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Tennessee School Law Quarterly

A TSBA Publication for School Board Attorneys, Board Members, and Administrators

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Child Evangelism Fellowship of Ohio, Inc. v. Cleveland Metro Sch. Dist., Sixth Circuit Court of Appeals, March 19, 2015

In this First Amendment case, the plaintiff Child Evangelism Fellowship of Ohio, Inc. ("CEF") appealed the denial of its motion for a preliminary injunction against defendant Cleveland Metropolitan School District ("the District"). This controversy arose out of the District's refusal to waive fees it assessed to CEF for use of school's facilities. The District made its facilities available to outside groups through its Community Use Policy. The policy required a permit for any non-district activities and stated that the District would impose a "reasonable fee" for use of the facilities. CEF obtained the permit and sent a letter to the District's Board of Education requesting a fee waiver. The District's board denied the request and sent CEF an invoice for the facilities use. After learning that the Boy Scouts used the District's facilities without paying a monetary fee, CEF renewed its request for a fee waiver which the District denied.

CEF sued and alleged that the District had an unwritten policy allowing school principals to waive facilities fees at their discretion, and that the District's preferential fee waiver for the Boy Scouts amounted to a violation of the First and Fourteenth Amendments. The District denied the allegation and explained that "in limited circumstances [the District] has agreed to accept goods or services as in-kind payment of the Permit Fee, when requested by the group." The District said it had agreed to such an arrangement with the Boy Scouts. It produced a letter to the Scouts memorializing a "satisfactory accord based upon an exchange of in-kind services." The District asserted that it does not consider the applicant organization's viewpoint when evaluating a proposal for an in-kind arrangement. Finally, the District claimed that CEF never proposed an in-kind arrangement in lieu of a monetary fee. Instead, it simply asked the District to waive the fee altogether.

The district court denied CEF's motion for a preliminary injunction. The court found that CEF could not demonstrate a likelihood of success on the merits because the record lacked sufficient evidence to show that "a fee-waiver policy exists, let alone that [the District] operates it in a discriminatory matter."

The parties agreed that CEF engaged in protected activity and that the District had created a limited public forum. On appeal, CEF renewed its argument that the District maintained an unwritten, discretionary fee-waiver policy that administrators had applied in a discriminatory manner. CEF argued that the District's actions constituted viewpoint discrimination, content discrimination, and a violation of the Equal Protection Clause. CEF asserted that the District's refusal to waive CEF's fees while not charging the Boy Scouts amounted to viewpoint discrimination.

The Court of Appeals found that CEF's evidence in support of its request for injunctive relief did not adequately show that the District had a fee-waiver policy. The court concluded that the record at this stage showed that the Scouts provided consideration in excess of their assessed facilities fees, strengthening the District's argument that its in-kind arrangements do not subsidize speech at all, let alone selectively, and affirmed the district court.

http://www.ca6.uscourts.gov/opinions.pdf/15a0220n-06.pdf

Michael S. Ward d/b/a Feredonna Commc'n v. Knox Cnty. Bd. of Educ., Sixth Circuit Court of Appeals, May 11, 2015

Since 1989, Knox County children have sold coupon books as part of an annual fundraising campaign for their county's schools. Michael Scott Ward and Feredonna Communications (collectively, Feredonna) won the contract to print Knox County's coupon books in 1994. The relationship between Feredonna and Knox County lasted until 2009, when Knox County switched to another, lower bidder.

In 2011, Feredonna filed suit against both the Knox County Board of Education and Knox County, alleging that Knox County's coupon books infringed on the trademark, trade dress, and copyright of Feredonna's coupon books. The district court denied Feredonna's requests for a temporary restraining order and a preliminary injunction, and eventually granted Knox County's motion for summary judgment.

The Court of Appeals affirmed the district court by concluding that the School Coupon mark associated with the book was not entitled to trademark protection. It then opined that the plaintiff's trade dress argument failed because the plaintiff could not establish that the disputed trade dress had acquired secondary meaning. The Court also affirmed the district court's summary judgment on copyright infringement by stating that Feredonna did nothing more than change the style and format of the language submitted by merchants, which the Sixth Circuit has held as not enough to reflect the requisite originality.

http://www.ca6.uscourts.gov/opinions.pdf/15a0352n-06.pdf

Stephen P. Geller v. Henry Cnty. Bd. of Educ. Sixth Circuit Court of Appeals, June 1, 2015

Stephen Geller began working for Henry County Schools in 1990. Following the 2011–2012 school year, he was removed from the assistant principal position and transferred to a teaching position. Geller was 64 years of age at the time of this demotion, and claimed that his removal was based on age discrimination.

In 2009, the State of Tennessee adopted new rules for the qualification of administrative positions. Beginning in September of that year, personnel with more than fifty percent of their responsibilities involved in instructional leadership were required to be licensed administrators or enrolled in the appropriate licensing program. Geller was aware of the new requirement, but chose not to apply. In the spring of 2012, Geller submitted an application for an upgraded license, despite the fact that he had never earned a license. The State's licensing authority notified Geller that his application was denied. The Director of Schools chose not waive the requirement, but attempted to find Geller a suitable position that he could

fill for the coming year. During a meeting, the Director commented on Geller's plans for retirement by noting that it was a good thing not to wait too late in life to enjoy oneself, as the Director's father had done. It was undisputed that Geller could have obtained the needed license prior to the commencement of the new school year.

The newly vacant assistant principal position went to Renae Lassiter. She was 39 years old at the time. Geller was offered a teaching position and signed an employment contract accepting his new position. At the bottom of the page he wrote, "I believe I was wrongfully removed as Assistant Principal at Henry County High School and am signing this contract only as a matter of financial necessity." Prior to receiving Geller's executed contract that included this message, the Board was unaware that Geller believed his reassignment to be at all wrongful. During two subsequent meetings Geller never suggested that his removal was based on age.

Geller submitted a formal complaint to the Board alleging that he was illegally transferred as the result of his age. Geller believed he was being treated in a discriminatory manner because his transfer was inconsistent with his years of experience and his favorable job performance history, and because he was replaced by a woman with very little experience who was 25 years his junior. The complaint was dismissed after the administrative reviewers found no evidence of discrimination and determined that Geller's transfer was based on his failure to maintain a license. Geller unsuccessfully appealed.

Geller then brought a suit in district court. The Board moved for summary judgment, based on the undisputed facts, and also indicating that a number of the school system's administrators, including the Director, were in the same protected age class as Geller and had not been subject to any adverse employment actions, because they had earned an administrator's license. The district court granted the Board's motion and Geller appealed.

At the Court of Appeals, Geller did not argue that he had direct evidence of age discrimination so the Court analyzed the evidence under the McDonnell Douglass burden-shifting framework. The parties disputed whether Geller demonstrated a prima facie case of age discrimination. The Court noted that the third element was at issue because Geller could not claim to be qualified since he was required to maintain an administrator's license and failed to do so. The Court stated that nearly all of the evidence supported the conclusion that Geller was removed from his post based solely on his failure to apply for and maintain an administrator's license.

The Court also opined that Geller was responsible for keeping apprised of the licensing requirements and for maintaining the appropriate license. The Director had engaged Geller to see if he could or would become licensed, and made reasonable attempts to accommodate Geller. The Court agreed that given the facts, no reasonable jury to conclude that Geller was discriminated against on account of his age, let alone that his age was the but-for cause of the adverse employment action.

http://www.ca6.uscourts.gov/opinions.pdf/15a0392n-06.pdf

Steve B. Smith, David Kucera, and Vicky Forgety v. Jefferson Cnty. Bd. of Sch. Comm'r, Sixth Circuit Court of Appeals, June 11, 2015

In this action, two alternative school teachers brought a suit against the district, asserting a violation of the Establishment Clause after the district's Board voted to eliminate the district ran alternative school program and contract with a local religious school, Kingswood, to provide alternative-school services. The Sixth Ciruit had previously ruled that the plaintiff teachers had standing, in their capacity as municipal taxpayers only, to raise the Establishment Clause claim.

Kingswood had two separate programs: the day program and the residential program. The residential program served troubled, neglected, and abused children and maintained a religious character and included deliberate religious instruction. The day program, however, did not feature deliberate religious instruction and was the program that Jefferson County students attended. Students were not entirely insulated from the schools religious environment, however, since forms,

report cards, school letters, official documents and the school's website contained scriptures from the Bible. In July 2013, the district court issued its findings and held that the Board had violated the Establishment Clause. The court enjoined the Board "from contracting with Kingswood or another religious entity for the operation of its alternative school." It also awarded plaintiffs damages for lost wages.

On appeal, The Sixth Circuit weaved together the Lemon Test and Justice O'Connor's Endorsement Analysis from *Lynch v. Donnelly*, which the Court viewed as a clarification of the Lemon Test. The Court of Appeals agreed that the Board had a secular purpose in contracting with Kingswood. The Court then found the district court's conclusion that the Kingswood atmosphere was coercive to be clearly erroneous. Students were not coerced into taking part in religious activity of any kind, and classroom activities did not include religious instruction, prayers, or moments of reflective silence. The Court of Appeals then looked at the case from the perspective of a reasonable observer and concluded that the relationship between the Board and Kingswood could not be interpreted as a governmental endorsement of religion. Parents and students encountered only de minimis religious references in Kingswood's day program. The Board chose a high-performing, state-certified alternative school on short notice to fulfill its obligation. The move saved significant taxpayer money and ensured that the alternative students received a sound education over the course of the seven-year arrangement. The mere status of Kingswood as a religious organization did not itself give rise to an endorsement. As a result, the Court reversed the district court and vacated the injunction and damages award.

http://www.ca6.uscourts.gov/opinions.pdf/15a0119p-06.pdf

Fry v. Napoleon Cmty. Sch., Sixth Circuit Court of Appeals, June 12, 2015

Does a student's wish for greater independence qualify as an educational goal? According to a recent 6th Circuit opinion yes. The Court held that issues relating to the presence of the student's service dog were crucially linked to her education.

The Court ruled that the parents could not pursue Section 504 or Title II claims against a former school district until they exhausted their administrative remedies under IDEA. The majority noted that the exhaustion requirement applies if the IDEA's Administrative procedures can provide some form of relief or if the claims relate to the provision of FAPE.

The parents were disputing the appropriateness of the student's IDEA services…specifically, they argued the dog's presence allowed the student to be more independent so that she would not have to rely on a one-to-one aide for tasks such as using the toilet and retrieving dropped items. They also maintained that the student needed the dog in school so that she could form a stronger bond with the animal and feel more confident.

The court reasoned that the parents' allegations brought the claim squarely within the IDEA's scope. "Developing a bond with the dog that allows the student to function more independently outside the classroom is an educational goal just as learning to read Braille or learning to operate an automated wheelchair would be." The Court affirmed the district court's ruling that the parents' failure to exhaust their administrative remedies required dismissal of their Section 504 and Title II claims. The panel was split on the decision 2/1.

http://www.ca6.uscourts.gov/opinions.pdf/15a0121p-06.pdf

Hamilton Cnty. Educ. Ass'n v. Hamilton Cnty. Bd. of Educ., U.S. District Court, Eastern Dist. of Tenn. at Chattanooga, June 9, 2015

What does "dominate, interfere or assist in the administration of any professional employee organization" or "interfere with, restrain, or coerce employees in the exercise of rights guaranteed in § 49-5-603" mean?

These questions were at the heart of a complaint filed by the Hamilton County Education Association (HCEA) against the Hamilton County Board of Education (HCBOE) and recently decided by the U. S. District Court, Eastern District of Tennessee at Chattanooga.

During the final year of the last EPNA contract with HCEA, there was a concerted effort by the Association to convince principals to continue their membership even though principals and other administrators would no longer be a part of the "bargaining unit" for the purposes of the Professional Educators Collaborative Conferencing Act (PECCA), which replaced the EPNA.

When informed of this, Assistant Superintendent for Human Resources Stacy Stewart wrote a letter to Association President Sandra Hughes and stated the following:

- that the Association could not represent principals or count them among membership totals for the purposes of PECCA
- that she was concerned regarding other statements made by Association representatives at their September 17 meeting that she worried "could be construed as intimidating" specifically referring to Association claims that, without the Association, teachers could be subjected to ten hour workdays and 100+ page code of conduct documents and could lose medical and retirement benefits
- she referenced pejorative comments made regarding a competing professional organization; and
- she closed the letter by citing to the PECCA prohibition on professional organizations attempting to coerce employees. Stewart stated that continuing this conduct would "either result in an official request for a retraction of such statements or in clarification/correction of these statements by the district" (emphasis added).

Based on the letter, HCEA filed the complaint alleging unlawful acts under both EPNA and PECCA as well as a violation of the Association's First Amendment rights. HCBOE responded by arguing that there was no violation of state or federal law and pointed to its own right in TCA 49-6-606(a)(5) to "express any views of opinions on the subject of employer-employee relations; provided however, that such expression shall contain no threat of reprimand, discharge or promise of benefits."

After pointing out the obvious flaws in the Association's arguments the Court found the letter did not violate any provisions of the EPNA or PECCA because if falls squarely within the protective space afforded to the Board in the law referenced in the previous paragraph. Additionally the Court found that the letter did not burden the Association's right to expressive Association and found for the district on the First Amendment violation claim granting summary judgment to the district on both claims.

(This decision was emailed to the TCSBA listserv on Wednesday June 10).

Rogelynn Emory v. Memphis City Sch. Bd. of Educ., now known as Shelby Cnty. Bd. of Educ., Tennessee Court of Appeals, April 29, 2015

This case was an appeal brought under the Tennessee Teacher Tenure Act in effect during 2005 and 2006 when the events in question occurred. As a tenured teacher, the plaintiff was employed by the Memphis City Board of Education. In 2005, the principal of Central High School noted that the plaintiff did not appear to have control of her students and demonstrated low levels of teaching. As a result, the principal recommended, and the superintendent agreed, that the plaintiff should be terminated. In response to her suspension letter, the plaintiff requested a hearing before the Board. The Board acknowledged receipt of the letter on November 11, 2005 but failed to hold a hearing on the charges until November 1, 2006 even though the law required a hearing within 30 days after the demand was made. The Board terminated the plaintiff on November 13, 2006.

The plaintiff timely appealed to the chancery court seeking a reversal of the Board's decision, but no action was taken by the Board until 2011 after the plaintiff filed a motion for default judgment. The trial court held that since the delay did not affect the outcome of the hearing, the Board's failure to comply with the Tenure Act was harmless and the teacher was not entitled to relief. The Court of Appeals reversed the trial court and awarded back pay for the additional days the plaintiff was suspended without pay after determining that the thirty day hearing requirement was directory in nature. The Court then concluded that since the statute was a directive, the Board's failure to comply did not void the original termination.

http://www.tncourts.gov/sites/default/files/emoryrogelynnopn.pdf

Pamela Barkley, et al. v. Shelby Cnty. Bd. of Educ., Tennessee Court of Appeals, March 18, 2015

This case was brought under the Tennessee Governmental Tort Liability Act to recover for injuries sustained in a slip and fall at a school operated by the Shelby County Board of Education. The plaintiff in the case was Pamela Barkley, the grandmother of two children who attended Riverdale Elementary School in Memphis. Ms. Barkley fell in a hallway during the school's Grandparent's Day event. The trial court held the school board 60% liable and plaintiff 40% liable. The Board of Education appealed the determination that it was negligent, that its immunity was removed, and that the plaintiff was less than 50% at fault for her injury.

The Court of Appeals first set forth the general rule of governmental immunity: "Except as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary." The Court then turned to a few specific findings of fact made by the trial court:

(1) To reach a trash can, Plaintiff walked past a hand washing station that was in the hallway outside the boys' restroom.
(2) Barkley was wearing "crocs" when she slipped and fell in water near the hand washing station.
(3) Syndi [sic] Whitaker also stated that she saw water in the area by the boy's hand washing station and that people had tracked through it. She testified that there is soap available at the hand washing station.
(4) Barkley slipped and fell which resulted in her suffering a hip dislocation and required medical treatment and physical therapy.

The Court noted that the evidence was conflicting, particularly with respect to whether Ms. Barkley fell on water which was on the floor, or whether the shoes she was wearing caused her to fall and spill a cup she had in her hand. The Court believed that there was no evidence to support a finding that the Board had actual notice of water on the floor sufficient either to remove the board's immunity or to otherwise establish liability. It stated that the plaintiff presented no proof as to the length of time the water had been present or any other facts upon which to conclude that the Board had constructive notice of the specific condition. The Court stated that general knowledge of such a condition does not constitute constructive knowledge of a specific condition. As a result, there was no basis upon which to hold the School Board liable.

http://www.tncourts.gov/sites/default/files/barkleypamelaopn.pdf

Rutherford Wrestling Club, Inc. v. Robert Arnold, et al., Tennessee Court of Appeals, April 30, 2015

In 1995, a member of the Sheriff's Office, Mr. Kennedy, established the Sheriff's Athletic Fellowship and Enrichment (S.A.F.E.) program. The program was very successful and in 1998 Mr. Kennedy began a wrestling program under the S.A.F.E. program. As the size of the program continued to grow, Mr. Kennedy in his capacity as a member of the Sheriff's department, applied for and received a federal grant to purchase wrestling equipment and insurance. By 2005, the program's current facilities could not longer support the amount of participants so Mr. Kennedy sought permission to construct a building on school property. The Board approved the request made from the "Rutherford County Sheriff's Department Wrestling Club", which was funded through donations and funds from the Sheriff's Office. The club also received 501(c)(3) status from the IRS.

In 2010, Mr. Kennedy resigned from the Sheriff's Department. After his resignation, the Sheriff removed the equipment from the building. The Board of Education required the club to submit a Use of Facilities Form since it was no longer associated with Rutherford County. When Mr. Kennedy refused, the Director of Schools denied the club access.

The club filed suit on a number of charges and the trial court ultimately dismissed all of the claims, concluding that the Board of Education owned the building and the Sheriff's Office owned the contents. The Court of Appeals affirmed the trial court, finding that:

(1) the building was constructed on behalf of the S.A.F.E. program, not the wrestling club;
(2) the wrestling club was acting as a booster-club-type organization and the building was donated to the school system with title vesting in the Board of Education pursuant to Tenn. Code Ann. 49-6-2006; and
(3) the personal property was bought under the auspices of the S.A.F.E. program which was administered by the Sheriff's Department.

http://www.tncourts.gov/sites/default/files/rutherfordwrestlingclub.opn_.pdf

Attorney General Opinions

(Below you will find the questions and opinions issued by the office of the Attorney General. For a more thorough analysis, click on the link following the opinion.)

Attorney General Opinion No. 15-18
Public Employer's Amendment of Retirement Plan Affecting Vested Members

QUESTION
Presuming that a public employer has adequately reserved the right to amend the retirement benefit plan that it maintains for its non-certificated employees, and the amendment does not impair vested rights or otherwise reduce vested benefits that have accrued at the time of the amendment, may the public employer amend the retirement plan to reduce future benefit accruals and other unaccrued rights of vested members?

ANSWER
Yes, assuming that the public employer has adequately reserved the right to amend its retirement benefit plan, the public employer may amend the plan to reduce future benefit accruals of vested members. In order to adequately reserve the right to amend future benefit accruals of vested members, however, the provisions of the retirement plan must be sufficient to apprise members that their future benefit accruals are subject to modification.

http://www.tn.gov/attorneygeneral/op/2015/op15-18.pdf

Attorney General Opinion No. 15-25
County Board of Education Vacancies

QUESTIONS
1. Why are county commissioners, who have no education requirements and who are not as familiar as a school board with county education issues, allowed to appoint school board members?

2. Would amending Tennessee Code Annotated §§ 49-2-201(a)(1) and -202(e) to allow the members of a county school board to appoint new members to fill vacancies violate Article VII, Section 2, of the Tennessee Constitution?

ANSWERS
1. Article VII, Section 2, of the Tennessee Constitution requires local legislative bodies to make appointments to fill vacancies that occur on local school boards until the next election.

2. Yes.

http://www.tn.gov/attorneygeneral/op/2015/op15-25.pdf

Attorney General Opinion No. 15-31
Local Agencies Combining Procurement Bids

QUESTION
Is it possible for a local sheriff's office and a school board to combine their food procurement bids in order to take advantage of the higher total purchase amount so that both local governmental entities save money?

ANSWER
Yes.

http://www.tn.gov/attorneygeneral/op/2015/op15-31.pdf

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TCSBA Annual Meeting November 15, 2015

The TCSBA Annual Meeting will be held November 15, 2015 from 10:00 a.m. - 11:30 a.m. at the Opryland Hotel and Convention Center in conjunction with TSBA's Annual Convention. There will be an opportunity for TCSBA members to gain CLE credit by attending a pre-convention legal workshop from 1:00 p.m. - 4:30 p.m. on Saturday, November 14. The cost of attendance will be $75. Legal Workshop topics include:

- A look at the legal issues surrounding mold and other environmental issues in school buildlings.
- Avoiding joint employment of your contractors' employees.
- Learning what every school board member needs ot know about what the law requires.