

TENNESSEE SCHOOL LAW QUARTERLY

*A TSBA Publication for School Board
Attorneys, Board Members, and
Administration*



TABLE OF CONTENTS

VOLUME 16, ISSUE 1

Pages 1-2	Susan Jones v. Knox County Board of Education
Pages 3-5	Service Employees International Union Local 205 v. Metropolitan Nashville Board of Public Education, Et Al.
Page 6	Attorney General Opinions
Page 7	TSBA Winter CLE

SUSAN JONES V. KNOX COUNTY BOARD OF EDUCATION DECEMBER 21, 2015

This appeal concerns a tenured teacher's legal challenge to her transfer from the position of Instructional Coach to classroom teacher, a transfer she considers to be a demotion. At the end of the 2011-2012 school year, Superintendent, Dr. James McIntyre, transferred Jones, a tenured teacher with Knox County schools, to her new position. In August 2013, Jones sued Defendants in the Trial Court, alleging that her transfer was arbitrary, capricious, and in violation of the requirements of Tenn. Code Ann. § 49-5-510 (2013), which provides:

The director of schools, when necessary to the efficient operation of the school system, may transfer a teacher from one location to another within the school system, or from one type of work to another for which the teacher is qualified and licensed; provided, that transfers shall be acted upon in accordance with board policy.

Jones also alleged that her grievance process was unduly cut short mid-process. At the heart of the complaint was the allegation that her performance evaluations were not considered by McIntyre, as required. Several exhibits were attached to Jones' complaint to this end. In the achievement and growth measures of her total evaluations, Jones received the highest possible results, according to her complaint. However, Jones acknowledged also having received criticism from a school principal, and receiving an unsatisfactory score of 2 in section 5 regarding classroom coaching.

In October 2014, Defendants filed a motion to dismiss asserting that Jones lacked a redressable grievance because she did not contest the accuracy of the data used in the evaluations. Moreover, according to Defendants, Jones' transfer had a rational basis in that, by her own acknowledgement, Jones had received certain criticism and unsatisfactory marks in her evaluations. Therefore, per Defendants' argument, Jones transfer could not be arbitrary or capricious. In January 2015, the Trial Court granted Defendants' motion to dismiss. In its final order of dismissal, the Trial Court found that Jones' transfer was not arbitrary, capricious, or contrary to the requirements of the law and that Ms. Jones' transfer was fair and reasonable; second, that Ms. Weaver Jones filed an improper grievance,

and, therefore, the grievance was not entitled to secondary review; and thirdly, Superintendent McIntyre acted properly in refusing to allow the plaintiff to advance her evaluation grievance.

Jones appealed raising the issue that the Trial Court erred in granting Defendants' motion to dismiss.

While directors of schools have discretion to transfer teachers, this discretion is not unbounded. Tenn. Code Ann. § 49-1-302(d)(2)(A)(2013), states in relevant part: "The evaluations shall be a factor in employment decisions, including, but not necessarily limited to, promotion, retention, termination, compensation and the attainment of tenure status." Jones' complaint alleges that Defendants failed to consider her evaluation results which is contrary both to state statutory law requiring her evaluations to be a factor in Defendants' employment decision to transfer her as well as State Board of Education Policy 5.201, which requires that evaluations be used to decide, among other things, assignments. Defendants contend, however, that because the transfer was not arbitrary or capricious, Ms. Jones' transfer is presumed to be reasonable.

The Court indicated the major flaw in Defendants' argument is that, while decisions to transfer are in fact presumed to be reasonable and fair, this presumption is rebuttable. It is insufficient and circular for Defendants to state simply that Jones' transfer was reasonable, and rest on that. It begs the question. If Jones' complaint is construed liberally and her factual allegations are taken as true, as they must be at the motion to dismiss stage, then McIntyre improperly failed to consider her evaluation results in making the decision to transfer her.

Defendants argue that because Jones herself acknowledges that she received certain unsatisfactory marks and criticism, the transfer cannot have been arbitrary or capricious.

Defendants' interpretation would serve to vitiate any protection for tenured teachers seeking to legally challenge a transfer because under that interpretation potentially any criticism of a teacher's performance, no matter how insignificant, could justify a transfer. Such an interpretation is inconsistent with the applicable law, especially our Supreme Court's framework for challenging transfers.

Moreover, the Court found that the Trial Court applied the wrong standard in deciding Defendants' motion to dismiss. Rather than applying the required standard applicable to a Rule 12.02(6) motion to dismiss as discussed above, the Trial Court instead did not take

Jones' factual allegations as true for purposes of the motion, made findings, and ruled on the merits of the case. Jones' claim may or may not succeed on its merits. Nevertheless, in our judgment, Jones has alleged facts sufficient to state a claim for relief. We hold that the Trial Court erred in granting Defendants' motion to dismiss.

In conclusion, the Court held that "Jones has alleged facts sufficient to state a claim for relief. Namely, our Supreme Court in Lawrence County articulated the legal route by which a tenured teacher may bring a direct action to challenge a transfer alleged to be arbitrary, capricious or contrary to applicable law. Taken as true, Jones' allegation that she was transferred arbitrarily without any consideration of her evaluation results could warrant relief. We take no position as to the ultimate outcome of this case. We hold only that the Trial Court erred in granting Defendants' motion to dismiss. We reverse the judgment of the Trial Court, and remand this case for further proceedings."

<https://www.tncourts.gov/sites/default/files/jonesswopn.pdf>

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 205 V. METROPOLITAN NASHVILLE BOARD OF PUBLIC EDUCATION, ET AL.
DECEMBER 21, 2015

This case involves the ability of the Service Employees International Union Local 205 (“SEIU”), a labor union, to represent service employees of the Metropolitan Nashville Board of Public Education (“the Board”).

The parties agree that in July 2000, the Board adopted the Labor Negotiations Policy (“LNP”), which gave non-licensed (i.e., non-teaching) employees the right to join an employee organization; to choose exclusive representatives to meet and confer with the Director of Schools (“the Director”) on matters relating to working conditions and other terms and conditions of employment; to have their representatives enter into nonbinding memorandums of understanding (“MOU”) with the Director; and to have organization dues deducted from their paychecks with their written authorization. Pursuant to the procedure set forth in the LNP, the SEIU was selected as the exclusive representative by a majority of service employees in October 2000, and the Board duly certified SEIU as the exclusive representative. SEIU thereafter entered into a series of MOU’s with the Director, the most recent of which extended from July 1, 2008, to June 30, 2011. The Director did not meet with SEIU to negotiate a new MOU to take effect after June 30, 2011; after that date he permitted employees to stop automatic withdrawal of SEIU dues from their paychecks and did not recognize SEIU as the exclusive representative of the workers.

In December 2011, the Director sent a letter to the representatives of SEIU and the United Steelworkers, the union which represented the bus drivers, advising that he “desire[d] to establish a harmonious working relationship with our support employee unions” and that “[f]or our future relationship with support employee unions to be mutually beneficial and productive, we must acknowledge the recent changes in state law.” The letter stated that, in light of these changes in the law, the Director and his executive staff had “met and voted to rescind [the LNP].” On the same day, the Director notified the members of the Board by electronic mail of his decision and attached a copy of the letter.

SEIU sent a letter to the Chairperson of the Board on January 9, 2012, filing a complaint against the Director and asking the Board to confirm the SEIU’s status as the exclusive bargaining representative of the support

employees and to direct the Director to comply with the LNP. On March 12, the Chairperson responded by letter to SEIU, stating that the complaint was “without merit and should proceed no further.”

SEIU filed a complaint in Davidson County Chancery Court on July 16, 2012, consisting of two counts. In count one, the complaint alleged that the LNP had been enacted by the Board pursuant to the powers granted it at Tenn. Code Ann. § 49-2301(b)(1)(A) and (HH), the Metropolitan Charter, and “other applicable law”; that the Board had never rescinded the LNP or delegated the authority to do so; that the Director refused to recognize SEIU as the exclusive bargaining representative, refused to meet and confer with SEIU, and refused to abide by the payroll deduction section of the LNP by allowing members of SEIU to revoke their membership and stop the deduction of dues from their pay at any time of the year.

Count two alleged that the meeting at which the Director and his executive staff rescinded the LNP did not comply with the Open Meetings Act. SEIU sought a declaratory judgment that “[t]he Court should declare that the LNP remains in effect and is binding upon the Director of Schools” and “further declare that [the Director] is in violation of the LNP” and other relief, including a permanent injunction requiring the Director to comply with the LNP, and an award of damages as well as attorney’s fees and costs. The Board filed its Answer on September 4, 2012, asserting that the Director had the authority to rescind the LNP and that “due to the changes in state law and Board policy, the School System is no longer required to maintain the LNP or enter into negotiations with SEIU.”

Both parties moved for judgment on the pleadings and for summary judgment. In due course, the court granted SEIU’s motion on the pleadings in part, ruling that Tenn. Code Ann. § 49-2-301 did not give the Director the authority to abrogate the LNP and, consequently, the LNP was still in effect. On the parties’ cross motions for summary judgment on count one of the complaint, the Court granted SEIU’s motion and denied the Board’s motion, declaring that:

[The LNP] is a full-fledged policy of the Board of Education, as opposed to some lesser policy or procedure. The LNP can only be revoked by the Board of Education. The Director of Schools does not have legal authority to revoke the LNP under any statute, charter provision, or Board of Education policy reviewed by this Court.

Therefore, Dr. Register did not effectively rescind the LNP. The LNP is still in effect.

The Board appeals, raising the following issue: “Did the Trial Court err in granting judgment in favor of the SEIU, determining that the LNP is still in effect and leaving open the possibility of enforcement?”

Prior to amendments to Title 49 which took effect in 2011, the Director had the following powers:

(EE) Within the approved budget and consistent with existing state laws, board policies and locally negotiated agreements covering licensed personnel, employ, transfer, suspend, nonrenew and dismiss all personnel, licensed or otherwise, except as provided in § 49-2-203(a)(1) and in chapter 5, part 5 of this title. Nothing in this subdivision (b) (1)(EE) shall be construed to alter, diminish or supersede the Education Professional Negotiations Act, compiled in chapter 5, part 6 of this title;

(FF) All persons who are employed in a position for which no teaching license is required shall be hired on a year-to-year contract. The director shall provide a person who is employed in such a position fifteen (15) days’ notice of nonrenewal of the contract before the end of the contract period[.]

In 2011, the General Assembly enacted amendments to various parts of Title 49, including the duties of the director listed in section 301(b). The amendments to the statute pertinent to this appeal read as follows:

(EE) Within the approved budget and consistent with existing state laws and board policies, employ, transfer, suspend, non-renew and dismiss all personnel, licensed or otherwise, except as provided in § 49-2-203(a)(1) and in chapter 5, part 5 of this title;

(FF) All persons who are employed in a position for which no teaching license is required shall be hired at the will of the director of schools. The local board of education shall develop a policy for dismissing such employees[.]

Tenn. Code Ann. § 49-2-301(b)(1). The practical effect of these amendments was to require the Board to assign to the Director the duty to hire, transfer, suspend, non-renew, and terminate all personnel and to remove the requirement that those decisions be made in accordance with “locally negotiated agreements covering licensed personnel.”

At the same time as the amendments to Tenn. Code Ann. § 49-2-301 were passed, the Professional Educators Collaborative Conferencing Act of 2011 was enacted in chapter 378 of the 2011 Tenn. Pub. Acts. The Act requires local school boards “to participate in collaborative conferencing with professional employees, or their designated representatives, if any, with respect to only those terms and conditions of employment that are specified in this section”; the specified terms and conditions are salaries or wages, grievance procedures, insurance, fringe benefits, working conditions, leave, and certain payroll deductions. Tenn. Code Ann. § 49-5-608(a). The Act grants the following rights to professional employees (i.e., licensed teachers): (1) the right to self-organization, (2) to form, join, or be assisted by organizations, (3) to participate in collaborative conferencing with local boards of education through representatives of their own choosing, and (4) to engage in other concerted activities for the purpose of other mutual aid and benefit; provided, that professional employees also have the right to refrain from any or all such activities. Tenn. Code Ann. § 49-5-603. The Act also ensures that professional employees of school boards have the right to engage in collaborative conferencing “through representatives of their own choosing” and that “no professional employee, group of professional employees, or professional employee organization shall be denied the opportunity to represent themselves or groups of professional employees in discussions.”Tenn. Code Ann. § 49-5-605.

Reading the amendments to Tenn. Code Ann. § 49-2-301 and the amendments to part 6 of chapter 5 of Title 49 in pari materia, the General Assembly granted the right to engage in collaborative conferencing on the terms and conditions of employment only to licensed teachers while making the employment of non-licensed personnel to be at the will of the director. In vesting sole discretion to make employment decisions pertaining to non-licensed personnel in the Director, the Legislature negated any Board policy which has the effect of removing that discretion.

Much of SEIU’s argument was premised on the contention that the LNP was unaffected by the 2011 amendments. To the contrary, the Court concluded that LNP was abrogated by the amendments. The requirements that the Director recognize a single exclusive representative of the employees, meet with that organization’s representative to discuss the terms and conditions of service workers’ employment, and permit payroll deduction for only that organization’s dues, are not consistent with the employment at will status

conferred on non-licensed personnel at Tenn. Code Ann. § 49-2301(b)(1)(FF). After the 2011 amendments became effective, the LNP was no longer operable; the Director was not obligated to follow it, and no Board action was required to rescind it.

As the Director is bound by statute to see “that the laws relating to the schools and rules of the state and the local board of education are faithfully executed,” Tenn. Code Ann. § 49-2-301(b)(1)(A), the Director was properly exercising the authority granted to him by law when he exercised his discretion to not follow the procedures in the LNP.

The Court reversed the trial court’s grant of summary judgment to SEIU and remanded the case for any further proceedings necessary.

https://www.tncourts.gov/sites/default/files/svc.emp_v.metroopn.pdf

Attorney General Opinion No. 16-01

Assumption of Memphis City Schools' Debts by Shelby County after Transfer of School Operations to County

QUESTION 1

The City of Memphis Special School District (Memphis City Schools) carried an unfunded Other Post-Employment Benefits (OPEB) liability when it surrendered its charter several years ago. At that time all Memphis City Schools operations were transferred to Shelby County Schools. Under State law, what process is required for Shelby County to assume the OPEB indebtedness of Memphis City Schools that existed when school operations were transferred?

OPINION 1

For Shelby County to assume the OPEB indebtedness of Memphis City Schools that existed when school operations were transferred to Shelby County Schools, Tennessee Code Annotated § 49-2-1002(d) requires the county legislative body to adopt, by a vote of a majority of its members, a resolution assuming the OPEB indebtedness owed by Memphis City Schools.

TSBA

Tennessee School Boards Association

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WINTER CLE

TENNESSEE COUNCIL OF SCHOOL BOARD ATTORNEYS

Friday February 26, 2016

10:00 a.m. - 2:15 p.m.

TSBA Headquarters - Nashville

AGENDA

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|---------------|---|
| 10:00 – 11:00 | How Tennessee Schools Should Respond to Open Records Requests
Samuel L. Jackson – Lewis, Thomason, King, Krieg, and Waldrop, P.C. |
| 11:00 – 12:00 | The Transgender Issue – What’s Happening in the Courts? Emily Harper Mack – Lewis, Thomason, King, Krieg, and Waldrop, P.C. |
| 12:00 – 12:15 | Break & Working Lunch |
| 12:15 – 1:15 | Ethics in the Life of an Attorney
Randall G. Bennett – Deputy Executive Director/General Counsel TSBA |
| 1:15 – 2:15 | Legislative Update – What’s Happening in the General Assembly? Charles W. Cagle – Lewis, Thomason, King, Krieg, and Waldrop, P.C. |

TSBA is applying for three (3) hours general credit and one (1) hour dual.

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