

file Negro education

COPY

Commonwealth of Virginia
Office of the Attorney General
Richmond

November 29, 1940.

Dr. Sidney B. Hall
Superintendent of Public Instruction,
State Board of Education,
Richmond, Virginia.

Dear Dr. Hall:

This is in reply to your letter of November 14, requesting my opinion upon the question raised by Dr. Joseph H. Saunders, Superintendent of Newport News Public Schools, in his letter to you of November 13. He asks what effect the decisions of the Federal Courts in the case of Alston, et al. v. School Board of City of Norfolk, 112 Fed. (2d) 992 (certiorari denied, 61 S. Ct. 75) will have upon the City of Newport News and other cities and counties in the Commonwealth of Virginia.

In this suit it was alleged by Alston, a Negro school teacher of Norfolk, Virginia, that the School Board and Superintendent of Schools of that city, in fixing the salaries of teachers in the public schools of Norfolk, arbitrarily fix the salaries of Negro teachers at a lower rate than that paid to white teachers of equal qualifications and experience, and performing the same duties and services.

The Circuit Court of Appeals, which was not called upon to decide whether the alleged facts existed, remanded the case to the District Court with instructions that, if the allegations of the complaint should be established, the plaintiffs would be entitled to a judgment to the effect that the discriminatory policy complained of is violative of their rights under the Constitution and to an injunction restraining defendants from making any discrimination on the grounds of race or color in fixing salaries to be paid school teachers.

This opinion speaks for itself and clearly forbids discrimination on the grounds of race or color in fixing salaries to be paid school teachers in the public schools of the State. Whether this decision will necessitate any change in the differentials in teachers' salaries fixed by any city or county of the State will depend entirely upon the factual question of whether such differentials are based upon differences in the qualifications and experience of the teachers and the duties and services performed by them, or whether they are based upon race or color. This is, of course, primarily a matter to be determined by the local school boards whose duty it is to fix the salaries of the teachers.

With best wishes, I am

Sincerely yours,
(Signed) Abram P. Staples,
Attorney General

Commonwealth of Virginia
State Board of Education
Richmond

SUPT. MEMO. No. 1208

December 2, 1940

TO THE DIVISION SUPERINTENDENT

Dear Sir:

I am enclosing herewith a copy of the opinion of the United States Circuit Court of Appeals, Fourth Circuit, in the case of Melvin O. Alston, and the Norfolk Teachers' Association, Appellants, versus The School Board of the City of Norfolk, and C. W. Mason, Superintendent of Schools of Norfolk, Appellees, which case was appealed from the District Court of the United States for the Eastern District of Virginia, at Norfolk; and likewise a copy of the proposal for an amicable adjustment of salaries of white and Negro teachers in the Norfolk City schools, as made by the Norfolk City School Board through the letter of Mr. Alfred Anderson, City Attorney, dated November 6, 1940. I am advised that the said proposal for adjustment of teachers' salaries over a period of years was accepted by the said appellants.

I am also enclosing a copy of an opinion of the Attorney General of Virginia regarding the effects of the decision of the Federal Courts in the above mentioned case on other counties and cities in Virginia.

This information is given you in response to several requests received, and for such assistance and guidance as may be deemed necessary by you and your school board in dealing with such questions as may arise in your division.

Very truly yours,

SIDNEY B. HALL
Superintendent of Public Instruction

By F. F. JENKINS, Director
Administration and Finance

FFJ/F.
Encls.

COPY

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 4623

MELVIN O. ALSTON, and the Norfolk Teachers' Association, an unincorporated
association,

Appellants,

versus

SCHOOL BOARD OF THE CITY OF NORFOLK, a body corporate, and C. W. MASON,
Superintendent of Schools of Norfolk,

Appellees.

Appeal from the District Court of the United States for the Eastern District
of Virginia, at Norfolk.

Argued June 13, 1940.

Decided June 18, 1940.)

Before Parker, Soper and Dobie, Circuit Judges

THURGOOD MARSHALL AND WILLIAM H. HASTIE (OLIVER W. HILL AND LEON A. RANSOM
on brief), for Appellants, and ALFRED ANDERSON and JONATHAN W. OLD, Jr.
(WILLIAM C. COUPLAND on brief) for Appellees.

June, 1940.

Parker, Circuit Judge:

This is an appeal in a suit instituted by Melvin O. Alston, a Negro school teacher of Norfolk, Va., and the Norfolk Teachers' Association, an association composed of the Negro school teachers of that city against the School Board and the Superintendent of Schools of the city. The purpose of the suit is to obtain a declaratory judgment, to the effect that the policy of defendants in maintaining a salary schedule which fixes the salaries of Negro teachers at a lower rate than that paid to white teachers of equal qualifications and experience, and performing the same duties and services, on the sole basis of race and color, is violative of the due process and equal protection clauses of the 14th amendment, and also to obtain an injunction restraining defendants from making any distinction on the ground of race or color in fixing the salaries of public school teachers in Norfolk. The suit was dismissed by the court below on the ground that Alston and the School Board were the only necessary parties to the cause and that Alston had waived such constitutional rights as he was seeking to enforce by having entered into a written contract with the School Board to teach for a year at the price fixed in the contract. On the appeal presented by the plaintiffs three questions arise: (1) whether upon the face of the complaint an unconstitutional discrimination is shown in the fixing of school salaries by the defendants; (2) whether rights of plaintiffs are infringed by such discrimination; and (3) whether plaintiffs have waived their right to complain of the discrimination by entering into contracts with the School Board for the current year.

On the first question, there can be no doubt but that the fixing of salary schedules for the teachers is action by the state which is subject to the limitations prescribed by the 14th Amendment. The Constitution of Virginia provides that the General Assembly shall establish and maintain an efficient system of public free schools throughout the state. Article IX, Sec. 129. The General Assembly has established such a system. Virginia Code of 1936, chs. 33 and 35. The public schools of the City of Norfolk are under the direct control and supervision of the defendants, whose duty it is to employ teachers and provide for the payment of teachers' salaries. Virginia Code, ch. 33, secs. 656, 660, and ch. 35, sec. 786. While provision is made in the law for separate schools for white and colored persons, the positive duty is enjoined of maintaining these separate schools under the same general regulations as to management, usefulness and efficiency. Virginia Code, Sec. 680. All teachers are required to hold teaching certificates in accordance with the rules of certification of the State Board of Education. Virginia Code, ch. 33, sec. 660 and ch. 35, sec. 786. White and Negro teachers must meet the same requirements to receive teachers certificates from the Board of Education and upon qualifying are issued identical certificates.

The allegations of the complaint as to discrimination, which are denied in the answer, but which must be taken as true on the motion to dismiss, are as follows:

"11. Defendants over a long period of years have consistently pursued and maintained and are now pursuing and maintaining the policy, custom, and usage of paying Negro teachers and principals in the public schools of Norfolk less salary than white teachers and principals in said public school system possessing the same professional qualifications, certificates and experience, exercising the same duties and performing the same services as Negro teachers and principals. Such discrimination is being practiced against the plaintiffs and all other Negro teachers and principals in Norfolk, Virginia, and is based solely upon their race or color.

"12. The plaintiff Alston and all of the members of the plaintiff association and all other Negro teachers and principals in public schools in the City of Norfolk are teachers by profession and are specially trained for their calling. By rules, regulations, practice, usage and custom of the Commonwealth acting by and through the defendants as its agents and agencies, the plaintiff Alston and all of the members of the plaintiff association and all other Negro teachers and principals in the City of Norfolk are being denied the equal protection of the laws in that solely by reason of their race, and color they are being denied compensation from public funds for their services as teachers equal to the compensation provided from public funds for and being paid to white teachers with equal qualifications and experience for equivalent services pursuant to rules, regulations, custom and practice of the Commonwealth acting by and through its agents and agencies, the School Board of the City of Norfolk and the Superintendent of Schools of Norfolk, Virginia.

"13. Plaintiff, Melvin O. Alston, has been employed as a regular male teacher by the defendants since September, 1935, and is in his fifth year of experience as a regular teacher in the Booker T. Washington High School, a public high school maintained and operated under the direct control, supervision, rules and regulations of the defendants. He successfully completed the course of instruction provided at Virginia State College for Negroes, an accredited college maintaining and operated by the State of Virginia for the instruction and preparation of Negroes as teachers in the public schools of the State. He holds a Collegiate Professional Certificate, the highest certificate issued by the Virginia State Board of Education for teaching in the public high schools of Virginia. In order to qualify for this certificate plaintiff has satisfied the same requirements as those exacted of all other teachers, white as well as Negro, qualifying therefor, and he exercises the same duties and performs services substantially equivalent to those performed by other holders of the said certificate, white

as well as Negro, yet all white male teachers in Norfolk who hold the said certificate with equal and less experience receive salaries much larger than the salary paid the plaintiff.

"14. White male high school teachers employed by defendants whose qualifications, certification, duties and services are the same as plaintiff's are being paid by defendants a minimum annual salary of Twelve Hundred (\$1200.00) Dollars.

"15. Plaintiff Alston is being paid by the defendants for his services this school year as a regular male high school teacher as aforesaid an annual salary of Nine Hundred and Twenty-one (\$921.00) Dollars, being the amount fixed by defendants for Negro male high school teachers in their fifth year of teaching experience and solely because of the practice, usage and custom complained of in paragraph 11 of this complaint, and by the operation of the discriminatory salary schedule described in paragraphs 16 and 17 of this complaint the plaintiffs have been, are, and unless relief shall be granted by this Honorable Court as hereinafter prayed, will continue to be denied, solely by reason of race and color the opportunity to receive a higher salary equal to that paid to any white teachers similarly situated.

"16. Pursuant to the policy, custom and usage set out in paragraph 12 the defendants acting as agents and agencies of the Commonwealth of Virginia have established and maintained a salary schedule used by them to fix the amount of compensation for teachers and principals in the public schools of Norfolk which discriminates against plaintiffs solely because of their race or color. All teachers and principals in the public schools of Norfolk, including the plaintiffs, have been, are being and will continue to be paid by defendants pursuant to the following salary schedule adopted, maintained and being enforced by the defendants for the school year 1939-1940:

<u>Negro</u>	<u>Salaries now being paid teachers new to the system.</u>	<u>Maximum salary being paid (affecting only those in system before increment plan was discontinued.</u>
Elementary		
Normal Certificate	\$ 597.50	\$ 960.10
Degree	611.00	960.00
High School		
Women	699.00	1,105.20
Men	784.50	1,235.00

White

Elementary		
Normal Certificate	\$ 850.00	\$ 1,425.00
Degree	937.00	1,425.00
High School		
Women	970.00	1,900.00
Men	1,200.00	2,185.00

The practical application of this salary schedule has been, is, and will be to pay Negro teachers and principals of equal qualifications, certification and experience with white teachers and principals less compensation from public funds solely on account of their race or color."

"19. The salaries of all teachers and principals in the public schools of the City of Norfolk, including the salaries of petitioners, are paid out of the public school fund. This fund derives from two sources: The Commonwealth of Virginia and the City of Norfolk (Virginia School Code, Chapter 33, Section 646); all of said public school fund is raised by means of taxation upon the inhabitants of Virginia and their property (Constitution of Virginia, Article IX, Sections 135, 136; Virginia School Code, Chapter 33, Sections, 657, 698, 699; Chapter 35, Section 782). Pursuant to these statutes all that portion of the public school fund which derives directly from the state is used exclusively for the payment of teachers' salaries (Virginia School Code, Chapter 33, Section 701.)"

That an unconstitutional discrimination is set forth in these paragraphs hardly admits of argument. The allegation is that the state, in paying for public services of the same kind and character to men and women equally qualified according to standards which the state itself prescribes, arbitrarily pays less to Negroes than to white persons. This is as clear a discrimination on the ground of race as could well be imagined and falls squarely within the inhibition of both the due process and the equal protection clauses of the 14th Amendment. As was said by Mr. Justice Harlan in Gibson v. Mississippi 162 U. S. 565, 591:

"Underlying all of these decisions is the principle that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race. All citizens are equal before the law. The guarantees of life, liberty and property are for all persons, within the jurisdiction of the United States, or of any State, without discrimination against any because of their race. These guarantees, when their violation is properly presented in the regular course of proceedings, must be enforced in the courts, both of the Nation and of the State, without reference to considerations based upon race."

Dealing with the precise question here involved, Judge Chestnut, in Mills v. Lowndes 26 F. Supp. 792, 801, said:

"While the State may freely select its employees and determine their compensation it would, in my opinion, be clearly unconstitutional for a state to pass legislation which imposed discriminatory burdens on the colored race with respect to their qualifications for office or prescribe a rate of pay less than that for other classes solely on account of race or color. If therefore the state laws prescribed that colored teachers of equal qualifications with white teachers should receive less compensation on account of their color, such a law would clearly be unconstitutional."

*Clark
of
Dist
Fed
Circuit*

In the later case of Mills v. Board of Education of Ann Arundel County 30 F. Supp. 245, Judge Chestnut applied the principle so stated in holding that a discrimination as to pay of teachers in white and colored schools was violative of the constitutional provision, and that a colored teacher might invoke the power of the court so to declare. This we think is in accord with a long line of decisions which condemn discrimination on account of race in the exercise of governmental power by a state or its agencies. Thus, in Strauder v. West Virginia 100 U. S. 303, exclusion of colored persons from service on petit juries was condemned as violative of the constitutional provision. In Pierre v. Louisiana 306 U. S. 354, the same holding was made with respect to grand juries. In Nixon v. Condon 286 U. S. 73 and Nixon v. Herndon 273 U. S. 536, discriminations with respect to participating in party primaries were condemned. In Lane v. Wilson 307 U. S. 268 and Guinn v. United States 238 U. S. 347 like holdings were made with respect to discrimination relating to the right to participate in elections. Discriminations with respect to the right to own and occupy property were condemned in Buchanan v. Warley 245 U. S. 60; with respect to Pullman accommodations on railroads, in McCabe v. Atchison, Topeka and S. F. R. Co. 235 U. S. 151; with respect to educational facilities, in Missouri ex rel Gaines v. Canada 305 U. S. 337; with respect to the division of school funds in Davenport v. Cloverport 72 F. 689; and with respect to the pursuit of a trade or vocation, in Chaires v. City of Atlanta 164 Ga. 755, 139 S. E. 559.

We come, then, to the second question, i. e. do plaintiffs as Negro teachers holding certificates qualifying them to teach in the public schools of Norfolk have rights which are infringed by the discrimination of which they complain? The answer to this must be in the affirmative. As teachers holding certificates from the state, plaintiffs have acquired a professional status. It is true that they are not entitled by reason of that fact alone to contracts to teach in the public schools of the state; for whether any particular one of them shall be employed to teach is a matter resting in the sound discretion of the school authorities; but they are entitled to

have the compensation for positions for which they may apply, and which will unquestionably be awarded to some of them, fixed without unconstitutional discrimination on account of race. As pointed out by Judge Chestnut, in Mills v. Lowndes, supra, they are qualified school teachers and have the civil right, as such, to pursue their profession without being subjected to discriminatory legislation on account of race or color. It is no answer to this to say that the hiring of any teacher is a matter resting in the discretion of the school authorities. Plaintiffs, as teachers qualified and subject to employment by the state, are entitled to apply for the positions and to have the discretion of the authorities exercised lawfully and without unconstitutional discrimination as to the rate of pay to be awarded them, if their applications are accepted.

Nor do we think that the fact that plaintiffs have entered into contracts with the school board for the current year at the rate fixed by the discriminatory practice precludes them from asking relief. What the effect of such contracts may be on right to compensation for the current year, we need not decide, since plaintiffs are not insisting upon additional compensation for the current year and their prayer for relief asks a broad declaration of rights and injunctive relief for the future. As qualified teachers holding certificates, they have rights as above indicated which are not confined to the contract for the current year, i. e. the right to apply for positions in the future and to have the Board award the positions without unconstitutional discrimination as to the rate of pay.

The defendants take the position that no one but a teacher holding a contract with the Board has any such interest in the rate of pay as would give him standing to sue concerning it, and that he cannot sue because he has waived the unconstitutional discrimination by entering into the contract. If this were sound, there would be no practical means of redress for teachers subjected to the unconstitutional discrimination. But it is not sound. As pointed out in Frost Trucking Co. v. Railroad Com. 271 U. S. 583, 594, even in the granting of a privilege, the state "may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." See also Union Pac. R. Co. v. Public Service Com. 248 U. S. 67, 69, 70; Hanover Ins. Co. v. Harding 272 U. S. 494, 507. But as stated above, the waiver could not extend beyond the terms of the contract for the current year, in any event, and the relief asked is for the declaration and protection of rights which extend beyond any present employment.

We should say, too, that we have no doubt as to the Norfolk Teachers Association being a proper party to the suit. According to the

complaint, it is a voluntary unincorporated association and "is composed of Negro teachers and principals in the public colored schools of Norfolk"; and the right of such an association to sue in its common name for the purpose of enforcing substantive rights under the Constitution of the United States is provided for under the Rules of Civil Procedure. Rule 17(b). The point is not important, however, as the suit is brought as a class suit and the members of the association belong to the same class as the plaintiff Alston. Likewise, there can be no question as to the propriety of joining the Superintendent of Schools with the Board as a party defendant, as teachers are employed on the recommendation of the Superintendent (Va. Code sec. 660); he requests the City Council to fix the tax levy so as to net the amount necessary for the operation of the schools (Va. Code sec. 657); and he is named by the statute as one of those charged with the administration of the schools (Va. Code sec. 611).

For the reasons stated, the order appealed from will be reversed and the cause will be remanded for further proceedings not inconsistent herewith. If the allegations of the complaint are established, plaintiffs will be entitled to a declaratory judgment to the effect that the discriminatory policy complained of is violative of their rights under the Constitution and to an injunction restraining defendants from making any discrimination on the grounds of race or color in fixing salaries to be paid school teachers after the current fiscal year. To avoid confusion and inconvenience in the preparation of the budget and the making of contracts for the ensuing year, we have given immediate consideration to the case. The mandate will issue forthwith, to the end that prompt action may be taken by the court below.

Reversed.

COPY

CITY OF NORFOLK

Virginia

November 6, 1940

Mr. Thurgood Marshall
c/o National Association for the
Advancement of Colored People
69 Fifth Avenue
New York, N. Y.

Dear Sir:

On the 4th day of this month Messrs. P. B. Young, Sr., of Norfolk, Virginia, L. F. Palmer, Principal Huntington High School, Newport News, Virginia, Thos. H. Henderson, Virginia State Teachers' Association, Armstrong High School, Richmond, Virginia, and Col. Chas. B. Borland, City Manager of Norfolk City, Virginia, conferred in the latter's office in an effort to reach an amicable adjustment of the pending litigation in the case of Alston, et al, vs. School Board of the City of Norfolk, et al. At that conference Col. Borland was requested to put in writing the proposals discussed. This was put in the form of a letter, which Col. Borland has discussed with Mr. P. B. Young, Sr., and at the latter's suggestion I am transmitting it to you, with copies to the following:

Messrs: P. B. Young, Pres.
Journal and Guide
Norfolk, Virginia

Oliver W. Hill
Leigh Street
Richmond, Virginia

Leon A. Ransom,
Howard University School of Law,
Washington, D. C.

L. F. Palmer, Principal
Huntington High School
Newport News, Virginia.

T. H. Henderson, Principal,
Armstrong High School,
Richmond, Virginia

Melvin O. Alston
1510 O'Keefe Street
Norfolk, Virginia

Norfolk Teachers' Association
c/o Mr. Melvin O. Alston, President,
1510 O'Keefe Street, Norfolk, Virginia.

Dr. J. M. Tinsley
4th and Leigh Streets,
Richmond, Virginia

The letter is as follows:

Gentlemen:

Following the conference of the 4th in the City Manager's Office, and the joint meeting of the City Council and the School Board of the City of Norfolk on the 5th relating to an amicable adjustment of the litigation of Melvin O. Alston and the Norfolk Teachers' Association against the School Board of the City of Norfolk and C. W. Mason, Superintendent of Public Schools of Norfolk City, we are authorized to say to you that for the year 1941 the School Board of the City of Norfolk will apply the sum of \$ 30,000 toward adjusting the differences between the salaries of white and negro school teachers in the Public Schools of Norfolk City, where there are differences based solely on race and color; that for the years 1942 and 1943 the School Board will apply a sufficient sum of money to the salaries of the negro teachers to fully adjust such differences, and that thereafter the School Board will avoid all differences between the salaries of white and negro school teachers in the Public Schools of Norfolk City which will be inconsistent with the ruling of the United States Circuit Court of Appeals for the Fourth Circuit in this case.

This adjustment will be over and above the appropriation to be made by the City of Norfolk for increments and readjustments of salaries of all school teachers in the Norfolk City Public Schools.

This letter is being written pursuant to conference in Colonel Chas. B. Borland's office on November 4th, 1940, and in the spirit of the conference for an amicable adjustment and termination of the pending litigation, and is without prejudice to the rights of anyone.

Since 1941 is not far off, it will be appreciated if you will let us have your answer to this letter as soon as you can. Should you approve the proposition authorized here, we will want time to get the City Council to appropriate the necessary monies.

Very truly yours,

(Signed) Alfred Anderson
City Attorney