

IN THE SUPREME COURT OF OHIO

ORIGINAL

JOHN DOE,

Petitioner,

v.

CINCINNATI PUBLIC SCHOOLS, et al.,

Respondents.

Case No. 09-2104

On Certification of State Law Questions
from the United States District Court for the
Southern District of Ohio

MERIT BRIEF OF RESPONDENTS CINCINNATI PUBLIC SCHOOLS
AND MARY RONAN

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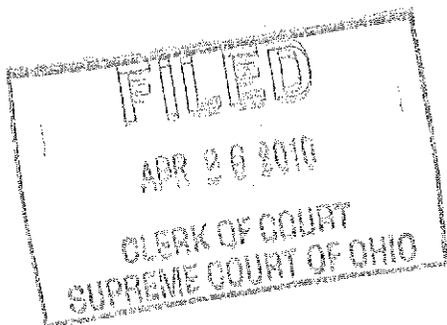


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I. STATEMENT OF FACTS

On January 27, 2010, this Court certified two questions of state law pursuant to Supreme Court Rule XVIII:

1. Does R.C. 3319.391 and Ohio Adm. Code 3301-20-01 violate the Retroactivity Clause of Article II, Section 28 of the Ohio Constitution?
2. Does R.C. 3319.391 and Ohio Adm. Code 3301-20-01 violate the Contract Clause of Article II, Section 28 of the Ohio Constitution?

Respondents Cincinnati Public Schools and Mary Ronan (collectively, "CPS") respectfully submit that the Court should answer both questions in the negative.

A. R.C. 3319.391 and Ohio Adm. Code 3301-20-01.

Since 1993, teachers and other licensed employees of Ohio public schools have been required to undergo criminal records background checks in accordance with procedures specified in R.C. 3319.39. In 2007, the Ohio General Assembly enacted R.C. 3319.391 and extended the criminal background check requirement to non-licensed employees. Sub. H.B. 190 (127th G.A.). All current non-licensed employees of Ohio public schools were required to complete their criminal records background check by September 5, 2008. *Id.*

Upon receiving the results of the criminal background checks, schools were required to "release from employment" any person who has been convicted or pleaded guilty to an offense enumerated in R.C. 3319.39(B)(1)(a). See R.C. 3319.391(C). Schools were required to dismiss persons convicted of an enumerated crime unless the person met the rehabilitation standards set by the Ohio Department of Education ("ODE") pursuant to R.C. 3319.39(E).

The rehabilitation standards set by ODE were already established when the criminal background checks were expanded to non-licensed employees in 2007. See Ohio Adm. Code 3301-20-01 (2007). The "rehabilitation factors" include, among others, the nature and seriousness of the crime, the age of the individual when the crime was committed, and the

conduct and work activity of the applicant before and after the criminal activity. Ohio Adm. Code 3301-20-01(E)(2)(e) (2007). Although the rehabilitation factors are applicable to most criminal offenses, ODE established a subset of the enumerated crimes that automatically disqualified an individual from being employed at a public school. Ohio Adm. Code 3301-20-01(E)(1) (2007). Such crimes included crimes involving violence, drug abuse, theft, or sexually-oriented offenses. For those disqualifying offenses, ODE's rehabilitation factors did not apply.

Id.

B. CPS complied with the statute and regulations and required all of its employees, including John Doe, to undergo a criminal records background checks.

By September 5, 2008, CPS required all of its employees to submit to the required criminal records background checks. CPS received the results of the criminal records check around November 2008.

Petitioner John Doe was employed at CPS in a non-licensed position from 1997 to 2009. (Amend. Compl., ¶ 5, Supp. 2) Doe's criminal records background check showed that he had been convicted of a felony drug trafficking offense under R.C. 2925.03. (*Id.* at ¶¶ 19-21, Supp. 20)

Drug trafficking in violation of R.C. 2925.03 is an enumerated offense under R.C. 3319(B)(1)(a) and a disqualifying offense under Ohio Adm. Code 3301-20-01(E)(1). Under the ODE regulations in effect at that time, CPS was not allowed to consider any rehabilitation standards with respect to Doe's drug trafficking conviction, and CPS notified Doe that his employment would be terminated as required by Ohio law. (*Id.*) Doe was not allowed to return to work, but CPS continued to pay Doe until all of his accumulated sick leave expired even though it was under no obligation to do so. (*Id.*) When his sick leave expired, CPS released Doe from his employment as it was required to do under R.C. 3319.391(C).

C. Doe filed a lawsuit against CPS and ODE alleging breach of contract and arguing that R.C. 3319.391 is unconstitutional.

Doe filed the underlying lawsuit in this case against CPS and ODE in the Hamilton County Common Pleas Court. Case No. A0903419. Defendants removed the case to federal court on April 7, 2009. *Doe v. CPS, et al.*, S.D. Ohio Case No. 1:09-CV-243.

Doe's complaint alleged a cause of action for breach of contract and claims under the Ohio and U.S. Constitutions. (Amend. Compl. ¶¶ 28-38, Supp. 21-22) Doe also claimed that R.C. 3319.391 and Ohio Adm. Code 3301-20-01 (2007) violated his constitutional rights under the impairment of contracts clauses of the Ohio and U.S. Constitutions (*Id.* at ¶¶ 39-50, Supp. 22-24), the ex post facto clause of the U.S. Constitution (*Id.* at ¶¶ 51-61, Supp. 24-25), the retroactive laws clause of the Ohio Constitution (*Id.* at ¶¶ 62-70, Supp. 25-26), the due process clause of the U.S. Constitution (*Id.* at ¶¶ 71-82, Supp. 26-27), and the equal protection clause of the U.S. Constitution (*Id.* at ¶¶ 83-92, Supp. 27-28).

Doe filed a motion for a temporary restraining order and preliminary injunction to prevent CPS from terminating his employment, which the federal district court denied. (Supp. 31-36) In May 2009, ODE filed a motion to dismiss Doe's complaint because the challenged statute and regulation were not unconstitutional under any of Doe's theories. CPS filed a motion for judgment on the pleadings, incorporating by reference ODE's arguments as to the constitutionality of the challenged statute and regulations. CPS further argued that it should not be liable because it was required to terminate his employment pursuant to state law.

Doe never responded to the CPS Defendants' motion for judgment on the pleadings, and instead he filed a motion to certify Ohio constitutional questions to this Court. On November 16, 2009, the district court granted Doe's motion to certify questions to this Court. On January 27, 2010, this Court determined to answer the certified questions.

D. ODE Revises Ohio Adm. Code 3301-20-01.

Although they are not at issue in this case, in August 2009, before the beginning of the 2009-10 school year, ODE issued revised criminal background check regulations for non-licensed employees of public schools. Under the revised rules, Ohio Adm. Code 3301-20-01(2009) now only applies to teachers and other licensed employees. A new rule adopted by ODE, Ohio Adm. Code 3301-20-03 (2009), applies to non-licensed employees.

While some crimes are still considered by ODE to be "non-rehabilitative," the revised regulation allows schools to consider the rehabilitation factors for some crimes that were committed years ago. Under Ohio Adm. Code 3301-20-03(A)(6), sexually-oriented offenses are considered non-rehabilitative. Murder and manslaughter are considered non-rehabilitative, but the rehabilitative standards may be considered for "other violence related offenses" occurring more than twenty years prior to the criminal records background check. *Id.* The rehabilitative standards may be considered for all "drug offenses" occurring more than ten years prior to the criminal records check. *Id.* The standards may be considered for "theft offenses" occurring more than ten years from the criminal records check. *Id.* The standards may be considered for all other violations identified in R.C. 3319.39 occurring more than five years before the criminal records check. *Id.*

Under the revised regulations, Doe would not be automatically disqualified from employment in a public school because his drug abuse offense occurred more than ten years ago.¹ Doe believes that under the revised regulations, he would be able to show that he has been rehabilitated under ODE's standard. (Appellant Brief 4) He has not, however, reapplied for employment with CPS.

¹ Although Doe is eligible for employment under the revised regulations, if Doe's argument prevails in this case the revised regulations would also be unconstitutional as applied to persons convicted of a felony prior to the effective date of the legislation.

II. ARGUMENT

CPS respectfully submits that the Court should answer both certified questions in the negative. R.C. 3319.391 and Ohio Adm. Code 3301-20-01 (2007) do not violate the prohibition on retroactive laws or the impairment of contracts clause in Article II, Section 28 of the Ohio Constitution.

Initially, it is noteworthy that statutes enjoy "a strong presumption of constitutionality." *State v. Cook* (1998), 83 Ohio St.3d 404, 409, 1998-Ohio-291. "An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Id.*

A. **Proposition of Law No. 1: R.C. 3319.391 and Ohio Adm. Code 3301-20-01 (2007) do not violate the retroactivity clause in Article II, Section 28 of the Ohio Constitution.**

The first certified question is whether R.C. 3319.391 and Ohio Adm. Code 3301-20-01 (2007) violate the prohibition on retroactive laws in the Ohio Constitution, which provides, "The general assembly shall have no power to pass retroactive laws." Section 28, Article II, Ohio Constitution. The Court applies a two-part test to determine whether a statute is unconstitutionally retroactive. The Court first determines whether the General Assembly made the statute expressly retroactive. Only if the legislature intended the law to apply retroactively does the Court analyze whether the statute restricts a substantive right or is remedial. Here, R.C. 3319.391 (2007) is not retroactive, and even if it is retroactive with respect to Doe's conviction, the statute is remedial. It does not violate Art. II, Sec. 28.

1. R.C. 3319.391 (2007) prospectively changed the conditions for employment in public schools. It is not a "retroactive law."

It is well-established that this Court will not address a question of constitutional retroactivity unless and until the Court determines that the General Assembly expressly made the statute retroactive. *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, ¶ 9. "A statute is presumed to be prospective in its operation unless expressly made retrospective." *Id.* at ¶ 7. To overcome the presumption that a statute applies prospectively, a statute must 'clearly proclaim' its retroactive application. *Id.* at ¶ 10.

In *Hyle*, the Court held that a statute prohibiting sex offenders from establishing a residence within 1,000 feet of a school was not a "retroactive law." The Court reasoned that the General Assembly did not clearly intend the statute to apply to a sex offender who bought a home prior to the effective date of the statute. *Id.* at ¶ 24. Because the Court found that the statute was not retroactive, it was unnecessary to consider whether the statute was unconstitutional under Art. II, Sec. 28. *Id.* See also *id.* at ¶¶ 35-40 (O'Donnell, J., dissenting) (finding that the statute was remedial and did not violate Art. II, Sec. 28 even if it was retroactive).

Here, Doe concedes that R.C. 3319.391 applies to him. But the fact that Doe is now required by statute to undergo a criminal records background check does not make this law "retroactive." Rather, the statute provides a condition on non-licensed school employees that applies prospectively only. When R.C. 3319.391 was enacted in November 2007, employees of public schools were given until September 5, 2008 to submit to a criminal records background check. The statute expressly allowed public schools to employ current staff "conditionally," until the criminal records check was completed and the board received the results. R.C. 3319.39(B)(1)(c). The statute applies prospectively only: the only conduct prohibited (i.e.,

employing an individual after receiving a disqualifying criminal background check) occurs after the effective date of the statute.

Nothing in R.C. 3319.391 prevents Doe from receiving the retirement benefits that he earned while he was employed at CPS. Doc is presently receiving retirement benefits, although he claims he is entitled to damages in the amount of the greater benefit he would have received if he continued working. The fact that Doe is allowed to collect retirement benefits at all proves that this statute does not apply retroactively. The statute does not apply to deprive Doe of benefits that he earned during the years he was employed at CPS. The statute only applies prospectively as a future condition on employment in Ohio public schools.

Doe does not dispute that he was required to undergo a criminal background check and that CPS was compelled by R.C. 3319.391 to terminate his employment. Rather, Doe argues that the General Assembly and ODE had no right to place these new conditions on his employment with CPS. If Doe's argument prevailed, no public body could change the conditions of employment for a public employee without grandfathering in all current employees who were not able to meet the new conditions. The Ohio Constitution does not compel such an absurd result.

With respect to Doe's employment, R.C. 3319.391 is not a retroactive law barred by Art. II, Sec. 28 of the Ohio Constitution.

2. **To the extent R.C. 3319.391 imposed a new restriction on Doe's conviction for drug trafficking, the statute is remedial, not punitive.**

R.C. 3319.391 was not a retroactive law to the extent that it applied a prospective condition on Doe's employment. The only argument Doe can make with respect to retroactivity is that the statute imposed a new restriction on his 1976 felony conviction for drug trafficking. But as this Court held in *State ex rel. Matz v. Brown* (1988), 37 Ohio St. 3d 279, 281, 525 N.E.2d 805, "except 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."

Art. II, Sec. 28 of the Ohio Constitution "does not prohibit all increased burdens; it prohibits only increased punishment." *State v. Ferguson* (2008), 120 Ohio St.3d 7, 16, 2008-Ohio-4824, ¶ 39. A statutory scheme that serves a regulatory or remedial purpose is not punishment and does not violate the Ohio Constitution even if its application to a past transaction "bear[s] harshly upon one affected." *Id.* "Consequences as drastic as deportation, deprivation of one's livelihood, and termination of financial support have not been considered sufficient to transform an avowedly regulatory measure into a punitive one." *Id.* (citing *Doe v. Pataki* (C.A.2 1997), 120 F.3d 1263, 1279).

In *State ex rel. Matz v. Brown*, this Court foresaw the instant set of facts, and explained the "important public policy reason" for holding that non-punitive laws are not unconstitutionally retroactive:

[I]f Relator's theory were to prevail, no person convicted of abusing children could be prevented from school employment by a later law excluding such persons from that employment.

37 Ohio St.3d at 282 (holding that a statute that restricted persons convicted of a past felony from making a claim on a crime victim fund was not unconstitutionally retroactive). In dicta, the

Court approved the type of law at issue in this case. The Court repeated its admonition in *Brown* in *State v. Cook* (1998), 83 Ohio St.3d 404, 412 1998-Ohio-291 (registration requirements for sexually-oriented offenders do not violate Art. II, Sec. 28) and in *Ferguson*, 2008-Ohio-4824 at ¶ 34 (upholding even stricter registration and notification requirements under Art. II, Sec. 28).

Here, there is an even stronger argument that the General Assembly's purpose for passing R.C. 3319.391 was regulatory than in the sex offender registration cases. Unlike the registration requirements, R.C. 3319.391 is not a criminal statute and no penalties are proposed for violating the statute. Rather, the criminal background check requirement is a part of Ohio's code provisions applicable to schools and is one of many code provisions that set the terms and conditions of employment for administrators, teachers, and staff in Ohio's public schools. Moreover, the inevitable public humiliation that results from the sex offender notification and registration requirements is not present in the criminal background check statute. Indeed, all criminal records checks produced pursuant to R.C. 3319.391 must be kept confidential and may not be made available to any person other than the applicant who is subject to the check and other necessary personnel at the school. R.C. 3319.39(D).

Any hardship that Doe suffered in this case was mitigated by the fact that he was on notice of R.C. 3319.391 for almost one year before CPS received the results of his criminal background check. Even after CPS learned of his criminal conviction, Doe was allowed to use all his sick leave before CPS terminated his employment in April 2009. Nothing in the statute prevented Doe from seeking other employment, including at Ohio's numerous private schools where criminal background checks are not required. As of August 2009, ODE revised its regulations and Doe was free to apply for reemployment with Ohio public schools.

R.C. 3319.391 and Ohio Adm. Code 3301-20-01 (2007) were clearly designed to protect Ohio public school children, and the certified question should be answered in the negative. Because R.C. 3319.391 and the ODE regulation were regulatory, not punitive, the Court should find that they do not violate the prohibition against retroactive laws in the Ohio Constitution.

3. The majority of courts to have considered the issue have held that similar criminal background statutes are not unconstitutionally retroactive.

The cases from other jurisdictions cited by Amicus Curiae American Civil Liberties Union ("ACLU") are inapposite. Two of the cases analyze criminal background check requirements under a due process analysis. *Cronin v. O'Leary* (Mass. Super. 2001), 2001 WL 919969 (background check violated plaintiffs' procedural due process); *Nixon v. Pennsylvania* (Pa. 2003), 839 A.2d 277 (background check violated plaintiffs' substantive due process). The certified questions presented here do not address procedural or substantive due process issues. The third "case" cited by the ACLU is a declaratory ruling from the Michigan Department of Community Health and does not provide any constitutional analysis that is relevant to the certified questions.

The majority of courts that have considered whether employment restrictions on convicted felons violate constitutional prohibitions against retroactive or *ex post facto* laws have held that they do not. For example, in *DeVeau v. Braisted* (1960), 363 U.S. 144, the United States Supreme Court held that it did not violate the *ex post facto* clause of the U.S. Constitution for New York to pass a law prohibiting ex-felons from engaging in certain employment along its waterfront. *Id.* at 160. The Court reasoned that "[b]arring convicted felons [was] a familiar legislative device to insure against corruption." *Id.* at 159. The Court upheld the statute reasoning that it was not intended to punish ex-felons, but instead "to devise what was felt to be a much-needed scheme of regulation of the waterfront." *Id.* at 160.

More recently, in *Gillespie v. City of Indianapolis* (S.D. Ind. 1998), 13 F. Supp. 2d 811, a police officer challenged a 1996 gun control law that made it unlawful for any person convicted of domestic violence to carry a firearm. *Id.* at 814-15. The year before, Gillespie had pled guilty to a misdemeanor domestic violence charge. *Id.* Under the new statute, he would not be allowed to carry a firearm. *Id.* Consequently he would be fired from his job as a police officer. *Id.* Gillespie claimed the statute violated the *ex post facto* clause of the U.S. Constitution. *Id.* at 825-26. The Court dismissed Gillespie's claim, reasoning that the statute "only criminalizes conduct occurring after the effective date of the statute (i.e., possession of a firearm by domestic violence offender)." *Id.* at 826 n.11 (emphasis added). The court also reasoned that the statute was enacted for remedial, not punitive purposes. *Id.* See also *Int'l Longshoreman's Ass'n v. Miami-Dade County* (S.D. Fla.) 1999 WL 726883, *4 (An ordinance that denied port access to individuals with recent criminal convictions did not violate the *ex post facto* clause of the U.S. Constitution because it "was clearly remedial." The ordinance was intended to increase security at the port, not as a punishment to those with prior felony convictions.).

The majority of courts to have considered this issue or similar issues have held that legislatively imposed restrictions on the employment of convicted felons do not violate constitutional principles forbidding retroactive laws.

B. Proposition of Law No. 2: R.C. 3319.391 and Ohio Adm. Code 3301-20-01 (2007) do not violate the impairments of contracts clause in Article II, Section 28 of the Ohio Constitution.

The second certified question asks whether R.C. 3319.391 and Ohio Adm. Code 3301-20-01 (2007) violate the impairments of contracts clause of the Ohio Constitution which provides, "[T]he general assembly shall have no power to pass . . . laws impairing the obligation of contracts." Sec. 28, Art. II, Ohio Constitution. The question should also be answered in the negative.

1. Doe's employment contract with CPS was not impaired by R.C. 3319.391.

Initially, Doe's argument fails because he did not enter into his most recent employment contract with CPS until after R.C. 3319.391 became effective. See *Toledo Area AFL-CIO Council v. Pizza* (C.A.6, 1998) 154 F.3d 307, 323 (In an impairment of contracts case, the challenged legislation must "substantial[ly] impair a contractual relationship."). R.C. 3319.391 was signed into law on November 14, 2007. Doe signed his most recent employment contract with CPS on July 14, 2008. (Compl., Ex. A, Supp. 14)

Moreover, Doe's contract with CPS was expressly conditioned on Doe undergoing a criminal background check and passing other state certification requirements: "Commencement of the term of this agreement [is] subject to confirmation of appropriate state certification." (*Id.*) The General Assembly anticipated that it would take time for schools to process criminal records background checks for all current employees. Under the statute, CPS was not required to perform the criminal records check until September 5, 2008. Under R.C. 3319.39(B)(2), school districts were allowed to "employ an applicant conditionally until the criminal records check required by this section is completed." Thus, successful completion of the criminal records check was a condition of Plaintiff's continued employment with CPS, not a substantial impairment violating the contracts clause.

Even if the certification condition had not been expressly written into Doe's contract, however, the enactment of R.C. 3319.391 did not violate Art. II, Sec. 28. CPS and Doe could not enter into a contract that would abrogate the ability of the General Assembly or ODE to change the qualifications for personnel of Ohio public schools. See, e.g., *State v. Netherland* (Ohio App. 4th Dist.), 2008-Ohio-7007, ¶ 40, 2008 WL 5451339 (holding that statutory revisions to Ohio sex offender classification statute did not unconstitutionally impair

convictee's plea agreement with county prosecutor). See also *Lima v. State*, 122 Ohio St.3d 155, 157, 2009-Ohio-2597, 909 N.E.2d 616 (holding that the General Assembly's statutory prohibition of residency requirements as a condition of employment did not unconstitutionally impair municipalities' contractual agreements with their public employees).

The state's authority to legislate pursuant to its police power "must be treated as an implied condition of any contract." *City of Akron v. Public Utilities Commission* (1948), 149 Ohio St. 347, 355-356, 78 N.E.2d 890. It is "well established . . . that when the subject of the contract is one which affects the safety and welfare of the public, such contracts are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health and morals." *Id.*

Thus, it was both an express and implied condition of Doe's employment that he obtain appropriate state certification, including successfully completing a criminal records background check. His employment contract was not impaired by R.C. 3319.391.

2. Even if Doe's contract had been impaired, the General Assembly has the authority to exercise its regulatory power.

Even if Doe could show that he was a party to a contract substantially impaired by R.C. 3319.391, his claim would fail. The prohibition against states passing legislation impairing the obligation of contracts "is not an absolute." *Toledo Area AFL-CIO Council v. Pizza* (C.A.6, 1998), 154 F.3d 307, 323. "It is well-settled that the provisions of the state and federal Constitutions inhibiting laws impairing the obligation of contract, cannot affect the [state's] police power." *Benjamin v. City of Columbus* (1957), 167 Ohio St. 103, 116, 146 N.E.2d 854. Where there is a "significant and legitimate public purpose" for the regulation, the impairments of contracts clause does not apply. *Toledo Area AFL-CIO Council*, 154 F.3d at 323.

The Ohio General Assembly's interest in protecting school children is incontrovertible. See, e.g., *Doe v. Petro* (S.D. Ohio), 2005 WL 1038846, *2. In *Petro*, plaintiffs sought a temporary restraining order enjoining the state from enforcing R.C. 2950.031, which forbid sex offenders from living within 1,000 feet of any school premises. The plaintiffs in *Petro* argued that the statute would result in the "complete abrogation of a lease between a landlord and a registered sex offender." Despite the alleged impairment, the court held that "the state of Ohio has a significant and legitimate purpose for impairing the parties' contractual rights – the protection and safety of children." *Id.* at *3. See also *Int'l Longshoreman's Ass'n v. Miami-Dade County* (S.D. Fla.) 1999 WL 726883, *4 (statute that barred convicted felons from accessing port was "reasonable and necessary" to increase security).

The decision by the General Assembly and ODE to prohibit persons convicted of drug trafficking from working in public schools was a valid exercise of the state's police power to protect Ohio public school children. The prohibition against impairments of contracts does not apply.

III. CONCLUSION

For each and all of the foregoing reasons, Respondents Cincinnati Public Schools and Mary Ronan respectfully submit that the Court should answer the certified questions in the negative.

Respectfully submitted,

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I certify that a copy of the foregoing was served via regular U.S. mail, postage prepaid upon the following this 26th day of April, 2010:

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