

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 20th day of January, 2022.

Present: All the Justices.

Suffolk City School Board, et al.,

Appellants,

against

Record No. 201334
Circuit Court No. CL20-1263

Sherri D. Story,

Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Suffolk.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the circuit court.

Sherri D. Story (“Story”) serves as a member of the Suffolk City School Board (the “Board”), a public body subject to the requirements of the Virginia Freedom of Information Act (“VFOIA”), Code § 2.2-3700 through -3715. Upon joining the Board in 2019, Story expressed concerns regarding potential VFOIA violations as to unnoticed committee meetings and irregularities of closed meetings. In addressing those concerns, Story shared court opinions and FOIA Advisory Council opinions with the other Board members and counsel for the Board.

On April 9, 2020, after the Board conducted a closed meeting, the Board reconvened an open meeting and counsel for the Board was requested to read the certification of the closed meeting. Only the title of the certification was read aloud: “A resolution of certification of the closed meeting of April 9, 2020 pursuant to § 2.2-3712 of the Code of Virginia 1950 as amended.” The majority of the Board voted to certify the resolution. A similar scenario occurred during other meetings wherein only the title of the certification (hereafter, the “short-form certification”) was read aloud before the Board voted on the matter.

Story subsequently brought a complaint alleging that the Board and some of its members had violated VFOIA. Specifically, she claimed that members of the Board were conducting meetings without giving proper notice to the public, the Board was not providing sufficient specificity before convening closed meetings, members of the Board were discussing matters

outside the subject matter of closed meetings, the Board was not properly certifying closed meetings after it reconvened, the Board failed to allow remote attendance to closed meetings, and members of the Board took secret votes by polling members before deciding certain issues. Story sought mandamus, declaratory and injunctive relief, as well as civil penalties, costs, and attorneys' fees.

After hearing the evidence, the circuit court ruled that the Board had violated VFOIA on several occasions. The circuit court determined that members of the Board held a public meeting without giving proper public notice, several motions for closed meetings lacked the proper specificity and the short-form certification was improper under VFOIA.¹ As a result, the circuit court entered an order granting Story's "request for an award of mandamus." Specifically, the circuit court ordered certain Board members to read the entirety of VFOIA and the entire Board to take the FOIA training specified in Code § 2.2-3704.3.² The circuit court further required that the Board comply with

all open and closed meeting requirements specified in the Virginia FOIA, including providing required notices of open meetings, using sufficiently specific motions, using the full certification process under Virginia Code § 2.2-3713 to be read at the conclusion of any closed meeting, and that all public vote requirements be followed that are not provided for under the polling provisions of FOIA.

The circuit court also ordered that,

in the event that any School Board members raise a request for legal advice as it relates to FOIA to counsel for the Suffolk School Board, if that Board member is not satisfied with the advice given, that upon request of that Board Member, that the Board as a whole, through counsel must seek the advice or guidance of the FOIA Advisory Council, in perpetuity.

¹ At the same time, the circuit court ruled in favor of the Board on several of the claims raised by Story. Specifically, the circuit court determined that members of the Board were not discussing matters outside the subject matter of closed meetings and that the Board's refusal to allow members to attend closed meetings remotely and the use of polling were not VFOIA violations.

² The circuit court noted that both of these requirements were moot, as the Board members had certified that they had completed these requirements prior to circuit court's entry of its order.

Although the circuit court denied Story's request for civil penalties, it granted Story's request for her attorneys' fees and costs. After a further hearing on the matter, the circuit court awarded Story a total of \$25,006.42 in attorneys' fees and costs.

On appeal, the Board argues that the circuit court erred in awarding mandamus relief in the form of requiring it seek the advice of the FOIA Advisory Council. The Board contends that such relief is beyond the scope of mandamus because it compels performance of a discretionary act and regulates a general course of conduct. Story responds that, given the remedial nature of VFOIA, the relief granted is proper in the present case as it is meant to prevent future violations.³

Mandamus is "an extraordinary remedy employed to compel a public official to perform a purely ministerial duty imposed upon him by law." *In re Horan*, 271 Va. 258, 258 (2006) (citations omitted). Mandamus may not be used "to compel the performance of discretionary acts or duties." *City of Richmond v. Hayes*, 212 Va. 428, 429 (1971). As the Board points out, there is no requirement that a school board consult with an attorney on FOIA matters, much less the FOIA Advisory Council. Thus, it is clear that a school board's decision to consult the FOIA Advisory Council is an entirely discretionary act. Accordingly, the circuit erred in awarding mandamus relief requiring the Board to contact the FOIA Advisory council.

The Board next argues that the circuit court erred in finding that its short-form certification of closed meetings violated VFOIA. The Board acknowledges that Code § 2.2-3712(D) requires that the Board members certify that the discussions during closed meetings were limited to business matters lawfully exempted from open meeting requirements and matters identified in the motion to have a closed meeting, but it notes that the statute is silent with regard to the manner in which such a certification must be made. According to the Board, moving to certify the closed meeting in accordance with Code § 2.2-3712(D) is sufficient because the reference to the statute identifies the substance of the motion.

Code § 2.2-3712(D) states, in relevant part:

At the conclusion of any closed meeting, the public body holding such meeting shall immediately reconvene in an open meeting and shall take a roll call or other recorded vote to be included in the minutes of that body, certifying that to the best of each member's

³ During the pendency of this appeal, Story filed two motions to dismiss the Board's appeal. The first motion was based on an alleged defect in the notice of appeal. In the second motion to dismiss, Story asserted that the appeal was moot. The Court denies both motions to dismiss.

knowledge (i) only public business matters lawfully exempted from open meeting requirements under this chapter and (ii) only such public business matters as were identified in the motion by which the closed meeting was convened were heard, discussed or considered in the meeting by the public body.

Contrary to the circuit court's ruling, nothing in this subsection requires that the certification of a closed meeting be read aloud during a public meeting. Moreover, requiring that the certification be read aloud after each closed meeting serves little, if any, purpose. Unlike a motion to convene a closed meeting which is different each time, *see* Code § 2.2-3712(A) (requiring each motion to convene a closed meeting to identify the subject matter, purpose and cite the applicable exemption), the certification vote will essentially be the same for each closed meeting.

It is further worth noting that Code § 2.2-3712(A) explicitly prohibits general references to statutory provisions as part of a motion to convene a closed meeting, whereas Code § 2.2-3712(D) contains no such prohibition. As this Court has repeatedly explained, "when the General Assembly includes specific language in one section of a statute, but omits that language from another section of the statute, [the Court] must presume that the exclusion of the language was intentional." *Halifax Corp. v. First Union Nat. Bank*, 262 Va. 91, 100 (2001). Accordingly, the Court views the omission of such a prohibition from Code § 2.2-3712(D) as the General Assembly tacitly permitting such general references for certifications. Therefore, as the short-form certification used by the Board serves as a general reference to Code § 2.2-3712(D), the use of the short-form certification does not violate VFOIA.

The Board further argues that the circuit court erred in awarding Story her attorneys' fees and costs. Under this Court's jurisprudence, "a VFOIA plaintiff can recover attorney's fees if a court finds (1) the public body committed a single VFOIA violation, and (2) the plaintiff 'substantially prevails on the merits of the case.'" *Cole v. Smyth County Bd. of Supervisors*, 298 Va. 625, 644 (2020) (quoting Code § 2.2-3713(D)). Additionally, Code § 2.2-3713(D) explicitly states that "[a] single instance of denial of the rights and privileges conferred by this chapter shall be sufficient to invoke the remedies granted herein," which include "reasonable costs, including costs and reasonable fees for expert witnesses, and attorney fees from the public body."

Here, it is undisputed that the Board committed multiple VFIOA violations. Thus, the only issue is whether the circuit court correctly determined that Story substantially prevailed on the merits of the case. The Court, however, does not reach this issue as some, but not all, of the bases for the circuit court's decision to award attorneys' fees are no longer valid. Accordingly, the Court remands the case to the circuit court to allow it the opportunity to address this issue whether, in light of this Court's rulings, Story has substantially prevailed on the merits of her case.⁴

This order shall be certified to the Circuit Court of the City of Suffolk.

A Copy,

Teste:

A handwritten signature in blue ink, appearing to read "M. M. [unclear] [unclear]".

Clerk

⁴ With regard to the Board's alternative argument that special circumstances existed that made the award of fees and costs unjust, the Court notes that "the determination of 'special circumstances' lies in the sound discretion of the trial court." *Harmon v. Ewing*, 285 Va. 335, 339 (2013). This discretion necessarily extends to the related question of whether the special circumstances are sufficient to render the award of attorneys' fees unjust. Here, the record supports the conclusion that Story fairly assumed that the Board's procedures were correct, that, after she learned otherwise, she attempted to convince the Board to follow the correct procedures and that she brought her VFOIA petition to ensure the Board was following the law. Thus, the Court cannot say that the circuit court abused its discretion in determining no special circumstances existed that rendered the award unjust.