

**IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA**

JIM SISNEY,

Plaintiff,

vs.

**MARYANNE FLIPPO,
SHARI WILKINS,
SHARON WHELPLEY, as individuals
and in their official capacities as
Members of the Broken Arrow
Public School Board of Education,
AND
INDEPENDENT SCHOOL DISTRICT
NO. 3 of TULSA COUNTY,**

Defendants.

**Case No. CJ-2008-6173
Judge Daman Cantrell**

**DISTRICT COURT
FILED**

NOV 14 2011

**SALLY HOWE SMITH, COURT CLERK
STATE OF OKLA. TULSA COUNTY**

**DEFENDANT BROKEN ARROW SCHOOL DISTRICT'S
SUPPLEMENTAL BRIEF**

In its Order of November 2, 2011, the court requested that the parties supplement their previous briefing to the following issue:

The Court has reviewed the extensive briefings in the respective defendant's motions for summary judgment dealing with plaintiff's now amended claims for breach of contract and breach of implied duty of fair dealing. The Court is interested in particular in the last paragraph of defendant Broken Arrow School District's reply to its motion to strike, which argues the implication that the Court must make of plaintiff's waiver of due process hearing. However, there is no authority cited in that final argument. The Court would appreciate input by either side as to what Oklahoma law discusses regarding, as BA argues, "plaintiff's waiver applies to all of the plaintiff's claims that would encompass the matters which were waived." In other words, the Court is seeking input as to the impact of the waiver, if any, as it applies to the breach of contract claim as it applies to the

Sherich case, cited by both parties. These authorities should be presented within 10 days, in the form of supplemental briefing.

In response thereto, this supplemental brief is submitted by defendant Independent School District No. 3 of Tulsa County, commonly referred to as the Broken Arrow School District (“District” or “School District”).

An Oklahoma school district is governed by its board of education. OKLA. STAT. tit. 70, § 5-106 (Supp. 2010). Therefore, when school board members act on matters related to an employee’s employment at a properly noticed meeting, their actions are that of the school district. *Hoerman v. Western Heights Bd. of Educ.*, 1995 OK CIV APP 130, 913 P.2d 684, 691¹ (“It is the Board of Education which is the governing body of the school district. 70 O.S. 1991 § 5-106. Under § 5-106, the superintendent of schools employed by the Board is the Board’s executive officer, performing such duties as the Board directs. Thus, it is the Board which ultimately stands responsible for the actions of the school district, and the superintendent is responsible to the Board.”).

In addressing the possible dismissal of an administrator, the Legislature has mandated that one entity, and only one, has the authority to determine whether cause exists warranting dismissal, and this authority is reposed in a local board of education. Such a board, one of whose duties is to “[m]aintain and operate a complete public school system of such character as [it] shall deem best suited to the needs of the school district,” OKLA. STAT. tit. 70, § 5-117(A)(4) (2010 Supp.), and not a court or a jury, is the sole

¹ For the court’s convenience, copies of all of the opinions cited herein, without annotation, are being provided with a copy of this brief.

entity authorized by law to determine whether cause exists for an administrator's dismissal. This was recognized by the court in *Scherich v. Independent Sch. Dist. No. 42 of Garfield County*, 1979 OK CIV APP 7, 591 P.2d 1270:

Resolution of the foregoing issue [whether the employee was guilty of the underlying offenses for which the employee was terminated] is statutorily reposed in the school board and the court has no jurisdiction to try it.

Id. at ¶ 13, 591 P.2d at 1273.

The Legislature has also mandated that the decision of the Board of Education is final. OKLA. STAT. tit. 70, § 6-101.13 (2001) (“The decision of the local board of education concerning the dismissal or nonreemployment, following the hearing, shall be final.”); *Hoerman*, 1995 OK CIV APP 130, ¶ 25, 913 P.2d at 690 (“Under the due process procedure set forth in § 6-101.13, the decision of the local board of education concerning dismissal of an administrator is final. There is no right of appeal as provided tenured teachers.”). The intent of this provision, like the similar provision addressed in *Scherich*, is “to vouchsafe causeless dismissals but to accelerate the process of removing those concerning who the board hears evidence of a transgression.” *Scherich* at ¶ 10, 591 P.2d at 1273.

As the court in *Scherich* noted, the finality of a board decision does not mean that a dismissed employee lacks a remedy. However, that remedy is not the retrial of the acts or omissions considered at the hearing. Rather, it is singularly limited to whether the dismissal decision was arbitrary:

The judgment appealed is therefore reversed and the cause remanded to the trial court **with directions to grant [the District] a new trial and to restrict further judicial inquiry to the narrow question of whether or not the Enid board's decision to dismiss Scherich was arbitrary and thus in violation of his contractual rights. If it was not, then, of course, [the District] should prevail.** But if it was, then an assessment of the resulting detriment to [Scherich] should be made. (emphasis added).

Id. at ¶ 14, 591 P.2d at 1273-74. As the court noted in *Hoerman*, this means a dismissal founded upon no evidence of acts or omissions alleged.

Under the due process procedure set forth in § 6-101.13, the decision of the local board of education concerning dismissal of an administrator is final. There is no right of appeal as provided tenured teachers. In considering a similar question where a teacher, under the law then in effect, had no right of appeal, the Court of Appeals, in *Scherich v. Independent School District No. 42 of Garfield County*, 591 P.2d 1270 (Okla.App. 1979), found:

But, to say Scherich has no right of appeal to the courts is not to say he has no remedy for a breach of contract, e.g., arbitrary dismissal for willful neglect of duty by the board - i.e., a dismissal founded on no evidence of such neglect.

We find the Scherich rationale applies here. To find otherwise would render Hoerman's contractual rights meaningless. While there are no statutory grounds for dismissal as there were in Scherich, the Board here was nonetheless obligated under the contract and could only dismiss Hoerman for such cause as was supported by evidence of the acts or omissions alleged. Without established cause, or previous breach by Hoerman, dismissal would constitute breach of the employment contract.

Hoerman, 1995 OK CIV APP 130, ¶ 25, 913 P.2d at 690.

In the present case, it is undisputed that the plaintiff was notified of his

opportunity to contest and challenge the cause cited for his dismissal at a board hearing. This included any alleged board bias that might have existed. However, with the advice of his then attorneys, he knowingly and voluntarily did not request such a hearing.²

Section 6-101.13 is clear: “Failure of the administrator to request a hearing before the local board of education within ten (10) days after receiving the written statement shall constitute a waiver of the right to a hearing.” The effect of this waiver prevents the litigation of procedural due process issues in a subsequent court proceeding. *Pitts v. Bd. of Educ. of U.S.D. 305, Salina, Kansas*, 869 F.2d 555, 557 (10th Cir. 1989) (“Pitts was fully informed of his considerable procedural rights. Indeed, he initially asserted them. The procedures mandated by Kansas law clearly meet the requirements of the due process clause. By knowingly failing to take advantage of those procedures, Pitts has waived his right to challenge them in federal court...By waiving his hearing, Pitts deprived the school board of the opportunity to provide him with due process, and he gave up his right to test the correctness of the board's decision. (emphasis added)”

Included in this waiver is the right to assert that board members were biased because “[i]mpartiality of the tribunal is an essential element of due process.” *Cypert v.*

Independent Sch. Dist. No. I-050 of Osage County, --- F.3d ---, 2011 WL 4952995 (10th Cir. Oct. 19, 2011) (citing *Riggins v. Goodman*, 572 F.3d 1101, 1112 (10th Cir. 2009)).

In *Security First Nat'l Bank v. Knowles*, 1994 OK CIV APP 27, 871 P.2d 446, the

² The fact that the plaintiff did not request a hearing before the Board of Education regarding his possible dismissal is not in dispute. Neither is the fact that this decision was (a) voluntarily and knowingly made and announced at a press conference attended by the plaintiff and his then legal counsel. <<http://www.newson6.com/story/9195747/superintendent-wont-fight-suspension?clienttype=printable>> (accessed November 14, 2011).

Bank brought an action against Knowles for default on a note secured by cattle. Knowles then filed a counterclaim asserting that the Bank had tortiously interfered with a cattle maintenance agreement between Knowles and the cattle's owner. However prior to his counterclaim, Knowles filed a disclaimer wherein he "disclaimed any right, title or interest in and to the personal property (i.e. cattle)[.]" *Id.* at ¶ 3, 871 P.2d at 447. In affirming the dismissal of Knowles' counterclaim, the court of appeals noted:

this case turns on whether, at the time the counterclaim was filed, [Knowles] retained any right or interest in the cattle. **We agree with the trial court on the issue of waiver by [Knowles] due to his disclaimer.** Although [Knowles] contends he was merely disclaiming an ownership interest in the cattle, we hold that the disclaimer also effectively served to waive any right based upon his alleged contractual right to possession of the cattle. **The language used in the disclaimer, that he "disclaims any right, title or interest in and to the personal property (i.e., cattle) set forth in plaintiff's Second Cause of Action", is incompatible with continuing the cattle maintenance contract because such contract would require obtaining possession of the cattle.** It was held in *Whitmire v. Zolbe*, 403 P.2d 445, 448 (Okla. 1965), that an action, or forbearance of action, which is inconsistent with an alleged right is a waiver. The Supreme Court cited *Southwest Cotton Co. v. Valley Bank*, 26 Ariz. 559, 227 P. 986, 988 (1924) which defined "waiver":

A waiver is a voluntary and intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. (Citations omitted) (Emphasis added).

The *Whitmire* Court also quoted approvingly from *Springfield Gas & Electric Co. v. Southern Surety Co. of Oklahoma*, 250 S.W. 78 (Mo. App. 1923):

A waiver occurs when one `in possession of any right, whether conferred by law or by

contract, and with full information of the material facts, does or forbears the doing of some things inconsistent with the existence of the right or his intention to rely upon it; thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterward. [*] [*] A consideration which is necessary to support a contract is unnecessary to support a waiver. A waiver may even take place in consequence of laches merely or in consequence of acting inconsistently with the idea of insisting upon the right which is waived, and may be shown by conduct as well as by express words.

[Knowles] cannot disclaim any "right, title or interest" in the cattle, only to turn around and claim the [Bank] destroyed his right to continued proceeds under his contract for maintaining the same cattle. **His act of filing the disclaimer was inconsistent with the counterclaim against [the Bank] as a matter of law.** The trial court did not err in sustaining [the Bank's] motion to dismiss. (emphasis added).

Knowles, 1994 OK CIV APP 27, ¶ 10, 817 P.2d at 448-49.

Through his breach of the implied covenant of good faith contract claim, the plaintiff is attempting expand the scope of the judicial inquiry beyond the only permissible inquiry as determined by *Scherich* - the issue of whether his dismissal was arbitrary. This claim is inconsistent with the waiver resulting from plaintiff's knowing and voluntary decision not to request a hearing before the District's board of education, and like the claim asserted in *Knowles*, the court should not permit it. To hold otherwise, and permit the plaintiff through such a claim to now challenge the character of the evidence against him and the impartiality of the board of education that considered it,

would green-light school administrators (and other such similarly-situated employees³) to by-pass board hearings on their employment and to instead litigate all issues surrounding their dismissal in a court proceeding. Such a ruling would, simply, render meaningless the legislatively mandated finality of a board hearing and the decisions in *Scherich* and *Hoerman* addressing such finality.

Conclusion

By not requesting a hearing before the District's board of education, the plaintiff has waived his right to contest in a breach of contract claim any matter related to his dismissal other than whether his dismissal was arbitrary, *i.e.*, a dismissal founded upon no evidence of the acts or omissions alleged.

Respectfully submitted,

ROSENSTEIN, FIST & RINGOLD

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³ Under current Oklahoma law, a board of education's decision on the dismissal or nonreemployment of teachers and support employees is final. *See* OKLA. STAT. tit. 70, §§ 6-101.26(C), 6-101.47.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2011, I served the attached document by U.S. Mail, Certified Return-Receipt Requested, postage prepaid, on the following:

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