ORAL ARGUMENT - 3/21/95
94-0269
TEMPLE ISD V. CENTRAL EDUCATION AGENCY, ET AL.

SCHULZE: May it please the court. My name is Eric Schulze, and I am here representing petitioner, Temple ISD this afternoon. The appeal before the Court arises from a decision of the Temple School Board not to renew the employment contract of a campus principal, George English, the person with the term contract nonrenewal. The Commissioner of Education confirmed and upheld the decision of the school board, the district court affirmed the commissioner's decision.

I have raised three points of error before this court and my intent this afternoon is to take up those points in the order in which they have been briefed. First the TCNA issues; and second the jurisdictional issue. Before I begin I want to emphasize to the court that Mr. English has never challenged on appeal any of the 21 findings of fact made by the commissioner of education. Mr. English has never challenged the substantive reasons why the Temple school board nonrenewed his contract: The fact that he repeatedly slept in his office, the fact that he repeatedly failed to attend previously scheduled conferences with parents and teachers, the fact that he paddled the kids so hard that the paddle broke, the fact that his performance was unsatisfactory.

Most importantly, English has never challenged the fact that indeed the Temple school board gave English notice of proposed nonrenewal as required by §21.204, of the TCNA. What English does contend is that when the school board voted only to accept the superintendent's recommendation of nonrenewal, that that vote by itself violated the procedures required of school boards under the TCNA.

CORNYN: Can you explain why there is a vote to accept the recommendation?

SCHULZE: Because 21.204 of the TCNA says, that when a superintendent presents the school board with a recommendation of nonrenewal, that the board shall either reject the recommendation or shall give the person notice of proposed nonrenewal.

CORNYN: And when they rejected that's a substantive determination that...

SCHULZE: It means that the board simply will not take up jurisdiction over the nonrenewal process. And indeed, the person is going to be renewed.

CORNYN: So that's a substantive determination?

SCHULZE: Yes.

CORNYN: But when they accepted, that's not a substantive determination? Is that true?

SCHULZE: That is true because as the commissioner of education stated in his decision in this case, the board's vote to accept this matter simply was the board's procedure of taking jurisdiction over the nonrenewal process so that the board could give English the notice of proposed nonrenewal, which in fact it did give. So if Mr. English wanted a hearing on the matter, the board could hold a nonrenewal hearing to make the substantive determination should he be nonrenewed or not.

SPECTOR: But notice was not given until later?

SCHULZE: Correct. On March 10, the board voted to accept the superintendent's recommendation. The Board did meet again on March 31. It voted at that point to confirm the previous action regarding the proposed nonrenewal of Mr. English, and only after those 2 votes, then did the board give Mr. English the notice of proposed nonrenewal.

The court below considered the issue before it to be a question of law. I believe that that is erroneous. But even assuming that it's a question of law, the court made numerous errors as reflected in its opinion. The court failed properly to review the TCNA procedures required of school boards. The court relied upon a flawed analogy to the Salinas opinion when it wrote the decision below. The court also failed to give any kind of meaning to the different language used on March 10 in its votes regarding the superintendent's recommendations. Because in fact on March 10, the superintendent had made a number of different personnel recommendations. As to every recommendation except the recommendation concerning English, the board voted by motion made and seconded to approve the superintendent's recommendations. However, when it came time to consider the recommendation regarding English, the board did not vote to approve that recommendation. The board voted merely to accept the recommendation.

My analogy is to this court's own procedures under Rule 114b. When this court votes to accept a certified question even though the rule doesn't specifically allow the court to make that kind of a vote, has the court predetermined the outcome of the certified question? No. The court hasn't. When the school board votes to accept a superintendent's recommendation has the court predetermined the outcome of the recommendation? No. Again the board has not.

What the school board did it made this vote to accept the recommendation and then gave English timely notice of proposed nonrenewal.

ENOCH: Is there anything in the record that the trial court _____ CA what the board considers "accept" to be? I mean is there anything in the record that says what does "accept" mean?

SCHULZE: Only visa vis the other actions that the board took on March 10.

ENOCH: Only by comparing approve with accept you get the idea that accept is something different than approve?

SCHULZE: Exactly. The only two court opinions that are reported that have ever addressed this procedure of first voting to accept and then sending out the notice of proposed nonrenewal are the grounds of the dissenting opinion by Justice Hecht that I have cited in my brief, and the Madisonville ISD case. Both of those indeed say that is an acceptable procedure under the TCNA. And that's what we are talking about. Does the TCNA mandate the particular language that a school board must use when it receives the superintendent's recommendation of nonrenewal? No. 21.204 does not contain any mandate, any magic words.

ENOCH: Is there some...the TCNA says that you have two things: you either reject it, or you give notice of a hearing.

SCHULZE: Of a proposed nonrenewal.

ENOCH: Where does a school board get the idea it's supposed to do anything other than reject or send out a notice of a hearing?

SCHULZE: Well there's 1,052 school districts. And the statute itself doesn't say the motion must be either to reject or to send out notice of proposed nonrenewal.

ENOCH: I thought that's what...isn't that what the TCNA says? When you get a recommendation of nonrenewal you either reject or you send a notice?

SCHULZE: Right. And in this case it is undisputed fact that indeed we did give English timely notice of proposed nonrenewal.

ENOCH: But why did the school district think it had to have some sort of formal action on the recommendation? What under the TCNA says a school district has the authority to take some sort of formal action on the recommendation?

SCHULZE: §21.203c says: School boards you shall have procedures and policies for receiving recommendations from the administration for nonrenewal. This was simply the procedure used by the school board pursuant to 21.203c to receive the recommendation. It accepted the recommendation.

ENOCH: And I go back to my question: Is there anything in the record that demonstrates that that is "accepting a recommendation of nonrenewal is the procedure that we, the school board adopt pursuant to the requirement that we adopt procedures for receiving this? I mean is there anything that says anything about that?

SCHULZE: No. There is nonrenewal policies that are in the record. But as far as the informal procedures for receiving the superintendent's recommendation, no.

PHILLIPS: Would you talk about jurisdictional issue?

SCHULZE: Certainly. The jurisdictional issue before the court is whether or not English's motion for rehearing as filed with the CEA was untimely? Certainly it was filed beyond 20 days after the commissioner's final decision was mailed to English. That's undisputed. The distinction that I am arguing in this case is that there is a difference between when a party completely fails to receive timely notice of a final agency decision within that 20 day period. If they completely fail to receive the notice within the 20 day period, indeed they can rebut the presumption that the party receives the notice upon mailing. However, as in this case where you have the party receiving the commissioner's decision 6 days after it was mailed, English still had 14 days (2 weeks) to file a timely motion for rehearing with the agency, but simply chose not to do so. Indeed in this case as the administrative record reflects English even tried to file a motion for extension of time. But that was filed after the 20 day period had already expired.

PHILLIPS: What if he got it on the 19th day so that he had 1 day?

SCHULZE: If he got it on the 19th day, he would have to file something. He could file a motion for extension of time in that scenario. But in this case even the motion for extension of time was untimely outside the 20 day period.

I believe that this court's opinion in the Commercial Life case indeed recognizes this distinction that I am trying to make. Because this court in Commercial Life simply stated that the Austin CA decision in Leisure Services stands for the proposition that the agency's failure to notify the company does not extend the time period. That was overruled. However, Leisure Services was grounded on 2 different reasons: one, a complete failure would not extend the time period; and then another scenario just like Justice Phillip's raised what if there is one day left in the time period is it required? Leisure Services said yes you had to file the motion for rehearing even if you had one day left. Commercial Life only

overruled the part of that decision that said a complete failure would not extend the time period.

The legislature certainly could have used the language in Atra(?) that the 20 day period runs from the date of receipt. The legislature did not use that type of language at all. Instead the legislature said we will presume that the party is notified on the date of mailing. The decision below completely renders superfluous the date of mailing. Because unless the party receives the decision on the exact same date that it's mailed, then the date of mailing is always rendered superfluous.

A party can always rebut at the presumption. They can always ignore the 20 day period. Every administrative appeal indeed can involve a jurisdictional dispute if the 3rd court opinion stands.

I would briefly like to say why I think that the CA was wrong when it considered the issue before it to be a question of law, rather than a question of fact. This court's decision in Bowman v. Lumberton ISD said that whether or not a school board ratifies and approves a superintendent's recommendation is a question of fact. In the Bowman case the issue before the court was the school district had this proposed salary schedule from the superintendent. Did the school board ratify and approve that proposed salary schedule as actioned by the school board. This court said that's a question of fact. That's what we have in this case. Did the school board ratify and approve the superintendent's recommendation as the action of the school board? It's a fact question.

I think English has recognized that ratification is indeed the issue from the commissioner's level up through this court.

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RESPONDENT

DOGGETT: May it please the court, Mr. Chief Justice. My name is Dianne Doggett. I am staff counsel for the Texas State Teacher's Association, and I am here today representing Mr. George English. There are three points of error that have been brought to you today. I will first address the first one. The CA correctly decided that the board nonrenewed Mr. English's contract prior to notice and hearing at its March 10, 1986 board meeting. As y'all have noted, the statute says that the board at that point has two choices: it can either reject the recommendation, or it can give notice of proposed nonrenewal. In this case the board did neither. It voted to accept the recommendation. Therefore, nonrenewing a contract prior to notice or hearing and it is uncontroverted that there was no notice or hearing prior to the March 10 board meeting.

HECHT: So why give the notice and hearing?

DOGGETT: Well exactly.

HECHT: But they did.

DOGGETT: Well they did. But they had already decided, and once they had decided any other actions were completely irrelevant and unable to cure the procedural defect that they had committed.

HECHT: Why is that?

DOGGETT: Because Mr. English was entitled to present his case to a board that had not made up its mind, that had not acted to nonrenew his contract. He was entitled to go before a board that had only proposed his nonrenewal. And he did not have that. They had already made the decision to

nonrenew his contract.

HECHT: And there is nothing they can say or do to indicate that all they meant by acceptance was start the process and operation?

DOGGETT: I think that's correct.

ENOCH: From the record that's here they approve certain recommendations, they accept other recommendations. How would you suggest that a school board make a pronouncement as to what they are supposed to do? If they decided not to reject it, how do they make a pronouncement that it is time to send out a notice?

DOGGETT: I think they very simply make a motion to send the teacher notice of proposed nonrenewal. That's exactly what the statute says. Motion carries. We have decided to send the teacher notice of proposed nonrenewal. But that's not what they did.

ENOCH: Could that be argued under even those facts, that a majority of the board had made up their mind to accept the recommendation? Since they haven't voted to reject it, and they voted to send out a notice, couldn't you also be arguing today that that's a predetermination, the fact that they took a formal action on this indicated to me that they had made up their mind they were going to accept the recommendation.

DOGGETT: Well I could certainly argue that. But I don't think that should be a winning argument. I think that case law in other states is fairly clear that just because a board votes to initiate the process to hear the case much as you may grant writ in a case does not mean that the board has predetermined the outcome. As opposed to accepting the recommendation to nonrenew which is very different, I think the two are very different.

HECHT: Very different? That's pretty close isn't it?

DOGGETT: I really don't think so. I really don't. I mean they accepted...you know acceptance is the opposite of rejection. They accepted the recommendation to nonrenew. And nothing they could say or do after that can undo that.

ENOCH: If the record shows that they...for a certain action that was done they approved the recommendation, and for this one the motion is to approve the recommendation or actually the recommendation is to approve it, but the board member says: well I move we accept this one. And they say, Okay we are going to grant. I mean there was a difference between I guess the superintendent moves for approval of several and they are granted, and then moves for approval of this one, but the board doesn't move to approve, they move to accept which is a different thing. And it is clear in the record that whoever is making the motion was making a very technical different motion. Couldn't that give credit to the commissioner who says, "I look at this and I find that that's merely beginning the process."

DOGGETT: Well two things: first of all, the commissioner had before him a very similar case in the Crow case, which is attached to my brief as appendix J, in which the board accepted a superintendent's recommendation to nonrenew. And the commissioner in that case held that that was nonrenewal prior to notice of hearing, and the decision was reversed. The hearing officer in this case recommended a decision in Mr. English's favor on this issue. And the commissioner reversed that.

So I think to say that this is a commissioner's call, I think the commissioners has made the very same call in a different case the other way. So I think whether or not the board member

who made the motion perceived a difference we will never know. But I think intent is irrelevant. The question is "what did they do?" and what they did was they accepted the recommendation.

HIGHTOWER: If the board had followed the procedure that you outlined that they should have you say, what would have been the result in this case? If the notice had gone to Mr. English about the proposed nonrenewal, what would have happened then?

DOGGETT: Well we will never know that. And I think that's the point.

HIGHTOWER: Well I know we won't know exactly. But let's say someone else. I am sure these things have happened before. What is the general procedure then to what would happen?

DOGGETT: Excuse me I misunderstood your question. The board would vote to give notice of proposed nonrenewal. The notice would go out. The teacher would request a hearing. There would be a hearing held before...

HIGHTOWER: Could request a hearing?

DOGGETT: Could request a hearing. Yes, that's true and sometimes they don't. The board would hold a hearing, a board that had never decided whether to nonrenew or not, would hold a hearing, hear evidence, and then make up its mind whether to nonrenew the contract or not.

HIGHTOWER: So the basis of your contention here is that Mr. English was denied a hearing, that he was entitled to under the statute?

DOGGETT: He did receive a hearing, but it was after the board had accepted the recommendation instead of before. There was a hearing held; evidence taken, that was appealed to the commissioner. The commissioner reviewed that evidence under the substantial evidence standard, which as you know is a very differential standard, no evidence was taken before the commissioner regarding the reasons for nonrenewal. Mr. Schultz tried to make much of the fact that Mr. English has not contested the reasons. But contesting any facts under the substantial evidence rule is a losing proposition. And the trial court then under Atra again makes a substantial evidence review. So it's really the board that you have the shot at. That's where you have to prove your case. Those are the people you have to convince.

HIGHTOWER: But didn't you just tell me they went ahead and had a hearing later?

DOGGETT: They did.

HIGHTOWER: So we are here because of a procedural problem that we didn't cross a t or dot an I in the proper sequence of events? But he really got an opportunity to make his case at a hearing before it was all over?

DOGGETT: He did get a chance to make his case at a hearing. But to a board who had already nonrenewed his contract.

GAMMAGE: What's the difference between accepting and approve? They approved some of the superintendent's recommendations at this meeting did they not? And then they accepted some others. Subsequently gave him notice, had a hearing, and on hearing or after hearing approved the superintendent's recommendation. Is there a difference between accepting and approving? Is accepting equated with receiving?

DOGGETT: I don't think accepting is the same as receiving. I think trying to draw a distinction between approving and accepting is a distinction without a difference.

GAMMAGE: Well why do they do some one way and some the other? Why do they say we are going to approve the superintendent's recommendations on these, we are going to accept the superintendent's recommendation on these, and then give notice and have a hearing?

DOGGETT: I don't think we will ever know that?

GAMMAGE: Is it because they are accepting it for consideration?

DOGGETT: I don't think we will ever know that.

GAMMAGE: Instead of rejecting it. Here we are going to reject these because we don't like what the superintendent recommended. Here we are going to approve these because we agree with the superintendent's recommendation. Here we are going to accept these because we are not sure.

DOGGETT: Well that's certainly the petitioner's contention. However, I think that goes to intent, and I think intent is irrelevant. The question is what they did do? What is the legal significance of what they did. And that is for this court to decide.

GAMMAGE: They are saying accepting is not decision-making other than to consider. And you're saying once they accepted to consider it they've made their decision?

DOGGETT: Well they didn't accept it to consider. The motion wasn't to consider it. The motion was to accept the recommendation to nonrenew.

GAMMAGE: But then on others there were motions to approve? There's got to be some difference just as there is a difference between approving and rejecting. Why would you have 3 separate actions if there is no difference between 2 of them?

DOGGETT: We will never know that. And for all we know it was a slip of the tongue. We don't know. There is no policy in evidence which goes to the difference between accepting and approve. The statute gives them 2 choices: either reject; or send notice of the proposed nonrenewal. And they did not take either of those avenues. And I submit to you that if the legislature thought that acceptance of the recommendation at that level was appropriate, they would have given the district 2 different choices. They would have said either reject the recommendation, or accept it and give notice of proposed nonrenewal. But they didn't say that. They said either reject it, or give notice. And then later after notice of hearing, then you can accept the recommendation. The statute doesn't say accept later. The legislature did not make acceptance of the recommendation a choice at that stage.

HIGHTOWER: Are you saying here though that the board made an error that there is no way that they could ever correct it?

DOGGETT: Yes I am.

HIGHTOWER: So that Mr. English has a contract for another year?

DOGGETT: Yes.

HIGHTOWER: And if next year they cross the Ts and dot the Is the way you say they should have

this past year, then they could at that time?

DOGGETT: Yes, absolutely.

HIGHTOWER: But it's absolutely another years contract because they got them out of sequence?

DOGGETT: That's right.

PHILLIPS: Counsel why do the courts have jurisdiction over this case in the first place?

DOGGETT: Regarding the motion for rehearing, formerly §16 of APTRA, the Administrative Procedure in Texas Register Act provided that the motion for rehearing must be filed within 20 days after notification of the decision. And it further states that notification is presumed to have been given on the date the final decision is mailed. Now petitioner would argue that presumption can be rebutted in some instances, but not rebutted in other instances. I think it has to be either rebuttable or not. You can't start drawing how many days into that period is it rebuttable or not rebuttable. The legislature changed that section in response to a couple of court cases being Leisure Services and Commercial Life. Now in Leisure Services the party who was to file the motion for rehearing was not timely notified of the decision. And because of this they filed their motion for rehearing more than 20 days after it was rendered, which the prior §16 said you have to file it within 20 days after it's rendered. And they didn't know it had been rendered. So they filed it late, and the court said, "well, I am sorry. You should have called everyday to see if it had been issued or whatever. But it's late. The statute says 20 days after rendered.

So the legislature amended the statute to say 20 days after notification, and that notification is presumed on the date of mailing.

Now in this case we rebutted that presumption. We showed to the satisfaction of the trial court that it was received some 6-7 days later, and that our motion for rehearing was filed within 20 days after actual receipt. Respondent says you can't rebut that presumption. And we say you can rebut that presumption. If you can't rebut that presumption then a notification that gets lost in the mail for 20 days and is received 20 days later, the person receiving it would not have an opportunity to file a timely motion for rehearing because they would not be able to rebut the presumption that notification was given on the date of mailing.

I think any rule proposed by respondent that it sometimes rebuttable and sometimes not rebuttable is just totally unworkable.

PHILLIPS: Why did the legislature choose a time frame that would lead to a potential of rebuttal in every case?

DOGGETT: Well you know the legislature does funny things. It may have been a political compromise. I don't know.

PHILLIPS: Why didn't they use our 3-day mailbox?

DOGGETT: Well that might have been a better idea in retrospect. But they didn't. And what they did was create this presumption which we argue is rebuttable. Now respondent says, "there will never be a deadline; every case will be open to argument about when it was received." But all the agency has to do is send the decision by certified mail, return receipt requested, and the date that it is received will be on the return receipt requested green card. And that will be the date received. There will be no question about it. So it being rebuttable presumption is a workable rule that's clearly authorized by the legislature.

ENOCH: Don't we have with some of our rules about notification of judgments and that's sort of thing a problem where one of the parties has to establish that the notice didn't come within 20 days of the judgment or something. I can't remember exactly what it is, but we have worked this issue out with regard to rules of civil procedure about the notification of when a judgment is rendered, and the opportunity to bring a motion for new trial within 30 days, filed within the 30 days extend the appellate time table; and if you can come in and show that you didn't receive the notice within 20 days of it being rendered, then there's a different time frame. Why wouldn't that rule be workable here having a reasonable period of time to file it if say the notice comes outside the 20 day period? In other words I've got 20 days to do it. If I am notified within that 20 day period, then I've got to bring my appeal even if I have one day to go. But if the notice is received outside of the period, then I get this 20 days to file it. Why isn't that rule as workable here? In other words, the presumption is it's mailed and you get 20 days. And the fact that you receive it within that 20 day period you don't get the benefit of an additional 20 days. Why can't we take that rule and apply it here? You would still lose, but why isn't that just as workable as your rule where you are saying whenever we walk in and say we received it we get 20 days from that date even if our receipt is within the 20 days of the time it was mailed?

DOGGETT: Well that may be workable, but that's not what the legislature did. The legislature created a presumption, and presumptions are rebuttable. I quote from Black's Law Dictionary. Presumption of law is defined as a rule of law that courts and judges shall draw particularly inference from a particular fact or from particular evidence unless and until the truth of such inference is disproved. The legislature said this is a mere presumption. They could have said that notification is deemed to have occurred on the date of mailing. But they didn't say that. They said presumed. And that creates a possibility for us to say that notification occurred on a different date. Now if the legislature had written a rule, like the rule you are referring to in the Texas Rules of Civil Procedure, then we would have the possibility of abiding by that rule. But that's not what the legislature did.

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REBUTTAL

SCHULZE: Let me start out by responding to Justice Gammage's question about the difference between accept and approve. Of course it's got to be relevant here because different words for endowed with different meanings and for the court below to say accept is the same thing as approved obliterates the very distinction that the board chose to make when it was accepting some recommendations and approving others. As Doggett says intent is irrelevant. However, when you have to determine the meaning of the language that the board used in these March 10 votes, indeed intent is relevant. It's like when the meaning of the word is unclear certainly intent is relevant in that scenario. For example when the meaning of a word in the statute is unclear, this court looks to the legislative intent underlying the statute. Here did the board intend to approve English's nonrenewal? No, it did not approve English's nonrenewal because it had used that exact word in response to other recommendations. It only accepted the recommendation in this case.

SPECTOR: After the hearing is there in the record a formal resolution, and how does that read?

SCHULZE: An actual nonrenewal hearing occurred on Aug. 18. Indeed the board voted at that time for the first time ever in this case not to renew Mr. English's contract. That was the first time the school board had voted not to renew. Previously on March 10 it had only voted to accept the recommendation on March 31 to affirm the previous action regarding the proposed nonrenewal of English's contract.

Mrs. Doggett says that you have to use the word proposed nonrenewal in receiving this recommendation, or voting on the motion. Well the Salinas case itself says that the word proposed is

not required.

OWEN: Under the board's procedures let's assume that they voted to accept it. They sent out the notice of nonrenewal. What happens if someone does not request a hearing? Is there another step taken after that?

SCHULZE: Yes. Under 21.205 or 21.206 the teacher, the principal, has a 10-day window of opportunity to request a hearing. If they fail to request a hearing within that 10 days, then when the 10-day period expires the board must make a decision within 15 days on the renewal or nonrenewal of the contract.

OWEN: Is that the procedure that this board follows?

SCHULZE: Yes, that's the statutory procedure that even if they don't request a hearing yes, the board has to make a decision within 15 days following the expiration of the 10 day request for a hearing period.

GAMMAGE: To follow-up on Judge Hightower's question earlier if the board does follow in error here at some point what can they do to redeem themselves, or must they continue the contract for another full year?

SCHULZE: If indeed they have nonrenewed Mr. English without prior notice and hearing, the Salinas case says: yes, that you have brought the teacher back for another year that they've been renewed by operation of law. You have to give them prior notice and a hearing before you make the actual decision to nonrenew. But that's exactly what we did in this case. There is no dispute that we gave him notice of proposed nonrenewal. There is no dispute that in response to its request. We gave him a multi-day hearing before the school board. And it wasn't until the very conclusion of that hearing that the school board for the very first time made the decision not to renew his contract. That's why this case is so absolutely distinguishable from the Salinas case. In the Salinas case first the board voted not to renew, then it gave him notice that the board already had voted not to renew, and then at the conclusion of the hearing, the board simply confirmed a prior nonrenewal decision already made.