

# Bill of Particulars



THE REPORTER OF THE LOCAL GOVERNMENT ATTORNEYS OF VIRGINIA, INC.

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**LAST CHANCE!**



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Don't miss your chance to join us at Marriott Virginia Beach Oceanfront for the 2022 LGA Fall Conference! The last day to register is **October 6**. The conference will feature a bevy of informative [programming](#), including presentations on employment law, social media, construction contracts, affordable housing, school boards, civil commitments, parliamentary procedure, and "sketchy" ethics.

There will also be a plethora of social events to enjoy. All social events will be held onsite, and we are excited to share that we will be oceanside for the YLGA Hosted Reception, Opening Night Party, and Awards Banquet Reception! In addition, Virginia Beach offers lots of fun things to do, and we have shared a few options on our [Friday Afternoon Activities event sheet](#). Check it out!



### BOOK SWAP AND BASKETS!



Bring a new or gently loved book for a fellow LGA-er and drop it off at the registration desk. Cozy up in one of our host hotel's outlets and enjoy a book adventure.

Join us at the banquet for a basket raffle! Each attendee will receive a ticket at the registration desk. For a chance to win one of the donated baskets, place your ticket in the bag associated with the basket you covet, and attend the Friday Awards Banquet for the drawing. Must be present to win! Interested in showing off the best of your locality, dazzling with some firm swag, or have some amazing school spirit to share? Click [here](#) for information about donating a basket.

### RENEW YOUR MEMBERSHIP

LGA membership renewal period begins each August. Renewal invoices were emailed to Chief Counsels on August 1. No invoices will be mailed. Questions? Contact Amy Sales ([amy.sales@easterassociates.com](mailto:amy.sales@easterassociates.com)).

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**INTERVIEW WITH STEPHEN C. PIEPGRASS, PARTNER, LGA ANNUAL SPONSOR TROUTMAN PEPPER HAMILTON SANDERS LLP**

*Q: Stephen, please tell our readers about the history of the firm.*

Troutman Pepper Hamilton Sanders LLP is the product of several mergers of major law firms over the years. Our Virginia local government practice traces back through Troutman Sanders LLP (before 2020) and Mays & Valentine LLP (before 2001). Mays & Valentine had several name changes going back to its origins in Richmond in the 1920s. No matter what name we have gone by, our firm has been involved in various Virginia local government matters for many years.

For 25 years, the firm's local government practice was led by Carter Glass—who joined Mays & Valentine as a new associate in the late 1970s and retired from Troutman Sanders at the end of 2017. Carter was considered by many as one of the “deans” of Virginia local government law. He advised local governments, businesses, and individuals on a wide range of issues and represented them in a wide range of matters. Throughout his career, Carter was actively involved in the LGA and the Bar and introduced me and my partner John West to the local government practice and the LGA. Although Carter is now enjoying retirement from the practice of law, John and I keep in touch with him and are grateful for his mentorship and friendship over the years.

In addition to John and me, today our local government team includes associates Tim McHugh, Robert Claiborne, and Abbey Thornhill. While the five of us are based in the Richmond office, our work involves localities across the Commonwealth, and we regularly collaborate with our colleagues in different practice areas and different offices, including those in Virginia Beach and Washington, D.C. We also collaborate with Clark Lewis and Karin Addison of Troutman Pepper Strategies, who have extensive experience with state government relations and lobbying the General Assembly on behalf of local governments and businesses.

*Q: What are the firm's areas of expertise when it comes to local government?*

We handle a variety of matters for local governments and officials, including administrative proceedings, civil litigation, and counseling on a variety of issues regarding government structure, annexation, election law, professional conduct, and local ordinances, among others. We also handle land use, zoning, utilities, economic development, compliance, public records, and false claims matters—sometimes on behalf of local governments or public officials and other times on behalf of businesses or individuals.

In representing local governments and public officials, we handle matters of various sizes and subject areas, but we distinguish ourselves in handling large, sometimes-contested matters. For instance, in recent years, we have been involved in matters related

to a city-to-town reversion, a request that the State Board of Education consolidate the separate school divisions of a city and county, annexation or boundary adjustments, and opposition to a toll-road rate increase before the State Corporation Commission. Our work on government structure matters—like city-to-town reversion, and annexations and boundary adjustments—is also notable because it typically involves proceedings before the Commission on Local Government and a special court composed of three circuit court judges from around the Commonwealth. Carter was heavily involved in those matters when he was at the firm. John and I gained great deal of experience working with Carter in those types of matters, and we continue to work on those types of matters today. Issues like these do not come up every day, and we offer a unique and well-informed experience in them.

Our public records work is also notable, especially as we often represent businesses negotiating with government. While any mention of FOIA usually brings to mind issues of access to the government's information, there is a good deal of sensitive information from private businesses in the government's possession, and FOIA requests for this information can be of great concern to those businesses. The public records matters we handle for businesses involve providing proactive advice to government contractors and other clients interacting with the government on disclosure rules and exemptions under FOIA, drafting contractual provisions to protect client information from public disclosure, protecting information provided in response to government investigations from disclosure, seeking opinions of the Attorney General and other government attorneys regarding applicable exemptions, and justifying disclosure exemptions to government agencies or, if need be, courts.

*Q: Why do you support the LGA?*

The LGA is the premier resource for local government lawyers in Virginia. The CLE programs and publications are expertly done, and they provide unrivaled resources for keeping lawyers well-informed on relevant areas of local-government law. The professionalism and civility of the group is really remarkable, too. LGA programs and events are always welcoming and are places where those on our team have formed lifelong friendships. The organization does a great job of providing a forum that allows local government lawyers the ability to discuss areas that impact clients. This allows collaboration between lawyers so that we can learn from each other's experiences, improving the knowledge and expertise of the bar as a whole.

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## MEMBER NEWS

Please welcome the following new LGA members:

Whitney Davis ([wdavis@arlingtonva.us](mailto:wdavis@arlingtonva.us)), Assistant Arlington County Attorney; Michael Derdeyn ([med@fplegal.com](mailto:med@fplegal.com)) of Flora Pettit PC; John Dorsey ([john.dorsey@fairfaxcounty.gov](mailto:john.dorsey@fairfaxcounty.gov)), Assistant Fairfax County Attorney; and Brian MacAvoy ([bryan.macavoy@alexandriava.gov](mailto:bryan.macavoy@alexandriava.gov)), Assistant Alexandria City Attorney. We also welcome new firm member Flora Pettit PC, based in Charlottesville and Harrisonburg.

Annual sponsor Sands Anderson PC welcomes two new LGA participants. Katie M. DeCoster ([kdecoster@sandsanderson.com](mailto:kdecoster@sandsanderson.com)) is Counsel in the firm's Christiansburg office. DeCoster helps cities, towns, and counties with a host of legal issues including those related to social services and delinquent real estate taxes. Robyn Hansen ([rhansen@sandsanderson.com](mailto:rhansen@sandsanderson.com)) represents regional authorities and other governmental entities with employment law and other matters. She is primarily located in the Williamsburg/James City County office. Sands Anderson also welcomes back Max Hlavin ([mhlavin@sandsanderson.com](mailto:mhlavin@sandsanderson.com)), who has returned to the LGA ranks after a brief absence. Formerly the Deputy County Attorney in James City County, Max has recently moved to Richmond and joined Sands Anderson. He provides legal support to locality clients as well as counseling on matters including planning, zoning, real estate, and economic development.

Stacy Haney ([shaney@haneyphinyo.com](mailto:shaney@haneyphinyo.com)), formerly with Reed Smith, and Pakapon Phinyowattanachip ([pakaponp@haneyphinyo.com](mailto:pakaponp@haneyphinyo.com)) have opened a firm and joined the LGA as Associate Members. The firm name is Haney Phinyowattanachip PLLC. Welcome!

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## VIRGINIA-BASED U.S. DISTRICT COURTS

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### EMPLOYMENT • AGE DISCRIMINATION • COVID-19 POLICY • PRETEXT • MOTION TO DISMISS

*Drzymala v. BAE Sys. Controls, Inc.*, No. 7:21-cv-00522, 2022 WL 3971050  
(W.D. Va. Aug. 31, 2022) (Dillon, J.).

**HOLDINGS:** (1) The former employee plausibly alleged that he was replaced by a younger employee, and (2) that the company's enforcement of its COVID-19 policy was pretext for age discrimination.

**DISCUSSION:** A former employee for an avionics company alleged that his termination for violating his employer's COVID-19 policy was pretext for age discrimination. The 59-year-old plaintiff stopped in at his office for approximately 30 minutes shortly after taking a COVID-19 test that he had scheduled two days earlier. The next day, December 29, 2020, he received a positive test result and informed his employer. Later that day, he was placed on administrative leave. The company disseminated an updated COVID-19 policy on January 7, 2021. A week later, the employee was terminated for violating this policy.

The company filed a motion to dismiss, contending that the complaint's heavy reliance on the phrase "upon information and belief" indicated that the former employee had not sufficiently alleged facts to state a plausible claim of age discrimination under the *McDonnell-Douglas* burden-shifting framework. A plaintiff is generally permitted to plead

facts based “upon information and belief” if he is in a position of uncertainty because the necessary evidence is controlled by the defendant, and the allegations are supported by secondhand information that provides the plaintiff with a good-faith reason for believing it to be true. See *Ridenour v. Multi-Color Corp.*, 147 F. Supp. 3d 452 (E.D. Va. 2015).

The court held first that the former employee plausibly alleged the only element of the Age Discrimination in Employment Act claim that was in dispute—that he was replaced by a younger employee. In support of this contention, the complaint alleged that at the time of his firing, “[the former employee] was one of the most senior engineers working at [the company],” and that, “[u]pon information and belief, after [the former employee]’s termination from employment, his job duties were taken over by one or more [company] employees, all of whom are younger than [the former employee].” These allegations, coupled with the fact that the company had control of this information, satisfied the plaintiff’s burden on this issue.

The court held second that the former employee sufficiently alleged pretext on the part of the employer regarding the reason for his termination. The company claimed that its employment decision was made solely due to the COVID-19 policy violation. But in claiming that this policy was selectively enforced against older employees, the former employee cited a conversation he had with a Facilities Electrical Maintenance Engineer at the company on January 26, 2021, in which the Engineer said that “[the company] had demonstrated a very inconsistent application of the quarantine policy, to-wit, allowing some employees with head cold symptoms similar to the symptom experienced by [the former employee] to work at the worksite,” and that the former employee “was the first employee of [the company] he had known to be terminated for activities that other workers had similarly engaged.” Thus, the complaint alleged that, “[u]pon information and belief, [the company]’s decision to terminate Plaintiff was not based upon legitimate business reasons, but was merely a pretext to unlawful age discrimination.” The statements allegedly made by the Engineer pointed to experience or secondhand knowledge and were sufficient to support the former employee’s allegations made “upon information and belief.”

Therefore, the court denied the company’s motion to dismiss.

**INDIVIDUALS WITH DISABILITIES EDUCATION ACT • FREE APPROPRIATE  
PUBLIC EDUCATION • INDIVIDUALIZED EDUCATION PROGRAM • AUTHORITY  
OF HEARING OFFICER**

*Fairfax Cnty. Sch. Bd. v. A.G.*, No. 1:21-cv-00840-MSN-JFA, 2022 WL 4016882 (E.D. Va. Sept. 2, 2022) (Nachmanoff, J.).

**HOLDING:** The hearing officer erred by resolving an issue not raised by the parties.

**DISCUSSION:** The Fairfax County Public School System (FCPS) filed suit to challenge the decision that Hearing Officer made with regard to whether a high school student eligible for special education was provided with a free appropriate public education (FAPE), as required by the Individuals with Disabilities Education Act (IDEA). In December 2019, the student’s parents engaged with FCPS regarding the special education services that the public school system could offer. In May 2020, FCPS developed an Individualized Education Program (IEP) that proposed placing the student at a public high school for the 2020-2021 school year. The parents disagreed, believing that the student required private school placement. In August 2020, FCPS proposed a revised IEP that still identified the public high school as the appropriate placement. The parents again disagreed and obtained an Independent Educational Evaluation (IEE) of the student. A Licensed Psychologist conducted the evaluation and issued a written report on September 28, 2020. On October 29, 2020, an FCPS IEP reevaluation committee convened to consider the report. The committee determined that FCPS should carry out a follow-up psychological evaluation. This evaluation was conducted by a School Psychologist, who issued her written report on January 5, 2021. That same day, the parents filed a request for a due process hearing regarding what they contended were errors made by FCPS regarding the student’s special education. Among other things, the parents alleged that FCPS denied the student a FAPE because the May and August 2020 IEPs were not reasonably calculated to allow the student to make appropriate progress, and that FCPS violated the IDEA because it did not timely hold the initial IEP meeting within 30 days of the March 5, 2020 determination that the student needed special education and related services. See 34 CFR § 300.323(c)(1).

Following the hearing, which took place in March 2021, the Hearing Officer rendered a decision that largely found in favor of FCPS. The Hearing Officer, however, ruled in favor of the parents on the issue of FCPS’s duty to reconvene the student’s IEP team to review the September 2020 report and revise the IEP in order to provide an appropriate location of services “within a reasonable time after receipt” of the IEE report, “at least by the end of FCPS 2020-2021 winter break.” Failing to do so denied the student a FAPE. FCPS subsequently filed the instant suit to challenge the Hearing Officer’s decision on this matter, arguing that he impermissibly decided an issue not raised by either party.

The court held that the Hearing Officer’s decision to inject a “failure to reconvene” theory into the dispute constituted reversible error. The parents never raised this issue. Although they did include an argument regarding FCPS’s alleged failure to timely hold an *initial* IEP meeting, they made no such claim with respect to FCPS’s failure to timely reconvene the IEP team after its receipt of the IEE report, despite having the opportunity to do so. The Hearing Officer acted beyond his authority in raising and deciding this issue *sua sponte*. The parents cited 8 Va. Admin. Code 20-81-210(F)(6) to argue that the Hearing Officer acted within his discretion, but this regulation only authorizes a hearing officer to consider an issue not raised in the pre-hearing notice *if it is raised by one of the parties* during the hearing, which it was not.

The Hearing Officer's legal error was further compounded by the fact that FCPS did timely respond to the September 2020 report approximately one month later, at which time FCPS proposed that the student undergo further testing with the School Psychologist. FCPS continued to hold meetings following the issuance of this second report and modified the student's IEP in response. The Hearing Officer was aware of the school's actions but provided no explanation as to why he found FCPS's response to be insufficient and untimely.

Therefore, the court vacated the portion of the Hearing Officer's decision that found that FCPS violated the IDEA by failing to timely reconvene the student's IEP team.

**PUBLIC EMPLOYMENT • UNITED STATES POSTAL  
SERVICE • DISCRIMINATION • RETALIATION • SUMMARY JUDGMENT**

[Calix-Hestick v. DeJoy](#), No. 1:21-cv-971, 2022 WL 4343110 (E.D. Va. Sept. 19, 2022) (Trenga, J.).

**HOLDINGS:** (1) The former postal employee did not support his claims of discrimination with enough evidence to survive summary judgment. (2) The retaliation claims could advance with respect to the employee's suspension, and (3) subsequent termination. (4) The failure-to-accommodate claim necessitated dismissal.

**DISCUSSION:** A former Rural Carrier Associate (RCA) for the United States Postal Service (USPS) in Stafford, Virginia, sued the agency, alleging that USPS engaged in discriminatory and retaliatory conduct by failing to accommodate his request to use a standing mat while sorting mail, suspending him without pay, and subsequently terminating his employment. The RCA, a disabled veteran, had received several medical diagnoses prior to applying for a position with USPS. Nevertheless, on the Medical Review Questionnaire he completed during the hiring process, he indicated that he had no medical condition that could interfere with his abilities to perform the job.

About four months after starting work, the RCA asked his first-line Supervisor to provide him with a standing mat in order to ease his knee and back pain. At a meeting three days later, the RCA's second-line Supervisor learned of this request. Evidently, he had planned on firing the RCA at this meeting due to a poor attendance record, but changed his mind after learning that the RCA's absences were due to medical appointments. Instead, he contacted the Occupational Health Nurse (OHN) Administrator the next day and conveyed the RCA's request for a standing mat. She emailed him a Return to Duty Form (RTDF). He gave this form to the RCA on the following day, explaining that the RCA would be suspended from work until he returned the completed RTDF, as it was standard procedure to stop someone from working under such circumstances in order to reduce the risk of an on-the-job injury.

On March 4, 2016, one day after being suspended, the RCA initiated an Equal Employment Opportunity (EEO) complaint. On April 20, 2016, the RCA took part in a teleconference call with three agency officials, during which the RCA's disabilities and



Medical Questionnaire were discussed. USPS ultimately decided to terminate the RCA's employment. USPS sent two notices to the RCA on May 10 and May 11, 2016. The first contained a mistake as to the name of the form containing the false information, and the second incorrectly stated that the RCA was not performing the essential functions of his position. USPS sent him a third letter on June 21, 2016, indicating that the reason for the termination was a failure to disclose relevant medical history. USPS moved for summary judgment on all claims.

The court held first that there was not enough evidence in the record for a factfinder to determine that USPS suspended and fired the RCA because of his disabilities. The Rehabilitation Act's stringent causation standard requires a plaintiff asserting disability discrimination to establish that his disability was the *sole reason* for his employer's adverse employment action. Here, the RCA's request for an accommodation to prevent possible injury and his untruthful answers on the Medical Questionnaire were arguably legitimate reasons to support USPS's actions.

The court held second that the RCA presented sufficient evidence to convince a reasonable jury to find in his favor on his retaliation claim with regard to the suspension. He presented a *prima facie* case. USPS proffered a legitimate, non-retaliatory reason for its conduct, stating that it sent the RCA home to complete the RTDF due to safety and liability concerns. The RCA then offered evidence that this reason was pretext for retaliation, citing inconsistent evidence. Namely, two USPS employees provided conflicting testimony—the second-line Supervisor, who had originally intended to fire the RCA, stated that his instruction that the RCA not return to work until completing the RTDF was issued at the direction of the OHN Administrator. She testified, however, that she never gave these instructions. This indicated potential retaliatory animus on the part of the Supervisor as the real reason for the RCA's suspension.

The court held third that the RCA's retaliation claim with respect to his termination could also proceed. The RCA introduced sufficient evidence to raise a genuine issue of fact as to whether the Human Resources (HR) Manager for the Richmond District was the pertinent decision-maker, as opposed to the RCA's second-line Supervisor. The record supported the inference that the HR Manager made the decision to fire the RCA soon after learning of the protected activity, which satisfied the RCA's burden for bringing this claim. USPS proffered a legitimate, non-retaliatory reason for terminating the RCA's employment—falsification of his employment application. However, the record was "riddled with inconsistencies that allow of a reasonable trier of fact to find that USPS's reasons for Plaintiff's termination were pretextual." In addition to the inconsistencies contained in the termination letters, an email chain between the HR Manager and her subordinates allowed for a reasonable inference that USPS's decision to terminate the RCA was made well before any investigation into the truthfulness of the RCA's employment application was initiated or completed. Thus, the RCA raised a genuine issue as to whether the reason for his termination was actually due to retaliatory animus.

The court held fourth that the RCA's claim for failure to accommodate a disability could not proceed because the RCA had adamantly contended that he could perform his essential job duties without a standing mat. This admission doomed his claim.

Therefore, the court granted USPS's motion for summary judgment as to the discrimination and failure-to-accommodate claims and denied the motion as to the RCA's retaliation claims.

**PUBLIC EMPLOYMENT • WHISTLEBLOWING • LIBERTY INTEREST • FIRST AMENDMENT RETALIATION • RES JUDICATA • WRONGFUL TERMINATION • DEFAMATION • MOTION TO DISMISS**

[Moschetti v. Off. of the Inspector Gen.](#), No. 3:22-cv-24-HEH, 2022 WL 3329926 (E.D. Va. Aug. 11, 2022) (Hudson, J.).

**HOLDINGS:** (1) The public statements associated with the investigator's termination did not violate her liberty interests. (2) Qualified immunity did not protect the supervisor from the First Amendment retaliation charge. (3) The whistleblower wrongful termination charge was not precluded by an earlier hearing. (4) The investigator failed to show that her termination violated public policy. (5) She likewise failed to state a wrongful termination claim based on her reporting of suspected unlawful activity. (6) Some of the allegedly defamatory statements could be actionable.

**DISCUSSION:** A former Investigator for the Virginia Office of the State Inspector General (OSIG) filed this action against the Commonwealth, OSIG, and several government employees following her termination in March 2021. Beginning in May 2020, at the direction of her Supervisor, the Investigator prepared reports detailing the Virginia Parole Board's decision to grant parole to several inmates, concluding that the Parole Board had violated its own policies and certain laws in the process. She submitted a report regarding one particular inmate to the Office of the Attorney General. OSIG released a redacted version of this report to certain persons, including the Chief of Staff for the Governor. A few days later, it was leaked to the public. Soon thereafter, the Investigator and her Supervisor met with members of the Governor's Administration, including the Chief of Staff and the Secretary of Public Safety and Homeland Security (Secretary), where the Investigator alleged that they hostilely cross-examined her and accused her of bias.

Over the next few months, the Investigator chose to speak out about these events and shared her reports and experiences with various law enforcement officials, motivated by concerns that OSIG, the Attorney General's Office, or the Governor's Office might try to cover up the Parole Board's wrongdoing. In February 2021, the report was leaked to the media and the "Parole Board Scandal" was reported widely. The Investigator was placed on pre-disciplinary leave on March 5, 2021. That same day, she sent documents to the Virginia Assembly and petitioned a Virginia state court to declare her a whistleblower. OSIG terminated her employment on March 22, 2021. The Investigator then filed a grievance with OSIG, which conducted a hearing. She alleged that the hearing was futile for various reasons and appealed to the circuit court in Richmond.

Relevant here, several public statements were made to the media with regard to the leaked report and the Investigator's firing. At a news conference, the Chief of Staff, referring to the meeting with the Investigator and her Supervisor, remarked, "We went into that meeting thinking that there was bias and there was lack of objectivity . . . . We left that meeting knowing that there was bias and a lack of objectivity in that report." He added that the Investigator's petition asking to declare her a whistleblower was a "political ploy" to harm the Administration. In a radio interview around the same time, the Secretary said that the Investigator's report was "biased" and "would not hold up under cross examination." OSIG's Communications Director, when asked by a news reporter about the Investigator's firing and allegations that OSIG had acted improperly, issued a statement which was approved by the Supervisor, saying, "[OSIG] models integrity, trust, and ethical behavior, and demonstrates the highest standards of honesty, respect, and accountability. For privacy reasons, OSIG cannot comment on personnel matters."

The Investigator alleged six claims in her employment action: her Supervisor and the Communications Director violated her liberty interest without due process by publicly disparaging her work performance (Count I); her Supervisor retaliated against her for exercising her right to free speech (Count II); her Supervisor wrongfully ended her employment in violation of Code § 2.2-3011, which protects whistleblowers (Count III); her Supervisor wrongfully fired her in violation of *Bowman v. State Bank of Keysville*, 229 Va. 534, 331 S.E.2d 797 (1985), which forbids terminations that violate public policy (Count IV); OSIG, the Commonwealth, and her Supervisor wrongfully terminated her in violation of Code § 40.1-27.3, which outlaws discharging employees who, in good faith, report violations of law to any governmental body or law enforcement official (Count V); and her Supervisor, OSIG's Communications Director, the Chief of Staff, and the Secretary defamed her by falsely claiming that she was biased, dishonest, and lacked integrity. The defendants moved to dismiss the case for failure to state a claim, on qualified immunity grounds, and for other reasons.

The court held first that the Investigator's stigma-plus claim in Count I did not hold up. The Investigator contended that OSIG's statement insinuated that she did not model integrity, trust, honesty, or ethics. A reasonable person, however, would not come to this conclusion, especially considering the express statement that OSIG would not comment on matters pertaining to personnel.

The court held second that the free speech retaliation charge could proceed. The Investigator claimed to have released information because she feared that the Parole Board investigation would be covered up. The content of the speech was a matter of public concern, and Virginia law allows state employees to release confidential information detailing wrongdoing or abuse to law enforcement agencies and the General Assembly so long as they do so in good faith. See Code § 2.2-3009 et seq. Because her right to take these actions had been clearly established, the Supervisor was on notice that firing her in response was unlawful. Thus, he was not entitled to qualified immunity.

The court held third that Count III was not barred by principles of *res judicata*. The Investigator's administrative grievance hearing and subsequent appeal did not result in a final judgment, and factual findings made by the hearing officer could not be given a preclusive effect because the circuit court could still remand the case.

The court held fourth that the *Bowman* claim must be dismissed. Six of the eight statutes that the Investigator cited did not create any rights related to her employment. The other two created causes of action and provided their own remedies.

The court held fifth that Count V also failed. The Commonwealth and its agencies, including OSIG, were immune from suit since Code § 40.1-27.3 contains no express waiver of sovereign immunity. And since the Supervisor did not actually “employ” the Investigator within the meaning of the statute, her claim against him could not proceed.

The court held sixth that some of the allegedly defamatory statements could be actionable. As discussed, the statement regarding OSIG’s high moral standards created no innuendo that defamed the Investigator. And the Chief of Staff’s statement about the Investigator’s petition being a “political ploy” was simply rhetorical hyperbole that no reasonable person would interpret as a fact. On the other hand, the various statements made about the report—insinuating bias, lack of objectivity, and not holding up under cross examination—contained verifiable, factual connotations. Thus, they could potentially support a defamation suit.

Therefore, the court granted in part and dismissed in part the defendants’ motion to dismiss.

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## U.S. COURT OF APPEALS OTHER THAN THE FOURTH CIRCUIT

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### MUNICIPAL CODE • SHORT-TERM RENTAL LICENSES • TAKINGS CLAUSE • DORMANT COMMERCE CLAUSE • FINAL JUDGMENT REQUIREMENTS

[\*Hignell-Stark v. City of New Orleans\*](#), 46 F.4th 317 (5th Cir. 2022).

**HOLDINGS:** (1) The property owners did not enjoy property interests in their short-term rental licenses for the purposes of the Takings Clause. (2) The city’s residency requirement for granting short-term rental licenses violated the dormant Commerce Clause by discriminating against out-of-state applicants. (3) The appeals court lacked jurisdiction to decide the prior-restraint claim because the district court’s decision was not a final judgment.

**DISCUSSION:** Several property owners sued the City of New Orleans, Louisiana, claiming that its short-term rental (STR) licensing requirements violated their constitutional rights. The City’s licensing regime went into effect in 2017. Finding that the rapid proliferation of STRs made popular by platforms such as Airbnb and Vrbo had brought about nuisances such as noisy renters, less affordable housing, and the loss

of “neighborhood character,” the City revised its regime in 2019 to restrict the issuing of STR licenses to only homeowners renting out their primary residences. The City also implemented stringent advertising restrictions. Relevant to this appeal, the property owners brought three constitutional claims. First, they asserted that the City’s failure to renew their STR licenses violated the Takings Clause because they had a property interest in their renewals. Second, they maintained that the residency requirement violated the dormant Commerce Clause because it discriminated against interstate commerce. Third, they contended that the advertising restrictions violated the First Amendment as a prior restraint on protected speech. The property owners requested a declaration that the City’s policies were unconstitutional and a permanent injunction against their enforcement. The district court granted the City’s motion for summary judgment on the first two claims and, after instructing the parties to brief the prior-restraint claim, determined that it was “viable.” Both parties appealed.

The court held first that the property owners did not enjoy property interests in the renewal of their STR licenses. While *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262 (5th Cir. 2012), recognized that business licenses can qualify as property for purposes of procedural due process, this decision did not mean that such licenses were automatically considered property interests under the Takings Clause. To clarify, the court emphasized that the different provisions required different tests. For a property interest to be recognized for Takings Clause purposes, it must be “so deeply rooted in custom” that just compensation for appropriating it necessarily includes money damages. The STR licenses did not meet this test. The City’s original licensing regime explicitly qualified an STR license as “a privilege, not a right,” and gave the City the authority to revoke or not renew such licenses based on non-compliance with the zoning ordinances. See La. Mun. Code §§ 26-613–26-615 (2017). In addition, the property owners’ interests “were not so longstanding that they can plausibly claim custom had elevated them to property interests.”

The court held second that the City’s residency requirement violated the dormant Commerce Clause because it discriminated on its face against out-of-state property owners. Such a law is *per se* invalid unless it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. The City provided three legitimate rationales for the restriction, but all of those objectives could be accomplished in other ways. To address the nuisances associated with STRs, the City could step up its enforcement efforts, increase the magnitude of penalties, and strip repeat offenders of their licenses. These measures could give owners stronger incentives to prevent nuisances. To preserve affordable housing, the City could increase the price of STR licenses, cap the number of licenses available per neighborhood, and provide incentives for the construction of more housing. Capping the share of housing units that could be used for STRs could also help preserve neighborhood character.

The court held third that it lacked jurisdiction to resolve the City's cross-appeal as to the district court's determination that the prior-restraint claim was "viable" because this "holding" was not a final decision. Although the district court termed this a "judgment," it did not resolve the property owners' request for a declaration or a permanent injunction. Thus, it was not "final" for the purposes of 28 U.S.C. § 1291.

Therefore, the court affirmed in part and vacated in part the district court's judgment and dismissed the City's cross-appeal for want of jurisdiction.

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## **ATTORNEY GENERAL'S OPINIONS**

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As of the time of publication, there were no recent Attorney General's Opinions that may be of interest to local government attorneys.

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## **POSITIONS AVAILABLE**

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### **CITY OF FALLS CHURCH CITY ATTORNEY**

The City of Falls Church, a thriving and quickly growing City, is recruiting for a City Attorney. This is an opportunity to take an active part in forming the future of Falls Church, which enjoys close proximity to urban areas while preserving a "small-town" feel. The incumbent City Attorney has served since 2014, and will retire on October 14, 2022. The City Attorney is appointed by the City Council and is the legal advisor to the City Council, the City Manager, City departments, and boards and commissions. The City Attorney manages the Office of the City Attorney and supervises the staff currently composed of one full-time paralegal. The successful candidate will have the opportunity to build a growing Attorney's Office team, either with additional internal staff or dedicated outside legal counsel.

The City Attorney serves as chief legal counsel to the City Council; the City Manager; and all departments, boards, commissions, and other officials of the City in all matters affecting City interests. The City Attorney conducts legal research and provides advice on questions of city, state, and federal laws, most frequently in the areas of land use and zoning, property, employment, public procurement, contracts, and general local government law. The City Attorney also attends all City Council meetings; advises the Council on parliamentary procedure; and prepares resolutions and ordinances for consideration and action by the Council. Other responsibilities include advising the City on actual or possible litigation; representing the City in legal matters before the courts; retaining and supervising outside litigation specialists, as appropriate; and varied other tasks as required.

The successful candidate must hold a Juris Doctor degree from a law school accredited by the American Bar Association; be a member of the Virginia State Bar; have extensive experience as a practicing attorney in local government, with preference for experience in Virginia; have comprehensive knowledge of municipal corporation law, local, state and federal laws, and court decisions affecting municipalities; have comprehensive knowledge of parliamentary rules of procedure; have expertise in land use and employment law; and have significant litigation and trial experience.

The salary range is \$180,000–\$210,000 and will be based upon the background and qualifications of the successful candidate. The City of Falls Church has an attractive benefits package which includes: annual leave, holidays, and sick leave; a retirement pension plan (non-VRS); health insurance, dental plan, life insurance, long-term disability insurance; optional deferred compensation (ICMA); credit union membership; sick leave bank; and an employee assistance program.

For more information and to apply, click [here](#).

### **FAIRFAX COUNTY ASSISTANT COUNTY ATTORNEY V**

The County Attorney's Office is seeking an attorney with high-quality legal knowledge and skills in the areas of collective bargaining and employment law. The applicant should be proficient in general employment law litigation, legal research, writing, and public speaking, as well as enjoy a wide variety of challenging legal work.

The position is in the Office of the County Attorney's Personnel Section. The successful applicant will counsel and represent the County, with the assistance of expert outside counsel, in collective bargaining with the County's bargaining units. Duties will include working on a variety of employment law matters, including collective bargaining, labor negotiations, grievances, drafting and reviewing employment-related ordinances and policies, and other related employment law matters. The potential candidate must have a strong background in employment law, including litigation experience.

The successful applicant may personally handle litigation in state and federal courts and before state administrative agencies, and provide legal advice to county agencies related to employment issues, including but not limited to Title VII, the Americans with Disabilities Act, and the Virginia Workers' Compensation Act. The successful applicant will represent county agencies in employee grievances and in matters before the Fairfax County Civil Service Commission. Litigation will include personal injury, employment law, constitutional law, workers' compensation, and alleged civil rights violations.

For more information and to apply, click [here](#).

## **HAMPTON CITY SCHOOL BOARD ATTORNEY**

The School Board Attorney is the chief legal advisor of the Hampton City School Board and provides legal advice to the School Board, the Superintendent, and Division Administration. The School Board Attorney attends all School Board public meetings and closed-door sessions; assists the Board members in the legal performance of their duties and fair and just discharging of such obligations to students, staff, employees, and the public; and provides proactive legal advice to the School Board and the Superintendent on all matters affecting the operation of the school system. The School Board Attorney supports or represents the Division, Board, and/or Administration in administrative hearings and proceedings, and reviews and recommends changes to policies, contracts, and procedures to ensure compliance with legal mandates. In addition, the School Board Attorney works with the City Attorney's Office in matters relating to the school division, provides quarterly reports to the School Board on pending litigation, and performs other related duties as required.

The successful candidate must possess a law degree from an accredited law school, be a member in good standing of the Virginia Bar, have two or more years of legal experience, preferably in Virginia K-12 school law and/or working in a law firm representing school district clients. The starting salary range for this position is \$106,714–\$178,369, negotiable and commensurate with experience. For more information and to apply, please click [here](#).

## **HAMPTON CITY ASSISTANT CITY ATTORNEY II—LITIGATION**

The City of Hampton seeks an Assistant City Attorney to perform a wide range of professional legal services to all City departments, various boards and commissions, and the City Council. The successful candidate will study, interpret, and apply laws, court decisions, ordinances, and other legal sources in advising officers and employees of the City in legal matters. He or she will represent the City, its officers, and employees in civil actions brought by or against the City in state court and handle judicial tax sales on behalf of the Treasurer. The Assistant City Attorney will prepare and draft ordinances, resolutions, administrative policies, grants, memorandums of agreement, and other legal documents and instruments; and review such documents and offer opinions as to legal acceptability when presented to the City for consideration. The Assistant City Attorney serves as primary legal counsel for all FOIA-related matters; may assist in the investigation of claims by or against the City and recommend actions to be taken; and represents the City in the community and at professional meetings as required.



The successful candidate must possess a Juris Doctor degree from an accredited law school and a minimum of two years of legal experience as a practicing attorney. He or she must be an active member in good standing in the Virginia State Bar, must be licensed to practice law in Virginia, and must possess a valid driver's license with a satisfactory driving record.

For more information and to apply, click [here](#).

### **NORFOLK CITY ASSISTANT CITY ATTORNEY (TRANSACTIONAL)**

The Norfolk City Attorney's Office seeks applicants for a newly created Assistant City Attorney position. Focusing on transactional matters, the successful candidate will provide legal services to city departments, agencies, and the City Council in a wide variety of practice areas particular to local government. Areas of responsibility may include real estate development, general real estate, leasing, land use, zoning, eminent domain/condemnation, government contract compliance, construction contracts and claims, procurement, grants compliance issues, and general business matters, including negotiating and drafting real estate purchase and development agreements, leases, franchise agreements, and contracts, and providing advice regarding and interpretation of contracts. Duties may also involve representation of various boards and commissions; interpretation and drafting of codes, statutes, regulations, ordinances, and policies; and provision of legal advice regarding the applicability of constitutional, statutory, and regulatory provisions to local governance and administrative issues.

Admission to the Virginia State Bar is preferred; pending admission will be considered. Local government experience will also be given preference. Position and salary will be commensurate with experience and will accompany a generous and comprehensive benefits package. This position is currently eligible for a one-time \$5,000 signing bonus.

Applicants should submit a résumé and cover letter addressed to: Heather A. Mullen, Deputy City Attorney, by email to [heather.mullen@norfolk.gov](mailto:heather.mullen@norfolk.gov) or by mail to the Office of the City Attorney, 810 Union Street, Suite 900, Norfolk, VA 23510.

### **NORFOLK CITY ASSISTANT CITY ATTORNEY (LITIGATION)**

The Norfolk City Attorney's Office seeks applicants for a newly created Assistant City Attorney position. Focusing on litigation, the successful candidate will provide legal services to city departments, agencies, and the City Council in a wide variety of practice areas particular to local government. Areas of responsibility may involve general civil litigation in federal and state courts, prosecution of City Code violations, and enforcement

of matters of interest to the City, including proceedings pertaining to regulatory matters and other federal, state, and local administrative proceedings. Duties may also involve the provision of pre-litigation counseling and advice in the assigned legal areas and/or to the assigned City departments and agencies. Duties may also involve representation of various boards and commissions; interpretation and drafting of codes, statutes, regulations, ordinances, and policies; and provision of legal advice regarding the applicability of constitutional, statutory, and regulatory provisions to local governance and administrative issues.

Admission to the Virginia State Bar is preferred; pending admission will be considered. Local government experience will also be given preference. Position and salary will be commensurate with experience and will accompany a generous and comprehensive benefits package. This position is currently eligible for a one-time \$5,000 signing bonus.

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### **PRINCE WILLIAM COUNTY PUBLIC SCHOOLS ASSISTANT DIVISION COUNSEL**

Prince William County Public Schools (PWCS) seeks an attorney with five or more years of experience with transactional matters focusing on the areas of real estate, procurement, and contracts. With 100 school facilities and more being renovated and constructed, this position offers the right candidate an opportunity to provide day-to-day legal advice to the PWCS Chief Operations Officer, Chief Financial Officer, and the Departments of School Facilities and Purchasing.

PWCS offers competitive compensation and an extensive level of health and leave benefits. The position may provide for telework. For more information and to apply, please click [here](#).

### **SANDS ANDERSON LOCAL GOVERNMENT ATTORNEY**

Sands Anderson is seeking a highly motivated, well-rounded, local government savvy attorney to support the Government Group. This role is responsible for supporting towns, counties, and cities across the state of Virginia in a wide variety of practice areas.

This position requires: Virginia Bar licensure; a minimum of 3–5 years of litigation experience and/or general counsel experience with localities or school districts; excellent client service and communication skills; strong organizational skills; the ability to manage multiple tasks and priorities; and the ability to travel within Virginia to attend local government meetings. A background in public sector, local government practice is preferred.

The application may be found [here](#). To apply, please submit the application, along with a cover letter and résumé, to: Sands Anderson PC, Attention: Human Resources P.O. Box 1998, Richmond, VA 23218; e-mail: [hr@sandsanderson.com](mailto:hr@sandsanderson.com).

### **SPOTSYLVANIA COUNTY DEPUTY COUNTY ATTORNEY**

The Spotsylvania County Attorney's Office seeks an energetic Deputy County Attorney who enjoys the varied challenges of a fast-paced, high-volume, local government practice. Under limited supervision, the Deputy County Attorney will be responsible for pursuit/defense of complex civil litigation, including but not limited to erroneous assessment cases, transportation/construction contract claims, and land use matters. The Deputy County Attorney will also perform legal research; prepare legal opinions and briefs; review bonds, contracts, and planning documents; and provide legal advice to various county departments, committees, and commissions. This position requires the use of considerable initiative and independent judgment in various phases of work and provides limited supervision of attorneys and support staff.

The County offers an excellent benefits package, including membership in the Virginia Retirement System and the opportunity to work remotely. Salary range for the position is \$96,741–\$154,786, with actual salary depending on qualifications. More information about the position is available [here](#). Submit an online County employment application, résumé, writing sample, case information highlighting litigation experience, and law school transcripts at [www.spotsylvania.va.us](http://www.spotsylvania.va.us).

### **CITY OF SUFFOLK ASSISTANT CITY ATTORNEY**

The City of Suffolk is seeking an Assistant City Attorney, who, under general supervision, performs professional legal work, advising City agencies, officials, and employees, and representing the City in civil trials and administrative hearings, prosecuting criminal cases involving violations of the City Code, collecting delinquent taxes and accounts, and performing legal research and drafting. The Assistant City Attorney must

exercise considerable initiative and independent judgment in various phases of work and must also exercise tact, courtesy, and discretion in frequent contact with public officials and employees, the judiciary, and the general public. The Assistant City Attorney will report to the Deputy City Attorney.

The Assistant City Attorney also serves as general counsel to boards, commissions, and agencies as assigned; recommends procedures and actions based on legal knowledge and experience; interprets legal documents, both on request and at the initiation of the employee; and attends meetings to provide legal advice, as necessary.

The Assistant City Attorney litigates cases on behalf of the City, including condemnation proceedings and employee grievances; advises the City Attorney, departments, and senior staff on local and federal laws and regulations; represents departments in courts and before boards; drafts and reviews contracts; trains inspectors for trial presentations; prepares presentations for City Council meetings; presents cases in court and makes motions and recommendations to the court; and questions witnesses and opposing parties.

The Assistant City Attorney also performs legal research and prepares memorandums of law pertaining to assigned cases; prepares legal opinions and briefs for presentation to Appellate Court; reviews and drafts deeds, real estate contracts, vendor contracts, memoranda of understandings, and easement agreements; investigates claims for and against assigned agencies and programs and makes recommendations for the settlement of claims, as appropriate; develops a thorough understanding of various City agencies and their programs and legal and administrative obligations; responds to subpoena duces tecum on behalf of the City; and performs other related duties as required.

The position requires a Juris Doctor degree. Litigation experience in state or federal courts or municipal law is preferred. The successful applicant must have a valid driver's license and a license to practice law in the Commonwealth of Virginia.

For more information and to apply, click [here](#).

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