

No. 08-0958

IN THE SUPREME COURT OF TEXAS

PRESIDIO INDEPENDENT SCHOOL DISTRICT

Petitioner,

v.

ROBERT SCOTT,
AS COMMISSIONER OF EDUCATION,

Respondent.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR REVIEW

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ABBREVIATIONS AND RECORD REFERENCES

Abbreviations:

Respondent, Robert Scott, Commissioner of Education of the State of Texas, is referred to as "commissioner."

Petitioner, Presidio Independent School District, is referred to as "Presidio."

Record References:

References to the Clerk's Record are in the form of "CR ____."

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References to Appendix items are in the form of "Tab ____."

REPLY ARGUMENT

I. Reasons to grant the petition.

The Court should grant the petition and rule in favor of Presidio by deciding that Section 21.307 of the Texas Education Code (“Section 21.307”) provides either a school district or teacher the right to judicial review. The Court should clarify Section 21.307 by ruling that only the teacher and school district must agree to venue in Travis County under the statute. The commissioner’s interpretation of Section 21.307 improperly allows the commissioner a chance to deprive a school district or a teacher of the right to judicial review. Unlike notice requirements in other statutes, Section 21.307 was not drafted as a statutory gatekeeper to limit suits against the government. These venue requirements are not jurisdictional for purposes of sovereign immunity, as the commissioner suggests, because that interpretation contradicts the clear intent of the Legislature in providing for judicial review.

II. The Legislature allowed the litigants to seek judicial review.

The Legislature intended for a school district or the teacher to have the right to ask a district court to review the commissioner’s decision. (Tab

1, p. 19-20). The construction of Section 21.307 advanced by the court of appeals and commissioner deprives Presidio of judicial review¹.

The statute's plain and common meaning is not easily understood. Within one sentence, Section 21.307 states that either party (the teacher or the school district) may appeal. Then, Section 21.307 goes on to state that suit can be filed in Travis County by agreement of "all parties." TEX. EDUC. CODE § 21.307(a). Later in the statute, the Legislature requires that the commissioner be made a party to the appeal. TEX. EDUC. CODE § 21.307(c). From the statute, it is unclear whether "all parties" includes the commissioner. Presidio has strongly argued that "all parties" does not include the commissioner. The court of appeals and the commissioner, however, provide a construction of Section 21.307 that limits the right to judicial review and defies common sense.

Viewing the statute in context, however, reveals that Section 21.307 should be construed to permit either the teacher or a school district the right to judicial review and not to limit review. Section 21.307 is part of an

¹ See TEX. GOV'T CODE § 312.005; *American Home Prods. Corp. v. Clark*, 38 S.W.3d 92, 95 (Tex.2000)(holding that first step in construing statute is to determine and give effect to the Legislature's intent). In *Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482, 484 (Tex. 1998) explained the objective when construing a statute is to determine and give effect to the Legislature's intent by:

- (a) Looking to the plain and common meaning of the statute's words;
- (b) Viewing a statute's terms in context and give them full effect;
- (c) Reviewing a statute's legislative history; and
- (d) Keep in mind the old law, the evil, and the remedy.

exhaustive administrative review process established to ensure due process to a contract teacher facing termination or nonrenewal from a school district. *See Grounds v. Tolar Indep. Sch. Dist.*, 856 S.W.2d 417, 419-20 (Tex. 1993), *superseded by statute*, TEX. EDUC. CODE § 21.204(e)(providing that property right does not exist beyond term of contract); *see also, Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d 559, 565 (Tex. 2000)(noting that Education Code placed more restriction on school board than APA). By enacting Section 21.307, the Legislature did not intend to place procedural hurdles to the right to judicial review of the employment decision.

The legislative history of Section 21.307 reveals the Legislature's intent that only a school district and teacher must agree to venue in Travis County. From 1984 to 1995, the statute mandated venue in Travis County. (Pet. for Review, p. 7). In 1995, the Legislature amended the statute allowing the parties to the commissioner's decision to appeal to either the district court in Travis County or the county where the district's administrative offices were located. TEX. EDUC. CODE § 21.307(a). The legislative discussion relating to the current version, section 21.307(a), centered on providing the right to judicial review. (Pet. for Review, Tab 9, pp. 19 & 20)("Allows for appeal" or "Authorizes a party to appeal"). There is no discussion about providing the commissioner a procedural trump card

to defeat judicial review when the school district and teacher agree to venue in Travis County. (*Id.*).

Considering the old law, the evil, and the remedy, the Court should uphold the Legislature's intent and construe Section 21.307 as only requiring the agreement of the teacher and school district for judicial review by a district court in Travis County. This is a case well suited for *per curiam* decision by this Court.

III. Section 21.307 is not a statutory gatekeeper to limit suits against the government.

Section 21.307 should not be construed as a statutory gatekeeper. Waiver of sovereign immunity is required in cases involving a claim for damages against the state. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 374 (Tex. 2006); *General Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001). For example, in cases brought under the Texas Tort Claims Act, the act expressly waives sovereign immunity; however, a plaintiff must successfully comply with the notice requirements to avail himself of the waiver². *See generally*, TEX. CIV. PRAC. REM. CODE § 101.101. Unlike the notice requirement in the Texas Tort Claims Act, the venue provision found in Section 21.307 does not provide a

² See *Univ. of Tex. S.W. Med. Ctr. at Dallas v. Estate of Arancibia ex. Rel. Vasquez-Arancibia*, 244 S.W.3d 455, 459-60 (Tex.App.—Dallas 2007, pet. filed)(explaining that Section 311.034 of the Texas Government Code promoted the notice requirement of the Texas Tort Claims Act to a jurisdictional statutory prerequisite to suit necessary to establish waiver of sovereign immunity).

limit on the waiver of sovereign immunity. *See Kamani v. Port of Houston Auth.*, 702 F.3d 612, 615 (5th Cir. 1983)(holding that notice requirement of Tort Claims Act is limit on waiver of sovereign immunity). Such a construction would defeat the Legislature's intent to allow for judicial review.

This case does not involve damages. The decision subject to judicial review is that of the commissioner. *Montgomery Indep. Sch. Dist. v. Davis*, 34 S.W.3d at 562. Suits that do not seek damages but instead seek review of a policy decision by a state agency do not require proof of waiver of sovereign immunity. *Nueces Cty. v. Hoff*, 105 S.W.3d 208, 211 (Tex. App.—Corpus Christi 2003), *rev'd on other grounds*, 153 S.W.3d 45 (Tex. 2004).

The reliance by the court of appeals and the commissioner on Section 311.034 of the Texas Government Code misses the mark because waiver of sovereign immunity is not at issue in this case. As a result, the venue requirement of Section 21.307(a) could not be construed as a limitation on the waiver of sovereign immunity because proof of waiver is not required in this case. That construction would defeat the Legislature's intent to provide judicial review to the teacher and the school district.

IV. Statutory prerequisites are not jurisdictional outside of the sovereign immunity context.

In his response, the commissioner presents a new argument that the Court can decide this case without looking at sovereign immunity upon which the commissioner and court of appeals previously anchored their position. The commissioner now argues that Section 311.034 provides an independent reason for dismissal.

Section 311.034 is titled "Waiver of Sovereign Immunity." In his brief before the court of appeals, the commissioner argued that Section 311.034 "clarified that waiver of sovereign or governmental immunity depends on the satisfaction of statutory prerequisites." (Appellant's Brief, p. 14)(citing *Cisneros v. State Bd. for Educator Certification*, No. 03-05-00657-CV, 2006 WL 3841515, at *5 and n.2 (Tex. App. - Austin Dec. 29, 2006, no pet.) (mem. op.); accord *Med. Arts Hosp. v. Robison*, 216 S.W.3d 38, 41 (Tex. App. - Eastland 2006, no pet.)). In other words, statutory prerequisites that must be completed to prove waiver of sovereign immunity are jurisdictional. Since the teacher and school district are not required to prove waiver of sovereign immunity, even if Section 21.307 is a statutory prerequisite, it certainly is not jurisdictional.

Accordingly, Section 311.034 does not provide a reason for dismissal of the school district's appeal independent from its sovereign immunity underpinnings.

PRAYER

For the reasons stated in this reply and the Petition for Review on file with the Court, Presidio asks the Court to grant the Petition for Review, reverse the court of appeals' judgment and affirm the trial court's order denying the commissioner's plea to the jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was mailed certified mail, return receipt requested to Daniel L. Geysler, Assistant Solicitor General, Office of the Attorney General, P. O. Box 12548 (MC 059), Austin, Texas 78711-2548, Lead Attorney for Respondent, and Richard L. Arnett, Brim, Arnett, Robinett, Hanner, Connors & McCormick, P.C., 2525 Wallingwood Drive, Bldg. 14, Austin, Texas 78746, Attorney for Interest Party Samuel Papa, on this 16 day of March, 2009.



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