

PHUONG LAN CARTER	§	BEFORE THE
Petitioner,	§	
	§	
V.	§	COMMISSIONER OF EDUCATION
	§	
COPPERAS COVE INDEPENDENT	§	
SCHOOL DISTRICT	§	
Respondent.	§	THE STATE OF TEXAS

**DECISION OF COMMISSIONER**

**STATEMENT OF THE CASE**

Petitioner, Phuong Lan Carter, complains of the decision of Respondent, Copperas Cove Independent School District, to nonrenew her term contract. Christopher Maska is the Administrative Law Judge appointed by the Commissioner of Education to hear this cause. Petitioner is represented by John F. McCormick, Attorney at Law, Round Rock, Texas. Respondent is represented by Haley Turner and Carlos E. Alferez, Attorneys at Law, Austin, Texas.

This case raises four principal issues: evidence, remediation, substantial evidence, and retaliation. The evidentiary issue concerns the admission into evidence of reprimands from prior school years. Because these reprimands were admitted for the limited purpose of showing that Petitioner had notice that she was required to bring complaints through proper channels, this did not violate the general rule that a contract cannot be nonrenewed for events that occurred during an earlier contract.

There is no right to remediation. However, remediation may be considered when assessing whether an action is sufficient to justify the nonrenewal of a contract. In the present case, Petitioner was given some opportunity to remediate, but additional remediation is not required.

While there is conflicting evidence in this case, there is substantial evidence to support the reasons given for proposed nonrenewal.

A school district cannot nonrenew a teacher's contract because the teacher has made a report to the Texas Education Agency concerning potential violations by the school district. If a school district were to do so, that action would violate the constitutional rights of remonstrance and petition that are incorporated into the teacher's contract. However, while Petitioner made such reports to the Texas Education Agency, Petitioner's contract was not nonrenewed for this reason.

### FINDINGS OF FACT

After due consideration of the record and matters officially noticed, it is concluded that the following Findings of Fact are established by the record and file in this case in accordance with 19 Tex. Admin. Code § 157.1072(i).

1. Petitioner was employed by Respondent under a term contract for the 2019-2020 school year.

2. Respondent proposed the nonrenewal of Petitioner's 2019-2020 term contract for:

1. Deficiencies pointed out in observation reports, appraisals, or evaluations, supplemental memoranda, or other communications.
5. Insubordination or failure to comply with official directives.
6. Failure to comply with Board policies or administrative regulations.
14. Failure to meet the district's standards for professional conduct.
21. Failure to maintain an effective working relationship or to maintain good rapport with parents, the community, or colleagues.
28. Misrepresentation of facts to a supervisor or other District official in the conduct of District business.
33. Any reason that makes the employment relationship void or voidable such as a violation of federal state, or local law.
34. Any reason that constitutes good cause for terminating the contract during its term.

3. The proposed nonrenewal of Petitioner's term contract was heard by the Respondent's Board of Trustees on June 16, 2020. This cause was not heard by an Independent Hearing Examiner.

4. Petitioner received directives or communications concerning her violations of FERPA, telling her not to communicate with parents and students, regarding her unprofessional

communications with staff and parents, and meeting with a student not assigned to her classroom.

5. Petitioner communicated with parents and students after being directed not to. Petitioner failed to bring complaints through proper channels after being directed to do so.

6. Petitioner violated FERPA and Respondent's policy concerning student privacy. Petitioner did not take her concerns through proper channels.

7. Petitioner's communications with both her supervisors and staff were unprofessional and failed to meet Respondent's standards for professional conduct.

8. Petitioner did not maintain good working relationships with supervisors and parents. Petitioner was insubordinate to supervisors. Her unprofessionalism with the parents of one of her students destroyed the relationship with the parents and caused the district to reassign the student to another teacher.

9. Petitioner misrepresented facts to her supervisor concerning a student who visited her in her classroom.

### DISCUSSION

Petitioner contends that Respondent improperly nonrenewed her term contract. Petitioner contends a prior year's incidents were improperly allowed into evidence, no opportunity for remediation was given, substantial evidence does not support the nonrenewal, and the nonrenewal is arbitrary, capricious, and unlawful because action was taken in retaliation for Petitioner filing complaints with the Texas Education Agency. Respondent denies these claims.

#### Prior Year's Incidents

Petitioner is correct that normally a district cannot use incidents that occurred during a prior contract as a basis to nonrenew the current contract. *Hernandez v. El Paso Independent School District*, Docket No. 053-R1-05 2016 (Comm'r Educ. 2016). While there is an exception, it does not apply to the present case. *Id.* The incidents that Petitioner complains of are memorialized in reprimands that Petitioner received in a prior year. These were entered into

evidence not to prove that Petitioner had engaged in bad acts that warranted the nonrenewal of her contract, but to show that Petitioner had notice that such acts were not acceptable. If one commits an act after being reprimanded, the violation is more serious than if the individual committed an action and had not been reprimanded before. It was not improper for the reprimands to be admitted into evidence for the limited purpose of showing that the Petitioner had notice that a type of conduct was not appropriate.

Petitioner argues that the reprimands from a prior year should not have been admitted into evidence because the prior acts were not sufficiently similar to the current year allegations against Petitioner. Whether or not the current year incidents are sufficiently similar to prior year incidents, Petitioner was not harmed by the admission of the evidence for a limited purpose. Further, Petitioner is incorrect as to how similar prior years incidents have to be. Petitioner objects that the prior year's incidents were not regarding the same subject matter. Petitioner argues that the reprimands concerned posting on social media, distribution of a corrective action plan, and involvement in student issues and these are not the issues she is accused of in the current year. All the prior years reprimands concerned bringing issues up through proper channels. Petitioner was accused in the present year of not bringing up issues through the proper channels. If Petitioner's interpretation were to be followed, one could not use a prior year's reprimand concerning an incident of insubordination to an assistant principal as notice when considering the seriousness of insubordination to a principal in the current year.

### Remediation

There is no independent right to remediation. *Weatherwax v. Fort Worth Independent School District*, Docket No. 080-R2-1298 (Comm'r Educ. 1999). Remediation is something that might be considered when determining whether an incident is serious enough to support termination or nonrenewal. Even in cases of the termination of a contract, there is no right to remediation. However, to terminate a contract a district is required to demonstrate good cause. Good cause is a high standard. The standard to nonrenew a contract is proof of the violation of a

pre-established policy reason. *Id.* This is often a lesser standard. Because of the difference in standards, remediation is often much more applicable to termination cases. Termination cases that address remediation will often have little relevance to nonrenewal cases because of the difference in standards. The real issue is whether the incidents in question are alone sufficient without remediation to support termination or nonrenewal. *Pepperday v. Clear Creek*, Docket No. 484-R1-895 (Comm'r Educ. 1997).

In the present case, Petitioner was given an opportunity for remediation in that she was told repeatedly to bring complaints through proper channels. As to the other allegations, Respondent was not required to first give her an opportunity to remediate. For example, as to the claims about communication with parents, Petitioner did not behave in a professional manner. This can be seen by the parent's characterization of the claims. The school board believed the parents. Under the substantial evidence standard of review, the finder of fact gets to determine the weight of the evidence. *Davis v. Montgomery Indep. Sch. Dist.*, 34 S.W.3d 559, 567 (Tex. 2000). But it was not just the parent's characterization of the event, an administrator who was present at the second part of the meeting affirmed the parent's characterization. The result of Petitioner's unprofessional conduct was a determination that the relationship between the parents and Petitioner was broken and the child was assigned to another teacher. Respondent was not required to give Petitioner another chance.

#### Substantial Evidence

Substantial evidence is not a high standard:

The standards of review under the substantial evidence rule are now reasonably well established in Texas:

1. The findings, inferences, conclusions, and decisions of an agency are presumed to be supported by substantial evidence, and the burden is on the party contesting the order to prove otherwise.
2. In applying the substantial evidence test, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence of questions committed to agency discretion.

3. Substantial evidence is more than a scintilla, but the evidence in the record actually may preponderate against the decision of the agency and nonetheless amount to substantial evidence.

4. 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.

5. 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.

*Texas Health Facilities Commission v. Charter Medical-Dallas, Inc.*, 665 S.W.2d 446, 452-53 (Tex.1984). It has also been stated that "substantial evidence" is less than that needed to sustain a verdict being attacked as against the great weight and preponderance of the evidence. *Browning-Ferris, Inc. v. Texas Department Health* of, 625 S.W.2d 764, 768 (Tex.App.1981, writ ref'd n.r.e.); *State Banking Board v. Valley National Bank*, 604 S.W.2d 415, 420 (Tex.Civ.App.1980, writ ref'd n.r.e.); see also Reavley, *Substantial Evidence and Insubstantial Review in Texas*, 23 Sw.L.J. 239, 241-42 (1969).

*City of League City v. Texas Water Comm'n*, 777 S.W.2d 802, 805 (Tex. App.-Austin 1989, no writ). While there is conflicting evidence as to many issues, there is substantial evidence to support the School Board's determination that Petitioner violated its pre-established reasons for nonrenewal. It also needs to be recalled that school districts authoritatively interpret their own policies. *Davis v. Montgomery Indep. Sch. Dist.*, 34 S.W.3d 559, 565 (Tex. 2000). Respondent's reasons for nonrenewing contracts were adopted as a policy. Hence, the meaning of the reasons for nonrenewal are authoritatively interpreted by Respondent's Board.

#### Retaliation

Petitioner contends that Respondent nonrenewed her contract because she had filed special education complaints with the Texas Education Agency. Petitioner asserts that this makes the nonrenewal of her contract arbitrary capricious and unlawful. Respondent argues that the Commissioner lacks jurisdiction over this claim. Respondent's view is mistaken. While the Texas Education Code does not state a school district cannot nonrenew a term contract for the

teacher making a report to the Texas Education Agency, Petitioner is correct that Respondent could not terminate her because of her complaint.

This can be seen in two ways. Respondent has not adopted a reason for nonrenewing contracts that a teacher has made a complaint to the Texas Education Agency. Hence, Respondent cannot nonrenew a teacher's contract for filing a complaint with the Texas Education Agency. Further, such a policy would be in violation of the Texas Constitution art. I, sec. 27, which creates the right of remonstrance, and the First Amendment of the United States Constitution which grants the people the right to "petition the Government for a redress of grievances." These constitutional rights are incorporated into Petitioner's contract. *Central Educ. Agency v. George West Independent School Dist.*, 783 S.W.2d 200, 201-202 (Tex. 1989). To nonrenew, a teacher for exercising the rights of remonstrance or petition would violate the teacher's contract. However, Petitioner's contract was nonrenewed because of her failings, not her reporting. Respondent had ample legitimate reasons to nonrenew Petitioner's contract.

### Conclusion

Prior year's incidents were not improperly admitted into evidence. While Petitioner did have some opportunity for remediation, Respondent was not required to give Petitioner an opportunity to remediate prior to nonrenewing her contract. Respondent's decision is supported by substantial evidence. Respondent did not retaliate against Petitioner.

### CONCLUSIONS OF LAW

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

1. The Commissioner has jurisdiction over this case under Texas Education Code section 21.301.
2. Respondent's decision to nonrenew Petitioner's contract is supported by substantial evidence.

3. The nonrenewal of Petitioner's contract is not arbitrary capricious, or unlawful.
4. It was not improper to admit into evidence reprimands from a prior school year for the limited purpose of showing notice. The admission into evidence of reprimands from the prior year was not improper.
5. There is no right to remediation. However, remediation may be considered when assessing whether an action is sufficient to justify the non-renewal of a contract.
6. Texas Constitution art. I, sec. 27, which creates the right of remonstrance, and the First Amendment of the United States Constitution which grants the people the right to "petition the Government for a redress of grievances." are incorporated into Petitioner's contract.
7. Petitioner's contract was not nonrenewed because Petitioner exercised her rights of remonstrance and petition. No violation of Petitioner's contract occurred.
8. The Amended Petition for Review should be denied.

### 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 the Petitioner's appeal be, and is hereby, DENIED.

SIGNED AND ISSUED this 24th day of August 2020.

**Mike Morath**  
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MIKE MORATH  
COMMISSIONER OF EDUCATION