

DOREATHA WALKER

V.

HITCHCOCK INDEPENDENT
SCHOOL DISTRICT

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BEFORE THE

COMMISSIONER OF EDUCATION

THE STATE OF TEXAS

DECISION OF THE COMMISSIONER

Petitioner, Doreatha Walker, complains that the Independent Hearing Examiner in a case concerning the proposed termination of her term contract did not conduct a fair hearing. Christopher Maska is the Administrative Law Judge appointed by the Commissioner of Education to hear this cause. Petitioner appeared *pro se*. Respondent is represented by Stephen E. Dubner, Attorney at Law, Lake Dallas, Texas.

Findings of Fact

After due consideration of the Petition for Review and the Orders in this case, the following Findings of Fact are made.

1. The Petition for Review in this case was filed on October 29, 2009. It alleges that the Independent Hearing Examiner who was appointed to hear the proposed termination of Petitioner's contract did not afford Petitioner a fair hearing.

2. By Order of November 3 2009, it was held that the Commissioner lacked jurisdiction over the Petition for Review. The parties were ordered to file briefs as to jurisdiction on or before November 17, 2009. The Order specified, "**Petitioner's failure to timely respond may result in this case being dismissed.**" (Emphasis in Original).

3. Neither party timely filed a brief as to jurisdiction.

Discussion

Petitioner contends that the Independent Hearing Examiner appointed to hear the proposed termination of her contract did not afford her a fair hearing. The issue of jurisdiction was raised by the Administrative Law Judge.

Jurisdiction

On October 29, 2009, Doreatha Walker's Original Petition for Review was filed. The Petition for Review alleges that the Independent Hearing Examiner appointed to hear the proposed termination of her contract did not afford her a fair hearing. However, one cannot directly appeal alleged procedural errors that occurred at a hearing concerning a proposed termination. One can only file an appeal concerning the termination of a term contract under Texas Education Code section 21.301(a) after an Independent Hearing Examiner issues a recommendation under Texas Education Code section 21.257 and the school board or board subcommittee issues a decision under Texas Education Code section 21.259. If one believes that an Independent Hearing Examiner made an error one must first make that claim to a school board or board subcommittee. The ultimate decision in a case concerning the proposed termination of a teaching contract is not made by an Independent Hearing Examiner. As important the Recommendation of an Independent Hearing Examiner is, it is properly titled a "Recommendation". One must raise claims that an Independent Hearing Examiner made an error before a school board or board subcommittee of the claim is waived for failure to exhaust administrative remedies. See *Weatherwax v. Fort Worth Independent School District*, Docket No. 080-R2-1298 (Comm'r Educ. 1999) *aff'd on other grounds Nelson v. Weatherwax*, 59 S.W.3d 340, (Tex. App.-Fort Worth 2001, pet. denied)(predetermination claim was waived because it was not raised both before the Independent Hearing Examiner and board of trustees) and *Sommers v. Judson Independent School District*, Docket No. 037-R3-0109 (Comm'r Educ. 2009)(claim that Independent Hearing Examiner made the wrong ruling concerning spoliation was waived because it was not brought before the school board).

The Commissioner lacks jurisdiction over a claim that an Independent Hearing Examiner is not properly conducting a hearing under Texas Education Code section 7.057 because that statute specifically excludes “a case to which Subchapter G, Chapter 21 applies.” TEX EDUC. CODE § 7.057(e)(1). The Texas Education Code does not allow for interlocutory appeals concerning the procedures used by an Independent Hearing Examiner. However, once a decision is issued under Texas Education Code section 21.259, an appeal may be made alleging that a fair hearing was not afforded a teacher by an Independent Hearing Examiner.

Premature Filing will not Ripen

A premature filing in an administrative appeal will not serve to invoke the jurisdiction of a tribunal even if a filing that were made later would invoke the tribunal’s jurisdiction. *See Marble Falls Independent School District v. Scott*, 275 S.W.3d 558, 566-567(Tex. App.-Austin 2008, pet. denied)(An administrative appealed filed in court before the statutory date when an appeal could be filed was dismissed for lack of jurisdiction even when if the appeal had been filed two days later the court would have had jurisdiction over the case). The Petition for Review in this case will never invoke the Commissioner’s jurisdiction, even if a recommendation is issued by the Independent Hearing Examiner and a decision is issued by the school board or a board subcommittee. Only by filing a petition for review after a decision is issued by the school board or a board subcommittee will Petitioner be able invoke the Commissioner’s jurisdiction over her claims that the Independent Hearing Examiner did not afford her a fair hearing.

Conclusion

The Commissioner lacks jurisdiction over this cause.

Conclusions of Law

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact, in my capacity as the Commissioner of Education, I make the following Conclusions of Law:

1. The Commissioner lacks jurisdiction over this case under Texas Education Code section 21.301.

2. The Commissioner only has jurisdiction over a claim that an Independent Hearing Examiner erred in the conduct of a hearing concerning the termination of a teaching contract when a petition for review is filed after a school board or board subcommittee issues a decision under Texas Education Code section 21.259. TEX. EDUC. CODE § 21.301(a).

3. A petition for review that alleges that an Independent Hearing Examiner erred in the conduct of a hearing concerning the termination of a teaching contract that is filed prior to the issuance of a decision under Texas Education Code section 21.259 will never invoke the Commissioner's jurisdiction. Even if a decision is issued under Texas Education Code section 21.259 after a petition for review is filed, the Commissioner will not have jurisdiction over the case.

4. The Commissioner lacks jurisdiction over the claims raised in the Petition for Review because they were not timely filed.

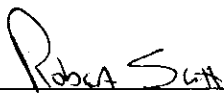
5. This case should be dismissed for lack of jurisdiction.

ORDER

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact and Conclusions of Law, in my capacity as the Commissioner of Education, it is hereby

ORDERED that the Petitioner's appeal, be, and is hereby DISMISSED.

SIGNED AND ISSUED this 17th day of December, 2009.



ROBERT SCOTT
COMMISSIONER OF EDUCATION