ORAL ARGUMENT – 4/5/00
99-0859
MONTGOMERY ISD V. DAVIS

HANKINSON: Before you get into the specific issues that your petition brought to the court, would you please procedurally and from an appellate standard of review perspective tell us how we get to those issues? In other words, what is it that we are reviewing and under what standard?

THOMPSON: I appreciate that question, and it is somewhat confusing. And it's an issue that is addressed several different ways, not only in the briefs of the parties, but in the amicus briefs submitted as well.

This is a case of first impression we believe to get to this court involving a comprehensive view hearing structure that was put in place by the legislature in 1995 with the enactment of S.B. 1. The purpose of S.B. 1 was to bide responsibility between the state and local districts with regard to educational manners.

The state very definitely took the responsibility through the accountability and accreditation system to set the standards: our outcomes; our objectives; our targets for public education and to devolve the local districts the responsibility to actually implement or carry out the functioning of the educational system.

Under this new system, one of the components was to try to streamline the hearing process. And so a new process was put in place. It's analogous and similar in many respects to the administrative procedures act, but it is specifically exempted by statute from the administrative procedures act.

The commissioner of education maintains a list of independent hearing examiners who are appointed in different cases. We believe the hearing examiners is not a decision-maker, that the sole function of the independent hearing examiner is to prepare the best possible record and present that to the board so that the board as the decision-maker can make an informed decision.

There are obviously limitations attached in statute to the review that the board has over the decision of the independent hearing examiner. Obviously on any questions of law or questions of policy, the board is not bound.

O'NEILL: Now your position hinges on the board's ability to make additional findings?

THOMPSON: There are two issues and on the issue of additional findings I want to make clear. In her original petition to the commissioner, the respondent in this case did not even contest

the ability of the board to make additional fact findings. That issue has sort of joined this case as it's gone through the process.

O'NEILL: But your argument presumes that ability?

THOMPSON: It does presume that ability.

O'NEILL: And if in fact the board has the authority to make additional findings, which is not specified in the statute, but they have that authority, but if in fact they do have that authority, then doesn't that subvert the review set forth in the statute because then you could make inferences to findings always and it would be a de novo sort of determination?

THOMPSON: I don't believe it subverts the statute. I believe that's exactly what the statute contemplates. The other view is that the function of the independent hearing examiner is in essence just a like a trial court hearing a case without a jury. And if an independent hearing examiner only has to make the findings to support his or her recommendation, then you've hamstrung the board. There is no reason for the board to even be in the process.

HANKINSON: It's the board's option whether or not to use a hearing examiner. The board could continue to conduct the hearing if the teacher requested it the way it always was with the board actually hearing the evidence and going forward?

THOMPSON: Correct. In this type of case.

HANKINSON: And in a nonrenewal case. I realize it's different for a termination. But in a nonrenewal case, the board could continue to do that, right?

THOMPSON: Correct.

HANKINSON: So if the board makes the decision to use this process, and I presume that they choose to do that for reasons like you were saying that it streamlines the process and they don't have to spend their time in 5 days in an evidentiary hearing and all of that kind of thing. And yet at the same time provision 21.259 which says what the board does when the record findings of fact and conclusions come back to the board after the hearing says that the board announces its decision via findings and conclusions and its disposition whether the contract will be nonrenewed or not. But then the subsequent provisions restrict what the board can do vis-a-vis the findings of fact and conclusions of law. Now I agree with you that they are the decision-maker. The hearing officer has no authority to nonrenew a teacher or to order renewal of her contract. But is all the hearing examiner doing is acting as a court reporter and taking the down the record, or doesn't the statute in fact put some parameters in 21.259 on the board vis-a-vis what it can do once it makes the choice to use a hearing examiner?

THOMPSON: The independent hearing examiner is much more than simply a transcriber of the testimony and the evidence. We believe that what 21.259 states is that in those cases, and there is a very narrow constriction on the board, on those cases where the independent hearing examiner actually makes findings, the board is not supposed to disturb those findings if they are supported by substantial evidence. Now that means that the independent hearing examiner should make the broadest range of findings possible and present the best view of the record to the board so that the board can make an informed decision. Because if the hearing examiner makes a finding on an issue, the board can't disturb it if it is supported by substantial evidence.

O'NEILL: But I believe you're arguing that they can find additional facts that are inconsistent with and, therefore, de facto subvert those findings. Doesn't that exempt the statutory scheme?

THOMPSON: We don't believe so. And in this particular case, we are not asserting the right to make inconsistent fact findings.

O'NEILL: Well, but aren't you? Because didn't the hearing examiners look at the two facts that you found and attach the testimony and his reasoning on why he concluded as he did?

THOMPSON: Let's look at what he said and what he didn't say. The additional fact findings, and there are three of them, one of the fact findings that the board dealt with were derogatory comments made about a student.

O'NEILL: Putting that one aside. I realize he didn't deal with that.

THOMPSON: Which very candidly ever professional witness who testified said that was inappropriate and unprofessional. And we believe that it is extremely inappropriate for the independent hearing examiner simply to leave that evidence out. Now on the other two issues, on the issue of the additional fact finding that the board made, which we believe is uncontested and not inconsistent with the fact findings made, that there were more requests for transfers out of her classes than any other...

O'NEILL: But your examiner found - didn't he deal with that and say that they had gone down and that was improving and, therefore, determined that that was insufficient to support nonrenewal?

THOMPSON: What the hearing examiner found was that in the Fall of 1995, the school year in question, that out of 6 instances there were 3 that actually resulted in transfers out of her class. And his conclusion was, I don't think that's a big deal. What he ignored was the testimony in the record about how many requests for transfers there were in that record.

HANKINSON: Maybe he didn't ignore. Maybe it was not persuasive to him and so he chose

not to make a fact finding on it. If he's acting as the finder of fact he has the ability to reject.

THOMPSON: There is no question if it is contested the hearing examiner on the evidentiary fact findings as opposed to policy making or legislative fact findings or ultimate fact findings, whatever you want to call them, that he weighs the evidence if it's contested. We believe it's uncontested that there were many more requests...

HANKINSON: But even if it's uncontested he can - it seems apparent from reviewing what the hearing examiner provided to the school board, that the hearing examiner decided that the principal was not particular credible, that the principal was out to get the teacher. Is that kind of a safe kind of characterization?

THOMPSON: There is no doubt that the hearing examiner's perspective was exactly as you characterized it.

HANKINSON: So if that were the case, and the hearing examiner after hearing these several days worth of testimony was led towards that view of the evidence that was presented, then perhaps he did not find credible the undisputed evidence about requests for transfers; and wouldn't he even in the face of undisputed evidence be free to reject that and not incorporate it in his findings of fact, and instead he incorporated as Justice O'Neill pointed out, he did deal with the area, he dealt with it in the way that he viewed the evidence?

THOMPSON: I would agree if it were contested. I am uncomfortable with the notion that an independent hearing examiner if there is uncontested evidence presented in a record can simply refuse to pass it on to the board for the board to even consider that evidence. In this particular case, the assistant principal testified that in the Fall of 1995, following immediately an open house at which Ms. Davis spoke to the parents of her class, that he had immediately received over 20 requests for transfer. And that's simply left out of the...

O'NEILL: You would agree that there were substantial evidence to support the hearing examiner determination, terminations, other than substantial evidence?

THOMPSON: There is substantial evidence to support those that are true findings of fact. With regard to finding of fact No. 17, we do not believe that's properly characterized as a finding of fact.

O'NEILL: Regardless of what it's characterized as, you would agree that there's substantial evidence to support it?

THOMPSON: I would agree that there is substantial evidence if that is a finding of fact. I understand the threshold of the substantial evidence...

ABBOTT: Let me ask you about this substantial evidence, analytical framework. So far the discussion has gone along the lines that if we apply these substantial evidence tests to what the hearing examiner did, according to the amicus brief by the Association of School Boards and according to a different paradine, the substantial evidence test does not apply to what the hearing examiner concludes. But instead is applied to what the commissioner concludes. What is your position on that? And if in fact it is applied to what the commissioner does, isn't it irrelevant then what the hearing examiner finds?

THOMPSON: It's not clear from the posture of this case whose decision is being reviewed. It is our position that as a matter of statute that by operation of statute the commissioner did in fact affirm the decision of the Montgomery ISD, and that it is the commissioner's decision that has therefore been appealed.

HANKINSON And under these cases when it's affirmed as a matter of law as opposed to by actual decision on analyzing what happened below, does that then mean that we are actually reviewing the board's decision because it became the commissioner's decision? This takes me back to my original question. Is that what we're doing?

THOMPSON: I think it's to some extent immaterial. It's a very confusing issue, but I believe you have two questions of law which obviously this court can review, which are truly legal issues and you're not bound by a prior determination. The first question of law is whether so called fact finding 17, which is simply a restatement of the policy...

HANKINSON: I understand that. But I'm just trying to figure out. We've got 5 locals of review below us. We have a hearing examiner, the board, the commissioner, the DC by statute that has actual - at each level there's a requirement for how it's to be reviewed. And it's a different one at each level. So then we go from the commissioner to the DC to the CA. And that was my threshold question is, you say that you are presenting 2 legal questions. If we answer those questions in your favor, what does our conclusion look like in this case in terms of what we are reviewing and the grounds for reversing the CA's judgment, and in fact, going with what the commissioner did vis-a-vis affirming the board's decision? I don't know what the conclusion looks likes given that review framework.

THOMPSON: I think the conclusion is that as a matter of law the characterization of finding of fact 17 is incorrect. And that as a matter of law, finding of fact 17, which purports to be a construction or interpretation or implication of board policy, is more properly characterized as either a conclusion of law or as a legislative fact finding if we were in an administrative procedures act construct and that the authority of the board to interpret its own policies is not only critical but needs to be preserved.

HANKINSON: Therefore, having decided that the board acted properly in treating that finding as a conclusion, there is substantial evidence to support the board's decision to nonrenew on the

grounds that she did not have good rapport with parents. Is that what our conclusion looks like?

THOMPSON: I believe so. And obviously if the board has the authority to make additional fact findings, that determination is much easier. Now the board we believe is entitled to look at that fact finding and say...

HANKINSON: They can reject it as not substantial evidence.

THOMPSON: Well the fact finding is that there were 3 actual transfers, not request for transfers, but 3 in a semester that actually resulted in transfers. The opinion that "I don't think that's a big deal" is not a fact finding by the independent hearing examiner. In other words, the board is entitled to decide how important that is in the context of Montgomery ISD.

O'NEILL: The fact that you chose to have the hearing examiner decide it doesn't your role change?

THOMPSON: I think the ultimate responsibility of the board is to construe and apply its own policies. The role of the board to speak for its community is a question of law. The interpretation of policies is never devolved to the independent hearing examiner.

HANKINSON: Isn't what's really before us when we get to your underlying issue a statutory interpretation - I understand you have the general policy questions - but isn't this actually a question of statutory interpretation of 21.259 of the Education Code?

THOMPSON: Yes.

HANKINSON: Now what language in that provision do you hang your hat on to say that 1) the board has the authority to make additional findings; and 2) to convert a finding of fact into a conclusion of law? What in 21.259 gives the board the authority to do that?

THOMPSON: The authority to make additional fact findings is the reserved powers. As this court said in 1996...

HANKINSON: So it's not in 21.259 - we can't look to the language of 21.259 to find that?

THOMPSON: No. And we believe the clear statutory scheme is that the broad bringing of power under what is now 11.151(b) is given to the local boards, the reservation of powers at the local level. The limitation is at the state level.

HANKINSON: But if under 21.259, the board exercises its discretion to use the hearing examiner, then by doing that it has also accepted the limitations upon itself that go with how it makes its decision under 21.259 after the independent hearing examiner forwards his or her results?

THOMPSON: Yes.

HANKINSON: That takes me back to 21.259. And my question to you again is what language in the statute are you asking us to look at that would give the board the authority to make additional findings and to treat a finding as a conclusion?

THOMPSON: With regard to the additional fact findings, the only language in 21.259 that limits the board is in those cases where the independent hearing officer actually makes fact findings. The board is not to disturb those. In any other case where an independent hearing examiner simply doesn't address an issue, there is no limitation on the board in the statute. The board is actually required under 21.258 to review the record.

HANKINSON: So your point is that because the statute doesn't address it, they have the ability to do it under their reserved power?

THOMPSON: The silence of statute works to the benefit of the local board. The reservation of power is at the local level. And absent a prohibition the authority of the board, the responsibility of the board to review the record as they are required to do by statute and to make additional fact findings we believe is inherent in the scheme.

ABBOTT: The framework for appealing a case like this is that the last decision before it goes to court is the decision made by the commissioner, correct?

THOMPSON: Correct.

ABBOTT: And because of that isn't it true that the issue at the DC level is whether or not what the commissioner did was supported by substantial evidence?

THOMPSON: That should have been the question.

O'NEILL: And the CA applied that question at the board level. Do you agree?

THOMPSON: I think that's correct. And again, I think that is the confusion as to whose decision is actually moving through the process. Our position is that it's the commissioner's decision that is under review.

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RESPONDENT

O'NEILL: If we do have to review the commissioner's decision under substantial evidence review, do you lose?

LUNGWITZ: No. And actually the standard of review cited in the amicus brief *Texas Association of School Boards*, does not give the complete picture. It's not just a substantial evidence review that the DC applies to the commissioner's decision. It's substantial evidence review or whether the commissioner applied erroneous conclusions of law. That's a big difference and that's missing in the Tasby(?) amicus brief on the standard of review from DC to the commissioner.

HANKINSON: Do you agree that the DC in fact should have reviewed the commissioner's decision, that that's really what's at issue once this left the administrative side and headed into the judicial system?

LUNGWITZ: According to the statute that is correct. And I guess the only thing my colleague and I will agree on today is that that is a little confusing: what happens when a commissioner did not issue a formal written decision. I'm rather flexible on that issue to tell you the truth. There's no doubt about it, the teacher has a right to appeal to DC, and the DC can review the commissioner's decision for erroneous conclusions of law. If the commissioner by not issuing a decision affirms the school board's decision, which concluded made erroneous conclusions of law: a) that they can add facts, or b) that a fact finding is a conclusion, those in and of themselves are conclusions of law that are freely reviewable on appeal all the way up to this court.

I think it needs to be made clear and Justice O'Neill has already picked up on it, that everything that this school board is seeking from this court to be able to do with Ms. Davis' case it could have done. But it voluntarily opted out of holding the hearing in front of itself, and instead converted it to a "subchapter F" hearing examiner case.

HECHT: If the law is that they give up substantial policy control over decisions like this by doing that, how will that affect their use of this procedure?

LUNGWITZ: They would obviously have the right not to use it next time in a nonrenewal context.

HECHT: Wouldn't that hurt teachers?

LUNGWITZ: To tell you quite frankly in the nonrenewal context very few school districts use this process. It is used of course at the right of the teacher in a mid-contract termination case. But in a nonrenewal case it is the school district's option. And I think it would actually hurt teachers more for this court to find that once that process is engaged the school district can cast it aside and do as it wishes.

ABBOTT: That doesn't happen because if you look under 21.301 when the appeal goes from what the school district does to the commissioner, the teacher has the opportunity to have the hearing before the commissioner.

LUNGWITZ: I disagree that we get a hearing in front of the commissioner in one of these cases. The commissioner shall review the board's decision to see if it's arbitrary, capricious, or lacking substantial evidence or makes erroneous conclusions of law. But there is no other hearing. And that's the whole idea of a subchapter F process that was implemented by the legislature in 1995.

ABBOTT: Under 21.301(d) it says, In conducting a hearing under this section, the commissioner has the same authority relating to discovery and conduct of a hearing as a hearing examiner has under subchapter F.

LUNGWITZ: I can tell you that I've been practicing under this law since it was implemented, and I've never seen that section used. My understanding of it is, it is used in the very limited purpose where if procedural irregularities are alleged, the commissioner has a slim chance to hold a very limited evidentiary hearing on some procedural matters.

ABBOTT: Maybe the reason you haven't seen it is because the commissioner doesn't do it. But if you look at subpart (e) it says, the commissioner may adopt rules governing the conduct of an appeal to the commissioner. So in other words, the commissioner can have a hearing and provide the teacher the opportunity with as full of a scope of a hearing as whatever the commissioner decides. Now if we have a commissioner as we may have had, and I don't know, who chooses not to have any hearings, well that's going to obviously limit the scope of review. But this does seem to provide in (d) and (e) the commissioner with the widest possible latitude to provide as meaningful of a hearing to the teacher as the commissioner may want to provide.

LUNGWITZ: I respectfully disagree. I think you have to read that in conjunction with 21.302, which talks about the evidentiary hearing before the commission and how it is limited to procedural irregularities. And if we go onto 21.303, we see here in (a), that is truly the commissioner's review authority of a school board decision when no procedural irregularities have been alleged. And it is admittedly a very deferential standard. The commissioner can only reject a school board's decision to nonrenew a teacher if it is arbitrary, capricious, unlawful, or not supported by substantial evidence. I think even my colleague might agree that that does now allow the commissioner to hold a full-blown evidentiary hearing and to relitigate all of the issues again before the commissioner.

HANKINSON: What issues did you raise before the commissioner? You didn't argue this as a procedural irregularities case?

LUNGWITZ: No.

HANKINSON: What issues did you raise to the commissioner?

LUNGWITZ: The two broad issues that this court is deciding today: whether the board can add facts; and whether the finding of fact 17 is a conclusion of law. Those are the two issues that

we briefed before the commissioner and those are the two issues that have followed.

HANKINSON: Why aren't those procedural irregularities?

LUNGWITZ: Procedural irregularities, I think those are issues of law, and I think there are other reviewing statutes that address reviewing issues of law.

ABBOTT: But don't you think that what the school board did in disregarding finding of fact 17 is a procedural irregularity?

LUNGWITZ: I think that's absolutely a matter of law, whether finding of fact...

ABBOTT: Don't you think that what the school board did with response to finding of fact 17 was a procedural irregularity?

LUNGWITZ: No, I believe it is, as a matter of law, not a procedural irregularity.

ABBOTT: So you think that what the school board did was they did something as a matter of law? But if you do something as a matter of law it could still be a procedural irregularity.

LUNGWITZ: They issued a decision that was unlawful.

ABBOTT: And that's a procedural irregularity, don't you agree?

LUNGWITZ: I do not agree. I think a procedural irregularity is perhaps whether a witness is not excluded from the room during the hearing, things of that nature, and whether that could have led to an erroneous conclusion or a biased decision. These are pure issues of law. Whether a board can look at the statutory scheme and add new facts or whether Ms. Davis' failure to get along with other people is a fact or a conclusion of law for a court to decide, those in and of themselves are pure conclusions of law.

OWEN: Let's suppose there was a lot of evidence, and the hearing examiner had just had two findings of fact that addressed a particular issue _____ or issue No. 17, but there's a lot more evidence in the record. Could the board in determining whether there was substantial evidence support what the hearing examiner had done recite the other evidence in the record that the hearing examiner did not mention in the facts and say, Based on this other evidence, we conclude that the finding is not supported by substantial evidence?

LUNGWITZ: I don't know if I'm completely following your question, but I do know that the substantial evidence test doesn't ask us to look at all the evidence that may be in favor of a contrary finding. It only asks us to look to see if the fact finding at hand is supported by more than a scintilla of evidence. And that's all. And you don't get to - I think that argument was raised earlier

this morning in a case.

OWEN: I didn't understand the substantial evidence test to be the same as legal sufficiency. Is that your position that it is?

LUNGWITZ: I think whether substantial evidence exist is a legal question.

OWEN: It's a legal question. It's not the same as our no evidence standard is it?

LUNGWITZ: It is slightly more deferential than a no evidence standard. My understanding of a no evidence standard is that if there is a scintilla of evidence, you lose on no evidence. Substantial evidence says there has to be more than a scintilla. A scintilla plus a scintilla. And you've got substantial evidence. But it's still a highly deferential standard.

OWEN: My question to you is, could the board do that? Could they say, Well the hearing examiner only looked at this evidence and there is all this evidence. And so after looking at this evidence we conclude that the hearing examiner's decision was not supported by substantial evidence?

LUNGWITZ: And my answer to you is no, they cannot do that.

O'NEILL: I believe your opposing counsel conceded that there would have been substantial evidence to support the hearing examiner's _____, that's their position depended on an additional finding.

LUNGWITZ: Yes. That's the only way they can subvert the hearing examiner's finding, is to make these additional facts. And by making additional facts from finding additional facts out of a cold record, that would subvert the substantial limitations placed on the school board by the legislature in _____.

OWEN: My question is, is the procedure I described - would you equate that with finding additional facts as opposed to reviewing the record to see if it's supported by substantial evidence?

LUNGWITZ: Absolutely.

HANKINSON: If you lose on the two issues that are presented, which I think Mr. Thompson agrees are statutory interpretation questions, what is the result in this case?

LUNGWITZ: If this court finds that whether Ms. Davis got along with certain other people is actually a conclusion of law.

HANKINSON: And that the school board can _____ that change?

LUNGWITZ: And if the school board can add facts and they would need to add those facts, otherwise we have a naked conclusion of law that has no support in the findings. They need those facts to support that conclusion. My ultimate argument is, those facts do not support that conclusion. Whether Ms. Davis used a pejorative reference to a student in a private meeting after school with a principal does nothing to prove whether she got along with parents, the community or colleagues. Whether she had six parental concerns and three requests for student transfers of the 147 students that she taught that year, does not support the finding that she lacked or failed to maintain rapport especially in the face of the hearing examiner's fact findings that there was an overwhelming - that Ms. Davis won on that issue, that the greater weight of evidence was in her favor.

HANKINSON: If substantial evidence review is this deferential, do you actually get to the point where we can - can we get to the point where we say that in fact there is notsubstantial evidence to support those findings and conclusions?

LUNGWITZ: I don't think we get to the point of applying substantial evidence to their findings. I don't think the question is whether there are three additional findings that are supported by substantial evidence. I think the question is whether their conclusion, their purported conclusion is supported by the findings. I think there is a distinction there.

HANKINSON: What does that review standard look like for us? What's that called?

LUNGWITZ: I don't know what that's called.

HANKINSON: What would it be called if we were back in the DC and we had invoked 21.307, which is the parameters for what the DC is supposed to do in reviewing the commissioner's decision? What is a decision like that look like? What standard is the TC applying?

LUNGWITZ: I think you would have to say if these are jury questions, that they don't match up with the issues in the case, and they do not support the issue.

HECHT: If the evidence in the case is that she had a terrible relationship with one parent, and there's a dispute about whether she really did or not, and the hearing examiner found that she did, but that was not enough to show ineffective working relationship or failure to maintain good rapport with parents in the finding. But the board thought that one such example like that is enough. That's grounds for nonremoval. Who gets to decide?

LUNGWITZ: The board makes the ultimate decision but they are significantly limited by the statutory scheme. Since it is a fact finding and whether she gets along with other people, we call this hearing examiner in, and in fact the school board called this hearing examiner in to run an evidentiary hearing to apply the rules of evidence, view the credibility of the witnesses...

HECHT: But to put a real fine point on it, he finds that it happened. It might not have happened, there's a dispute about it, but he finds yes indeed that disagreement did exist, and it was significant, but I don't think that's serious enough. Can he make that second finding or is that the board's decision?

LUNGWITZ: The board can review that second finding under substantial evidence standard.

HECHT: Well what is there to review? You either think it is or you think isn't.

LUNGWITZ: They would have to go back and see if that finding - his conclusion or finding that Ms. Davis got along with other people, he's going to have to have support in the record or in his recommendation by substantial evidence. If his only finding is that she - the only evidence in the case was that she had a horrible relationship with a parent...

HECHT: He makes two findings. The hearing examiner says, I find she had a terrible relationship with A. Next finding. I find that that is not a failure to have an effective working relationship or maintain good rapport with parents. Is that second finding something that he can make, or is that something the board must decide?

LUNGWITZ: Since it is a finding of fact, that is something that he makes subject to their substantial evidence review. We have to remember that in every teacher dismissal case - bar none, there is going to be someone somewhere who's got something unfavorable to say about a teacher, or we wouldn't be at the hearing in the first place.

ABBOTT: At the hearing with the hearing examiner, isn't it true that there was evidence concerning the three issues raised by the school district: (1) the teacher made use of the pejorative term: that was evidence before the hearing examiner, correct? And there was evidence before the hearing examiner that there were a lot of complaints and things like that about the teacher. Correct?

LUNGWITZ: That there were 6 parental concerns.

ABBOTT: With that being in the record before the hearing examiner, I would like to focus your attention on §21.301(c). The first two sentences I think are key. Under 21.301(c) it says the commissioner shall review the record of the hearing before the hearing examiner, which would mean all of the evidence, and the oral argument before the board of trustees. Except as provided under 21.302, which doesn't matter, the commissioner shall consider the appeal solely on the basis of the local record and may not consider any additional evidence or issue. What those two sentences mean to me is that the commissioner in making his decision can rely upon all of the evidence that was presented to the hearing examiner, is not confined to the findings of fact or conclusions of law of the hearing examiner, but has the ability to look at all of the evidence that was presented and rely upon that in the commissioner making his decision. With that being the case, why then would it not be true that what our true focus really is, is whether or not there is substantial evidence supporting

what the commissioner's conclusion was?

LUNGWITZ: I think this statute that you've called my attention to allows a commissioner to have at his disposal the entire record of the case and the argument before the board, but he's still very limited by 21.303 in reviewing the board's decision. Yes he get's the hearing examiner transcripts, he gets the board announcing of their decision, which is required to be reported by a court reporter, and he has all of these at his disposal in his office. Then he goes to 21.303 and has to look and make the determination of whether the school board's decision was arbitrary, capricious, unlawful or not supported by substantial evidence. And that is the only standard.

ENOCH: Suppose that the Montgomery ISD establishes as its policy that if a teacher fails to get along with one parent in the classroom, the teacher's contract will not be renewed. And there's a dispute as to whether or not the teacher doesn't get along with that one parent and goes to the hearing examiner. The hearing examiner finds that the teacher failed to get along with one parent. Is it still your view that if the hearing examiner says, but that does not amount to a failure to get along with parents and cites this other, does that fact finding that you call it in that second instance overcome the school district's policy that they will not be renewed if they fail to get along with one other person?

LUNGWITZ: I think in that limited instance, I could concede if the policy says one instance of failure and the hearing examiner finds one instance of failure, we may be approaching something that looks more like a conclusion of law.

ENOCH: Suppose the policy now just says the teacher's failure to get along with parents will be a basis for non-renewal. And the hearing examiner looks at the contested evidence and decides that the teacher fails to get along with some parents, but then attempts to make another finding, but this does not amount to a failure to get along with parents. Isn't that the same problem?

LUNGWITZ: It is not the same problem because the school district by its policy hasn't really defined or given any guidance to the hearing examiner. It is asking the hearing examiner to make this factual determination after weighing all of the evidence and the credibility of the witnesses.

ENOCH: What makes the ill-defined nature of the policy a fact finding as opposed to a specifically defined policy? If they specifically define what is a failure to get along with parents, you say that's a legal conclusion ultimately, but if they don't define that, they state a more general policy, then that creates it a fact issue?

LUNGWITZ: That's correct. That is the way I view it.

HANKINSON: Following up on what Judge Enoch is talking about. Let's say - I know that policy manuals are not written that specifically with the non-renewal grounds. They tend to be broader categories of wrongful conduct that's been identified. But if we do have one of those

policies that says, one instance is enough, you can be non-renewed for it, and you have evidence of one instance and let's say if we do call it a fact finding and the hearing examiner says, I find that he or she did not commit that bad act, then wouldn't the school board under 21.259(c) be free to reject or change that finding of fact because it's not supported by substantial evidence? And similarly if it were a conclusion of law, then the board of trustees would also be free to reject or change that conclusion of law since it did not reflect what the board policy was and what the evidence was. And so if we have that kind of abuse by a hearing examiner, again, I go back to statutory interpretation question. I'm trying to understand how the statute works. Is it your position that if we had that kind of record the board would have the authority to then make the changes to fulfill its policy and then non-renew the teacher under that basis, do you think that's the way it would work or am I misreading the statute?

LUNGWITZ: I don't believe there - and maybe I misunderstood your question - would be an opportunity for the school board to change its policy and then fire the teacher.

HANKINSON: No, I'm not talking about changing the policy. I'm saying change the conclusion of law. If it is a conclusion of law, and the conclusion of law is written in terms of she didn't violate that specific policy, then would the school board in that circumstance be free to change that conclusion of law to say he or she violated that policy and then in fact do their disposition which would be to non-renew?

LUNGWITZ: If the finding of fact which the school board disagrees with is not supported by substantial evidence, they can change that finding of fact, essentially reverse it, then they may make a conclusion of law also and reverse that conclusion of law. Now that conclusion would be supported by the finding. And we have a reasonable decision.

HANKINSON: And they could non-renew. And so therefore the circumstance that Judge Enoch is talking about the statute covers and allows the school board the ability to take care of that situation?

LUNGWITZ: Yes.

HANKINSON: That's the way you read the statute?

LUNGWITZ: Yes.

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REBUTTAL

HANKINSON: I want to go back to the delegation argument. What prohibits the school board from delegating this power that you are talking about? Is there anything that prohibits them from doing it since you say that we have to look outside 21.259 and look at their retained power? Is there

anything that prohibits them from delegating to the extent that your opponent wants us to read the statute?

THOMPSON: I guess in a specific case a board could make a specific determination to let someone else have the authority to construe their policy. I'm not sure that's even delegable because governmental functions aren't relegable as a general matter and the statute doesn't provide for that specific delegation. In this case there is no question that the board did not delegate the authority to construe their policy. And the commissioner has even addressed that issue in subsequent cases.

HANKINSON: But you keep talking about this as delegating its decision to construe its policy. We're talking about the decision whether or not to non-renew a teacher. And whether or not the teacher has run afoul of the grounds for renewal listed in the board policy manual. That means we've really got an adjudicative matter that's present in terms of actually deciding facts. We're at the administrative stage at this point. I'm a little bit confused about why we've crossed back over into the general policy-making area when what we're really doing is adjudicating the conduct of the teacher and making a determination on whether or not her relationship with the school district should be severed.

THOMPSON: The reason why they are inextricably intertwined is so called finding of fact 17, which by the way is almost verbatim the same as so-called conclusion of law No. 4. It's very evident that the hearing examiner wasn't sure whether this was a conclusion of law or a finding of fact. Is simply a statement of board policy in the negative? That fact finding takes away from the board...

HANKINSON: It's not a statement of board policy. It's a statement about her conduct.

THOMPSON: It is a statement of board policy.
HANKINSON: Why is that?

THOMPSON: Board policy DFBB local reasons for non-renewal: Failure to maintain an effective working relationship or maintain good rapport with parents, the community or colleagues. Finding of fact 17, Jo Ann Davis did not fail to maintain an effective working relationship or maintain good rapport with parents, the community or colleagues.

HANKINSON: But the key is, the difference is, the second thing you read have her name in it. It said that she didn't do it.

THOMPSON: The two things it had were her name and a _____. And other than that it is a construction of the policy.

HANKINSON: So why isn't the policy acting as it is the law in this case and we're just applying the law to her situation in making a determination?

THOMPSON: That statement as a fact is not an adjudicative or evidentiary fact. It is a legislative ultimate determinative fact, to use the words that are used in the context of the APA(?) The termination of ultimate facts, legislative facts, we believe are questions of law or at least mixed questions that are reserved for the policy _____.

HANKINSON: Why isn't the legislative fact the board's decision at the point in time it adopted its policy manual and said these are the grounds for non-renewal, why isn't that the legislative fact and the adjudicative fact whether or not this teacher ran afoul of those grounds for non-renewal?

THOMPSON: The interpretation of what the policy means is still a legislative fact finding, that is a policy function to give meaning to those words. Back to your example that if the hearing examiner had said, I find that three kids actually transferred in one semester, but I don't think that's a big deal. We believe that the first part of that is a legitimate fact finding. The second piece of that is not a fact finding. That is an intrusion of the role of the board to interpret and construe its own policy. In *Miller v. Houston ISD,* one of the cases that the commissioner includes in his brief, opinion which is attached, says it must be concluded that the application and interpretation of a board policy is akin to a conclusion of law and can be modified or rejected by the board. The board has the authority to redesignate findings as conclusions of law.

HECHT: The amicus says before the commissioner, the hearing examiner's fact finding proposals are no longer entitled to any presumption of validity. Do you agree with that or not?

THOMPSON: In this particular case, I do agree with that. And the reason why if you look at §21.303, there are three sections. Subsection (c) is the harmless error. There should not be a reversal for a procedural error that doesn't affect the board's ability to make a decision. Subsection (b) deals with termination cases where you are actually interrupting a property interest. This isn't that case. Subsection (a) deals with nonrenewal cases. And what it says is if the board of trustees decided not to renew a teacher's term contract, this case, the commissioner may not substitute the commissioner's judgment for that of the board of trustees unless the board's decision was arbitrary, capricious or unlawful, or is not supported by substantial evidence. So in a non-renewal case, the commissioner's review is to the board's decision, not to the independent hearing examiner's decision.

HANKINSON: And then the way that the commissioner would review this one in light of the arguments that are raised by the teacher, the teacher says, I guess that it's an unlawful decision, and looks totally at it because you couldn't do what you did and therefore because it was unlawful, I shouldn't have been nonrenewed. Is that the way it plays out?

THOMPSON: Yes. The teacher's challenge has to be not that the board's decision isn't supported by substantial evidence, but that it is in fact an unlawful decision.