Approved April 26, 1991
Date

MINUTES OF THE SENATE COMMITTEE ON EDUCATION.

The meeting was called to order by SENATOR JOSEPH C. HARDER at
Chairperson

1:30 ~~xx~~ a.m./p.m. on Wednesday, March 6, 1991 in room 123-S of the Capitol.

All members were present except:
Senator Anderson, excused

Committee staff present:
Mr. Ben Barrett, Legislative Research Department
Ms. Avis Swartzman, Revisor of Statutes
Mr. Dale Dennis, Assistant Commissioner of Education
Mrs. Millie Randell, Committee Secretary

Conferees appearing before the committee:
SB 109 - Teachers, costs of hearings provided upon nonrenewal or termination of contracts of employment.

Proponents:
Mr. Craig Grant, Director of Political Action, Kansas-National Education Association
Mr. David M. Schauner, General Counsel, Kansas-National Education Association
Ms. Pat BAker, Associate Executive Director, Kansas Association of School Boards

Opponents:
Mr. Charles L. (Chuck) Stuart, Legislative Liaison, United School Administrators of Kansas

SB 143 - Teachers, time requirement for hearings upon nonrenewal or termination of contracts.

Proponents:
Senator Dave Kerr, sponsor of SB 143
Mr. Charles L. (Chuck) Stuart, Legislative Liaison, United School Administrators of Kansas
Ms. Pat Baker, Associate Executive Director/General Counsel, Kansas Association of School Boards

Opponents:
Mr. David M. Schauner, General Counsel, Kansas-National Education Association

SB 109 - Teachers, costs of hearings provided upon nonrenewal or termination of contracts of employment.

Chairman Joseph C. Harder called the meeting to order and recognized Mr. Craig Grant, Director of Political Action for Kansas-National Education Association.

Mr. Grant explained that SB 109, which was introduced at the request of Kansas-NEA, contains two policy changes, and he would address the first change relating to compensation of hearing committee members. (Attachment 1)

Responding to a Committee question, Mr. Grant estimated that hearing committee members are paid for approximately five days.

The Chair called upon Mr. David Schauner, General Counsel, Kansas-NEA. Mr. Schauner clarified previous discussion by stating that due process hearing committee members are not entitled to reimbursement for any additional per diem expenses unless they are required to be "out overnight". He said that typically anyone who serves on a due process hearing committee is making a financial sacrifice to do so. Prospective hearing committee members, he said, have declined more than they have accepted an offer to serve on a hearing committee. Mr. Schauner explained he had been invited

by Mr. Grant to testify today regarding the reallocation of the costs of a due process hearing. (Attachment 2)

Mr. Schauner indicated that a due process hearing can cost between $500 and $5,000, with the majority of the cost incurred by transcription of the record. (About $2.25 per page.) Mr. Schauner summarized that the amendments embodied in SB 109 attempt to address two issues: 1. More adequate compensation to the people who volunteer their time, and 2) cost reallocation.

Replying to a question, Mr. Schauner said that records have always been made in the cases with which he has been involved.

Ms. Pat Baker, Associate Executive Director and General Counsel, Kansas Association of School Boards, stated that although she does not object to the basic thrust of SB 109, she would like the Committee to consider some amendments to SB 109 as found in her testimony in Attachment 3.

Mr. Chuck Stuart, representing United School Administrators of Kansas, said that his organization supports the raise to $150 per day for hearing committee members, but it cannot support the shift of the major cost of such hearings to the board of education. He pointed out that sharing the expenses makes for more responsible decisions by the parties requesting such hearings. (Attachment 4)

Following a call for additional conferees, the Chairman announced that the hearing on SB 109 was concluded.

SB 143 Teachers, time requirements for hearings upon nonrenewal or termination of contracts.

The Chair asked the Committee to turn its attention to SB 143 and yielded to Senator Dave Kerr, who had requested the Committee to introduce SB 143.

Senator Kerr said the key to SB 143 can be found on page 2, lines 3, 4, and 5. He explained he had been informed by a local school district that occasionally it has had problems in getting hearings to commence. Although there are time limitations on appointments of the various people who hear the cases, he acknowledged, there is no time limit on when the hearing must be held; and he understands some cases are delayed for as long as a year. Senator Kerr said SB 109 primarily imposes a 45-calendar-day time limit after designation of the appointment of the third hearing committee member in order for the hearing to actually be held. Senator Kerr said the bill also clarifies calendar days.

The Chair informed members that the Committee would hear conferees on SB 143 before returning to discussion on the bill.

The Chair called upon Mr. Chuck Stuart, representing United School Administrators of Kansas. Mr. Stuart said he not only confirms his organization's support of SB 143 but is very receptive to the idea of imposing a time frame during which the committee must make its decision after the committee has concluded its hearing. (Attachment 5)

Ms. Pat Baker, Associate Executive Director for the Kansas Association of School Boards, appeared in support of SB 143. Ms. Baker said that if due process is to be meaningful, then it also should be expeditious. Ms. Baker called Committee attention to a proposed amendment to SB 143 and described it as a technical amendment, because she felt it may have been overlooked when the bill was drafted. (Attachment 6)

The Chair recognized Mr. David Schauner, General Counsel, Kansas-National Education Association. Mr. Schauner said although he believes the current

due process system is "broken", the change proposed in SB 143 is not a "fix". Speeding up the process, he said, probably will tend to discourage rather than encourage people to use the system. If anyone suffers during the delay, he said, it is the teacher and not the board. (Attachment 7) Mr. Schauner urged the Committee to reject SB 143.

The Chair adjourned the meeting.

SENATE EDUCATION COMMITTEE

TIME: 1:30 p.m. PLACE: 123-S DATE: Wednesday, March 6, 1991

GUEST LIST

NAME	ADDRESS	ORGANIZATION
Nicholas Andre' Haney	6416 Rosedale KCK 66104	Page - Ft. Schlagle HS
Shane Lance Turner	6315 Rowland KCK 66104	Page - B.D. Kanan
Kim Cates	Topeka	KNEA
Craig Grant	Topeka	K-NEA
Pat Baker	Topeka	KASB
DAVID SCHAUNER	TOPEKA	KNEA
Marjorie Blanfuss	Lawrence	K-NEA
Brella Highfill/Scott	Topeka	USA
Merle Haas		KACC
Jacque Oakes	Topeka	SDE
Cindy Kelly	Topeka	KASB
Robin Nichols	Wichita	USD 259
CHUCK STUART	TOPEKA	U.S.A.
Chuck Tilman	Topeka	KNEA
Jennifer Thomas	Topeka	KNEA
Marjorie Jantz	Prairie Village	Jo. Co. Comm. on Aging
Kristie Wardell	Topeka	ASK
Matt Truell	Topeka	AP
Char C Burnett	Topeka	USD501
Helen Stephens	Pl	USD 229
Don Mermes	TOPEKA	DOB
Tim Caughlan	Topeka	Sen Jerry Karr's office

KA[illegible]-NATIONAL EDUCATION ASSOCIATION / 715 W. 10TH STREET / TOPEKA, KANSAS 6661[illegible]6

Craig Grant Testimony Before The
Senate Education Committee
Wednesday, March 6, 1991

Thank you, Mr. Chairman. I am Craig Grant and I represent Kansas-NEA. I appreciate this opportunity to visit with the committee about SB 109.

SB 109 was introduced by this committee at Kansas-NEA's request, and we thank you for doing so. There are two policy changes in SB 109. The first is incorporated in lines 27 through 31 of page one and would change the compensation from the $35 compensation per day to a $150 per day fee. The second change is contained in each section and indicates that the board of education will be responsible for the cost incurred at the hearing.

I will speak briefly to the increased stipend and our general counsel, Mr. David Schauner, will speak to the change in responsibility for hearing costs. We do not have many due process cases in this state. Our research finds that there have only been 24 in the last five years. However, it is getting more and more difficult to find qualified citizens willing to serve for this amount of compensation. Especially in the case of the third party, who is the chair and who runs the meeting, we are having trouble. Generally the best chair is one who has some legal background and training, but those people have to make a great financial sacrifice to serve.

I believe both sides want the best qualified people serving as the hearing panel members and, as such, should be willing to allow this increased compensation. SB 109 will accomplish that goal.

Mr. Schauner will speak to the second policy, but I hope that the committee will act favorably on SB 109. Thank you for listening to the concerns of our teachers.

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Telephone: (913) 232-8271

David M. Schauner Testimony Before The
Senate Education Committee
Wednesday, March 6, 1991
Re: Senate Bill No. 109

Thank you Mr. Chairman. My name is David Schauner and I represent Kansas-NEA. I appreciate this opportunity to visit with the Committee in support of Senate Bill No. 109. This bill would remedy that portion of the statutory due process scheme (K.S.A. 72-5436 et seq.) which relates to the costs of hearings provided to career teachers.

The current statutory scheme provides that each party bears the cost of its nominee to the due process panel. The costs of the committee chairperson are borne equally by the parties. In addition, the cost for transcription of the due process proceedings under the current statutory scheme is shared equally by the parties.

In a federal lawsuit captioned Rankin v. Independent School District No. 1-3, Noble County, Oklahoma, 876 F.2d 838 (1989), the United States Court of Appeals, Tenth Circuit, found that the Oklahoma statute requiring teachers to pay half the cost of a post termination hearing violated due process. The Oklahoma statute was patterned after the Kansas statute. I have attached for your information a copy of the Rankin decision.

In short, the Court reasoned that the statutory scheme requiring a teacher to pay an unrestricted amount for that which they are constitutionally entitled, could not withstand the strict scrutiny of the Court. Citing Boddie v. Connecticut, 401 U.S. 371,

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91 S.Ct. 780, 28 L.Ed2d 113 (1971), the Tenth Circuit found that a ". . . state statute imposing a significant hurdle to that means [due process] must be justified by 'a countervailing state interest of overriding significance'." The Rankin Court found that there was no countervailing state interest of overriding significance that would support requiring Rankin or anyone else in his circumstance to pay an unrestricted amount for the constitutional due process to which they were entitled. The Court reasoned that the chilling effect of the penalty in Rankin was magnified because a tenured teacher's potential liability for costs is unrestricted and is the result in part to factors outside his control. The Court went on to conclude that the statute challenged is unconstitutional on its face because it imposes a significant and unjustified open-ended penalty on the exercise of a constitutional right. In light of the fact that the Kansas statute and the Oklahoma statute are identical in that they require allocation of unrestricted costs between the employing school district and the tenured teacher, the Kansas statute does not withstand constitutional scrutiny under the Rankin test.

The amendments proposed in Senate Bill 109 are designed to remedy the constitutional defects of Kansas Statutes Annotated 72-5440.

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The proposed compensation of $150.00 for each day of actual attendance at the hearing for each member of the hearing committee is not court imposed. The Rankin Court did not address the question of what compensation level was appropriate. The Court only addressed the issue of who should pay the compensation and other expenses connected with the due process hearing. The Court clearly stated that those costs of committee members and, by analogy, other costs related to the hearing process were properly payable by the state entity (the school board).

The state, through the school board, does have an affirmative obligation to furnish any career teacher with a due process hearing when they take action adverse to the teacher's liberty or property interests. It is clear that a career teacher's liberty and property interests are at stake when a Board of Education terminates or nonrenews such an employee. The stigma attaching to such action is in many cases the end of the teacher's career.

In addition, the individual teacher's actual ability to pay, which was a matter of dispute in the Rankin case, was found to be irrelevant in determining whether the state (school board) can show a compelling interest in requiring him to do so. It makes no difference whether the career teacher can afford to pay the costs, or the costs are being paid by someone else on the teacher's behalf. The chilling effect of an open-ended and financially burdensome statute cannot be justified on that basis.

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In conclusion, without the proposed amendments in Senate Bill 109, the Kansas Due Process Act imposes a substantial and open-ended financial burden on the right to procedural due process and must be narrowly tailored so as to impose no greater burden than necessary on the recipient. The current Kansas statute does not meet that burden. The amendments proposed by Senate Bill 109 do remedy the cost sharing defects in the current system.

Your support is requested for Senate Bill 109.

provisions therein." (Plaintiff's Exh. 1.) Under *Thurston*, mere awareness of the ADEA by a defendant is not enough to cause a violation of the Act to be willful. 469 U.S. at 127–28, 105 S.Ct. at 625–26.

Johnny Lee RANKIN,
Plaintiff–Appellant,

v.

INDEPENDENT SCHOOL DISTRICT NO. I–3, NOBLE COUNTY, OKLAHOMA, Bob J. Piguet, individually and in his official capacity as Superintendent of Independent School District No. I–3, Noble County, Oklahoma, Donald J. Green, Byron A. Phipps, Kenneth D. Caswell, each of them, individually and in their official capacities as Members of the Board of Education of Independent School District No. I–3, Noble County, Oklahoma, Donald W. Doyle, Edward Roberson, in their official capacities only as Members of the Board of Education of Independent School District No. I–3, Noble County, Oklahoma, Defendant–Appellees.

No. 87–1751.

United States Court of Appeals,
Tenth Circuit.

June 2, 1989.

Discharged teacher appealed from an order of the United States District Court for the Western District of Oklahoma, Wayne E. Alley, J., which dismissed his action against a school district, the district superintendent, and members of the district school board alleging that the nonrenewal of his teaching contract violated his First and Fourteenth Amendment rights. The Court of Appeals, Seymour, Circuit Judge, held that: (1) statute requiring teachers to pay half the cost of a posttermination hearing violated due process; (2) teacher was not entitled to be provided a hearing before state published stigmatizing reasons for his discharge; and (3) teacher's speech on school district's disciplinary policy was constitutionally protected.

Reversed and remanded.

Barrett, Senior Circuit Judge, concurred in part and dissented in part and filed opinion.

1. Constitutional Law ⇐278.5(3)
Schools ⇐133.15

Statute requiring tenured teachers to pay half the cost of a hearing concerning nonrenewal of their contracts placed impermissible burden on teachers' due process rights. 70 O.S.1981, § 6–103.10, subd. B; U.S.C.A. Const.Amend. 14.

2. Constitutional Law ⇐275(1)

Due process does not require hearing prior to publication of stigmatizing charges in connection with an adverse employment decision, insofar as employee's liberty interest is not implicated until the stigmatizing information is published. U.S.C.A. Const.Amend. 14.

3. Constitutional Law ⇐90.1(7.3)
Schools ⇐141(4)

Teacher's speaking out at public meetings concerning school's methods of punishing students, at time when community was greatly interested in school district's discipline policy, was constitutionally protected speech. U.S.C.A. Const.Amend. 1.

Alexander L. Meszaros (James B. Browne, James B. Browne and Associates, Oklahoma City, Okl., with him on the brief), Lexington, Ky., for plaintiff-appellant.

Stephen Jones (Craig Bryant, Jones, Bryant & Nigh, Enid, Okl., John Gladd and Oliver W. Arbogast of Gibbon, Gladd & Associates, Tulsa, Okl. with them on the brief) of Jones, Bryant & Nigh, Enid, Okl., for defendants-appellees.

Before McKAY, BARRETT, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

Johnny Lee Rankin brought this action under 42 U.S.C. § 1983 (1982) against Independent School District Number I-3, the District Superintendent, and members of the District school board. Rankin, a tenured teacher employed by the District, alleged that the nonrenewal of his teaching contract violated his First and Fourteenth Amendment rights by punishing him for the exercise of his right to free speech, and by depriving him of his liberty and property interests without due process. The district court granted defendants' motion for summary judgment on the due process claims, concluding that the Oklahoma statute requiring tenured teachers to pay half the cost of a due process hearing is constitutional and that Rankin waived his right to due process by failing to proceed under the statute. After Rankin presented his First Amendment case to the jury, the court granted defendants' motion for a directed verdict, concluding that Rankin had failed to produce any evidence of protected speech. On appeal, Rankin argues that he was denied due process (1) because the state statute imposes an impermissible burden on the due process rights of nonrenewed tenured teachers, and (2) because he was not provided a hearing before the state published stigmatizing reasons for his discharge. He also argues that (3) he presented sufficient evidence of protected speech to withstand a motion for directed verdict. We find merit in two of these contentions and reverse.

I.

DUE PROCESS

Rankin's right to due process protection in connection with his property and liberty interests is undisputed. As a tenured teacher, he had a constitutionally protected entitlement to his employment. Defendants concede that his nonrenewal on a charge of immorality [1] implicated his liberty interest as well. We address his two due process contentions in turn.[2]

A.

Rankin first argues that he did not waive his right to a due process hearing because the state unconstitutionally burdens that right. Under Oklahoma law, a tenured teacher who is not reemployed is entitled to have a hearing conducted by a hearing panel. *See* Okla.Stat., tit. 70 § 6-103.4 (1981). The three-member panel consists of a hearing judge selected jointly by the tenured teacher and the school board from a list of state-designated attorneys, *id.* § 6-103.5, plus one person selected by the teacher and one selected by the board, *id.* § 6-103.6 C. Both the teacher and the board have the right to have an official transcript of the hearing made. *Id.* § 6-103.7.6. The statute provides compensation for the hearing panel, and further states: "The local board of education and the tenured teacher *shall* each be responsible for fifty percent (50%) of the expenses and cost of the hearing and the official transcript, excluding attorney's fees of the parties involved." *Id.* § 6-103.10 B (emphasis added). The record contains evidence that, in addition to the cost of the transcript, the cost of the hearing includes up to $250 per day compensation for the hearing judge, $50 per day for each of the other panel members, and numerous miscellaneous per diem expenses. *See* rec., vol. III, at 4. The losing party has the right to appeal the decision to the state district court. *See* Okla. Stat., tit. 70 § 6-103.12. Rankin asserts that by requiring him to pay for the hearing which the

1. The immorality charge stems from an incident in the teachers lounge during which Rankin, in a heated argument with another teacher, swore either at the teacher or at a piece of office equipment.

2. We are not here concerned with the nature of the process due Rankin. *Lassiter v. Dept. of Social Serv.*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), cited by defendants, thus sheds no light on our inquiry. That case considered the requirements of due process under the circumstances, not whether the due process right itself was improperly burdened.

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District is required to give him, the cost-sharing statute imposes an impermissible burden on his right to due process.

When a state statute penalizes the exercise of a constitutional right, the statute is subject to exacting judicial scrutiny. *See, e.g., Meyer v. Grant,* — U.S. —, 108 S.Ct. 1886, 1891, 100 L.Ed.2d 425 (1988) (strict scrutiny of statute burdening plaintiff's First Amendment rights); *Smith v. Paulk,* 705 F.2d 1279, 1284 (10th Cir.1983) (strict scrutiny of statute penalizing plaintiff's exercise of constitutional right to interstate travel). Accordingly, the statute at issue here, which imposes a substantial and open-ended financial burden on the right to procedural due process, must be justified by a compelling state interest and must be narrowly tailored so as to impose no greater a burden than necessary.[3] *Smith,* 705 F.2d at 1284.

[1] Defendants have suggested no specific state interest, compelling or otherwise, beyond a general reference to the fairness of requiring Rankin to bear his share of the cost of a hearing. This cost-recoupment argument ignores the fact that it is *defendants' affirmative obligation* to furnish Rankin a due process hearing when they take action adverse to his liberty or property interests. Defendants have failed to demonstrate any compelling state interest in requiring Rankin to pay *an unrestricted amount* for that which they are constitutionally required to provide him. The trial judge likewise articulated no state interest upon which the statute could be upheld, basing his decision solely on his unsubstantiated belief that Rankin should have been able to afford the cost on his teacher's salary. *See* Rec., vol. IV, at 15. Not only is Rankin's *actual* ability to pay a matter of considerable dispute on the summary judgment record,[4] it is irrelevant to determining whether the state has shown a compelling interest in requiring him to do so.

Our conclusion that the statute here cannot withstand strict scrutiny is supported by the decision in *Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). The Court held in *Boddie* that mandatory court fees and costs imposed a significant burden on the ability of those unable to pay to obtain a divorce. The Court further held that in view of the fundamental nature of the right to adjust the marital relationship and the state's monopolization of the means of doing so, a state statute imposing a significant hurdle to that means must be justified by "a countervailing state interest of overriding significance." *Id.* at 377, 91 S.Ct. at 785. The Court summarily rejected the state's asserted interest in re-

3. The dissent starts off on the wrong foot by assuming the majority opinion is employing an overbreadth analysis. We do not do so. The overbreadth doctrine is inapplicable here. This doctrine has been "carved out in the area of the First Amendment." *Broadrick v. Oklahoma,* 413 U.S. 601, 611, 93 S.Ct. 2908, 2915, 37 L.Ed. 2d 830 (1973). In order to give the First Amendment "breathing space," *id.,* the Supreme Court "has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Id.* (quoting *Dombrowski v. Pfister,* 380 U.S. 479, 486, 85 S.Ct. 1116, 1121, 14 L.Ed.2d 22 (1965)). In the instant case, Rankin has not challenged the Oklahoma statute under the First Amendment. Nor has he alleged that while his own conduct is subject to regulation, the statute could conceivably be applied unconstitutionally to others. He contends that the statute *on its face* impermissibly burdens *his own* constitutional right to procedural due process. As set forth in the text *supra,* we have followed the precedent of both the Supreme Court and this circuit in applying strict judicial scrutiny to this claim to determine whether the statute is facially invalid.

4. In opposition to the motion for summary judgment, Rankin filed an affidavit stating that he could not afford the costs of the due process hearing. Rec., vol. I, doc. 25 at 3–4. Rankin had recently taken bankruptcy, and he had lost a child custody fight for which he owed attorneys fees. Rec., vol. IV, at 13–14. His attorney had advised him that a two or three-day hearing would cost him a thousand or fifteen hundred dollars. *Id.* at 14. Defendants argue that Rankin should have requested that the costs of the hearing be waived, if he could not afford to pay. Given the mandatory language of the statute (the parties "shall each be responsible for fifty percent (50%) of the expense"), we decline to hold Rankin responsible for failing to request a waiver.

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source allocation or cost recoupment.[5] *Id.* at 382, 91 S.Ct. at 788.

A tenured teacher's right to procedural due process protection of his liberty and property rights in his employment is as constitutionally substantial as the right to divorce. Moreover, the state here has created the need for the process by not renewing Rankin's contract. As in *Boddie*, the state provides no way to exercise the right other than in a manner penalizing those seeking to assert it.[6] We therefore decline to afford cost recoupment any greater weight here than the Court did in *Boddie*.

We reject defendants' attempt to bring this case within the holdings of *Ortwein v. Schwab*, 410 U.S. 656, 93 S.Ct. 1172, 35 L.Ed.2d 572 (1973) (per curiam), and *Otasco v. United States (In re South)*, 689 F.2d 162 (10th Cir.1982), *cert. denied*, 460 U.S. 1069, 103 S.Ct. 1522, 75 L.Ed.2d 946 (1983), because those cases are readily distinguishable. In *Ortwein*, the plaintiffs challenged a $25 filing fee required to obtain judicial review of agency decisions reducing their welfare benefits. The Court upheld the fee, pointing out that the right to increased welfare payments has far less constitutional significance than the interest burdened in *Boddie*, and that the free administrative hearing provided an alternative unburdened means of obtaining due process. *See* 410 U.S. at 659–60, 93 S.Ct. at 1174–75. Here, to the contrary, Rankin's right to due process is of weightier constitutional significance and the state provides no alternative means to that burdened by substantial cost. In *In re South*, we upheld a $60 filing fee imposed on creditors who initiate adversary bankruptcy proceedings. In so doing, we relied on "Otasco's ability to pay the fee, the nonfundamental nature of Otasco's interest and the government's legitimate interest in levying the fee." 689 F.2d at 166. Those factors compel a different result here.

Unlike the filing fee cases discussed above, the chilling effect of the penalty here is magnified because a tenured teacher's potential liability for costs is unrestricted and is the result in part of factors outside his control. The length of the hearing will depend upon the extent to which a school board offers evidence to support its decision. Moreover, even if a teacher prevails and decides to forego a transcript, the board has the right to request one for an appeal and to require the teacher to pay half the cost. For these reasons, we conclude that the statute challenged here is unconstitutional on its face because it imposes a significant and unjustified open-ended penalty on the exercise of a constitutional right.[7]

5. The dissent is correct in pointing out that the Court in *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), held the statute there invalid as applied, while the statute here is challenged as invalid on its face. However, that distinction is irrelevant to our citation to *Boddie*. The strict scrutiny test contains the same requirement when applied to either type of claim: the state must demonstrate a compelling state interest. *See, e.g., Boddie*, 401 U.S. at 377, 91 S.Ct. at 785 (state interest must be of "overriding significance"); *Smith v. Paulk*, 705 F.2d 1279, 1284 (10th Cir.1983) (statute must be justified by "compelling state interest"). Thus, the point we found significant in *Boddie*, that cost recoupment is not a compelling state interest, is not affected by the fact that *Boddie* involved a challenge to a statute as applied.

6. In *Winston v. City of New York*, 759 F.2d 242 (2d Cir.1985), the court considered facts more closely analogous to those before us. There, teachers facing charges giving cause for dismissal could either resign or challenge the charges in a hearing. Teachers who resigned while under charges received pension benefits, while those dismissed for cause did not. A teacher's exercise of the constitutional right to a hearing was thus chilled by the prospect that an adverse decision would result in the loss of pension benefits. The court balanced "the need for the challenged statute against its chilling effect on the exercise of the parties constitutional rights", *id.* at 246, and held that the automatic penalty "places an unconstitutional burden on a teacher's right to a hearing," *id.* at 245. Although the court employed a slightly different analysis than we do here, it reached the same result.

7. The dissent's suggestion that we certify the due process question to the Oklahoma Supreme Court is manifestly inappropriate. Under our Tenth Circuit Rule 27.1, this court may certify to the state court "questions arising under the laws of that state which may control the outcome of a case pending in the federal court." The dissent suggests that certification would allow the Oklahoma Supreme Court to decide the due process issue "either under the Oklahoma Constitution or the United States Constitution." Dissent, at 845. That the validity of the statute

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B.

[2] Rankin also contends that due process requires a hearing *prior* to the publication of stigmatizing charges in connection with an adverse employment decision. We disagree. When the termination of a public employee "is accompanied by public dissemination of the reasons for dismissal, and those reasons would stigmatize the employee's reputation or foreclose future employment opportunities, due process requires that the employee be provided a hearing at which he may test the validity of the proffered grounds for dismissal." *Miller v. City of Mission*, 705 F.2d 368, 373 (10th Cir.1983). Thus, one's liberty interest is not implicated until the stigmatizing information is published. While the advantages of a prepublication hearing should be obvious to a prudent public employer who wishes to avoid liability for a liberty interest deprivation, a name-clearing hearing may be constitutionally adequate even if it occurs after publication. *See, e.g., Codd v. Velger*, 429 U.S. 624, 627, 97 S.Ct. 882, 884, 51 L.Ed.2d 92 (1977); *Board of Regents v. Roth*, 408 U.S. 564, 573 & n. 12, 92 S.Ct. 2701, 2707 & n. 12, 33 L.Ed.2d 548 (1972); *Lentsch v. Marshall*, 741 F.2d 301, 303–04 (10th Cir.1984). We therefore reject Rankin's argument that procedural due process requires a prepublication hearing.

II.

FIRST AMENDMENT

Rankin challenges the district court's grant of a directed verdict for defendants on his First Amendment claim. In *Saye v. St. Vrain Valley School Dist. RE–IJ*, 785 F.2d 862 (10th Cir.1986), we addressed the standard of review applicable to a grant of a directed verdict when a plaintiff claims that an adverse employment decision violates her right to free speech. Although the protected status of the speech at issue is subject to our independent constitutional judgment, the sufficiency of the underlying historical facts upon which the constitutional claim is grounded is determined by the traditional standard of review. *Id.* at 865. Accordingly, we must view the historical facts most favorably to Rankin, giving him the benefit of all reasonable inferences to be drawn from the evidence. "A directed verdict is appropriate only when the facts and inferences, thus viewed, point so strongly in favor of one party that reasonable minds could not come to a different conclusion." *Id.*

In granting defendants' motion for directed verdict, the district court stated that there was "a total failure of proof in this case as to exactly, or even approximately, what was said, to whom, and under what conditions." Rec., vol. I, doc. 103, at 2–3. Relying on *Ewers v. Board of County Comm'rs.*, 802 F.2d 1242, 1246 (10th Cir. 1986), *rehearing granted on other grounds*, 813 F.2d 1583 (10th Cir.1987), the court concluded that a directed verdict was proper because "the record before the Court does not contain any particular evidence of protected speech." Rec., vol. I, doc. 103, at 3. In so doing the court adopted an overly restrictive standard unwarranted by *Ewers* and the law upon which *Ewers* is based.

In *Ewers*, we held that the trial court's submission of the plaintiff's First Amendment claim to the jury was erroneous on two interrelated grounds: the jury had no basis for a verdict when the court's instruction failed to identify the protected speech allegedly motivating the adverse action, and the record itself contained *no* evidence of any such protected speech. *Id.* at 1246–47. Our reference in *Ewers* to the "necessity of presenting precise evidence of the alleged protected conduct, or speech with a degree of specificity," *id.* at 1246, must therefore be read in the context of a total failure by either the judge or the plaintiff to identify the speech allegedly motivating the defendants' conduct toward the plaintiff.

under the federal constitution is a question of federal rather than state law is too obvious to require discussion. The validity of the statute under the state constitution, while undoubtedly a question of state law, is not a question in this case because Rankin has not challenged the statute as violative of the state constitution.

[3] The record in this case stands in clear contrast to the *Ewers* record. Rankin alleged that the nonrenewal of his contract was in retaliation for his speaking out on the District's method of disciplining its students. He presented evidence that following an incident in which a student was administered corporal punishment, public concern over school disciplinary practices ran high. Indeed, the evidence is undisputed that a school board meeting at which discipline was discussed began at 7:00 p.m. and ran until at least 3:00 a.m. The record contains testimony that Rankin spoke publicly on the issue of school discipline, both with parents and at school board meetings. In addition, there is evidence that Rankin was openly critical of the District for failing to have a written discipline policy and for failing to administer punishment even-handedly.

The parties and the district court agreed that the issue of student discipline was a matter of public concern in the District during the relevant period. "There exist few questions within the area of education which are of more interest to the public than the one which raises the possibility of the physical mistreatment of students in the community schools." *Bowman v. Pulaski Cty. Special School Dist.*, 723 F.2d 640, 644 (8th Cir.1983). However, plaintiff must also present evidence that his speech, by its content, form and context, was itself of general interest rather than of purely personal concern. *See Saye*, 785 F.2d at 866; *Wren v. Spurlock*, 798 F.2d 1313, 1317–18 & n. 1 (10th Cir.1986), *cert. denied*, 479 U.S. 1085, 107 S.Ct. 1287, 94 L.Ed.2d 145 (1987); *Wilson v. City of Littleton*, 732 F.2d 765, 768–69 (10th Cir.1984). Rankin met this burden with evidence that his speech was made publicly to parents and at school board meetings, that the speech occurred at a time of great general interest in the District's discipline policy and in the context of a public debate on the issue, and that the content of his speech contributed to that debate. *See Bowman*, 723 F.2d at 644–45.

The dissenting opinion's quotations and summarizations from the record support the above conclusion. It is not surprising that defendant board members who voted against Rankin "can't recall" whether Rankin spoke out at board meetings on the clearly volatile subject of disciplining school children. As the dissent recognizes, however, Donald Doyle, a board member who voted in favor of Rankin, clearly testified that:

> "Rankin had attended the board meetings and spoke on the problems of discipline (R., Vol. VII at p. 332); that the spanking of Theresa Johnson and others was a matter of concern in the community, *id.;* all the board members were concerned about Rankin speaking out on matters of discipline, *id.* at p. 342; Rankin's appearances at board meetings and statements about discipline were some of the things that irritated Dr. Piguet, *id.* at 348; Dr. Piguet never actually related that Rankin spoke too much or too often at meetings or any place else, *id.* at p. 352; the town was factionalized over 'the way stuff was handled at school,' *id;* and that Rankin was not, to his knowledge, a member of any group or faction, *id.*"

Dissent, at 852. In addition, Rankin testified that he spoke publicly about the need for a written, evenly-applied discipline policy, and two parents likewise testified that Rankin came to board meetings and spoke out on discipline, rec., vol. VIII, at 479–83, 513. The dissent inexplicably fails to view this evidence most favorably to Rankin, concluding instead that "there is a total failure of proof in this case as to exactly, or even approximately, what (constitutionally protected speech) was said, to whom, and under what conditions." Dissent, at 852. Yet, the record clearly reflects that the protected speech was Rankin's outspoken articulation of his views on the manner and even-handedness of discipline in the public schools ("what"), and that these views were expressed to parents and to the school board at public meetings ("to whom" and "under what conditions"). It is apparent that the content, form, and context of Rankin's speech was of public, not private, concern, and that Rankin's speech

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was therefore constitutionally protected.[8]

The dissent also claims there was no evidence that Rankin's speech on the subject was a motivating factor in his termination. However, "[t]he trial court's entry of a directed verdict for the District was based upon Rankin's failure to meet his initial burden, that of establishing protected speech." Brief of Appellee, at 28. The trial court's decision did not rest on any failure by Rankin to present evidence that his speech was a motivating factor in his termination, *see* rec., vol. I, doc. 103, at 3 (order granting defendants' motion for directed verdict), and defendants do not raise this issue on appeal. In any event, the record as quoted by the dissent reflects that Rankin's protected speech was a source of irritation to defendants, evidence which supports a reasonable inference that his speech was a motivating factor in their decision.

We conclude that the record here, viewed most favorably to Rankin, adequately identifies the constitutionally protected speech that Rankin claims was a motivating factor in the nonrenewal decision, and thus satisfies the concerns voiced in *Ewers*. His failure to offer evidence specifying the dates and the exact words of his speech is not therefore fatal to his cause of action. Accordingly, the district court erred in directing a verdict for defendants.[9]

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

BARRETT, Senior Circuit Judge, concurring in part and dissenting in part:

I concur in IB of the majority opinion rejecting Rankin's contention that procedural due process required a prepublication hearing.

I dissent from the majority's holding that (1) Oklahoma's statutory procedure, i.e., Okla.Stat. Tit. 70 § 6–103.4, *et seq.*, (1981), which provides a tenured teacher a hearing when his teaching contract is, for cause, to be terminated or not renewed is unconstitutional on its face because it imposes a significant and unjustified open-ended penalty on the exercise of a constitutional right, and (2) Rankin did provide evidence of the content, form, and context of his speech sufficient to enable the court to determine whether it was constitutionally protected.

I.

I do not agree with the majority's holding that the Oklahoma statutory procedure, Okla.Stat. Tit. 70 § 6–103.4, *et seq.*, (1981), providing a tenured teacher an independent hearing after the school board has given notice of its intention, for cause, either to terminate or not to renew the teacher's employment contract, is unconstitutional *on its face* because it assesses one-half of the costs of the proceeding to the teacher.

Facial overbreath challenges are "manifestly strong medicine" which must be employed "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). When a party asserts such a challenge, the overbreath "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615, 93 S.Ct. at 2918.

The majority states that the defendants have not demonstrated a compelling state

8. In determining whether a public employee's speech on a matter of public concern is constitutionally protected, a court must balance the employee's interest in exercising his First Amendment rights and the employer's interest in efficient government services. *See Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968); *Bowman v. Pulaski Cty. Special School Dist.*, 723 F.2d 640, 644–45 (8th Cir.1983). That balancing test is not at issue here. Defendants do not argue that the decision not to renew Rankin's contract was based on a conclusion that his speech was too disruptive; rather, defendants argue that Rankin's speech played no part in their decision. *See Saye v. St. Vrain Valley School Dist.*, 785 F.2d 862, 867 (10th Cir.1986).

9. Rankin also contends that the trial court erred in excluding evidence offered under Fed.R.Evid. 404(b) relevant to the First Amendment claim. In view of our holding that this case must be retried, and the possibility that this issue may not arise again in the same context, we decline to assess the merits of this claim.

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interest in requiring Rankin to pay one-half of the hearing costs. This presupposes that Rankin's entitlement to a due process hearing requires that the Board bear all of the costs of the hearing. I am not willing to write that requirement into the Oklahoma statute. If the causes given by the Board for the non-renewal of Rankin's contract should be found to be valid, there is no reason the Board should bear all of the costs of a proceeding requested by Rankin to challenge those causes. It also ignores the fact that Rankin elected not to accept the Board's invitation to meet with the Board to discuss the matters involved in the notice of his contract nonrenewal, notwithstanding the 3 to 2 vote of the Board members, and the fact that the statutory hearing panel of three judges is to be selected independent of the Board. Furthermore, it is uncontested that Rankin did not inform the Board of his inability to pay any portion of the costs of the statutory hearing. The defendants have stated categorically on the record that "[I]f he had, the defendants would have offered to assume the entire cost of the due process hearing." (R., Vol. II, Tab 51, p. 9). It was not until Rankin filed the instant suit that he executed an affidavit stating, *inter alia:* "7. That he could not and cannot afford the price of the due process rights provided by the statutes of the State of Oklahoma." (R., Vol. I, Tab 25). Such an affidavit is conclusory in nature. It does not contain facts relative to Rankin's financial status. There is nothing in the record on appeal which specifically relates to Rankin's inability to pay one-half of the hearing costs.

The majority relies on *Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) for its conclusion that the Oklahoma hearing statute cannot stand strict scrutiny and is unconstitutional *on its face* "because it imposes a significant and unjustified open-ended penalty on the exercise of a constitutional right." I reject this position.

The challenges in Boddie were not posited to the statutes on their face, but rather, and significantly, as applied. Thus, unlike the instant case, the *Boddie* plaintiffs established with concrete evidence that they were indigent and totally unable to pay the requisite costs and filing fees to bring divorce actions in Connecticut state courts. In *Boddie,* the Court found that the state's interest in allocating scarce resources and balancing the rights of the parties could not override the interest of the indigent plaintiffs in having access to the only route open for dissolving their allegedly untenable marriages. *Id.* at 381, 91 S.Ct. at 788. Further, the Court stated that "we wish to re-emphasize that we go no further than necessary to dispose of the case before us. A case where the *bona fides* of both appellants' indigency and desire for divorce are here beyond dispute. We do not decide that access for all individuals to the court is a right that is, in all circumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship." *Id.* at pp. 382–83, 91 S.Ct. at 788.

As previously observed, there is no evidence in our case beyond Rankin's self-serving conclusory statement to demonstrate his inability to pay one-half of the hearing costs. Under these circumstances, this court should refrain from striking down the Oklahoma statute, and particularly so in view of the fact that the identical due process challenge presented here may be decided on state constitutional grounds.

Federal courts should refrain from striking down state statutes as unconstitutional where the challenge to the statutes has not been presented to the state courts. Here, certification from this court to the Oklahoma Supreme Court is an available procedure. See, Okla.Stat. Tit. 20 § 1602, *et seq.* Such procedure would permit the Oklahoma Supreme Court to decide the issue either under the Oklahoma Constitution or the United States Constitution. § 1602, *supra,* provides, *inter alia,* that the Oklahoma Supreme Court may answer "questions of law of this state which may be determinative of the cause then pending"

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where there are no controlling Oklahoma state court decisions. I recognize that abstention is not necessary in a case such as this, but as a matter of comity, federal courts should stay their hands whenever it is feasible to refer the validity of a state statute to the state courts. In the instant case, the relevant facts concerning the due process challenge are not in dispute. This, then, in my view, presents a case whereby this court should decline to exercise it's power in favor of that of the Oklahoma Supreme Court. By exercising such restraint, the Oklahoma Supreme Court would be granted the initial opportunity to examine the Oklahoma statute here challenged and to adjudicate its constitutionality, both under the Oklahoma Constitution and the United States Constitution.

In *Imel v. United States*, 523 F.2d 853 (10th Cir.1975) this court observed that the proposed certification to the Colorado Supreme Court, while requesting an interpretation of doubtful state law, also improperly requested that court to answer a federal law question, i.e., whether the transfer of property arising from a property settlement agreement constitutes a taxable event for purposes of federal income taxation. Unlike the federal law question posed in *Imel* which was a question exclusively reserved to the federal courts, in the case at bar the federal constitutional challenge based on due process may also be presented and decided in state courts. Furthermore, just as there is no requirement that the state courts answer the questions certified, there is nothing in the law which requires the referral court to accept the answers to the questions certified.

The certification procedure would afford the Oklahoma Supreme Court the initial opportunity to judge the constitutionality of the challenged statutes in an important area of state function. It might significantly avoid unnecessary friction in federal-state relations. In *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987), the Supreme Court held in a 42 U.S.C. § 1983 action challenging a Texas state court ordered supersedeas bond under the equal protection and due process clause of the Fourteenth Amendment, that federal court abstention was required in light of the need to avoid a determination of federal constitutional questions if the state courts could resolve the case on state statutory or constitutional grounds. Furthermore, the Court stated that if the matter may not be resolved on state statutory or constitutional grounds, still the state courts are required to resolve federal constitutional questions. The Court observed that the state's interests in the proceeding were so important that abstention was required with regard to the comity between the states and the federal government. The Court emphasized that both the district court and the court of appeals failed to recognize the significant state interests involved, and further that when federal courts interpret state statutes in a way that raises federal constitutional questions, such a reading is not binding on state courts and may be discredited at any time. Finally, the court observed that Article VI of the United States Constitution declares that "the Judges in every state shall be bound" by the Federal Constitution, laws and treaties.

II.

The majority plainly misses the mark in holding, contrary to the district court, that Rankin provided evidence of the content, form, and context of his speech sufficient to enable the court to determine whether it was constitutionally protected. The record tells us otherwise. Furthermore, there is a total failure on the part of Rankin to show that his "protected speech" was the motivating factor in his contract nonrenewal.

It was plaintiff Rankin's obligation to establish that certain speech-expressions made by him and communicated to the defendants were constitutionally protected under the First Amendment. I agree with the trial court's finding that "[T]here is a total failure of proof in this case as to exactly, or even approximately, what was said to whom, and under what conditions." The district court correctly observed that jurors must be knowledgeable of the protected speech in order to find that such speech was the motivating factor in the

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action (nonrenewal of Rankin's teaching contract) being challenged. In my view, the majority has failed to recognize the legal burden imposed on Rankin and has ignored the trial court's precise factual determinations which are solidly supported by the record.

The majority opinion does not even pretend to identify any First Amendment speech made by Rankin which could be considered as the "motivating factor" for the Board's decision not to renew his contract, notwithstanding the fact that Rankin was legally charged with the burden of establishing that his constitutionally protected speech was the "motivating factor" in the adverse employment decision. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977); *Saye v. St. Vrain Valley School Dist. RE-1J*, 785 F.2d 862, 867 (10th Cir.1986). In my view, Rankin utterly failed to carry his burden of proof in his case-in-chief as required under *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Thus, I conclude that the district court quite properly granted the defendants' motion for a directed verdict.

At the close of the Rankin's case, the Board moved for a directed verdict. Counsel for the Board pointed out that there were two relevant matters which Rankin must have presented sufficient evidence of for the case to go to the jury. First, Rankin must show that he engaged in constitutionally protected speech; second, that the speech was a substantial and motivating factor in the non-renewal of his contract. (R. Vol. IX, p. 571.) Counsel for the Board observed that there were three points upon which Rankin based his argument of protected speech.

The first was an incident involving a boy named Henry Grant who apparently suffered from some form of leukemia. Mr. Rankin escorted the boy who started a scuffle with Henry Grant to the principal's office. Grant's parents were not notified of the incident. Counsel for the Board correctly pointed out that the evidence showed only that there was some talk of a lawsuit and that Rankin may have agreed to testify. However, no lawsuit was filed and there is no evidence that the Board members or the school superintendent knew of any involvement Rankin might have in the matter. Furthermore, there is no evidence of any protected speech on Rankin's part involving the matter.

The second occasion Rankin relied on was an incident involving Theresa Johnson. She was swatted and Rankin viewed the result of the blow. Apparently, a lawsuit was filed and Rankin indicated that he would be willing to testify, although the record is silent as to what he might testify to. Rankin was never called as a witness, nor was his name included in the witness portion of the pretrial order. The only evidence of any speech by Rankin in connection with that incident is that he spoke privately with Theresa's parents.

The third point was that Rankin spoke out generally on subjects relating to discipline at school board meetings. The evidence in that regard is very sketchy and vague. One witness, Mrs. Grant, did testify that she was at a school board meeting when Rankin spoke out against putting a boy out of school because of a disciplinary problem.

The trial judge pointed out that, in light of Mrs. Grant's testimony, there was not a total absence of evidence as to what Rankin stated at a board meeting. Counsel for the defendants argued, however, if that was the case, there was no evidence that Rankin's protected speech, if there was any, was a substantial and motivating factor in the Board's nonrenewal action.

The court, out of concern for the absence of evidence, inquired of Rankin's attorney what, specifically, was the protected speech he relied upon and what evidence there may be that the speech was the motivating factor for the Board's action. The responses were completely unsatisfactory and identified no specific evidence.

In granting the defendants' motion for a directed verdict, the court cited a passage

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from *Ewers v. Board of County Comm'rs*, 802 F.2d 1242 (10th Cir.1986) (consolidated cases No. 84-2437 and No. 84-2477), *reh'g granted on other grounds* (No. 84-2437), 813 F.2d 1583 (10th Cir.1987), *cert. denied*, —U.S. ——, 108 S.Ct. 704, 98 L.Ed.2d 655 (1988), which he believed to be particularly apposite. "The necessity of precise evidence of the alleged protected conduct or speech with a degree of specificity in a damage [suit] such as this is obvious: Jurors must be knowledgeable of the protected conduct or speech in order to find that the conduct was a motivating factor in the action being challenged." (R., Vol. IX, p. 598). The court found no evidence sufficient to go to the jury on the content, form and context of the protected speech as required by *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). The court noted that the record indicates a reasonable suspicion that Rankin may have been non-renewed for reasons other than those stated, but that it's "wholly speculative as to what those other reasons may be, personality conflict, a sense he wasn't part of the team, a generalized feeling of an uncooperative stance by Plaintiff as against the School Board or a sense that he simply was not as adequate a teacher as the School Board was willing to retain, notwithstanding his tenured status." (R., Vol. IX, p. 549). The court, having reviewed the evidence in the light most favorable to Rankin, found that there was no evidence of the content, form and context of any protected speech. Neither could the court find any evidence that any speech by Rankin was a motivating factor in the Board's non-renewal of his contract. I agree.

After reviewing the entire record with the district court's comments in mind, I conclude that there is no evidence of constitutionally protected speech which Rankin could rely upon in regard to the Board's decision not to renew his contract:

RANKIN—DIRECT TESTIMONY:

Q. Did you actually attend Board meetings and discuss discipline?

A. Yes, several times.

Q. Now, tell us, just tell the Jury what you would say at Board Meetings, what the problems were and what positions you took.

A. Well, it depended—it would depend upon what was being discussed at the time. The policy—it was just like they were going to pass the policy that whoever was the sponsor of an activity was required to make sure all students that were at the activity stay within the guidelines of the school district. That would mean, like if I went to a stock show, then I would be required to go out on the midway to make sure students from the school were not smoking or chewing tobacco or doing anything against school policy. And I stated at that time that I didn't have time to be a policeman and run around outside when I had my job to take care of the animals and prepare the students, make sure they got to the show ring on time and made sure their animals were fit to be shown.

(R., Vol. V, p. 20).

RANKIN—CROSS EXAMINATION:

Q. I see. Now, Mr. Rankin, you say that you attended a number of Board Meetings in which you discussed present at the Board, discipline policy, is that correct?

A. Yes.

Q. And you think that because you spoke out at those Board Meetings that that was a factor in their terminating you.

A. Yes.

Q. And what facts do you base that on?

A. On the opinion that I was a local citizen, that I would question purchases that were made of why they wanted to buy any type of equipment for the school, that I didn't feel like the school didn't have no need for an infrared security system, that's one of the purchases they wanted to spend $85,000 on a security system, why does the school need an infrared security system.

Q. Mr. Rankin, where in your lawsuit do you claim that you were fired because

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you opposed an $85,000 infrared security system.

A. There was none.

Q. I understand the basing of your claim is that you were fired because you criticized at the public meeting the Board's disciplinary policy as it related to students.

A. Yes.

Q. I asked you what information or facts you had, you answered the question by stating your opinion. Is that what you're basing it, on your opinion?

A. I was vocal at Board meetings and I felt like they resented the fact that I would question their decisions.

Q. And that's your opinion?

A. That's my opinion, yes.

(*Id.*, p. 59–60)

* * * * * *

Q. My question to you, sir: If in the three previous years some or all of these Board Members had voted with you and against Doctor Piguet, what caused them to change their mind in March of 84?

A. Well, the situations were different.

Q. I see.

A. I had become more vocal.

Q. Because you were coming to the Board Meetings?

A. Because I was present at the Board Meetings and because I was questioning some of the policies they were making, if they were really legitimate reasons.

(*Id.*, p. 77)

DOYLE (member of the School Board who voted to renew Rankin's employment contract)—CROSS EXAMINATION:

Q. In the executive session meeting was there comments from any of the Board Members or the Superintendent or the Principal with respect to Mr. Rankin's conduct or his appearances or his speaking out on matters of interest to the operation of the school?

THE COURT: Let's just add to that, matters of interest concerning discipline of children in the school.

A. I don't remember as a specific answer or question in the session directly about John Rankin due to the discipline matters, it was common knowledge; and part of these allegations, in my opinion, come through this.

(R., Vol. VIII, p. 393)

* * * * * *

DOYLE—CROSS EXAMINATION:

Q. Now, you say Mr. Rankin attended meetings and spoke on the discipline matters?

A. Yes. As I recall, we had three or four meetings that discipline was a pretty good issue in.

* * * * * *

Q. All right. What did he say at the first meeting?

A. I don't remember the specific, other than people expressed concerns and—

Q. How many people expressed concern at the first meeting that he spoke?

A. I would think there was several.

Q. How long did he speak?

A. Nobody spoke too awful long as an individual.

Q. Can you remember anything he said?

A. I can remember some words.

Q. What did he say?

A. I say I can remember some words, no words as such but more of the emotion.

(*Id.*, p. 424–25)

* * * * * *

Q. My question is what do you recall he said, not what other people said but what Mr. Rankin said at the second meeting.

A. As individual words, I don't remember; it involves two subjects, spanking—

Q. Do you remember he spoke on those two subjects or are you just recalling generally that's what other people talked about?

A. That's the only two subjects that was talked about as discipline.

Q. Do you have a memory of Mr. Rankin speaking on those two subjects?

A. I believe I do.

Q. What do you believe your memory tells you?

A. It involved a—or two problems, double standards and corporal punishment.

Q. All right. What did Mr. Rankin say on double standards?

A. Just the punishment involved whose child it was.

Q. Well, did he give any examples?

A. I don't remember.

Q. And on corporal punishment what did he say?

A. This I can't really remember, I think one overlaps the other one.

Q. At the third meeting, do you recall when that was that he spoke?

A. Do I remember him a-speaking at the meeting?

Q. At a third meeting, yes, sir.

A. I remember him speaking at a meeting, whether it was a third meeting I don't know.

Q. While Mr. Rankin was speaking at any of these meetings, did Donnie Green do anything in your presence that indicated that he was aggravated that Mr. Rankin was speaking?

A. Nothing verbally.

Q. Well, other than verbally what did he do?

A. I don't know whether uneasiness—

A. How was that expressed, Mr. Doyle?

A. I don't know, maybe the way a person sets or shifts or looks or as anybody uneasy may do.

Q. Can you be more specific than that?

A. Not really.

Q. How about Mr. Phipps, did he say or do anything that you could see or hear that would indicate that he was upset at any of these meetings that Mr. Rankin was speaking?

A. No.

Q. And, Mr. Caswell, did you see him or hear him do anything at these meetings while Mr. Rankin was speaking?

A. He wasn't on the Board.

Q. All right. How about Doctor Piguet, did you see him do anything or hear him say anything at the meeting that indicated he was upset with Mr. Rankin speaking at the meetings?

A. I believe the expression on his face and the way he would move, you could tell he was annoyed.

Q. You could tell he was annoyed.

A. Uh-huh.

Q. Okay. How could you tell that?

A. As you would tell if anybody was annoyed.

Q. Well, how did you know he was annoyed at Mr. Rankin?

A. They were talking.

Q. Who was talking?

A. I suppose when this discipline deal was going on.

Q. You mean Doctor Piguet and Mr. Rankin were talking?

A. They usually didn't talk directly to one another, somebody got up and said whatever they said.

Q. Well, I thought you said that with Doctor Piguet it was the expression on his face, not what he was saying.

A. Uh-huh.

Q. What was the expression on his face that made you think he was annoyed at Mr. Rankin?

A. Just an expression of annoyance.

(R., Vol. VIII, p. 427–30)

LAFOE (parent who attended board meetings)—DIRECT EXAMINATION:

Q. All right. You indicated you attended most of the Board Meetings. Did Mr. Rankin attend the Board Meetings?

A. I don't know that he attended all of them, but, yes, I seen him there.

Q. And at the Board Meetings would he speak out?

A. Yes, sir.

Q. Now, do you know whether or not John Rankin openly spoke out on issues involving discipline during that period of time?

A. You mean at the Board Meetings?

Q. At the Board Meetings or individually to parents.

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A. Yes, I mean a lot—a lot of people discussed it and I know he had discussed it, yes.

Q. Do you know of anyone you observed him being critical of at the Board Meetings or anywhere else?

A. I couldn't say right off, it's been two years ago.

(*Id.*, p. 479-80)

MRS. GRANT (Parent who attended School Board meeting)—CROSS EXAMINATION:

Q. Have you ever been at any Board Meetings where Mr. Rankin spoke out on issues of discipline or occurrences in the school?

A. Mr. Rankin—yes, I would say that Mr. Rankin, yes.

Q. Can you recall any specifics about what he might—subject matter or whatever he was talking about?

A. It's been so long ago, I think there was I think one of the times he was trying to help the Fink boy because they just wanted to totally put him out of school.

Q. Okay. How would he try to help the Fink boy, for example?

A. Well, there would be a time when people could speak and Mr. Rankin might, you know, stand up and, you know, say, couldn't we do this, or isn't there some way we could do that, or something like that order.

(*Id.*, p. 513)

During trial, Rankin called each of the five board members serving at the time that his contract was not renewed:

Kenneth Coswell, who voted not to renew Rankin's contract, testified, *inter alia,* that: he had attended several meetings prior to his election to the board and there was never, to his knowledge, any discussion by board members that people should not be so vocal about disciplinary matters within the schools (R., Vol. VII, p. 213); while on the board he never observed any board member or the superintendent, Dr. Bob Piguet, ever try to silence someone or try to keep someone from speaking their piece at a board meeting (*Id.*, p. 217); teachers frequently addressed board meetings and everyone had a chance to voice their opinions, *id.*, at 218; he did not remember Rankin ever addressing the board, *id.* at p. 220; he did not remember Rankin speaking to the board about student discipline, *id.;* he did not vote to terminate Rankin because he was allegedly speaking out on student discipline, *id.;* and that the main reason Rankin was fired was his failure to do his duty, his willful neglect, *id.* at p. 226.

Byron Phipps, who voted not to renew Rankin's contract testified, *inter alia,* that: Rankin had had a "cuss fight" with a teacher, an act for which he could not forgive Rankin (R., Vol. VIII at p. 277); he did not remember that anybody was "just out to see" that Rankin lost his job, *id.* at p. 282; he did not believe that people tried to justify Rankin's termination after the fact, *id.;* he did not remember Rankin speaking to the board about Theresa Johnson's paddling, *id.;* he did not recall Rankin speaking to the board at the January, 1985, meeting, *id.* at p. 285; he did not recall the board discussing during their January, 1985, executive committee meeting any comments that Rankin might have made relative to discipline problems at the school, *id.* at p. 285; Rankin's performance, both good and bad, was discussed during the March 4, 1985 meeting, *id.*, p. 288; and that he did not make a private investigation of the eight or nine reasons given by Dr. Piguet for not retaining Rankin. *Id.* p. 290.

Donald Green, a board member who voted not to renew Rankin's contract testified, *inter alia:* he did not remember Rankin attending board meetings and speaking out on discipline (R., Vol. VII at p. 315); it was possible that Rankin could have attended meetings which he did not remember, *id.;* discipline within the district was a subject of concern for parents during January, 1985, but he did not recall Rankin speaking about discipline during the January, 1985, board meeting, *id.* at p. 317; and that he knew of no instance where Dr. Piguet told patrons who were trying to speak about discipline to sit down and be quiet and not talk, *id.*

Donald Doyle, a board member who voted to renew Rankin's contract testified, *inter alia:* Rankin had attended the board meetings and spoke on the problems of discipline (R., Vol. VII at p. 332); that the spanking of Theresa Johnson and others was a matter of concern in the community, *id.;* all the board members were concerned about Rankin speaking out on matters of discipline, *id.* at p. 342; Rankin's appearances at board meetings and statements about discipline were some of the things that irritated Dr. Piguet, *id.* at 348; Dr. Piguet never actually related that Rankin spoke too much or too often at meetings or any place else, *id.* at p. 352; the town was factionalized over "the way stuff was handled at school," *id;* and that Rankin was not, to his knowledge, a member of any group or faction, *id.*

Edward Roberson, a board member who voted to renew Rankin's contract, testified, *inter alia:* he did not believe that the board had any formal or informal custom or policies during September, 1985—March, 1985 regarding the treatment of dissenters or people who disagreed with the actions of the board or administrators (R., Vol. VIII at p. 526); the board did discuss limiting how long a person could speak in view of the number of people attending the board meetings, *id.* at p. 527; parents who attended the board meetings were allowed to speak even when they were not on the agenda, *id.* at p. 528; and that anyone who wanted to speak to the board whether parent, teacher, contractor or member of the public, was allowed to do so, *id.* at pp. 529–30.

Patricia Jaynes, a teacher at the same school where Rankin was employed testified, *inter alia:* she was involved in an incident with Rankin during which he used a profanity (R., Vol. VII at p. 304); the incident was settled later during the same day and there were no hard feelings between them, *id.* at p. 305; she had seen Rankin at board meetings, *id.* at p. 307; she did not recall Rankin ever criticizing Dr. Piguet or any board members during a board meeting; she didn't recall Rankin ever standing up and criticizing any board policy at any board meeting; and that she didn't recall Rankin criticizing any teacher at any board meeting.

Thus, my detailed review of the record shows that the district court was correct in finding that there is a total failure of proof in this case as to exactly, or even approximately, what (constitutionally protected speech) was said, to whom, and under what conditions or that the speech was a motivating factor in the Board's decision not to renew Rankin's employment contract. I would affirm the district court's grant of the defendants' motion for a directed verdict.

WEST KEY NUMBER SYSTEM

SHEET METAL WORKERS HEALTH AND WELFARE TRUST FUND; Sheet Metal Workers Local No. 9 Pension Trust Fund; Sheet Metal Workers Local No. 9 Vacation Trust Fund; Sheet Metal Workers Training Fund, Inc., Plaintiffs–Appellants,

v.

BIG D SERVICE CO., a Colorado corporation, Defendant–Appellee.

No. 87–2468.

United States Court of Appeals, Tenth Circuit.

June 2, 1989.

Multiemployer benefit plans appealed from order of the United States District Court for the District of Colorado, Sherman G. Finesilver, Chief Judge, denying award of attorney fees incurred during garnishment proceedings against entity for whom employer had performed work even though employer had been found liable for delinquent plan payments. The Court of Appeals held that plans could recover fees

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KANSAS ASSOCIATION OF SCHOOL BOARDS

5401 S. W. 7th Avenue Topeka, Kansas 66606
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Testimony on S.B. 109
before the
Senate Committee on Education

by

Patricia E. Baker
Associate Executive Director/General Counsel
Kansas Association of School Boards

March 6, 1991

On behalf of the boards of education of schools throughout Kansas, I appreciate the opportunity to appear on Senate Bill 109.

The basic thrust of the bill is not objected to by KASB but we do suggest some amendments. While agreeing to pay the costs of the hearing, we also request that there be some limitation on those costs. Both the board and the teacher currently select a representative to serve on a due process panel. We suggest that those parties continue to be paid the per diem compensation allowed under the statute. We agree that an increased stipend for the hearing committee chairman might allow the parties to select persons with sufficient background and experience to oversee a fair and impartial hearing.

While we agree that a teacher should have access to the transcript of the hearing, the cost of providing a copy is often prohibitive.

KANSAS ASSOCIATION OF SCHOOL BOARDS
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SB 109
March 6, 1991

Finally, we recommend that the committee address the issue of who should be entitled to due process procedures. We recommend that starting with the 1992-93 school year only full-time teachers who have worked a probationary period of five years be covered by the Act. As we embark on school improvement with performance based education; site based management; increased accountability for schools and employees, everyone must look forward to some changes. Different skills and enhanced skills are going to be required of all of our personnel. There are going to be changes in curriculum; changes in emphasis of programs; changes in accountability standards. To make school improvement work, schools and employees must be given the flexibility to meet the expectations of the public and the legislature.

With the suggested amendments we recommend favorable consideration of Senate Bill 109. Thank you and I would be glad to answer any questions.

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Session of 1991

SENATE BILL No. 109

By Committee on Education

2-1

AN ACT concerning teachers; relating to the costs of hearings provided upon notice of nonrenewal or termination of contracts of employment; amending K.S.A. 1990 Supp. 72-5440 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1990 Supp. 72-5440 is hereby amended to read as follows: 72-5440. (a) For ~~attending~~ *appearing* before the hearing committee at a hearing, witnesses who are subpoenaed shall receive $5 per day and mileage at the rate prescribed under K.S.A. 75-3203, and amendments thereto, for miles actually traveled in going to and returning from attendance at the hearing. The fees and mileage for the attendance of witnesses shall be ~~borne~~ *paid* by the party calling the witness, except that fees and mileage of witnesses subpoenaed by the hearing committee shall be ~~borne equally~~ *paid* by the ~~parties~~ *board*. Witnesses voluntarily ~~attending~~ *appearing* before the hearing committee shall not receive fees or mileage for attendance at the hearing.

(b) ~~Each member of the hearing committee shall be paid *per diem* compensation, *of $150 for each day of actual attendance at the hearing or at any meeting of the hearing committee held for the purpose of performing the hearing committee's official duties. In addition to compensation, each member of the hearing committee shall be paid* subsistence allowances, mileage and other expenses as provided in K.S.A. 75-3223, and amendments thereto~~. The costs for the services of members of the hearing committee shall be ~~borne by the parties as follows: (1) For each member who is designated by a party, the party designating the member; and (2) for the third member, by the parties equally~~ *paid by the board*.

(c) Testimony at a hearing may, and upon the request of either party shall, be taken by a certified shorthand reporter ~~or electronically recorded,~~ and shall be transcribed upon request of either party or upon direction by a court. ~~*The costs for transcription shall be paid by the board. The teacher shall be provided with a copy of the transcript upon request and the cost shall be paid by the board.*~~

(b) Each member of the hearing committee shall be paid compensation, subsistence allowances, mileage and other expenses as provided in K.S.A. 75-3223, and amendments thereto, except that the chairperson of the committee may be paid per diem compensation of $150 for each day of actual attendance at the hearing or at any meeting of the hearing committee held for the purpose of performing the hearing committee's official duties.

(c) "The cost of transcription shall be paid by the board, and the board shall make the transcript accessible to the teacher. If the teacher desires a copy of the transcript, the cost of the copy shall be paid by the teacher."

(d) All costs of a hearing which are not specifically allocated in this section shall be ~~borne equally by the parties~~ *paid by the board*.

~~Sec. 2. K.S.A. 1990 Supp. 72-5440 is hereby repealed~~.

Sec. ~~3.~~4. This act shall take effect and be in force from and after its publication in the statute book.

Sec. 3. K.S.A. 1990 Supp. 72-5440 and K.S.A. 72-5445 are hereby repealed.

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Section 2. K.S.A. 72-5445 is hereby amended to read as follows:

(a) Subject to the provisions of K.S.A. 72-5446, the provisions of K.S.A. 72-5438 through 72-5443, and amendments thereto, apply only to: ~~(1) Teachers who have completed not less than two consecutive years of employment, prior to the effective date of this act, in the school district, area vocational-technical school or community college by which the teacher is currently employed; and (2) teachers who have completed one year of employment, prior to the effective date of this act and, consecutively thereto, one year of employment, after the effective date of this act, in the school district, area vocational-technical school or community college by which the teacher is currently employed; and (3) teachers who have completed not less than three consecutive years of employment, after the effective date of this act, in the school district, area vocational-technical school or community college by which the teacher is currently employed; and (4) teachers who have completed not less than two consecutive years of employment, after the effective date of this act, in the school district, area vocational-technical school or community college by which the teacher is currently employed if at any time prior to the current years of employment requirement of provision (1), (2) or (3) in any school district, area vocational-technical school or community college in this state.~~

(1) Full-time teachers who began teaching in the school district, area vocational technical school or community college where they are currently employed prior to the 1992-93 school year, who completed not less than three consecutive years of employment and were offered a fourth contract;

(2) Full-time teachers who begin teaching any time after the beginning of the 1993-94 school year who complete not less than 5 consecutive years of employment, and are offered a sixth contract in the school district, area vocational technical school or community college in which they are employed;

(3) Full-time teachers who complete not less than two consecutive years of employment in the school district, area vocational technical school or community college in which the teacher is currently employed, if at any time prior to the current employment the teacher has completed the requirements of provisions (1) or (2) in any school district, area vocational technical school or community college in this state.

(b) For the purposes of this section the term "full-time teacher" means any teacher who:
(1) is currently teaching on at least a .75 time contract for the full school year, or (2) is currently teaching on a less than .75 time contract, but has previously taught on a full time basis for not less than two years in the school district, area vocational technical school or community college in which the teacher is currently employed.

(~~b~~)(c) Any board may waive, at any time, the years of employment requirements of subsection (a) for any teachers employed by it.

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USA
UNITED SCHOOL ADMINISTRATORS OF KANSAS

SB 109

March 6, 1991

Testimony presented before the Senate Committee on Education
by Charles L. "Chuck" Stuart, Legislative Liaison
United School Administrators of Kansas

Mr. Chairman and members of the committee, thank you for the opportunity to respond to SB 109. Although there is a part of SB 109 which we feel is good, overall we are forced to oppose it.

SB 109 establishes a rate of $150 per day for hearing committee members when a teacher chooses to have a hearing upon receipt of a notice of non-renewal or termination of contract. We support this change since persons agreeing to serve on such a committee should be adequately reimbursed for their time and expense.

We cannot support the shift of the major part of the cost of such hearings to the board of education. These hearings do not usually happen in isolation between the teacher and the board. Most teachers who seek such hearings are advised by their labor organization and we assume such organizations have funds set aside for such hearing costs.

Having no responsibility for the cost of such hearings could lead to more hearings being sought. Most people make more responsible decisions if they have some financial responsibility for the process.

United School Administrators of Kansas urges you to retain the current financial responsibility, or at least make the teacher responsible for the cost of the hearing officer the teacher names.

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820 Quincy, Suite 200 Topeka, Kansas 66612 (913) 232-6566

USA
UNITED SCHOOL ADMINISTRATORS OF KANSAS

SB 143

March 6, 1991

Testimony presented before the Senate Committee on Education
by Charles L. "Chuck" Stuart, Legislative Liaison
United School Administrators of Kansas

Mr. Chairman and members of the committee, thank you for the opportunity to lend our support to SB 143 which could hasten the decision of the hearing committee convened to consider non-renewal or termination of a teacher's contract.

Tightening the time frame to name two committee members, and they in turn to name the third member, is a good proposal. Holding the committee hearing within 45 days is also good for both parties.

Although no mention is made of a time frame for the committee decision, we believe it is in the best interest of both parties to make this decision as quickly as possible. If an early decision is made, both the teacher and board can make plans before a new school year begins.

For the board and administration, a quick decision condensing the time frame in which a teacher is in a questionable position, is beneficial for the educational process. It is not realistic to assume that people don't "choose sides" in such a process. There are usually fellow teachers who support the teacher being non-renewed or terminated, while others feel a change is in the best interest of children. Shortening the time for potential teacher conflict can only benefit the total educational process.

We urge your favorable consideration of SB 143.

sb143/bsm

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Testimony on S.B. 143
before the
Senate Committee on Education

by

Patricia E. Baker
Associate Executive Director/General Counsel
Kansas Association of School Boards

March 6, 1991

Thank you, Mr. Chairman for the opportunity to appear in support of Senate Bill 143. The provisions of this bill would ensure a more expeditious handling of due process hearings for teachers. Currently there is no timeline required for holding a hearing on the nonrenewal or termination of a teacher. The result is often that hearings are not held until a new school year has begun. In some instances the time between notice of nonrenewal and the actual hearing is in excess of a year.

I recommend that the amendment shown on the attached be adopted. Since the board of education is charged with ensuring that due process is granted to the teacher, we feel they should have the right to seek appointment of a hearing committee chairman.

Thank you.

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Session of 1991

SENATE BILL No. 143

By Committee on Education

2-6

AN ACT concerning teachers; imposing a period of time requirement for the holding of hearings provided upon notice of nonrenewal or termination of contracts of employment; amending K.S.A. 72-5439 and K.S.A. 1990 Supp. 72-5438 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1990 Supp. 72-5438 is hereby amended to read as follows: 72-5438. *(a)* Whenever a teacher is given written notice of intention by a board to not renew or to terminate the contract of the teacher as provided in K.S.A. 72-5437, and amendments thereto, the written notice of the proposed nonrenewal or termination shall include (1) a statement of the reasons for the proposed nonrenewal or termination, and (2) a statement that the teacher may have the matter heard by a hearing committee upon written request filed with the clerk of the board of education or the board of control or the secretary of the board of trustees within 15 *calendar* days from the date of such notice of nonrenewal or termination.

(b) The written request of ~~the~~ *a* teacher to be heard *as provided in subsection (a)* shall include ~~therein~~ a designation of one hearing committee member. Upon the filing of any such request, the board shall designate, within 15 *calendar* days thereafter, one hearing committee member. The two hearing committee members shall designate a third hearing committee member who shall be the chairperson and who shall in all cases be a resident of the state of Kansas. In the event that the two hearing committee members are unable to agree upon a third hearing committee member within five *calendar* days after the designation of the second hearing committee member, a district judge of the home county of the school district, area vocational-technical school or community college shall appoint *as expeditiously as possible*, upon application of the teacher, the board, or either of the first two hearing committee members, the third hearing committee member. Such appointment may be made by the district judge from a list, which shall be compiled and maintained by the commissioner of education, of impartial persons who are representative of the public and who are qualified to serve as hearing committee members.

Sec. 2. K.S.A. 72-5439 is hereby amended to read as follows: 72-5439. The hearing provided for ~~in~~ *under* K.S.A. 72-5438, *and amendments thereto, shall be held within 45 calendar days after the designation or appointment of the third hearing committee member and* shall afford procedural due process, including the following:

(a) The right of each party to have counsel of such party's own choice present and to receive the advice of such counsel or other person whom such party may select~~, and~~;

(b) the right of each party or such party's counsel to cross-examine any person who provides information for the consideration of the hearing committee, except those persons whose testimony is presented by affidavit~~, and~~;

(c) the right of each party to present such party's own witnesses in person, or their testimony by affidavit or deposition, except that testimony of a witness by affidavit may be presented only if such witness lives more than ~~one hundred (100)~~ *100* miles from the location of the unified school district office, area vocational-technical school or community ~~junior~~ college, or is absent from the state, or is unable to appear because of age, illness, infirmity or imprisonment. When testimony is presented by affidavit the same shall be served upon the clerk of the board of education or the board of control, or the secretary of the board of trustees, or the agent of the board and upon the teacher in person or by first class mail to the address of the teacher which is on file with the board not less than ~~ten (10)~~ *10 calendar* days prior to presentation to the hearing committee~~, and~~;

(d) the right of the teacher to testify in ~~his or her~~ *the teacher's* own behalf and give reasons for ~~his or her~~ *the teacher's* conduct, and the right of the board to present its testimony through such persons as it may call to testify in its behalf and to give reasons for its actions, rulings or policies~~, and~~;

(e) the right of the parties to have an orderly hearing~~;~~; *and*

(f) the right of the teacher to a fair and impartial decision based on substantial evidence.

Sec. 3. K.S.A. 72-5439 and K.S.A. 1990 Supp. 72-5438 are hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

David M. Schauner Testimony Before The
Senate Education Committee
Wednesday, March 6, 1991
Re: Senate Bill No. 143

Thank you Mr. Chairman. My name is David Schauner and I represent Kansas-NEA. I appreciate this opportunity to visit with the Committee in opposition to Senate Bill No. 143. This bill seeks to amend K.S.A. 72-5439 and to mandate that the due process hearing provided for certified, nonprobationary teachers under K.S.A. 72-5438 be held within 45 calendar days after the designation or appointment of the third hearing committee member.

In my position as General Counsel for the Kansas-NEA, I believe I have been personally involved in more due process hearings than any single attorney in Kansas. My comments about the proposed amendment are based on that experience.

My opposition to Senate Bill 143 is based on my belief that it would provide no worthwhile change in the teacher due process law.

The following issues should be considered:

1. The 45 calendar day timeline is unrealistic. The average due process hearing lasts 2 to 3 days,involves hearing testimony from between 5 and 35 witnesses, and receiving testimony concerning more than 25 exhibits.[1]

[1] These figures are attempts to represent the "average" due process hearing, and are not intended to be an absolute number for each due process hearing conducted.

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2. The current Kansas due process procedure (K.S.A. 72-5436 et seq.) provides the teacher with one opportunity to develop the "record" on which their professional future is to be determined. Creating artificial timelines for the conduct of the hearing creates a substantial disadvantage to the teacher. The time needed to prepare for the typical due process hearing is inconsistent with the proposed amendment.

A Board of Education that elects to nonrenew a career teacher has theoretically done its homework in advance of its decision. The artificial timeline proposed in Senate Bill 143 will substantially disadvantage the career teacher's opportunity to defend against the Board's action. The typical hearing includes exhibits that cover several school years and a laundry list of complaints. This bulk of material requires time to sort through and investigate prior to the date of the actual hearing.
A thorough investigation, presentation, and analysis of facts must take place to ensure that the career teacher is being fairly treated.

3. The proposed amendment will be only "directory" and not mandatory. The current due process statute contains a number of timelines that are not enforceable. For example, the teacher's nominee to the due process panel must be appointed within 15 days from the date of the nonrenewal notice, and the Board of Education's nominee within 15 days after receipt of the teacher's

request for a hearing. The due process hearing committee is required to render its decision within 30 days after the close of the hearing. In practice, the hearing committee's "leave the record open" until the written transcripts of the proceedings have been provided to the parties and briefs are written and submitted to the committee. This is typically about 60 days. The committee then has 30 days to render its recommendation. None of these timelines (other than the teacher's duty to nominate) are enforceable.

4. Senate Bill 143 does not take into account the practical difficulty of scheduling a hearing.

Under the current statutory scheme, three persons serve on the due process panel, each side is entitled to a legal representative and all parties must find a time and place available to all in order to conduct a hearing. Scheduling hearings in the months of June, July, and August is difficult due to existing conflicts, vacation schedules, and the general press of other business.

5. The current Kansas statutory due process scheme does not provide continued pay for the teacher while the due process hearing is pending. Thus, the employing Board of Education suffers no loss by the due process hearing being held in the fall of the ensuing school year. In every case with which I am familiar, the Board of Education has hired a replacement for the nonrenewed teacher to begin work at the start of the ensuing school year.

The current Kansas due process scheme cries out for a substantial overhaul. The scheme is arguably unconstitutional as it lacks a satisfactory decision making process, it does not promise substantive due process, it lacks recall rights for teachers who are RIF'ed, and its low threshold of proof required of the nonrenewing Board of Education all make the current system highly suspect in the eyes of the career teacher. Instead of providing meaningful relief in these areas, Senate Bill 143 only attempts to "hurry up" the flawed process.

Kansas courts have repeatedly said that the purpose of the Teacher Tenure Act is to protect competent and worthwhile employees from unjust dismissal. Yet, the current statutory scheme provides the employing Board of Education with broad authority to dismiss career employees with a minimum of expense and delay.

This Committee should seriously entertain placing the entire matter of amending the Teacher Tenure Act in the hands of an interim committee whose charge would include adopting measures which would make the process meaningful, fair, and prompt.

In summary, Senate Bill 143 neither accomplishes its stated purpose of speeding up the current system, nor does it address the inherent flaws in the current scheme. I believe the current due process system is broken, but the change proposed in Senate Bill 143 is not a "fix."

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