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HEARING—PRACTICE AND PROCEDURE—BY BOARD OF EDUCATION BEFORE TERMINATION OF TEACHER'S CONTRACT—SECTION 4842-12 G. C.

SYLLABUS:

Practice and procedure by a board of education conducting a hearing pursuant to provisions of Section 4842-12, General Code, before termination of a teacher's contract, discussed.

Columbus, Ohio, June 9, 1945

Hon. Kenneth C. Ray, Superintendent of Public Instruction
Columbus, Ohio

Dear Sir:

Your request for my opinion reads:

"We should like to have your formal opinion in answer to the following questions:

(1) Is a hearing that is held before a board of education under the provisions of Section 4842-12 of the General Code an administrative proceeding or a judicial proceeding?

(2) To what extent must the hearing be conducted according to the formalities and technical rules of procedure applicable to a court proceeding?

a. Must provision be made for opening and closing statements?

b. Must the testimony be limited to responses to specific and detailed questions posed by counsel, or may the teacher and witnesses simply 'tell their story' under general directions from the presiding officer?

c. May the teacher and witnesses be questioned by members of the board of education?

d. Must the board hear objections by counsel, and sustain or overrule them as in a court hearing?

e. Must testimony be given by one person at a time from a special witness stand, or may the questions be directed to and answered by witnesses seated in various places in the room where the hearing is conducted?

(3) To what extent must the hearing be conducted according to the technical rules of evidence applicable in a court proceeding?

(4) To what extent must the board of education prove by means of testimony at the hearing that there are sufficient grounds for termination of the contract?

(5) If the board is not required to prove its case against the teacher by testimony at the hearing, what would be the nature of the cross-examination on behalf of the teacher?

(6) May the board of education establish a time limit for the hearing?"

Due to the nature of your request for my opinion, I will not attempt to answer in the order named, and in some cases I will not specifically answer, the questions as they are set forth in your request, but my opinion is in the nature of a discussion of the general problems involved in the request.

Section 4842-12, General Code, reads as follows:

"The contract of a teacher may not be terminated except for gross inefficiency or immorality; for wilful and persistent viola-

tions of reasonable regulations of the board of education; or for other good and just cause. Before terminating any contract, the employing board of education shall furnish the teacher a written notice signed by its clerk of its intention to consider the termination of his contract with full specification of the ground or grounds for such consideration. Unless the teacher so notified shall within ten days subsequent to the receipt of such notice, demand in writing an opportunity to appear before the board and offer reasons against such termination, the board may proceed with formal action to terminate the contract. If, however, said teacher shall, within ten days after receipt of notice from the clerk of the board demand in writing a hearing before said board, the board shall set a time for the hearing within thirty days from the date of said written demand and the clerk of the board shall give the teacher at least fifteen days' notice in writing of the time and place of such hearing; provided, however, that no hearing shall be held during the summer vacation without the teacher's consent. Such hearing shall be private unless the teacher requests a public hearing. The hearing shall be conducted by a majority of the members of the board and be confined to the aforesaid ground or grounds for such termination. The board of education shall provide for a complete stenographic record of the proceedings, a copy of such record to be furnished to the teacher. The board of education may suspend a teacher pending final action to terminate his contract if, in its judgment, the character of the charges warrants such action.

Both parties shall have the right to be present at such hearing, to be represented by counsel, to require witnesses to be under oath, to cross-examine witnesses, to take a record of the proceedings, and to require the presence of witnesses in their behalf upon subpoena to be issued by the clerk of the board. In case of the failure of any person to comply with a subpoena, a common pleas judge of the county in which the person resides, upon application of any interested party, shall compel attendance of the person by attachment proceedings as for contempt. Any member of the board of education shall have power to administer oaths to witnesses. After hearing, the board by majority vote may enter upon its minutes an order of termination. If the decision of the board, after hearing, is against termination of the contract, the charges and the record of the hearing shall be physically expunged from the minutes and, if the teacher has been suspended, he shall be paid his full salary for the period of such suspension.

Any teacher affected by an order of termination of contract shall have the right of appeal to the court of common pleas of the county in which the school is located within thirty days after receipt of notice of the entry of such order. Such appeal shall

be an original action in said common pleas court and shall be commenced by the filing of a petition against such board of education, in which petition the facts shall be alleged upon which the teacher relies for a reversal or modification of such order of termination of contract. Upon service or waiver of summons in said appeal, such board of education shall forthwith transmit to the clerk of said common pleas court for filing a transcript of the original papers theretofore filed with said board and a certified transcript of all evidence adduced at the hearing or hearings before such board, whereupon the cause shall be at issue without further pleading and shall be advanced and heard without delay. The common pleas court shall examine the transcript and record of the hearing before the board of education and shall hold such additional hearings as it may deem advisable, at which it may consider other evidence in addition to such transcript and record.

Upon final hearing, the common pleas court shall grant or deny the relief prayed for in the petition as may be proper under the provisions of law in accordance with the evidence adduced in the hearing. Such an action shall be deemed to be a special proceeding within the purview of section 12223-2 of the General Code and either the teacher or the board of education may appeal therefrom.

In any court action the board of education may utilize the services of the prosecuting attorney or city solicitor as authorized by section 4834-8 of the General Code, or may employ other legal counsel if it deems it necessary.

This is the statute referred to in your letter and the only one directly involved in your inquiry, as it is the only section of the Code which prescribes the procedure for the notice and opportunity for hearing by a board of education before termination of a teacher's contract.

Such a hearing as is provided in Section 4842-12, General Code, is an administrative proceeding, but in conducting such a hearing the board is exercising quasi-judicial powers. The procedure to be followed in such a hearing is generally not that prescribed for ordinary civil actions, and in the absence of specific requirements in the statute the board would be bound only by ordinary rules that would be conducive to orderly procedure and would conform to the rudimentary requirements of fair play. These rules would include the specific statutory requirements of Section 4842-12, General Code, such as, the right to be present at the hearing, the right to be represented by counsel, to require wit-

nesses to be under oath, to cross-examine witnesses, to take a record of the proceedings, and to require the presense of witnesses in behalf of either party.

The differences in origin and function of courts and of administrative bodies preclude the wholesale transportation to administrative proceedings of the rules of procedure, trial and review which have evolved from the history and experience of courts. When such body as the board of education conducts a hearing as required by the statute under discussion, it is acting in a quasi-judicial capacity and would be unrestricted by the technical and formal rules of procedure which would govern trials by a court. However, the elementary and fundamental principles of judicial inquiry should be observed. These rules would require an opportunity for an opening and closing statement by counsel; would permit that the teacher and other witnesses be questioned by members of the board or its counsel, and that full opportunity for cross-examination be given either party. It would require that the board, sitting in a quasi-judicial capacity, pass upon objections and rule as to the admissibility of evidence. This does not mean that the board would be bound by the strict and technical rules of evidence governing jury trials, but it would mean that the basic philosophy of the rules as crystallized in modern court procedure be followed.

I might relate four principle concepts of this basic philosophy of evidence which, while necessarily subject to many exceptions and limitations, nevertheless should be kept in mind by any board or quasi-judicial body conducting a hearing involving rights and property. The first basic principle has already been referred to in this opinion, and it may be stated as that common law ideal of fair procedure upon which has been built the requirements of sworn testimony, opportunity for cross-examination and rebuttal, insistence that all evidence be formally introduced, and the power to subpoena witnesses and documents. The second requirement would be that there be presented only trustworthy evidence, and this requirement concerns such exclusionary rules as are involved in hearsay, opinion and best evidence rules in court practice. The third principle would be the shielding, for social reasons, of certain so-called privileged communications made in confidential relationships. The fourth would be to protect the witness from self-crimination and involuntary confessions. This relates to the common-law doctrine embodied in our Federal and State Con-

stitutions, that a witness may not be compelled to give testimony which would expose him to a prosecution for crime or to a forfeiture or penalty, but may claim the privilege of refusing to answer or disclose such information.

While there is no objection to the admission of evidence in narrative form, the statute under consideration requires that a record of the proceedings be taken; and this would involve a transcript of the testimony. Therefore, as a practical matter the testimony must be given in orderly fashion, and the witnesses should be properly sworn and questioned in a manner that will permit the taking of a complete and intelligible record. To this end it could very conceivably be suggested by the questioner that the witness tell his story in narrative form. Of course, he should be directed to confine his testimony to the issues. While there would be no objection from a procedural standpoint to having a witness testify from wherever he happened to be sitting in the hearing room, it might be more conducive to orderly procedure if a witness stand were provided where the person testifying could be easily heard by the stenographer, the board, and other parties and officials. Questions should not be directed to witnesses generally, but witnesses should be interrogated separately and in order.

In the absence of a specific statutory requirement concerning the degree of proof, the rule would be that the charges of the board upon which it desires to terminate the contract be established by a preponderance of the evidence. By "preponderance of evidence" is meant the greater weight of evidence. It does not mean that more witnesses have testified on one side or the other; in other words, it does not have reference to the number of witnesses testifying, or the mere quantity of evidence, but to the quality thereof. It means simply that after the testimony of all witnesses has been weighed with reference to their credibility, exactness of memory, and all of the circumstances surrounding their testimony, the evidence of one side outweighs that of the other. 17 Ohio Jur., page 390.

While it might be found expedient to establish a time limit for a hearing, it would be necessary to exercise considerable care in this respect in order that all parties have an opportunity for a complete and fair hearing.

This general discussion of rights and duties of a board will, I trust,

answer the questions propounded by you. I realize that I have not answered each question specifically, but the vast and rapidly advancing theories in relation to public administrative law does not permit hard and fast rules, and any attempt to cover every question that might arise in such a procedure as is contemplated by Section 4842-12, General Code, would involve an opinion of great length and technical discussion.

Respectfully,

HUGH S. JENKINS

Attorney General