State Bar Section Report

School Law

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To the Members of the School Law Section:

I just recently realized that I started law school 20 years ago this fall. I have practiced school law my entire 17 year legal career. Being entrenched in school law has resulted in me forgetting almost everything that was on the bar exam. Yet, because school law is far-reaching and ever-changing, there are days when I am not sure if I even know any of the answers to the school law questions I am asked. Amid my sporadic confusion, one point is clear: I feel lucky to be practicing school law.

As the current PTA president of my two daughters' elementary school, I am seeing public education through slightly different eyes than I once did. I am now afforded a daily, unvarnished behind the scenes view at school. Our school staff (principal, teachers, paraprofessionals, custodians, etc.) contribute to the system much more than anyone can ever measure, they will never have all of the institutional resources they need, and they are certainly worth more than we pay them. It has made me appreciate people who serve on school boards for no pay and who put in untold hours serving in an often thankless capacity. My PTA experience is a good shot in the arm for me coming twenty years from the beginning of my legal journey. I believe it has already made me a better and more empathetic advocate.

Public education and its people deserve loyal, skilled, and empathetic advocates. I am convinced that the School Law Section fosters these characteristics in us. Some of you have taught me lessons the hard way; others have mentored me perhaps without even knowing it. However, I believe we enjoy in this section a camaraderie not found in other areas of the law. We recently enjoyed that camaraderie at our retreat in The Woodlands this past July. Almost 100 of you attended and were treated to a fantastic CLE program organized by Joy Baskin and Shellie Hoffman Crow, and time for relaxation with family and friends. **Please mark your calendar now for July 13-14, 2007.** That is when we will be holding our summer 2007 retreat at the San Luis Hotel in Galveston.

I would like to thank outgoing chair Wayne Haglund for his creativity, hard work, and leadership to the section. It has been a real treat following Wayne in service to the section. He has made it exceedingly easy for me to serve as chair.

Finally, I want to thank our Newsletter editors, Julie Leahey and Leticia McGowan. They have worked diligently to bring us a very informative collection of legal articles in this edition. Julie and Leticia have agreed to continue in this capacity for another year. Please contact them if you have ideas for a Newsletter article. They would appreciate hearing from you. I hope you have a great fall.

Respectfully,
Kevin Lungwitz
Chair
State Bar of Texas School Law Section

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HOUSE BILL 1: MORE THAN JUST SCHOOL FINANCE

By: Allyson Holt Collins
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The Texas Legislature's most recent education reform package, House Bill 1[1], has received wide press coverage due to its inclusion of school finance and property tax reforms, a teacher salary increase, and joint election mandates. However, the bill contained many other provisions that will significantly impact school districts and school employees in the coming years. This article will highlight some of the new laws from House Bill 1 that may have been overshadowed by the finance provisions.

School Start Date: Effective the 2007-08 school year, a school district may not begin instruction before the fourth Monday in August, unless the school operates a year-round system. A school may not receive an exemption or waiver from the requirements for the first day of instruction. A waiver related to the first day of instruction for the 2007-08 school year or beyond is void.

Self-Administration of Anaphylaxis Medication: Permits a child who suffers from anaphylaxis (severe allergic reactions that can result in anaphylactic shock) to possess and self-administer prescription anaphylaxis medicine while on school property or at a school-related event. The medicine must be prescribed for the student and the student must demonstrate to the student's physician or other licensed health care provider and the school nurse, if available, the skill level necessary to self-administer the prescription medication, including any device necessary.

Student Transfers: A district shall permit a parent, guardian, or person standing in parental relation to obtain an intra-district transfer for students living in the same house as a special education student who is attending a campus other than the campus the special education student would attend based on residence. The transfer student must be otherwise entitled to admission in the district (under the admissions laws) and the campus must offer the appropriate grade level. Transportation is not required for transfer students under this section.

Electronic Student Records System: Each school district, open-enrollment charter school, and institution of higher education (as defined by Texas Education Code Section 61.003) must participate in an electronic student records system that meets the standards of the commissioners of education and higher education. The system must permit an authorized state or district official or representative of an institution of higher education to electronically transfer to and from an educational institution where the student is enrolled and retrieve student transcripts (including course or grade completion, teachers of record, assessment instrument results, receipt of special education services and the individualized education program, and the personal graduation program).

Evaluation of Bilingual Education Students After Transfer Out of Bilingual Education or a Special Language Program: A district's language proficiency assessment committee (LPAC) shall reevaluate a student transferred from a bilingual or special language program if the student earns a failing grade in a foundation curriculum subject during the first two school years after the transfer. The LPAC shall determine whether the student should be reenrolled in the special program. During the two years after a student transfers out of one of these programs, the LPAC shall review the student's performance. After an evaluation, the LPAC may (1) require intensive instruction, or (2) reenroll the student in a bilingual or special language program.

College Readiness: No later than the fall 2008 semester, each district must offer students the opportunity to earn at least 12 semester hours of college credit in high school. If requested, a public higher education institution must help a district develop and implement the program.

College Curriculum Development: Vertical teams composed of public school and higher education faculty will be established by the commissioners of education and higher education to: (1) recommend college readiness standards and expectations; (2) evaluate the effectiveness of the TEKS in preparing students for college; (3) recommend strategies for aligning curricula; and (4) develop instructional strategies, professional development and online support materials.

Increased Math and Science Requirements: Beginning with students entering the ninth grade in the 2007-08 school year, students pursuing a recommended or advanced high school diploma must complete four years each of math and science. One or more courses offered in the required curriculum for the recommended and advanced programs must include a research writing component. The required curriculum is comprised of English language arts, math, science, and social studies.

Optional Flexible School Day Program: A district may apply to the Commissioner to provide a flexible school day program for students in grades nine through 12 who have dropped out of school, are at risk of dropping out of school as defined by Texas Education Code Section 29.081, or attend a campus implementing an innovative redesign of the campus or an early college high school under a plan approved by the Commissioner. The district may provide flexibility in the number of hours the student attends each day, in the number of days each week the student attends, or allow the student to enroll in less than or more than a full course load. A course must provide for at least the same number of instructional hours as required for a course offered in a program that meets the required minimum number of instructional days.

High School Allotment: Provides to district $275 per high school student in average daily attendance to prepare students to go on to higher education, encourage students to take advanced academic course work, increase the rigor of academic course work, align secondary and postsecondary curriculum and support promising high school completion and success initiatives in grades six though 12. Beginning with the 2008-09 school year, certain districts may use these funds on any instructional program in grades six through 12 other than an athletic program.

- The first payment of these funds to districts will be in September 2006. Rules from TEA with guidance

and standards for use of the funds are on an expedited timeline, with a proposed publication date of August 18, 2006, and a proposed effective date of October 2006. If districts and campuses implement programs before the proposed rules are published, the programs should closely adhere to the language in HB 1.

Expansion of Pre-Kindergarten Eligibility: Expands eligibility for pre-kindergarten services to include children of active duty members of the armed forces and children of members of the armed forces who were injured or killed in the line of duty. The child remains eligible even if the parent leaves active duty after the child begins a prekindergarten class.

Summary of Proposed Budget: Now, concurrently with the NOTICE OF PUBLIC MEETING TO DISCUSS BUDGET AND PROPOSED TAX RATE, each district must post a summary of the proposed budget on the district's Internet Web site or at the central administrative office if the district has no Web site. The summary must include information relating to per student and aggregate spending on instruction, instructional support, central administration, district operations, debt service, and any other category designated by the Commissioner. The summary must also compare the previous year's actual spending with the proposed budget. The summary is not required to be posted in a specific format or on a standard form.

- In the Texas Education Agency (TEA)'s Frequently Asked Questions on House Bill 1, the budget function areas that should be presented in the new budget summary are outlined in question 44: http://www.tea.state.tx.us/tea/hb1faq.pdf.

Education Research Centers: The Commissioner and the Higher Education Coordinating Board may establish up to three centers for education research. If established, the centers will conduct education research, including research relating to the impact of state and federal education programs, the performance of educator preparation programs, public school finance, and the best practices of school districts with regard to classroom instruction, bilingual education programs, special language programs, and business practices.

Public Access to PEIMS Data: The Commissioner must develop a request for proposal for a third party to make PEIMS data publicly available on the Internet by August 1, 2007. In developing the proposal, the Commissioner must establish an advisory panel of educators, interested stakeholders, business leaders, and other interested members of the public.

- TEA reports that the redesign of its website will significantly improve user awareness of and access to various data reports available on the site. This website redesign project will take into consideration recommendations made by the Commissioner's Advisory Panel on Public Access to PEIMS, before developing a request for proposal.

"Best Practices" Clearinghouse: Through third party contractors, TEA must maintain a clearinghouse, available to the public, of information gathered about best educational practices, including instruction, school finance, resource allocation, business practices, special programs, and technology. The information will be gathered from the education research centers, the Legislative Budget Board, and exemplary or recognized districts, campuses, and charter schools. The Commissioner may purchase curriculum and other instructional tools identified under this section to provide for use by school districts.

Administrative Efficiency: Not later than December 1, 2006, the Commissioner shall evaluate the feasibility of including a uniform indicator under the FIRST system that measures effective administrative management through the use of cooperative shared services arrangements. If the Commissioner determines that the adoption of a uniform indicator described by this subsection is feasible, the Commissioner by rule shall include the indicator in the financial accountability rating system beginning with the 2007-08 school year.

Each ESC shall notify each school district served by the ESC regarding the opportunities available through the ESC for cooperative shared services arrangements within the service area, evaluate the need for shared services arrangements within the service area, and consider expanding ESC-sponsored shared services arrangements. Each ESC shall assist a district in entering into an agreement for a cooperative shared services arrangement regarding administrative services, including transportation, food service, purchasing, and payroll functions.

The Commissioner may require a district to enter into a cooperative shared services arrangement for administrative services if the Commissioner determines that: (1) the district has failed to satisfy a FIRST financial accountability standard; and (2) entering into a cooperative shared services arrangement would enable the district to enhance its performance on the financial accountability standard and promote the efficient operation of the district.

- TEA issued a request for proposals for conducting an evaluation of the use of shared services arrangements statewide and identification of any legal impediments to school districts entering into a shared services arrangement. The RFP can be found at: http://www.tea.state.tx.us/HB1/RevAccSys/RFP.doc

Internal Auditors: If a school district employs an internal auditor, the board of trustees shall select the internal auditor and the internal auditor shall report directly to the board.

Review of Accounting Systems: The Commissioner will contract with a third party to conduct a comprehensive review of the accounting systems districts use under Texas Education Code Section 44.007 (by which each district selects an accounting system that conforms to minimum standards). The review will provide recommendations relating to increased transparency, information about campus spending and program evaluation, whether reporting requirements should be adjusted due to district size. TEA must provide a report to the Legislature by January 1, 2007. Additionally, now the Commissioner, not the State Board of Education, will prescribe the minimum accounting standards. By

January 1, 2007, the Commissioner will report to the Legislature about the benefits of providing districts standardized accounting software. The report shall consider cost savings, accountability benefits, and personnel or other needs for TEA to continuously review the information collected and alert school officials to potential waste or fraud.

- TEA issued a request for proposals for conducting a comprehensive review of the accounting systems used by school districts and reporting on the feasibility of standardized accounting software. The RFP can be found at: http://www.tea.state.tx.us/HB1/RevAccSys/RFP.doc

Spending Targets for District Expenditures: The Commissioner shall annually establish and publish proposed expenditures for each school district based on an evaluation of information relating to the best practices of campuses and districts. The spending limits will include amounts for instructional expenditures, central administrative expenditures, district operations, and any other category designated by the Commissioner. In developing the expenditures, the Commissioner shall consider unique characteristics of the district, including the district's size. If a board intends to exceed the proposed expenditures established by the Commissioner under this section, the board must adopt and publish a resolution that includes an explanation justifying the board's actions.

Rating Rename: Campus rating of "low-performing" is changed to "academically unacceptable."

Academic Excellence Indicators: Added two performance indicators: (1) the measure of progress toward preparation for postsecondary success; and (2) the measure of progress toward dual language proficiency under Texas Education Code Section 39.034(b), for limited English proficient students.

Accreditation: Creates two new accreditation statuses to be defined by the Commissioner: accredited-warned and accredited-probation. The Commissioner shall determine a district's accreditation status each year and will either assign an accreditation status or impose a sanction, including appointing a board of managers to replace the board, revoking the accreditation, or ordering closure of the district and annexing it to another district. In determining accreditation status, the Commissioner shall evaluate and consider the performance of the district under both the academic accountability and financial accountability systems, and may consider other factors set out in House Bill 1. If a district receives an accreditation-warned or accreditation-probation status, the Commissioner shall "warn" the district and require the district to notify parents and property owners of the status and the "implications" of that status.

Procedures for Challenging Accountability Ratings or Sanctions: The Commissioner will develop a process to challenge an academic or financial accountability rating. The rules must provide for a committee that will make recommendations to the Commissioner, and an agency employee may not be a member of the committee. The challenge may be limited to a written submission. The Commissioner's decision (after consideration of the committee's recommendation) may not be appealed under Texas Education Code Section 7.057 or other law. If a district has challenged a decision relating to an academic or financial accountability rating, the district may not challenge the TEA rating "in another proceeding."

To appeal a decision to close a district or campus or to appoint alternative management to a campus, the district must follow the procedures for a contested case under Chapter 2001, Texas Government Code (State Office of Administrative Hearings-SOAH). The substantial evidence rule applies. SOAH shall provide an expedited review with the judge issuing a final order within 30 days after the end of the hearing, and the decision of the administrative law judge is final and may not be appealed.

School Leadership Pilot Program for Principals: TEA must develop a school leadership pilot program for principals, in cooperation with a nonprofit corporation that has substantial experience in developing best practices to improve leadership skills, student achievement, student graduation rates, and teacher retention. A principal of a campus rated academically unacceptable, and his or her replacement, *must* participate in the program. Other principals or potential principals *may* apply to participate in the program.

Mentor Teacher Program: A district may assign a mentor teacher to a teacher with less than two years of teaching experience. A mentor teacher must teach in the same school and teach the same subject and grade level, to the extent practicable. TEA must adopt rules to implement this provision. The rules must require that a mentor teacher complete a "training and induction program" approved by the Commissioner, complete training provided by the district, have at least three years of experience, and have a superior record of assisting students in improving performance. A district may use TEA mentor teacher funds to pay stipends, to schedule time for mentoring, and to provide mentor training.

TEA Sunset Provision: Extends TEA's Sunset Advisory Commission review date to 2012 (from 2007).

Education reform will again be on the legislature's agenda when the 80th Legislature convenes on Tuesday, January 9, 2007. Prior to that time, several House and Senate committees will be completing their interim study charges relating to public education including: studying disciplinary alternative education programs (DAEPs); investigating the expenditures of taxpayer money by school boards to lobby the legislature; reviewing central administration and superintendent compensation; examining school district resource allocation and budgeting practices; and analyzing whether Chapter 21 of the Texas Education Code is structured and administered in a manner that effectively promotes the state's educational goals. School lawyers and officials can be certain that these and related issues will be the subjects of discussion and possible legislation during the next session.

1 The Third Called Session of the 79th Legislature began on April 17, 2006 and adjourned on May 15, 2006. House Bill 1 was signed by the Governor on May 31, 2006. Except as otherwise provided in the bill, House Bill 1 applies beginning with the 2006-07 school year and took effect on May 31, 2006.

WHAT SCHOOL DISTRICTS (AND SCHOOL LAWYERS) NEED TO KNOW ABOUT HIRING RETIRED EDUCATORS

By: Shellie Hoffman Crow
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During the past several years, the number of educators retiring each year has continued to increase at an unprecedented rate. In recent years, many more of these retired educators have sought to return to work in public schools - as retirees. In an apparent attempt to discourage school districts from re-hiring these retired educators, the 79th Legislature responded in 2005 by enacting new statutes that impose significant financial penalties on school districts who hire retirees. Although school districts are still permitted to hire retirees, those that do will pay a high premium for retirees who are not excepted from the surcharge.

This article will begin with an explanation of the numerous statutory options for retirees to return to work in public schools (with or without loss of their retirement benefits), will include a detailed overview of the new surcharges for school districts and the related new TRS rules, and will provide a review of the risks associated with certain options being used by school districts to offset the new surcharges.

Going Back to School - Exceptions Allowing Retirees to Return to Work in School Districts

Educators who retired with an effective date prior to January 1, 2001 may return to work in any position in a school district, working as much as full time, with no restrictions or reduction in their retirement benefits. Section 20 of Acts, 2001, 77th Leg., Ch. 1229; Title 34, Texas Administrative Code, Section 31.12(a). These educators may return to work full-time in any position with no loss of benefits. However, educators who retire with an effective date on or after January 1, 2001, may return to work and be eligible for full retirement benefits only under certain circumstances.

Several exceptions exist to the general rule prohibiting educators from receiving retirement benefits while working for a public school district. These “return-to-work” exceptions, which generally allow a retiree to return to work for a public school district without reduction in retirement benefits, include:

1) Employment as a substitute. Newly adopted Teacher Retirement System (TRS) rules define a substitute as a person who serves on a temporary basis in the place of a current employee and the pay does not exceed the rate of pay for substitute work established by the employer. Service as a substitute that does not meet this definition is not eligible substitute service for purposes of an exception to forfeiture of annuity payments. Title 34, Texas Administrative Code, Section 31.1(b).

2) Employment in any position working no more than half time per month. The number of hours allowed per week is calculated and limited according to the full-time equivalent for the same position and may be averaged for the month.

3) Work as a substitute AND in one other TRS “return to work” position, provided the number of days worked in a month does not exceed "half time." TRS rules allow the substitute exception and the part-time exception to be combined.

4) Employment in any position working full-time no more than six months of the school year. It is important to note, though, that this exception cannot be used in the same school year as the year in which the educator retires.

5) Employment in a position as a classroom teacher, working as much as full-time, if the retiree is: retired without reduction for early retirement; certified by SBEC to teach the subjects assigned; teaching in a critical shortage area as determined by the board of trustees of the hiring school district, according to guidelines adopted by the Commissioner of Education; and separated from service with all public schools for at least 12 months before returning.

6) Employment in a position as a principal or assistant principal, working as much as full-time, provided the retiree is: retired without reduction for early retirement; certified by SBEC as a principal; and separated from service with all public schools for at least 12 months.

7) Employment in a position as a bus driver working as much as full time, provided that bus-driving is the primary employment with the school district. For bus-driving to be considered the primary employment, the total amount of any other employment with the school district must be less than half-time. The “primary employment” limitation is effective beginning with retirements after September 1, 2005.

Texas Government Code, Section 824.602; Title 34, Texas Administrative Code, Sections 31.13 31.18.

Educators who retired after January 1, 2001, and who return to work under the “six month exception” will forfeit an annuity payment for any month in the school year for work in excess of the six month period between September and February. However, use of this exception is very common and many retired educators choose to return to work with exactly this outcome in mind. Although the educator will forfeit retirement benefits for any month worked beyond the first six of the TRS year (September 1st to August 31st), the educator is not subject to any limitations on the amount of time or the type of position worked. For example, a teacher employed on a ten month term contract could return to work full-time in any type of teaching position, but could only receive retirement benefits for eight months of the year. Similarly, an administrator employed on an eleven or twelve month contract could work full-time in any administrative position but would only receive retirement benefits for six or seven

months of the year, respectively. Title 34, Texas Administrative Code, Section 31.15(d).

Hitting the Pocketbook - New Financial Penalties for School Districts Hiring Retirees

Although retired educators have many options for returning to work, with or without loss of retirement benefits, the legislature recently imposed new financial penalties for school districts hiring retirees. During each payroll period for which a retiree is reported as an employee, a covered employer must now contribute to the retirement system for each reported retiree an amount equal to the sum of (1) the current contribution amount that the retiree would be contributing to the retirement system if the retiree were an active contributing member; and (2) the current contribution amount that the state would be contributing to the retirement system if the retiree were an active contributing member. Texas Government Code, Section 825.4092(b). This payment is typically around 12 to 13% of the retiree's salary. In addition, for each rehired retiree who has opted into insurance coverage provided by the TRS-Care Group Insurance Program (TRS insurance fund for retirees), an employer must contribute to the TRS-Care Program the difference between the amount charged to the retiree for coverage for self and covered dependents, if any, and the full cost to the state of providing insurance coverage for the retiree and any covered dependents. Texas Government Code, Section 825.4092(c).

There are some exceptions, however, to the new surcharges required by Texas Government Code, Sections 825.4092(b) and (c). The surcharges are not owed for any retiree who was reported as a retired employee by the reporting employer for the month of January 2005. Texas Government Code, Section 825.4092(e). The bill "grandfathers" any retiree employed by a school district *as a retiree* and reported to TRS as such in January 2005, for as long as the retiree remains employed by the district. The surcharge will not apply for this retired employee even if the employee changes positions within the school district and/or leaves the district and later returns to employment with the district.

Additionally, the surcharges are not owed for retirees who are working under the exception for substitute service unless a retiree combines the substitute service with other TRS-covered employment in the same calendar month. For each calendar month that the retiree combines substitute service and other TRS-covered employment, the surcharge is owed by the employer. Title 34, Texas Administrative Code, Sections 31.41(e) and 41.4(g). Again, TRS defines a substitute as "a person who serves on a temporary basis in the place of a current employee and the pay does not exceed the rate of pay for substitute work established by the employer."

Finally, the surcharges are not owed for rehired retirees who are employed in positions not covered by TRS. Positions that are less than half-time of the position's full-time equivalent are not TRS-covered positions; consequently, school districts do not owe the TRS surcharges for retirees employed in these "less than half-time" positions. Title 34, Texas Administrative Code, Sections 25.1, 31.41(a), and 41.4. Temporary positions are similarly not considered to be TRS-covered positions. "Temporary positions" cannot exceed four and a half months and generally are positions that school districts are in the process of trying to fill. Therefore, school districts do not owe the TRS surcharges for retirees employed in temporary positions for less than four and a half months. Title 34, Texas Administrative Code, Sections 25.1, 31.41(a) and 41.4.

A limited additional exception exists during the 2005-2006 school year for retirees employed by school districts due to the enrollment of students displaced by Hurricane Katrina. These retirees may be considered temporary employees for the 2005-2006 school year and their employment is not subject to the pension and health benefit surcharges owed by their employers. This exception applies only to retirees who retired before September 1, 2005 and who are employed on a temporary basis for a period that does not exceed the 2005-2006 school year.

District Options for Dealing with the TRS Surcharges

The new surcharges have created considerable confusion and presented many unanswered questions regarding a school district's employment of TRS retirees. With the imposition of these surcharges, the Legislature has put school districts in a difficult position regarding hiring retirees in the future, and there is no available precedent to provide any real guidance.

In response to the surcharges, some school districts have simply placed a moratorium on hiring TRS retirees and adopted a practice of not hiring any retirees for as long as this law is in place. However, this approach could be problematic in light of the United States Supreme Court's holding last year in *Smith v. City of Jackson, Mississippi,* 544 U.S. 228, 125 S.Ct. 1536. In the *Smith* case, the Supreme Court broadened the scope of potential liability under the Age Discrimination in Employment Act (ADEA) by holding that a plaintiff may maintain a cause of action on the basis of "disparate impact." In other words, an employer may be held liable even if the employer did not *intend* to discriminate on the basis of age, if a particular policy has the *impact* or *effect* of discriminating against persons age 40 or over.

Similarly, any blanket prohibition against hiring all TRS retirees will surely impact persons seeking employment with the district who are 40 years old or older while not impacting those persons who are under 40. Under the *Smith* analysis, such a prohibition would have a "disparate impact" and could be actionable under the ADEA. Whether the financial considerations created by the Legislature's imposition of the requirements on school districts to pay significant amounts to TRS for each TRS retiree hired will provide a sufficient defense to a disparate impact claim under the ADEA is an unanswered question.

Alternatively, many districts have decided to pass on some or all of these TRS surcharges to the retirees. Again, becoming a defendant in a disparate impact ADEA case is the risk created by reducing retirees' salaries to pass on some or all of the TRS surcharges. Again, the rehired retirees could allege that, regardless of the district's intention, the impact of accommodating these costs would fall entirely upon persons age 40 or over in the form of lower salaries than those paid to the nonretirees, thereby violating the ADEA.

Nonetheless, some school districts have determined a way to pass on some of these costs while at the same time

creating a more defensible position. Instead of reducing a rehired retiree's salary by the full surcharge, some school districts are reducing the retirees' salaries only by the percentage that the salaries would have been reduced by the retirees' contributions to TRS prior to retirement. The school districts then cover the remainder of the pension surcharge without reimbursement from the state. This option might enable a school district to take the position that there is no "disparate impact," as the impact on the TRS retirees is the same as the non-retired employees, whose salaries are also reduced for their TRS contributions. Under this type of arrangement, the district could also deduct from a retiree's salary any amount TRS assesses to the district for the state's portion of the retiree's TRS Care costs, minus the amount the district pays toward health insurance premiums for non-retired employees. This option again would more closely resemble the way the district is treating its non-retired employees and would present a more limited opportunity for an ADEA disparate treatment claim.

It is important to keep in mind that state law requires that all retirees be paid in accordance with the state minimum salary schedule and that any reduction of a TRS retiree's salary cannot result in a salary lower than that required by the state schedule. Additionally, there is some risk that TRS or the Texas Education Agency (TEA) might someday take the position that the school district is not really paying the surcharges as required by the statute when it lowers the salaries of retirees to make up for some portion of the costs. However, neither TEA nor TRS have expressed any position regarding the authority of school districts to negotiate salaries, provided that school district salaries comply with the state minimum salary schedule.

The only way to eliminate any risk, of course, is for school districts to pay the entire pension and health insurance surcharges without attempting to recover any of those costs from the TRS retiree.

Other Issues Related to Hiring Retirees

The Required Break in Service

In order for a retirement to be considered valid, each retiree must completely break his or her employment with public school districts. Specifically, the retiree must not be employed by a public school district during the first full calendar month following the month in which his effective retirement date falls. Texas Government Code, Section 824.005. There is a special provision for those that have a contract that goes until June 15th. Their retirement date can be May 31st even though they work until June 15th, but they cannot return to employment until August 1st.

An educator who has a contract or agreement for future employment has not ended all employment with a TRS covered employer and may not retire and receive any benefits unless the educator will be returning to work under one of the "return to work" exceptions in Texas Government Code, Section 824.602 (i.e., those exceptions discussed above for retirees with an effective date on or after January 1, 2001: part time, for only six months a year, as a bus driver, or if employed in a critical shortage area as a teacher or as a principal or assistant principal after a twelve month break). Texas Government Code, Section 824.002; Title 34, Texas Administrative Code, Section 29.15 (b). School districts may promise future employment or offer a contract to a retiring educator prior to his or her retirement date only if the educator will be returning to work for the district under one of these specific exceptions. However, a school district may **not** promise future employment or offer a contract to retiring educators who plan to return to work full time and forfeit annuity payments for the number of months in the school year worked in excess of the six month period.

Preference for Non-Retirees

Section 824.602(a)(m)(3) of the Texas Government Code requires that school districts give hiring preference to certified applicants who are not retirees when filling positions in critical shortage areas determined by the school district. Although it is not entirely clear, the placement of this statutory provision appears to limit the applicability of the provision to retirees who return to work in critical shortage areas *after a 12-month break in service and continue to receive full retirement benefits*. However, other retirees often return to work for school districts under other statutory exceptions and are hired to fill a variety of positions, including positions in the critical shortage areas determined by the district board of trustees. A review of district practices has revealed that some school districts are applying the requirement to give preference for nonretirees to *all* positions for which retirees apply rather than just to the limited statutory exception described above. While this practice has not been challenged, it could at some point result in challenges of age discrimination.

In fact, one school district has already been challenged over its interpretation and application of the "preference" requirement. The Commissioner of Education recently upheld a school district's policy that required all retirees who were teaching in critical shortage areas, had sat out for twelve months after retirement, and were receiving full retirement benefits to resign or be nonrenewed at the end of each school year in order for the district to determine whether the retiree's position continued to be eligible for the critical shortage area exception. *Judith Tarrant v. Clear Creek Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 080-R1-605 (Aug. 14, 2005). Finding that the school district did not discriminate on the basis of age in applying the policy, the Commissioner upheld a teacher's nonrenewal in accordance with the policy. The Commissioner further held that the nonrenewal was based on a reasonable factor other than the teacher's age and distinguished the teacher's age from her retirement status. However, it is important to note that this decision has been appealed to a Galveston district court. Additionally, even if the holding of the Commissioner is upheld by the district court, under the relatively narrow holding of the decision, it is likely to be problematic for school districts to choose to apply such a mandatory termination provision each year to *all* retirees, rather than just those rehired under the critical shortage area return to work exception.

Rehire-Retire Guidelines

While it is not necessary to have policies or formal programs in place for hiring retired educators, many school districts have chosen in the past to implement such policies

and/or programs. Whether or not a school district has a formal program, districts should not promise in policies, administrative procedures, formal programs, informational materials and/or in counseling sessions to rehire any retiring educators, unless the retiring educator plans to return to work under one of the "return to work" exceptions (part time, for only six months a year, as a bus driver, or in a critical shortage area or as a principal or assistant principal after a twelve month break in service). Unless the retiree will return under one of the "return to work" exceptions, school districts may offer employment only after the completion of the full break in service following the retiree's effective retirement date.

Additionally, written or oral communications should not include any assurances regarding the receipt of retirement benefits for any employee working for the district after retirement. Rather, employees should be directed to rely only on the advice and information of TRS regarding their eligibility to receive benefits. A school district may inform the educators of the TRS rules regarding full time employment and eligibility for benefits, but a district should avoid any express statement that the employee will be entitled to full retirement benefits.

Finally, school districts must file a monthly certified statement of employment of a retiree in the form and manner required by the retirement system. A person commits an offense if the person is an administrator of an employer, is responsible for filing such statement, and knowingly fails to file the report as required. Texas Government Code, Section 824.6022.

Rights Of Retired Educators Hired By A School District

Many school districts are not aware that retired educators returning to work in a school district have most, if not all, of the same rights as nonretired educators. For example, the Texas Education Code does not provide an exception to the requirement that all full time educators and all classroom teachers who teach at least four hours a day be employed by Chapter 21 term contracts. Presumably, this provision applies to retired educators as well. Similarly, the Texas Education Code does not provide an exception to the requirement that all classroom teachers and all full time counselors, librarians and nurses be paid according to the state minimum salary schedule or to the requirement that all district employees be afforded five days per year of state personal leave. While local benefits, such as local salary supplements and local sick and personal leave, may be discretionary with a local school district, school districts should weigh the benefits of denying these benefits to retired educators against the risk of potential challenges based on age discrimination.

Although Texas public school districts that provide health coverage for employees through TRS ActiveCare generally cannot provide health coverage to retirees who have returned to work, the Texas Attorney General has opined that districts that provide group health coverage through a risk pool, under a policy of insurance or by self insurance are obligated to provide health coverage to retirees. Op. Tex. Att'y Gen. No. GA-0119 (2003). However, the Texas Insurance Code expressly exempts retired educators from the employee benefits supplement that has been granted, withheld, and granted again by the Texas Legislature. See Texas Insurance Code, Article 3.50 8.

Contracting With Private Companies For Teaching Services

Private companies have begun hiring former school district employees eligible for full retirement benefits who have retired from a school district and started drawing retirement benefits. The companies contract the services of the retired educators back to the school districts. The school districts enter into contracts with the private companies for the placement of educators approved by the districts, and the districts pay to the companies an amount per educator equal to or less than the educator's previous salary.

In order to close the "loophole" being used by retirees and private companies to get around the benefits restriction imposed on retirees working directly for school districts, Section 824.601 of the Government Code was amended in 2003 to require retirees who return to work through a private company to meet the return-to-work exceptions. This requirement applies to any retiree placed after May 24, 2003. In other words, even retirees who work for private companies and are placed in school districts must fall within one of the return-to-work exceptions to be eligible for full retirement benefits or they will forfeit some number of months of benefits after 6 months of work in a school district.

School districts who enter (or who have already entered) into contracts with private companies should consider and address the following issues. First, an educator should be employed by the private company and not the school district. The contract between the private company and the school district should not be able to be construed as creating an employment relationship between the educator and the school district. For example, the contract should not include any commitment by the school district to accept for placement any specific educator for any specific period of time. Additionally, it should specify some supervisory responsibilities for the private company, possibly to include conducting evaluations, providing semester overview of assignments, and/or verification of certification requirements. Finally, it should not include any provisions that promise future employment or eligibility for retirement benefits to any retiring educator.

Also of concern are the potential liability issues raised by contracting with private companies. Possible legal challenges could be brought against the school district for acts and/or omissions of the private company under federal causes of action or under a "joint venture" theory of liability. However, the issue of liability for the third-party contractor employee has been addressed by the legislature. Section 22.051 of the Education Code was amended several years ago to include in the definition of "professional employee" "a teacher employed by a company that contracts with a school district to provide the teacher's services to the district" for purposes of the statutory immunity under Section 22.051.

Finally, the TRS pension and health benefits surcharges discussed in Section II. above is owed by any school district contracting with a third-party entity for all retired educators. Title 34, Texas Administrative Code, Sections 31.41(f) and 41.4(e). However, under this arrangement, a school district may have much more latitude in negotiating the rate they would pay the third-party entity for the services of retired educators, effectively deferring to

the third-party entity the negotiation of (and possible risks related to) a reduced salary with a contracted educator.

Conclusion

While various groups and individuals have expressed intention to petition the legislature to address the confusion and burden of the new financial penalties related to hiring retired educators, there is no certainty that new legislation will be passed or that, even if passed, new legislation would result in any more clarity regarding the hiring of retired educators. In the meantime, as school districts continue to be faced with teacher and administrator shortages, it is fairly certain that they will continue to consider and hire retired educators to fill those positions.

SCHOOL BOARD APPOINTMENTS AND AG OPINION GA-0377: DOCTRINE'S TRUE INCOMPATIBILITY DISSOLVED

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The Texas Attorney General's Office issued opinion GA-0377 in response to a question regarding whether a school district trustee whose term is expiring may vote for himself to fill a newly vacant position on the board of trustees following the end of his term of office.[1] When finally released on November 28, 2005, the opinion declared that under the common-law doctrine of incompatibility, "the prohibition against self-appointment is a *literal* and *absolute* prohibition . . . not limited by the facts."[2] Attorney General Abbott prohibited the trustee from completing the other's term and held the appointment void. In effect, that opinion destroyed the incompatibility element of the Incompatibility Doctrine.

The Attorney General's declaration was a surprise to seasoned school attorneys and administrative law experts alike. This interpretation dissolves the fundamental requirement that a position be "naturally incompatible." While the doctrine is comprised of several aspects which are explained in more detail in this article, it is helpful to consider a general statement of the common-law doctrine of incompatibility:

> In determining incompatibility, the crucial question is whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other[3]. . . . The common-law rule operates only when natural incompatibility exists.[4]

By ignoring the complete compatibility of the trustees' positions, the essence of the doctrine is lost. The opinion also destroys the impression left by numerous other AG opinions that the doctrine applied to appointments made to other distinct boards, or paid positions on the same governing entity (resulting in employment). Although this new opinion states that the prohibition is "not limited by the facts," previous AG opinions exhaustively distinguish factual details in reaching their conclusions. If the doctrine's prohibition is so "literal and absolute," why has the Attorney General seen the need to analyze detailed facts in so many earlier opinions?

Opinion GA-0377 relied upon a quote from *Ehlinger v. Clark*[5] that was clearly taken out of context.[6] The sources for this statement from *Ehlinger*—one of which is RULING CASE LAW from 1914-1921 with supplements—are difficult to find, but going directly to the sources yielded an understanding of the reasoning of the *Ehlinger* court.[7] Upon review of that source, its previous section declares that it is

> "*extremely difficult to lay down any clear and comprehensive rule* as to what constitutes incompatibility. . . . As a general rule, when it comes to stating what constitutes incompatibility, the courts *evade the formulation of a general definition* and content themselves with a discussion of specific cases and the particular facts. . . ."[8]

The significance of these statements in the very sources relied upon by the Ehlinger court is explained in this article.

Opinions from the Office of the Texas Attorney General are advisory only and do not have the force of court rulings. Because these opinions are merely legal interpretations, often strong arguments can be made for a different interpretation. A different interpretation is justified for an elected, unpaid school trustee willing to serve out another trustee's term after completing his own.

THE BACKGROUND SITUATION

Surprise Vacancy Misses Ballot for Upcoming Election

In March 2005, a school board trustee unexpectedly submitted her resignation. Since the board had no prior notice of this resignation, it was not posted on the agenda, and the board could not discuss nor take action at that meeting to formally accept the resignation. Therefore, according to board policy, the vacancy could not occur until the "eighth day after the date of its receipt by the Board," which was March 9, 2005.[9] The election calendar published online by the Secretary of State's Elections Division designated March 7, 2005, as the "last day to file for place on ballot."[10] Thus the board barely missed the statutory timeline for an election on May 7 to fill the vacated seat.

Appointment to Fill Vacancy with Later Effective Date

A school board is not required to hold an election to fill a vacancy. The Texas Education Code provides that "[i]f a vacancy occurs on the board of trustees of an independent school district, the *remaining* trustees may fill the vacancy by appointment until the next trustee election."[11] Also, the law provides that if more than one year remains in the term of the resigning trustee, "the vacancy shall be filled under this section not later than the 180th day after the date the vacancy occurs."[12]

Another trustee serving as the Vice President had decided not to run for re-election and would thus not be on the board after the May election. Since this was a well-known fact, at an April 2005 meeting, another trustee nominated the Vice President to fill the unexpired term of the seat vacated by resignation, with his appointment to begin in May **after** his term had expired.[13] Unfortunately, the motion was misquoted in the board minutes, perhaps leading the Attorney General to think that the Vice President was to immediately begin to serve the vacant seat. However, the appointment term was clear at the time of the meeting, and the board later corrected the minutes to reflect the actual motion.[14] The Vice President acknowledged that he was willing to serve one additional year even though he was not eager to serve an entire term. The Vice President did not resign nor attempt to avoid his membership on the board at any time. The nomination passed 3-2, with the Vice President voting in support of the motion.[15]

ISSUES

Trustee's Vote for Self

May a trustee ever vote for himself? Yes. The parliamentary procedures as found in *Robert's Rules of Order, Newly Revised*, explain that members of a board may vote for themselves.[16] School boards customarily adopt *Robert's Rules* as their procedural bible.[17] However, in Opinion GA-0377, the Attorney General concludes that the question of whether the Vice President could vote for himself was "inconsequential" in this circumstance.[18] But if the Vice President had not voted for himself, the motion would have failed, and the board could have simply waited until his term expired and then appointed him if it so desired. Such an appointment would have been valid since the seat would have been filled within 180 days of the vacancy[19] and would not have been incompatible in accordance with the opinion.

Constitutional Prohibitions

When does the Texas Constitution prohibit a person from holding a public office? The first step in analyzing a situation is to look at whether the offices run afoul of the Texas Constitution's prohibition that "[n]o person shall hold or exercise at the same time, more than one civil office of emolument. . . ."[20] It is vital to note that the trustee position is not one of emolument, for a trustee receives no salary, no pay per diem or per meeting, and no remuneration beyond possible reimbursement for actual expenses, such as reimbursement for hotel expenses at a convention.[21] Furthermore, the trustee in this instance **did not hold two offices at the same time**.

As such, it is obvious that this trustee's appointment did not violate the Constitutional provision found in Article XVI.

Doctrine of Incompatibility & Dual Office Holding

When does the common-law doctrine of incompatibility prohibit persons from holding a public office? Historically, the doctrine is explained as having three aspects, identified as conflicting loyalties, self-appointment, and self-employment.[22] Most often the situations include dual office holding.[23] The Attorney General's publication for public officers states that "[i]ncompatibility occurs when there are two inconsistent public duties. The doctrine prohibits a person from holding two positions where one might impose its policies on the other or subject it to control in some other way."[24]

1. Dual Office Holding: Are the offices to be held simultaneously?

If the positions do not violate the Constitutional provision against dual office holding, then the question becomes whether the doctrine of incompatibility prohibits the simultaneous public service. Numerous opinions have addressed situations of dual office holding, and many of the opinions that analyze the doctrine of incompatibility are responses to questions about simultaneous service.[25] The Attorney General's own publication organizes explanations of the doctrine of incompatibility and its three aspects under the topic of "Dual Office Holding"[26] and states in the Introduction that the "common-law rule of incompatibility of office – an aspect of dual office holding – prevents one person from **holding two offices with conflicting duties**."[27]

In this school board trustee situation, the appointment of the trustee to the vacated position was to begin **after** his own term expired, and thus no overlap or dual office holding was created.

2. Conflicting Loyalties: Are there inconsistent public duties?

As a previous Texas Attorney General succinctly stated, "[T]he doctrine has been held to prohibit an individual from holding two separate positions in which one is subordinate and accountable to the other."[28] A major case which focused on the aspect of conflicting loyalties, *Thomas v. Abernathy County Line Independent School District*,[29] dealt with whether a person can be elected and simultaneously hold the offices of alderman and school district trustee. The court ruled that the two positions were incompatible because they had two inconsistent public duties since the Board of Aldermen had directory or supervisory powers regarding school property which could result in a conflict of duties with the duties of the trustee.[30]

In the current trustee's situation, the only position to be considered was that of school board trustee, the exact same position, with the same duties, and with the seats held consecutively. No conflicting loyalty was possible.

3. Self-Employment: Is one position that of an employee who is subordinate to the office held?

Self-employment was considered merely a variation of self-appointment until a letter opinion made the distinction between these two aspects as it addressed a question concerning a public school teacher's membership on that district's board of trustees.[31] Since the school teacher was

accountable ultimately to the board of trustees for her employment, this was seen as self-employment and thus incompatible even though the teacher was elected to the board after she was already employed.[32] Obviously, having one person in the role of both employee and supervisor would cause a conflict and would create a "natural incompatibility."[33]

Clearly, the self-employment aspect of the doctrine does not apply in this trustee's case.

4. Self-Appointment

Contrary to the Attorney General's conclusion in the November 28 opinion, several administrative law experts agree that the "self-appointment" aspect of the common law doctrine of incompatibility does not apply to this present set of facts. Opinion GA-0377 relies upon only two cases and two older AG opinions without explaining its public policy rationale.

a. Is the appointment to a position on another distinct body or a different role on the same body?

The 1928 *Ehlinger* Texas Supreme Court case contains a frequently quoted statement on self-appointment which is often quoted out of the context of the court's application. When lifted from the case and read alone, the following passage from *Ehlinger* appears to declare a blanket prohibition:

> It is because of the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body that the courts have with great unanimity throughout the country declared that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint.[34]

Yet *Ehlinger* and the cases and opinions citing it do not make such a broad legal determination. In fact, the *Ehlinger* court ruled upon a situation in which the county judge who presided over the commissioners' court was hired as attorney for the court and thus was an *employee* of the court (paid subordinate position).[35] With knowledge that this was the issue before the court, it is important to read the passage from *Ehlinger* that directly follows the above quote:

We think the employment of the county judge as an attorney by the commissioners' court, over which he presided, comes clearly within the rule that the appointing, power, in this instance the commissioners' court, cannot appoint as its attorney one of its own members, to wit, the county judge, as was done in this case, and that, therefore, the contract of his employment as attorney, in so far as it provided for compensation, was void.[36]

Following a review of these consecutive passages from Ehlinger, a reading of the source for the first quote provides greater evidence that the Attorney General cited *Ehlinger* out of context. The source actually addresses "Subordination of One Office to Other," and states that "[t]his rule has been applied to prevent a board from appointing one of their own members to an office which is subordinate to such board."[37] After tracking this citation in light of the issue before the court, and reading the second passage from the case, it is clear that the court was making a more limited ruling and was not declaring a blanket prohibition.

In addition, earlier attorneys general clarified this ruling in their paraphrasing of that quotation. Opinion JC-0225 stated that *Ehlinger* stood for preventing "an individual with appointing power from appointing himself to *anothe*r office or position."[38] Previously, in a letter opinion, the attorney general wrote that "the common-law doctrine of incompatibility disqualifies all officers who have the appointing power from appointing themselves to a *different position*."[39] In a 2004 opinion, the Attorney General explained that self-appointment occurred when one was "appointing oneself to *another* public entity ("self appointment" incompatibility)."[40] Also, as Opinion C-452 states, "an analysis of the opinion shows that the case appears to have been decided under the common law principle that a person cannot hold *two incompatible offices* at the same time. . . ,"[41] which indicates that *Ehlinger* is primarily applicable in cases of dual office holding.

As further verification that this doctrine applies to appointment to a different, distinct, or separate board or position, and is not a blanket prohibition, the attorney general has issued several opinions in support of that limited application. Some of these opinions are cited in the current Texas Attorney General publication[42] that explains the self-appointment aspect of incompatibility:

> In accordance with this principle, the attorney general has held, *inter alia*, that members of a school district board of trustees may not appoint themselves to the governing board of a community college district; that a city council may not appoint one of its members to the city's police reserve; that the governing body of an entity that is authorized to make appointments to the board of directors of the Edwards Aquifer Authority may not appoint one of its own members to that position; that the board of trustees of a community college district may not appoint one of its own as interim chancellor; and that a member of a city council may not appoint himself to the board of the city's crime control and prevention district. A home-rule city may not by ordinance exempt a city council appointment to the governing body of another political subdivision from the common-law doctrine of incompatibility.[43]

These and similar opinions are examples in which the board or governing body appoints a member to another distinct body, a subordinate position, or a different role on the same body. None of these opinions (nor any court case for that matter) addresses the situation that faced this board of trustees. In the only other Texas case cited in opinion GA-0377, the situation was again distinguishable: school board trustees with statutory authority to appoint an equalization board appointed themselves as a body to become that tax assessing board.[44] Again, they appointed themselves to another entity with other responsibilities and duties.

b. Self-appointment of commissioners to county judges: different positions, dual office holding, and offices of emolument

Furthermore, the two older opinions cited in GA-0377 can still be distinguished from the facts of this school board trustee appointment.[45] In both situations, the commissioners appointed one of their own to fill the paid position of the county judge.[46] While the county judge does sit on the commissioners' court and acts as the presiding officer, the county judge is more than a commissioner who has been elected president of the body, for it is a different role on the same body with *significant* additional duties and responsibilities for which he is paid.[47] As presiding officer of the commissioners' court and judge of the county court, he has "two separate and distinct positions of authority," as well as additional administrative duties.[48]

These two opinions can be further distinguished from this school board circumstance by examining the dates of the various appointments. In both O-789 (1939) and C-452 (1965), the appointments of the commissioners to the county judgeship were to begin immediately, not at the end of their terms as commissioners. Under the holdover doctrine, since the commissioners were to take the position of county judge immediately, even though they had resigned, each was considered still a commissioner until replaced by a successor.[49] In both situations, then, the commissioner was a holdover commissioner and a county judge simultaneously, thus prohibited situations of dual office holding.

Finally, the two opinions relied upon by the AG are distinguishable because the offices in question are offices of emolument. Texas school board members do not hold offices of emolument, so no self-dealing should be assumed.[50] There is simply no underlying public policy rationale for applying this interpretation of the Doctrine of Incompatibility in this school board situation.

Should This Appointment Be Void as Against Public Policy?

The school board member who was appointed to fill the vacant position was highly qualified: he had been duly elected several times by the voters to a seat on the board; he had years of experience as both a member and an officer; and he had already been trained in board responsibilities and duties. Should this appointment be void as against public policy? The rationale behind the doctrine of incompatibility is to prevent harm to the public arising from conflicting loyalties, inconsistent public duties, or other such incompatibilities.[51]

In this school district, a trustee submitted a surprise resignation to the board, and at a subsequent meeting another sitting trustee nominated the Vice President to later fill the unexpired term of the vacated seat. Since the appointment to fill the vacancy would not begin until the Vice President's current term expired, there was no overlap of service – the Vice President's term expired in May 2005, and he was appointed to serve in the vacated seat from May 2005 until May 2006. Thus, the trustee was not placed in two positions on the board at the same time,[52] nor was he placed in "two separate positions in which one [was] subordinate and accountable to the other,"[53] nor was he placed in two positions with "two inconsistent public duties."[54]

Therefore, was this trustee's appointment to the board "detrimental to the public interest?"[55] No. The timing of the other trustee's resignation prevented a public election, and the board was left with appointing a trustee to fill the seat. Since an election was not possible, there was no attempt to prevent voters from duly electing a trustee, and the Vice President had already been granted the community's endorsement in previous elections. Nor was the Vice President appointed to a position of enrichment or emolument, for public school trustees offer their time and expertise freely to their communities without receiving any monetary gain.

Could we conclude that the performance of his duty to appoint a new board member "interferes with the performance of those" duties of the board member he was to become?[56] Again, no. In contrast to the cases and opinions cited in GA-0377, the board member's new position was equivalent to his former position, free of conflicts or interference.

By not allowing his appointment to stand, the AG has not enforced the logic and public policy intent of the doctrine. In at least one opinion, the Attorney General did respond to a public policy argument, and opined in favor of overcoming a "cumbersome" process when the positions involved looked incompatible.[57] In GA-0350, the AG concluded that it was acceptable for the county attorneys of neighboring counties to appoint each other as assistant county attorneys of their own counties to avoid the "cumbersome" process of appointing an attorney pro tem.[58] In examining this reciprocal arrangement, the AG determined that "[n]either self-appointment incompatibility nor self-employment incompatibility apply here because the county attorneys are not considering appointing themselves to a position."[59] Even though the appointments would be reciprocal and agreed upon in advance, the AG decided they are not self-appointments. Apparently in GA-0350, the AG did opine in favor of logic and public policy. Such a decision allowing this trustee's appointment to stand would have been similarly logical and in the public interest, particularly since the school board trustee is an unpaid position while the county attorneys received pay.

And finally, contrary to what GA-0377 declares is a "literal and absolute prohibition," the foundational source relied upon in *Ehlinger* makes the following statement:

> It is extremely difficult to lay down any clear and comprehensive rule as to what constitutes incompatibility of offices. . . . As a general rule, when it comes to stating what constitutes incompatibility, the courts evade the formulation of a general definition and content themselves with a discussion of specific cases and the particular facts which, in separate instances, have been looked upon as creating incompatibility.[60]

Therefore, the Attorney General should revisit this specific instance and allow an exception to this application of the self-appointment aspect of the doctrine of incompatibility. Such an exception would be in the public interest for several reasons. First, this public school trustee has generously benefited his community and its school children by donating

his time and energy without any remuneration. Second, this trustee, appointed to fill a vacancy on his own board, was not placing himself in another position that would conflict with his trustee duties. Third, public school districts often have difficulty finding such experienced and willing citizen-volunteers to serve in leadership positions, so allowing a sitting trustee to continue his service would benefit the district.

IMPACT

Attorney General Opinion GA-0377 may have broad ramifications. The opinion made this trustee's appointment void.[61] In so doing, any votes in which he participated and cast the deciding vote are now void. Fortunately, this school board had no such close votes. But what about other school boards as well as other public boards? Might there be others which are negatively impacted by this opinion? Governmental entities across the state may have ineligible members and scores of votes may now be void.

The opinion may have an even wider-ranging impact in light of the language in a Texas Association of School Boards (TASB) model policy. The TASB policy currently designated as BA (LEGAL) states that "[o]pinions of the attorney general *shall* be used for guidance in interpretation of applicable law."[62] TASB policies coded as "LEGAL" are generally disseminated to member school districts, and the districts include those policies in their official policy manuals without revision. Because this policy makes it mandatory that school boards use AG opinions to interpret the law, that requirement gives greater force to the opinions. We hope that TASB will reconsider the wording and change the "shall" to "may" so that AG opinions remain optional guidance, as they should be depending upon the facts.[63]

CONCLUSION

Opinion GA-0377 has expanded the doctrine of incompatibility, going beyond what the law generally requires, which is that the "common-law rule operates only when **natural incompatibility** exists."[64] Perhaps this question will be addressed again and the resulting opinion will overrule, or at least modify, the opinion expressed in GA-0377. A better analysis should reiterate that the fundamental concept of the doctrine truly is based upon an "incompatibility."[65] A revised answer to the question of incompatibility that allows an exception based upon public policy would effect a more reasonable outcome. In this unusual circumstance, the public school board member should have been allowed to remain on the board, and the Attorney General should ensure that future factual analyses for incompatibility not consider the prohibition so "literal and absolute," but rather review the instances with an eye on the facts and public policy rationale.

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ENDNOTES

1 Op. Tex. Att'y Gen. No. GA-0377 (2005) (responding to June 20, 2005, letter request RQ-350-GA from Texas Senator Ken Armbrister).

2 *Id*., note 2 (emphasis added).

3 63C AM. JUR. 2D *Public Officers and Employees* § 62 (2004) (quoting State *ex rel.* Hill v. Pirtle, 887 S.W.2d 921, 930 (Tex. Crim. App. 1994)).

4 *Id*. (citing Advisory Opinion to Governor, 121 RI 64, 394 A2d 1355).

5 Ehlinger v. Clark, 8 S.W.2d 666, 674 (Tex. 1928).

6 *See infra* discussion accompanying notes 34-37.

7 22 RULING CASE LAW, § 56, at 414.

8 22 RULING CASE LAW, § 55, at 413 (emphasis added); additional discussion at *infra*, note 60.

9 Schulenburg Indep. Sch. Dist. Board Policy BBC (LEGAL).

10 Upcoming Elections (by calendar year) – 2005 *at* http://www.sos.state.tx.us/elections/voter/2005dates.shtml (implementing TEX. ELEC. CODE § 144.005)

11 TEX. EDUC. CODE ANN. § 11.060(a) (Vernon 2004) (emphasis added).

12 *Id*. at § 11.060(d).

13 The Superintendent had called the Elections Division of the Secretary of State's Office to inquire whether such an appointment could be made. In an email from the Superintendent to a trustee, the Superintendent wrote that he had spoken with an official in that office who "declared a sitting trustee could be named, one that was finishing a 3 year term and not seeking reelection." Email from Superintendent to trustee (March 29, 2005) (on file with Morrison & Associates, P.C.). Contradictory advice later came from the Secretary of State's Elections Division to another trustee.

14 The local newspaper, the SCHULENBURG STICKER, reported the motion accurately, and the Board subsequently corrected the minutes at their August 15, 2005, meeting. This information was sent in a supplemental brief to the Attorney General to provide accurate background, but this corrected fact was not mentioned in the opinion.

15 All trustees who voted on the appointment at the April 18 meeting were the remaining active trustees; the resigning member did not vote. As a remaining trustee, the Vice President properly participated in the appointment process.

16 ROBERT'S RULES OF ORDER, NEWLY REVISED, 394 (10th ed. 2000).

17 Texas Association of School Boards supplies model policies to member districts, and the model policy BE (LOCAL) specifies reliance upon ROBERT'S RULES OF ORDER, NEWLY REVISED.

18 Op. Tex. Att'y Gen. No. GA-0377 (2005) at 2.

19 TEX. EDUC. CODE ANN. § 11.060(d) (Vernon 2004).

20 TEX. CONST. art. XVI, § 40(a).

21 "Emolument" in Section 40(a) has been interpreted as any "pecuniary profit, gain or advantage." Irwin v. State,177 S.W.2d 970, 973 (Tex. Crim App. 1944) (citing 34 Tex.Jur. p. 349, Sec. 17); Op. Tex. Att'y Gen. Nos. GA-0032 (2003) at 2, JM-704 (1987), JM-594 (1986), MW-21 (1979).

22 Tex. Att'y Gen., PUBLIC OFFICERS: TRAPS FOR THE UNWARY (2004), 42, *available at* http://www.oag.state.tx.us/AG_Publications/pdfs/2004trapshb.pdf [hereinafter PUBLIC OFFICERS: TRAPS FOR THE UNWARY].

23 See *id*. at 41.

24 *Id*. (citations omitted). This explanation in the AG's handbook seems to contradict the assertion in a footnote in Opinion GA-0377 that a brief

submitted "argues incorrectly that 'the underlying rationale of the [self-appointment prohibition] is to prevent . . . having a person hold two positions where one position might control the other in some way . . .'" Op. Tex. Att'y Gen. No. GA-0377 (2005), n.2.

25 *See, e.g.*, Op. Tex. Att'y Gen. Nos. GA-0307 (2005), GA-0250 (2004), GA-0214 (2004), GA-0169 (2004), GA-0132 (2003), GA-084 (2003), JC-0455A (2002), JC-0216 (2000), LO-98-035 (1998), LO-97-081 (1997), LO-95-029 (1995), LO-93-70 ((1993), JM-828 (1987), JM-386 (1985), JM-172 (1984), JM-129 (1984), LA-114 (1975).

26 PUBLIC OFFICERS: TRAPS FOR THE UNWARY, *supra* note 22, at 32-47.

27 *Id*. at 1. (emphasis added).

28 Tex. Att'y Gen. Letter Op.No. 95-029 (1995), at 2 (citing Op. Tex. Att'y Gen. JM-934 (1988) at 3, C-452 (1965) at 3; Tex. Att'y Gen. LA-114 (1975); *see also* Turner v. Trinity Indep. Sch. Dist., 700 S.W.2d 1, 2 (Tex. App.—Houston [14th Dist.] 1983, no writ)).

29 Thomas v. Abernathy County Line Ind. Sch. Dist., 290 S.W. 152 (Tex. 1927).

30 *Id*. at 153.

31 Tex. Att'y Gen. Op. No. LA-114 (1975).

32 *Id*.

33 63C AM. JUR. 2D *Public Officers and Employees* § 62 (2004).

34 Ehlinger v. Clark, 8 S.W.2d 666, 674 (Tex. 1928).

35 *Id*. Today, that situation would be classified as a self-employment incompatibility rather than a self-appointment incompatibility. *See supra* text accompanying notes 31-33.

36 *Ehlinger*, 8 S.W.2d at 674.

37 22 RULING CASE LAW, § 56, at 414.

38 Op. Tex. Att'y Gen. No. JC-0225 (2000) (emphasis added).

39 Tex. Att'y Gen. Letter Op. Nos. 94-20 (1994), 93-70 (1993) (emphasis added).

40 GA-0250, p. 3 (citing AG Op GA-0032 (2003) at 4) (emphasis added).

41 Op. Tex. Att'y Gen. No. C-452 (1965) at 4.

42 PUBLIC OFFICERS: TRAPS FOR THE UNWARY, *supra* note 22, at 42-43.

43 *Id*. at 42 (citations omitted).

44 *St. Louis Southwestern Ry. Co. of Texas v. Naples Indep. School Dist.*, 30 S.W.2d 703 (Tex. Civ. App.—Texarkana 1930, no writ).

45 Because these two opinions can be distinguished from this trustee's situation, this author disagrees with the analysis in GA-0377: "This office has twice determined that the self-appointment aspect of the common-law incompatibility doctrine bars a sitting member of a body from being appointed to fill a vacancy on the body itself." Tex. Att'y Gen. Op. No. GA-0377 (2005) at 2.

46 Tex. Att'y Gen. Op. No. C-452 (1965); Tex. Att'y Gen. Op. No. O-789 (1939).

47 DAVID B. BROOKS, COUNTY AND SPECIAL DISTRICT LAW § 22.5 (2d ed), *available at* WL 36 TXPRAC s 22.5.

48 *Id*. Additional administrative duties relate to the conduct of elections, liquor licenses, and possibly budget preparation. *Id*.

49 TEX. CONST. art. XVI, § 17.

50 *See* discussion *supra* accompanying notes 20-21.

51 "Under the doctrine, one individual may not simultaneously hold two public offices where the functions of the two offices concerned are inherently inconsistent, as where there are conflicting interests, or where the nature and duties of the two offices are such as to render it *improper from considerations of public policy* for one person to retain both." 63C AM. JUR. 2D *Public Officers and Employees* § 62 (2004) (emphasis added).

52 *See supra* text accompanying notes 25-27.

53 Tex. Att'y Gen. Letter Op. No. 95-029 (1995), at 2.

54 PUBLIC OFFICERS: TRAPS FOR THE UNWARY, *supra* note 22, at 41.

55 "In determining incompatibility, the crucial question is whether the occupancy of both offices by the same person is detrimental to the public interest or whether the performance of the duties of one interferes with the performance of those of the other." State *ex rel.* Hill v. Pirtle, 887 S.W.2d 921, 930 Tex. Crim. App. 1994).

56 *Id*.

57 Op. Tex. Att'y Gen. No. GA-0350 (2005).

58 *Id*. at 1.

59 *Id*. at 4.

60 22 RULING CASE LAW, § 55, at 413.

61 Op. Tex. Att'y Gen. No. GA-0377 (2005).

62 Schulenburg ISD, Board Policy BA (LEGAL) (emphasis added).

63 During a telephone conference with Joy Baskin, Director of TASB's Legal Division, regarding concern over this wording, Ms. Baskin indicated that she would ask the division to review that policy.

64 63C AM. JUR. 2D *Public Officers and Employees* § 62 (2004) (emphasis added).

65 Obviously, interpreting the application of this common-law doctrine is not easy, and at least one official in the Secretary of State's Elections Division did not label this appointment as incompatible. *See supra* note 13.

I. INTRODUCTION AND SCOPE

A Refresher on Teacher Rights
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No matter which side of the bar you are on, no doubt you have been asked a "can they do that" question. "Can teachers leave campus during duty-free lunch?" (You bet!) "Can the principal require me to change a grade?" (Maybe.) "Can a principal direct how a teacher uses his/her planning and preparation period?" (No.)

As an employee representative, I am continually surprised at how little my clients know about the rights provided to them under the Texas Education Code. Further, I'm amazed by how many administrators seem to be unaware of these rights, as well.

The purpose of this article is to refresh all school law practitioners of the day-to-day workplace rights provided to teachers under the Texas Education Code. While some of these rights are old favorites, and others are relatively new and untested, they all have impacts for our clients. Hopefully, educating our clients of the rights provided to teachers under the Texas Education Code will reduce the number of conflicts between employees and administration.

II. Rights Provided to Teachers Under the Texas Education Code

A. Paperwork Reduction, Tex. Educ. Code § 11.164

A relatively new provision in the Texas Education Code is Section 11.164, which requires the board of trustees to limit redundant requests for information and the number and length of reports that a classroom teacher is required to prepare.[1] A classroom teacher may not be required to prepare any written information other than:

(1) any report concerning the health, safety, or welfare of a student;

(2) a report of a student's grade on an assignment or examination;

(3) a report of a student's academic progress in a class or course;

(4) a report of a student's grades at the end of each grade reporting period;

(5) a textbook report;

(6) a unit or weekly lesson plan that outlines, **in a brief and general manner**, the information to be presented during each period at the secondary level or in each subject or topic at the elementary level;

(7) an attendance report;

(8) any report required for accreditation review;

(9) any information required by a school district that relates to a complaint, grievance, or actual or potential litigation and that requires the classroom teacher's involvement; or

(10) any information specifically required by law, rule, or regulation.

The board of trustees is further required to review paperwork requirements imposed upon classroom teachers.[2] Moreover, reporting tasks that can be reasonably accomplished by existing noninstructional staff are required to be transferred to such staff.[3]

Clearly, the Legislature intended to limit the requests for information and reports classroom teachers are required to prepare. But how does Section 11.164 affect other statutes and regulations related to public school employees? For example, do additional paperwork requirements imposed under an intervention plan violate Section 11.164?

Section 11.164 provides no exceptions for intervention plans; however, Subsection (c) allows additional "essential" information to be collected "on agreement between the classroom teacher and the district."[4] Therefore, unless the intervention plan is reached by "agreement between the classroom teacher and the district," and the information is deemed "essential," Subsection (c) does not seem to validate additional paperwork requirements (other than those already allowed under Subsection (a)) that may be set forth pursuant to an intervention plan. Consequently, the days of intervention plans which require the teacher to submit book reviews, reports on classroom observations, and other forms of redundant paperwork, may be over.

Because it is relatively new and untested, school officials and practitioners might find that this provision may also have unforeseen consequences on other currently common paperwork requirements. Time will tell.

B. Planning and Preparation Period, Tex. Educ. Code § 21.404

While the paperwork reduction statute may be relatively new and untested, most employees and administrators are familiar with the right of classroom teachers to have a planning and preparation period. To refresh, each classroom teacher is entitled to at least 450 minutes within each two-week period for instructional preparation, including parent-teacher conferences, evaluation of students' work, and planning.[5] The planning period may not be less than forty-five (45) minutes within the instructional day.[6] During the planning period, a classroom teacher may not be required to participate in any other activity.[7]

Classroom teachers are not necessarily entitled to a planning period every work-day. The statute requires only that the teacher receive at least 450 minutes within a two-week period. Thus, in districts where college-like Monday-Wednesday-Friday and Tuesday-Thursday scheduling occurs, a classroom teacher may not get a planning period on some days, but will get two periods or more to plan on others. This scheduling is permissible as long as the total minutes add up to 450 minutes in each two-week period, and no one planning period is scheduled for less than 45 minutes in the instructional day.

The Commissioner of Education has made it clear that the planning period is to be used by the teacher as the teacher deems appropriate and necessary, not an administrator or the district. "A teacher's planning and preparation period is… for the use of the teacher as he or she sees fit, within the statutory boundaries, free from any duty mandated by the school district."[8] Moreover, "[t]he statute was enacted for the purpose of giving teachers time to engage in parent-teacher conferences, reviewing students' homework, and planning and preparation as the teacher, not the administration, deems best. The statute clearly relieves the teacher of any duty during this period of time and prohibits the district and its administration from requiring the teacher to engage in any other activity the administration determines to be useful and important."[9]

One interesting issue that has yet to be determined by the Commissioner of Education since the recodification of the Education Code is what constitutes the "instructional day?" There is no definition of "instructional day" in the current version of the Texas Education Code. Is the instructional day that period of time teachers are required to be on duty? Is it the normal school day in which students are present to be instructed? Is it something entirely different? The only guidance provided to school officials and practitioners regarding the school day is section 25.082, which states, "A school day shall be at least seven hours each day, including intermissions and recesses."[10] Thus, the only new frontier on the planning and preparation period issue is when exactly the planning period must be held, or what exactly constitutes the "instructional day."

C. Duty-free Lunch, Tex. Educ. Code § 21.405

Another highly-valued right provided to classroom teachers and full-time librarians is duty-free lunch. Each classroom teacher or full-time librarian is entitled to at least a 30-minute lunch period free from all duties and responsibilities connected with the instruction and supervision of students.[11] A district may not lengthen the school day to implement a duty-free lunch period.[12]

As with most rules, however, there are exceptions. A school district may require a classroom teacher or full-time librarian to supervise students during lunch if necessary for three circumstances: personnel shortages, extreme economic conditions, or an unavoidable or unforeseen circumstance.[13]

A personnel shortage "exists when, despite reasonable efforts of a school district to use nonteaching personnel or the assistance of community volunteers to supervise students during lunch, there are no other personnel available."[14] Thus, according to the regulations, a district must make "reasonable efforts" to secure nonteaching personnel or the assistance of community volunteers before the district can impose on the duty-free lunch of teachers and librarians.

An extreme economic condition "exists when the percentage of a local tax increase, including any amounts necessary to implement this section, would place the district in jeopardy with respect to a potential tax roll-back election…".[15] In this circumstance, a district will have to establish that, without cutting the teacher's duty-free lunch one day a week, the district will face dire economic conditions.

The Texas Administrative Code defines "an unavoidable or unforeseen circumstance" as one that "exists when, due to illness, epidemic, or natural or man-made disaster, a school district is unable to find an individual to supervise students during lunch."[16] Clearly, this circumstance is one which is rare, and presumptively, rarely available to justify requiring a teacher or librarian to give up his or her duty-free lunch.

Even if one of these extreme conditions exists, however, a classroom teacher or librarian may not be required to supervise students under this provision more than one day in any school week.[17]

Those who represent employees will probably agree that there is one time of the year that section 21.405 is routinely violated—state-wide TAKS testing. When campus-wide testing occurs, it is not unusual for schedules of students and faculty to be modified. As such, lunchroom duty schedules also get skewed. If teachers and librarians are directed to cover lunch duty because of testing schedules, at the expense of their own duty-free lunch period, such a direction would be a violation of Section 21.405. (Unless, of course, the district could establish that one of the three exceptional circumstances applied.) Accordingly, districts should make arrangements prior to testing dates that provide for lunchroom coverage, while not denying teachers and librarians their own duty-free lunch periods.

Not only are classroom teachers and full-time librarians entitled to thirty minutes of duty-free lunch, a school district may not require teachers or full-time librarians to remain in the cafeteria, or even on campus, during their duty-free lunch.[18] The Texas Attorney General has opined that restricting the employee to remain on campus would be a duty, in and of itself.[19]

D. Finality of Grades, Tex. Educ. Code § 28.0214

While non-tenured, public school educators in Texas do not enjoy the full spectrum of rights known as "academic freedom" that teachers of college students enjoy, public school teachers do have a relatively recent addition to the Texas Education Code regarding the finality of grades that they issue. "An examination or course grade issued by a classroom teacher is final and may not be changed unless the grade is arbitrary, erroneous, or not consistent with the school district grading policy…, **as determined by the board of trustees…**".[20]

Thus, a teacher can only be required to change a grade if the ***board of trustees*** determines the grade was arbitrary, erroneous, or inconsistent with the district's grading policy.

An assistant principal, principal, superintendent, or coach may not change a grade or demand a teacher change a grade unless the board of trustees makes a determination that the grade is arbitrary, erroneous, or in violation of a district grading policy.

E. Reassignments

Most teaching contracts contain a clause to the effect that the employee may be assigned and reassigned at the discretion of the superintendent. However, a reassignment that is motivated by illegal reasons is improper. If the reassignment is retaliatory, it is actionable. *Anderson v. Pasadena Indep. Sch. Dist.*, 184 F.3d 439 (5th Cir. 1999).

The Texas Administrative Code provides more guidance in making determinations regarding reassignments outside a teacher's area of certification.

A degreed, certified teacher who was employed by a district in the previous year or semester in an assignment for which he or she was fully certified may not be assigned to a position that requires the activation of an emergency permit unless

(a) the teacher gives written consent to the activation of the permit, or

(b) because of fluctuations in enrollment or changes in course offerings, the teacher's previous assignment no longer exists and no alternative assignment for which the teacher is fully certified is available on that campus.[21]

If a permit is activated under these circumstances, the teacher shall be given the opportunity to return to his or her previous assignment or to a position for which he or she is fully certified on that campus as soon as such assignment is available. A teacher who refuses to consent to the activation of an emergency permit may not be terminated or nonrenewed or otherwise retaliated against because of the teacher's refusal to consent. However, the teacher's refusal to consent shall not impair a district's right to implement a necessary RIF or other personnel action in accordance with its local policy.

If the permit is activated within 30 days before the opening of the school year or later during the contract year, the teacher is exempt from the requirements necessary for certification in the new area for the remainder of the contract year for which the permit is activated. This is a one-time exemption, and if the teacher continues on the permit for an additional year, he or she must meet the full requirements of an emergency permit.[22]

Thus, under Section 230.501, a teacher may be reassigned to an area in which she is not fully certified in two situations: (1) if the teacher consents in writing to be placed on the permit, or (2) if the teacher's previous assignment no longer exists due to fluctuations in enrollment or changes in course offerings.

While the teacher that does not agree to the activation of the permit may be placed on the permit at the district's discretion (in the limited circumstances detailed in §230.501(c)(1)(B)), the teacher has the right to be placed back in his or her area of certification as soon as it becomes available on that campus. If the reassignment to the area in which the teacher is not certified is not based on fluctuations in enrollment or course changes, however, the teacher may not be placed on the emergency permit without his or her written consent.

Further, a district may not reassign a teacher outside his or her area of certification in order to avoid the non-renewal or termination rights of teachers set out in Chapter 21 of the Texas Education Code. A teacher's contract may not be considered void if he or she has been assigned to teach a subject for which the teacher is not certified.[23]

Teachers also have protection against reassignments outside their contracted professional capacities. Unless a district terminates or timely nonrenews an employee, the district is required to employ the educator "in the same professional capacity" for the following school year.[24] While the contractual language regarding reassignments may be broad, the district cannot reassign a contracted employee to "just any position."[25] In appeals of reassignment grievances, the Commissioner has recognized that the educator can "only be reassigned to a position that [is] in the 'same professional capacity' stated in the contract."[26]

F. Immunity from Disciplinary Proceedings, Tex. Educ. Code § 22.0512

Texas Education Code Section 22.0512 provides:

(a) A professional employee of a school district may not be subject to disciplinary proceedings for the employee's use of physical force against a student to the extent justified under Section 9.62, Penal Code.

(b) In this section, "disciplinary proceeding" means:

(1) an action brought by the school district employing a professional employee of a school district to discharge or suspend the employee or terminate or not renew the employee's term contract; or

(2) an action brought by the State Board for Educator Certification to enforce the educator's code of ethics…

(c) This section does not prohibit a school district from:

(1) enforcing a policy related to corporal punishment; or

(2) notwithstanding Subsection (a), bringing a disciplinary proceeding against a professional employee of the district who violates the district policy relating to corporal punishment.

Section 9.62 of the Texas Penal Code provides that force against a student is justified if the actor is entrusted with

the care, supervision, or administration of the student for a special purpose, and if the actor reasonably believes the force is necessary to further the special purpose or maintain discipline. "Special purpose" as used in Section 9.62 has been interpreted by courts to mean, in the case of a public school employee, "that of controlling, training and educating the child."[27]

To determine whether an educator's use of force is reasonably necessary in furtherance of a special purpose, Texas courts consider factors from the Restatement of Torts, Second Edition. The Restatement of Torts, adopted in *Hogenson*, provides:

One standing *in loco parentis* is privileged to use reasonable force as he reasonably believes necessary for the child's proper control, training, or education. In determining if the force is reasonable for those purposes the following factors are to be considered:

(a) The age, sex, and condition of the child,

(b) The nature of his offense or conduct and his motives,

(c) The influence of his example upon other students,

(d) Whether the force was reasonably necessary to compel obedience to a proper command, and

(e) Whether the force was disproportionate to the offense, is unnecessarily degrading, or is likely to cause serious injury.[28]

Section 22.0512 prohibits a school district from bringing a disciplinary proceeding against a professional employee for using physical force for punishment purposes if the school district has no corporal punishment policy or its policy is substantially similar to section 22.0512(a) and Section 9.62 of the Texas Penal Code. Section 22.0512 concomitantly allows a school district to bring a disciplinary proceeding against a professional employee if the employee uses physical force to punish the child (corporal punishment) contrary to the school district's policy.[29]

G. Leave

1. State Minimum Personal Leave, Tex. Educ. Code 22.003(a)

All district employees shall receive at least five personal leave days per year.[30] These days may be accrued without limit and are transferable among districts.[31] The Board of Trustees may adopt a policy governing an employee's use of leave but may not restrict the purposes for which the leave may be used.[32]

A personal leave policy must be neutral on its face as to the purpose for which leave is taken. There must also be a rational basis for the policy. A personal leave policy that makes it difficult or impossible for teachers to use their yearly allotment of leave would not be a legitimate use of the policy-making authority.[33]

The Commissioner has upheld policies prohibiting more than two employees in a category from taking leave at the same time, prohibiting use of state personal leave the day before a district holiday, or prohibiting the use of more than two consecutive days of personal leave.[34] Thus, while districts may generally institute policies that govern "when" state personal leave is taken, districts may not restrict "why" the leave is taken.

Citing Section 22.003(a), the Commissioner has concluded that "[a] district may not terminate an employee's contract because an employee has properly requested personal leave."[35] In *Charles v. Columbus Independent School District*, the central issue was whether the District terminated the at-will employee's employment because she attempted to use her personal days or because she refused to report to work. The Commissioner found that allowing a district to fire an at-will employee for attempting to *properly* use personal leave would nullify the minimum personal leave program. However, when Charles informed the District that she planned to take the leave with or without approval, and then did so, the Commissioner determined that the District had a legitimate reason to terminate her employment.

The Commissioner has also found that denying an employee a stipend solely for utilizing her accrued minimum personal leave was not a violation of section 22.003(a). In *Ceynowa v. Brady Independent School District*, BISD offered a $1000 stipend to full-time, certified teachers who, among other requirements, "missed no more than five personal/state sick days, except that absences would be excused if due to a death in the immediate family or if they lasted for three or more consecutive days and a doctor's note was obtained…".[36] Ceynowa was absent eight days during the school year and did not receive the stipend.

On appeal, Ceynowa contended that the stipend policy penalized her for using leave days for reasons other than illness. BISD countered that the stipend policy does not restrict the purposes for which the teacher may use her leave, rather, it merely limited the number of absences a teacher may have and still be eligible for the stipend. Thus, the Commissioner concluded, Ceynowa was not penalized for the reasons she used her personal leave, she was just not rewarded for her attendance record.

2. Assault Leave, Tex. Educ. Code § 22.003(b)

In addition to all the other forms of leave to which an employee is entitled, an employee who is physically assaulted during the performance of his or her regular duties is entitled to up to two years paid leave to recuperate from all physical injuries.[37] Days of leave taken under the assault leave provision may not be deducted from accrued personal leave.[38]

At the request of the employee, the district must immediately assign the employee to assault leave.[39] Upon investigation of the claim, however, the district may change the assault leave status and charge the leave against the employee's accrued leave (or pay, if insufficient accrued leave is available).[40]

An employee is "physically assaulted" if the person causing the injury (a) could be prosecuted for assault or,

(b) could not be prosecuted only because the person's age or mental incapacity bars criminal liability.

To determine if an "assault" has occurred, the Commissioner looks to the definition of assault from Section 22.01 of the Texas Penal Code.[41] The Texas Penal Code defines assault, in part, as when a person "intentionally, knowingly, or recklessly causes bodily injury to another."[42] Thus, in determining whether an assault has occurred, a school district may not deny assault leave simply on the determination that the perpetrator ("student") did not intend to assault the employee. An assault can occur when the student acts recklessly. In such a situation, the Commissioner will review the record to determine if there is substantial evidence that the student's conduct was an accident, as in *Bryan v. Pharr-San Juan-Alamo Indep. Sch. Dist.*, Docket No. 094-R10-498 (Comm'r Educ. 1999), or if the student's conduct was "not wrongful," as in *Friar v. Austin Indep. Sch. Dist.*, Docket No. 113-R10-596 (Comm'r Educ. 1997).

3. Temporary Disability Leave, Tex. Educ. Code § 21.409

Each full-time educator shall be granted a leave of absence for temporary disability at any time the educator's condition interferes with the performance of regular duties.[43] The district may not terminate the educator's contract while the educator is on a leave of absence for temporary disability.[44]

The superintendent as required by the individual educator shall grant the length of leave of absence.[45] The board of trustees may establish a maximum length for a leave of absence for temporary disability, but the maximum may not be less than 180 days.[46]

An educator returning to duty after a leave of absence is entitled to an assignment at the school where the educator formerly taught, if an appropriate teaching position is available. The educator must be placed on active duty not later than the beginning of the next term. "Term," as used in this statute, means "calendar school year."[47] Thus, an educator returning to duty after a leave of absence is entitled to be reassigned not later than the beginning of the next calendar school year.

H. Appraisals

Generally, a teacher shall be appraised once every school year.[48] A teacher may be appraised less frequently, however, if the teacher agrees in writing, and the teacher's most recent evaluation rated the teacher as proficient, and did not identify any deficiencies.[49] A teacher who is appraised less than annually must be appraised no less than every five school years.[50]

A teacher may request a second appraisal by another appraiser within ten working days of receiving a written observation summary or written summative annual appraisal report.[51] The second appraiser must appraise the teacher in all domains, not just domains the teacher would like re-evaluated.[52] The second appraiser must make observations and walk-throughs as necessary to evaluate Domains I-V.[53]

A teacher may submit a written rebuttal after receiving a written observation summary or any other written documentation associated with the teacher's appraisal; and/or after receiving a written summative annual appraisal report.[54] The rebuttal must be submitted within ten working days of receiving the document that the teacher is rebutting.[55]

Appraisals must be completed no later than fifteen working days before the last day of instruction.[56] Any third-party information from a source other than the teacher's supervisor that will be used as cumulative data must be verified. Any documentation that will influence the teacher's summative annual appraisal must be shared in writing within ten working days of the appraiser's knowledge of the occurrence.[57] Observations must be at least 45 minutes in length. Observations may be held in shorter segments that aggregate to 45 minutes upon mutual consent of the teacher and appraiser.[58]

The Commissioner of Education will not substitute his/her judgment for the judgment of the appraiser, absent a showing that the appraisal was arbitrary and capricious.[59] Thus, a teacher should not expect the Commissioner to routinely grant appeals that request substantive changes to the appraisal. However, the Commissioner will remedy procedural appraisal violations. The remedy is not to change the ratings on the appraisal or to order the appraisal to be destroyed. The remedy is simply to declare the appraisal null and void.[60]

I. Unilateral Right to Resign, Tex. Educ. Code § 21.105, 11.160, 21.210

A teacher employed under a probationary, term or continuing contract may unilaterally resign from his/her contract if the teacher does so in writing, at least 45 days before the first day of instruction. The resignation must be submitted to the board of trustees or the board's designee, and will be considered "filed" on the day it is mailed.

III. CONCLUSION

Many of the protections provided by the Texas Education Code and discussed in this article have yet to be tested in appeals to the Commissioner of Education. The paperwork reduction provision, immunity from disciplinary proceedings provision, and finality of grades provision are all relatively new and have not had any reported decisions as of yet. Others, such as duty-free lunch and planning and preparation periods, are fairly well-settled. Whether a new provision, or a tried and tested statute, each of these areas has a potential for conflict if they are violated.

Thus, it will serve all school law practitioners' clients well to be knowledgeable of the rights provided to teachers under the Education Code. Hopefully, that knowledge will eliminate some of the conflicts that occur at the campus level.

ENDNOTES

1 Tex. Educ. Code Ann. § 11.164 (Vernon's 2006).

2 Tex. Educ. Code Ann. § 11.164(b) (Vernon's 2006).

3 *Id.*

4 Subsection (c) states: “This section does not preclude a school district from collecting essential information, in addition to information specified under Subsection (a), from a classroom teacher on agreement between the classroom teacher and the district.”

5 Tex. Educ. Code Ann. § 21.404 (Vernon’s 2006).

6 *Id*.

7 *Id*.

8 *Chaffin v. Los Fresnos Indep. Sch. Dist.*, Docket No. 128-R10-1290 (Comm’r Educ. 1990).

9 *Strater v. Houston Indep. Sch. Dist.*, Docket No. 129-R8-685 (Comm’r Educ. 1985).

10 Tex. Educ. Code Ann. § 25.082(a) (Vernon’s 2006).

11 Tex. Educ. Code Ann § 21.405(a) (Vernon’s 2006).

12 Tex. Educ. Code Ann § 21.405(b) (Vernon’s 2006).

13 Tex. Educ. Code Ann § 21.405(c) (Vernon’s 2006).

14 19 Tex. Admin. Code § 153.1001(b).

15 19 Tex. Admin. Code § 153.1001(c).

16 19 Tex. Admin. Code § 153.1001(d).

17 Tex. Educ. Code Ann. § 21.404(c) (Vernon’s 2006).

18 Op. Tex. Att’y Gen. JM-481.

19 *Id*.

20 Tex. Educ. Code Ann. § 28.0214 (Vernon’s 2006).

21 19 Tex. Admin. Code § 230.501.

22 19 Tex. Admin. Code § 230.501(c)(2).

23 Tex. Educ. Code § 21.0031(e) (Vernon’s 2006).

24 Tex. Educ. Code § 21.206(b) (Vernon’s 2006).

25 *Veliz v. Donna Indep. Sch. Dist.*, Docket No. 011-R3-999 (Comm’r Educ. 2000).

26 *Id*.

27 *Hogenson v. Williams*, 542 S.W.2d 456, 459-60 (Tex. Civ. App.—Texarkana 1976, n.w.h.).

28 *Hogenson* at 459.

29 Op. Att’y. Gen. No. GA-0202 (2004).

30 Tex. Educ. Code Ann. § 22.003(a) (Vernon’s 2006).

31 *Id*.

32 *Id*.

33 *See Rogers v. Poteet Indep. Sch. Dist.*, Docket No. 087-R10-498 (Comm’r Educ. 1998); *see also Amaral-Whittenberg v. Alanis*, 123 S.W.3d 714 (Tex. App.—Austin, 2003, no writ).

34 *See id*.

35 *Charles v. Columbus Indep. Sch. Dist.,* Docket No. 007-R10-999 (Comm’r Educ. 2001).

36 Docket No. 010-R10-999 (Comm’r Educ. 2000)

37 Tex. Educ. Code Ann. § 22.003(b) (Vernon’s 2006).

38 *Id*.

39 *Id*.

40 *Id*.

41 *Hennigan v. Spurger Indep. Sch. Dist.*, Docket No. 112-R10-700 (Comm’r Educ. 2001).

42 *Id; see also* Tex. Penal Code § 22.01.

43 **Tex. Educ. Code Ann.** § 21.409(a) (Vernon’s 2006).

44 *Id*.

45 Tex. Educ. Code Ann. § 21.409(f) (Vernon’s 2006).

46 *Id*.

47 Op. Tex. Att’y Gen. DM-177 (1992); *See also McCray v. Klein Indep. Sch. Dist.*, Docket No. 029-R3-992 (Comm’r Educ. 1994).

48 Tex. Educ. Code Ann. § 21.351(c) (Vernon’s 2006).

49 *Id*.

50 *Id*.

51 19 Tex. Admin. Code § 150.1005(c).

52 19 Tex. Admin. Code § 150.1005(f).

53 *Id*.

54 19 Tex. Admin. Code § 150.1005(a).

55 19 Tex. Admin. Code § 150.1005(b).

56 19 Tex. Admin. Code § 150.1003(d).

57 19 Tex. Admin. Code § 150.1003(f).

58 19 Tex. Admin. Code § 150.1003(b)(1).

59 *Etzel v. Galveston Indep. Sch. Dist.*, Docket No. 231-R9-885 (Comm’r Educ. 1987).

60 *Durand v. Hillsboro Indep. Sch. Dist.*, Docket No. 056-R10-1198 (Comm’r Educ. 1999).

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