

01/11/09

In the
Supreme Court of Ohio

JOHN DOE,	:	Case No. 2009-2104
	:	
Plaintiff,	:	On Review of Certified Questions from
	:	the United States District Court for the
v.	:	Southern District of Ohio
	:	
MARY RONAN, et al.,	:	U.S. District Court Case
	:	No. 1:09-cv-243
Defendants.	:	
	:	

**PRELIMINARY MEMORANDUM OF DEFENDANT OHIO DEPARTMENT OF
EDUCATION IN RESPONSE TO THE CERTIFICATION ORDER**

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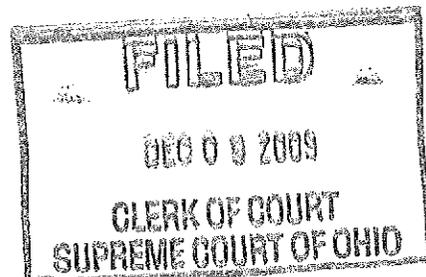


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INTRODUCTION

In 1993, the General Assembly passed a law, R.C. 3319.39, prohibiting individuals convicted of certain crimes—notably, crimes of violence, drug crimes, and sexually oriented offenses—from holding educational positions involving the care, custody, or control of children. The law also directed the Ohio Department of Education (“ODE”) to develop criteria for determining whether or not a convicted felon was sufficiently rehabilitated and, thus, permitted to work in the school setting. See Ohio Admin. Code 3301-20-01. In 2007, the General Assembly expanded the prohibition to cover all positions inside a school, regardless of whether the position included the direct custody or control of children, or whether the position required licensure from the state board of education.

In this case, John Doe was convicted twice of the unlawful sale of narcotic drugs in November 1976. In 1997, Doe accepted employment with the Cincinnati Public School District, first as a drug-free school specialist, and later as a due process hearing specialist. In November 2008, the District learned of Doe’s convictions. As required by R.C. 3319.39 and R.C. 3319.391, the District terminated his employment. (Doe could not invoke the rehabilitation exception in Ohio Admin. Code 3301-20-01 because he was convicted of non-rehabilitative offenses.)

Doe filed suit against the District, its superintendent Mary Ronan, and ODE, alleging numerous state and federal constitutional violations. The federal district court certified two questions to this Court: (1) “Does Ohio Revised Code § 3319.391 and Ohio Administrative Code § 3301-20-01 violate the Retroactivity Clause of Article II, Section 28 of the Ohio Constitution?” and (2) “Does Ohio Revised Code § 3319.391 and Ohio Administrative Code § 3301-20-01 violate the Contract Clause of Article II, Section 28 of the Ohio Constitution?”

ODE does not oppose review of the first certified question. This Court has clearly stated, albeit in dicta, that R.C. 3319.39 does not offend the Retroactivity Clause. See *State v. Cook* (1998), 83 Ohio St. 3d 404, 412. A law that “prohibits school districts from employing those previously convicted of various criminal offenses” is constitutional because “felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.” *Id.* (citation and emphasis omitted). Although ODE believes that *Cook* settles the question, the Court could accept review and adopt *Cook*’s sound analysis as a formal holding. Because Doe had “no vested right” in employment with the Cincinnati School District and no “reasonable expectation of finality” that his past narcotics convictions would “never thereafter be made the subject of legislation,” the statutory ban on his employment in the school setting does not offend the Retroactivity Clause. *Id.* (citation omitted).

The Court should not, however, entertain the second certified question because Doe’s Contracts Clause claim lacks merit. To impair a contract, the disputed statute must “essentially change the contract which existed *prior to* the effective date of the statute.” *Aetna Life Ins. Co. v. Schilling* (1993), 67 Ohio St. 3d 164, 167 (emphasis added). By contrast, “contracts entered into *on or after* the effective date of [the statute]” do not trigger the Contracts Clause. *Id.* at 168. In this case, Doe alleges that R.C. 3319.39 and R.C. 3319.391 impaired his July 2008 contract. But the General Assembly passed those laws in 2007. Because these statutes (and Ohio Admin. Code 3301-20-01) were already in effect when the contract was signed, they cannot possibly impair that contract. Thus, while ODE agrees that having this Court interpret Ohio law is preferable, such an interpretation is not necessary here because the law is well established.

STATEMENT OF THE CASE AND FACTS

A. The General Assembly enacted, and later expanded, laws prohibiting school districts from employing individuals convicted of certain criminal offenses.

Since 1993, the General Assembly has prohibited certain convicted felons from working in schools. As originally enacted, the law required schools “to conduct a criminal records check with respect to any applicant who has applied to the school district, educational service center, or school for employment in any position as a person responsible for the care, custody, or control of a child.” Former R.C. 3319.39(A)(1). It then prohibited schools from employing individuals who “ha[d] been convicted of or pleaded guilty to” any of the enumerated crimes in the statute, including drug trafficking. Former R.C. 3319.39(B)(1). Finally, the law directed ODE to adopt administrative rules specifying the circumstances under which a school could “hire a person who has been convicted of an offense listed in [the statute] but who meets standards in regard to rehabilitation set by the department.” Former R.C. 3319.39(E). ODE has promulgated such rules in Ohio Admin. Code 3301-20-01 since the statute’s enactment.

In 2005, ODE revised its rehabilitation criteria. The rules allowed convicted felons to apply for employment in the school setting if they could demonstrate rehabilitation—that is, if their “hiring or licensure w[ould] not jeopardize the health, safety, or welfare of the persons served by the district.” Ohio Admin. Code 3301-20-01(E)(2)(e) (2005). The rules specified, however, that schools could not under any circumstances hire individuals convicted of certain serious offenses involving violence, theft, drugs, or sex. Ohio Admin. Code 3301-20-01(E)(1) (2005). That list included drug trafficking. Ohio Admin. Code 3301-20-01(A)(11) (2005).

In 2007, the General Assembly enacted H.B. 190, which expanded R.C. 3319.39 beyond jobs involving the direct contact with or custody and control over children. Instead, the law now covers “any applicant who has applied to the school district, educational service center, or school

for employment in *any position.*” R.C. 3319.39(A)(1) (2007) (emphasis added). Like the prior version of the law, no school is permitted to “employ a person if the person previously has been convicted of or pleaded guilty” to any of the enumerated criminal offenses in the statute. R.C. 3319.39(B)(1) (2007). Again, the list included drug trafficking. R.C. 3319.39(B)(1)(a) (2007). These revisions took effect on November 14, 2007.

The General Assembly also enacted a sister provision covering “any position that does not require a ‘license’ issued by the state board of education.” R.C. 3319.391(A)(1). This provision operates in the same fashion. The school district must perform a criminal background check on current and potential employees in such positions. R.C. 3319.391(B). If the employee “has been convicted of or pleaded guilty to any offense described in [R.C. 3319.39(B)(1)],” they “shall not be hired or shall be released from employment, as applicable, unless the person meets the rehabilitation standards adopted by [ODE].” R.C. 3319.391(C). This law also took effect on November 14, 2007.

Finally, in 2008, the General Assembly made two minor modifications to the statutes. The legislature removed adult educators from the debarment provisions in R.C. 3319.39, and it modified the deadlines in R.C. 3319.391 for schools to obtain criminal background checks on their employees. See Sub.H.B. No. 248 (127th Gen. Assem.), at 40-41, 44. These revisions had no bearing on the District’s termination decision in this case.

B. The Cincinnati Public School District terminated Doe after learning of his drug trafficking convictions.

The plaintiff, John Doe, was convicted twice of Unlawful Sale of Narcotic Drugs in November 1976. He served three years in prison. After his incarceration, Doe obtained a sociology degree and later became a licensed social worker. In 1997, he accepted a position with

the Cincinnati Public School District as a drug-free school specialist. In 2002, he started a new position as a due process hearing specialist.

On July 14, 2008, the District renewed Doe's contract for two years. The agreement was made "subject to confirmation of appropriate state certification."

On November 24, 2008, the District "became aware that [Doe] had been convicted twice of Unlawful Sale of Narcotic Drugs in June 1976 and November 1976." The District informed Doe that H.B. 190 and R.C. 3319.39 "bar[red] [him] from continuing to work in the district." The District permitted him to exhaust his sick leave, and it then terminated his employment.

C. Doe filed suit against the Cincinnati Public School District and ODE.

Doe then filed suit in the Hamilton County Court of Common Pleas, naming the Cincinnati Public School District, its superintendent Mary Ronan, and ODE as defendants. He alleged that the District breached his July 2008 contract, and that the disputed laws (R.C. 3319.39, R.C. 3319.391, and Ohio Admin. Code 3301-20-01) violated the Contracts Clauses of the United States and Ohio Constitutions, the Ex Post Facto Clause of the United States Constitution, the Retroactivity Clause of the Ohio Constitution, due process, and equal protection. The District removed the case to the United States District Court for the Southern District of Ohio.

Once in federal court, ODE filed a motion to dismiss, and the District filed a motion for judgment on the pleadings. In response, Doe urged the district court to certify the Retroactivity Clause and Contracts Clause claims to this Court. The court acceded to the request and certified two questions of law: (1) "Does Ohio Revised Code § 3319.391 and Ohio Administrative Code § 3301-20-01 violate the Retroactivity Clause of Article II, Section 28 of the Ohio Constitution?" and (2) "Does Ohio Revised Code § 3319.391 and Ohio Administrative Code § 3301-20-01 violate the Contract Clause of Article II, Section 28 of the Ohio Constitution?"

The district court then denied ODE's motion to dismiss and the District's motion for judgment without prejudice, and it stayed all proceedings.

It should be noted that, although Doe attacks the constitutionality of both R.C. 3319.39 and R.C. 3319.391, the district court curiously certified only the latter statute to this Court. (The court's certified questions adopted Doe's proposed language in full). Given that both statutes mirror each other's provisions, and that the District cited only to R.C. 3319.39 when it terminated Doe, ODE assumes that the district court intended to include R.C. 3319.39 in its certification order.

**THE OHIO DEPARTMENT OF EDUCATION DOES NOT OPPOSE REVIEW OF
THE RETROACTIVITY CLAUSE QUESTION, BUT THE COURT SHOULD
DECLINE TO ANSWER THE CONTRACTS CLAUSE QUESTION**

A. Although *State v. Cook* resolves Doe's claim under the Retroactivity Clause, ODE does not oppose review of the first certified question.

The law governing the Retroactivity Clause is firmly established. In *Cook*, this Court stated that a law is unconstitutionally retroactive "if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right." 83 Ohio St. 3d at 411. The Court then summarized the Retroactivity Clause inquiry: Has a "vested right . . . been created?" *Id.* at 412. If not, the court must determine whether the disputed law "'burden[s] or attach[es] a new disability to a past transaction or consideration.'" *Id.* (quoting *State ex rel Matz v. Brown* (1988), 37 Ohio St. 3d 279, 281). And if a new burden or disability does attach, the court must assess whether "'the past transaction or consideration created at least a reasonable expectation of finality.'" *Id.* (quoting *Matz*, 37 Ohio St. 3d at 281).

The *Cook* Court then highlighted R.C. 3319.39 as an example of a statute that did *not* violate the Retroactivity Clause. *Id.* And with good reason. There is no vested right in play, as

an individual has no absolute, unqualified right to employment within a school. See *Rehor v. Case Western Reserve Univ.* (1975), 43 Ohio St. 2d 224, 229 (“A vested right is a right fixed, settled, absolute, and not contingent upon anything.”). And although R.C. 3319.39 attaches a new disability to a past criminal conviction, the Court reaffirmed that felons had no reasonable expectation of finality with respect to their past convictions: “[E]xcept with regard to constitutional protections against ex post facto laws, felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.” *Cook*, 83 Ohio St. 3d. at 412 (quoting *Matz*, 37 Ohio St. 3d at 281-82) (emphasis and alteration omitted).

Cook resolves any lingering doubt over the constitutionality of R.C. 3319.39, its sister provision, R.C. 3319.391, and the associated administrative rule, Ohio Admin. Code 3301-20-01. Notwithstanding the Retroactivity Clause, the General Assembly may forever “prohibit[] school districts from employing those previously convicted of various criminal offenses”—including felonious assault, aggravated robbery, kidnapping, rape, sexual battery, prostitution, drug manufacturing, or, in this case, drug trafficking. *Cook*, 83 Ohio St. 3d. at 412.

Nevertheless, *Cook*’s discussion of R.C. 3319.39 is dicta. The Court invoked the statute as an illustration of how the Retroactivity Clause operates, but it did not purport to rule on the ultimate issue. For that reason, the Court may wish to accept review of the first certified question and adopt *Cook*’s analysis as a formal judgment that settles the question presented here. ODE is aware of two other cases challenging the constitutionality of these laws. See *Swan v. State*, No. CV 09-70567 (Cuyahoga C.P.); *Walter v. Fairfield City Schools*, No. 1:09-cv-462 (S.D. Ohio).

Review of Doe’s Retroactivity Clause claim also may be warranted given the prevalence and importance of criminal background check laws in Ohio. The General Assembly has enacted

similar statutes—requiring criminal background checks and disqualifying certain individuals from employment—in other sensitive fields. See, e.g., R.C. 173.394 (long-term care homes), R.C. 737.081 (firefighters); R.C. 3301.32 (head start agencies); R.C. 3712.09 (hospice homes); R.C. 3721.121 (nursing homes); R.C. 4765.301 (emergency medical technicians); R.C. 5104.012 (child day-care centers); R.C. 5126.28 (county boards of developmental disabilities). These laws advance a vital public safety function. Not only do they ensure that employees of a school, day-care center, or hospice home have suitable credentials, but they build public trust in such institutions. Parents would be hesitant to leave their children in the custody of school officials if they had any doubts about their children’s safety or well-being in the building.

Put simply, although ODE believes that *Cook* firmly resolves any dispute about the validity of R.C. 3319.39, R.C. 3319.391, and Ohio Admin. Code 3301.20-01, it does not oppose review of the first certified question. A pronouncement from this Court that such laws do not violate the Retroactivity Clause would foreclose all future litigation on the issue.

B. The Court should not accept review of the second certified question because Doe cannot show an impairment of his July 2008 contract.

The case law governing the Contracts Clause is also well worn, and that case law demonstrates the futility of Doe’s claim in this case.

To establish a violation of the Contracts Clause, a party must establish that the law, when it became effective, impaired an existing contract. Or, put another way, the law “essentially change[d] [a] contract which existed *prior to* the effective date of the statute.” *Aetna Life Ins.*, 67 Ohio St. 3d at 167 (emphasis added). “[C]ontracts entered into *on or after* the effective date of [a statute] are subject to the provisions of the statute.” *Id.* at 168. The Contracts Clause has no bearing on that circumstance.

The federal Contracts Clause operates in the same fashion: “[I]t must be understood to impose *some* limits upon the power of a State to abridge *existing* contractual relationships, even in the exercise of its otherwise legitimate police power.” *Allied Structural Steel Co. v. Spannaus* (1978), 438 U.S. 234, 242 (second emphasis added).

In this case, Doe claims that R.C. 3319.39, R.C. 3319.391, and Ohio Admin. Code 3301-20-01 impaired his July 2008 contract. The fatal defect in that theory is the sequence. R.C. 3319.39 and R.C. 3319.391, which expanded background checks to all employees of a school, went into effect in 2007. Likewise, the provision in Ohio Admin. Code 3301-20-01 specifying that drug trafficking is a non-rehabilitative offense went into effect in 2005. Because the challenged laws *preceded* Doe’s July 2008 contract, they cannot possibly impair that contract.

In sum, Doe cannot state a colorable Contracts Clause claim, and there is no reason for the Court to accept the second certified question.

CONCLUSION

For the above reasons, Defendant Ohio Department of Education does not oppose review of the first certified question. The Court should, however, decline to answer the second certified question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

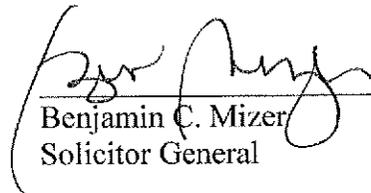
I certify that a copy of the foregoing Preliminary Memorandum of Defendant Ohio Department of Education in Response to the Certification Order was served by U.S. mail this 9th day of December, 2009 upon the following counsel:

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