Approved: B. Lawrence
Date

MINUTES OF THE SENATE COMMITTEE ON EDUCATION.

The meeting was called to order by Chairperson Barbara Lawrence at 9:00 a.m. on February 12, 1997 in Room 123-S of the Capitol.

All members were present except:

Committee staff present: Ben Barrett, Legislative Research Department
Carolyn Rampey, Legislative Research Department
Avis Swartzman, Revisor of Statutes
Jackie Breymeyer, Committee Secretary

Conferees appearing before the committee: Patricia Baker, Deputy Exec. Dir./Gen. Counsel, KASB
Scott Brown, President, KASB
J. Patrick Brazil, Chief Judge, KS Court of Appeals
Gerry Henderson, USA
Dr. Gary Reynolds, Superintendent, Clearwater
Val DeFever, School Board Member, Independence

Others attending: See attached list Deb Larimore, Paola

Chairperson Lawrence called the meeting to order and stated the Committee would be hearing:
SB 170--teachers; relating to hearings provided upon notice of nonrenewal or termination of contracts of employment - Proponents

Patricia Baker, Deputy Executive Director/General Counsel, KASB, appeared first on the bill and presented her testimony along with three Court of Appeals cases. (Attachments 1)

Ms. Baker began by stating how the bill would make the following changes in the Kansas teacher tenure law. It eliminates the due process hearing officer. It allows tenured teachers the right to a hearing before the school board or committee or person appointed by the board. If the teacher believes the board has not provided a fair and impartial decision based on substantial evidence, the teacher may appeal directly to the Kansas Court of Appeals. The probationary period before a teacher is granted these tenure rights would be increased from three to four years. KASB believes the bill would improve the teacher tenure law in the following ways: Local school boards could again enforce community standards of conduct and performance, as long as those standards are reasonable and not enforced arbitrarily or in an unfair manner. The time and cost of tenured teacher due process procedures would be dramatically reduced for both teacher and school district. Boards would have longer to evaluate teachers before making a choice on tenure or dismissal.

Ms. Baker stated what KASB seeks is a return to the locally elected school boards the ability to make staffing decisions to enhance the quality of education for students. Teachers would be protected from arbitrary and capricious terminations or nonrenewal. Accountability would be with the local community, not an outside third party. Several court decisions interpreting the current law indicated that the decision of what standards of conduct were used lay not in the district but with a hearing officer. It is KASB's belief that this was not the intent of the legislature when the law was amended.

Ms. Baker added that she hoped this bill would get rid of the incompetent teacher and then stated that there is another issue looming on the horizon that will hit very quickly. School districts are rapidly losing enrollment. There will be more teachers than needed. Nonrenewal of teachers contracts means that for each and every reduction in staff, those schools look forward to the expenditure of thousands of dollars, simply to achieve a reduction in staff that is not based on teacher performance. Administrators have stated that based on the current status of the law, it will be cheaper to keep unneeded teachers than to go through a procedure that is both financially strapping and emotionally draining.

Chairperson Lawrence thanked Ms. Baker for her testimony and comments and called on the next conferee.

Scott Brown, President, KASB, appeared next as a proponent of the bill. Mr. Brown stated that he hoped that the Committee would see beyond the labor-management issues of this law to the very heart of what Kansas public schools are about - children. Mr. Scott has family who are teachers and would not like to see them dismissed by a board, but at some point someone has to ensure that what is being taught in the classrooms is the best that can be provided. There is no doubt in Mr. Scott's mind that the Board of Education should be the one. (Attachment 2)

J. Patrick Brazil, Chief Judge, Kansas Court of Appeals, was next to address the bill. Judge Brazil appeared as a neutral conferee and stated he was there to speak to the portion of the bill directly related to the Court of Appeals. He spoke of the great numbers of appeals, stating that in 1996, the appeals were double those of 1987, yet there were no additional judges to handle the load. He said the Court could handle a few more appeals, but it will be more difficult to handle them on an expedited basis. **SB 170** requires that the Court of Appeals file its decision within 120 days of notice of appeal. He would suggest amending the bill to require merely an expedited appeal rather than requiring a decision within 120 days. Judge Brazil noted that this is similar to appeals from the KCC in utility rate cases. Exhibit 2 in his testimony listed expedited appeals. (Attachment 3)

Gerry Henderson, USA, spoke to the contentious circumstances surrounding Kansas teacher due process. (Attachment 4)When a teacher is notified by a board of education of an intent to terminate or nonrenew a contract, the teacher has a right to have the matter heard before a hearing officer. That decision is binding on the board, subject to review in district court. Since the decision of the hearing officer is the final decision, it is that decision and the process used to reach that decision which is subjected to judicial review. It is the decision of one who most often has little or no connection to the community from which conflicts arise. Teachers must be protected against arbitrary, capricious or fraudulent action by administrators or boards of education, but it ought to be community folks making decisions about people who work with the children of that community. Several administrators reminded Mr. Henderson that the cases in Galena, Highland, Augusta, Santa Fe Trail and Clearwater serve to illustrate that the due process statutes as they have evolved and interpreted leave local people out of the ultimate decisions, and are therefore not worth the risk of time and resources.

Mr. Henderson submitted written testimony from Mr. Jan Collins of Highland (Attachment 5) and Dr. James "Chris" Christman (Attachment 6) who were not able to make it to Topeka to testify.

A comment was made to Judge Brazil that it would appear that the appeals court has from time to time thought that the district court did not really understand its appellate role. Would there not be advantages to having these cases go straight to the appellate instead of going to the district court.

Judge Brazil replied that this is different than a workers comp case that would come directly from the workers comp board or a Board of Tax Appeals case that would come directly to the Court. These are bodies that have people with expertise with support staff and have good records from them. It remains to be seen in this particular bill if appeals came directly whether the records from the hearing before the school board are complete for the court to review.

With regard for the 120 day limit on a utility rate case being somewhat difficult in that the court had to drop everything to do that case. Judge Brazil was asked if he could describe how extensive the records are in a utility rate case and then by comparison the record of volume and material a judge would have to review in one of these cases.

Judge Brazil replied the rate cases are going to be much more voluminous. A typical rate case the Judge was on last year had a record of over 17,000 pages. There is no question that these are larger and much more complex issues and involving very technical fields. The rules and regulations surrounding the utilities are very complex and foreign to most of the court. Teacher cases would be more similar to an appeal from a trial to a court involving a day or two of testimony.

A response to the Judge's reply was that hearing several of the teacher cases would not compare with six utility cases. The Judge responded that it would still be a problem for the court taking them on an expedited appeal rather than a normal one.

Dr. Gary Reynolds, Superintendent, Clearwater, made a few comments to the Committee. Dr. Reynolds told of the Clearwater case and why it was so inherently flawed. In the spring of 1990, the Board chose not to renew a tenured teacher. Eighteen months later the hearing panel finally met. Its report was in favor of the teacher. The Board then took the case to the district court who found for the Board. The teacher took the district court's decision to the Court of Appeals. The Court of Appeals overturned the district court's decision

and found in favor of the teacher. The Board appealed to the Supreme Court of Kansas, who chose not to hear the appeal. The entire process was unfair to the teacher, the Board and the taxpayers because the process took four and one-half years, cost $110,000 in settlement and $42,000 in attorney fees. The process should not take longer than a year. In essence, the teacher was paid for two years of not teaching. If the process would have been shorter, less money would have gone to the teacher and attorney.

Dr. Reynolds stated that he was there today to relate how flawed the system is. It makes no difference what decision the hearing officer makes because if the Board or teacher loses, it will go to court. The process needs to be changed.

The Chairperson thanked Dr. Reynolds and called on Val DeFever, School Board member from Independence.

Val DeFever, School Board Member, Independence, spoke to the bill. She stated she had taught for 13 years.By 1988 she was so discouraged that she quit. She said sentiment about education in Kansas and across the nation is very negative in many cases, largely because publicity is very slanted. This may be related to two things - taxes, and a bad teacher somewhere along the line. She stated that she had never feared for her job. A number of things have been done to remediate less than wonderful teachers.

Ms. DeFever stated that parents called her constantly, begging to not have their children in those clases where teachers are bad. Those teachers were never removed. It is tough to sit on a school board and know that a teacher needs to be removed and not be able to do anything about it. The parents who do not know anything about a bad teacher will be the ones who have their children in that classroom. Things won't improve because a hearing will end up in court and the teacher will still be there. There is no money for a court situation.

At this time the district is $143,000 in the red; they are looking at ways to cut the budget. They will never be able to get into technology. Because of the way things are, school boards in Kansas have no leverage. If there are those types of teachers out there, we need to get rid of them. There should be no reason why school boards cannot get rid of those teachers if they are not doing their job. There are 135 teachers in the district; 132 of them are wonderful, but the district cannot do anything about the three who are not.

Ms. DeFever ended her testimony by asking the Committee to give us the tool to deal with this situation.

Deb Larimore, Paola, spoke next. She told of a prior due process hearing that she termed a 'joke'. The hearing officer who came in to deal with the issue was a very nice gentleman, but the process was unbelievably slow. The officer had no control over the hearing. The hearing itself fell apart. The attorneys got together and negotiated a deal. The sad part of this story is how it affected the teacher and the Board. If the teacher could have been dealt with up front in an open and honest manner, it would have been better for all concerned. The Board could not do that. The Board could not sit down with that teacher. The teacher could not come to them and speak with them about the situation or the problems because the attorney said due process would not allow the teacher to do that. Ms. Larimore stated that school boards are not afraid of accountability or responsibility. They cannot do the job if their hands are tied in trying to deal with staff and employees. It would be unthinkable to private business to operate if it had no control over the hiring or termination of its employees.

Ms. Larimore ended her testimony by asking the Committee to give favorable consideration to the bill; school boards need to have their hands untied.

Chairperson Lawrence asked if there were questions from the Committee.

One of the Senators asked Dr. Reynolds if, besides the $110,000 pay for four and a half years and the $42,000 in legal fees if he had estimated the cost in terms of staff time.

Dr. Reynolds replied that they never tried to figure the cost as far as staff time, but it was very substantial. Dr. Reynolds characterized the effect on the school and community. Four and a half years with an on-going situation in a community that thought it very strange that it took so long to resolve the issue. In the building it was a difficult situation because of the number of individuals involved. The spouse of the individual involved worked in the school system. No one could understand why the process took so long.

Dr. Reynolds also responded that he is there today because these cases need to be resolved expeditiously and finalized in a reasonable amount of time.

Dr. Reynolds was asked if he could tell the Committee the basis of the nonrenewal case in his district. He replied that the individual in question taught at the high school level and had difficulty in controlling the class

and was ineffectively teaching. He was transferred to middle school where it was thought the students would not be quite so difficult to handle, although middle school students are also a challenge. Problems persisted with discipline. There were a number of problems that made this individual's teaching abilities suspect at best. The hearing panel found that the individual probably had inadequate teaching communication techniques, but found for the teacher. The case got to district court and it found the individual to be an inadequate teacher. The Court of Appeals stated that the improvement plan had not been written and found for the teacher. This documentation had not been written by the principal because he thought it unnecessary as he was not being recommended for approval and an improvement plan had been written five out of the last six years. The Court of Appeals based its decision on that lack of documentation.

Chairperson Lawrence stated that this has been what she has heard; the people responsible do not document clearly and responsibly.

The talk focused on the different associations getting together on a possible proposal to deal with the appellate issue - to work out some type of compromise. There has been no progress when USA/KASB and KNEA have gotten together.

Ms. Baker was asked her interpretation of what message the court was trying to send in the McMillan case. She replied that her interpretation of what message the court was sending is that the court is not the Legislature; its role is limited. It is forcing the court into a decision that it would not make if it had any alternative.

Chairperson Lawrence adjourned the meeting.

The next meeting is scheduled for February 13, 1997.

SENATE EDUCATION COMMITTEE GUEST LIST

DATE: February 12, 1997

NAME	REPRESENTING
Ken Bahr	KACC
Reg Metz	USD 410 Hillsboro
Jim Marbas	USD 402 Augusta
Larry Lyon	USD 339 Jeff Port
Mike Logue	USD 262 Valley Center
Shelly Garcia	USD 402
Amanda Garcia	USD 402
Harold Vinton	Retired
Jennie Vesta O	USD 434
Fred Berry	USD 434
Tom Schmidt	USD 434
Jeff Badger	USD 434
Mike Brockman	USD 434
Tom Krebs	USD 341/464
Marjorie Blankenship	KNEA
Kristy Lewis	Other NEA
Bill Land	Blue Valley NEA
David Allner	KNEA
Ray Peterson	NEA - Topeka

SENATE EDUCATION COMMITTEE GUEST LIST

DATE: Feb 12, 1997

NAME	REPRESENTING
Jan Mader	KNEA
Cynthia Mongeg	KNEA
Claudette Johns	KNEA
Kathy Richardson	KCK PTA Council
Jerri Ruiz	KCK PTA Council
Lori Dohrmann	USD 309 Nickerson
Pat Petty	KNEA - Turner
Brilla Highfill Scott	USA
Gerald Henderson	USA/KS
Neal K. Mo	USD 293
Clara Frick	USD 410
Curtis Frick	USD 410 Hillsboro
Teresa Friel	USD 403 Otis-Bison
Dennis Depew	USD 461 Neodesha
Val DeFever	USD 446 Independence
Pat Baker	KASB
Scott Brown	KASB
debbie Lawmore	USD 368 Paola KS
Carole Wilson	USD 252 Southern Lyon Co.

SENATE EDUCATION COMMITTEE GUEST LIST

DATE: Feb. 12, 1997

NAME	REPRESENTING
Greg Brownfield	KNEA
Lisa Gilpin	KNEA
Tom Corn	USD #264
Lisa Conrad	USD #264
Karen Heitman	USD 264
Joan Barby Lt	teacher USD 305
Jacque Oakes	SDE
[illegible]	USD 268
R. Carl Combs	Admin. USD 268
STEVE FIRKINS	USD 463
Larry Rhyne	USD 209
Howard Gray	Pratt USD 382
Mike Lockett	Moscow USD 209
Tom Lohey	USD 209 Board Member
Stanley McDill	USD 209 Moscow
Dave Kirkland	KNEA
Tim Schultz	KNEA
Sheryl Hoffer	KNEA
Lee Tunsenberg	KNEA

SENATE EDUCATION COMMITTEE GUEST LIST

DATE: Feb 12, 1997

NAME	REPRESENTING
Sue Chase	KNEA
Brenda Enns	USD410 - Hillsboro - Bd. Member
Jerry Wilson	USD#270 BOE - Plainville
Janice R. Ball	Sen. Biggs / Gilstrap

KANSAS ASSOCIATION OF SCHOOL BOARDS

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Testimony on Senate Bill No. 170
before the
Senate Education Committee

by
Patricia Baker
Deputy Executive Director/General Counsel
Kansas Association of School Boards
February 12, 1997

Madam Chairman, Members of the Committee:

Thank you for the opportunity to appear before you in support of S.B. 170.

Senate Bill 170 would make the following changes in the Kansas teacher tenure law:

- It eliminates the due process hearing officer. Under current law the hearing officer, not the employing school board, determines whether there is good cause for removing a tenured teacher. This means boards cannot enforce their own standards of conduct and performance.

- It allows tenured teachers the right to a hearing before the school board, or a committee or person appointed by the board. It requires the teacher receive procedural due process, including, among other things, "the right of the teacher to a fair and impartial hearing based on substantial evidence."

- If the teacher believes the board has not provided a fair and impartial decision based on substantial evidence, the teacher may appeal the decision directly to the Kansas Court of Appeals. The Court of Appeals would determine: (1) whether the board's decision was within its scope of authority; (2) whether the board's decision was substantially supported by the evidence contained in the record as a whole; and (3) whether the board acted fraudulently, arbitrarily or capriciously.

- The probationary period before a teacher is granted these tenure rights would be increased from three to four years.

KASB believes the bill would improve the teacher tenure law in the following ways:

- Local school boards could again enforce community standards of conduct and performance, as long as those standards are reasonable and not enforced in an arbitrary or unfair manner.

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Attachment 1

- The time and cost of tenured teacher due process procedures would be dramatically reduced for both the teacher and the school district.

- Boards would have longer to evaluate teachers before making a choice on tenure or dismissal. Teachers would have longer to prove themselves.

Contrary to rumor and untrue statements over the past few months and years, we do not advocate nor have we ever advocated eliminating rights of teachers which are protected by the 14th Amendment to the United States Constitution. What we seek is a return to the locally elected school boards the ability to make staffing decisions to enhance the quality of education for our students.

Teachers would still be protected from arbitrary and capricious terminations or nonrenewal but the accountability would be with the local community, not an outside third party.

The issue has been before the Legislature since several court decisions interpreting the current law indicated that the decision of what standards of conduct were used lay not in the district but with a hearing officer. It is our belief that this was not the intent of the legislature when the law was amended. Nevertheless, it is that interpretation which governs us at this time.

Accountability for the performance of our public schools lies with locally elected boards. But if those boards do not have the tools to require accountability of employees, our chances of enhanced performance are limited. It is in the classroom, with the teacher, that learning takes place. It is there that accountability must be assured.

Senate Bill 170 and its predecessor bills are an employer-employee issue, it's true. But it is much more than that, it is an education bill.

With this testimony, I have included a KASB position paper and copies of the most relevant Court decisions. I ask you to review them carefully.

I will be happy to answer any questions.

Due Process Cases Since 1974

Source: KASB Annual Research Bulletin on Employee Relations

*=Examples of boards reversing termination or nonrenewal upon committee recommendation.

School Year	Teacher Termination	Tenured Teachers Nonrenewed
Due process law enacted with three-member hearing committee; school board made final decision.		
1974-75	32 termination notices. 3 hearings held; 1 recommended termination, 2 were not concluded. No additional information.	35 nonrenewal notices. 5 hearings requested. No additional information.
1976-77	53 termination notices. No additional information.	50 nonrenewal notices. No additional information.
1977-78*	16 termination notices. 4 hearings held; all 4 recommended termination.	69 nonrenewal notices. 9 hearings were requested and held. 5 recommended that the teacher be nonrenewed. 4 recommended that the teacher be retained. 1 board retained the teacher.
1978-79*	15 termination notices. 6 hearings requested; 4 were held. 1 committee recommended termination. 1 recommended the teacher be reinstated and the board reinstated the teacher. 1 decision was still pending. 1 teacher resigned before a decision.	53 nonrenewal notices. 14 hearings requested and 10 were held. 4 recommended that the teacher be nonrenewed. 4 recommended that the teacher be retained. 2 boards retained the teachers. 1 case was settled before a decision. 1 case was pending.
1979-80*	10 termination notices. 4 requested hearings; 2 were held. 1 recommended the teacher be reinstated and the board reinstated the teacher. 1 case was pending.	35 nonrenewal notices. 7 hearings were completed. 6 recommended that the teacher be nonrenewed. 1 recommended that the teacher be retained and the board retained the teacher.
1980-81	8 termination notices. 3 hearings requested; 2 were held. 1 recommended that the teacher be terminated. 1 recommended the teacher be reinstated but the board terminated.	37 nonrenewal notices. 10 hearings requested and 5 were held. 1 recommended the teacher be nonrenewed. 1 recommended the teacher be continued but the board nonrenewed. 3 were pending.
1981-82	5 termination notices. No hearings requested.	43 nonrenewal notices. 19 hearings requested and 14 were held. 9 recommended the teacher be nonrenewed. 3 recommended the teacher be continued, but all 3 boards nonrenewed. No information on the remaining 2.
1982-83	8 termination notices. 2 hearings requested; 1 withdrawn and 1 settled.	55 nonrenewal notices. 19 hearings requested; 12 were held. 4 recommended the teacher be nonrenewed. 1 recommended the teacher be retained but the board nonrenewed. 4 were pending. No information on the remaining 3.
1983-84*	3 termination notices. 3 hearings requested. 2 recommended termination; 1 request was dropped.	34 nonrenewal notices. 15 hearings requested; 11 were held. 5 recommended nonrenewal. 2 recommended the teacher be retained. 1 board retained the teacher and the other had not made a decision. The remaining 4 hearings were not complete.

Unanimous recommendation of the committee made binding on the board.		
1984-85	4 termination notices. 2 hearings requested; 1 was held and it recommended termination.	37 nonrenewal notices. 17 hearings requested; 3 were held. 2 recommended nonenewal; 1 was not complete.
1985-86	3 termination notices (1 from a community college). 1 hearing was requested but dropped.	38 nonrenewal notices. 12 hearings requested; 5 were held. 2 recommended nonenewal. 1 recommended the teacher be retained and the board retained the teacher. No information on the remaining 2.
1986-87*	5 termination notices. 2 hearings requested; 1 was held; results not available.	31 nonrenewal notices. 15 hearings requested; 11 were held. 4 recommended nonrenewal. 3 recommended the teacher be retained. 1 board retained the teacher; 2 boards nonrenewed.
1987-88	3 termination notices. 1 hearing was held and it recommended termination.	34 nonrenewal notices. (10 were from one district due to the transfer of a program to another institution.) Of the remaining 24, 6 hearings requested and 3 were held. 2 recommended nonrenewal. 1 recommended that the teacher be retained but the board nonrenewed.
1988-89	5 termination notices. 1 hearing requested but the request was later withdrawn.	14 nonrenewals. 3 hearings requested; 2 were held. Both recommended nonrenewal.
1989-90	7 termination notices. 2 hearings requested, but both requests were later withdrawn.	25 nonrenewal notices. 9 hearings requested; two were held. Both recommended nonrenewal.
1990-91	2 termination notices. No hearings requested.	23 nonrenewal notices. 10 hearings requested; 6 were held. All 6 recommended nonrenewal.
Majority committee recommendation made binding on the board.		
1991-92	9 termination notices. 7 hearings requested; 3 were held. 2 upheld termination, 1 reversed the board.	28 nonrenewal notices. 12 hearings requested; 4 hearings were held. 3 upheld nonrenewal; 1 reinstated the teacher..
Single hearing officer replaces committee.		
1992-93	7 termination notices. 2 hearings requested; both recommended termination.	10 nonrenewal notices. 4 hearings requested; none held.
1993-94	7 termination notices. 6 hearings requested; 5 were held. 2 upheld termination, 1 recommended reinstatement but the teacher eventually resigned, 2 were not completed.	16 nonrenewal notices. 3 hearings requested, 3 were held. 1 upheld nonrenewal, 1 reinstated the teacher, and 1 was not completed.
1994-95	12 termination notices. 8 hearings requested, 2 held, both recommended reinstatement, neither board appealed.	22 nonrenewal notices, 13 hearings requested, 1 held. Results not available.
1995-96	6 termination notices. 2 hearings requested, 1 held, termination upheld. Teacher has appealed to the district court.	21 nonrenewal notices, 13 hearings requested, 1 were held. Both upheld board's action.

Due Process Issues
The Role of the Local School Board

State and federal courts have established that certain public employees, including public school teachers, gain an expectation of continued employment and can only be removed for good cause. Before they are removed, these employees are entitled to "due process," which provides an opportunity to respond to the reasons at a fair hearing. *When* the employee is entitled to due process, *how* the process will be conducted, and *who* determines what constitutes good cause are determined by state law.

KASB's Position

Local school boards should have the authority to determine good cause for removing a tenured teacher on a case by case basis from the evidence provided at a due process hearing.

Traditional School Board Authority

Kansas has traditionally entrusted local school boards with the management of public schools. 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."

This decision applied only to tenured teachers. Although state statutes do not actually use the term "tenure," it is commonly used to mean those teachers who are entitled to due process. (Under current law, teachers receive this entitlement after three years of employment, or two years if the teacher had previously received tenure in another district.) Over the years, the Legislature developed a due process hearing requirement. 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 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.

Changes in the Due Process Hearing

To review a local board's decision to remove a tenured teacher, the Legislature created a three person hearing panel. At first, the panel could only make a recommendation to the school board, and the board could review the record of the hearing and the recommendation and take final action. The law was then amended to make the panel decision binding on the board if it was a unanimous decision. In 1991, the law was amended again to allow a majority panel decision to be binding. This action occurred as an amendment to a bill on the House floor and was approved by the Senate as part of a conference committee report.

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 officer.

Changes in the due process law were proposed to ensure 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.

The Hubbard Case

But in 1994, the Kansas Court of Appeals ruled that the Legislature did change the role of the school board. 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.

What This Means for School Boards

Under these court decisions, the local school board 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 improving the quality of education and maintaining an efficient school system." Instead, this decision has been transferred to an unelected, unaccountable hearing process. There are accumulating examples of teachers who have been dismissed for violating professional and community standards, but have been reinstated by the hearing process.

- In the *Hubbard* case, the board terminated a teacher after viewing a video tape a teacher allowed students in his class to make. It showed students engaging in vulgar behavior, harassing other students, and a general lack of discipline in the classroom. The hearing committee concluded that the teacher "did not control the classroom in a manner which would be expected of him," but ordered reinstatement with back pay. The district court upheld the committee's action.

- In *U.S.D. 328 v. Whitmer*, a hearing found students testifying that a teacher used vulgar and demeaning language in reference to girls, blacks and other groups. The teacher admitted to using racial slurs in reference to blacks. The hearing panel, without making specific findings, simply concluded the board did not meet its burden of proof, and found termination improper. 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. The Kansas Supreme Court reversed in part and ordered the cases remanded to the hearing committee to make specific findings.

  In *Ames v. U.S.D. No. 264*, the hearing panel found that the teacher "probably had inadequate teaching and communication techniques," but concluded that nonrenewal was improper.

  In *USD 500 v. Robinson,* (under revview by the Kansas Supreme Court), the Kansas Court of Appeals reversed the Wyandotte County District Court's decision which upheld a hearing officer's decision in favor of a teacher. The Court of Appeals found that the hearing officer acted outside his scope of authority by applying his own standards of teacher performance.

- In a recent case, testimony by five students indicated that they were either directed or pressured into performing activities prohibited by medical excuses in a physical education class. Students who were injured in the class and could not perform the activities were not allowed an opportunity to earn a grade. The hearing officer ordered the teacher reinstated.

- In other recent cases, hearing officers have found evidence that board policies or the reasonable standards set by the board were violated, but have concluded that dismissal is unwarranted.

Although the *Gillett* standard for good cause has not been overruled by the courts, given the current system and the standard of judicial review, it appears that it is the hearing officer, not the board, whose judgment determines good cause. Further, the hearing officer's decision cannot be overturned by a district court unless the decision was arbitrary or capricious, unsupported by substantial evidence, or beyond the scope of the hearing officer's authority. This limited standard of judicial review is applied even though the hearing officer is not part of an administrative body, and is not required to have any expertise in the efficient operation of a school district.

In addition to removing the ability of local school boards to remove teachers for good cause, the current due process system has major other disadvantages.

First, it is time-consuming and costly. To remove a tenured teacher, a school district must first build a "case" to demonstrate the reasons for removal. Then, if the teacher appeals to the hearing officer, the board must pay the entire cost of the hearing, as well as its own legal fees. The process will also certainly involve many hours of administrative time. If the decision is appealed, the process is repeated. Districts have experienced costs of $40,000 to over $100,000 for a single teacher nonrenewal. And, it can easily take several years and hours of administrative staff time to complete the entire process.

The resources required for these cases are taken from the operating budget of the district. The cost of removing a tenured teacher diverts time and money from all other staff and students. That certainly has a chilling effect on efforts to remove poorly performing teachers.

The system has a negative impact on new teachers as well. Many boards will nonrenew a marginal or questionable beginning teacher because they know how difficult it is to remove them after they have received tenure. Teachers who might improve with help do not get the chance. The board can't take the chance they will not improve knowing how difficult it is to terminate after they receive tenure.

What Do School Boards Want From the Due Process System?

The most important tool school boards want is the ability to establish and enforce employment standards for teachers, as well as every other district employee. If school boards are to be held accountable for school performance, they must have the ability to hold their own employees accountable, and make decisions on both hiring and firing.

State law must be changed to give local boards final authority to establish good cause for removing a tenured teacher–as long as the reasons are supported by evidence and not arbitrary, unreasonable or capricious. If a teacher believes a school board has failed to provide due process, the teacher has the opportunity to appeal to Court.

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.

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

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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

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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.

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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.

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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?

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.

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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.

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"'[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

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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).

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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

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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

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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.
. . . .	

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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.

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"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.

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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.

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Senate Education
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Attachment 16

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

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.

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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.

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."

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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

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.

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No. 74,943

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

UNIFIED SCHOOL DISTRICT NO. 500,
KANSAS CITY, WYANDOTTE COUNTY, KANSAS,
Appellant,

v.

MABLE ROBINSON,
Appellee.

SYLLABUS BY THE COURT

1.

There are three factors that guide a hearing officer's review of a school district's decision to nonrenew a teacher's contract: (1) The burden of proof is on the school board; (2) the school board's reasons for termination must constitute good cause; and (3) the decision must be supported by substantial evidence.

2.

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

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Senate Education
2-12-97
Attachment 1C

court's decision which affirmed the hearing officer's ruling that the District failed to establish by substantial evidence good cause for nonrenewal of Mable Robinson's teacher contract. We reverse.

The District had continuously employed Robinson as an elementary teacher since 1967. In the spring of 1994, the District decided to terminate Robinson's contract. Robinson was given notice of the school board's intent to nonrenew her contract for the 1994-95 school year due to her failure to satisfactorily plan and teach lessons and her failure to provide an orderly teaching and learning climate. As a tenured teacher, Robinson filed a request for a due process hearing pursuant to K.S.A. 72-5436 *et seq.* An evidentiary hearing was held beginning January 12, 1995. The hearing officer found that there was not substantial evidence to support the District's stated reasons for nonrenewal.

On appeal at the district court level, the court found that the hearing officer had applied the correct standard of "good cause," his findings were supported by substantial evidence, and he did not arbitrarily ignore undisputed evidence. The District appeals.

Dr. Nelda Kibby was the principal at Lindbergh Elementary School during most of Robinson's tenure there and was Robinson's main evaluator. Dr. Kibby testified that from the beginning, Robinson was a "mediocre" teacher, but Dr. Kibby

your butt." Robinson testified that she told the child that if he ever said that again, then she would "kick his butt." Robinson then called Dr. Kibby to remove the child because by that time he was throwing a tantrum. Dr. Kibby testified that after talking with Robinson about this incident and thinking it over, the decision was made to place Robinson on leave without pay for the next school day. Following this incident, Robinson was placed on warning status and received intensive assistance during the 1993-94 school year.

During the 1993-94 school year, Dr. Kibby and Georgia Barry, the principal at Silver City Elementary School, made up the team for Robinson's assistance program. The team decided that Robinson should complete the new teacher mentor program whereby objectives were provided to help new teachers. Barry also observed Robinson approximately six times while Robinson was teaching. After each observation, Barry would conference with Robinson on what went well and what needed improvement. Barry's concerns were that Robinson was inconsistent in following through with suggestions and no real improvement was ever achieved. Barry was concerned about Robinson's lesson presentation, use of relevant materials, and ability to keep the students focused and involved in the lesson.

The three factors that should have guided the hearing officer in his decision were: (1) The burden of proof was on the school board, (2) the school board's

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which is not arbitrary, irrational, unreasonable, or irrelevant to the school board's task of building up and maintaining an efficient school system."

"'The evident purpose of the Tenure of Instructors Act . . . is to protect competent and worthy instructors and other members of the teaching profession against unjust dismissal of any kind--political, religious or personal, and secure for them teaching conditions which will encourage their growth in the full practice of their profession, unharried by constant pressure and fear, but it does not confer special privileges or immunities upon them to retain permanently their positions or salary, nor permit their interference with the control or efficient operation of the public-school system; and, notwithstanding it grants tenure to those who have taught the requisite period, it nonetheless empowers Boards of Education to discharge them for *just cause* in an orderly manner by the procedures specified.'" *Gillett*, 227 Kan. at 75-76 (quoting *Million v. Board of Education*, 181 Kan. 230, Syl. ¶ 1, 310 P.2d 917 [1957]).

The District argues that the hearing officer neither found that the reasons for nonrenewal of Robinson's contract were based on bad faith nor that the reasons were arbitrary, irrational, unreasonable, or irrelevant to the District's objective of maintaining an efficient school system for the students. It does appear that the hearing officer made no such finding.

The District contends that the hearing officer failed to balance the interests of everyone involved and instead focused solely on Robinson's tenure interest.

or irrelevant to the school board's task of building up and maintaining an efficient school system. See *Gillett*, 227 Kan. at 78. In paragraph 22 of his opinion, the hearing officer acknowledged that if the notice of nonrenewal had stated that Robinson was terminated for inefficient or incompetent service, his decision would have been much more difficult.

In paragraph 26 of his opinion, the hearing officer conceded that the philosophy of teaching between the administration and Robinson had changed over the years and that the administration was of the opinion that Robinson was no longer a suitable teacher for the present school environment. In paragraph 28 of his opinion, the hearing officer stated that in the opinion of the administration, Robinson no longer fit the system or the administration's expectations. In paragraph 30 of his opinion, the hearing officer indicated that while the record may reveal Robinson was a teacher with many years of experience who did not have exceptional credentials or ability, she appeared to have fit into the system until recently. Finally, in paragraph 54 of his opinion, the hearing officer wrote: "Satisfactory performance by a teacher is what the administrator says is satisfactory. Mrs. Robinson had to become a satisfactory teacher in the opinion and judgment of Dr. Kibby and Ms. [Barry]."

It does seem that the school board would be in a better position to determine the standard of performance for teachers within the district than a hearing officer.

about Robinson prior to this incident and that the incident itself was not really disputed.

Robinson presented no testimony to refute her 1989 or 1992 evaluations. At a minimum, the 1992 evaluation shows that Robinson's teaching performance was unsatisfactory. Robinson's April 1993 evaluation referred to Robinson's personal goals instead of a general evaluation of her teaching performance. These evaluations occurred before the May 24, 1993, incident and contradict the hearing officer's opinion that this event triggered Robinson's warning status.

The District contends that its nonrenewal notice was sufficient and that Robinson did not vigorously argue to the contrary. Citing *Loewen v. U.S.D. No. 411*, 15 Kan. App. 2d 612, 813 P.2d 385 (1991), the hearing officer noted that a teacher whose contract is being nonrenewed "is entitled to be judged solely on the reasons enunciated in the notice of nonrenewal. Due process requires no less." The hearing officer appears to have concluded that because the notice of nonrenewal did not specifically claim that Robinson was a "substandard" or an "incompetent" teacher, any evidence of substandard teaching or incompetence would be ignored. The claim that Robinson was a substandard teacher would be the more general underlying reason. If a teacher cannot adequately plan and teach lessons or maintain control of the classroom, then that teacher would be substandard by any definition. How the hearing officer distinguishes incompetence, substandard or inadequate planning

We conclude that the hearing officer exceeded the scope of his authority by applying his own standard of teacher performance, that the hearing officer ignored undisputed evidence which supported the District's decision, and that the hearing officer acted arbitrarily or erroneously in finding that the District's evidence did not comport with the notice of nonrenewal.

The judgment of the district court affirming the ruling of the hearing officer is reversed.

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KANSAS ASSOCIATION OF SCHOOL BOARDS
1420 S.W. Arrowhead Rd, Topeka, Kansas 66604
913-273-3600

Testimony on Senate Bill No. 170
before the
Senate Education Committee

by
Scott Brown
President
Kansas Association of School Boards
February 12, 1997

Madam Chairman, Members of the Committee:

Good morning and thank you for the opportunity to appear before you in support of S.B. 170. My name is Scott Brown. I am a member of the USD 347, Kinsley-Offerle Board of Education and I currently serve as President of the Kansas Association of School Boards. I have served on my local board since 1991 and I have found board service to be, at times, quite rewarding and other times, most frustrating. In the column of most rewarding things that I do, I would have to list the times I have spent at my high school cafeteria watching and interacting with students as they come in for lunch. Our high school cafeteria serves grades K-4 and 9-12. I find that I especially enjoy the elementary students. I know that my going to the cafeteria is not a required part of my board member duties. But, I have found I enjoy it immensely and I think it helps me focus when I am working as a school board member.

I do not envy the position you are in when legislation seemingly this divisive comes before you. It is my hope that you will see beyond the labor-management issues of this law to the very heart of what Kansas public schools are about–children. The children that I see on my visits to the cafeteria. Children who have one chance at being 8 or 9, 15 or 16. They have or maybe I should say, we have one chance to capture that youthful, energetic desire for knowledge. One chance to put forward the best we have to seize that opportunity, that time in their lives can never be captured again.

I have two brothers and three sisters-in-law that teach in public schools here in Kansas. I have no interest in seeing any of them mistreated or dismissed by the boards of education that they work for. But, it seems to me at some point someone has to ensure that what is occurring in the classrooms they teach in and in every classroom throughout Kansas is the best we can provide. That ultimately requires someone to make a decision. The question is who should make that decision? In my mind, there is no doubt but the locally elected and locally accountable Board of Education, working with their administration, should be that someone.

Local boards can and will make mistakes. But, their power is limited to an ability to exclude a teacher from teaching in a single district. They do not have the power to keep that teacher from teaching

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in the other 303 districts in this state. A teacher can have a second chance, but, as I have said before, you only get to be 8 years old once.

The frustrating part of board service comes when I watch good people, who were at one time good teachers, allow themselves to be seduced by: employment protection laws until they no longer see the need to learn, grow and be effective in their classrooms; employment protection laws which have little to do with why public schools exist; laws have little to do with children. I'm sure before the debate on this legislation is over, you will be told there is no problem. When you sit and look at the numbers, they will say you won't find anything which needs corrected, but I will tell you when I sit with the five members of my immediate family who teach and we talk about education, each of them will admit to me that they know someone in their district that they feel should not be teaching today. I can guarantee you that if you talk to local board members, they will tell you the same thing. No, I don't believe it is a large problem, but there is a problem and I think in S.B. 170 you are looking at a possible solution.

Thank you for your time. I wish you the best in your efforts on this matter. I will be happy to answer any question.

Appearance before the

Senate Education Committee

February 12, 1997

J. Patrick Brazil, Chief Judge
Kansas Court of Appeals

Thank you for this opportunity to appear and address the committee as you consider SB 170. I will be brief.

I am not appearing here today to support or oppose the bill. My intention is to point out the effect this bill might have on our court, and to answer any questions.

As Senator Lawrence knows, I met with the Ways and Means Subcommittee yesterday and told them about our problems and needs.

If you look at Exhibit #1, you will note that there were 1128 appeals filed in the Court of Appeals in 1987. Because of the growth experienced by the court from its creation in 1977 until 1987, the legislature expanded the court from 7 to 10 judges.

In 1996, the appeals were double the 1987 filings - 2,260, yet we still have only 10 judges. You'll also note that the largest jump in appeals has occurred since 1993, attributable largely to the enactment of sentencing guidelines.

I give you these statistics merely to point out problems we have with our present caseloads.

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Our inquiries into the number of teacher due process appeals over the last several years would suggest that we might not have many appeals per year.

Can we handle a few more appeals? Yes.

Can we handle them on an expedited basis? It will be a little more difficult, but yes.

See Exhibit 2. It is human nature to want priority, as you can see in the 12 or more kinds of cases that we currently handle.

As an example: See #1. K.S.A. 1995 Supp. 38-1591(a),(d) provides "Notwithstanding any other provision of law to the contrary, appeals under this section shall have priority over all other cases."

S.B. 170 requires that the COA file its decision within 120 days of notice of appeal - this is similar to appeals from the KCC in utility rate cases. See #4, p. 2, Exhibit 2.

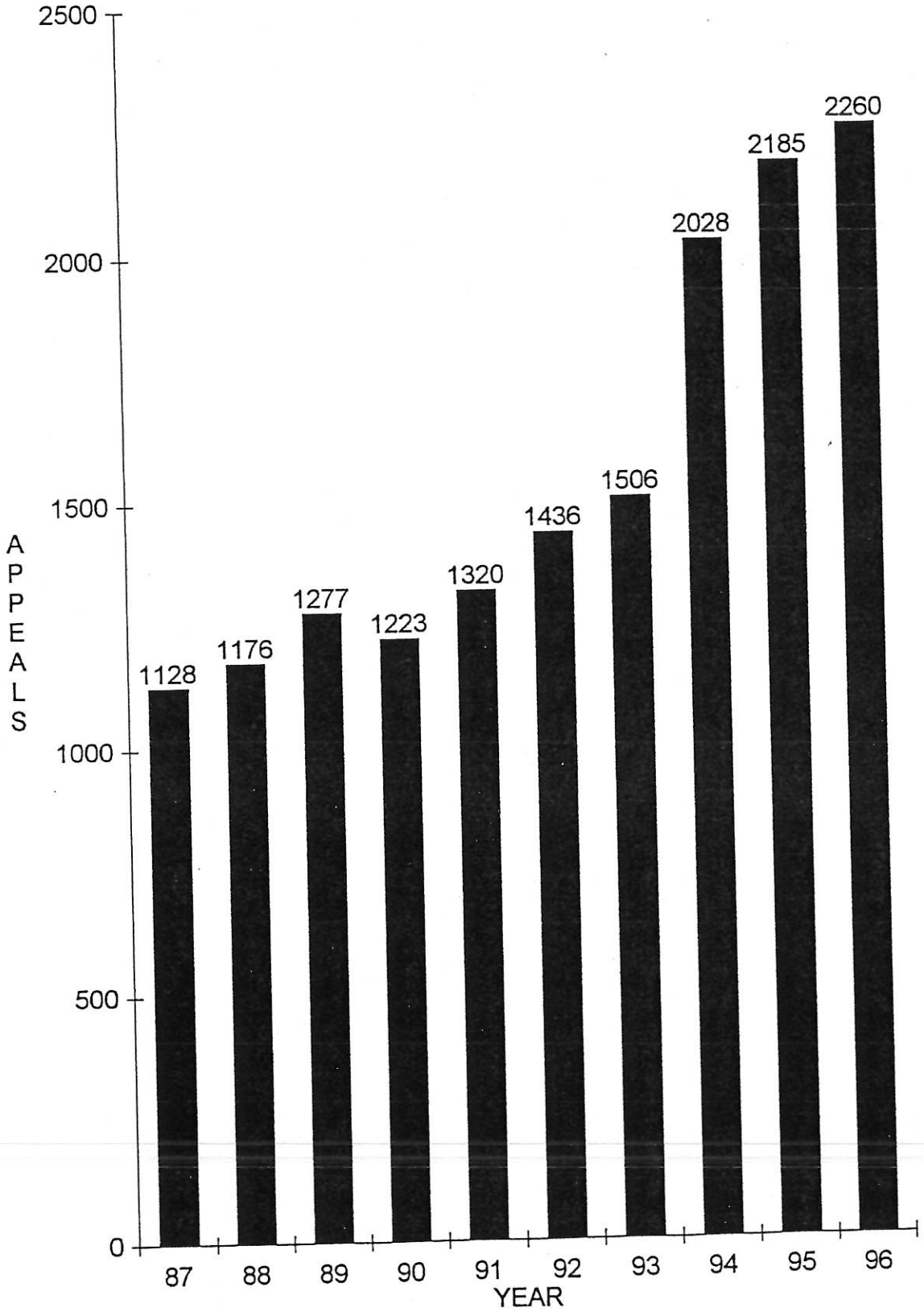
Expedited cases, especially those with time limits as proposed by SB 170 are most difficult for volume courts such as the COA.

I would suggest that the bill be amended to require merely an expedited appeal rather than requiring a decision within 120 days.

Questions.

Thank you.

Kansas Court of Appeals
Appeals Docketed



Exh. #1

Revised July 1996

EXPEDITED APPEALS IN KANSAS COURT OF APPEALS

Certain appeals are expedited either based on statutory authority or because the Court of Appeals wants to treat them quickly. Following is a list of expedited appeals.

Appeals With Priority Over All Other Appeals:

NOTE: Attorneys performing jurisdiction checks should inform the motions attorney about these appeals immediately.

1. Appeals by an interested party from any adjudication, disposition, or termination of parental rights or order of temporary custody in any proceedings pursuant to the Code for Care of Children. K.S.A. 1995 Supp. 38-1591(a), (d).

2. Criminal interlocutory appeals. K.S.A. 22-3603; Rule 4.02.

3. Habeas corpus proceedings involving extradition to another state. K.S.A. 60-1505(e). The statute requires the district court to send the transcript of the hearing to this court within 20 days after the notice of appeal is filed. After review of the transcript, the court sets the time for filing of the record. After reviewing the record, the court sets deadlines for filing of briefs *if briefs are desired.*

4. Appeals involving children, such as adoption and child custody appeals.

5. 2. Orders authorizing prosecution of a juvenile as an adult and other juvenile offender appeals. K.S.A. 38-1681(a), (c).

Other Expedited Appeals:

1. Waiver of parental notification for minors seeking an abortion. K.S.A. 65-6705(g).

Exh. 2

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2. Board of Public Utilities cases on public utility water and electricity rates. K.S.A. 13-1228h. The COA has jurisdiction over these cases despite K.S.A. 1993 Supp. 60-2101.

3. Workers compensation cases pursuant to the old system. K.S.A. 1992 Supp. 44-556(c). Workers compensation cases pursuant to the new system are not expedited.

4. An appeal of any agency action of the state corporation commission has precedence in the court in which it is pending. K.S.A. 66-118d. Agency action arising from a rate hearing requested by a public utility or requested by the state corporation commission when a public utility is a necessary party are appealed directly to the Court of Appeals and must be decided within 120 days. K.S.A. 66-118g.

5. Any action of the water transfer hearing panel of the Kansas water authority. K.S.A. 82a-1505(c).

6. Civil interlocutory appeal. K.S.A. 1993 Supp. 60-2102(b); Rule 4.01.

7. Habeas Corpus. K.S.A. 60-1503. NOTE: Only applies to 1501's and not 1507's.

8. Remands for ineffective assistance of counsel. *State v. Van Cleave*, 239 Kan. 117, 716 P.2d 580 (1986).

SB 170

Testimony presented before the Senate Committee on Education
by Gerald W. Henderson, Executive Director
United School Administrators of Kansas
February 12, 1997

Madam Chairman and Members of the Committee:

The contentious circumstances surrounding Kansas teacher due process rises out of an evolution of both the statutes and judicial interpretation of statutes, the latter of which is still evolving. Under current law, when a tenured teacher is notified by a board of education of an intent to terminate or non-renew a contract, the teacher has the right to have the matter heard before a hearing officer. The decision of that officer is binding on the board, subject to review in the district court. The problem is that since the decision of the hearing officer is in actuality the **final** decision, it is that decision and the process used to reach that decision which is subjected to judicial review.

United School Administrators of Kansas believes that those who deliver the mission of the school, teachers, must be protected against arbitrary, capricious or fraudulent action by our members, school administrators, or by the locally elected school boards who employ us all. Again, the problem under current evolved law is that the actions of school administrators and local boards is not subjected to the arbitrary, capricious or fraudulent test. It is the decision of one who most often has little or no connection to the community from whence the conflict arose that is considered by the court. The hearing officer's process and decision are tested, rather than those who are responsible for a community's schools.

Again, let me say what I said to start with. We believe teachers **must** be protected against arbitrary, capricious or fraudulent action by administrators or boards of education. But, short of failing those tests, it ought to be community folks making the decisions about people who work with the children of that community.

OVER

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820 SE Quincy St, Ste 200 Topeka, KS 66612-1165 (913) 232-6566 FAX (913) 232-9776

In preparation for today's testimony, I sent a memo via our communication network to all school districts asking for recent problems with the due process procedures in Kansas. When I received not one response in two days, I thought we are indeed getting better. Not trusting that first impulse, I made some telephone calls. Calls to all corners of the state and to both large and small districts produced the same response. Administrator after administrator reminded me that the cases in Galena, Highland, Augusta, Sante Fe Trail, Clearwater and others during the past two to three years serve to illustrate that the due process statutes as they have evolved and as they have been interpreted leave local people out of the ultimate decisions, and are therefore not worth the risk of time and resources.

So, I do not have a whole new set of conferees lined up to talk about a whole new set of cases. There aren't any. My members and those of KASB are searching for other solutions to personnel problems, or they are living with the problems. I did however, ask three of my members from whom some of you have heard before, to share the story of their experience with the due process procedures. One, Dr. Gary Reynolds, superintendent of Clearwater Public Schools, is here. The other two, Dr. James "Chris" Christman of Galena and Mr. Jan Collins of Highland were not able to make the trip to Topeka today. I have included with my testimony copies of testimony Chris and Jan have previously presented before legislative committees.

I encourage you to approve **SB 170** and return school personnel decisions to local boards subject to expeditious judicial review.

TESTIMONY BEFORE THE SPECIAL INTERIM COMMITTEE ON EDUCATION
Wednesday, August 23, 1995 1:30 PM

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

My name is Jan Collins. I am the superintendent of schools in Highland USD 425. Thank you for allowing me to share a few short comments relative to my perspectives on teacher due process as it now exits in Kansas. I will be brief.

On March 14, I stood before some of you as members of the Senate Education Committee and spoke with passion relative to my belief that the present system is broken and needs to be fixed. I feel no less strongly today. Realistic safeguards are needed, and I support them for all employees. However, the pendulum has swung too far and we are seriously out of balance concerning tenured teacher non-renewal. The present system which essentially gives the ability to make employment decisions on tenured teacher non-renewal to a third party completely removed from the school district is not working as well as it should and must. The mountains of required documentation, the associated extraordinary time requirements and the excessive costs are significant detriments to educational quality.

Members of local boards of education, administrators, and fellow educators must continue to provide the encouragement, the opportunities, and the support for teachers to continually learn and update their skills. (I believe that inherent within the word professional is the individual responsibility to continually learn and grow.) As needs change educators must work to develop the necessary skills to best serve our children; and just as coaches must be given reasonable latitude to select team composition, so must administrators and local boards of education with professional staffs be allowed to make selections for appropriate reasons. Teachers who need to improve, when given the guidance and opportunities to develop the necessary skills, must improve. The profession can accept no less. And for that very small percentage who for whatever reason do not meet the necessary level of performance, local boards of education must be again allowed to take the necessary steps to insure our children are receiving the most appropriate education we can provide.

I do not believe that the present atmosphere is within the parameters of the original legislative intent when the law was changed to what exists today. However, it appears that minor rewording in the present law could result in major change. Wording which simply delineates the role of the hearing officer to change from that of a decision maker to one that reviews and makes recommendations relative to the decisions made by the board of education should provide an appropriate forum for challenges, but leave the decisions with

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the elected local body (the board of education) whose responsibility includes making personnel decisions.

Two years ago we endured a tenured teacher non-renewal. It was a horrible experience for everyone. It required hundreds of administrative hours, months of anguish, notebooks of documentation, and many thousands of dollars. Even though the board felt everything that could realistically have been done was done, they felt forced to accept a buy out agreement when one was finally offered in late July the day before the hearing was scheduled rather than leave the decision to an unknown hearing officer. The present law made every aspect of an already very difficult situation much worse. Please fix this broken system. All Kansans deserve better.

Thank you.

HOUSE EDUCATION COMMITTEE
FEBRUARY 14, 1996

MY NAME IS CHRIS CHRISTMAN, SUPERINTENDENT OF SCHOOLS AT GALENA U.S.D. NO. 499.

THANK YOU FOR THE OPPORTUNITY TO SPEAK TO H.B. 2857.

UNDER CURRENT LAW, SCHOOL DISTRICTS DO NOT HAVE THE AUTHORITY LOCALLY TO MAKE CHANGES IN PERSONNEL IF THAT PERSON IS A TENURED TEACHER. THAT DECISION IS NOW LEFT TO A HEARING OFFICER FROM NOT ONLY OUTSIDE THE COMMUNITY, BUT THE FIELD OF EDUCATION. THE DECISION OF THAT PERSON WILL BE BASED, MOST LIKELY, ON CRITERIA OTHER THAN THAT WHICH WAS ORIGINALLY IDENTIFIED AS CAUSE FOR DISMISSAL. THE BOARD OF EDUCATION OF A SCHOOL DISTRICT MUST ACCEPT THE FINDING OF THE HEARING OFFICER AS THAT DECISION IS, UNDER CURRENT LAW BINDING ON THE BOARD OF EDUCATION.

SCHOOLS ARE CHANGING, STUDENTS ARE CHANGING, SOCIETY IS CHANGING, AND EXPECTATIONS OF SCHOOLS ARE CHANGING. SCHOOL DISTRICTS ARE IN A CONTINUOUS IMPROVEMENT MODE. THE PUBLIC IS DEMANDING MORE OF SCHOOLS, THE LEGISLATURE IS DEMANDING MORE OF SCHOOLS, THE STATE BOARD OF EDUCATION IS DEMANDING MORE OF SCHOOLS, AND THE COURTS ARE DEMANDING MORE OF SCHOOLS. IT IS UNREASONABLE AND UNREALISTIC TO HOLD SCHOOLS ACCOUNTABLE FOR ACADEMIC, SOCIAL, AND DISCIPLINARY STANDARDS IF THEY ARE NOT ALLOWED TO DISMISS TEACHERS THAT CONTINUALLY FAIL TO MEET THESE STANDARDS.

AT TIMES SCHOOL DISTRICTS ARE CALLED UPON TO MAKE DIFFICULT PERSONNEL DECISIONS. THESE DECISIONS ARE TAKEN VERY SERIOUSLY BY ADMINISTRATORS AND BOARD OF EDUCATION MEMBERS. HOWEVER DIFFICULT THESE DECISIONS ARE, WE MUST REMAIN VIGILANT TO OUR MISSION OF PROVIDING THE BEST EDUCATIONAL OPPORTUNITIES FOR OUR STUDENTS.

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02-11-97 02:32PM P02

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TEACHERS, NOR ANYONE ELSE SHOULD BE TREATED UNFAIRLY. HOWEVER I DO BELIEVE THAT IN SOME INSTANCES, THE CHILDREN OF KANSAS ARE BEING TREATED UNFAIRLY BECAUSE OF INEFFECTIVE AND INEFFICIENT TEACHING. THIS IS UNFORTUNATE.

LOCAL SCHOOL DISTRICTS NEED TO HAVE THE AUTHORITY TO MAKE PERSONNEL CHANGES WITHOUT THE THREAT OF LENGTHY AND COSTLY LITIGATION. A STRONG COMMITMENT TO DUE PROCESS FOR ALL INDIVIDUALS SHOULD ALWAYS BE PARAMOUNT IN ANY PERSONNEL DECISION. HOWEVER, THE THREAT OF LITIGATION SHOULD NOT BE. THIS THREAT MAY PREVENT SOME SCHOOL DISTRICTS FROM MAKING EMPLOYMENT DECISIONS FOR TENURED TEACHERS THAT NEED TO BE MADE. BASED ON PERSONAL EXPERIENCE WITH A TEACHER NON-RENEWAL, IT IS THE STRATEGY OF THE TEACHER'S K.N.E.A. PAID ATTORNEYS TO MAKE THE PROCESS OF NON-RENEWING THE CONTRACT OF A TENURED TEACHER SO MONETARILY COSTLY, TIME CONSUMING, AND UNPLEASANT THAT FUTURE NON-RENEWALS WOULD NOT OCCUR. THIS POSITION GIVES NO CONSIDERATION FOR THE WELFARE THE STUDENTS. CONTINUED EMPLOYMENT OF THE TEACHER BECOMES THE CENTRAL THEME OF THE TEACHER'S LEGAL DEFENSE, NOT IF THEY WERE EFFECTIVE OR EFFICIENT IN THEIR INSTRUCTION OF YOUNG PEOPLE.

LET ME GIVE YOU A VERY REAL EXAMPLE OF WHAT OCCURS WHEN A SCHOOL DISTRICT MAKES A COMMITMENT TO PROVIDE QUALITY INSTRUCTION FOR THEIR STUDENTS AND NON-RENEW THE CONTRACT OF A TENURED TEACHER.

A TENURED TEACHER IN GALENA UNIFIED SCHOOL DISTRICT 499 WAS PLACED ON PROBATION FOR THE 1988-89 SCHOOL YEAR AND WHEN SUFFICIENT IMPROVEMENT HAD NOT OCCURRED THIS TEACHERS WAS PLACED ON PROBATION A SECOND TIME DURING THE 1989-90 SCHOOL YEAR. IN APRIL, 1990 THE BOARD OF EDUCATION ISSUED NOTICE OF INTENT TO NON-RENEW THE TEACHER'S CONTRACT FOR THE 1990-91 SCHOOL YEAR. THE TEACHER REQUESTED A DUE PROCESS HEARING IN APRIL, 1990 BEFORE A THREE PERSON HEARING PANEL. THE HEARING COMMITTEE HEARD TESTIMONY FOR THREE DAYS AND RENDERED A DECISION IN JANUARY, 1991

RECOMMENDING THE DECISION TO NON-RENEW BE UPHELD WITH SUFFICIENT

EVIDENCE. DURING THE HEARING THE ATTORNEY FOR THE TEACHER REQUESTED THAT HE BE ALLOWED TO QUESTION BOARD OF EDUCATION MEMBERS ABOUT WHAT WAS DISCUSSED IN EXECUTIVE SESSION CONCERNING THIS TEACHER'S EVALUATIONS. THE HEARING PANEL DENIED THE REQUEST ON THE GROUNDS THAT INFORMATION DISCUSSED DURING EXECUTIVE SESSION WAS PRIVILEGED AND NOT OPEN TO PUBLIC REVIEW.

THE TEACHER APPEALED THE DECISION OF THE SCHOOL DISTRICT TO NON-RENEW THE CONTRACT TO THE DISTRICT COURT IN FEBRUARY, 1991. THE ISSUE REMAINED IN THE DISTRICT COURT FOR TWENTY TWO MONTHS.

THE DISTRICT COURT RENDERED A DECISION IN NOVEMBER, 1993 UPHOLDING THE HEARING COMMITTEE'S AND THE SCHOOL BOARD'S DECISION TO NON-RENEW THE TEACHER'S CONTRACT.

THE TEACHER APPEALED THE DISTRICT COURT'S DECISION TO THE COURT OF APPEALS WHICH RENDERED THEIR DECISION IN MARCH, 1995. THE COURT OF APPEALS HELD THAT THE TEACHER WAS DENIED DUE PROCESS BY THE THREE PERSON HEARING COMMITTEE WHEN THE HEARING COMMITTEE DENIED EVIDENCE CONCERNING DISCUSSIONS OF SCHOOL BOARD MEMBERS IN EXECUTIVE SESSION. THE APPELLATE COURT WENT ON TO SAY THE SCHOOL DISTRICT MAY HAVE HAD VALID REASONS FOR NOT RENEWING THE TEACHER'S CONTRACT. THE APPELLATE COURT FOUND IN FAVOR OF THE TEACHER NOT BECAUSE OF ANY WRONG DOING OF THE SCHOOL BOARD OR THE SCHOOL DISTRICT, BUT BECAUSE THE DUE PROCESS HEARING COMMITTEE EXCLUDED EVIDENCE FROM EXECUTIVE SESSIONS. THE SCHOOL DISTRICT APPEALED THE DECISION TO THE KANSAS SUPREME COURT WHO REFUSED TO HEAR THE CASE THEREBY LETTING THE APPELLATE COURT DECISION STAND.

BECAUSE THE ISSUE WAS BEFORE THE HEARING COMMITTEE FOR APPROXIMATELY NINE MONTHS AND REMAINED IN THE COURT SYSTEM THROUGH THE DISTRICT COURT, THE KANSAS COURT OF APPEALS, AND THE

KANSAS SUPREME COURT FOR THE NEXT FOUR YEARS, THE TEACHER WAS

AWARDED BACK PAY PLUS INTEREST LESS ANY WAGES AND UNEMPLOYMENT BENEFITS RECEIVED FOR FIVE YEARS. THE SCHOOL DISTRICT'S ERRORS AND OMISSIONS INSURANCE POLICY DID NOT COVER ANY OF THE COST OF THE JUDGMENT BECAUSE THE SCHOOL DISTRICT WAS NOT FOUND TO HAVE ACTED WRONGLY. HAD THE TEACHER BEEN AWARDED PUNITIVE DAMAGES BECAUSE OF WRONG DOING ON THE PART OF THE SCHOOL DISTRICT THEY WOULD HAD PAID THE FULL AMOUNT. AS IT WAS THE TEACHER WAS AWARDED BACK PAY AND NOT DAMAGES

SINCE THE COURT ORDERED THE TEACHER REINSTATED, THE DISTRICT AND TEACHER REACHED AN AGREEMENT WHEREIN THE BOARD BOUGHT OUT HER TEACHING CONTRACT AND BOTH PARTIES EXECUTED A JOINT RELEASE WHICH BROUGHT THE MATTER TO A FINAL CONCLUSION IN AUGUST, 1995.

DURING THE FIVE YEARS OF LITIGATION, GALENA U.S.D. 499 HAS NOT WAVERED FROM IT'S COMMITMENT TO EXCELLENCE FOR OUR CHILDREN. THE TEACHER WAS AWARDED $218,216.00 (IN ORDER TO PREVENT THE REINSTATEMENT OF THIS TEACHER IN OUR SCHOOL SYSTEM, THE TEACHER WAS PAID THE EQUIVALENT OF ONE YEARS SALARY WHICH WAS APPROXIMATELY $38,500) . WHEN THIS AMOUNT IS ADDED TO THE LEGAL EXPENSES INCURRED BY THE SCHOOL DISTRICT THE TOTAL EXCEEDS ONE-QUARTER OF A MILLION DOLLARS.

THE SCHOOL DISTRICT HAS EXPENDED THOUSANDS OF DOLLARS AND THOUSANDS OF MAN-HOURS WITH THIS CASE. RESOURCES WHICH COULD HAVE BEEN BETTER SPENT IN CONTINUING TO IMPROVE THE QUALITY OF EDUCATION THE STUDENTS, PARENTS, AND CITIZENS OF GALENA, KANSAS DESERVE AND HAVE COME TO EXPECT OF THEIR SCHOOL SYSTEM.

THE IMPACT ON THE SCHOOL DISTRICT FINANCIALLY HAS BEEN A BURDEN THIS YEAR. BUDGET CUTS HAVE BEEN MADE WHICH WILL HAVE THE LEAST DIRECT IMPACT ON THE STUDENTS ATTENDING OUR SCHOOLS.

H.B. 2857 DOES CORRECT THE PROBLEM OF ALLOWING A NON-

EDUCATOR TO DECIDE THE FATE OF A TEACHER AND A SCHOOL DISTRICT.

HOWEVER, IT DOES NOT RETURN TO THE LOCAL SCHOOL DISTRICTS AND ELECTED BOARDS OF EDUCATION LOCAL CONTROL OF PERSONNEL MATTERS. AS IN THE CASE OF GALENA U.S.D.NO. 499 ACTIONS OF A HEARING PANEL OR A HEARING OFFICER CAN HAVE PROFOUND EFFECTS ON A SCHOOL DISTRICT. IN MY HUMBLE OPINION A HEARING OFFICER OR A HEARING PANEL IS NOT NECESSARY SINCE THE DECISION OF THE BOARD OF EDUCATION CAN BE APPEALED DIRECTLY INTO THE COURT SYSTEM.

AS THIS COMMITTEE CONSIDERS THESE MATTERS, PLEASE REMEMBER THE IMPORTANCE OF A QUALITY EDUCATION AND WHAT IT MEANS FOR THE CHILDREN OF KANSAS. THEY ARE OUR FUTURE.