

STATE OF MICHIGAN
COURT OF APPEALS

KATHERINE M. ERNSTING,

Plaintiff-Appellant,

v

AVE MARIA COLLEGE,

Defendant-Appellee.

FOR PUBLICATION

March 6, 2007

9:00 a.m.

No. 265187

Washtenaw Circuit Court

LC No. 04-000989-CD

Official Reported Version

Before: Wilder, P.J., and Zahra and Davis, JJ.

ZAHRA, J. (*dissenting*).

I respectfully dissent. While I agree with the majority's conclusion that a federal law enforcement agency may be considered a public body under the Michigan Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq.*, I disagree with the majority's conclusion that the Department of Education (DOE), with its Office of Inspector General (OIG), is a law enforcement agency under the WPA. I would affirm the judgment of the trial court.

The dispositive issue in this case turns on the meaning of the term "law enforcement agency" as it is used in the WPA. As observed by the majority, this term is not defined in the WPA. Every word or phrase undefined by statute should be accorded its plain and ordinary meaning, considering the context in which each word or phrase is used. MCL 8.3a; *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 245; 697 NW2d 130 (2005).

The majority has concluded that the DOE is a law enforcement agency merely because it is an agency that has been granted some limited law enforcement powers through the OIG. This conclusion is erroneous. Significantly, the WPA makes reference to a "law enforcement agency," not an agency with law enforcement power. I conclude that the phrase "law enforcement agency" refers to an agency that has as its primary purpose the enforcement of the general criminal laws of the jurisdiction. The DOE is not such an agency.¹ The primary purpose

¹ Congress expressed the purpose of the DOE in the Department of Education Organization Act, 20 USC 3402:

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of the DOE is not the enforcement of criminal laws. Rather, the DOE is an agency created to implement the education policies of the United States government.

This Court has previously considered the meaning of the term "law enforcement agency." *In re Faketty*, 121 Mich App 266, 271; 328 NW2d 551 (1982). Consistently with the position I advocate here, this Court concluded in *Faketty* that the phrase "law enforcement agency" refers to "those agencies charged with the prevention and detection of crime and enforcement of the general criminal laws of this state." *Id.*²

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The Congress declares that the establishment of a Department of Education is in the public interest, will promote the general welfare of the United States, will help ensure that education issues receive proper treatment at the Federal level, and will enable the Federal Government to coordinate its education activities more effectively. Therefore, the purposes of this Act are—

(1) to strengthen the Federal commitment to ensuring access to equal educational opportunity for every individual;

(2) to supplement and complement the efforts of States, the local school systems and other instrumentalities of the States, the private sector, public and private educational institutions, public and private nonprofit educational research institutions, community-based organizations, parents, and students to improve the quality of education;

(3) to encourage the increased involvement of the public, parents, and students in Federal education programs;

(4) to promote improvements in the quality and usefulness of education through federally supported research, evaluation, and sharing of information;

(5) to improve the coordination of Federal education programs;

(6) to improve the management and efficiency of Federal education activities, especially with respect to the process, procedures, and administrative structures for the dispersal of Federal funds, as well as the reduction of unnecessary and duplicative burdens and constraints, including unnecessary paperwork, on the recipients of Federal funds; and

(7) to increase the accountability of Federal education programs to the President, the Congress, and the public.

² In *In re Faketty*, petitioner Faketty asked the probate court to expunge his juvenile record as provided under the Juvenile Court Rules, specifically JCR 1969, 13, which provided in pertinent part: "The court may at any time order the expunction of its own
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In defining the meaning of "law enforcement agency," this Court in *Faketty* considered the Michigan Law Enforcement Officers Training Council Act of 1965 (currently titled the Commission on Law Enforcement Standards Act [COLES]), MCL 28.601 *et seq.*, which describes and defines the duties of a law enforcement officer.³ This Court concluded that "the

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files and records and any law enforcement agency files and records pertaining to a juvenile, including fingerprints and photographs, on a showing of good cause." The probate court expunged the court's records, but declined to order expunction of the Michigan Department of Corrections records. While the panel in *Faketty* was called upon to interpret a court rule, and in the present case we are called upon to interpret a statute, the rules of interpretation for statutes and court rules are identical. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004).

³ MCL 28.602(l) of COLES provides:

"Police officer" or "law enforcement officer" means, unless the context requires otherwise, any of the following:

(i) A regularly employed member of a law enforcement agency authorized and established pursuant to law, including common law, who is responsible for the prevention and detection of crime and the enforcement of the general criminal laws of this state. Police officer or law enforcement officer does not include a person serving solely because he or she occupies any other office or position.

(ii) A law enforcement officer of a Michigan Indian tribal police force, subject to the limitations set forth in section 9(3).

(iii) The sergeant at arms or any assistant sergeant at arms of either house of the legislature who is commissioned as a police officer by that respective house of the legislature as provided by the legislative sergeant at arms police powers act, 2001 PA 185, MCL 4.381 to 4.382.

(iv) A law enforcement officer of a multicounty metropolitan district, subject to the limitations of section 9(7).

(v) A county prosecuting attorney's investigator sworn and fully empowered by the sheriff of that county.

(vi) Until December 31, 2007, a law enforcement officer of a school district in this state that has a membership of at least 20,000 pupils and that includes in its territory a city with a population of at least 180,000 as of the most recent federal decennial census.

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term 'law enforcement agency' refers to those agencies charged with the prevention and detection of crime and enforcement of the general criminal laws of this state." 121 Mich App at 271. This Court then reviewed the jurisdiction of the Department of Corrections and concluded:

The powers which the Legislature has extended to the department are related solely to the administration of penal institutions, probation, pardons, paroles and commutation and other aspects of the department's corrections functions. It is clear that the department is not charged with the enforcement of the general criminal laws of this state. The probate court . . . correctly ruled that the department is not a "law enforcement agency" within JCR 1969, 13. [*Id.*]

Consistently with *Faketty*, I would not confer "law enforcement agency" status to those governmental agencies or their employees that are not charged with enforcing the general criminal laws of their jurisdiction or otherwise specifically enumerated as such by statute.

My conclusion that the DOE is not a law enforcement agency is not changed merely because the DOE utilized its OIG to investigate limited matters. Inspectors general were created by the Inspector General Act of 1978 (the Act), 5 USC Appendix, 1 *et seq.* The Act did not empower inspectors to enforce the general criminal laws of the country. See 5 USC Appendix, 2.⁴ The code sections pertaining to the DOE also do not confer such authority.⁵ Congress would

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(vii) A fire arson investigator from a fire department within a city with a population of not less than 750,000 who is sworn and fully empowered by the city chief of police.

⁴ The statute reads:

In order to create independent and objective units—

(1) to conduct and supervise audits and investigations relating to the programs and operations of the establishments . . . ;

(2) to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations; and

(3) to provide a means for keeping the head of the establishment and the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the necessity for and progress of corrective action;

there is established—

(A) in each of such establishments an office of Inspector General [5 USC App 2.]

⁵ 20 USC 3422 reads: "There shall be in the [DOE] an Office of Inspector General, established in accordance with the Inspector General Act of 1978."

not create a law enforcement agency and then hamstring it to the extent it has by limiting the
OIG's use of such capabilities.

In sum, the Michigan Legislature limited disclosures protected under the WPA to those
made to entities that fit into one of the enumerated categories of the WPA. Plaintiff cannot fit
the DOE or its OIG into any one of the categories. Therefore, I would affirm the judgment of the
trial court.

/s/ Brian K. Zahra