

DOREATHA WALKER

V.

HITCHCOCK
INDEPENDENT SCHOOL DISTRICT

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BEFORE THE

COMMISSIONER OF EDUCATION

THE STATE OF TEXAS

DECISION OF THE COMMISSIONER

Statement of the Case

Petitioner, Doreatha Walker, appeals the action of Respondent, Hitchcock Independent School District, concerning her contract. Christopher Maska is the Administrative Law Judge appointed by the Commissioner of Education. Petitioner appeared pro se. Respondent is represented by Stephen E. Dubner, Attorney at Law, Lake Dallas, Texas.

The Administrative Law Judge issued a Proposal for Decision recommending that Petitioner's appeal be dismissed for lack of jurisdiction. No exceptions were filed.

Findings of Fact

After due consideration of the record and matters officially noticed, it is concluded that the following Findings of Fact are supported by substantial evidence and are the Findings of Fact that best support Respondent's decision¹.

1. The Petition for Review alleges that Respondent violated Petitioner's employment contract and violated Texas Education Code section 21.103(a).

2. Respondent's board voted to propose the termination of Petitioner's probationary contract on August 17, 2009.

3. Petitioner believes that Respondent's board voted to terminate her probationary contract on August 18, 2009.

¹ See 19 TEX. ADMIN. CODE § 157.1073(h); *Bosworth v. East Central Independent School District*, Docket No. 090-R1-803 (Comm'r Educ. 2003).

4. Petitioner continued to receive paychecks from Respondent. As late as October 22, 2009, Petitioner admitted that she was still receiving paychecks.

5. Petitioner never filed a grievance with Respondent concerning the causes of action raised in her Petition for Review.

6. By letter of August 20, 2009, Petitioner was informed by the superintendent that the board had proposed to terminate her contract. The letter specified that Petitioner could ask for hearing, but that this would not be a hearing under Texas Education Code chapter 21.

7. Petitioner requested the Commissioner to assign an Independent Hearing Examiner to hear the proposed termination under Texas Education Code chapter 21. An Independent Hearing Examiner was assigned to hear her case.

8. The Independent Hearing Examiner conducted a hearing in early October 2009.

9. The Recommendation of Independent Hearing Examiner in Petitioner's case is statutorily required to be issued by the end of October, 2009.

Discussion

Petitioner contends Respondent violated her written employment contract by the manner in which it attempted to end her employment and violated Texas Education Code section 21.103(a). Respondent denies this and alleges that the Commissioner lacks jurisdiction over this cause.

Background

There is some confusion over the process Respondent has used to propose action concerning Petitioner's probationary contract. By letter of August 12, 2009, Respondent's superintendent informed Petitioner that he would recommend that Petitioner's contract be proposed for termination at the August 17, 2009 board meeting. At the board meeting, the board voted to propose the termination of Petitioner's contract. Petitioner was at the meeting. A newspaper reported that Respondent's board had voted

at the August 17, 2009 meeting to terminate Petitioner's probationary contract. Petitioner heard from others that the board had terminated her contract. However, Petitioner continued to receive her paychecks. By letter of August 20, 2009, Petitioner was informed by the superintendent that the board had proposed to terminate her contract. The letter specified that Petitioner could ask for a hearing that would have significant due process rights, but that this would not be a hearing under Texas Education Code chapter 21. Petitioner requested the Commissioner to assign an Independent Hearing Examiner to hear the case concerning the proposed termination of her probationary contract. An Independent Hearing Examiner was assigned to the case. While Respondent initially indicated that it believed that a chapter 21 hearing was not appropriate, it has since not objected to holding a hearing under chapter 21. The hearing was held in early October, 2009. The Recommendation of the Independent Hearing Examiner ^{LHS} is not due until the end of October, 2009.

TEX. EDUC. CODE § 7.057(a)(2)(B)

For the Commissioner to have jurisdiction over a claim under Texas Education Code section 7.057(a)(2)(B), a petitioner must not only allege a violation of a written employment contract, but also that the violation causes or would cause monetary harm. Whether or not there was a violation of Petitioner's contract, there has been no monetary harm alleged. The Austin Court of Appeals in *Smith v. Nelson*, 53 S.W.3d 792, 795 (Tex. App.-Austin 2001, pet denied) held that the monetary harm referred to in Texas Education Code section 7.057(a)(2)(B) must be a harm recoverable under a contract cause of action. Currently, Petitioner cannot allege contract damages because she is still being paid by Respondent.

TEX. EDUC. CODE § 21.103(a)

Petitioner contends that Respondent violated Texas Education Code section 21.103(a) which allows a board to terminate a probationary contract at the end of the contract's term if the board gives written notice of termination no later than the 45th day

before the first day of instruction. However, Respondent has never contended that that is what it was doing. Respondent gave Petitioner notice of the proposed termination of Petitioner's contract during the contract's term. Petitioner does not allege Respondent gave notice of the termination of her probationary contract at the end of the contract's term but that it failed to timely give that notice. Petitioner has failed to allege a violation of Texas Education Code section 21.103(a). Petitioner has failed to allege the facts required to state a possible violation of Texas Education Code section 21.103(a).

Exhaustion of Remedies

Petitioner never filed a grievance with Respondent concerning either of her claims. An appeal against a school district under Texas Education Code section 7.057 is to be heard by the Commissioner based on the local record. TEX. EDUC. CODE § 7.057(c). A local record is created through a grievance process. By not availing herself of the grievance process, Petitioner has failed to exhaust administrative remedies. Because administrative remedies were not exhausted, the Commissioner lacks jurisdiction over this cause.

Petitioner contends that she did not have to exhaust the grievance process due to Respondent's policy DGBA(LOCAL) which excepts from the grievance policy:

Complaints arising from the proposed termination or suspension without pay of an employee on a probationary, term, or continuing contract issued under Chapter 21 of the Education Code during the contract term. [See DFAA, DFBA, or DFCA, respectively]

What this provision does is channel chapter 21 cases, into the chapter 21 processes. This does not let a teacher go straight to the Commissioner when a claim involves a proposed termination.

Chapter 21 the Exclusive Remedy

Petitioner is in the midst of the chapter 21 process. Petitioner asked for and received an Independent Hearing Examiner to hear the proposed termination of her

contract. While Respondent at first indicated that it believed that Petitioner was not entitled to the chapter 21 process, it has never formally made this claim to the Independent Hearing Examiner. The chapter 21 hearing has occurred and the Independent Hearing Examiner's Recommendation is required to be issued at end of October 2009. If Petitioner is unhappy with the board's decision, Petitioner will have the right to appeal to the Commissioner under Texas Education Code chapter 21, subchapter G. Petitioner's claims are claims that can be brought under Texas Education Code chapter 21. This is significant because Texas Education Code section 7.057(e)(1) provides that, "[t]his section does not apply to a case to which Subchapter G, Chapter applies". Petitioner has a legal avenue of redress and that avenue is exclusively Texas Education Code chapter 21, subchapter G.

Conclusion

The Commissioner lacks jurisdiction over this cause. Petitioner has not exhausted administrative remedies for a Texas Education Code section 7.057 claim. To the extent that the Commissioner could have jurisdiction over Petitioner's claims that jurisdiction would be under Texas Education Code chapter 21, subchapter G.

Conclusions of Law

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

1. The Commissioner of Education lacks jurisdiction over this cause under Texas Education Code section 7.057.
2. The Commissioner has jurisdiction under Texas Education Code section 7.057(a)(2)(B) over violations of written contracts that cause or would cause monetary harm. The monetary harm alleged must be a harm recoverable under a contract cause of action.

3. Petitioner's claim under Texas Education Code section 7.057(a)(2)(B) fails because of a lack of monetary harm.

4. Texas Education Code section 21.103(a) requires notice of the proposed termination of a probationary contract at the end of the contract's term to be given to a teacher not later than 45 days before the last day of instruction under the contract.

5. Petitioner's Texas Education Code section 21.103(a) claim fails because Respondent did not vote to terminate Petitioner's contract at the end of the contract's term.

6. A person is required to exhaust administrative remedies before bringing a Texas Education Code section 7.057 claim against a school district. TEX. EDUC. CODE section 7.057(c).

7. Petitioner's Texas Education Code section 7.057 claims fail because Petitioner has not exhausted administrative remedies through Respondent's grievance process.

8. One cannot bring a claim under Texas Education Code section 7.057 if it is a claim which can be brought under Texas Education Code chapter 21, subchapter G.

9. Petitioner's claims cannot be brought under Texas Education Code section 7.057, because these claims could be brought under Texas Education Code chapter 21, subchapter G.

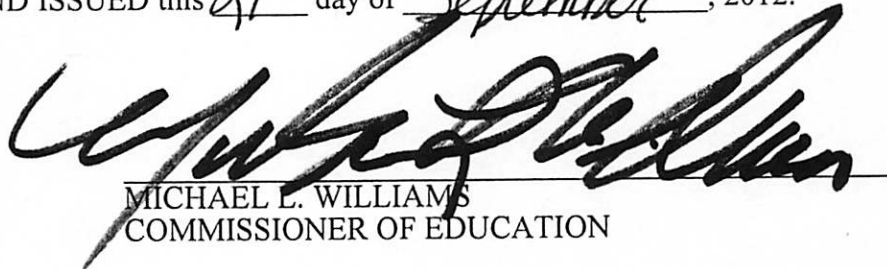
10. Petitioner's claims should be dismissed for lack of jurisdiction. 19 TEX. ADMIN. CODE § 157.1056(a).

Order

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

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

SIGNED AND ISSUED this 21st day of September, 2012.



MICHAEL L. WILLIAMS
COMMISSIONER OF EDUCATION