ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. STACEY L. CARNA,	:	
	:	**CASE NO. 2011-0716**
Relator-Appellant	:	
	:	
vs.	:	
	:	**On Appeal from the Pickaway**
	:	**County Court of Appeals,**
TEAYS VALLEY LOCAL SCHOOL	:	**Fourth Appellate District**
DISTRICT BOARD OF EDUCATION	:	**Case No. 2010 CA 0018**
	:	
Respondent-Appellee.	:	

REPLY BRIEF OF APPELLANT STACEY L. CARNA

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I. INTRODUCTION

This case turns on a single question: was Appellee Teays Valley Local School District Board of Education ("the District") required to grant the request for a meeting with the school board made by Appellant Stacey L. Carna after she was told her employment contract would not be renewed? The District admits Carna made the request, but, to this point, has insisted that its failure to grant her a meeting with the board was excused because she made her request too early in the nonrenewal process. The lower court erroneously agreed, despite the total lack of support in Revised Code Section 3319.02 for the notion that an administrator's meeting request must be made after a certain date. This Court granted jurisdiction solely to decide whether Carna's meeting request was valid pursuant to Division (D)(4) of Section 3319.02, such that the board's failure to grant her request triggered Division (D)(5)'s automatic reinstatement provision.

Now, though, facing the realization that there is no reasonable interpretation of Section 3319.02 that would support its prior argument or the lower court's opinion, the District presents an entirely new argument, arguing for the first time in this case that, in fact, it *did* grant Carna's request for a meeting. The District has abandoned its prior assertion that Carna's request was inadequate or premature, and now claims that by merely meeting to vote on Carna's nonrenewal, it satisfied the requirements of the statute. Of course, it is improper for the District to raise an entirely new legal argument at this stage of the proceedings, when it never claimed in its briefing before the trial court or the court of appeals that it had granted Carna's meeting request.

More important, though, the District's claim that it granted Carna's request is patently false. Division (D)(4)'s meeting requirement does not simply reiterate the requirements of Ohio's Open Meetings Law by mandating a meeting *of* the board to vote on an administrator's contract; it gives the administrator the right to a meeting "*with* the board." The District claims,

without explanation, that a board can somehow meet *with* an administrator even if the administrator is not in attendance. The District's claim also ignores the mandatory criteria the statute imposes on such a meeting: that the meeting be "in executive session"; that it include a discussion of the "reasons for considering renewal or nonrenewal"; and that the administrator "have a representative, chosen by the employee, present at the meeting." R.C. § 3319.02(D)(4). None of these criteria were satisfied by the *in absentia* vote on Carna's contract.

The District sidesteps these inconvenient statutory mandates by blaming Carna for her failure to attend the meeting at which the board voted. According to the District, a board considering an employee's nonrenewal can "grant the employee a meeting" without taking any affirmative steps to arrange for the meeting, such as placing the meeting on its agenda or even informing the administrator of the chosen date or time. Under this construction, an administrator must do more than simply "request" the meeting; he or she must also anticipate the granting of this request by attending every regular and special meeting between the request and the deadline for nonrenewal—with a chosen representative in tow each time—in hopes of somehow initiating a spontaneous, executive session discussion of the reasons for the potential nonrenewal.

The District tries to make this scenario more palatable by arguing that the statute's time limits prevent the board from holding the required meeting before a certain date. Carna, therefore, must have known that the board could meet with her only at the time of its vote. As with its prior arguments, there is no basis for this conclusion in the statutory text. The statute limits the time for the board to take "action *** on the employee's contract"—that is, the time in which the board can vote on renewal or nonrenewal—but does not limit the time in which the board can discuss a potential nonrenewal. Even if this were not generally the case, and there was only one date when Carna's nonrenewal could legally be discussed, Carna did not have the

option of just showing up at a board meeting to initiate the required meeting: she had been banned from entering District property since being placed on forced leave. The District did not just fail to invite her to the meeting it claims it held; it affirmatively disinvited her.

One of the key problems with the District's prior, now-abandoned position that Carna's request for a meeting was "unripe" was that it would have allowed a board to ignore an administrator's request for a meeting, or even multiple requests, unless the request was repeated once more within an extremely brief window just prior to the final vote. The District's new argument discards this absurd scenario, but replaces it with an even more onerous burden: it requires an administrator who has already made a request for a meeting (or many such requests) to appear in person, at a particular board meeting, just prior to the nonrenewal vote, to request the meeting one more time. Otherwise, all the board must do to "grant" all of the administrator's prior requests is vote on nonrenewal. Even if the District had properly raised this argument in a timely manner, it would have no merit. The General Assembly's words require a board to satisfy detailed criteria in order to grant an administrator's meeting request, but they impose no limitation on how or when an administrator must request a meeting. The District, by ignoring virtually all of the words of the statute, now seeks to reverse these burdens. This Court should enforce the statute as it is written and reject the District's new argument.

II. ARGUMENT

A. Voting on Carna's Nonrenewal at a School Board Meeting Is Not the Same as Honoring Carna's Request for a Meeting with the Board.

After arguing throughout this litigation that Carna did not properly request a meeting with the school board, the District now abandons this argument and argues instead that "the issue is whether the board failed to provide the R.C. 3319.02(D)(4) meeting." (Appellee's Merit Brief, p. 18 (quotations omitted)). This argument is entirely new, and should be disregarded. See

Belvedere Condominium Unit Owners' Assn. v. R.E. Roark Cos., Inc., 67 Ohio St. 3d 274, 279, 617 N.E.2d 1075 (stating general rule that Supreme Court will not consider issues not raised below). But beyond its procedural shortcomings, the District's new assertion is simply meritless.

To be clear, the District is not claiming the board met with Carna, per her request, to discuss its reasons for considering nonrenewal of her contract. Rather, the District claims it honored Carna's valid meeting request by simply voting on her nonrenewal at a regular public board meeting. The District argues it does not matter that neither Carna nor any representative of her interests was in attendance, that she was not notified of the meeting, or that the meeting was not in executive session. All that matters is that a "meeting" was held after her request.

The District is correct to abandon its position that the timing of Carna's request meant it could be ignored. As detailed in the Appellant's Merit Brief, that position had no basis in the statutory text, which imposes no limitations on the time or manner of a meeting request, and adopting the limitations previously proposed by the District would produce absurd and unjust results. But the District's new assertion has no more statutory support than its prior arguments.

When an administrator requests a meeting pursuant to Division (D)(4) of Section 3319.02, the statute requires more than just a vote on nonrenewal. Division (D)(4) provides several mandatory criteria for the required meeting: it gives the administrator the right to "a meeting *with* the board" (i.e., a meeting between the administrator and the board, not just a meeting *of* the board); it requires that the meeting be "in executive session"; it requires the board to "discuss its reasons for considering renewal or nonrenewal of the contract"; and it entitles the administrator to "have a representative, chosen by the employee, present at the meeting." R.C. § 3319.02(D)(4) (emphasis added). Division (D)(5) makes these criteria mandatory by requiring automatic reinstatement of the administrator if the board "fails to provide at the request

of the employee a meeting *as prescribed in Division (D)(4)*." R.C. § 3319.02(D)(5) (emphasis added). Not just any meeting will do, and the District did not meet any of these criteria by merely holding a vote.

The type of meeting the District advocates—any meeting where the board votes in public on the administrator's contract—is also mandated, but not in Division (D)(4). Division (C) requires that the reemployment of an administrator be decided at "any regular or special meeting" prior to the last day of March in the year the contract expires. R.C. § 3319.02(C). As the District itself points out, this is required of every official action a school board takes. For instance, Ohio's Open Meetings Law requires board votes to be taken in public, and requires that all deliberation occur either in public or in a properly convened executive session. See generally R.C. § 121.22. Holding that Section 3319.02(D)(4) requires nothing more than compliance with the Open Meetings Law would render this provision superfluous. Even the reinstatement provision of Division (D)(5) would be redundant, since the Open Meetings Law itself invalidates any action by a public body that violates its provisions. R.C. § 121.22(H). The District's brief notes that statutes must not be construed so they are redundant (see, e.g., Appellee's Brief at p. 8 (citing *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 26)), but its own interpretation of the word "meeting" does exactly that.

Beyond rendering Divisions (D)(4) and (D)(5) superfluous, the District's "any meeting will do" argument makes these divisions incoherent. Both parties agree that the board must vote on nonrenewal at a public meeting, no matter what. But both parties also agree that Division (D)(4)'s meeting requirement and Division (D)(5)'s reinstatement provision are triggered only if an administrator requests a meeting. Using the District's analysis, all the administrator's meeting request would do is remind the board of its pre-existing duty to hold a public meeting to

vote on nonrenewal. Such a request would not trigger any of the more specific requirements of Division (D)(4), which the District simply ignores. If the administrator fails to request a meeting, the board must still meet publicly and vote, per the Open Meetings Law, but Section 3319.02(D) no longer requires a meeting. Nothing would change in practice—nonrenewal would still be valid if voted upon at a meeting, and void if not—but Section 3319.02(D) would give the misleading impression that a meeting and vote are not required without a request.

Contrary to the District's analysis, the General Assembly's intent in drafting Section 3319.02(D) was not to reiterate the Open Meetings Law. Instead, it constructed a system where, at an administrator's request, a board must hold a specific type of meeting with the administrator and a chosen representative. It did so to give administrators a chance to discuss with their boards, in executive session, with representation, the reasons for renewal or nonrenewal. That way, nonrenewal would not be decided hastily, without hearing the administrator's side of the story, as was the case for Carna. This Court need not divine that intent from legislative history or a liberal construction rule (though, as noted, Section 3319.02 is to be construed liberally in favor of the rights of administrators): the General Assembly stated its intent in the explicit words of Division (D)(4). It is only by ignoring these words that the District can claim a meeting at which Carna was not even present satisfied the statute's requirements.

B. Section 3319.02 Does Not Require An Administrator Who Requests a Meeting to Repeat His or Her Request in Person at a Public Meeting.

1. The District's Effort to Place the Burden of Arranging a Meeting on Carna Is Both Impractical and Contrary to the Words of the Statute.

The District tries to justify ignoring every single requirement of Section 3319.02(D)(4) by blaming Carna for her own failure to attend the March 2008 meeting at which the board voted on her nonrenewal. The District argues throughout its brief that her absence was the only thing

preventing a proper Division (D)(4) meeting. But the District does not claim it sought to comply with the statute and changed its plans only because Carna failed to show up. Nothing in the record indicates that the District expected or intended for Carna or her representative to be present, that it placed any meeting with her on its agenda, or that it discussed the reasons for considering her nonrenewal.[1] According to the District, if Carna desired a meeting that satisfied the criteria of Division (D)(4), the onus was on her to accomplish such a meeting.

The statute does not place that burden on the administrator, though. Instead, it requires only that an administrator "request" a meeting with the board. Upon such a request, it is the board's duty to "grant the employee a meeting" that satisfies the requirements of Division (D)(4), including holding the meeting in executive session, allowing representation, and discussing the reasons for considering nonrenewal. R.C. § 3319.02(D)(4). Reinstatement is mandatory if the board "fails to provide" such a meeting. R.C. § 3319.02(D)(5). The District suggests this Court should hold that a board can "grant" and "provide" such a meeting without doing anything to bring the meeting about. Among the many steps the District does not believe are included in "granting" or "providing" a meeting are: (1) indicating in any way the board's assent to the request for a meeting; (2) choosing a date and time for the meeting; (3) informing the administrator of that date and time; or (4) placing the meeting on the board's agenda.

Instead of taking any of these extremely limited steps to arrange the meeting, the District argues it could "grant" and "provide" the meeting without doing anything at all. The only situation where it might have to do something to comply with the statute would be if Carna happened to appear at an already-scheduled public board meeting, with her chosen representative

[1] The lack of such a record arises from the District's failure to raise this issue, which deprived Carna of the ability to discover pertinent evidence or incorporate it into the record. This lost opportunity and the resulting likelihood of unverified or speculative discussion at oral argument are among the many reasons this Court generally refuses to consider newly raised arguments.

in tow, and request (again) the opportunity to meet with the board in executive session to discuss her contract. If Carna attended every regular and special board meeting between her request and the nonrenewal vote—and paid her legal representative to attend each of these meetings—the board would then violate the statute only if it refused to meet at least once with Carna in executive session prior to voting on her contract. If Carna had attended all but one meeting, the board would now likely be claiming it would have met with her at the meeting she missed.

In this case, as the District is well aware, it was unlikely, to say the least, that Carna would simply appear at every board meeting to repeat her prior meeting request—not only because she had received no indication the board would honor her request, but because *she had been banned from District property* while on administrative leave, and had not set foot in a District building since July 2007 except when specifically instructed to do so. (Supp. 3, ¶ 14). In other words, the District not only took no action to invite Carna to the meeting it claims it held; it affirmatively disinvited her. Yet it now claims Carna herself was to blame for her absence.

2. The Board's Claim that Its March 2008 Meeting Was the Only Time at Which It Could Legally Meet with Carna is False.

Even under ordinary circumstances, where showing up at a board meeting would not subject an administrator to the possibility of discipline or trespassing charges, the District's proposed system would be unworkable. How would an administrator even initiate the meeting? Would the administrator simply stand up, mid-meeting, to demand that the board go into an impromptu executive session? Or would the administrator need to wait until the public session of the meeting to make this request? And how could the administrator be expected to prepare for the meeting when there is no indication of when it will take place?

The District ignores most of these issues, but it does claim that Carna should have known exactly when she could meet with the board. It claims the only time the board could have met

with Carna per her request was at the March 2008 board meeting when it voted on her contract, because in its view, the board was barred from even discussing the nonrenewal of her contract until sixty days after the issuance of her preliminary evaluation, per Division (C)(2)(c)(ii).

This assertion is incorrect. Division (C)(2)(c)(ii) does bar "any action by the board on the employee's contract of employment" for sixty days after the preliminary evaluation, but this is plainly intended to delay voting on nonrenewal, not the mere discussion of nonrenewal. The District's justification for its assertion is that the same provision also prevents the board from "acting to renew or not renew the contract" until five days after issuance of the final evaluation. The District concludes that because the General Assembly used this extremely similar phrase, "acting to renew or not renew the contract," instead of the identical phrase, "any action by the board on the employee's contract of employment," it must have been referring to two different things: it prevents the board from doing anything at all related to the contract for sixty days after the first evaluation; but in the first five days after the final evaluation, it bars only voting.

The District's interpretation reads far too much significance into such a minor semantic distinction. In fact, the General Assembly used similar variations of these words throughout the statute to refer to the act of voting, such as: "acting to renew or not renew the contract" (Division (C)(2)(c)(ii)); "taking action to renew or nonrenew the contract," (Division (D)(4)); and "making the final determination regarding the renewal or nonrenewal of the contract" (Division (D)(5)). The District agrees these three phrases all refer to the act of voting; it is only "action *** on the employee's contract" that refers to all steps, even mere discussion, related to nonrenewal.

Even the District itself seems to reject this unreasonable reading of the statute's words when it suits its purposes. According to the District's brief, the first evaluation must be followed by a sixty-day period of total inaction, then the second evaluation, and finally the vote. But the

District conducted its final evaluation of Carna less than sixty days after the preliminary evaluation. (Supp. 23-24). Evidently, it believed the second evaluation, a function that clearly relates to renewal or nonrenewal, could be completed during the sixty-day ban on "any action." And of course, Carna was informed as early as the summer of 2007, well before the first evaluation, that there was already discussion (and, in fact, a decision) as to her nonrenewal. The District provides further support for this view in its own words, citing Ohio case law "requiring that school boards *act* by resolution." (Appellee's Merit Brief, p. 12 (emphasis added)). When the General Assembly refers to "action" by a school board, it can only mean voting. When it refers in the statute to "action on" a contract, it means voting on that contract, not mere discussion of the contract. Nothing in the statute prevents a board from discussing an administrator's contract with the administrator prior to, and separate from, its final vote.[2]

The District's claim that the March 2008 meeting was the only possible time the board could have met with Carna also fails because it disregards the possibility of a special meeting. Special meetings require only twenty-four hours notice under the Open Meetings Law. R.C. § 121.22(F). Even crediting the District's incorrect assertion that the board could not meet

[2] Nor does the statute prohibit an administrator from making a valid request prior to the time for voting. The District notes that the statute requires the board to meet with the administrator "upon request," and claims that division (C)(2)(c)(ii) bars the board from doing so if the request is prior to the sixty-day post-evaluation period. (Appellee's Merit Brief, p. 10). But even if the District were correct that no meeting could be held during that period, that would bar the board from honoring a prior request only if "upon request" meant "immediately upon request"—that is, if the board would violate the statute by failing to hold the meeting at the instant of the request. Such a requirement would be onerous, to say the least, and would likely result in reinstatement in every instance, since the natural response to a request for a meeting is to schedule some later, mutually convenient meeting date. If the General Assembly had intended to impose such an extreme restriction, it would have done so explicitly, using a phrase such as "immediately upon request" or "as soon as possible upon request." It did not, and this Court may not act as if it had. See *State v. Bess*, 126 Ohio St.3d 350, 2010-Ohio-3292, 933 N.E.2d 1076, ¶ 18 ("[W]e must give effect to the words of a statute and may not modify an unambiguous statute by deleting words used or inserting words not used." (quotations and citations omitted)).

with Carna until sixty days after her first evaluation, it could have held a special meeting to do so any time between March 10 and March 31, 2008. In the absence of some indication that the board intended to grant her request, Carna had no way to know when the board intended to meet with her, or even whether it intended to provide a meeting prior to its March 31 voting deadline.[3]

3. The District's New Argument, Like Its Previous Argument, Would Permit Boards to Ignore Even Repeated Meeting Requests by Administrators.

When the General Assembly enacted Section 3319.02 in its current form, the words it chose created a number of requirements for the type of meeting a board must hold with an administrator upon the administrator's request, but it placed no limitations whatsoever on an administrator's right to request a meeting with the board. As the Appellant's Merit Brief argued in detail, and as the District now evidently concedes, nothing in the statute prevented Carna from requesting a meeting with the board at the time or in the manner that she did.

According to the District's prior argument, despite the lack of statutory restrictions on such requests, a board could ignore a "premature" meeting request unless the administrator reiterated his or her request within an extremely brief window of time just prior to the vote. Under the lower court's interpretation, this window could be as short as five days (the minimum

[3] Contrary to the District's extraordinary claim, it was required to grant Carna's meeting request *prior* to its nonrenewal vote, not after the fact. The District seems to make this argument almost tongue-in-cheek; it admits its proposed time restrictions on valid meeting requests cannot be found in the statute, but it claims that other core requirements, such as the requirement that the meeting take place before the vote, are also not in the statute. (Appellee's Merit Brief, p. 16). This is false. Division (D)(4) requires the meeting to include discussion of the board's "reasons for considering renewal or nonrenewal of the employee's contract." This phrase requires that the board must still be considering renewal or nonrenewal when the meeting occurs. Similarly, Division (D)(5) provides that if the board votes on nonrenewal without providing the requested meeting with the board, the nonrenewal will be invalidated. Since a violation is complete upon the board's vote, holding a meeting after the vote does nothing to make the board's illegal action any less illegal. The District can claim there is no deadline for the requested meeting only by ignoring these clear provisions, just as it argues that the administrator need not be present for the meeting by ignoring Division (D)(4)'s requirement of a meeting "with the board."

time allowed between the final evaluation and the nonrenewal vote), or even shorter, if the board subsequently issued the required notice of the administrator's right to a meeting with the board. This reasoning allows the absurd scenario in which an administrator can request a meeting every day for a period of months, but the board can deny the meeting with impunity unless the request is reiterated yet again just prior to the board's vote. (Appellant's Merit Brief, pp. 15-16).

The District's new argument would make matters even worse. Under its new interpretation, the board would have to "grant" and "provide" the requested meeting no matter when the administrator requests it. But since the board would not have to do anything to arrange the meeting, including informing the administrator when the meeting will occur, or placing the meeting on its agenda, it would not actually have to provide an executive session meeting that satisfies the specific requirements of Division (D)(4), or even meet *with* the administrator, unless the administrator were to appear at a particular meeting with his or her chosen representative and demand that the board go into executive session. In other words, after having already requested a meeting with the board at least once prior to the meeting, the District claims the administrator must request it again, in person, at a public board meeting. And even this in-person request can be ignored by the board under the District's interpretation if it does not occur at the correct meeting, just prior to the board's nonrenewal vote. The District has thus abandoned an argument that might have required some administrators to make multiple requests in order to obtain a meeting, but it has replaced this unworkable proposal with an argument that would require all administrators to make multiple, extremely precise, in-person meeting requests—and to divine the single correct moment for making these requests—in order to obtain the type of meeting required by the statute. If the General Assembly had truly intended to impose such stringent requirements, it would have done so using the words of the statute. It did not.

III. CONCLUSION

The District's Merit Brief pays lip service to the principles of statutory construction, but at its core, its argument would require this Court to ignore all of the operative words of the statute and insert words the General Assembly chose not to include. It asks this Court to hold that an administrator's meeting "with the board," "in executive session," with "a representative, chosen by the employee, present," at which the board "shall discuss its reasons for considering renewal or nonrenewal of the contract," need not satisfy *any* of these requirements. It asks this Court to hold that the words "grant" and "provide" have no meaning, so that a board can "grant" and "provide" a meeting without doing anything in response to an administrator's meeting request. Perhaps most important, it asks this Court to conclude that the statute's plainly worded requirement that an administrator merely "request" a meeting with the board was actually meant to require the administrator to request the meeting multiple times, including at least once in person, at a specific public meeting, just prior to the nonrenewal vote—even where, as here, the administrator was prohibited from showing up at a board meeting without permission.

None of these illogical conclusions has any basis in the words or structure of Section 3319.02. The District admits Carna requested a meeting with the board when she learned she would be nonrenewed. It admits Carna was nonrenewed without being provided a meeting with the board, to say nothing of a meeting "as prescribed in division (D)(4)" of Section 3319.02. It now also admits, as the Appellant's Merit Brief demonstrated, that the statute did not require Carna to make her meeting request at a particular time or in a certain manner. These undisputed facts and clear legal standards require Carna's automatic reinstatement. For the reasons stated above and in her Merit Brief, Appellant Stacey L. Carna respectfully requests that this Court reverse the judgment below and order that summary judgment be granted in her favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2011, a copy of the foregoing Reply Brief of Appellant Stacey L. Carna was served by postage-paid U.S. Mail upon the following:

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