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TESTIMONY OF ERIC HARTMAN
ON BEHALF OF TEXAS AFT
REGARDING SB 8
BEFORE THE SENATE EDUCATION COMMITTEE
JUNE 2, 2011

SB 8 would make unnecessary and counterproductive changes in state law. These changes would permanently undo important state salary standards and contract safeguards for educators. The effect would be to make it harder to retain and recruit the teachers we need to deliver a high-quality education to the students in Texas public schools. SB 8 says to school districts: We won't provide you the funding we promised, but we invite you to economize at the expense of students and their teachers.

New authority to impose salary reductions

SECTION 8 of the bill permanently repeals the salary floor established in Section 21.402(d) of the Education Code. This action is not justified by a temporary fiscal crisis and is not necessary to provide desired flexibility to deal with that crisis.

The salary floor in current Section 21.402(d) reflects a legislative determination to prevent rollback of the state pay raise enacted in 2009. The legislature placed this language in statute with good reason. Its aim was to ensure that a state-directed teacher pay raise would be passed through to teachers, not used to supplant local effort and thus to nullify the intended raise.

The proposed repeal of that provision now would invite school districts to do exactly what this salary floor was intended to prevent: roll back that state pay raise as well as local step increases that occurred since the last legislative session. With this move the legislature would make teacher pay, which is already significantly lower than pay for other jobs in our state demanding comparable knowledge and skills, even less competitive. This is a big step in the wrong direction.

New authority to impose unpaid furloughs

The six-day unpaid furlough authorized in SECTION 5 of SB 8 would translate into an average annual cut in pay of nearly $1,600, based on the latest TASB teacher salary survey. (The average teacher salary according to TASB's survey is an estimated $48,950 per year.) This furlough option would be provided in addition to, not instead of, new authority to impose other forms of salary reduction as well existing authority to impose layoffs.

Any furlough option (or the option of any other form of salary reduction) ought to be a true last resort for the state and school districts short of layoffs. Otherwise, the availability of the furlough

option or other forms of salary reduction becomes a de-facto excuse for reducing state funding, a means of avoiding a state obligation, not a response to real funding constraints remaining after better alternatives have run out.

"Solving" the structural deficit by cutting teacher pay for the indefinite future

For this reason, as with the similar provision in SB 12 in the regular session, the limit on furlough authority to cases where state-guaranteed funding falls short of 2010-2011 levels is more apparent than real. SB 8 eliminates pressure on the legislature to come up with needed funding—it just "solves" the structural deficit by letting districts cut employee salaries indefinitely to cope with the state's failure to provide sufficient revenue, as long as 2010-2011 funding levels are not restored.

Instead of offering a narrowly tailored, temporary provision for limited salary reductions or furloughs, with a fixed expiration date, this bill makes furloughs and salary reductions a method of permanently avoiding the need to restore funding. SB 8 "solves" the structural deficit—the state's failure to deliver promised levels of funding to school districts—by letting districts cut teacher pay for the indefinite future.

The provisions on furloughs and other salary reductions in SB 8 in some ways are worse from the teacher's standpoint than the provisions in SB 12, the predecessor bill in the 2011 regular session. Under that prior bill, for instance, school boards would have had to go through a specific process of dialogue with their constituents and with employees before instituting furloughs or pay cuts, including explicit consideration of other available options, and administrators would have been included in any furloughs or pay cuts.

SB 8 does share one negative feature with the previous bill, however. That is the omission of a more meaningful opportunity for those affected by a proposed salary reduction or furlough to have a say in the design and adoption of a local salary-reduction plan. Yet this legislature considered it essential to require such participation by teachers in shaping state-funded bonus-pay policies under the District Awards for Teacher Excellence program.

Even a carefully designed, temporary, limited furlough/salary reduction option along these lines would run into an additional problem. Rolling back teachers' salaries by any significant amount would create an unintended incentive for veteran teachers to retire, with an adverse impact on the TRS pension fund. Teachers eligible for retirement are acutely aware that their TRS pension benefit amount depends on their average salary for the last few years they are employed. If they see a significant salary reduction coming in the next school year, they will have an incentive to retire to avoid a negative impact on their annuity amount.

Altered deadline for notice of proposed contract non-renewal

SECTION 2 and SECTION 4 of SB 8 would permanently move the date for notice of proposed non-renewal of a teacher's probationary or term contract to the 10th day before the last day of instruction each school year. This would disadvantage teachers, who now are entitled to notice 45 days before the end of the school year. Teachers deserve more timely notice that their job is in

jeopardy, so that they can make alternative plans for their future. This untimely notice also means teachers will spend five extra weeks anxiously waiting for word of their fate.

There is no substantial evidence, only unsubstantiated claims, for the contention by some administrators that teachers quit doing their best once notified of proposed non-renewal. It is not in the teachers' interest to neglect their duties and thereby hurt their case for contract renewal in a contested hearing or hurt their reputation and their ability to negotiate favorable terms of departure. This provision adds insult to injury to teachers who face the possibility of layoffs based on a district's financial situation, by suggesting that they must be kept in the dark about their fate until the end of the school year lest they fail to carry out their duties toward their students. These professionals, who devote their careers to helping children succeed in school and in life, deserve better from this legislature.

The current 45-day notice requirement is part of a carefully balanced set of provisions in Chapter 21 of the Education Code, and this change would upset that balance. (For example, the teacher has a corresponding deadline of 45 days before the start of the new school year to give notice of resignation without penalty. The 45-day notice of proposed non-renewal and the 45-day deadline for resignation without penalty represent a balancing of employee and employer interest in timely notification of intentions.)

Retroactive alteration of continuing contracts

SECTION 3 of SB 8 amends the law on continuing contracts by eliminating the provision in Education Code Section 21.157 for reductions in force in reverse order of seniority within specific teaching fields affected. This section of the bill would permanently take away seniority-based protection in layoff situations for teachers whose districts have chosen to give them continuing contracts as an incentive to stay with the district. The legislature by this action would adversely change the terms of these veteran teachers' contract after the fact. This is a clear invitation to focus layoffs on a district's most senior and highly paid teachers.

A significant percentage of Texas teachers across the state are employed under continuing contracts. These continuing contracts are granted entirely at the discretion of local school districts. A school district that wants more flexibility than is available under continuing contracts, in relation to RIFs, can simply choose not to issue such contracts to future hires.

School districts typically grant continuing contracts as an inducement to keep a good teacher in their employ. Continuing contracts are attractive to teachers because they automatically roll over from year to year without need of renewal. They also are attractive because they carry the modest protection against layoffs afforded by the consideration given to seniority. This protection is important to veteran teachers who have higher pay and are concerned that without some seniority protection they would be especially targeted by cost-cutting districts for layoffs.

Please note this crucial point: For current teachers with continuing contracts, SB 8 cannot eliminate the seniority-based protection afforded by Section 21.157. Existing continuing contracts are considered to incorporate the provisions of law that were in force when the contracts began. That means the seniority-based protection in case of RIFs provided by this

statute is a part of these teachers' contracts. A subsequent change in law cannot alter a material term of a continuing contract.

The LBB fiscal note for SB 8 acknowledges this very point. The fiscal note states:

"Current school employee contracts are considered under case law to incorporate relevant statutes as they existed at the time the contract was initiated. To the extent that school districts' implementation of the proposed statutory changes would affect current contracts, which could be multi-year, the Agency anticipates the potential for an increase in appeals to the commissioner under Subchapter G, Chapter 21, resulting in additional costs for hearings by the Texas Education Agency or the State Office of Administrative Hearings." (For your convenience, the key case in point is attached to this testimony.)

The change proposed in SECTION 3 of SB 8 is sure to foment litigation if districts attempt to apply it to holders of existing continuing contracts. Again, if districts feel their flexibility is unduly restricted by the seniority-based layoff provision applicable to continuing contracts, they have a simple recourse: They don't have to offer any more continuing contracts. They can employ teachers under term contracts to which the seniority-based layoff provision does not apply. Thus, current law already affords them ample flexibility.

Voiding teachers' contracts when certification lapses

Automatically voiding teachers' contracts for not maintaining certification, as proposed in SECTION 1 of the bill, is not necessary. Section 21.0031 already addresses this situation adequately, setting up a simple process requiring notice to the employee and action by the school board to void the contract. The proposed language would cause confusion, because it leaves the status of the teacher's employment up to a third party, SBEC. The local school board is the entity with which the teacher contracts for employment, and the local board needs to take action to sever that employment relationship, so that the parties know the status of the teacher's employment and the date of severance. The change proposed here, obviating the need for board action, is not worth the uncertainty it will create, particularly given the ease with which the current law allows the board to act.

Conclusion

Working with members of this committee and the Senate Finance Committee, Texas AFT and other statewide teacher organizations demonstrated our willingness to negotiate during the regular session with associations representing school boards and school superintendents to help avoid layoffs by providing temporary easing of various requirements in current law, limited in scope to the immediate financial shortfall districts would experience in fiscal 2012-2013 as a result of the state's failure to fulfill its commitment to funding our public schools. It is in this context that our opposition to SB 8 should be understood. SB 8 makes multiple permanent, not temporary, changes in law, authorizing furloughs and salary reductions of indefinite scope for the indefinite future. It responds to the current state budget shortfall in effect by balancing the budget on the backs of teachers, to the detriment of educational quality for our students. It removes pressure on the legislature to restore funding to 2010-2011 levels. We believe the state can and must do better.

5.05(a) when the Nueces County Sheriff's Office took possession of it.[3]

This construction of the statute comports with the strong policy considerations underlying the Act. Interdiction of traffic in illegal drugs is the responsibility of numerous state and federal law enforcement officials. The State may not know when federal officers have seized property subject to forfeiture in Texas. If the State's right to forfeit property expired thirty days after it was seized by federal officers, the State could not assert that right unless the federal officers turned the property over to state officials within a very few days. The plain language of the Act does not force this compromise of federal and state drug enforcement efforts, but marks the deadline for commencement of forfeiture proceedings from the date the State's own officers come into possession of property.

The judgment of the court of appeals is reversed, and this cause is remanded to the trial court for further proceedings consistent with this opinion.

CENTRAL EDUCATION AGENCY and J.J. McCollough, Petitioners,

v.

GEORGE WEST INDEPENDENT SCHOOL DISTRICT, Respondent.

No. C-7687.

Supreme Court of Texas.

Oct. 4, 1989.

Rehearing Overruled Feb. 21, 1990.

School district sought review of an order of the Central Education Agency vacating the termination of teacher's employment. The 331st District Court, Travis County, Hume Cofer, J., set aside the Agency order. Appeal was taken. The Austin Court of Appeals, Third Supreme Judicial District, 750 S.W.2d 900, affirmed. Agency and teacher brought error. The Supreme Court, Ray, J., held that the school district's newly adopted probationary policy could not be applied retroactively to a teacher who had a contract protected by the Term Contract Nonrenewable Act.

Affirmed in part and reversed in part.

1. Schools ⇐133.11

School district's newly adopted probationary policy could not be applied retroactively to teacher who had current employment contract; although district was entitled to exclude teachers from provisions of Term Contract Nonrenewal Act by establishing probationary policy before it offered contracts of employment, district could not unilaterally modify existing contracts to deny teacher protections of Act. V.T.C.A., Education Code §§ 11.13(c), 21.201–21.211, 21.203(b), 21.207(b).

2. Schools ⇐147.2(1)

School district's right to modify teacher contracts did not entitle district to act unilaterally to deprive teachers of protections of Term Contract Nonrenewal Act; Act had been specifically designed to give teachers rights when district decided not to renew teacher's contract of employment. V.T.C.A., Education Code §§ 11.13(c), 21.201–21.211, 21.203(b), 21.207(b).

Dean Pinkert, Lynn E. Rubinett, Celina Romero, Anne E. Swenson, Austin, Office of the Attorney General, Jim Mattox, Atty. Gen., for petitioners.

Judy Underwood, Eric W. Schulze, Austin, for respondent.

OPINION ON MOTION FOR REHEARING

RAY, Justice.

Respondent's motion for rehearing is granted in part and overruled in part. The

3. There is no contention in this case that the seizure by the Nueces County Sheriff's Office was unauthorized under section 5.04.

opinion and judgment of July 12, 1989, are withdrawn and the following substituted.

At issue in this cause is the validity of a school district's probationary policy that has retroactive effect on currently employed teachers. The Commissioner of Education concluded that the district's policy violated the provisions of The Term Contract Nonrenewal Act. The district court and the court of appeals reversed and vacated the Commissioner's order. 750 S.W.2d 900. Because the district's probationary policy breaches the teacher's contract of employment, we reverse the judgment of the court of appeals in part and affirm in part.

J.J. McCollough was employed in May 1982 as a high school English teacher by the George West Independent School District. The school district voted not to renew her teaching contract in March 1984. When McCollough was first hired, the school district had no probationary policy for its teachers, but it did adopt such a policy in July 1983. Because the school district believed that the adoption of the probationary policy exempted it from the requirements of The Term Contract Nonrenewal Act, the district made no effort to comply with the Act's provisions in the nonrenewal process. The Term Contract Nonrenewal Act, ch. 765, 67th Leg., 1981 Tex.Gen.Laws 2847, *amended by* Act of June 30, 1984, ch. 28, art. I, pt. D, sec. 8, art. III, pt. A, sec. 3, 68th Leg., 2d Called Sess., 1984 Tex.Gen.Laws 117, 130, 150, *amended by* Act of June 1, 1987, ch. 968, 70th Leg., 1987 Tex.Gen.Laws 3292 (current law codified as Tex.Educ.Code Ann. §§ 21.201–21.211 (Vernon 1987 & Supp. 1989)).

McCollough appealed the decision not to renew her contract to the Commissioner of Education, who ordered the school district to employ McCollough in the same professional capacity in which she was employed for the 1982–83 school year and to reimburse her for damages for loss of salary.[1] The school district filed an administrative appeal from the Commissioner's order and the district court reversed and vacated. *See* Tex.Educ.Code Ann. § 11.13(c) (Vernon Supp.1989), § 21.207(b) (Vernon 1987). The court of appeals affirmed, holding that the plain meaning of the Act authorized the school district to adopt a probationary policy at any time.

[1] At the time McCollough was hired by the school district, section 21.209 of the Education Code read as follows:

> The board of trustees of any school district may provide by written policy for a probationary period not to exceed the first two years of continuous employment in the district, in which case the provisions of this subchapter [The Term Contract Nonrenewal Act] shall not apply during such probationary period.

The Term Contract Nonrenewal Act, ch. 765, sec. 2, § 21.209, 67th Leg., 1981 Tex. Gen.Laws 2847, 2848, *amended by* Act of June 1, 1987, ch. 968, 70th Leg., 1987 Tex. Gen.Laws 3292. Since it is undisputed that the school district had no probationary policy when McCollough was hired, the issue before us is whether the school district could implement a probationary policy for currently employed teachers. We hold that even though a district may exclude teachers from the provisions of The Term Contract Nonrenewal Act by establishing a probationary policy prior to offering a contract of employment, the district may not unilaterally modify an existing contract to deny a teacher the protections of the Act.

The protections of The Term Contract Nonrenewal Act were a part of McCol-

1. McCollough raised a supplemental point of error in the court of appeals asserting that the district court erred in holding that the Commissioner does not have the authority to award past wages. She did not raise this point in either her motion for rehearing in the court of appeals or her application for writ of error in this court, so the point is, therefore, waived. *See Oil Field Haulers Ass'n v. Railroad Comm'n,* 381 S.W.2d 183, 189 (Tex.1964). The rule of *McKelvy v. Barber* will not excuse McCollough's failure to preserve her point of error because the court of appeals expressly overruled all of the appellants' points of error. *McKelvy* only relieves a party of the duty of preserving a particular point of error to this court when the court of appeals does not commit error in declining to rule on that point of error. *McKelvy v. Barber,* 381 S.W.2d 59 (Tex.1964).

lough's 1982–83 and 1983–84 employment contracts even though these protections were not expressly written into the contracts. "[L]aws which subsist at the time and place of the making of a contract ... enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 550, 18 L.Ed. 403 (1866), *quoted in Smith v. Elliott & Deats*, 39 Tex. 201, 212 (1873); *see also Wessely Energy Corp. v. Jennings*, 736 S.W.2d 624, 626 (Tex.1987). These protections were a material part of McCollough's contracts, which the school district could not unilaterally abrogate without committing a breach.

[2] The school district argues that it had the right to implement the probationary policy affecting currently employed teachers because the contract of employment provided that the "[t]eacher agrees to abide by and conform to the rules, regulations and policy [sic] of the District, and such other reasonable rules, regulations and policies as may be from time to time adopted by the school authorities." We disagree. The school district's right to modify the contract does not imply the power to substitute something entirely different or confer the power to destroy the agreement. *See Webb v. Finger Contract Supply Co.*, 447 S.W.2d 906, 908 (Tex. 1969). The Term Contract Nonrenewal Act was specifically designed to give teachers due process rights when a school district decides not to renew the teacher's contract of employment. The contract of employment does not allow the district to unilaterally deprive the teachers of these rights.

Because the district may not unilaterally modify an existing contract to deny a teacher the protections of the Act, we do not address the court of appeals' statutory interpretation of the Act. Accordingly, we reverse the judgment of the trial court and court of appeals as to the employment of McCollough and reinstate the portion of the Commissioner's order directing the school district to employ McCollough in the same professional capacity in which she was employed for the 1982–83 school year. In all other respects we affirm the judgment of the court of appeals.

SUN EXPLORATION AND PRODUCTION COMPANY, et al., Petitioners,

v.

Ocie R. JACKSON, et al., Respondents.

No. C–6000.

Supreme Court of Texas.

Oct. 25, 1989.

Rehearing Overruled Feb. 21, 1990.

Lessee brought action for declaratory judgment and injunction against lessors seeking to establish validity of an oil, gas, and mineral lease. The lessors by counterclaim sought cancellation of the lease. The 253rd District Court, Chambers County, Carroll E. Wilborn, Jr., J., entered judgment unconditionally canceling the lease in part and conditionally canceling other portions. Appeal was taken. The Houston Court of Appeals, First Supreme Judicial District, 715 S.W.2d 199, affirmed the unconditional cancellation and reversed and remanded as to the conditional cancellation. Motions for rehearing were overruled, 729 S.W.2d 310. The Supreme Court, Ray, J., held that: (1) no implied covenant of further exploration exists independent of implied covenant of reasonable development, and (2) evidence supported jury's finding that no breach of the covenant to reasonably develop occurred.

Reversed and remanded.

Spears, J., filed concurring opinion in which Cook, J., joined.

Gonzalez, J., filed concurring opinion in which Doggett, J., joined.