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Volume 15
Issue 1

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Chalkboard

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ABOUT ROSENSTEIN, FIST & RINGOLD

Claude H. Rosenstein began practicing law in Tulsa, Oklahoma in 1913, six years after Oklahoma became a state. Mr. Rosenstein had distinguished law partners over the years, but his association with Henry Fist, David Fist and Tony Ringold led to the establishment of Rosenstein, Fist & Ringold.

The firm has numerous long-standing clients and is proud to have represented the **Tulsa Public Schools** since 1932. Today, clients of the firm include 300 other school districts, as well as financial institutions, retailers, manufacturers, insurance groups, health care providers, state agencies, and oil and gas companies.

The firm conducts a general corporate, commercial, and litigation practice. Our emphasis is on providing each of our clients prompt, efficient, and exemplary service in the areas of: state and federal litigation; banking; bankruptcy; commercial transactions; education;

employment; environmental conditions; health care; mergers; municipal and administrative law; oil and gas; real estate; wills, trusts and estates; taxation; and workers' compensation defense.

This is the first publication of *Chalkboard* for the 2004-05 school year. With this new issue the Firm wishes to thank its clients for the privilege to work with Oklahoma educators and school districts in the past, as we look forward to a new year of challenges and opportunities.

With gratitude for your dedication and perseverance,

The Lawyers of RF&R

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CONGRATULATIONS! YOU HAVE BEEN SUED

It's going to happen. Maybe not today, maybe not tomorrow, but someday a lawsuit is coming your way. Maybe you have seen it on the horizon. Perhaps a problem situation has been brewing for some time. You may have received a tort claim. It may come out of the blue with no warning, much like a tornado. Once it arrives, you may feel like a tornado has hit you.

(Continued page 2)

Unfortunately litigation is a fact of life for educators in Oklahoma and across the nation. A contingency plan or a framework to handle these situations is a necessity in this day and age. Whether it is an EEOC charge, a federal summons and complaint, a tort claim, a request for a due process hearing, or a small claims affidavit, the bottom line is that someone wants something (usually money) from your school district, and you must respond. None of these actions, no matter how frivolous, should be ignored.

A four step plan handles the initial stages of most lawsuits or other adversarial proceedings.

1. Call your lawyer immediately! This step may seem obvious but you would be surprised how often lawsuits or other adversarial proceedings sit on a superintendent's desk for days before any action is taken to call the lawyer. Besides calling your lawyer, call your insurer. You are going to need your insurer's help eventually, so put them on notice as early as possible. Rosenstein, Fist & Ringold represents school districts and private schools across the state, and regularly handles litigation in state and federal courts, administrative proceedings and all issues related to schools. We have good working relationships with all insurers of schools in Oklahoma. We frequently tender tort claims to insurers on behalf of schools who want this firm to defend them regardless of whether we regularly represent the district.

2. Read, think and mark your calendar. Read the document thoroughly. Make sure it is about what you think it is. Put the response date on your calendar with a reminder a few days before the response date to be sure that any documentation that needs to be gathered is assembled in time for your lawyer's response. As a general rule responses to lawsuits are required within twenty (20) days of their receipt. Responses to EEOC charges are typically within thirty (30) days of their receipt. Tort claims have a ninety (90) day action/investigation period.

3. Gather documents and identify witnesses. Many times records are destroyed at the end of the school year in the ordinary course of business. Obviously destruction of records relevant to a problem situation is not something you want to do. Sometimes the records are not particularly helpful, but often they are. If they are destroyed, well, . . . just think: Enron and Arthur Andersen. Gather the documents and put them in a safe place where they will not be forgotten. Likewise, identify witnesses by name, title, home address and telephone number and a brief summary of their involvement in the situation. A little work at the front

end of the situation will help you in the long run. We suggest that any documents you generate, such as a witness list containing summaries, should be kept in the form of a letter to your school district's legal counsel. This will help maintain the confidentiality of the information that you generate. Mark these writings "Personal and Confidential."

4. Keep quiet! Do not hold a press conference. What you and your staff say about a situation can easily work its way into the local newspaper and you may be faced with an additional lawsuit. Do not make that mistake. Obviously reports must be made to the board members (this can be done in an executive session and protected by attorney/client privilege), and a pending lawsuit does not relieve a school district from Open Records Act requests. Nonetheless, public comment about a pending claim usually should be avoided. While the "Keep Quiet" rule is a good general rule, there are exceptions. Sometimes a matter is of such public importance that steps should be taken to project the school's position. In those situations a coordinated effort should be made and the message should be focused. The school's administration, board, and legal team must work together so the right message is sent out at the right time by the right people.

Litigation does not mean the end of the world. If you have a plan and act promptly, you and your school district will reap rewards as the action proceeds. Think, investigate, get help and keep quiet.

COMPLYING WITH NEW WAGE AND HOUR RULES

The U.S. Department of Labor (DOL) issued final revisions to its regulations implementing the "white collar" exemptions to the Fair Labor Standards Act (FLSA). The new rules went into effect August 23, 2004. Among other things the new and revised regulations:

- Expand employer wage-deduction options
- Establish higher-level salary requirements for most exempt employees (under the new standard test, exempt executive employees generally must be paid a salary of no less than \$455.00 per week)
- May result in the reclassification of employees who earn close to or over \$100,000 a year (such workers may be eligible for exemption under the special "highly compensated employee" test)
- Warrant a careful review of job descriptions and revisions to ensure that the description reflects the

- actual duties of workers, with an emphasis on using language that is consistent with DOL's terminology
- U Requires employers to carefully audit existing employee classifications and revise handbooks and other written policies to establish clear procedures and policies for docking the wages of exempt workers
 - U Permit disciplinary deductions in pay for exempt employees (but this would not apply in instances where state law prohibits unpaid suspensions from work)
 - U Establish a "safe harbor" rule to insulate employers from certain salary basis test errors. The safe harbor is available if the employer:
 - a. has a clearly communicated policy prohibiting improper deductions;
 - b. has a complaint mechanism in place;
 - c. reimburses employees for any wrongful deductions; and
 - d. commits to future compliance with FLSA
 - U Eliminated the former long and short tests for exemptions

The new regulations should result in every school district conducting a self-audit to ensure compliance with the new rules. In addition, every district must review and revise existing district policies governing minimum wage and overtime issues. Policies that rely on the old long and short tests to determine exempt status will need revision to remove any reference to the former tests. Policies should include the new salary basis test adopted by DOL. Additionally, districts in order to take advantage of the safe harbor provisions must adopt a specific policy prohibiting improper payroll deductions and the policy should include an employee complaint procedure providing for complaints of actual or perceived improper deductions. Likewise, districts should review existing job descriptions to ensure that all job duties are included, and that the descriptions incorporate DOL wording critical to exempt status claimed for employees. Also, care should be taken to ensure that job descriptions meet requirements imposed by the Americans with Disabilities Act.

**2004 LEGISLATION THAT
REQUIRES NEW OR REVISED
BOARD POLICIES**

Every year the Oklahoma Legislature passes legislation that requires school districts to review their policies to determine whether new policies should be developed for

approval by the board or existing policies should be revised to incorporate changes mandated by the Legislature. The following 2004 legislation requires school districts to approve new or revised policies:

HB 2294

Effective 7/1/04

Subject: Expense Reimbursement – Authorizes the board of education of each school district to reimburse meals and lodging expenses of school district students and sponsors from the general funds; requires board of education to establish a written policy on meal and travel reimbursement. Remember - all district should already have a travel and expense reimbursement policy. HB2294 permits eligible expense reimbursements to be made to students or individual non-employee sponsors.

HB 2662

Effective 7/1/04

Subject: Health Insurance – Modifies amount of flexible benefit allowance for school district employees and adjusts definitions of some fringe benefits for purpose of calculation of salary necessary to meet Oklahoma's minimum salary schedule. Districts that have policies that define salary and compensation will need to amend those policies to address these issues. (Other bills also affect health insurance issues including SB 1106 and HB 1571.)

SB 713

Effective: 6/8/04

Subject: Charter Schools – Changes timeline of notification of non-renewal of charter contract and changes first-year funding formula. This only affects school districts that have adopted policies concerning charter schools.

SB 922

Effective 7/1/04

Subject: Criminal Records Checks – Requires all applicants for Oklahoma teacher licenses to provide state and national criminal history records. Policies need to be revised by districts if the district has adopted a policy that describes its practice concerning criminal history record checks and then only if the policy does not provide for national and state criminal history records.

SB 1129

Effective 4/1/04

Subject: Student Transfers – Limits the number of school transfers made pursuant to the *Education Open Transfer Act* to one transfer annually. All districts are required to have a transfer policy and all should ensure that their existing policy is amended to adopt the no more than one annual transfer standard.

SB 1627

Effective: 9/1/04
Subject: Healthy and Fit Kids Act – Creates a *Healthy and Fit Kids Act of 2004* providing for inclusion of local community values in local schools; creates a Safe and Healthy School Advisory Committee at each public school site and expanded instruction concerning health issues. Schools must adopt a policy establishing the required committee and setting out the responsibilities of the Committee and related timelines. Alternatively, schools may amend their existing policy related to Safe Schools and combine the Safe Schools Committee and the Healthy Schools Advisory Committee.

THE LOCAL SUPPORT FOUNDATION

The Local Support Foundation (“Foundation”) is an effective entity to assist public school districts in meeting their increasing financial demands. Through a Foundation, members of the community help “share the load” of educating the community’s children. The benefits for contributors, the district, and students are easy to see:

A Foundation is inexpensive and relatively easy to create;

Contributions to the Foundation are tax-deductible;

It is an attractive charitable organization from the donor’s point of view, because it will provide educational assistance to the children in the donor’s community and, very possibly, to the donor’s children;

Administrators of the school district can have a voice in determining the procedures and goals of the Foundation; and

It enhances parental and student body involvement with the school district.

The Purpose of the Foundation

The Foundation is a non-profit corporation, trust or association with one primary purpose: to assist in providing for the education needs of the district and its student body. Because of the local involvement between the district and donors, contributions to the Foundation can be used to meet expenditures exactly where the district needs help most (new computers, uniforms, building repair, etc.), oftentimes in a way that the donor can personally see and feel good about.

Tax Aspects of the Foundation

A Foundation should be set up as a publicly supported entity – which makes contributions from individuals, corporations and estates tax deductible for the donor.

Another bonus is that the Foundation itself will not have to pay taxes on the earnings, provided that the earnings are used in accordance with the goals of supporting the district.

Creating the Foundation

Because the initial organization and filings must be done within specific guidelines in order for a district to receive the full benefits of a Foundation, an attorney experienced in tax law and establishing Foundations should be consulted prior to establishing a Foundation.

The Benefits of the Foundation

With the ever increasing need for financial assistance and the concern of insufficient state financial aid, every school district should consider how a properly established Foundation could benefit it.

REMINDER - ATTORNEY GENERAL OPINION ON USE OF REVENUE FROM VENDING CONTRACTS

In response to a request from the State Auditor and Inspector, the Oklahoma Attorney General issued an opinion concerning the use of proceeds from vending contracts. Specifically, the State Auditor asked whether Okl. Stat. tit. 70 § 5-129(B)(3), which authorizes school districts to deposit revenue from vending contracts into school activity accounts, violates the Article X, Section 17 of the Oklahoma Constitution. The Attorney General’s response, issued as Opinion No. 2003-21 on May 15, 2003, found no constitutional violation resulting from the deposit of vending proceeds into a school activity fund.

The Oklahoma Constitution requires that public funds be spent for public purposes. Public funds may not, for example, be given as gifts or used to benefit a private person or organization. The provisions of Article X, Section 17, do not cover private funds, for example those that are generated through student fund-raising activities, and the monies may be spent for any approved public or non-public purpose. The Attorney General applied a “use-of-school-property test” to determine whether monies are to be treated as public or private. Where money is received pursuant to a contract between the school district and a private entity and is derived from the use of property owned by the school district, the funds are public in nature and may only be spent for public purposes.

Whether funds are public or private is determined by the source and nature of the funds, not the account into which they have been deposited. Simply because monies are deposited into an activity account, for example, does not mean that the funds are private and free from constitutional restrictions on use. The specific account into which the funds are deposited may, however, act as a further limitation on the type of expenditure, that may be made.

Of particular interest is the Attorney General's statement regarding the determination of what constitutes a public purpose. The opinion states that this determination is a matter for the Board of Education to decide and that the decision of the Board will not be disturbed absent a showing of fraud or arbitrariness. Activity fund disbursements should be reviewed on a case-by-case basis and approved or rejected based upon whether the Board has determined that the expenditure serves a public purpose. If the expenditure furthers a legitimate interest of the school district, it should survive challenge even if made to a private or benevolent organization or if the expenditure results in an ancillary benefit to private individuals.

For additional information concerning Attorney General's Opinion No. 2003-21, contact your school district attorney.

SCHOOL FINANCE REFORMS – THE BRIGHT SIDE OF THE 2004 LEGISLATIVE SESSION

HB 2332 was effective July 1. It modifies school district record-keeping requirements, expands the time allowed for adoption of a school district's final budget, allows the use of automated record keeping, and makes a variety of other changes. Primary changes affecting school districts are listed below.

- ' Permits a school district to adopt an "orderly numerical system" of recording the issuance of checks or warrants. Districts are provided the flexibility a district desires to set up different numbering systems for different funds or different fund sub accounts. This will permit the District to better track categories of payments, more easily obtain financial data as to expenditures in these separate funds or accounts, and more easily respond to particular audit/finance inquiries. The Bill increases local district control by deleting the current mandate that all warrants be sequentially numbered, regardless of which account upon which warrants are drawn.
- ' Permits the issuance of a duplicate check or warrant for a lost or destroyed check or warrant in an amount of less

than \$1,000 based upon the affidavit of the vendor that the check or warrant has been destroyed or lost, that the lost warrant or warrant believed to have been destroyed will not be deposited if found, and that the vendor will be responsible for double the amount of the lost or destroyed check or warrant if deposit is made. A vendor need not bear the expense of paying for a security bond for the issuance of a duplicate check or warrant of less than \$1,000.

- ' Provides faster processing of a duplicate check or warrant of less than \$1,000 by permitting the vendor affidavit to be sent to the district by fax.
- ' Replaces the current requirement that boards of education approve on the first Monday in August a financial statement of the previous fiscal year with the requirement that a board approve the statement at any time selected by the board prior to September 1. This measure increases local control since the board, not state law, sets the time the board will meet in August. The Open Meeting Act permits a school board to determine the dates when the school board meets. This was the only statute that mandated a board meet on a particular day of the year. Many boards will not be meeting on the first Monday of August. The bill provides additional time to prepare the statement, and thereby increases statement accuracy.
- ' Replaces the date of the first Monday in July for preparing a report of earnings and costs in a district department for the previous fiscal year with the requirement that this report be completed at a time selected by the District prior to September 1. Again, local control and accuracy of reporting is increased.
- ' Removes the expense of publicizing a district's application to the excise board for authority to approve the temporary appropriations for the new fiscal year until the annual estimate of needs and income is approved by the county excise board. Publication was an unjustified cost because there is no mechanism to oppose temporary appropriations and a district cannot operate without approval of temporary appropriations until the annual appropriations are approved after September 1.
- ' Permits a district to issue checks instead of warrants. A treasurer of a district that approves payment by checks instead of warrants will no longer have to issue a check to the district's depository bank to purchase the warrants honored by the bank. No longer will vendors have to wonder what a "warrant" is.
- ' Permits districts to enter into overdraft protection agreements with the district's depository bank whereby the depository bank will honor checks issued by the district when cash flow does not permit the district to have sufficient funds in the amount of the checks issued. Issuance of nonpayable warrants will not be required. The bank can still not charge more than 5% of the checks honored as a fee for payment to the payees, and the district will still have to make payment to the

depository bank for payments honored and fees charged during the fiscal year in which the checks are issued. No longer will vendors and their depository banks have to try to ascertain what kind of instrument a “nonpayable warrant” is.

Activity funds need not be deposited daily but are to be deposited by the end of the next business day after receipt. Although this would appear to be a minor change, it will afford tremendous relief to district financial operations.

Financial statements need no longer contain a detailed expenditure account of funds generated by and allotted to the district through economic disadvantaged student weights in the State Aid Formula.

Requires the county excise board to notify the district when the district’s estimate of needs and probable income has been approved as fiscal year appropriations. Again, this is an improvement that would appear to be minor but will be received with great joy by financial officers who will no longer have to hound the county clerk every day to determine if the district’s appropriations have been approved to find out when the time period for approving the annual budget has started.

Permits a district to accept vendor invoices by fax or electronic means as an alternative to hand-delivery or mail.

Permits a district to approve automated record-keeping procedures.

Permits a district to disburse payments by Automated Clearing House, bank account debit system, wire transfer, or automated payment system.

Permits a district to develop district controls as approved by the district’s auditor.

Permits short-term bonds to pay for web-based software subscriptions that continually update software whereas current law restricts bond payments for the no longer used system of updating software systems through the purchase of new system discs.

Provides that prior to assessing a Fund Balance State Aid penalty, “all federal funds” will be deducted from the district’s fund balance.

Permits districts to proceed to submit claims for federal reimbursement funds available to the district prior to the end of the fiscal year without fear that receipt of federal funds will count against the district in a fund balance penalty. Ensuring a district is not imposed with a reduction in State Aid because of receipt of federal funds complies with federal law that federal funds cannot supplant any revenue received from state or local sources. The bill removes a state law penalty that could result in a district having to reimburse the federal government for federal funds replaced by state revenue, thereby resulting in both a loss of State Aid and federal funds.

Permits a district to set an earlier date than September 30 to close prior fiscal year unencumbered balances.

Removes the requirement that districts that keep unencumbered balances for the prior fiscal year open until September 30 must pay the cost of publishing this notice.

Provides for criminal and civil liability for district treasurers when facts indicate willing and knowing acts in violation of the law; the standard established is the same applied to other officials.

MANDATORY PRISON PURCHASE

Oklahoma Stat. tit. 57 §549.1 requires that school districts purchase prison industry goods and services. The purchase is conditioned on the goods/services being the lowest bid.

These prison industry products, produced under the name of Oklahoma Correctional Industries (“OCI”), are detailed in a CD catalog that may be obtained by contacting the OCI Customer Service Department at 1-800-522-3565 (also available on line at <http://www.state.ok.us/~osi/>). School districts may also purchase items or services by direct order without competitive bidding at the above number.

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.