No. 15-1146

In The
Supreme Court of the United States

CYNTHIA LEE,

Petitioner,

v.

FAIRFAX COUNTY SCHOOL BOARD, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Mary McGowan
Counsel of Record
John Cafferky
BLANKINGSHIP & KEITH, P. C.
4020 University Drive, Suite 300
Fairfax, Virginia 22030
(703) 691-1235 (telephone)
mmcgowan@blankeith.com

Counsel for Respondents

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THE LEX GROUP[DC] ♦ 1825 K Street, N.W. ♦ Suite 103 ♦ Washington, D.C. 20006
(202) 955-0001 ♦ (800) 856-4419 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

1. Whether Petitioner can meet the jurisdictional requirements for a writ of certiorari where the underlying case was both decided and affirmed solely upon state contract law and there is no Fourth Circuit decision in conflict with the decision of another United States court of appeals or decision of this Court, nor is the underlying case a decision on an important question of federal law.

2. Whether the Supreme Court of the United States should grant a writ of certiorari where the petition raises federal issues relating to mandatory arbitration agreements subject to the Federal Arbitration Act, but both the District Court and the Fourth Circuit decisions were based solely upon application of state law to a voluntary settlement agreement which contained no arbitration provision and has no nexus to interstate commerce.

3. Whether Petitioner properly raised the applicability of mandatory arbitration agreements and the Federal Arbitration Act in the lower courts or has waived certiorari.

4. Whether this Court's decision in *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), and the federal courts' post-*Green Tree* jurisprudence has any application to Petitioner's voluntary settlement agreement or Virginia's grievance procedure for public

school teachers, neither of which contain any arbitration provision or preclude a dismissed teacher from pursuing her judicial remedies.

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Jurisdiction is not appropriate because the Fourth Circuit's decision was limited solely to the application of Virginia contract law to Petitioner's Settlement Agreement and, accordingly, did not involve a decision in conflict with a decision of this Court, any other United States Court of Appeals, and did not involve a decision on an important question of federal law. Jurisdiction is also not appropriate under the Federal Arbitration Act because Petitioner never raised the FAA in the courts below, and there was no mandatory arbitration agreement in this case involving interstate commerce subject to the provisions of the Act.

BRIEF IN OPPOSITION

The Fairfax County School Board ("the School Board"), Dr. Jack Dale, Dr. Phyllis Pajardo, and Jamey Chianetta ("Respondents") respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari filed by Cynthia Lee ("Petitioner" or "Lee").

STATEMENT OF THE CASE

(1) Nature of the Case

This is an appeal by a former teacher in the Fairfax County Public Schools ("FCPS"), who, with benefit of legal counsel, entered into a voluntary settlement agreement in 2012 ("the Settlement Agreement" or "the Agreement"), resolving all

disputes and waiving any legal claims arising out of her employment. In 2014, after Lee filed a multi-count Amended Complaint in the United States District Court for the Eastern District of Virginia (Alexandria Division), the District Court granted summary judgment to Respondents on the grounds that the Settlement Agreement barred all claims in the Amended Complaint since Lee was unable to prove that the Agreement should be set aside under Virginia law based upon economic duress and unconscionability. The Fourth Circuit Court of Appeals affirmed the District Court on the same state law grounds.

Throughout her Petition for Certiorari, Lee repeatedly misstates the facts, law, and nature of the case in a transparent effort to obtain a writ under the guise of a split in the federal circuits involving the validity of fee-splitting and other provisions in mandatory arbitration agreements. Lee also misrepresents that the petition arises "under the Federal Arbitration Act, codified at 9 U.S.C. § 2." Pet'r's Br. 2, et seq. Petitioner does so, although her case involved no mandatory arbitration agreement, nor any arbitration provision at all, and did not arise under the Federal Arbitration Act ("the FAA"). In fact, the Amended Complaint made no reference to the FAA or to arbitration, mandatory or otherwise, and the Settlement Agreement contained no arbitration provision. J.A. at 197-201; 556-638. Therefore, neither the District Court nor the Fourth Circuit Court of Appeals addressed the issues raised in the Petition relating to mandatory arbitration agreements. J.A. at 694-696, 736; App. 1a–5a, 31a–37a. As a result, all three of Lee's Questions

Presented, which raise various challenges to mandatory arbitration agreements, simply have no application to this case.

Furthermore, the Petition contains no Statement of the Facts "material to consideration of the questions presented," with appropriate references to the joint appendix or the record, as required by United States Supreme Court Rules 14(1)(g) and 24(1)(g). This omission is particularly problematic because the Petition contains numerous mischaracterizations of critical facts material to the questions presented (i.e., repeated references to a "mandatory arbitration agreement" and "a mandatory government arbitration agreement," when none exists), with no citations to the record to support those mischaracterizations. *See* Pet'r's Br. 5-6 and seriatim. As required by Rule 15, Respondents address here, and throughout their Arguments, those misstatements of fact and law upon which the entire Petition rests.

(2) Course of Proceedings

On October 31, 2014, the District Court granted Respondents' Motion for Summary Judgment, dismissing Lee's ten-count Amended Complaint against the School Board, former Division Superintendent, Jack Dale, Assistant Superintendent for Human Resources, Phyllis Parjardo (since retired in 2015), and the Principal of Halley Elementary School, Jamey Cianetta, on the grounds that Lee, a former teacher with the Fairfax County Public Schools ("FCPS"), had waived all claims asserted in the Complaint when she

voluntarily entered into the 2012 Settlement Agreement which resolved all disputes arising out of her employment. J.A. at 187-201. The Settlement Agreement, which was attached and incorporated into the Amended Complaint, contained a release of all claims arising out of Lee's employment and provided that, "the Agreement shall be governed by the laws of the Commonwealth of Virginia." J.A. at 187-201, ¶¶5, 18.

The Amended Complaint asserted racial discrimination and retaliation claims under 42 U.S.C. §§ 1981 and 1983, a Fourteenth Amendment procedural due process claim, and state law claims of defamation and wrongful termination arising out of Lee's employment with FCPS. J.A. at 556-615. At Counts I and II, Lee asked the Court to set aside the Settlement Agreement based on economic duress and unconscionability. J.A. at 197-201. (The Settlement Agreement contained no provision relating to arbitration, *id.*, and the Amended Complaint did not contain a single reference or allegation relating to arbitration, nor any count arising under the Federal Arbitration Act. J.A. at 556-615.)

Respondents contended in their Motion for Summary Judgment that Lee's state and federal claims were barred by the Settlement Agreement and that the undisputed facts established that Lee did not enter into the Agreement under duress nor could she establish that the Agreement was unconscionable as a matter of Virginia law. Lee filed a Memorandum in Opposition to Summary Judgment, but did not submit any affidavits or

declarations placing in dispute those facts contained in Respondents' Statement of Material Facts and supporting affidavits and exhibits. J.A. at 693-645. Nor did Lee file a Rule 56(f) affidavit seeking discovery prior to summary judgment. Lee's Opposition also contained no reference to arbitration or the FAA. J.A. at 693-645.

Lee argued on summary judgment that she was under economic duress and that the Settlement Agreement was unconscionable because, *inter alia*, Virginia's statutory, albeit voluntary, grievance procedure ("the State Grievance Procedure"), adopted by the School Board as FCPS Regulation 4294.4 (J.A. at 396-401), which provides several levels of due process protections for tenured public school teachers facing dismissal, then contained a provision which required a teacher **who chose to grieve** a proposed dismissal before a fact-finding panel to split the costs of the panel hearing. J.A. at 396-401. Lee did not support that argument with the federal cases she now cites in her Petition relating to fee-splitting provisions in mandatory arbitration agreements. J.A. at 639-645. Rather, Lee's attorney referred to an allegation in the Amended Complaint, contending that the grievance procedure was unconscionable because Lee had read an article in the Washington Post about the total legal costs incurred by FCPS in reference to another teacher who had challenged her dismissal under the grievance procedure. *Id.* However, Lee presented no evidence as to the actual costs for the due process panel hearing which she and her attorneys had

initiated before she decided to enter into the Settlement Agreement.[1] *Id.*

In granting Respondents' Motion for Summary Judgment, the District Court first found that Lee could not prove that she entered into the Settlement Agreement under duress, citing that Virginia case law holding that mere financial hardship does not constitute duress; the fact that Lee was represented by counsel during the negotiation of the Settlement Agreement; and the "significant benefits" Lee received under the Settlement Agreement before moving to overturn the same. J.A. 694-696, 736-37; App. 31a–37a. The District Court also concluded that Lee failed to advance "any facts that would allow a reasonable fact-finder to conclude that the settlement agreement was the result of either procedural or substantive unconscionability," as defined by Virginia law. App. 36a. Finally, the District Court found (and Lee did not deny) that all of Lee's remaining claims were "within the scope of the release contained in the settlement agreement." Accordingly, the Court held that Respondents were entitled to summary judgment on all claims asserted in the Amended Complaint. App. 37a.

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[1] Lee did not file any affidavits or declarations in opposition to summary judgment containing evidence of the actual costs of the fact-finding panel she had selected, but simply referred in her briefs to the inadmissible newspaper article quoted in her October 24, 2014 Amended Complaint. J.A. at 556-615. In response, FCPS submitted an affidavit and legal bill showing that the actual cost to the other teacher of her panel hearing was not $70,000, as alleged by Lee, but a little over $8,000. Pet'r's App. 40a.

Lee subsequently filed a Motion to Alter or Amend Judgment under F.R.C.P. 59(e), J.A. at 697-716, to which Appellants filed an Opposition. J.A. at 720-727 (Again, Lee failed to raise any claim or arguments relating to arbitration or the FAA. J.A. at 697-716). After the District Court denied Lee's motion, she appealed. J.A. at 736-737, 738.

The Fourth Circuit Court of Appeals affirmed the District Court's ruling, stating in its' unpublished opinion that:

> *We have reviewed the record and found no evidence of duress. Lee fails to show that FCPS engaged in any wrongful conduct in the negotiation of the agreement, and her financial hardship, standing alone, is insufficient to invalidate a contract due to duress under Virginia law.*
> App. 4a.

The Fourth Circuit also agreed that the record contained no facts that would support invalidating the Settlement Agreement under Virginia law on the grounds of either substantive or procedural unconscionability:

> *We conclude that neither element is present in the settlement agreement before this court. In exchange for releasing her claims against Appellees, Lee avoided termination for incompetence (for which she could have lost her teacher's license), retained a*

> *position at FCPS, wiped her record clean, received a neutral reference from FCPS, and could resign with only five-days notice if she were to obtain new employment. In negotiating these benefits, Lee was represented by counsel. As a result, the district court properly refused to invalidate the settlement agreement due to unconscionability.*
> App. 5a.

Finally, the Fourth Circuit noted that because Lee "does not contend that any of her claims were beyond the scope of her settlement agreement, we affirm the district court's judgment." App. 5a.

Significantly, for purposes of this appeal, in neither her Opening nor her Reply Brief in the Fourth Circuit did Lee raise, or even refer to, the Federal Arbitration Act. While Lee did make cursory reference in her briefs to several federal court decisions addressing fee-splitting provisions in mandatory arbitration agreements, specifically, *Shankle v. B-G Maintenance Mgmt.*, 163 F.3d 1230 (10th Cir. 1999) and *Bradford v. Rockwell Semiconductor Sys. Inc.*, 238 F.3d 549 (4th Cir. 2001), those cases were inapposite since there was no mandatory arbitration agreement or provision at issue in Lee's case and the parties had agreed that the Settlement Agreement was controlled by Virginia law. Thus, the Fourth Circuit did not address those arguments which now form the basis of Lee's Petition for Certiorari.

Lee subsequently filed a Petition for Rehearing and Rehearing En Banc, in which she amplified on her unconscionability argument, citing to federal cases involving mandatory arbitration agreements in support of her contention that a rehearing en banc should be granted. That Petition also contained no reference to the Federal Arbitration Act. Under Rule 40(a)(3) of the Federal Rules of Appellate Procedure, no answer to that Petition was allowed. The Petition for Rehearing and Rehearing En Banc was summarily denied by the Fourth Circuit on September 22, 2015.

(3) Statement of the Facts

Lee was employed by FCPS from 1999 through June 2012 as a special education teacher. J.A. at 8-9. In May 2011, Lee received "does-not-meet" ratings in four of the five performance standards under which Virginia teachers are evaluated and was conditionally re-appointed for the following year, with the expectation that she participate in an intervention work plan process during the 2011-12 school year. J.A. at 202-272, 273-209, 284-285; App. 31a. However, on Lee's 2012 mid-year evaluation, she again received does-not-meet ratings and was advised by her principal, Jamey Chianetta, that unless her performance improved, she would not be recommended for reappointment. J.A. 202-272. Thereafter, Lee filed a written grievance alleging that her evaluation was the result of racial discrimination. J.A. 340-353.

The FCPS grievance procedure ("the Grievance Procedure") contained at FCPS

Regulation 4294.4, J.A. at 396-401, provides certain due process rights for teachers, as required by §§ 22.1-306 *et seq*. of the Virginia Code, consistent with the Virginia Department of Education's State Grievance Procedure For Teachers ("the State Grievance Procedure'). J.A. at 354-391; 396-401; 8 VAC 20-90-30. Part II of the State Grievance Procedure and of the FCPS Grievance Procedure sets forth the procedures for certain grievable disputes not involving dismissal, while Part III contains the procedures applicable to recommendations for dismissal. J.A. at 396-401. (Throughout her pleadings in the District Court and the Fourth Circuit, and in her current Petition, Lee has confused the five step-procedure applicable to Part II grievances with the procedures governing a teacher's right to grieve her proposed dismissal under Part III.)

Lee's initial grievance, alleging that her evaluation was based upon racial discrimination, fell under Part II of the Grievance Procedure, which provided that any grievances relating to discrimination or harassment be referred to the FCPS Department of Equity and Compliance for investigation. J.A. at 346. While Lee's discrimination grievance was being investigated, she received her 2012 final evaluation, which again included multiple does-not-meet ratings. J.A. at 269-272. Lee was then given written notice that based on her performance, the Division Superintendent was recommending to the School Board that she be dismissed from her employment as a teacher. J.A. at 269-272. Receipt of that notice triggered Lee's right to challenge the dismissal

recommendation under Part III of the Grievance Procedure. J.A. at 396-401.

Lee then retained legal counsel to pursue a Part III grievance related to her proposed dismissal. Under the Virginia Code, the State Grievance Procedure, and FCPS Regulation 4294.4, the decision of whether to grieve a proposed dismissal was up to the teacher, who, if she chose to do so, had the **choice** of selecting a due process hearing before either the school board or a three member fact-finding panel:

> *§ 22.1-309. Notice to teacher of recommendation of dismissal; school board not to consider merits during notice; superintendent required to provide reasons for recommendation upon request.*
>
> *In the event a division superintendent determines to recommend dismissal of any teacher, written notice shall be sent to the teacher notifying him of the proposed dismissal and informing him that within 10 business days after receiving the notice* ***the teacher may request a hearing before the school board or before a fact-finding panel as provided in § 22.1-312…***

§ 22.1-312. Hearing before a fact-finding panel.

A. In the event that a hearing before a fact-finding panel is requested, a three member panel shall be selected by the following method. The teacher shall select one panel member from among other employees of the school division. The division superintendent shall select one panel member from among employees of the school divisions. The teacher and the division superintendents shall select their respective panel members within five business days of any request for a hearing before a fact-finding panel. The two panel members shall select the third impartial member…

J. The teacher shall bear his or her own expenses. The School Board shall bear the expenses of the division superintendent. The expenses of the panel shall be borne one-half by the school board and one-half by the teacher.

L. The parties shall set the per diem rate of the panel. If the parties are unable to agree on the per diem, it shall be fixed by the judge of the circuit court. No Employee of the school division shall receive such per diem for service on a panel during his normal work hours if

> *he receives his normal salary for the period of such service.*

Va. Code §§ 22.1-309, 312 (prior to 2013 amendments)[2]; 8 VAC 20-90-30, J.A. at 354; FCPS Regulation 4294.4 (emphasis added).

The State Grievance Procedure, adopted by FCPS at Regulation 4294.4, contains no mandatory arbitration provisions, but provides a series of due process protections to teachers which are entirely voluntary. Va. Code §§ 22.1-306 *et seq.*; 8 VAC 29-90-10 through 20-90-80; FCPS Regulation 4294.4. Nor do the Grievance Procedures contain any provision requiring a teacher to file a grievance or exhaust her grievance rights as a prerequisite to pursuing any judicial remedies. *Id.*

Lee chose to grieve her proposed dismissal before a three-member fact-finding panel, rather than the school board. She was represented by counsel, who worked with attorneys for FCPS to select a fact-finding panel. Each side named a panel member and agreed to a chairman for the panel, which was the initial step under Part III of the grievance procedure. J.A. at 414-421, 425-437. During discussions surrounding the selection of the panel members and chairman, Lee's counsel made no objection to the cost of the panel proceedings. J.A. at 414-437.

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[2] Effective July 1, 2013, the Virginia legislature amended the State Grievance Procedure for Teachers to, *inter alia*, eliminate fact-finding panels in favor of a hearing officer. *See* Va. Code §§ 22.1-309, 310 (repealed), 311 and 313.

After the FCPS Office of Equity and Compliance advised Lee in June of 2102 that her discrimination charges were deemed unsubstantiated, Lee's legal counsel began settlement negotiations with FCPS and cancelled her request for a fact-finding panel. J.A. at 414-421, 440-443. Attorneys for Lee and FCPS negotiated the terms of the parties' resulting settlement agreement, which provided, *inter alia*, that Lee would accept a demotion from special education teacher to instructional assistant and a decrease in salary, and would execute a waiver of any and all claims Lee had against the School Board and its employees arising out of her employment. J.A. at 198, 201, 197. In exchange, FCPS withdrew the pending recommendation for dismissal, removed all documents relating to poor performance from Lee's personnel file, agreed to provide Lee with a neutral employment reference, and allowed Lee to resign from her new position with only five days' notice if she found alternative employment. J.A. at 197-201. Notably, the Settlement Agreement contained no provision relating to arbitration whatsoever. *Id.*

Lee continued her employment with FCPS for nearly two additional years before retiring from her position as an instructional assistant in April 2014. J.A. at 588-589. Four months later, and well after she had accepted the benefits of the Settlement Agreement, Lee filed suit, asking that the Settlement Agreement be set aside. J.A. at 8-115.

ARGUMENT FOR DENYING THE PETITION

I. The Petition for Writ Of Certiorari Should Be Denied Because There Is No Basis For Jurisdiction In The Supreme Court

Rule 10 of Part II of the Rules of the Supreme Court, *Jurisdiction on Writ of Certiorari*, states, in pertinent part, that: "[a] petition for a writ of certiorari will be granted only for compelling reason." Among the reasons the Court considers are the following:

> (a) *A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter...*
>
> and
>
> (c) *...a United States court of appeals has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.*

It appears from Lee's arguments [3] that she mistakenly relies on the above stated grounds for jurisdiction, even though neither court below decided a federal question nor rendered a decision addressing the challenges to mandatory arbitration agreements raised in the Petition nor the applicability of the FAA. As noted above, both the District Court and the Fourth Circuit decisions were based solely on state law, as it applied to the preclusive effect of the Settlement Agreement on those claims asserted in the Amended Complaint.

A. The Fourth Circuit's Decision, Which Was Based Solely On Virginia Contract Law, Is Not In Conflict With The Decisions of this Court or Other United States Courts of Appeal, And Did Not Involve Any Question of Federal Law.

Since the Fourth Circuit affirmed the District Court's award of summary judgment solely upon application of the Virginia law governing duress and

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[3] Lee asks this Court to grant a writ, *inter alia*, in order to resolve a "three-way split among eleven circuits" regarding the formula for determining when "the cost of arbitration is so large that it effectively impedes a litigant from vindicating her federal rights," Pet'r's Br. 2-3, 7-17, and "whether **mandatory government arbitration agreements**, in which a state actor compels a private party to give up her right to a judicial forum as a condition of employment," amounts to a violation of a fundamental due process right to access the judicial system or should be subject to a higher standard of review than the unconscionability standard applicable to private agreements. Pet'r's Br. 18-31 (emphasis added).

unconscionability and did not address any of the issues raised in the Petition for Certiorari dealing with the validity of mandatory arbitration agreements nor the FAA, there is no decision by the Fourth Circuit which conflicts with decisions of this Court or decisions of other courts of appeals addressing mandatory arbitration agreements subject to the FAA. Nor is there a Fourth Circuit decision involving any important question of federal law to be resolved by this Court.

B. Petitioner Conflates Her Settlement Agreement With the State Grievance Procedure In An Effort to Create A Mandatory Government Arbitration Agreement Where None Exists.

The Petition repeatedly conflates Virginia's statutorily mandated, but voluntary, grievance procedure for teachers and the Settlement Agreement, in a confusing effort to bring the case into the ambit of Lee's argument that: (1) she was a party to a mandatory arbitration agreement subject to the Federal Arbitration Act, and (2) the Fourth Circuit's decision has created a conflict in the circuits regarding the effect of such agreements on issues such as fee-splitting, judicial remedies, due process, and the appropriate standard under which such agreements may be found unconscionable and unenforceable. Pet'r's Br. 5-6. In a linguistic sleight of hand, Lee alternatively mischaracterizes both the Settlement Agreement and the fee-splitting provisions of the State Grievance Procedure as "an arbitration agreement" under which "had she not

settled, she would have been responsible for half of the costs of arbitration," and as an "arbitration agreement [that] did not provide mutual appeal rights." Pet'r's Br. 5. However, the Petition does not, and cannot, cite to any facts in the record establishing the existence of an arbitration agreement, mandatory or otherwise, nor even any arbitration provision imposed by the Grievance Procedure.

Simply put, the factual record does not support Lee's repeated references to "a mandatory arbitration agreement" or a "government arbitration agreement," Pet'r's Br. 6, 18- 27, there being no arbitration provision whatsoever in the Settlement Agreement. J.A. at 197-201. To the extent that Lee is alluding to Virginia's State Grievance Procedure for Teachers, as adopted by FCPS at Regulation 4294.4, the record is clear that the Grievance Procedure also contains no arbitration requirement. The FCPS Grievance Procedure, contained at Regulation 4294.4, follows the State Grievance Procedure as required by Virginia Code § 22.1-253.13:7(c)(8). However, that procedure is entirely voluntary, contains no mandatory arbitration provision, and does not foreclose a teacher from pursuing any judicial remedies she or he might have. J.A. at 396-401; Va. Code § 22.1-309 *et seq.*; 8 VAC 20-90-10 through 20-90-80. Indeed, the Virginia Supreme Court has repeatedly held that Virginia's constitution **prohibits** binding arbitration clauses in the Grievance Procedure. *See, e.g.*, *Commonwealth v. Arlington Cty. Sch. Bd.*, 217 Va. 558, 232 S.E.2d 30 (Va. 1977); *School Board v. Parham*, 218 Va. 950, 243 S.E.2d 468 (Va. 1978).

C. There Is No Jurisdiction Under The Federal Arbitration Act Since The Settlement Agreement Contains No Arbitration Provision And Does Not Involve Interstate Commerce.

Petitioner states that her request for a writ "arises generally under the Federal Arbitration Act ("FAA"), codified at 9 U.S.C. § 2." Pet'r's Br. 2. To the extent Petitioner's writ is grounded in the Federal Arbitration Act, it is also predicated on a misstatement of the facts, the law, and the record below.

The FAA applies only to written agreements to arbitrate and then only to those arbitration agreements "evidencing a transaction involving commerce." Here, there is no agreement to arbitrate and the underlying transaction, i.e., resolution of Lee's employment relationship with a local school board, has no connection to interstate commerce. Thus, there is no jurisdiction under the Federal Arbitration Act.

> The FAA provides in pertinent part that: *[a]**written provision in . . a contract** evidencing a transaction **involving commerce** to settle by arbitration a controversy thereafter arising out of such contract or transaction . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*

9 U.S.C. § 2 (emphasis added). By its terms, § 2 does not apply until the arbitration clause in question is determined to be part of the contract, and the question whether a valid arbitration clause exists is determined under state law contract principles. *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135, 137 (4th Cir. 1979). (Here, neither the District Court nor the Fourth Circuit were asked to make any determination relative to the applicability of the FAA to the Settlement Agreement.) Under Virginia law, in order for an arbitration agreement to exist, the parties must mutually agree to such a provision as ascertained by the plain language of the contract. *Phillips v. Mazyck*, 273 Va. 630, 636, 643 S.E.2d 172 (Va. 2007). It is plain from the language of the Settlement Agreement that it contains no written provision applying to arbitration. J.A. at 197-201.

Even if the Settlement Agreement did include an arbitration provision, it still falls outside the scope of the FAA, which is only "applicable to any arbitration agreement within the coverage of the Act." *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (citing *Southland Corp v. Keating*, 465 U.S. 1, 11-12 (1984)); U.S. Const., Art. I, § 8, cl. 3. Section 2 of the FAA "embodies a clear federal policy of requiring arbitration *unless* the agreement to arbitrate is *not part of a contract evidencing interstate commerce*…." 9 U.S.C. § 2 (emphasis added); *see also Perry*, 482 U.S. at 489. 'Commerce' in this context "means commerce 'among the several states….'" 9 U.S.C. § 1.

Thus, the FAA has application only to a written, mandatory arbitration provision in a contract arising out of a transaction involving interstate commerce. The only contract existing in this case is the Settlement Agreement, which contains no arbitration provision and simply involved an employment dispute between a Virginia political subdivision and its employee, with no nexus to interstate commerce. J.A. at 197-201. *Cf. e.g.*, *Mesa Operating Ltd. P'ship v. La. Intrastate Gas Corp.*, 797 F.2d 238, 243 (5th Cir. 1986) ("Citizens of different states engaged in performance of contractual operations in one of those states are engaged in a contract involving commerce under the FAA"); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 270 (Tex. 1992) (finding that the FAA applied to an arbitration agreement because the contract involved interstate commerce when the employer's agent transported materials across state lines pursuant to the contract and prepared billings for a job in another state). Under these facts, it would be improper for this Court to grant Petitioner's writ grounded in the FAA.

D. Lee Failed To Properly and Timely Raise The Applicability of Mandatory Arbitration Agreements and the Federal Arbitration Act In the Courts Below.

In the District Court, Lee made no reference to any federal case law regarding fee-splitting or other provisions in mandatory arbitration agreements nor the Federal Arbitration Act. Nor was such law in any way relevant to the District

Court's decision since the Settlement Agreement was subject to Virginia law, there was no arbitration agreement between the parties, no connection between Lee's employment and interstate commerce, and no mandatory arbitration provision in the Grievance Procedure.

In her Fourth Circuit Petition for Rehearing under Fed. R. App. 40, and for Rehearing En Banc under Fed. R. App. 35, Lee expanded on her unconscionability argument by asserting for the first time (in order to meet the requirements for a Rule 35 petition) that the decision of the Fourth Circuit panel "conflicted with decisions of the United States Supreme Court, the 4th Circuit, as well as other circuit courts and there are questions of exceptional importance" requiring full court consideration. In support of that Petition, Lee cited several federal cases involving fee-splitting provisions in mandatory arbitration agreements, including *Green Tree v. Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000). However, those cases were both inapposite (there being no mandatory arbitration agreement in this case) and untimely. Arguments not timely presented are deemed waived, and "this general doctrine of waiver applies to arguments raised for the first time in a petition for rehearing." *Boardman v. Estelle*, 957 F.2d 1523, 1534 (9th Cir. 1992) (citing *United States v. Lewis*, 798 F.2d 1250, 1250 (9th Cir. 1986) and *Costo v. United States*, 922 F.2d 302 (6th Cir. 1990)).

Lee cannot argue that a mere reference in her Fourth Circuit Petition for Rehearing to several cases involving fee-splitting provisions in mandatory

arbitration agreements constitutes proper presentation of the issues which now form the nucleus of her Petition for Certiorari because "discussion of 'a federal case, in the midst of an unrelated argument, is insufficient to inform" the court that it has been presented with a claim. *Adams v. Robertson*, 520 U.S. 83, 88 (1997) (per curiam) (quoting *Bd. of Dirs. of Rotary Int'l*, 481 U.S. 537, 550, n.9 (1987)).

Similarly, Lee did not ask for relief in the District Court under the Federal Arbitration Act, did not appeal a District Court decision involving a mandatory arbitration agreement to the Fourth Circuit under the FAA, and did not even mention the FAA in any of her pleadings or briefs filed in those courts, including her Petition for Rehearing and Rehearing En Banc. The Federal Arbitration Act first appeared in the Petition for Certiorari as an after-the-fact vehicle to create a federal basis for this Court's jurisdiction, where none previously existed.

Since neither the applicability of mandatory arbitration agreements nor the Federal Arbitration Act to Lee's case were timely, or ever, raised prior to the filing of the Petition for Certiorari, they were not briefed by Respondents or addressed by the lower courts. Thus, the decisions of both the District Court and the Fourth Circuit are devoid of any discussion or any reference to the issues raised in the Petition. From this silence arises the presumption that the issues presented regarding the applicability of mandatory arbitration agreements and the FAA, even if they had been relevant to Lee's case, were not properly presented before the lower courts; a

presumption that the Petitioner cannot rebut. *See Adams*, 520 U.S. at 86.

E. This Court Should Decline To Review A State Law Decision Where A Federal Question Was Not Raised.

The courts below did not, and could not, base their decisions on federal case law applicable to mandatory arbitration agreements or any issues arising under the FAA. Instead, the Fourth Circuit and the District Court based their decisions solely on the Virginia law applicable to the validity of a settlement agreement. So, the legal principles which bar Supreme Court review of a state court decision regarding a federal claim not properly raised in the state court apply here.

"With very rare exceptions, [the Supreme Court] ha[s] adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams*, 520 U.S. at 86 (internal quotation omitted). "Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state law grounds, but also assists [the Supreme Court] in [its] deliberations by promoting the creation of an adequate factual and legal record." *Id.* at 85.

Petitioner has the "burden of showing that the issue was properly presented to that court." *Id.* The Supreme Court presumes that "the issue was not properly presented" when the lower court is "silent on the federal question" presented in the petitioner's writ for certiorari. *Id.*; *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987); *Webb v. Webb*, 451 U.S. 493, 501 (1981). Such is the case here, where neither the District Court nor the Fourth Circuit Court of Appeals addressed the applicability of mandatory arbitration agreements or the Federal Arbitration Act to Petitioner's case. J.A. at 694-696, 736-37; App. 1a–5a, 31a–37a.

Lee has also waived certiorari review. *See Adams*, 520 U.S. at 89, n.3 (concluding that "passing invocations of 'due process'" that "fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment" do not "meet our minimal requirement that it must be clear that a *federal* claim was presented"); *Webb*, 451 U.S. at 496 (finding a reference to "full faith and credit" insufficient to raise a federal claim without a reference to the U.S. Constitution or to any cases relying on it); *New York Central R. Co.* v. *New York*, 186 U.S. 269, 273 (1902) ("[I]t is well settled in this court that it must be made to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth"); *Oxley Stave Co.* v. *Butler County*, 166 U.S. 648, 655 (1897) (a party's intent to invoke the Federal Constitution must be "unmistakably" declared, and the statutory

requirement is not met if "the purpose of the party to assert a Federal right is left to mere inference").

As Lee presented only Virginia state law issues of duress and unconscionability to the courts below and has done nothing to demonstrate that she presented her mandatory arbitration arguments or her claim that her case "arises generally under the Federal Arbitration Act", Pet'r's Br. 2, a writ should be denied.

II. The Authorities Cited in the Petition Relating to Mandatory Arbitration Agreements and the FAA Are Inapplicable Since There is No Mandatory Arbitration Agreement Nor Any Mandatory Arbitrary Provision in the Grievance Procedure.

The Petition for Certiorari asserts multiple arguments regarding this Court's decision in *Green-Tree Fin. Corporation-Alabama v. Randolph*, 531 U.S. 79 (2000) and "the Court's post-*Green Tree* jurisprudence," all of which involve the validity and effect of various provisions of mandatory arbitration agreements. Pet'r's Br., seriatim. Indeed, the Court of Appeals cases cited in support of Petitioner's "split in the Circuits" argument have one critical fact in common, they all involved written agreements containing mandatory arbitration provisions subject to the FAA. See *Green-Tree*, 531 U.S. 79 (financing agreement containing provision for binding arbitration); *Sanchez v. Nitro-Lift Techs., L.L.C.*, 762 F.3d 1139 (10th Cir. 2014) (arbitration clause in confidentiality/noncompete agreement); *Spinetti v.*

Serv. Corp., Int'l, 324 F.3d 212 (3d Cir. 2003) (arbitration provision in employment agreement); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889 (9th Cir. 2002) (binding arbitration provision in employee/employer dispute resolution agreement); *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (cable service agreement containing arbitration provision); *In re Am. Express Merchs.' Litig.*, 681 F.3d 139 (2d Cir. 2002) (arbitration agreement for disputes arising out of employment); *James v. McDonald's Corp.*, 417 F.3d 672 (7th Cir. 2005) (arbitration clause in Official Rules agreement governing participation in McDonalds' "Who Wants to be a Millionaire" contest); *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255 (11th Cir. 2003) (arbitration agreement in employment contract); *Bradford v. Rockwell Semiconductor Sys. Inc.*, 238 F.3d 549 (4th Cir. 2001) (mandatory arbitration provision in employment agreement); *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646 (6th Cir. 2003) (arbitration clause in employer's "Dispute Resolution Agreement with employee).

Obviously, those cases are all inapposite to Lee's case which did not involve an arbitration agreement of any kind, nor even a mandatory arbitration provision in the State Grievance Procedure.

III. Assuming, *Arguendo*, that the State Grievance Procedure's Fee-Splitting Provision Was Mandatory, Petitioner Cannot Establish a Violation of this Court's *Green Tree* doctrine.

Even assuming, *arguendo*, that this Court's *Green Tree* doctrine were to apply somehow to Virginia's statutory grievance procedure and, in particular, to the fee-splitting provision applicable to a teacher's decision to pursue a due process hearing before a three-member fact-finding panel, Lee cannot establish that the Grievance Procedure is unenforceable under the Federal Arbitration Act or the principles discussed by this Court in *Green Tree*. In the first place, the Court made it clear in *Green Tree* that the strong federal preference for arbitration of disputes expressed by Congress in the Federal Arbitration Act must be enforced where possible. 531 U.S. at 91. Following *Green Tree*, there has been overwhelming consensus among the Circuits that a plaintiff who claims a fee-splitting provision is unenforceable has the burden of showing that the cost of such arbitration is "prohibitive" and that those costs prevented her from vindicating her rights. *Id.*; *see also Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255 (11th Cir. 2003), and cases cited therein.

As this Court acknowledged in *Green Tree*, "[i]t may well be that the existence of large arbitration costs could preclude a litigant … from effectively vindicating her federal statutory rights in the arbitral forum." *Id.* However, the test this Court ultimately advanced was not whether or not

the costs are "large," as Petitioner suggests. Pet'r's Br. 2, 7. Rather, the rule flowing from *Green Tree* is that the "party seek[ing] to invalidate an arbitration agreement [bears the burden of proving] that arbitration would be *prohibitively expensive*." *Id.* at 91 (emphasis added).

Here, Lee presented no evidence on summary judgment that the fact-finding panel was "prohibitively expensive," but relied entirely upon her attorney's inappropriate argument (referring to inadmissible evidence) that his client believed that would be the case based on what she read in the Washington Post about the total legal costs **incurred by FCPS** in relation to another teacher's grievance. As in *Green Tree*, Lee had no evidence of her share of the actual costs of the fact-finding panel which she initially elected to pursue, but, as in *Green Tree*, presented only "'unsupported statements' regarding the costs involved." *Id.* at 91, n.6. Simply put, Lee's argument that she would have been saddled with large costs was too speculative to justify the invalidation of the Settlement Agreement under the theory of economic duress, or to meet the burden of proving those costs were "prohibitively expensive" under *Green Tree*.

Moreover, Lee cannot demonstrate that the costs of the panel hearing prevented her from vindicating her rights, since the Grievance Procedure was entirely voluntary and did not prevent Lee from marching down to the federal courthouse to challenge her dismissal if she or her attorneys chose to do so. She also had the choice to take her grievance to the School Board rather than a

grievance panel. What prevented Lee from "vindicating her rights" was the Settlement Agreement, in which, acting through and with the benefit of legal counsel, she knowingly waived "all claims of any kind she may have against the School Board and its officers, agents, and employees under federal, state, and local laws and regulations, arising from her employment" in exchange for the considerable benefits which she accepted and ratified throughout her continued employment with the School Board for another two years after entering into the Settlement Agreement. J.A. at 197-201.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Mary McGowan, VSB No. 22222
Counsel of Record
John Cafferky, VSB No. 26179
BLANKINGSHIP & KEITH, P. C.
4020 University Drive
Suite 300
Fairfax, Virginia 22030
(703) 691-1235 (telephone)
(703) 691-3913 (facsimile)
mmcgowan@blankeith.com

Counsel for Respondents,
Fairfax County School Board
Jack Dale
Phyllis Pajardo
Jamey Chianetta

APPENDIX

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[ENTERED AUGUST 18, 2015]

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1050

CYNTHIA LEE,

Plaintiff - Appellant,

v.

FAIRFAX COUNTY SCHOOL BOARD; Dr. JACK DALE, former Superintendent; Dr. PHYLLIS PAJARDO, Assistant Superintendent; JAMEY CHIANETTA, Principal,

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony J. Trenga, District Judge. (1:14-cv-01116-AJT-TCB)

Submitted: August 10, 2015 Decided: August 18, 2015

Before KING and THACKER, Circuit Judges, and DAVIS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Christopher E. Brown, THE BROWN LAW FIRM, PLLC, Alexandria, Virginia, for Appellant. Mary McGowan, Robert M. Falconi, BLANKINGSHP & KEITH, P.C., Fairfax, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Cynthia Lee challenges the district court's order granting the Fairfax County Public School (FCPS) Board's motion for summary judgment and dismissing Lee's complaint alleging that the FCPS Board and FCPS employees (collectively, "Appellees") violated Lee's civil rights under 42 U.S.C. §§ 1981, 1983 (2012), and her procedural due process rights under the Fourteenth Amendment, and engaged in defamation and wrongful termination under Virginia state law. Lee argues that her claims are not barred by her prior settlement agreement with FCPS because she entered the agreement under duress and the agreement is unconscionable. We affirm.

We review the grant or denial of summary judgment de novo. Cloaninger ex rel. Estate of Cloaninger v. McDevitt, 555 F.3d 324, 330 (4th Cir. 2009). All facts and reasonable inferences are viewed "in the light most favorable to the non-moving party." Dulaney v. Packaging Corp. of Am., 673 F.3d 323, 330 (4th Cir. 2012). Summary judgment is only appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Conclusory or speculative allegations do not suffice, nor does a mere scintilla of evidence in support of [the nonmoving party's] case." Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 649 (4th Cir. 2002) (internal quotation marks omitted).

We first review Lee's claim that her settlement agreement should be set aside because she entered it under duress. Under Virginia law, "[d]uress is not readily accepted as an excuse, and must be proven by clear and convincing evidence." Pelfrey v. Pelfrey, 487 S.E.2d 281, 284 (Va. Ct. App. 1997) (internal quotation marks omitted). "Duress exists when a defendant commits a wrongful act sufficient to prevent a plaintiff from exercising his free will, thereby coercing the plaintiff's consent." Goode v. Burke Town Plaza, Inc., 436 S.E.2d 450, 452 (Va. 1993). Virginia courts have been particularly hesitant to accept the exertion of economic pressure as a form of duress. See id. at 452-53 ("Because the application of economic pressure by threatening to enforce a legal right is not a wrongful act, it cannot constitute duress."); Seward v. Am. Hardware Co., 171 S.E. 650, 662 (Va. 1933) ("A contract reluctantly entered into by one

badly in need of money without force or intimidation and with full knowledge of the fact is not a contract executed under duress.").

We have reviewed the record and found no evidence of duress. Lee fails to show that FCPS engaged in any wrongful conduct in the negotiation of the agreement, and her financial hardship, standing alone, is insufficient to invalidate a contract due to duress under Virginia law.

We next consider whether the settlement agreement should be invalidated as unconscionable. Traditionally, for a contract to be unconscionable, it must have been "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." Chaplain v. Chaplain, 682 S.E.2d 108, 113 (Va. Ct. App. 2009) (internal quotation marks omitted). In other words, "'[t]he inequality must be so gross as to shock the conscience.'" Id. (quoting Smyth Bros. v. Beresford, 104 S.E. 371, 382 (Va. 1920)).

Unconscionability has both a substantive and procedural element. Id. at 114. The former requires a "gross disparity in the value exchanged." Id. at 113 (internal alterations and quotation marks omitted). The latter necessitates inequity and bad faith in "the accompanying incidents . . . , such as concealments, misrepresentations, undue advantage, oppressions on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like." Id. at 114 (internal quotation marks omitted).

We conclude that neither element is present in the settlement agreement before this court. In exchange for releasing her claims against Appellees, Lee avoided termination for incompetence (for which she could have lost her teacher's license), retained a position at FCPS, wiped her record clean, received a neutral reference from FCPS, and could resign with only five-days notice if she were to obtain new employment. In negotiating these benefits, Lee was represented by counsel. As a result, the district court properly refused to invalidate the settlement agreement due to unconscionability.

Because Lee does not contend that any of her claims were beyond the scope of her settlement agreement, we affirm the district court's judgment. We also deny as moot her motion to reconsider our order denying her motion to expedite. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CYNTHIA LEE,	) Case 1:14-cv-01116
	)
Plaintiff,	)
	)
v.	) Alexandria, Virginia
	) October 31, 2014
	) 10:46 a.m.
FAIRFAX COUNTY	)
SCHOOL BOARD, *et al.*,	)
	)
Defendants.	)
	) Pages 1 - 36

TRANSCRIPT OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM BEFORE THE HONORABLE ANTHONY J. TRENGA

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:

CHRISTOPHER E. BROWN, ESQUIRE
TUCKER & ASSOCIATES, PLLC
8521 Leesburg Pike, Suite 200
Vienna, Virginia 22182
(571) 477-2524

FOR THE DEFENDANTS:

MARY E. McGOWAN, ESQUIRE
KRISTI L. JOHNSON, ESQUIRE
BLANKINGSHIP & KEITH, PC
9300 West Courthouse Road
Manassas, Virginia 20110
(703) 365-9945

THE CLERK: Civil Action 1:14-cv-1116, *Cynthia Lee v. Fairfax County School Board*, *et al.*

Will counsel please come forward and identify yourselves for the record.

MR. BROWN: Good morning, Your Honor. Christopher Brown on behalf of the plaintiff.

THE COURT: Good morning, Mr. Brown.

MS. McGOWAN: Good morning, Judge Trenga. Mary McGowan and Kristi Johnson on behalf of the defendants.

THE COURT: Welcome. We're here on the defendants' motion for summary judgment and the motion to dismiss. I've reviewed these pleadings. I'll give counsel an opportunity to emphasize or supplement what they've already told the Court.

Ms. McGowan.

MS. McGOWAN: With Your Honor's permission, we will address the summary judgment motion initially --

THE COURT: Please.

MS. McGOWAN: -- because if granted, it would be dispositive of the motion to dismiss.

Your Honor, we believe that based upon the submissions that we have presented on behalf of the defendants, the affidavits and exhibits, supporting our statement of facts and the relative lack of opposition to our statement of facts, that there are no material facts in dispute on the limited issues before the Court on summary judgment.

In the opposition that was filed to our statement of facts, the plaintiff admitted many of the critical factors that are before the Court and also added some extraneous or nonmaterial facts -- which are of no moment to the issues before the Court – and argued, though simply -- continually invoke the mantra that additional discovery was needed.

I want to point out -- I'm sure Your Honor has read our reply brief -- that none of the plaintiff's alleged dispute of the facts is supported by affidavit or declaration or reference to the record. There's simply generic denials or claims that there is a dispute when, in fact, the material facts are not in dispute.

The mantra for continued discovery was unsubstantiated by a Rule 56(d) affidavit explaining why and how discovery is necessary on these limited issues. I'd also point out that as to the so-called disputed facts, they're primarily -- plaintiff states

that she is unable to agree with certain exhibits, which the majority of which were either attached to her complaint or were generated by her own attorneys.

So I would say that under those circumstances, those are clearly facts that don't require discovery. They're already available to her, and she could have addressed those facts or any paucity in those facts by affidavit if she had chosen to do so.

So we believe, Your Honor, that the nondisputed facts before the Court, which are absolutely dispositive of the summary judgment issue, or the fact that the plaintiff did indeed enter into a settlement agreement in August 2012 -- that is her own exhibit to her own complaint. She is bound by its terms.

She has also accepted the benefits -- that is something she has pleaded -- by remaining in the employ of the school division for two years after signing the agreement. She has not contested the fact that she was represented by counsel in the negotiation of the settlement agreement and thereafter. She has not contested the fact that she sought a neutral reference following the execution of the agreement, nor has she contested that she had voluntarily left the employ of the school division in 2014 basically with a clean slate in order to start over as a teacher in another school division.

She stands before the Court today with a purged personnel file that makes no reference to her

performance problems, her evaluations, or the superintendent's recommendation for dismissal. She is free to walk out the door today with the benefit of that agreement which she now seeks to overturn.

We think also that the fact that the agreement was -- that plaintiff is estopped from arguing that the agreement was not voluntary by the provision -- I believe it's paragraph 17 of the settlement agreement, which is part of her own exhibit. She's bound by that.

So we believe there are really no material facts relative to the circumstances in which the settlement agreement was negotiated.

The plaintiff argues that the settlement agreement should be set aside basically based upon a number of conclusory allegations supporting Counts 1 and 2 of the complaint for duress and unconscionability.

The plaintiff in her complaint and in her opposition to our motion for summary judgment has still identified no fact that would establish any wrongful act on the part of any of the defendants which would support her duress claim. A wrongful or illegal act is an absolute predicate for a duress claim. The only evidence, if you will, that Ms. Lee relies upon are her allegations of a threat to terminate and financial pressure.

As a matter of law under Virginia law, interpreting both state and federal court cases interpreting duress, there is no question but that a

termination cannot constitute a threat for purposes of economic duress. Similarly, financial pressure cannot constitute economic duress.

Plaintiff has made much about this fact that she was informed -- apparently read in the *Washington Post* -- that in another teacher's case, it cost the school division $70,000 to litigate a particular dismissal grievance.

It's unreasonable for her to rely upon that subjective belief that somehow this would have applied to her. Number one, the cost cited in her -- in *The Washington Post* article, which are in our exhibits, were the defendants' cost, not the teacher's cost. And as we've established with our exhibit and the affidavit of Carol Marchant, the actual cost to the teacher in that case was something around $8,000. So plaintiff's subjective, misplaced belief based upon what she read in the newspaper cannot be attributed to the defendant as some type of threat constituting duress.

We also would point out that under the *Friedlander* case, Judge Williams in a remarkably similar type of case granted summary judgment and denied discovery based upon the language of a settlement agreement in which the plaintiffs had claimed there that economic duress was an issue of fact that should go to the jury and that summary judgment was not appropriate.

As Judge Williams pointed out in *Friedlander*, in order to proceed with an economic duress claim, you may not go forward with just subjective evidence

of duress. You need objective evidence. That is glaringly evident here in the complaint or certainly in the opposition. There is no objective evidence of any duress, financial or threatwise, in terms of Ms. Lee's employment with the school division.

The other important factor, I think, is that there is no dispute here that Ms. Lee was represented by counsel. So this directly affects her argument that she was under some type of duress. She was able to have counsel who helped her negotiate the settlement agreement and stayed by her side even after the agreement was negotiated. She is, again, I say, estopped by her own statements and her own representation by counsel.

The amended complaint that was filed last Monday does not cure these problems. Nowhere in the amended complaint are there any facts establishing any evidence of duress beyond the original allegations of financial pressure by virtue of *The Washington Post* article and that somehow the superintendent's recommendation was a threat.

As we argued in our brief and as is evident from Virginia law, the superintendent in proceeding with a recommendation for dismissal is required by the Virginia Code to inform the teacher of her rights underneath the grievance process. And in this case, the rights were simply that she had a right to a fact-finding panel and/or if she elected not to proceed with the panel, then the board would make the determination based upon the superintendent's recommendation alone. That can hardly be constituted a threat rising to the level of a duress

argument, Your Honor, where the superintendent is required to give that information.

In reference to the unconscionability effort to set aside the settlement agreement, which is Count 2, again, the amended complaint has not identified any additional facts supporting the unconscionability argument. It rests solely upon the conclusory allegations in the complaint, which are essentially two. One is that -- and I quote -- Due to her race, Ms. Lee was forced to accept the settlement agreement.

This conclusory allegation is unsubstantiated with any fact anywhere indicating that any of the defendants had any racial animus or motivation. So that is totally speculative, and as Your Honor well knows, in employment discrimination cases, you cannot predicate a discrimination claim on conclusory allegations. You need objective evidence. There is none here, and plaintiff has not pointed anything out in her opposition or in her amended complaint to the contrary.

She has merely added an argument that she believed at the time -- and again, this is her subjective belief -- that if she didn't resign her -- or if she didn't enter into the settlement agreement and accept a voluntary demotion, that she would – and the recommendation for dismissal went forward and was successful, that she would lose her license by the State of Virginia. Again, we don't think that that really changes the analysis at all.

Then, of course, the other allegation supporting the unconscionability argument is that

she was forced to enter into the settlement agreement and that that in itself is unconscionable. But in fact, again, she's bound by her own repeated statements that she voluntarily entered into that settlement agreement with benefit of counsel.

THE COURT: When was the amended complaint filed?

MS. McGOWAN: I'm sorry, Your Honor?

THE COURT: When was the amended complaint filed?

MS. McGOWAN: Last Monday -- or excuse me -- last Friday, last Friday at about four minutes before midnight along with the opposition to the motion to dismiss. As Your Honor may recall, the Court granted an extension for that.

THE COURT: Right, I did.

MS. McGOWAN: The opposition to summary judgment was not filed until Saturday out of time. The Court has permitted that filing, but the bottom line is they had --

THE COURT: I guess procedurally I'm just focused on the fact that your motion, both the summary judgment motion and the motion to dismiss, was filed in response to the original complaint. Then she's filed now an amended complaint. Normally, that would essentially moot the motion to dismiss. You'd have to refile it against the amended complaint.

MS. McGOWAN: It would the motion to dismiss, but I don't believe it affects the motion for summary judgment. There's nothing in the amended complaint -- and Your Honor is free to --

THE COURT: Right.

MS. McGOWAN: -- that alters the situation.

THE COURT: How does the amended complaint differ from the original complaint? The counts are the same?

MS. McGOWAN: No. There are two additional counts. The first ten counts are essentially the same. Several of the 1981 counts have been converted by changing the title to 1983 counts. Plaintiff has added a malicious statement cause of action under new Count 11 and tortious interference with contract under Count 13. Those new counts obviously would also be affected by the release provision of the settlement agreement that --

THE COURT: Right.

MS. McGOWAN: -- bars any type of tort.

There are some allegations added. They are conclusory, Your Honor.

In reference to the duress claim, plaintiff has added an allegation that she was – another conclusory allegation that she felt threatened by the loss of her employment. That's nothing new. She has added some other conclusory allegations about the

fact that she was afraid that she was going to lose her teaching license.

In reference to the unconscionability count, the only change is really that another paragraph was added to indicate that as part of the settlement agreement, plaintiff was -- in accepting a demotion from a teaching position to an instructional assistant position, she also suffered a reduction in the percentage of her retirement.

So those facts really do not alter the summary judgment motion whatsoever.

In light of the fact that the settlement agreement was intended to prevent exactly what we're standing here for, additional litigation and discovery and filing responses to subsequent pleadings, etc., it's even more appropriate, I think, for the Court to look at this as a threshold matter just as Your Honor would look at summary judgment on a statute of limitations or a statute of repose argument. If there's nothing in the amended complaint that changes the facts that are dispositive of this case on the basis of the settlement agreement, I would argue that the Court should be granting summary judgment on that basis.

THE COURT: Okay.

MS. McGOWAN: So our position is there being no material disputed facts to support setting the settlement agreement aside on either theories of duress or unconscionability, that the clear unambiguous language of the settlement agreement

requires the Court to dismiss all the remaining counts in the complaint.

There is no contention here in the opposition that the settlement agreement was not entered into, that it's an invalid settlement agreement other than to the extent plaintiff claims it was unconscionable and/or she was forced to enter into it because of economic duress. There's no question that there's any ambiguousness or no question that it isn't the Court's purview to interpret the agreement and apply it to the case.

I will reserve argument for anything additional.

THE COURT: All right. Thank you.

One moment, Mr. Brown.

MR. BROWN: Good morning, Your Honor.

THE COURT: Hold on one moment.

I take it you filed the amended complaint without leave of Court as a matter of right. Is that what you did?

MR. BROWN: Well, no, Your Honor. I mean, Federal Rule of Civil Procedure 15 would allow the filing of an amended complaint as a matter of right if a motion for summary judgment has not been filed. So they filed that. So we filed the motion for leave to amend and the amended complaint. We had to

correct it because it was incorrectly uploaded. It's an exhibit to the motion.

THE COURT: So the amended complaint is not operative at this point?

MR. BROWN: You have not granted the motion for leave to accept it.

THE COURT: All right. So procedurally, we're properly dealing still with the original complaint?

MR. BROWN: That is correct, Your Honor.

THE COURT: All right. Am I correct that if the settlement agreement applies, all the substantive counts, Counts 3 through 10 of the original complaint, are within the scope of the releases?

MR. BROWN: Yes. I mean, my client and I have discussed at great length over the past couple of months that this -- we need to get passed this settlement agreement.

Although, we do feel confident that while -- and we put in the amended complaint -- I think we pled it was going to be $7,000. That nonetheless creates an economic hardship and the duress that results in my client facing what she legitimately felt would be the loss of her license. It's not because she's being terminated. I understand that. The fact that she's being terminated with the allegation that she's incompetent. And understanding when she's told,

You're either going to pony up the 7,000 or we get to go in there by ourselves and we will win.

And then she's told: Well, you have this other alternative. But if you take that alternative, we can go ahead and request a fact-finding panel anyway. I addressed that on page 2 of my opposition to the motion to dismiss referencing the complaint at paragraph 164 and exhibit -- Jack Dale's May 30, 2012, letter. He says, you know, Even if you take this other alternative -- which they assert she didn't have to pay the money and request a fact-finding panel -- they, in fact, could say in turn, Well, thank you for that request. We're going to turn that into a fact-finding panel, and you have to pay the money anyway.

So yes, I understand we need to get passed this settlement agreement, but the economic duress placed on her, we feel, is a clear violation of her constitutional rights to due process by the taking of her property, which is her teaching position with the public school.

Whether it's $70,000 or $7,000, despite the difference in that amount, she was making reference to the overall cost, not the cost of just the panel hearing individually.

THE COURT: Well, there was a panel. There was a fact-finding panel established, correct?

MR. BROWN: I don't believe they went forward before a fact-finding panel.

THE COURT: I understand. But there was an agreement as to Judge Sheridan to be the chair of the panel?

MR. BROWN: Correct.

THE COURT: Right. Then there was a decision by the Office of Equity and Compliance that basically found the allegations of discrimination not substantiated. That was something other than the panel that Judge Sheridan would have presided over?

MR. BROWN: Yes. That panel would have followed that finding if she would have appealed or grieved that finding. It would have cost her $8,000 per the defendants' representation here before the Court, which on a teacher's salary is still a significant amount of money.

When you're faced with the prospect of being terminated for incompetence or paying $7,000 for a fact-finding panel that you don't have, we felt that that sufficiently establishes the duress part of putting her in a position despite -- whether she has a lawyer or not, the lawyer can't help her come up with $7,000. He can help her negotiate a good settlement. I'll concede he did a good job with it, but he can't change the fact that she doesn't have $7,000.

So she accepted the agreement in order to protect her livelihood -- even though she was being demoted to an assistant position -- so that she wouldn't have a finding of incompetence against her

for the school board appearing on its own before the fact-finding panel.

THE COURT: Was there a requirement that any funds be deposited in advance of the hearings?

MR. BROWN: Well, I have done these before. Whether or not my client had to pay them in advance I can't recall, Your Honor. I did one of these, and my client had to pay about $7,000 or $8,000. I can't recall if it was in advance or not. I'm sorry.

THE COURT: All right.

MR. BROWN: I think -- when we talk about conclusory allegations, you know, I think we also need to talk about self-serving statements. I don't think there's any dispute to the facts that we feel do support our claims of discrimination repled in the amended complaint under 1983 for retaliation, hostile work environment, and racial discrimination.

That is, we have a teacher of 14 years who for all previous years before Ms. Chianetta becomes the principal is meeting or exceeding expectations -- meeting expectations and in several areas exceeding expectations. So the last evaluation we have pre-Principal Chianetta is 2008. I believe she meets all the expectations and exceeds in three or four areas. Then 2010 comes around, and suddenly, she's being papered.

Now, in the absence of racial slurs, direct racially derogative comments -- which aren't going to happen in this day and age unless you're in a very

interesting situation -- it's easy for the defendants in these cases to come forward and say, You have no evidence of racial animus.

I believe they can assert it's conclusory, but we are allowed to rely on circumstantial evidence. We have a teacher who doesn't have a four-year record or a six-year record. She has 14-year record with Fairfax County of being a special education teacher, providing -- exceeding or meeting the expectations of her position.

Ms. Chianetta arises, and they're implementing a lot of new standards. Everybody is aware of this and the effect it's had on teachers. Perhaps for the teachers who have been there longer, it might be a more difficult transition. There was really no acknowledgment of that by the principal and her administration.

I recognize the stuff about some of the lesson plans and things. Those things are more straightforward, but the allegations that she's failing and that she's incompetent, these are things that for the first time -- Ms. Chianetta arrives, and for two years, suddenly my client is incompetent and she's failing to meet the requirements of her position.

She's trying to find the time to work in learning and implementing these lesson plans and these different things that she has to comply with. There's no evidence from the defendants that any of that is not true.

And when you have that circumstantial evidence of Ms. Lee's record and then Ms. Chianetta shows up and suddenly the woman is somehow incompetent and they've papered her, which is how it works – I mean, we can be honest about it. Yes, it's going to be difficult for any plaintiff to come forward and say, Well, here's the evidence that it's racially motivated.

The request for discovery would be important. How do they treat other teachers who had similar issues? They might have been late to a meeting a couple of times, failed to get a lesson plan in on time. Ms. Lee is not going to have access to those records at this time.

So I feel that circumstantially, given my client's tenure with Fairfax County Public Schools, I believe we create a question of fact that can rebut their self-serving affidavits for my client's performance in the final two years of Fairfax County Public Schools from 2010 to 2012. It does create a question of fact, like the fact that the previous 10 or 12 years, she's meeting and/or exceeding the expectations of Fairfax County.

THE COURT: Let's assume that all of that is true. Then if we were to ever get to litigating the underlying claims, there may be disputed issues of fact. But is there any reported case that you can point the Court to that, based on facts comparable to these, there were findings of either duress or unconscionability sufficient to set aside a settlement agreement of this sort?

MR. BROWN: Your Honor, I would have to simply rely on -- since they didn't address that count in the motion to dismiss -- they did in the motion for summary judgment.

THE COURT: Summary judgment, right.

MR. BROWN: The Court's indulgence.

THE COURT: Yes.

MR. BROWN: I don't wish to suggest that the Court is not in a position to rule, that I'm not prepared to argue today.

THE COURT: I understand.

MR. BROWN: I have had a little bit of a tough couple of weeks.

THE COURT: I understand.

MR. BROWN: So we had the extra day for the summary judgment. Nonetheless, I'd have to -- I would have to submit something late to the Court if the Court would allow that.

THE COURT: Right. I will tell you: I've looked closely at the standards. They're very high, as I'm sure you recognize, to set aside an agreement.

MR. BROWN: We have addressed this.

THE COURT: Anything else you'd like to say about this?

MR. BROWN: I'd like to say -- no evidence to support an illegal act is a prerequisite to the duress claim. Well, they're getting right back into the you have no objective evidence of racial animus. I feel there's circumstantial evidence of discrimination that will support that claim. There you have an illegal act that can serve as a prerequisite for the duress claim. And when you have a teacher who --

THE COURT: Under that theory, it would be almost impossible to settle a discrimination claim.

MR. BROWN: Impossible to settle?

THE COURT: I mean, every settlement of a discrimination claim would be susceptible to that argument; wouldn't it? Doesn't the illegal act have to be an act that induces the settlement itself?

MR. BROWN: If you're settling with a plaintiff who is facing a $7,000 fee to fix a fact-finding panel, it should be a concern for counsel for the county.

THE COURT: I understand.

MR. BROWN: That's what I would address if that were my client.

THE COURT: All right.

MR. BROWN: The threat of termination cannot be duress. It wasn't just the threat of termination. We have to make a distinction between -- there's a threat of termination, but that isn't my

client's issue. While she, of course, wishes that weren't the case, the issue is that she's being deemed incompetent. So while a threat of termination in and of itself cannot give rise to the duress to enter into a contract, it's the allegation that she's incompetent, which is the next step that we will rely on to support that part of our argument.

She has not contested that she received the benefits of the settlement. I don't believe that that's going to be relevant to a determination of whether or not she was in duress in entering into the agreement. I mean, it is what it is. She got demoted to an assistant principal position -- an assistant teacher position. They said they would give a neutral reference for her, Prince William or wherever.

THE COURT: Now, when she left in August of this year, did she retire or --

MR. BROWN: She did.

THE COURT: She retired?

MR. BROWN: She retired.

THE COURT: All right. So she had accrued a retirement benefit?

MR. BROWN: No. The two additional counts were intentional affliction of emotional distress and breach of contract. It was the emotional distress of being in that position. She felt it was demeaning. We can get to those issues were we to get there.

THE COURT: I understand.

MR. BROWN: I just want to address – the amended complaint does not cure these problems or either duress.

THE COURT: I was really just wondering why it was framed in terms of retirement as opposed to a termination.

MR. BROWN: She took what she had at the time so she could get out of the situation.

THE COURT: I see.

MR. BROWN: I think the last thing I did want to address, Your Honor, was that it was not the threat of the termination. It was the allegation that she was incompetent that is of concern to my client, utmost concern.

Thank you, Your Honor.

THE COURT: All right. Ms. McGowan, anything else?

MS. McGOWAN: Your Honor, just a few points.

One, to clarify the record, the OEC determination is separate and apart from the grievance. The grievance procedure for dismissal of teachers is a separate process under the state grievance from discrimination complaints. So that was not something that was going to the fact-finding

panel. Solely, the dismissal was going to the fact-finding panel.

THE COURT: I understand.

MS. McGOWAN: The argument that the duress to Ms. Lee has now been reduced from $70,000 to a $7,000 cost that she couldn't afford can't be laid at the steps of -- at the door of the defendants because it's the law. Virginia law tells school divisions when they can terminate teachers, how they can do it, and what procedures they have to use to do it.

That statutory grievance procedure, which Dr. Dale referenced in his letter which counsel referred to, is dictated by the Virginia Code. Virginia Code 22.1, I think, 312 says that the Department of Education will have a grievance procedure for teachers that includes the following elements. Among those is the fact-finding panel process or was. That was eliminated by the legislature in 2013 in favor of hearing officers to make the process more expeditious, if you will.

At any rate, at that time, the law said the teacher is entitled to a fact-finding hearing and/or a hearing before the school board depending on whether the school board decides if they want it to go to the fact-finding panel.

In this case, the Fairfax school board said, When we get teacher dismissals, we would like them to go to a fact-finding panel before they come to us. That was the procedure here. It was provided for by

law. It was adopted into the school regulations. So this idea that the costs that are imposed on the teacher through that statutory process should somehow be deemed a threat made by the defendants is just not logical. You can hardly charge the school division with the responsibility for imposing costs that are required by law. I mean, it's kind of like an attorney's fees provision.

THE COURT: All right.

MS. McGOWAN: Now, the other thing I wanted to address was there was much argument here about the merits of the discrimination case. Those are not material to summary judgment.

Then the incompetence, the last piece I wanted to address. I can understand why Ms. Lee is concerned about that word "incompetence," but incompetence in the world of public education is a term of art in Virginia. It has a legal connotation. The Virginia Code defines incompetence to include unsuccessful performance as documented in evaluations. And similarly, the school board's regulations define incompetence to include a lack of performance by a teacher.

So you can't fire a teacher in Virginia without just cause. Just cause is defined as incompetence, which in turn is defined by the legislature to include substandard performance on evaluations. So that term is required essentially for the defendants to put forth a just cause recommendation for dismissal.

THE COURT: All right. Thank you.

MR. BROWN: Your Honor, I just wanted to point out for the Court –

THE COURT: All right. I'll let you briefly.

MR. BROWN: I'm not going to argue, Your Honor.

THE COURT: Go ahead.

MR. BROWN: There's a case recently filed here in the Eastern District. I think it was before Judge Ellis. It's *Charlton v. Fairfax County Public Schools*, 1:14-cv-1268. Counsel for that plaintiff has contacted me. I haven't had a chance to speak with counsel. But in ruling on this and the motion to amend, I'd ask the Court to consider -- I need to review these class action claims and perhaps determine whether my client may be a part of that class and what may -- how I may proceed going forward.

THE COURT: All right.

MS. McGOWAN: Your Honor, could I address that because I'm defending the *Charlton* case?

THE COURT: Go ahead.

MS. McGOWAN: I just filed a motion to sever. That is not a class action. That is four plaintiffs joined only by a mass mailing by the plaintiffs' attorney soliciting people unhappy with a situation at an entirely different school from where the

plaintiff worked. So I think it has absolutely nothing to do with this case.

THE COURT: That case isn't before the Court. I think the Court is in a position to rule on this motion that is before the Court, on defendants' motion to dismiss and also a motion for summary judgment.

Let me first speak to the motion for summary judgment. The Court has reviewed the filings in this case. Based on the undisputed facts briefly summarized, the plaintiff, Cynthia Lee, was employed as a special education teacher for Fairfax County Public Schools from approximately 1999 until 2014.

In May 2011, she was given does-not-meet ratings in four areas of evaluation during her year-end 2010-2011 evaluation and was conditionally reappointed for the following year, 2011-2012.

She was also requested, pursuant to the standard protocol for teachers who do not meet expectations, that she participate in an intervention work plan process whereby an intervention team consisting of a teacher and other school personnel develop a plan to assist teacher improvement.

In January 2012, during her midyear review, Ms. Lee, again, received does-not-meet ratings on her 2011-2012 midyear evaluation, and she was advised that unless her performance improved, she would not be recommended for reappointment.

Thereafter, on February 10, 2012, pursuant to the grievance procedures in place, she filed a grievance in which she alleged, based on her midyear evaluation, that she was discriminated against on the basis of race and that she was subject to a hostile work environment. She also requested a transfer and an investigation. Pursuant to regulations pertaining to charges of racial discrimination, her grievance was referred to the Office of Equity and Compliance.

On May 14, 2012, she received her final year-end evaluation for the 2011-2012 school year in which she received does-not-meet ratings in multiple areas, and she was advised that she would not be recommended for reappointment but rather terminated based on her performance. The plaintiff then amended her grievance to include the dismissal recommendation.

On May 30, 2012, she was advised that the division superintendent would be recommending her dismissal.

Ms. Lee then retained counsel, who advised the school system of his involvement on June 18, 2012.

On June 21, 2012, the Office of Equity and Compliance advised the plaintiff that based on its investigation and findings, her discrimination charges were not substantiated and her evaluations were based on legitimate, nondiscriminatory performance concerns.

Thereafter, Ms. Lee, through her counsel, began settlement discussions with the school system which resulted in a settlement agreement, which Ms. Lee signed on August 29, 2012. Under the settlement, she accepted a demotion from special education teacher to instructional assistant, a decrease in salary, and waived any and all claims that she had against the school board, its officers, agents, and employees under federal, state, and local law, including but not limited to claims based on age, race, sex, disability, and any other employment discrimination claims.

The settlement also contained other provisions that she had requested through her counsel, including withdrawal of the pending recommendation for dismissal, removal from Ms. Lee's personnel file of all documents relating to poor performance, an agreement to provide Ms. Lee a neutral employment reference, and an agreement to allow her to resign from employment outside of the Fairfax County Public School system with only five days notice.

Ms. Lee continued her employment with Fairfax County Public Schools for nearly two additional years before retiring on April 30, 2014.

On August 26, 2014, Ms. Lee filed a ten-count complaint in this court that included in Counts 1 and 2 claims that the settlement agreement was unenforceable either because it was entered into under duress or was unconscionable; in Count 3, that she was deprived of her employment without due process; in Count 4, she alleged defamation;

Count 5, that she was wrongfully terminated under Virginia law; in Count 6, that she was racially discriminated against under Section 1981; in Count 7, that she endured disparate treatment under 1981 because of her race; in Count 8, that she was subjected to a hostile work environment in violation of Section 1981; in Count 9, that she was illegally retaliated against because her filing of the OEC complaint; and in Count 10, that she was denied equal protection of a violation of Section 1983.

In assessing the motion for summary judgment, the Court must determine whether there is any genuine issue of material fact and whether the moving party, based on those undisputed facts, is entitled to judgment as a matter of law. The party seeking summary judgment has the initial burden to show the absence of a genuine issue of material fact. A genuine issue of material fact exists if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing a genuine dispute exists. The facts shall be viewed and all reasonable inferences drawn in the light most favorable to the nonmoving party.

Here all of the plaintiff's substantive claims in Counts 3 through 10 are within the scope of the release contained in the settlement agreement signed by the plaintiff. The Court will, therefore, first consider whether there are any genuine issues of material fact pertaining to plaintiff's first two

counts, which seek to invalidate the settlement agreement.

First, as to Count 1, based on economic duress under Virginia law, in order to show economic duress sufficient to set aside a contract, the plaintiff must show by clear and convincing evidence that the defendants committed a wrongful act or that the plaintiff experienced more than mere financial hardship. Virginia law on this point, as in other states, establishes a high bar, and duress is not readily accepted as an excuse and must be proven by clear and convincing evidence.

In *Friedlander v. NCNB National Bank of North Carolina*, a Fourth Circuit 1990 decision, the Fourth Circuit articulated the Virginia law standard for duress, which governs the plaintiff's claim here, has the overbearing of a person's free will by an unlawful or wrongful act or by threat such that the party's consent to a contractual agreement is involuntary.

As I indicated earlier, financial hardship alone does not constitute financial duress; otherwise, I suspect many, if not most, settlements would be susceptible of being set aside on the grounds of economic duress.

Here there's no evidence from which a reasonable fact finder could conclude that the defendants engaged in a wrongful act or that her ability to exercise free will was overcome by any act, wrongful or otherwise, on the part of the defendant.

The settlement was signed after she was represented by counsel, who engaged in settlement negotiations on her behalf and proposed provisions for the settlement agreement that the school system accepted.

The facts show only that the plaintiff agreed to settle her claim in exchange for a settlement under which she received significant benefits, including, among others, continued employment, a removal from her record of the superintendent's dismissal recommendation, and a neutral reference.

The Court, therefore, finds that there are no genuine issues of material fact and concludes that the defendant is entitled to judgment as a matter of law as to Count 1.

As to Count 2 alleging that the settlement is unenforceable based on unconscionability, in order for the plaintiff to prevail, she must show that the agreement created an inequality so gross as to shock the conscience.

Here the Court concludes that the plaintiff has not come forward with any facts that would allow a reasonable fact finder to conclude that the settlement agreement was the result of either procedural or substantive unconscionability.

Under the settlement, as I mentioned earlier, the defendant received substantial benefits, including continued employment, and there is nothing about her underlying claims that make her settlement of those claims shocking to the

conscience, including her claims for racial discrimination.

The Court, therefore, concludes that the defendants are entitled to judgment as a matter of law as to Count 2.

As I indicated earlier, the waiver of claims provision encompasses all of the plaintiff's remaining claims. Therefore, the defendants are entitled to judgment as a matter of law as to those claims as well.

For these reasons, the motion for summary judgment is granted, and the case is dismissed. The Court will issue an order.

MR. BROWN: Thank you, Your Honor.

THE COURT: All right.

MR. BROWN: I'll just let the Court know: If I feel like I can in good faith submit something on the duress or unconscionability and do a motion to consider, I'll do that.

THE COURT: That will be fine.

MR. BROWN: We'll see how that plays out.

THE COURT: All right. Thank you.

MS. McGOWAN: Thank you, Your Honor, for your time.

THE COURT: The Court will stand in recess.

Time: 11:32 a.m.

I certify that the foregoing is a true and accurate transcription of my stenographic notes.

/s/_____
Rhonda F. Montgomery, CCR, RPR

SETTLEMENT AGREEMENT

This agreement (hereinafter, "Agreement") is made by and between Ms. Cynthia Lee and the Fairfax County School Board (hereinafter "School Board").

RECITALS

R1. The School Board employs Ms. Cynthia Lee (hereinafter, "Employee") as a Teacher pursuant to a continuing contract.

R2. The School Board and the Employee disagree regarding her performance as a Teacher and wish to resolve their dispute and all other matters relating to her employment as of the effective date of this settlement.

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the sufficiency of which is hereby acknowledged, the parties agree as follows:

1. **Recitals**: The recitals set forth above are fully incorporated into this Agreement.

2. **Voluntary Demotion and Reassignment of Employee**: Employee hereby tenders her request for a voluntary demotion to the position of Instructional Assistant. On behalf of the School Board, the Superintendent hereby approves the request for voluntary demotion and withdraws his dismissal recommendation; such dismissal recommendation being null and void. Human

Resources shall assign her to an Instructional Assistant vacancy taking into account her preferences for location to the extent practicable. Nothing in the paragraph shall preclude the employee from locating her own assignment if she chooses to do so, and the hiring principal agrees.

3. **Conditions of Continued Employment**: Employee understands that she may not seek employment as a teacher with Fairfax County Public Schools and that the School Board will not consider her eligible for employment as a teacher. Employee may apply, and be considered, for nonteaching positions with Fairfax, County Public Schools.

4. **Notice in the Event of Resignation**: If Employee obtains a position with an employer other than the School Board, the School Board shall require no more than five business days notice. If waiving this requirement does not, in the responsible school principal's opinion, pose a problem for continuity of instruction for students, this time requirement may be reduced.

5. **Waiver of Claims**: Employee waives all claims of any kind she may have against the School Board and its officers, agents, and employees under federal, state, and local laws and regulations, arising from her employment including, but not limited to, claims based on age (including specifically, claims under the Age Discrimination in Employment Act), race, sex, disability, religion, national origin, genetic information (Genetic Information Discrimination Act) or any other

employment discrimination; all claims relating to payment of salary or wages (including specifically claims under the Lily Ledbetter Fair Pay Act); and all claims of any kind based on contract, tort, or any claim whatsoever including, but not limited to, defamation, breach of contract, compensation, and infliction of emotional distress. Employee agrees to refrain from filing and hereby withdraws with prejudice her request for a fact-finding hearing, and any and all claims or grievances pertaining to her employment that she may have filed in any forum. Nothing in this paragraph shall bar Employee from taking action to enforce this Agreement.

Federal law requires the following provisions relating to the waiver of any claim under the Age Discrimination in Employment Act. The Teacher does not waive rights or claims that may arise after the date the waiver is executed. The Teacher waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled; this consideration is acknowledged to be the withdrawal of the Superintendent's recommendation that she be dismissed from her employment with FCPS and her continued employment with FCPS. Teacher shall consult with an attorney prior to executing this agreement. The Teacher has a period of twenty-one calendar days within which to consider this Agreement. The Teacher shall not be required to execute this Agreement before the twenty-second day after its receipt. For a period of seven calendar days following the execution of this Agreement, the Teacher may revoke the Agreement.

6. **No Assignment of Claims**: Employee verifies that she has not heretofore assigned or transferred to any person or entity any claim or portion thereof relating in any way to this Agreement.

7. **Future Recommendations**: Employee may direct all employment inquiries and requests for references relating to her to the Assistance Superintendent for Human Resources (currently, Dr. Phyllis Pajardo) or her designee, or to the Director of Employee Performance and Development (currently, Mr. Samuel Newman) or his designee. Human Resources shall direct all employment inquiries and requests for references relating to Employee to any of the persons identified in the previous sentence. The Employee's former principal, Jamey Chianetta, will direct any employment inquiry and/or request for reference for Employee to Human Resources for a response. in response to any such inquiries or requests for references, the Assistance Superintendent for Human Resources and/or the Director of Employee Performance and Development or either of their designees shall (i) provide the dates Employee was employed by the School Board, her position, and her beginning and ending salary, and (ii) if asked, state that the employee's position change from a teacher to an instructional assistant was the result of a voluntary demotion. The Assistant Superintendent for Human Resources or his designee shall provide no further information stating, if necessary, that she or he cannot comment further.

This Agreement does not prevent Employee from requesting references relating to her from any employee of the School Board, nor is any employee of the School Board prevented from providing a reference on behalf of Employee. Employee understands and agrees that if any individual or organization requests a reference or other information about her from anyone other than the persons identified in the preceding paragraph, the School Board is not a guarantor for the information provided and will not be responsible for it or liable therefore. Any employee so contacted is in no way limited to what Information he or she may provide.

8. **Confidentiality**: The terms and provisions of this Agreement, including its existence and the negotiations leading up to this Agreement, are strictly confidential and shall not be disclosed to any third party except (i) to the extent required by law; (ii) to secure advice from a legal or tax advisor, (iii) to Employee's employee organizational representative or legal counsel, (iv) to Employee's spouse, or (v) as permitted herein. If Employee discloses information pursuant to subsections (ii) (iii) or (iv), she shall instruct the recipient(s) that a condition of disclosure is their obligation to keep the information confidential. Notwithstanding the foregoing, Employee's resignation letter shall be filed in her personnel file. Further, this Agreement may be disclosed to any School Board employee who has a reasonable need to know of the existence and/or contents of this Agreement.

This Agreement shall be placed in a separate, sealed file (the "Sealed File") and not maintained as

part of Employee's personnel file. The Assistant Superintendent for Human Resources or his designee shall maintain this Agreement in a separate Sealed File solely for the purpose of administering and enforcing this Agreement. The School Board shall remove from Employee's personnel file, including all local files, evaluations done during the 2011-2012 school year, any notices of Proposed Termination or Requests for Termination, but may maintain the same in the Sealed File. The Sealed File shall be accessible only to Employee, her representatives, the Assistant Superintendent for Human Resources, and his/her designee and/or representative, except as provided below.

Either party may use the documents in the Sealed File in defense of litigation, in response to government inquiry, or in response to legal process. The School Board also may use them for legitimate business processes of the School Board, but shall not use them in response to any third party employment inquiry regarding Employee. Nothing in this Agreement shall preclude the Assistant Superintendent, Director or his/her designee from responding honestly and completely in response to government inquiry regarding Employee's employment with or resignation from School Board employment, as provided above. It is expressly agreed and understood that the provisions of this paragraph are material terms of this agreement.

9. **Release of Personnel File**: Notwithstanding the foregoing, the School Board or anyone acting on its behalf shall release the contents

of Employee's personnel file to a third party only as provided by law and FCPS policy. The contents of, or any documents or information contained in, the Sealed File shall not be considered contents of Employee's personnel file.

10. **Right of Access to Files**: Employee shall have the right as provided by law to review and copy, upon request, any and all non-privileged files about Employee that are maintained by the School Board, provided that she may not inspect or copy student information in such files except as allowed by law

11. **No Admission of Liability**: The parties acknowledge and agree that by entering into this Agreement, neither party admits any wrongdoing, fault or liability of any kind whatsoever. Each party shall bear its own attorney fees and costs.

12. **Entire Agreement**: This Agreement constitutes the entire agreement and understanding between the parties. No other representations, inducements, or agreements between the parties, oral or otherwise, which are not expressly set forth herein, shall be of any force or effect. This Agreement may not be modified, changed, terminated, or waived, in whole or in part, orally or in any other manner, except through an agreement in writing duly executed by authorized representatives of the parties.

13. **Binding Effect**: This Agreement, including the releases contained herein, shall be

binding upon and inure to the benefit of the parties hereto and their respective legal representatives, predecessors, heirs, successors, transferees, assigns, agents, and attorneys.

14. **Counterparts**: This Agreement may be signed in counterparts all of which, when taken together, shall constitute the entire agreement and any of which shall be deemed to be an original.

15. **Severability**: If any provision or any part of any provision of this Agreement shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision of this Agreement, and this Agreement shall be construed as if such invalid, illegal, or unenforceable provision or part thereof had never been contained herein, but only to the extent of its invalidity, illegality, or unenforceability.

16. **Paragraph Headings**: The paragraph and other headings contained in this Agreement are for reference purposes only and shall not affect the meaning or interpretation of this Agreement.

17. **Acknowledgement and Authority**: Each party acknowledges that it has been represented by legal counsel in the negotiation and execution of this Agreement and that the terms and conditions of this Agreement have been completely read and understood. Each party further agrees that It enters into this Agreement voluntarily and that it is the respective party's intention to be legally bound hereby.

18. **Governing Law**: This Agreement shall be governed by the laws of the Commonwealth of Virginia.

19. **Waiver of Enforceability of Agreement**: No failure or delay in exercising any right, power, or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power, or privilege hereunder.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date set forth below.

/s/ Cynthia Lee 8/29/12
Cynthia Lee Date

/s/ Phyllis Pajardo 9/10/12
Phyllis Pajardo Date
Assistant Superintendent,
Human Resources
Fairfax County Public Schools

Va. Code § 22.1-79

A school board shall:

1. See that the school laws are properly explained, enforced and observed;

2. Secure, by visitation or otherwise, as full information as possible about the conduct of the public schools in the school division and take care that they are conducted according to law and with the utmost efficiency;

3. Care for, manage and control the property of the school division and provide for the erecting, furnishing, equipping, and noninstructional operating of necessary school buildings and appurtenances and the maintenance thereof by purchase, lease, or other contracts;

4. Provide for the consolidation of schools or redistricting of school boundaries or adopt pupil assignment plans whenever such procedure will contribute to the efficiency of the school division;

5. Insofar as not inconsistent with state statutes and regulations of the Board of Education, operate and maintain the public schools in the school division and determine the length of the school term, the studies to be pursued, the methods of teaching and the government to be employed in the schools;

6. In instances in which no grievance procedure has been adopted prior to January 1, 1991, establish and administer by July 1, 1992, a grievance procedure for all school board employees, except the division superintendent and those employees covered under the provisions of Article 2 (§ 22.1-293 et seq.) and Article 3 (§ 22.1-306 et seq.) of Chapter 15 of this title, who have completed such probationary period as may be required by the school

board, not to exceed 18 months. The grievance procedure shall afford a timely and fair method of the resolution of disputes arising between the school board and such employees regarding dismissal, suspension, or other disciplinary actions, excluding suspensions, and shall be consistent with the provisions of the Board of Education's procedures for adjusting grievances, except that there shall be no right to a hearing before a fact-finding panel. Except in the case of dismissal, suspension, or other disciplinary action, the grievance procedure prescribed by the Board of Education pursuant to § 22.1-308 shall apply to all full-time employees of a school board, except supervisory employees;

7. Perform such other duties as shall be prescribed by the Board of Education or as are imposed by law;

8. Obtain public comment through a public hearing not less than 10 days after reasonable notice to the public in a newspaper of general circulation in the school division prior to providing (i) for the consolidation of schools; (ii) the transfer from the public school system of the administration of all instructional services for any public school classroom or all noninstructional services in the school division pursuant to a contract with any private entity or organization; or (iii) in school divisions having 15,000 pupils or more in average daily membership, for redistricting of school boundaries or adopting any pupil assignment plan affecting the assignment of 15 percent or more of the pupils in average daily membership in the affected school. Such public hearing may be held at the same time and place as the meeting of the school board at which the proposed action is taken if the public

hearing is held before the action is taken. If a public hearing has been held prior to the effective date of this provision on a proposed consolidation, redistricting or pupil assignment plan which is to be implemented after the effective date of this provision, an additional public hearing shall not be required;

9. (Expires July 1, 2010) At least annually, survey the school division to identify critical shortages of teachers and administrative personnel by subject matter, and report such critical shortages to the Superintendent of Public Instruction and to the Virginia Retirement System; however, the school board may request the division superintendent to conduct such survey and submit such report to the school board, the Superintendent, and the Virginia Retirement System; and

10. Ensure that the public schools within the school division are registered with the Department of State Police to receive from the State Police electronic notice of the registration or reregistration of any sex offender within that school division pursuant to § 9.1-914.

Va. Code § 22.1-253.13:7

A. Each local school board shall develop policies and procedures to address complaints of sexual abuse of a student by a teacher or other school board employee.

B. Each local school board shall maintain and follow up-to-date policies. All school board policies shall be reviewed at least every five years and revised as needed.

C. Each local school board shall ensure that policies are developed giving consideration to the views of teachers, parents, and other concerned citizens and addressing the following:

1. A system of two-way communication between employees and the local school board and its administrative staff whereby matters of concern can be discussed in an orderly and constructive manner;

2. The selection and evaluation of all instructional materials purchased by the school division, with clear procedures for handling challenged controversial materials;

3. The standards of student conduct and attendance and enforcement procedures designed to provide that public education be conducted in an atmosphere free of disruption and threat to persons or property and supportive of individual rights;

4. School-community communications and community involvement;

5. Guidelines to encourage parents to provide instructional assistance to their children in the home, which may include voluntary training for the parents of children in grades K through three;

6. Information about procedures for addressing concerns with the school division and recourse available to parents pursuant to § 22.1-87;

7. A cooperatively developed procedure for personnel evaluation appropriate to tasks performed by those being evaluated; and

8. Grievances, dismissals, etc., of teachers, and the implementation procedure prescribed by the General Assembly and the Board of Education, as provided in Article 3 (§ 22.1-306 et seq.) of Chapter 15 of this title, and the maintenance of copies of such procedures.

D. A current copy of the school division policies required by this section, including the Student Conduct Policy, shall be posted on the division's website and shall be available to employees and to the public. School boards shall ensure that printed copies of such policies are available as needed to citizens who do not have online access.

E. An annual announcement shall be made in each division at the beginning of the school year and, for parents of students enrolling later in the academic year, at the time of enrollment, advising the public that the policies are available in such places.

Va. Code § 22.1-306

§ 22.1-306. Definitions

As used in this article:

"Grievance" means a complaint or dispute by a teacher relating to his or her employment including, but not necessarily limited to: (i) disciplinary action including dismissal or placing on probation; (ii) the application or interpretation of: (a) personnel policies, (b) procedures, (c) rules and regulations, (d) ordinances and (e) statutes; (iii) acts of reprisal against a teacher for filing or processing a grievance, participating as a witness in any step, meeting or hearing relating to a grievance, or serving as a member of a fact-finding panel; and (iv) complaints of discrimination on the basis of race, color, creed, political affiliation, handicap, age, national origin or sex. Each school board shall have the exclusive right to manage the affairs and operations of the school division. Accordingly, the term "grievance" shall not include a complaint or dispute by a teacher relating to (i) establishment and revision of wages or salaries, position classifications or general benefits, (ii) suspension of a teacher or nonrenewal of the contract of a teacher who has not achieved continuing contract status, (iii) the establishment or contents of ordinances, statutes or personnel policies, procedures, rules and regulations, (iv) failure to promote, or (v) discharge, layoff or suspension from duties because of decrease in enrollment, decrease in enrollment or abolition of a particular subject or insufficient funding, (vi) hiring, transfer, assignment and retention of teachers within the school division, or (vii) suspension from

duties in emergencies, (viii) the methods, means and personnel by which the school division's operations are to be carried on.

While these management rights are reserved to the school board, failure to apply, where applicable, the rules, regulations, policies, or procedures as written or established by the school board is grievable.

"Dismissal" means the dismissal of any teacher during the term of such teacher's contract and the nonrenewal of the contract of a teacher on continuing contract.

Va. Code § 22.1-307

§ 22.1-307. Dismissal, etc., of teacher; grounds.

A. Teachers may be dismissed or placed on probation for incompetency, immorality, noncompliance with school laws and regulations, disability as shown by competent medical evidence when in compliance with federal law, conviction of a felony or a crime of moral turpitude or other good and just cause. A teacher shall be dismissed if such teacher is or becomes the subject of a founded complaint of child abuse and neglect, pursuant to § 63.2-1505, and after all rights to an appeal provided by § 63.2-1526 have been exhausted. The fact of such finding, after all rights to an appeal provided by § 63.2-1526 have been exhausted, shall be grounds for the local school division to recommend that the Board of Education revoke such person's license to teach. No teacher shall be dismissed or placed on probation solely on the basis of the teacher's refusal to submit to a polygraph examination requested by the school board.

B. For the purposes of this article, "incompetency" may be construed to include, but shall not be limited to, consistent failure to meet the endorsement requirements for the position or performance that is documented through evaluation to be consistently less than satisfactory.

Va. Code § 22.1-308

§ 22.1-308. Grievance procedure

A. The Board of Education shall prescribe a grievance procedure which shall include the following:

1. Except in the case of dismissal or placing on probation, a first step which shall provide for an informal, initial processing of a grievance by the most immediate appropriate supervisor through a discussion;

2. A requirement that all stages of the grievance beyond the first step be in writing on forms prescribed by the Board of Education and supplied by the school board;

3. A requirement that in reducing the grievance to writing, the teacher shall specify the specific relief sought through the use of the procedure;

4. The right of the grievant and the respondent to present appropriate witnesses and be represented by legal counsel and another representative;

5. Reasonable time limitations, prescribed by the Board, for the grievant to submit an initial complaint and to appeal each decision through the steps of the grievance procedure which shall correspond generally or be equivalent to the time prescribed for response at each step;

6. Termination of the right of the grievant to further appeal upon failure of the grievant to comply with all substantial procedural requirements of the grievance procedure without just cause;

7. The right of the grievant, at his option, upon failure of the respondent to comply with all substantial procedural requirements without just cause, to advancement to the next step or, in the final step, to a decision in his favor;

8. A final step which shall provide for a final decision on the grievance by the school board;

9. The provisions of §§ 22.1-309 through 22.1-313.

B. Representatives referred to in subsection A 4 of this section may examine, cross-examine, question and present evidence on behalf of a grievant or respondent in the grievance procedure without being in violation of the provisions of § 54.1-3904.

C. Nothing in the procedure shall be construed to restrict any teacher's right to seek or a school division administration's right to provide customary review of complaints that are not included within the definition of a grievance.

Va. Code § 22.1-309

§ 22.1-309. Notice to teacher of recommendation of dismissal or placing on probation; school board not to consider merits during notice; superintendent required to provide reasons for recommendation upon request.

In the event a division superintendent determines to recommend dismissal of any teacher or the placing on probation of a teacher on continuing contract, written notice shall be sent to the teacher notifying him that within fifteen days after receiving the notice the teacher may request a hearing before the school board as provided in § 22.1-311 or before a fact-finding panel as provided in § 22.1-312. During such fifteen-day period and thereafter until a hearing is held in accordance with the provisions herein, if one is requested by the teacher, the merits of the recommendation of the division of superintendent shall not be considered, discussed or acted upon by the school board except as provided for herein. At the request of the teacher, the division superintendent shall provide the reasons for the recommendation in writing or, if the teacher prefers, in a personal interview. In the event a teacher requests a hearing pursuant to § 22.1-311 or § 22.1-312, the division superintendent shall provide, within ten days of the request, the teacher or his representative with the opportunity to inspect and copy his dismissal or probation. Within ten days of the request of the division superintendent, the teacher or his representative shall provide the division superintendent with the

opportunity to inspect and copy the documents to be offered in rebuttal to the decision to recommend dismissal or probation. The division superintendent and the teacher of his representative shall be under a continuing duty to disclose and produce any additional documents identified later which may be used in the respective parties' cases-in-chief. The cost of copying such documents shall be paid by the requesting party.

For the purposes of this section, "personnel file" shall mean any and all memoranda, entries or other documents included in the teacher's file as maintained in the central school administration office or in any file on the teacher maintained within a school in which the teacher serves.

Va. Code § 22.1-310

§ 22.1-310. Election of hearing before fact-finding panel prior to decision of school board.

A. In the event a grievance, other than a grievance to which the provisions of § 22.1309 are applicable, is not settled at a lower step, the teacher or the school board may elect to have a hearing by a fact-finding panel as provided in § 22.1312 prior to a decision by the school board.

B. In the case of a grievance to which the provisions of § 22.1309 are applicable, the teacher or the school board may elect, within fifteen days after the teacher receives the notice referred to in § 22.1309, to have a hearing by a fact-finding panel as provided in § 22.1312 prior to a decision by the school board.

C. In no grievance after a hearing by a fact-finding panel shall the teacher have a right to a further hearing by the school board as provided in subsection D of § 22.1313, except in the case of a grievance to which the provisions of § 22.1309 are applicable where the school board elected to have a hearing by a fact-finding panel. A school board shall have the right to require a further hearing as provided in subsection D of § 22.1313 in any grievance.

Va. Code § 22.1-311 and 22.1-312

§ 22.1-311. Hearing before school board.

The hearing before the school board, which shall be private unless the teacher requests a public one, must be set within thirty 30 days of the request, and the teacher must be given at least fifteen 15 days' written notice of the time and place. At the hearing the teacher may appear with or without a representative and be heard, presenting testimony of witnesses and other evidence. The school board may hear a recommendation for dismissal and make a determination whether to make a recommendation to the Board of Education regarding the teacher's license at the same hearing or hold a separate hearing for each action.

Va. Code § 22.1-312

§ 22.1-312. Hearing before fact-finding panel.

A. In the event that a hearing before a fact-finding panel is requested, a three-member panel shall be selected by the following method. The teacher shall select one panel member from among other employees of the school division. The division superintendent shall select one panel member from among employees of the school division. The teacher and the division superintendent shall select their respective panel members within five business days of any request for a hearing before a fact-finding panel. The two panel members so selected shall select the third impartial panel member.

If within five business days after both panel members have been selected they are unable to agree upon a third panel member, the chief judge of the circuit court shall be requested by the two members of the panel to furnish a list of five qualified and impartial fact finders, one of whom shall then be selected by the two members of the panel as the third member. The persons comprising the list may reside within or without the jurisdiction of the circuit court, be residents of the Commonwealth of Virginia and, in all cases, shall possess some knowledge and expertise in public education and education law and shall be deemed by the judge capable of presiding over an administrative hearing. Selection shall be made by the panel members alternately deleting any name from the list until only one remains. The panel member selected by the teacher shall make the first deletion. This selection process shall be completed

within five business days after receipt of the list of fact finders from the chief judge. The third impartial panel member shall chair the panel. No elected official shall serve as a panel member. Panel members shall not be parties to, or witnesses to, the matter grieved.

With the agreement of the teacher's and division superintendent's panel members, the impartial panel member shall have the authority to conduct the hearing and make recommendations as set forth herein while acting as a hearing officer.

The Attorney General shall represent personally or through one of his assistants any third impartial panel member who shall be made a defendant in any civil action arising out of any matter connected with his duties as a panel member. If, in the opinion of the Attorney General, it is impracticable or uneconomical for such legal representation to be rendered by him or one of his assistants, he may employ special counsel for this purpose, whose compensation shall be fixed by the Attorney General and be paid out of the funds appropriated for the administration of the Department of Education.

B. The panel shall set the time for a hearing, which shall be held within 30 business days, and shall so notify the division superintendent and the teacher. The teacher and the division superintendent each may have present at the hearing and be represented at all stages by a representative or legal counsel. The panel may hear a recommendation for dismissal and make a determination whether to make a recommendation to the Board of Education regarding the teacher's

license at the same hearing or hold a separate hearing for each action.

C. The panel shall determine the propriety of attendance at the hearing of persons not having a direct interest in the hearing; however, at the request of the teacher, the hearing shall be private.

D. The panel may ask, at the beginning of the hearing, for statements from the division superintendent and the teacher clarifying the issues involved.

The parties shall then present their claims and evidence. Witnesses may be questioned by the panel members, the teacher and the division superintendent. The panel may, at its discretion, vary this procedure but shall afford full and equal opportunity to all parties for presentation of any material or relevant evidence and shall afford the parties the right of cross-examination.

The parties shall produce such additional evidence as the panel may deem necessary to an understanding and determination of the dispute. The panel shall be the judge of relevancy and materiality of the evidence offered. All evidence shall be taken in the presence of the panel and of the parties.

E. Exhibits offered by the teacher or the division superintendent may be received in evidence by the panel and, when so received, shall be marked and made a part of the record.

F. The facts found and recommendations made by the panel shall be arrived at by a majority vote of the panel members.

G. The hearing may be reopened by the panel on its own motion or upon application of the teacher or the division superintendent for good cause

shown to hear after-discovered evidence at any time before the panel's report is made.

H. The panel shall make a written report which shall include its findings of fact and recommendations and shall file it with the members of the school board, the division superintendent and the teacher, not later than 30 business days after the completion of the hearing.

I. A stenographic record or tape recording of the proceedings shall be taken. However, in proceedings concerning grievances not related to dismissal or probation, the recording may be dispensed with entirely by mutual consent of the parties. In such proceedings, if the recording is not dispensed with, the two parties shall share the cost of the recording equally; if either party requests a transcript, that party shall bear the expense of its preparation.

In cases of dismissal or probation, a record or recording of the proceedings shall be made and preserved for a period of six months. If either the teacher or the school board requests that a transcript of the record or recording be made at any time prior to expiration of the six-month period, it shall be made and copies shall be furnished to both parties. The school board shall bear the expense of the recording and the transcription.

J. The teacher shall bear his or her own expenses. The school board shall bear the expenses of the division superintendent. The expenses of the panel shall be borne one-half by the school board and one-half by the teacher.

K. The parties shall set the per diem rate of the panel. If the parties are unable to agree on the per diem, it shall be fixed by the judge of the circuit

court. No employee of the school division shall receive such per diem for service on a panel during his normal work hours if he receives his normal salary for the period of such service.

L. The recommendations and findings of fact of the panel submitted to the school board shall be based exclusively upon the evidence presented to the panel at the hearing. No panel member shall conduct an independent investigation involving the matter grieved.

M. Witnesses who are employees of the school board shall be granted release time if the hearing is held during the school day. The hearing shall be held at the school in which most witnesses work, if feasible.

N. For the purposes of this section, "business day" means any day that the relevant school board office is open.

Va. Code § 22.1-313

§ 22.1-313. Decision of school board; generally.

A. The school board shall retain its exclusive final authority over matters concerning employment and supervision of its personnel, including dismissals, suspensions and placing on probation.

B. In the case of a hearing before the school board, the school board shall give the teacher its written decision within 30 days after the hearing. A record of the proceedings shall be taken and made available as provided in subsection I of § 22.1-312. Witnesses who are employees of the school board shall be granted release time if the hearing is held during the school day. The hearing shall be held at the school in which most witnesses work, if feasible. In the case of a hearing before a fact-finding panel, the school board shall give the teacher its written decision within 30 days after the school board receives both the transcript of such hearing, if any, and the panel's findings of fact and recommendations; however, should there be a further hearing before the school board, as hereafter provided, such decision shall be furnished the teacher within 30 days after such further hearing. The decision of the school board shall be reached after considering the transcript, if any, and the findings of fact and recommendations of the panel and such further evidence as the school board may receive at any further hearing.

C. A teacher may be dismissed, suspended or placed on probation by a majority of a quorum of the school board. In the event the school board's

decision is at variance with the recommendations of the fact-finding panel, the school board shall be required to conduct an additional hearing which shall be public unless the teacher requests a private one. However, if the fact-finding hearing was held in private, the additional hearing shall be held in private. The hearing shall be conducted by the school board pursuant to subsection D of this section, except that the grievant and the division superintendent shall be allowed to appear, to be represented, and to give testimony. However, the additional hearing shall not include examination and cross-examination of any other witnesses. The school board's written decision shall include the rationale for the decision.

D. In any case in which a further hearing by a school board is held after a hearing before a fact-finding panel, the school board shall consider at such further hearing the transcript, if any, the findings and recommendations of the fact-finding panel and such further evidence, including that of witnesses having testified before the panel, as the school board deems appropriate or as may be offered on behalf of the grievant or the respondent. A school board may initiate any such hearing upon written notice to the teacher and the division superintendent within 10 business days after the board receives the findings of fact and recommendations of the panel and any transcript of any panel hearing. Such notice shall specify each matter to be inquired into by the school board. In any case in which a teacher may initiate any such hearing, the teacher shall request such hearing in writing within 10 business days after receiving the findings of fact and recommendations of the panel and any transcript of

the panel hearing. Any decision by the school board shall be based solely on the transcript, if any, the findings of fact and recommendations of the panel, and any evidence relevant to the issues of the original grievance adduced at the hearing in the presence of each party. Such hearing shall be conducted as a hearing by the school board as provided in § 22.1-311.

E. The school board's attorney, assistants or representative, if he or they represented a participant in the prior proceedings, the grievant, the grievant's attorney or representative and, notwithstanding the provisions of § 22.1-69, the superintendent shall be excluded from any executive session of the school board which has as its purpose reaching a decision on a grievance. However, immediately after a decision has been made and publicly announced, as in favor of or not in favor of the grievant, the school board's attorney or representative and the superintendent may join the school board in executive session to assist in the writing of the decision.

F. In those instances when licensed personnel are dismissed or resign due to a conviction of any felony, any offense involving the sexual molestation, physical or sexual abuse or rape of a child, any offense involving drugs, or due to having become the subject of a founded case of child abuse or neglect, the local school board shall notify the Board of Education within 10 business days of such dismissal or the acceptance of such resignation.

Va. Code § 22.1-314

§ 22.1-314. Decision of school board; issue of grievability; appeal.

Decisions regarding whether or not a matter is grievable shall be made by the school board at the request of the school division administration or grievant and such decision shall be made within ten 10 business days of such request. The school board shall reach its decision only after allowing the school division administration and the grievant opportunity to present written or oral arguments regarding grievability. The decision as to whether the arguments shall be written or oral shall be in the discretion of the school board. Decisions of the school board may be appealed to the circuit court having jurisdiction in the school division for a hearing on the issue of grievability.

Proceedings for review of the decision of the school board shall be instituted by filing a notice of appeal with the school board within ten 10 business days after the date of the decision and giving a copy thereof to all other parties. Within ten 10 business days thereafter, the school board shall transmit to the clerk of the court to which the appeal is taken a copy of its decision, a copy of the notice of appeal, and the exhibits. The failure of the school board to transmit the record within the time allowed shall not prejudice the rights of the grievant. The court, on motion of the grievant, may issue a writ of certiorari requiring the school board to transmit the record on or before a certain date. Within ten *10 business* days of receipt by the clerk of such record, the court, sitting without a jury, shall hear the appeal on the

record transmitted by the school board and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. The court, in its discretion, may receive such other evidence as the ends of justice require. The court may affirm the decision of the school board or may reverse or modify the decision. The decision of the court shall be rendered no later than the fifteenth day from the date of the conclusion of the hearing. Such determination of grievability shall be made subsequent to the reduction of the grievance to writing but prior to any panel or school board hearing or the right to such determination shall be deemed to have been waived.

8 VAC 90

Virginia Administrative Code
Title 8. Education
Agency 20. State Board of Education
Chapter 90. Procedure for Adjusting Grievances

Part I
Definitions

8VAC20-90-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise.

"Business day" means, in accordance with § 22.1-312 of the Code of Virginia, any day that the relevant school board office is open.

"Days" means calendar days unless a different meaning is clearly expressed in this procedure. Whenever any period of time fixed by this procedure shall expire on a Saturday, Sunday, or legal holiday, the period of time for taking action under this procedure shall be extended to the next day if it is not a Saturday, Sunday, or legal holiday.

"Dismissal" means the dismissal of any teacher within the term of such teacher's contract and the nonrenewal of a contract of a teacher on a continuing contract.

"Grievance" means, for the purpose of Part II (8VAC20-90-20 et seq.), a complaint or a dispute by a

teacher relating to his employment, including but not necessarily limited to the application or interpretation of personnel policies, rules and regulations, ordinances, and statutes; acts of reprisal as a result of discrimination on the basis of race, color, creed, political affiliation, handicap, age, national origin, or sex. "Grievance" means, for the purposes of Part III (8VAC20-90-60 et seq.), a complaint or a dispute involving a teacher relating to his employment involving dismissal or placing on probation. The term "grievance" shall not include a complaint or dispute by a teacher relating to the establishment and revision of wages or salaries, position classifications or general benefits; suspension of a teacher or nonrenewal of the contract of a teacher who has not achieved continuing contract status; the establishment or contents of ordinances, statutes or personnel policies, procedures, rules and regulations; failure to promote; or discharge, layoff, or suspension from duties because of decrease in enrollment, decrease in a particular subject, abolition of a particular subject, insufficient funding; hiring, transfer, assignment and retention of teachers within the school division; suspension from duties in emergencies; or the methods, means and personnel by which the school division's operations are to be carried on. While these management rights are reserved to the school board, failure to apply, where applicable, these rules, regulations, policies, or procedures as written or established by the school board is grievable.

"Personnel file" means, for the purposes of Part III (8VAC20-90-60 et seq.), any and all memoranda, entries or other documents included in

the teacher's file as maintained in the central school administration office or in any file regarding the teacher maintained within a school in which the teacher serves.

"Probation" means a period not to exceed one year during which time it shall be the duty of the teacher to remedy those deficiencies which give rise to the probationary status.

"Teacher" or "teachers" means, for the purposes of Part II (8VAC20-90-20 et seq.), all employees of the school division involved in classroom instruction and all other full-time employees of the school division except those employees classified as supervising employees. "Teacher" means, for the purposes of Part III (8VAC20-90-60 et seq.), all regularly certified professional public school personnel employed under a written contract as provided by § 22.1-302 of the Code of Virginia, by any school division as a teacher or supervisor of classroom teachers but excluding all superintendents.

"Shall file," "shall respond in writing," or "shall serve written notice" means the document is either delivered personally to the grievant or office of the proper school board representative or is mailed by registered or certified mail, return receipt requested, and postmarked within the time limits prescribed by this procedure.

"Supervisory employee" means any person having authority in the interest of the board (i) to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees; and

(ii) to direct other employees; or (iii) to adjust the grievance of other employees; or (iv) to recommend any action set forth in clause (i), (ii), or (iii) above; provided that the authority to act as set forth in clause (i), (ii), (iii), or (iv) requires the exercise of independent judgment and is not merely routine and clerical in nature.

"Written grievance appeal" means a written or typed statement describing the event or action complained of, or the date of the event or action, and a concise description of those policies, procedures, regulations, ordinances or statutes upon which the teacher bases his claim. The grievant shall specify what he expects to obtain through use of the grievance procedure. A statement shall be written upon forms prescribed by the Board of Education and supplied by the local school board.

Statutory Authority
§§ 22.1-16 and 22.1-308 of the Code of Virginia.

Historical Notes
Derived from VR270-01-0008 § 1.1, eff. February 1, 1986; amended, Virginia Register Volume 21, Issue 14, eff. May 2, 2005.

Part II
Grievance Procedure

8VAC20-90-20. Purpose of Part II of this grievance procedure.

The purpose of Part II of the Procedure for Adjusting Grievances is to provide an orderly procedure for

resolving disputes concerning the application, interpretation, or violation of any of the provisions of local school board policies, rules and regulations as they affect the work of teachers, other than dismissals or probation. An equitable solution of grievances should be secured at the most immediate administrative level. The procedure should not be construed as limiting the right of any teacher to discuss any matter of concern with any member of the school administration, nor should the procedure be construed to restrict any teacher's right to seek, or the school division administration's right to provide, review of complaints that are not included within the definition of a grievance. Nothing in this procedure shall be interpreted to limit a school board's exclusive final authority over the management and operation of the school division.

Statutory Authority

§§ 22.1-16 and 22.1-308 of the Code of Virginia.

Historical Notes

Derived from VR270-01-0008 § 2.1, eff. February 1, 1986.

8VAC20-90-30. Grievance procedure.

Recognizing that grievances should be begun and settled promptly, a grievance must be initiated within 15 business days following either the event giving rise to the grievance, or within 15 business days following the time when the employee knew or

reasonably should have known of its occurrence. Grievances shall be processed as follows:

1. Step 1 -- Informal. The first step shall be an informal conference between the teacher and his immediate supervisor (which may be the principal). The teacher shall state the nature of the grievance, and the immediate supervisor shall attempt to adjust the grievance. It is mandatory that the teacher present the grievance informally prior to proceeding to Step 2.

2. Step 2 -- Principal. If for any reason the grievance is not resolved informally in Step 1 to the satisfaction of the teacher, the teacher must perfect his grievance by filing said grievance in writing within 15 business days following the event giving rise to the grievance, or within 15 business days following the time when the employee knew or reasonably should have known of its occurrence, specifying on the form the specific relief expected. Regardless of the outcome of Step 1, if a written grievance is not, without just cause, filed within the specified time, the grievance will be barred.

A meeting shall be held between the principal (or his designee or both) and the teacher (or his designee or both) within five business days of the receipt by the principal of the written grievance. At such meeting the teacher or other party involved, or both, shall be entitled to present appropriate witnesses and to be accompanied by a representative other than an attorney. The principal (or his designee or both)

shall respond in writing within five business days following such meeting.

The principal may forward to the teacher within five days from the receipt of the written grievance a written request for more specific information regarding the grievance. The teacher shall file an answer thereto within 10 business days, and the meeting must then be held within five business days thereafter.

3. Step 3 -- Superintendent. If the grievance is not settled to the teacher's satisfaction in Step 2, the teacher can proceed to Step 3 by filing a written notice of appeal with the superintendent, accompanied by the original grievance appeal form within five business days after receipt of the Step 2 answer (or the due date of such answer). A meeting shall then be held between the superintendent (or his designee or both) and the teacher (or his designee or both) at a mutually agreeable time within five business days. At such meeting both the superintendent and the teacher shall be entitled to present witnesses and to be accompanied by a representative who may be an attorney. A representative may examine, cross-examine, question, and present evidence on behalf of a grievant or the superintendent without violating the provisions of § 54.1- 3904 of the Code of Virginia. If no settlement can be reached in said meeting, the superintendent (or his designee) shall respond in writing within five business days following such meeting. The superintendent or designee may make a written request for more specific information from the teacher, but only if such was not requested in

Step 2. Such request shall be answered within 10 business days, and the meeting shall be held within five business days of the date on which the answer was received. If the grievance is not resolved to the satisfaction of the teacher in Step 3, the teacher may elect to have a hearing by a fact-finding panel, as provided in Step 4, or after giving proper notice may request a decision by the school board pursuant to Step 5.

4. Step 4 -- Fact-finding panel. In the event the grievance is not settled upon completion of Step 3, either the teacher or the school board may elect to have a hearing by a fact-finding panel prior to a decision by the school board, as provided in Step 4. If the teacher elects to proceed to Step 4, he must notify the superintendent in writing of the intention to request a fact-finding panel and enclose a copy of the original grievance form within five business days after receipt of a Step 3 answer (or the due date of such answer). If the school board elects to proceed to a fact-finding panel, the superintendent must serve written notice of the board's intention upon the grievant within 15 business days after the answer provided by Step 3.

a. Panel. Within five business days after the receipt by the division superintendent of the request for a fact-finding panel, the teacher and the division superintendent shall each select one panel member from among the employees of the school division other than an individual involved in any previous phase of the grievance procedure as a supervisor, witness, or representative. The two panel members so selected shall within five

business days of their selection select a third impartial panel member.

b. Selection of impartial third member. In the event that both panel members are unable to agree upon a third panel member within five business days, both members of the panel shall request the chief judge of the circuit court having jurisdiction of the school division to furnish a list of five qualified and impartial individuals from which one individual shall be selected by the two members of the panel to serve as the third member. The individuals named by the chief judge may reside either within or outside the jurisdiction of the circuit court, be residents of the Commonwealth of Virginia, and in all cases shall possess some knowledge and expertise in public education and education law and shall be deemed by the judge capable of presiding over an administrative hearing. Within five business days after receipt by the two panel members of the list of fact finders nominated by the chief judge, the panel members shall meet to select the third panel member. Selection shall be made by alternately deleting names from the list until only one remains. The panel member selected by the teacher shall make the first deletion. The third impartial panel member shall chair the panel. No elected official shall serve as a panel member. Panel members shall not be parties to, or witnesses to, the matter grieved. With the agreement of the teacher's and division superintendent's panel members, the impartial panel member shall have the authority to conduct

the hearing and make recommendations as set forth herein while acting as a hearing officer.

The Attorney General shall represent personally or through one of his assistants any third impartial panel member who shall be made a defendant in any civil action arising out of any matter connected with his duties as a panel member. If, in the opinion of the Attorney General, it is impracticable or uneconomical for such legal representation to be rendered by him or one of his assistants, he may employ special counsel for this purpose, whose compensation shall be fixed by the Attorney General and be paid out of the funds appropriated for the administration of the Department of Education.

c. Holding of hearing. The hearing shall be held by the panel within 30 business days from the date of the selection of the final panel member. The panel shall set the date, place, and time for the hearing and shall so notify the division superintendent and the teacher. The teacher and the division superintendent each may have present at the hearing and be represented at all stages by a representative or legal counsel.

d. Procedure for fact-finding panel.

(1) The panel shall determine the propriety of attendance at the hearing of persons not having a direct interest in the hearing, provided that, at the request of the teacher, the hearing shall be private.

(2) The panel may ask, at the beginning of the hearing, for statements from the division superintendent and the teacher clarifying the issues involved.

(3) The parties shall then present their claims and evidence. Witnesses may be questioned by the panel members, the teacher and the division superintendent. The panel may, at its discretion, vary this procedure, but shall afford full and equal opportunity to all parties to present any material or relevant evidence and shall afford the parties the right of cross-examination.

(4) The parties shall produce such additional evidence as the panel may deem necessary to an understanding and determination of the dispute. The panel shall be the judge of the relevancy and materiality of the evidence offered. All evidence shall be taken in the presence of the panel and of the parties.

(5) Exhibits offered by the teacher of the division superintendent may be received in evidence by the panel and, when so received, shall be marked and made a part of the record.

(6) The facts found and recommendations made by the panel shall be arrived at by a majority vote of the panel members.

(7) The hearing may be reopened by the panel, on its own motion or upon application of the teacher or the division superintendent, for good cause

shown, to hear after discovered evidence at any time before the panel's report is made.

(8) The panel shall make a written report which shall include its findings of fact and recommendations, and shall file it with the members of the school board, the division superintendent, and the teacher, not later than 30 business days after the completion of the hearing.

(9) A stenographic record or tape recording of the proceedings shall be taken. However, in proceedings concerning grievances not related to dismissal or probation, the recording may be dispensed with entirely by mutual consent of the parties. In such proceedings, if the recording is not dispensed with the two parties shall share equally the cost of the recording. If either party requests a transcript, that party shall bear the expense of its preparation.

In cases of dismissal or probation, a record or recording of the proceedings shall be made and preserved for a period of six months. If either the teacher or the school board requests that a transcript of the record or recording be made at any time prior to expiration of the six-month period, it shall be made and copies shall be furnished to both parties. The school board shall bear the expense of the recording and the transcription.

(10) The recommendations and findings of fact of the panel submitted to the school board shall be based exclusively upon the evidence presented to

the panel at the hearing. No panel member shall conduct an independent investigation involving the matter grieved.

e. Expenses.

(1) The teacher shall bear his own expenses. The school board shall bear the expenses of the division superintendent. The expenses of the panel shall be borne one half by the school board and one half by the teacher.

(2) The parties shall set the per diem rate of the panel. If the parties are unable to agree on the per diem, it shall be fixed by the chief judge of the circuit court. No employee of the school division shall receive such per diem for service on a panel during his normal business hours if he receives his normal salary for the period of such service.

(3) Witnesses who are employees of the school board shall be granted release time if the hearing is held during the school day. The hearing shall be held at the school in which most witnesses work, if feasible.

f. Right to further hearings. Following a hearing by a fact-finding panel, the teacher shall not have the right to a further hearing by the school board as provided in subdivision 5 c of this section. The school board shall have the right to require a further hearing in any grievance proceeding as provided in subdivision 5 c of this section.

5. Step 5 -- Decision by the school board.

a. If a teacher elects to proceed directly to a determination before the school board as provided for in Step 5, he must notify the superintendent in writing of the intention to appeal directly to the board, of the grievance alleged, and the relief sought within five business days after receipt of the answer as required in Step 3 or the due date thereof. Upon receipt of such notice, the school board may elect to have a hearing before a fact finding panel, as indicated in Step 4, by filing a written notice of such intention with the teacher within 10 business days of the deadline for the teacher's request for a determination by the school board.

b. In the case of a hearing before a fact-finding panel, the school board shall give the grievant its written decision within 30 days after the school board receives both the transcript of such hearing, if any, and the panel's finding of fact and recommendations unless the school board proceeds to a hearing under subdivision 5 c of this section. The decision of the school board shall be reached after considering the transcript, if any; the findings of fact and recommendations of the panel; and such further evidence as the school board may receive at any further hearing which the school board elects to conduct.

c. In any case in which a hearing before a fact-finding panel is held in accordance with Step 4, the local school board may conduct a further hearing before such school board.

(1) The local school board shall initiate such hearing by sending written notice of its intention to the teacher and the division superintendent within 10 days after receipt by the board of the findings of fact and recommendations of the fact-finding panel and any transcript of the panel hearing. Such notice shall be provided upon forms to be prescribed by the Board of Education and shall specify each matter to be inquired into by the school board.

(2) In any case where such further hearing is held by a school board after a hearing before the fact-finding panel, the school board shall consider at such further hearing the transcript, if any; the findings and recommendations of the fact-finding panel; and such further evidence including, but not limited to, the testimony of those witnesses who have previously testified before the fact-finding panel as the school board deems may be appropriate or as may be offered on behalf of the grievant or the administration.

(3) The further hearing before the school board shall be set within 30 days of the initiation of such hearing, and the teacher must be given at least 15 days written notice of the date, place, and time of the hearing. The teacher and the division superintendent may be represented by legal counsel or other representatives. The hearing before the school board shall be private, unless the teacher requests a public hearing. The school board shall establish the rules for the conduct of any hearing before it. Such rules shall include the opportunity for the teacher and the

division superintendent to make an opening statement and to present all material or relevant evidence, including the testimony of witnesses and the right of all parties or their representatives to cross examine the witnesses. Witnesses may be questioned by the school board.

The school board's attorney, assistants, or representative, if he, or they, represented a participant in the prior proceedings, the grievant, the grievant's attorney, or representative and, notwithstanding the provisions of § 22.1-69 of the Code of Virginia, the superintendent shall be excluded from any executive session of the school board which has as its purpose reaching a decision on the grievance. However, immediately after a decision has been made and publicly announced, as in favor of or not in favor of the grievant, the school board's attorney or representative, and the superintendent, may join the school board in executive session to assist in the writing of the decision.

A stenographic record or tape recording of the proceedings shall be taken. However, in proceedings concerning grievances not related to dismissal or probation, the recording may be dispensed with entirely by mutual consent of the parties. In such proceedings, if the recording is not dispensed with, the two parties shall share the cost of the recording equally, and if either party requests a transcript, that party shall bear the expense of its preparation.

In the case of dismissal or probation, a record or recording of the proceedings shall be made and preserved for a period of six months. If either the teacher or the school board requests that a transcript of the record or recording be made at any time prior to the expiration of the six-month period, it shall be made and copies shall be furnished to both parties. The school board shall bear the expense of the recording and the transcription.

(4) The decision of the school board shall be based solely on the transcript, if any; the findings of fact and recommendations of the fact-finding panel; and any evidence relevant to the issues of the original grievance procedure at the school board hearing in the presence of each party. The school board shall give the grievant its written decision within 30 days after the completion of the hearing before the school board. In the event the school board's decision is at variance with the recommendations of the fact-finding panel, the school board's written decision shall include the rationale for the decision.

d. In any case where a hearing before a fact-finding panel is not held, the board may hold a separate hearing or may make its determination on the basis of the written evidence presented by the teacher and the recommendation of the superintendent.

e. The school board shall retain its exclusive final authority over matters concerning employment and the supervision of its personnel.

Statutory Authority

§§ 22.1-16 and 22.1-308 of the Code of Virginia.

Historical Notes

Derived from VR270-01-0008 § 2.2, eff. February 1, 1986; amended, Virginia Register Volume 21, Issue 14, eff. May 2, 2005.

8VAC20-90-40. Grievability.

A. Initial determination of grievability. Decisions regarding whether a matter is grievable shall be made by the school board at the request of the division superintendent or grievant. The school board shall reach its decision only after allowing the division superintendent and the grievant opportunity to present written or oral arguments regarding grievability. The decision as to whether the arguments shall be written or oral shall be at the discretion of the school board. Decisions shall be made within 10 business days of such request. Such determination of grievability shall be made subsequent to the reduction of the grievance to writing but prior to any panel or board hearing or the right to such determination shall be deemed to have been waived. Failure of the school board to make such a determination within such a prescribed 10-business-day period shall entitle the grievant to advance to the next step as if the matter were grievable.

B. Appeal of determination on grievability.

1. Decisions of the school board may be appealed to the circuit court having jurisdiction in the school division for a hearing on the issue of grievability.

a. Proceedings for a review of the decision of the school board shall be instituted by filing a notice of appeal with the school board within 10 business days after the date of the decision and giving a copy thereof to all other parties.

b. Within 10 business days thereafter, the school board shall transmit to the clerk of the court to which the appeal is taken, a copy of its decision, a copy of the notice of appeal, and the exhibits. The failure of the school board to transmit the record within the time allowed shall not prejudice the rights of the grievant. The court may, on motion of the grievant, issue a writ of certiorari requiring the school board to transmit the records on or before a certain date.

c. Within 10 business days of receipt by the clerk of such record, the court, sitting without a jury, shall hear the appeal on the record transmitted by the school board and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. The court may, in its discretion, receive such other evidence as the ends of justice require.

d. The court may affirm the decision of the school board or may reverse or modify the decision. The decision of the court shall be rendered not later than 15 days from the date of the conclusion of the court's hearing.

Statutory Authority

§§ 22.1-16 and 22.1-308 of the Code of Virginia.

Historical Notes

Derived from VR270-01-0008 § 2.3, eff. February 1, 1986; amended, Virginia Register Volume 21, Issue 14, eff. May 2, 2005.

8VAC20-90-50. Time limitations.

A. The right of any party to proceed at any step of this Part II grievance procedure shall be conditioned upon compliance with the time limitations and other requirements set forth in this procedure.

B. The failure of the teacher to comply with all substantial procedural requirements including initiation of the grievance and notice of appeal to the next step in the procedure, shall eliminate the teacher's right to any further proceedings on the grievance unless just cause for such failure can be shown.

C. The failure of the school board or any supervisory employee to comply with all substantial procedural requirements without just cause shall entitle the grievant, at his option, to advance to the next step in

the procedure or, at the final step, to a decision in his favor.

D. The determination as to whether the substantial procedural requirements of this Part II of the Procedure for Adjusting Grievances have been complied with shall be made by the school board. In any case in which there is a factual dispute as to whether the procedural requirements have been met or just cause has been shown for failure to comply, the school board shall have the option of allowing the grievant to proceed to its next step. The fact that the grievance is allowed to proceed in such case shall not prevent any party from raising such failure to observe the substantial procedural requirements as an affirmative defense at any further hearing involving the grievance.

Statutory Authority

§§ 22.1-16 and 22.1-308 of the Code of Virginia.

Historical Notes

Derived from VR270-01-0008 § 2.4, eff. February 1, 1986.

Part III
Procedure for Dismissals or Placing on Probation

8VAC20-90-60. Dispute resolution.

This Part III of the Procedure for Adjusting Grievances adopted by the Board of Education in accordance with the statutory mandate of Article 3 (§

22.1-306 et seq.) Chapter 15 of Title 22.1 of the Code of Virginia and the Standards of Quality for school divisions, Chapter 13.1 (§ 22.1-253.13:1 et seq.) of Title 22.1 of the Code of Virginia, is to provide an orderly procedure for the expeditious resolution of disputes involving the dismissal or placing on probation of any teacher.

Statutory Authority

§§ 22.1-16 and 22.1-308 of the Code of Virginia.

Historical Notes

Derived from VR270-01-0008, eff. February 1, 1986.

8VAC20-90-70. Procedure for dismissals or placing on probation.

A. Notice to teacher of recommendation for dismissal or placing on probation.

1. In the event a division superintendent determines to recommend dismissal of any teacher, or the placing on probation of a teacher on continuing contract, written notice shall be sent to the teacher on forms to be prescribed by the Board of Education notifying him of the proposed dismissal, or placing on probation, and informing the teacher that within 15 days after receiving the notice, the teacher may request a hearing before the school board, or before a fact-finding panel as hereinafter set forth.

2. During such 15-day period and thereafter until a hearing is held in accordance with the provisions herein, if one is requested by the teacher, the merits of the recommendation of the division superintendent shall not be considered, discussed, or acted upon by the school board except as provided for herein.

3. At the request of the teacher, the superintendent shall provide the reasons for the recommendation in writing or, if the teacher prefers, in a personal interview. In the event a teacher requests a hearing pursuant to § 22.1-311 or § 22.1-312 of the Code of Virginia, the division superintendent shall provide, within 10 days of the request, the teacher, or his representative, with the opportunity to inspect and copy his personnel file and all other documents relied upon in reaching the decision to recommend dismissal or probation. Within 10 days of the request of the division superintendent, the teacher, or his representative, shall provide the division superintendent with the opportunity to inspect and copy the documents to be offered in rebuttal to the decision to recommend dismissal or probation. The division superintendent and the teacher or his representative shall be under a continuing duty to disclose and produce any additional documents identified later that may be used in the respective parties' cases-in-chief. The cost of copying such documents shall be paid by the requesting party.

B. Fact-finding panel. Within 15 days after the teacher receives the notice referred to in subdivision

A 1 of this section, either the teacher, or the school board, by written notice to the other party upon a form to be prescribed by the Board of Education, may elect to have a hearing before a fact-finding panel prior to any decision by the school board.

1. Panel. Within five business days after the receipt by the division superintendent of the request for a fact-finding panel, the teacher and the division superintendent shall each select one panel member from among the employees of the school division other than an individual involved in the recommendation of dismissal or placing on probation as a supervisor, witness, or representative. The two panel members so selected shall within five business days of their selection select a third impartial panel member.

2. Selection of impartial third member. In the event that both panel members are unable to agree upon a third panel member within five business days, both members of the panel shall request the chief judge of the circuit court having jurisdiction of the school division to furnish a list of five qualified and impartial individuals from which list one individual shall be selected by the two members of the panel as the third member. The individuals named by the chief judge may reside either within or without the jurisdiction of the circuit court, be residents of the Commonwealth of Virginia, and in all cases shall possess some knowledge and expertise in public education and education law, and shall be deemed by the judge capable of presiding over an administrative hearing. Within five business

days after receipt by the two panel members of the list of fact finders nominated by the chief judge, the panel members shall meet to select the third panel member. Selection shall be made by the panel members alternately deleting names from the list until only one remains with the panel member selected by the teacher to make the first deletion. The third impartial panel member shall chair the panel. No elected official shall serve as a panel member. Panel members shall not be parties to, or witnesses to, the matter grieved. With the agreement of the teacher's and division superintendent's panel members, the impartial panel member shall have the authority to conduct the hearing and make recommendations as set forth herein while acting as a hearing officer.

The Attorney General shall represent personally or through one of his assistants any third impartial panel member who shall be made a defendant in any civil action arising out of any matter connected with his duties as a panel member. If, in the opinion of the Attorney General, it is impracticable or uneconomical for such legal representation to be rendered by him or one of his assistants, he may employ special counsel for this purpose, whose compensation shall be fixed by the Attorney General and be paid out of the funds appropriated for the administration of the Department of Education.

3. Holding of hearing. The hearing shall be held by the panel within 30 calendar days from the date of the selection of the final panel member.

The panel shall set the date, place, and time for the hearing and shall so notify the division superintendent and the teacher. The teacher and the division superintendent each may have present at the hearing and be represented at all stages by legal counsel or another representative.

4. Procedure for fact-finding panel.

a. The panel shall determine the propriety of attendance at the hearing of persons not having a direct interest in the hearing, provided that, at the request of the teacher, the hearing shall be private.

b. The panel may ask, at the beginning of the hearing, for statements from the division superintendent and the teacher (or their representative) clarifying the issues involved.

c. The parties shall then present their claims and evidence. Witnesses may be questioned by the panel members, the teacher and the division superintendent,. However, the panel may, at its discretion, vary this procedure but shall afford full and equal opportunity to all parties for presentation of any material or relevant evidence and shall afford the parties the right of cross-examination.

d. The parties shall produce such additional evidence as the panel may deem necessary to an understanding and determination of the dispute. The panel shall be the judge of relevancy and materiality of the evidence

offered. All evidence shall be taken in the presence of the panel and of the parties.

e. Exhibits offered by the teacher or the division superintendent may be received in evidence by the panel and, when so received, shall be marked and made a part of the record.

f. The facts found and recommendations made by the panel shall be arrived at by a majority vote of the panel members.

g. The recommendations and findings of fact of the panel shall be based exclusively upon the evidence presented to the panel at the hearing. No panel member shall conduct an independent investigation involving the matter grieved.

h. The hearing may be reopened by the panel at any time before the panel's report is made upon its own motion or upon application of the teacher or the division superintendent for good cause shown to hear after-discovered evidence.

i. The panel shall make a written report which shall include its findings of fact and recommendations and shall file it with the members of the school board, the division superintendent and the teacher, not later than 30 days after the completion of the hearing.

j. A stenographic record or tape recording of the proceedings shall be taken. However, in

proceedings concerning grievances not related to dismissal or probation, the recording may be dispensed with entirely by mutual consent of the parties. In such proceedings, if the recording is not dispensed with, the two parties shall share the cost of the recording equally; if either party requests a transcript, that party shall bear the expense of its preparation.

In cases of dismissal or probation, a record or recording of the proceedings shall be made and preserved for a period of six months. If either the teacher or the school board requests that a transcript of the record or recording be made at any time prior to expiration of the six-month period, it shall be made and copies shall be furnished to both parties. The school board shall bear the expense of the recording and the transcription.

5. Expenses.

a. The teacher shall bear his own expenses. The school board shall bear the expenses of the division superintendent. The expenses of the panel shall be borne one half by the school board and one half by the teacher.

b. The parties shall set the per diem rate of the panel. If the parties are unable to agree on the per diem, it shall be fixed by the chief judge of the circuit court. No employee of the school division shall receive such per diem for service on a panel during his normal business

hours if he receives his normal salary for the period of such service.

6. Right to further hearing. If the school board elects to have a hearing by a fact-finding panel on the dismissal or placing on probation of a teacher, the teacher shall have the right to a further hearing by the school board as provided in subsection C of this section. The school board shall have the right to require a further hearing as provided in subsection C also.

7. Witnesses. Witnesses who are employees of the school board shall be granted release time if the hearing is held during the school day. The hearing shall be held at the school in which most witnesses work, if feasible.

C. Hearing by school board.

1. After receipt of the notice of pending dismissal or placing on probation described in subdivision A 1 of this section, the teacher may request a hearing before the school board by delivering written notice to the division superintendent within 15 days from the receipt of notice from the superintendent. Subsequent to the hearing by a fact-finding panel under subsection B of this section, the teacher, as permitted by subdivision B 6 of this section, or the school board may request a school board hearing by written notice to the opposing party and the division superintendent within 10 business days after the receipt by the party initiating such hearing of the findings of fact and recommendations made by

the fact finding panel and the transcript of the panel hearing. Such notice shall be provided upon a form to be prescribed by the Board of Education and shall specify each matter to be inquired into by the school board.

2. In any case in which a further hearing is held by a school board after a hearing before the fact-finding panel, the school board shall consider at such further hearing the record, or transcript, if any, the findings of fact and recommendations made by the fact-finding panel and such further evidence, including, but not limited to, the testimony of those witnesses who have previously testified before the fact-finding panel as the school board deems may be appropriate or as may be offered on behalf of the teacher or the superintendent.

3. The school board hearing shall be set and conducted within 30 days of the receipt of the teacher's notice or the giving by the school board of its notice. The teacher shall be given at least 15 days written notice of the date, place, and time of the hearing and such notice shall also be provided to the division superintendent.

4. The teacher and the division superintendent may be represented by legal counsel or other representatives. The hearing before the school board shall be private, unless the teacher requests a public hearing. The school board shall establish the rules for the conduct of any hearing before it, and such rules shall include the opportunity for the teacher and the division

superintendent to make an opening statement and to present all material or relevant evidence including the testimony of witnesses and the right of all parties to cross examine the witnesses. Witnesses may be questioned by the school board. The school board may hear a recommendation for dismissal and make a determination whether to make a recommendation to the Board of Education regarding the teacher's license at the same hearing or hold a separate hearing for each action.

5. A record or recording of the proceedings shall be made and preserved for a period of six months. If either the teacher or the school board requests that a transcript of the record or recording be made at any time prior to expiration of the six-month period, it shall be made and copies shall be furnished to both parties. The board shall bear the expense of the recording and the transcription.

6. The school board shall give the teacher its written decision within 30 days after the completion of the hearing before the school board.

7. The decision by the school board shall be based on the transcript, the findings of the fact and recommendations made by the fact-finding panel, and any evidence relevant to the issues of the original grievance produced at the school board hearing in the presence of each party.

The school board's attorney, assistants, or representative, if he or they represented a participant in the prior proceedings, the grievant, the grievant's attorney, or representative and, notwithstanding the provisions of § 22.1-69 of the Code of Virginia, the superintendent shall be excluded from any executive session of the school board which has as its purpose reaching a decision on a grievance. However, immediately after a decision has been made and publicly announced, as in favor of or not in favor of the grievant, the school board's attorney or representative and the superintendent may join the school board in executive session to assist in the writing of the decision.

D. School board determination.

1. In any case in which a hearing is held before a fact-finding panel but no further hearing before the school board is requested by either party, the school board shall give the teacher its written decision within 30 days after the school board receives both the transcript of such hearing and the panel's findings of the fact and recommendation. The decision of the school board shall be reached after considering the transcript, the findings of fact, and the recommendations made by the panel.

2. The school board may dismiss, suspend, or place on probation a teacher upon a majority vote of a quorum of the school board. In the event the school board's decision is at variance with the recommendation of the fact-finding panel, the

school board shall be required to conduct an additional hearing, which shall be public unless the teacher requests a private one. However, if the fact-finding hearing was held in private, the additional hearing shall be held in private. The hearing shall be conducted by the school board pursuant to subdivisions C 1 and 2 of this section, except that the grievant and the division superintendent shall be allowed to appear, to be represented, and to give testimony. However, the additional hearing shall not include examination and cross-examination of any other witnesses. The school board's written decision shall include the rationale for the decision.

Statutory Authority

§§ 22.1-16 and 22.1-308 of the Code of Virginia.

Historical Notes

Derived from VR270-01-0008 § 3.1, eff. February 1, 1986; amended, Virginia Register Volume 21, Issue 14, eff. May 2, 2005.

8VAC20-90-80. Time limitations.

The right of any party to proceed at any step of the grievance procedure shall be conditioned upon compliance with the time limitations and other requirements set forth in this grievance procedure.

1. The failure of the grievant to comply with all substantial procedural requirements shall terminate the teacher's right to any further proceedings on the

grievance unless just cause for such failure can be shown.

2. The failure of the school board or of any supervisory employee to comply with all substantial procedural requirements without just cause shall entitle the grievant, at his option, to advance to the next step in the procedure or, at the final step, to a decision in his favor.

3. The determination as to whether the substantial procedural requirements of this Part III of the Procedure for Adjusting Grievances have been complied with shall be made by the school board. In any case in which there is a factual dispute as to whether the procedural requirements have been met or just cause has been shown for failure to comply, the school board shall have the option of allowing the grievance to proceed to its next step. The fact that the grievance is allowed to proceed in such case shall not prevent any party from raising such failure to observe the substantial procedural requirements as an affirmative defense at any further hearing involving the grievance.

Statutory Authority

§§ 22.1-16 and 22.1-308 of the Code of Virginia.

Historical Notes

Derived from VR270-01-0008 § 3.2, eff. February 1, 1986.

Forms (8VAC20-90)

Statement of Grievance, eff. 2/05.

Principal's Decision, eff. 2/05.

Superintendent's Level, eff. 2/05.

Request for Hearing (Decision to be Presented to Grievant), eff. 2/05.

Notice of Proposed Dismissal or Proposed Placing on Probation, eff. 2/05.

Request for Hearing (to be submitted to Superintendent), eff. 2/05.

Regulation 4294.4
Human Resources
Employee Performance
and Development
Effective 8-12-11

HUMAN RESOURCES
Employee Actions and Records
Procedures for Non-Renewal and Dismissal-Educational Personnel

This regulation supersedes Regulation 4294.3.

I. PURPOSE

To establish procedures by which employment of contracted educational personnel may be discontinued by nonrenewal or dismissal.

II. SUMMARY OF CHANGES SINCE LAST PUBLICATION

This policy has been reviewed, and there are no changes at this time.

III. NONRENEWAL OF CONTRACTS

A. Annual-Contract Employees

The nonrenewal of an annual-contract employee shall be in accordance with applicable provisions of the Code of Virginia.

B. Recommendation Deadline

In the absence of unusual circumstances such as potential budget limitations or other problems, the principal or program manager shall submit nonrenewal recommendations of annual-contract employees to the assistant superintendent, Department of Human Resources, in writing on or before March 1. The School Board shall act on the Division Superintendents recommendation in sufficient time for notice to be given to employees by April 15.

IV. DISMISSAL OF EDUCATIONAL EMPLOYEES

A. Annual-and Continuing-Contract Employees

The dismissal of an employee on continuing contract or the dismissal of an employee during the term of an annual contract shall be in accordance with applicable provisions of the Code of Virginia and Virginia Board of Education regulations.

B. Recommendation for Dismissal

The principal, program manager, cluster director, or assistant superintendent may recommend the dismissal of an educational employee. Such a recommendation requires that the following actions be taken:

1. The principal, program manager, cluster director, or assistant superintendent shall notify, in writing, the educational employee and the assistant superintendent, Department of Human Resources, or his or her designee. The assistant superintendent, Department of Human Resources, or designee. The assistant superintendent, Department of Human Resources, may also originate a recommendation for dismissal and must so inform the employee in writing.

2. The assistant superintendent. Department of Human Resources, shall forward the recommendation to the Division Superintendent.

3. The Division Superintendent shall recommend dismissal to the School Board. The assistant superintendent, Department of Human Resources, shall notify the employee in writing of this action.

4. Subsequent to the notification that an educational employee is being recommended for dismissal, the School Board shall not discuss or act upon the recommendation of the Division Superintendent except as provided for in this regulation or in the Code of Virginia.

5. At the request of the educational employee, the Division Superintendent or his or her designee shall provide, within ten days of the request copies of all documents upon which

the Superintendent will rely if a hearing is requested. A reasonable charge will be made for all copies. At the request of the Division Superintendent or his or her designee, the educational employee shall provide, within ten days of the request, copies of all documents upon which the employee will rely at the hearing.

C. School Board Hearing

Hearings on recommendations to dismiss shall be conducted in accordance with applicable provisions of the Code of Virginia and Virginia Board of Education regulations.

1. The order of the hearing procedures shall be as follows:

a. Opening statem ants by each party or counselor their representative.

b. Presentation of witnesses and other evidence on behalf of the Division Superintendent or his or her designee.

c. Presentation of witnesses and other evidence on behalf of the employee.

d. Presentation of rebuttal evidence and testimony by each party, if desired.

e. Closing statement on behalf of the Division Superintendent or designee.

f. Closing statement on behalf of the employee.

2. Each party shall be accorded the right of cross-examination of each witness testifying on behalf of the opposing party, and members of the School Board may question each witness.

3. All questions of admissibility of evidence shall be determined by the chairman or acting chairman of the Board and shall be binding unless overturned by a majority vote of the Board members.

4. If necessary, the hearing may be continued from time to time until concluded.

5. Each party shall be encouraged to submit a written stipulation of agreed-upon facts to the Board at the beginning of the hearing.

6. All questions of procedure not addressed in the Code of Virginia or regulations shall be determined by the chairman or acting chairman of the School Board and shall be binding unless overruled by a majority of the School Board members.

D. Fact-Finding Hearing

Either the employee or the School Board may elect to have a fact-finding hearing in lieu of an initial School Board hearing. Hearings by a fact-finding panel shall be conducted in

accordance with applicable provisions of the Code of Virginia and Virginia Board of Education regulations.

The recommendation of the fact-finding panel shall be presented to the School Board for decision as specified in the Code of Virginia.

E. Final Decision

In any case involving a further School Board hearing following a fact-finding hearing, the School Board will determine the procedures to be used at the hearing, subject to the provisions of the Code of Virginia.

The decision of the School Board in regard to a recommendation for dismissal shall be final.