

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

June 17, 2010

Case Number 10-1048

Purdham v. Fairfax County School Board

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The Virginia School Boards Association (VSBA) is a private, voluntary non-partisan organization representing every local school board in Virginia. VSBA's primary mission is the advancement of education through local control of the public schools. VSBA's members are the local school districts responsible for teaching students.

All of *amici's* members are subject to the mandates of the Fair Labor Standards Act (FLSA). As public employers, school districts strive to comply with federal employment laws that apply to the personnel that work in many capacities to ensure that public schools are able to fulfill their educational mission in an efficient and effective manner. When the requirements of federal employment law are not clear, *amici* have over the years made concerted efforts to gain clarification through judicial interpretation, legislative amendments, regulatory provisions or administrative agency assistance. Despite these efforts, some aspects of the FLSA, such as the "nominal fee" provision at issue here, remain difficult for school districts to understand and implement with assurance that their actions are in compliance with the law. *Amici's* members have a strong interest in advising the Court of these difficulties and of the potential impact this Court's decision will have on the ability of school districts to continue to provide the millions of students they serve with a wide variety of athletic and other extracurricular activities that enhance their educational experience.

Appellant opposes the filing of this brief unless the Court grants additional time to respond. As required by Federal Rule of Appellate Procedure 29, this brief is submitted on motion for leave to file.

SUMMARY OF THE ARGUMENT

The outcome of this case will likely turn on one question: what is the test for determining what amount is a “nominal fee?” This Court’s answer to that question will affect school districts across the nation that, like Fairfax County, depend on a system of volunteer coaches to provide athletic and other extracurricular activities to millions of public school students. Because of the far reaching impact of its decision, this Court should adopt a test that allows public school districts to continue their practice of offering small stipends to nonexempt employees who volunteer to coach/advise students. Likewise, *amici* urge the Court to adopt a test that is clear, easy to apply, relevant to school districts, and that can be applied in all circumstances and yield a definitive answer.

Under the current law, school districts across the country wonder what amount exactly is a nominal fee and whether the stipends they have historically offered to nonexempt employees who coach/advise students are in fact nominal fees. If this Court rules that support staff employees who coach/advise must be paid overtime, most school districts will be forced to stop letting them coach/advise because the districts cannot sustain the cost. Similarly, if this Court

devises a test for “nominal fee” that does not include small stipends or that is too ambiguous to apply—arguably the current state of the law—districts will either only allow support staff to “volunteer” for no compensation at all or will stop allowing them to “volunteer” altogether. In short, in the event of a ruling unfavorable to Fairfax County, many support staff employees will either no longer be able to do something they love or will be deprived of a small stipend that recognizes their efforts.

While the consequences of disallowing support staff employees to receive small stipends for “volunteering” as coaches/advisors will be bad for those employees, the consequences for students will be worse. In the best case scenario, students will be deprived of current and future competent and devoted coaches/advisors. In the worst case scenario, school districts will have to cancel completely some athletics/extracurricular activities for lack of willing and affordable coaches/advisors.

ARGUMENT

I.

calculation method, coaches of sports that are more prestigious and that have longer seasons appear to receive larger stipends.⁵

Stipends are essentially a token amount of money thanking coaches/advisors for their service. Stipends nationally are not large compared to the hundreds, or even thousands,⁶ of hours put in by coaches/advisors. It appears that football coaches nationally receive the highest compensation; but even their stipends appear to not usually exceed about \$6,000.⁷ Recent evidence indicates that the highest current football coach stipend in southern Virginia is \$5,300 in Newport News.⁸ Newport News' "low end" coaches (golf, field hockey, soccer, and tennis) receive between \$1,970-\$2,750.⁹

II. The Law is Unclear About What Amount Is a "Nominal Fee."

Pursuant to the Fair Labor Standards Act (FLSA) nonexempt school district employees may "volunteer" at the district so long as, among other things, the only

⁵ See, e.g., Cobb County School District Athletic Supplements, <http://www.cobbk12.org/centraloffice/athletics/2009-10AthleticSupplements.pdf>.

⁶ See, e.g., Staci Haight, *Coaches, Activity Leaders Keeping Eye on Budget Cuts*, VENTURA COUNTY STAR, Feb. 24, 2003, at B01 (high school football coach D.000901 Tm0 Tc0 less ch09 3047 All coach

compensation they receive is a “nominal fee.”¹⁰ What amount is a “nominal fee” is a question that has plagued school districts since the FLSA was amended to include the “volunteer” exception for public employers in 1985. The question remains unanswered today.

Before the School Litigation Group¹¹ (SLG) brought FLSA lawsuits in the early 2000s against numerous school districts in at least 10 states—claiming among other things that nonexempt employees who were also coaches/advisors should receive overtime instead of stipends—school districts regularly offered nonexempt support staff employees stipends to coach/advise. By and large, school districts seemed unaware that this practice might violate the FLSA.¹² Likewise, a 1995 DOL opinion letter stated that a “nominal fee” for a “volunteer” nonexempt school district employee was an amount less than minimum wage.¹³ Some school districts relied on this letter and thought they were complying with the FLSA

¹⁰ 29 U.S.C. § 203(e)(4)(A) (2010).

¹¹ Gary Young, *Overtime Suits 101*, NATIONAL LAW JOURNAL, Mar. 19, 2003 (providing background information about the SLG).

¹² See, e.g., Laura Smith, *Working Overtime*, ATHLETIC MANAGEMENT, Aug./Sept. 2004. (“Schools have had people in dual roles for a long time, and we’ve never calculated their hours or paid overtime. This is just the way things have always been done,” says Lynn Smith, Superintendent of the Brewton (Ala.) City School District. Before a recent policy change, Brewton made extensive use of its non-professional staff for coaching roles. “This is my 13th year as a superintendent, and I had never thought about wage and hour laws until last year. I just didn’t know that we were impacted by it.”).

¹³ Letter from Daniel F. Sweeney, Deputy Assistant Administrator (July 11, 1995).

plaintiff—under any reasonable interpretation of the letter—received a “nominal fee.”

The 2005 DOL letter has left school districts nationally in a quandary over what amount is a “nominal fee.” For ex

coaches cannot provide.¹⁹ First, allowing support staff to fill open “volunteer” coaching/advising positions means school districts can choose from a pool of familiar people. Accordingly, positions can be filled with quality employees the district trusts, and the coaches/advisors will already be familiar with the school’s mission, culture, and expectations. As described by school principals in a district considering having only community member coaches, community members are not as familiar as school employees are with behavior expected from students, appropriate discipline, and academic eligibility standards.²⁰ Moreover, an outside coach/advisor may not fully understand the considerable time commitment involved in coaching/advising—meaning, a well-intentioned outside coach/advisor might be more likely than a support staff member to quit in the middle of a season. In the same vein, many support staff employees, such as teacher’s assistants or food service employees, have the same work schedule as the students’ school day, which allows support staff employees to be available after school when students are attending practice or games.

¹⁹ Also, as discussed in Section VI, school districts may not be able afford to employ coaches/advisors from the community who would have to be paid at least minimum wage for each hour worked.

²⁰ Michelle Hatfield, *Will Schools Turn to Volunteer Coaches?*, THE MODESTO BEE, Jan. 19, 2010, available at <http://www.modbee.com/2010/01/19/1013216/will-schools-turn-to-volunteer.html>.

The second advantage to having support staff coach/advise is that they require less supervision than community members.²¹ School districts want support staff with whom they are familiar to coach/advise precisely because the district often is not able to supervise coaches/advisors closely.²² Many sports and extracurricular practices and activities not only take place after school and away from school grounds, but also involve working closely with the children, sometimes in one-on-one settings.²³ One study of non-school-based youth sports teams found that many volunteer coaches had no formal training in educationally appropriate coaching practices.²⁴ Researchers also have found that volunteer coaches for nonschool-based teams were unprepared to face particular aspects of

²¹ Michelle Hatfield, *supra* note 20.

²² For a good example of a coach who needed, perhaps among other thing, more supervision see Markham Evans, *Police: Enraged Youth Coach Attacks Refs*, ABC7News.com, May 5, 2010, <http://www.wjla.com/news/stories/0510/732947.html> (youth soccer coach charged with assault and battery for attacking two referees after allegedly becoming enraged after his team received a penalty).

²³ It is important for school districts to know who is working with their students because there have been unfortunate cases of coaches taking advantage of their positions and having inappropriate relationships with students. See, e.g., Christine Willmsen & Maureen O'Hagan, *Coaches Continue Working for Schools and Teams After Being Caught for Sexual Misconduct*, SEATTLE TIMES, Dec. 14, 2003.

²⁴ Lenny Wiersma & Clay Sherman, *Volunteer Youth Sport Coaches' Perspectives of Coaching Education/Certification and Parental Codes of Conduct*, 76 RES. Q. FOR EXERCISE & SPORT 324, 325 (2005). Interviews with volunteer coaches revealed that "the role of youth sport coach carries a 'general societal perception that anyone can coach,' and the 'criteria for selecting coaches

A fourth advantage to having support staff employees coach/advise is not only are district officials familiar with

the FLSA, he “broke down in tears trying to tell them, and they broke down in tears trying to listen and understand.”³¹

IV. School Districts Cannot Afford To Pay Support Staff Overtime to Coach/Advise.

School districts that want support staff employees to coach/advise could avoid the “nominal fee” issue altogether by paying them overtime. However, school districts cannot afford to pay support staff overtime for coaching/advising, especially considering the current financial situation in most districts. As most, if not all, states struggle with budget deficits, education spending has been drastically cut.³² With districts forced to lay off teachers,³³ institute furlough days,³⁴ and even cut the school year by as many as 17 days, as Hawaii was forced to do this year,³⁵ the budget situation in many districts has hit a crisis point.

³¹ David Lee Morgan, Jr., *supra* note 14.

³² State cuts in education spending are expected to stretch into the next several years. For instance, Colorado school districts experienced a six percent budget cut for 2010 and expect even deeper cuts over 2011 and 2012. Frank Wolfe, *States, Districts Expect Money Woes to Worsen*, EDUC. DAILY, Jan. 14, 2010.

³³ Employee sal9.0005any o648 0 TDmp0 12 721.488 T Tc.0043 Hawaiiabool 80dget cut cuts

Even current coach/advisor stipends are in jeopardy of being cut in states facing severe budget problems. To help close a \$2 billion gap in the state budget, Virginia Governor Bob McDonnell has proposed eliminating \$65 million in stipend funding for coaches, advisors, and department chairs.³⁶ Critics of this proposal said that without the stipends, school districts would lose coaches, have reduced game schedules, and may have to institute pay to play policies.³⁷ Given this already stark financial reality, it simply is not feasible for most school districts to pay support staff overtime for coaching/advising.

Even putting aside the current financial crisis,³⁸ most school districts cannot afford to pay coaches/advisors overtime. The time spent coaching/advising can be substantial. Paying time and a half would be cost-prohibitive, especially for nonexempt employees with high wages.³⁹ One superintendent noted that the overtime rate for the number of hours a typical coach puts in per year could end up

³⁶ See, e.g., Cathy Grimes, *Governor's Proposed K-12 Budget Cuts Hit School Breakfast Programs and Coaches' Salaries*, DAILY PRESS, Feb. 17, 2010.

³⁷ John Harvey, *Loss of Stipends Threatens Sports*, VIRGINIA GAZETTE, Feb. 20, 2010, <http://www.vagazette.com/articles/2010/02/27/news/doc4b7f1f8138112958637484.prt> (last visited Mar. 15, 2010).

³⁸ Extracurricular activity stipends were in danger of being cut in school districts facing budget issues even before the current financial crisis hit. See, e.g., Kyra Kitlowski, *School Board Still Faces Cuts to its Budget; Extracurricular Stipends are Vulnerable*, SAN RAMON VALLEY TIMES, June 13, 2001, at A3.

³⁹ Laura Smith, *supra* note 12.

doubling the normal coaching stipend.⁴⁰ If that was the case, a significant discrepancy in pay would result between teacher-coaches who receive the stipend and support staff-coaches who receive overtime for the same position.⁴¹

that a coach or advisor would not be able to offer extra assistance to a particular student or accept more players onto the team than usual. Neither situation would result in the best outcome for the students.

Even if a school district can afford to pay a coach/advisor time and a half for overtime hours, the district may not want to fill these positions with nonexempt staff because it is difficult to accurately track hours worked for coaching/advising. Coaching is not a 9 to 5 job in which hours

involved in tracking hours and calculating overtime rates would overwhelm the payroll departments of most school districts, districts would be less likely to allow nonexempt staff to fill coaching/advising positions even if the budget allowed for paying overtime.

V. Concluding That a Small Stipend Is Not a “Nominal Fee” or That Support Staff Employees Who Coach/Advise Must Be Paid Overtime Will Have Negative Consequences for Support Staff Employees.

If this Court rules that support staff employees who act as coaches/advisors must be paid overtime, as discussed in Section IV, most school districts will not employ them as coaches/advisors, particularly in the current economic climate. Similarly, if this Court comes up with a definition of “nominal fee” that does not include small stipends or that is too difficult to apply, districts will either only allow support staff to “volunteer” for no compensation at all or will stop allowing them to “volunteer” altogether.

In short, a ruling against Fairfax County will have one of two negative consequences for support staff employees: either they will not be able to coach/advise at all or they will not be able to coach/advise and receive any compensation. In newspaper article after newspaper article about support staff employees being told either of the above, support staff employees are quoted as saying that they want to continue coaching because they enjoy working with students. The following statement by Coach Englehart—head girls and boys cross

country coach, head girls track coach, and assistant girls basketball coach—after being told he could no longer coach due to the FLSA is typical: “I love coaching, and it’s not all about the money. You don’t make a living coaching. But my biggest concern is that this is going to hurt the kids. It isn’t fair to the kids.”⁴⁵

Not coaching/advising at all will be devastating for many support staff coaches/advisors—particularly those who have been involved in these activities for many years.⁴⁶ Likewise, while all support staff employees are appreciative⁴⁷ of the small stipends they receive some depend on them and will struggle financially⁴⁸ without them as many support staff employees do not have high paying positions.

⁴⁵ David Lee Mor6

VI. If Support Staff Employees Cannot “Volunteer” as Coaches/Advisors Then Sports/Extracurricular Activities May be Cancelled.

The only real choice a financially strapped school district has to fill coaching/advising positions, if it cannot allow support staff to “volunteer” and receive small stipends, is to rely on exempt employees. The FLSA clearly allows exempt employees to be given stipends and no overtime for coaching/advising. However, numerous newspaper articles describing school districts that disallowed support staff employees from “volunteering” discuss the difficulty of finding enough exempt employees who are (1) qualified to coach⁴⁹—particularly because recently so few new teachers have been hired;⁵⁰ (2) interested in coaching/advising;⁵¹ (3) willing to accept the responsibility of coaching/advising in light of other additional responsibilities placed on teachers due to the No Child Left Behind Act, layoffs, and unfilled positions at school districts.⁵²

⁴⁹ Aaron McFarling, *supra* note 15 (According to a school district athletic director: “A good coach is hard to find, and if you can’t find one within your teaching ranks and you have to hire within your teaching ranks, that’s going to hurt athletics eventually.”).

⁵⁰ *See, e.g.*, John Murphy, *supra* note 1 (According to a school district athletic director: “We’re cutting teachers and so it’s rare that a teacher comes in who can coach.”).

⁵¹ *See, e.g.*, Trent Moore, *supra* note 28 (According to the leader of a county principals association: “I wish things were still like they were five years ago and we had a ton of teachers that wanted to coach But now they’re just not as interested in coaching.”).

⁵² *See, e.g.*, Marietta Nelson, *Three Brenerton Coaches Who Don’t Teach Fall Under Budget Ax*, KITSAP SUN, July 3, 2009 (According to a school district human

If school districts cannot find enough exempt employees willing to coach/advise they have three options: hire community members, have fewer coaches/advisors, or cease offering some sports/extracurricular activities. For financially strapped school districts, hiring community members may not be possible. Community members have to be paid minimum wage and overtime if their hours exceed 40 in a week. Either way, their compensation in most cases would exceed the stipend the district has paid in the past to exempt employees or support staff. Furthermore, hiring coaches from the community has disadvantages other than greater cost. First, as described in Section III, school districts prefer to have school district employees coach/advise students because they are already part of the school community. Second, community member coaches would be required to track hours worked, which is difficult, as described in Section IV.

While having fewer coaches/advisors may be an option in some instances, doing so has some disadvantages. First, having fewer coaches--particularly for contact and/or high injury sports like football and basketball--could jeopardize the safety of student athletes.⁵³ Second, cutting a coaching position in one sport may mean a coaching position in another sport also has to be cut to comply with Title

resources director: “Teacher’s aren’t coaching as often as in the past as their jobs

education 10 years later than their classmates who had similar standardized test scores but were less socially adroit and participated in fewer extracurricular activities.⁵⁸

VII. Allowing Support Staff To “Volunteer” and Receive No Compensation at All Would Likely Lead to Sports/Extracurricular Activities Being Cancelled, Among Other Practical Problems.

If this Court comes up with a definition of “nominal fee” that is too difficult for school districts to apply or rules that the definition of “nominal fee” does not include small stipends, school districts could allow support staff employees to “volunteer” for no compensation at all. However, numerous practical problems would arise including sports/extracurricular activities being cancelled, poor employee morale, and public relations problems.

If school districts allow support staff employees to continue coaching/advising without any compensation at all, anecdotal evidence indicates many would simply quit.⁵⁹ If support staff quit and cannot be replaced by exempt employees, as described in Section VI, school districts will have to cancel some sports/extracurricular activities. Similarly, recruiting additional support staff in the

⁵⁸ ScienceDaily, Social Skills, Extracurricular Activities in High School Pay Off Later in Life, Mar. 26, 2009, <http://www.sciencedaily.com/releases/2009/03/090325132536.htm>.

⁵⁹ See, e.g., Melanie C. Johnson, *supra* note 27 (“Goodloe, a classified employee and computer instructor on campus, said he likely won’t volunteer to coach, but it is not about the stipend. The money he gets for coaching he puts back into the program, buying shoes for students whose parents cannot afford them. He spends his own money and free time taking these students to visit colleges, he said.”).

future for “volunteer” positions with no compensation may be difficult--especially when support staff learn that exempt employees receive a stipend for the same duties. Anecdotal evidence and common sense suggest that the morale of those who chose to continue coaching/advising without benefit of the stipend would be negatively affected because not only did they previously receive these nominal amounts but also exempt employees would continue to receive stipends for the same work.⁶⁰ Finally, the fact that the words “nominal fee” *do not appear in any of the newspaper articles cited in this brief* illustrates the difficulty school districts would have explaining to the community why a support staff employee can no longer receive a small amount of compensation for coaching/advising. Trying to explain the (nearly) unexplainable will be a public relations nightmare for school districts that tarnishes their image in their local communities.

To eliminate the issue of inequity between exempt and nonexempt employees receiving stipends, school districts, at least in Virginia and in other non-collective bargaining states, could take stipends away from both exempt and nonexempt employees.⁶¹ Again, the ultimate consequence of taking this measure

⁶⁰ John Murphy, *supra* note 1 (“[No longer receiving a stipend] makes me feel a little bit less appreciated for all the time and effort I put in with the kids,” said Chacon, a campus supervisor. “We don’t get paid that much anyway, and we’re not coaching for the money anyway because if you added up all the hours it would come out to about 55 cents per hour. So this doesn’t make me feel real good.”).

⁶¹ In collective bargaining states, “wages, hours, and conditions of employment” are typically mandatory subjects of bargaining which means that school districts

would be the elimination of some or maybe even all sports/extracurricular activities. Interestingly, *amici* were able to find no anecdotal evidence that any school districts have taken this measure in order to comply with the FLSA. When eliminating stipends for all employees has been suggested for financial reasons, many of the problems described in the above paragraph have been cited--exempt employees would quit volunteering⁶² or suffer a decline in morale,⁶³ and recruiting future coaches/advisors would be difficult. In fact, when school boards have considered cutting stipends entirely to save money, this measure has been perceived as tantamount to eliminating the athletic/extracurricular programs.⁶⁴ An additional problem with eliminating stipends for both nonexempt and exempt

could only stop paying stipends if districts were able to remove them from the contract through the collective bargaining process. *See also* Jason Schrieber, *Play Ball! Despite Grievance Threat, Candia Votes to Go Ahead*, UNION LEADER, Jan. 10, 2003 (“Volunteer coaches would violate contract rules that require school coaches receive a stipend as compensation for their work.”).

⁶² Dave Johnson, *supra* note 8 (School district athletic director said: “There are other ways to save money other than cutting coaching stipends, which are ridiculously small in the first place. If you cut coaching stipends, you’re going to lose a lot of coaches.”).

⁶³ *Id.* (A girls basketball and softball coach said the following about Virginia governor’s recent proposal to eliminate stipends for coaches for the entire state: “That would be a slap in the face to the profession and to those who put in the extra time.”).

⁶⁴ *See, e.g.,* Mark Gormus, *Chesterfield Budget Woes Could Eliminate Sports Teams*, TIMES-DISPATCH, Jan. 26, 2010 (School district athletic director said the following about a proposal to eliminate coaching/advising stipends and transportation to competitions: “I don’t see us offering those programs if this part of the budget is enacted because our staff members, who are coaches and sponsors, are professional people.”).

employees is that teachers and other exempt employees might resent support staff personally for taking their stipends away, which would create untenable tension. Finally, eliminating stipends across the board would put districts in the awkward position of trying to explain to the public why everyone must be punished because of technical FLSA rules.

CONCLUSION

For the foregoing reasons and those arguments made in Appellee's brief, *amici* urge this Court to affirm the decision below.

Respectfully submitted,

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June 17, 2010

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App.P.28.1(e)(2) or 32(a)(7)(B) because:

[X] this brief contains 6542 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[X] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-Point Times New Roman.

Dated: June 17, 2010

/S/ Francisco M. Negron, Jr.
Amici Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of June 2010, I caused this Brief of Amici Curiae to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following CM/ECF users:

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I further certify that on this 17th day of June 2010, I caused the required number of bound copies of the foregoing Brief of Amici Curiae to be mailed first class postage prepaid to the Clerk of this Court at 1100 East Main Street, Suite 501, Richmond, VA 23219, and one copy to be served by first-class mail to:

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