

PREPARED TESTIMONY
SENATE COMMITTEE ON EDUCATION
FEBRUARY 1, 2011

Martha P. Owen, Deats, Durst, Owen & Levy, L.L.P.
General Counsel, Texas AFT

REDUCTIONS IN FORCE.

● Under existing law, a local school district has the necessary authority and flexibility to declare a financial exigency and implement the reduction in force policy that its school board has developed. The Commissioner of Education has stated that if a board determines that such a financial exigency exists, the Commissioner will defer to the board on the need for same. *See, e.g., Stidham v. Anahuac I.S.D.*, Docket No. 205-R2-687 (Comm'r. Educ. 1989).

● There are provisions in the law to protect teachers' interests in such circumstances. Some provisions, such as an appeal to the Commissioner, ensure that the district abides by the RIF policy that it has enacted. Other provisions ensure that if a teacher is to lose her job, the separation from employment is accomplished in accordance with her contractual and constitutional rights.

● The vast majority of reductions in force are conducted at the end of the school year, with the least disruption to the students, teachers and the school community. A term contract teacher may be nonrenewed at the end of her contract due to a reduction in force. Tex. Educ. Code Section 21.203(b). In a nonrenewal hearing, the abbreviated separation process described in Section 21.207 applies, including limiting the teacher to a nonrenewal hearing before the board of trustees. These hearings are not elaborate. Probationary contract teachers do not even receive a nonrenewal hearing before the board of trustees. Tex. Educ. Code Section 21.103.

● Under existing law, a school district also has the authority to choose to terminate a term or probationary contract teacher during the middle of the contract term due to a reduction in force. Tex. Educ. Code Section 21.211(2). While it is true that in such situations, the teacher has enhanced procedural protections, including the right to request that a hearing be conducted by an independent hearing examiner, this requirement is a function of the fact that the teacher whose contract is being terminated (as opposed to merely nonrenewed) has a constitutionally protected property interest in her continued employment. This is also true of continuing contract teachers. While this process is necessarily more elaborate due to the legal interests at stake, a district can easily avoid the additional costs by acting at the end of the year, at the time when it is least disruptive for all concerned and districts are doing their budgeting and planning for the upcoming school year anyway.

● While some have suggested that the legislature could reduce the legal costs of mid-term RIFs by allowing school boards, rather than independent hearing examiners, to conduct the termination hearing, this would deprive teachers of an independent fact-finder, inevitably generate scores of court challenges over whether due process requirements were satisfied in a

particular case, and saddle school boards with the burden of conducting lengthy evidentiary hearings during the middle of the school year. Moreover, to the extent that the suggested changes in the law would purport to affect teachers during the present contract term, this would run afoul of the legal prohibition that forbids a school district from making material changes in the terms of an existing contract, creating an additional avenue of legal challenges. *See Central Education Agency v. George West I.S.D.*, 783 S.W.2d 200 (Tex. 1989)(material terms of a contract cannot be abrogated during the term of a contract).

CHANGES TO THE INDEPENDENT HEARING EXAMINER'S AUTHORITY.

●In 1995, following years of effort, the Texas Legislature crafted the independent hearing examiner provisions in the Education Code, carefully balancing the authority of a hearing examiner in termination cases with that of the school board and the Commissioner of Education. Under existing law, the hearing examiner makes findings of fact because she is the one who examines the evidence and judges the witnesses' credibility. Based upon those findings, the school board retains the right to make the ultimate employment decision. This apportionment of authority has been approved by the Texas Supreme Court, *Montgomery I.S.D. v. Davis*, 34 S.W.3d 559, 564 (Tex. 2000), with the Supreme Court specifically noting that "permitting a school board to select an independent factfinder avoids having the board, a party to the employment contract and a party to the dispute, act as its own factfinder when reviewing the employment decision of its own administration."

●It is well-established in Texas that with employment contracts (not just teacher contracts), "the issue of whether an employer had good cause to discharge an employee is a question of fact." *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572 (Houston [1st Dist.] 1992, no writ). Accordingly, the Commissioner has appropriately followed the law, as well as the legislature's intent through Senate Bill 1, by limiting the extent to which school boards may alter findings of fact. Despite the fact that the Commissioner's decisions on this question have been repeatedly upheld by the courts, including the Texas Supreme Court, it has been suggested that the legislature upend the existing scheme and simply label the fact finding of good cause a conclusion of law, so as to circumvent the current limitations on a school board's ability to change findings of fact. Such a "form over substance" maneuver would spawn a wave of litigation and would likely fail in the courts, given that it is clearly contrary to established legal principles governing contracts.

SUSPENSIONS WITHOUT PAY

●A suspension without pay deprives a teacher of her property interest without due process of law. In other words, under the both the federal and state constitutions, a teacher must be provided with full due process if she is going to be deprived of her property interest in her pay and continued employment (even if it just an "interruption" in employment for 30 days). It has been suggested that the legislature simply amend the Education Code to exempt disciplinary suspensions from the due process provisions set forth in Section 21.251. This suggestion is ill-conceived and violates constitutional standards. First, the suggested revisions do not contain any due process hearing provisions whatsoever, even any undertaken by the school board (such as in

a nonrenewal hearing). Even if the school board were to conduct such a hearing, it would still need to comport with constitutional standards and would be subject to the same problems outlined above with respect to school boards conducting mid-term termination hearings for RIFs. Additionally, the suggested revision except disciplinary suspensions from the Commissioner's review entirely, clearing the way to a direct court appeal.

- As for the suggestion that school districts be able to suspend teachers as a disciplinary measure, that ability is already provided in the Education Code: that's why the Code allows a district to suspend a teacher "in lieu of terminating the teacher." See Tex. Educ. Code Sections 21.211(b), 21.104. The plain meaning of these provisions is that a district may take disciplinary action short of discharge. The fact that it must do so only in accordance with constitutional standards is something that the legislature cannot alter, even if it were so inclined. The desire to suspend teachers without pay pending investigations runs up against the same legal problems. Moreover, the point should be made that investigations are just that: investigations. The teacher should be presumed innocent. The current practice of administrative leave with pay correctly balances the interests involved.

ALTERING THE TIME BY WHICH A TEACHER MAY RESIGN UNILATERALLY.

- Teachers are typically given contracts in the spring preceding a school year and directed to either sign the contract or not have a job. Often, this is before budgets are even approved for the coming school year so that, in order to have a job, the teacher must sign the contract without even knowing how much money she will be earning. Plus, the teacher is busy teaching and does not have the opportunity to look into other employment options. Recognizing the onus that this situation puts on teachers, the legislature has given teachers a window period in which they may tender their resignations, currently fixed at 45 days prior to the first day of instruction. Tex. Educ. Code Sections 21.105(a); 21.160(a); 21.210(a). It has been suggested that this period be shortened, so that a teacher is locked into the contract 60 days ahead of the new year. The existing law strikes the proper balance between the teachers' and the districts' interests. The justification for tipping the balance in the districts' favor is the under-supply of teachers. With potentially thousands of teachers due to lose their jobs due to the budget shortfall, there is no reasonable justification for this change at this time.

PROVIDING NOTICE OF PROPOSED NONRENEWAL.

- The Education Code provides that a district give notice of proposed nonrenewal in writing not later than the 45th day before the last instructional day. Tex. Educ. Code Section 21.206(a). The law does not restrict the district in the manner in which it provides the written notice. It has been suggested that the law be changed in order to allow the district to just put the notice in the mail before the 45th day, so that it will be deemed timely even if the district mails it to the wrong address, the teacher has moved, or for some other reason, the teacher does not receive it. Any problems that a district has in this regard would be of its own making and are easily avoided by the district not waiting until the last minute. Further, the district maintains supervisory control over its employees and can order the employee to present herself for the purpose of receiving, in person, the notice of proposed nonrenewal.

VOIDING THE CONTRACT OF AN UNCERTIFIED EMPLOYEE.

● Texas Education Code Section 21.0031 was enacted in order to allow a district to void the contract of an uncertified teacher. It is a simple process requiring notice to the employee and the board's action to void the contract. The suggestion is that the law should be changed so that the contract becomes automatically void upon the lapse of the certificate or permit. This will cause confusion because it leaves the status of the teacher's employment up to a third party, SBEC. The board is the entity with whom the teacher contracts and the board needs to take action to sever that relationship so that the parties know the status of employment and the date of severance. This change is not worth the uncertainty that it will create, particularly given the ease with which the current law allows the board to act.