DOCKET NO. 022-R2-1011

MARILYN BOYER	§	BEFORE THE
V.	§	COMMISSIONER OF EDUCATION
BLOOMING GROVE INDEPENDENT SCHOOL DISTRICT	§	THE STATE OF TEXAS

DECISION OF THE COMMISSIONER

Petitioner, Marilyn Boyer, complains that Respondent, Blooming Grove Independent School District, improperly terminated her term contract and suspended her without pay. Christopher Maska is the Administrative Law Judge appointed by the Commissioner of Education to hear this cause. Petitioner is represented by W. Mark Midkiff and Helena Venturini, Attorneys at Law, Fort Worth, Texas. Respondent is represented by Jennifer M. Engdale, Attorneys at Law, Austin, Texas.

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.

1. The Findings of Fact drafted by the Independent Hearing Examiner are adopted as if set out in full except for Finding of Fact No. 4. Finding of Fact No.4 as changed by Respondent's board is adopted as if set out in full. The following addition is made to the portion of the Recommendation labeled Discussion Narrative:

> The Notice of Proposed Termination reads in part:
> - Ms. Boyer has allowed class time to be used by the students to gossip with the teacher.
> - Ms. Boyer has shared personal, private, and confidential information about students whether truthful or not with students openly in class.
>   - Information about students leaving school and alleged molestation.
>   - Talking about and naming students that were or are pregnant on campus.
>   - Questioning whether a BGHS student would graduate because of absences.

- Talking to a student about another student having the opportunity to redo a physics project and how unfair that was.

- Ms. Boyer has commented on professional colleagues with students.
  - Talking negatively about colleagues' work performance.
  - Talking about colleagues leaving TAKS testing documents out.
  - Talking about a relationship between a colleague and an administrator that led to a firing.
  - Talking about an inappropriate relationship between colleagues.
  - Complaining about coaches having favorites in regards to how they treat kids and allot playing time.

Discussion

Petitioner contends that Respondent's decision to terminate her term contract is arbitrary, capricious, unlawful and not supported by substantial evidence. Respondent denies these claims and asserts that the Commissioner lacks jurisdiction over the Open Meetings Act claim, the State Board for Educator Certification (hereinafter, "SBEC") reporting claim; the claim concerning the date of the board meeting, and claims that the Recommendation is supported by substantial evidence. Respondent contends that the Petition for Review should be dismissed for a failure to comply with the Commissioner's briefing rules.

Background

This case was initially filed under both Texas Education Code section 21.301 and section 7.057. The Commissioner dismissed the Texas Education Code section 7.057 claims from this case without prejudice. Petitioner refiled the Texas Education Code section 7.057 claims in a new case.

Open Meetings Act

Respondent contends that the Commissioner lacks jurisdiction over Open Meetings violations under Texas Education Code 21.301. Respondent also contends that Petitioner failed to exhaust administrative remedies as to this claim and that the Commissioner cannot order discovery on this issue.

Jurisdiction over Open Meetings claims under TEX. EDUC. CODE § 21.301

Under Texas Education Code chapter 21, subchapter G, the Commissioner may hear a claim that a school district violated the Texas Open Meetings Act. *Casteñeda v. Lasara Independent School District*, Docket No. 081-R1-502 (Comm'r Educ. 2002); *Garcia v. Miles Independent School District*, Docket No. 026-R2-103 (Comm'r Educ. 2003); *Weddle v. Prairiland Independent School District*, Docket No. 105-R1-600 (Comm'r Educ. 2000). The Commissioner may overturn a board's decision if it is unlawful. TEX. EDUC. CODE § 21.303(a). If a school district were to violate the Texas Education Code it would commit an unlawful act. A separate grievance and a Texas Education Code section 7.057 appeal would not be required to present a violation of the Texas Education Code that occurred during chapter 21 proceedings. The Commissioner can overturn a school district's decision in a Texas Education Code chapter 21, subchapter G case if the decision violates Texas Education Code section 26.007(a). This does not mean that the Commissioner would have jurisdiction in a chapter 21, subchapter G case over any violation of any law somehow connected to the case.

Exhaustion

In an appeal to the Commissioner under Texas Education Code section 21.301, the Commissioner may only consider issues raised at the local level with a minor exception that does not apply to this case. TEX. EDUC. CODE §§ 21.301(c), 21.302, *Grigsby v. Moses*, 31 S.W.3d 747, 750 (Tex. App.-Austin 2000, no pet.). A school district gets the opportunity to consider issues before the Commissioner gets to consider the issues. Respondent argues that Petitioner failed to raise the issue that Respondent violated Open Meetings Act at the local level. Respondent is correct. Petitioner did not so allege. As Petitioner did not raise this issue at the local level, the Commissioner lacks jurisdiction over this claim. But even if the Commissioner could consider this issue,

Petitioner would not prevail on the Open Meetings Act claim. The evidence in the local record does not establish that a vote occurred in closed session.

The exception to the general rule requiring issues to be raised at the local level only allows the Commissioner to take evidence and consider procedural irregularities that are not reflected in the record which occurred before the independent hearing examiner. The claim here is that an irregularity occurred before the school board. Hence, in the present case Commissioner cannot take evidence or rule on the issue.

SBEC Claim

Petitioner contends that Respondent could not take action against her contract because it did not make a report to SBEC alleging violations of the Code of Ethics and Standard Practices. 19 TEX. ADMIN. CODE § 247.2. Respondent correctly points out that Petitioner failed to raise this issue at the local level and, hence, the Commissioner cannot consider this issue. TEX. EDUC. CODE §§ 21.301(c), 21.302, *Grigsby v. Moses*, 31 S.W.3d 747, 750 (Tex. App.-Austin 2000, no pet.). Assuming solely for the purposes of argument that this issue could be considered, Petitioner would not prevail on the SBEC claim. A school district is not required to make a report to SBEC prior to proposing contract action for actions that might violate the Code of Ethics and Standard Practices.

TEX. EDUC. CODE § 21.258(a) Claim

Petitioner alleges that Respondent's board did not meet to consider the Recommendation "at the first board meeting for which notice can be posted in compliance with Chapter 551, Government Code, following the issuance of the recommendation." TEX. EDUC. CODE § 21.258(a). Respondent correctly points out that Petitioner failed to raise this issue at the local level and, hence, the Commissioner cannot consider this issue. TEX. EDUC. CODE §§ 21.301(c), 21.302, *Grigsby v. Moses*, 31 S.W.3d 747, 750 (Tex. App.-Austin 2000, no pet.).

Briefing

The Commissioner has briefing rules that are designed to require each party to make a clear and concise statement of its claims. 19 TEX. ADMIN. CODE § 157.1058. Respondent contends that Petitioner failed to comply with the rules in such a significant manner that the Petition for Review should be dismissed.

Respondent contends Petitioner fails to cite to the record. Petitioner does not cite to the record in numerous places. This allegation is not demonstrated. However, it should be noted that 19 TEX. ADMIN. CODE § 157.1058 requires a brief to contain a Statement of Facts which is supposed to be a concise statement of facts pertinent to the issues presented without argument.

Respondent objects that Petitioner incorporates her Petition for Review which incorporates another document entitled "Exceptions." There is no blanket prohibition on incorporation. However, in this case the incorporated documents total 43 pages and are Petitioner's own documents. There is much duplication in the three documents. The briefing rules repeatedly use the word "concise" to describe the various sections of a brief. Petitioner's brief is not concise. In this age of word processing, it seems odd that there could be a real need to incorporate one's own documents into a brief. While Petitioner's lack of concision is in no way condoned, it does not warrant a death penalty sanction.

Substantial Evidence

Respondent claims that because Petitioner failed to argue that the Recommendation of the Independent Hearing Examiner was supported by substantial evidence at the board hearing, that Petitioner cannot argue that the Recommendation is supported by substantial evidence at this time citing *Brown v. Sealy Independent School District*, Docket No. 071-R2-0710 (Comm'r Educ. 2010). Brown argued before the Commissioner that the Recommendation was unlawful because the wrong standard was applied. The Commissioner rejected this and other arguments against the Recommendation because they were not raised before the school board. If either party

has objections to a recommendation, such arguments need to be raised at the hearing to consider the recommendation. If a party has no objections to a recommendation, the party is not required to make every possible argument in support of the recommendation or risk waiving those arguments. However, if a party wishes any changes to a recommendation, the party needs to make the argument at the local level before making the argument to the Commissioner. Petitioner did not waive the argument that the Recommendation was not supported by substantial evidence by not making the argument before the school board. Likewise, Petitioner did not waive the argument that a finding of fact found anywhere in a recommendation shall be considered a finding of fact.

Good Cause

A term contract may be terminated for "good cause." TEX. EDUC. CODE § 21.211(a)(1). This term is not defined in statute for the termination of a term contract. Since 1995[1], the Commissioner has generally recognized that the definition of "good cause" for the termination of a term contract as the common law definition of good cause found in *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 580 (Tex. App.-Houston [1st Dist.] 1992, no writ):

> The issue of whether an employer had good cause to discharge an employee is a question of a fact, unless the conduct involved and effect on the employer's business are clear, in which case it is a question of law. *Watts,* 662 S.W.2d at 58. *Good cause for discharging an employee is defined as the employee's failure to*

[1] A selection of such cases includes *Carpenter v. Dangerfield-Lone Star Independent School District*, Docket No. 010-R2-7994 (Comm'r Educ. 1995); *Outman v. Allen Independent School District*, Docket No.132-R2-1294 (Comm'r Educ. 1995); *Baker v. Rice Consolidated Independent School District*, Docket No. 227-R2-493 (Comm'r Educ. 1995); *Caussey v. Fort Worth Independent School District*, Docket No. 303-R2-694 (Comm'r Educ. 1997); *Scott-Austin v. Houston Independent School District*, Docket No. 021-R2-998 (Comm'r Educ. 1998); *Gibson v. Tatum Independent School District*, Docket No. 040-R2-1099 (Comm'r Educ. 1999); *Tisby v. Dallas Independent School District*, Docket No. 067-R2-100 (Comm'r Educ. 2000); *Tave v. Dallas Independent School District*, Docket No. 067-R2-501 (Comm'r Educ. 2001); *Nassar v. Dallas Independent School District*, Docket No. 011-R2-501 (Comm'r Educ. 2002); Floyd v. *Houston Independent School District*, Docket No. 038-R2-203 (Comm'r Educ. 2003) ; *Martin V. Dallas Independent School District*, Docket No. 059-R2-304 (Comm'r Educ. 2004); *Evans v. Dallas Independent School District*, Docket No.091-R2-805 (Comm'r Educ. 2005); *Hammond v. Dallas Independent School District*, Docket No. 013-R21006 (Comm'r Educ. 2006); Earthly *v. Fort Bend Independent School District*, Docket No. 040-R2-0209 (Comm'r Educ. 2009); *Adams v. Aldine Independent School District*, Docket No. 054-R2-0410 (Comm'r Educ. 2010)

> *perform the duties in the scope of employment that a person of ordinary prudence would have done under the same or similar circumstances. An employee's act constitutes good cause for discharge if it is inconsistent with the continued existence of the employer-employee relationship. Dixie,* 341 S.W.2d at 541-43.

(Emphasis added). When the Legislature uses a legal term of art in a statute, the term is construed accordingly. TEX. GOV'T CODE § 311.011(b). The Legislature intended that the term "good cause" as used in Texas Education Code section 21.211(a)(1) should be defined according to the common law definition of "good cause." The *Lee-Wright* definition has also been applied by an appellate court to the termination of a term contract. *Tave v. Alanis*, 109 S.W.3d 890, 893(Tex. App.-Dallas, no pet.)

Alternate Definition

Petitioner points out the discussion section of *Everton v. Round Rock Independent School District*, Docket No. 070-R2-1091 (Comm'r Educ. 1996), presents a different understanding of "good cause":

> In the absence of a definition by Respondent, we must look to prior Commissioner decisions. *Good cause has been defined as the failure of a teacher to meet acceptable standards of conduct for the profession as generally recognized and applied in similarly-situated school districts throughout Texas*; for example: engaging in harmful or potentially harmful conduct to students, manufacturing grades, failure to comply with a corporal punishment policy, failure to meet certification requirements, failure to alleviate substandard conditions on a school campus, and criminal conduct. *In other words, a range of conduct not susceptible to remediation or inappropriate conduct that persists in spite of good faith efforts by school district administrators constitutes good cause.*

(Emphasis added). There are a few Commissioner Decisions from 1996-1998 that find the standard for "good cause" to terminate a term contract is that specified in the first italicized section supra. One problem with using this definition is that it comes directly from the statute which defined "good cause" for terminating a continuing contract when *Everton* was filed. *See* the former Texas Education Code section 13.110(7). If the Legislature had intended for this definition to apply to the termination of a term contract

it would have said so, just as it did when it used the definition for "good cause" for a continuing contract.

Everton does not cite to any Commissioner's Decisions for the definition of "good cause" used. However, *Velasco v. San Elizario Independent School District*, Docket No. 367-R2-894 (Comm'r Educ. 1996), a case decided about the same time, uses the *Everton* definition of "good cause" and cites to *Rickaway v. Elkhurt Independent School District*, Docket No. 227-R2-493 (Comm'r Educ. 1995) to show the Commissioner had previously used that definition for the termination of term contracts. However, that definition was used in *Rickaway* because the school district by policy had defined "good cause" in that way. Neither party disputed the use of this definition. *Id.* The statutory definition for "good cause" in continuing contract cases is not the proper definition for "good cause" in term contract cases.

The second italicized portion of the *Everton* opinion has less to be said for it than the first. There is no basis in statute for this interpretation. Even the statutory definition termination of continuing contracts has no such language. Whether or not a teacher would change his or her behavior after the persistent good faith efforts of an administrator, is not the statutory "good cause" standard to terminate a term contract. The definition of "good cause" found in *Everton* and *Velasco* and any other cases is disapproved.

Good Cause a Fact Finding

The Recommendation of the Independent Hearing Examiner found that there was not good cause to terminate Petitioner's term contract. All of the vital factual determinations made by the Independent Hearing Examiner lead inescapably to the ultimate finding that there is not good cause to terminate Petitioner's contract. Respondent made numerous changes to the Recommendation that resulted in a decision to terminate Petitioner's contract. "Good cause" in most circumstances is a finding of

fact[2]. *Adams v. Aldine Independent School District*, Docket No. 054-R2-0410 (Comm'r Educ. 2010) citing *Miller v. Houston Indep. Sch. Dist.*, 51 S.W.3d 676, 685-686 (Tex. App.-Houston [1st. Dist.] 2001 pet. denied) *citing Ball v. Kerrville Indep. Sch. Dist.*, 504 S.W.2d 791, 798 (Tex. Civ. App.-San Antonio 1973, writ ref'd n.r.e.); *Nelson v. Weatherwax*, 59 S.W.3d 340, 352 (Tex. App.-Dallas 2001, pet. denied).

The "good cause" determination in the Independent Hearing Examiner's Recommendation is actually found at Conclusion of Law No. 47. However, a finding of fact is a finding of fact no matter how it is labeled in a recommendation. *Miller v. Houston Indep. Sch. Dist.*, 51 S.W.3d 676, 683 (Tex. App.-Houston [1st Dist] March 2, 2001, pet. denied.) Hence, to properly terminate Petitioner's contract, Respondent was required to change the finding of fact stating that there was not good cause to terminate Petitioner's contract or show how in this case good cause is a conclusion of law.

Changing Findings of Fact

Texas Education Code section 21.259 allows a school board to make changes to a recommendation of an independent hearing examiner. However, there are very significant limitations concerning findings of fact. The Supreme Court of Texas, in *Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 564 (Tex. 2000) held:

> A board may reject or change a finding of fact only if the fact is not supported by substantial evidence. *Id.* § 21.259(c). Section 21.259(d) then requires the board to "state in writing the reason and legal basis for a change or rejection made under this section." *Id.* § 21.259(d). Nowhere in the specific provisions of section 21.259 has the Legislature provided for a school board to find facts in addition to those found by the hearing examiner. We cannot read into subchapter F's detailed administrative scheme permission for a board to find additional facts when the Legislature did not include that authority.

While a board may not make new findings of fact, it can rely on undisputed evidence. *Id.* at 567. In order to prevail, Respondent must show that the finding of fact that there is not good cause to terminate Petitioner's contract is not supported by substantial evidence or

[2] The recent Legislature amended the Texas Education Code to make "good cause" a conclusion of law. However, this recent change does not apply to the current case.

that in this case "good cause" is a conclusion of law. To demonstrate that the ultimate finding of fact is not supported by substantial evidence could possibly be done by showing that the underlying findings of fact are not supported by substantial evidence and by showing undisputed evidence that calls into question the ultimate finding of fact. To show that good cause is a conclusion of law in this case would require a showing that the rules Petitioner allegedly violated were reasonable; that Petitioner's conduct is undisputed; and that the effect on Respondent's business is clear.

What are the Findings?

In the Recommendation there are many findings of fact that are not labeled Findings of Fact. In some instances the labeled Conclusions of Law are either findings of fact or are mixed statements of law and fact. The Conclusions of Law often make reference to such determinations as what was established by a preponderance of evidence, whether evidence was credible, professional standards, whether harm or malice was intended, and whether Petitioner's contract was violated. While at least in some cases these can be said contain mixed issues of fact and law, there are very significant issues of fact decided. The factual elements of all the labeled Conclusions of Law are supported by substantial evidence. It should be noted that Conclusion of Law 17, which holds Petitioner has a property interest in employment with the district for the 2011-2012 school year is supported by substantial evidence only because as a result of the chapter 21 process it is ultimately determined that Respondent does not have legal justification to terminate Petitioner's contract. The labeled Findings of Fact are also supported by substantial evidence, except for Finding of Fact No. 4. Respondent only properly changed Finding of Fact No. 4.

Because of the significant finding of fact component to the labeled Conclusions of Law only two changes to the Conclusions of Law are legitimate. Respondent properly removed the portion of Conclusion of Law No. 20 that finds remediation was required. This is not the law. *Matthews v. Scott*, 268 S.W.3d 162, 175 (Tex. App-Corpus Christi

2008, no pet.) Respondent also properly rejected Conclusion of Law 31 because there is no legal requirement for the administration to allow an employee access to legal counsel during meetings. The other changes to the Conclusions of Law cannot be made because the Independent Hearing Examiner found none of Petitioner's actions to be of the type that were identified in the notice of proposed termination. The changed Conclusions of Law are not legitimate because they are not supported by the Findings of Fact made by the Independent Hearing Examiner or properly modified and are not called into question by undisputed evidence.

Credibility

Respondent makes numerous changes to the Recommendation based upon its determination that witnesses that the Independent Hearing Examiner did not find credible were in fact credible. It is extremely difficult to challenge the credibility determinations of an independent hearing examiner:

> As the factfinder, the hearing examiner is the sole judge of the witnesses' credibility and the weight to be given their testimony, and is free to resolve any inconsistencies. *See Webb v. Jorns*, 488 S.W.2d 407, 411 (Tex. 1972) ("It is an old and familiar rule that the fact finder may resolve conflicts and inconsistencies in the testimony of any one witness as well as in the testimony of different witnesses."); *Transmission Exch. Inc. v. Long*, 821 S.W.2d 265, 271 (Tex. App. – Houston [1st Dist.] 1991, writ denied); *Blackmon v. Piggly Wiggly Corp.*, 485 S.W.2d 381, 384 (Tex. Civ. App. – Waco 1972, writ ref'd n.r.e.).

Id. at 567. Respondent has not made a showing that the creditability determinations of the Independent Hearing Examiner are not supported by substantial evidence. When one witness says x and another witness says not x, either finding by an independent hearing examiner will be upheld unless it can be demonstrated that one or both of witnesses was not credible.

Petitioner goes too far in claiming uncorroborated and/or suspect allegations by students are not sufficient to support a termination or suspension citing *Aguilar v. Ysleta Independent School District*, Docket No. 067-R2-190 (Comm'r Educ. 1991). Aguilar

was a case heard de novo at the Texas Education Agency. Two students were found not credible solely because their statements were not corroborated by adults or because one could point to some flaws in their testimony. The students were found not credible considering all the evidence presented. Credible student testimony can support a termination even if it is uncorroborated or even if it has some flaws.

Undisputed Evidence

Respondent's case ultimately rests on claims of undisputed evidence as the Independent Hearing Examiner's Findings of Fact are supported by substantial evidence. Respondent properly cites to a statement of Petitioner as undisputed evidence:

> . . .
>
> 1) I do not engage in "gossip" during class periods or otherwise, whether in or out of school, with my students. Students in my class do discuss matters amongst themselves. I do not encourage any discussions with my students pertaining to others.
> 2) I do not share personal or private information about students, openly or otherwise, whether in or out of school. Students do come forward on occasion to share information about themselves with me and to the extent a duty arises to report any potential criminal activity and/or abuse wherein a student may be a victim I comply with my duty to report.
> 3) At any time when my students have engaged in negative conversations regarding my colleagues, I have attempted to redirect my student's attention. Although I have not received from the District any information as to the origin or specific nature of any allegations contained in the Notice, I would ask that before coming to a determination regarding my employment the District makes full inquiry into every allegation that has been raised against me.
>
> . . .

In response to general allegations, Petitioner made these general denials. Respondent contends that in two instances Petitioner's testimony at the hearing before the Independent Hearing Examiner shows that Petitioner lied.

Venting

Respondent alleges that Petitioner lied when she said she did not engage in gossip with students and did not share personal or private information with students because according to Petitioner's own testimony she vented to a student that a teacher had treated

Petitioner's daughter unfairly. Local Record pp. 701-703. To lie requires that both a false statement be made and that the individual knows the statement is false. The first question to be addressed is did Petitioner make a false statement. Respondent seems to think the phrase "I do not" means "I never do." This construction is problematical. The phrase "I do not" would seem to mean "as a matter of habit I do not." This can further be seen by the context of Petitioner's statement. The administration brought vague allegations to Petitioner that were not limited to a specific time period. Petitioner made a general denial. Petitioner did not make a false statement to the allegations.

But assuming for the purposes of argument that Petitioner made a false statement, it cannot be concluded that Petitioner knowingly made a false statement. Did Petitioner think of this one incident about venting when she made the statement? The undisputed evidence does not answer this question in the affirmative. The undisputed evidence does not demonstrate that Petitioner lied in this instance.

The situation would be different if Petitioner was responding to a specific question. If Petitioner were asked "did you vent to student w about how your daughter was treated by x teacher concerning y project on z day" and Petitioner said "no" there would be a very different situation. The statement would be false and it would be difficult to see how Petitioner did not know the statement was false.

Placement

Respondent contends that Petitioner lied about not giving out personal and private information when she discussed with the yearbook staff a student's placement in an Alternative Education Placement (hereinafter, "AEP") and that the student's graduation status was uncertain. Local Record p. 699. Respondent believes that this information is private because of the Family Educational Rights and Privacy Act (hereinafter, "FERPA"). However, Petitioner's testimony on the next page of the transcript makes clear that she did not believe the information at issue was covered by FERPA. The undisputed evidence does not demonstrate that Petitioner lied in this instance.

Additionally, for similar reasons as with the venting issue, the undisputed evidence does not establish that Petitioner lied.

FERPA

Respondent contends this conversation with the student on the yearbook staff violated FERPA. Petitioner denies any violation occurred because there is no proof that she ever viewed an educational record as to the student being in AEP and the student's graduation status. Respondent is correct that oral disclosures of information found in educational records are covered by FERPA. 34 CFR § 99.3. However, the ultimate source of the disclosed information must be an educational record. The record does not establish the source of the information that Petitioner disclosed. Hence, the record does not establish that FERPA was violated.

Assuming solely for purposes of argument that the conversation with a student on the yearbook staff violated FERPA, this would not lead to Respondent prevailing. FERPA is an important statute that protects important rights. However, not all violations of FERPA constitute good cause to terminate a term contract. Good cause per se has been reserved by the Commissioner for truly egregious situations. Even if Petitioner's conversation with the student on the year book staff violated FERPA, this would not be sufficient to establish good cause per se.

Good Cause as a Conclusion of Law

Respondent argues that in this case good cause should be a conclusion of law. The Commissioner in *Adams v. Aldine Independent School District*, Docket No. 054-R2-0410 (Comm'r Educ. 2010) provides an extended discussion as to when good cause is a conclusion of law:

> The first case cited is *Watts v. St. Mary's Hal Inc.*, 662 S.W.2d 55 (Tex. App.- San Antonio 1983, writ ref'd n.r.e.). Watts was a teacher with a term contract at a boarding school who witnessed under age students who were drunk in the dorms and contrary to school policy failed to make a report. St. Mary's

Hall was granted an instructed verdict based solely of Watts testimony. However, the standard set forth by court was:

> Disobedience of reasonable rules of the employer that are known to the employee constitute a just ground for discharge. *Robertson v. Panhandle & S.F. Ry. Co.*, 77 S.W.2d 1078, 1079 (Tex.Civ.App.-Austin 1934, writ dism'd); *Swilley v. Galveston, H. & S.A. Ry. Co.*, 96 S.W.2d 105, 108 (Tex.Civ.App.-Galveston 1936, dism'd). While it may be a question of fact whether there exists circumstances to show good cause for the discharge of an employee, if the discharged employee's misconduct is undisputed and the effect on the employer's business is clear, the question of good cause is a matter of law. *Royal Oak Stave Co. v. Groce, supra* at 317.

Id. at 58. Under this standard, it takes undisputed facts to make a determination of good cause a question of law.

Disobedience to rules can support a determination of good cause, but the rules at issue must be reasonable rules. In *Watts* no one could dispute the rules banning underage drinking and requiring staff to report underage drinking are reasonable rules. However, in some cases, such as the present case, the issue is not so clear. The policies Petitioner is alleged to have violated are general policies concerning following directives and engaging an activity that impairs or diminishes a person's effectiveness in the school system. While no one disputes that teachers should generally follow directives from supervisors, the reasonableness of following a directive must be viewed in terms of the directive itself. A rule to follow directives is reasonable only in so far as particular directives are reasonable. This will often be a fact intense inquiry. Was a particular directive reasonable in the circumstances? There also must be a clear factual determination that that employee engaged in the alleged misconduct. The third requirement is that there also must be a clear effect on the employer's business.

In *Watts* all these standards were met. The rules in question were indisputably reasonable. That Watts engaged in the alleged behavior was established by her testimony. It is also indisputable that word getting out that the school turned a blind to its own policies concerning drunkenness would be harmful to the school's business. Much more is required to turn good cause into a question of law than the fact that the employee's action is not disputed. Undisputed evidence of the reasonableness of the rule, the action taken, and the effect of the violation of the rule are required. Otherwise, good cause remains a finding of fact.

In the present case, only one of the three requirements for holding that good cause is a conclusion of law is met. Respondent's policy reasons for terminating a term contract are reasonable. However, the record fails to show undisputed evidence of

misconduct and the record fails to show a clear effect on Respondent's business. In the present case, good cause is a finding of fact.

Suspension Without Pay

There are a number of issues concerning Respondent's decision to suspend Petitioner without pay. For example, Respondent voted to suspend Petitioner without pay prior to the hearing on the issue of suspension without pay being heard under Texas Education Code chapter 21, subchapter F, this raises issues about predetermination concerning both the suspension without pay and the termination. However, Texas Education Code section 21.211 (c) provides:

> A teacher who is not discharged after being suspended without pay pending discharge is entitled to back pay for the period of suspension.

As Respondent's decision to terminate Petitioner's contract is overturned, so is Respondent's decision to suspend Petitioner without pay.

Discussion Narrative Changes

Respondent made changes to the Discussion Narrative in the Recommendation. The Discussion Narrative contains a number of unlabeled Findings of Fact. Respondent only challenges one portion of the Discussion Narrative that generally characterizes the district's allegations. The challenged portion is supported by substantial evidence in that Respondent made these allegations. However, Respondent is correct that the notice of proposed termination provides a more precise statement as to what is alleged. As this is undisputed evidence, it should be considered and it is added to the Discussion Narrative.

Conclusion

The Petition for Review should be granted. The Independent Hearing Examiner found against Respondent on all dispositive factual issues. Respondent did not properly change the dispositive findings of fact and reliance upon undisputed evidence does not

allow Respondent to change the Recommendation so as to terminate Petitioner's contract and suspend her without pay.

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 has jurisdiction over this case under Texas Education Code section 21.301.

2. The Conclusions of Law of the Independent Hearing Examiner are incorporated as if set out in full with the exceptions of Conclusion of Law No. 31 and the portion of Conclusion of Law No. 20 that finds remediation was required.

3. Under Texas Education Code chapter 21, subchapter G, the Commissioner may hear a claim that a school district violated the Texas Open meetings Act.

4. In an appeal to the Commissioner under Texas Education Code section 21.301, the Commissioner may only consider issues raised at the local level with a minor exception that does not apply to this case. TEX. EDUC. CODE §§ 21.301(c), 21.302.

5. Since Petitioner did not raise the Open Meetings Act issue at the local level, the Commissioner cannot hear this claim in the present appeal. TEX. EDUC. CODE §§ 21.301(c), 21.302.

6. Since Petitioner did not raise the claim that Respondent cannot take action against her contract because it did not make a report to SBEC alleging violations of the Code of Ethics and Standard Practices at the local level, the Commissioner cannot hear this claim in the present appeal. TEX. EDUC. CODE §§ 21.301(c), 21.302.

7. Since Petitioner did not raise the claim that Respondent's board did not meet to consider the Recommendation "at the first board meeting for which notice can be posted in compliance with Chapter 551, Government Code, following the issuance of the

recommendation," at the local level, the Commissioner cannot hear this claim in the present appeal. TEX. EDUC. CODE §§ 21.301(c), 21.302.

8. The Commissioner's Briefing rules require a concise statement of facts without argument and require each section of a brief to be concise or short. 19 TEX. ADMIN. CODE § 157.1058.

9. While Petitioner's brief, due to the incorporation of two large documents created by Petitioner, fails to be concise, this error while in no way condoned does not warrant the requested death penalty sanction.

10. If either party has objections to a recommendation, such arguments need to be raised at the hearing to consider the recommendation. If a party has no objections to a recommendation, the party is not required to make every possible argument in support of the recommendation or risk waiving those arguments.

11. Petitioner did not waive the argument that the Recommendation was supported by substantial evidence by not making the argument at the hearing to consider the Recommendation.

12. Petitioner did not waive the argument that a finding of fact found anywhere in a recommendation shall be considered a finding of fact by not making the argument at the hearing to consider the Recommendation.

13. "Good cause" for terminating a term contract is defined as the employee's failure to perform the duties in the scope of employment that a person of ordinary prudence would have done under the same or similar circumstances. An employee's act constitutes good cause for discharge if it is inconsistent with the continued existence of the employer-employee relationship.

14. A finding of fact is a finding of fact no matter how it is labeled in a recommendation.

15. Good cause is a finding of fact; unless the rule alleged to be violated is reasonable, the employee's misconduct is undisputed and the effect on the employer's business is clear,

16. In the present case, good cause is a finding of fact.

17. A school board may change a finding of fact in a recommendation if the finding of fact is not supported by substantial evidence. TEX. EDUC. CODE § 21.259.

18. A school board may not make findings of fact in addition to the findings of fact made by the independent hearing examiner.

19. A school board may base its decision on undisputed evidence in addition to the independent hearing examiner's valid findings of fact.

20. Respondent did not properly change any of the Independent Hearing Examiner's Findings of Fact except Finding of Fact No. 4.

21. As the factfinder, the Independent Hearing Examiner is the sole judge of the witnesses' credibility and the weight to be given their testimony, and is free to resolve any inconsistencies.

22. Respondent did not properly change any of the Independent Hearing Examiner's findings of fact except for Finding of Fact No. 4 because the other Findings of Fact are supported by substantial evidence.

23. Respondent does not have good cause to terminate Petitioner's term contract.

24. A teacher who is not discharged after being suspended without pay pending discharge is entitled to back pay for the period of suspension. TEX. EDUC. CODE § 21.211 (c).

25 Respondent's Decision to terminate Petitioner's term contract is arbitrary, capricious, unlawful, and not supported by substantial evidence.

26. The Petition for Review shall be dismissed in part as specified in Conclusions of Law Nos. 5-7.

27. The Petition for Review should be granted in part and Petitioner is entitled to the relief specified in Conclusions of Law Nos. 26-27.

28. Because Petitioner's contract was not lawfully terminated by Respondent, Petitioner is entitled to back pay for the period of suspension without pay. TEX. EDUC. CODE § 21.211 (c).

29. Because Petitioner's contract was not lawfully terminated by Respondent, Petitioner is entitled to back pay and benefits from the date Respondent terminated Petitioner's contract. Respondent shall reinstate Petitioner. Instead of reinstating Petitioner, Respondent may pay Petitioner one year's salary from the date Petitioner would have been reinstated. The date Petitioner would have been reinstated is the date Respondent tenders Petitioner in full any back pay and benefits plus one year's salary. TEX. EDUC. CODE § 21.304.

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 Petitioners' appeal, be, and is hereby DISSMISSED in part and GRANTED in part.

IT IS FURTHER ORDERED that Petitioner is entitled from Respondent to any back pay and benefits from the date Respondent suspended Petitioner without pay. Respondent shall reinstate Petitioner. Instead of reinstating Petitioner, Respondent may pay Petitioner one year's salary from the date Petitioner would have been reinstated. The date Petitioner would have been reinstated is the date Respondent tenders Petitioner in full any back pay and benefits plus one year's salary.

SIGNED AND ISSUED this 28th day of November, 2011.

Robert Scott

ROBERT SCOTT
COMMISSIONER OF EDUCATION