Bill of Particulars

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

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

Vol. 50, No. 1 **January 2024**

LEADERSHIP TRAINING FOR NEW AND ASPIRING VIRGINIA LOCAL GOVERNMENT CHIEF LEGAL COUNSEL

Don't miss out on the opportunity to be the first to participate in the Leadership Training Program. Registration is limited to 50, and we are excited that so many of you have taken advantage of the opportunity to prepare for your professional goals.

The pilot Leadership Training Program was designed for new and aspiring local government chief counsel and is being provided through a collaboration between the Virginia State Bar Local Government Law Section, Local Government Attorneys of Virginia (LGA), and the Virginia Institute of Government. The Program represents an innovative recognition of the legal, management, and leadership skill sets needed for an attorney's success in an important and demanding role in public service. Specifically, the two-year course of study will include (1) a core curriculum on substantive areas of local government law, (2) training in management skills (e.g., budgeting and personnel management), and (3) intangible or leadership training. Course requirements will be met with a combination of webinars, LGA conference programming, and a two-day in-person seminar in Fredericksburg on February 22–23, 2024, at the Courtyard Marriott. Click here for program information and to register for the Fredericksburg seminar.

If you have any questions about the program, please contact Kathleen Dooley (kdooley@fredericksburgva.gov) or Brandi Law (brandi.law@hampton.gov).

PLAN AHEAD—LGA SPRING CONFERENCE IN RICHMOND APRIL 25-27

Christy Y. Jenkins, Associate Director

Mark your calendars for the 2024 LGA Spring Conference, which will take place at the Omni Richmond April 25-27, 2024. The LGA Spring Conference Committee is already planning the program with topics of interest and importance to local government attorneys. Conference registration and hotel room reservations will open in March 2024. Programming details will be posted on the conference webpage as they become available.

Reminder that at each Fall conference we take the opportunity to recognize and thank our members for their years of service with commemorative gifts to those who have reached the following milestones: 15, 20, 25, and 30 years of service. We also recognize members who are retiring at each program. The LGA relies on YOU to self-report these milestones. If you or someone in your office is reaching one of these milestones, please let us know so we can acknowledge them. Simply email the name, locality, and milestone to Christy Jenkins at christy.jenkins@easterassociates.com.

The LGA appreciates our conference sponsors for their generous support. Here are the sponsors who have already committed to helping fund our spring program:

Davenport & Company, LLC

Guynn Waddell P.C.

Harman Claytor Corrigan & Wellman, P.C.

Hefty Wiley & Gore, P.C.

Taxing Authority Consulting Services, PC

Vanderpool, Frostick & Nishanian, P.C.

VACo Group Self Insurance Risk Pool

Virginia Risk Sharing Association

We also recognize our Annual Sponsors who support all LGA operations, including conferences:

AquaLaw PLC

Briglia Hundley, P.C.

Hunton Andrews Kurth LLP

McGuireWoods LLP

Pender & Coward, P.C.

Sands Anderson PC

Troutman Pepper LLP

If you would like to join these firms in their support of exceptional education, networking, and fellowship as the LGA fosters excellence in local government, please see more information on our website or reach out to Christy Jenkins at christy.jenkins@easterassociates.com.

CALL FOR NOMINATIONS

Happy New Year! You can make 2024 extra happy for a colleague by nominating him or her for an LGA Award. Local government attorneys are devoted, hard-working public servants who typically support their localities and residents with little or no recognition. You can remedy that by nominating a deserving colleague for the **Cherin Award, Erwin Special Projects Award, Bobzien Pro Bono Award, or Retiree Recognition.**

Award nominations are due by 5:00 p.m. on February 15, 2024, and awards will be presented at the Spring Conference at the Omni Richmond Hotel on April 25-27, 2024. Please send your nomination(s) to Tara McGee, LGA Awards and Recognitions Chair (tmcgee@goochlandva.us). Please also let Tara know about any LGA members who have retired or passed away in the past year, so they can be given appropriate recognition.

A. Robert Cherin Award

The A. Robert Cherin Award for an Outstanding Deputy or Assistant Local Government Attorney was created specifically to recognize the important contributions that staff attorneys make to the Commonwealth. Click here for more information.

Walter C. Erwin, III Special Project Award

The LGA recognizes its members who have performed work on a project of significant importance to the LGA or to local government generally. The award can be presented to either an individual LGA member or a group of members. Click here for more information.

David P. Bobzien Pro Bono Award

The LGA created the David P. Bobzien Pro Bono Award to encourage and recognize an LGA member's creative contribution to the provision of pro bono representational and nonrepresentational legal services. Click here for more information.

Retiree Recognition

The LGA recognizes its members who are retiring after 15 or more years of service to a county, city, or town, either as a full-time employee or as chief legal counsel. Please submit name, position(s), and dates of local government service. The LGA relies solely on voluntarily submitted information for making these recognitions.

LGA FORUM BENEFITS, FUNCTIONS, AND BEST PRACTICES

While the LGA forums are valuable tools for helping local government practitioners better serve their clients, participation in the forums can, at times, overwhelm our in-boxes. To stem the tide of forum emails, please consider the following suggestions for better and more efficient use of the forums.

There are two separate forums: the **Active Membership Forum** and the **All Members Forum**.

The **Active Membership Forum** is restricted to Chief Counsel and other staff attorneys of those cities, counties, towns, and other organizations that are active LGA members (as distinguished from associate LGA members), and authorized individual members.

The **All Members Forum** is for all LGA members (except for judicial members, who are not eligible for forums). All subscribers to the **Active Membership Forum** are automatically also subscribed to the **All Members Forum**. If desired, subscribers may affirmatively opt to remove their addresses from the **All Members Forum** by contacting staff at info@lgava.org. Thus, to ensure the most widespread dissemination of an email, send your message to both the **Active Membership Forum** and the **All Members Forum**.

- As a rule of thumb, requests for documents should be generally understood as requests to provide such documents to that entire forum. Thus, a "me too" response is unnecessary. The documents are also automatically stored on the forum's dedicated webpage in the library.

- As is always the case with email, use caution when drafting an email to be sent to the forum, as you never know who your ultimate audience may be (think FOIA).

- Be cautious about using a "reply to group" as such responses are sent out to the entire forum. When appropriate, simply reply to the sender/requestor individually. To do so from your email server, you must manually change the "reply to" from what is automatically filled in to the specific sender/requester's email. You may use the "reply to sender" link incorporated in the email when you are logged into the LGA's website.

- While we all enjoy the good humor of our colleagues, keep the humorous quips and other one-liners to a minimum.

For more information about the forums, including further explanation of the various subscribing options, please contact staff at info@lgava.org.

MEMBER NEWS

WELCOME to the following new members of LGA!

Ashley Anderson (aanderson@sandsanderson.com), Sands Anderson

Dale G. Mullen (dmullen@whitefordlaw.com), Interim County Attorney for Louisa County

CONGRATULATIONS to the following LGA members who have been promoted or have changed their positions!

Andrea Atkinson (andrea.atkinson@hampton.gov), formerly with the York County Commonwealth's Attorney, is now Assistant City Attorney I with the City of Hampton.

Steven D. Bond (sbond@hampton.gov) is now the Interim City Attorney for the City of Hampton.

Cheran Cordell Ivery (cheran.ivery@alexandriava.gov), formerly with the City of Hampton, is now the City Attorney for Alexandria.

Helen Phillips (hphillips@culpepercounty.gov) is now Assistant County Attorney for Culpeper County.

Jessica Reep (jreep@cityofchesapeake.net) is a new attorney with the City of Chesapeake.

Amanda Wiseley (awiseley@frontroyalva.com) is the new Assistant Town Attorney for the Town of Front Royal.

INTERVIEW WITH BRIGLIA HUNDLEY, P.C.—A PROUD ANNUAL SPONSOR OF LGA

Please tell us about the history and structure of the firm.

The firm was established on November 1, 1993, and has just celebrated 30 years of being in business. The firm's founding partner, Steven D. Briglia, came out of the Commonwealth Attorney's Office, and in 1997, James W. Hundley left the Commonwealth Attorney's Office and joined Steve. Over the years, the firm has grown organically and has evolved from a criminal defense focus to becoming a full-service law firm that handles transactional, general civil, and criminal litigation matters. Our attorneys employ their extensive experience to provide innovative legal services across several practice areas, including business and commercial law, criminal defense, personal injury, family law, estate planning and administrative law, municipal law, and land-use matters. The firm now has 12 lawyers and other experienced legal professionals.

What are the firm's areas of expertise when it comes to local government?

The firm has over 30 years of experience representing Virginia municipalities (cities, towns, and counties), both as in-house counsel and as outside legal advisors for litigation, general counsel, and specialized representation matters, including defense of

erroneous tax assessment litigation, complex real estate transactions, FOIA and COIA compliance matters, advice regarding legislative matters before the General Assembly, and representation in connection with all aspects of eminent domain, from project planning to final litigation of just compensation.

In addition, partners in the firm currently serve as the City Attorney for the City of Fairfax and the Town Attorney for Vienna. Most recently, we also served as the interim City Attorney for the City of Falls Church.

Is there any current or recent work of the firm that you would like to highlight?

- Successfully defended a challenge to multi-family housing authority subdivision where petitioners sought to void the governmental approval
- Assisted a Virginia locality with property acquisition from a church organization
- Assisted a Virginia locality with zoning code re-write and re-organization
- Successfully represented a Virginia locality in appeal from BZA decisions

Why does the firm support LGA?

- LGA provides invaluable peer support and access to other local government attorneys
- LGA offers access to model and form pleadings and ordinances
- LGA hosts outstanding Continuing Legal Education and conference programs
- LGA fosters collaborative relationships between local government practitioners, facilitating both high-quality legal services and a valued sense of community
- The collegiality of members of the LGA is second to none

Briglia Hundley, P.C.

1921 Gallows Road, Suite 750

Tysons Corner, VA 22182

(703) 883-0880

www.brigliahundley.com

MANY THANKS TO BRIGLIA HUNDLEY FOR ITS ANNUAL SPONSORSHIP OF THE LGA!

VIRGINIA SUPREME COURT

PUBLIC SCHOOLS • TRANSGENDER STUDENT • USE OF PRONOUNS • FREE EXERCISE OF RELIGION • LIMITING PRINCIPLE • VIRGINIA RELIGIOUS FREEDOM RESTORATION ACT • COMPELLED SPEECH • DUE PROCESS • BREACH OF CONTRACT • VIRGINIA CONSTITUTION, ARTICLE I, §§ 11, 12, & 16

Vlaming v. W. Point Sch. Bd., No. 211061, 2023 Va. LEXIS 62 (Dec. 14, 2023) (Kelsey, J.).

HOLDINGS: (1) The teacher alleged legally viable free exercise claims under Article I, § 16, of the Constitution of Virginia and (2) the Virginia Religious Freedom Restoration Act. (3) The teacher brought viable constitutional claims based on free speech and (4) due process violations. (5) His breach of contract claim could proceed as well.

DISCUSSION: A French teacher at West Point High School was fired for refusing to use masculine pronouns to address or refer to a biologically female transgender student. He explained to the school's Principal and Assistant Principal that doing so violated his conscience and religious practice, which "prohibits him from intentionally lying, and he sincerely believes that referring to a female as a male by using an objectively male pronoun is telling a lie." Seeking to respect the student's preferences, the teacher used only the student's preferred proper names (in both English and French). To the best of his ability, he also avoided using third-person pronouns when referring to any students during class or while the transgender student was present. The Principal and Assistant Principal conveyed to the teacher that his "non-use of pronouns was not enough," and that he "should use male pronouns or his job could be at risk."

Shortly thereafter, the teacher gave a lesson involving the use of virtual-reality goggles. At one point, the student was wearing the goggles and walking through the classroom while receiving instructions from a second student. Concerned that the student was about to walk into a wall, the teacher exclaimed to the second student: "Don't let her hit the wall!" He immediately put his hand to his mouth and finished supervising the activity. When class concluded, the teacher apologized to the student, explaining that his remark was a spontaneous reaction to the risk of the student getting hurt. Dissatisfied, the student withdrew from the teacher's class later that day.

The teacher immediately reported the incident to the Principal, who recommended to the Superintendent that the teacher be placed on administrative leave. Five days later, the Principal issued a final warning letter to the teacher, explaining that his refusal to use masculine pronouns to refer to the student had violated the School Board's policy "prohibiting harassment or retaliation against students and others on the basis of gender identity." The Superintendent subsequently gave the teacher a written directive ordering him to use masculine pronouns to refer to the student. The teacher reiterated that he could not in good conscience adhere to this instruction. The Superintendent then recommended the teacher's termination to the School Board, which thereafter voted to terminate his employment.

The teacher filed a complaint in the circuit court against the School Board and the three School Officials involved in his firing, asserting free exercise, free speech, due process, and breach of contract claims under Virginia law. Without any consideration of evidence and solely on review of the pleadings, the circuit court sustained Defendants' demurrer as to each of the claims and granted Defendants' plea in bar as to the free speech claims. The teacher appealed.

The court held first that the teacher alleged a legally viable claim under Article I, § 16, of the Constitution of Virginia. This provision provides, in part, that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience." Article I, § 16, is textually distinct from and broader than its federal counterpart; as such, judicial interpretations of the First Amendment's Free Exercise Clause inform, but do not necessarily govern, the analysis in Virginia courts. Historically, the Commonwealth has followed the admonition of Thomas Jefferson's 1786 Act for Religious Freedom, which states that the government can only curtail the free exercise of religion when such exercise results in "overt acts against peace and good order." Virginia's legislature reaffirmed its adherence to these principles in 2016. *See* Va. Code §§ 57-1, 57-2. The U.S. Supreme Court has found, in similar vein, that claims for religious exemptions from neutral laws could be rejected when "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). The Supreme Court altered its stance via a divided opinion in 1990, in which the majority held that a neutral law of general applicability might not violate the Free Exercise Clause when the law incidentally burdens religious views, speech, or practices.

Emp. Div. v. Smith, 494 U.S. 872 (1990). Recognizing that "*Smith* continues to be controversial," the court expressly rejected the federal neutrality doctrine as inconsistent with the text and historical context of Article I, § 16, and set forth its stance as to the outer reaches of this textually unqualified right:

> [W]e hold that in the Commonwealth of Virginia, the constitutional right to free exercise of religion is among the "natural and unalienable rights of mankind," and that "overt acts against peace and good order," correctly defines the limiting principle for this right and establishes the duty of government to accommodate religious liberties that do not transgress these limits. (citations omitted)

Turning to the issue at hand, the court reasoned that the controversy did not turn on whether the School Board's policies applied to the compelled speech situation alleged in the complaint; rather, the apposite issue was whether the teacher's sincerely held religious beliefs caused him to commit overt acts that "invariably posed some substantial threat to public safety, peace or order," and, if so, whether the government's compelling state interest in protecting the public from that threat, when examined under the rigors of strict scrutiny, could be satisfied by "less restrictive means." The court concluded: "When religious liberty merges with free-speech protections, as it does in this case, mere 'objectionable' and 'hurtful' religious speech or, as in this case, nonspeech, is not enough to meet this standard."

The court held second that the teacher's complaint set forth a statutory free exercise claim under the Virginia Religious Freedom Restoration Act (VRFRA). The VRFRA proscribes a government entity from "substantially burden[ing] a person's free exercise of religion even if the burden results from a rule of general applicability." Va. Code § 57-2.02(B). Strict scrutiny applies. *Id.* Here, the teacher set forth a prima facie claim under the VRFRA, alleging that he could not comply with the mandate to use male pronouns to address a biologically female student since doing so would violate his conscience by endorsing an ideology at odds with his sincerely held religious beliefs. Subsection (E) of the statute, which reads, "[n]othing in this section shall prevent any governmental institution or facility from maintaining health, safety, security or discipline," did not bar the teacher's VRFRA claim as a matter of law. If construed as broadly as the School Board asserted, this clause "would apply to nearly all government actions" and "eviscerate the VRFRA."

The court held third that the complaint stated a legally viable claim that the teacher's employment was terminated in violation of his free speech rights as secured under Article I, § 12, of the Virginia Constitution. The teacher asserted a compelled speech claim—that the School Board fired him for refusing to endorse the School Board's view on a highly controversial, ideological subject. The dissent's reliance on the official duties doctrine expounded by *Garcetti v. Ceballos*, 547 U.S. 410 (2006), was misplaced since *Garcetti* did not involve compelled speech. Nor did the curricular speech exception apply, since the instant controversy did not involve school subjects.

The court held fourth that the complaint set forth a legally viable due process claim under Article I, § 11. The teacher asserted an as-applied constitutional challenge, maintaining that the School Board policies of which he was accused of violating did not clearly inform teachers that they could be fired for not using third-person pronouns when referring to transgender students. None of these policies mentioned the use or nonuse of pronouns. The School Board contended that they incorporated by reference Title IX, which protects students from discrimination on the basis of sex. But no appellate court, federal or state, has ever held, in the school context, that referring to a transgender student by a preferred proper name and avoiding the use of any third-person pronouns ran afoul of Title IX. In short, at the time the School Board fired the teacher, no clearly established law had put him on notice that his actions were unlawful.

The court held fifth that the teacher alleged a valid claim for breach of contract. At the time he was fired, the teacher had been granted "continuing contract status," which is "a form of tenure" that entitles teachers "to continuing contracts during good behavior and competent service." Va. Code § 22.1-304(B); *Dennis v. Cnty. Sch. Bd.*, 582 F. Supp. 536, 538 (W.D. Va. 1984). The teacher alleged that the School Board terminated his employment because he asserted his constitutional and statutory rights under Virginia law. By merely asserting such rights, the teacher could not have violated any condition of "good behavior and competent service" statutorily implicit in his employment agreement.

Therefore, the court reversed the circuit court's dismissal order and remanded the case for further proceedings.

(Powell, J., joined by Goodwyn, C.J., concurring in part): The concurring opinion, authored by Justice Powell, disagreed with the majority's conclusion that "overt acts against peace and good order" correctly defined the limiting principle for Article I, § 16's free exercise right, noting that this statutory language was never added to the Virginia Constitution, despite numerous opportunities to do so. Citing *Sherbert*, the concurrence concluded that it "would clearly state the test in familiar terms as requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest."

(Mann, J., joined in part by Goodwyn, C.J., and Powell, J., concurring in part and dissenting in part): Writing for the dissent, Justice Mann concurred with the majority's judgment that the circuit court erred in dismissing the teacher's free exercise claims under the Virginia Constitution and the VRFRA, and the breach of contract claim, but dissented from the majority's analysis and interpretation of Article I, § 16, and its rulings on the free speech and due process claims. As to the free exercise limiting principle, the dissent stressed:

> [T]he ambiguity that attends the scope of "overt acts against peace and good order" casts severe doubt on the workability of the majority's test . . . . I believe the correct interpretation of Article 1, Section 16, as has been historically interpreted by this Court, permits legislation to incidentally burden religious practice so long as it does not target religious belief and is applied "to protect all persons" for a secular purpose. *See Rich v. Commonwealth*, 198 Va. 445, 449, 94 S.E.2d 549[, 552] (1956).

The dissent repeatedly referred to the majority's holding as creating a "super strict scrutiny standard" for state policies that affect religious expression. As to the free speech and due process claims, the dissent categorized the teacher as "a public employee engaged in curricular speech pursuant to his official job duties . . . [with] ample notice that his refusal to use [the student]'s preferred pronouns was a violation of the School Board's policies." Thus, in the dissent's view, these claims should fail as a matter of law.

VIRGINIA COURT OF APPEALS

BOARD OF ZONING APPEALS • TRIAL COURT REVIEW • CONDITIONAL USE PERMIT • CODE § 15.2-2314 • APPROBATE AND REPROBATE DOCTRINE

E. End Landfill, LLC v. County of Henrico, Nos. 1232-22-2, 1233-22-2, and 1234-22-2, 2023 Va. App. LEXIS 805 (Dec. 5, 2023) (Humphreys, J.).

HOLDINGS: (1) The circuit court properly dismissed the petition to review the constitutionality of the ordinance. (2) The court declined to address the merits of the company's inconsistent arguments, citing the approbate and reprobate doctrine.

DISCUSSION: A limited liability company (LLC) that owned a landfill in Henrico County challenged the denial of a conditional use permit to expand its facilities. After the Henrico County Board of Zoning Appeals (BZA) denied the application in October 2020, the LLC appealed to the circuit court, arguing that the County's conditional use permit ordinance was unconstitutionally vague. The LLC later filed separate actions for declaratory judgment and injunctive relief, arguing that the zoning ordinance at issue, Henrico Zoning Ordinance (HZO) § 24-116, was void for failure "to articulate definite standards to govern the BZA decision." On June 22, 2021, during the pendency of the BZA appeal but prior to the LLC filing its declaratory judgment and injunction actions, the Henrico County Board of Supervisors replaced HZO § 24-116 with a new ordinance, under which conditional use permits for landfills were to be issued directly by the Board of Supervisors. This obviated the need for specific articulable standards. The circuit court subsequently granted the County's motions to dismiss each of the actions on the grounds that they were now moot. The LLC appealed.

The court held first that dismissal was proper. Under Code § 15.2-2314, a party aggrieved by a BZA decision may file a petition for a writ of certiorari in circuit court for review. However, "the trial court's review is limited to determining whether the decision of the board of zoning appeals is plainly wrong or is based on erroneous principles of law." *Bd. of Zoning Appeals of James City Cnty. v. Univ. Square Assocs.*, 246 Va. 290, 294–95, 435 S.E.2d 385, 388 (1993). In other words, an aggrieved party may not challenge the constitutionality of an ordinance through the certiorari process.

The court held second that it would not reach the merits of the LLC's argument that the circuit court erred in dismissing its declaratory judgment action and its petition for an injunction as moot. The approbate and reprobate doctrine bars a litigant from advancing inconsistent positions during the course of the same litigation. Here, the LLC's initial filings alleged that HZO § 24-116 was void. But on appeal, the LLC contended that the circuit court's mootness ruling deprived it of its rights to proceed under that ordinance. "It is mutually inconsistent to argue that an ordinance is void and without legal effect while simultaneously arguing that a litigant somehow has rights under that same ordinance."

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

ZONING • NOTICE OF VIOLATION • CODE § 15.2-2311

Calway v. City of Chesapeake, 79 Va. App. 220, 894 S.E.2d 373 (2023) (Ortiz, J.).

HOLDINGS: (1) The violation notice's failure to comport with the statutory requirements rendered it invalid. (2) The city's ensuing enforcement action was, thus, voidable. (3) The subsequent determination letter did not cure the defective notice.

DISCUSSION: A property owner in Chesapeake was issued a notice of violation (NOV) on August 19, 2020, indicating that a freestanding carport on his property was in noncompliance with a city zoning ordinance since it had been constructed by the property's previous owner in or around 2004 without a building permit. The NOV instructed the property owner to correct the violation within ten days. Fine print at the bottom of the NOV stipulated that the property owner could appeal to the Board of Zoning Appeals (BZA) within 30 days, but did not mention that failure to appeal would make the decision final and unappealable. The property owner did not appeal to the BZA, and on October 7, 2020, the City of Chesapeake General District Court (GDC) issued him a civil penalty. Around that time, the property owner contacted the Zoning Administrator to determine the legal status of his carport. In response, he received a determination letter dated November 4, 2020, stating that the carport was illegal and must be removed. The letter indicated that the decision could be appealed to the BZA and explicitly stated that failure to appeal would make the decision final and unappealable. Again, the property owner did not appeal.

On November 18, 2020, the GDC entered judgment in favor of the property owner and dismissed the complaint. The City appealed this decision to the circuit court, which issued a letter opinion on April 27, 2022, ordering removal of the carport within six months. It found that because the property owner failed to exhaust his administrative remedies by not appealing the NOV or the determination letter to the BZA, the carport's status was a "thing decided" and not subject to challenge in court. The circuit court declined to address the property owner's argument that because he and the prior owner had collectively paid taxes on the value of the carport for more than 15 years, the carport was therefore neither illegal nor subject to removal. *See* Va. Code § 15.2-2307(D). Following the property owner's unsuccessful motion to reconsider, this appeal ensued.

The court held first that the NOV was invalid because it failed to adhere to the requirements of Code § 15.2-2311(A). Parsing the statute, the court found that a valid notice must include four elements: (1) that the party has the right to appeal within 30 days; (2) that the zoning decision will be final and unappealable if no appeal is filed within 30 days; (3) the cost of filing an appeal; and (4) the location of further information about appeals. The NOV contained language satisfying only the first, third, and fourth of these elements. The court rejected the City's argument that the finality element was inherent in the stated right to appeal within 30 days, pointing out that without the "final and unappealable" language, "a property owner might logically conclude that the failure to appeal to the BZA within 30 days would foreclose an appeal in that forum, but that they could later appeal to a court."

The court held second that the NOV's failure to comply with the statutory notice requirements rendered any subsequent enforcement action voidable. Because the NOV was defective, the 30-day appeal period never commenced, and no court had authority to issue a civil penalty or abatement order. Thus, the GDC properly dismissed the case, and all subsequent findings by the circuit court were undertaken without proper authority.

The court held third that the determination letter did not cure the defective NOV. Although it included a full notice of appeal rights, "the determination letter did not include required next steps, such as correcting the violation by a specified date, or the impending risk of enforcement action if the carport was not removed. Instead, it merely pointed back to the original NOV, which . . . was defective." The court noted that the City could have issued a new summons, referring to November 4, 2020, as the date of violation, which would have allowed the GDC to take proper jurisdiction of the case. Instead, the City chose to rely on the defective NOV throughout the course of the litigation.

Because the court ruled that the enforcement action was void, it did not reach the issue of whether the property owner acquired a vested right to the carport under Code § 15.2-2307(D).

Therefore, the court reversed the circuit court's judgment and remanded the case for further proceedings.

VIRGINIA-BASED U.S. DISTRICT COURTS

INMATE ASSAULT • EIGHTH AMENDMENT • 42 U.S.C. § 1983 • COLOR OF STATE LAW • EMPLOYER LIABILITY

Parson v. Ms. (Unknown) Palmer, No. 1:22cv491 (RDA/JFA), 2023 U.S. Dist. LEXIS 220403 (E.D. Va. Dec. 11, 2023) (Alston, Jr., J.).

HOLDINGS: (1) The inmate's complaint failed to allege sufficient facts to establish that the prison nurse acted under color of state law, or (2) that her action was attributable to her employer.

DISCUSSION: An inmate detained at the Nottoway Correctional Center in Burkeville alleged that a nurse punched him in the back of the neck, without provocation, while he was assigned to work at the Medical Unit for floor maintenance and sanitation. The attack triggered migraine headaches and spinal column pain. The inmate, proceeding *pro se*, alleged a § 1983 claim for a violation of his Eighth Amendment rights, as well as state law assault and battery claims. In addition to the nurse, he also named (but did not serve) two other defendants: the company that employed the nurse, and the company's owner.

The court held first that the inmate failed to state a § 1983 claim against the nurse because he did not allege that she acted under color of state law. Assuming that the wrongful conduct happened as alleged, there was nothing in the complaint to indicate that the attack occurred while the nurse was performing a duty in her official capacity, other than the fact that she was a contract nurse in a Virginia Department of Corrections Facility. Fourth Circuit precedent requires more than this for an "under color of state law" showing. Instead, the alleged facts supported an inference that the nurse's wrongful conduct was a personal, private pursuit.

The court held second that there was no basis for liability on the part of the nurse's employer—neither the company itself nor its owner. The inmate's alleged constitutional violation was predicated solely upon his assertion that the nurse punched him and not on any purported official policy or custom attributable to her employer.

Therefore, the court dismissed the complaint, declined to exercise pendant jurisdiction over the state law tort claims, and granted the inmate leave to amend his complaint within 30 days.

PRISONS • INMATE ASSAULT • WARDEN • BYSTANDER LIABILITY • SUPERVISORY LIABILITY

Shipp v. Punturi, No. 7:21cv00414, 2023 U.S. Dist. LEXIS 222802 (W.D. Va. Dec. 14, 2023) (Cullen, J.).

HOLDINGS: (1) The warden was not liable for the assault on the inmate based on a theory of either bystander liability or (2) supervisory liability.

DISCUSSION: An inmate being held at the Pocahontas State Correctional Center in Tazewell County filed a § 1983 suit against several Prison Officials stemming from an incident involving the alleged use of excessive force. According to the complaint, the inmate was restrained in handcuffs and shackles and held by two Corrections Officers on March 29, 2021, when a Lieutenant came up from behind and slammed his face into the wall, then forced his head against the wall, holding it there for approximately 30 seconds. The inmate suffered permanent vision impairment and chronic headaches. One of the defendants, the Prison's Warden, was not present at the Correctional Center on the day of the incident. The Warden moved for summary judgment as to all claims against him.

The court held first that the facts, as alleged, did not support a claim against the Warden under a theory of bystander liability. To succeed on this claim, the inmate must have shown that the Warden "(1) knows that a fellow officer is violating an individual's constitutional rights; (2) has a reasonable opportunity to prevent the harm; and (3) chooses not to act." *Randall v. Prince George's County*, 302 F.3d 188, 204 (4th Cir. 2002). In addition to not being present on the day of the attack, the inmate did not allege that the Warden had any advance knowledge that such use of force would occur. "[T]he court cannot find that [the Warden] had a reasonable opportunity to prevent the alleged assault from happening."

The court held second that the allegations likewise could not support a finding that the Warden was liable for the assault based on a theory of supervisory liability. Supervisory liability cannot be predicated solely on the basis of *respondeat superior*; it requires that the supervisor himself bears personal responsibility for his subordinate's acts. The elements of this claim are:

> (1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices," and (3) that there was an "affirmative causal link" between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994). The complaint did not adequately allege these elements; it offered only a conclusory declaration that the Warden was "legally responsible for the overall operations of the institution . . . and for the welfare

of all the inmates in that prison." The facts also tended to refute the merits of this claim. After learning about the incident, the Warden, relying on an investigation of the event in responding to the inmate's grievance, later overturned the inmate's related disciplinary conviction. This demonstrated that the Warden did not show "deliberate indifference to or tacit authorization of the alleged offensive practices."

Therefore, the court granted the Warden's motion for summary judgment and dismissed him as a defendant in this case.

ATTORNEY GENERAL'S OPINIONS

The opinion summarized here is available for downloading, in PDF format, from the Attorney General's website, www.oag.state.va.us/ (look under "Citizen Resources," then "Opinions and Legal Resources," and then "Official Opinions"), or by clicking on the hyperlinked opinion number below.

PERSONAL PROPERTY TAXES • RECREATIONAL VEHICLES • SITUS • CODE § 58.1-3511(A)

Op. No. 23-001, Addressed to Cameron S. Bell, Esq., Abingdon Town Attorney (Dec. 18, 2023).

Under what circumstances does a locality serve as the situs for the imposition of personal property taxes for vehicles (which are not used for business) that are regularly, but not exclusively, stored in that locality.

The Town of Abingdon, which is located in Washington County, Virginia, contains several storage facilities where customers house their boats and trailers. These vehicles are primarily used for recreational purposes on nearby Lake Holston. The lake straddles Virginia's southern border—it is located partly in Washington County (outside the Town of Abingdon limits), and partly in Sullivan County, Tennessee.

With respect to the imposition of tangible personal property taxes by localities, Code § 58.1-3511(A) establishes that, with certain exceptions, "the situs for purposes of assessment of motor vehicles, travel trailers, boats and airplanes as personal property shall be the county, district, town or city where the vehicle is normally garaged, docked or parked." Prior Attorney General Opinions have consistently held that the phrase "normally garaged, docked or parked" means that the vehicle must have been located in a particular

jurisdiction for six months or more during the year. The statute provides the following relevant exception: "the situs for vehicles with a weight of 10,000 pounds or less registered in Virginia but normally garaged, docked or parked in another state shall be the locality in Virginia where registered."

Ultimately, the determination as to whether a particular vehicle is "normally garaged, docked or parked" in a particular locality rests with that locality's Commissioner of the Revenue or other appropriate tax official. This factual determination as to situs is made annually on the first day of January. Va. Code § 58.1-3515. (Note that the physical location of the vehicle on January 1st is not determinative of the inquiry.)

Accordingly, it is the Attorney General's opinion that the Town of Abingdon may impose personal property taxes on two classes of vehicles: (1) any boat or trailer determined to be normally garaged, docked, or parked within Town limits, irrespective of weight or place of registration; and (2) boats and trailers weighing 10,000 pounds or less that are registered in Abingdon and normally docked in another state, such as Tennessee's portion of Lake Holston. Boats and trailers not fitting into either of these categories are not subject to the imposition of personal property taxes by the Town of Abingdon.

POSITIONS AVAILABLE

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

County of Loudoun

Position: Assistant Division Counsel (General), Loudoun County Public Schools

Deadline: 3/1/2024

Details: The County of Loudoun is seeking an Assistant Division Counsel for Loudoun County Public Schools. Roles and responsibilities include: attending and providing legal advice at regular and special meetings of the School Board and committees thereof as requested; providing legal assistance in the drafting of contracts, policies, rules and regulations, resolutions, and

all other legal or quasi-legal papers upon request and preparing and/or reviewing contracts as requested; advising the School Board in all matters of a legal or technical nature relating to the interpretation of statutes, ordinances, and contracts; monitoring and reviewing changes in public school law; advising the School Board and the Superintendent regarding legislative changes and necessary School Board and/or administrative action; serving as legal representative of the School Board, its members, and/or staff in any judicial or administrative proceedings brought by or against the School Board, as appropriate; preparing and rendering oral and/or written legal opinions upon request to Division Counsel, the Superintendent, and to the School Board; advising the School Board on the sale, lease or other disposition of excess real property and providing legal assistance and advice concerning the acquisition or disposition of real estate; and preparing resolutions, deeds, leases and conveyances, obligations and other legal instruments relating to the business of the School Board, and conducting such correspondence therewith as may be necessary or as may be requested by the School Board.

Salary: $138,527–$212,541

Link/Contact: Loudoun County Public Schools Assistant Division Counsel

City of Chesapeake

Position: Deputy City Attorney

Deadline: 2/23/2024

Details: The City of Chesapeake is seeking an experienced individual to fill the role of Deputy City Attorney. The successful candidate will assist the City Attorney in overseeing departmental operations and provide a wide range of legal services for the City of Chesapeake. The position is responsible for staff supervision; providing legal advice to all departments, boards, and commissions; preparing legal documents; analyzing policy issues; and managing cases for trial. The selected candidate will assume the duties of the City Attorney when he/she is absent, which include attending City Council meetings and providing legal advice directly to the Mayor and the members of City Council. This position will supervise the City Attorney's Office in the absence of, and otherwise to the extent requested by, the City Attorney. The position works within broad policy and organizational guidelines; independently plans and implements projects; and reports progress of major activities through periodic conferences and meetings.

Salary: $109,244 minimum (salary commensurate with experience)

Link/Contact: Chesapeake Deputy City Attorney

City of Virginia Beach

Position: Senior Attorney or Deputy City Attorney

Deadline: Open until filled

Details: The City of Virginia Beach is seeking a knowledgeable and experienced Land Use Senior Attorney or Deputy City Attorney. This position requires solid problem-solving, communication, management, and leadership skills essential to setting up new programs and overseeing their adoption, implementation, and enforcement. The primary functions of the position are to provide timely and sound legal guidance to the Zoning Administrator, the Planning Director, the Planning Commission, City Council, and boards and commissions. Legal guidance will include interpreting zoning laws with accuracy and consistency; preparing City Council ordinances and resolutions; giving public presentations and briefings; serving as the subject matter expert on zoning-related litigation matters; understanding and applying telecommunications regulations; and overseeing updates to and the uniform implementation of the City Zoning Ordinance, the Comprehensive Plan, the Stormwater Management Program, various housing programs, and other important programs affecting citizens' rights and the quality of life in the most populous city in Virginia.

Salary: Senior Attorney: $103,830–$160,937

Deputy City Attorney: $120,196–$186,304

Link/Contact: Virginia Beach Senior Attorney/Deputy City Attorney

City of Hampton

Position: Assistant City Attorney I

Deadline: Open until filled

Details: The purpose of the class is to assist the City Attorney in a wide range of professional legal services to all City departments, various boards and commissions, and City Council. The class works under administrative supervision developing and implementing programs within organizational policies and reporting major activities to executive-level administrators through conferences and reports.

Salary: $73,242–$80,566

Link/Contact: Hampton Assistant City Attorney I

County of Louisa

Position: Assistant County Attorney

Deadline: Open until filled

Details: The Assistant County Attorney is expected to assist the County Attorney and will be assigned to work primarily for several departments. This position offers an excellent opportunity for interaction with county staff involved in a diverse array of legal issues facing a growing community rooted in its rural tradition. The ability to work on several projects at once and meet deadlines is necessary for performance in this position. The Assistant Louisa County Attorney will perform a wide variety of complex legal work including the management and trial of cases involving enforcement of the Louisa County Code. This position involves the review of and drafting of ordinances, legal opinions, and contracts.

Salary: Commensurate with experience.

Link/Contact: Louisa Assistant County Attorney

County of Louisa

Position: County Attorney

Deadline: Open until filled

Details: Louisa County is seeking candidates for County Attorney. The Louisa County Attorney represents the County by providing timely legal services and advice to the Board of Supervisors, Constitutional Officers, and Department Heads. The County Attorney also provides legal advice and consultation to the various Boards, Authorities, and commissions in and for Louisa County. The County Attorney performs complex legal work including the management and trial of complex civil litigation; work with insurance counsel and outside counsel; and review and preparation of legal documents including ordinances, legal opinions, and contracts. The County Attorney is the primary risk management officer for the County and works daily with leadership, staff, and citizens to resolve problems.

Salary: $109,483–$180,647

Link/Contact: Louisa County Attorney

County of Rockbridge

Position: County Attorney

Deadline: Open until filled

Details: Rockbridge County is seeking qualified candidates for the full-time position of County Attorney, due to retirement of the incumbent. The County Attorney is appointed by and reports directly to the Board of Supervisors, and serves as legal advisor to the Board, the County Administrator, departments, boards and commissions, and other officials of the County affecting County interests.

Salary: Negotiable depending upon experience and qualifications

Link/Contact: Rockbridge County Attorney

Town of Wytheville

Position: Town Attorney

Deadline: Open until filled

Details: The Town of Wytheville is seeking a Town Attorney. The Town Attorney serves as the chief legal advisor and general counsel to the Wytheville Town Council. This position provides legal services and legal representation to Town leadership and other Town employees in all matters related to Town operations. The Town Attorney 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: $77,896–$116,854

Link/Contact: Wytheville Town Attorney

LGA OFFICERS/BOARD OF DIRECTORS 2024-2025

LESA J. YEATTS
President
Herndon Town Attorney
777 Lynn Street
Herndon, VA 20172
(703) 435-6800
lesa.yeatts@herndon-va.gov

ANDREW H. HERRICK
Vice President
Albemarle Deputy County Attorney
401 McIntire Road, Suite 325
Charlottesville,VA 22902
(434) 972-4067
aherrick@albemarle.org

KELLY J. LACKEY
Treasurer
King George County Attorney
10459 Courthouse Drive, Suite 200
King George, VA 22485
(540)775-8530
klackey@co.kinggeorge.state.va.us

COURTNEY R. SYDNOR
Secretary
Loudoun Sr. Deputy County Attorney
1 Harrison Street SE, 5th Floor
Leesburg,VA 20175
(703) 771-5055
courtney.sydnor@loudoun.gov

MICHAEL H. ABBOTT
Wise Senior Assistant County Attorney
Wise County Courthouse
Wise, VA 24293
(276) 328-9406
michael@wisecwa.info

JOHN C. BLAIR
Staunton City Attorney
116 West Beverley Street
Staunton, VA 24401
(540) 332-3992
blairjc@ci.staunton.va.us

MARTIN R. CRIM
Culpeper, Middleburg, Occcoquan,
Warrenton, and Washington Town Attorney
Sands Anderson P.C.
725 Jackson Street, Suite 217
Fredericksburg, VA 22401
(703) 663-1720
mcrim@sandsanderson.com

BRANDI A. LAW
Hampton Deputy City Attorney
22 Lincoln Street, 8th Floor
Hampton, VA 23669
(757) 727-6174
brandi.law@hampton.gov

PATRICK C. MURPHREY
Newport News Assistant City Attorney
6060 Jefferson Avenue, 3rd Floor
Newport News, VA 23605
(757) 926-6466
murphreypc@nnva.gov

MARK C. POPOVICH
Immediate Past President
Covington City Attorney
Guynn Waddell, P.C.
Salem,VA 24153
(540) 387-2320
markp@guynnwaddell.com

RYAN C. SAMUEL
Arlington Deputy County Attorney
One Courthouse Plaza
2100 Clarendon Blvd., Suite 403
Arlington,VA 22201
(703) 228-3100
rsamuel@arlingtonva.us

TYLER C. SOUTHALL
Dinwiddie County Attorney
14010 Boydton Plank Road
Dinwiddie,VA 23841
(804) 469-4500
tsouthall@dinwiddieva.us

ALAN B. SPENCER
Danville Deputy City Attorney
421 Municipal Building
P.O. Box 3300
Danville, VA 24543
(434) 799-5122
spencab@danvilleva.gov

Easter Associates
9 South 12th Street, Second Floor,
Richmond, VA 23219

Amy V. Sales
Executive Director
(434) 906-1778
amy.sales@easterassociates.com

The *Bill of Particulars* (*Bill*) is published each month by the Local Government Attorneys of Virginia, Inc. (LGA). The LGA through the *Bill* distributes to its members content published or supplied by third parties and LGA members. Any summaries, opinions, advice, statements, services, offers, or other information or content expressed or made available in the *Bill* are those of the respective author(s) or third-party distributor(s) and not of the LGA. Neither the LGA nor any third-party provider of information guarantees the accuracy, completeness, or usefulness of any content. The LGA neither endorses nor is responsible for the accuracy or reliability of any opinion, summary, advice, or statement made in the *Bill*. It is the responsibility of the reader to evaluate the accuracy, completeness, or usefulness of any information, opinion, summary, advice, or other content available through the *Bill*.

DAVID WAGONER, J.D., EDITOR

National Legal Research Group, Inc.

2421 Ivy Road, Suite 100

Charlottesville, Virginia 22903

(800) 727-6574

dwagoner@nlrg.com