



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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CITY OF FAIRFAX

January 11, 2021

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Peter E. Broadbent
Assistant Attorney General
202 N. 9th Street
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Joseph A. Glean
8533 Washington Avenue
Alexandria, VA 22309

Re: Commonwealth of Virginia, ex rel. Joseph A. Glean v. Supervisors of Fairfax County, CL 2019-14869

Dear Mr. Broadbent and Mr. Glean:

This matter is before the court on the motion of the Commonwealth of Virginia, by the Office of the Attorney General ("OAG"), to dismiss the case.

The Commonwealth makes four arguments: 1) the OAG has an unfettered right to dismiss a qui tam action; 2) Relator is not represented by counsel; 3) Relator failed to serve a disclosure statement upon the OAG; and 4) Relator fails to state a valid false claim. The court GRANTS the motion for the reasons that follow.

ANALYSIS

1. The Commonwealth's Purported Unfettered Right To Dismiss

1) This action was brought pursuant to Code § 8.01-216.5(A) ("A person may bring a civil action for a violation of § 8.01-216.3 for the person and for the Commonwealth. The action shall be brought in the name of the Commonwealth."). As such, the Commonwealth:

may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Commonwealth of the filing of the complaint and the court has provided the person with an opportunity for a hearing on the complaint.

Code § 8.01-216.6(B).¹

The reason for this ultimate power in the hands of the Commonwealth is that:

the relator seeks to vindicate injury not to himself, but to the Government. (Citation omitted). As the true party in interest, the Government retains ultimate control over the action. (Citation omitted).

United States ex rel. Davidheiser v. Capital Rail Constructors, 433 F. Supp. 3d 899, 901 (E.D. Va. 2019).

In the case at bar, the Commonwealth has asked the court not to afford a hearing to Relator:

While a hearing is available under Va. Code Ann. § 8.01-216.6(B), when the OAG dismisses a Complaint over the objections of the Relator, an oral hearing is an unnecessary procedural step as the Court only needs to provide "a formal opportunity for the Government not to dismiss the case." See *Swift v. United States*, 355 U.S. App. 59, 318 F.3d 250, 252-53 (2003).

Memorandum at 6-7.

In this court's view, the language of Code § 8.01-216.6(B) is plain; for the Commonwealth's motion to dismiss to be granted pursuant to Code § 8.01-216.6(B), the court must first provide the Relator "with an opportunity for a hearing on the complaint." As that has not been done at the Commonwealth's request, the Commonwealth's motion to dismiss pursuant to Code § 8.01-216.6(B) is DENIED.

2. Relator Is Not Represented By Counsel

The Commonwealth contends that, because the Relator is not represented by counsel, the case must be dismissed, citing the interpretation of the federal *qui tam* statute, 31 U.S.C. § 3730(b)(1) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government"), in *Wojcicki v.*

¹ The court is uncertain what the General Assembly meant when it required the Commonwealth to notify the Relator "of the filing of the complaint" as the Relator filed the complaint. In the case at bar, however, the court does not need to resolve the meaning of that language as the case is being disposed of on other grounds.

SCANA/SCE&G, 947 F.3d 240 (4th Cir. 2020), where the court held that, because the relator represents not only his own interests, but those of the federal government, a "relator cannot pursue a *qui tam* FCA suit *pro se*." 947 F.3d at 244.

The equivalent Virginia statute to 31 U.S.C. § 3730(b)(1) is Code § 8.01-216.5(A): "A person may bring a civil action for a violation of § 8.01-216.3 for the person and for the Commonwealth." As in federal court, in a Virginia court, only an attorney licensed to practice in Virginia may represent another. See Va.Sup.Ct.R., Part 6, Section I, UPC 1-2 ("A non-lawyer may represent himself, but not the interest of another, before any tribunal."). Accordingly, this court adopts the well-reasoned holding of *Wojcicki* and holds that a relator cannot pursue a Virginia *qui tam* suit *pro se*.

Apparently acknowledging that the Commonwealth was correct that Relator could not pursue this *qui tam* action *pro se*, Relator argues that he is represented by counsel, to wit, the County Attorney, by virtue of the fact that he is a county employee, citing Code § 15.2-1245(A) and Code § 15.2-1542, and *Marchant & Taylor v. Mathews Co.*, 139 Va. 723 (1924). Neither the statutes nor the case provide support for Relator's position.

In pertinent part, Code § 15.2-1245(A) provides:

No account shall be allowed by the governing body of the county unless made out in separate items with the nature of each item specifically stated. When no specific fees are allowed by law, the time actually and necessarily devoted to the performance of any service charged in such account shall be verified by affidavit, which shall be filed with the account. The attorney for the Commonwealth, or **the county attorney** if there is one, **shall represent the county** before the board and advise the board of any claim which in his opinion is illegal or not before the board in proper form or upon proper proof, or which for any other reason ought not to be allowed. No such claim shall be denied unless the attorney representing the county has, by certified mail, served written notice on the claimant or his agent of the date that the governing body will consider the claim. (Emphasis added).

Relator apparently relies on the bolded language, but rips it out of context. This statute is concerned with the county attorney's role with regard to payments for services to the county and has nothing whatever to do with the county attorney's representation of county employees.

Code § 15.2-1542(A) provides in pertinent part:

Every county . . . , not otherwise authorized to create the office, may create the office of county . . . attorney. Such attorney shall be appointed by the governing body to serve at

the pleasure of the governing body. . . . In the event of the appointment of such attorney, the attorney for the Commonwealth for such locality shall be relieved of any duty imposed upon him by law in civil matters . . . of defending or **bringing actions in which the local government or any of its** boards, departments or agencies, or officials or **employees**, thereof, **shall be a party**, and in any other manner advising or **representing the local government**, its boards, departments, agencies, officials and **employees**, and all such duties shall be performed by the local government attorney. . . . (Emphasis added).

Relator apparently relies on the bolded language which addresses the duties that are removed from the Commonwealth Attorney upon the appointment of a county attorney and, by implication, indicates the duties of the county attorney. But even assuming that the bolded language sets forth the duties of the county attorney, it does not follow that the county attorney has a duty to represent every county employee in any legal matter in which the employee is involved. Rather, the clear import of Code § 15.2-1542(A), and its companion provision, Code § 15.2-836,² is that the county attorney is authorized to represent an employee only when that employee is acting in his capacity as a county employee.³ There is no merit to the contention that the General Assembly intended to provide legal representation to county employees for personal matters.

Because Relator's action in the case at bar is not brought in his capacity as a county employee, but rather as a private individual acting on behalf of the Commonwealth, Relator is not entitled to representation by the county attorney and, as a matter of law, is not represented by the county attorney in this matter.

The language of *Marchant & Taylor* upon which Relator relies provides no support for Relator:

It seems to follow that while the duty of the Commonwealth's

² In the Urban County Executive Form of Government, which is Fairfax County's form of government, "[i]f a county attorney is appointed":

the attorney for the Commonwealth shall be relieved of the duties of advising the board, of drafting or preparing county ordinances, and of defending or bringing civil actions in which the county or any of its officials is a party. All such duties shall be performed by the county attorney, who shall be accountable to the board in all such matters.

Code § 15.2-836.

³ Code § 15.2-1542(A) requires representation by the county attorney of "the local government, its boards, departments, agencies, officials and employees" Application of the maxim of *noscitur a sociis* ("the meaning of doubtful words in a statute may be determined by reference to their association with related words and phrases," *Andrews v. Ring*, 266 Va. 311, 319 (2003)) evidences that it is county governmental interests which the county attorney represents.

attorney to the county is paramount, since he represents the county before the board and is required to resist the action of the board when in his opinion it is in conflict with the county's interest, yet he is the legal adviser of the board and in case of suit against the board he would no doubt represent the board.

139 Va. at 736.

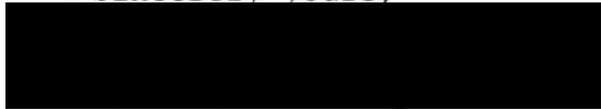
Assuming that the duties to which the Court refers are now the duties of the county attorney, there is plainly nothing in *Marchant & Taylor* which supports Relator's position.⁴

Finally, Relator asserts that, pursuant to Code § 8.01-216.5, the Attorney General represents him, but does not identify any specific language of Code § 8.01-216.5 which supports his assertion. After careful review of all five (5) subsections of Code § 8.01-216.5, the court can find no support for Relator's assertion.

As neither the county attorney nor the Attorney General has a duty to represent Relator, Relator is not represented by counsel. Accordingly, the Commonwealth's motion to dismiss is GRANTED on that ground.⁵

An appropriate order will enter.

Sincerely yours,



Richard E. Gardiner
Judge

⁴ Relator also asserts that Code § 15.2-1627 requires that he be represented by the Attorney General. Code § 15.2-1627(A), however, concerns only the duties of the Commonwealth Attorney and expressly prohibits the Commonwealth Attorney's involvement:

in civil matters . . . of defending or bringing actions in which the county . . . , or any of its boards, departments or agencies, or officials and employees thereof, shall be a party; or in any other manner of . . . representing the county or city, its boards, departments, agencies, officials and employees, except in matters involving the enforcement of the criminal law within the county or city.

⁵ As the Commonwealth's motion is granted as to Relator's not being represented by counsel, the court does not need to address whether Relator failed to serve a disclosure statement upon the OAG or whether Relator fails to state a valid false claim.

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA)	
EX REL. JOSEPH A. GLEAN)	
)	
Plaintiffs)	
)	
v.)	CL 2019-14869
)	
SUPERVISORS OF FAIRFAX COUNTY)	
)	
Defendants)	

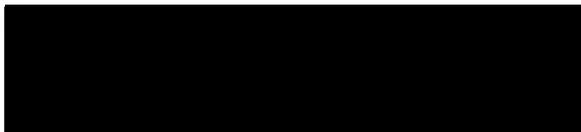
ORDER

THIS MATTER came before the court on the motion of the Commonwealth of Virginia, by the Office of the Attorney General ("OAG"), to dismiss the case.

THE COURT, having considered the arguments of the parties and for the reasons set forth in the court's letter opinion of today's date, hereby GRANTS the motion, and it is hereby

ORDERED that the case is DISMISSED without prejudice.

ENTERED this 11th day of January, 2021.



Richard E. Gardiner
Judge

Copies to:

Peter E. Broadbent
Assistant Attorney General
Counsel for the Commonwealth of Virginia

Joseph A. Glean, *pro se*