

FILED  
STATE OF NORTH CAROLINA  
COUNTY OF WAKE JUL 17 PM 12:23

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
FILE NO. 09 CVS 006655

WAKE COUNTY, C.S.C.  
JUNE ST. CLAIR ATKINSON,  
Individually and in her official capacity as  
Superintendent of Public Instruction of the  
State of North Carolina;  
Plaintiff.

v.

**ORDER**

STATE OF NORTH CAROLINA; *et al.*,  
Defendants.

**THIS CAUSE** came on to be heard before the undersigned Judge Presiding in the Wake County Civil Superior Court on 15 July 2009 pursuant to Motions for Summary Judgment under Rule 56 of the North Carolina Rules of Civil Procedure filed by the Plaintiff and the Defendants. The Plaintiff was represented at this hearing by Robert F. Orr, Attorney at Law, and Jeanette K. Doran, Attorney at Law, of the N.C. Institute for Constitutional Law. The Defendants were represented at this hearing by Mark A. Davis, Special Deputy Attorney General, and Gary R. Govert, Special Deputy Attorney General, of the North Carolina Department of Justice. All pleadings, briefs, memorandum, affidavits and other relevant material were provided to the Court by the attorneys prior to this hearing.

The Court finds that there is no genuine issue of any material fact and that the Plaintiff is entitled to Summary Judgment as a matter of law on Count One of the Complaint and Petition for Declaratory Judgment and Partial Summary Judgment on that portion of Count Two of the Complaint and Petition for Declaratory Judgment that challenges the constitutional authority of the State Board of Education to limit the inherent constitutional authority and power of the duly elected State Superintendent of Schools as the chief administrative officer of the State Board of Election. The Defendants are entitled to Summary Judgment on Count Three of the Complaint and Petition for Declaratory Judgment as a matter of law pursuant to N.C. Gen. Stat. §128-1.1, and Partial Summary Judgment on that portion of Count Two of the Plaintiff's Complaint and Petition for Declaratory Judgment that challenges the constitutional authority of the State Board of Education to create a position in the North Carolina Department of Education.

The General Assembly and the State Board of Education do not have the power, without a constitutional amendment, to deprive the duly elected Superintendent of Public Instruction of her inherent power as chief administrative officer of the State Board of Education. The General Assembly and the State Board of Education do not have the power, without a constitutional amendment, to confer on the Chief Executive Officer of

the State Board of Education the inherent powers of the duly elected Superintendent of Public Instruction as the chief administrative officer of the State Board of Education.

The General Assembly has mandated that the general supervision and administration of the free public school system shall be vested in the State Board of Education. The State Board of Education shall establish policy for the system of free public schools, subject to laws enacted by the General Assembly. N.C. Gen. Stat. §115C-12. However, the General Assembly also specified that all the powers and duties exercised by the State Board of Education shall be in conformity with the Constitution. N.C. Gen. Stat. §115C-12(9).

The wisdom of having a “Chief Executive Officer” appointed by the State Board of Education at a salary of \$265,000 per year is not for this court to decide. There is no question that the job of administering a statewide public school system is difficult and complex. It is uncontroverted that 41 years ago all candidates for the position of State Superintendent of Schools in the election of 1968 advocated that the office be filled by appointment of the State Board of Education. Since that time, many persons have advocated the selection of the State Superintendent of Public Instruction by appointment. However, the people of North Carolina have never voted by a constitutional amendment to select the Superintendent of Public Instruction by appointment rather than by election.

That portion of the State Board Policy Manual Policy ID Number EEO (now TCS) – C-022 that states that the Chief Executive Officer shall be “solely” accountable and responsible to the State Board of Education “without interference or contrary instructions from any other entity” is unconstitutional to the extent that it purports to limit the inherent constitutional authority of the duly elected State Superintendent of Public Instruction as Chief Administrative Officer of the State Board of Education without having been submitted to and approved by the qualified voters of the State of North Carolina in a constitutional amendment.

The State Board of Education and General Assembly of North Carolina may not, without a constitutional amendment approved by the qualified voters of North Carolina, take from the Superintendent of Public Instruction her responsibility as “chief administrative officer” of the State Board of Education and confer that responsibility upon a “Chief Executive Officer.” The State Constitution does not prohibit the General Assembly from establishing a position that has the authority and power to administer the day to day operations of the Department of Public Instruction as designated by the State Board of Education so long as such legislation requires that such responsibilities be exercised through the Superintendent of Public Instruction or under her supervision.

**WHEREFORE, IT IS ORDERED BY THE COURT** that the duties and responsibilities for administering and managing the North Carolina Department of Public Instruction and administering the North Carolina public school system as directed by the State Board of Education are vested in the duly elected State Superintendent of Public Instruction under the Constitution of North Carolina as the Chief Administrative Officer of the State Board of Education until such time as the qualified voters of North Carolina

specify otherwise by a constitutional amendment. This Order is a result of the Court allowing the Plaintiff's Motion for Summary Judgment on Count One of the Complaint and Petition for Declaratory Judgment.


It is further **Ordered by the Court** that all acts by the Defendants purporting to give the office of Chief Executive Officer as created by the State Board of Education authority to run the North Carolina Department of Public Instruction and administer the public school system without being accountable and responsible to and without interference or contrary instructions from the duly elected State Superintendent of Public Instruction are unconstitutional and therefore null and void and unenforceable until such time as the qualified voters of North Carolina specify otherwise by a constitutional amendment. This ruling specifically holds that that portion of the State Board Policy Manual Policy ID Number EEO (now TCS) –C-022 that states that the Chief Executive Officer shall be “solely” accountable and responsible to the State Board of Education “without interference or contrary instructions from any other entity” is unconstitutional and null and void and unenforceable in that it purports to limit the inherent constitutional authority of the duly elected State Superintendent of Public Instruction as Chief Administrative Officer of the State Board of Education. The State Superintendent of Public Instruction must supervise the Chief Executive Officer without countermanning any other policy adopted by the State Board of Education. Any employee of the North Carolina Department of Instruction must be accountable and responsible to the State Superintendent of Public Instruction, as well as the State Board of Education, until such time as the duly qualified voters specify otherwise by a constitutional amendment. This Order is a result of the Court allowing Partial Summary Judgment for the Plaintiff on Count Two of the Complaint and Petition for Declaratory Judgment.

It is further **Ordered by the Court** that the Plaintiff's Motion for Summary Judgment on Count Three of the Complaint and Petition for Declaratory Judgment is denied and the Defendants' Motion for Summary Judgment on Count Three of the Complaint and Petition for Declaratory Judgment is allowed.

Implicit in the Court's rulings today, the Defendants' Motion for Summary Judgment on Count One of the Complaint and Petition for ~~Summary~~<sup>Declaratory</sup> Judgment is denied. The affirmative defenses raised by the Defendants in the Answer of the doctrine of sovereign immunity, nonjusticiable political question and Plaintiff's lack of standing are denied and dismissed by the Court.

It is further **Ordered by the Court** that Defendants' Motion for Summary Judgment on that portion of Count Two of the Plaintiff's Complaint and Petition for Declaratory Judgment that challenges the constitutional authority of the State Board of Education to create a position in the State Department of Public Instruction by whatever title is allowed.


This the 17<sup>th</sup> day of July, 2009.

  
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ROBERT H. HOBGOOD  
Judge Presiding

**MEMORANDUM ORDER FOR INJUNCTIVE RELIEF**

The duly elected North Carolina Superintendent of Public Instruction will suffer immediate and irreparable harm for which there is no adequate remedy at law unless the terms of this Order are enforced by a permanent injunction. The Court allows a permanent injunction to enforce the terms of this Order. The Court directs Mr. Orr to draft the Order allowing a permanent injunction. No bond is required.

This the 17<sup>th</sup> day of July, 2009, at 12:15 P.M.

  
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ROBERT H. HOBGOOD  
Judge Presiding

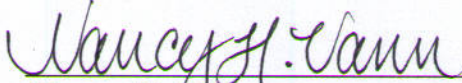
## Certificate of Service

The undersigned Deputy Clerk of Court of Wake County hereby certifies that a copy of the foregoing Order, was served on the following parties to this action by hand delivery.

Robert Orr  
Jeanette Duran  
333 E. Six Forks Road, Suite 180  
Raleigh, NC 27609

Mark A. Davis  
Gary R. Govert  
N.C. Department of Justice  
P. O. Box 629  
Raleigh, NC 27602

This the 17<sup>th</sup> day of July, 2009.

  
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Nancy H. Vann