Approved: 3/30/94
Date

MINUTES OF THE SENATE COMMITTEE ON EDUCATION

The meeting was called to order by Chairperson Dave Kerr at 5:15 p.m. on March 22, 1994 in Room 531-N of the Capitol.

All members were present.

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

Conferees appearing before the committee: None

Others attending: See attached list

The Subcommittee on Inclusion provided a revised list of questions to be asked of a select panel (Attachment No. 1). By consensus, the Committee agreed that Chairman Kerr and Senator Frahm, Chair of the Subcommittee, would submit the list of questions to selected individuals and schedule a meeting of the full Committee for presentation of the panelists' answers.

Chairman Kerr said that two decisions by the Court of Appeals have recently come to his attention with regard to due process and provided excerpts from the *Hubbard* and *Whitmer* decisions (Attachments No. 2 and 3). He said a situation has developed where the courts are interpreting the changes that were made in the due process law in 1991 and 1992 to be far more broad than what was intended by the Legislature. The result is that the authority which formerly rested with the school board to determine good cause for dismissal has been given to the hearing officer. Chairman Kerr noted that there are two bills in the Committee, dealing with due process, which are still active.

Senator Tiahrt made a conceptual motion that HB 2056 be amended to provide that the hearing officer serves in an advisory role and that the decision of the board of education is final, subject to judicial review. Senator Corbin seconded the motion. It was noted that HB 2056 deals with due process for teachers at the state School for the Blind and School for the Deaf. The Revisor provided some history of the due process legislation. Senator Emert made a substitute motion that HB 2056 be amended to provide that the hearing officer serves in an advisory role and that the decision of the board of education is final, subject to judicial review; that the base state aid per pupil be raised to $3625, and that the provisions of SB 559 be added. Senator Langworthy seconded the substitute motion. It was noted that SB 559 provides that the maximum local option budget of 25 percent rises as the base rises.

During discussion, it was noted that both the *Hubbard* and *Whitmer* cases began prior to the change in the law providing for a single hearing officer. A brief description of each case was given by Chairman Kerr. It was clarified that the original motion and substitute motion are intended to include the teachers at the state School for the Blind and the state School for the Deaf in any change in due process law.

It was requested that the question be divided between the primary motion and the substitute motion. Then, it was requested that the question be divided into three parts. Chairman Kerr announced that the first vote would pertain to the amendment dealing with due process. The substitute motion to amend HB 2056 to provide that the hearing officer's opinion is advisory and that the decision of the board of education is final, subject to judicial review, carried, and Senator Walker requested that his "no" vote be recorded. Chairman Kerr announced that the second vote would pertain to raising the base state aid per pupil. The substitute motion to amend HB 2056 by raising the base state aid per pupil to $3625 carried. Chairman Kerr announced that the third vote would pertain to amending the provisions of SB 559 into HB 2056. The substitute motion to allow the maximum 25 percent local option budget to rise with the base carried.

Senator Tiahrt made a motion that HB 2056, as amended, be recommended favorably for passage. Senator

MINUTES OF THE SENATE COMMITTEE ON EDUCATION, Room 531-N Statehouse, at 5:15 p.m. on March 22, 1994.

Frahm seconded the motion. Senator Walker made a substitute motion that HB 2056 be tabled. Senator Jones seconded the substitute motion. The substitute motion failed. The primary motion carried, and Senators Walker, Jones and Downey requested that their "no" votes be recorded.

The meeting was adjourned at 6:00 p.m. There are no additional meetings of the Committee scheduled at this time.

SENATE EDUCATION COMMITTEE

TIME: 5:00 PLACE: 531-N DATE: 3/22/94

GUEST LIST

NAME	ADDRESS	ORGANIZATION
Cindy Kelly	Topeka	KASB
Helen Stephens	✓	BV USD 229
Jacque Gaber	✓	S&E
Kristen Haag	✓	Cap-Journal
Kathy Sexton	✓	Div. of Budget
Denise Apt	✓	USA
GERALD HENDERSON	Topeka	USA of KS
Mark Tallman	Topeka	KASB
Diane Gjerstad	Wichita	USD259
Connie Hummel	Topeka	SBOE
Mona Neely	Topeka	KNEA
Barbara Cale	Topeka	KNEA
Jim Yonally	Overland Park	USD #512

The Subcommittee on Inclusion made up of Senator Frahm, Senator Corbin, and Senator Downey has developed the following list of questions concerning the State Board of Education's policy on least restrictive environment for students with disabilities.

1. Should the words "appropriate" or "responsible" be included before the word inclusion?

2. What is the definition of full inclusion? (see attachment)

3. Are the emotional, social, and academic needs of special education students best being met through inclusion?

4. Does inclusion hinder regular education students' academic achievement?

5. What additional supports are needed for regular education teachers who are involved in inclusion? How do we get beyond the knowledge level of assistance to the implementation level of assistance?

6. Are there special inservice needs related to inclusion?

7. Is there a plan for evaluation of the state's policy on inclusion? How will outcomes be determined and evaluated on state-wide effectiveness of inclusion?

8. How will the legislature and school districts know about the evaluation results?

9. What is the state board's intent concerning the placement of special education students?* *(see paragraph I, line 9, paragraph 3, sentence 2)

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Attachment 1

10. Must failure in the regular classroom be demonstrated prior to an alternative placement or can an alternative placement be recommended by the IEP team members?

11. Does the State BOE's policy on inclusion require a regular classroom placement, documented failure alternative placement sequence?

12. Who decides that it is "clear" that a student cannot succeed?

13. What is the role of parents in inclusion?

14. How do we allow special education teachers the flexibility to work with non-IEP students also?

15. How is current preservice training addressing the preparation of teachers for implementation of inclusion?

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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3/22/94
Attachment 2

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.

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

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

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

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

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

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