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IN THE SUPREME COURT OF FLORIDA.

JUNE TERM, A.D. 1939.

JOHN GILBERT, *
Plaintiff in Error *
v. *
L. R. HIGHFILL, et al., as the School Board; and DAMON HUTZLER, Secretary and County Superintendent of Public Instruction for Brevard County, Florida, *
Defendants in Error *

BREVARD COUNTY

PETITION FOR REHEARING

COMES NOW the petitioner in the above entitled cause by his undersigned attorneys, and moves the Court to reconsider the transcript of the record in this cause now before the Court on writ of error, taken to this court, to ascertain if anything contained in said transcript was overlooked by the court or not fully considered, in view of the importance of the legal question involved in this cause, and to vacate and set aside the judgment heretofore entered in this cause upon the following grounds to-wit:

1. Because this court recognizes the principle of law urged by petitioner on the question of discrimination and the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, yet it denies that a discrimination against the petitioner and others of his race has been made to appear in this case. Paragraph IX of the petition follows:

"The differentials in said salary schedule in the payment of teachers' salaries and the payment to petitioner and others of his race, of salaries less than those paid to white teachers with identical

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qualifications, experience and performing essentially the same duties, are based solely on the ground of the race or color of petitioner and the establishment and enforcement of the said salary schedule is unlawful and arbitrary and in violation of the Constitution and Laws of the State of Florida, and denies to petitioner and others of his race the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States."

It would appear that the allegations of fact in this paragraph, like the other paragraphs of this petition, have been admitted or rather must be admitted for the purpose of this case. We are aware that racial discrimination such as is urged here must be proved or admitted and in this case, although it was not proved, it was admitted, there being no appearance and the Court based its judgment, denying the petitioner's relief, upon the petition alone. We have shown that the statutory provisions of this state and the constitution of the same, under which the Board of Public Instruction employs teachers of the public schools, do not discriminate against persons on account of their race or color and they do not authorize the Board of Public Instruction to make the discrimination in payment of salaries that they do. The statutes and constitution under which they act are valid but the question insisted upon here is that the action of respondent in making these differentials in the payment of salaries, based solely upon race or color, is in violation of the Constitution of the United States and the discrimination shown by this record is not to be found in the statutes but it is an actual discrimination nevertheless, by state officers and in such cases the discrimination is as much in violation of the Fourteenth Amendment as if it were written in the statutes.

"....Such an actual discrimination is as potential in creating a denial of equality of rights as a discrimination made by law. But such an actual discrimination is not persumed. It must be proved or admitted...."

Tarrence v. Fla., 188 U.S. 520, 23 S. Ct. 402 47 L. Ed. 572 (1902).

WHEREFORE, your petitioner moves this Honorable Court to reconsider its judgment herein, affirming the judgment of the court below in this cause, and to vacate the same as provided by law.

AND YOUR PETITIONER WILL EVER PRAY.

S. D. McGILL

McGILL & McGILL

THURGOOD MARSHALL

WILLIAM H. HARWICK

By S. D. McGill
Attorneys for Plaintiff in Error

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7-28-39

IN THE SUPREME COURT OF FLORIDA,

JUNE TERM, A.D. 1939
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JOHN GILBERT,

Plaintiff in Error

v.

L. R. HIGHFILL, et al., as the School Board; and DAMON HUTZLER, Secretary and County Superintendent of Public Instruction for Brevard County, Florida,

Defendants in Error

BREVARD COUNTY

Opinion filed July 25, 1939

A Writ of Error from the Circuit Court for Brevard County, M.B. Smith, Judge.

S.D. McGill, McGill & McGill, Thurgood Marshall, William H. Harwick and Wm. S. Robinson, for Plaintiff in Error;

Leonard B. Newman, for Defendants in Error.

CHAPMAN, J.

On the 24th day of May, 1938, relator filed in the Circuit Court of Brevard County, Florida, his petition for an alternative writ of mandamus directed to the Board of Public Instruction and the Superintendent of Public Instruction of Brevard County, Florida. It was made to appear thereby that the petitioner was a qualified teacher and a member of the colored race and for eleven years had taught in the public schools of said county and at the time of filing the petition was teaching under a second grade certificate as principal of the Cocoa Junior High School, a colored school, and was supported by taxation. It was alleged that the respondents had adopted and were enforcing a schedule of salaries paid to teachers in Brevard County whereby negro teachers received a basic salary of $20.00; each unit value $2.00, minimum $50.00, and that white teachers received a basic salary of $50.00; each unit value $3.00, minimum $100.00, and that these differentials are based solely on race and color. A copy of the purported salary schedules of Brevard County is attached to and by appropriate language made a part of the petition.

The prayer of the petition is, viz:

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"WHEREFORE, your relator prays, that a writ of mandamus issue to Damon Hutzler, Secretary of said Board and Superintendent of Public Instruction of Brevard County, Florida; L. R. Highfill, J. D. Pepper and W. J. Creel as members of the Board of Public Instruction of Brevard County, Florida, at their office in Titusville, Florida, requiring the said respondents to adopt and establish salary schedules for teachers in Brevard County, Florida, without distinction or discrimination on account of color of teacher or as to school taught and further, ordering and requiring such other and further relief and protection to relator in the premises as justice may require."

An Order was entered by the lower court denying the application for an alternative writ of mandamus and made certain recitals in the order which are pertinent and material to a decision of the case at bar. The order recites:

"This cause came on to be heard upon application of petitioner for Alternative Writ of Mandamus in which the petitioner seeks to compel the respondent School Board "To adopt and establish salary schedules in Brevard County, Florida, without distinction or discrimination ---". The statute under which teachers are employed by the Board, directs the Board 'To employ teachers for every school in the county and to contract with and pay the same for their services ---". The constitution provides that the Board shall establish and maintain 'A uniform system of public instruction ---' I do not find any law which requires the Board 'To establish salary schedules'. The statute seems to conetmplate individual contracts with teachers, and the constitutional provision for uniformity provides for the accomplishment of a result and not the details of the means by which the same shall be accomplished. It is, therefore; ORDERED, ADJUDGED AND DECREED, That said application for Alternative Writ be, and the same is, hereby denied."

From the order denying the alternative writ of mandamus a writ of error was taken and the denial thereof is assigned as error in this Court.

Section I of Article XII of the Constitution of Florida makes it a duty of the Legislature of Florida to provide for a uniform system of public free schools and to provide for the liberal maintenance of the same. Section 12 of Article XII of the Constitution provides that white and colored children shall not be taught in the same school but impartial provisions shall be made for

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both.

Section 493 C.G.L. provides for the establishment and maintenance of a uniform system of public instruction free to all youths residing in Florida between the ages of six and twenty-one years. The Board of Public Instruction of each County of Florida are charged with many constitutional and statutory duties. Sub Section 6 of Section 561 C.G.L. not only directs but makes it a duty of the Board to employ teachers for every school in the county and to contract with and pay the same for their services. It will be observed that the law does not fix the monthly sums to be paid teachers but makes it a duty of the Board to contract with and pay teachers. The amount to be paid by teachers is left to the business judgment and sound discretion of the members of the Board. It is reasonable to assume that some teachers are better prepared by education and otherwise qualified to teach than others and for this and other reasons the Legislature clothed members constituting the Boards of Public Instruction with broad powers so as to enable them to contract with the very best teachers obtainable for the funds at their disposal. It would be absurd to say that teachers of certain qualifications should receive the same monthly payments for services rendered when the members of a Board are acquainted or familiar with the preparation, scholastic attainments, natural talents and many of the different and material characteristics making the qualifications of a teacher, and these attributes are considered when entering into contracts with teachers and stipulating for their monthly payments.

We have not been supplied with citation of authorities to the effect that the Board of Public Instruction of Brevard County had the constitutional or statutory power or authority to adopt the salary schedule made a part of the petition. This Court has no power in a mandamus proceeding to control the discretionary authority conferred by statute on the respondents here. It is the duty of the relator to show that he has a clear legal right to the performance by the respondents of the particular duty in question. See State v. Florida East Coast R. Co., 69 Fla. 165, 67 So. 906; Merchants' Broom Co. v. Butler, 70 Fla. 397, 70 So. 383; Leatherman v. Schwab, 98 Fla. 885, 124. So. 459; State v. Greer, 88 Fla. 249, 102 So. 739, 37 A.L.R. 1298; Welch v. State, 85 Fla. 264, 95 So. 751; Myers v. State, 61 Fla. 32, 87 So. 80; Johns v. County Com'rs., 28 Fla. 626, 10 So. 96; Davis v. Crawford, 95 Fla. 438, 116 So. 41; State v. Atlantic Coast Line R. Co. 53 Fla. 650, 44 So. 213, 13 L.R.A. (N.S.) 320, 12 Ann. Cas. 359; State v. Amos. 100 Fla. 1335, 131 So. 122.

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We fully agree with counsel for relator and the authorities cited in their brief on the question of discrimination and an equal protection of the law as guaranteed by the 14th Amendment to the Constitution of the United States. We do not think that either of these questions is presented by this record.

This proceeding is in mandamus, and the specific relief sought should be prayed for and the prayer must be supported by allegations legally sufficient to show that the particular Act sought to be enforced is a legal duty of the respondents, and that the relator has no other remedy and has a right to require the legal duty as alleged, to be enforced by mandamus.

If it is the duty of respondents to "adopt and establish salary schedules," such duty involves administrative discretion to be legally performed; and if the duty be illegally performed of record, the cancellation of such record may be enforced in appropriate judicial proceedings.

Even if it were sufficiently alleged that it is a legal duty of respondents to "adopt and establish salary schedules for teachers in Brevard County, Florida". which relator had a right to enforce, and that he had no other remedy than mandamus, it is not prayed that respondents be required to cancel and annul present schedule on the ground of alleged illegality.

Careful consideration has been given to the record, briefs and authorities cited by counsel for the respective parties, and after hearing oral argument at the bar of this Court, we are of the opinion that no errors appear in the record and the order appealed from should be and is hereby affirmed.

TERRELL, C.J. and WHITFIELD, BROWN, BUFORD AND THOMAS, JJ., concur.