

No. 16-116818-A

IN THE SUPREME COURT OF THE STATE OF KANSAS

SALLIE A. SCRIBNER AND
MARK E. MCNEMEE,
Plaintiffs-Appellants,

vs.

BOARD OF EDUCATION OF
U.S.D. No. 492, FLINTHILLS,
BUTLER COUNTY, KANSAS,
Defendant-Appellee,

AND

THE STATE OF KANSAS,
Intervenor.

BRIEF OF APPELLANTS

Appeal from the District Court of Butler County, Kansas
Honorable, Charles M. Hart, Judge
District Court Case No. 15-CV-243

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I. NATURE OF THE CASE

This is a case challenging the constitutionality of the 2014 amendments to the Teacher Due Process Statutes, K.S.A. 72-5436 *et seq.*, enacted as part of 2014 House Bill 2506 (HB 2506). Specifically, HB 2506 amended the Due Process Act by deleting the phrase, “any professional employee who is required to hold a certificate to teach in any school district” from the definition of “Teacher” in K.S.A. 72-5436(a), and the phrase “board of education of any school district” from the definition of “Board” in K.S.A. 72-5436(b). The effect of these amendments was to remove elementary and secondary school teachers in the school districts of the state from the protections of the Teacher Due Process Act.

The Plaintiffs-Appellants are teachers who were employed by the Defendant-Appellee Board of Education of U.S.D. No. 492. The Plaintiffs-Appellants had earned due process rights in their continued employment with the Defendant-Appellee well before the 2014 Due Process Act amendments were enacted. At the end of the 2014-2015 school year, after the 2014 Due Process Act amendments became effective, the Plaintiffs-Appellants were both notified by the Board that their contracts of employment would not be renewed for the next school year. The Plaintiffs-Appellants’ written notices of nonrenewal from the Board contained neither the reasons for their nonrenewals, nor did the Board advise the Plaintiffs-Appellants that they had any right to a hearing before an impartial due process hearing officer. Although the Plaintiffs-Appellants have previously earned the right to due process on the nonrenewal of their teaching contracts with the Board, the Board took the position that the enactment of the

2014 Due Process Act amendments stripped the Plaintiffs-Appellants of those rights.

The Plaintiffs-Appellants filed suit for Declaratory Judgment and Breach of Contract in Butler County district court asking the court to hold that the 2014 Teacher Due Process Act amendments were unconstitutional as a violation of the Plaintiffs-Appellants' due process rights. Plaintiffs-Appellants also asked the district court to find that the District, by not providing them adequate notice and a hearing as provided in K.S.A. 72-5438 through K.S.A. 72-5443, violated Plaintiffs-Appellants' continuing contract right when it failed to employ them for the 2015-2016 school year.

ISSUES ON APPEAL

- 1. ARE THE 2014 AMENDMENTS TO THE TEACHER DUE PROCESS ACT, K.S.A. 72-5436 ET SEQ., UNCONSTITUTIONAL AS A VIOLATION OF THE DUE PROCESS RIGHTS OF TENURED TEACHERS IN KANSAS SCHOOL DISTRICTS?**

- 2. DID THE DEFENDANT-APPELLEE U.S.D. NO. 492 VIOLATE THE PLAINTIFFS-APPELLANTS' CONTINUING CONTRACT RIGHT BY FAILING TO EMPLOY THEM FOR THE 2015-2016 SCHOOL YEAR AND THEREAFTER?**

STATEMENT OF FACTS

This case was submitted for a decision by the Butler County District Court on the parties' Motion for Summary Judgment based on facts stipulated by the

parties. The court made no factual findings of its own. The facts, as stipulated by the parties, are the following:

1. The Defendant-Appellee Board of Education of Unified School District No. 492, Flinthills, Butler County, KS (Board or School District), is duly organized pursuant to Article 6, Section 5 of the Kansas Constitution and Chapter 72 of the Kansas Statutes Annotated. (R. I, 96.)

2. Plaintiff-Appellant Sallie A. Scribner was first employed as a teacher by the defendant U.S.D. No. 492 beginning with the 1997-1998 school year. (R. I, 96.)

3. Ms. Scribner had been continuously employed as a teacher by the School District for 18 consecutive years, from the beginning of the 1997-1998 school year through the end of the 2014-2015 school year. (R. I, 96.)

4. Plaintiff-Appellant Mark E. McNemee was first employed as a teacher by U.S.D. No. 492 beginning with the 1999-2000 school year. (R. I, 97.)

5. Mr. McNemee had been continuously employed as a teacher by the School District for 16 consecutive years, from the beginning of the 1999-2000 school year through the end of the 2014-2015 school year. (R. I, 97.)

6. May 15, 2015, was the third Friday in May 2015. (R. I, 97.)

7. At the May 12, 2015, meeting of the Board of Education of U.S.D. No. 492, the Board adopted resolutions directing that Plaintiffs-Appellants be given notice of the Board's intent to not renew their employment contracts for the 2015-2016 school year. (R. I, 97.)

8. The Board served Plaintiffs-Appellants with written notices of its intent to not renew their contracts for the 2015-2016 school year in notice letters from Stephanie Girty, the Clerk of the Board, on May 12, 2015. (R. I, 97.)

9. House Bill 2506 (HB 2506) was introduced into the state House of Representatives on January 27, 2014. (R. I, 97; 2014 Kansas House Journal, p. 1621.)

10. HB 2506 was an act to repeal K.S.A. 72-60b03 relating to the expiration provision of the Midwestern Higher Education Compact Act. (R. I, 97; 2014 House Journal, p. 1621.)

11. On January 28, 2014, HB 2506 was referred to the House Education Budget Committee. (R. I, 97; 2014 House Journal, p. 1626.)

12. A hearing on HB 2506 was held in the House Education Budget Committee on February 19, 2014. (R. I, 98; House Actions Report, p. 211.)

13. HB 2506 was passed without amendment by the House by a 122-1 vote on February 26, 2014. (R. I, 98; 2014 House Journal, p. 1791; House Actions Report, p. 211.)

14. That same day, February 26, 2014, HB 2506 was introduced into the Senate. (R. I, 98; 2014 Senate Journal, p. 1641; House Actions Report, p. 211.)

15. On February 27, 2014, HB 2506 was referred to the Senate Committee on Ways and Means. (R. I, 98; 2014 Senate Journal, p. 1661; House Actions Report, p. 211.)

16. At the April 1, 2014, meeting of the Senate Committee on Ways and Means, the committee voted to remove the contents of HB 2506 and replace it with the contents of S.B. 452, creating Senate Substitute for HB 2506. (R. I, 98; Minutes of the Committee on Ways and Means, Tuesday, April 1, 2014, p. 5.)

17. The original version of Senate Substitute for HB 2506 which was passed by the Senate Ways and Means Committee on April 1, 2014, contained no provisions that amended the Teacher Due Process Act, K.S.A. 2013 Supp. 72-5436 *et seq.* (R. I, 98; 2014 Senate Journal, p. 1942.)

18. On Thursday, April 3, 2014, the Senate, having resolved itself into the Committee of the Whole, voted multiple times to amend S. Sub. for HB 2506. (R. I, 98; 2014 Senate Journal, pp. 1986-2006.)

19. The last of the amendments to S. Sub. for HB 2506 approved by the Senate on Thursday, April 3, 2014, was a proposal by Senator Arpke which made amendments to the Teacher Due Process Act, K.S.A. 2013 Supp. 72-5436 *et seq.* (R. I, 98-9; 2014 Senate Journal, pp. 1994-2006.)

20. No committee hearings were held in the Senate regarding Senator Arpke's amendments to Senate Sub. for HB 2506. (R. I, 99; House Actions Report, pp. 211-212.)

21. Senator Arpke's amendments had not been considered by either house of the Kansas legislature before they were added to S. Sub. for HB 2506 on April 3, 2014. (R. I, 99.)

22. After debate, Senate Substitute for HB 2506, as amended, was passed by the Senate on April 3, 2014, by a vote of 23 to 17. (R. I, 99; 2014 Senate Journal, p. 2005.)

23. On Friday, April 4, 2014, the House voted to nonconcur to S. Sub. for HB 2506, as amended, and requested that a conference committee be appointed. (R. I, 99; 2014 House Journal, p. 2185.)

24. A conference committee consisting of three members of each legislative body was appointed on Friday, April 4, 2014, to reconcile the version of HB 2506, which had been passed by the House and S. Sub. for HB 2506, as amended, which had been passed by the Senate. (R. I, 99; 2014 House Journal, pp. 2185; 2014 Senate Journal, p. 2010.)

25. On Saturday, April 5, 2014, the conference committee failed to reach agreement on S. Sub. for HB 2506, as amended. On Sunday, April 6, 2014, the conference committee report to agree to disagree was adopted by both legislative bodies and a second conference committee was appointed. (R. I, 99; 2014 House Journal, p. 2294; 2014 Senate Journal, p. 2243.)

26. Later on Sunday, April 6, 2014, the second conference committee reached agreement on S. Sub. for HB 2506, as amended, when the House acceded to all Senate amendments. The second conference committee issued its conference committee report. (R. I, 100.)

27. After debate, the House voted to adopt the second conference committee report on S. Sub. for HB 2506 later on April 6, 2014, by the vote of Yeas 63 to Nays 57. (2014 House Journal, pp. 2294, 2342.) That vote approved

S. Sub. for HB 2506, as amended, including Senator Arpke's amendments. (R. I, 100.)

28. After debate, the Senate also voted to adopt the second conference committee report on S. Sub. for HB 2506 on April 6, 2014, by the vote of Yeas 22 to Nays 16. (2014 Senate Journal, p. 2292.) That vote approved S. Sub. for HB 2506, as amended, including Senator Arpke's amendments. (R. I, 100.)

29. Governor Brownback signed S. Sub. for HB 2506, as amended, on April 21, 2014. (R. I, 100; 2014 House Journal, p. 2347.)

30. Senate Sub. for HB 2506, as amended, took effect and was in force from and after its publication in the Kansas Register. (R. I, 100; 2014 Kansas Session Laws, Ch. 93, § 68.)

31. Senate Sub. for HB 2506 was published in the Kansas Register on May 1, 2014. (R. I, 100; 33 Kansas Register, No. 18, May 1, 2014, pp. 438-455.)

32. K.S.A. 2013 Supp. 72-5436, 72-5437, 72-5438, 72-5439, 72-5445, and 72-5446 of the Teacher Due Process Act were amended by S. Sub. for HB 2506 effective July 1, 2014. (R. I, 100; 2014 Kansas Session Laws, Ch. 93, § 67.)

ARGUMENTS AND AUTHORITIES

ISSUE 1: ARE THE 2014 AMENDMENTS TO THE TEACHER DUE PROCESS ACT, K.S.A. 72-5436 ET SEQ., UNCONSTITUTIONAL AS A VIOLATION OF THE DUE PROCESS RIGHTS OF TENURED TEACHERS IN KANSAS SCHOOL DISTRICTS?

Standard of Appellate Review

This Court’s review of Issue 1, which addresses the constitutionality of the 2014 amendments to the Teacher Due Process Act, K.S.A. 72-5436 *et seq.*, is unlimited. “Appellate courts conduct unlimited review of questions regarding a statute’s constitutionality because they are issues of law.” *Miller v. Johnson*, 295 Kan. 636, 647, 289 P.3d 1098 (2012) (citing, *Brennan v. Kansas Insurance Guaranty Ass’n*, 293 Kan. 446, 450, 264 P.3d 102 (2011)).

A. Government May Not Deprive Any Person of Property Without Due Process of Law

The 14th Amendment to the United States Constitution provides, in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;

The Kansas Constitution provides much the same protection:

[T]he Kansas Supreme Court has said for nearly a century that sections 1 and 2 of the Kansas Constitution Bill of Rights have ‘much the same effect’ as the Due Process and Equal Protection Clauses of the United States Constitution. *State v. Limon*, 280 Kan. 275, 283, 122 P.3d 22 (2005); *State ex rel. Stephan v. Parrish*, 257 Kan. 294, Syl. ¶ 5, 891 P.2d 445 (1995); *State ex rel. Tomasic v. Kansas City, Kansas Port Authority*, 230 Kan. 404, 426, 636 P.2d 760 (1981); *Manzanares v. Bell*, 214 Kan. 589, 602, 522 P.2d 1291 (1974); *Henry v. Bauder*, 213 Kan. 751, 752-53, 518 P.2d 362 (1974); *Tri-State Hotel Co. v. Londerholm*, 195 Kan. 748, Syl. ¶ 1, 408 P.2d 877 (1965); *State v. Wilson*, 101 Kan. 789, 795-96, 168 Pac. 679 (1917).

Hodes & Nauser, MDs v. Schmidt, 52 Kan. App. 2d 274, 275, 368 P.3d 667 (2016), *rev. granted* 304 Kan. No. 1. As applied to tenured teachers under the Teacher

Due Process statutes, K.S.A. 72-5436 *et seq.*, the 2014 amendments to the Due Process statutes enacted as part of HB 2506 (2014) constitute a taking of those teachers' property without due process of law in violation of the Due Process provisions of the 14th Amendment and the Kansas Constitution.

**B. Tenured Teachers in Kansas Had a
Property Interest in Continued Employment Prior to July 1, 2014**

This Court has long held that a public employee in Kansas who may be discharged only “for cause” has a property interest in continued employment. *McMillen v. U.S.D. No. 380, Marshall County*, 253 Kan. 259, 263-64, 855 P.2d 896 (1993) (citing, *Kosik v. Cloud County Community College*, 250 Kan. 507, 512, 827 P.2d 59 [1992]); *Gorham v. City of Kansas City*, 225 Kan. 369, Syl. ¶ 1, 590 P.2d 1051 (1979).

The hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except “for cause.” *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978); *Goss v. Lopez*, 419 U.S. 565, 573-574 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 576-578 (1972). Once that characteristic is found, the types of interests protected as “property” are varied and, as often as not, intangible, relating “to the whole domain of social and economic fact.”

Logan v. Zimmerman Brush Co., 455 U.S. 422, 430, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982).

The Kansas courts have consistently held that within the statutory scheme of the Kansas Due Process statute, K.S.A. 72-5436 *et seq.*, a tenured teacher may be terminated or nonrenewed only if good cause is shown. *In re Due Process Hearing of McReynolds*, 273 Kan. 514, 519, 44 P.3d 391 (2003) (citing, *Coats v.*

U.S.D. No. 353, 233 Kan. 394, 397, 662 P.2d 1279 [1983]); *U.S.D. No. 500 v. Robinson*, 262 Kan. 357, Syl. ¶ 2, 940 P.2d 1 (1997); *Gillett v. U.S.D. No. 276*, 227 Kan. 71, Syl. ¶ 1, 605 P.2d 105 (1980). The Kansas courts have concluded, therefore, that a tenured Kansas teacher’s right to continued employment under the Due Process statute is a property right subject to the protections of due process. *McMillen*, 253 Kan. at Syl. ¶ 5; *Kelly v. Kansas City, Kansas Community College*, 231 Kan. 751, 760, 648 P.2d 225 (1982); *Bogart v. Unified School District*, 432 F. Supp. 895, 903 (D. Kan. 1977); *Rettie v. U.S.D. No. 475*, 38 Kan.App.2d 517, 520, 167 P.3d 810, (2007), *rev. denied* 286 Kan. 1179 (2008); *Baughman et al. v. U.S.D. No. 492*, 27 Kan.App.2d 888, 890, 10 P.3d 21 (2000).

Before the 2014 amendments, once a teacher had achieved tenured status in a school district, *i.e.*, satisfied the “years of experience” requirement of K.S.A. 72-5445, he or she is vested in a due process right under the Teachers Due Process Act. *Rettie v. U.S.D. No. 475*, 38 Kan.App.2d at Syl. ¶ 5. Teachers who have not yet satisfied the “years of experience” requirement of K.S.A. 72-5445(a) do not have a vested due process right in continued employment, but only an expectation of future right. Plaintiff Sallie Scribner became tenured with a property right in her continued employment by the Board no later than May 1, 2000. (K.S.A. 2002 Supp. 72-5437(a), 72-5445(a)(1)(A).) Plaintiff Mark McNemee became tenured with a property right in his continued employment by the Board no later than May 1, 2002. *Id.*

C. The 2014 Amendments to the Due Process Act Should Be Applied Prospectively Only

At the end of its 2014 session, the Kansas legislature faced a deadline to increase school funding. Earlier that year, the Kansas Supreme Court had declared certain aspects of the school funding system unconstitutional and warned that the necessary funds had to be appropriated by the legislature or it would strike down a key school funding statutory provision. *Gannon v. State*, 298 Kan. 1107, 1198, 319 P.3d 1196 (2014). In response to this Court's directive of March 7, 2014, the 2014 legislature quickly enacted Senate Substitute for HB 2506. *Gannon v. State*, 303 Kan. 682, 689, 368 P.3d 1024 (2016).

After all opportunity for hearings and testimony on the bill had passed, the Senate voted multiple times on the floor of the Senate to amend HB 2506, the last of which was a proposal by Senator Arpke to amend the Teacher Due Process Act, K.S.A. 2013 Supp. 72-5436 *et seq.* (R. I, 98-9; 2014 Senate Journal, pp. 1986-2006). The legislature passed Sen. Sub. for HB 2506, as amended, and Governor Brownback quickly signed it on April 21, 2014. (R. I, 100; 2014 House Journal, p. 2347).

Among the amendments to the Due Process statutes, the legislature amended K.S.A. 2013 Supp. 72-5436(a) to delete the phrase "any professional employee who is required to hold a certificate to teach in any school district" from the definition of "Teacher" used in the Teacher Due Process Act. 2014 Kan. Sess. Laws, Ch. 93, § 49. The legislature likewise amended K.S.A. 2013 Supp. 72-5436(b) to delete the phrase "board of education of any school district" from the definition of "Board" used in the Teacher Due Process Act. *Id.* The effect of

these amendments was to remove elementary and secondary school teachers in Kansas from the purview of the fair and efficient dismissal procedures established by the Due Process Act. An essential question is whether the 2014 Due Process Act amendments apply retroactively so as to divest tenured teachers of their property right to continued employment with their boards of education.

The Defendant-Appellee Board of Education has always taken the position that the 2014 amendments have retroactive effect. When the Board nonrenewed the Plaintiffs-Appellants' contracts at the end of the 2014-2015 school year, the Board's Notices of Nonrenewal to the Plaintiffs-Appellants did not contain the reasons for their nonrenewals, nor a notice that they were entitled to a hearing on their nonrenewals, as would be required if the 2014 Due Process amendments were to apply prospectively. (R. I, 132-133); K.S.A. 72-5438(a). Further, the Board explicitly asserts that the 2014 amendments have retroactive effect:

Defendant specifically denies . . . that plaintiffs were "tenured" teachers after July 1, 2014; that plaintiffs had any protected property interest in their employment after that date; and that they were in any way deprived of their right to constitutional due process of law or had any protected property interest in continued employment with the Board after July 1, 2014. (R. I, 29, ¶ 2.)

After Chapter 93 of the 2014 Session Laws of Kansas became effective on July 1, 2014, plaintiffs did not have any property interest in their employment (R. I, 30, ¶ 5.)

It is specifically denied that Chapter 93 of the 2014 Session Laws of Kansas did not eliminate [sic?] any property right plaintiffs may have previously had in their employment contracts. (R. I, 31, ¶ 6.)

The Kansas courts have consistently held that a statute operates prospectively unless its language clearly indicates that the legislature intended it to operate retroactively. *Norris v. Kansas Employment Security Bd. of Review*,

303 Kan. 834, 841, 367 P.3d 1252 (2016) (quoting *State v. Williams*, 291 Kan. 554, Syl. ¶ 1, 244 P.3d 667 [2010].); See also, *Brennan v. Kansas Insurance Guaranty Ass'n*, 293 Kan. 446, 460, 264 P.3d 102 (2011); *Harding v. K.C. Wall Products, Inc.*, 250 Kan. 655, Syl. ¶ 4, 831 P.2d 958 [1992]). There is no explicit statutory language in HB 2506 that indicates the legislature intended the 2014 Due Process Act amendments to operate retroactively. 2014 Kan. Sess. Laws, Ch. 93, §§ 49-54.

Kansas courts also distinguish between substantive and procedural statutes:

a “statutory change [that] does not prejudicially affect the substantive rights of the parties and is merely procedural” in nature may apply retroactively. 291 Kan. 554, Syl. ¶ 1. “Procedural laws relate to the “machinery for carrying on the suit, including pleading, process, evidence, and practice” and “the mode or proceedings by which a legal right is enforced, that which regulates the formal steps in an action.”” *Brennan v. Kansas Insurance Guaranty Ass'n*, 293 Kan. 446, 461, 264 P.3d 102 (2011) (quoting *Resolution Trust Corporation v. Fleischer*, 257 Kan. 360, 366, 892 P.2d 497 [1995]). In contrast, “[s]ubstantive laws give or define the right, give the right or denounce the wrong, or create liability against a defendant for a tort committed.” *Brennan*, 293 Kan. at 461.

Norris v. Kansas Employment Security Bd. of Review, 303 Kan. 834, 841-42, 367 P.3d 1252 (2016).

Legislatures may by express provision make procedural laws retroactive because no property rights are involved. A different rule applies, however, to substantive laws. They affect vested rights and are not subject to retroactive legislation which would constitute the taking of property without due process. *Harding*, 250 Kan. at Syl. ¶ 4.

See also, *Holt v. Wesley Med. Center*, 277 Kan. 536; 548, 86 P.3d 1012 (2004); *Rios v. Board of Public Utilities of Kansas City*, 256 Kan. 184, 190, 883 P.2d 1177 (1994).

The Due Process Act contains both procedural and substantive provisions. The Act specifies the procedures a tenured teacher is entitled to on termination or nonrenewal. K.S.A. 72-5438 through 72-5443. But it also contains substantive provisions that give and define the procedural rights. The K.S.A. 72-5436 defines the category of persons who can acquire the rights, and K.S.A. 72-5445 specifies how those rights are acquired.

HB 2506 left the actual procedures afforded in K.S.A. 72-5438 through 72-5443 virtually intact. 2014 Kan. Sess. Laws, Ch. 93, §§ 51-52. What HB 2506 did was to remove teachers in Kansas school districts from the protections of the Act. 2014 Kan. Sess. Laws, Ch. 93, § 49. Because substantive laws give or define rights, the legislature's amendment to the definition of "teacher" and "board" in K.S.A. 72-5436 was a change to a substantive statute that made school district teachers ineligible to acquire a property right in continuing employment with a school district from July 1, 2014, forward.

Furthermore, retroactive application of even procedural statutes cannot be sustained if in doing so vested rights are affected:

Although procedural statutes may be applied retroactively, retroactive application is not an absolute. Such application is inappropriate if new legislation affects a vested right. *Brennan*, 293 Kan. at 460. . . . '[W]hile we have applied the general rule that a legislature may retrospectively modify the remedies by which rights are enforced, we have not done so when the modification has the

practical effect of abrogating the right.’ *Owen Lumber Co. v. Chartrand*, 276 Kan. 218, 225, 73 P.3d 753 (2003).

Norris v. Kansas Employment Security Bd. of Review, 303 Kan. 834, 842, 367 P.3d 1252 (2016).

It is settled that the constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. In determining constitutionality, it is the court’s duty to uphold a statute under attack rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. Statutes are not stricken down unless the infringement of the superior law is clear beyond substantial doubt.

Holt v. Wesley Med. Center, 277 Kan. 536; 542-43, 86 P.3d 1012 (2004) (citing *State ex rel. Tomasic v. Unified Gov. of Wyandotte Co./Kansas City*, 264 Kan. 293, 300, 955 P.2d 1136 [1998]).

Retroactive application of the 2014 Due Process Act amendments constitutes the taking of property without due process. This Court has the responsibility to construe the 2014 Due Process Act amendments as constitutional, if there is any reasonable way to do so. This can be done by giving the 2014 Due Process Act amendments prospective application only. Prospective application of the 2014 Due Process Act amendments means that when the Board nonrenewed Plaintiffs-Appellants’ contracts at the end of the 2014-2015 school year, they were tenured and entitled to the protections of the Due Process statutes.

**D. K.S.A. 72-5444 Does Not Act to Prevent Teachers
From Having a Vested Property Right Under K.S.A. 72-5436 *et seq.***

The district court, however, agreed with the Board by holding that the 2014 Due Process Act amendments apply retroactively:

The Court subsequently adopts defendant's Conclusions of Law 1 through 7 inclusive; finding, in summary, the text of the law is clear and unambiguous. After July 1, 2014, the procedures in K.S.A. 72-5438, *et seq.*, no longer apply to any K-12 teachers. (R. I, 211; R. II, 5, lines 15-20.)

Essentially, the district court held that the 2014 Due Process Act amendments are retroactive enactments. Thus, the Due Process Act amendments are statutory changes that prejudicially affect the substantive rights of tenured teachers in Kansas school districts.

The district court held that the Plaintiffs-Appellants did not have a vested right in continued employment as tenured teachers. The court, adopting the Defendant-Appellee's proposed conclusions of law, held:

This Court finds the plaintiffs are requesting this Court do exactly what K.S.A. 72-5444 expressly prohibits: Declare plaintiffs had a, quote, vested right, unquote, which was not subject to amendments or nullification by the legislature. K.S.A. 72-5444 makes clear plaintiffs had no such right. (R. I, 211; R. II, 5, 6-7.)

K.S.A. 72-5444 provides:

Nothing in this act shall be construed to create any right, or to authorize the creation of any right, which is not subject to amendment or nullification by act of the legislature. Nothing in this act and no amendment or repeal of this act or any part thereof shall be construed to constitute an impairment of any existing contractual right.

K.S.A. 72-5444 was enacted as part of the original Due Process Act in 1974. 1974 Kan. Sess. Laws, Ch. 301, § 9. K.S.A. 72-5444 has not been

amended since it was first enacted, nor has any reported court decision interpreted the effect of this provision since it was enacted.

Similar statutes are found elsewhere in Kansas law: K.S.A. 72-5397 (1980 Kan. Sess. Laws, Ch. 213, § 3, authorizing school district early retirement incentive programs); K.S.A. 72-5454 (1981 Kan. Sess. Laws, Ch. 274, § 4, school administrator contract nonrenewal procedure); K.S.A. 74-4914(5) (2008 Kan. Sess. Laws, Ch. 113, § 12, working after KPERS retirement); K.S.A. 74-4914(7)(g) (2015 Kan. Sess. Laws, Ch. 77, § 2, working after KPERS retirement); and K.S.A. 74-4937(3) (2009 Kan. Sess. Laws, Ch. 137, § 2, working after KPERS retirement). No reported Kansas case has interpreted the effect of any of these provisions.

The Kansas Attorney General had the opportunity to interpret K.S.A. 72-5397 dealing with school district early retirement incentive programs. Attorney General Opinion, No. 95-049. There, the Attorney General opined,

K.S.A. 72-5397 states “[n]othing in [K.S.A. 72-5395 *et seq.*] shall be construed to create any right, or to authorize the creation of any right, which is not subject to amendment or nullification by act of the legislature.” While it would appear that K.S.A. 72-5397 reserves to the state the authority to amend or nullify early retirement incentive programs, such authority must be reviewed in light of the court’s determination regarding the interests of public employees in governmental retirement programs. *Id.*

The Attorney General concluded that contract rights under section 10 of article 1 of the United States Constitution could be created that could not be nullified by act of the legislature, despite the legislature’s reservation of authority under K.S.A. 72-5397. *Id.*

As discussed earlier, this Court has held numerous times that tenured teachers under the Due Process Act had a property interest in continued employment under the Act. *See, e.g. McMillen v. U.S.D. No. 380, Marshall County*, 253 Kan. 259, Syl. ¶ 5, 855 P.2d 896 (1993). These property rights cognizable under the 14th amendment of the United States Constitution should not be nullified, except prospectively, by subsequent legislation without due process. Interpreting K.S.A. 72-5444 as reserving to the legislature the right to amend or nullify a property right found under the act, but prospectively only, would both give effect to this provision, while ensuring that such amendments do not constitute the taking of property without due process.

Further, the district court should not have interpreted K.S.A. 72-5444 as necessarily expressing the same legislative intent as it did in 1974. Certainly, K.S.A. 72-5444 can be said to have expressed the intent of the 1974 legislature, which first enacted the Due Process Act. The 1974 enactment gave tenured teachers procedural rights to notice and a hearing on termination or nonrenewal, the 1974 enactment retained for the board of education the final decision-making authority with respect to that termination or nonrenewal. 1974 Kan. Sess. Laws, Ch. 301, § 8. Further, as originally enacted, the due process hearing panel established under the Due Process Act was advisory only in that it issued a written “recommendation” that was submitted to the board and the teacher. *Id.* The board considered the hearing committee’s recommendation, but the board was free to disregard the panel’s decision—the board retained the

authority to make the final decision to nonrenew or retain the teacher, subject to appeal to district court. *Id.*

This changed in 1984 when the legislature amended the Act first by changing the statute's reference to the hearing committee's decision as an "opinion" rather than as a "recommendation." 1984 Kan. Sess. Laws, Ch. 267, § 2(a). The legislature further amended the statute to require the board of education to "adopt the opinion as its decision in the matter" when the members of the hearing committee were unanimous in that opinion. *Id.* at § 2(b). Although the board of education still made the final decision when the hearing panel was not unanimous, after 1984, the unanimous 3-person hearing committee, not the board of education, had the authority to make the final decision whether to terminate or nonrenew a teacher.

The legislature again amended the Due Process Act in 1991 in which it transferred the remaining authority to make the final decision to terminate or nonrenew a tenured teacher from the board of education to the 3-person hearing committee. The legislature eliminated all remaining references to the hearing committee's written opinion as a "recommendation" to the board, and it made the committee's written opinion binding on the board regardless of whether the opinion was unanimous. 1991 Kan. Sess. Laws, Ch. 224, § 3. The board of education was then required to adopt the committee's opinion as the final decision in the matter, subject to appeal to the district court. *Id.* at § 3(b). This Court has noted that the 1991 amendments took the authority to make the final termination or nonrenewal decision away from the board of education and gave

it to the hearing committee. *In re Due Process Hearing of McReynolds*, 273 Kan. 514, 523, 44 P.3d 391 (2002).

Finally, in 1992, the legislature eliminated the 3-person hearing committee altogether and replaced it with a single hearing officer. 1992 Kan. Sess. Laws, Ch. 185, §§ 1-8. This Court has held that under the 1992 Due Process Act amendments, the hearing officer is empowered to make the final determination whether a board of education had good cause to nonrenew or terminate a tenured teacher. *In re Due Process Hearing of McReynolds*, 273 Kan. 514, 523, 44 P.3d 391 (2003). This Court held that since 1992, the hearing officer could substitute his own judgment for that of the board when making his good cause determination in a nonrenewal case. *Id.*

As the legislature gave more rights to tenured teachers, and took away authority from the board of education, K.S.A. 72-5444 ceased reflecting the intent of the legislature. Since 1991, when the legislature removed the final decision-making authority from the board of education in teacher nonrenewal and termination cases, K.S.A. 72-5444 cannot be said to reflect the intent of the legislature, as it did when the Due Process Act was enacted. Since 1991, this Court has consistently held that tenured teachers have a property right in continued employment with their boards of education. See, e.g., *McMillen v. U.S.D. No. 380, Marshall County*, 253 Kan. 259, Syl. ¶ 5, 263-64, 855 P.2d 896 (1993).

Furthermore, K.S.A. 72-5444 can be interpreted to give effect both to the language of the statute and to the constitutional requirements with regard to the

property interest that tenured teachers had under the Due Process Act. The language “which is not subject to amendment or nullification by act of the legislature” should be interpreted as referring to a prospective amendment or nullification only. In essence, amendment or nullification of the rights guaranteed under the Due Process Act must “grandfather-in” teachers who have acquired a property right in continued employment before the amendment or nullification.

This Court has noted that the area of “vested rights” to be a murky area of the law. *Resolution Trust Corporation v. Fleischer*, 257 Kan. 360, 365, 892 P.2d 497 [1995]). This Court has recently addressed vested rights. In *Norris*, 303 Kan. 834, 367 P.3d 1252 (2016) this Court stated:

Although procedural statutes may be applied retroactively, retroactive application is not an absolute. Such application is inappropriate if new legislation affects a vested right. *Brennan*, 293 Kan. at 460.

Three factors are considered in determining the existence of a vested right:

“ (1) the nature of the rights at stake (*e.g.*, procedural, substantive, remedial), (2) how the rights were affected (*e.g.*, were the rights partially or completely abolished by the legislation; was any substitute remedy provided), and (3) the nature and strength of the public interest furthered by the legislation.’ [*Resolution Trust Corp. v. Fleischer*,] 257 Kan. [360], 369, [892 P.2d 497 (1995)].” *Brennan*, 293 Kan. at 460.

Norris v. Kansas Employment Security Bd. of Review, 303 Kan. 834, 842 (2016).

In the case of the 2014 Due Process Act amendments, the procedural sections of the Due Process Act were left essentially untouched by HB 2506. 2014 Kan. Sess. Laws, Ch. 93, §§ 51-52. Those procedures remain available for

“any [tenured] teacher or instructor in any technical college, institute of technology at Washburn university or community college.” K.S.A. 72-5436(a). Rather, at issue here are the substantive amendments that took away those procedural rights from teachers in Kansas school districts.

“[W]hile we have applied the general rule that a legislature may retrospectively modify the remedies by which rights are enforced, we have not done so when the modification has the practical effect of abrogating the right.” *Owen Lumber Co. v. Chartrand*, 276 Kan. 218, 225, 73 P.3d 753 (2003).

Norris, at 842.

Second, the district court held that by changing the definitions of “teacher” and “board” in K.S.A. 72-5436, the legislature eliminated those procedural rights for teachers in the state’s school districts: “After July 1, 2014, the procedures in K.S.A. Supp. 72-5438, et seq., no longer apply to any K-12 teachers. (R. I, 211; R. II, 5, lines 18-20.) Thus, after July 1, 2014, tenured teachers in Kansas school districts were completely removed from “the law which gives or defines the right,” while there was no change to the procedural sections; due process procedures for instructors in technical colleges and community colleges remain essentially unchanged. 2014 Kan. Sess. Laws, Ch. 93, §§ 49, 51-53. HB 2506 eliminated only the property rights of tenured teachers teaching in Kansas school districts after July 1, 2014. (2014 Kan. Sess. Laws, Ch. 93, §§ 49, 67; R. II, 5, lines 18-20.)

Finally, neither the nature nor the strength of any public interest furthered by 2014 Due Process Act amendments is known. No compelling need or emergency situation was given by anyone as a justification for the action. See,

Darling, 245 Kan. at 48. The legislature held no hearings at which the Due Process amendments were considered. (R. I, 99; House Actions Report, pp. 211-212.) Neither the Plaintiffs-Appellants, nor any other member of the public, had the opportunity to appear before the appropriate legislative committees to express their opposition to the proposed legislation. See, *Darling*, 245 Kan. at 49. Further, the Due Process Act amendments were not vetted, either as a stand-alone bill or as part of another bill, before they were added, fully-formed, to HB 2506. (R. I, 99, ¶ 21; 2014 Senate Journal, pp. 2293-94.) The state simply cannot show any public interest in the removal of the state’s school district teachers from the notice and hearing provisions of the Due Process Act.

Even if, however, K.S.A. 72-5444 were effective in reserving the legislature’s right to amend or nullify the Due Process Act retroactively, the legislature’s action must, nevertheless, provide due process. In enacting the 2014 amendments to the Due Process Act, the legislature failed to provide such due process.

E. The Legislative Process Did Not Provide Plaintiffs-Appellants With Due Process

The Defendant-Appellee cites a number of cases to argue that the legislative process itself provided Plaintiffs-Appellants with due process, and through that process, the legislature abrogated Plaintiffs-Appellants’ property interest in continued employment. (Defendant’s Memorandum in Support of its Motion for Judgment, pp. 8-11). In its decision in *Darling*, this Court, quoting the U.S. Supreme Court, stated:

While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. Darling, 245 Kan. at 49 (quoting, Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541, 105 S.Ct. 1487, 1492-93, 84 L.Ed.2d 494 [1985]) (Emphasis supplied by the Darling court).

State law rather than the United States Constitution must provide the source of this property interest. *McMillen v. U.S.D. No. 380*, 253 Kan. 259, 263, 855 P.2d 896 (1993) (citing, *Kosik v. Cloud County Community College*, 250 Kan. 507, 512, 827 P.2d 59, *cert. denied* 506 U.S. 867, 121 L. Ed. 2d 138, 113 S. Ct. 195 [1992]). Even though state law is the source for a property interest, the minimum procedural requirements for due process are a matter of federal law, not state law. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) (citing, *Vitek v. Jones*, 445 U.S. 480, 491 [1980]). Indeed, as the U.S. Supreme Court observed, any other conclusion would allow the State to destroy at will virtually any state-created property interest. *Logan v. Zimmerman Brush Co.*, 455 U.S. at 432.

The *Kosik* court observed “[o]nce the State has conferred a property interest, the property interest cannot be taken without constitutional, procedural due process. *Kosik*, at 512 (citing *Loudermill*, 470 U.S. at 541). This is the same holding as that found in the federal courts: Once created, a property interest cannot be deprived except pursuant to constitutionally adequate procedures. *Gattis v. Gravett*, 806 F.2d 778, 780 (8th Cir. 1986), *citing*, *Loudermill*, 470 U.S. at 541; *Atkins v. Parker*, 472 U.S. 115, 105 S. Ct. 2520, 2529, 86 L. Ed. 2d 81

(1985). A defect in the legislative process can obstruct the power of the legislature to modify or rescind a property interest. *Gattis*, at 780.

Here, the process used to enact the 2014 Due Process Act amendments as part of HB 2506 was defective because it did not provide Plaintiffs-Appellants with due process. *Darling* shows that that merely using normal legislative procedures does not necessarily pass constitutional muster for due process. The legislative procedures must satisfy the notice and hearing requirements of due process. That did not occur for the 2014 Due Process Act amendments.

In *Darling*, SB 501 was enacted using normal legislative procedures. The State argued that the legislative process provided plaintiffs with due process:

Defendants argue that the legislative process by which SB 501 became law was sufficient to meet the constitutional procedural due process requirements, though the Defendants point to the fact that every citizen in the State of Kansas, Plaintiffs included, has notice of pending legislation and can voice an opinion before a committee considering the bill. So, Defendants conclude, ‘all the process due under the circumstances was provided by the Kansas Legislature.’ *Darling*, 245 Kan. at 50.

The Court, however, found that the process used in *Darling* did not provide plaintiffs with due process because plaintiffs were discouraged from discussing with the legislators their views in opposition to the bill. *Id.* at 51. The Kansas Supreme Court has stated that “An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Kosik*, at Syl. ¶ 3. In *Darling*, the opportunity to be heard component of due process was absent.

It continues to be true that due process requires notice and an opportunity to be heard:

The Government may not deprive a person of one of these protected interests [life, liberty, or property] without providing “notice and an opportunity to respond,” or, in other words, the opportunity to present reasons not to proceed with the deprivation and have them considered. *United States v. Raya-Vaca*, 771 F.3d 1195, 1204 (9th Cir. 2014); *accord Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *ASSE Int’l, Inc. v. Kerry*, 803 F.3d 1059, 1073 (9th Cir. 2015).

State of Washington v. Trump, at p. 19, Case No. 17-35105 (Order, filed February 9, 2017).

In this case, the process used to enact the 2014 Due Process Act amendments did not provide due process, because the legislative process used provided no notice to the public of the Due Process Act changes, nor did the legislative process provide an opportunity for the public to be heard on the matter. In this case, unlike in *Darling*, members of the public were never given the opportunity to be heard on the Due Process Act amendments, or to voice their misgivings regarding the loss of due process rights for teachers.

A review of the history of HB 2506 shows the constitutionality infirmity of the legislative process used. As it was originally introduced, HB 2506 was a one-page “noncontroversial” bill repealing an outdated sunset provision in the Midwestern Higher Education Compact Act. (See 2014 House Journal, at 1621, 1751; Standing Comm. Rept. [Feb. 20, 2014].) The House Education Budget Committee had a hearing on HB 2506 on February 19, 2014. (House Actions Report, p. 211.) HB 2506 was passed by the House without amendment on

February 26, 2014. (2014 House Journal, p. 1791; House Actions Report, p. 211.) That same day, HB 2506 was introduced into the Senate. (2014 Senate Journal, p. 1641; House Actions Report, p. 211.)

In the Senate, the Senate Committee on Ways and Means ultimately voted to remove the contents of HB 2506 and replace those contents with the contents of SB 452, a school funding bill, creating Senate Substitute for HB 2506. (Minutes of the Committee on Ways and Means, Tuesday, April 1, 2014, p. 5.) Sen. Sub. for HB 2506 was created to address the Kansas Supreme Court's decision in *Gannon v. State*, 298 Kan. 1107, 319 P.3d 1196 (2014), in which the Court ordered the legislature to "promptly cure" the educational funding defects in state law, and stated that if the legislature failed to do so by July 1, 2014, the district court panel was directed to "declare null and void" K.S.A. 2013 Supp. 72-8814(c), the subsection of the Kansas Statutes that withheld money from the equalization fund and reduced supplemental state aid. *Gannon*, 298 Kan. at 1181, 1198-99. This version of Senate Substitute for HB 2506 was passed by the Senate Ways and Means Committee on April 1, 2014; and it contained no provisions that amended the Teacher Due Process Act, K.S.A. 2013 Supp. 72-5436 *et seq.* (2014 Senate Journal, p. 1942.)

On the floor of the Senate on April 3, 2014, the Senate voted multiple times to amend S. Sub. for HB 2506. (2014 Senate Journal, pp. 1986-2006.) The last of the amendments to S. Sub. for HB 2506 approved by the Senate that day was a proposal by Senator Arpke which made amendments to the Teacher Due Process Act, K.S.A. 2013 Supp. 72-5436 *et seq.* (2014 Senate Journal, pp. 1994-

2006.) No hearings were ever held in the legislature to publically discuss Senator Arpke's Due Process Act amendments. (House Actions Report, pp. 211-212.) Further, Senator Arpke's Due Process Act amendments had not been previously vetted by either house of the Kansas legislature, either as a stand-alone bill or part of another bill, before they were added to S. Sub. for HB 2506 on April 3, 2014. (2014 Senate Journal, pp. 2293-94.)

Unlike in *Darling*, Plaintiffs-Appellants had **no** opportunity to appear before the appropriate legislative committees and express their opposition to the proposed 2014 Teacher Due Process amendments. *Darling*, at 49-50. Further, unlike in *Darling*, no member of the public had the opportunity to contact their representative or senator in time to urge them to vote against the 2014 Teacher Due Process amendments.

The process used to enact the 2014 Teacher Due Process Act amendments seemed specifically designed to avoid public scrutiny and comment. The Due Process Act amendments were added, fully-formed, to a must-pass bill, after all hearings in House and Senate committees were over, one day before the final day for consideration of bills during the 2014 regular legislative session. (2014 House Journal, p. xlvi; Senate Journal, p. lx, "2013-2014 Joint Rules of the Senate and House of Representatives," Joint Rule 4(k).)

While the legislative process used to strip tenured teachers of their property right to continued employment was not contrary to state law, it did not provide due process because it failed to provide even minimal constitutional due process, *i.e.*, notice and an opportunity to be heard.

Because the legislative process failed to provide tenured teachers with even the minimum elements of due process, the 2014 amendments to the Teacher Due Process Act were ineffective to divest tenured teachers of their property right in continued employment. As discussed more fully in Plaintiff's Motion for Summary Judgment, the 2014 amendments to the Teacher Due Process Act must be applied prospectively only.

There was no notice of the Due Process Act amendments before they were advanced on the Senate floor, fully-formed, as an amendment to Sen. Sub. for HB 2506. The 2014 Teacher Due Process Act amendments had not been previously vetted as either a stand-alone bill or as part of another bill added (2014 Senate Journal, pp. 2293-94.)

Furthermore, the "hearing" component of due process was lacking for the 2014 Teacher Due Process Act amendments. The House Education Budget Committee had a hearing on HB 2506 on February 19, 2014. (House Actions Report, p. 211.) However, as it was originally introduced, HB 2506 was a one-page "noncontroversial" bill repealing an outdated sunset provision in the Midwestern Higher Education Compact Act. (See 2014 House Journal, at 1621, 1751; Standing Comm. Rept. [Feb. 20, 2014].) HB 2506 was passed by the House without amendment on February 26, 2014. (2014 House Journal, p. 1791; House Actions Report, p. 211.)

Here, the district court agreed with the Defendant-Appellant, finding that the legislative process provided all the process that was due. (R. II, 6, lines 20-23.) The district court distinguished this Court's decision in *Darling*, restricting

the holding in *Darling* to the “unique set of facts” of that case. (*Id.*, at lines 18-20.)

Here, the public had no notice of the pending legislation to amend the Teacher Due Process Act, and no opportunity to “voice an opinion before a committee considering the bill.” No hearings were held on HB 2506 after the 2014 amendments to the Due Process Act were appended to HB 2506. (R. I, 98, ¶ 20; House Actions Report, pp. 211-212.)

The [U.S. Supreme] Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests. *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The requirement for some kind of a hearing applies to the taking of private property, *Grannis v. Ordean*, 234 U.S. 385 (1914), the revocation of licenses, *In re Ruffalo*, 390 U.S. 544 (1968), the operation of state dispute-settlement mechanisms, when one person seeks to take property from another, or to government-created jobs held, absent “cause” for termination, *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974) (POWELL, J., concurring); *Id.* at 171 (WHITE, J., concurring in part and dissenting in part); *Id.* at 206 (MARSHALL, J., dissenting). Cf. *Stanley v. Illinois*, 405 U.S. 645, 652-654 (1972); *Bell v. Burson*, 402 U.S. 535 (1971).

Wolff v. McDonnell, 418 U.S. 539, 557-558, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

Constitutionally sufficient procedural due process requires that a person be afforded a right to be heard in a meaningful way before being deprived of “life, liberty, or property.” *Miller v. Board of Wabaunsee County Comm’rs*, 51 Kan. App. 2d 644, 671, 352 P.3d 1053 (2015), *rev. granted* 303 Kan. No. 2 (Atcheson, J. dissenting) (*citing*, U.S. Const. amend. XIV, § 1; *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 [1976]). “The fundamental requirement

of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Id.* (citing, *Mathews v. Eldridge*, at 333). The nature and extent of the due process protections must be calibrated to the significance of the property interest; and the more important the interest at stake, the more elaborate the protections that are needed. *Id.* (citing, *Mathews*, 424 U.S. at 349; *Goldberg v. Kelly*, 397 U.S. 254, 262-63, 90 S. Ct. 1011, 25 L. Ed. 2d 287 [1970]).

Under the particular facts here, the legislative process used to enact the 2014 Due Process Act amendments did not provide Plaintiffs-Appellants with either the constitutionally required notice or the opportunity to be heard. It is clear that the legislative process in general, but most assuredly under the particular surrounding the enactment of the 2014 Due Process Act amendments, did not provide Plaintiffs-Appellants here with adequate due process.

The question of whether the 2014 amendments to the Teacher Due Process statutes apply retroactively or prospectively only, is a question of law for the Court to decide. If the Court finds that the legislature intended for the 2014 amendments to the Due Process statutes to apply retroactively, however, those amendments are unconstitutional in violation of the Due Process clauses of the U.S. and Kansas Constitutions.

ISSUE 2. DID THE BOARD VIOLATE PLAINTIFFS-APPELLANTS’ DUE PROCESS RIGHTS AND BREACH THEIR CONTINUING CONTRACTS WITH THE BOARD BY APPLYING THE 2014 DUE PROCESS ACT AMENDMENTS RETROACTIVELY?

Standard of Appellate Review

This case was decided on Summary Judgment based on stipulated facts. When there is no factual dispute, appellate review of an order regarding summary judgment is de novo. *Martin v. Naik*, 297 Kan. 241, 246, 300 P.3d 625 (2013).

Arguments and Authorities

Prospective application of the 2014 amendments to the Due Process Act requires the Board to comply with requirements of the Due Process statutes when it nonrenewed Ms. Scribner and Mr. McNemee, because they were tenured when Sen. Sub. for HB 2506 became effective. However, the Board's written notices of nonrenewal to Plaintiffs-Appellants contained neither the reasons for Plaintiffs-Appellants' nonrenewals, nor a statement that Plaintiffs-Appellants had the right to request hearings before an impartial hearing officer as required by K.S.A. 2013 Supp. 72-5438. (R. I, 132, 133.) Under the Due Process statutes, a notice of nonrenewal must include a statement of the reasons for nonrenewal and the right to request a hearing within 15 days of the nonrenewal notice. *Rettie v. U.S.D. No. 475*, at Syl. ¶ 6. Failure to comply with K.S.A. 2013 Supp. 72-5438 constitutes a violation of due process. *Id.* at Syl. ¶ 7.

The Board failed to comply with K.S.A. 2013 Supp. 72-5438 in its nonrenewals of the Plaintiffs-Appellants' contracts, depriving them of all due process in the loss of their property right to continuing employment by the Board. Tenured teachers cannot be dismissed for arbitrary reasons. *Gillett v.*

U.S.D. No. 276, 227 Kan. 71, 78, 605 P.2d 105 (1980). The Kansas Supreme Court has observed that the requirement that a school board specify the reasons for its intent not to renew a contract discourages unlawful or arbitrary action. See, *Kosik*, 250 Kan. at 514 (quoting, *Peterson v. United School Dist. No. 418*, 724 F. Supp. 829, 834 [D. Kan. 1989]). A board acts no more arbitrarily than when it nonrenews a tenured teacher for no reason at all.

Teachers' primary employment contracts are deemed to continue for the next succeeding school year unless they are nonrenewed as required by the Due Process statutes. K.S.A. 2013 Supp. 72-5437. Because the Board's notices of intent to nonrenew Plaintiffs-Appellants' contracts did not comply with the requirements of K.S.A. 2013 Supp. 72-5438, those notices were ineffective to nonrenew Plaintiffs-Appellant's contracts. As a result, both Plaintiffs-Appellant's contracts renewed by law as of the end of the third Friday of May, *i.e.*, May 16, 2014. K.S.A. 2013 Supp. 72-5437(a). When the Board failed to employ Plaintiffs-Appellants for the 2015-2016 school year, it breached their existing continuing contract with the Board.

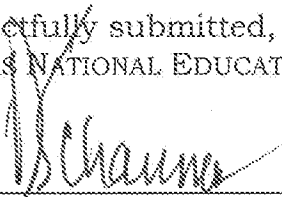
Conclusion

For the reasons stated above, the Plaintiffs-Appellants respectfully request that this Court reverse the judgment of the district court and find the legislature's enactment of the 2014 Teacher Due Process Act amendments violated Plaintiffs-Appellants' due process rights. Because the amendments should have been applied prospectively, Plaintiffs-Appellants further request

that this Court find that the Board breached their continuing contract with the Plaintiffs-Appellants, and award Plaintiffs-Appellants the relief requested.

Respectfully submitted,
KANSAS NATIONAL EDUCATION ASSOCIATION

By:



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CERTIFICATE OF SERVICE

I certify that on the 18th day of February, 2017, the above BRIEF OF PLAINTIFFS-APPELLANTS was filed with the Clerk of the Court using the Court's electronic filing system, and a true and correct copy was electronically mailed to the following counsel of record at the e-mail addresses below:

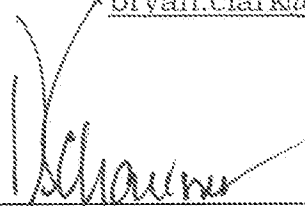
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