THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

C.A. No.: 2019-CP-40-04931
Appellate Case No. 2019 - 001624

Nancy Miramonti,

Respondent,

v.

Richland County School District One, a body politic and corporate; and the Board of Commissioners of Richland County School District One,

Appellants.

FINAL BRIEF OF APPELLANT

Eugene H. Matthews, S.C. Bar No. 10193
RICHARDSON PLOWDEN & ROBINSON, P.A.
Post Office Drawer 7788
Columbia, South Carolina 29202
T: (803) 771-4400
F: (803) 779-0016
E-mail: gmatthews@RichardsonPlowden.com

Kenneth A. Davis, S.C. Bar No. 66416
Charles J. Boykin, S.C. Bar No. 65149
BOYKIN & DAVIS, LLC
220 Stoneridge Drive, Suite 100
Columbia, South Carolina 29210
T: (803) 254-0707
E-mail: cjboykin@boykinlawsc.com
E-mail: kdavis@boykinlawsc.com

COUNSEL FOR APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. The Court erred in finding Appellants violated FOIA when entering Executive Session to discuss the Complaint Letter because it was permissible for appellants to receive legal advice without pending litigation.

II. The Court erred in concluding that Appellants' took action in Executive Session because there is no evidence in the record to support this conclusion.

III. The Court's decision to award equitable relief should be reversed because it is effectively a "Writ of Mandamus."

IV. In the alternative, to the extent the Court made factual determinations, the case should be remanded as the action is at "Law," and factual disputes should be determined by a jury.

TABLE OF AUTHORITIES

STATUTES

STATEMENT OF THE CASE

On September 4, 2019, Respondent commenced this action by filing a Summons and Complaint, against Appellants, Richland County School District One (hereinafter "the District") and the Richland County School District One Board of Commissioners (hereinafter "the Board). In the Complaint, Respondent alleged two (2) causes of action against the Board and District.

- The first claim sought (1) a Declaratory Judgment that the Board violated the South Carolina Freedom of Information Act (hereinafter referenced as "FOIA") by discussing a citizen complaint letter in executive session, and (2) an injunction from "further violations of the open meeting requirements" of FOIA.

- The second claim sought (a) a Declaratory Judgment that the Board violated FOIA because it "took action in issuing the response letter based on those same discussions in executive session," and (2) an order "requiring the Richland One [*sic*] and the School Board to adhere to the lawful requirements for holding open meetings."

- Respondent also sought attorney's fees and costs of bringing the action.

(Rec. on App., p. 90, ¶¶ 17-26).

On September 13, 2019, the Court conducted a hearing on this matter pursuant to §30-4-100(A).[1] (Rec. on App., p. 121-161).

[1] S.C. Code Ann. § 30-4-100(A) provides as follows: "A citizen of the State may apply to the circuit court for a declaratory judgment, injunctive relief, or both, to enforce the provisions of this chapter in appropriate cases if the application is made no later than one year after the date of the alleged violation or one year after a public vote in public session, whichever comes later. Upon the filing of the request for declaratory judgment or injunctive relief related to provisions of this chapter, the chief administrative judge of the circuit court must schedule an initial hearing within ten days of the service on all parties. If the hearing court is unable to make a final ruling at the initial hearing, the court shall establish a scheduling order to conclude actions brought pursuant to this chapter within six months of initial filing. The court may extend this time period upon a showing of good cause. The court may order equitable relief as it considers appropriate, and a violation of this chapter must be considered to be an irreparable injury for which no adequate remedy at law exists."

On September 18, 2019, the Court issued an Order granting relief to Respondent. Specifically, the Order found as follows:

- The Court declared that the Appellants' "going into executive session to discuss the Letter" was improper and in violation of FOIA, and enjoined them from further such violations.

- The Court declared that the conduct of the Appellants "in taking action on the Letter in executive session" was invalid and in violation of FOIA, and enjoined them from further such violations.

- The Court ordered the Appellants to "consider the Letter complaint at their next regular meeting or special meeting and dispose of the matter according to their best judgment, in a public setting."

- The Court ordered the Appellants to pay Respondent's attorney's fees of four thousand two hundred dollars ($4,200.00) and costs of three hundred sixty-six dollars and eighty-two cents ($366.82).

(Rec. on App., p 12-13).

On September 20, 2019, Appellants filed a Motion to Alter and/or Amend the Court's Order. The motion included an affidavit authored by the District's General Counsel, Ms. Susan Williams, which explained in greater detail the reasons the legal advice was rendered to the Board in executive session on August 13, 2019. (Rec. on App., p 20-31).

On September 23, 2019, Respondent submitted a response to Appellants' Motion to Alter and/or Amend. (Rec. on App., p 16-19) Appellants responded with a letter to the Court. (Rec. on App., p. 15).

On September 24, 2019, the Court denied Appellants' Motion to Alter and/or Amend. (Rec. on App., p. 1). On the same date, Appellants served Respondents with the Notice of Appeal.

STATEMENT OF THE FACTS

This case concerns a "complaint letter" filed with the District on August 7, 2019, by a third party, not a party to this action, over the District's application of its transfer policy regarding certain English-as-a-Second-Language ("ESOL") students. The third party submitted the complaint letter pursuant to Board Policy *KE*, which provides that the Board "will consider the complaint and dispose of the matter according to its best judgment." The letter specifically requested that the Board provide exceptions to the District's transfer policy in the event that students participating in the District's ESOL program wished to remain at their prior school rather than attend another school that offered ESOL services.

On August 13, 2019, the Board held a regularly-scheduled meeting at which the complaint letter was discussed in both executive session and the public session. The Board's minutes reflect that the Board went into executive session and was provided with legal advice regarding the letter. (Rec. on App., pp. 55-57). Although the letter did not include a threat or suggestion of formal legal action, it explicitly requested changes to the District's existing policy on transfers. For that reason, the Board received legal counsel from its General Counsel, Ms. Susan Williams, in executive session concerning potential legal issues implicated by the request. Specifically, the Board sought legal advice from Ms. Williams on the following matters:

- The Board received legal advice concerning the legality of a District agent requesting that ESOL students waive their rights to ESOL services in order to remain at A.C. Moore Elementary School, and how these actions relate legally to the complaint letter and the transfer policy.

- The Board received legal advice regarding the ways in which a response to the complaint letter would implicate student privacy, including how the requirements of state and federal statutory protections would impact the response.

(Rec. on App., p. 31).

During executive session, the Board took no actions, took no votes, and reached no decisions concerning its response to the letter in executive session. The only action the Board took in executive session was to come out of executive session.

Once the Board returned to open session, Board Chairman Devine indicated that (1) the Board members discussed the letter in executive session, and (2) he would send a response letter to the third party. (Rec. on App., pp. 55-57). After the statement by Chairman Devine, Commissioner King asked if District Policy *KE* required the Board to take a vote to dispose of the complaint letter because there was a discussion in executive session, but they could not vote in executive session. In response, Chairman Devine stated that the policy does not require a vote by the Board. Although Commissioner King voiced concerns over Chairman Devine's proposed course of action, and asked for clarification on the policy, she did not raise a point of order or move to act otherwise, such as request a vote.

On August 14, 2019, the District responded to the complaint letter. In part, the response referred the third party to answers he had received earlier from a member of the District administrative staff and Superintendent Witherspoon.

STANDARD OF REVIEW

The standard of review in a declaratory action is determined by the underlying issues. *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 398, 728 S.E.2d 477, 479 (2012) (citing *Felts v. Richland Cnty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). The interpretation of a statute is a question of law. *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 128, 750 S.E.2d 61, 63 (2013) (citing *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011)). This Court may interpret statutes, and therefore resolve this case, "without any deference to the court below." *Brock v. Town of Mount Pleasant*, 415 S.C. 625, 628 (2016). (citing *CFRE*, 395 S.C. at 74, 716 S.E.2d at 881).

ARGUMENT

I. THE COURT ERRED IN FINDING APPELLANTS VIOLATED FOIA WHEN ENTERING EXECUTIVE SESSION TO DISCUSS THE COMPLAINT LETTER BECAUSE IT WAS PERMISSIBLE FOR APPELLANTS TO RECEIVE LEGAL ADVICE WITHOUT PENDING LITIGATION.

S.C. Code Ann. § 30-4-70(a) provides that a public body may have a meeting closed to the public, i.e. an executive session, for specific reasons, including the receipt of legal advice. S.C. Code Ann. § 30-4-70(a)(2). The FOIA statute also provides as follows concerning the conduct of affairs in executive session:

> Before going into executive session the public agency shall vote in public on the question and when the vote is favorable, the presiding officer shall announce the specific purpose of the executive session. As used in this subsection, "specific purpose" means a description of the matter to be discussed as identified in items (1) through (5) of subsection (a) of this section. However, when the executive session is held pursuant to Sections 30-4-70(a)(1) or 30-4-70(a)(5), the identity of the individual or entity being discussed is not required to be disclosed to satisfy the requirement that the specific purpose of the executive session be stated. No action may be taken in executive session except to (a) adjourn or (b) return to public session. The members of a public body may not commit the public body to a course of action by a polling of members in executive session.

S.C. Code Ann. § 30-4-70(b).

It is perfectly permissible under this exemption for the public body to receive legal advice even where it is not actively involved in litigation. "The exemption does not require that a public body actually be engaged in litigation, only that legal advice be rendered." *Herald Pub. Co. v. Barnwell*, 291 S.C. 4, 10, 351 S.E.2d 878, 882 (S.C. App. 1986)

In the present case, the third party complaint letter requested that the Appellants provide ESOL students with an exception to District Policy *JFABC* Student Assignments and Transfers, allowing these students who were zoned to attend a different school for the 2019-2020 school year to remain at the school they attended during the previous school year. Although this letter did not threaten legal action and legal action was not pending, the letter sought a change to the transfer

policy, and a waiver of student rights to ESOL services in order to remain at A.C. Moore Elementary School. Understandably, the Board went into executive session to receive legal advice on the numerous legal issues the letter raised.

At the hearing on the matter, the Appellants articulated the legal justification for receiving legal advice regarding the complaint letter, and the Court agreed that there was a justifiable need for legal advice. (Rec. on App., pp. 147-148, 156-157). Nevertheless, the Court's Order concluded that Appellants' rational for using the FOIA legal advice exception was "manufactured," despite the Court's acknowledgement in the hearing on the matter that there was a legal basis and justification for the Board to receive legal advice regarding the complaint letter. Instead, the court noted that "none of the statutes which could potentially be impacted by a change in the transfer policy were cited in the response letter which undermines the presented argument of the [Appellants]." Notably, FOIA does not require that a governmental body subsequently disclose the legal advice it received in executive session, or that the advice received be readily apparent in any subsequent communications. Rather, FOIA requires that the governing body meet its statutory requirements, a standard which the Appellants meet in this case, as reflected in the meeting minutes.

For these reasons, this Court should reverse the lower court's decision that Appellants violated FOIA by discussing the letter in executive session because the record reflects the Board lawfully received legal advice regarding the complaint letter during executive session.

II. THE COURT ERRED IN CONCLUDING THAT APPELLANTS TOOK ACTION IN EXECUTIVE SESSION BECAUSE THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT THIS CONCLUSION.

S.C. Code Ann. §30-4-70(b) provides in part that a public body may not take action except to adjourn or return to public session or may not commit the public body to a course of action by polling its member while in executive session. The record reflects that the Board engaged in a discussion during open session in a manner that supports the conclusion that it did not take any action, formal or otherwise, during executive session, other than voting to come out of executive session.

Specifically, minutes from the August 13, 2019 meeting establish that, while the Board had a discussion regarding the complaint letter in executive session, they did not take any action in executive session regarding the response to the complaint. During open session, Ms. King, who was also present in executive session, stated, "We can't vote in executive session...There has been a discussion, but there needs to be action taken." (Rec. on App., pp. 55-57).

These proceedings, conducted in open session, indicate that (1) the letter was discussed in executive session, and (2) there was no action taken on the letter in executive session. As to the discussion and action taken in open session, Mr. Devine and Ms. King may have disagreed over whether the Board must formally vote on how to respond to the complaint letter, but that matter was not subject for the Court's review under FOIA. The Board Chairman's decision to dispose of the matter by responding with a letter under his signature without any vote on the matter by the full Board may be appropriate (or not) under the Board's internal procedures, but that matter is not subject to review under FOIA. In any event, because the matter was discussed in open session, and decided in open session, the Appellants did not violate the "open meeting" provisions of FOIA.

Nevertheless, in its Order, the Court concluded that Appellants violated FOIA because "to dispose of the matter requires an action by the Board. Action was taken in executive session when it could not be." (Rec. on App., p 11). The Court's conclusion appears to be in direct contradiction to the evidence provided in the record. As set forth above, the meeting minutes reflect a discussion during open session in which Ms. King asked for an explanation of Board Policy *KE*, which states, "the Board shall consider the complaint and dispose of the matter at the next regular meeting." (Rec. on App, p. 55). Ms. King specifically asked for an explanation of how to dispose of the complaint and went further to ask if there had to be a vote by the Board to take action, stating that the Board merely discussed the matter in executive session. (Rec. on App., p. 55). The Court erred in making the determination that there was a violation of FOIA by making a subjective determination that to dispose of the complaint required the Board to take an unlawful act in executive session.

For these reasons, the decision of the Court should be reversed.

III. THE COURT'S DECISION TO AWARD EQUITABLE RELIEF SHOULD BE REVERSED BECAUSE IT IS EFFECTIVELY A "WRIT OF MANDAMUS."

In its decision, the Court ordered equitable relief based on its finding that the Appellants violated FOIA. Specifically, the Court ordered the Appellants to "consider the Letter complaint at their next regular meeting or special meeting and dispose of the matter according to their best judgment, in a public setting." Because the underlying finding that the Appellants violated FOIA should be reversed, the equitable relief ordered by the Court is inappropriate.

Further, the equitable relief ordered by the Court is the equivalent of a Writ of Mandamus, which requires different findings from those set forth in the Order.

A Writ of Mandamus is the highest judicial writ and is issued only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy. *Ex parte Littlefield,* 343 S.C. 212, 540 S.E.2d 81 (2000); *Willimon v. Greenville,* 243 S.C. 82, 132 S.E.2d 169 (1963). It is a coercive writ that orders a public official to perform a **ministerial** duty. *Plum Creek Dev. Co. v. City of Conway,* 334 S.C. 30, 512 S.E.2d 106 (1999) (emphasis added). Mandamus will be issued only to compel a public official to perform a mandatory legal duty. *Redmond v. Lexington County School Dist. No. Four,* 314 S.C. 431, 445 S.E.2d 441 (1994).

To obtain a writ of mandamus requiring the performance of an act, a petitioner must show: (1) a duty to perform the act; (2) the ministerial nature of the act; (3) the petitioner's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. *Sanford v. S. Carolina State Ethics Comm'n,* 385 S.C. 483, 494, 685 S.E.2d 600, 606, *opinion clarified,* 386 S.C. 274, 688 S.E.2d 120 (2009). When the legal right is doubtful, or the performance of duty rests in discretion, or when there is another adequate remedy, a writ of mandamus cannot rightfully be issued. *City of Rock Hill v. Thompson*; 349 S.C. 197, 200, 563 S.E.2d 101, 102 (2002) (emphasis added).

Generally, courts issue writs of mandamus to legislative bodies[2] only "in those extremely limited circumstances in which there is a clear constitutional or statutory mandate that the legislative body take some specified action." *See, e.g.*, *McMehan v. York County Council*, 281 S.C. 249, 315 S.E.2d 127 (1984); *Buchanan v. State Treasurer*, 68 S.C. 411, 47 S.E. 683 (1903); *Culbertson v. Blatt*, 194 S.C. 105 S.E.2d 218 (1940); *Attorney General Op.*, 1988 WL 485355, at *4 (S.C.A.G. Dec. 30, 1988). A School Board sits in a legislative capacity with respect to the making and changing of Board Policy. *See Cole v. Buchanan Cty. Sch. Bd.*, 504 F. Supp. 2d 81, 84 (W.D. Va. 2007), *rev'd on other grounds*, 328 F. App'x 204 (4th Cir. 2009).

Here, the issue concerns a policy of the Board that permits the Board to dispose of matters "according to its best judgment." At very least, and by its own terms, the performance of duty rests in the discretion of the Board. Generally, a court will not disturb decisions within the discretion of a school board unless there is clear evidence of corruption, bad faith, or a clear abuse of power. *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005). Review of school board decisions by the Court is limited to allow the Board the discretion necessary to carry out the duties imposed upon them. *Id.* For this reason alone, a Writ of Mandamus is not appropriate.

Further, there is no "clear constitutional or statutory mandate that the legislative body take some specified action" at issue here. Therefore, the Order's inclusion of a directive to the Board to "consider the Letter complaint at their next regular meeting or special meeting" appears to have been in error, as it does not meet the standards required for issuance of the Writ of Mandamus.

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[2] A School Board sits in a legislative capacity with respect to the making and changing of Board Policy. *Cole v. Buchanan Cty. Sch. Bd.*, 504 F. Supp. 2d 81, 84 (W.D. Va. 2007), *rev'd on other grounds*, 328 F. App'x 204 (4th Cir. 2009).

IV. IN THE ALTERNATIVE, TO THE EXTENT THE COURT MADE FACTUAL DETERMINATIONS, THE CASE SHOULD BE REMANDED AS THE ACTION IS AT "LAW," AND FACTUAL DISPUTES SHOULD BE DETERMINED BY A JURY.

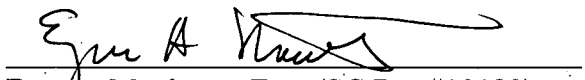
A declaratory judgment action under the FOIA to determine whether certain information should be disclosed is an action at law. *Campbell v. Marion Cty. Hosp. Dist.*, 354 S.C. 274, 280, 580 S.E.2d 163, 165 (S.C. App. 2003) (emphasis added). Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable. There is no right to trial by jury in an equitable action, but there is for an action at law. *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997).

In this matter, the Court appeared to resolve genuine issues of material fact in favor of the Respondent. This is inappropriate. Because this action is an action at law, not equity, these issues of material fact appear to require resolution by a jury. For this reason alone, the Court's Order should be remanded for further proceedings consistent with this principle.

CONCLUSION

For the forgoing reasons, this Court should reverse the lower court's decision, or in the alternative, remand the case for further proceedings consistent with this Court's directives.

Respectfully Submitted,



Eugene Matthews, Esq. (SC Bar #10193)
RICHARDSON PLOWDEN & ROBINSON, P.A.
Post Office Box Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
gmatthews@richardsonplowden.com

Kenneth A. Davis, Esq. (SC Bar #66416)
Charles J. Boykin, Esq. (SC Bar #65149)
BOYKIN & DAVIS, LLC
220 Stoneridge Drive, Suite 100
Columbia, South Carolina 29210
(803) 254-0707
cjboykin@boykinlawsc.com
kdavis@boykinlawsc.com

Attorneys for Appellants

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief and Final Reply Brief comply with Rule 211(b), SCACR.

Dated this 5th day of February, 2020.

RICHARDSON PLOWDEN & ROBINSON, P.A.

Eugene H. Matthews
Post Office Drawer 7788
Columbia, South Carolina 29202
T: (803) 771-4400
F: (803) 779-0016
Email: gmatthews@RichardsonPlowden.com

COUNSEL FOR APPELLANTS