Bill of Particulars

THE REPORTER OF THE LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC.

National Legal Research Group, Inc. David Wagoner, J.D., Editor

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FALL CONFERENCE REVIEW
By Christy Y. Jenkins

Norfolk's beautiful harbor was the backdrop for the LGA's 2024 Fall Conference, held October 3–5. The conference committee, moderators, and speakers put on a great program, and enabled attendees to receive up to nine hours of Continuing Legal Education credits, including two hours of ethics. MCLE forms were distributed via email throughout the conference, and are also available **here**. We appreciate members providing their feedback on the weekend by **completing an evaluation**; the Board and staff take these evaluations seriously in continually improving the conference experience.

The LGA was once again the "guinea pig" at our opening night party venue—the newly renovated "Design, Build, Sail!" exhibit at Nauticus, overlooking the Elizabeth River. Our Thursday evening social, catered by Yummy Goodness, was the first public event to be held in the space since the state-of-the-art interactive renovation was completed this fall.

The Friday Luncheon and Awards Banquet was a special highlight of the conference, as we awarded the LGA's highest honor, the Edward J. Finnegan Elizabeth D. Whiting Award for Distinguished Service, to Prince William County Attorney Michelle R. Robl. Michelle has spent most of her career in local government public service, and has made significant contributions to both the LGA and to the profession for the past 30 years.

We are grateful for the support of our partners whose continuing commitment sustains the LGA's operations and education throughout the year. Platinum Partners include Briglia Hundley PC, Hunton Andrews Kurth LLP, Pender & Coward PC, Sands Anderson PC, and Troutman Pepper LLP. Gold Partners include AquaLaw PLC, Kaufman & Canoles PC (new this year!), Spilman Thomas & Battle PLLC (new this year!), and McGuire Woods LLP.

We also thank the organizations whose sponsorship supports our meals, breaks, and activities. The 2024 Fall Conference sponsors were Davenport & Company LLC (General Support), DiCello Levitt (Awards Banquet Reception), Furniss Davis Rashkind and Saunders PC (General Support), Guynn Waddell PC (Friday Afternoon Activity), Harman Claytor Corrigan & Wellman (Thursday YLGA Reception), Hefty Wiley & Gore PC (General Support), Kaufman & Canoles (Opening Night Party Beverages), Pandak & Taves PLLC (Friday Afternoon Activity), Pender & Coward (Lanyards), Taxing Authority Consulting Services PC (General Support), VACo Group Self Insurance Risk Pool (Friday Breakfast), Vanderpool Frostick & Nishanian PC (Thursday Afternoon Break), Venable (Hospitality Suite), and Virginia Risk Sharing Association (Friday Break).

Save the date for the LGA's 2025 Spring Conference, scheduled for April 24–26 in Charlottesville. And, make plans to celebrate the LGA's 50th Anniversary at the Omni Homestead, October 30 to November 1, 2025. We look forward to continuing our tradition of excellence in education, fellowship, and networking in our anniversary year!

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50 YEARS OF THE LGA—YOUR INPUT NEEDED!
By John C. Blair

I am writing because we are a little over one year away from the LGA's 50th Anniversary celebration.

As we approach the golden anniversary, I am writing to ask for your assistance.

One potential way to preserve the organization's history is to record a series of podcasts about the LGA. I would like to survey the membership to ask about who you might like to hear interviewed in one of these podcasts.

Please email me individually (blairjc@ci.staunton.va.us) with any suggestions you have about potential interviewees for a podcast series.

MEMBER NEWS

WELCOME to the following new members of the LGA!

Christina Denbow (cdenbow@cityofchesapeake.net); Assistant City Attorney, Chesapeake

Andrew Mullen (amullen@hccw.com); Harman Claytor Corrigan & Wellman

Colin Schlueter (cschlueter@hccw.com); Harman Claytor Corrigan & Wellman

CONGRATULATIONS to the following members who have been promoted, taken a new position, or been recognized by their peers:

Leah Han (ldhan@hanovercounty.gov) has been promoted to Deputy County Attorney, Hanover County

Alexandra Spaulding (aspaulding@goochlandva.us) is now Deputy County Attorney, Goochland County

The following LGA members have been recognized in the most recent edition of *The Best Lawyers in America*® for their expertise in municipal law:

- Steven D. Briglia (sbriglia@brigliahundley.com); Briglia Hundley PC
- Brian J. Lubkeman (blubkeman@brigliahundley.com); Briglia Hundley PC
- Sharon E. Pandak (spandak@gtpslaw.com); Pandak & Taves PLLC

Michelle R. Robl (mrobl@pwcgov.org), Prince William County Attorney, was awarded the Edward J. Finnegan Elizabeth D. Whiting Award for Distinguished Service

Have we missed anyone? Please submit professional news announcements to dwagoner@nlrg.com.

VIRGINIA COURT OF APPEALS

BOARD OF ZONING APPEALS • ZONING ORDINANCE • VARIANCE • ACCESS TO PARKING • CODE § 15.2-2201 • STATUTORY INTERPRETATION

Avonlea LLC v. Moritz, 81 Va. App. 729, 905 S.E.2d 160 (2024) (Annunziata, J.).

HOLDING: The city board of zoning appeals lacked authority to grant a variance from the ordinance pertaining to access to parking.

DISCUSSION: A property owner appealed the decision of the Circuit Court of the City of Alexandria, which overturned the grant of a variance issued to the property owner by the City's Board of Zoning Appeals (BZA). The owner of two adjacent lots within Alexandria's Old and Historic District applied to the BZA for a variance from a City Ordinance (the Ordinance) providing, in relevant part, that "[w]ithin the Old and Historic Alexandria District, access to all parking shall be provided from an alley or interior court." Alexandria Zoning Ordinance § 8-200(C)(6)(a). The property owner claimed that the Ordinance prevented the reasonable use of its property because the lots could not be accessed from an alley or interior court, and proposed constructing a landscaped parking area on the primarily vacant of the two lots that would allow parking for two cars.

The BZA approved the variance. The City's Director of Planning and Zoning, the City Council, and two citizens subsequently appealed to the circuit court, which overturned the BZA's decision. The circuit court concluded that the BZA lacked statutory authority to grant the variance at issue because the Ordinance did not regulate the types of activities that are subject to a variance. The property owner appealed.

The court held that the circuit court's letter opinion correctly interpreted the statutes defining the BZA's authority and appropriately concluded that the BZA exceeded its statutory authority by granting the variance. The Code of Virginia defines a "variance" in the application of a zoning ordinance, as "a reasonable deviation from those provisions regulating the shape, size, or area of a lot or parcel of land or the size, height, area, bulk, or location of a building or structure when the strict application of the ordinance would unreasonably restrict the utilization of the property." Va. Code § 15.2-2201. The literal terms of the Ordinance regulated only "access to all parking"—*i.e.*, whether one may travel from a roadway onto a lot to park. The Ordinance did not regulate "the shape, size, or area of a lot or parcel of land," nor did it regulate anything related to "a building or structure." Contrary to the property owner's argument, its proposal to construct a landscaped parking area did not qualify as a "building" or "structure" under the definitions set forth elsewhere in the City's ordinances.

Therefore, the court affirmed the circuit court's judgment.

INVERSE CONDEMNATION • STORMWATER MANAGEMENT • RECUSAL • EVIDENTIARY RULINGS • ATTORNEY FEES & COSTS • CODE § 25.1-420

Town of Iron Gate v. Simpson, No. 1588-23-3, 2024 Va. App. LEXIS 528 (Sept. 17, 2024) (O'Brien, J.).

HOLDINGS: (1) The town failed to provide an adequate record to support its recusal argument, thereby precluding review. (2) The landowner stated a claim for inverse condemnation. (3) The trial court did not abuse its discretion when it issued certain evidentiary rulings. (4) The landowner was entitled to attorneys' fees and costs.

DISCUSSION: The owner of residential property (landowner) in the Town of Iron Gate filed a declaratory judgment action pursuant to Code § 8.01-187, asking for a determination that the Town had taken and damaged her property without just compensation, in violation of Article I, § 11 of the Virginia Constitution. As part of its stormwater management system, the Town owned a drainage pipe running beneath the property in question, of which the landowner was unaware when she purchased the lot in 2013. A prior owner had discovered the pipe in 2010 and alerted the Town that it was partially disintegrated, which caused the property to flood. In 2011, the Town encased the pipe with a boot, but the flooding continued. Although the Town knew that the problem persisted, it took no further action aside from requesting the Virginia Department of Transportation (VDOT) to clean out its lines to which the Town's pipe connected. The Town was aware that when VDOT's system clogged, the water flow in the pipe backed up and flooded the property.

After incidents of flooding intensified in 2017 and 2018, the landowner reported it to Town administrators and requested assistance. In January 2019, the Town examined the pipe and determined that the best fix was to replace it. The Town excavated a portion of the property and removed a 20-foot section of pipe running beneath the landowner's yard, leaving an open ditch. The Town neither replaced the pipe nor restored the soil and grass. The landowner's property continued to flood after VDOT cleaned its system in 2019.

The trial court determined that the Town had taken the property without just compensation by effectively taking a drainage easement across it for the purpose of storing excess storm water that escaped its drainage system. A jury awarded the landowner the full amount sought ($37,586) and the trial court ordered the Town to pay the landowner's attorney fees and costs ($206,786 plus interest). The Town appealed.

The court held first that it was precluded from reviewing the Town's first assignment of error—that the trial judge should have recused himself after explicitly stating his bias against the Town—because the Town failed to ensure that the record contained the March 27, 2023 transcript, which was essential to deciding this issue.

The court held second that the trial court did not err when it denied the Town's demurrer. The Town argued at trial that the landowner failed to allege that any taking was for a "public use," and that, at best, she only alleged negligent repair of the pipe, which could not serve as the basis for an inverse condemnation award. To the contrary, the landowner's petition specifically stated that the Town purposefully used her property "as a 'makeshift storage site for excess stormwater,' which was accomplished for the public use of maintaining and operating the Town's stormwater system." And despite knowing that its pipe continued to cause the property to flood, the Town never effectively resolved the issue. Although the petition referred to the Town's failed attempts to repair the pipe, these factual allegations served only to demonstrate the Town's ownership of the pipe and its knowledge of the problem; this was not a fact upon which the landowner relied to establish the Town's liability.

The court held third that the trial court did not abuse its discretion when issuing certain evidentiary rulings. The Town argued that the trial court had erred by precluding evidence of its affirmative defense that the landowner failed to mitigate damages. The record indicated, however, that the Town was able to introduce evidence at trial of its plan to fix the pipe, but the trial judge limited the Town's cross-examination of an expert appraiser when it attempted to mischaracterize the evidence. (The Town alleged that the landowner prevented it from fixing the pipe, trying to cover over the fact that its plan required that the landowner execute a deed of gift that would grant the Town an easement to access her property, which the landowner would not sign without first consulting an attorney.) Furthermore, evidence of the Town's offer to fix the pipe and the landowner's refusal to sign the deed of gift without a lawyer constituted inadmissible evidence of settlement negotiations. *See* Va. R. Evid. 2:408.

The court held fourth that the trial court properly awarded the landowner attorney fees and costs. The relevant statute provides that a court "shall determine and award" the prevailing plaintiff the sum that will "*reimburse* such plaintiff for his reasonable costs, disbursements and expenses, including reasonable attorney, appraisal and engineering fees, actually *incurred* because of such proceeding." Va. Code § 25.1-420 (emphasis added). The Town argued that it was error to award the landowner fees and costs because she had not yet paid them. But the Town's interpretation of this statute was flawed. To "incur" means to become legally responsible for, not necessarily to have paid. And, *Black's Law Dictionary* defines the word "reimbursement" to mean either repayment or indemnification. The "indemnification" meaning was the better reading, as it corresponded to the legislative purpose behind Code § 25.1-420, which was to shift litigation expenses incurred by a property owner back to the government that took or damaged the private property without just compensation. The landowner was also entitled to an award of attorney fees and costs for the appellate portion of the case.

Therefore, the court affirmed the trial court's judgment and remanded the case for the limited purpose of determining the proper fees-and-costs award.

SCHOOL BOARD • BUS COMPANY • SOVEREIGN IMMUNITY • CODE § 22.1-194 • NEGLIGENCE • GROSS NEGLIGENCE

Hamilton v. Jackson, No. 0944-23-3, 2024 Va. App. LEXIS 494 (Aug. 27, 2024) (Lorish, J.).

HOLDINGS: (1) The school board did not show that it was entitled to sovereign immunity. (2) The circuit court did not err in granting the bus company's plea in bar based on sovereign immunity.

DISCUSSION: A 10-year-old student who was hit by a car and suffered a fractured fibula while crossing the street after exiting his school bus filed suit (by his next friend) against the Roanoke City School Board (RCSB), the transportation company that operated the school bus (bus company) under contract with Roanoke City Public Schools (RCPS), the bus driver, and the driver of the car. The complaint alleged "negligence or gross negligence" on the part of RCSB and the bus company due to their failure to use reasonable care in selecting bus drop-off sites and keeping students safe, as well as their vicarious liability for the school bus driver's negligence.

The bus company filed a demurrer and plea in bar arguing that it was entitled to sovereign immunity as an agent of RCSB. It also argued that the complaint failed to plead a claim against it based on the alleged negligence of the bus driver because the bus company had no duty to select the drop-off sites or formulate drop-off procedures, as these were RCPS's contractual duty; the accident occurred after any duty relating to operation of the bus had ended; and the complaint failed to state a claim for gross negligence. RCSB also filed a demurrer and plea in bar asserting that it was entitled to

sovereign immunity. According to RCSB, Code § 22.1-194 did not abrogate its sovereign immunity because RCSB neither owned nor operated the school bus in question, nor was it otherwise insured under a policy for a vehicle involved in an accident. And even if RCSB's self-insurance contract somehow could apply to the school bus, that contract could not provide coverage because the claim did not arise out of the ownership, maintenance, or use of the school bus. The circuit court granted the pleas in bar, and this appeal ensued.

The court held first that RCSB failed to meet its burden to prove that sovereign immunity applied because insufficient evidence was presented on the record to allow a determination as a matter of law that Code § 22.1-194 did not abrogate its sovereign immunity. This statute provides, in pertinent part:

> In case the locality or the school board is the owner, or operator through medium of a driver, of, or *otherwise is the insured* under the policy upon, a vehicle involved in an accident, the locality or school board shall be subject to action up to, but not beyond, the limits of valid and collectible insurance in force to cover the injury complained of.

Va. Code § 22.1-194 (emphasis added). Despite RCSB's contentions that it had no insurance policy covering the bus, "the evidence before the court below was that RCPS contracted with [the bus company] to be a named insured party under [the bus company]'s insurance policy, and nothing in the fragment of that actual policy entered into evidence points to the contrary." As to the question of whether the accident occurred as part of the use of the school bus, resolution of this issue required a fact-intensive inquiry that had not been undertaken in the proceedings below.

The court held second that the circuit court did not err in granting the bus company's plea in bar based on sovereign immunity, as an agent performing a governmental function. The appeal noted very specific assignments of error as to this holding, limiting the appeals court's review. First, the complaint established that the bus driver indeed exercised some degree of care by dropping off the student at the RCPS-approved bus stop, thereby defeating the claim for gross negligence. Second, the language of Code § 22.1-194's abrogation of sovereign immunity must be construed narrowly, and its text limited this application to "the locality or the school board"; it did not extend to agents thereof. Third, the appeal improperly equated the circuit court's finding that the bus company was immune with the more general argument that the case should not have been dismissed.

Therefore, the court affirmed in part and reversed in part the circuit court's holding, and remanded the case for further proceedings.

WORKERS' COMPENSATION BENEFITS • INPATIENT RESIDENTIAL CARE • ASSISTED LIVING FACILITY • CODE § 65.2-603

Rockingham Cnty. Sch. Bd. v. Rohrbaugh, No. 1193-23-2, 2024 Va. App. LEXIS 490 (Aug. 27, 2024) (Beales, J.).

HOLDING: The workers' compensation claimant was entitled to benefits for inpatient residential care at an assisted living facility.

DISCUSSION: In September 2021, a workers' compensation claimant who was receiving permanent total disability benefits filed a request for a hearing before the Workers' Compensation Commission (Commission), requesting that the Rockingham County School Board pay for her inpatient residential care at an assisted living facility. The claimant suffered a serious brain injury in 1987 when she tripped and fell down a flight of stairs while employed as a teacher's aide. In 2020, she fell numerous times at home as a result of her worsening condition, prompting several visits to the emergency room. She moved to an assisted living facility in January 2021. In the period spanning September 2021 through August 2022, the claimant was evaluated by her primary care physician, an occupational therapist, a physician's assistant, and a family nurse practitioner. All four medical professionals agreed that the claimant would be best served by residing in an assisted living facility, where she could be monitored by caregivers 24 hours a day, due to the nature of her physical and cognitive abilities.

Following the hearing, a Deputy Commissioner granted the claimant's request, and on June 12, 2023, the full Commission unanimously affirmed. The School Board appealed the decision, arguing that the Commission's award of inpatient residential care was outside the scope of medical attention that it was required to furnish, since this type of care did not constitute "other necessary medical attention" under Code § 65.2-603.

The court held that the Commission did not err in finding that the requested benefit satisfied the statute's requirements and that the claimant was entitled to this benefit. The Workers' Compensation Act provides that employers must furnish "free of charge to the injured employee, a physician . . . and such other necessary medical attention." Va. Code § 65.2-603(A)(1). Dictionary definitions of these terms and Virginia Supreme Court precedent made clear that supervised, inpatient care could qualify as "other necessary medical attention." In the instant case, four medical professionals agreed that this type of care was indeed necessary to maintain the claimant's health. The Commission's findings of fact were supported by credible evidence in the record.

Therefore, the court affirmed the Commission's decision.

42 U.S.C. § 1983 • MUNICIPAL LIABILITY • STATE ACTION • MENTAL ILLNESS TREATMENT CENTER • POLICE • 42 U.S.C. § 290II(A) • EXCESSIVE FORCE • UNLAWFUL ARREST • WRONGFUL DEATH • WILLFUL & WANTON NEGLIGENCE

Byers v. City of Richmond, No. 3:23cv801 (RCY), 2024 U.S. Dist. LEXIS 153173 (E.D. Va. Aug. 26, 2024) (Young, J.).

HOLDINGS: (1) The § 1983 claim asserting denial of rights to be free from physical and mental abuse can proceed. (2) The alleged violations of other laws were not enforceable under § 1983. (3) The complaint sufficiently alleged that the hospital and nurse were engaged in state action, and (4) their conduct constituted excessive force. (5) The objections raised with respect to the unlawful arrest claim did not warrant its dismissal. (6) The complaint sufficiently alleged a policy or custom on behalf of the hospital, subjecting it to municipal liability as to the surviving § 1983 claim, (7) but not with regard to utilizing excessive force or subjecting its patients to unlawful arrests. (8) The wrongful death claim can proceed.

DISCUSSION: The parents of a mentally ill man (patient) filed a five-count complaint against multiple defendants stemming from the events leading up to his death at the hands of law enforcement on July 8, 2023. The patient suffered from schizoaffective disorder, a mental illness that is related to both schizophrenia and bipolar disorder. He was dropped off at Tucker Pavilion on July 5, 2023, a treatment center for severe mental illness located at Chippenham Hospital (Chippenham) in Richmond. Chippenham is operated by Chippenham & Johnston-Willis Hospitals, Inc. (CJW). CJW utilizes Richmond Police Department (RPD) officers as security and to manage psychiatric patients, but these officers were not provided specialized training for this assignment. Following an initial psychiatric screening, the patient was admitted, and a Magistrate issued a Temporary Detention Order (TDO), which meant that the patient could not lawfully be released prior to a commitment hearing (unless deemed by a judge or the Tucker Pavilion Director that the patient no longer met the criteria for the TDO, which never occurred).

On the evening of July 6, 2023, CJW staff, including a nurse, sought to move the patient from the third floor to the second floor, but he refused. Eventually, the nurse, an RPD Officer, and security guards forcefully attempted to move the patient by threatening to employ a taser and wrestling him to the ground in order to handcuff him. The complaint alleged that patient was non-combative, but the nurse and the Officer fabricated an assault charge, saying that the patient kicked the nurse. This gave the Officer cause to arrest the patient, and the nurse printed what appeared to be a signed discharge form in order to falsely show that the patient was being lawfully released. The Officer took the patient to

Richmond City Jail where he appeared before a Magistrate on the assault charge. At no point did the Officer inform the Magistrate that the patient was under a TDO or had been hospitalized for mental health treatment, leading the Magistrate to release the patient on his own recognizance. The patient spent the next 36 hours wandering the streets, presumably attempting to navigate the 14 miles back to his home. Around noon on July 8, 2023, Chesterfield County Police Officers found him a few blocks from his home, holding a hatchet that he had apparently found. When the patient disobeyed orders to drop the hatchet, the officers shot and killed him.

Relevant to the instant decision, the complaint lodged four counts against CJW and the nurse under 42 U.S.C. § 1983: denial and withholding of medical care (Count I); denial of rights to be free from physical and mental abuse, and restraints and seclusion (Count II); use of excessive force (Count III); and unlawful arrest (Count IV). The complaint also contained a state law tort claim for wrongful death caused by negligence, gross negligence, and willful and wanton negligence (Count V). CJW and the nurse moved to dismiss the claims.

The court held first that Count II could proceed against both CJW and the nurse, premised on a violation of 42 U.S.C. § 290ii (presuming that their conduct qualified as "state action"). This statute requires federally funded healthcare facilities to "protect and promote the rights of each resident of the facility, including the right to be free from physical or mental abuse, corporal punishment, and any restraints or involuntary seclusions imposed for purposes of discipline or convenience." 42 U.S.C. § 290ii(a). A federal law can form the basis of a § 1983 suit if it unambiguously confers individual rights upon a class of beneficiaries. The rights recognized by the statute satisfied this inquiry. First, its language was deemed "legally indistinguishable" from that of the Federal Nursing Home Reform Act, considered in a recent Supreme Court case in which the Court held that the rights explicitly recognized therein were "presumptively enforceable under § 1983." *Health & Hosp. Corp. v. Talevski*, 599 U.S. 166 (2023). Second, 42 U.S.C. § 290ii resided within a larger section entitled "Requirements relating to the rights of residents of certain facilities." Third, it requires hospitals such as CJW to "protect and promote the rights of each resident of the facility."

The court held second that the other laws cited in Counts I & II did not unambiguously confer rights that could be enforced by way of a § 1983 action. The prelude to 42 U.S.C. § 10841, "Restatement of bill of rights," indicated that the statute was "merely precatory," describing only what states "should do." Plus, insofar as Count I tracked the language of § 10841 and not § 290ii, it could not support a § 1983 action. The complaint's general invocation of 42 U.S.C. §§ 1395 *et seq.* was insufficient to put either the court or the defendants on notice of what enforceable federal rights within those statutes had allegedly been violated. And the complaint's reliance on 42 C.F.R. § 482.13 was misplaced, since language in a regulation, alone, cannot form the basis of a private cause of action not authorized by Congress for the purposes of § 1983.

The court held third that the complaint sufficiently alleged that CJW and the nurse were engaged in state action for the purposes of the § 1983 claims. The totality of the circumstances revealed that their private actions had a sufficiently close nexus with the state so as to be fairly treated as those of the state itself. The complaint averred that CJW and RPD engaged in a partnership whereby RPD placed officers inside Tucker Pavilion, and that CJW staff jointly worked with these officers to manage mentally ill patients. The complaint further alleged that this joint action violated the patient's federal statutory and constitutional rights.

The court held fourth that the complaint sufficiently alleged that CJW and the nurse used excessive force. The patient had committed no crime when he was initially confronted by CJW staff. To the extent that the patient represented any threat to others, this threat was mitigated by the fact that he was present in a facility for mental health treatment and surrounded by individuals who were purportedly there to help him. The patient's resistance was passive and therefore did not import much danger or urgency into a situation that was, in effect, a static impasse. Thus, to the extent that any force was justified, it should have been very limited.

The court held fifth that none of the objections raised by CJW and the nurse with respect to Count IV warranted dismissal of the claim. They argued that there was probable cause to arrest the patient for assault and battery under Code § 18.2-57. However, taking the allegations in the complaint as true, the patient either did not kick the nurse at all, or, if he did so accidentally, he lacked the requisite mental state to be charged for this crime. Alternatively, CJW and the nurse contended that Count IV should be dismissed because the Officer obtained a warrant for the patient's arrest. Notably, though, the Officer made the arrest and thereafter obtained a warrant in order to justify it. "Defendants have cited no cases to suggest—and the Court is accordingly skeptical as to whether—such a post-hoc warrant can be deemed the sort of 'intervening act'" that would break the causal chain of liability. Furthermore, the complaint alleged that CJW, the nurse, and the Officer worked in concert to fabricate the assault charge, and that the Officer continued this deceit by failing to adequately inform the Magistrate of the circumstances surrounding the patient's arrest.

The court held sixth that the complaint sufficiently alleged that CJW embraced a policy or custom amounting to the statutory violation asserted in Count II, thereby subjecting it to municipal liability. In short, the complaint stated the following pertinent allegations: (1) CJW contracted with RPD to place officers inside of Tucker Pavilion; (2) CJW used these officers to actively manage mentally ill patients; (3) despite this setup, neither CJW nor RPD provided the officers with specialized training regarding how to work with mentally ill patients in a medical setting; (4) RPD's pervasive presence at Tucker Pavilion, coupled with the lack of site-specific training, was causally related to statistics showing that Chippenham substantially outpaced other Richmond-area hospitals with regard to incidents involving RPD and patients; (5) prior to this episode, there were no internal investigations by RPD into the many incidents involving RPD officers and CJW's patients;

and (6) a myriad of former patients and employees have expressed concerns regarding Tucker Pavilion's "prison-like" conditions. These allegations demonstrated the existence of a policy or custom relative to Count II via the avenue of deliberate indifference through failure to train, and/or persistent and widespread customs or practices. "Here, Plaintiffs' allegations . . . plausibly establish that CJW employees routinely skirt their obligations under § 290ii(a), and in doing so, engage in a pattern of constitutional or statutory deprivations." These same allegations further established that CJW's policymakers were aware of and acquiesced in this pattern of deprivations, and that the RPD officers stationed at Tucker Pavilion were thrust into their roles without proper training. With regard to causation, the alleged violations of the patient's rights were made "reasonably probable" by either formulation of this alleged policy and custom.

The court held seventh that the complaint lacked non-conclusory allegations indicating that CJW had a policy or custom of either utilizing excessive force or subjecting its patients to unlawful arrests. Thus, CJW could not be liable for Counts III or IV under a *Monell* theory of liability.

The court held eighth that the state law wrongful death claim could proceed. The complaint generally alleged that CJW and the nurse had a duty to treat the patient "in accordance with recognized and accepted standards of medical care," and that they breached this duty by using RPD officers to "bully and manage mentally ill patients." These allegations plausibly alleged willful and wanton negligence, but not gross negligence, since the complaint established that CJW and the nurse provided the patient with at least "some degree of care." Particularly relevant to this finding were the allegations concerning CJW's use of improperly trained police officers to manage mentally ill patients, and the charge that the nurse fabricated the patient's discharge form to facilitate his release.

Therefore, the court granted in part and denied in part the motion to dismiss. With respect to CJW, the court dismissed Counts I, III, and IV without prejudice, allowing Counts II and V to proceed. With respect to the nurse, the court dismissed Count I without prejudice, allowing Counts II, III, IV, and V to proceed.

COUNTY BOARD OF SUPERVISORS • COUNTY ADMINISTRATOR • FIRST AMENDMENT RETALIATION • SUPERVISORY LIABILITY • DEFAMATION

Stewart v. Evelyn, No. 3:24CV84 (RCY), 2024 U.S. Dist. LEXIS 165672 (E.D. Va. Sept. 13, 2024) (Young, J.).

HOLDINGS: (1) The County Administrator was not liable in his supervisory capacity. (2) The employee plausibly alleged supervisory liability with respect to one board member. (3) The supervisory and individual capacity claims against the other two board members were deficient. (4) Though the defamation claim was unsupported by the suspension letter, (5) it could proceed with respect to the termination letter.

DISCUSSION: The former Department Head of General Services for New Kent County (employee) lodged a 42 U.S.C. § 1983 claim for First Amendment retaliation and a state law claim for defamation against the New Kent County Administrator (Administrator) and three members of the New Kent County Board of Supervisors (Board) in their supervisory and individual capacities. The employee served directly under the Administrator, who, in turn, reported to the Board. On May 16, 2023, at their monthly meeting, the employee informed the Administrator that his daughter intended to run for a seat on the Board against incumbent Board member J.L. The Administrator assured the employee that this would pose no concerns or conflicts of interest regarding his employment, and that he was free to campaign on his daughter's behalf outside of work. Board member R.S. offered the employee the same assurances. The employee received no negative feedback regarding his employment or extracurricular campaign efforts. On November 7, 2023, the employee's daughter won the election, with her term set to commence on January 1, 2024.

On November 13, 2023, the Administrator called the employee into his office to inform him that the Board had ordered him to terminate the employee. According to the Administrator, the Board received a complaint that the employee had stated that the Fire Chief would be fired if his daughter won the election, which the employee disputed ever saying. The Administrator also conveyed that Board member T.E., who was the Board's chairman, brought up a property dispute between the employee's family and a business associate of T.E. The employee expressed his belief that the Board's decision to terminate him was in retaliation for his work on behalf of his daughter's campaign, to which the Administrator nodded in agreement. The Administrator then handed him a letter, dated November 13, 2023, signed by the Administrator. It notified the employee that he was being suspended while these complaints were investigated, and that a final decision would be made by the close of business on November 15, 2023. When this deadline passed without any communication, the employee returned to work on November 16, 2023, and spoke with the Administrator. The Administrator informed the employee that the Board had met in closed session the night before and decided to terminate the employee, effective immediately, over the objections of Board member R.S. The Administrator conveyed that his own job security had been threatened in the process. He then handed the employee a termination letter, dated November 16, 2023. It was signed by the Administrator and cc'd to Human Resources (HR). It stated, in pertinent part: "Upon my completion of my investigation into various complaints received by my office and the Board of Supervisors regarding unprofessional conduct, it is my finding that termination is appropriate."

On December 19, 2023, the employee's daughter attended orientation for the newly elected members of the Board. There, the Administrator told her that T.E. had "led the effort to terminate" her father because she appeared to be aligned with T.E.'s opponent in T.E.'s race to maintain his seat on the Board, and because of "the family issue" between her father and T.E.'s business associate. The Administrator further stated that T.E.'s demand to fire the employee was retaliatory and in retribution for his support of his daughter, and that the Administrator only terminated the employee because he was carrying out an instruction from T.E.

The Administrator and the Board members filed joint and partial motions to dismiss.

The court held first that the Administrator could not be liable to the employee in his supervisory capacity, based on the facts alleged. Supervisory officials may be held liable in certain circumstances for constitutional injuries inflicted by their subordinates, but the only subordinate of the Administrator mentioned in the complaint was the employee himself.

The court held second that the claim against Board member T.E. in his supervisory capacity was plausible. The Board members contended that they could not be liable because the Board itself, not its individual members, functioned as the Administrator's supervisor. The court disagreed, explaining that supervisory liability is "personal" and that individuals in the decision-making chain may be "pinpointed" when their conduct has permitted constitutional abuses. *See Shaw v. Stroud*, 13 F.3d 791 (4th Cir. 1994). The complaint detailed specific actions that T.E. undertook to effectuate the employee's termination.

The court held third that the complaint lacked specific allegations regarding the conduct or state of mind necessary to impose liability on Board members J.L. and C.T. in either their supervisory or individual capacities. The employee needed to allege more than just their membership on the Board in order for his claims against them to proceed.

The court held fourth that the suspension letter could not form the basis of a state law defamation action because there was no indication that it was ever sent to anyone other than the employee—*i.e.*, it was not published.

The court held fifth that the defamation claim could proceed based on the termination letter. Beneath the signature, the letter contained the line: "cc: Human Resources." It was, thus, reasonable to conclude that the County's HR staff received and read the letter. The letter contained actionable statements. The term "unprofessional conduct" was presented as the reason for the employee's termination, not as the Administrator's opinion. The statement that an "investigation" had been completed was allegedly false since no such investigation ever took place. The reason provided for the personnel action was allegedly pretextual, since the employee was actually fired in retaliation for supporting his daughter's campaign. The court was also persuaded that T.E., J.L., and C.T. could be liable for defamation even if they did not personally write or sign the letter. The evidence indicated that the Administrator composed and delivered it to the employee at the direction of the Board, under the impression that his job was in jeopardy if he did not comply. It was also evident that the "finding" of unprofessional conduct came from the Board.

Therefore, the court granted in part and dismissed in part the motions to dismiss without prejudice.

FIRE DEPARTMENT • FIREFIGHTERS' UNION • TITLE VII • HOSTILE WORK ENVIRONMENT • SEX-BASED DISCRIMINATION • FAILURE TO PROMOTE • RETALIATION • EXHAUSTION OF ADMINISTRATIVE REMEDIES

McCaffery v. Fairfax County, No. 1:23-cv-965 (RDA/JFA), 2024 U.S. Dist. LEXIS 159465 (E.D. Va. Sept. 4, 2024) (Alston, Jr., J.).

HOLDINGS: (1) The firefighter's hostile work environment claim required dismissal because she did not allege having subjectively experienced sex-based discrimination. (2) The alleged failure to promote could form the basis for the firefighter's claims for retaliation and (3) sex-based discrimination. (4) The claims against the international union could not proceed because only the local union was named in the Equal Employment Opportunity Commission charge.

DISCUSSION: A female firefighter with the Fairfax County Fire and Rescue Department (FRD or Department) alleged Title VII violations against her employer and union stemming from sex-based discrimination and retaliation. After her initial hire in 1995, she took on the role of Battalion Chief of Special Projects in March 2016. In April 2016, she also began serving as FRD's Women's Program Officer (WPO), where she acted as an advocate for the Department's female employees in meetings with senior staff and command staff. As WPO, she relayed complaints containing numerous examples of female firefighters being treated less favorably than their male counterparts, as well as instances of bullying in which the male harassers were not disciplined. In response, the firefighter faced "hostility" from the Fire Chief and was "berated" during staff meetings. She eventually stepped down as WPO on January 29, 2018, because she felt "defeated by her inability to effect change for women in the department." Her letter of resignation from the position identified 20 distinct incidents or practices that prompted her decision. Shortly after this letter was publicized, the firefighter became the target of retaliation—*e.g.*, she was excluded from emails and meetings, and her computer hard drive was replaced with a defective one. At a February 7, 2018 meeting, the County's Human Resources (HR) Director urged her to "finish [her] career outside the fire department." Two months later, the HR Director presented the firefighter with three options, all of which involved a demotion. The firefighter declined these options in a letter sent by her attorney.

When the Fire Chief stepped down on May 8, 2018, the firefighter applied to fill this position. The interviewer, an outside executive from the County's Department of Public Works, told her that she was a "very strong candidate" and that he would forward her application to the County Executive for consideration for a final interview. The County Executive interviewed all referred candidates except for her, and the job was awarded to a male candidate. The firefighter alleged that her qualifications were "commensurate with, and in some respects superior to," the individual selected to replace the outgoing Fire Chief.

The firefighter also alleged that the firefighters' union, of which she was a member—International Association of Fire Fighters (IAFF) Local 2068—also retaliated against her by openly disparaging her. Specifically, an executive board member made numerous hostile posts about the firefighter on IAFF Local 2068's Facebook page, calling for her removal from membership and attacking those who defended her. Other senior leadership "liked" these and other similarly hostile posts. The local union also rescinded pledges of support for the annual International Association of Women in Fire and Emergency Services conference to be held in May 2018.

The firefighter filed formal charges of discrimination with the Equal Employment Opportunity Commission (EEOC) and was issued right to sue notices. The County and IAFF filed motions to dismiss.

The court held first that the firefighter's claim of hostile work environment based on sex discrimination required dismissal. To advance this claim, the firefighter needed to allege "that she subjectively found her work environment to be 'hostile or abusive' [and] that an 'objectively reasonable' person would have found it to be so." *Harris v. Mayor & City Council of Balt.*, 429 F. App'x 195, 201 (4th Cir. 2011). The complaint alleged that, as WPO, the firefighter complained to her superior officers about numerous instances of sex-based discrimination on behalf of women in the Department and about problems she observed. "But Plaintiff fails to allege with specificity which of the listed instances were incidents that occurred to *her* or was disparate treatment that she *personally* experienced based on her sex." In other words, aside from conclusory statements, the firefighter did not sufficiently allege the subjective component of the "severe or pervasive" element of a hostile work environment claim.

The court held second that the firefighter's retaliation claim could proceed with respect to her alleged failure to be considered for promotion to the Fire Chief position. "Plaintiff has alleged facts that demonstrate both a temporal connection based on the time between her EEOC Charge and the decision not to promote her and based on the totality of the retaliatory animus alleged to have been directed at her" by the County following the publication of her WPO resignation letter. While the complaint alleged numerous instances of alleged retaliatory acts after the firefighter reported sex-based discrimination to her superiors, most qualified as "petty slights" and "minor annoyances"; only the failure to promote rose to the level of material adversity needed to state a claim of retaliation under Title VII. With regard to the HR Director's proposed demotion, because the firefighter alleged only that she declined these options, the court assumed that she continued in her present position.

The court held third that the firefighter plausibly alleged her failure-to-promote claim based on sex discrimination. She stated that she was a woman, she applied for the vacant position of Fire Chief, she had the requisite qualifications listed in the job announcement, and she was at least as qualified as those candidates selected for a final interview, including the man who was chosen for the position. "[A]lthough it is a close

question, Plaintiff has satisfied her pleading burden. Plaintiff has alleged an environment where women were routinely subject to sexist conduct, denied overtime shifts, denied promotions, and denied access to specialized training and where [the] County was hostile to requests to investigate alleged incidents of sex discrimination."

The court held fourth that the claims against IAFF could not proceed. The firefighter's underlying EEOC charge named "Local 2068" as the discriminating organization. But "local union chapters are separate and distinct entities from their international parents." *United Elec., Radio & Mach. Workers v. NLRB*, 986 F.2d 70, 75 (4th Cir. 1993). By failing to name IAFF in the initial EEOC charge, the firefighter did not exhaust her administrative remedies and did not provide IAFF with notice of the suit. Moreover, all of the firefighter's allegations concerning the union's alleged discriminatory and retaliatory acts revolved around Local 2068's Facebook page and leadership, with no mention of the international organization.

Therefore, the court granted in part and denied in part the County's motion to dismiss, and granted IAFF's motion, dismissing it from the case.

SCHOOL BOARD • PRINCIPAL • TITLE IX • STUDENT-ON-STUDENT SEXUAL ORIENTATION HARASSMENT • EQUAL PROTECTION • DELIBERATE INDIFFERENCE • CONSPIRACY • GROSS NEGLIGENCE

N.S. v. Prince William Cnty. Sch. Bd., No. 1:23-cv-848 (RDA/IDD), 2024 U.S. Dist. LEXIS 151741 (E.D. Va. Aug. 22, 2024) (Alston, Jr., J.).

HOLDINGS: (1) The student plausibly alleged a Title IX claim based on student-on-student sexual harassment. (2) The equal protection claim can proceed against the principal and assistant principal due to their deliberate indifference to the student's complaints. (3) The student did not sufficiently plead facts to demonstrate a conspiracy. (4) Additional discovery was required to assess the gross negligence claim.

DISCUSSION: A former student at Ronald Reagan Middle School (RRMS) in Prince William County, by way of his mother, sued the Prince William County School Board, as well as RRMS's Principal and Assistant Principal (collectively, Principals), based on their inadequate response to his complaints of sexual harassment at the hands of other students. The student alleged that he was the target of consistent verbal abuse and physical bullying because of his homosexual orientation throughout the 2020–2022 school years. Despite multiple complaints to school staff made by the student and the student's mother, school officials never backed up their promises to investigate or rectify the situation. The student consistently expressed that he felt unsafe and intimidated, and his schoolwork suffered as a result. In May 2022, a school counselor advised the student's mother that the student was not safe at RRMS, the situation was likely to worsen, school administrators were too afraid of backlash from conservative parents to offer support, the situation was a Title IX case because the student was being targeted based on his sexual orientation, and the mother should remove the student from RRMS for his own

safety. The student's parents filed formal complaints with the school's Title IX Equity Officer in June 2022, prompting an investigation resulting in a finding that, outside of one student's admission of homophobic harassment, the complaint was unfounded. The student asserted a cause of action for sex discrimination under Title IX against the School Board, and against the Principals, alleging violations of the Fourteenth Amendment's Equal Protection Clause and 42 U.S.C. § 1986, and gross negligence. The School Board and the Principals filed motions to dismiss.

The court held first that the student plausibly alleged facts in support of each element of a student-on-student Title IX claim. The student maintained that he was repeatedly verbally and physically abused based on his sexual orientation, causing him to suffer severe mental and physical effects which, in turn, led him to miss classes, perform poorly on tests, and ultimately withdraw from school. The student's mother communicated with several school officials regarding her son's harassment, including direct communication with the Principals. Specifically, the complaint stated that the Principal told the student's mother on June 2, 2022, that he was aware of the student's long history of being bullied for being gay, recognized that reactive and proactive measures were necessary, and confessed to having "dropped the ball on this one." More broadly, RRMS had been on notice of sex-based bullying since 2019 from the mother's discussions with the former principal and never took any steps to remedy the situation, discipline the harassers, or otherwise protect the student. The counselor's admonitions provided further evidence of the School Board's awareness of, and deliberate indifference to, the ongoing sex-based harassment taking place at RRMS.

The court held second that the equal protection claim against the Principals could proceed for largely the same reasons. The Principals' discriminatory intent could be inferred from their knowledge of the sexual harassment and their decisions to take little or no action to remedy the abuse.

The court held third that the 42 U.S.C. § 1986 claim required dismissal. This federal law provides a cause of action against anyone who has knowledge of a § 1985 conspiracy and who, "having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do." 42 U.S.C. § 1986. The complaint did not identify the members of any underlying conspiracy or when they were acting jointly; it contemplated only actions based on individual animus.

The court held fourth that it was appropriate to allow the gross negligence claim to proceed to discovery, largely because of a recent holding in which the court faced a similar motion to dismiss allegations that individual school administrators had committed gross negligence in failing to protect a student who was being sexually harassed. *B.R. v. Fairfax Cnty. Sch. Bd.*, 2023 U.S. Dist. LEXIS 40930 (E.D. Va. Mar. 10, 2023). In that case, the court denied the motion because discovery was necessary to determine whether the administrators' conduct rose to the level of gross negligence.

Therefore, the court denied the motion to dismiss filed by the School Board and granted in part and denied in part the Principals' motion.

SCHOOLS • ANTI-RACISM TRAINING • TITLE VII • HOSTILE WORK ENVIRONMENT • CONSTRUCTIVE DISCHARGE • RETALIATION

Mais v. Albemarle Cnty. Sch. Bd., No. 3:22-cv-51, 2024 U.S. Dist. LEXIS 162031 (W.D. Va. Sept. 9, 2024) (Moon, J.).

HOLDINGS: (1) The former assistant principal adduced evidence to survive summary judgment on her claims alleging a hostile work environment and (2) constructive discharge. (3) Her retaliation claim cannot proceed.

DISCUSSION: After resigning from her position at Agnor-Hurt Elementary School in September 2021, the former Assistant Principal (AP) asserted Title VII claims against the Albemarle County School Board. In February 2019, the School Board adopted an anti-racism policy that included mandatory training for elementary school staff based on curriculum from the book "Courageous Conversations About Race." Several parents and staff members, including the AP, voiced concerns to the training leader and the Assistant Superintendent that the training and training materials had created a racially hostile environment, and that other staff members had made hurtful and pejorative comments about them being white. These concerns were largely ignored.

During the final training session on June 11, 2021, the AP used the term "colored" people instead of "people of color" and immediately apologized for her slip of the tongue. A teacher's aide disregarded the apology and verbally attacked the AP. Over the next few weeks, several employees reported that the teacher's aide and her friends were referring to the AP as a "white racist bitch." The AP complained to the school's Principal about this and the training, but the Principal took no action. She also expressed her concerns to the Director of Education, who encouraged the AP to just "fall on her sword" and watch what she said so that the situation would pass. On August 6, 2021, the AP met with the Assistant Superintendent, the teacher's aide, and two other school officials. The AP was repeatedly apologetic and explained her concerns about the effect of the training, but the teacher's aide again refused to accept her apology. The Assistant Superintendent suggested that the AP should apologize to the entire staff. Following this meeting, the AP spoke with two Human Resources employees and a different Assistant Superintendent about how she felt mistreated during the meeting, as well as her intent to seek mental health counseling to deal with panic attacks and other symptoms precipitated by how she was being treated. Again, no action was taken. The AP's assistant distanced herself from the AP because the situation disturbed her, which affected the AP's ability to complete her work. Ultimately, the AP felt compelled to resign. The School Board filed a motion for summary judgment on all claims.

The court held first that the racial hostile work environment claim could proceed since the AP adduced evidence on each element of this claim. She alleged unwelcome conduct in response to her use of a racially charged term, spoken as a white person. This unwelcome conduct was severe and pervasive in both duration and intensity, arising directly from divisive interactions which left the AP feeling "ganged up" on, based on race, and with the persistent feeling that her complaints and apologies were "falling on deaf

ears." The driving force behind this conduct was a coworker, and the AP reported her concerns to no less than six individuals who all had some degree of superiority over her. However, no preventive or corrective action was taken. Thus, the evidence showed that School Board and its agents were on notice about the race-based harassment and failed to respond effectively to the situation.

The court held second that the AP proffered evidence that would allow a reasonable jury to conclude that, due to the ongoing and unresolved harassment, she had "no choice" but to resign. The AP's allegations suggested that continuing in her position was futile, as harassment would likely escalate or, at least, go unresolved.

The court held third that the School Board was entitled to summary judgment on the retaliation claim. The AP's complaints constituted protected activity under Title VII—each stemmed from the racially hostile environment, brought about by an anti-racism training and the AP's use of a racially charged term. "The content of her complaints often explicitly called attention to the racial nature of the tension and hostility she and others were experiencing." Nevertheless, the AP produced little distinct evidence to show that the School Board cultivated the hostile working environment, constructively discharged her, or took any other adverse action against her *in response to* these complaints. To the contrary, much of the AP's argument was devoted to showing that the School Board did not respond to her concerns.

Therefore, the court granted in part and denied in part the School Board's motion for summary judgment.

SECOND AMENDMENT • COUNTY ORDINANCE • FIREARMS PROHIBITION AT PARKS & PERMITTED EVENTS • FACIAL VAGUENESS CHALLENGE

Lafave v. County of Fairfax, No. 1:23-cv-1605 (WBP), 2024 U.S. Dist. LEXIS 152000 (E.D. Va. Aug. 23, 2024), *appeal filed*, No. 24-1886 (4th Cir. Sept. 16, 2024) (Porter, J.).

HOLDINGS: (1) The Second Amendment's right to keep and bear arms presumptively guarantees citizens' right to bear arms in county parks and in or near county-permitted events for self-defense. (2) The ordinance's firearms restriction in county parks is consistent with the nation's historical tradition of firearms regulation. (3) This restriction is likewise constitutional under the "sensitive places" analysis. (4) The ordinance's restriction against carrying firearms at or adjacent to a county-permitted event is consistent with historical prohibitions within or near areas of sensitivity. (5) The restriction's challenged language was not unconstitutionally vague.

DISCUSSION: Three citizens with valid concealed handgun permits challenged a Fairfax County Ordinance (Ordinance) prohibiting the possession of firearms in Fairfax County parks (Parks Restriction) and in any public area that "is being used by or is adjacent to a County-permitted event or an event that would otherwise require a County

permit" (Events Restriction). Fairfax Cnty. Code § 6-2-1(A)(4). They contended that the Ordinance violated their Second and Fourteenth Amendment rights to self-defense in these areas, and that the "adjacent to" and "would otherwise require a permit" language in the Events Restriction was unconstitutionally vague on its face, citing the County's complex permitting provisions. Following extensive briefing and oral argument, both sides moved for summary judgment.

The Supreme Court has established the framework for evaluating whether a firearms prohibition violates the Second Amendment, explaining, "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct," at which point the challenged regulation is unconstitutional unless the government can show that "the regulation is consistent with this Nation's historical tradition of firearm regulation." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022). This showing requires the government to identify a "proper analogue for a distinctly modern firearm regulation," meaning that the two are "relevantly similar." *Id.* at 28–29. The *Bruen* Court acknowledged that there exists an ongoing scholarly debate as to whether the controlling period for this historical analysis should be when the Second Amendment was adopted in 1791 (Founding Era) or when the Fourteenth Amendment was ratified in 1868, making the Second Amendment applicable to state and local governments (Reconstruction Era). *Id.* at 37–38. *Bruen* also confirmed an earlier decision recognizing that history supported a limit on the right to bear arms in "sensitive spaces," like schools and government buildings. *Id.* at 17 (citing *District of Columbia v. Heller*, 554 U.S. 570 (2008)).

The district court held first that the citizens met their initial burden under *Bruen*. They alleged that they were "ordinary, law-abiding, adult citizens" who wished to carry their concealed handguns in the County parks for self-protection.

The court held second that County and its Chief of Police (collectively, Defendants) provided sufficient historical evidence showing that the Parks Restriction was consistent with the nation's historical tradition of firearms regulation. They cited 116 prohibitions on guns in parks that were enacted during the Reconstruction Era, none of which have been determined to violate the Constitution. Because modern recreational parks did not exist during the Founding Era, Defendants proffered evidence of an analogous tradition of regulating firearms in often-crowded public forums.

The court held third that the Parks Restriction was likewise constitutional under the "sensitive places" analysis. Defendants evinced that the County parks were analogous to schools, citing statistics indicating that, in 2023, approximately four million children visited these parks, over 43,000 children attended summer camps there, and three pre-schools were operational in the parks.

The court held fourth that Defendants sufficiently demonstrated that the Events Restriction was also consistent with the nation's historical tradition of firearms regulation. Because of the limitations that the County places on issuing permits for events, the

restriction itself was relatively narrow, applying only to events requiring permits in buildings, parks, and recreation and community centers owned and run by the County. With regard to historical evidence, "the County has identified a robust historical tradition of prohibiting firearms not only within an area of sensitivity, but adjacent to it."

The court held fifth that the latter part of the Events Restriction was not unconstitutionally vague because a person of ordinary intelligence had a reasonable opportunity to understand what was prohibited by the Ordinance. The County has provided information about prohibited conduct on its website. It has also provided guidance and training to police officers, so law enforcement presumably knows when and how to enforce the Ordinance, thereby safeguarding citizens from arbitrary enforcement. And, consistent with the principles of due process, the Ordinance contained the following notice requirement: "Notice of this ordinance shall be posted . . . at all entrances or other appropriate places . . . that is open to the public and is being used by or is adjacent to a permitted event or an event that would otherwise require a permit." Fairfax Cnty. Code § 6-2-1(D)(1).

Therefore, the court granted Defendants' motion for summary judgment, denied the citizens' motion, declared the Ordinance constitutional under the Second and Fourteenth Amendments, and entered judgment in favor of Defendants.

ATTORNEY GENERAL'S OPINIONS

The opinions summarized here are available for downloading, in PDF format, from the Attorney General's website, www.oag.state.va.us/, or by clicking on the hyperlinked opinion numbers below.

NOISE CONTROL ORDINANCE • CITY CHARTER • DILLON RULE • LEAF BLOWERS

Op. No. 24-018, addressed to the Honorable Elizabeth Bennett-Parker, Member, House of Delegates (Aug. 12, 2024).

Whether the City of Alexandria is permitted to amend its noise control ordinances to either: (1) incidentally ban the use of leaf blowers by repealing an exemption for power lawn and garden equipment; or (2) prohibit the use of gas-powered leaf blowers while continuing to allow the use of electric leaf blowers.

The City may amend its noise control ordinances in either of these manners.

Alexandria's City Charter grants it the power "to compel . . . the elimination of unnecessary noise . . . and to compel the abatement or removal of any and all other nuisances." Alexandria City Charter § 2.04(m). Pursuant to this power, the City has

adopted a series of noise control ordinances that include restrictions based on the nature of the noise, decibel levels, time, and location. Specifically, the ordinances make it unlawful to project noise beyond the boundaries of a property when such noise exceeds 55 decibels in residential areas, and 65 decibels in commercial areas. Alexandria City Code § 11-5-5(a)(1)–(3). Although both gas and electric leaf blowers typically generate noise exceeding these decibel limits, the City Code provides an exemption for the use of "power lawn and garden equipment," subject to certain time restrictions. *Id.* § 11-5-4(16).

Pursuant to the Dillon Rule, the City is authorized to enact noise regulations, and basing noise restrictions on decibel levels is a reasonable method of seeking the elimination of unnecessary noise. Consequently, amending its noise control ordinances by repealing the exemption is within the City's discretionary authority.

Similarly, it follows that the City may amend its noise control ordinances to prohibit the use of only gas-powered leaf blowers, which generally emit greater decibels than their electric counterparts. Furthermore, the City is broadly empowered to "adopt ordinances . . . for the preservation of the safety, health, peace, good order, comfort, convenience, morals and welfare of its inhabitants." Alexandria City Charter § 2.04. Therefore, it is reasonable to fashion this amendment with other policy goals in mind, as gas-powered blowers produce not just more noise but also emit airborne pollutants.

SHERIFFS • CUSTODY OF UNLAWFUL ALIEN • IMMIGRATION AND NATIONALITY ACT • DEPARTMENT OF HOMELAND SECURITY • UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT • DETAINER • INTER-DEPARTMENTAL COOPERATION

Op. No. 24-031, addressed to the Honorable Michael W. Miller, Sheriff, Bedford County (Sept. 5, 2024).

Whether the law prohibits a sheriff from cooperating with federal immigration authorities by notifying United States Immigration and Customs Enforcement (ICE) officers, after receipt of an ICE-issued detainer related to an inmate in the sheriff's custody, of the release of that inmate in order for ICE to attain custody of the inmate prior to or upon release.

No law precludes a sheriff from providing this information to ICE officers. "On the contrary, . . . a sheriff is expressly authorized to cooperate with federal officials by providing them prerelease notification as requested by the detainer."

The Immigration and Nationality Act (INA) vests the Department of Homeland Security (DHS), which includes ICE, with "the administration and enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1). Congress has authorized state and local officers to execute enforcement actions under the INA through formal agreements that confer upon them the status of an immigration officer. 8 U.S.C. § 1357(g). Absent an express agreement, the INA

nevertheless permits state and local officers to "cooperate with [federal agencies] in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(B). The United States Supreme Court has highlighted that DHS recognizes "allow[ing] federal immigration officials to gain access to detainees held in state facilities" as an example of permissible cooperation. *Arizona v. United States*, 567 U.S. 387, 410 (2012).

DHS regulations authorize ICE officers to issue detainers to state and local law enforcement agencies that are holding an alien who is subject to removal proceedings. Such detainers advise the agency that DHS seeks custody of the alien for the purpose of arrest and removal, and "request that such agency advise [DHS], prior to release of the alien, in order for [DHS] to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible." 8 C.F.R. § 287.7(a).

In Virginia, sheriffs are charged with the custody and care of all prisoners confined within county and city jails. Va. Code § 15.2-1609. Of particular relevance, the General Assembly has provided that the sheriff "may, upon receipt of a detainer from [ICE], transfer custody of the alien to [ICE] no more than five days prior to the date that he would otherwise be released from custody." Va. Code § 53.1-220.2. Because the ability to transfer custody necessarily involves the authority to communicate with ICE regarding the alien's release date, "the sheriff is permitted to honor an ICE detainer by advising ICE officers of the imminent release of an alien from the sheriff's custody."

POSITIONS AVAILABLE

(Positions posted in order received, sorted by most recent)

Chesterfield County Public Schools' Office of Legal Services

Position: Assistant School Board Attorney

Deadline: Dec. 1, 2024

Details: The Chesterfield County Public Schools' Office of Legal Services is growing and there is now a terrific opportunity to join our team as an Assistant School Board Attorney. This exciting position will provide legal counsel, guidance, and representation on a variety of legal matters related to education, governance, and public administration. The Chesterfield County School Board is committed to providing a high-quality education in a safe, inclusive, and legally compliant environment. The Office of Legal Services plays a key role in supporting this mission through effective legal counsel and strategic decision-making.

Salary: $99,336–$168,880

Link/Contact: Chesterfield County Assistant School Board Attorney

Alexandria City Attorney's Office

Position: Assistant City Attorney I or II

Deadline: Open until filled

Details: The Office of the City Attorney, legal counsel to the City of Alexandria, is accepting applications for a permanent full-time position of Assistant City Attorney I or II (depending on qualifications). This position will focus on employment law matters including advice to the Human Resources Department as well as various departments regarding personnel policies, employee grievances, issues related to collective bargaining agreements, and litigation involving employment matters. Other duties of this position may include the general duties of an ACA I such as: legal research, drafting of opinions and ordinances, and assisting in representing the City in a wide variety of operational, administrative, and judicial proceedings.

Salary: $84,029–$147,875

Link/Contact: Alexandria Assistant City Attorney I/II

Winchester City Attorney's Office

Position: City Attorney

Deadline: Open until filled

Details: The Winchester City Council has opted to re-establish the office of the City Attorney following a successful five-year period of utilizing an outside-contracted law office. The City seeks an attorney with experience serving as a legal advisor to municipal government bodies and their staff. The ideal candidate is comfortable handling legal affairs on

behalf of a municipality; reviewing, drafting, updating, and maintaining municipal code; and prosecuting violations of municipal ordinances. This position serves at the pleasure of the Common Council.

Salary: Depends on qualifications/experience

Link/Contact: Winchester City Attorney

Spotsylvania County Attorney's Office

Position: Senior Assistant County Attorney

Deadline: Nov. 15, 2024

Details: The Spotsylvania County Attorney's Office is seeking to fill a Senior Assistant County Attorney position. Details on the position and the link to apply can be found by visiting: https://www.spotsylvania.va.us/178/Spotsylvania-Countys-Career-Listings. The description is expansive, but please note that the successful applicant will be working primarily, if not exclusively, on land use matters including, but not limited to, reviewing planning documents such as subdivision plats, BMP Agreements, etc., as well as more substantive matters such as zoning changes (conditional rezonings and special use permits) and amendments to the zoning ordinance. The successful applicant will also staff meetings of the Planning Commission. The successful applicant will rarely, if ever, litigate, but that experience is always a bonus.

Salary: Depends on qualifications/experience

Link/Contact: Spotsylvania Senior Assistant County Attorney

Mineral Town Attorney's Office

Position: Town Attorney

Deadline: Open until filled

Details: The Town of Mineral (population 620) is seeking a Town Attorney. The Town Attorney serves as the chief legal advisor and general counsel to the Mineral, VA Town Council. This position provides legal services and legal representation to Town leadership and other Town employees in all matters related to Town operations. Performs professional and administrative work as it relates to the provision of legal services, including but not limited to legal review, legal document generation, legal representation, court filings, and policy guidance.

Salary: Depends on qualifications/experience

Link/Contact: Mineral Town Attorney

Charlottesville City Attorney's Office

Position: Assistant City Attorney

or

Deputy City Attorney

Deadline: Open until filled

Details: The City Attorney's Office is seeking candidates to be considered for the position of Assistant City Attorney or Deputy City Attorney who are highly motivated and who strive for success by demonstrating Charlottesville's Core Values of Commitment, Integrity, Respect, Innovation, and Collaboration.

The **Assistant City Attorney** is responsible for providing professional legal services to City departments, boards and commissions on complex matters, and should have the ability to independently handle litigation in the City's General District and Circuit Courts. Primarily and most frequently, the work done is performed as leader or director with broad functional areas and more expertise and strategic focus. Work is completed under the general supervisor of the City Attorney.

The **Deputy City Attorney** performs difficult and complex professional legal services and responsible administrative work in the rendering of legal services to the City; does related work as required. Primarily and most frequently, the work done is performed independently, with diverse functional areas and more specialization and ability to train others.

Some experience in one or more of the following legal areas is helpful, but not required, for either position: juvenile or domestic relations/social services, litigation, land use, or real estate.

Salary: Assistant City Attorney: $86,091–$105,435

Deputy City Attorney: $105,456–$129,147

Link/Contact: Charlottesville Assistant City Attorney/Deputy City Attorney

Hanover County Attorney's Office

Position: Assistant County Attorney I

or

Assistant County Attorney II

or

Senior Assistant County Attorney

Deadline: Continuous

Details: The Hanover County Attorney's Office seeks qualified applicants for an Assistant County Attorney I position; however, the position may be filled as an Assistant County Attorney II or Senior Assistant County Attorney position, depending on candidate qualifications and experience. The successful candidate will assist the County Attorney and Deputy County Attorney in providing a wide range of legal services to the Board of Supervisors, the School Board, constitutional officers, the Pamunkey Regional Library, and County departments, boards, and agencies. Duties include drafting and reviewing contracts, ordinances, resolutions, and other legal documents; litigating cases before administrative agencies and state and federal courts; performing legal research; and providing legal advice. The successful candidate may be responsible for assigning projects and reviewing the work product of legal assistants.

Salary: Assistant County Attorney I: hiring range begins at $70,858

Assistant County Attorney II: hiring range begins at $83,612

Senior Assistant County Attorney: hiring range begins at $98,663

Link/Contact: Hanover County Assistant County Attorney I/II/Senior Assistant County Attorney

Richmond City Attorney's Office

Position: Assistant City Attorney Civil Litigation Division

Deadline: Continuous

Details: The City of Richmond seeks an **Assistant City Attorney** to handle civil cases in federal and state trial and appellate courts. The position will undertake other assignments as needed. The successful candidate must be a member of the Virginia State Bar. This position is responsible

for protecting the legal interests of the City of Richmond and providing legal services and representation and advice to City officials, employees, and departments. The position is responsible for reviewing legal matters, providing appropriate counsel, and initiating or responding to legal actions. The class works within a general outline of work to be performed and develops work methods and sequences under general supervision.

The successful candidate must have demonstrated the ability to apply legal analysis in the solution of technical, administrative, and legal problems. The successful candidate must also have strong written and verbal skills. Prior trial experience is preferred although not required. The position will undertake other assignments as needed.

Salary: $87,614–$146,317

Link/Contact: Assistant City Attorney Civil Litigation Division

James City County Circuit Court

Position: Attorney I/II

Deadline: Open until filled

Details: James City County's Circuit Court seeks an individual to provide legal research and recommendations to the Judges of the Williamsburg and James City County Circuit Court judges; provide overall training, direction and supervision to law clerks; and perform related work as directed by the Judges.

Salary: $84,843–$90,000 or higher DOQ

Link/Contact: Click here for full job description. Accepting applications until position is filled. Cover letters and resumes may also be attached, but a fully completed application is required for your application to be considered.

Petersburg City Attorney's Office

Position: Assistant City Attorney

Deadline: Open until filled

Details: The purpose of this job within the organization is to assist the City Attorney in providing excellent legal representation for the City of Petersburg. In accordance with Section 2-192 of the City Code, this position works under the supervision and serves at the pleasure of the

City Attorney. This position is not covered under the City's Grievance Policy.

Examples of duties:

- Provides support and assistance as instructed by the City Attorney in his efforts to provide legal representation of the City of Petersburg.
- Prepares, researches, and drafts legal documents as assigned including but not limited to deeds, ordinances, resolutions, and contracts.
- Prepares legal memoranda on complex legal issues.
- Provides legal advice in matters as assigned to various City employees and constitutional officers.
- Attends meetings and other functions as assigned by the City Attorney.
- Provides representation to the City on assigned cases in various civil matters including but not limited to Building Code enforcement, taxation, personnel matters, land use, zoning, FOIA, and other areas.
- Provides representation to the City on assigned cases in various administrative proceedings including but not limited to employee grievances, ABC and other state licensure proceedings; state Technical Review Board proceedings; EEOC; DEQ; SCC, and other areas.
- Prosecutes cases involving specified misdemeanor offenses and violations of City Code as assigned.

Salary: $63,159–$104,023

Link/Contact: Petersburg Assistant City Attorney

Hopewell City Attorney's Office

Position: City Attorney

Deadline: Open until filled

Details: Under the appointment of City Council, the Hopewell City Attorney performs work of considerable difficulty in protecting the legal interests of the City, and serves as the chief legal advisor to Council and City Manager. As designated by Council, the City Attorney also serves as the chief legal advisor to other departments, boards, commissions, and agencies of the City in all matters affecting the interests of the

City. City residency is required within mutually agreed upon terms at time of appointment.

Examples of duties:

- Provides oral and written legal opinions and advice on complex matters to City Council, City administration, and City departments on a daily basis.
- Attends a variety of meetings—City Council, Boards, Commissions, Committees, Authorities, etc.
- Represents the City in complex legal matters. Prepares and tries cases, including appeals to state and federal courts; processes and litigates claims against the City; and prosecutes suits, actions, and proceedings for and on behalf of the City.
- Prepares, reviews, and/or approves various complex legal documents on behalf of the City—contracts, ordinances, resolutions, bonds, bids, deeds, leases, policies, etc. Provides explanations and answers when necessary.
- Researches, interprets, and applies laws, court decisions, and other legal authority in the preparation of opinions, advice, and briefs.
- Advises on the purchase, sale, exchange, and/or leasing of properties.
- Reviews procurement matters to ensure compliance.
- Prepares and reviews legislation for General Assembly sessions. Presents to the General Assembly as necessary.
- Supervises and reviews codifications of City Code.
- Manages, supervises, and reviews the work of support staff, as well as managing the department budget, support contracts, etc.
- Membership and active engagement in local government organizations and attendance of continuing education seminars specializing in local government.

Salary: Negotiable

Link/Contact: Hopewell City Attorney

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