IN THE SUPREME COURT OF MISSISSIPPI

GARRY J. ALEXANDER **APPELLANT**

V. **No. 2010-TS-01992**

JAMES REEVES, CONSERVATOR OF THE HAZLEHURST SCHOOL DISTRICT ACTING IN PLACE OF THE BOARD OF TRUSTEES OF THE HAZLEHURST SCHOOL **APPELLEE**

APPEAL FROM THE CHANCERY COURT OF COPIAH COUNTY

BRIEF OF APPELLANT GARRY J. ALEXANDER

ORAL ARGUMENT IS NOT REQUESTED

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I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judge of this Court may evaluate possible disqualification or recusal.

1. Garry J. Alexander, Appellant
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   Bogue Chitto, MS 39629

2. James Reeves, Conservator of the Hazlehurst School District, Appellee
   c/o Hazlehurst City School District
   119 Robert McDaniel Drive
   Hazlehurst, Mississippi 39083

3. Stanley Blackmon, former Conservator of the Hazlehurst School District.
   c/o Hazlehurst City School District
   119 Robert McDaniel Drive
   Hazlehurst, Mississippi 39083

4. Hazlehurst School District
   c/o Hazlehurst City School District
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8. Hon. Edward E. Patten, Jr.,
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Respectfully submitted, this the 9th day of June, 2011.

GARRY J. ALEXANDER
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PROCEEDINGS BELOW.

This is an appeal from a September 29, 2010, decision of the Chancery Court of Copiah County affirming a decision of the conservator[1] of the Hazlehurst School District rendered January 12, 2010.

By letter dated February 17, 2009,[2] [RE 4] the then conservator for the Hazlehurst School District, Stanley Blackmon, notified Garry Alexander, a health and physical education teacher, that

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1Two names occur in the record as purported conservators. The District's failure to establish by substantial evidence that either of these men were in fact validly appointed conservators with the authority to take the actions they took is an issue in this appeal. Accordingly, any reference to a "conservator" of the Hazlehurst School District is for convenience and should not be understood as Appellant's agreement that said persons were established by sufficient evidence as being lawful conservators of the District. Rather, such references should be understood as references to the "alleged conservators."

2Ex. 4 to June 26, 2009, hearing.

Alexander was being dismissed from his position with the District for "Neglect of Duty." According to Blackmon's notice, that alleged neglect consisted of

1. Failure to adequately supervise your classroom.

2. Failure to timely and adequately report an incident involving students to your administrator.[3]

. Alexander requested a hearing in a timely manner pursuant to Miss. Code Ann. § 37-9-59,[4] which hearing was subsequently held before a hearing officer. V. II, 4.[5]

Apparently, after Mr. Alexander's termination, but before the hearing was held, Conservator Blackmon was replaced by James Reeves. V. II, 101.[6] Mr. Reeves issued a decision in this matter on January 12, 2010. He opined therein that (1) Mr. Alexander "failed to carry out his duties to adequately supervise his students"; (2) that "he failed to turn in adequate lesson plans"; (3) that certain witnesses testified to times when Mr. Alexander supposedly was not teaching his students and that the students were "doing nothing";[7] and that (4) Mr. Alexander "failed to carry out his responsibilities" and "duties as a health and physical education teacher."[8] Conservator Reeves upheld the decision to terminate Mr. Alexander's contract based upon "these incidents and the

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3This reason was not mentioned in the final decision to terminate Mr. Alexander.

4Copies of all statutes referenced are contained in the appendix.

5The transcript is in three volumes (volumes 2-4). References to the transcript will be by volume number (II, III, or IV), followed by page reference. *E. g.*, V. II, 4, in the text above, refers to volume 2, page 4.

6There is no evidence in the record (only statements of the District's counsel) to indicate exactly what Mr. Reeves's status was at any particular time.

7The Opinion does not appear to make findings regarding these observations, but recites that fact that certain persons testified to them. The only findings appear to be items one, two, and four.

8The Opinion does not specify those responsibilities and duties.

substantial and credible evidence submitted at the hearing . . . ." Reeves Decision, CP 6-7, RE 5.[9] Mr. Alexander appealed that decision to the Chancery Court of Copiah County, which affirmed Mr. Reeves's decision. (CP 6-7, RE 13). Following the lower court's overruling of his motion for rehearing, Mr. Alexander filed a timely appeal to this Court. CP 1-7.

FACTS

To fully appreciate the circumstances of this case requires an understanding of the tumultuous environment that existed in the Hazlehurst School District during the 2008-2009 school year, particularly in Hazlehurst Middle School where Appellant Alexander taught. There was virtually no leadership in the middle school and little administrative supervision of the students and faculty. Apparently, conditions were so bad that the state took control of the District, disbanded the school board, and placed a state Department of Education-hired conservator in charge of the district. V. II, 6-8.[10] The chaos, though, continued unabated.

General disorder and disrespect for authority was the norm. One teacher sold food for profit to students in her classroom in violation of school policy. V. II, 83. Teachers frequently lost control of their classrooms. V. IV, 2. Deborah Lee testified that students were often uncontrollable and would get off the morning school bus fighting. V. IV, 11-12. A Ms. Roby testified that during her time at the middle school she had been fought, attacked, and cursed. V. IV, 51-52.

9The Clerk's papers are in Volume One of the Record. To avoid confusion with the transcript, which is referred to by volume number, the Clerk's Papers are referenced herein as "CP." Conservator Stanley Blackmon, who made the decision to terminate Alexander,testified that his decision was based upon an incident that occurred on the school playground. V. III, p. 17-18.

10This is according to Mr. Blackmon's testimony. As noted previously, Appellant contends that the District has failed to establish by sufficient evidence either the fact of a conservatorship or Mr. Blackmon's appointment to the position of conservator pursuant thereto.

There were many over-aged students in the middle school, which brought on special problems. Inappropriate sexual activities were apparently rampant among the students. At least two middle school students were discovered to have had sexual intercourse in a restroom. V. II, 252. There were other cases of boys and girls "feeling on" each other. V. II, 256. No one was fired over those incidents. V. II, 256.

For whatever reason, the eighth graders were particularly incorrigible. Conservator Blackmon admitted that the eighth grade class included many overaged, problematic, and disruptive students. V. III, 44-45. At one point the entire class was sent home with letters stating that no eighth grade student would be readmitted to the school until his parent or guardian came to the school and had a conference with the principal. V. IV, 53, 56.

One cannot say "the principal," though, when referring to Hazlehurst Middle School during the 2008-2009 school year. One must say, "one of the half dozen principals," for, from the time school began in August 2008 until Mr. Alexander was dismissed in February 2009, incredible as it may sound, there were six different principals at Hazlehurst Middle School. V. II, 39; V. II, 50. One teacher who testified had difficulty even recalling the names of all the principals she served under during the 2008-2009 school year. V. IV, 14, 19. She simply referred to one principal as "principal number 4." V. IV, 13.

In general, teacher morale was terrible. As state contractor/consultant Livingston put it, "this was a very hurt group of people." V. II, 149.

It would seem more than enough challenge for a young teacher like Mr. Alexander to be expected to teach in such a blackboard jungle, but things were even worse for him than for others. In January, 2009, Alexander was assigned the task of teaching *five different grade levels of health.*

V. IV, 62. Teaching five different age groups, including the incorrigible eighth grade, with five different curricula, would be hard enough. *Mr. Alexander was expected to do that without textbooks.* His only curriculum guide, apparently, was a looseleaf binder of materials that "somebody" gave him, according to assistant principal Roby. V. IV, 57-58. The absurdity of a school district not supplying a teacher with textbooks is only surpassed by the repeated statements found in the record by state department of education employees to the effect that middle school teachers really don't need textbooks! *E. g.*, V. II, 93, 203-204.

Mr. Alexander had no planning period in which to attempt to master the curricula for five different grade levels for which he had no (or, at best, inadequate) textbooks, despite the fact that such planning times are required by state and district policy. V. III, 200-02.[11] V. II, 201. Moreover, for at least some of his time at Hazlehurst middle school Mr. Alexander didn't even have a classroom, but was required to teach on a stage in a gymnasium in which physical education classes were simultaneously being conducted! V. III, 41. To make matters worse, students were not required to pass health in order to be promoted to the next grade level, and the students knew it. V. II, 97. Thus, the students in the school who caused behavioral problems had no academic motivation to behave themselves in Mr. Alexander's classes. As far as promotion was concerned, the class was irrelevant.

Anita Johnson testified that Mr. Alexander's discipline problems were no worse than anyone else's and that discipline was bad throughout the school. V. IV, 146. Yet, while some teachers had

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11*See*, Mississippi Public School Accountability Standards, Standard 30. www.mde.k12.ms.us/accred/Final_2010_11-30-10_manual.pdf; Appendix at 7. When asked, School Evaluator Livingston, assigned to Hazlehurst by the State to evaluate the rehabilitation process at the school, could not find any evidence that Mr. Alexander had a plannning period. V. III, 200-02.

state-appointed mentors to guide them in discipline problems, Mr. Alexander was not given that assistance. V. IV, 151-153.

When Mr. Alexander had playground supervisory duty over the fourth graders, as he did the day the incident of inappropriate touching occurred, he was entirely on his own. According to Mr. Blackmon, a Coach Mack was shown on school records as being the co-teacher of the fourth grade class in question. V. III, 20. Mack habitually did not assist in that duty, despite Alexander's complaint to the administration about Mack's dereliction of duty. V. II, 222-23. A teacher's aid (Mrs. Cleveland) who was also scheduled to share in that playground assignment that day, like Mack, simply did not report for duty. V. IV, 65-66. Apparently, neither Cleveland nor Mack was terminated or otherwise disciplined following the incident. Only Mr. Alexander was fired. V. IV, 65-66.

A hearing was held on Mr. Alexander's request. As noted above, at the conclusion of the hearing, and without the statutorily required opportunity to make a final statement, Mr. Reeves, without any authority of record to do so, issued an opinion affirming Mr. Blackmon's decision to terminate Mr. Alexander's employment. Mr. Alexander filed a timely appeal to chancery court, which affirmed Reeve's decision. A subsequent motion for rehearing was denied by order of the chancery court. (CP 68-70, RE 35-37). It is from the judgment (CP 40, RE 34), opinion (CP 14-39, RE 8-33), and order (CP 68-70, RE) of that court that Mr. Alexander now appeals.

VI. SUMMARY OF THE ARGUMENT

A. THE DECISION WAS BEYOND THE AUTHORITY OF THE CONSERVATOR TO MAKE.

No evidence of lawful appointment of conservators.

Generally only the superintendent of a district may recommend termination of a licensed employee and only the board of trustees has the authority to make a final decision as to that recommendation. *See*, Miss. Code Ann. § 37-9-59; *Noxubee County Board of Education v. Givens*, 481 So. 2d 816, 819 (Miss. 1985). Only by order of the governor pursuant to Miss. Code Ann. § 37-17-6 (11) can those powers of the superintendent and board be assumed by a conservator. Despite the objection of hearing counsel to the authority of the purported conservator to act, the conservator failed to put into evidence proof of his lawful appointment by the governor. Accordingly, the conservator had no authority to terminate the appellant, Mr. Alexander.

B. THE CONSERVATOR'S DECISION VIOLATED APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHTS.

1. The Decision Was Not Fair and Unbiased as Required by Law.

Assuming, the conservator was lawfully appointed, the hearing process was fatally flawed, nonetheless. In this case, the initial conservator (Blackmon), a self-described contract employee of the Mississippi Department of Education, made the original decision to terminate Mr. Alexander. The succeeding putative conservator, Mr. Reeves, was likewise purported by counsel for the District to be or to have been a similar agent of the Mississippi Department of Education, administering the same conservatorship. Reeves issued the decision following the hearing that finally terminated Mr. Alexander's employment. Since the same supposed conservatorship

representing the MDE that made the initial decision to terminate Mr. Alexander also ruled on the evidence and made the final decision to terminate, Mr. Alexander could not have had a fair hearing. He was denied due process. *See Cantrell v. Vickers*, 495 F. Supp. 195 (N.D. Miss. 1980) (decision maker that had made up its mind could not give teacher due process).

2. Mr. Alexander was never afforded his right to give his closing statement before the trier of fact.

Miss. Code Ann. § 37-9-111 (4) provides, in pertinent part, that a board of trustees *shall* permit a teacher to appear before the board to make a statement prior to a final decision by the board. In this case, the conservator, supposedly standing in the shoes of the board, failed to permit the appellant to make a statement before him prior to his final decision. A mandatory right of the appellant having been violated, prejudicial error requiring reversal was committed.

C. THE DECISION WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The District Failed to Prove Neglect of Duty Under the Circumstances of this Case.

Termination of a teacher's employment during the contract year requires proof of extraordinary circumstances. *See Madison County Board of Education v. Miles*, 252 Miss. 711, 173 So. 2d 425, 427 (1965). While there is no apparent guidance on application of the term "neglect of duty" in our code or case law, other jurisdictions can provide direction. As far back as 1933, California noted that "the mere failure to perform a certain act, with nothing more, does not constitute either a neglect of duty in fact or law. . . . [E]ither wilfulness, intention, design, or inexcusableness must be present." *Rapaport v. Civil Service Commission of State of California*, 134 Cal. App. 319, 25 P. 2d 265, 267 (Cal. App. 3 Dist. 1933). The surrounding facts--the environment in which the employee is working--must be taken into

consideration, as well. *Gubser v. Department of Employment*, 271 Cal. App. 2d 240, 76 Cal. Rptr. 577, 579 (Cal. App. 5 Dist. 1969).

The Supreme Court of Nebraska has said that the standard is not one of perfection. *Sanders v. Board of Education of South Sioux City Community School District No. 11*, 200 Neb. 282, 263 N. W. 2d 461, 465 (1978). Rather, in determining the matter the court should look at "surrounding circumstances" and "the standard required of others."

In this case, the environment in which Mr. Alexander was expected to work was so atrocious and the district's own defaults were so egregious that it cannot be said as a matter of law that Mr. Alexander neglected his duty.

D. THE DECISION WAS ARBITRARY AND CAPRICIOUS.

Conservator Reeves's findings were unsupported by citations to specific evidence and failed to make findings sufficient to enable a reviewing court to understand what actions or inactions on Mr. Alexander's part resulted in the final decision to terminate. For that reason alone, the decision "lacked [an] adequately determining principle." *McGowan v. Mississippi State Oil & Gas Board*, 604 So. 2d 312, 322 (Miss. 1992).

Moreover, the decision totally ignored the egregious circumstances in the school during the 2008-2009 school year and the fact that Mr. Alexander was treated by the administration in arbitrary and capricious manner. Accordingly, the decision demonstrated a "lack of understanding of or a disregard for the surrounding facts and settled controlling principles" on the part of Conservator Reeves. *McGowan*, 604 So. 2d at 322. That failure also placed the conservator's actions in contravention to the clear intent of the statute. *See, Mississippi Insurance Commission*

v. Savery, 204 So. 2d 278, 283 (Miss. 1967). Under the settled law of *McGowan* and related cases, the decision was arbitrary and capricious and must be reversed.

VII. ARGUMENT

STANDARD OF REVIEW

A teacher may be terminated from his contract or suspended without pay only for the reasons set down in Miss. Code Ann. § 37-9-59. The legislative intent in enacting this section was to make teachers reasonably secure in their jobs and to subject them to removal only for serious causes. *Madison County Board of Education v. Miles*, 252 Miss. 711, 173 So. 2d 425, 427 (1965). The school superintendent (in this case, the conservator) must prove the "serious causes" he alleges by a preponderance of the evidence. *Merchant v. Board of Trustees of Pearl Municipal School District*, 492 So. 2d 959, 961 (Miss. 1986). In order to sustain a school board's action, the reviewing court must find "substantial credible evidence undergirding the school board's finding of fact." *Harris v. Canton Public School Board of Education*, 655 So. 2d 898, 902 (1995). Substantial evidence may be "something less than a preponderance" but it most assuredly must be "more than a scintilla or glimmer." *Mississippi Department of Environmental Quality v. Weems*, 653 So. 2d 266, 280-81 (Miss. 1993).

In reviewing a teacher termination decision, the Court looks to see whether the decision of the board (in this case, a purported conservator) is supported by substantial evidence, was arbitrary or capricious, was beyond the power of the board to make, or violated some statutory or constitutional right of the complaining party. *Byrd v. Greene County School District*, 633 So. 2d 1018, 1022 (Miss. 1994); *Hoffman v. Board of Trustees*, 567 So. 2d 838, 842 (Miss. 1990). That, of course, is the same standard applied to review of any administrative agency. *See, e. g.*,

Shird v. Mississippi State Department of Mental Health, 785 So. 2d 275, 278 (*en banc*), ¶5. It can hardly be overemphasized in this case that it is the school district's "finding of fact" that must be "undergird[ed]" by "substantial credible evidence," *Harris,* 655 So. 2d at 902, not the District's conclusions of law.

Findings must be specific enough on the fact issues to enable the reviewing court to determine whether the applicable criteria have been met. *Sierra Club v. Mississippi Department of Environmental Quality*, 819 So. 2d 515, 523 (Miss. 2002).

Unlike factual determinations, questions of law are always reviewed *de novo*. *Board of Supervisors of Harrison County v. Waste Management, Inc.*, 759 So. 2d 397, 400 (Miss. 2000). A fundamental task of the reviewing court is to determine whether the agency acted within the scope of the law. *Game and Fish Commission v. Marlar*, 206 So. 2d. 628, 631 (Miss. 1968). Related to that is the question of whether the agency acted within the clear intent of the applicable statute or arbitrarily or capriciously. If so, the court must reverse the agency's findings. *Mississippi Insurance Commission v. Savory, 204 So.2d 278, 283 (Miss. 1967). See also, Merchant v. Board of Trustees of Pearl Municipal School District*, 492 So. 2d at 961-62 ("Where a school board has acted in a manner which is arbitrary and capricious and where its actions are not supported by substantial evidence, the [appellate] court [has] the responsibility to intervene"). Whether statutory definitions were properly applied is also a question of law for *de novo* review by the appellate court. *See, e. g., Sones v. Southern Lumber Co.*, 215 Miss. 148, 60 So. 2d 582-586. (1952) (Court determined workers' compensation commission failed to apply correct definition of independent contractor).

The same standards of review apply to appeals from the chancery court to the Supreme Court as from the school district to the chancery court. *Byrd, id.*

This Court must not "[wear] blinders" in reviewing an agency conclusion but must determine whether there is "such relevant evidence as [should be] accepted as adequate to support" the agency's decision. *Mississippi State Board of Examiners v. Anderson*, 757 So. 2d 1079, 1084 (Miss. App. 2000). Clearly, appellate review under these standards clearly is no rubber stamp. *McFadden v. Mississippi State Board of Medical Licensure*, 735 So. 2d 145, 151 (Miss. 1999). We would submit that the decisions of the conservator and the chancery court below do not the standards set out above.

A. THE DECISION WAS BEYOND THE AUTHORITY OF THE CONSERVATOR TO MAKE.

No evidence of lawful appointment of conservators.

As noted above, a chief task of a court on appeal is to determine whether the agency below acted within the scope of the law. *Game and Fish Commission v. Marlar*, 206 So. 2d. 628, 631 (Miss. 1968). In this case, this Court cannot do that because there is no evidence of the authority of the alleged conservators to take the actions they took.

Mississippi Code Annotated § 37-9-59 provides that only the superintendent of a district has the authority to recommend termination of a licensed employee, and that only the board of trustees of such a district has the authority to make a final decision as to that recommendation. *Noxubee County Board of Education v. Givens*, 481 So. 2d 816, 819 (Miss. 1985). Only by

order of the governor pursuant to Miss. Code Ann. § 37-17-6 (11) can those statutory powers of a superintendent and a board of trustees be set aside and their functions be assumed by as conservator.

At the outset of the hearing, counsel for Mr. Alexander objected to the alleged conservator making any decision in this case. V. II, 7. In the transcript, we find this exchange during appellant's counsel's *voir dire* of the hearing officer:

> The Hearing officer: I will not be making a recommendation one way or the other as to what the decision of the interim conservator Mr. Reeves [*sic*] should be. [My report] will simply be my summary of the evidence and the testimony that's presented at the hearing.
>
> Ms. Ross: And you said you're preparing this report for the intereim conservator and not the school board?
>
> The Hearing officer: It's my understanding of the law that when an interim conservator has been appointed that the decision is to be made by him instead of the school board.
>
> Ms. Ross: Can you point me to the statute that says that?
>
> The Hearing officer: I don't know it off the top of my head. If you want to
>
> —
>
> Mr. Armistad: 37-716 [*sic*].

Ms. Ross: That's not what it says, and I would object to any decision being made by a conservator.[12] The law says that it shall be made by the school board . . . ." V. II, 7.

Mr. Armistad noted "for the record [that] Mr. Reeves is the interim conservator. The governor of the State of Mississippi has declared a state of emergency." V. II, 8.

There is no competent evidence in the record of any authority on the part of Mr. Blackmon to make the initial decision to terminate Mr. Alexander's contract. Neither is there any competent evidence to substantiate the authority of Mr. Reeves to make a decision upholding the termination.

The court below rejected this argument: "Appellant's objection was limited to what the statute said regarding the decision making authority, not whether the Conservator had actually been appointed." CP 22, RE 16. Had "a timely objection been made . . . ," the court added, "it would have put the District on notice of the need to produce additional documentation regarding the conservator's appointment."[13] CP 22, RE 16.

With all due respect to the chancellor, the "decision making authority" of a conservator depends upon whether he "had actually been appointed." Alexander's counsel clearly "object[ed] to any decision being made by a conservator." V. II, 7. The objection put the District on notice

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12No doubt Ms. Ross would have raised the same objection to a decision by a conservator had Mr. Alexander been permitted the statutorily required closing statement. As will be noted and argued below, Mr. Alexander was not permitted that opportunity.

13It is doubtful that the district could have done that, for it doesn't appear that such evidence was provided in advance to Movant. Even in a termination, the respondent must be given advance notice of the charges and the evidence against him. *See Cantrell v. Vickers*, 495 F. Supp. 195 (N.D. Miss. 1980). Evidence of that nature not previously supplied to respondent would probably have been inadmissible.

that the authority of its conservator was being challenged. Counsel for the district certainly understood it that way. Why else would he have "note[d] for the record [that] Mr. Reeves is the interim conservator [and that t]he governor of the State of Mississippi has declared a state of emergency?" V. II, 8. District counsel sought to make up with his statement was what lacking in the evidentiary record. Statements of counsel, though, are not evidence. *Haggerty v. Foster*, 838 So. 2d 948, 954 (2002).

In any event, Alexander respectfully suggests that to require hyper-accuracy in the preservation error violates the spirit of Miss. Code Ann. § 37-9-111: "the board or hearing officer shall not be bound by common law or by statutory rules of evidence or by technical or formal rules of procedure except as provided in Sections 37-9-101 through 37-9-113 . . . ."

The court below also said that "Appellant offers no proof to support his contention that conservators were not duly appointed or acted outside the scope of their authority" in terminating him. With all due respect, what Appellant has argued is that, given Ms. Ross's timely objection, the District was required to prove the Conservators' authority, which it failed to do. A respondent cannot be expected to prove a negative, which, no doubt, is precisely why Mississippi jurisprudence requires the government to prove official acts by something other than oral testimony. *Lange v. City of Batesville*, 972 So. 2d. 11 (Miss. App. 2008) (parol evidence inadmissible to interpret "public road" term in contract with board of supervisors since board speaks only through its minutes). Oral statements cannot supply proof of authority to act. *Game and Fish Commission v. Marlar*, 206 So. 2d. 628, 631 (Miss. 1968) (in a hearing to determine whether an employee was to be discharged, agency could not act on facts not disclosed in the record). *See also Mississippi Gaming Commission v. Pennebaker*, 824 So. 2d. 552, 555

(Miss. 2002) (because agency actions may be evidenced only by their minutes, circuit court erred in considering commission members' statements not found in agency's official record). We are all bound by the record. Whether the conservators in fact had authority to act, we cannot say, because the record does not establish it.[14]

There being no gubernatorial order in the record establishing the statutory authority of Messrs. Reeves and Blackmon to act as conservators in the district, Mr. Alexander's termination was without the authority of law and must be reversed.

B. THE CONSERVATOR'S DECISION VIOLATED APPELLANT'S CONSTITUTIONAL AND STATUTORY RIGHTS.

1. The Decision Was Not Fair and Unbiased as Required by Law.

Assuming, arguendo, [but still denying] that the conservator(s) were lawfully appointed, the hearing process and the resulting termination of Mr. Alexander's contract were still fatally flawed. As already noted, under normal circumstances, the ultimate decision regarding the termination of a teacher belongs to the Board of Trustees of the School District. As district

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Teachers are at a tremendous disadvantage in termination cases. While it would seem that a teacher being deprived of existing contract rights under Miss. Code Ann. § 37-9-59 would be entitled to more rights than one whose contract is not being renewed, that is not the case. There is no disclosure provided by statute: only the due process rights established by case-law apply. *See, e. g., Ford v. Holly Springs School District*, 665 So. 2d 840, 843 (Miss. 1995). A teacher in a termination case is accorded only the barest due process rights and is not even entitled to the minimal disclosure afforded a teacher in a non-renewal case. Consider also that the witnesses who could help the respondent typically work for the district. Obviously, such persons would be reluctant to testify against their employer. In this attorney's experience, many districts deny the right of a teacher to subpoena documents, as well, in such cases. Given the rapid time-lines involved in these proceedings, discovery by statutory information request is often not an option, particularly if a district is uncooperative. Under the circumstances, it is very difficult for a terminated teacher to obtain evidence prior to a hearing.

witness Ken Acton noted, the circumstances of this case are not normal. V. II, 50. The Hazlehurst School District allegedly had been placed under a conservatorship. V. II, 48.

In this case, the conservator (Blackmon), a self-described contract employee of the Mississippi Department of Education, made the initial decision to terminate Mr. Alexander. The succeeding putative conservator, Mr. Reeves, was likewise purported by counsel for the District [V. II, 7] to be or to have been a similar agent of the Mississippi Department of Education, administering the same conservatorship. Reeves issued the decision following the hearing that finally terminated Mr. Alexander's employment. Since the same supposed conservatorship representing the MDE that made the initial decision to terminate Mr. Alexander also ruled on the evidence and made the final decision to terminate, Mr. Alexander could not have had a fair hearing. He was denied due process.

The U. S. District Court for the Northern District of Mississippi was presented with a case analogous in principle in *Cantrell v. Vickers*, 495 F. Supp. 195 (N.D. Miss. 1980). There, a teacher, upon receiving notice of termination, went directly to federal court without taking advantage of the statutory hearing offered by the school district's board of trustees. The District argued that the teacher had failed to exhaust her administrative remedies. The court rejected that argument for the reason that the evidence showed without contradiction that the board had "decided Mrs. Cantrell's future . . . in the school district before she was advised" of her right to a hearing. Since the decision to fire Mrs. Cantrell already had been made by the board, she would not have been provided an "impartial forum in which to present her case" as required by Miss. Code Ann. §§ 37-9-59 and -111 and "the due process guarantee of the Fourteenth Amendment."

Such is the situation with Mr. Alexander. Though two separate individuals supposedly held the office, they would have been legally the same since both, if validly appointed, would have been MDE conservators holding office pursuant to Miss. Code Ann. § 37-17-6.

Accordingly, Mr. Alexander could not have been afforded a fair hearing and unbiased hearing as required by law.

2. Mr. Alexander was never afforded his right to give his closing statement before the trier of fact.

Miss. Code Ann. § 37-9-111 (4) provides, in pertinent part, that

> [i]f the matter is heard before a hearing officer, the board *shall* also grant the employee the opportunity to appear before the board to present a statement in his own behalf, either in person or by his attorney, *prior* to a final decision by the board.

The Court of Appeals has said that the "purpose of the statute was to give certain employees notice *and a right to be heard . . .* ." *Ford v. Holly Springs School District*, 665 So. 2d 840, 843 (Miss. 1995) (emphasis added). The legislature accorded a respondent the right to appear before the board only if the case is heard by a hearing officer rather than the board. It is plain that the intent of the legislature was that the respondent have an opportunity to actually appear before and speak to the ultimate decision maker prior to a decision being rendered in his case. The conservator has no discretion in this regard. This Court has "noted time and again the distinction between the mandatory and discretionary language of statutes. When used in a statute, the word 'shall' is mandatory and the word 'may' is discretionary." *In the Interest of D. D. B., a Minor, v. Jackson County Youth Court*, 816 So. 2d 380, 382 ¶7 (Miss. 2002); *see also*, *Mississippi State Highway Comm'n v. Sanders*, 269 So.2d 350, 352 (Miss. 1972) (citing *Pearl Realty Co. v. State Highway Comm'n*, 170 Miss. 103, 115, 154 So. 292, 294 (1934).

Yet, the court below, citing *Cox v. Thomas*, 403 So. 2d 135 (Miss. 1981), and *Noxubee Co. Board of Education v. Overton*, 483 So. 2d 301, 303 (Miss. 1985), called the denial of Mr. Alexander's statutory right to address the conservator prior to a decision on the merits "harmless error . . . ."

With all due respect to the chancellor, neither case is applicable. In *Cox*, for instance, as the chancellor noted below, the Court found "evidence of a substantial and manifestly good faith attempt by the superintendent to comply with the law." *Cox*, 403 So. 2d at 137. There is no evidence whatsoever that the conservator in this case attempted to permit Alexander to make a statement before the decision was made. More importantly, the real basis for the Court's decision in *Cox* was the fact the teacher, unlike Mr. Alexander, had failed to file an appeal within the time required by statute. In fact, she had never even requested a hearing in the first place. The school board had given her one anyway. *Cox*, 403 So. 2d at 137. This Court did not rule in the School Board's favor so much because its errors were harmless, as the chancellor suggested, but because the chancery court that heard the matter had no jurisdiction to do so. *Id.*, at 138. Had the appellant in that case filed a timely appeal, the Board's failure to provide her with an opportunity to address the board may have been viewed in a different light. Neither does the *Overton* case apply. It dealt with timeliness in scheduling, not with the denial of a statutory right to speak before the board. The fundamental purpose of the statute, "to provide notice *and a right to be heard*," *Ford v. Holly Springs School District*, 665 So. 2d 840, 843 (Miss. 1995) (emphasis added), was not denied to the teacher in either case. Mr. Alexander *was never heard by the person who made the final decision to fire him.*

The lower court also said that because the "Conservator's review is limited to the evidence presented at the hearing, Appellant was not thereby prejudiced by his inability to make a final statement because it would not have added to or taken away from the substantive testimony." CP 27, RE 21.

With all due respect, the decision maker in a teacher termination is *always* limited to the record in making its decision. To suggest a respondent's statement is thereby meaningless is to say that there is never any reason for a respondent to make a statement to the board or conservator. The obvious purpose of the right to address the decision maker is to permit the respondent, not to add new testimony, but to make a reasoned argument against termination based upon the facts already in evidence. To call the denial of that right "harmless error" would render part of the statute to be mere "useless language," something our rules of statutory construction will not permit us to attribute to the legislature. *Martin v. State*, 190 Miss. 32, 42-43, 199 So. 98 (1940) (a construction of a statute that would be useless will not be presumed to have been intended by the legislature). It also suggests that the die is cast before the process is completed, something that strikes at the very heart of due process of law and of the purpose of § 37-9-59, which is to make certain that teachers are reasonably secure in their jobs and can be removed only for serious purposes, *Merchant v. Board of Trustees of Pearl Municipal School District*, 492 So. 2d 959, 961 (Miss. 1986), and only after notice *and a right to be heard by the decision maker* prior to the making of the decision. *See, Ford v. Holly Springs School District*, 665 So. 2d 840, 843 (Miss. 1995), *supra*. To call the denial of that right to be heard by the decision maker harmless error strikes at the very heart of the legislative purpose behind the statute. *Id.*

Granted, there are cases where this Court has held failure to meet statutory deadlines to be "harmless error."[15] This case is not one of a district being a few days late getting a contract non-renewal letter to a teacher, or failing to schedule a hearing within the time allotted. Rather, the conservator in this case wholly failed to permit Mr. Alexander to appear before him prior to making the decision.

A chief task of the reviewing court in a teacher termination case is to determine whether the "school board violated some statutory or constitutional right"of the appellant. *Byrd*, 633 So. 2d at 1022. Clearly, Mr. Alexander was not accorded his right to appear before the decision maker. Accordingly, this case must be reversed and remanded for that reason alone. *Mississippi Insurance Commission v. Savery*, 204 So. 2d 278, 283 (Miss. 1967) (where an administrative agency fails to act within clear intent of statute, the court must reverse).

C. THE DECISION WAS UNSUPPORTED BY SUBSTANTIAL EVIDENCE

The District Failed to Prove Neglect of Duty Under the Circumstances of this Case.

Unlike a contract non-renewal, which may be for any valid educational reason,[16] termination of a teacher's employment during the contract year requires proof of extraordinary circumstances. *See Madison County Board of Education v. Miles*, 252 Miss. 711, 173 So. 2d 425, 427 (1965). Specifically, the statute requires that the District prove "incompetence, neglect of duty, immoral conduct, intemperance, brutal treatment of a pupil or other good cause . . . ."

15Given the holding in McKnight v. Mound Bayou Public School District, 879 So. 2d 493, reh den, cert. den., 882 So. 2d 234, ¶13 (Miss. Ct. App. 2004), that "mandatory compliance with the notice provisions in the statute is the rule", it's hard to see how a court could now find any violation of notice procedures to be "harmless error."

16*See* Miss. Code Ann § 37-9-111.

Miss. Code Ann § 37-9-59. It must not be overlooked here that, while the Court must defer to the factual findings of the conservator, it is the Court's task to determine, as a matter of law, whether those facts rise to the level of "neglect of duty" within the meaning of Miss. Code Ann § 37-9-59. *See, e. g., Sones v. Southern Lumber Co.*, 215 Miss. 148, 60 So. 2d 582-586. (1952) (while court accepted facts determined by workers' compensation commission as to relationship of worker and business owner, it was court's role to determine whether those facts did or did not establish an independent contractor relationship within the meaning of the state's legal definition). According to principles of statutory construction and the "serious causes" standard of *Miles*, none of Conservator Reeves stated reasons for terminating Alexander[17] amount to neglect of duty within the meaning of Miss. Code Ann § 37-9-59. There is no statutory definition of "neglect of duty" in our code. Neither does it appear that our courts have provided any guidance to school boards (or conservators) in determining when "neglect of duty" has occurred.

Decisions from other states can provide some guidance in this area. As far back as 1933, California noted that "the mere failure to perform a certain act, with nothing more, does not constitute either a neglect of duty in fact or law. . . . [E]ither wilfulness, intention, design, or inexcusableness must be present." *Rapaport v. Civil Service Commission of State of California*, 134 Cal. App. 319, 25 P. 2d 265, 267 (Cal. App. 3 Dist. 1933).[18] The surrounding facts--the environment in which the employee is working--must be taken into consideration, as well. The

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17*I. e.*, that Alexander allegedly (1) "failed to carry out his duties to adequately supervise his students"; (2) that "he failed to turn in adequate lesson plans"; (3) that at times Alexander supposedly was not teaching his students and that the students were "doing nothing"; and (4) that he "failed to carry out his responsibilities" and "duties as a health and physical education teacher." CP 6, RE 12.

18Copies of foreign cases are included in the appendix at the end of this brief.

expression (neglect of duty) "remains an abstraction until viewed in the light of the facts surrounding a particular case." *Gubser v. Department of Employment*, 271 Cal. App. 2d 240, 76 Cal. Rptr. 577, 579 (Cal. App. 5 Dist. 1969).

The Supreme Court of Nebraska, when faced with defining "neglect of duty" under its teacher dismissal statute, reasoned similarly:

> Evidence that a particular duty was not completely performed on certain occasions, or evidence of an occasional neglect of some duty of performance, in itself, does not ordinarily establish . . . neglect of duty sufficient to constitute just cause for termination. Neither is "neglect of duty" measured in a vacuum or against a standard of perfection." Rather, neglect of duty "must be measured against the standard required of others performing similar duties."

Sanders v. Board of Education of South Sioux City Community School District No. 11, 200 Neb. 282, 263 N. W. 2d 461, 465 (1978).

From the foregoing, we can draw two principles. First, the allegation of neglect of duty is not considered "in a vacuum or against a standard of perfection." *Sanders*, 263 N. W. 2d at 465. Rather, we must evaluate a teacher's performance in the light of the circumstances of the case. *Gubser*, 76 Cal. Rptr. at 579. Second, we must measure the respondent's performance "against the standard required of others performing the same duties." *Sanders*, 263 N. W. 2d at 465. If we objectively apply those criteria, we cannot conclude that Mr. Alexander's contract should have been terminated.

The Surrounding Circumstances

This criterion is especially important to consider in this case. We will not repeat here all the problems in the District. Those are set out in the fact statement. Suffice it so say that chaos reigned in the Hazlehurst School District in general and in the middle school in particular. Over-aged students apparently caused the bulk of the problems. At least two middle school students

were discovered to have had sexual intercourse in a restroom, V. II, 252, there were other cases of boys and girls "feeling on" each other. V. I, 256. Teachers frequently lost control of their classrooms. V. IV, 2. Deborah Lee testified that students were often uncontrollable and would get off the morning bus fighting. V. IV, 11-12. Ms. Roby testified that during her time at the middle school she had been fought, attacked, and cursed. V. IV, 51-52. At one point, the entire 8th grade was expelled pending parent/principal conference. V. IV, 53, 56. There was a complete leadership void. Teacher moral was abysmal. V. II, 149. From August 2008 until Mr. Alexander was dismissed in February 2009, there were six different principals at Hazlehurst Middle School. V. II, 39. As Conservator Blackmon testified, "instruction was just not taking place." V. II, 50.

The Standard Required of Others

In determining the standard required of others, we should consider the standards set by the state and the district and the district's failure to meet them. For example, District Standard 36.2 requires the District provide safe instructional facilities. Ex. 5, p. 15, RE 7. The District utterly failed in that responsibility. The middle school simply was not safe. The undisputed testimony of Deborah Lee presented at the hearing proves that teachers regularly were subjected to seriously unruly students who often came to school fighting. V. IV, 11-12. Teacher Roby testified without contradiction that in her time at Hazlehurst she had been fought, attacked, and cursed. V. IV , 51-52.

State and district policy also require districts to provide teachers with adequate textbooks.[19] V. II, 91. The testimony is undisputed that Mr. Alexander was not provided with a

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19*E. g.*, District policy Standard 36.3 (Ex. 5, RE 7)states that the district will meet the instructional needs of the staff. See also, Miss. Code Ann. , regarding the duties of superintendents and boards as to textbooks.

sufficient number of textbooks [V. II 94]. Yet, he was assigned to teach *five different grade levels of health*, including the incorrigible eighth graders. Not only was he required to master five different curricula for those classes, he was expected to do it *without a teacher's edition textbook.*

To expect Mr. Alexander to teach a five classes of rowdy students in a rowdy district with inadequate materials is to require him to do something not expected of other teachers. If he failed to meet that unreasonable standard, how can he be accused of neglect of duty? Yet, in the face of state law to the contrary, state department of education employees testified that middle school teachers really don't need textbooks! *E. g.*, V. II 93, 203-204. Department employees who justified this absurd and entirely illegal situation are the ones who should be fired, not Mr. Alexander.

Mr. Alexander apparently was not even given a planning period, V. II, 200-02,[20] as required by state policy, in which to attempt to master (without the teacher's textbook) the curricula for five different courses.

The law also requires that teaches be provided with adequate classrooms and air conditioning. Miss. Code Ann. § 37-17-6 (2); District Standard 36.4 (*see* Exhibit 5, RE 7). The District failed on both counts. Mr. Alexander was not provided with air conditioning. V II, 71. Moreover, for at least some of the time, he didn't even have a classroom, but was required to teach on a stage in a gymnasium in which physical education classes were simultaneously being conducted. V. II, 41. Students knew they were not required to pass health in order to be promoted to the next grade level. V. II, 97. How could a teacher with constantly changing

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20When asked, School Evaluator Livingston, assigned to Hazlehurst by the State to evaluate the rehabilitation process at the school, could not find any evidence that Mr. Alexander had a plannning period. V. III, 200-02.

principals be expected to maintain order and teach under such circumstances? How can anyone say Mr. Alexander's behavior was unreasonable under the circumstances? *See Sanders,* 263 N. W. 2d at 465, *supra.*

The playground incident is what precipitated Alexander's termination. The day that occurred, Mr. Alexander was supposed to have been assisted in his duty by a teacher's aid (Mrs. Cleveland) and another teacher (Coach Mack). V. IV, 65-66. They did not report for duty that day. Yet, neither was fired. Only Mr. Alexander, who did report to duty, was terminated. V. IV, 65-66. Again, Mr. Alexander was expected to meet a standard others were not required to meet.

State Department of Education evaluator Patsy Livingston. testified that Mr. Alexander had been identified as a person of "high concern," known to be having classroom difficulties. Vol. II, 188. Anita Johnson, a district employee, testified that Mr. Alexander's discipline problems were no worse than anyone else's and that discipline was bad throughout the school. V. IV, 146. The District's own witness, Patsy Livington, though, testified with out contradiction, that any deficiencies on Mr. Alexander's part were failings of skill, not will.[21] V. III, 202-03. By contrast, one teacher sold food for profit to students in her classroom in wilful violation of school policy. V. II, 83. Yet, she was not fired. While some teachers had mentors to guide them in discipline problems, Mr. Alexander was not given that assistance. V. IV, 151-153. Again, Mr. Alexander, a willing teacher, was terminated for not meeting standards (*i.e.*, improvement without a mentor) other teachers were not required to meet.

21As will be argued further herein, this testimony alone proves that Mr. Alexander was not guilty of "neglect of duty" as that term is understood in law.

This case is also strange in that the administration that first recommended Mr. Alexander's dismissal were not the administration that prosecuted that recommendation. The principals and the purported conservators changed. The District (*i.e.*, the conservator) and the Department totally eviscerated the administrative structure of the school, dismissing the school board and the superintendent, serially replacing principals, and sending a "team" of "consultants" into the district, apparently with no ability to put a permanent principal in place. The district, the conservator, and the department did nothing to staunch the chaos, and then responded to Mr. Alexander, one of the "hurt" (V. II, 149) teachers who needed help (recall that Mr. Alexander was not provided a mentor as were other teachers, V. IV, 151-153), by figuratively bayoneting the wounded. This flies directly in the face of our state policy of providing disciplined, extended assistance to a teacher prior to a decision to dismiss.[22] *See*, Miss. Code Ann. § 37-18-7 (3).

Simple failure to perform to the desires of the latest in a series of administrators is not "neglect of duty" under any rational construction of § 37-9-59. As the court in *Rapaport v. Civil Service Commission of State of California*, 134 Cal. App. 319, 25 P. 2d 265, 267 (Cal. App. 3 Dist. 1933), said, firing for "neglect of duty" requires evidence of "either wilfulness, intention, design, or inexcusableness . . . ." The District's own evidence established that whatever deficiencies Mr. Alexander may have had were not wilful, intentional, or by design. V. II, 202-03. Given the atrocious conditions in the district, Mr. Alexander's actions or inactions cannot fairly be labeled inexcusable, either. Clearly, he is not guilty of neglect of duty within the meaning of *Rapaport*, *Gubsner*, and *Sanders*.

22According to the letter of Principal Billy Brown, Exhibit 3, to the June 26, 2009, hearing, Mr. Alexander was not on an improvement plan at the beginning of the 2008-2009 school year.

Such an interpretation and application of those cases is consistent with the principles of statutory construction applied by this Court in its past decisions. In *Byrd v. Greene County School District*, 633 So. 2d 1018, 1023 (Miss. 1994); *Miles*, 173 So. 2d at 427, this Court applied the principle of *ejusdem generis*,[23] a doctrine that says "general words" in a legal writing " are not to be construed *in their widest extent*, but are to be held as applying only to . . . things of the same general kind or class as those specifically mentioned," Citing Black's Law Dictionary 517 (6th ed.1990). "Neglect of duty," then, cannot be equated with the mere inability to deal with extraordinary circumstances (as in were the circumstances of this case). Rather, in the context of the statute, "neglect of duty" must refer to something of an intentional or seriously culpable matter such as "incompetence, neglect of duty, immoral conduct, intemperance,[24] or brutal treatment of a pupil . . . ."

Given the egregious circumstances (not of his making) in the Hazlehurst Middle School, any omissions or lapses on Mr. Alexander's part cannot in good conscience be labeled "neglect of duty" or any other conduct that could justify his termination under Miss. Code. Ann. § 37-9-59.

23The minority opinion in *City of Hernando v. North Mississippi Utility Co.*, 901 So. 2d 652 (Miss. Ct. App. 2004), appeal after remand, reh den, cert. den., 3 So. 3d 775, 787, ¶32 (Miss. Ct. App. 2008), *reh den, cert. den.*, 11 So. 3d 1250 (Miss. Ct. App. 2009), defined it well:

> [i]n the construction of laws, wills, and other instruments, . . . where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. Black's Law Dictionary 517 (6th ed.1990). ; see also *Cole v. McDonald*, 236 Miss. 168, 187, 109 So. 2d 628, 637 (Miss. 1959).

24*I. e.*, habitual drunkeness or drug addiction. *See Accu-Fab & Construction, Inc., v. Ladner*, 970 So. 2d 1276, 1285 (2000) (habitual drug and alcohol use referred to as "intemperance). *Cf.* Miss. Code Ann. § 21-31-69 (intemperance as grounds for dismissing public official).

Accordingly, the decision was not supported by substantial evidence and must be reversed. *Noxubee County Board of Education v. Givens*, 481 So. 2d 816 (Miss. 1985) (teacher's errors that were caused by the district were not grounds for termination).

D. THE DECISION WAS ARBITRARY AND CAPRICIOUS.

The Mississippi Supreme Court defines "arbitrary" as

> fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone . . . implying either a lack of understanding of or a disregard for the fundamental nature of things.

McGowan v. Mississippi State Oil & Gas Board, 604 So. 2d 312, 322 (Miss. 1992). The Court defines "capricious" as

> freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles.

McGowan, 604 So. 2d at 322.

As noted in the statement of facts, *supra*, Conservator Blackmon initially notified Mr. Alexander that he would be terminated due to his alleged:

1. Failure to adequately supervise your classroom.

2. Failure to timely and adequately report an incident involving students to your administrator.

When Conservator Reeves issued his decision on January 12, 2010, said that (1) Mr. Alexander "failed to carry out his duties to adequately supervise his students"; (2) that "he failed to turn in adequate lesson plans"; (3) that certain witnesses testified to times when Mr. Alexander

supposedly was not teaching his students and that the students were "doing nothing";[25] and that he "failed to carry out his responsibilities" and "duties as a health and physical education teacher."[26] Conservator Reeves further said that he was upholding the decision to terminate Mr. Alexander's contract based upon "these incidents and the substantial and credible evidence submitted at the hearing . . . ." CP 6, RE 12.[27]

Reeves's findings were unsupported by citations to specific evidence and failed to make findings sufficient to enable a reviewing court to understand what actions or inactions on Mr. Alexander's part resulted in the final decision to terminate. For that reason alone, the decision "lacked [an] adequately determining principle." *McGowan*, 604 So. 2d at 322.

Moreover, the decision totally ignored the egregious circumstances in the school during the 2008-2009 school year and the fact that Mr. Alexander was treated by the administration in arbitrary and capricious manner. For instance, he was blamed and terminated for the playground incident, when the other two who were supposed to be present but didn't show up were not disciplined. As noted elsewhere herein, the decision was made without according the Mr. Alexander his right to make a final statement. Accordingly, the decision demonstrated a "lack of understanding of or a disregard for the surrounding facts and settled controlling principles" on the part of Conservator Reeves. *McGowan*, 604 So. 2d at 322. That failure also placed the

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25The Opinion does not appear to make findings regarding these observations, but recites that fact that certain persons testified to them. The only findings appear to be items one, two, and four.

26The Opinion does not specify those responsibilities and duties.

27Former Conservator Stanley Blackmon, who made the decision to terminate Alexander, testified that his decision was based upon an incident that occurred on the school playground. V. II, 17-18.

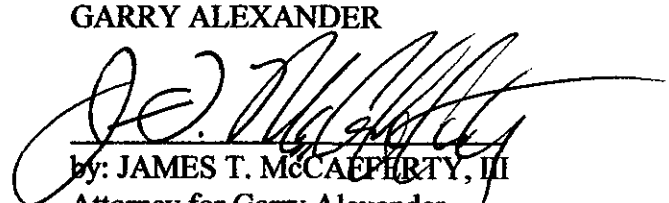
conservator's actions in contravention to the clear intent of the statute. *See, Mississippi Insurance Commission v. Savery,* 204 So. 2d 278, 283 (Miss. 1967) Under the settled law of *McGowan* and related cases, the decision was arbitrary and capricious and must be reversed.[28]

VIII. CONCLUSION

The blame in this case lies, not with Mr. Alexander, but with an erstwhile purported conservator and a Department of Education that (1) deposed the politically appointed superintendent, (2) ran through a succession of administrators, (3) and failed to provide the support the teachers required. The total chaos that was the Hazlehurst School District was not the fault of Mr. Alexander. Six principals in six months indicates a total default in leadership that cannot be set right by taking the job of a young, willing to work, willing to learn, teacher like Mr. Alexander. Moreover, the District failed to prove that the conservators had the legal authority to terminate Mr. Alexander's contract and failed to accord Mr. Alexander his legal rights in the hearing process. Clearly, prejudicial error was committed by the conservator. Accordingly, the decisions below must be reversed and this case remanded with instructions to reinstate Mr. Alexander to his former position.

Respectfully submitted, this the 9th day of June, 2011.

GARRY ALEXANDER



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28The decision was also arbitrary and capricious due to the other problems with it as raised in the issues argued earlier in this brief.

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IX. PROOF OF SERVICE

I, the undersigned counsel for the Appellant, Garry J. Alexander, certify that I have this day served a copy of the above and foregoing document by U. S. Mail, postage prepaid, upon the following persons:

1 John Hooks, Esquire
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2. Hon. Edward E. Patten, Jr.,
Chancellor
Fifteenth Chancery Court District
P. O. Drawer 707
Hazlehurst, Mississippi 39083

3. Dorian Turner, Esquire
Hearing Officer
300 W. Capitol Street, Suite 200
Jackson, Mississippi 39203

Respectfully submitted, this the 9th day of June, 2011.

GARRY J. ALEXANDER
Appellant

by: JAMES T. McCAFFERTY, III
Attorney for
Garry J. Alexander
Appellant

IN THE CHANCERY COURT OF COPIAH COUNTY, MISSISSIPPI

GARRY J. ALEXANDER **APPELLANT**

V. **No. 2010-TS-01992**

JAMES REEVES, CONSERVATOR OF THE HAZLEHURST SCHOOL DISTRICT ACTING IN PLACE OF THE BOARD OF TRUSTEES OF THE HAZLEHURST SCHOOL **APPELLEE**

X. APPENDIX

§ 37-7-301. General powers and duties.

The school boards of all school districts shall have the following powers, authority and duties in addition to all others imposed or granted by law, to wit:

(n) To enforce in the schools the courses of study and the use of the textbooks prescribed by the proper authorities . . . .

§ 37-9-14. General duties and powers of superintendent of school district.

(2) In addition to all other powers, authority and duties imposed or granted by law, the superintendent of schools shall have the following powers, authority and duties:

(b) To enforce in the public schools of the school district the courses of study provided by law or the rules and regulations of the State Board of Education, and to comply with the law with reference to the use and distribution of free textbooks.

§ 37-9-59. Grounds and procedure for dismissal or suspension of licensed employee; attendance of different school system by child as ground for denying employment or reemployment of superintendent, principal or licensed employee.

For incompetence, neglect of duty, immoral conduct, intemperance, brutal treatment of a pupil or other good cause the superintendent of schools may dismiss or suspend any licensed employee in any school district. Before being so dismissed or suspended any licensed employee shall be notified of the charges against him and he shall be advised that he is entitled to a public hearing upon said charges. In the event the continued presence of said employee on school premises poses a potential threat or danger to the health, safety or general welfare of the students, or, in the discretion of the superintendent, may interfere with or cause a disruption of normal school operations, the superintendent may immediately release said employee of all duties pending a hearing if one is requested by the employee. In the event a licensed employee is arrested, indicted or otherwise charged with a felony by a recognized law enforcement official, the continued presence of the licensed employee on school premises shall be deemed to constitute a disruption of normal school operations. The school board, upon a request for a hearing by the person so suspended or removed shall set a date, time and place for such hearing which shall be not sooner than five (5) days nor later than thirty (30) days from the date of the request. The procedure for such hearing shall be as prescribed for hearings before the board or hearing officer in Section 37-9-111. From the decision made at said hearing, any licensed employee shall be allowed an appeal to the chancery court in the same manner as appeals are authorized in Section 37-9-113. Any party aggrieved by action of the chancery court may appeal to the Mississippi Supreme Court as provided by law. In the event that a licensed employee is immediately relieved of duties

pending a hearing, as provided in this section, said employee shall be entitled to compensation for a period up to and including the date that the initial hearing is set by the school board, in the event that there is a request for such a hearing by the employee. In the event that an employee does not request a hearing within five (5) calendar days of the date of the notice of discharge or suspension, it shall constitute a waiver of all rights by said employee and such discharge or suspension shall be effective on the date set out in the notice to the employee.

The school board of every school district in this state is hereby prohibited from denying employment or reemployment to any person as a superintendent, principal or licensed employee, as defined in Section 37-19-1, or as a non-instructional personnel, as defined in Section 37-9-1, for the single reason that any eligible child of such person does not attend the school system in which such superintendent, principal, licensed employee or non-instructional personnel is employed.

Sources: Codes, 1942, § 6282-26; Laws, 1953, Ex Sess, ch. 20, § 26; Laws, 1974, ch. 459; Laws, 1978, ch. 311, § 1; Laws, 1986, ch. 492, § 82; Laws, 1987, ch. 307, § 14; Laws, 1997, ch. 545, § 21, eff from and after passage (approved April 10, 1997).

§ 37-9-111. Hearing.

(1) The school board, or its designee, upon request for a hearing from an employee under the terms of Sections 37-9-101 through 37-9-113, shall set the time, place and date of such hearing and notify the employee in writing of same. The date shall be set not sooner than five (5) days nor later than thirty (30) days from the date of the request, unless otherwise agreed. The hearing may be held before the board or before a hearing officer appointed for such purpose by the board, either from among its own membership, from the staff of the school district or some other qualified and impartial person, but in no event shall the hearing officer be the staff member responsible for the initial recommendation of nonreemployment. No hearing officer may have an interest in the outcome of a hearing, nor may a hearing officer be related to a board member, any administrator making the recommendations of nonreemployment or the employee. Once a hearing officer is appointed, no ex parte communications may be made regarding any substantive provisions of the hearing.

(2) The hearing must be held in executive session unless the employee elects to have a public hearing. If an employee makes this election, however, the board or the hearing officer, as the case may be, may order any part of the hearing to be held in executive session, if, in the opinion of the board or the hearing officer, the testimony to be elicited deals with matters involving the reputation or character of another person. Notwithstanding the election by an employee for a

public hearing, any testimony by minor witnesses must be held in executive session and considered confidential personnel records and confidential student records, subject to an expectation of reasonable privacy and confidentiality. Public disclosure of these records may be by court order only.

(3) The district shall present evidence, either in written or oral form, at the hearing in support of its recommendation for nonreemployment. The employee shall be afforded an opportunity to present matters at the hearing relevant to the reasons given for the proposed nonreemployment determination and to the reasons the employee alleges to be the reasons for nonreemployment and to be represented by counsel at such a hearing. Such hearing shall be conducted in such a manner as to afford the parties a fair and reasonable opportunity to present witnesses and other evidence pertinent to the issues and to cross-examine witnesses presented at the hearing. The board or the hearing officer may require any portion of the evidence to be submitted in the form of depositions or affidavits, and in case affidavits are received, an opportunity to present counter-affidavits shall be provided.

(4) The board shall cause to be made stenographic notes of the proceedings. In the event of a judicial appeal of the board's decision, the entire expense of the transcript and notes shall be assessed as court costs.

(5) The board shall review the matters presented before it, or, if the hearing is conducted by a hearing officer, the report of the hearing officer, if any, the record of the proceedings and, based solely thereon, conclude whether the proposed nonreemployment is a proper employment decision, is based upon a valid educational reason or noncompliance with school district personnel policies and is based solely upon the evidence presented at the hearing, and shall notify the employee in writing of its final decision and reasons therefor. Such notification shall be within thirty (30) days of the conclusion of the hearing if the hearing is conducted by a hearing officer and within ten (10) days of the conclusion of the hearing if the hearing is initially conducted by the board. If the matter is heard before a hearing officer, the board shall also grant the employee the opportunity to appear before the board to present a statement in his own behalf, either in person or by his attorney, prior to a final decision by the board.

(6) In conducting a hearing, the board or hearing officer shall not be bound by common law or by statutory rules of evidence or by technical or formal rules of procedure except as provided in Sections 37-9-101 through 37-9-113, but may conduct such hearing in such manner as best to ascertain the rights of the parties; however, hearsay evidence, if admitted, shall not be the sole basis for the determination of facts by the board or hearing officer.

(7) In the event the decision of the school board is in favor of the employee, the board shall have the authority to order the execution of a contract with the employee for an additional period of one (1) year.

(8) For purposes of conducting hearings under Sections 37-9-101 through 37-9-113, the board or hearing officer shall have the authority to issue subpoenas for witnesses and to compel their attendance and the giving of evidence. Any expense connected therewith shall be borne by the party requesting the subpoenas, which shall include an appearance fee for each witness so subpoenaed not inconsistent with state laws governing payments to witnesses. In the event it is necessary to enforce or to quash a subpoena issued to compel the attendance of a witness, application shall be made with the chancery court of the county where the school board is located.

Sources: Laws, 1974, ch. 577, § 6; Laws, 1977, ch. 489, § 4; Laws, 2001, ch. 459, § 6, eff from and after July 1, 2001.

§ 37-9-113. Judicial review.

(1) Any employee aggrieved by a final decision of the school board is entitled to judicial review thereof, as hereinafter provided.

(2) An appeal may be taken by such employee to the chancery court of the judicial district in which the school district is located, by filing a petition with the clerk of that court and executing and filing bond payable to the school board with sufficient sureties, in the penalty of not less than two hundred dollars ($200.00), conditioned upon the payment of all of the costs of appeal, within twenty (20) days of the receipt of the final decision of the board.

(3) The scope of review of the chancery court in such cases shall be limited to a review of the record made before the school board or hearing officer to determine if the action of the school board is unlawful for the reason that it was:

(a) Not supported by any substantial evidence;

(b) Arbitrary or capricious; or

(c) In violation of some statutory or constitutional right of the employee.

(4) No relief shall be granted based upon a court's finding of harmless error by the board in complying with the procedural requirements of Sections 37-9-101 through 37-9-113. However, in the event that there is a finding of prejudicial error in the proceedings, the cause shall be remanded for a rehearing consistent with the findings of the court.

(5) Any party aggrieved by action of the chancery court may appeal to the Supreme Court in the manner provided by law.

Sources: Laws, 1974, ch. 577, § 7; Laws, 1977, ch. 489, § 5, eff from and after July 1, 1977.

(2) No later than June 30, 1995, the State Board of Education, acting through the Commission on School Accreditation, shall require school districts to provide school classroom space that is air conditioned as a minimum requirement for accreditation.

(11) (a) If the recommendations for corrective action are not taken by the local school district or if the deficiencies are not removed by the end of the probationary period, the Commission on School Accreditation shall conduct a hearing to allow such affected school district to present evidence or other reasons why its accreditation should not be withdrawn. Subsequent to its consideration of the results of such hearing, the Commission on School Accreditation shall be authorized, with the approval of the State Board of Education, to withdraw the accreditation of a public school district, and issue a request to the Governor that a state of emergency be declared in that district.

(b) If the State Board of Education and the Commission on School Accreditation determine that an extreme emergency situation exists in a school district which jeopardizes the safety, security or educational interests of the children enrolled in the schools in that district and such emergency situation is believed to be related to a serious violation or violations of accreditation standards or state or federal law, or when a school district meets the State Board of Education's definition of a failing school district for two (2) consecutive full school years, the State Board of Education may request the Governor to declare a state of emergency in that school district. For purposes of this paragraph, such declarations of a state of emergency shall not be limited to those instances when a school district's impairments are related to a lack of financial resources, but also shall include serious failure to meet minimum academic standards, as evidenced by a continued pattern of poor student performance.

(c) Whenever the Governor declares a state of emergency in a school district in response to a request made under paragraph (a) or (b) of this subsection, the State Board of Education may take one or more of the following actions:

(i) Declare a state of emergency, under which some or all of state funds can be escrowed except as otherwise provided in Section 206, Constitution of 1890, until the board determines corrective actions are being taken or the deficiencies have been removed, or that the needs of students warrant the release of funds. Such funds may be released from escrow for any program which the board determines to have been restored to standard even though the state of emergency may not as yet be terminated for the district as a whole;

(ii) Override any decision of the local school board or superintendent of education, or both, concerning the management and operation of the school district, or initiate and make decisions concerning the management and operation of the school district;

(iii) Assign an interim conservator, or in its discretion, contract with a private entity with experience in the academic, finance and other operational functions of schools and school districts, who will have those powers and duties prescribed in subsection (14) of this section; . . .
§ 37-18-7. Professional development plan for educators identified as needing improvement; sanctions.

(1) As part of the school improvement plan for a School At-Risk, a professional development plan shall be prepared for those school administrators, teachers or other employees who are identified by the evaluation team as needing improvement. The State Department of Education shall assist the School At-Risk in identifying funds necessary to fully implement the school improvement plan.

(2) (a) If a principal is deemed to be in need of improvement by the evaluation team, a professional development plan shall be developed for the principal, and the principal's full participation in the professional development plan shall be a condition of continued employment. The plan shall provide professional training in the roles and behaviors of an instructional leader and shall offer training specifically identified for that principal's needs. The principal of a School At-Risk may be assigned mentors who have demonstrated expertise as an exemplary-performing principal. Mentors shall make a personal time commitment to this process and may not be evaluators of the principals being mentored. The local school administration shall continue to monitor and evaluate all school personnel during this period, evaluate their professional development plans and make personnel decisions as appropriate.

(b) At the end of the second year, if a school continues to be a School At-Risk and a principal has been at that school for three (3) or more years, the administration shall recommend and the local school board shall dismiss the principal in a manner consistent with Section 37-9-59, and the State Board of Education may initiate the school district conservatorship process authorized under Section 37-17-6. If extenuating circumstances exist, such as the assignment of a principal at a School At-Risk for less than two (2) years, other options may be considered, subject to approval by the State Board of Education.

(3) (a) If a teacher is deemed to be in need of professional development by the independent evaluation team, that teacher shall be required to participate in a professional development plan. This plan will provide professional training and will be based on each teacher's specific needs and teaching assignments. The teacher's full participation in the professional development plan shall be required. This process shall be followed by a performance-based evaluation, which shall monitor the teacher's teaching skills and teaching behavior over a period of time. This monitoring shall include announced and unannounced reviews. Additionally, the teacher also may be assigned a mentor who has demonstrated expertise as a high-performing teacher.

(b) If, after one (1) year, the teacher fails to perform, the local school administration shall reevaluate the teacher's professional development plan, make any necessary adjustments to it, and require his participation in the plan for a second year.

(c) If, after the second year, the teacher fails to perform, the administration shall recommend and the local school shall dismiss the teacher in a manner consistent with Section 37-9-59. . . . .

MISSISSIPPI ACCOUNTABILITY STANDARDS

30. Each classroom teacher, excluding vocational teachers whose class periods exceed 50 minutes, has an unencumbered period of time during the teaching day to be used for individual or departmental planning.

30.1 If the school utilizes a traditional six-period or seven-period day schedule, the instructional planning time provided for secondary teachers is a minimum of 225 minutes per week, exclusive of lunch period. If the school utilizes any form of a modular/block schedule, the instructional planning time provided is a minimum of either 225 minutes per week or an average of 225 minutes per week per instructional cycle, exclusive of lunch period.

30.2 Instructional planning time for the elementary school teacher is no less than 150 minutes per week, exclusive of lunch period.

www.mde.k12.ms.us/accred/Final_2010_11-30-10_manual.pdf

NORTHWEST TERRITORY. A name formerly applied to the territory northwest of the Ohio river.

NOSCITUR A SOCIIS. It is known from its associates. 1 Vent. 225. The meaning of a word is or may be known from the accompanying words. 3 Term R. 87; Broom, Max. 588. Morecock v. Hood, 202 N.C. 321, 162 S.E. 730, 731; Louis Pizitz Dry Goods Co. v. Fidelity & Deposit Co. of Maryland, 223 Ala. 385, 136 So. 800, 801.

The doctrine means that general and specific words are associated with and take color from each other, restricting general words to sense analogous to less general. Dunham v. State, 140 Fla. 754, 192 So. 324, 325, 326.

NOSCITUR EX SOCIO, QUI NON COGNOSCITUR EX SE. Moore, 817. He who cannot be known from himself may be known from his associate.

NOSOCOMI. In the civil law, persons who have the management and care of hospitals for paupers.

NOSTRUM. A quack, patent, or proprietary medicine recommended by its proprietor, or one the ingredients of which are kept secret for the purpose of restricting the profits of sale to the inventor or proprietor. World's Dispensary Medical Ass'n v. Collier, 86 Misc. 217, 148 N.Y.S. 405, 409.

NOT EXCEEDING. Usually a term of limitation only, denoting uncertainty of amount. Stuyvesant Ins. Co. v. Jacksonville Oil Mill, C.C.A.Tenn., 10 F.2d 54, 56.

NOT FOUND. These words, indorsed on a bill of indictment by a grand jury, have the same effect as the indorsement "Not a true bill" or "*Ignoramus.*"

See, also, Non Est Inventus.

NOT GUILTY. A plea of the general issue in the actions of trespass and case and in criminal prosecutions.

The form of the verdict in criminal cases, where the jury acquit the prisoner. 4 Bl.Comm. 361.

NOT GUILTY BY STATUTE. In English practice, a plea of the general issue by a defendant in a civil action, when he intends to give special matter in evidence by virtue of some act or acts of parliament, in which case he must add the reference to such act or acts, and state whether such acts are public or otherwise. But, if a defendant so plead, he will not be allowed to plead any other defense, without the leave of the court or a judge. Mozley & Whiteley.

NOT LATER THAN. "Within" or "not beyond" time specified. Hansen v. Bacher, Tex.Com.App., 299 S.W. 225, 227.

NOT LESS THAN. The words "not less than" signify in the smallest or lowest degree, at the lowest estimate; at least. Watson v. City of Salem, 84 Or. 666, 164 P. 567, 568; Miller v. Rodd, 285 Pa. 16, 131 A. 482, 483.

NOT POSSESSED. A special traverse used in an action of trover, alleging that defendant was not possessed, at the time of action brought, of the chattels alleged to have been converted by him.

NOT PROVEN. A verdict in a Scotch criminal trial, to the effect that the guilt of the accused is not made out, though his innocence is not clear.

NOT SATISFIED. A return sometimes made by sheriffs or constables to a writ of execution; but it is not a technical formula, and is condemned by the courts as ambiguous and insufficient. Martin v. Martin, 50 N.C. 346; Langford v. Few, 146 Mo. 142, 47 S.W. 927, 69 Am.St.Rep. 606.

NOT TO BE PERFORMED WITHIN ONE YEAR. The clause "not to be performed within one year" includes any agreement which by a reasonable interpretation in view of all the circumstances does not admit of its performance, according to its language and intention, within one year from the time of its making. Mrs. K. Edwards & Sons v. Farve, 110 Miss. 864, 71 So. 12, 13.

NOT TRANSFERABLE. These words, when written across the face of a negotiable instrument, operate to destroy its negotiability. Durr v. State, 59 Ala. 24.

NOTA. Lat. In the civil law, a mark or brand put upon a person by the law. Mackeld. Rom. Law, § 135.

NOTÆ. In civil and old European law, short-hand characters or marks of contraction, in which the emperors' secretaries took down what they dictated. Spelman; Calvin.

NOTARIAL. Taken by a notary; performed by a notary in his official capacity; belonging to a notary and evidencing his official character, as, a notarial seal.

NOTARIAL WILL. A will executed by the testator in the presence of a Notary Public and two witnesses.

NOTARIUS. Lat.

In old English law. A scribe or scrivener who made short draughts of writings and other instruments; a notary. Cowell.

In Roman law. A draughtsman; an amanuensis; a shorthand writer; one who took notes of the proceedings in the senate or a court, or of what was dictated to him by another; one who prepared draughts of wills, conveyances, etc.

NOTARY PUBLIC. A public officer whose function it is to administer oaths; to attest and certify, by his hand and official seal, certain classes of documents, in order to give them credit and authenticity in foreign jurisdictions; to take acknowledgments of deeds and other conveyances, and certify the same; and to perform certain official acts, chiefly in commercial matters, such as the protesting of notes and bills, the noting of foreign drafts, and marine protests in cases of loss or damage. Kip v. People's Bank & Trust Co., 110 N.J.L. 178, 164 A. 253, 254.

August R. GUBSER, Plaintiff and Respondent,

v.

DEPARTMENT OF EMPLOYMENT and State Personnel Board, Defendants and Appellants.

Civ. 1004.

Court of Appeal, Fifth District.

March 27, 1969.

Mandamus proceeding. The Superior Court, Sacramento County, Stanley W. Reckers, J., granted peremptory writ directing State Personnel Board to reconsider question of penalty, other than dismissal, of employee whom Board had found guilty of inexcusable neglect of duty and had dismissed. The State Department of Employment and State Personnel Board appealed. The Court of Appeal, Stone, J., held that state employee, whose primary responsibility as state farm labor supervisor was active supervision of local office in his area, and who needed reasonably accurate account of volume of work to be handled by his subordinates in various field offices he supervised in order to recommend number of subordinates or staff members needed for local offices, had duty to verify accuracy of reports submitted by subordinates even though no one specifically ordered him to do so. And that evidence supported inference that employee knew or should have known that his subordinates were filing false reports.

Reversed and remanded with instructions.

1. States ⇐53

Term "neglect of duty" as used in statute governing grounds for dismissal of state employees remains abstraction until viewed in light of facts surrounding particular case. West's Ann.Gov.Code, § 19572(d).

See publication Words and Phrases for other judicial constructions and definitions.

2. States ⇐53

Circumstantial evidence may be used to prove intent or inexcusable neglect of duty as ground for dismissal of state employee, and direct evidence is not necessary to support finding of intentional omission to perform duty. West's Ann.Gov.Code, § 19572(d).

3. Appeal and Error ⇐996

In determining whether inference is supported by the evidence, facts need not be viewed as isolated fragments but should be considered as a whole.

4. States ⇐74

State employee, whose primary responsibility as farm labor supervisor was active supervision of local offices in his area, was not excused of his failure to take measures to verify accuracy of reports submitted by his subordinates by reason of failure of others in their duty to verify the reports. West's Ann.Gov.Code, § 19572(d).

5. States ⇐74

State employee, whose primary responsibility as state farm labor supervisor was active supervision of local offices in his area, and who needed reasonably accurate account of volume of work to be handled by his subordinates in various field offices he supervised in order to recommend number of subordinates or staff members needed for local offices, had duty to verify accuracy of reports submitted by subordinates even though no one specifically ordered him to do so.

6. States ⇐53

Province of superior court and of Court of Appeal in reviewing action of State Personnel Board begins and ends with determination whether there is substantial evidence to support Board's decision.

7. States ⇐53

In reviewing decision of State Personnel Board, superior court and Court of Appeal cannot reweigh the evidence and all legitimate and reasonable inferences must be drawn in favor of findings of fact made by Board, not those made by superior

court, and intervening judgment of superior court does not change nature of review to be made by Court of Appeal.

8. States ⇦53

Evidence supported inference that state employee, who was dismissed on ground of inexcusable neglect of duty, knew or should have known that his subordinates were filing false reports.

9. States ⇦53

In reviewing decision of State Personnel Board, it does not matter that Court of Appeal might come to different conclusion had decision been its to make in first instance or that reasonable men might differ, and it is enough that reasonable mind could reach same conclusion that was reached by the appeals board.

Thomas C. Lynch, Atty. Gen., and Walter J. Weisner, Deputy Atty. Gen., Sacramento, for appellants.

Evans, Jackson & Kennedy, Anthony M. Kennedy and Timothy F. Kennedy, Sacramento, for respondent.

STONE, Associate Justice.

The Department of Employment of the State of California and the State Personnel Board appeal from a judgment of the Superior Court granting a peremptory writ pursuant to a mandamus proceeding under Code of Civil Procedure section 1094.5. The State Personnel Board found respondent Gubser guilty on two separate charges of "inexcusable neglect of duty" within the meaning of section 19572, subdivision (d), of the Government Code, and ordered his dismissal for each separate violation. The superior court found that one charge was not supported by the evidence and although the other charge was true dismissal was not warranted, and directed the board to reconsider the question of penalty, other than dismissal.

Respondent, as a Farm Labor Supervisor I, was in charge of the administration of four all-year farm employment offices, six seasonal offices, and the agricultural phase of five nonagricultural offices of the Department of Employment. The farm labor offices had a dual function, to find employment for laborers and to make farm laborers available to growers to meet seasonal labor needs. There were a number of employees attached to each field office who, among other things, were to report to the Department of Employment the number of laborers recruited by the particular labor office and the farms to which they were assigned. Some of these employees grossly and falsely inflated the number of placements. Gubser, as supervisor of the employees making the returns, was charged with inexcusable neglect of duty, it being charged that he knew or should have known that the reports were false. He was dismissed by the department; the State Personnel Board, following a hearing before a hearing officer, sustained the dismissal.

Only two of the findings of the appeals board are pertinent to this appeal. Finding V states that for extended periods of time the placement figures were inflated to equal or exceed budget estimates made from time to time by the manager of each individual office involved, in order to prevent a reduction in staff; that the figures were so far removed from reality that a supervisor functioning at Gubser's level should have spotted the discrepancies, particularly since Gubser visited the various offices and failed to make even the elementary checks necessary to identify obvious and widespread violations which continued over an extended period of time. Based upon this Finding V, the appeals board held that Gubser's neglect of duty "to exercise reasonable supervision and control over the four offices involved is inexcusable and constitutes cause for punitive action under the provisions of Government Code section 19572(d)," and that the punitive action of dismissal imposed by the department was proper.

In its Finding VII, the board states that approximately 100 job placements were

transferred from the Sebastopol and Healdsburg seasonal offices to the Santa Rosa main office; that the transfers were made with respondent's knowledge and consent, and that although the placements themselves were legitimate the effect of transferring them to the Santa Rosa office was to deceive and mislead "those area and central office officials who might be concerned with the budgetary requirements of the Santa Rosa office." For this "inexcusable neglect of duty," the appeals board again upheld the department's order of dismissal.

The trial court found there was no substantial evidence in the record to support Finding V, and although Finding VII was substantiated by the evidence, the appeals board abused its discretion in sustaining the department's dismissal on this ground. The court directed the board to reconsider the question of penalty. This appeal followed.

Preliminarily, we are confronted with an interpretation of the term "inexcusable neglect of duty." Stated abstractly in Government Code section 17572, subdivision (d), as one of the several grounds for dismissal, the term is vague, to say the least. Respondent contends the Supreme Court's definition of "neglect of duty" found in People v. McCaughan, 49 Cal.2d 409, 317 P.2d 974, is controlling. The Supreme Court said, at page 414, 317 P.2d at page 977:

> "The phrase 'neglect of duty' has an accepted legal meaning. It means an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty."

[1–3] The statute modifies the term "neglect of duty" by the word "inexcusable," which Webster's New Collegiate Dictionary defines as "Not excusable; not admitting excuse or justification." Even with the benefit of these expository statements the expression remains an abstraction until viewed in the light of the facts surrounding a particular case. One difficulty in relating the terminology of the code section to the facts of this case is presented in respondent's argument that a finding of inexcusable neglect must be grounded on an affirmative showing of his awareness of a duty, and an intent to neglect that duty. Although he does not specifically say so, the substance of respondent's argument is that direct evidence is necessary to support a finding of an intentional omission to perform a duty. Were we to agree, the effect would be to prevent the use of circumstantial evidence to prove intent or inexcusable neglect of duty. Yet as a practical matter, absent admissions of the fact, an intentional or inexcusable omission usually can be proved only by circumstantial evidence. Moreover, in determining whether an inference is supported by the evidence, facts need not be viewed as isolated fragments but should be considered as a whole.

In viewing the facts, it is essential that we keep in mind the purpose for reporting agricultural employment statistics. Crop harvesting is seasonal; consequently most of the workers are migrant laborers who go from one part of the state to another, and even from one state to another, as the crops mature. The demand for workers varies from large numbers at the peak of the season, to none at all after the harvest. It is the purpose of the Unemployment Act to facilitate the migration of these laborers from cities and towns to various rural areas at harvest time, and refer them to employer-farmers for placement, as well as to facilitate their movement from one harvest area to another as needed. Both the federal and the state governments rely upon field worker recruitment and employment records to determine where field offices shall be located, the number of employees necessary to staff the various stations, and the amount of money to fund the project.

To argue that a supervisor has no duty to see to it that the basic statistics upon which the entire project is grounded are truthful, is to overlook both the purpose of the program and the duty of a supervisor. In fact, it appears that there is little other

reason for having a supervisor in the position occupied by respondent.

Mr. Tieberg, then Director of the Department of Employment, testified that, as a result of obtaining information that false placement records of an employment service office in another state had been the subject of hearings held by a Congressional subcommittee of the House Labor Committee, he caused to be issued Division Notice 3412N in November 1963, which emphasized that all "statistical reporting must at all times be scrupulously accurate with strict adherence to all reporting standards and definitions. That notice also pointed out that while the department was anxious to expand its placement work, it wished to do so honestly rather than by "gleaning extra statistics out of our present level of business." In December 1963, the notice issued at Tieberg's direction was discussed at a staff meeting at which Mr. Gubser was present. The importance of accurate reports was stressed and it was made clear that disciplinary action would be taken if there were false reports.

Subsequently, in May 1964, another Division Notice 3627Q was sent to all division offices. Again, the importance and necessity for truthfulness in reporting was emphasized, and an instance of an employee's dismissal for falsifying reports was cited. It was stated therein that "we cannot permit the integrity of our agency and the entire employment security system to be damaged by wilful falsification of reports by employees." Mr. Gubser was familiar with both of these notices.

The record reflects that the San Francisco office placement figures were inflated by "three to one" and that had there been honest reporting at the Union City farm office the number of placements reported would have dropped as much as 90 per cent in some months. One of the methods respondent's subordinates used to inflate the figures was to visit a ranch, obtain the names of all workers there and take credit for placing them, even though they were not obtained through the office. Mr. Backus, manager of the office in Brentwood, testified that he brought this method of crediting placements in the field to the attention of Mr. Gubser, stating that he had been told the year before by some other person that it was "perfectly all right," and Mr. Gubser said that was common practice or something like that, and said it was all right. The record reveals other instances where respondent told the staff workers they would have to "light a lot of candles for this," and when placements were running behind to "sharpen the pencil."

The evidence supports the inference that respondent knew what was going on and that he was interested in keeping the placement figures high in order to maintain the number of subordinates under him and the number of offices he supervised. The subordinates were likewise interested in keeping their jobs and the money budgeted.

[4, 5] Since respondent's primary responsibility, as a Farm Labor Supervisor I, was the active supervision of the local offices in his area, it seems to us a fragile argument that he was under no duty to verify reports submitted by his subordinates, by even a spot check, simply because no one specifically ordered him to do so. This would seem to be an inherent duty of supervising in the common understanding of the term "supervisor," particularly where the Department of Employment, the state government, and the federal government all relied upon such reports to carry out the program. Nor can we, as respondent argues we should, excuse him for his failure to take any measures to verify the accuracy of the reports because others, too, failed in this duty.

Respondent, as supervisor, was under a duty to evaluate the performance of his subordinates and to recommend the number of subordinates or staff members needed for local offices. To perform this duty he required a reasonably accurate account of the volume of work to be handled by his subordinates in the various field offices he

supervised. Inflated reports resulted in his recommending improper staffing of field offices.

[5, 7] The province of the superior court, as well as of this court in reviewing the action of the State Personnel Board, begins and ends with the determination whether there is substantial evidence to support the board's decision. Neither the superior court nor this court can reweigh the evidence; all legitimate and reasonable inferences must be drawn in favor of the findings of fact made by the board, not those made by the superior court, and the intervening judgment of the superior court does not change the nature of the review to be made by this court. (Shepherd v. State Personnel Board, 48 Cal.2d 41, 46, 307 P.2d 4; Sweeney v. State Personnel Board, 245 Cal.App.2d 246, 251, 53 Cal. Rptr. 766.)

Respondent's contention seems to be that the evidence, which assertedly supports the board's decision, is not substantial. Substantial evidence has been defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion, that is, whether a fair and reasonable mind would accept it as probative of the issue. (Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126; Houghton v. Loma Prieta Lumber Co., 152 Cal. 574, 93 P. 377; Gerhardt v. Fresno Medical Group, 217 Cal.App.2d 353, 361, 31 Cal. Rptr. 633.)

[8, 9] We believe that from the evidence related above a reasonable mind might well infer that respondent either knew or should have known that his subordinates were filing false reports. It matters not that we might have come to a different conclusion had the decision been ours to make in the first instance, or that reasonable men might differ (as respondent argues); it is enough that a reasonable mind could reach the same conclusion that was reached by the appeals board.

The judgment is reversed, and the cause is remanded to the trial court with instructions to discharge its writ of mandate and enter judgment in favor of the State Personnel Board.

CONLEY, P. J., and GARGANO, J., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles Edward BRASHIER, Defendant and Appellant.

Cr. 14603.

Court of Appeal, Second District, Division 5.

March 28, 1969.

Defendant was convicted in the Superior Court of Los Angeles County, Robert A. Wenke, J., of forgery, and he appealed. The Court of Appeal, Reppy, J., held that where out-of-court statements of defendant from which guilty knowledge of utterance of forged checks could have been inferred by jury and about which officer testified were made before defendant expressed his hesitant concern over whether he should be talking to officer or were made by defendant on his own initiative or were of accumulative effect only and where jury could have reached same verdict of guilt on basis of evidence other than the statements, admission of testimony about the statements was not prejudicial error.

Affirmed.

1. Forgery ⇐44(3)

Evidence supported finding of knowledge on part of defendant that payroll checks, which had been given to him by his acquaintance and which he had passed, had been forged by his acquaintance and supported defendant's conviction of forgery. West's Ann.Pen.Code, § 470.

herein that each of such instructions was adequately covered by other instructions which the trial court gave to the jury, it becomes clear with respect to such specification of error that appellant has no just cause for complaint.

It is ordered that the judgment and the order by which the motion for a new trial was denied be, and the same are, affirmed.

I concur: YORK, J.

CONREY, Presiding Justice.

I concur. I think that this appeal is frivolous. There should be some way to avoid the public expense of a 638-page reporter's transcript at the instance of a party who (as later shown by his brief on appeal) had no use for such transcript.

RAPAPORT v. CIVIL SERVICE COMMISSION OF STATE OF CALIFORNIA et al.

Civ. 4197.

District Court of Appeal, Third District, California.

Sept. 28, 1933.

Hearing Denied by Supreme Court Nov. 24, 1933.

1. Hospitals ⇐4.

Charge that assistant physician at state hospital accepted fee for medical service from named person in violation of statute *held* insufficient to justify his dismissal as not covering statutory exceptions (Pol. Code, § 2157; Gen. Laws 1931, Act 1400, § 14).

Pol. Code, § 2157, prohibits assistant physicians at state hospital from engaging in private practice, but provides that they may give necessary medical care to hospital officers and employees or in emergency cases, no rules and regulations prohibiting them from accepting compensation for such services were referred to in charge, and it did not state that accused was guilty of private practice.

2. Hospitals ⇐4.

Charge of inefficiency of assistant physician at state hospital and his neglect of duty in failing to visit certain wards *held* insufficient to authorize his dismissal (Gen. Laws 1931, Act 1400, § 14).

The charge did not allege any facts indicating inefficiency, nor that alleged neglect of duty was incompatible with or inimical to public service, that any patient suffered because of it, or that it was willful and intentional or without sufficient cause; "failed" signifying merely that accused fell short of visiting designated wards.

[Ed. Note.—For other definitions of "Fail," see Words & Phrases.]

3. Hospitals ⇐4.

Failure to perform act is not "neglect of duty," authorizing removal of assistant physician at state hospital, unless willful, intentional or inexcusable (Gen. Laws 1931, Act 1400, § 14).

"Neglect of duty" has been defined as careless or intentional failure to exercise due diligence in performance of official duty and including willful neglect or misfeasance and malfeasance involving failure in performance of legal duties, while "neglect," as distinguished from "omitted," means to omit by carelessness, design, etc.

[Ed. Note.—For other definitions of "Neglect," "Neglect of Duty" and "Omit," see Words & Phrases.]

4. Hospitals ⇐4.

Complaint must state sufficient facts to show actual unprofessional conduct of assistant physician at state hospital to authorize his removal by state civil service commission, whether he objects to sufficiency thereof or not (Pol. Code, § 2157; Gen. Laws 1931, Act 1400, § 14).

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Application by Walter Rapaport for a writ of *certiorari* to *review* and annul an order of the Civil Service Commission of the State of California and the members thereof, dismissing petitioner from his position as assistant physician at the Mendocino State Hospital. From a judgment denying the application, petitioner appeals.

Reversed, commissioners' order annulled, and cause remanded with directions.

A. L. Wessels, of Ukiah, and Jesse E. Nichols and Harry M. Gross, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Lilburn Gibson, Dist. Atty., of Ukiah, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

This cause is before us upon an appeal from the judgment of the trial court denying the application of the petitioner for a writ of certiorari annulling and setting aside the findings and judgment of the respondents dismissing the petitioner from his position as an assistant physician at the Mendocino State Hospital.

25 PACIFIC REPORTER, 2d SERIES

The return made by the respondents in this case is exceedingly voluminous, and the brief filed in behalf of the petitioner calls attention to many points of procedure alleged to be defective, which, from the views hereinafter set forth, need not be referred to in this opinion.

The charges filed against the petitioner upon which respondents based their judgment is in the following words and figures, to wit:

"Unprofessional Conduct: (a) In that you accepted from one S. H. Cox a fee for medical service in violation of section 2157 of the Political Code of the State of California, which provides that assistant physicians shall not engage in private practice, but shall devote their entire time and attention to the duties of their office.

"Inefficiency and Neglect of Duty: In that, on or about June 29, 1929, and on several occasions you failed to visit ward 7 of the Mendocino State Hospital, and that on or about June 22, 1929, and on several occasions you failed to visit ward 4 of the Mendocino State Hospital, which wards were a portion of the service assigned to you, in your professional capacity for several consecutive days, resulting in the patients of these wards being without medical attention during such periods."

Charge B scheduled "Unprofessional Conduct," was dismissed by the commissioners, and requires no further mention.

Section 14 of Act No. 1400, Deering's General Laws of California, 1931, volume 1, page 630, relative to the powers of the Civil Service Commission, specifies the grounds upon which officers and employees may be removed, to wit: "Incompetency, inefficiency, insubordination, dishonesty, intemperance, immorality, profanity, discourteous treatment of the public or other employees, improper political activity, wilful disobedience, violation of the provisions of this act or of the rules and regulations of the commission, or for any other failure of good behavior or any other act or acts which are incompatible with or inimical to the public service."

Section 2157 of the Political Code reads as follows: "The medical superintendents and assistant physicians shall not engage in private practice, but shall devote their entire time to the duties of their positions. Nothing in this section shall, however, be regarded as prohibiting them from giving necessary medical care and treatment to the officers and employees of the hospital residing at the hospital or in the immediate vicinity thereof, or in cases of emergency."

[1] It will be observed that the charge which we have set forth does not cover the excepted provisions of section 2157, supra. This section of the Code does not inhibit the private practice of a physician in so far as that practice and medical attention refers to officers and employees of a hospital, residing at the hospital, or in the immediate vicinity thereof, or in cases of emergency. There are no facts set forth in the charge showing that the petitioner has violated the provisions of section 2157 of the Political Code. It does not prohibit a physician from accepting a fee for services performed in giving medical attention to officers or employees of the institution, residing at the hospital, or in the immediate vicinity thereof; nor does it inhibit either the medical superintendent, or any of the assistant physicians from giving medical attention in cases of emergency.

While not sufficient as a charge to show that the petitioner violated the section of the Code referred to, the testimony shows beyond contradiction that the medical attention assigned as "unprofessional conduct" was given to an employee of the Mendocino State Hospital by the name of S. H. Cox, and that Cox paid him the sum of $50 for such services. No rules or regulations governing the conduct of assistant physicians of the Mendocino State Hospital, or specifying that assistant physicians shall not accept compensation for rendering medical services to an employee of the institution, have been called to our attention. If such rules and regulations exist, however, they would not supply the lack in the charge purporting to set forth unprofessional conduct, as there is no reference to any rule or provision forbidding a physician accepting such compensation. In fact, it is not set forth in the charge that the petitioner has been guilty of any private practice. The only charge is that he accepted a fee from one S. H. Cox in violation of section 2157, supra, which, as we have just shown, does not state a cause of action and does not set forth any circumstances or acts violative of law.

[2] As to the second charge sustained by the commissioners, purporting to show inefficiency and neglect of duty, it is sufficient first to call attention to the fact that there is not a word in the charge indicating inefficiency, nor is there anything in the record called to our attention, indicating that petitioner was either inefficient or incompetent, or has done any act coming within the provisions of section 14 of Act No. 1400, supra. The section does not purport to give the commission authority to discharge an employee on the ground of neglect. However, if the neglect were shown to be such as to be incompatible with or inimical to the public service, it might be that a liberal construction of the section would give the power of removal to the commission. This, however, is not alleged against the petitioner. We find only the simple statement that the petitioner on several occasions failed to visit ward 4 of the Mendocino State Hospital, and on several occasions failed to visit ward 7 of said hospital. There is no allegation that the public service was in any way impaired, nor that a single pa-

tient suffered by reason of such failure. Nor do we think that an allegation which simply says that a physician failed to visit a ward, without setting forth facts showing that such failure is willful and intentional, gives the commission any jurisdiction. For aught that appears in the charge the failure might have been due to any number of sufficient causes. It does not appear that the petitioner purposely failed to visit either ward 4 or ward 7. For all that appears his services may have been required in other wards in the institution, and no time was given in which he could have visited the wards in question on the 22d day of June, 1929, or thereabouts. It may be here stated that a review of the testimony preponderates very greatly in favor of the petitioner that he did visit the wards in question on the days referred to. If the commission had jurisdiction, of course, on a conflict of evidence we would be bound by its findings.

[3] If neglect of duty were specifically mentioned as a cause for removal, the charge filed against the petitioner would still be insufficient upon which to place petitioner upon trial. The mere failure to perform a certain act, with nothing more, does not constitute either a neglect of duty in fact or in law. The elements which we have mentioned showing either willfulness, intention, design, or inexcusableness, must be present.

In 46 C. J. p. 988, referring to the removal of officers for neglect of duty, we find the following: " 'Neglect of duty' means the careless or intentional failure to exercise due diligence in the performance of an official duty, the degree of care depending on the character of the duty, and includes, therefore, wilful neglect and such forms of misfeasance and malfeasance as involve a failure in the performance of the duties required by law. * * * In some cases, by constitution or statute, the refusal or neglect to perform the duties pertaining to the office is made a cause for removal. Under such provisions it has been held that a public officer should not be removed from office unless he has refused or neglected to perform an official duty pertaining thereto in some substantial respect, which, under the existing conditions, would lead all reasonable minds to conclude that the act complained of was an intentional violation of law. But it is not necessary to show that the officer acted with no evil or corrupt intent or motive, it being sufficient if it appear that the act was done intentionally, designedly, without lawful excuse, and therefore was not accidentally done."

In the case of In re Chadbourne, 15 Cal. App. 363, 114 P. 1012, this court had occasion to pass upon the meaning of the words "neglect" and "omitted." It was there held that the words are not synonymous; that to neglect means to omit by carelessness, design, etc. In the present case the allegation simply sets forth that the petitioner "failed." There is a difference in the meaning between the words "neglect" and "failed." The word "failed" in its primary meaning signifies, as used in the charge, that the plaintiff fell short of visiting the wards in question; while to charge the petitioner with neglect for such failure it must show, as we have stated, that it was the result of willfulness, intention, design, or some deliberate purpose.

It may be also observed that there is no allegation that the petitioner willfully failed, or intentionally failed, or designedly failed. All it really amounts to is that the petitioner left unperformed his visits to the respective wards.

[4] The language of the Supreme Court in denying a hearing in the case of Dyment v. Board of Medical Examiners, 57 Cal. App. 260, 207 P. 409, 412, is applicable here: "The act does not contemplate a formal method of procedure. The person charged may at the hearing object either formally or informally to the sufficiency of the complaint. But, whether he does or not, the complaint must be sufficient in its statement of facts to show actual unprofessional conduct by the person charged, or it will not give the board power or jurisdiction to revoke his certificate, and if a revocation is ordered on such a complaint the holder thereof may maintain a proceeding in certiorari to have it annulled for the want of jurisdiction of the board to make the order."

The charges filed by the superintendent of the Mendocino State Hospital against petitioner not having stated any facts constituting cause for removal, the respondents in this case had no jurisdiction to make such order.

While other objections have been urged by the petitioner, what we have stated is decisive on this appeal.

It follows that the order of the superior court should be and the same is hereby reversed. That the order of the respondents, in removing the petitioner, should be and the same is hereby annulled, and the cause remanded to the superior court with directions to enter judgment annulling the order of the respondent commission removing the petitioner as assistant physician at the Mendocino State Hospital.

We concur: PULLEN, P. J.; THOMPSON, J.

200 Neb. 282

Sharon L. SANDERS, Appellee,

v.

The BOARD OF EDUCATION OF the SOUTH SIOUX CITY COMMUNITY SCHOOL DISTRICT NO. 11 IN the CITY OF SOUTH SIOUX CITY, IN the COUNTY OF DAKOTA, in the State of Nebraska, a political subdivision of the State of Nebraska, Appellant.

No. 41266.

Supreme Court of Nebraska.

March 15, 1978.

Teacher sought review of decision of school board to terminate her contract. The District Court, Dakota County, Kneifl, J., set aside the termination and ordered reinstatement and board of education appealed. The Supreme Court, McCown, J., held that the evidence was insufficient to establish neglect of duty or incompetency on the part of the tenured teacher.

Affirmed.

1. Appeal and Error ⇐5

An error proceeding has for its purpose the removal of the record from an inferior to a superior tribunal to determine if the judgment or final order entered is in accordance with law.

2. Schools and School Districts ⇐141(5)

On appeal from termination of contract of tenured teacher, the district court and the Supreme Court must determine if the evidence presented before the school board was sufficient, as a matter of law, to support its determination. R.R.S.1943, § 79–1254.

3. Schools and School Districts ⇐141(5)

At a hearing before board of education to terminate the contract of a tenured teacher, the evidence at hearing must be sufficient to establish just cause for the termination; "just cause" means incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duties. R.R.S.1943, § 79–1254.

See publication Words and Phrases for other judicial constructions and definitions.

4. Schools and School Districts ⇐141(5)

Evidence that a particular duty was not competently performed by a teacher on certain occasion, or evidence of an occasional neglect of some duty of performance, does not, in itself, ordinarily establish incompetency or neglect of duty sufficient to constitute just cause for termination of a tenured teacher; incompetency or neglect of duty are not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties.

5. Schools and School Districts ⇐141(5)

Since there was no evidence that tenured teacher's performance of her particular duties was below the standard of performance required of other teachers in the school, testimony that assistant principal was required on several occasions to discipline the teacher's students for being out of class and that the teacher had requested his assistance with discipline problems on occasion, evidence that teacher's classes started late on occasion, and evidence that, on occasion, the equipment used in the classes was not properly cared for was insufficient to show incompetency or neglect of duty on the part of the teacher sufficient to constitute just cause for termination. R.R.S. 1943, § 79–1254.

Syllabus by the Court

1. At a hearing before a board of education to terminate the contract of a tenured teacher under section 79–1254, R.R.S. 1943, the evidence at the hearing must be sufficient to establish just cause for termination.

2. Under section 79–1254, R.R.S.1943, the term "just cause" means incompetency, neglect of duty, unprofessional conduct, in-

subordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duty.

Smith, Smith & Boyd, South Sioux City, for appellant.

Mohummed Sadden, South Sioux City, Phillip S. Dandos, Sioux City, Iowa, for appellee.

Heard before WHITE, C. J., and SPENCER, BOSLAUGH, McCOWN, CLINTON, BRODKEY, and WHITE, JJ.

McCOWN, Justice.

This is an error proceeding to challenge the action of the defendant, Board of Education of South Sioux City, Nebraska, terminating plaintiff's teaching contract. The District Court found that the action of the defendant board was arbitrary and unreasonable, and that no just cause for termination existed. The District Court set aside the termination and ordered defendant to reinstate the teaching contract of the plaintiff.

The plaintiff, Sharon L. Sanders, after 3 years of teaching physical education in Colorado schools, was employed by the defendant school board commencing with the school year of 1969–70. She taught girls physical education in the junior high school for 3 years. She was transferred to the senior high school for the 1972–73 school year. She taught girls physical education and was director of the girls drill team.

On February 6, 1975, Mrs. Sanders' performance for the 1974–75 year was evaluated by the principal of the senior high school, James Deignan. His overall evaluation was "good" and he recommended that she receive regular salary advancement but no merit increase for the next year. On the instructor evaluation form, Principal Deignan rated Mrs. Sanders "good" or "excellent" on all 12 rating classifications for personal traits. Mrs. Sanders was rated "good" or "excellent" in 15 out of 18 rating categories for instructional methods, and was evaluated as "needs to improve" in 3 areas. These three were "care and appearance of room and equipment"; "definition of goals"; and "all pupil participation." In no area was she rated as nonacceptable.

On February 24, 1975, the school board voted to continue Mrs. Sanders' employment for the 1975–76 school year, but placed her on probationary status. The record does not reflect the significance of that status, but it has no statutory basis. The record reflects that Mrs. Sanders requested, and apparently received, a hearing on the matter, but no record of the hearing was made. There is nothing in the record to reflect the grounds for the "probation" other than the evaluation report of Mr. Deignan. The "comments or suggestions to the instructor" section of that report stated that better organization and discipline were needed. Whatever the reason for the "probation," no suggestions or guidelines for improvement were given to Mrs. Sanders.

On March 22, 1976, Dennis Trump, the high school principal for the year, who had been assistant principal the preceding year, completed his evaluation report on Mrs. Sanders' performance for the 1975–76 school year. Mr. Trump gave Mrs. Sanders an overall rating of "good" and recommended renewal of her contract. His report stated that "improvement has been shown in cooperation and percentage of student participation." Mr. Trump rated Mrs. Sanders "good" or "excellent" in all rating categories except two in which he rated her as "needs to improve." Those two were "classroom control" and "all pupil participation." In the "comments or suggestions to the instructor" section of the report Mr. Trump noted "some time wasted prior to start of class activity. Improvement has been made in number of students participating."

On the same day Mr. Trump's report was made the defendant school board voted to consider terminating the plaintiff's contract at the end of the 1975–76 school year on the ground of "incompetency, neglect of duty, inability to control students, and poor preservation of class equipment." Mrs. Sanders

requested a hearing, which was held on May 5, 1976.

The school board presented three witnesses at the hearing. Dr. Ralph Weaver, the Superintendent of Schools, testified that he did not visit individual teacher's classrooms, nor perform any classroom evaluations, and that the responsibility for the evaluation of individual classroom teachers rested with the various principals. He himself dealt with the principals and reports and recommendations from them. He testified, however, that on several occasions Mrs. Sanders was not present when the drill team was practicing, performing, or working out, and that he considered that a neglect of duty.

Mr. Dennis Trump, the principal of the senior high school for the 1975–76 school year, testified that he was primarily responsible for evaluating teachers and visits each classroom at least three times a year. He knew that Mrs. Sanders was on probation, but had not seen her evaluation report from the preceding year. He testified that on several occasions during the 1975–76 school year, students who should have been in Mrs. Sanders' classes, were, instead, outside the gymnasium classroom and in other places in and around the high school building. He also testified that on occasion Mrs. Sanders had not properly supervised or guarded gymnastics equipment for the safety of students, but acknowledged that he had not called the matter to her attention. Mr. Trump testified that on one occasion during Mrs. Sanders' maternity leave a substitute teacher, in his opinion, had done a better job than Mrs. Sanders. Mr. Trump noted also that on one occasion a drill team class taught by Mrs. Sanders was late in getting started, and that on occasion he had picked up volleyballs in the gymnasium which had not been put away after her classes. Mr. Trump was, nevertheless, of the opinion that Mrs. Sanders' performance had improved, and he recommended that she be retained.

The final witness for the school board was Fred Colvard, the assistant principal of the senior high school. Colvard was in charge of discipline at the high school. He testified that several times he had had to discipline Mrs. Sanders' students for being out of class, and that on occasion Mrs. Sanders had requested his assistance with discipline problems. He testified that on one or two occasions he had seen students working on gymnastics equipment without proper guarding, but had not called it to Mrs. Sanders' attention. Essentially, his testimony as to Mrs. Sanders' conduct agreed with that of Mr. Trump, although Colvard testified that he had not made, or been called upon to make, an evaluation of Mrs. Sanders' teaching performance. He testified that on the basis of his informal observations he was not in a position to say whether she should be retained or terminated.

There were two witnesses for plaintiff. A former student of Mrs. Sanders, who had been in her physical education classes for several years in both junior and senior high school, testified that she had never noticed any discipline problems in class, nor any problems of an insufficient number of students guarding gymnastics equipment, and that Mrs. Sanders was better than the other physical education teachers she had had. She also testified that there were a few students who skipped class on occasion, but that they were people who routinely skipped other classes as well.

Mrs. Sanders herself testified that until the 1974–75 school year she had never had complaints about her teaching. She testified that in the spring of 1975, when she was placed on probation, she was given no specific instructions, suggestions, or guidelines to follow to correct whatever deficiencies there might have been in her teaching. She also testified that her probation was not discussed with her during the 1975–76 school year except in February of 1976, when Mr. Trump indicated to her that he was going to recommend that she be taken off probation. It was her testimony that she did not have an unusual number of discipline problems and that those she had she either handled herself or referred to Mr. Colvard. Mrs. Sanders testified that on one occasion less than four student guards had

been in place around the trampoline, and that she immediately corrected the situation when she noticed it. She denied any problem in losing students from her classroom, and explained that if students did not come down to the gymnasium level from the locker room, she had no way of knowing they were present, and she counted them absent. She also testified that all equipment she started the year with was accounted for, although she conceded that on occasion volleyballs would be stuck under the bleachers and she did not find them until later. She also testified that she had never received any complaints from parents about her performance.

At the conclusion of the hearing before the school board on May 5, 1976, the five members of the school board present unanimously voted to terminate Mrs. Sanders' contract.

This error proceeding was thereupon filed in the District Court. The District Court found that there was not substantial evidence sufficient to establish just cause for the termination of plaintiff's teaching contract, and that the termination was arbitrary and unreasonable. The District Court set aside the termination and directed the school board to reinstate plaintiff's teaching contract. The school board has appealed.

This case is one of first impression in interpreting some of the provisions of section 79-1254, R.R.S.1943, which became effective February 26, 1975. That section deals with the continuation or termination of teachers' contracts and provides in relevant part: "Except for the first two years of employment * * * any contract of employment between an administrator or a teacher who holds a certificate which is valid for a term of more than one year and a Class I, II, III, or VI district shall be deemed renewed and shall remain in full force and effect until a majority of the members of the board vote on or before May 15 to amend or to terminate the contract for just cause at the close of the contract period. The first two years of the contract shall be a probationary period during which it may be terminated without just cause. * * * The secretary of the board shall, not later than April 15, notify each administrator or teacher in writing of any conditions of unsatisfactory performance * * * which the board considers may be just cause to either terminate or amend the contract for the ensuing school year. Any teacher or administrator so notified shall have the right to file within five days of receipt of such notice a written request with the board of education for a hearing before the board. Upon receipt of such request the board shall order the hearing to be held within ten days, and shall give written notice of the time and place of the hearing to the teacher or administrator. At the hearing evidence shall be presented in support of the reasons given for considering termination or amendment of the contract, and the teacher or administrator shall be permitted to produce evidence relating thereto. The board shall render the decision to amend or terminate a contract based on the evidence produced at the hearing. As used in this section * * * the term just cause shall mean incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, other conduct which interferes substantially with the continued performance of duties * * *."

The parties have stipulated that only incompetency and neglect of duty are involved here, and none of the other statutory meanings of "just cause" are applicable. It should be noted also that the statute specifically requires that any decision to terminate a teacher's contract must be based only on the evidence produced at the hearing before the school board.

[1, 2] An error proceeding has for its purpose the removal of the record from an inferior to a superior tribunal to determine if the judgment or final order entered is in accordance with law. *Dovel v. School Dist. No. 23,* 166 Neb. 548, 90 N.W.2d 58. The District Court and this court, on appeal, must determine if the evidence presented at the hearing before the school board on May 5, 1976, is sufficient, as a matter of law, to support the determination of the school board.

The critical issue here is what conduct is sufficient to constitute just cause for the termination of the contract of a tenured teacher under current statutory requirements. There are few, if any, objective criteria for evaluating teacher performance or for determining what constitutes just cause for terminating teaching contracts of tenured teachers. Each case must, therefore, be assessed on its own facts. In this case there is no evidence that Mrs. Sanders violated any directive, regulation, rule, or order given to her by any administrator or the board of education. There is no evidence that the conduct of Mrs. Sanders complained of by the board violated any specific rule or regulation of the school administration. In both of the detailed evaluations of Mrs. Sanders' performance, made by the person charged with that duty by the school administration, there were no areas of performance in which she was not acceptable, and out of almost 20 rating categories, only 2 or 3 were rated as needing improvement. Both of those official evaluations by the administration itself recommended retention. Both were made by professional administrators who presumably had ample knowledge of professional competence and the standards for performance of duty. The evidence at the hearing reflected facts which were thoroughly known by the principal at the time he made his evaluation and report.

[3] At a hearing before a board of education to terminate the contract of a tenured teacher under section 79–1254, R.R.S. 1943, the evidence at the hearing must be sufficient to establish just cause for termination. Under section 79–1254, R.R.S.1943, the term "just cause" means incompetency, neglect of duty, unprofessional conduct, insubordination, immorality, physical or mental incapacity, or other conduct which interferes substantially with the continued performance of duties.

[4, 5] Evidence that a particular duty was not competently performed on certain occasions, or evidence of an occasional neglect of some duty of performance, in itself, does not ordinarily establish incompetency or neglect of duty sufficient to constitute just cause for termination. Incompetency or neglect of duty are not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties. The conduct of Mrs. Sanders complained of by the board might well be categorized as minimal rather than substantial evidence of incompetence or neglect of duty. However her performance of duty is classified, there is a complete absence of evidence that Mrs. Sanders' performance of her particular duties was below the standard of performance required of other teachers in the high school performing the same or similar duties. Neither is there any expert testimony that Mrs. Sanders' conduct was, or should be, sufficient evidence of incompetency or neglect of duty to constitute just cause for termination of her contract.

The District Court was correct in finding that there was no substantial evidence of incompetency or neglect of duty sufficient to establish just cause for the termination of plaintiff's contract. In the absence of just cause the defendant's action was arbitrary and unreasonable.

The judgment of the District Court was correct and is affirmed.

AFFIRMED.

200 Neb. 291

PROGRESSIVE DESIGN, INC., Appellee,

v.

OLSON BROTHERS MANUFACTURING COMPANY, Appellee,

Security State Bank of Oxford, Nebraska, a corporation, Intervenor-Appellant.

No. 41313.

Supreme Court of Nebraska.

March 15, 1978.

Seller of hydraulic valves brought action against buyer for breach of contract.