Approved: March 21, 1995
Date

MINUTES OF THE SENATE COMMITTEE ON EDUCATION

The meeting was called to order by Chairperson Dave Kerr at 1:30 p.m. on March 14, 1995 in Room 123-S of the Capitol.

All members were present.

Committee staff present: Ben Barrett, Legislative Research Department
Avis Swartzman, Revisor of Statutes
Brenda Dunlap, Committee Secretary

Conferees appearing before the committee: Mark Tallman, KASB
Fred Marten, Clearwater Principal
Jim Barrett, Superintendent USD #466
James Chrisman, Superintendent, Galena
Paul Lira, Board Member, Santa Fe Trail
Jan Collins, Superintendent, Highland
Maureen Weiss, Pres. Elect, KS Assoc. of School Boards
Gerry Henderson, USA

Others attending: See attached list

SB 136 - Teachers decisions at close of hearings on non-renewal or termination of contracts

Mark Tallman, Kansas Association of School Boards explained the bill that was introduced at KASB's request. He first cited a 1980 Kansas Supreme Court decision *Gillett v. U.S.D. No. 276*. In *Gillett*, the court stated: "We hold that under the Kansas due process statute, a tenured teacher may be terminated or non-renewed only if good cause is shown, including any ground which is put forward by the school board in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the school board's task for building up and maintaining an efficient school system." Further, "the purpose of the due process hearing granted a teacher by statute is to develop the grounds that have induced the board to give the teacher notice of its desire to discontinue his/her services, and to afford the teacher an opportunity to test the good faith and sufficiency of the notice." The purpose of the hearing, in other words, is not to substitute for the school board's judgment, but to determine whether the school board has "good cause," which means any ground put forward in good faith and not arbitrary, irrational, unreasonable or irrelevant.

To conduct this review of the board's action, the Legislature created a three person hearing panel. At first, the panel could only recommend that the school board reverse its decision about firing a teacher. The law was then amended to allow the panel to reverse the board by a unanimous decision. In 1991, the law was amended again to allow the panel to reverse the board by a majority opinion. The hearing panel was composed of one member chosen by the teacher one member chosen by the school board, and a third member chosen by the first two. KASB supported an amendment to the due process law in 1992 that created a single hearing officer, instead of a panel. Changes in the due process law were proposed to ensure that teachers had recourse against unfair, arbitrary actions by school boards. However, these amendments were never presented to change the authority of the hearing process, only its form. Nor was it suggested the authority of the school board would be changed, only the way its decision would be reviewed.

In 1994, the Kansas Court of Appeals ruled that the Legislature did change the power of the hearing process. In *U.S.D. no. 434 v. Hubbard*, the court said "the primary responsibility for determining "good cause" rested with the school board." Under the *Hubbard* decision, the school board no longer determines "good cause," with a hearing panel to review whether or not the board acted in good faith. Instead, the hearing officer determines "good cause," and the court can only review whether or not the hearing officer (or committee) acted in good faith. In other words, the court no longer considers whether or not the school board acted in good faith to terminate a teacher. It can only consider whether or not the hearing committee or officer acted in good faith.

The local school boards have lost the ability to apply their own standards, as the elected representatives of the community, in determining good cause based on "the school board's task of building up and maintaining an efficient school system." Instead, this decision has been transferred to an unelected, unaccountable hearing officer who has no responsibility for the operation of the district.

SB 136 would make two changes. First, it would make clear that the hearing officer shall be limited to determining if the board acted in good faith and presented substantial evidence supporting its action in terminating or non-renewing a tenured teacher. Second, the hearing officer's opinion would not be binding on the board. However, if the board rejects the hearing officer's opinion, it must provide its reasons in writing.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

The teacher would still have the right to appeal to the district court. We submit that there is something wrong with a system that says a board cannot remove a teacher who admits to making repeated racist comments in front of students; where the records shows not only racial bigotry but what can only be described as sexual harassment. The system can only be changed by your action. (See Attachment 1)

Fred Marten, Principal of Clearwater Middle School, USD #264, testified in support of the bill. He cited a specific example of a teacher whose use of grammar was not acceptable, his classroom discipline was ineffective and the students took advantage and made fun of him, showing no respect. This teacher had been on probation twice, and the district had found serious concerns with him on three different occasions and by three different principals. The teacher disagreed with all negative concerns. After the school consulted their attorney, the non-renewal process was begun. They spent four and a half years, $43,000 in legal fees and $110,000 in a settlement judgment. Pat Baker, KASB's chief attorney, said she strongly feels that firing a tenured teacher is very difficult if not impossible. This entire process can and should be called into question. It is necessary to bring the school board back into the decision making arena. (See Attachment 2) Mr. Marten was asked if he has made any changes in granting tenure. He replied his consideration is now much more deliberate and careful before he grants any teacher tenure.

Jim Barrett, Superintendent, USD #466, testified in support of the bill. Current Kansas law provides a series of barriers for administrators and boards of education in the removal of tenured teachers. Those barriers have been enacted to ensure that teachers are treated fairly by boards of education. However, when too many barriers are placed in front of administrators and boards of education, students can, and do suffer. Because of all of the negative experiences surrounding the non-renewal of the tenured teacher in USD #380, he has a different attitude about non-renewals. A tenured teacher will have to do something illegal or immoral at high noon, in the middle of downtown where there are 100 witnesses, 50 of them willing in writing what they saw, and 25 of them willing to testify to what they saw, before he will again consider recommending his or her non-renewal. He encouraged the committee to begin the process of removing one of those barriers by their favorable consideration of **SB 136**. (See Attachment 3)

James Chrisman, Superintendent, Galena, testified in support of the bill. As it stands now, the decision of the hearing officer is final, and this person has nothing to do with the school system. This is unfair because school districts are held accountable even though they cannot get rid of incompetent teachers. They need to be able to get rid of poor, ineffective teachers without the threat of costly litigation. Many school districts do not want to non-renew poor teachers because of the cost of litigation. The hearing panel is not part of the school district. Mr. Chrisman felt he was put on trial rather than the incompetent teacher, and the process was made as time consuming, costly and inconvenient as possible in order to strongly discourage them from trying to discharge another teacher.

Paul Lira, Member Board of Education, Santa Fe Trail, USD 434, testified in support of the bill. This bill begins to reinstate the statutory requirements for elected members of a school community to determine those things which are in the best interest of the community's children. In his school district, the board of education was faced with a difficult decision in the continued employment of one of their teachers. After appropriate deliberation with building supervisors, district administrators, and legal counsel, it was determined that the teacher should be removed permanently from the classroom. The local board of education made this determination in the best interests of the school community. Unfortunately, in 1991 the Kansas Court of Appeals gave the hearing panel (now officer) the ability to reverse a board of education's decision. Now, the legislature has clearly indicated that a hearing panel (now officer) is best qualified to make the decision, and not the local school board. If it is truly the board of education's responsibility to "build up and maintain an efficient school system," then the decision to employ or not employ a school teacher should not rest with an unelected, unaccountable hearing officer. (See Attachment 4)

Jan Collins, Superintendent, Highland USD 425, testified in support of the bill. Mr. Collins stated that a local board of education is more capable of making personnel decisions than a third party completely removed from the situation. In addition, the fact that it is practically impossible to prove incompetence, and that it is exceeding expensive to do so, is not in the best interest of children and Kansas education. The legislature must take action to improve the situation that presently exists, especially as it not within the parameters of the original legislative intent. (See Attachment 5)

Maureen Weiss, President-elect of the Kansas Association of School Boards, testified in support of the bill. She related two stories of incompetent teachers. In the first case, although it was widely known that this teacher was not meeting the academic and professional standards of the district, it was also known the board would probably be unsuccessful in removing this tenured teacher. As this situation was partly the fault of the principal who had not been documenting the problem, the school board quickly hired a new principal. But, it took two more years of counseling, evaluation and building a paper trail before the board could replace the teacher. As a board member, her constituents do not understand a tenure system that keeps the board of

education from removing ineffective teachers who do not respond to assistance efforts, and hiring the best instructors possible. In the second case, the board was informed that several sixth grade girls had approached staff members that a male teacher had inappropriately touched them while their regular teacher was not in the room. Another student in the room also said he had witnessed the incident. The male teacher admitted he had touched the girls, but denied there was anything improper about his actions. Imagine the position of the board of education. Who should be believed? An intensive investigation was conducted, interviewing a large number of current and former students, and depositions were taken. Under the due process, the board could vote to terminate the teacher, but the real decision would be made by a hearing officer. After the hearing officer's review of the case, he agreed that the board of education had acted properly. This case took several years to be resolved, cost the district over $30,000 in legal expenses; and was obviously traumatic to the students, their parents and the entire school community. Her major concern was what would have happened if the hearing officer had not agreed with the board of education? This did not involve a legal finding of guilt or innocence. The teacher did not go to prison or receive any sanction other than losing his job. But if the hearing officer had felt that the board had made the wrong decision, regardless of supporting evidence, the district would have been forced to keep this teacher on staff. The hearing officer has no obligation to the community. He or she does not have to come back and explain his decision to parents. The hearing officer has no obligation to the effective running of the district, or maintaining educational quality. As a board member Mrs. Weiss has that obligation. In order to do the job she was elected to do, she needs the authority to remove staff members when there is good cause. She does not have that ability now; **SB 136** would give that ability back to the local school boards. (See Attachment 6)

A motion was made by Senator Corbin to approve the minutes of the March 13, 1995 meeting. Senator Oleen seconded the motion, and the motion carried.

The meeting was adjourned at 2:30 p.m.

The next meeting is scheduled for March 15, 1995.

SENATE EDUCATION COMMITTEE COMMITTEE GUEST LIST

DATE: 3-14-95

NAME	REPRESENTING
Maureen Weiss	Auburn-Washburn USD437
Karen Lawrence	KNEA
Jeff Barrett	USD#466-Scott City
DJ Chaumont	KNEA
Kristen Ryan	Barbara Lawrence
Jennifer Deutsch	Barbara Lawrence
Vance Hoyer	Kansas Public Radio
GORDON MYERS	USD 434
Jerry Schmidt	USD 434 Lyndon
Bob Clairns	Santa Fe Trail
Robert Ellicott	Wichita Federation of Teachers
Marshall Cook	CIT
Paul Lira	USD 434
Mike Fawl	FARM BUREAU
Chris Burnett	USD 501
Robin Lehman	USD 233
Denise Apt	USA
Gerald Henderson	USA of KS
James C. Brustman	USD #499
Jan Collins	USD #425

SENATE EDUCATION COMMITTEE COMMITTEE GUEST LIST

DATE: 3-14-95

NAME	REPRESENTING
Clay Aberra	USD #499 - Galena
Fred Marten	USD #264 - Clearwater
Kate Depenbrusch	Girl Scouts of Wichita
Rita Francis	Girl Scouts of Wichita
Janice Harding	Girl Scouts - Wichita
Sarah Sheldon	Girl Scouts of Wichita
Danielle Harding	Girl Scouts of Wichita
Katie Rucker	Girl Scouts of Wichita

KANSAS ASSOCIATION OF SCHOOL BOARDS

1420 S.W. Arrowhead Rd, Topeka, Kansas 66604
913-273-3600

TO: Senate Committee on Education
FROM: Mark Tallman, Director of Governmental Relations
DATE: March 14, 1995

RE: **Testimony on S.B. 136**

Mr. Chairman, Members of the Committee:

Thank you for the opportunity to appear today in support of S.B. 136, which was introduced at our request. I am presenting to you several documents:

First, a two-page position statement on teacher due process issues.

Second, a single page summary of two recent court cases in this area.

Third, the full text those two decisions.

Thank you for your consideration of this important issue. Please let me know if our association can answer any questions or provide you with more information.

Senate Education
3-14-95
Attachment 1

Teacher Due Process
The Role of the Local School Board

1. Traditional School Board Authority

In the 1980 Kansas Supreme Court decision *Gillett v. U.S.D. No. 276*, the court said:

> "We hold that under the Kansas due process statute, a tenured teacher may be terminated or nonrenewed only if good cause is shown, including any ground which is put forward by the school board in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the school board's task for building up and maintaining an efficient school system."

Over the years, teachers were given the right to a due process hearing. In *Gillett*, the court stated:

> "The purpose of the due process hearing granted a teacher by statute is to develop the grounds that have induced the board to give the teacher notice of its desire to discontinue her services, and to afford the teacher an opportunity to test the good faith and sufficiency of the notice. The hearing must be fair and just, conducted in good faith, and dominated throughout by a sincere effort to ascertain whether good cause exists for the notice given." *("Good cause" is defined by the citation above.)*

The purpose of the hearing, in other words, was not to substitute for the school board's judgment, but to determine whether the school board had "good cause", which meant any ground put forward in good faith and not arbitrary, irrational, unreasonable or irrelevant.

2. Changes in the Due Process Hearing

To conduct this review of the board's action, the Legislature created a three person hearing panel. At first, the panel could only recommend that the school board reverse its decision about firing a teacher. The law was then amended to allow the panel to reverse the board by a unanimous decision. In 1991, the law was amended again to allow the panel to reverse the board by a majority opinion. (This bill passed the House, but not the Senate Education Committee. These provisions were then amended into a Senate bill by the House, and the Senate concurred.)

The hearing panel was composed of one member chosen by the teacher, one member chosen by the school board, and a third member chosen by the first two. The cost of the hearing panel was split between the board and the teacher. Federal courts ruled in the early 1990's that employees could not be required to pay for their own due process. KASB supported an amendment to the due process law in 1992 that created a single hearing officer, instead of a panel, and required the board to pay the full cost of the hearing.

Changes in the due process law were proposed to ensure that teachers had recourse against unfair, arbitrary actions by school boards. However, these amendments were never presented to change the authority of the hearing process - only its form. Nor was it suggested the authority of the school board would be changed - only the way its decision would be reviewed.

3. The Hubbard Case

But ~~this~~ 1994 spring, the Kansas Court of Appeals ruled that the Legislature did change the power of the hearing process. In *U.S.D. No. 434 v. Hubbard*, the court said:

> "*Before* the 1991 amendment, the primary responsibility for determining "good cause" rested with the school board. Moreover, the decision of a school board on the question of whether a teacher's contract should be renewed or terminated was final, subject to limited judicial review. The 1991 amendment, however, changed all that when the legislature decided to make the decision of the hearing committee (now hearing officer) final, subject to appeal to the district court by either party as provided in K.S.A. 1993 Supp. 60-2101. Therefore, in a teacher termination case, a due process hearing committee is the *factfinder*. Accordingly, a hearing committee must decide whether the reasons given by a school board in its decision to terminate or nonrenew a tenured teacher's contract constitute good cause. Finally, the amendment clearly indicates that a hearing committee is the body best qualified to assume these quasi-judicial functions *formerly* performed by the school board." *(Emphasis added.)*

Under the *Hubbard* decision, the school board no longer determines "good cause," with a hearing panel to review whether or not the board acted in good faith. Instead, the hearing officer determines "good cause," and the court can only review whether or not the hearing officer (or committee) acted in good faith. The Hubbard court said:

> "We conclude that the standard of review outlined in Butler is still the appropriate standard to be applied by the district court and this court, except the 1991 amendment requires us now to apply our review to the decision of the hearing committee. Consequently, the standard of review of a due process hearing committee's decision is limited to deciding if: (1) the committee's decision was within the scope of its authority; (2) the committee's decision was supported by substantial evidence; and (3) the committee did not act fraudulently, arbitrarily or capriciously."

In other words, the court no longer considers whether or not the **school board** acted in good faith to terminate a teacher. It can only consider whether or not the **hearing committee or officer** acted in good faith.

4. What These Changes Mean for School Boards

In the *Hubbard* case, the board terminated a teacher after viewing a video tape that a teacher allowed students in his class to make. It showed students engaging in vulgar behavior, harrassing other students, and a general lack of discipline in the classroom. The hearing committee, however, reversed the board's actions and ordered the board to reinstate the teacher. The district court upheld the committee's action.

In *U.S.D. 328 v. Whitmer*, a hearing committee heard students testify that a teacher used vulgar and demeaning language in reference to girls, blacks and other groups. The teacher admitted to using a racial slur in reference to blacks. The board terminated the teacher, but the hearing panel reversed the board. The district court sided with the school board. But the court of appeals, citing its own Hubbard decision, ruled that because the hearing committee acted in good faith, its decision should be upheld.

In these decisions, the local school has lost the ability to apply its own standards, as the elected representatives of the community, in determining good cause based on "the school board's task of building up and maintaining an efficient school system." Instead, this decision has been transferred to an unelected, unaccountable hearing officer who has no responsibility for the operation of the district.

5. Changes Proposed in S.B. 136

S.B. 136 would make two changes. First, it would make clear that the hearing officer shall be limited to determining if the board acted in good faith and presented substantial evidence supporting its action in terminating or nonrenewing a tenured teacher. Second, the hearing officer's opinion would not be binding on the board. However, if the board rejects the hearing officer's opinion, it must provide its reasons in writing. The teacher would still have the right to appeal to the district court.

Attachments

I have attached to my testimony two decisions from the Kansas Court of Appeals. We would respectfully ask you to read them carefully.

The first, *USD 434 v. Hubbard*, was written by Judge Green. This is the decision that established the hearing committee (now hearing officer), not the board, as the factfinder in a teacher due process hearing. It also established that the court could conduct only a limited review of the hearing committee or officer's opinion.

A summary of the school board's case is found on page 3. The hearing committee actually agreed with the board that the teacher "did not control the classroom in a manner which would be expected of him." This is not a case of a board acting in unreasonable, arbitrary or capricious manner, or reaching a decision that was not supported by evidence. It is simply a case of the hearing panel disagreeing with the board. The committee felt that "the evidence in its entirety does not establish just cause for the termination of Mr. Hubbard's employment." In other words, the hearing committee substituted its own standard of "good cause" for that of the school board. The Court of Appeals ruled that was what the Legislature intended. Only the Legislature can change this situation.

The second case, *USD 328 v. Whitmer* is, in my mind, nothing less than shocking. It concerns a teacher dismissed by a school board. A hearing panel ruled in favor of the teacher. The District Court then ruled in favor of the board, but the Court of Appeals reversed the lower court. It said that the lower court had exceeded its authority when it overturned the hearing committee.

Judge Green, who wrote the majority opinion for the court in *Hubbard*, wrote a dissent in *Whitmer* that begins on page D-1. I strongly urge you read it in its entirety. Judge Green quotes extensively from the record, finding a pattern of racial slurs and comments, inappropriate touching and vulgar, demeaning references to girls.

On page D-20, the Judge writes, "the school board needs to prove only one good cause for terminating or nonrenewing a teacher's contract to justify termination or nonrenewal of that teacher. Here, the evidence was undisputed that Whitmer had repeatedly uttered racial and gender slurs in the presence of students." But Judge Green is trapped by his own opinion in *Hubbard*: under that opinion, the board no longer determines "good cause." The hearing officer does that.

We submit that there is something wrong with a system that says a board cannot remove a teacher who admits to making repeated racist comments in front of students; where the record shows not only racial bigotry but what can only be described as sexual harassment. That system can only be changed by your action.

No. 69,656

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

UNIFIED SCHOOL DISTRICT NO. 434,
OSAGE COUNTY, KANSAS,
Appellant,

v.

ROBERT HUBBARD,
Appellee.

SYLLABUS BY THE COURT

1.

In a teacher termination case, a due process hearing committee is the factfinder. Accordingly, a hearing committee must decide whether the reasons given by a school board in its decision to terminate or nonrenew a tenured teacher's contract constitute good cause.

2.

The standard of review of a due process hearing committee's decision is limited to deciding if: (1) the committee's decision was within the scope of its authority; (2) the committee's decision was supported by substantial evidence; and (3) the committee did not act fraudulently, arbitrarily, or capriciously.

Appeal from Osage District Court; JAMES J. SMITH, judge.

Opinion filed February 18, 1994. Affirmed.

Patricia E. Baker and *Cynthia Lutz Kelly*, of The Kansas Association of School Boards, of Topeka, and *Fred W. Rausch, Jr.*, of Topeka, for appellant.

Richard D. Anderson, of Topeka, for appellee.

Before BRISCOE, C.J., GREEN, J., and JOHN J. BUKATY, JR., District Judge, assigned.

GREEN, J.: This case involves a teacher termination wherein the Board of Education of U.S.D. No. 434 (Board), the appellant, seeks reversal of the judgment of the district court upholding the decision of the Due Process Hearing Committee (Committee) to reinstate Robert Hubbard, the appellee.

Before the Board notified Hubbard of his termination, he had taught at Santa Fe Trail High School for 10 years. The Board, after watching a videotape made by some of his art class students, decided to terminate his contract because of the activities shown on the videotape. The Board claimed the videotape showed his lack of classroom control and his failure to intervene and stop a female from being sexually harassed by two male students.

After receiving notice of his termination, and because he was a tenured teacher, Hubbard requested a due process hearing. The

three-member Committee was convened, and it watched the videotape and summarized it as follows:

> "The gravamen of this case concerns a videotape [taken during] Robert Hubbard's first hour art class at Santa Fe [Trail] High School. [C.H.], an art student was transferring and Hubbard allowed the students to have a going away skit and/or social time with [C.H.] The video tape started with planned skits, including a 'Wizard of Oz' scene and a condom commercial, neither of which were objected to by the administration.
>
> "After the skits, Mr. Hubbard went back to his work area, in the classroom, and allowed the students free time to converse or film each other. The second part of the filming included students portraying 'Saturday Night Live' skits; telling of off campus, unsavory activities; attempting to embarrass each other with zoom shots of crotch areas; alleged sexual harassment; and generally acting in bad taste. Two male students, [J.C.] and [S.S.] were the primary actors in the second part of the 15 minute film. The alleged victims were [C.H.] and [J.S.].
>
> "Mr. Hubbard several times cautioned the students to not let their activities to get out of hand. However, for the majority of the time, Mr. Hubbard busied himself at his work station and/or went outside of the classroom

to help other students and did not control the classroom in a manner which would be expected of him."

Approximately two months after the hearing, the Committee concluded that "the evidence in its entirety does not establish just cause for the termination of Mr. Hubbard's employment."

The Board disagreed with the Committee's decision and filed an appeal with the district court. The district court affirmed the Committee's decision and denied the Board's appeal, stating: (1) The Committee's findings of fact were not arbitrary and capricious; (2) the Committee acted within the scope of its authority in reviewing the district's sexual harassment policy; and (3) the Committee's decision finding Hubbard's termination was without good cause was not arbitrary or capricious. The district court then ordered the Board to immediately reinstate Hubbard with pay.

Before we address the specific arguments made by the Board, we must first consider the important question of whether the Board's or the Committee's decision is entitled to deference upon review. Specifically, because of the 1991 amendments to the Due Process Procedures Act, K.S.A. 72-5436 *et seq.*, the Board contends the amendments are unclear regarding the issue of whether the Board or the Committee is the factfinder whose findings are to be given deference upon review. The Board argues it is the proper factfinder in determining whether a teacher's termination is for good cause, subject only to limited

judicial review. Furthermore, the Board contends the district court erred when it failed to give greater deference to the Board's action.

The Board, however, misunderstands the role of a hearing committee in the termination of a tenured teacher. Initially, the school board investigates and makes its determination to terminate a teacher. A hearing committee, as a disinterested factfinding body, determines if the school board's decision to terminate was for good cause. Before the 1991 amendment, the primary responsibility for determining "good cause" rested with the school board. Moreover, the decision of a school board on the question of whether a teacher's contract should be renewed or terminated was final, subject to limited judicial review. The 1991 amendment, however, changed all that when the legislature decided to make the decision of the hearing committee (now hearing officer) final, subject to appeal to the district court by either party as provided in K.S.A. 1993 Supp. 60-2101. Therefore, in a teacher termination case, a due process hearing committee is the factfinder. Accordingly, a hearing committee must decide whether the reasons given by a school board in its decision to terminate or nonrenew a tenured teacher's contract constitute good cause. Finally, the amendment clearly indicates that a hearing committee is the body best qualified to assume these quasi-judicial functions formerly performed by the school board. See *U.S.D. No. 380 v. McMillen*, 252 Kan. 451, 454, 845 P.2d 667 (1993), for an excellent summary written by Chief Justice Holmes of the legislative history of K.S.A. 72-5443.

Consequently, the Board is no longer the factfinder, and because of this change, its decision is not entitled to any deference upon judicial review. Accordingly, the district court did not err when it limited its review to the Committee's decision.

Next, we must decide what is the proper standard of review to be applied to this case. Before the 1991 amendment, the Kansas Supreme Court, in *Butler v. U.S.D. No. 440*, 244 Kan. 458, 463, 769 P.2d 651 (1989), concluded that the district court's standard of review was as follows:

> "K.S.A. 1988 Supp. 60-2101(d) gives the district court jurisdiction to review the Board's decision. The district court may not hear the case de novo, but is limited to deciding whether: (1) The Board's decision was within the scope of its authority; (2) its decision was substantially supported by the evidence, and (3) it did not act fraudulently, arbitrarily, or capriciously."

See *O'Hair v. U.S.D. No. 300*, 15 Kan. App. 2d 52, Syl. ¶ 2, 805 P.2d 40, *rev. denied*, 247 Kan. 705 (1990).

We conclude the standard of review outlined in *Butler* is still the appropriate standard to be applied by the district court and this court, except the 1991 amendment requires us now to apply our review to the decision of the hearing committee. Consequently, the standard of review of a due process hearing committee's decision is limited to deciding if: (1)

the committee's decision was within the scope of its authority; (2) the committee's decision was supported by substantial evidence; and (3) the committee did not act fraudulently, arbitrarily, or capriciously.

First, in order to terminate a tenured teacher, the burden of proof rests upon the school board. The Kansas Supreme Court, in *Gillett v. U.S.D. No. 276*, 227 Kan. 71, 77, 605 P.2d 105 (1980), stated:

> "72-5442 places the burden of proof upon the school board in all instances other than where the allegation is that the teacher's contract is nonrenewed by reason of the teacher's exercise of a constitutional right."

Second, the school board's reason for seeking the termination of the teacher must constitute good cause. The *Gillett* court defined good cause as the following:

> "Under the Kansas due process statute (K.S.A. 1977 Supp. 72-5436 *et seq.*), a tenured teacher may be terminated or nonrenewed only if good cause is shown, including any ground which is put forward by the school board in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the school board's task of building up and maintaining an efficient school system." 227 Kan. 71, Syl. ¶ 1.

Third, the committee's decision must be supported by substantial evidence. K.S.A. 72-5439(f). Substantial evidence has been defined as follows:

> "Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. [Citation omitted.] Stated in another way, 'substantial evidence' is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. [Citation omitted.]" *Williams Telecommunications Co. v. Gragg*, 242 Kan. 675, 676, 750 P.2d 398 (1988).

Having attempted to briefly outline the major steps for terminating a teacher, we now focus our attention on the Board's remaining arguments.

The Board next argues the district court erred in failing to find the Committee acted outside the scope of its authority. The Board claims the Committee acted beyond the scope of its authority by failing to give proper consideration to the Board's sexual harassment policy and by applying federal sexual harassment laws established under Title VII to determine if Hubbard's conduct was improper.

The Committee, however, reviewed the Board's sexual harassment policy and determined the isolated events depicted on the videotape did not warrant termination. Specifically, under its findings of fact, the Committee stated:

> "7. While this panel finds the second part of the skit offensive, and in no way condones the temporary lack of discipline on Mr. Hubbard's behalf, or the actions of the students in the skit, we do not find that the activities placed any student in a 'hostile' environment, or find that the activities were raised to a level which constitutes sexual harassment. No female student complained of sexual harassment. The actions were not repetitive or continuing in nature.
>
> . . . .
>
> "13. The female students participated in the activities. The girls were giggling and joking and generally participating in 'teenager horseplay' throughout the second part of the taping. The female student provided the condoms for the commercial, and commented on passing gas. They at no time had their welfare placed in jeopardy during the free time."

The Committee found the Board's sexual harassment policy allows for a range of penalties depending on the degree of misconduct. Furthermore, the Committee determined the activities shown on the videotape did not constitute sexual harassment. Moreover, we conclude that even if Hubbard's conduct did violate the Board's sexual harassment policy, the Committee's determination that the isolated events shown on the videotape did not warrant termination is supported by substantial evidence. Consequently, we conclude the Committee acted within the scope of its authority.

The Board next argues the Committee acted outside the scope of its authority when the Committee ignored the Board's standards of teacher conduct and adopted a different standard for teacher conduct during classroom "free time." Hubbard testified that during free time students are allowed to be more relaxed in their behavior and are not strictly required to follow his classroom rules of conduct. During the 10-minute free time period that is the subject of this appeal, Hubbard permitted the students to talk to each other, to move around the classroom, to say goodbye to a fellow classmate who was moving out of the school district, and to videotape a skit using that student as one of the participants.

We agree the Committee acted outside the scope of its authority when it adopted a different standard of conduct, which was apparently contrary to the Board's standards for teacher conduct. The Board's standards require a teacher to maintain control of his or her class

at all times without any distinction being made between free time and regular class time. We conclude, however, the Committee did substantially act within the scope of its authority, and its distinction between free time and regular class time was simply tangential to its ultimate determination that the Board lacked good cause to terminate Hubbard.

The Board next argues the district court erred in finding that the Committee did not act fraudulently, arbitrarily, or capriciously and that the Committee's findings were supported by substantial evidence. The Board contends the Committee's findings are arbitrary because they are unsupported by the evidence.

The Board cites numerous examples of where it believes the Committee's decision is unsupported by substantial evidence. However, the examples cited deal with the weight and credibility the Committee gave certain evidence and witnesses. Neither the district court nor this court may reweigh the evidence and substitute its judgment for that of the Committee. See *City of Topeka v. Board of Shawnee County Comm'rs*, 252 Kan. 432, 446, 845 P.2d 663 (1993). Therefore, these examples do not establish that the Committee's findings are unsupported by the evidence, nor do they establish that the Committee arbitrarily disregarded any undisputed evidence.

Although the Board did present undisputed evidence of two prior incidents of Hubbard's lack of discipline of students on supervised

bus trips, which occurred three years earlier, the Board failed to use these incidents as a basis for seeking his termination. Instead, the Board improperly sought to bolster its reasons for terminating him without ever including these incidents in its written notice of termination.

Because the Board failed to include these incidents in its written notice of termination to Hubbard and because it failed to supplement its reasons for termination as outlined in *Gillett*, the Committee, in its decision, properly gave no weight to these earlier incidents.

In summary, after hearing all of the evidence, the Committee determined the activities shown on the videotape were isolated and were not reflective of Hubbard's teaching ability. The Committee specifically stated: "We find from the entire record that Mr. Hubbard's classroom discipline does not suffer from a general lack of control and the March 23 tape was a brief, isolated event." Therefore, the Committee determined the Board's evidence failed to establish good cause to terminate him.

We conclude a due process hearing committee's purpose and role is to hear evidence and determine whether a school Board has carried its burden of proving a justification for termination. *Keller v. Board of Trustees of Coffeyville Community College*, 12 Kan. App. 2d 14, 15, 733 P.2d 830, *rev. denied* 241 Kan. 839 (1987). "Under the Kansas due process statute [K.S.A. 72-5436 *et seq.*], a tenured teacher may be terminated or nonrenewed only if good cause is shown." *Gillett,* 227 Kan. 71, Syl. ¶ 1.

The committee's decision on the termination or nonrenewal of a tenured teacher's contract must be supported by substantial evidence. K.S.A. 72-5439(f).

Although this is a close case, we conclude the Committee's decision was supported by substantial evidence. The Committee determined that the activities shown on the videotape involved a single episode, which was of a very short duration, and under the circumstances did not justify Hubbard's termination. Further, we conclude the Committee did not act arbitrarily or capriciously in reaching its decision.

Affirmed.

NOT DESIGNATED FOR PUBLICATION

No. 70,003

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

U.S.D. No. 328,
Appellee,

v.

RICHARD WHITMER,
Appellant.

MEMORANDUM OPINION

Appeal from Ellsworth District Court; BARRY A. BENNINGTON, judge. Opinion filed March 18, 1994. Reversed and remanded with directions.

David Schauner and *Jonathan Paretsky*, of Kansas National Education Association, of Topeka, for appellant.

Fred W. Rausch, Jr., of Topeka, for appellee.

Before ROYSE, P.J., GREEN, J., and DAVID W. KENNEDY, District Judge, assigned.

KENNEDY, J.: Richard Whitmer appeals from a decision of the district court reversing the decision of a due process hearing committee (Committee) in a teacher termination case.

Whitmer was employed as a social science teacher and coach at Wilson High School. U.S.D. No. 328 (Board) terminated his teaching contract. Whitmer requested a due process hearing pursuant to K.S.A. 72-5438 and designated Jari Marietta, a McPherson teacher, to serve on the Committee. The Board designated Tom Hodges, business manager for the Salina school district, as a Committee member. Those two Committee members selected the Honorable Richard Wahl, retired district court judge, to chair the Committee. The hearing was held September 14-16, 1992. The Committee heard testimony from 34 witnesses relating to 18 separate allegations of improper conduct by Whitmer.

After hearing the testimony, the Committee found that the Board had not proved its allegations of misconduct by a preponderance of the evidence. The Committee also stated the Board did not follow its own sexual harassment procedure and that the allegations of misconduct were based primarily on "hearsay, rumor, community involvement, and convoluted administrative ineffectiveness." The Committee unanimously ordered Whitmer's reinstatement.

The Board adopted the Committee's decision, as required by K.S.A. 1991 Supp. 72-5443. The Board subsequently filed an appeal to the district court. The district court found that the Board did prove its allegations of misconduct by a preponderance of the evidence. The district court reversed the Committee's decision and affirmed the Board's decision to terminate Whitmer.

Under the statute applicable to this case, a teacher whose contract is

terminated may request a due process committee hearing. K.S.A. 1991 Supp. 72-5438(a)(2). The hearing committee must render an opinion setting forth its findings of fact and determination of the issues, and this opinion is binding on both the teacher and the school board. K.S.A. 1991 Supp. 72-5443(a). Upon receipt of the opinion, the school board must adopt the decision but may appeal to the district court. K.S.A. 1991 Supp. 72-5443(b).

The standard of review applicable in an appeal to the district court from a hearing committee decision has recently been set out in *U.S.D. No. 434 v. Hubbard*, 19 Kan. App. 2d ___, ___ P.2d ___ (No. 69,656 filed February 18, 1994). The district court is limited to deciding whether (1) the committee's decision was within the scope of its authority; (2) the committee's decision was supported by substantial evidence; and (3) the committee did not act fraudulently, arbitrarily, or capriciously. 19 Kan. App. 2d ___, Syl. ¶ 2.

Where the district court decision is appealed, we review the committee decision as though the appeal had been made directly to us, and we are subject to the same limitations of review as the district court. *Hubbard*, 19 Kan. App. 2d at ___; see *Butler v. U.S.D. No. 440*, 244 Kan. 458, 464, 769 P.2d 651 (1989). "Neither the district court nor this court may reweigh the evidence and substitute its judgment for that of the Committee." *Hubbard*, 19 Kan. App. 2d at ___; see *City of Topeka v. Board of Shawnee County Comm'rs*, 252 Kan. 432, 446, 845 P.2d 663 (1993).

The first issue on appeal relates to the Committee's finding that the Board had not proved its allegations of misconduct by a preponderance of the evidence. The

district court recognized that this is a negative finding, which can only be overturned upon a showing of arbitrary disregard of undisputed evidence. *Lostutter v. Estate of Larkin*, 235 Kan. 154, 162-63, 679 P.2d 181 (1984); *Chris Hunt Water Hauling Contractor, Inc. v. Kansas Corporation Comm'n*, 10 Kan. App. 2d 612, 617, 706 P.2d 825 (1985). The district court found that because the Committee made no written findings regarding the credibility of witnesses, the Committee must have arbitrarily disregarded much of the testimony presented by the Board.

This finding by the district court is not supported by the law or the record. First, K.S.A. 1991 Supp. 72-5443(a) requires the committee to set forth its findings of fact and determination of the issues. The statute does not require the hearing committee to make specific findings about the credibility of witnesses. Second, the record indicates that although the Board alleged numerous instances of misconduct, all of those allegations were controverted by Whitmer, either through the testimony of students or through Whitmer's denial of the misconduct claimed. The Committee determined, after hearing conflicting testimony from numerous witnesses, that the Board failed to sustain its burden of proof. This determination does not justify the assumption that the Committee disregarded evidence. Finally, it is noteworthy that the district court did not say the Committee disregarded *undisputed* evidence, nor did the court specify the undisputed evidence which it concluded had been disregarded.

The district court examined the Committee's statement that the charges pursued were a product of "community involvement" and determined the statement reflected consideration of extrinsic issues showing bias, passion, or

prejudice on the part of the Committee. The district court reasoned that "community involvement" is good, that parental interest should be encouraged and not discouraged, and that therefore "community involvement" provides no basis for criticizing the Board's claims.

Whitmer argues that the Board had not even alleged bias, passion, or prejudice in its appeal from the Committee decision. If we assume, however, that the issue was properly before the district court, there is nothing in the record to explain what the Committee meant by the term "community involvement." While the district court guessed that the phrase might have meant the beneficial community involvement which occurs when parents voice complaints about problems in their schools, it is equally likely that the Committee was referring to the detrimental situation which occurs when parents act upon hearsay and rumor. Witnesses described at least one such incident. It is impossible to determine what type of "community involvement" the Committee meant, but use of the term does not amount to proof that the Committee's decision was the result of bias, passion, or prejudice.

The district court also focused on the Committee's statement that "Whitmer's conduct may not always have been exemplary." The district court interpreted the statement to be a "masked admission" that the Committee found the Board's charges to be true but insufficient to justify termination. The district court said that in making such a statement, the Committee exceeded its authority. This interpretation is far-fetched, as it ignores the Committee's specific finding that the Board did not prove its allegations of misconduct. In any event, another panel of

this court has recently concluded that "a hearing committee must decide whether the reasons given by a school board in its decision to terminate or nonrenew a tenured teacher's contract constitute good cause." *Hubbard*, 19 Kan. App. 2d ___, Syl. ¶ 1.

For all the foregoing reasons, the district court erred in concluding that the Committee's decision arbitrarily disregarded undisputed evidence; resulted from bias, passion, or prejudice; and exceeded its authority.

Finally, the district court erred in affirming the Board's decision to fire Whitmer. The district court recognized that it could not reweigh the evidence. It then proceeded to do just that: It reweighed the evidence and found "the Board did prove its allegations of misconduct by a preponderance of the evidence and by substantial evidence." The district court usurped the statutory authority of the Committee as factfinder. See *Hubbard*, 19 Kan. App. 2d at ___.

To avoid unduly extending the length of this opinion, it is sufficient to note that the Board presented evidence of 18 claims of misconduct. The Committee found many of the charges arose from rumor and hearsay, and there is evidence in the record to support that characterization. Even when the Board's charges were supported by direct evidence, they were controverted by the testimony of Whitmer's witnesses and/or Whitmer himself.

This case comes down to the credibility of the witnesses. Had we heard the witnesses, we might have reached a different decision than the Committee. But that

is not the issue. A review of the record reveals there is substantial competent evidence to support the Committee's decision, and the finding that the Board failed to sustain its burden of proof is not arbitrary or capricious, given the contested facts.

The decision of the district court is reversed, and the case is remanded with directions to reinstate the Committee's decision.

GREEN, J., dissenting: There are several reasons why I disagree with the decision of the majority. First, the majority incorrectly states that all of the Board's allegations against Whitmer "were controverted by Whitmer, either through the testimony of students or through Whitmer's denial of the misconduct claimed." Contrary to what the majority says, the trial court, in its memorandum decision, stated the following:

> "The third type of testimony offered by the defense is the testimony of Whitmer himself in which he attempts to refute most of the allegations, describes some of the allegations as misunderstandings, *and admits only one of the allegations--the reference to black people as niggers.*" (Emphasis added.)

Several students gave direct evidence, which was not hearsay or rumor testimony, confirming Whitmer's repeated utterances of the word "niggers" when referring to black people. Of those who testified on this charge, six students' testimonies were quite disturbing and persuasive.

For instance, one student testified that Whitmer, during class, discouraged the bringing of a black person to the school prom. An excerpt of the relevant testimony of this student is as follows:

"Examiner:	. . . I want to ask you about his remarks that you may remember about Mr. Whitmer calling Black people niggers. Do you remember that occurring in class?
Student #1:	I remember Mr. Whitmer saying something about not bringing a nigger to prom.

Examiner: And do you know if someone was going to bring a Black person to the prom?

Student #1: They were--there was a couple of people joking about bringing a friend, a Black friend, to prom.

Examiner: And what did Mr. Whitmer say again?

Student #1: Something related to not bringing a nigger to prom.

Examiner: And was there any discussion going on at that time about Government lessons or anything to that extent?

Student #1: Afterwards, because we were just discussing prom before.

Examiner: And was this in class?

Student #1: Yes.

Examiner: And was class in session actually?

Student #1: Yes.

. . . .

Examiner: . . . Did Mr. Whitmer teach you in American History or American Government that Blacks do not like to be called niggers?

Student # 1 : No.

Examiner: Didn't teach you that?

Student # 1 : No.

. . . .

Examiner: Did you discuss that nigger was a negative term?

Student # 1 : No, I just learned from my dad that black people don't like to be called niggers.

Examiner: And your dad told you not to do that?

Student # 1 : He told me that they didn't like to be called niggers."

In other examples, two students testified that Whitmer would frequently make jokes about blacks, women, and Poles. The relevant part of their testimonies is as follows:

"Examiner:	Okay. We talked a little while ago about what kind of language Mr. Whitmer used in class when he was referring to Black people. And can you tell me what he does in class as far as referring to Black people, how he refers to them?
....	
Student # 2 :	Yes, I think so. He wouldn't like just come out and say it. It would be like a joke he would just like call them Negroes or niggers, nothing really bad. But use it just in a joke when everybody would like laugh about it.
Examiner:	Was this in class?
Student # 2 :	Yes.
Examiner:	When class was in session?
Student # 2 :	Yes.
Examiner:	And it wasn't used at that time in any teaching suggestion where he was teaching a lesson of any kind?
Student # 2 :	No.
Examiner:	While he was telling a joke?
Student # 2 :	Yes.
....	
Examiner:	Can you remember any specific jokes?
Student # 3 :	Oh, not a specific joke itself; Polacks to women to Black people.
....	
Examiner:	Were the jokes then were always either about women, Blacks, Polacks, or some other minority group?

Student # 3 : (Shakes head.)

Examiner: Is that right? You need to answer yes or no?

Student # 3 : Yes.

Examiner: Do you remember how often he would tell these jokes?

Student # 3 : I don't know, probably once at least a week, a joke. You know, a week during class, yes.

Examiner: And in these jokes would he refer to Blacks as niggers?

Student # 3 : Yes, definitely.

Examiner: Did he ever refer to them as Blacks?

Student # 3 : No.

Examiner: Do you remember him in your American History class last year trying to explain anything about the difference between Blacks, Negroes, and the word niggers?

Student # 3 : Slaves. Just used the word slaves, in History anyways.

Examiner: Okay. How did he use that word slaves?

Student # 3 : When we were discussing the Civil War time period and stuff he used the word slaves. But when it come to Study Hall class he used the word niggers.

Examiner: Okay. Do you remember him using the word niggers in such a way that it was instructional, meant to instruct, you know, to use the word or that it was demeaning?

Student # 3 : No.

Examiner: So whenever it was used in your opinion it was used in a demeaning fashion?

MR. SCHAUNER: Object to the form of the question. It is leading and suggestive.

MR. CHAIRMAN: Well, it is. What was your impression as to why the word was used?

Student # 3 : The word niggers? Make fun of."

In the final example, a fourth student testified to the following incident:

"Examiner: And in that class do you remember talking about the NBA All Star game?

Student #4: I sure do.

Examiner: And what was the conversation that was had about that?

Student #4: We were talking about the NBA game and Magic Johnson. And they were talking about how the other players hugged Magic Johnson. And Mr. Whitmer said well he goes, 'I can't believe they were hugging him because he has got AIDS.' And another student said, 'Well, you can't get AIDS from hugging'. 'Well, it doesn't matter because I will never hug any niggers.'

Examiner: Did that offend you any?

Student #4: It didn't upset me but it bothered me that he called them a nigger. I mean, they are just the same as anybody else. They are just a different color."

Although Whitmer admitted to saying the word "niggers" in class, he claimed, however, he commonly said that word when teaching his students about history. Nevertheless, he readily admitted to using the term "niggers" in other than a purely instructional manner. For instance, he testified, while being questioned by the Board's attorney, as follows:

"Examiner: Have you never used the word niggers in class except in a way about history?

Whitmer: I didn't say that. I said it was not commonly used.

Examiner: So you have used it other than in a teaching manner?

Whitmer: Yes."

Moreover, Whitmer justifies his common use of the term "nigger" when referring to black people by saying the term is frequently uttered in the community of Wilson, Kansas. Under questioning of his attorney, Whitmer testified to the following:

"Examiner: Have you heard the word niggers used in Wilson, Kansas, throughout your life?

Whitmer: Many times."

Finally, Whitmer clearly admits that he told his class that "he would never hug niggers" in connection with Magic Johnson's announcement that he had contracted AIDS. He, however, claims he was only repeating what another student had said to him. Under questioning by the Board's attorney, Whitmer testified as follows:

"Examiner: But you are saying you didn't say you would never hug a nigger?

Whitmer: I didn't say--I said I was not the one that said that. I must have repeated what another student had said.

Examiner: Who if you repeated that you wouldn't hug a nigger what were you repeating it for?

Whitmer: They were discussing about whether AIDS could be spread by hugging a sweaty person.

Examiner: Uh-huh. And but you had--if you made that statement you repeated it?

Whitmer:	If they thought it was coming from me it was not from me. I was repeating what another person had said. That was one way to avoid not getting AIDS, I guess, by not hugging them.
Examiner:	Oh, okay so you were saying it was in a classroom discussion and you were just repeating what one of the students had said to get--comments of other students?
Whitmer:	Yes.
Examiner:	Okay. But you have used the word niggers in class when referring to Black people?
Whitmer:	Yes."

In the former example, it is not important whether Whitmer or another student was the initiator of the racial slur. What is important is what Whitmer did after he heard or said the racial slur. In this case, he alleges he simply repeated the racial slur to his class, neither explaining to his students that he was not the originator of the racial slur nor saying the racial slur was inappropriate. Moreover, he failed to explain to his students that you do not contract AIDS by simply hugging a "sweaty" person. By Whitmer's actions of repeating the racial slur, without furnishing his students with any beneficial information about AIDS, he adopted the racial slur as his own utterance.

Black's Law Dictionary 1527 (6th ed. 1990) defines an undisputed fact as "[a]n admitted fact." Inasmuch as Whitmer freely admits to using the word "niggers" in a manner not consistent with educating his students, the fact of his inappropriate utterance of racial slurs is clearly undisputed. Therefore, the trial court's finding that Whitmer admits to uttering racial slurs is amply supported by the record.

In *Gillett v. U.S.D. No. 276*, 227 Kan. 71, 78, 605 P.2d 105 (1980), the Kansas Supreme Court discussed the purpose of the due process hearing. The court stated:

> "The purpose of the due process hearing granted a teacher by statute is to develop the grounds that have induced the board to give the teacher notice of its desire to discontinue her services, and to afford the teacher an opportunity to test the good faith and sufficiency of the notice. The hearing must be fair and just, conducted in good faith, and dominated throughout by a sincere effort to ascertain whether good cause exists for the notice given."

The *Gillett* court went on to define "good cause" as follows:

> "We hold that under the Kansas due process statute [K.S.A. 72-5436 *ett seq.]* a tenured teacher may be terminated or nonrenewed only if good cause is shown, including *any ground* which is put forward by the school board in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the school board's task of building up and maintaining an efficient school system." (Emphasis added.) 227 Kan. at 78.

A teacher in the public school classroom serves not only as an instructor, but also as a *role model for students.* In *Board of Trustees v. Hartman*, 246 Cal. App. 2d 756, 763-64, 55 Cal. Rptr. 144 (1966), speaking to this role, the court stated:

"'[T]he calling [of a teacher] is so intimate, its duties so delicate, the things in which a teacher might prove unworthy or would fail are so numerous that they are incapable of enumeration in any legislative enactment. . . . His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his official utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention.'"

Where a teacher's conduct exceeds the bounds of propriety and fails to give students the proper guidance as to morals and standards of conduct which teachers should foster and encourage in their students, discharge of the teacher is appropriate. *Penn-Delco School District v. Urso*, 33 Pa. Commw. 501, 512, 382 A. 2d 162 (1978).

The Nebraska Supreme Court in *Clarke v. Board of Education*, 215 Neb. 250, 338 N.W. 2d 272 (1983), correctly concluded that a racial slur spoken by a junior high school teacher is totally unacceptable in today's society. In concluding that the teacher should be terminated for uttering the words "dumb niggers," the court stated:

"it is difficult to imagine how one can argue in this day and age, in view of the efforts made to eliminate discrimination in this country, that statements by a teacher in referring to black students as 'dumb niggers' do not offend the morals of the community. As noted by the Supreme Court of Minnesota . . . 'We cannot regard use of the term

'nigger' in reference to a black youth as anything but discrimination against that youth based on his race. . . . When a racial epithet is used to refer to a person of that race, an adverse distinction is implied between that person and other persons not of his race. The use of the term "nigger" has no place in the civil treatment of a citizen by a public official.' If, indeed, the use of such words does not constitute immorality, we are in greater danger as a country than some even suggest. Laws against discrimination have as their very foundation the notion that it is immoral to racially discriminate against another human, either by deed or by word.

"While much to our regret there may have been a time in our history when it was thought appropriate for us to refer to each other as 'kikes' or 'wops' or 'shanty Irish' or 'niggers,' thankfully we have overcome that disgrace. And those who insist on making such words a part of their vocabulary must be labeled by the public as immoral. For us to take any other position would be to condone such words and action, which no member of this society, let alone a court, should do. Silent indifference to racial discrimination is as much a threat to our society as racial discrimination itself. Either act is immoral in the broader sense.

"As noted by the late philosopher and theologian, Abraham Joshua Heschel: 'Few of us seem to realize how insidious, how radical, how universal and evil racism is. Few of us realize that racism is man's gravest threat to man, the maximum of hatred for a minimum

of reason, the maximum of cruelty for a minimum of thinking.' Heschel, *The Religious Basis of Equality of Opportunity--The Segregation of God*, in Race, Challenge to Religion 56 (M. Ahmann ed. 1963). And, as noted by the bishops of the Roman Catholic Church in the United States in their pastoral letter on racism, Brothers and Sisters to Us 2, 10 (Nov. 14, 1979): 'Every form of discrimination against individuals and groups--whether because of race, ethnicity, religion, gender, economic status, or national or cultural origin--is a serious injustice which has severely weakened our social fabric and deprived our country of the unique contributions of many of our citizens.

. . . .

'As individuals we should try to influence the attitudes of others by expressly rejecting racial stereotypes, racial slurs and racial jokes. We should influence the members of our families, especially our children, to be sensitive to the authentic human values and cultural contributions of each racial grouping in our country.'

"Whatever may be said concerning the population generally is only magnified when dealing with teachers, who, by example, permanently mold the minds of future citizens." 215 Neb. at 259-61.

See *Fiscus v. Central Sch. D. of Greene Cy.*, 509 N.E. 2d 1137 (Ind. App. 1987).

In *Fiscus*, the Court of Appeals of Indiana upheld the termination of a fifth grade teacher for *one* immoral statement which only a few students in her class actually heard. The statement, which the teacher denied, was "fuck you" and apparently was not said directly toward any student or for any particular purpose. The teacher argued that one such utterance, even if true, should not warrant her dismissal, but the court disagreed and ruled that the board did not abuse its discretion in dismissing the teacher nor did the board act arbitrarily or capriciously.

With the anti-Semitic hate crimes and the recent Los Angeles riots still fresh in our memories, it is vital that school children be taught racial tolerance. Racial bias hurts all children. First, the child who is the recipient of the biased behavior is damaged in the form of lowered self-esteem, and second, the child who initiates the prejudice is harmed by failing to appreciate differences in a child whose color, religion, or gender might not be the same. Moreover, a child's scope of acceptance is severely limited when he or she is taught to substitute a stereotype for reality. Finally, if bigotry is ever to be eradicated, it will be through education and through teaching students to appreciate the differences in people and in their beliefs and to not think negatively of these differences.

In conclusion, the Board certainly had good cause to terminate Whitmer's employment based upon the undisputed evidence of his repeated utterance of racial slurs in his classroom.

Second, I disagree with the negative finding standard adopted by the majority. A negative finding occurs when a party, who has the burden of proof, fails to sustain that burden. Absent arbitrary disregard of undisputed evidence or some

extrinsic consideration such as bias, passion, or prejudice, the negative finding cannot be disturbed. Generally, the negative finding standard has been applied by the trial court when a party has failed to meet its burden. See *Lostutter v. Estate of Larkin*, 235 Kan. 154, 162-63, 679 P.2d 181 (1984); *Highland Lumber Co., Inc. v. Knudson*, 219 Kan. 366, Syl. ¶ 5, 548 P.2d 719 (1976); *Jones v. Estate of Cooper*, 216 Kan. 764, 768, 533 P.2d 1273 (1975) and *Fox v. Wilson*, 211 Kan. 563, Syl. ¶ 8, 507 P.2d 252 (1973). Moreover, my research showed that our appellate courts have generally limited the application of the negative finding standard to a trial court's disbelief of evidence and that our appellate courts have never applied the negative finding standard to a teacher's hearing committee's findings.

Therefore, the question here is whether the application of the negative finding standard should be extended to the Committee's findings that the termination of Whitmer "was done without sufficient cause." I think not.

As to whether the Committee's decision was supported by substantial evidence, the majority, in applying the negative finding standard, says the trial court should have limited its review to whether the Committee had disregarded undisputed evidence. For instance, the majority stated "[t]he first issue on appeal relates to the Committee's finding that the Board had not proved its allegations of misconduct by a preponderance of the evidence. The district court recognized that this is a negative finding, which can only be overturned upon a showing of arbitrary disregard of undisputed evidence."

In *U.S.D. No. 434 v. Hubbard*, 19 Kan. App. 2d ___, ___, ___ P.2d ___ (No. 69,656 filed February 18, 1994), we stated that "the Committee's decision must be

supported by substantial evidence." K.S.A. 72-5439(f). The majority's reliance on the negative finding standard clearly circumvents the substantial evidence requirement of K.S.A. 72-5439(f). By severely limiting the review of a committee's decision, which is favorable to the teacher, the negative finding standard puts the school board at a clear disadvantage.

For instance, a committee determines the board has failed to show good cause for the teacher's termination; however, after a review of the evidence, it is clear the committee has disregarded substantial, but disputed, evidence of good cause to terminate the teacher. The negative finding standard would preclude any appellate review as to whether the committee's decision was supported by substantial, but disputed, evidence. As previously stated, absent arbitrary disregard of *undisputed evidence* or some extrinsic consideration such as bias, passion, or prejudice, the negative finding cannot be disturbed. Obviously, the legislature did not intend this result when it drafted K.S.A. 72-5439(f) and K.S.A. 72-5443(b).

Third, the Committee failed to set out adequate findings of fact. K.S.A. 72-5443(a) requires the due process hearing committee to set forth its findings of fact and determination of the issues.

The Committee determined the charges brought against Whitmer "are based primarily on hearsay, rumor, community involvement, and convoluted administrative ineffectiveness." The Committee, however, failed to specify which charges were based on "hearsay or rumor" or which charges were based on "community involvement" or which charges were based on "convoluted

administrative ineffectiveness." Moreover, many charges against Whitmer were supported by direct evidence, which was clearly not hearsay or rumor evidence.

What does the Committee mean when its says the charges against Whitmer were pursued because of "community involvement"? Even the majority states: "It is impossible to determine what type of 'community involvement' the Committee meant."

Moreover, what did the Committee mean when it mentions "convoluted administrative ineffectiveness" as one of the reasons for finding the Board's evidence inadequate? Again, the Committee failed to explain the later phrase.

In *Gillett*, the Kansas Supreme Court stated:

> "When a *conclusion must be buttressed by findings of fact* for which there is supporting evidence, it becomes *more difficult to conceal arbitrary action.* We believe that the better procedure in all school termination cases is for a school board to either adopt the findings of the hearing committee or, if it cannot accept them, to make its own findings of fact so that the propriety of its action may be more easily determined upon review in district court." (Emphasis added.) 227 Kan. at 80.

Here, the Committee grouped its reasons all together for rejecting the Board's 18 charges against Whitmer. In disposing of this case in this manner, the Committee avoided specifying which reason or reasons it applied in rejecting each

of the Board's 18 charges. The Committee's failure, however, to make specific findings of fact prevented proper judicial review of their actions. In addition, the Committee's inadequate findings prejudiced the Board. Although the Committee failed to make a specific finding on the racial slur charge, let us say, for this example, the Committee concluded that the Board had proved its racial slur charge against Whitmer. On review, the trial court or the appellate court would reexamine this finding to determine if it was supported by substantial evidence.

In this case, the trial court actually determined Whitmer admitted the Board's misconduct charge of uttering racial slurs in his classroom. Upon this determination, the trial court or appellate court would then proceed to the next part of the analysis, that is, whether the proved misconduct of Whitmer uttering racial slurs in his classroom constituted good cause for his termination. If the proved misconduct constituted good cause for termination, the court would then consider if the Board had brought the charge "in good faith" and if the Board's action in bringing the charge "was arbitrary, irrational, unreasonable, or irrelevant to the school board's objective of maintaining an efficient school system for the students in the school district." *Gillett*, 227 Kan. at 84.

The Committee's inadequate findings, however, prevented this type of reasoned analysis on review, to the detriment of the Board, and concealed the possible arbitrariness of the Committee's decision.

Fourth, the Committee determined the evidence was insufficient to justify the termination of Whitmer's contract. The trial court, however, determined the evidence was more than adequate to establish good cause to terminate Whitmer.

The trial court was correct. The Board presented undisputed evidence that Whitmer not only made racial slurs and told uncomplimentary jokes about blacks and women in his classroom, but it presented good and sufficient evidence that Whitmer improperly grabbed one female by her buttocks, called another female student "cantaloupe cunt," and made unflattering remarks concerning the anatomies of various other female students.

For instance, several students gave direct evidence, which was not hearsay or rumor testimony, concerning Whitmer's inappropriate remarks and behavior. They testified as follows:

"Examiner:	And you heard him use the name [T.B.] that day?
Student #A:	. . . yes.
Examiner:	. . . Mr. Whitmer said the following quote, 'Boy, she has big tits' unquote, and then quote 'Boy, look at them bounce' unquote. Is that your testimony?
Student #A:	Yes.
. . . .	
Examiner:	. . . have you heard Mr. Whitmer make any remarks about [M.W.] in class or anything?
Student #B:	Yes, I have.
Examiner:	And would you tell us what those comments were?
Student #B:	He--well, in one instance he compared her bra size to the size of something fitting into a wine glass.
Examiner:	He compared her bra size with something fitting into a wine glass?
Student #B:	He said that [breasts that] would fit into a wine glass was a perfect size.
. . . .	

Examiner: He called you cantaloupe?

Student #C: Yes.

Examiner: And do you know why that was a nickname for you?

Student #C: It means cantaloupe cunt.

Examiner: Excuse me?

Student #C: Cantaloupe cunt.

. . . .

Examiner: And were there boys present there then?

Student #C: Oh, yes.

Examiner: And they were the ones laughing?

Student #C: Oh, yes.

Examiner: And was Mr. Whitmer laughing then?

Student #C: Oh, yes. Sure, grinning.

Examiner: And you were offended by that?

Student #C: Very.

. . . .

Student #D: I was leaning against a banister and I was leaning there watching the game and he came up and he grabbed my butt.

Examiner: How did he grab you?

Student #D: Just kind of walked up and he put his hand on my butt and he squeezed a little bit. And he looked at me like oh, I guess I shouldn't be doing that.

. . . .

Examiner: Were you offended when he touched your bottom?

Student #D: Yes.

. . . .

Examiner: And is it your testimony that [B.V.] said to you he saw Mr. Whitmer grab your butt?

Student #D: He turned to me and he goes, 'Did he grab your butt?' And I go, 'Yes'. And he goes, 'I thought that's what he did'.

. . . .

Examiner: And do you remember an incident where [K.H.] felt she was touched or squeezed by Richard Whitmer?

Student #E: Yes. . . . we were watching the game and he came up and grabbed her butt and goes 'Whoops, I guess my hand shouldn't be there.'

Examiner: He said 'Whoops, I guess my hand shouldn't be there'?

Student #E: Yes, sir.

. . . .

Examiner: Did you give your statement to anybody after that fact, after that event allegedly took place?

Student #E: I told my mother.

. . . .

Examiner: You told her that night?

Student #E: Yes.

. . . .

Examiner: Had you heard [A.C.] called cantaloupe before the day in question?

. . . .

Student #F: Yes.

Examiner: Did you know what it meant?

Student #F: Yes.

Examiner: What did it mean?

Student #F: Cantaloupe Cunt.

Examiner:	And do you know whether Mr. Whitmer knew that was what it meant when he used that word on whatever day it was, fall to winter, 1991-92?
Student #F:	I am pretty sure he did.
Examiner:	Why do you think he did?
Student #F:	Because he was always joking about it.
. . . .	
Examiner:	Were you in Study Hall when Mr. Whitmer made comments about the wine glass?
Student #G:	Yes.
Examiner:	And what was his comment about the wine glass?
Student #G:	He said that-- he asked us if we had ever heard that the woman has a perfect breast if it fits into a wine glass."

As stated in *Gillett*, a tenured teacher may be terminated or nonrenewed for good cause, "including *any ground* which is put forward by the school board in good faith." (Emphasis added.) 227 Kan. at 78. See *Gaylord v. U.S.D. No. 218*, 14 Kan. App. 2d 462, 794 P.2d 307 (1990) (a single incident of insubordination justified termination of teacher). Therefore, the school board needs to prove only one good cause for terminating or nonrenewing a teacher's contract to justify termination or nonrenewal of that teacher. Here, the evidence was undisputed that Whitmer had repeatedly uttered racial and gender slurs in the presence of students.

The majority says, "This case comes down to the credibility of the witnesses. Had we heard the witnesses, we might have reached a different decision than the Committee." If that is the case, what credibility did the Committee give to Whitmer's repeated admissions that he uttered racial slurs in his classroom?

"Examiner:	Have you never used the word niggers in class except in a way about history?
Whitmer:	I didn't say that. I said it was not commonly used.
Examiner:	So you have used it other than in a teaching manner?
Whitmer:	Yes."

The Board not only proved Whitmer's racial bigotry, but it also proved his gender bias towards female students. Therefore, the Board clearly acted in good faith in seeking Whitmer's termination.

Finally, the trial court was correct when it concluded the Committee arbitrarily disregarded much of the evidence produced by the Board that clearly showed good cause for Whitmer's termination.

Because the Committee's decision is wholly deficient of required findings of fact and its decision is totally unsupported by substantial evidence, I would affirm the trial court. For these reason, I must respectfully dissent from the majority opinion.

Mr. Chairman, Senator Harrington, members of the committee, my name is Fred Marten. For the past six years I have been the principal of Clearwater Middle School in Unified School District #264. I am here today as a supporter of Senate Bill 136. I want to thank the committee for allowing me to give testimony concerning a process which I have experienced in a personal way.

When I was hired to my present position in the spring of 1989, I held the position of assistant principal at Clearwater High School. The announcement of my appointment was still news when three high school teachers came to visit me individually about a former high school English teacher who was presently assigned to the middle school teaching 6th grade science. All of the teachers had taught with the man whom I will call Mr. X. The three teachers were members of local and state teacher organizations and one had served on the state board of her organization. During the time in which the teachers taught with Mr. X at the high school, two of the three had gone to the administration and complained about Mr. X's ability to teach high school English classes. They told me that Mr. X had his grade book thrown out of the classroom window on a regular basis, he had little or no control of his room, and he made many grammatical mistakes on his assignments. The three told me the same story. The three high school teachers all stated that Mr. X was "a kind person", but I needed to "get rid of him." During an inservice at the middle school, all of the teachers had attended a session in Mr. X's room. There was a sign up in his room which said, "Do not throw paper or other ways to disturb others." They all told me this did not make sense and that action was long overdue concerning Mr. X. As I could do nothing at the time, I wrote these concerns down and went on about my business. The board of education and the superintendent of schools did not mention Mr. X to me as a teacher to watch. The teachers in the district gave me my first warning about Mr. X. This was very unusual. During my first year as middle school principal, it became apparent that his use of grammar was not acceptable, his classroom discipline was ineffective, and the students took advantage and made fun of him. The students made fun of Mr. X showing him little, if any respect. My evaluation expressed concern in many areas. When I went to Mr. X's file to look up his history, I found that he had been on probation in 1985-86, on job targets in 1988-89, and had my poor evaluation for the 1989-90 school year. From my point of view, the district had found serious concern with Mr. X on three different occasions and by three different principals. Mr. X found nothing wrong with his teaching and wrote a nine page

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response to my evaluation. During our meeting he told me that he would go on probation. He told me that the board would probably fire him this time. I asked my superintendent to consider the non-renewal of Mr. X. I was sent to our school board attorney. After looking at my documentation, and that of my predecessors, the attorney felt that we should start the non-renewal process. The reason which he developed was, **"Ineffective teaching techniques over a long period of time with basic resistance to change".** I took this back to my superintendent and school board. As I found complete support, I informed Mr. X that I was going to recommend that he be non-renewed. He informed me that it would be "a long process, probably two or three years" and would be very expensive for our district, costing us , "over $ 100,000". I passed this information on to the board. The vote to non-renew Mr. X was 7-0. I felt that the hearing process would take place within one or two months. I was wrong. Eighteen months after non-renewing Mr. X, we had our first day of hearings. One month later, the second day of the hearings took place and the third and final day took place several weeks later. Two years after his non-renewal, the hearing board came back with a vote of 3-0 for Mr. X. The board, superintendent, and I, had all been led to believe that if we showed that Mr. X was ineffective and incompetent we would win. Our attorney told us that the law stated this. The hearing board stated that we had proven that he "appeared" to be incompetent and ineffective, but felt that Mr. X had never shown "resistance to change". In my opinion, he had the inability to change. They also stated that the administrator had failed to put Mr. X on a plan of assistance as the evaluation form stated. The attorney, the superintendent, and I felt that it was a complete waste of time to put a person who we were releasing on job targets and the state law did not require it. This did not seem to be something that a reasonable person would have to do. Obviously, two items which could have been easily changed ended up costing our district $153,000.00. I feel that the hearing board intentions were misdirected. Their concerns should have included his due process rights and whether or not we proved him to be incompetent. We feel that he received his due process rights and that we proved that he was incompetent. **Our board voted to appeal the decision**. In the meantime, our attorney told us that the law was changed forcing boards to accept the finding of the hearing officer or panel. Our attorney asked the board to accept the decision and continue the appeal, which they did. The district court overturned the hearing committee and stated that the law had

been followed when the committee found that Mr. X was an incompetent teacher. The Kansas Court of Appeals reversed the district court simply stating that the board had voted to accept the finding of the committee. **This would mean that the board had no right to appeal.** The state supreme court refused to hear the case. We spent four and a half years, $43,000.00 in legal fees, and $110,000.00 in settlement because we used the word "resistance" and I failed to put a plan of assistance in place for a person we were going to release. At their school law seminar this year, the KASB's chief attorney Pat Baker said that she strongly felt that the court of appeals misinterpreted the law as it pertained to boards having to accept the decision of a hearing panel or officer. She said that it was becoming apparent to her that firing a tenure teacher was very difficult if not impossible. It is unreasonable to believe that school boards should be out of the loop. We cannot ask the elected leaders of the district to be uninvolved after the non-renewal goes to due process. By supporting Senate Bill 136 the board has the very clear option of accepting the recommendation of a hearing officer or not accepting the decision and taking appropriate action which the board deems necessary.

I have faith in school boards. I believe that in the majority of cases, the board will follow the recommendation of the hearing officer. If the board believes, as my board did, that we followed the law and accomplished its task, the right to appeal must be available.

I do not take the non-renewal of teaching staff lightly. I believe today as I have for my entire adult life that teachers perform a tremendous service for the youth of this state. Parents and the entire community have the right to expect our schools to employ the best teaching staff possible. During a period of time when the public school system is under such scrutiny, it is embarrassing to say that, instead of spending tax money on needed resources for our children, we spent $ 153,000 for an inadequate and incompetent teacher.

When it becomes necessary to take action to replace or remove a tenure teacher, the process must be fair to the teacher, the school board, and the entire community. In the case of Mr. X, not one teacher, student, or patron, came to the meeting to support him. Not one student, patron, or teacher contacted the school board, the superintendent of schools, or me to contest our action. The school board, the superintendent, and I still believe that the proper action took place. The entire process can and should be called into question. I believe Senate Bill 136 is a first step to straighten out this process. It is necessary to

bring the school board back into the decision making arena. Thank you for your time and kind attention and I will be glad to answer any questions at this time.

TESTIMONY BEFORE

THE SENATE EDUCATION COMMITTEE

BY

JIM BARRETT, SUPERINTENDENT, USD #466

YESTERDAY, AS I WAS WALKING THROUGH THE SECURITY STATE BANK IN SCOTT CITY, I DECIDED TO STOP TO SAY HELLO TO AN ACQUAINTANCE. HE IS IN THE UNIQUE SITUATION OF HAVING TWINS IN OUR SCHOOL SYSTEM, WHICH MEANS THAT HIS CHILDREN HAVE TWO DIFFERENT TEACHERS IN THE SAME GRADE LEVEL. HE HAS OBSERVED HOW DIFFERENT TEACHING STYLES AFFECT HIS CHILDREN AND HAS BEGUN TO WONDER HOW TEACHERS WHO DO NOT MEET COMMUNITY EXPECTATIONS ARE REMOVED FROM THE SCHOOLS. DURING OUR CONVERSATION HE QUESTIONED, "HOW DID TEACHER TENURE COME ABOUT?" THE CONCEPT OF TENURE IS UNHEARD OF "IN THE REAL WORLD", AS HE SPOKE OF THE BANKING BUSINESS AND OTHER ENTERPRISES IN THE PRIVATE SECTOR. HE WAS EVEN MORE DISTURBED TO DISCOVER THAT THE FINAL DECISION ON REMOVING A TEACHER FROM THE SCHOOL SYSTEM IS OFTEN DETERMINED BY A THIRD PARTY WITH NO AFFILIATION TO THE SCHOOL SYSTEM.

I SHARE HIS CONCERN, HOWEVER, I HAVE A MUCH DIFFERENT PERSPECTIVE. I SERVED USD #380 AS SUPERINTENDENT OF SCHOOLS FROM JULY 1989 THROUGH JUNE OF 1994. IN APRIL OF 1991 THE USD #380 BOARD OF EDUCATION VOTED TO NON-RENEW THE TEACHING CONTRACT OF A TENURED TEACHER. I WORKED CLOSELY WITH THE BUILDING PRINCIPAL DURING THE SCHOOL YEAR IN SUPERVISION OF THIS SPECIFIC TEACHER. A CONSIDERABLE AMOUNT OF MY LEADERSHIP TIME OVER THE NEXT TWO YEARS AND TWO MONTHS WAS CONSUMED BY THE STEPS REQUIRED BY PROCEDURAL DUE PROCESS OUTLINED IN THE TEACHER TENURE LAW. A MAJOR DETRIMENT TO THE SCHOOL DURING THIS TIME WAS THE NEGATIVE EFFECT THIS PROCESS HAD ON THE ENTIRE SCHOOL SYSTEM. COMMUNITY AND FACULTY BECAME DIVIDED OVER THE NON-RENEWAL ISSUE. THOUGHT, TIME AND EFFORT WERE SPENT ON THE NON-RENEWAL ISSUE INSTEAD OF ON THE IMPROVEMENT OF INSTRUCTION. USD #380 STUDENTS, AND THE QUALITY OF EDUCATION PROVIDED TO THEM SUFFERED THE MOST. STUDENTS WERE THE LOSERS IN THIS NON-RENEWAL PROCESS.

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AS EDUCATORS AND A LEADERS OF EDUCATORS, IT IS ESSENTIAL THAT WE LOOK IN RETROSPECT AT OUR EXPERIENCES AND DETERMINE THE LESSONS THAT WE HAVE LEARNED. WE MUST ALL ATTEMPT TO IMPROVE. BECAUSE OF ALL OF THE NEGATIVE EXPERIENCES SURROUNDING THE NON-RENEWAL OF THE TENURED TEACHER IN USD #380, I HAVE A DIFFERENT ATTITUDE ABOUT NON-RENEWALS. A TENURED TEACHER WILL HAVE TO DO SOMETHING ILLEGAL OR IMMORAL AT HIGH NOON, IN THE MIDDLE OF DOWNTOWN WHERE THERE ARE 100 WITNESSES, FIFTY OF THEM WILLING TO PUT IN WRITING WHAT THEY SAW AND 25 OF THEM WILLING TO TESTIFY TO WHAT THEY SAW, BEFORE I WILL AGAIN CONSIDER RECOMMENDING HIS OR HER NON-RENEWAL.

CURRENT KANSAS LAW PROVIDES A SERIES OF BARRIERS FOR ADMINISTRATORS AND BOARDS OF EDUCATION IN THE REMOVAL OF TENURED TEACHERS. THOSE BARRIERS HAVE BEEN ENACTED TO ENSURE THAT TEACHERS ARE TREATED FAIRLY BY BOARDS OF EDUCATION. HOWEVER, WHEN TOO MANY BARRIERS ARE PLACED IN FRONT OF ADMINISTRATORS AND BOARDS OF EDUCATION, STUDENTS CAN, AND DO SUFFER. I ENCOURAGE THIS COMMITTEE TO BEGIN THE PROCESS OF REMOVING ONE OF THOSE BARRIERS BY YOUR FAVORABLE CONSIDERATION OF SENATE BILL 136. THANK YOU FOR TIME AND CONSIDERATION.

TESTIMONY PROVIDED FOR THE KANSAS SENATE EDUCATION COMMITTEE

MARCH 14, 1995

Provided by:

Paul Lira, Board of Education Member
Santa Fe Trail USD 434

Senator Kerr and Members of the Senate Education Committee:

Thank you for allowing me to testify in support of Senate Bill 136. My name is Paul Lira of Scranton, Kansas. I am a member of the Santa Fe Trail USD 434 Board of Education, Carbondale, Kansas. I have been a member of the board since July 1, 1991. Today I am present to convey my deepest commitment to the local control of schools as provided when members of a school community elect its representatives. Senate Bill 136 begins to reinstate the statutory requirements for elected members of a school community to determine those things which are in the best interest of the community's children. A significant part of these responsibilities is to ensure that the very best teachers are employed and continue to be employed for the instructional programs. The teaching profession consists of a majority of men and women who commit their lives to the betterment of society. As with all aspects of society, problems develop which can hinder a school district in providing the very best instructional setting and climate for learning. When problems develop, a local board of education must ensure that appropriate remedies are taken through board policy and board decision-making. To do anything less results in a breach of the community's trust.

Senate Bill 136 addresses a critical need in the governance of the public's schools. In order to protect the interests of a professional educator, it is critical for a board of education to support those practices which lead to successful learning and to implement appropriate measures to remedy harmful acts when committed by any member of the education community. In my school district the board of education was faced with a difficult decision

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in the continued employment of one of our teachers. After appropriate deliberation with building supervisors, with district administrators and with legal counsel, it was determined that a teacher should be removed permanently from a classroom. Our **local board of education** made this determination in the best interests of the school community.

My fellow board members and I are very concerned that recent court decisions and actions by the legislature **remove** the local board of education's authority to make decisions in the best interests of its children. In the decision, USD No. 434 v. Hubbard, the Kansas Court of Appeals ruled that the legislature changed the power of the teacher due process hearing in 1991, when legislation gave the hearing panel (now officer) the ability to reverse a board of education's decision. The court agreed that before 1991 the primary responsibility for determining teacher employment issues rested with the **local school board.** Unfortunately, the action of the legislature clearly indicated that a hearing committee (now officer) is best qualified to make a quasi-judicial decision and **not the local school board.** Senate Bill 136 would provide remedy for this problem.

The Santa Fe Trail Board of Education, like all local governing bodies across the State, would prefer to apply its own standards, as elected members of the school community, in determining "good cause" for the employment status of any teacher. If it truly is the board's responsibility to "build up and maintain an efficient school system", then the decision to employ or not employ a school teacher should **not** rest with an unelected, unaccountable hearing officer.

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I have no problem with a teacher being given appropriate due process protection. In fact, as I am employed in the private sector, I work diligently to protect the interests of my fellow employees and the interests of my company. I would not want to turn over those decisions which affect my company to an outside person who has no stake in my work or in the interests of my company. I should expect no less for the children of our school community. Members of my local board of education and I want to be held accountable for the very best academic and disciplinary standards. If we are unable to remove employees who do not meet these standards, then the local board of education cannot be held accountable for the successes and/or failures of our local education system. With Senate Bill 136 **no** due process rights are removed for teachers. A teacher would still have the right to a hearing. The board must still present its case with evidence. A judicial remedy is still possible for a teacher who does not accept the final decision of the board. The role of a hearing officer would still be important in the due process procedure. All findings from the due process hearing could be used in any future judicial review.

It is critical, for the well being of our schools, that the **local board of education** has returned to it the power to make decisions affecting the employment of its teachers. In an era of transferring responsibility to those elected officials who know best what standards the community expects from its elected officials, it seems imperative the legislature review the maladies now found in current statute and take aggressive action for remedy by passing Senate Bill 136.

- continued -

Thank you very much for your time to listen from one of many who hope to support the betterment of our schools through local decision making. I am more than willing to answer any of your questions.

TESTIMONY BEFORE THE SENATE EDUCATION COMMITTEE

Tuesday, March 14, 1995 1:30 PM

Jan Collins, superintendent
Highland USD 425
402 E Main, P.O. Box 8
Highland, KS 66035

The following is a synopsis of the beliefs presented in testimony by Jan Collins relative to present laws concerning teacher due process.

I believe:

- that I speak as an advocate for the children of Kansas; their schools; their teachers, administrators, and all other school employees; our communities; and our state.

- that we must focus on the most appropriate directions for Kansas schools, and the proper balance of the various rules and regulations so we may advance in today's world and meet today's challenges.

- that public schools exist to help students learn and grow. (Not to provide jobs.)

- that our constant focus must be that schools exist for student learning and growth.

- that the present law has taken us out of balance, and we must work to find a more appropriate balance.

- that local control is important, and that the present law severely limits the ability of the local board of education to make critical personnel decisions.

- that a local board of education is more capable of making personnel decisions than a third party completely removed from the situation.

- that personnel decisions should be one of the basic responsibilities of the local board of education.

- that the present atmosphere, which allows the belief that it is practically impossible to prove incompetence, is not in the best interests of children and Kansas education.

- that realistic safeguards are needed and can be developed, and punitive actions should be taken against those whose would abuse teachers' rights.

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- that the present law can have a negative impact on non-tenured teachers and other school personnel, and is not in the best interests of children and Kansas education.

- that under the present law most non-renewals could result in excessive costs.

- that the present law significantly worsens the overall effects of teacher non-renewal on schools and communities.

- that the present law is one which results in skewed priorities and is completely out of balance.

- that all educators must be given the encouragement, opportunities, and support to improve.

- that professionalism carries an individual responsibility to continually learn and grow.

- that as the world changes educational systems and individual educators must change to best meet the needs of children.

- that local boards of education must be allowed to make personnel decisions for the appropriate reasons.

- that educators who need to improve, must improve.

- that the present atmosphere, which has developed under the present law, is not within the parameters of the original legislative intent.

- that the present law is not working as well as it should and must.

- that the legislature must take action to improve the situation that presently exists.

Statement by Maureen Weiss
Senate Education Committee, March 14, 1995

My name is Maureen Weiss and I am a registered nurse, and the mother of two daughters who both attended public schools. Education has always been an important part of my life. My mother was an elementary school teacher and I have been married 24 years to a former school teacher . In 1985, I was elected to the Auburn-Washburn Board of Education. Currently I am president-elect of the Kansas Association of School Boards. I also serve on the Quality Performance Accreditation Advisory Committee to the State Board of Education and on the Governor's Educational Advisory Committee.

I want to talk about two incidents during my ten years in office that I believe show why the current teacher tenure system should be changed.

At the beginning of my first term, I become aware of serious problems in our high school journalism department. The yearbook advisor was widely considered ineffective by students and staff. Enrollment in yearbook was declining. Even teachers would not purchase the yearbook because of the poor quality. As I investigated the situation, I found that the teacher's performance had been deteriorating for a number of years. Although the board wanted to take corrective action, we were told that attempts to improve the teacher's performance had been made, but never properly documented. In short, although it was widely known that this teacher was not meeting the academic and professional standards of the district, the board would probably be unsuccessful in removing this tenured teacher.

This, of course, was partly the fault of the high school principal. Because administrators do not have tenure, the board was able to quickly replace the principal with a new leader for that school. But it took two more years of counseling, evaluation and building a paper trail before the board could replace the teacher with a more effective instructor, who has rebuilt the program. Enrollment demand regularly exceeds space in the program and the yearbook annually receives national awards for excellence. My regret is for the five semesters of missed opportunties for journalism students in our district.

As a board member, my constituents do not understand a tenure system that keeps the board of education from removing ineffective teachers who do not respond to assistance efforts, and hiring the best instructors possible.

The second situation was far more difficult. It involved a teacher who seemed to be an exemplary educator, a teacher who was well known to the board, popular with many students and other staff.

The board was informed that several sixth grade girls had approached staff members that this male teacher had inappropriately touched them while their regular teacher was not in the room. Another student in the room also said he had witnessed the incident.

Imagine the position of the board of education. The male teacher admitted he had touched the girls, but denied there was anything improper about his actions. Who should we believe? On one hand, a respected educator. On the other, the children whose physical and emotional safety is as important to any responsible board member as the quality of their education. Of course, the parents of these children quickly learned about the accusations, and demanded the board take action.

I believe we proceeded as cautiously and fairly as possible. Eventually, a large number of current and former students and their parents were interviewed. It became clear that the actions of this teachers had caused some young girls, at a minimum, discomfort; while other girls were truly upset by the teacher's contact with them. Ultimately, six to eight students had to make depositions on video tape of their statements. During this time, the board removed the teacher from student contact, but continued to pay his salary during the appeal process.

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Under the due process law, the board could vote to "terminate" this teacher, but the real decision would be made by a hearing officer. We believe that we were fortunate in getting a hearing officer who was a retired judge. After his review of the case, he agreed that the board of education had acted properly. This case took several years to finally be resolved; it cost our district over $30,000 in legal expenses; and was obviously traumatic to the students, their parents, and the entire school community.

But my major concern is this: what would have happened if the hearing officer had not agreed with us? This did not involve a legal finding of guilt or innocence. The teacher did not go to prison or receive any sanction other than losing his job. But if the hearing officer had felt that the board had made the wrong decision - regardless of supporting evidence - the district would have been forced to keep this teacher on staff.

I would just ask this committee to consider how you would feel if this case had involved your children? How would you feel if your district told you that despite what your children said, despite evidence that other children were being harmed, despite violations of district and community standards, your elected representatives on the board of education had no choice but to reinstate this teacher? The hearing officer has no obligation to the community. He or she does not have to come back and explain his decision to parents. The hearing officer has no obligation to the effective running of the district, or maintaining educational quality.

As a board member, I have that obligation. If I am going to do the job I was elected to do, I need the authority to remove staff members when there is good cause. I don't have that now. S.B. 136 would give it back to me.