

COLORADO SUPREME COURT OF COLORADO

2 East 14th Street
Denver, CO 80203

On Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 2018CA2345 Opinion
by Lipinsky, J., Webb and Dunn, JJ., concurring

PETITIONERS:

POUDRE SCHOOL DISTRICT R-1 and POUDRE
SCHOOL DISTRICT R-1 BOARD OF EDUCATION,

v.

RESPONDENTS:

PATRICIA STANCZYK and POUDRE EDUCATION
ASSOCIATION.

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▲ COURT USE ONLY ▲

Case Number: 2020SC269

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Response in Opposition to Petition for Writ of Certiorari complies with the requirements of C.A.R. 53, which incorporates C.A.R. 32 by reference. Specifically, the undersigned certifies that:

The brief complies with the word limit set forth in C.A.R. 53. It contains 3,351 words.

I acknowledge that this Response may be stricken if it fails to comply with any of the requirements of C.A.R. 53.

/s/ Charles F. Kaiser

Charles F. Kaiser, No. 8557

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QUESTION PRESENTED

The Petition for Certiorari overstates what the Court of Appeals characterized as a narrow holding. That Court explicitly declined to address the questions of whether teachers could voluntarily waive their right to portability of their nonprobationary status (hereinafter “portability”, or as, a verb, “to port”), or whether school districts could impose reasonable restrictions on teachers’ ability to obtain that status. Rather, the Court of Appeals simply held that the practice of Petitioner Poudre School District (District) of leading teachers to believe that they could never apply for portability violated the requirement of § 22-63-203.5, C.R.S. (2019) that they may do so.

STATEMENT OF THE CASE

A. Statute at Issue

§ 22-63-203.5 provides as follows:

Beginning with the 2014-15 school year, a nonprobationary teacher, except for a nonprobationary teacher who has had two consecutive performance evaluations with an ineffective rating, who is employed by a school district and is subsequently hired by a different school district may provide to the hiring school district evidence of his or her

student academic growth data and performance evaluations for the prior two years for the purposes of retaining nonprobationary status. If, upon providing such data, the nonprobationary teacher can show two consecutive performance evaluations with effectiveness ratings in good standing, he or she shall be granted nonprobationary status in the hiring school district.

Appendix A.

B. Statement of Facts

Respondent Patricia Stanczyk is a licensed teacher. CF 8, ¶ 2; 137, ¶ 2. She applied for at least six position with the Petitioner Poudre School District (District) for the 2016-17 school year, including several teaching positions. CF 403. At the time of her application, she was teaching for the Thompson School District. She had obtained nonprobationary status with that school district starting in the 1998-1999 school year, and held that status at the time of her applications for positions with the District. CF 378, ¶ ¶ 4-5.

Respondent Poudre Education Association (PEA) is a member organization composed primarily of licensed personnel employed by the District. It is largely funded by member dues. CF 381, ¶ ¶ 2-3.

Applicants for teaching positions with the District had to apply through an online program called “Applitrack”; paper applications were not accepted. CF 389, Deposition pp. 35:18-36:8. Applitrack contained a section entitled “Applicant’s Acknowledgement and Agreement”. That section required, amongst

other things, that the applicant click a box stating that he or she agree to a number of terms of employment. One such term was:

“...[a]ny offers of employment extended by Poudre School District to me are conditioned on signing a probationary teacher contract and not asserting the portability of nonprobationary status I have acquired in another school district, if any” CF, p. 412.

The “Agreement” was followed by a box for the applicant to click “I agree”. There was no box to click “I disagree”. CF, 413. The applicant had to click the “I agree” box in order to submit the application. CF 368-369, Deposition p. 74; 15; pp. 78:8-79:1.

Stanczyk attempted to submit the application without checking the “I agree” box. She could not do so. CF 369, Deposition pp. 78:15-79:1.

Before signing her contract with the District, she went to its Human Resources Office to inquire about obtaining portability of her nonprobationary status. She was told that the District did not “do that here”. CF 370, Deposition pp. 85:4-87:14. Hence, she signed a contract of employment with the District called a “Probationary Contract”. CF 370, Deposition p. 85:2-15; CF 458-459. Her understanding was that if she was going to accept employment with the District, it had to be on probationary status. CF 304, Deposition pp. 84:22-85:3.

The District's form probationary teacher contract, which Stanczyk signed, provided that it was voidable if the teacher asserted what the contract characterized as her right to nonprobationary portability pursuant to § 22-63-203.5. CF 458, ¶ 2 (emphasis added).

Victoria Thompson was the District's Human Resources Director at all times pertinent to this case. CF 386, Deposition p. 14:3-9. She decided to create the practice at issue in this case. CF 387, Deposition pp. 18:20-19:16; CF 399, Deposition pp. 126:16-127:9. She testified at her deposition that, if an applicant had a question about obtaining portability of nonprobationary status, the applicant could call the District's Human Resources Department. CF 387, Deposition pp. 20:20-21:18. However, Thompson was unable to say what would happen in the event of such a call, other than that someone from the District's Human Resources Department would meet with the applicant to review the law and next steps. CF 391-392, Deposition pp. 44:22-45:9. She was unable to answer the question of whether the School District would hire someone who was not willing to waive portability, and had "no idea" as to the likelihood that it would do so. CF 392, Deposition pp. 45:10-46:3. Thompson was unable to state what the District's deadline was for teachers to apply for portability of their nonprobationary status. CF 397, Deposition p. 99:7-11.

The District does not have a written policy concerning waiving portability of nonprobationary status. CF 387, Deposition pp. 18:20-19:1. After three years of litigation, the District has still not informed the Court how, by when, or even if teachers may obtain portability of their nonprobationary status that they have obtained in another school district.

Human Resources Director Thompson was unable to describe how the District's evaluation system was more rigorous than that of the school district from which Stanczyk sought portability of her nonprobationary status, the Thompson School District. CF 393-395, Deposition pp. 63:19-70:23, specifically CF 395, Deposition p. 70:6-23.

C. The Court of Appeals Decision

The Court of Appeals applied the plain language of the statute, to give its text its ordinary and commonly accepted meaning. *Stanczyk v. Poudre Sch. Dist. R-1*, ___ P. 3d ___, 2020 COA 27, ¶ 57 (Colo. App. 2020). It determined that the requirement of § 22-63-203.5 that, upon providing the documentation required by the statute, the provision of the statute that school districts shall grant portability, (emphasis in original), to teachers who: 1) were employed by a school district; 2) subsequently are hired by another school district; and 3) submit the required

documentation, means that such teachers have a statutory right to portability. *Id.* at ¶ ¶ 58-60.

Because the District’s application form required teachers to waive this right, and because neither the application form nor the District’s website indicated that a teacher could apply for a job without waiving this right, the record showed only that a teacher had to agree to waive portability to submit an application for a job with the District. Whether “intentionally or otherwise”, the information that the District presented to the public created the impression that it did not permit teachers to exercise their right to obtain nonprobationary portability. *Stanczyk*, ¶ 61.

Hence, there was no dispute that the District effectively required teachers to relinquish the right to portability. Even if there was a dispute as to whether a teacher could circumvent the restrictions that the District put on this right, its form contract allowed it to hire only those teachers who surrendered that right. *Stanczyk* at ¶ 63.

For these reasons, the restrictions the District placed on portability wrote § 22-63-203.5 “out of the statute book”. *Stanczyk* at ¶ 64.

The Court of Appeals stated that its holding was narrow: it did not address the question of whether teachers may voluntarily waive the right to portability

without the restrictions the District placed on that right. It did not address the question of whether a school district may place reasonable restrictions on the exercise of that right. *Stanczyk* at ¶ 68.

The Court rejected the District's local control argument on the ground that a school district cannot simply ignore a statutory mandate. Taken to its extreme, that argument would allow every school district in Colorado to ignore any statewide statutory mandate. *Stanczyk* at ¶ 72. The Court also noted that the existence of the statutory provision allowing school districts to seek waivers of state law set forth in § 22-2-117, C.R.S., (2019), authorizes the State Board of Education to balance local control against stateside educational mandates. Hence, school districts may not deny teachers a right guaranteed by statute without obtaining State Board authorization. *Stanczyk*, ¶ 70.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

A. Summary

The Petition overstates the impact of the Court of Appeals' decision, misperceives the meaning of the statutory language, and provides no factual basis in the record for any significant impact on the constitutional authority of its Board of Education (Board) to control instruction. In addition, while the Petition frames the issue presented as whether a school district may ask or require teachers to

waive portability, there is nothing in the record stating how, when, or what evidence needs to be furnished by teachers requesting portability. Nothing in § 22-63-203.5 requires the Board to hire anyone, whether the applicant does or does not seek portability. Moreover, it is the Board which has the responsibility to control instruction in the District, not unelected District administrators. Human Resources Director Thompson testified that she could not remember when, or even if, she discussed waiver of portability with the Board. CF 389, Deposition pp. 33:18-35:2. There is no Board Policy concerning teachers' ability to waive or obtain portability. CF 387, Deposition pp. 18:20-20:15. Nothing in the record indicates that the Board was ever given the opportunity to hire or not hire Stanczyk.

By contrast to the petitioning District, Denver Public Schools (DPS) has a policy describing how teachers may obtain portability. This policy allows teachers 30 days after they sign their contracts to apply for it. CF 542¹. Nothing in the record indicates that this policy has had a negative impact on local control or teacher effectiveness in DPS.

DISCUSSION

A. The Plain Language of the Statute and Legislative Intent

¹ Stanczyk provided the District Court and Court of Appeals with the link to this policy. The link is: <https://hr.dpsk12.org/wp-content/uploads/sites/37/District-Employment-Handbook-1-2017.pdf>

A court's central task in interpreting a statute is to ascertain and give effect to the intent of the General Assembly. *Jefferson County Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010).

In 2010, the General Assembly enacted SB 191. This Bill substantially changed the manner in which public school districts employed and evaluated their teachers. For example, displaced nonprobationary teachers who do not secure mutual consent positions from school principals within one year or two hiring cycles must be placed on indefinite leave without pay. § 22-63-202 (c.5)(IV), C.R.S. (2019). SB 10-191 also created a uniform, statewide framework for teacher evaluations that is applicable to all school districts in this state. § 22-63-603 (7), C.R.S. (2019). Amongst other components of the statewide system, fifty percent of teacher evaluations were to be measured by what the Bill characterized as their students' academic growth. § 22-9-105.5 (3)(a), C.R.S. (2019).

Portability was not in the original version of SB 10-191. It was added² because the General Assembly decided that a teacher who earned nonprobationary status

² A copy of the proposed amendment is available at: [http://www.leg.state.co.us/CLICS/CLICS2010A/commsumm.nsf/91320994cb8e0b6e8725681d005cb995/40cf87f55d7d799a8725771c00531a1c/\\$FILE/10HseEd0506AttachK.pdf](http://www.leg.state.co.us/CLICS/CLICS2010A/commsumm.nsf/91320994cb8e0b6e8725681d005cb995/40cf87f55d7d799a8725771c00531a1c/$FILE/10HseEd0506AttachK.pdf).

because of her effective performance in one district should be able to port that status to any other district that she might go to. Thus, when what became § 22-63-203.5 was introduced, its sponsor described the purpose of portability as follows:

Representative Scanlan: Thank you. Now we are back—I move.

Representative Murray: Second

Unidentified Speaker: I'm working with her

Representative Scanlan: Thank you

Chairman Merrifield: Representative Scanlan

Representative Scanlan: Thank you

Chairman Merrifield: Representative Scanlan

Representative Scanlan: Thank you Mr. Chair. Alright, this is something that we think is quite exciting. **This is something no other state in the nation does.** We are—in the words of—of someone at the department of education: **we are all in with believing that this effectiveness system is a vision and it's the right thing for Colorado to do in that a teacher who has earned status as an effective teacher by criteria that is recognized across the state therefore has earned their nonprobationary status and that will now be portable with them to any other district that they might go to.**

Chairman Merrifield: Questions on this amendment? Representative Todd.

Representative Nancy Todd: Thank you Mr. Speaker—Mr. Chair—I'm sorry. So does this mean that they will move in to the salary schedule of whatever district they are moving into?

Chairman Merrifield: Representative Scanlan?

Representative Scanlan: Thank you Mr. —No³—thank you Representative Todd. It doesn't translate to salary. Different districts have different ways of calculating how salary—years of experience come across to their salary schedule but **it does give them a nonprobationary status so that they do not have to re-earn that in a new district.** And we think in particular rural districts will find this quite appealing who have trouble attracting experienced teachers often.

³ The “No” at this portion of the transcript is an answer to the question asked by Representative Todd.

Senate Bill 191 (2010) House Education Committee; 5/6/10; JOld Sup Ct 11:36 p.m.–12:37 a.m. CD 19 of 19 (emphasis added).

Thus, as the Court of Appeals recognized, portability is not some gift to be conveyed at management's whim. The plain language of the statute provides that teachers may obtain portability by applying for it. The District in this case effectively said that teachers may not apply. The General Assembly, in enacting a statute, cannot anticipate every subterfuge that may exist to avoid a statutory mandate. The plain language of the statute, which evinces the legislative intent, prohibits the practice at issue in this case.

Even the District's form contract, signed by Stanczyk, provides that applying for portability is a teacher's right.

B. Local Control

The primary purpose of school boards' control of instruction, set forth in Colo. Const. Art. IX, § 15, is to require publicly-elected school board members to take responsibility for significant policy decisions associated with the management of the school district. *Fremont Re-1 Sch. Dist. v. Jacobs*, 737 P.2d 816, 819 (Colo. 1987). In this case, District administration usurped Board authority by imposing a practice depriving teachers of the opportunity to apply for nonprobationary status without Board action. By doing so, administration has evaded the legislative

mandate of § 22-63-203.5, thereby discouraging qualified nonprobationary teachers from applying for teaching jobs with the District.

Moreover, local control is not unlimited. The General Assembly is vested with constitutional authority to establish and maintain a thorough and uniform school system. Colo. Const. Art. IX § 2. The General Assembly has general supervision of the schools of this state. Colo. Const. Art. IX, § 1 (1). When the General Assembly's constitutional authority conflicts with that of local school boards, courts apply a balancing test between the two. *Board of Educ. v. Booth*, 984 P.2d 639, 648 (Colo. 1999).

The state-wide interest in this case is in implementing the evaluation system mandated by SB 10-191, by giving effective teachers the ability to move between school districts without forfeiting nonprobationary status. The District has provided little in the way of a counter-balancing local interest and control. Nothing in § 22-63-203.5 requires school boards to hire teachers seeking portability, or not to hire them. DPS does not even require teachers to apply for portability until after they are hired, *i.e.*, has a policy that is neutral on its face on this subject. School boards' ability to implement reasonable restrictions on portability is not before the Court in this case. The District presented no evidence that the evaluation system of the Thompson School District was any less rigorous

than its own, and, therefore, that Stanczyk was any less deserving of nonprobationary status at the time of hire than a teacher who had obtained nonprobationary status through effective performance within the District itself. Finally, nothing in § 22-63-203.5 prevents a school board from dismissing a teacher exercising her right to portability. The only difference between probationary teachers and nonprobationary teachers is that the contracts of the former may be non-renewed without cause, § 22-63-203(2)(a), and 4, C.R.S. (2019), while, to dismiss the latter, a school board must endure the inconvenience⁴ of affording the teacher a hearing pursuant to the requirement of § 22-63-302, C.R.S. (2019).

Thus, the state interest prevails under *Booth*. While there may be situations where school district administrators may choose to disobey a state statute without first exhausting the waiver provision of § 22-2-117, C.R.S. (2019), this is not one of them.

⁴Amongst other reasons, the dismissal procedure of § 22-63-302 is only an inconvenience because a school board may dismiss a teacher even if the neutral hearing officer, before whom the evidentiary hearing is held, recommends the teacher's retention. § 22-63-302 (9), C.R.S. (2019). The boards' dismissal authority is only constrained by the extremely deferential standard of judicial review of whether its dismissal decision is arbitrary, capricious, or legally impermissible. § 22-63-302 (10)(c), C.R.S. (2019); *Adams Cty. Sch. Dist. No. 50 v. Heimer*, 919 P.2d 786, 791 and fn. 3 (Colo. 1996).

Finally, if § 22-63-203.5 violates local control, the other, more intrusive provisions of SB 10-191 described above also violate local control.

C. Waiver and “Freedom of Contract”

Contrary to the District’s argument, it is the practice at issue, not § 22-63-203.5 as interpreted by the Court of Appeals, that limits freedom of contract. The District has prevented teachers from exercising their right to obtain contracts providing them with portability as a result of this practice. To be effective, a waiver must be voluntary and intentional. *Department of Health v. Donahue*, 690 P.3d 243, 247 (Colo. 1984); *See Bd. of Educ. v Airhart*, 569 S.F. 2nd 422, 428-429 (W.Va. 2002) (applicants did not waive their right to benefits by applying for a reduced contract when they did not have the option of insisting on full benefits). As the Court of Appeals determined, there was nothing voluntary about the alleged waiver in this case.

The cases cited by the District are inapposite. *County of Riverside v. Superior Court*, 42 P.3d 1034 (Cal. 2002), upheld one waiver in an application for a position of public employment as a police officer, and held that another was against public policy. *Riverside* upheld waivers of applicants’ statutory right to view adverse comments in their personnel files, because the waivers were only

temporary (for one year), because the waivers benefited the applicants by expediting the application process, and because of a countervailing public policy embodied in a statute that police officers be of good moral character. *Id.* at 1042-1043. It held that a waiver of the applicant's statutory right to have a background investigation completed before the applicant was hired was unlawful, because that waiver seriously undermined the purpose of the statute allowing police officers to view adverse comments in their personnel files after they were hired, and because of the unequal bargaining power between an applicant for a job and a prospective employer. *Id.* at 1042. In this case, Stanczyk derived no benefit from the compelled waiver. She had no bargaining power, as the District led her to believe that there was no possibility of obtaining a position without the waiver.

Francom Bldg. Corp. v. Fail, 646 P.2d 345, 349 (Colo. 1982) held that waiving a statutory procedural right in the event of an eviction in a commercial lease between two parties with equal bargaining power. *New York Life Ins. Co. V. West*, 82 P.2d 754 (Colo. 1938) involved a double indemnity provision in an insurance contract between two private parties. *Marzec v. Fremont Cty Sch. Dist.*, 349 P.2d 699, 702 (Colo. 1960) recognized that (what was at the time) teacher tenure was a matter to be determined by the General Assembly, which could not be waived (by, in that instance, a school board). In this case, as in *Marzec*, the conditions under

which teachers may obtain nonprobationary status pursuant to § 22-63-203.5 is also a matter for the General Assembly which may not be negated by school district administrators.

CONCLUSION

For the above-stated reasons, Respondents respectfully request that the Petition for Certiorari be denied.

Dated this 20th day of April, 2020.

Respectfully submitted,

/s/ Charles F. Kaiser

Charles F. Kaiser

Rory M. Herington

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2020, a true and correct copy of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI was electronically filed with service requested as follows:

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