

ALANA SISK

v.

KLEIN INDEPENDENT  
SCHOOL DISTRICT

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BEFORE THE

COMMISSIONER OF EDUCATION

THE STATE OF TEXAS

**DECISION OF THE COMMISSIONER**

**STATEMENT OF THE CASE**

Petitioner, Alana Sisk, complains of actions and decisions of Respondent, Klein Independent School District to terminate her continuing contract. Merle Dover is the Administrative Law Judge appointed by the Commissioner of Education to preside over this cause. Petitioner is represented by Judith Sadler, Rachel Sedita, and Zachary Wilson, Attorneys at Law, Houston, Texas. Respondent is represented by C. Cory Rush and Holly A. Sherman, Attorneys at Law, Houston, Texas.

The primary issue is whether Respondent's Board properly modified and/or rejected the Independent Hearing Examiner's (IHE's) Findings of Fact, Conclusions of Law and recommendation not to terminate Petitioner's continuing contract. In particular, the issue to be resolved is whether Petitioner violated Respondent's testing policy during the administration of a standardized test.<sup>1</sup> Petitioner contends that handing a student a whisper phone during the administration of a standardized test did not violate Respondent's policy. Because school districts authoritatively interpret their own policies and because determinations regarding good cause are conclusions of law that school districts have significant authority to change, Respondent's modifications and rejections are valid. Respondent met its burden to establish that good cause exists to terminate Petitioner's contract.

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<sup>1</sup> While Respondent also contends that Petitioner's actions violate Texas Education Agency testing guidelines, since this cause can be resolved based on Respondent's testing policies, Texas Education Agency testing policies will not be addressed.

## FINDINGS OF FACT

After due consideration of the record and matters officially noticed, it is concluded that the following Findings of Fact are supported by substantial evidence:

1. The Board of Trustees' Findings of Fact are adopted as if fully set forth herein.
2. The IHE recommended that Respondent not terminate Respondent's continuing contract.
3. Respondent's Board modified Findings of Fact Nos. 94, 96, and 97 to eliminate the word "not" in each and relabeled them as Conclusions of Law.
4. Respondent's Board adopted the remaining Findings of Fact.
5. Respondent's Board modified Conclusions of Law Nos. 5 and 6 and modified two unlabeled Conclusions of Law from the discussion section of the IHE decision by changing the negative statements to the positive and adopted the remaining Conclusions of Law.
6. Respondent's Board changed and rejected the IHE's recommendation not to terminate by eliminating the word "not."

## DISCUSSION

Petitioner contends that Respondent's decision to reject and modify the IHE's Findings of Fact, Conclusions of Law, and Recommendation not to terminate her continuing contract was improper. Respondent contends that the Board's changes were supported by substantial evidence and were not improper, arbitrary or capricious.

### Substantial Evidence Review

In a hearing brought under Chapter 21 of the Texas Education Code, the Commissioner reviews the record created before an independent hearing examiner or the board of trustees and makes a decision based on a substantial evidence review. 19 Tex. Admin. Code § 157.1072(b). The Texas Supreme Court has established the standard for a substantial evidence review:

Although substantial evidence is more than a mere scintilla, the evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence. The true test is not whether the agency reached the correct conclusion, but whether some reasonable basis exists in the

record for the action taken by the agency. . . . Thus, the agency's action will be sustained if the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action. The findings, inferences, conclusions, and decisions of an administrative agency are presumed to be supported by substantial evidence, and the burden is on the contestant to prove otherwise.

*Tex. Health Facilities Com. v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446, 452-53 (Tex. 1984) (internal citations omitted); *Timmons v. Killeen Ind. Sch. Dist.*, Docket No. 019-R1-03-2017 (Comm'r Educ. 2017).

In reviewing the Board's decision, the Commissioner measures the evidence against the examiner's fact findings, not the board's, to see if substantial evidence supports them and thus to determine if the board erred in determining otherwise. *Miller v. Houston Indep. Sch. Dist.*, 51 S.W.3d 676, 681 (Tex. App.—Houston [1<sup>st</sup> Dist] 2001, pet. denied), *cert. denied*, 535 U.S. 905 (2002). Whether a board's decision meets the substantial evidence standard is a question of law. *Montgomery Independent School District v. Davis*, 34 S.W.2d 559, 566 (Tex. 2000). The Commissioner's decision must be based on facts amounting to substantial evidence. *Id.*

#### Board Changes to Findings of Fact and Conclusions of Law

The board "may adopt, reject, or change the hearing examiner's conclusions of law, including a determination regarding good cause" for termination. Tex. Educ. Code § 21.259(b). The board "may reject or change a finding of fact made by the hearing examiner only after reviewing the record and only if the finding of fact is not supported by substantial evidence." Tex. Educ. Code § 21.259(c). The board must state in writing the reason and legal basis for the change or rejection. Tex. Educ. Code § 21.259(d).

The IHE is the factfinder and the sole judge of the witnesses' credibility and the weight to be given to their testimony and is free to resolve any inconsistencies. *See e.g., Webb v. Jorns*, 488 S.W.2d 407, 411 (Tex. 1972); *Chambliss v. Dallas Indep. Sch. Dist.*, Docket No. 077-R2-0512 (Comm'r Educ. 2012). In reviewing the IHE decision, the board conducts a substantial evidence review and acts as a reviewing tribunal subject to the limitations set out in Texas Education Code

section 21.259. *Montgomery*, 34 S.W. at 561. The board cannot reweigh evidence and judge witness credibility. *Ysleta Indep. Sch. Dist. v. Meno*, 933 S.W.2d 748, 751 n.5 (Tex. App.—Austin 1996, writ denied).

While the IHE is the factfinder, the board retains the authority to make the ultimate decision as to whether the facts establish a violation of board policy. *Id.* at 565. A school board is entitled to adopt, reject, or change an IHE's conclusions of law and make the ultimate decision whether to terminate a contract, so long as the board's decision is supported by substantial evidence and free from legal error. *Id.* at 566. The label "finding of fact" or "conclusion of law" is not determinative; the focus is on whether the issue is determined by policy and is supported by substantial evidence and free from legal error. *Id.* The board can rely on undisputed evidence in the record to reach its conclusion of law. *Id.* at 568.

The Commissioner has held that a school board can change the ultimate determination that good cause does or does not exist if that change is supported by findings of fact and undisputed evidence. *Esparza v. Edinburg Consol. Indep. Sch. Dist.*, Docket No. 017-R2-01-2017 (Comm'r Educ. 2017); *Larberg v. Bellville Indep. Sch. Dist.*, Docket No. 005-R2-10-2016 (Comm'r Educ. 2016). Further, the Commissioner has held:

A determination regarding good cause as that term is used in Texas Education Code sections 21.257(a-1) and 21.259(b)(1) includes both an ultimate determination of good cause and an interpretive fact that is closely tied to that ultimate determination. A school district may change a hearing examiner's interpretive fact that is closely tied to a determination that good cause does or does not exist.

*Esparza, supra.* The Commissioner has also held:

Good cause is a high standard. An employee must not only fail to perform as an ordinary employee would, but the failure must be of a serious nature.

*Carpenter v. Daingerfield Lone Star Indep. Sch. Dist.*, Docket No. 010-R2-094 (Comm'r Educ. 1995).

After a two-day hearing, the IHE issued a Recommendation with 98 Findings of Fact and seven Conclusions of Law. Respondent's Board adopted Findings of Fact 1-93, 95 and 98. The IHE's Finding of Fact 94 states:

Petitioner has not established that Respondent provided unauthorized assistance to any students during the 2018 STAAR testing.

The Board considered this Finding of Fact to be a mislabeled Conclusion of Law and eliminated the word "not." The Board's reason for its change is: "The undisputed evidence in the record demonstrates that Ms. Sisk reminded a student to utilize a whisper phone device during the 2018 STAAR testing administration." The Legal Basis is: "A board of trustees may rely on undisputed evidence to support rejecting or changing a hearing examiner's conclusions of law" citing *Montgomery Independent School District v. Davis*, 34 S.W.2d 559, 568 (Tex. 2000).

The IHE's Finding of Fact 96 states:

Petitioner has not established that Respondent violated KISD Board Policies, state law or ethical standards, including Standards 1.1, 1.6, 1.7, 1.10, 3.3, and 3.3 of the Educators Code of Ethics.

As with Finding of Fact 94, the Board declared that Finding of Fact 96 was a mislabeled conclusion of law and eliminated the word "not" in this finding for the same reason and legal basis as Finding of Fact 94.

The IHE's Finding of Fact 97 states:

Petitioner has not established that good cause exists to terminate Respondent's continuing contract.

The Board found that the IHE's Finding of Fact 97 was also a mislabeled conclusion of law and eliminated the word "not." The Board's reason for the change is that the determination of good cause is a legal conclusion and "the KISD Board of Trustees retains ultimate authority to determine whether undisputed evidence in the record demonstrates that good cause exists to terminate a teacher's continuing contract. The undisputed evidence in the record demonstrates that Ms. Sisk reminded a student to utilize a whisper phone device during the 2018 STAAR testing

administration.” The Board’s legal basis for the change cites to Texas Education Code section 21.257(a-1): “A determination by the hearing examiner regarding good cause for the . . . termination of a probationary, continuing, or term contract is a conclusion of law and may be adopted, rejected, or changed by the board of trustees or board subcommittee as provided by Section 21.259(b).” The Board cites to *Montgomery*, 34 S.W.3d at 567 and *Judson Indep. Sch. Dist. v. Ruiz*, 2015 Tex. App. LEXIS 3055, \*18 (Tex. App.—San Antonio 2015, pet. denied) (“The school board retains the authority to make the ultimate determination of whether board policy has been violated and whether the violation is good cause to terminate a contract.”) (citing Tex. Educ. Code § 21.211(a)(1); *Montgomery*, 34 S.W.3d at 565.”

The Commissioner must determine whether the record contains evidence to support these changes. The fact that Petitioner admitted to reminding a student to use his whisper phone device<sup>2</sup> may or may not be sufficient to support these changes and a good cause determination.

#### Handing a Student a Whisper Phone

The fact upon which Respondent based all of its changes to the IHE’s Findings of Fact, Conclusions of Law and Recommendation is Petitioner’s alleged admission that she reminded a student to utilize a whisper phone device during the STAAR test administration. The actual evidence in the record is that the Director of Human Resources (“Director”) testified that Petitioner told her:

She [Petitioner] also did say that she picked up a whisper phone and handed it to a student. Did not make any verbal commentary, but did hand the whisper phone to the student who wasn’t using it.

Although the Petitioner testified that she did not believe she was doing anything wrong by doing this, the Director testified that, in her opinion, handing the student the approved accommodation [the whisper phone] was indirect assistance and a violation. When asked on cross-examination to point out where handing a student a whisper phone is listed as a violation, she referred to District

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<sup>2</sup> A whisper phone is a device made of PVC tubing in a c-shape used by a student to hear himself reading aloud quietly and is an allowable STAAR accommodation for some students. It was an allowable accommodation for the student in question.

Policy EKB (Legal), the district policy related to state assessment, which states that conduct that may constitute a violation of test security includes directly or indirectly assisting students with responses to test questions. The Director admitted that nothing in that policy specifically states that handing a student a whisper phone is indirect assistance, but rather, that is her interpretation. Petitioner testified that she told the Director of Human Resources and District Testing Coordinator when they met with her during their investigation:

[M]y students had their allowable accommodations on their desks. And if I noticed a student that was off task, daydreaming, playing with their shoes, whatever, that I would pick up the whisper phone, for example, and – without saying anything and hand it to the student as a non-verbal reminder to stay on task because the students that I tested in small group they were very – they were easily distracted.

Petitioner testified that she did not think that handing the student the whisper phone as a non-verbal reminder to stay on task was a testing violation and Respondent's District Testing Manual does not indicate that handing a student his whisper phone is a testing violation.

#### Policy Interpretation

Respondent's Board stated as its legal basis for rejecting the IHE's recommendation not to terminate Petitioner that: "A school board "has the power to apply [its] policies to the examiners' findings and the undisputed evidence by rejecting or changing the examiner's conclusions of law or proposal for relief" citing *Montgomery*, 34 S.W.3d at 565. As noted above, a district's interpretation of its own policy is entitled to great deference and may not be reversed so long as it is reasonably supported by the policy's language and school districts have broad authority to change determinations regarding good cause. Tex. Educ. Code §§ 21.257(a-1), 21.259(b), *Hubbard v. Dallas Indep. Sch. Dist.*, Docket No. 168-R3-292 (Comm'r Educ. 1992), *see also*, *Dallas Transit System and City of Dallas v. Mann*, 750 S.W.2d 287 (Tex. App. – Dallas 1988, no writ). Hence, the question to be addressed is whether Respondent's policy that finds testing violations may include directly or indirectly assisting students with responses to test questions can

reasonably be interpreted to prohibit a teacher from handing a student a whisper phone during a test administration.

It is not entirely clear that handing a student a whisper phone during test administration would constitute indirectly assisting a student with responses to test questions. Some might think that this is too attenuated to constitute indirect assistance. However, others might believe that handing a whisper phone to a student during test administration does constitute indirect assistance. Because school districts authoritatively interpret their policies and make the determination regarding good cause for termination, Respondent's interpretation of its policy will be given deference. It is a reasonable interpretation of its policy but not the only reasonable interpretation of its policy. Hence, it is concluded that Petitioner violated district policy when she handed a student a whisper phone during test administration.

#### CONCLUSIONS OF LAW

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact, in my capacity as the Commissioner of Education, I make the following Conclusions of Law:

1. The Commissioner has jurisdiction over this case pursuant to Texas Education Code section 21.301.
2. The Independent Hearing Examiner's Findings of Fact are supported by substantial evidence.
3. The Board of Trustees' Conclusions of Law or adopted as if set out in full.
4. Petitioner was employed by Respondent under a continuing contract.
5. A district's interpretation of its own policy is entitled to great deference and may not be reversed so long as it is reasonably supported by the policy's language.
6. School districts have broad authority to change determinations regarding good cause.



7. Respondent properly interpreted its policy EKB (Legal) as prohibiting a teacher from handing a whisper phone to a student taking the STAAR test. Petitioner violated policy EKB (Legal) by handing a student a whisper phone during the administration of a standardized test.

8. Respondent had good cause to terminate Petitioner's continuing contract.

ORDER

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact and Conclusions of Law, in my capacity as Commissioner of Education, it is hereby ORDERED that Petitioner's appeal be and is hereby DENIED.

SIGNED AND ISSUED this 16<sup>th</sup> day of December 2019.

A handwritten signature in black ink, appearing to read 'Mike Morath', is written over a horizontal line.

MIKE MORATH  
COMMISSIONER OF EDUCATION