2009 SENATE EDUCATION

SB 2357

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2357

Senate Education Committee

☐ Check here for Conference Committee

Hearing Date: February 11, 2009

Recorder Job Number: 9162

Committee Clerk Signature

Minutes:

Chairman Freborg opened the hearing on SB 2357. All members were present.

Senator Flakoll introduced the bill. See written testimony. He also distributed amendment .0101. This bill is about due process. There has also been discussion in the hallways to use the Educational Fact Finding Commission instead of an Administrative Law Judge. He walked the committee through the bill. The hearing is in executive session which means it is a closed hearing. The .0101 amendment would have the Administrative Law Judge make a recommendation to the school board as opposed to the way the bill is written which would give the Administrative Law Judge the final say. In the West Fargo case, the North Dakota School Boards Association attorney gave the school board a number of options. Later in the hearing, he distributed copies of Sections 28 – 32 of the Century Code.

Senator Taylor asked about the workload of the Administrative Law Judges.

Senator Flakoll said he doesn't know.

Senator Judy Lee testified in favor of the bill. She said Mavis Tjon fell and broke her hip and is unable to be here today. She distributed and read the testimony of Mavis Tjon (attached). She added she arrived at the hearing scheduled for Ms. Tjon at the appointed time of 6:15 to testify as a character witness. She stayed until 10:00 when she left for a meeting in Bismarck

which those running the hearing knew she had. She was asked one question, if she had ever observed Ms. Tjon in the classroom, which she answered no. She was angry on her drive to Bismarck. The intent is not to make it difficult to discharge a teacher or administrator that is bad. The intent is not to obstruct the process. We need some sort of procedure where the board is not the judge and the jury after which the only alternative is to go to court. In a case like this where a teacher is dismissed by an administrator who is implementing policy set by the school board and then the hearing is with the school board and the only next step is to go to court, which is very expensive, there needs to be some fairness and decency. The finding of fact should be considered. Advising by the Administrative Law Judge could be an answer rather than determining.

Representative Thoreson testified in favor of the bill. We need a fair way to do this, the amendments are good. This is an issue that will come up again. We need a better path for a fair process.

Greg Burns, executive director, North Dakota Education Association, testified in favor of the bill. See written testimony. They counsel many people out before the hearing process.

Senator Taylor said we heard in testimony the process would have been different if she had been a member of the West Fargo Education Association. What would have changed?

Greg Burns said they couldn't have changed the process, they would have recommended legal counsel at no cost to the teacher. They would have taken on the appeal.

Senator Taylor said she could have obtained legal counsel on her own.

Greg Burns said she did, at her own expense.

Mike Geiermann, legal counsel for North Dakota Education Association, testified in favor of the bill. See written testimony. Allegations for dismissal are more serious than non renewal for cause.

Senator Lee asked if he preferred the Administrative Law Judge or the Fact Finding Commission.

Mike Geiermann said he had no objection to the Fact Finding Commission. It would still be an independent body.

Alan Hoberg, Office of Administrative Hearings, said he is not in favor of the bill or against it. He appeared to answer questions about the Office of Administrative Hearings.

Senator Bakke asked who are the Administrative Law Judges.

Alan Hoberg said all Administrative Law Judges are lawyers except one and that one is a certified hearing official and has attended the National Judicial College and is very well trained and has conducted hearings for almost 30 years.

Senator Bakke asked what kind of cases do they hear.

Alan Hoberg said they do hearings for almost all agencies in state government except Department of Transportation and Job Service employment hearings. Regarding the amendment for the recommendation rather than a final decision, there are three methods they use to conduct hearings. The first is a procedural hearing, which is commonly used for boards and commissions and some local entities including a school board where they conduct the pre hearing matters, conduct the hearing and turn it over to the agency or board to issue a decision. They can do a recommended decision where they do findings of fact, conclusions of law and make a recommendation of an order to the board or agency. The board issues a final decision and if they modify or reject the decision of the Administrative Law Judge, they have to explain why. They can do a final decision hearing, which is about half of their cases, where they do a finding of fact and a conclusion of law, they conduct the hearing and make a final decision. In this case their order is appealable to the district court. They do quite a few

personnel hearings. All the state employee hearings, dismissals and other types of grievance hearings, are done by his office.

Senator Bakke asked which type of hearing is in the bill.

Alan Hoberg said the bill as introduced is a final decision hearing, the amendment is a recommendation hearing.

Senator Taylor asked about the number of Administrative Law Judges and where they are located across the state.

Alan Hoberg said they have 3 permanent and 9 temporary Administrative Law Judges so they have a lot of flexibility. These hearings would be more complex than some they do but he thought they could make a decision within 30 days. They have judges in Fargo, West Fargo, Bismarck, Minot, Dickinson.

Senator Flakoll asked if all their hearings are open.

Alan Hoberg said some are closed by law. The basic rule is they are open unless they are closed by law. Some human services hearings are closed, some portions of some hearings are closed if they involve medical records.

Jack McDonald, North Dakota Newspaper Association and North Dakota Broadcasters Association, testified against the bill. See written testimony.

Senator Flakoll asked if he would agree that these hearings are generally closed.

Jack McDonald said yes he agrees.

Senator Flakoll asked if currently they can appeal to the District Court. Does he know of any case where the appeal is not open?

Jack McDonald said no, they do not appeal currently, they bring a separate lawsuit that is open under the rules of the court. These are rare occurrences . In this case, where it is an appeal of a lower court, it could be closed.

Senator Taylor asked which was his greater concern, these hearings or the slippery slope we could be starting down.

Jack McDonald said both. He is primarily concerned that a public forum, the Administrative Law Judge hearings which are usually open might be closed. This could provide a precedence. The Public Service Commission for example could decide they want some of their Administrative Law Judge hearings closed.

Senator Taylor said Human Services hearings are closed.

Jack McDonald said yes, social services grants have been closed for years and is not an issue. Also medical records, only the portion dealing with the records, are closed.

Senator Taylor said might some portion of these hearings be closed?

Jack McDonald said maybe. Court proceedings are generally public, for example bankruptcy, divorce, child abuse cases are all open proceedings.

Gary Thune, attorney for the North Dakota School Boards Association, testified against the bill. See written testimony. He deals with 90% of the discharge cases that occur across the state. They are infrequent, not 2 per year on average. As far as the executive session issue, they are specifically required by law to be closed. Jack McDonald forgot to mention when he was discussing libel that protection from libel and slander occur when in executive session so we don't have the protection in an open meeting. There is no intent in this bill to change the current status of the discharge hearing as they relate to executive session. It is not a slippery slope of closed meetings since it is not adding anything. Regarding the sufficiency issue of Mike Geiermann, the burden of proof is on the board to prove by a preponderance of the evidence so there is a standard in place. Regarding the double jeopardy issue, the burden of proof in a discharge case is by a preponderance of the evidence. There is no burden of proof in a non renewal hearing, the evidence simply must be presented and there is a review

procedure. OJ Simpson might have tried to make the claim unsuccessfully, the criminal proceedings have a beyond a reasonable doubt standard, the civil proceedings for wrongful death in which OJ lost $30 million was about the same incident, it wasn't double jeopardy, it was a separate decision. It may very well be that a teacher who is brought to a discharge hearing in the fall and allowed to stay in the position had other problems and one could be a problem with how he handled discipline and that should not preclude doing a non renewal in the spring on that teacher. He served as hearing officer in the West Fargo case, he listened to the testimony and he thinks Mavis Tjon accurately described the proceedings. He gave the board options and left it to them to decide. He and Mr. Geiermann recently held a discharge hearing in Minot and the board employed an Administrative Law Judge from Mr. Hoberg's office who heard the case. When all the evidence was in he ruled on all the procedural matters and decided what objections were to be sustained, made the record and then he left. The board then made the decision. Lawsuits are more common in discharge cases than in non renewal cases and he agrees they sit down and resolve many of them before they go to a hearing. With the amendment that suggests the Administrative Law Judge would make recommendations, that would appear to eliminate the concern over the added legal cost to the school board. With the State Board of Public School Education, the Administrative Law Judge rules on all the evidence, creates the record, tapes the proceedings and then at the end closes the record and leaves and the board debates it and makes a decision. Their lawyer drafts findings of fact, conclusions of law and an order, the board reviews it and they issue a decision. The responsibility is on the board and that approach makes sense. The Fact Finding Commission currently is a retired principal who is chairman, a former teacher who negotiated for teachers for many years and a school board member from Dickinson. None of them are law trained. You need law trained people because rules of evidence apply, there is

cross examination, all of those things involve a lot of rulings. The Administrative Law Judges are qualified in that regard. They are trained to do that but the Fact Finding Commission is not.

Ben Auch, school board member from Mott Regent, testified against the bill. See written testimony.

Chairman Freborg closed the hearing on SB 2357.

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2357

Senate Education Committee

☐ Check here for Conference Committee

Hearing Date: February 16, 2009

Recorder Job Number: 9503

Committee Clerk Signature

Minutes:

Chairman Freborg opened the discussion on SB 2357. All members were present.

Senator Flakoll distributed amendment .0102. It changes the bill as introduced relative to the Administrative Law Judge. This will make the playing field level. The Administrative Law Judge would preside over the hearing and turn the evidence over to the school board for their decision. The cost would be comparable to what was paid the Mr. Thune when he presided over the hearing in West Fargo. In one case it was about $4300. This would be paid by the school district.

Senator Flakoll moved amendment .0102, seconded by Senator Lee.

Senator Taylor said regarding an open hearing, when the decision is made by the board, it may be an open meeting.

Senator Flakoll said the big change is the session is presided over by an Administrative Law Judge. The hearings are currently closed unless both parties agree to have them open.

Senator Taylor said the decision is still in the hands of the school board. This is not a whole new chapter in open meetings. If there is an appeal to the district court, that would open.

Senator Flakoll said that is correct except if a minor was involved, then portions could be closed by the judge.

Senator Bakke asked if the school board has any obligation to take the suggestions of the Administrative Law Judge.

Senator Flakoll said with the amendment, the Administrative Law Judge would not make a recommendation. In testimony we heard the Administrative Law Judge can conduct three types of hearings and this would be the first type where they preside over the hearing but do not make a ruling or recommendation.

Senator Bakke clarified they make no determination.

Senator Flakoll said that is correct.

Senator Bakke said the point of the bill was to let an impartial person make the decision.

Senator Flakoll said this will level the playing field. All evidence will be presented fairly. The Administrative Law Judge is trained in the law. The board will make the decision.

Senator Bakke asked if the board would be present during the hearings.

Senator Flakoll said yes.

The motion passed 4 – 1.

Senator Flakoll moved a Do Pass As Amended on SB 2357, seconded by Senator Taylor.

Senator Taylor said we have a somewhat weaker bill, is this the right step? Since the incident discussed in testimony was in Senator Flakoll's school district, what is his opinion?

Senator Flakoll said it is not his district. It is not a common situation. The involved party thinks it would have been a better situation in her case if this change had been in place. It won't be a heavy burden financially on the school districts. It levels the playing field and helps take some of the emotion out of it. In the larger school districts, personalities are not quite as involved but in the smaller school districts, relationships with family, church, sports, and neighbors tend to be a factor. This also insures that someone learned in the law presides. It is helpful to have a third party from outside the district involved.

The motion passed 3 – 2. Senator Flakoll will carry the bill.

90734.0101
Title.

Prepared by the Legislative Council staff for
Senator Flakoll
February 10, 2009

PROPOSED AMENDMENTS TO SENATE BILL NO. 2357

Page 2, line 25, remove "a."

Page 2, line 26, replace "determine whether sufficient grounds exist" with "recommend a course of action regarding the contemplated discharge.

7. If the board of a school district discharges an individual under this section, the individual may appeal the decision to the district court. The court shall review the matter in the same manner as it reviews an appeal from a determination of an administrative agency under chapter 28-32."

Page 2, remove lines 27 through 31

Page 3, remove lines 1 through 4

Renumber accordingly

Prepared by the Legislative Council staff for
Senator Flakoll
February 11, 2009

PROPOSED AMENDMENTS TO SENATE BILL NO. 2357

Page 2, line 8, remove the overstrike over "~~Unless otherwise agreed to by~~", remove "At the request of", remove the overstrike over "~~and~~", and remove "or"

Page 2, line 15, replace "two" with "three"

Page 2, line 16, replace "two" with "three"

Page 2, replace lines 25 through 31 with:

"6. At the conclusion of the hearing, the administrative law judge shall provide all evidence presented at the hearing to the board in order that the board may make a determination regarding the discharge.

7. A determination of the board under this section may be appealed to the district court.

8. All costs of the services provided by the administrative law judge, including reimbursement for expenses, are the responsibility of the board."

Page 3, remove lines 1 through 4

Renumber accordingly

Date: 2/16/09
Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2351

Senate Education Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Move amendment 90734.0102

Motion Made By Sen. Flakoll Seconded By Sen Lee

Senators	Yes	No	Senators	Yes	No
Senator Freborg	✓		Senator Taylor	✓	
Senator Gary Lee	✓		Senator Bakke		✓
Senator Flakoll	✓				

Total (Yes) 4 No 1

Absent 0

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Date: 2/16/09
Roll Call Vote #: 2

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2357

Senate Education Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass as amended

Motion Made By Sen. Flakoll Seconded By Sen Taylor

Senators	Yes	No	Senators	Yes	No
Senator Freborg		✓	Senator Taylor	✓	
Senator Gary Lee		✓	Senator Bakke	✓	
Senator Flakoll	✓				

Total (Yes) 3 No 2

Absent 0

Floor Assignment Sen Flakoll

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2357: Education Committee (Sen. Freborg, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (3 YEAS, 2 NAYS, 0 ABSENT AND NOT VOTING). SB 2357 was placed on the Sixth order on the calendar.

Page 2, line 8, remove the overstrike over "~~Unless otherwise agreed to by~~", remove "At the request of", remove the overstrike over "~~and~~", and remove "or"

Page 2, line 15, replace "two" with "three"

Page 2, line 16, replace "two" with "three"

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7. A determination of the board under this section may be appealed to the district court.

8. All costs of the services provided by the administrative law judge, including reimbursement for expenses, are the responsibility of the board."

Page 3, remove lines 1 through 4

Renumber accordingly

2009 HOUSE EDUCATION

SB 2357

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2357

House Education Committee

☐ Check here for Conference Committee

Hearing Date: March 11, 2009

Recorder Job Number: 10715 and 10716

Committee Clerk Signature Carmen Hart

Minutes:

Rep. Blair Thoreson, District 44, Fargo, appeared. This bill came from a situation with a person in our district who was dismissed from her employment. We feel that it is perhaps important to make some changes. This bill would allow the administrative law judge to be involved in the process for the dismissal.

Rep. Donald Clark, District 44, Fargo, appeared in support of SB 2357. Like Blair said, this bill is a result of a concern brought forward by a constituent of District 44. As you can see, the legislators from District 44 felt strongly enough about this to lend their name to this bill. I trust this committee will give it a favorable consideration.

Senator Tim Flakoll, District 44, Fargo, appeared. **(See Attachment 1.)**

Rep. David Rust: Where do you find administrative law judges?

Senator Flakoll: There is one right over here. THE RECORDING QUIT HERE. THE REST OF THIS IS ON 10716. . . .Actually, some of the other things in terms of back story on this, on the senate side we did talk about what other things could we look at whether it is a fact finding commission or whatever, we just really felt that this was the best way to go.

Rep. Mike Schatz: What is the typical cost per case?

Senator Flakoll: In the case of West Fargo they paid the person who presided over the session $4,318.92 for their advice and representation in that particular case. I believe the

administrative law judge would be somewhat in that same ballpark. If you think about this and I thought about this some, I think this will lessen the chance in terms of other legal action that could be brought against you as you move forward that there would be a greater level of satisfaction on both sides if you have a more neutral party presiding over this. When you look at the overall picture, I think this is a pretty reasonable amount, one to the next.

Rep. Jerry Kelsh: It sounds like the only thing that an administrative law judge does is insure that all the evidence on both sides is gathered, and then it still is the board. Does this guarantee that all the prejudices are going to be gone on both sides? Why don't they have the judge make the determination? Does he make a recommendation first?

Senator Flakoll: There are three different things that the administrative law judge can do. In all cases, they preside over the event. They can make a ruling that is binding. They can make a recommendation, and they can turn the information over to the school board. On the senate side, we felt that it would be best if the local elected school board members had that final determination as the employer. We think that is a reasonable position. We are all human. Prejudices exist everywhere at every turn whether we know about them or not on a whole host of issues.

Rep. John Wall: Based on past history, how many cases per year do you perceive going through this process?

Senator Flakoll: On the senate side they talked about maybe one or two cases a year. These are not real commonplace. Nevertheless, they are of such significance in a community that if they are not handled right, it will really rip it apart.

Rep. Phillip Mueller: Could a school board and the person involved ask for and have an administrative law judge now without this bill?

Senator Flakoll: I will leave that up to the administrative law judge to answer that question.

Rep. Bob Hunskor: The administrative law judge would turn the information evidence over to the board without recommendation or with the recommendation? Would there be a choice? Would the board just agree with the evidence and make their decision? Would there be a recommendation?

Senator Flakoll: There would not be a recommendation. They would turn the materials over. In the case that we are most familiar with, the teacher felt that their side didn't have an ample opportunity to present the facts of their case for a variety of reasons. We are just looking to make sure that we so call level the playing field and that in essence we are putting all that information forward and then the decision rises and falls based upon that information.

Rep. Lee Myxter: Does this take any authority or power away from the school board?

Senator Flakoll: In this case often times they may hire, as an example, the attorney to represent the school board. All this does is say that it must be administrative law judge that presides over that. In that respect they don't control that process anymore as far as gaining of evidence. Right now they can stop someone from speaking during hearing or some of those things. This is designed so that everyone feels that they had their fair shake. I think the thing that the school boards and the schools like is that they still have the final say on the determination of what happens with that individual.

Rep. Brenda Heller: Why do you think it was necessary to change ten days prior to five?

Senator Flakoll: Madam Chair, could you specify where we looking here again so that...

Rep. Brenda Heller: On line 10 it is crossed out that at least ten days prior to discharge date and then that is just taken away and a new procedure is put into place. Is that how it is going to work?

Chairman Kelsch: I think what it does is that an administrative law judge is setting the date of the hearing. The board has to provide the individual the list of charges at least five days before the hearing.

Senator Flakoll: I don't know that there is any problem either way. They still have to do it in a timely fashion. They know they have to do it in a timely fashion before the contract expires.

Chairman Kelsch: The better part of this is the fact that the administrative law judge actually works together with both parties to set the hearing date rather than just the school board making the notification that the hearing will be now.

Rep. Phillip Mueller: The teacher and the school board they both have or have if a teacher is a NDEA member access to legal counsel and certainly the School Board Association has the same thing. What role then does that legal counsel play with this scenario and an administrative law judge?

Senator Flakoll: I think we should go to the administrative law judge for that?

Rep. Karen Karls: I sit on a board that occasionally uses the ALJ office, and there's a procedure that is gone through but we get a recommendation, because if it ever goes further like into district court, we have that as a fallback position. What would be the sense of the ALJ not making a recommendation?

Senator Flakoll: We feel that the best spot is that it is problem wise within them presiding over it. There is not support for them making a recommendation.

Chairman Kelsch: I am pretty sure that the elected school board officials would have a real problem with a recommendation.

Senator Flakoll: That was one of the scenarios that were thrown out because we did talk about that on the other side. There really wasn't the support to do that. They felt that it took

away from the local school board's ability to hire and fire to a great extent. That is why we didn't do that in terms of recommendation.

Chairman Kelsch: Really what it does is it allows both parties their fair share of getting their story out. Both voices would be heard in front of the ALJ. The person that was wronged in West Fargo did not feel that she had the opportunity to share her side of the story.

Senator Flakoll: I believe the bill before you that the parties that are normally on opposite sides on a situation like this will both be coming up in support of the bill. If we move it one way or the other way, we will lose that. If we move towards a recommendation or mandate, that is not a happy place. We have a spot now where both sides are comfortable with the bill.

Rep. Karen Karls: My only comment to that was the board I sit on then has the option. They can accept the recommendation or not. They still are the final decision maker.

Rep. David Rust: Wouldn't you kind of see this being similar to like a court hearing where you have a judge and representation from administration making a case for probably discharge? They have the teacher and the NDEA representative refuting that and the board being the jury and as such we have an administrative judge. Just like in a court case today, it doesn't give a recommendation to a jury. You would have the same thing happening here. You wouldn't have an administrative judge giving a recommendation to a school board. Is that similar in thinking?

Senator Flakoll: I believe so.

Rep. Lee Myxter: I see this sort of like the teacher negotiation laws saying in North Dakota where you can go through the whole process and at the very end the board decides it doesn't make any difference what the information was. The board has the final decision.

Senator Flakoll: The board has the final decision, certainly.

Chairman Kelsch: Until it is appealed.

Senator Flakoll: In that case there could be the fact finding commission that could involved.

Chairman Kelsch: They can appeal it. They can take it to court so it is not the final decision. It is the final decision only as long as that individual accepts that decision.

Rep. Lee Myxter: Is the information from that hearing ever publicized?

Senator Flakoll: It would be part of the permanent record. These are closed meetings unless both parties agree that they would be open. That is the case now. That is the case with the bill as presented to you.

Rep. Jerry Kelsh: The ability to go to a district court—is that not allowed now and a board decision?

Senator Flakoll: I believe in this case, the individual did make an appeal to. Part of this did go to the district court.

Senator Judy Lee, District 13, appeared. She provided testimony from Mavis Tjon who was unable to be here because she is recovering from a fall. She is the teacher to whom we have been alluding and has been a long time friend of mine. **(See Attachment 2.)** I want to make a short comment about that hearing to which I was a party. The hearing was called at 6:15 and the three of us who were asked to be character references were ushered to the lunchroom where we sat until ten minutes to 10, someone came in and said that they were ready to hear from us now. I was asked one question which was did you observe the teacher in this situation in the classroom to which obviously my answer was no. That was it. There was no opportunity to provide any other information about what I know about her and the way she interacts with people and children. The other character references had the same kind of situation. I couldn't believe it. Her husband was not permitted to come to the hearing because she had two attorneys and they were the people who were permitted to accompany her. Because of all the publicity, it has affected getting other jobs. There has been a lot of criticism

of the school board. I know most, if not all, of the school board members. They are honorable people. I think that they try to do their best, but I think that they weren't in a position to do the best that needed to be done, because they aren't experienced in this kind of hearing.

Allen Hoberg, Director of the Office of Administrative Hearings, and an administrative law judge, appeared to answer any questions that the committee might have.

Rep. Phillip Mueller: One of the questions had to do with the role of the attorneys that might represent these folks in a circumstance like this. Can you comment on that?

Allen Hoberg: It would be much like any other administrative hearing, because it would be under Chapter 2832. The role of the attorneys would be much like a court proceeding. It would represent the parties. The administrative law judge would conduct the proceeding, perhaps hold a prehearing conference to get evidence concerns straightened out before the hearing, but conduct the hearing under the practices act, Chapter 2832 of the North Dakota Century Code. The attorneys would present their case, maybe give an opening statement, present the evidence, and then probably give a closing statement. As this bill requires currently under the engrossed version, the board would issue the decision.

Rep. Phillip Mueller: Much reference has been made to turning the evidence and information over. Would it be safe to assume that evidence and information may lean to a recommendation or could a recommendation be gleaned from the information and how you might turn that over to a board? I understand we are not suppose to recommend here, but could we assume that may follow?

Allen Hoberg: There would be no recommendation or a hint of a recommendation from the administrative law judge. We have basically three ways that we can conduct a hearing under Chapter 2832. One would be as in this bill to just conduct the hearing and turn the evidence over to the board or commission who is all sitting there listening to the evidence and they

would make a decision. The second way would be to issue a recommended decision, and then, yes, we would write a decision that would be our recommendation as to what the final disposition should be. The board or commission could accept that, reject that, or modify it, and then they would issue a final decision. With a large number of cases now, including WSI cases, we issue final decisions. Probably half the decisions we issue are final decisions. Then the agency would not have any say. They would just have an opportunity to appeal that to district court.

Rep. John Wall: On page 2, Number 6, it talks about after the administrative hearing is turned over the board. My question is if the grieved party wants to appeal it, would all that testimony become part of the public record?

Allen Hoberg: Currently any matter that is appealed to the courts would then become an open record, and then this whole record of the proceeding transcript, all the evidence would be part of the court record unless it was somehow protected under confidentiality provisions.

Rep. David Rust: Where are the administrative judges, and how many are there? I am in northwest North Dakota. How easy is it to find one?

Allen Hoberg: We currently have, it was alluded to, three permanent administrative law judges which are full-time employees, myself being one of them. We also have nine contract administrative law judges that do primarily workforce safety insurance hearings, but also some other hearings. We can call on people. We have a person in Minot and a couple of people in Fargo. We have a permanent person in West Fargo. We have a person in Dickinson. We have people around the state that we can call if need be. I would say probably because there are not very many of these types of cases, we would probably use our permanent people to do these, but not necessarily.

Greg Burns, Executive Director, NDEA, appeared. **(See Attachment 3.)** He did not read his testimony, but asked the committee to turn to page 2 to point something out. We are not offering the amendment. I think you heard substantial testimony about how awful the current system is. Rather than jeopardizing a chance at doing something better, we will not offer the amendment, but I would say it is a strong preference for us. Even though this is an improvement, this record will go before a judge if it is appealed to a court. The judge is still confined in the district court to making a decision based on one thing and one thing only. They will not substitute their judgment for that of the school board. This becomes a different issue if an administrative law judge makes a recommendation that the school board would be free to refuse or to accept which would make this much better.

Rep. David Rust: Item 7, a determination of the board under this section may be appealed to the district court. How do you see that being different than now?

Greg Burns: It isn't different than now.

Rep. Mike Schatz: Do you think there will be more dismissals because it will be somewhat less painful for a school board to bring cases?

Greg Burns: I don't think there will be more cases. These are very unfortunate events, and I think everybody is reluctant to going to something like this unless it is absolutely necessary. I think as you heard in previous testimony, a termination for cause is the professional death sentence for a teacher. I don't anticipate any increase.

Bev Nielson, NDSBA, appeared in support of SB 2357 as you have it before you. We had serious concerns about it originally and worked with the sponsors to get to a happy place. Even though that this will be quite extensive for districts, we do believe that in the long run, it puts them in a better legal position should they be appealed.

Rep. Jerry Kelsh: I still have a little concern. I served on a school board for 12 years, and we had some problems. We didn't have to go through anything like this. Do you agree that the school board was in the wrong on this or not?

Bev Nielson: Absolutely not. Actually they did have a hearing officer at that hearing, and I think what happened was because of so many things that happened over the course of those few months that they wanted to make some change in the system. I am not convinced it would have made a difference in that situation, because the hearing officer is a hearing officer. Both sides had a separate attorney. When you try to second guess something or crack legislation to one specific instance that happened, you don't always jump off the cliff. That is why I think this compromise is appropriate.

Rep. Jerry Kelsh: The hearing officer that was testified that was there, isn't that the school board association attorney?

Bev Nielson: He does represent school board that is part of his practice. He was not there in the capacity of representing the West Fargo School Board. They had their own attorney. He was there hired as a hearing officer. I wouldn't second guess his ability to run a hearing.

Rep. Jerry Kelsh: From the testimony we hear, there was, in my opinion, a wrong created by the school board and the administration of West Fargo.

Bev Nielson: That is why you have an appeals process. It was appealed to district court.

Rep. Mike Schatz: I had this kind of described as a jury situation, but a school board isn't going to be at the hearing, so they will just get a transcript. Is that how this works?

Bev Nielson: No. The school board as an entity is the plaintiff so they are there. They get the transcript and everything for their deliberations which would occur after the hearing.

There was no opposition. The hearing was closed.

Attachment 4 was testimony provided at a later date by Janis Schmidt.

2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2357

House Education Committee

☐ Check here for Conference Committee

Hearing Date: March 16, 2009

Recorder Job Number: 10973

Committee Clerk Signature Carmen Hart

Minutes:

Chairman Kelsch: This was the bill that dealt with the same issue. This was a discharge for cause. There was no testimony in opposition to the bill.

Rep. David Rust moved a **Do Pass. Rep. Jerry Kelsh** seconded the motion.

Rep. David Rust: I agree with testimony from Bev Nielson of School Board Association. I think that this will cause some dollars to be spent by school districts. Fortunately, these kinds of cases happen very infrequently, but they do happen. Even though it might cost a school district some dollars, I think it would be dollars that are well spent because you would now have a third, disinterested party, who would try to keep everybody on track and try to make sure that both sides are equally represented in that process.

Rep. Jerry Kelsh: I totally agree with that. I didn't ask Bev to be funny about whether she agreed there was some solemn. I asked it seriously. I wasn't totally happy with her answer, but it should be up to the board to do anything they want. I don't believe that. There should be the level playing field. All the evidence should be out there, and somebody should be able to make a decision that is not totally involved in it. I think this helps a lot. This may not be the total answer that there can't be recommendations but at least the evidence is there.

Rep. Lee Myxter: Obviously, it is a fairer way. It still goes down that the board has the final control. It may be a little fairer and neater process, but you are still at the will of the board.

Rep. Mike Schatz: I will be interested to see how many more discharges there might be, if there are, two years from now. There is a cost to this--$4,300 for an administrative law judge. In many ways he has taken over the responsibility of the administrator and the school board president. This looks pretty nice, but we are paying administrators a lot of money in these schools. Isn't this their job? I am going to vote for it, but I would like to know in two years if there is a lot more dismissals on account of this process.

DO PASS. 14 YEAS, 0 NAYS. Rep. Jerry Kelsh is the carrier of this bill.

Date: 3-16-09

Roll Call Vote #: ____

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2257

House Education Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number ____

Action Taken ☑ Do Pass ☐ Do Not Pass ☐ Amended

Motion Made By Rep Rust Seconded By Rep Kelsh

Representatives	Yes	No	Representatives	Yes	No
Chairman RaeAnn Kelsch	✓		Rep. Lyle Hanson	✓	
Vice Chairman Lisa Meier	✓		Rep. Bob Hunskor	✓	
Rep. Brenda Heller	✓		Rep. Jerry Kelsh	✓	
Rep. Dennis Johnson	✓		Rep. Corey Mock	✓	
Rep. Karen Karls	✓		Rep. Phillip Mueller	✓	
Rep. Mike Schatz	✓		Rep. Lee Myxter	✓	
Rep. John D. Wall	✓				
Rep. David Rust	✓				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep Kelsh

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2357, as engrossed: Education Committee (Rep. R. Kelsch, Chairman) recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2357 was placed on the Fourteenth order on the calendar.

2009 TESTIMONY

SB 2357

SB 2357 2/11/09

Senator Tim Flakoll

District 44 - Fargo

Chairman Freborg and distinguished members of the Senate Education Committee,

For the record I am Senator Tim Flakoll of Fargo. I bring to you SB 2357 on behalf of a constituent in my district.

I will also be offering up some amendments (90734.0101) in an effort to smooth off some of the rough edges that some have expressed concern over. It has also been discussed if it would be better to use the Education Factfinding commission instead of an Administrative Law Judge.

This is a bill that deals with the decisions and processes which affect people's lives, sometimes in a permanent way. I am sure that most if not all of us agree that we do not want bad teachers in the classroom.

I will make a few general comments and walk you through the bill.

Our collective goals should be fair due process during situations where the termination of a teacher is contemplated. We need to be sure that when it comes to discovery and a finding of facts that there is a level playing field where both sides can offer up their evidence.

We need to be sure we have a methodology that is legally sound and whose outcome is evidenced based and free of speculation and hearsay.

These termination sessions are often emotionally charged. To emphasize this point, I will remind this committee of the early morning hours of April 2007 when police had to be called to a dismissal meeting of the Fargo School District (The Forum of Fargo Moorhead, April 26, 2007) because of the concern of the volatility of an employment situation.

These termination sessions are legally dicey if not handled properly by legally trained individuals. Comments made in inquiry by school board members or administrators can be grounds for additional suits against the district. Contested non-renewal or termination sessions are not that common. As such a one or two hour training session cannot adequately prepare board members or administrators for the legal complexities that surround them. That is why it is better if they have someone who is running the session who is not only trained in the law, but is not employed by either party.

By having an independent third party we are also lessening the chance of preexisting prejudices. This is especially the case in smaller communities where all parties involved are often a relative, member of your church or other important or long term linkage.

I am sure that we all agree that we need to do our best to obtain facts and let the decision rise or fall on the merits of those facts.

The dismissal process is one that has lifelong implications for an individual, but it can also tear apart communities if not handled in a proper manner.

Walk through the bill and amendments -

There seems to be some misunderstanding of the issue related to "open meetings" and SB 2357.

For current law see

See 15.1-15-08

Subsection 7

"Unless otherwise agreed to by the board and the individual, the hearing must be conducted as an executive session of the board, except that

a. The individual may invite to the hearing any two representatives and the individual's spouse or one other family member; and
b. The board may invite to the hearing any two representatives, the school business manager, and the school district superintendent. "

The proposed change in SB2357 is:

"At the request of the board or the individual, the administrative law judge shall close the hearing, except for the parties, their legal representatives, witnesses, two invitees requested by the individual, and two invitees requested by the board."

So right now the session is closed unless both parties agree to open it up and with the proposed law the session is open unless one of the parties asked that it be closed.

Chairman Freborg, that concludes my testimony.

NOTES:

Administrative Law Judges NDCC chapter 54-57 creates the office of administrative hearings. The director is appointed by the governor and confirmed by the Senate. The director can hire additional administrative law judges.

Under NDCC 54-57-07, any agency that requires the services of an ALJ must pay. The required payment must include support staff, mileage, meals, and lodging.

Education Factfinding commission - 15.1-16-02 - It consists of three members "experienced in educational activities." One is appointed by the Governor, one by the Attorney General, and one by the Superintendent of Public Instruction. This last individual serves as the chairman.

From: Thomas, L. Anita
Sent: Friday, January 30, 2009 3:17 PM
To: [redacted]
Subject: WF School District expenditures

[redacted]

A few days ago you asked about certain school district expenditures.

According to Joe Sykora, the WF business manager, the district:

1. Pays $3800 in annual dues to the ND School Boards Association
2. Pays $13,088 to the ND Council of Educational Leaders on behalf of individual administrators; and
3. Paid $4318.92 to Gary Thune / Pearce Durick for advice and representation in the Tjon case.

Hope this helps. Have a great weekend.

Anita

SF 2/11/09 2359

28-31-09. Proceedings in exercise of original jurisdiction. In an original cause in the supreme court, whether in response to an order to show cause or an alternative writ of any kind, the respondent shall appear by written motion, answer, or return. This may be submitted to the supreme court without waiver at one or different times, as may best suit the convenience of the court and the parties, for purposes of expedition. Upon a hearing, the parties may present, in support of the issues, affidavits and counter affidavits. If, for the determination of controverted facts, a further hearing and additional evidence become necessary, the court, upon application made therefor, shall determine the method of taking, and the time for the return of, additional testimony, whether the same be by additional evidence, by deposition, or by oral testimony taken before the court, or by reference either to a trial court or some designated commissioner or referee.

Source: Supreme Court Rule No. 12; R.C. 1943, § 28-3109.

28-31-10. Taxation of costs. Superseded by N.D.R.App.P., Rule 39.

28-31-11. Execution for costs. Superseded by N.D.R.App.P., Rule 39.

CHAPTER 28-32
ADMINISTRATIVE AGENCIES PRACTICE ACT

SE

2357 2/11/09

Note.
This chapter, enacted by section 12 of chapter 293, S.L. 2001, effective August 1, 2001, replaces former Chapter 28-32, entitled "Administrative Agencies Practice Act," which was repealed by section 35 of chapter 293, S.L. 2001.

28-32-01. Definitions. In this chapter, unless the context or subject matter otherwise provides:

1. "Adjudicative proceeding" means an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required. An adjudicative proceeding includes administrative matters involving a hearing on a complaint against a specific-named respondent; a hearing on an application seeking a right, privilege, or an authorization from an agency, such as a ratemaking or licensing hearing; or a hearing on an appeal to an agency. An adjudicative proceeding includes reconsideration, rehearing, or reopening. Once an adjudicative proceeding has begun, the adjudicative proceeding includes any informal disposition of the administrative matter under section 28-32-22 or another specific statute or rule, unless the matter has been specifically converted to another type of proceeding under section 28-32-22. An adjudicative proceeding does not include a decision or order to file or not to file a complaint, or to initiate an investigation, an adjudicative proceeding, or any other proceeding before the agency, or another agency, or a court. An adjudicative proceeding does not include a decision or order to issue, reconsider, or reopen an order that precedes an opportunity for hearing or that under another section of this code is not subject to review in an adjudicative proceeding. An adjudicative proceeding does not include rulemaking under this chapter.
2. "Administrative agency" or "agency" means each board, bureau, commission, department, or other administrative unit of the executive branch of state government, including one or more officers,

employees, or other persons directly or indirectly purporting to act on behalf or under authority of the agency. An administrative unit located within or subordinate to an administrative agency must be treated as part of that agency to the extent it purports to exercise authority subject to this chapter. The term administrative agency does not include:

a. The office of management and budget except with respect to rules made under section 32-12.2-14, rules relating to conduct on the capitol grounds and in buildings located on the capitol grounds under section 54-21-18, rules relating to the classified service as authorized under section 54-44.3-07, and rules relating to state purchasing practices as required under section 54-44.4-04.
b. The adjutant general with respect to the department of emergency services.
c. The council on the arts.
d. The state auditor.
e. The department of commerce with respect to the division of economic development and finance.
f. The dairy promotion commission.
g. The education factfinding commission.
h. The educational technology council.
i. The board of equalization.
j. The board of higher education.
k. The Indian affairs commission.
l. The industrial commission with respect to the activities of the Bank of North Dakota, North Dakota housing finance agency, public finance authority, North Dakota mill and elevator association, North Dakota farm finance agency, and the North Dakota transmission authority.
m. The department of corrections and rehabilitation except with respect to the activities of the division of adult services under chapter 54-23.4.
n. The pardon advisory board.
o. The parks and recreation department.
p. The parole board.
q. The state fair association.
r. The attorney general with respect to activities of the state toxicologist and the state crime laboratory.
s. The board of university and school lands except with respect to activities under chapter 47-30.1.
t. The administrative committee on veterans' affairs except with respect to rules relating to the supervision and government of the veterans' home and the implementation of programs or services provided by the veterans' home.
u. The industrial commission with respect to the lignite research fund except as required under section 57-61-01.5.

v. The attorney general with respect to guidelines adopted under section 12.1-32-15 for the risk assessment of sexual offenders, the risk level review process, and public disclosure of information under section 12.1-32-15.

w. The commission on legal counsel for indigents.

3. "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency is vested by law.
4. "Complainant" means any person who files a complaint before an administrative agency pursuant to section 28-32-21 and any administrative agency that, when authorized by law, files such a complaint before such agency or any other agency.
5. "Hearing officer" means any agency head or one or more members of the agency head when presiding in an administrative proceeding, or, unless prohibited by law, one or more other persons designated by the agency head to preside in an administrative proceeding, an administrative law judge from the office of administrative hearings, or any other person duly assigned, appointed, or designated to preside in an administrative proceeding pursuant to statute or rule.
6. "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by law.
7. "Order" means any agency action of particular applicability which determines the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons. The term does not include an executive order issued by the governor.
8. "Party" means each person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party. An administrative agency may be a party. In a hearing for the suspension, revocation, or disqualification of an operator's license under title 39, the term may include each city and each county in which the alleged conduct occurred, but the city or county may not appeal the decision of the hearing officer.
9. "Person" includes an individual, association, partnership, corporation, limited liability company, state governmental agency or governmental subdivision, or an agency of such governmental subdivision.
10. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the administrative action more probable or less probable than it would be without the evidence.
11. "Rule" means the whole or a part of an agency statement of general applicability which implements or prescribes law or policy or the organization, procedure, or practice requirements of the agency. The term includes the adoption of new rules and the amendment, repeal, or suspension of an existing rule. The term does not include:
    a. A rule concerning only the internal management of an agency which does not directly or substantially affect the substantive or procedural rights or duties of any segment of the public.

b. A rule that sets forth criteria or guidelines to be used by the staff of an agency in the performance of audits, investigations, inspections, and settling commercial disputes or negotiating commercial arrangements, or in the defense, prosecution, or settlement of cases, if the disclosure of the statement would:
   (1) Enable law violators to avoid detection;
   (2) Facilitate disregard of requirements imposed by law; or
   (3) Give a clearly improper advantage to persons who are in an adverse position to the state.
c. A rule establishing specific prices to be charged for particular goods or services sold by an agency.
d. A rule concerning only the physical servicing, maintenance, or care of agency-owned or agency-operated facilities or property.
e. A rule relating only to the use of a particular facility or property owned, operated, or maintained by the state or any of its subdivisions, if the substance of the rule is adequately indicated by means of signs or signals to persons who use the facility or property.
f. A rule concerning only inmates of a correctional or detention facility, students enrolled in an educational institution, or patients admitted to a hospital, if adopted by that facility, institution, or hospital.
g. A form whose contents or substantive requirements are prescribed by rule or statute or are instructions for the execution or use of the form.
h. An agency budget.
i. An opinion of the attorney general.
j. A rule adopted by an agency selection committee under section 54-44.7-03.
k. Any material, including a guideline, interpretive statement, statement of general policy, manual, brochure, or pamphlet, which is explanatory and not intended to have the force and effect of law.

Source: S.L. 2001, ch. 140, § 2; 2001, ch. 93, § 12; 2001, ch. 501, § 4; 2001, ch. 488, 18; 2003, ch. 174, § 5; 2003, ch. 469, § 3; 003, ch. 493, § 1; 2005, ch. 16, § 11; 2005, h. 89, § 29; 2005, ch. 195, § 13; 2005, ch. 06, § 14; 2005, ch. 538, § 6.

ffective Date.
The 2005 amendment of this section by ction 11 of chapter 16, S.L. 2005 became fective July 1, 2005.
The 2005 amendment of this section by ction 29 of chapter 89, S.L. 2005 became fective August 1, 2005.
The 2005 amendment of this section by section 13 of chapter 195, S.L. 2005 became effective August 1, 2005.
The 2005 amendment of this section by section 14 of chapter 406, S.L. 2005 became effective August 1, 2005.
The 2005 amendment of this section by section 6 of chapter 538, S.L. 2005 became effective July 1, 2005.
Section 35 of chapter 293, S.L. 2001 repeals former Chapter 28-32, as it existed on December 31, 2000. Section 12 of chapter 293, S.L. 2001 enacts a new Chapter 28-32, effective for administrative rules for which the notice of rulemaking is filed with the office of the

Senate Bill No. 2357
Section 1 – 15.1 – 15-08

Chairman Freborg and member of this committee, thank you for allowing me to testify before you today in support of Senate Bill 2357. I would also like to reaffirm that I will gain nothing from the passage of this bill.

School boards are usually made up of ordinary people, with little or no legal background. The statute controlling the hearing process before school boards for termination of teacher contracts was completely rewritten in 2001. The statute at this time says, "The hearings must be conducted in accordance with Chapter 28-32". Present termination hearings are run by a hearing officer, in my case, Mr. Gary Thune, His sole purpose for being present was to interpret questions of legal terminology and to make sure that the hearing was conducted in accordance with Chapter 28-32. It is my belief that the position should be changed to that of an administrative law judge. As shown in my case, it is not likely that you will have a fair hearing in front of the school board who hired the administration. The impartial administrative law judge would have the authority to make the decision.

As it stands now, the hearing is not conducted as it would be in a court of law. The presence of a lawyer for the defendant does not guarantee a fair hearing. But the result is a legal, life-altering decision. In a court of law, witnesses who embellish their testimonies can be found guilty of perjury. In my school board hearing, this was not done. In fact, the people who testified had no first-hand knowledge of what took place in my classroom – they were not there. The child involved was there, and in his deposition indicated that this was "no big deal". I as the person, who reported the incident, was told I was not credible.

When I was called to the administrative offices to tell them what had happened, they never asked me if I was a member of WFEA. If I was a member of WFEA they would have been required to allow me to have an attorney present. But when I asked if I needed an attorney, they said "no". I was told that the parents were the type who would call the media and scream "lawsuit." I was also told to write everything down that had taken place and give it to them that afternoon so that they could defend me if the parents made a complaint,

Mavis Tjon Judy Lee 2357

During the hearing, the credibility of my three character witnesses – Judy Lee, State Senator from West Fargo; Pastor Dale Vitalis, First Lutheran Church in Fargo; and Mary Kloster, a former teaching colleague at Holy Spirit School—was challenged by the school board's attorney John Arntson in as much as he said 'since you were not there, you have nothing to offer.' In contrast, the "witnesses" they produced (none of whom were in the classroom) were given credibility by the attorney as well as the school board. In fact, in the case of the secretary, when questioned on three different occasions under oath, gave three different versions of what occurred, each time enhancing or embellishing the information.

It is significant that at the beginning of instructions by Mr. Thune he said (p. 220 line 22) of the Court Reporter's record of the hearing, "This hearing, though it may seem strange to some, is the hearing provided by state law for this type of decision-making process. It's set out by the Century Code in that regard. I do want to agree specifically with Mr. Baker about the fact that YOUR DECISION IS NOT TO BE BASED UPON A NEED TO SUPPORT YOUR ADMINISTRATION, WHETHER THAT BE A SUPERINTENTANT OR PRINCIPAL OR OTHERWISE".

At the end of the hearing, MR GENTZKOW stated (p. 242, line 22),"I think too when we were asked to be consistent earlier, I think we have to go back to zero tolerance. I think that's kind of the ground level and the bricklaying of what we as a board have administered in most of our past six years. We have been consistent on zero tolerance. .....(p. 243, line 7) IN DEALING) "WITH STUDENTS OR FACULTY, WE'VE ALWAYS WENT BACK TO ZERO TOLERANCE AND ALWAYS TAKEN THE RECOMMENDATION OF THE ADMINISTRATION.

During his instructions to the board, Mr. Thune offered remedies other than firing even if the teacher was found guilty of the charges, which the board chose to ignore.

In its present form Bill No. 2357 offers a remedy for any future mishandling of dismissal of teachers, administrators and employees of school districts throughout the state of North Dakota.

It is also my opinion that by providing the employee, teacher or administrator with an appeal process to the District Court where the entire

evidence would be heard and judged to be correct or incorrect, would in fact provide protection and justice to all involved."

As was demonstrated by a civil suit brought by myself against the West Fargo School Board, Judge Frank L. Racek indicated in his decision "there are those that may argue that termination was too extreme in this case, given Tjon's long and unblemished teaching career. The Court's role in this case, however, is limited to the determination as to whether all procedural requirements were complied with (this is undisputed), and whether the board proved by a fair preponderance of the evidence that it had cause for dismissal. In the present case, a preponderance of the evidence demonstrated that the school district's policy against corporal punishment had been violated (zero tolerance). For such violation, the legislature has authorized termination. When a school board is acting within the authority given to it by the legislature, the court must exercise restraint and cannot substitute its judgment for that of the board. Doberbich vs. Central Cass Public School District No.17, 283N.W.2d187,193(ND1979).

In addition, safeguards were left out of the current law intentionally, as was discussed in the Committee Minutes 15.1-15-07 and 08 which deals with the discharge of a superintendent and a teacher. "In the very sensitive area of discharge of teachers for cause prior to the expiration of the term of the teachers' contracts, or in decisions not to renew the contracts of teachers, school boards shall give serious consideration to the damage that can result to the professional stature and reputation of such teachers, which stature and reputation were acquired only after the expenditure of substantial time and money in obtaining the necessary qualifications for such profession and in years of practicing the profession of teaching; and that in all decisions of school boards relating to discharge or refusal to renew contracts, all actions of the board be taken with consideration and dignity, giving the maximum consideration to basic fairness and decency....the committee decided that the legislative intent section should not be maintained as either a legislative intent section or as a statutory section. THE COMMITTEE THOUGHT THAT THE LEGISLATIVE ASSEMBLY DID NOT NEED TO BE MICRO-MANAGING SCHOOL DISTRICTS BY REQUIRING THAT THE CHANELS OF COMMUICATION REMAIN OPEN OR THAT THE DISCHARGE PROCEEDINGS ARE CONDUCTED WITH FAIRNESS AND DIGNITY. THE COMMITTEE FELT THAT THE PEOPLE INVOLVED IN ALL THESE SITUATIONS COULD BE COUNTED ON

TO GIVE THE SITUATIONS THEIR DUE DEFERENCE AND TO BEHAVE IN AN ACCEPTABLE FASHION.

It is my hope that you will see fit to recommend that this bill be passed in its entirety, so that in the future this type of activity and action on the part of school boards will not occur and the teachers, administrators and employees of the school districts will have fair representation.
For those school boards who treat personnel issues with integrity, fairness, and decency, this amendment should not create a problem.

Thank you for the opportunity to present this testimony.

Testimony SB 2357 Senate Education Committee 2/11/09

Greg Burns, Executive Director, North Dakota Education Association

Mr. Chairman, members of the Senate Education Committee, I come before you today on behalf of the members of the NDEA to support SB 2357. We believe that this bill represents a method superior to the current method for dealing with those unfortunate times when a teacher is proposed for discharge from his/her duties.

Currently hearings for discharge take place before school boards composed of laypeople who do their best to listen to testimony and weigh the evidence presented at the hearing. It is difficult for these people to do this while having in the back of their minds the need to support an administrator that they employed. A sincere desire to weigh the evidence in a completely neutral manner may also be clouded by the political pressure of friends, neighbors and constituents who are very emotional about the teacher involved, who do not share the burden of listening carefully to the proceedings and who do not have the responsibility for making this very difficult decision. This is understandable human behavior. School board members are not trained in what constitutes good evidence, or the best evidence. They are not trained to discern what credible testimony is.

This is in contrast to an administrative law judge who is learned in the law and learned in judicial and quasi-judicial proceedings. It is an administrative law judge's profession and duty to listen to testimony, direct and cross-examination, and to weigh evidence with a neutral attitude. They are neutral professionals who understand what credible testimony is and what is credible evidence.

Those are critical descriptors: professional and neutral. Teacher discharges are emotional events that can divide communities. It is fair and it is just that that these situations should be guided by a professional, neutral administrative law judge. They can make a professional and impartial recommendation to the school board.

School boards, quite naturally, have a stake in the outcome of these types of proceedings. Basic fundamentals of fairness dictate that any party to a proceeding that has a stake in the outcome of that proceeding, should not be allowed to be the judge, jury and executioner in that proceeding. The current process for teacher discharge allows that to happen. This bill represents a more fair and equitable process for these unfortunate events.

In a few moments the NDEA attorney will outline some concerns we have with the clarity and meaning of a few of the provisions of this bill, but we urge you to vote Do Pass on SB 2357.

TESTIMONY ON SENATE BILL 2357
Michael J. Geiermann- NDEA Legal Counsel

Mr. Chairman and members of the committee,

I appear before you today in favor of Senate Bill 2357. This bill deals with a modification to the procedure school boards implement to discharge a teacher from their employment. As the attorney for the North Dakota Education Association for over 20 years, I have participated in many discharge hearings involving school boards and teachers.

As the process now works, the administrators for the school board advise the board it should contemplate the discharge of a teacher for various reasons. The board is then informed of the reasons but not the evidence which supports those reasons. There are basic due process guarantees for the teacher. However, as currently written, the school board acts as the fact-finder and makes the determination as to whether the teacher should be discharged from the school district. In my many years of representing teachers in discharge and nonrenewal for cause hearings, I firmly believe the process was slightly flawed from the perspective the employer is allowed to make the decision in regard to the termination of a teachers employment. While that in and of itself is not a flaw in the process, it is often been my experience school board members have a general knowledge of the incident which led to the discharge and may have preconceived ideas in regard to the continuation of this teacher within the school district. It has always been my feeling in order to ensure the due process rights of a teacher in a discharge hearing, an independent fact-finder should be brought in to hear the evidence. This independent fact-finder would be free from any biases, preconceived ideas, or any understanding of the case prior to the case being put before the disinterested third party. This Bill accomplishes this purpose.

As drafted, Senate Bill 2357 addresses the concern by allowing for the appointment of an administrative law judge to preside over the hearing. As written, the administrative law judge would conduct a hearing pursuant to N.D.C.C. Ch. 28-32. In subsection 6 on page 2 of the Bill, the Bill proposes to allow the administrative law judge to determine whether there were sufficient grounds to discharge the teacher for cause. In the event sufficient grounds did not exist to discharge the teacher, the administrative law judge would order the charges be dismissed against the teacher.

While this new Bill satisfies the concern over an independent fact-finder who is free of bias, there are several issues that are raised by the language in the Bill draft.

1. On page 2 line 26, the Bill draft states "the administrative law judge shall determine whether <u>sufficient grounds</u> exist for the board of the school district to discharge an individual for cause". The concern I have is the term "sufficient grounds" is not defined within the statute itself. The term "sufficient grounds" is not a recognized evidentiary standard that is found in the North Dakota Century Code or in other types of adversarial proceedings. Most often times, legislatures will draft laws which set forth a specific evidentiary standard that must be met in order to discharge a

teacher. There has already been one North Dakota Supreme Court case on the issue of whether the legislature had changed an evidentiary standard when the nonrenewal law was changed by the legislature in 1983. See Belcourt vs. Fort Totten Public School District, 454 N.W. 2d 703 (N.D. 1990). In that case, arguments were made the 1983 legislature modified the evidentiary standard a school board had to arrive at in nonrenewing a teacher. My concern is the inclusion of the term "sufficient grounds" will simply lead to a court case in the event a teacher is discharged. It would be a much better practice to have the legislature define that particular term.

2. I also have a concern as to the specific duties of the administrative law judge. In most administrative hearings under N.D.C.C. Ch. 28-32, the administrative law judge is given the duty to hear the evidence and make findings of fact, conclusions of law, and an order. See N.D.C.C. § 28-32-31 and 28-32-39. In subsection 2 of the Bill, the statement is made "as otherwise provided in this section, the hearing must be conducted in accordance with Ch. 28-32". The new section simply requires the administrative law judge to consider all of the evidence and testimony and then make a determination as to whether sufficient grounds exist. There is no specific requirement that he issue findings of fact, conclusions of law, and an order. There is a reference in subsection 7 of the new Bill which does make reference to an "order" but it does not clarify the specific duties of the administrative law judge in a teacher discharge proceeding.

3. The third concern I have about the Bill draft is found in the last sentence of the amendment 6(c) which provides "a determination under this subdivision shall not prevent a board from engaging in nonrenewal procedures as set forth in section 15.1-15-06.". The concern I have is this language may subject a teacher to a type of "double jeopardy" scenario. Although double jeopardy is a criminal law concept which prohibits trying a defendant twice for the same offense, the language in section 6(c) appears to allow a school board to subject a teacher to two proceedings in regard to the same offense. For example, a teacher in October of school year 2009 is accused of administering corporal punishment to a student. A discharge hearing is held and the administrative law judge, after hearing the evidence, dismisses the discharge proceeding against the teacher. However, under subsection 6(c), a school board could move to nonrenew the teacher in March or April of the next year for the same conduct. It would be patently unfair to allow a school board two opportunities to terminate a teacher's employment based upon one event. I would certainly suggest this language be modified to clarify the issue and not place a teacher into "double jeopardy".

In my opening comments I appeared before this committee and indicated I was in favor of the Bill. I am certainly in favor of the concept of allowing a third party, disinterested administrative law judge to make a determination whether a teacher should be discharged from their employment. I do have some concerns about the evidentiary standard the administrative law judge must apply and whether he must fulfill all of his duties under Ch. 28-32. I would be more than happy to assist the committee in drafting any amendments

the committee sees fit.

February 11, 2009

SENATE EDUCATION COMMITTEE
SB 2357

CHAIRMAN FREBORG AND COMMITTEE MEMBERS:

My name is Jack McDonald. I'm appearing here today on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. We oppose the provisions of this bill that not only allow closed administrative law hearings for teacher dismissals for cause, but also imply that appeals from these hearings before the state's district courts would also be closed.

We understand that current law allows school boards to conduct closed dismissal hearings. We don't agree with this law, but we're stuck with it. However, as cooking guru Emeril Legasse would say, this bill "kicks it up a notch."

Under this bill school boards pass the buck on these hearings to the state Office of Administrative Hearings, a statewide agency that provides administrative law judges to conduct hearings for many state public entities. These hearings are conducted like court proceedings and generally, with a few exceptions, are open hearings just as nearly all court proceedings in North Dakota are open proceedings. However, this bill says that this traditionally open administrative law forum will now be closed to the public, and more importantly to the patrons of the school district, for the conduct of these hearings.

Under this bill either party may appeal the decision to a district court. Would these appeals be open or closed? We don't know, but if the administrative hearing is closed, a court may say its proceeding should be closed as well. That's not good.

Teacher dismissals for cause usually involve issues that have already received some level of notoriety within a school district such as allegations of teacher misconduct, possible criminal charges, abuse of students, etc. School district patrons are usually very emotionally involved on either side of the issue. The district patrons and the bill paying public really deserve to know how their locally-elected school board is going to handle this issue.

But instead of providing the public with some assurances and transparency, this bill says the school board is going to pass this hot potato onto an administrative law judge, and that the public will not be allowed to know anything about it.

We don't believe this best serves the public. We do not take a position on whether the hearings should be conducted by the board or an administrative law judge, but we do respectfully request that the bill be amended to eliminate the closed hearing provisions. If you have any questions, I will be happy to try to answer them.

THANK YOU FOR YOUR TIME AND CONSIDERATION.

SENATE EDUCATION COMMITTEE
Wednesday, February 11, 2009 - 10:00 a.m.

SENATE BILL NO. 2357

Testimony of:
Gary R. Thune
NDSBA Legal Counsel

Chairman Freborg, Members of the Committee, for the record my name is Gary Thune, legal counsel to the North Dakota School Boards Association. I appear in opposition to SB 2357 for the following reasons:

1. **The Import of Personnel Decisions:** The two most important decisions made by publicly-elected school board members are the decision to hire and the decision to discharge those individuals who are entrusted to provide a safe place where our children and grandchildren receive a free public education. It goes without saying that Board members are held accountable to the people who elect them to handle these decisions responsibly.

2. **The Burden of Proof:** In *Lithun vs. Grand Forks Public School District No. 1*, 307 N.W.2d 545 (N.D. 1981), the only reported case involving the discharge of a teacher for cause, the North Dakota Supreme Court held that the School Board was required to sustain the charges with evidence produced at the hearing, distinguishing discharge cases from nonrenewal hearings where no similar burden of proof is required of a school board (See footnote 6). The Supreme Court twice ruled in *Lithun* that the School Board had sustained its burden of proof, based on the Court's review of a 709 page transcript of an 18 hour hearing. The provisions of Section 15.1-15-08(3) and Section 28-32-46(5) of the North Dakota Century Code place the burden of proof on the School Board, by a preponderance of the evidence, in teacher discharge cases.

3. **<u>The Cost of SB 2357</u>:** A teacher discharge hearing under current law costs the school district from $5,000 to $8,000. If the decision of the School Board is challenged in a court of law, the school district's cost of defense is provided by its insurer, as is the cost of the teacher's appeal to the North Dakota Supreme Court.

SB 2357 requires School Boards to employ an administrative law judge to preside over all discharge hearings, a practice which some larger school districts have already implemented. However, this Bill also delegates the Board's authority to decide whether the teacher is or is not to be discharged. The removal of that authority from the publicly-elected officials who are accountable to their taxpayers and voters is not without risk of considerable additional expense. Under current law, the only appeal to the courts comes from the teacher. Under SB 2357, a School Board that cannot accept the administrative law judge's decision may feel compelled to challenge that decision in a court of law. When a School Board makes that choice, it becomes a plaintiff and is without insurance coverage.

If the case ends up in the Supreme Court, the cost in attorney's fees alone could easily reach $15,000 to $20,000, over and above the cost of the discharge hearing. Under current law, the School Board decides whether the reasons for discharging a teacher have been substantiated by a preponderance of the evidence. Under current law, the school district's funds are used to educate children, NOT to pay attorney's fees, even if the case is taken through the judicial system by the teacher.

[Responses, if any, to testimony of proponents of SB 2357]

CONCLUSION

Senate Bill 2357 would disenfranchise publicly-elected School Board members from making one of the most important decisions they are called upon to make. It would remove accountability to the electorate and would divert funding away from the education of children.

For all of the above reasons, the North Dakota School Boards Association urges a Do Not Pass on SB 2357.

Testimony Senate Education Committee

SB 2357 February 9, 2009

Ben Auch Board Member Mott Regent School Board

Chairman Freborg and members of the Senate Education Committee, for the record my name is Ben Auch and I am a member of the Mott Regent School Board I come before you today in opposition to SB 2357.

This legislation only serves to undermine and remove the authority of a duly elected school board. To require an administrative law judge for any discharge hearing will only complicate the matter of removing an underperforming or poor employee. The local school board knows best the issues in their district not an administrative law judge. The school board also has a responsibility to the members of their district and its teachers an administrative law judge does not. If the school board discharges a teacher that their constituents think should have stayed the school board members will be discharged. This is the essence of democracy in our country. This legislation in my opinion is a solution looking for a problem. The system we have now works very well. Please allow the duly elected school boards to do their jobs as employers. We are starting down a slippery slope, if we require a law judge for discharge for cause what is next? When will we stop removing the authority of school boards?

Thank You

Attachment 1

SB 2357 3/11/09

Senator Tim Flakoll

District 44 - Fargo

Chairman Kelsch and distinguished members of the House Education Committee,

For the record I am Senator Tim Flakoll of Fargo. I bring to you SB 2357 as a result of conversations with a constituent in my district resulting from a highly publicized case.

This is a bill that deals with the decisions and processes which affect people's lives, sometimes in a permanent way.

I will make a few general comments and then walk you through the bill.

Chairman Kelsch our collective goals should be a fair due process during situations where the discharge for cause (termination) of a teacher is contemplated. We need to be sure that when it comes to discovery and a finding of facts that there is a level playing field where both sides can offer up their evidence in an equitable manner.

The bill before you simply requires an Administrative law Judge to preside over sessions where a dismissal is considered to insure that both sides are treated fairly, uniformly and that legal guidelines are adhered to.

We need to be sure we have a methodology that is legally sound and whose outcome is evidenced based and free of speculation and hearsay.

These termination sessions are often emotionally charged. To emphasize this point, I will remind this committee of the early morning hours of April 2007 when police had to be called to a dismissal meeting of the Fargo School District (The Forum of Fargo Moorhead, April 26, 2007) because of the concern of the volatility of an employment situation.

These termination sessions are legally dicey if not handled properly by legally trained individuals. Comments made in inquiry by school board members or administrators can be grounds for additional suits against the school district.

Contested non-renewal or termination sessions are not that common. As such, a one or two hour training session cannot adequately prepare board members or administrators for the legal complexities that surround them. That is why it is better if they have someone who is running the session who is not only trained in the law, but is not employed by either party.

By having an independent third party involved, we are also lessening the chance of preexisting prejudices. This is especially important in smaller communities where the parties involved are often a relative, member of your church, or other important or long term linkage.

The dismissal process is one that has lifelong implications for an individual, but it can also tear apart communities if not handled in a proper manner.

I am sure that we all agree that we need to do our best to obtain facts and let the decision rise or fall on the merits of those facts.

Walk through the bill -

Page 1 subsections 1 & 2:

Sets up the process whereby the services of an administrative law judge (ALJ) can be secured to preside over a termination or non-renewal proceedings. That ALJ is required to set the time and place of the hearing and direct the school board to provide a list of charges at least five days before the hearing.

Page 2, lines 8 -16

Contains language related to open meeting laws. It provides greater specificity regarding who may attend the session. With the bill we have increased the number of invitees (or guests) from two people per side up to three people per side.

Madam Chairman in the first half of the session there was some mild confusion of the issue related to "open meetings" and SB 2357. We have not changed the status of open meeting laws with this bill.

For current law see

See 15.1-15-08

Subsection 7

"Unless otherwise agreed to by the board and the individual, the hearing must be conducted as an executive session of the board, except that

a. The individual may invite to the hearing any two representatives and the individual's spouse or one other family member; and
b. The board may invite to the hearing any two representatives, the school business manager, and the school district superintendent. "

So under current law the session is closed unless both parties agree to open it up and with SB 2357 the session is closed unless both parties agree to open it up.

Page 2, lines 17 – 21

Provides for a continuance by the administrative law judge. The terms of the continuance are the same as current law.

Page 2, lines 25 – 27

Makes it clear that at the conclusion of the hearing, that the administrative law judge shall turn over all evidence presented to the board and that the **local board will make the determination regarding the discharge**.

Page 2, lines 28 -29

Allows for an appeal

Page 2, lines 30 – 31

Continues the practice that the legal expenses of the person presiding over the hearing (ALJ) are the responsibility of the board.

Thus, the administrative law judge is paid for her/his services, including reimbursement for expenses by the school board.

Madam Chairman, that concludes my testimony.

END

NOTES:

Administrative Law Judges NDCC chapter 54-57 creates the office of administrative hearings. The director is appointed by the governor and confirmed by the Senate. The director can hire additional administrative law judges.

Under NDCC 54-57-07, any agency that requires the services of an ALJ must pay. The required payment must include support staff, mileage, meals, and lodging.

Mavis Tjon

Attachment 2
SB 2357

House Bill No. 2357, Section 1-15.1-15-08
Wednesday, March 11, 2009

Chairman Kelsch and members of this committee, thank you for allowing me to testify before you today in support of House Bill 2357. I would also like to affirm that I will personally gain nothing from the passage of this bill.

School boards are usually made up of ordinary people, with little or no legal background. The statute controlling the hearing process before school boards for termination of teacher contracts was completely rewritten in 2001. The statute at this time says, "The hearings must be conducted in accordance with Chapter 28-32". Present termination hearings are run by a hearing officer, in my case Mr. Gary Thune. His purpose for being present was to interpret questions of legal terminology and to make sure that the hearing was conducted in accordance with Chapter 28-32. It is my belief that the position should be changed to that of an administrative law judge. As shown in my case, it is not likely that you will have a fair hearing in front of the school board who hired the administration. The impartial administrative law judge would have the authority to make the decision.

As it stands now, the hearing is not conducted as it would be in a court of law. The presence of a lawyer for the defendant does not guarantee a fair hearing. But the result is a legal, life-altering decision. In a court of law, witnesses who embellish their testimonies can be found guilty of perjury. In my school board hearing, this was not done. In fact, the people who testified had no first-hand knowledge of what took place in my classroom – they were not there. The child involved was there, and in his deposition indicated that this was "no big deal". I, as the person who reported the incident, was told I was not credible.

When I was called to the administrative offices to tell them what happened, they never asked me if I was a member of WFEA. If I was a member of WFEA, they would have been required to allow me to have an attorney present. But when I asked if I needed an attorney, they said "no". I was told that the parents were the type who would call the media and scream "lawsuit". I was also told to write everything down that had taken place and give it to them that afternoon so that they could defend me if the parents made a complaint.

During the hearing, the credibility of my three character witnesses – Judy Lee, State Senator from West Fargo; Pastor Dale Vitalis, First Lutheran Church in Fargo; and Mary Kloster, a former teaching colleague at Holy Spirit School in Fargo- was challenged by the school board's attorney, John Arntson, in as much as he said to them and I quote from the Court Reporter's record of the hearing, pages 131-140: "you really have no first-hand knowledge of the incident that we're here about"; "you have no first-hand knowledge of what happened in that classroom on October 5th; and "you have no first-hand knowledge of that incident, do you?". In contrast, the "witnesses" they produced (none of whom were in the classroom) were given credibility by the attorney as well as the school board. In fact, in the case of Secretary Ronda Rheault and Principal Carol Zent, when questioned on three different occasions under oath, gave three different versions of what occurred, each time enhancing and embellishing the information.

It is significant that at the beginning of instructions by Mr. Thune he said (p. 220, line 22 of the Court Reporter's record of the hearing) "This hearing, though it may seem strange to some, is the hearing provided by state law for this type of decision-making process. It's set out by the Century Code in that regard. I do want to agree specifically with Mr. Baker (Tjon's attorney) about the fact that your decision IS NOT to be based upon a NEED TO SUPPORT YOUR ADMINISTRATION, whether that be a superintendent or principal or otherwise".

At the end of the hearing, board member Tom Gentzkow stated (p. 242, line 22), "I think too when we were asked to be consistent earlier, I think we have to go back to zero tolerance. I think that's kind of the ground level and the bricklaying of what we as a board have administered in most of our past six years. We have been consistent on zero tolerance....(p. 243, line 7) "in dealing with students or faculty, we've always went back to zero tolerance and ALWAYS TAKEN THE RECOMMENDATION OF THE ADMINISTRATION".

During his instructions to the board, Mr. Thune offered remedies other than firing, even if the teacher was found guilty of the charges, which the board chose to ignore.

Bill No. 2357 offers a remedy for any future mishandling of dismissal of teachers, administrators and employees of school districts throughout the state of North Dakota.

It is also my opinion that by providing the employee, teacher or administrator with an appeal process to the District Court where the entire evidence would be heard and judged to be correct or incorrect, would in fact provide protection and justice to all involved.

As was demonstrated in a civil suit brought by myself against the West Fargo School Board, Judge Frank L. Racek indicated in his decision, "there are those that may argue that termination was too extreme in this case, given Tjon's long and unblemished teaching career. The Court's role in this case, however, is limited to the determination as to whether all PROCEDURAL requirements were complied with (this is undisputed), and whether the board proved by a fair preponderance of the evidence that it had cause for dismissal. (This was disputed from the beginning). In the present case, a preponderance of the evidence demonstrated that the SCHOOL DISTRICT'S POLICY against corporal punishment had been violated (zero tolerance). For such violation, the legislature has authorized termination. When a school board is acting within the authority given to it by the legislature, the court must exercise restraint and cannot substitute its judgment for that of the board. Dobervich vs. Central Cass Public School District No. 17, 283N.W.2d187,193 (ND1979).

In addition, safeguards were left out of the current law intentionally, as was discussed in the Committee Minutes 15.1-15-07 and 08, which deals with the discharge of a superintendent and a teacher. "In the very sensitive area of discharge of teachers for cause prior to the expiration of the term of the teachers' contracts, or in decisions not to renew the contracts of teachers, school boards shall give serious consideration to the damage that can result to the professional stature and reputation of such teachers, which stature and reputation were acquired only after the expenditure of substantial time and money in obtaining the necessary qualifications for such profession and in years of practicing the profession of teaching; and that in all decisions of school boards relating to discharge or refusal to renew contracts, all actions of the board be taken with consideration and dignity, giving the maximum consideration to basic fairness and decency....the committee decided that the legislative intent section should not be maintained as either a legislative intent section or as a statutory section. " THE COMMITTEE THOUGHT THAT THE LEGISLATIVE ASSEMBLY DID NOT NEED TO BE MICRO-MANAGING SCHOOL DISTRICTS BY REQUIRING THAT THE CHANNELS OF COMMUNICATION REMAIN OPEN OR THAT

THE DISCHARGE PROCEEDINGS ARE CONDUCTED WITH FAIRNESS AND DIGNITY. THE COMMITTEE FELT THAT THE PEOPLE INVOLVED IN ALL THESE SITUATIONS COULD BE COUNTED ON TO GIVE THE SITUATIONS THEIR DUE DEFERENCE AND TO BEHAVE IN AN ACCEPTABLE FASHION".

It is my hope that you will recommend this bill be passed in its entirety, so that in the future this type of activity and action on the part of school boards will not occur. With passage if Bill 2357, teachers, administrators and employees of school districts will have fair representation and the right to appeal the DECISION to the District Court, with the Court having authority to hear the testimony and overturn a decision.

For those school boards who treat personnel issues with integrity, fairness and decency, this bill should not create a problem.

Thank you for the opportunity to present this testimony.

Attachment 3

Testimony SB 2357 House Education Committee 3/11/09

Greg Burns, Executive Director, North Dakota Education Association

Madame Chair, members of the House Education Committee, I come before you today on behalf of the members of the NDEA to support SB 2357. We believe that this bill represents a method superior to the current method for dealing with those unfortunate times when a teacher is proposed for discharge from his/her duties.

Currently hearings for discharge take place before school boards composed of laypeople who do their best to listen to testimony and weigh the evidence presented at the hearing. It is difficult for these people to do this while having in the back of their minds the need to support an administrator that they employed. A sincere desire to weigh the evidence in a completely neutral manner may also be clouded by the political pressure of friends, neighbors and constituents who are very emotional about the teacher involved, who do not share the burden of listening carefully to the proceedings and who do not have the responsibility for making this very difficult decision. This is understandable human behavior. School board members are not trained in what constitutes good evidence, or the best evidence. They are not trained to discern what credible testimony is.

This is in contrast to an administrative law judge who is learned in the law and learned in judicial and quasi-judicial proceedings. It is an administrative law judge's profession and duty to listen to testimony, direct examination and cross-examination, and to weigh evidence with a neutral attitude. They are neutral professionals who understand what credible testimony is and what is credible evidence.

Those are critical descriptors: professional and neutral. Teacher discharges are emotional events that can divide communities. It is fair and it is just that that these situations should be guided by a professional, neutral administrative law judge. They can make a professional and impartial recommendation to the school board.

School boards, quite naturally, have a stake in the outcome of these types of proceedings. Basic fundamentals of fairness dictate that any party to a proceeding that has a stake in the outcome of that proceeding, should not be allowed to be the judge, jury and executioner in that proceeding. The current process for teacher discharge allows that to happen. This bill represents a more fair and equitable process for these unfortunate events.

While we believe that the bill in its current form represents a great improvement in the process for the discharge of a teacher, I would like to offer an amendment that we feel would make the proposed bill even better.

On page 2, line 26 insert the following language between the words "board" and "in order."

"and recommend a course of action regarding the contemplated discharge, "

Even though this bill in its current form represents a better process than the existing one, having the administrative law judge recommend a course of action would further insulate the school board from making a decision that may be influenced by the emotions of the community or the board members' own emotions. The recommendation would represent the best thinking of someone who is trained in the law. The school board would still retain the final decision about the discharge of the teacher. The school board could adopt the recommendation of the administrative law judge or reject the recommendation, but at least the board would have the recommendation of a neutral professional upon which to make this very difficult decision.

Madame Chair and members of the committee, we urge a "do pass" recommendation on SB 2357 with our proposed amendment.

Attachment 4

SENATE BILL NO. 2357

Janis Schmidt
418 Griffin St.
Warwick, ND 58381
701-284-2106

Citizen Janis Schmidt from Warwick, ND, requests to speak for Senate Bill #2357. Because of raging blizzard preventing me from appearing, I am asking Joan Heckaman to forward my thoughts to you. I request that one of the members of the Committee, please read before the Committee, and make sure each member has a copy of this.

SPEECH IN SUPPORT OF SENATE BILL NO. 2357

I am a fired school teacher, who did not have a dismissal hearing or even warning before I was fired and charged with misconduct. As a result of this illegal firing, I not only lost my job and income, I lost any hope of ever getting another job. Misconduct for a teacher, is a very serious charge. Had an unbiased administrative law judge presided over a dismissal hearing with the authority to render a decision, I feel this travesty of justice would never have occurred. My case also suggests other laws that should be enacted to protect teachers and students from administrators who violate Child Abuse laws and the lawyers, agencies such as Social Services and law enforcement who fail to investigate the reported violations of the Child Abuse laws, egregiously enough, because the children affected are Native American. Job Service actually colluded with the school's attorney in defiance to NDCC teacher dismissal laws, to find me guilty of misconduct, although the school had not found any misconduct, nor did I have a dismissal hearing for misconduct by the school. This was all accomplished by a lawyer who advised the school on how to fire me, and cover up their tracks for not reporting serious crimes against children when they learn of the crime. In the eyes of the school and their lawyer, my misconduct was that I reported the rape as told to me by a student, instead of keeping my mouth shut. I am a teacher, and I thought my first duty was to not only educate, but to keep my students safe. But the law does not keep students or teachers safe from the abuses of abusive administrators. Senate Bill #2357 was a good bill before its amended form of taking the decision out of the administrative law judge's hands, and placing the decision in the hands of the school board and their attorney, who are apt to be biased. A good amendment to this bill would be: that, additionally, an administrative law judge must preside over all Unemployment hearings concerning teacher dismissals. You shall learn why when you hear my amazing story.

SUMMARY OF FACTS

On July 17, 2006, I signed a contract with Warwick School for the 06 – 07 school year to teach for a term of 9 months, beginning August 23, 2006, at an annual salary of $29,150. I was hired to teach because of my excellent credentials, and my 14 year experience of teaching at Oglala Lakota College on the Pine Ridge Indian Reservation.

In late September, 2006, M H, announced, during 9th grade art class, that she had been raped, and that the school had done nothing about it during the last week of September, 2006. Under NDCC 50-25.1-03, I had a duty to report the rape, as did the school administrators. I immediately reported to both Principal Riedinger and Supt. Guthrie. Instead of reporting to Social Services, Guthrie, Riedinger, and the school counselor Ms. Tiokiason covered up their failure to report, by expelling the rape victim, a student on an IEP, without a hearing, in violation of NDCC 15.1-19-09.

Immediately after M H was expelled, the Warwick administration began retaliating against me for having reported the rape, in violation of N.D.C.C. 50-25.1-09.1, Employer Retaliation Prohibited.[1] Retaliation was perpetrated upon me in the following ways:

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[1] **50-25.1-09.1 Employer retaliation prohibited.**

1. An employer who retaliates against an employee solely because the employee in good faith reported having reasonable cause to suspect that a child was abused or neglected, or died as a result of abuse or neglect, or because the employee is a child with respect to whom a report was made, is guilty of a class B misdemeanor. It is a defense to any charge brought under this section that the presumption of good faith, described in section 50-25.1-09, has been rebutted.
2. The employer of a person required to permitted to report pursuant to section 50-25.1-03 who retaliates against the person because of a report of abuse or neglect, or a report of a death resulting from child abuse or neglect, is liable to that person in a civil action for all damages, including exemplary damages, costs of the litigation, and reasonable attorney's fees.
3. There is a rebuttable presumption that any adverse action within ninety days of a report is retaliatory. For purposes of this subsection, an adverse action is action taken by an employer against the person making the report or the child with respect to whom a report was made, including:

a. Discharge, suspension, termination, or transfer from any facility, institution, school, agency, or other place of employment;

b. Discharge from or termination of employment;

c. Demotion or reduction in remuneration for services; or

1. My authority as a teacher was greatly diminished by the Principal's manipulation of my students and interference in my classroom.
2. I was told I could not discipline my students my way, but had to call an administrator,
3. Low teacher evaluations.
4. Restricted from participation in vital Curriculum Committee functions.
5. Denial of my constitutional right of free speech, in that if I told anyone I had been fired, it was grounds for my immediate dismissal.
6. Fired.
7. Nonrenewed
8. Fired without a hearing before end of term and told it was an Administrative Leave.

Having once broke the law by not reporting a rape, the administration kept breaking the law in an effort to cover their tracks, for fear some authority would discover they had not reported a rape as required by law.

25. J J, a new student, 12 years old, was enrolled in both of my 7th grade classes sometime in November, 06. Jamie wanted to talk about Wounded Knee of 73, AIM, and Leonard Peltier, whom she was related to. J J wanted to be a part of the Indian civil rights movement, and asked me many questions about Leonard Peltier. She particularly admired Anna Mae Pictou Aquash.

26. J J talked to me about her personal life. I asked Ms. Toikiason, the counselor, to speak with J J. I only discovered that J J had been questioned about a rape after defendants Guthrie and Riedinger had performed sex talks to all students grade 7th-12th , taking a whole class period. I noticed a marked change in J J who was exhibiting moods of humiliation and despair. In December of 06, when I confronted Ms. Tiokiason, she admitted that Riedinger and Michels had questioned Jami concerning a rape. Yet Mr. Riedinger and Mr. Michels, music teacher and NEA representative, along with Ms. Tiokiason, all acting in their official capacity, did question J J in Ms. Tiokiason's office, about a rape, without the knowledge or permission of Social Services, J J's parents, or myself, in violation of Child Abuse laws concerning privacy and that only

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d. Restriction or prohibition of access to any facility, institution, school, agency or other place of employment or persons affiliated with it.

Social Services is authorized to investigate.[2] Outraged, I accused Tiokiason of damaging a 12 year old who was having difficulty adjusting to a new school. Together, she and Mr. Guthrie came to my room and explained that I had a duty to report, and that J J had admitted to them that she had been raped, when in fact, J J had made no such admission, nor did Mr. Guthrie report any rapes to Social Services. At the time, I was deceived into believing that J J had admitted to Mr. Guthrie that she had been raped.

32. J J's friend told me she was being sexually harassed by the three girls who followed her, calling her names like tits, slut, and bitch. I reported this to Mr. Riedinger, who said he would take care of it, but he didn't.

Mr. Guthrie and the Warwick administration saw this as their golden opportunity to create sexual problems for a little 7th grade girl, so she could replace the real rape victim they had expelled. That is why Riedinger turned his "girls" loose on J J. They wanted J J to have sexual problems.

33. A few days later, I reported to Mr. Guthrie that with J J being harassed.

34. Mr Guthrie, along with Mr. Riedinger, took the next day, all day, going from classroom to classroom, 7th through 12th grades, talking to students about rape, in violation of Child Abuse law NDCC 50-25.1-05.05.[1] Guthrie then send out a memo of the staff meeting, to document that he and Mr. Riedinger had conducted a sex talks with each 7-12 grades.[3]

35. I went immediately to Ms. Toikison and asked if she had talked with J J. Tiokiason said she reported to Mr. Guthrie that I had told her that J J had been raped. She told me that Principal Riedinger and NEA rep and music teacher, Mr. Michels, questioned J J in her office about being raped, which she recorded for the record, in violation of NDCC **50-25.1-05.1.**

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[2] **50-25.1-05.05 Interviews on School Property** The department or appropriate law enforcement agency shall notify the school principal or other appropriate school administrator of its intent to conduct an interview on school property pursuant to section 50-25.1-05. The school administrator may not disclose the nature of the notification or any other related information concerning the interview to any person, including a person responsible for the child's welfare. The school administrator and department or law enforcement agency shall make every effort to reduce the disruption of the educational program of the child, other students, or school staff when an interview is conducted on school property.

[3] This is in violation of Child Abuse laws, NDCC 50-25.1, and Social Workers laws, NDCC 43-41-04(1) which states that ..."no person may engage in social work practice in this state unless that person is a licensed social worker, a licensed certified social worker, or a licensed independent clinical social worker."

36. Mr. Guthrie and Ms. Tiokiason soon appeared in my room, and assured me that I had done the right thing, and that everything was being taken care of. Ms. Tiokiason indicated that through the questioning, they had discovered that Jamie had been raped. Mr. Guthrie explained it was his duty to talk to students about rape.

37. Soon J J stopped coming to class. When I told Mr. Riedinger about her not coming to class, he said she was in detention, but I noticed she was attending her other classes, and instead of going to my classes, she went to other teacher's classrooms.

38. Mr. Riedinger recommended to teachers that J J needed to be punished because "she taught a lesson by going to detention, and that we should look for reasons to put her in detention." I told him that putting J J in detention was the wrong thing to do, that she needed to go to class, not detention. He said it was an administrative decision.

39. A little later, Mr. Reidinger marched me down to Mr. Guthrie's office, in front of students, without notice, nor was I told the purpose of this meeting. I went through another terrifying inquisition styled interrogation. Guthrie told me in no uncertain terms that there is a chain-of-command in place and I was not to question administrative decisions. Guthrie told me that my student J J was not my problem or concern. I told Guthrie that he had enrolled her in two of my classes, and it is a teacher's duty to know what is happening to her students. Guthrie told me that they could remove J J from my classes without consulting me or even giving me any reasons. I asked him if she told him she had been raped, why was he putting her in detention? Guthrie emphatically did not feel he had to answer any of my questions about what they were doing, stating, "It was an administrative decision."

42. M H, the real rape victim, was still listed as enrolled. When I asked Mr. Guthrie about M H, he told me M H was on an IEP and she could not be expelled. He said she was being home schooled, when in fact, she was not being home schooled.

43. On December 15, 2006, Guthrie had a woman going around talking to all grades about rape and sexual abuse to all 7^{th}-12^{th} grades. Mr. Riedinger asked me to sit in on sexual abuse talk during the second hour, my prep period.[4]

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[4] Guthrie and Riedinger had talked to all the 7^{th} -12^{th} grade classes the end of November. This was the second time students were subjected to unauthorized sex talks.

46. On or about December 27, I called Selina Horse, M H"s mother, to find out why M H was not coming to school. She told me her daughter had been expelled without a hearing, and that the school was trying to get her to sign off that she was being home schooled, but she refused to sign because M H was not being home schooled, nor did Selina qualify to home school. She told me about the rape and about M H's fight in school, how Mrs. Armstrong restrained her while another student kicked her in the mouth. **(Attached as Ex. G, a true and complete copy of Affidavit of Selina Horse, mother of rape victim, attesting to the rape, suicide attempt, and her daughter's expulsion.)**

47. When I asked about the rapist, Selina said he was in tribal court. That's when I realized that Guthrie had not reported the rape as required by law. That meant although I had reported to him, it was still unreported. Having a duty to report, I contacted Social Services to let them know that M H had reported to me in class, that she had been raped.

Social Services is the first responder in the steps necessary to be taken once a teacher and/or school administrator has reported knowledge of a rape. Bennett County Social Services was neglectful of its duty, and did not properly assess the facts after I submitted a 29 page report in December of 2006, submitted as a 960 official report. Social Services failed to investigate, stating the incident was out of their jurisdiction. Even though I had reported a felony crime, Social Services refused to order a criminal investigation.

48. On or about January 29, 2006, I talked to M H"s mother who said that her daughter tried to kill herself again, and was hospitalized in Jamestown, and that she was to have no contact with M H. This was my realization that M H's rape had not been reported. I was still confused about J J, remembering that Mr. Guthrie had told me that J J had admitted to them she had been raped. If they hadn't reported, that meant I had not reported. I felt an obligation to tell the school board members, and I sent them a 29 page report on December 29, 2006. (Available at trial as **Ex H,** is a true and complete copy of December 29, 2006, Report to Warwick School Board)

49. Alarmed that a suicide attempt had taken place, and that Guthrie was not being truthful, I called J J's father, the parent she lives with. I told him that Riedinger and Guthrie were saying that J J had been raped and that Guthrie and Riedinger had talked to all 7^{th}-12^{th} graders about rape, singling out J J as the rape victim. He was confused and furious. He was

going to get a lawyer, and called his daughter, J J, and told her what I had said. J J called me. She was furious that I had told her father. Her father called me and asked if I would talk to his attorney. I agreed. Mr. Jones, the attorney located in Devils Lake, called me and asked if I had any evidence. I told him I would give him the same packet I had sent to the school board. Additionally, he said he would represent me at my evaluation meeting.

53. On January 4, 2007, Mr. Jetty and Mr. Jones came to Warwick School to ask Mr. Guthrie why J.J. had been questioned about a rape without her father's knowledge or permission. Mr. Guthrie, along with Riedinger, Tiokiason, Jacobson, and Michels met with Mr. Jones and Mr. Jetty. Guthrie, Tiokiason, Riedinger, Michels, all told Mr. Jones and Mr. Jetty that I had reported to Ms. Tiokiason that J J had told me that J J had been raped, which was a lie.

54. An hour later, Mr. Reidinger came to my room just before my 7th grade English class at 11:20am. He told the 7th graders to go to the library with Mrs. Bertch. Reidinger told me to go to Mr. Guthrie"s office, which I did, and I was instantly fired. Without a hearing, without warning, without cause, Mr. Guthrie told me I had 15 minutes to clear out my desk and turn in my keys.

56. When I got home, I reported to the Devils Lake Police Dept., ND Standards and Practices, U.S. Attorney Drew Rigley, and the FBI. I reported to Social Services, what M H had told me in class, that she had been raped and that I had been fired for having reported. I sent the 29 page report to Social Services, detailing the abuse going on in Warwick school. Astonishingly, Social Services through the Human Services sent me at letter on January 16, 2007, stating that "After careful deliberation, we determined that there were no child protection related issues contained within the [29 page] document to wqrrant a CPS assessment." They found no instances of Warwick administration violating the law, and did not order a criminal investigation.

I notified the Warwick School Board numerous times, of the abuse and failure to follow the law at Warwick School. The Warwick School Board failed to perform its duty to me and to the students who were gravely and adversely affected by Warwick School Board's negligence and failure to investigate a 29 page report of serious and criminal violations of child abuse laws by administrators.

57. At 2:30 that same day, Mr. Guthrie called me and told me to report to his office tomorrow morning at 8:00 where he said he would let me know under what conditions I would be allowed to return to my teaching duties.

He did not tell me that he had just received a call from FBI, asking about M H, why she had been expelled, and why he hadn't reported the rape. Nor did he tell me that he had called an attorney for advice, Gary Thune, and President of the North Dakota School Boards Association. (Hearing Transcript, p. 105-115)

58. January 5, 2007, meeting of Administration, Supt. Guthrie, Prin, Riedinger, Counselor Tiokiason, and Elem. Prin. Jacobson, and myself present. Mr. Guthrie did all the talking. I was here, he said, to be told under what conditions I would be allowed to return to my teaching duties.

59. I stated that if this was to be a hearing, I was unrepresented, and therefore did not wish to answer questions. Mr. Guthrie totally ignored my rightful and legal request, and began questioning me.

60. He said that I had made the statement to him that I had reported the rape of J J to himself, Mr. Riedinger and Ms. Toikison, and that nothing had been done about it? Is that true? I said no.

61. I told him I thought we were here to clear up a misunderstanding. I repeated that I was not here to confess something untrue, that this was not a proper hearing, and I was unrepresented, and I asked for a true hearing.

62. Guthrie ignored my objections. He kept demanding I confess that I reported rape of J J, over and over. He said, just answer yes or no. His manner and voice was very intimidating. He said I would not be allowed to teach unless I confess.

69. His questioning had taken such a frightening turn, I didn't know what to say. He kept asking if I talked about Leonard Peltier in my classroom, over and over. He insisted it was true, because students said it was, but he would not identify which students.

70. He said many staff members complained about me, but he would not identify the staff members or identify what the problem was.

71. His questioning was very Kafkaesque and frightening to me.

73. He then summed up by stating that since I hadn't admitted what he wanted me to admit, that it constituted Defamation of Character, and that legal steps could be taken against me.

74. Mr. Guthrie said I had to agree that I agreed to his directives if I wanted to be allowed back in the classroom. Mr. Guthrie did not offer in writing, any directives, or any legal basis that I should agree to his directives. **(Attached hereto as Ex. J is a true and complete copy of Guthrie's Five Directives.)**

75. I agreed to abide by the directives as long as they did not infringe upon my rights, the rights of students, or my Constitutional rights, and I agreed (spoken) to uphold the N.D. Century Code and to teach in a manner I had been trained to teach.

I was coerced into agreeing to the 5 Directives as a condition for my return to my classroom. When Mr. Guthrie gave me the 5 Directives, he did so to hide the fact that he had not reported a rape, and that he had substituted JJ for the rape victim, and told her father James that I had told him to question J J about a rape. I was on a very short leash, and I had to strictly adhere to the Chain of Command, or be fired. Guthrie said I had to first of all, resolve any differences through him first, before I could take any issue to the school board. The school board totally ignored my reports of abuse and other irregularities going on at Warwick School in which I had mailed to them. They relied on Mr. Guthrie's version of the facts as being the only truth.

I was given very low teacher evaluations, and nonrenewed. I contacted ESPB and made a complaint, naming Mr. Guthrie and Mr. Riedinger. After nonrenewal, I was placed under house arrest for an incident with a student set up by Mr. Riedinger. Mr. Guthrie suggested I take medical leave for the rest of the school year, although there was nothing wrong with my health. When Mr. Guthrie discovered that I had named him in my complaint to ESPB, he called a secret emergency meeting of the School Board. He convinced them to fire me. I was not given any warning, nor was I invited to meeting for a hearing. I was not given any reasons for my dismissal on April 11, 2007. In short, my dismissal had been illegally executed. I was told that I was placed on Administrative Leave, and paid my full salary. No further explanation or reasons were given.

133. As I walked down the hall, on Aprile 11, 2007, I noticed school board members. I unlocked the door to the Ivan room for board members McKevely and Brown. Neither one mentioned the special meeting in which they were going to terminate me.

134. A few minutes later, I was hanging the 6th grade art work in the hall of the library, where the school board meeting was taking place. I could see teachers going into Mrs. Eversvik's room.. At 4:10pm, I heard Michels

voice, then peals of laughter. I left the school building. No one spoke to me.

135. Forty five minutes later, Mr. Guthrie called to tell me to get my things and clear out. "And don't set foot on school property. The Board voted unanimously to dismiss me from my teaching duties, effective immediately after Mr. Guthrie's negative comments against me were taken under advisement. Guthrie refused to tell me the reason for which I was terminated before the end of the school year.

136. On April 12, Mr. Jacobson and Carol Wolford delivered a letter of dismissal to my house from Mr. Guthrie, in which he did not advise me of any appeal rights, nor did I have a dismissal hearing, nor did the letter contain any reasons listed for my dismissal.

137. I wrote letter to Mr. Guthrie demanding a reason for my termination, a copy of my file, a copy of school policy.

138. Several days later, Mr. Jacobson delivered a copy of my file. He said there was no policy. I gave him the keys. In my file was Mr. Jacobson's evaluation, with very negative commentary on high school issues. When I asked Mr. Jacobson about it, he said he wasn't aware that his evaluation had been placed in my file since we had never completed it. He said he would remove it, but Mr. Guthrie forbid him from removing it.

141. On July 5, 2007, I applied for unemployment. I was disqualified for "misconduct." This is the first I was informed of any misconduct charges charged to me as a reason for my dismissal. I appealed the decision.

142. I applied for a teaching positions, but no one would hire me because of the misconduct charge.

144. In August, 2007, the rape victim M H, was severely beaten by Cherilou, age 29, daughter of Myra Pearson, and her boyfriend, who smashed a bottle over her head, causing her a concussion. I filed a 960 report with Social Services. Once again, there was no federal investigation of a felony crime. Once again, it was investigated by tribal authorities, and the case against Cherilou and her boyfriend was dismissed.

On August 21, 2007, Job Service held a hearing to determine whether or not I had committed misconduct at Warwick School. Mr. Guthrie made many false statements, which the hearing officer would not permit my attorney to challenge. Hearing Officer Dave Clinton made a ruling contrary to NDCC 15-47-38, in which he based his decision on requiring a separate dismissal hearing, distinct from a nonrenewal hearing, based solely on Mr. Guthrie's extorted, illegal 5 Directives and perjured testimony, which was an unconstitutional disregard for my constitutional right to due process. Job Service ruled that I had committed misconduct by not obeying "reasonable directives given by the employer." I appealed the decision to district court, who affirmed the decision. I appealed to the Supreme Court, who affirmed district court.

I contacted the Attorney General to report this crime. He said he couldn't involve himself in tribal affairs. Furthermore, it wasn't his job to respond to individuals. I contacted U.S. Senators, who said that tribes were sovereign. I contacted U.S. Attorney stating that rape was a major crime, and asked why he wasn't investigating, his answer; because the don't investigate on the basis of an individual's report, but have to be referred by Social Services or States Attorney. I contacted States Attorney Wang, who said that the rape was tribal or federal jurisdiction, and there was nothing he could do. I contacted tribal prosecutor who said that the rapist had been set for trial in tribal court, but the case was dismissed because M H, the real rape victim, didn't want to testify. I contacted Sheriff Royher who said the case was unsubstantiated and too old to investigate, meaning the rape had not been reported to Social Services by Supt. Guthrie from Warwick School, and that my reporting didn't count because Guthrie told Social Services that I had fabricated the report of a rape. I contacted the Devil's Lake Police, who said that they lacked jurisdiction, and advised me to call the FBI. I called the FBI numerous times, and they ignored my phone calls.

On November 4, 2008, J J committed suicide. She had changed schools twice, but the sexual stigma followed her. I have a report from one of her classmates who said that J J called her, very despondent, and said, "I just want it to end, because no one will believe me about what Guthrie did to me." I have this as recorded testimony.

ATTACHMENT

From a portion of the Job Service unemployment hearing.

Janis Schmidt

Attachment to statement for Senate Bill 2397

Job Service Hearing

III. Job Service Took and Reported Separation Information in a Way That Violated My Procedural and Substantive Due Process Rights Which Invalidates the Job Service Decision That I Committed Misconduct, Which Wrongly Caused Me To Be Ineligible For Benefits

A. Filing a Claim for Unemployment

I called the local Job Service office in Devils Lake for information on filing a claim for unemployment. I was given a Bismarck number and told that all claims were being taken over the phone. I called Bismarck on July 6, 2007, to file a claim for unemployment. I had to give all my information, and separation information over the phone in about 15 minutes. The Claims taker did not read back my separation information to me. I never signed anything. I just had to take it on faith that the Claims Taker got it right. I asked for another method of filing the claim, but I was told that this was this was the only way. (Record, p. 1-3)

Job Service took my information and sent it to my employer, along with Job Service formulated questions to answer, including the reason I was no longer working. Charles Guthrie answered in the name of Warwick School Board, as evidenced in the Record, pp. 6-10. Guthrie was given until July 16 to answer Job Service questions as to why I was no longer working. He had over a week's time to formulate his response, whereas, I had to give all my information, and separation information over the phone in about 15 minutes to an anonymous Claims Taker who was in a rush to go home. Guthrie could look over the form, read the questions, read the Claims Taker's statement, and in fact, have the time to gather 32 pages of evidence against me. (Id., pp. 11-43) Guthrie had time to respond the the written questions that would be important making the Nonmonetary decision, confer with his lawyer, Thune, write his response, and return it at his leisure, but within Job Service ample time line of over a week.

In about a week, I received a Monetary Determination, stating I was eligible for a maximum total of $5742. (Id, p. 5) Shortly thereafter, I received a Nonmonetary Determination disqualifying me for Unemployment Benefits, based upon the Claims Taker's statement and Guthrie's statement as to why I was no longer working. (Id, p. 4-5) The Determination reads in pertinent part:

> You were discharged from your employment for failure to comply with instructions or directions from your employer. According to information in the Record, it is determined that you were discharged for reasons which constitute misconduct.
>
> Misconduct has been defined as conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or

> disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgement or discretion are not to be deemed "misconduct" within the meaning of the statute.

I appealed the Decision on July 20, 2007. I wrote my own statement of facts. A hearing was set for August 2, 2007. I got my friend, an out of state attorney to represent me in the hearing. The hearing was then rescheduled for August 9, 2007. I tried to add evidence for the hearing, but hearing officer, Dave Clinton, would not permit me to do so. Yet Guthrie got to add 32 pages of evidence.

Mr. Clinton's Decision reveals that he ignored all my evidence, except to take statements out of context and use it against me. He disregarded the testimony that refuted Mr. Guthrie's statements, as well as those of the Claims Taker. Instead, Mr. Clinton relied totally on the Claims Taker statement of my facts, and Guthrie's perjured statements and hearsay evidence.

> MR. CLINTON'S DECISION:
>
> In this case, the greater weight of the evidence in the record gives rise to a determination that the claimant deliberately violated a standard that she knew, or should have known, would result in the termination of her employment by deliberately failing to comply with directions or instructions from her employer. It is reasoned based on the diverse number of people who approached the employer and the tribal chairperson that the information relayed to the employer concerning the claimant's insubordination was true and accurate. This is held despite the claimant's denial. The result might have been different if there were only one or two children who complained. Indeed, the information that was supplied by the claimant herself in her letters and memorandums demonstrate that the claimant was insolent and unwilling to yield to the reasonable directives of the employer.[5]

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[5] **28-32-46. Scope of and procedure on appeal from determination of administrative agency.** A judge of the district court must review an appeal from the determination of an administrative agency based only on the record filed with the court. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court must affirm the order of the agency unless it finds that any of the following are present:

B. Mr. Clinton Fails to Establish My Last Day Of Work and the Reason I Was Fired.

The very first steps in taking a claim for Unemployment has 3 primary elements, which must first be determined before any nonmonetary ruling can be made. Those are: 1. last day worked; 2. reason for leaving; 3. if fired, was notice of discharge given in advance of firing. Under direct examination, Mr. Guthrie and Mr. Thune did not address those questions, so Mr. Clinton attempted to get answers, but allowed Mr. Guthrie to stonewall. Mr. Clinton did not receive an answer to any of those questions, nor did he vigorously pursue any answers. He made an interim ruling to control the case, that a nonrenewal notice can substitute for a dismissal notice. This is contrary to Teacher Dismissal laws, (Chapters 15.1-14 and 15.1-15, NDCC). Therefore, he had no legal basis to make a ruling, and his decision should be declared void. Clinton's irresponsible Decision has now made possible for school administrator to ignore Teacher Dismissal laws, and fire teachers by substituting nonrenewal laws for a dismissal. As such, teachers and children have no protection against predatory administrative practices.

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1. The order is not in accordance with the law.

2. The order is in violation of the constitutional rights of the appellant.

3. The provisions of this chapter have not been complied with in the proceedings before the agency.

4. The rules or procedure of the agency have not afforded the appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.

6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

If the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.

MR. CLINTON: Mr. Guthrie, she wasn't fired during the Notice of Nonrenewal, she's not fired on August 12th, she's placed on Administrative Leave with full pay. Tell me was she fired? (Id., p. 99, line 12-14)

MR. GUTHRIE: Was she fired? She was nonrenewed. (line 15)

MR. CLINTON: But, you said that's not a firing. (Id., p. 99, line 16)

MR. GUTHRIE: Well, it's not classified as firing; it's classified as a nonrenewal of a contract. (line 17-18)

MR. CLINTON: Well, exactly. So when was she discharged, cuz I need a date, Sir? (line 19)

MR. GUTHRIE: Actually, when she was placed on Administrative Leave, she wasn't fired, she was just placed on Administrative Leave with full pay. Her actual discharge date would have been the last day of school. (line 20-22)

MR. CLINTON: When is she told she was fired? (line 23)

MR. GUTHRIE: When was she told she's fired? (Id., p. 100, line 1)

MR. CLINTON: Yeah. (line 2)

MR. GUTHRIE: When was she told that she was nonrenewed? (line 3)

MR. CLINTON: No, because you told me you drew a distinction between the two, so when does she receive notice of discharge? Does she receive Notice of Discharge one the 12th of April to be effective the last day of school, is that how it operates? Or if that is not how it operates, how does it? (Id., p. 100, line 4-7)

MR. GUTHRIE: She was notified through her letter of nonrenewal that her contract would not be renewed. I call it nonrenewal, she calls it firing. You call it firing or nonrenewal, I don't know. (line 8-10)

MR. CLINTON: No, Sir, I'm interested in terms of what the employer calls firing at this point and I still didn't get an answer to my question. On what date, cuz I want to limit the employer's information to establish misconduct relative to the date that she receives notice of termination because that's the time she's told she's fired. Subsequent events will have much less persuasive impact in my decision, so I'm back there. When in the eyes of the employer, you, did she receive notice of discharge and when was that discharge to be effective? (Id., p. 100, line 11-17)

Mr. Guthrie is not the employer; Warwick School Board is the employer. Mr. Guthrie is just another employee, who disobeyed the Child Abuse laws, and hence, the one who committed misconduct. Since the hearing officer, Mr. Clinton, is unaware who the employer is, the results of the hearing should be declared void, and the decision should be reversed.

MR. GUTHRIE: The Notice of Nonrenewal was her notification that her contract would not be renewed and her contract was up at the end of the school year, which I think was 25th of May. (line 18-20)

MR. CLINTON: Let me make this clear. So, you're saying that she receives notice of termination, discharge, when she receives the Notice of Nonrenewal, and that the effective date of her discharge would be the end of the school year? (line 21-23)

MR. GUTHRIE: Correct. (Id., p. 101, line 1)

Mr. Guthrie, coached by Mr. Thune, steadfastly maintains that the Notice of Nonrenewal was my notice of Dismissal. Mr. Clinton had correctly stated Mr. Guthrie's position. Mr. Clinton has asked the three important questions of Mr. Guthrie, who avoids answering. Mr. Thune, then, jumps in. Instead of enlightenment, Mr. Thune and Mr. Clinton work a collusion on how they will agree to circumvent teacher dismissal laws.

MR. THUNE: Mr. Clinton.....(p. 101, line 2)

MR. CLINTON: Yes, Mr. Thune, I want to go back because I think you understand where I'm going here. (line 3-4)

Now Mr. Thune and Mr. Clinton understood where they were going, but they did not clarify to myself or Mr. Bachrach, that their intention was to circumvent teacher dismissal laws. Not only have they violated Child Abuse law, they have violated Teacher Dismissal laws, and as such, have committed Fraud and Official Misconduct.

MR. THUNE: Yes, I do, and I think that Mr. Guthrie is not incorrect in his statement that the Nonrenewal meant that after the last say of school that year she would not be employed any further in the Warwick School District because the contract would not be nonrenewed. The School Board never went through a discharge hearing which is a separate section of the North Dakota Century Code, Section 15.1-15-06, *I believe, and the discharge would be more consistent with the general meaning of firing because that means that the contract is over and we're not paying you anymore.* [emphasis added] A nonrenewal doesn't mean that at all; it means we're not going to issue you another contract and tha hearing is required to be held by State law before the 15th...of April and we have to make a decision before the 1st of May, if we are not going to offer them a contract for the next year. (Id., p. 101, line 5-14)

Mr. Thune might say that my discharge was more consistent with the general meaning of firing. But I am not the general public; I am a highly trained teacher, who cannot be dismissed legally, without a hearing. North Dakota law governing nonrenewal and dismissal of a teacher are two different processes, and are separate from labor laws. A lawyer who specializes in school law, clearly knows the difference between a Walmart clerk and a teacher and the law. The 3-part process

in steps to take in my dismissal were blatantly ignored. [6] (1) No recommendation contemplating my dismissal in an open school board meeting with reasons. (2)

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[6] **V. Prehearing Process (Voting to Contemplate)** As is the case in nonrenewals, the board must comply with the open public meeting law (44-04-19, NDCC), the open voting law (44-04-21, NDCC, which requires roll call voting), and the discharge laws (Chapters 15.1-14 and 15.1-15, NDCC). The decision to *contemplate* the discharge of a teacher or administrator must be made in an open public meeting and involves a three-step process similar to contemplated nonrenewal.

A. Recommendation to Contemplate

It is primarily the responsibility of the administration to recommend contemplated discharge with reference to teachers, principals, or assistant superintendents. Recommendations to the board must:

1. Be at an open public meeting
2. Identify the teacher or administrator by name
3. State the reasons upon which the recommendation is made (these reasons should be documented, but the documentation should **not** be presented or discussed until the hearing)

B. Board Action on Recommendation

After the reasons for a teacher or administrator's contemplated discharge have been given to the board, discussion should be limited to the sole question: Do the reasons given conform with the requirements of Section 15.1-15-07, NDCC, namely:

1. Immoral conduct
2. Insubordination
3. Conviction of a felony
4. Conduct unbecoming the position held by the individual
5. Failure to perform contracted duties without justification
6. Gross inefficiency that the individual has failed to correct after written notice
7. Continuing physical or mental disability that renders the individual unfit or unable to perform the individual's duties

C. Notice of Contemplated Discharge

If the board votes to contemplate discharge of a teacher or administrator, written notice of that fact and of the time and place for a special board meeting must be provided at least ten days prior to the meeting date. Written notice must also inform the teacher or administrator of the right to demand specification of reasons for discharge, which will be furnished at least five days before the meeting if demanded

B. Record of Hearing

In addition to filing all evidence and exhibits produced at the hearing, a record must be made of all testimony.

C. Hearing Procedure

The hearing must conform to the rules for an administrative hearing under NDCC Chapter 28-32. These rules include subpoena rights, cross-examination of witnesses, and prohibition of ex parte communications. If a continuance is requested at the hearing, it **must** be granted. That continuance is not to exceed seven days unless good cause for a longer continuance is shown.

D. Evidence

1. At The Hearing Although the admissibility of evidence is generally to be determined according to the North Dakota Rules of Evidence, the board is allowed to waive the rules of evidence so long as only relevant evidence is admitted. The waiver must be specifically stated. All objections to evidence must be noted in the record (28-32-24, NDCC).

Discussion of reasons in special meeting to determine if any of the reasons are serious enough for my dismissal. (3) I was denied the right of written notice of that fact and of the time and place for a special board meeting must be provided at least ten days prior to the meeting date, before I was dismissed. I was not informed in writing, the specific reasons for discharge. Additionally, no record was made of the April 11th, 2007, Special School Board Meeting to terminate my employment before the end of the year, no record of the testimony taken, no evidence was produced. It was all secret. The hearing did not conform to the rules for an administrative hearing under NDCC Chapter 28-32. The hearing did not adhere to North Dakota Rules of Evidence, nor was I given any opportunity to examine the evidence or offer evidence and testimony. The board did not concisely and explicitly state its findings of fact, conclusions of law, and decision within "thirty days after the evidence has been received, briefs filed, and arguments closed." The Warwick School Board delivered its final decision personally, but failed to advise me of my petition rights pursuant to (28-32-40, NDCC).

MR. CLINTON: Well, that's it; Mr Thune, and you understand how these education employees are treated. (line 15-16)

MR. THUNE: Yes. (line 17)

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2. After The Hearing
If the board wishes to review additional evidence not presented at the hearing, it may do so by providing copies to each party. However, if any party submits a written request, the right to cross-examine the person furnishing additional information must be granted at a properly noticed additional hearing (28-32-25, NDCC)

E. Findings, Conclusions, and Decision
The board is required to concisely and explicitly state its findings of fact, conclusions of law, and decision within "thirty days after the evidence has been received, briefs filed, and arguments closed." This statutory language is indicative of the complexity of the discharge procedure. It also points out the implied right of the parties to submit briefs and of the board to take the matter under advisement. Preparation of specific findings of fact and separate conclusions of law must be arefully accomplished, since these items become a primary focus if the board's decision is appealed to the courts (28-32-39, NDCC).

F. Petition for Reconsideration
Within fifteen days after a copy of the board's final decision has been mailed by certified mail or personally delivered, the teacher or administrator may petition for reconsideration, which the board may deny or grant on such terms as the board may prescribe (28-32-40, NDCC).

G. Notice to ESPB

Any school board that dismisses a teacher, principal, assistant superintendent, or superintendent for cause is required to report the dismissal to North Dakota's Education Standards and Practices Board, pursuant to Sections 15.1-14-07, 15.1-14-17, 15.1-14-27, and 15.1-15-11, NDCC

Mr. Clinton allowed Mr. Guthrie to get by without naming a date for my last day of work. Mr. Clinton established that nonrenewal is the same thing as a dismissal in defiance of the law. Mr. Thune is suggesting that the general meaning of firing should apply, like firing a Walmart clerk, rather than firing a teacher; although Mr. Thune has admitted he is well aware of the teacher dismissal laws. Instead, he obfuscated the nonrenewal with discharge. Why? Because I was not lawfully discharged, and because of the misadvised Warwick School Board in matters concerning legal procedure for dismissing a teacher.

Continuing:

> MR. CLINTON: So, if you had not gone through this process, she would have had a contractual right to be a school teacher in the fall. (Id., p. 101, line 18-19)
>
> MR. THUNE: Yes, she would have been, we had by law, we'd have been required to offer a contract again for the next fall that she would have a right to say yes or no..... (line 20-22)
>
> MR. CLINTON: Hold on, I've got an error message on my machine. I don't know what the issue was, I'm looking at my (INAUDIBLE), but the point it, you know, if you hadn't gone through the nonrenewal and she would have had a contract right, she would also not be allowed Unemployment Insurance benefits because she had reasonable assurance of reemployment. Thus, you know, for the Unemployment Compensation System, let's look—there's kind of a continual kind of employment, even though you have the Summer break and Winter break. (Id., p. 102, line 1-7)
>
> MR. THUNE: That's correct. (line 8)

What possible message did Mr. Clinton receive on his machine? And what kind of machine is he referring to? Instead of explaining, Mr. Clinton goes down the irrelevant road of nonrenewal, which is not in contest.

C. Mr. Clinton Makes Illegal Ruling

Whether or not I was dismissed according to law is the question on the table, and Mr. Clinton and Mr. Thune have just hijacked my right of cross examination to get an answer to that question.

> MR. CLINTON: Now, so, so, but, I thought you drew the distinction in terms of when she actually receives Notice that she's being let go and in this case I'm going to make an interim finding unless Mr. Bachrach

objectures that I will consider the Notice of Nonrenewal the Notice of Discharge.[7] Mr. Bachrach, any objections? (Id., p. 102, line 9-12)

Mr. Clinton just pulled this ruling out of his hat. There is no law that supports such a ruling the Notice of Nonrenewal can be considered the Notice of Discharge. Such a ruling is contrary to ND law. Mr. Bachrach objected on the basis that Warwick School had not introduced any procedure by which I was terminated for misconduct. There is absolutely no basis for hearing officer to find that I had committed misconduct. This outrageous decision ought to be reversed, and I should be paid all Unemployment benefits I rightfully deserve.

MR. BACHRACH: The Notice of Nonrenewal is being the Notice of Discharge? (line 13-14)

MR. CLINTON: I gotta have a date.

MR. BACHRACH: I understand, but now my concern, based on what I've heard, is that they have not introduced any procedure by which she was terminated for misconduct.

MR. CLINTON: We'll go there later, Mr. Bachrach.

Mr. Clinton just brushed off Mr. Bachrach's objection. Yet the employer's own exhibit D, **(Record, Exhibits, p. 244, 245)** prove that my final day of work was April 11, 2007. So, the date of discharge was NOT the date of nonrenewal. Not only did Mr. Clinton not accept my version of when I was fired, of which I was fired not once, but twice: Jan 4, 2007 and April 11, 2007; Mr. Clinton never returned later to Mr. Bachrach's poignant point that you have to have a separate hearing from nonrenewal, for a teacher to be fired for misconduct. The similarities between nonrenewal and discharge are far outweighed by the differences when the decision-making stage is reached. The right of cross-examination is specifically provided in discharge hearings, while "questioning for the purpose of clarification" is the applicable standard in nonrenewals.

Subsection 5 of Section 15-47-38, N.D.C.C., which governs the nonrenewal of a teacher's contract, does not contain language requiring a school board to

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[7] A school board contemplating discharging a teacher for cause must afford the teacher many of the procedural rights found in the North Dakota Administrative Agencies Practices Act. Section 15-47-38(2), N.D.C.C., reads in part:

"All procedures relative to evidence, subpoena of witnesses, oaths, record of testimony, decision, rehearing, appeals, certification of record, scope and procedure for appeals, and appeals to the supreme court shall be conducted in accordance with the provisions of sections 28-32-06, 28-32-07, 28-32-09, 28-32-10, 28-32-11, 28-32-12, 28-32-13, 28-32-14, 28-32-15, 28-32-16, 28-32-17, 28-32-18, 28-32-19, 28-32-20, and 28-32-21."

sustain its reasons for nonrenewal at the hearing. In Rolland v. Grand Forks Public School District No. 1, 279 N.W.2d 889 (N.D.1979), this court concluded that the Legislature intentionally avoided placing an evidentiary burden of proof on the school board in nonrenewal hearings. The specific language in subsection 2 of Section 15-47-38 indicates that the Legislature intended to place an evidentiary burden of proof on the school board in those instances involving dismissal of a teacher during the term of his contract.

> MR. CLINTON: I'm looking now for a date. I need to use a date, as I said before, and I'm still lokking at that as this is a person that's employed. She's placed on Administrative Leave, but you she works till the end of the school year. So, naturally, I gotta ask, was this a layoff, was this a discharge, was it a quit? I have to put in one of those three caps. The employer saying discharge, fine, I need a date. I need a date that nobody's given. (Id., p. 102, line 19-23)
>
> MR. BACHRACH: I would agree with you then, your Honor, that the discharged based upon and we can argue about what it means later. (Id., p. 103, line 1-2)
>
> MR. CLINTON: Fine. (line 3)
>
> MR. BACHRACH: But it would have to be the Notice of Nonrenewal. (line 4)
>
> MR. CLINTON: Thank you, because I thought there was drawing a distinction and I had looked at this differently. Now, that was only...questions, I apologize, but you see from my point of view, it makes an important turn of events of what I want to learn from both parties, you know, because events of subsequent discharge are gonna be given much less significance that those that lead up to the time of separation. Did the Board vote, the Board voted. Don't I have the minutes of that, Mr. Guthrie, in one of these things, the nonrenewal? (Id., p. 103, line 5-11)

I was illegally fired on January 4th and April 11th of 07. There were no detailed minutes or recordings made of either one, in violation of NDCC 15.1-14.[8]

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[8] C. Notice of Contemplated Discharge
If the board votes to contemplate discharge of a teacher or administrator, written notice of that fact and of the time and place for a special board meeting must be provided at least ten days prior to the meeting date. Written notice must also inform the teacher or administrator of the right to demand specification of reasons for discharge, which will be furnished at least five days before the meeting if demanded

B. Record of Hearing
In addition to filing all evidence and exhibits produced at the hearing, a record must be made of all testimony.

There is no conceivable reason for Mr. Clinton to only consider the time span between January 5 and March 28 of 07 as to events leading to my dismissal, unless he wants to hide all the infractions of Child Abuse laws, human rights law, and discrimination law that Warwick administrators were in violation of. Subsection 5 of Section 15-47-38, N.D.C.C., which governs the nonrenewal of a teacher's contract, does not contain language requiring a school board to sustain its reasons for nonrenewal at the hearing. In Rolland v. Grand Forks Public School District No. 1, 279 N.W.2d 889 (N.D.1979), this court concluded that the Legislature intentionally avoided placing an evidentiary burden of proof on the school board in nonrenewal hearings. The specific language in subsection 2 of Section 15-47-38 indicates that the Legislature intended to place an evidentiary burden of proof on the school board in those instances involving dismissal of a teacher during the term of his contract.

> MR. BACHRACH: No, that was an Executive Session and I don't believe it's ever been produced. (Id., p. 103, line 12-13)
>
> MR. THUNE: That's correct. The Executive Session minutes are sealed. Janis Schmidt has the right to access them. The School Board cannot disclose or use those minutes because it was an Executive Session required by law.... (line 14-16)
>
> MR. CLINTON: I apologize. I was thinking of the April 11, 07, minutes... (line 17)
>
> MR. THUNE: And, that is April 11th minutes from Exhibit D that would in essence be the last day that she was actually employed. With nonrenewals, that notice came out on March ...28th, Exhibit C, she, her employment continues. It continues till the end of the school year. They just have been told that when this school year is over you don't have a job again.[9] (Id., p. 103, line 18-22)

Mr. Thune is substituting the Nonrenewal recording, because that was done according to law. The dismissal hearing was not recorded. I was not notified of the dismissal hearing. I never received any detailed description of the board's reasons as to why they they dismissed me, after they had already nonrenewed me. Mr. Guthrie never discussed anything with me.

> MR. CLINTON: Yes, exactly that, I mean, I an have an employee and I can say, well look, you know, production is getting low; we're gonna lay you off in two months, why? Or I can say look, you know, Reduction in Force or look your things aren't working out, you're missing too much

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[9] NDCC **15.1-15-02(4)** If the board of a school district elects not to renew the contract of an individual employed as a first-year teacher, the board shall provide written notification of the decision, together with a detailed description of the board's reasons, to the individual no earlier than April fifteenth nor later than May first.

work. You have a month to work and after that, you'll find a new job. I can understand how that works even under the usual common law employee distinction. Mr. Bachrach, I apologize, I wanted to make that quick, but I hope you understand my point of view. I thought that might limit the scope of the hearing if I was able to ascertain a date. Please, Mr. Bachrach, you opportunity to examine Mr. Guthrie. (Id., p. 104, line 1-8

MR. BACHRACH: ....let me ask one thing, you Honor, cuz I was gonna go into a series of questions concerning reviewing the date of discharge is March of 07, correct? (line 10-12)

MR. GUTHRIE: I think it out to be April 12 of 07 because...(line 13)

MR. CLINTON: April 12th? (line 14)

MR. BACHRACH: Yeah, because she's still working from March 28th until April 11, she's still fully employed, she's at the school, she's teaching on April 11th when Mr. Guthrie went to the Board. He said we can't have her in the classroom anymore. We'll pay her for the rest of the year, but we can't have her in the classroom anymore. The Board agreed and then on pril 12th, she was told that she was done. She never was back in the classroom again after April 12th, so if there is a quote "discharge date", I mean, was with pay, so I probably fix more of your layoff I'm not sure, but she was told on April 12th and she never cane back. So, from April 12 until May 25 when school was out she did not teach, but she was paid. (Id., p. 104, line 15-23)

MR. CLINTON: Yeah, but I'm still gonna go, though Notice of Discharge with a nonrenewal. Subsequent events will have less impact. I will allow you to ask questions as to that subsequent event, but I am gonna focuas primarily, and I hope both parties understand this, and we could do that because we have a lot of collateral information in here that's not so persuasive. I hope we can focus on those 3 items that are articulated in that School Board Nonrenewal, your hearing. There were three elements. Those would be critical of at least in terms of my analysis so far. Not saying it's fixed in stone, but that's what I'm looking at now. Let's focus attention on those three items. Those would be most probative in my view. Mr. Bachrach, I know this is somewhat lesser, but I certainly allow you to ask questions...

In spite of Mr. Bachrach's objections, Mr. Clinton insists on falsifying the Record with the wrong date for my last day of work, the wrong reasons for my dismissal, and insists that Mr. Bachrach focus on Guthrie's reasons for my dismissal. Not only is this contrary to ND Century Code, it is also a violation of my Fifth and Fourteenth constitutional right of due process. Considering that Job Service and Pearce & Durick offered this to the Supreme Court as the truth, knowing it was a lie, and fooled the Supreme Court, amounts to Fraud upon the

Court. Job Service can either Reconsider it's Bureau Review and reverse Clinton's Decision, or Job Service and Mr. Clinton can be added to my lawsuit as defendants.

IV. Conflicting Reasons Given For Why I Was Fired on January 4, 2007.

Claims Taker's Version:

A student told me that she had been raped during the summer on the Reservation. She told me this in October. I asked her what she had done about it and she said she had told the counseler, Shirley, about it. Shirley then told the principal and also the superintendent. I talked to the principal about it and he said I did the right thing and he said he reported it. He lead me to believe that it wal all taken care of.

Early November the girl diappeared. We were told she got into a fight and was expelled. I noticed that she was still on my class rooster. I asked how I was to grade her. I was told she was being home schooled. I inquired a couple more times. At Christmas time, I called her mom to find out why she was not in school. Her mom told me that the Principal had called the police and take her from school. (after the fight) I asked her mom what was being done with the rape. She said it was in tribal court. I said it should be in federal court. I then realized that it was not reported. I then reported it to the police.

I spoke with the principal and the superintendent and they got angry that I went to the police. On January 4, I was then fired for going beyond the chain of command. (Id., p. 1-3)

Guthrie's Version:

> MR. THUNE: ....would you describe what occurred that lead to a brief Administrative Leave for Janis Schmidt? (Id., p. 87, line 22-23)
>
> MR. GUTHRIE: Ms. Schmidt had talked about a student or students being raped at the school and claiming that nothing had been done and in fact the rape that she was talking about happened during the summer time and that was followed up on...then kids were dropping out of her class because she was not just talking Native American culture, but the issues that she was talking about such as Leonard Peltier, Wounded Knee, AIM, and she was even talking to the students about her personal law suits in South Dakota against that tribe and there was a teacher sho had a son here who is non Native who was even beginning to feel safety reasons, concerns, and also, we do have a chain of command policy that's approved by the board which

she was not following and she was making allegations that she just could not prove. (Job Service hearing, p. 12, line 1-2)

My version:

The only opportunity I had to present my facts into the Record was when I appealed the Nonmonetary Decision based on the Claims Taker's false statements of my facts.

> "I appeal Decision to deny benefits because the reason for termination given by my employer is disingenuous, false, and misleading. I committed no acts that could possible constitute "misconduct." I was wrongfully terminated before the end of my contract, because I reported a rape that a student had announced to me and the whole 9th grade class...." (Record, p. 48-49)