



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse  
4110 Chain Bridge Road  
Fairfax, Virginia 22030-4009

703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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November 21, 2017

### LETTER OPINION

Mr. Michael C. Wylie  
Mr. Joshua E. Bushman  
Bushman Law Group  
2800 Shirlington Road, Suite 503  
Arlington, VA 22206  
*Counsel for Plaintiff*

Ms. Laurie L. Kirkland  
Ms. Lindy K. Stevens  
Blankingship & Keith, P.C.  
4020 University Drive, Suite 300  
Fairfax, VA 22030  
*Counsel for Defendant*

RE: *Scott Evans v. Fairfax County Public School Board*  
Case No. CL-2017-3884

Dear Counsel:

The Court has before it Defendant's Demurrer to Plaintiff's Complaint challenging Count II (breach of a continuing contract) and Count III (breach of an implied contractual duty of good faith and fair dealing), as well as his claim for attorney's fees. For the reasons as more fully stated herein the Court sustains the objection to Count III with leave to amend, and overrules the objections to Count II and to the claim for attorneys' fees.

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## **BACKGROUND**

Plaintiff, Scott Evans ("Plaintiff"), was formerly employed by Fairfax County Public Schools ("FCPS" or "Defendant") as a special education teacher at Clearview Elementary School. In May of 2014, the Plaintiff was placed on paid administrative leave after he became the subject of sexual abuse allegations. In July 2014, Child Protective Services ("CPS") found that the Plaintiff had sexually abused and molested a FCPS student. Plaintiff appealed the determination, and a local hearing officer at the Fairfax County Department of Family Services upheld CPS's determination in April 2015.

Pending the state level appeal, on April 2, 2015, Plaintiff was placed on suspension without pay with his salary to be held in an interest-bearing escrow account. Plaintiff contested the escrowing of his salary and eventually retired in October 2015 to acquire retirement funds. However, FCPS did not release the Plaintiff's escrowed salary because of the Plaintiff's pending appeal of the child sexual abuse and molestation findings. The findings were reversed on July 5, 2016. Following the reversal, Plaintiff filed a complaint in this Court. Defendant filed a Demurrer, which the Court sustained with leave to amend. Plaintiff filed an Amended Complaint alleging the following counts: (1) breach of contract; (2) breach of continuing contract; and (3) breach of contract – breach of duty of good faith and fair dealing. The Defendant filed a Demurrer to the First Amended Complaint. The Demurrer is before the Court.

## **DEFENDANT'S DEMURRER**

Defendant argues this Court sustained its prior demurrer to any economic duress claim for post-retirement salary. FCPS has paid Plaintiff his escrowed salary. The sole issue for this demurrer is whether Plaintiff is entitled to post retirement salary and attorney's fees. Plaintiff has abandoned his theory of economic duress and now seeks the post-retirement salary that he might have earned based on a breach of continuing contract (Count II) and breach of an implied duty of good faith and fair dealing (Count III). Defendant argues Plaintiff had no contract with FCPS after he retired, and therefore, his new theories fail.

Defendant contends Count II (breach of a continuing contract) fails to state a claim for breach of any contract after Plaintiff retired. Plaintiff alleges he was entitled to \$16,765.64, which is the difference between the amount he received during his retirement and the amount he would have received if he had not retired. FCPS renewed Plaintiff's contract for the 2015-16 school year but Plaintiff terminated it when he retired. FCPS was no longer obligated to pay Plaintiff for the remaining pay periods in that school year. Defendant claims Plaintiff does not provide any facts to support the allegation that FCPS forced him to retire in order to mitigate his damages. Further, a duty to mitigate is not an excuse one may use to justify one's own termination of a contract. When Plaintiff elected to terminate his contract, both parties were relieved of any further duties.

Next, Defendant argues Count III (breach of an implied contractual duty of good faith and fair dealing) fails to state a claim. Plaintiff seeks \$126,622.65 for the escrowed salary plus any salary he might have earned during the 2015-16 school year had he not

retired. Defendant contends Plaintiff's claim is governed by his employment contract. The Commonwealth does not recognize a cause of action for breach of an implied covenant of good faith and fair dealing in employment contracts. *Devnew v. Brown & Brown, Inc.*, 396 F. Supp. 2d 655, 671 (E.D. Va. 2005). Additionally, where an express contract governs, an implied duty of faith and fair dealing is inapplicable. When Plaintiff retired, there was no duty for Plaintiff to provide services for FCPS and FCPS owed no duty, express or implied, to pay Plaintiff's salary.

Lastly, Defendant argues Plaintiff's claim for reimbursement of attorney's fees should be dismissed. He brings his claim pursuant to Virginia Code section 22.1-83, which authorizes, without requiring, FCPS to reimburse certain fees. The statute authorizes FCPS to pay such fees only to an employee who is "arrested, indicated, or prosecuted on a charge arising out of an act committed in the discharge of his duties" and is found not guilty. Defendant states that the Plaintiff does not fall into the categories of employees the statute covers because he was never charged. Furthermore, he was made a defendant only to administrative proceedings and not to a civil action. As such, Defendant asks the Court to dismiss the Plaintiff's request for attorneys' fees.

### **PLAINTIFF'S OPPOSITION**

Plaintiff first states Count I (breach of contract) was not addressed in Defendant's brief, but nonetheless, FCPS attempts to have the Court dismiss this Claim on the basis of having made partial payment of the damages Plaintiff requested. The amount of \$36,904.35 was received, plus interest at 0.1%, which reduces the damages to which he is entitled but the amount does not satisfy the damages alleged. Further, the only

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applicable rate of prejudgment interest is 6.0% which is set by Virginia Code section 8.01-382.

Plaintiff also contends Count II does state a claim. Defendant admits there was an existing contract between the parties and has not denied having breached the contract prior to the date Plaintiff retired. By paying Plaintiff the salary it was holding in escrow, Defendant has admitted to a breach of the employment contract. Further, Defendant's argument that Plaintiff's retirement terminated the contract is a factual issue. Plaintiff contends this matter is distinguishable from the two cases Defendant cites. The case of *NLRB v. Cone Mills* was determined under the National Labor Relations Act and it related to collective bargaining rather than a statutory contract, as alleged in this case. *NLRB v. Cone Mills*, 373 F.2d 595, 598 (4<sup>th</sup> Cir. 1967). Plaintiff argues Defendant breached the contract through its voluntary act of improperly holding the funds in escrow, and repeatedly denying Plaintiff the due process rights guaranteed by the contract. Plaintiff's duty to perform any specific action under the contract ended at the point in which Defendant breached the contract. After the breach, Plaintiff's only duty that remained was to mitigate his damages. Defendant's duties continued under Virginia Code sections 22.1-304, 22.1-307, and 22.1-315.

Plaintiff contends it is the breaching party who may no longer enforce the contract. Defendant does not point to any Code section that speaks to the issue of when retirement constitutes a waiver or release of a contract. Plaintiff agrees that in accordance with *Smith v. City of LaGrange*, the parties obligations are fixed at the date of retirement. On the day of retirement, FCPS owed Plaintiff unpaid salary plus interest. *Smith v. City of LaGrange*,

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461 S.E.2d 550, 552 (Ga. 1995). Moreover, FCPS continued to owe him his unpaid salary plus interest after his retirement. FCPS's obligation never ceased. Plaintiff's collection of money from the county retirement system was entirely separate from his contract with FCPS.

Plaintiff also argues Count III does state a valid claim for breach of the duty of good faith and fair dealing. Again, Plaintiff contends his retirement is a separate legal agreement between himself and the retirement system. FCPS has alleged no facts concerning that contract and FCPS has no right to enforce such agreement. FCPS has also admitted that an express contract governed the rights of the parties. Plaintiff contends such contract is a statutory contract. Virginia Courts have refused to recognize the duty of good faith and fair dealing in at-will employment contracts, but the existence of the duty is an issue of first impression with respect to a statutory contract. The parties owe each other a higher duty than in an at-will contract.

Lastly, Plaintiff contends he stated a claim for attorney's fees. Virginia Code section 22.1-83 authorizes the payment of attorney's fees for a school board employee. Plaintiff argues he alleged in his Complaint that he was an employee of the Fairfax County School Board. He was a defendant to a CPS investigation, which is a civil proceeding appealable to this Court. The investigation focused on actions alleged to have taken place in connection with his duties as a teacher. He incurred a large sum in attorney's fees defending himself, and § 22.1-83 provides a mechanism in which the School Board bears the burden of paying those fees.

## ANALYSIS

This Court may sustain a demurrer when a pleading fails to state a cause of action or to state facts upon which the relief demanded can be granted. Va. Code Ann. § 8.01-273. Only those grounds stated in a demurrer shall be considered by the Court. *Ward's Equip. v. New Holland N. Am.*, 254 Va. 379, 382 (1997). A demurrer admits the truth of all “properly pleaded material facts” and all reasonable inferences are drawn in favor of the Plaintiff. *Id.* However, a plaintiff's conclusions of law are not admitted as correct. *Id.* The Court does not decide the merits of a claim when ruling on a demurrer; the Court merely determines whether the Plaintiff's factual allegations are sufficient to state a cause of action. *Barber v. VistaRMS, Inc.*, 272 Va. 319, 327 (2006).

The decision of whether to sustain a demurrer is a question of law. *Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 489 (2011). When a complaint “contains sufficient allegations of material facts to inform a defendant of the nature and character of the claim, it is unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer.” *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24 (Va. 1993). “[E]ven though a . . . complaint may be imperfect, when it is drafted so that defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer.” *Id.*

### **I. Whether Plaintiff sufficiently plead breach of a continuing contract (Count II)**

Plaintiff's Count II relates to a violation of Virginia Code § 22.1-304. Virginia Code § 22.1-304(b) provides that “[t]eachers employed after completing the probationary period shall be entitled to continuing contracts during good behavior and competent service.” As

in the first Complaint, Plaintiff relies on *Wilkinson v. School Board* to assert that he has a property interest in his employment, which includes avoiding suspension and eventual dismissal. 566 F.Supp 766 (E.D. Va. 1983).

In *Wilkinson*, the plaintiff was employed by the defendant school board as a teacher. *Id.* at 767. The plaintiff alleged that the school board suspended her and considered dismissing her in retaliation for her legal suit. *Id.* The Plaintiff had worked for the school board for twenty-two (22) years when she was suspended for five (5) days, and she was provided no hearing prior to her suspension. *Id.* At all times relevant, the plaintiff was employed under a continuing contract. *Id.* The court further noted that she was employed by the school board at the time of the appeal. *See id.* The court evaluated the defendants' claim that the plaintiff's continuing contract status gave the plaintiff a property interest in only being dismissed – not suspended, and found the argument to be incorrect. *Id.* In fact, the court stated that the property interest is grounded in either statutory provision, assumingly referring to §§ 22.1-315 and 22.1-307. The court held that the “[p]laintiff’s property interest in continued employment provided by Va. Code § 22.1-307 includes a right not to have such employment interrupted by a suspension. *Id.*

In the Amended Complaint, Plaintiff alleges:

31. From April 8, 2015 until August 11, 2015 Evans felt economically pressured by FCPS to resign.

32. At no time between the suspension of his wages and the successful conclusion of his appeal did Evans waive the right to wages owed to him by FCPS.

33. FCPS acted intentionally to deprive Evans of wages due under his contract with FCPS in an effort to pressure Evans into retirement.

34. Evans submitted a Notification of Retirement on August 11, 2015 with the Fairfax County Educational Employees' Supplementary Retirement System, and the Virginia Retirement System effective October 1, 2015.

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35. Between October 1, 2015 and the end of the contract in effect for the 2015-2016 school year, nine (9) FCPS pay scales passed where Evans was no paid any wages.
36. Evans should have received a total of \$87, 718.30 in salary during the period from October 1, 2015 to June 30, 2016.
37. Evans submitted his Notification of Retirement on August 11, 2015, in order to mitigate FCPS' prior breach of contract.
38. But for FCPS's breaches of contract, Evans would not have resigned from his role as a teacher at FCPS. . . .
64. Evans was not subject to a probationary contract at any time relevant to this action.
65. Evans had a present and future interest in the continuation of his contract with FCPS. . . .
66. Evans taught in a classroom during the 2013-2014 school year.
67. FCPS renewed Evans' contract for the 2014-2015 school year.
68. FCPS renewed Evans' contract for the 2015-2016 school year.
69. FCPS did not make any payments to Evans after April 8, 2015.
70. FCPS committed a material breach of Evans' employment contract by failing to pay Evans. . . .

Am. Compl. ¶¶ 31-65. Unlike in the first Complaint, Plaintiff now alleges he had a present and future interest in the continuation of his contract with FCPS, and he no longer includes a claim under § 22.1-307. In the previous Complaint, the reason the Court sustained Defendant's Demurrer was in relation to the economic duress claim under § 22.1-307. Additionally, Defendant had not specified that he had an interest in the continuation of his contract with FCPS. Plaintiff has appropriately amended the Complaint to include that allegation, and thus the objection to this Count is overruled.

## **II. Whether Plaintiff sufficiently alleged breach of duty of good faith and fair dealing (Count III)**

Virginia does not recognize a separate cause of action for the breach of the implied duty of good faith and fair dealing. If a breach of the implied duty of good faith and fair dealing is brought, it must be raised in a claim for breach of contract, as opposed to a claim in tort. *See Charles E. Brauer Co., Inc. v. Nations Bank of Va., N.A.*, 251 Va. 28, 33

(1996). In Virginia, when parties to a contract create valid and binding rights, an implied covenant of good faith and fair dealing is inapplicable to those rights, and this is so under either the common law or the Uniform Commercial Code. See *Ward's Equip. v. New Holland N. Am*, 254 Va. 379, 385 (1997). Generally, such a covenant cannot be the vehicle for rewriting an unambiguous contract in order to create duties that do not otherwise exist. *Id.*

Most importantly, “the Commonwealth does not recognize a cause of action for breach of an implied covenant of good faith and fair dealing in employment contracts, and in at-will employment contracts in particular.” *Devnew v. Brown & Brown, Inc.*, 396 F. Supp. 2d 665, 671 (E.D. Va. 2005). “Even assuming that Virginia law would imply a covenant of good faith and fair dealing in employment contracts, in light of the Virginia Supreme Court's adherence to the employment at will doctrine and its narrowly defined public policy exception, [ ] such an implied covenant's application to employment contracts would be limited to contracts for a fixed term or to those instances where clear public policy is violated by the discharge.” *Schryer v. VBR*, 25 Va. Cir. 464, 467-468 (Va. Cir. Ct. 1991).

In this Count, Plaintiff alleges the contract between the parties granted him certain property rights under Virginia Code Sections 22.1-315, 22.1-307, 22.1-304. First Plaintiff alleges:

71. The terms of the employment contract between Evans and FCPS, by virtue of Evans being employed as a teacher, incorporate certain sections of the Virginia Code which provide specific due process protections different than those held by at-will employees in Virginia.
72. Specifically, the contract between FCPS and Evans granted Evans cognizable property rights under Virginia Code Sections 22.1-315,

22.1-307, 22.1-304.

73. FCPS' cumulative violations of these rights constitute breach of the duty of good faith and fair dealing by FCPS under their contract with Evans.
74. Virginia Code § 22.1-315, Grounds and Procedures for Suspension, subsection A, contains two (2) key provisions containing affirmative duties owed by FCPS to Evans which FCPS violated between April 8, 2015 and July 7, 2016 in their employment and post-employment relationship with Evans . . .

Am. Compl. ¶¶ 71-74.

Virginia Code section 22.1-315 (A) and (B) provides:

A teacher or other public school employee, whether full-time or part-time, permanent, or temporary, may be suspended for good and just cause when the safety or welfare of the school division or the students therein is threatened or when the teacher or school employee has been charged by summons, warrant, indictment or information with the commission of a felony; a misdemeanor involving (i) sexual assault as established in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2, (ii) obscenity and related offenses as established in Article 5 (§ 18.2-372 et seq.) of Chapter 8 of Title 18.2, (iii) drugs as established in Article 1 (§ 18.2-247 et seq.) of Chapter 7 of Title 18.2, (iv) moral turpitude, or (v) the physical or sexual abuse or neglect of a child; or an equivalent offense in another state. Except when a teacher or school employee is suspended because of being charged by summons, warrant, indictment or information with the commission of one of the above-listed criminal offenses, a division superintendent or appropriate central office designee shall not suspend a teacher or school employee for longer than sixty days and shall not suspend a teacher or school employee for a period in excess of five days unless such teacher or school employee is advised in writing of the reason for the suspension and afforded an opportunity for a hearing before the school board in accordance with §§ 22.1-311 and 22.1-313, if applicable. Any teacher or other school employee so suspended shall continue to receive his or her then applicable salary unless and until the school board, after a hearing, determines otherwise. No teacher or school employee shall be suspended solely on the basis of his or her refusal to submit to a polygraph examination requested by the school board.

Any school employee suspended because of being charged by summons, warrant, information or indictment with one of the offenses listed in subsection A may be suspended with or without pay. In the event any school employee is suspended without pay, an amount equal to his or her salary

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while on suspended status shall be placed in an interest-bearing demand escrow account. Upon being found not guilty of one of the offenses listed in subsection A or upon the dismissal or nolle prosequi of the charge, such school employee shall be reinstated with all unpaid salary and accrued interest from the escrow account, less any earnings received by the school employee during the period of suspension, but in no event shall such payment exceed one year's salary.

Va. Code Ann. § 22.1-315.

Plaintiff next alleges:

83. Virginia Code Sections 22.1-304 and 22.1-307, taken together, with limited exceptions, provide teachers the right to a continuing contract, and that the right to a continuing contract includes the right not to have such continuing contract interrupted by a suspension.

Am. Compl. ¶83.

Virginia Code Section 22.1-304 (B) states:

Teachers employed after completing the probationary period shall be entitled to continuing contracts during good behavior and competent service. Written notice of noncontinuation of the contract by either party must be given by June 15 of each year; otherwise the contract continues in effect for the ensuing year in conformity with local salary stipulations including increments.

Va. Code Ann. §22.304(B). And Virginia Code Section 22.1-307 states:

Teachers may be dismissed for incompetency, immorality, noncompliance with school laws and regulations, disability as shown by competent medical evidence when in compliance with federal law, conviction of a felony or a crime of moral turpitude, or other good and just cause. A teacher shall be dismissed if such teacher is or becomes the subject of a founded complaint of child abuse and neglect, pursuant to § 63.2-1505, and after all rights to any administrative appeal provided by § 63.2-1526 have been exhausted. The fact of such finding, after all rights to any administrative appeal provided by § 63.2-1526 have been exhausted, shall be grounds for the local school division to recommend that the Board of Education revoke such person's license to teach. No teacher shall be dismissed or placed on probation solely on the basis of the teacher's refusal to submit to a polygraph examination requested by the school board.

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For the purposes of this article, "incompetency" may be construed to include, but shall not be limited to, consistent failure to meet the endorsement requirements for the position or one or more unsatisfactory performance evaluations.

Va. Code Ann. §22.307 (A)(B).

For this Count, Plaintiff alleges the employment contract between the parties incorporated Virginia Code Sections 22.1-315, 22.1-307, 22.1-304, and that it gave Plaintiff these property rights. In Virginia, a claim for the breach of the duty of good faith and good dealing must be tied to a breach of contract. Although Plaintiff concedes that this cause is not applicable in an employment at will contract, he contends the contract at issue was not an employment at will contract. He claims the contract was a statutory contract, thus making this an issue of first impression for the Court to decide.

Regardless, Plaintiff must still overcome certain hurdles to survive this Demurrer. Plaintiff must allege this was not an employment at will contract, which he does not do. Next, Plaintiff must allege the terms of the contract do not address the particular dispute at hand or that applying the contract's express language gives rise to an unfair result that the parties did not anticipate. This is an essential allegation because an implied duty of good faith will not override the express terms of a contract. Plaintiff, however, did not make this allegation or provide sufficient facts to support an inference of such an allegation.

Here, Plaintiff has not sufficiently alleged or shown that the terms of the contract are such that this claim is appropriate. Specifically, Plaintiff does not quote any of the contractual language which leads him to believe this cause is proper, despite Virginia's clear take that the duty of good faith and fair dealing does not apply in certain employment

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contexts. Plaintiff has also not attached the contract to the Complaint. In turn, the Court will thus have to grant the Demurrer on this Count because the Plaintiff has not alleged sufficient facts to sustain the claim.

Additionally, Plaintiff cites to Virginia Code Section §22.1-307, which pertains to the dismissal of teachers. Plaintiff has not alleged that he was dismissed, and therefore, has not provided sufficient facts to sustain the claim that this purportedly incorporated code section provides a right under this cause. Defendant's main argument is that this claim cannot survive because the employment contract terminated upon Plaintiff's retirement. The validity of this argument is not something the Court can determine under the demurrer standard.

The Court sustains the objection to this Count with leave to amend.

### **III. Whether the Plaintiff may seek attorney's fees**

The Plaintiff seeks attorney's fees under Virginia Code § 22.1-83, which provides,

If an employee of a school board is arrested, indicted or otherwise prosecuted on any charge arising out of any act committed in the discharge of his duties as such employee and such charge is subsequently dismissed or a verdict of not guilty is rendered or if an employee of a school board is made a defendant in any civil action arising out of his actions in connection with his duties as such employee, the school board may pay the legal fees and expenses of such employee.

Virginia Code § 22.1-83.

The Plaintiff was an employee of the school board. He was investigated and arguably "otherwise prosecuted" for allegations regarding sexual abuse of a student. He was further made a defendant in a civil case arising from his duties as an employee. Moreover, the charge was ultimately reversed. Although the Defendant is not required in

every circumstance to pay the Plaintiff's attorneys' fees, this is not an appropriate argument to dismiss the Plaintiff's request within the framework of whether such discretionary denial was arbitrary and an abuse of statutory discretion.

The objection to this Court is thus overruled as the Plaintiff's request for attorney's fees is sufficient for purposes of demurrer.

### CONCLUSION

The Court having considered Defendant's Demurrer to Plaintiff's Complaint challenging Count II (breach of a continuing contract) and Count III (breach of an implied contractual duty of good faith and fair dealing), as well as his claim for attorney's fees, and for the reasons as already stated herein, sustains the objection to Count III with leave to amend, and overrules the objections to Count II and to the claim for attorneys' fees. The Court does not address Count I (breach of contract) because although the Defendant expressed at the hearing a view the claim is moot, such defensive position necessarily requires an evidentiary determination not appropriate for consideration on demurrer.

The Defendant shall prepare, circulate and submit to the Court an order incorporating the ruling in this Letter Opinion and setting the time for leave to amend as fourteen days from entry of such order.

AND THIS CAUSE CONTINUES.

Sincerely, 

  
David Bernhard  
Judge, Fairfax Circuit Court

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