

NORTH CAROLINA COURT OF APPEALS

NORTH CAROLINA STATE)	
BOARD OF EDUCATION,)	
)	
Plaintiff-Appellee,)	
)	
v.)	
)	
THE STATE OF NORTH)	<u>From Wake County</u>
CAROLINA and THE NORTH)	
CAROLINA RULES REVIEW)	
COMMISSION,)	
)	
Defendants-Appellants.)	
)	

REPLY BRIEF OF DEFENDANT-APPELLANT
NORTH CAROLINA RULES REVIEW COMMISSION

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From Wake County

REPLY BRIEF OF DEFENDANT-APPELLANT
NORTH CAROLINA RULES REVIEW COMMISSION

ARGUMENT

Apparently recognizing that the Superior Court's decision was in error, Plaintiff-Appellee North Carolina State Board of Education ("SBOE") fails to respond to the argument set out in the brief of Defendant-Appellant North Carolina Rules Review Commission ("RRC"), RRC Br.8-16, that the plain language of Chapters 115C and 150B makes unambiguous the General Assembly's intent that the SBOE shall be subject to the rulemaking provisions of the North Carolina Administrative Procedure Act ("APA"), N.C. Gen. Stat. § 150B-1 *et seq.* Tellingly, the SBOE completely ignores a Court of Appeals' opinion written by one of the SBOE's counsel of record that expressly recognizes the SBOE is subject to the APA. RRC Br. 11 (citing *Beaufort Cnty. Sch. v. Roach*, 114 N.C. App. 330, 443 S.E.2d 339 (1994) (Orr, J.)). The SBOE's brief does not even cite the *Beaufort County* decision.

The provisions of Chapters 115C and 150B directing that the SBOE shall be subject to the rulemaking provisions of the APA are entitled to a presumption of constitutionality. *State ex rel. McCrory v. Berger*, 2016 N.C. LEXIS 33 at *9 (N.C. Jan. 19, 2016).¹ Moreover, the Superior Court was without authority to

¹ The *McCrory* decision puts to rest an argument that the SBOE made in this case but later abandoned. 2016 N.C. LEXIS 33 at *28-29 (noting that the General Assembly likely has broader latitude when it appoints members to commissions, such as the Rules Review

declare these provisions of the APA unconstitutional. N.C. Gen. Stat. § 1-267.1(b1), (b2). By failing to address this central argument, the SBOE has effectively conceded that the Superior Court's grant of summary judgment in favor of the SBOE was in error.

I. THE SUPERIOR COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE SBOE.

Not only does the SBOE fail to address binding precedent that holds the SBOE is subject to the APA and the APA's rulemaking provisions, the arguments that the SBOE does make in its Appellee brief lack merit.

A. The Plain Language of the Constitution does not Support the SBOE's Argument.

The SBOE's brief exhaustively discusses minute changes in the state Constitution that have little bearing on this appeal, SBOE Br. 14-24, while making only a cursory argument with respect to the plain language of the Constitution. *Id.* 11-13. The Constitution expressly provides that the SBOE's authority to make rules is "subject to laws enacted by the General Assembly." N.C. Const. art. IX, § 5. Given that Article 2A ("Rules") of Chapter 150B is unquestionably a "law[] enacted by the General Assembly" and that the SBOE appears to concede that the General Assembly intended the SBOE to be "subject" to Article 2A, it is

Commission, that perform functions different from the Coal Ash Commission, Mining Commission and Oil and Gas Commission); *see* R. 29 (voluntarily dismissing Count 7).

understandable why the SBOE glosses over the plain language of the Constitution and instead attempts to confuse the issues through an eleven-page dissertation on what the Constitution once said.

The SBOE's argument that it cannot be subject to the APA seeks to distort the clear and unambiguous wording of N.C. Const. art. IX, § 5. The SBOE's argument is also inconsistent with the holding of the North Carolina Supreme Court that when the General Assembly enacts legislation to limit the SBOE's power to make rules, such a limitation imposed by the General Assembly must be given effect. *State v. Whittle Commc'ns*, 328 N.C. 456, 464, 402 S.E.2d 556, 560 (1991).

The true issue before this Court is the plain language of our State's Constitution – what did the people of this State understand when they went to the polling place to adopt our current Constitution. The phrase “subject to laws enacted by the General Assembly” in N.C. Const. art. IX, § 5 is readily understandable by those voters. Those words should not and cannot be reasonably construed, as the SBOE argues, to mean that the only way the General Assembly can make an SBOE rule “subject to laws enacted by the General Assembly” is if the General Assembly specifically enacts a law repealing an SBOE rule or if the General Assembly enacts a law that “preempts” SBOE regulation in a specific area. SBOE Br. 20-21.

Relying on superceded language from a constitutional provision of nearly 150 years ago and without any case law citation, the SBOE boldly asserts “only an act of the General Assembly ‘altering, amending, or repealing’ a particular rule adopted by the Board could nullify [an SBOE] rule.” SBOE Br. 20 (citing 1868 N.C. Const. art. IX, § 9). Neither the text of our current Constitution nor any decision of our state appellate courts supports such a statement. The SBOE’s Appellee brief does attempt to support its argument by repeating, essentially verbatim, its discussion of *Guthrie v. Taylor*, 279 N.C. 703, 185 S.E.2d 193 (1971), from the SBOE’s trial brief. Cf. SBOE Br. 20-21 with R. 130. The SBOE, however, has chosen not to address the RRC’s explanation in its opening brief as to why the *Guthrie* decision does not stand for what the SBOE claims. RRC Br. 23-24.

The plain language of the Constitution makes clear that the General Assembly may make the SBOE’s rulemaking process subject to the procedural protections that the General Assembly has afforded to the people of this State through the APA.² The SBOE’s arguments to the contrary fail.

² The SBOE faults the RRC for noting on appeal the provisions of the APA that expressly state that the APA creates “procedural” rights for the people of North Carolina. SBOE Br. 27. The SBOE, however, cannot dispute that this is exactly what the APA says. N.C. Gen. Stat. § 150B-1(b).

B. The RRC does not Strike Down Proposed Rules of the SBOE or any Other State Agency.

Throughout its brief, the SBOE asserts that the RRC “strikes down” SBOE rules. SBOE Br. 12-14. The RRC, however, does no such thing. The RRC has no authority to, and does not attempt to, weigh the policy determination behind any proposed agency rule. N.C. Gen. Stat. § 150B-19.1(a)(2), (4), (5), (6), -21.9(a). The limited role that the RRC plays in ensuring that state agencies comply with the rulemaking provisions of the APA does not constitute a “veto.” *See* RRC Br. 17-20.

C. The Inclusion of the SBOE Within the APA’s Rulemaking Provisions does not Constitute a Transfer of Rulemaking from the SBOE to the RRC.

In a variation on its theme that the RRC somehow “strikes down” rules of the SBOE, the SBOE also claims that including the SBOE within the scope of the APA would constitute an unconstitutional “transfer” of final rulemaking authority from the SBOE to the RRC. SBOE Br. 27-33. The RRC cannot promulgate rules relating to education. The RRC simply reviews rules promulgated by state agencies to ensure compliance with the APA. The SBOE ignores the limited role that the RRC plays under the APA.

In making its argument that there was an unconstitutional transfer of rulemaking authority from the SBOE to the RRC, the SBOE unfairly asserts that

“for the first time in this litigation,” the RRC has argued that it does not have a veto power over agency rules and that there is no transfer of final rulemaking authority from state agencies to the RRC under the APA. The State of North Carolina’s position that the RRC does not hold a veto power and that there is no transfer of rulemaking in violation of the Constitution has been consistent for over a decade since these novel arguments were first asserted in our appellate courts.

Cf. RRC Br. 17-20 with Br. of State, N.C. Bd. of Pharmacy v. Rules Review Comm’n, No. 673A05, at 24-30 (N.C. S. Ct.) (filed 21 July 2006) *and* *Br. of State, N.C. Bd. of Pharmacy v. Rules Review Comm’n*, No. COA04-929, at 27-28 (N.C. Ct. App.) (filed 23 Dec. 2004).

Despite the SBOE’s efforts to aggrandize the role of the RRC under the APA, there is no unconstitutional transfer of final rulemaking authority from any state agency to the RRC.

D. The SBOE’s Policy Arguments as to why it Believes it Should be Excluded From the APA’s Rulemaking Provisions are Irrelevant.

Citing West Virginia case law, the SBOE makes various policy arguments as to why it should not be subject to the APA. SBOE Br. 21-24; *see also id.* 32 (citing Montana and Idaho cases) . The issue before this Court is not whether including the SBOE within the scope of the APA is good or bad from a policy perspective. Our Constitution places those policy determinations in the hands of

the General Assembly – not the courts. The SBOE’s policy arguments are immaterial to the issues before this Court.

E. The SBOE’s Mere Repetition of its Arguments Before the Trial Court with Respect to Two Letter Opinions by Attorneys at the North Carolina Department of Justice is Unpersuasive.

Simply repeating its brief to the Superior Court, the SBOE once again argues that two letter opinions from a Chief Deputy at the North Carolina Department of Justice support the SBOE’s argument. *Cf.* SBOE Br. 28-31 *with* R. 136-38. The SBOE, however, fails to address the RRC’s brief that explains why these letter opinions have no bearing on the facts of this case. *See* RRC Br. 21-22. The SBOE’s failure to address the RRC’s briefing before this Court speaks volumes.

F. The SBOE’s Argument that the General Assembly has Failed to Provide Adequate Guiding Standards to the RRC is in Error.

While pointing out that the Superior Court did not expressly strike down a state statute as unconstitutional, SBOE Br. at 43, the SBOE urges this Court to do so – despite the clear directive of N.C. Gen. Stat. § 7A-27(a1). Specifically, the SBOE urges this Court to hold that the General Assembly has improperly delegated its authority to the RRC. The effect of such a ruling would be to declare Article 2A of Chapter 150B unconstitutional. This Court should decline that request. *See id.* Moreover, for the reasons set out in the RRC’s principal brief, there has been no improper delegation of authority from the General Assembly to

the RRC. RRC Br. 25-29. The SBOE's reliance on newspapers arguments, SBOE Br. 38-39, does not refute the RRC's argument which is well-supported by legitimate authority, such as statutory provisions and binding precedent.

II. ALTERNATIVELY, THIS COURT SHOULD REMAND FOR CLARIFICATION BY THE SUPERIOR COURT.

Given the cursory language of the Superior Court's final judgment in this case involving multiple state constitutional claims, it is difficult, if not impossible, to discern the rationale for the Superior Court's decision. In defense of the Superior Court, this is explainable in part due to the manner in which the SBOE litigated this case below. First, the SBOE attempted to revise its original claims to artfully avoid the need to convene a three-judge panel in this case. Second, the SBOE proceeded to argue at the hearing claims that it had appeared to abandon. *See R pp 19-20, 29.*

The SBOE is correct that the Superior Court's order does not expressly hold that any specific state statute is facially unconstitutional. SBOE Br. 43. As a result, the RRC has been precluded from filing a Notice of Appeal with the North Carolina Supreme Court pursuant to N.C. Gen. Stat. § 7A-27(a1). Nevertheless, the Superior Court's final judgment could be read as effectively rendering *sub silentio* numerous state statutes unconstitutional. For the reasons set out in the RRC's opening brief and its response to the SBOE's motion to dismiss (filed 8

February 2016), this Court should, in the alternative, remand to the Superior Court for clarification of its ambiguous order. The people of this State should not be deprived of the right to have the constitutional validity of a state statute heard by an appellate court simply because of an ambiguity in a lower court's decision. At a minimum, this case should be remanded for clarification as to whether N.C. Gen. Stat. §§ 115C-2, 115C-106.3(19), 115C-150.13 and 115C-218.1(c) have been effectively rendered unconstitutional on its face.

CONCLUSION

For the reasons stated herein and in the RRC's opening brief, the Court of Appeals should reverse the trial court's summary judgment order and remand with instructions that the Superior Court enter judgment in favor of Defendants-Appellants. In the alternative, this Court should remand with instructions that the Superior Court clarify whether it intended to strike down N.C. Gen. Stat. §§ 115C-2, 115C-106.3(19), 115C-150.13 and 115C-218.1(c), as facially invalid.

Respectfully submitted, this the 15th day of February, 2016.

TROUTMAN SANDERS LLP

Electronically submitted

Christopher G. Browning, Jr.

N.C. State Bar No. 13436

(919) 835-4127

chris.browning@troutmansanders.com

P.O. Drawer 1389

Raleigh, North Carolina 27602

*Counsel for Defendant-Appellant North Carolina
Rules Review Commission*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for Defendant-Appellant North Carolina Rules Review Commission certifies that the foregoing brief, which was prepared using a proportional font, is less than 3,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance, and appendices) as reported by the word-processing software.

Electronically submitted

Christopher G. Browning, Jr.
N.C. State Bar No. 13436
(919) 835-4127
chris.browning@troutmansanders.com
P.O. Drawer 1389
Raleigh, North Carolina 27602

*Counsel for Defendant-Appellant North
Carolina Rules Review Commission*

CERTIFICATE OF SERVICE

The undersigned attorney for Defendant-Appellant North Carolina Rules Review Commission hereby certifies that on this day the foregoing Reply Brief of Defendant-Appellant North Carolina Rules Review Commission was served upon counsel for all parties in this action by depositing a copy thereof in the United States mail, First Class, postage pre-paid, and addressed as follows:

Amar Majmundar
Olga E. Vysotskaya de Brito
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602
For Defendant-Appellant State of North Carolina

Robert F. Orr
Campbell Shatley, PLLC
674 Merrimon Avenue, Suite 210
Asheville, NC 28804
For Plaintiff-Appellee N.C. State Board of Education

Andrew H. Erteschik
Poyner Spruill LLP
Post Office Box 1801
Raleigh, NC 27602-1801
For Plaintiff-Appellee N.C. State Board of Education

This the 15th day of February, 2016.

Electronically submitted
Christopher G. Browning, Jr.