



ROSENSTEIN FIST & RINGOLD

ATTORNEYS AT LAW

A.F. Ringold
 Coleman L. Robison
 J. Douglas Mann
 John G. Moyer, Jr.
 John E. Howland
 Jerry L. Zimmerman
 Frederick J. Hegenbart
 Eric P. Nelson
 Karen L. Long
 John E. Priddy
 Bryan K. Drummond
 Kent "Bo" Rainey
 Eric D. Wade
 Matthew J. Ballard
 Samantha S. Marshall
 Cheryl A. Dixon
 Brian M. Kester

Of Counsel
 Jerry A. Richardson
 Catharine M. Bashaw
 Staci L. Roberds

C.H. Rosenstein
 (1893-1990)
 Henry L. Fist
 (1893-1976)
 David L. Fist
 (1931-2008)

Copyright 2011
 Rosenstein, Fist &
 Ringold, Inc.

INSIDE THIS
 ISSUE:

<i>New Dismissal and Nonreemployment Procedures and Repeal of Trial De Novo for Career Teachers</i>	1
<i>Tenth Circuit Affirms Three Decisions for Prue School District</i>	2
<i>RFR News</i>	4
<i>RFR Speaker Showcase</i>	4

Chalkboard

www.rfrlaw.com

2011 ISSUE 3

NEW DISMISSAL AND NONREEMPLOYMENT PROCEDURES AND REPEAL OF TRIAL DE NOVO FOR CAREER TEACHERS

BY CHERYL A. DIXON

Effective August 26, 2011, substantial changes took effect in the procedures required for career teacher dismissals and nonreemployment. House Bill 1380 was signed into law on April 12, 2011 and went into effect on August 26, 2011. This bill reforms dismissal and nonrenewal procedures for career teachers by repealing the trial de novo process and requiring the State Department of Education to adopt procedures by which a school district's board of education is to conduct all teacher hearings. On July 28, 2011, the State Department of Education (SDE) issued a memorandum outlining emergency rules related to teacher due process hearing procedures. This article discusses the new due process hearing procedures for career teachers.

Certain Pretermination Procedures No Longer Required

According to the new SDE regulations, once a superintendent determines that statutory cause does, in fact, exist for the dismissal or nonreemployment of a career teacher, a superintendent is no longer required to provide the teacher notice (1) of the charges against him, (2) an explanation of the evidence against him, or (3) the opportunity to present evidence in person or writing of why the teacher should not be dismissed or nonrenewed prior to the superintendent submitting a recommendation to the board of education. Although the SDE regulations no longer require this notification be provided, RFR recommends that your district still send this notice prior to the superintendent's recommendation to the board of education.

Career teachers are still entitled to receive a copy of the superintendent's recommendation from the district's board of education, notifying the teacher of the right to a hearing before the board and the date, time and place set by the board for that hearing. The notice must still state the statutory grounds upon which the recommendation is based and the underlying facts supporting the recommendation.

Procedural Changes For Career Teacher Hearings

SDE regulations specify that the following procedures must be followed in career teacher due process hearings:

- ◆ Career teachers have the right to present witnesses at their due process hearing in person or

(Continued on page 2)

OKLAHOMA'S PIONEER IN LEGAL EXCELLENCE



NEW DISMISSAL AND NONREEMPLOYMENT PROCEDURES (CONTINUED FROM PAGE 1)

by interrogatories, affidavits, or depositions. A list of all witnesses to be presented at a hearing by either party shall be furnished to the other party at least five (5) days before the hearing.

- ◆ The board of education is now required to maintain a record, including a tape recording of the hearing and any documents or evidence presented to the board, for two (2) years from the date of the hearing. **In light of this requirement, RFR highly recommends that your district utilize a court reporter to make a record of all hearings.**
- ◆ After the board of education has reached its decision at the hearing, the board must notify the teacher in writing **within ten (10) business**

days of the hearing of its decision by certified mail, restricted delivery, return receipt requested or substitute process as authorized by law.

- ◆ The school board’s decision regarding the dismissal or nonreemployment of a career teacher is final. A trial de novo is no longer an option for a career teacher.

Although career teachers no longer are entitled to a trial de novo, there are other causes of action that remain available for a career teacher to challenge the board’s dismissal or nonreemployment decision. For example, a career teacher may file a lawsuit in district court alleging breach of contract. In such a case, the court

is limited to reviewing whether the board of education’s decision was arbitrary, meaning there was no evidence presented at the hearing upon which the board could reasonably have based its decision to dismiss or nonreemploy the teacher. The right of the career teacher to file a lawsuit in federal or state court for civil rights violations, such as a violation of due process, also remains.

In light of these new procedures it is important for your board of education to make certain all procedural safeguards are followed and that the record of testimony and evidence presented at the hearing is accurately recorded. Therefore, in addition

(Continued on page 3)

“The court found the evidence of bias speculative and was reluctant to second guess the board’s decision to cut its budget”



The United States Court of Appeals for the Tenth Circuit recently affirmed the grant of summary judgment in three lawsuits brought by former employees of the Prue School District. The lawsuits were brought by two administrators (*James/Tennison v. Prue School District, et al.*), a treasurer and part-time support employee (*Bunch v. Prue School District, et al.*), and a support employee (*Cypert v. Prue School District,*

TENTH CIRCUIT AFFIRMS THREE DECISIONS IN FAVOR OF THE PRUE SCHOOL DISTRICT

BY STACI L. ROBERDS

et al.). The Defendants in each of the three cases were the Prue School District and four members of the Prue Board of Education. Although the lawsuits differed in certain aspects, they all involved allegations of wrongful termination in violation of the Plaintiffs’ due process rights. The Defendants responded by stating that the employment actions were taken because the District was facing an unprecedented financial crisis.

In *James/Tennison*, two principals alleged their due process rights were violated because they

were not afforded an unbiased hearing before an impartial tribunal, they were denied the opportunity to confront the school board’s attorney who signed the recommendation letters for Plaintiffs’ dismissal (a recommendation which had been previously approved unanimously by the Board), and their termination hearing was a sham because there was no real financial crisis. The Tenth Circuit rejected all of these contentions. The court found the evidence of bias speculative and was reluctant to second guess the board’s decision to cut its budget, noting that

(Continued on page 3)

NEW DISMISSAL AND NONREEMPLOYMENT PROCEDURES (CONTINUED FROM PAGE 2)

tion to recommending that a court reporter be present to make a complete record of every hearing, RFR also recommends that your board of education give consideration to being represented by an attorney, independent of the district's attorney representing the superintendent and presenting the matter to the

board, to advise your board of education during the hearing. This independent attorney will ensure that the board follows the required procedures, will assist the President of the board with any evidentiary rulings that may be required during the hearing, and will make certain the board's decision is

adequately supported by the evidence presented for consideration during the hearing.

If you have any questions or require assistance with a career teacher dismissal, nonre-employment, or any other matter, please contact your district's attorney.

TENTH CIRCUIT AFFIRMS THREE DECISIONS (CONTINUED FROM PAGE 2)

"where a board makes a decision in a district's best interest, federal due process is not implicated, even if the decision may also serve board members' interest in other ways." The court was not troubled by the recommendations for dismissal being issued by the school board's attorney, indicating that "[d]ue process requires notice, but not necessarily notice from someone the employee can subsequently confront and cross-examine at a due-process hearing." Nor did the court view the due process hearing as a sham. Even though the financial crisis turned out not to be as dire as the District first thought, the benefit of hindsight did not turn the hearing into a sham that violated the Plaintiffs' due process rights.

In *Bunch*, the District voted to terminate the Plaintiff's employment as treasurer and her part-time support employee contract without holding a due process hearing. The Plaintiff asserted that her support employee contract with the District, which identified her position as Treasurer, created a protected property interest in her employment and

entitled her to a hearing. The Tenth Circuit determined that a school district treasurer who had a support employee contract "had no property interest in her employment and was not entitled to a hearing before [she] was terminated." In reaching its conclusion, the court relied upon Okla. Stat. tit. 70, § 5-114, which provides that a district treasurer serves at the pleasure of a board of education, and it determined that the district court's decision was correct in that "the Board did not have the power to waive or supersede § 5-114 by entering into a contract purporting to give [the Plaintiff] expanded rights." The court noted that this had been the law in Oklahoma for over ninety years, citing the 1917 Oklahoma Supreme Court case of *Farley v. Board of Education*.

In *Cypert*, the Plaintiff's support employee contract was non-renewed based on the district's financial situation, and her extra-duty contract was not renewed based on the District's preference to offer such contracts to teachers before support

employees. The Plaintiff alleged that her hearing did not satisfy her right to due process and the non-renewal of her extra-duty contract was based on age and gender discrimination. The Tenth Circuit determined there was not a "substantial showing of actual bias" and that the hearing was not a sham. The court concluded that the mere presence of the superintendent during the school board's executive session deliberation after the hearing did not result in a due process violation. Further, the court was unimpressed with the Plaintiff's argument that she was not allowed to confront and cross-examine the District's new treasurer regarding his financial forecast for the District. The court noted that the Plaintiff failed to show that she had sought the treasurer's attendance at the hearing or that she was "inhibited or restricted" from doing so. Finally, with regard to her extra-duty contract, the court noted that the Plaintiff "failed to establish

(Continued on page 4)



"... where a board makes a decision in a district's best interest, federal due process is not implicated, even if the decision may also serve board members' interest in other ways."



RFR NEWS

TULSA OFFICE:

525 S. MAIN, SUITE 700
TULSA, OKLAHOMA 74103
PHONE: 918.585.9211
FAX: 918.583.5617
TOLL FREE: 800.767.5291

OKLAHOMA CITY OFFICE:

2801 N. LINCOLN BLVD., SUITE 224
OKLAHOMA CITY, OKLAHOMA 73105
PHONE: 405.521.0202
FAX: 405.521.1515
TOLL FREE: 888.414.5291

Rosenstein, Fist & Ringold is pleased to announce that **Brian M. Kester** has joined the firm as an associate attorney. Mr. Kester was admitted to the Oklahoma bar in 2011. After graduating from Broken Arrow High School in 1997, Mr. Kester enlisted in the United States Air Force, where he served as a public affairs specialist until 2002. His undergraduate degree in social psychology is from Park University (B.S., magna cum laude, 2002), his graduate degree in counseling is from Campbellsville University (M.S., 2007), and his law degree is from the University of Tulsa College



Brian M. Kester

of Law (J.D., with highest honors, 2011). While in law school, Mr. Kester served on the *Tulsa Law Review* as an Articles Research Editor and was selected for the Order of the Curule Chair and the Order of the Barristers.

RFR SPEAKER SHOWCASE

Cheryl A. Dixon will be a guest lecturer at Northeastern State University, Facilities Management class, on November 1, 2011, discussing Legal Issues in School Facilities Planning, Design, and Construction.

TENTH CIRCUIT AFFIRMS THREE DECISIONS (CONTINUED FROM PAGE 3)

[the] proffered reason for not renewing her contract was a pretext for gender or age discrimination.”

The Plaintiffs in all three lawsuits also included First Amendment retaliation claims based on the fact that all of the Plaintiffs had participated in a grand jury petition previously filed against the Prue

School Board. The Tenth Circuit determined that the Plaintiffs’ general allegations failed “to identify with particularity statements or actions sufficient to satisfy their burden to identify the specific instances of speech underlying their claims.” The court also noted that any inference of retaliatory motive for the exercise of

speech was undermined by intervening circumstances—the investigation of the district’s finances and resulting financial uncertainty.

The Defendants were represented in all three cases by Rosenstein, Fist and Ringold attorneys Bo Rainey, Matt Ballard, Staci Roberds, and Cheryl Dixon.

We're on the Web:
www.rfrlaw.com

Chalkboard is a Rosenstein, Fist & Ringold publication that addresses current education law issues. *Chalkboard* is published four times a year and is sent without charge to all education clients of Rosenstein, Fist & Ringold and all other persons who are interested in education law issues. We invite you to share *Chalkboard* with your friends and colleagues. We think you will find *Chalkboard* to be informative and helpful with the difficult task of operating our educational institutions.

Chalkboard is designed to provide current and accurate information regarding current education law issues. *Chalkboard* is not intended to provide legal or other professional advice to its readers. If legal advice or assistance is required, the services of a competent attorney familiar with education law issues should be sought.

We welcome your comments, criticisms and suggestions. Correspondence should be directed to Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call us at (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.

[Please use the form on www.rfrlaw.com \(located on the Resources page\) to add or change Chalkboard mailing addresses](http://www.rfrlaw.com)