IN THE SUPREME COURT OF TEXAS

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NO. 03-1123

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VAN INDEPENDENT SCHOOL DISTRICT, PETITIONER

v.

SCOTT A. MCCARTY, RESPONDENT

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TWELFTH DISTRICT OF TEXAS

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JUSTICE O'NEILL, dissenting.

The Court, without the benefit of oral argument, summarily resolves an issue of first impression by holding that compliance with non-statutory administrative deadlines was a jurisdictional prerequisite to filing suit in this case. Moreover, the Court does so without acknowledging the impact of its holding. I believe that McCarty exhausted his administrative remedies by requesting the Board to hold a hearing on his grievance and to waive the non-statutory deadline for filing the request. I also believe that the purpose of the exhaustion requirement was satisfied in this case. Because I would hold that the district court had jurisdiction over McCarty's retaliatory discharge claim, I respectfully dissent.

McCarty was an at-will employee of Van Independent School District who sued for unlawful termination under chapter 451 of the Texas Labor Code. As the Court notes, we have held that the trial court lacked subject-matter jurisdiction in a case in which a similarly situated plaintiff failed to

exhaust her administrative remedies by suing a school district for retaliatory discharge without first invoking the local grievance procedures. *Wilmer-Hutchins Indep. Sch. Dist. v. Sullivan*, 51 S.W.3d 293, 294 (Tex. 2001) (per curiam). But unlike the plaintiff in *Wilmer-Hutchins*, McCarty invoked the grievance procedures by requesting a hearing before the Board of Trustees as set out in the local policy; he simply failed to do so within the seven-day deadline set by the policy.[1]

I agree with the Court, as did the court of appeals, that failure to exhaust administrative remedies is a jurisdictional defect. Unlike the Court, however, I do not read the court of appeals' opinion to hold that subject matter jurisdiction can be and was conferred by waiver, ___ S.W.3d at ___; in fact, the court of appeals expressly recognized the proposition that subject matter jurisdiction *cannot* be conferred on a court by waiver.[2] ___ S.W.3d ___, ___ (citing *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 76 (Tex. 2000)). What the court of appeals did hold was that "the matter waived [*i.e.*, the seven-day filing deadline] was not a prerequisite to subject matter jurisdiction." *Id.* The real issue, then, is whether McCarty failed to exhaust his administrative remedies by filing his grievance in an untimely fashion, or whether the administrative deadline was simply a procedural requirement that could be waived.

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[1] I note, however, that the deadline itself was not entirely clear in this case. The superintendent's letter terminating McCarty did not specify a deadline, but merely informed him that he had "the right to request and to be heard by the Board in accordance with policy DGBA (LOCAL)." The policy provides for a three-step grievance process, each with its own deadlines. The District concedes here that the first two steps of the process, which require an employee to discuss a grievance with his principal or immediate supervisor and then with the superintendent, did not apply in McCarty's case because he was terminated directly by the superintendent. Given this departure from the usual procedure, the deadline to request that the matter be placed on the agenda of a future Board meeting (step 3) understandably may not have been readily apparent to McCarty.

[2] I accordingly question the Court's conclusion that the court of appeals' opinion conflicts with *Wilmer-Hutchins* such that we have conflicts jurisdiction in this case. ___ S.W.3d at ___.

The Court effectively agrees with the former proposition by holding that because the Board did not extend the deadline and McCarty did not comply with it, he failed to exhaust his administrative remedies. ___ S.W.3d at ___. But whether a local administrative body like a school district can impose such a jurisdictional deadline is an issue of first impression that the Court decides with little to no analysis.

We have previously addressed the issue of whether administrative deadlines imposed by statute are jurisdictional when exhaustion of administrative remedies is required. In *Schroeder v. Texas Iron Works, Inc.*, we held that a person claiming a violation of the Commission on Human Rights Act (CHRA) must first exhaust the administrative remedies set out in the statute. 813 S.W.2d 483, 485 (Tex. 1991) (citing Act of July 8, 1983, 68th Leg., 1st C.S., ch. 7, 1983 Tex. Gen. Laws 37, *repealed by* Act of May 24, 1993, 73d Leg., R.S., ch. 269, § 5, 1993 Tex. Gen. Laws 1273 (current version at TEX. LAB. CODE §§ 21.001-21.306)). We specifically noted that the *statutory provision* requiring a claim to be filed with the Commission within 180 days after the alleged unlawful practice occurred was "mandatory and jurisdictional." *Id.* at 486. But in contrast to the CHRA, chapter 451 of the Labor Code sets out no administrative prerequisites for bringing a claim against an employer for discrimination based on filing a worker's compensation claim. TEX. LAB. CODE §§ 451.001-451.003. Nor does the Education Code provide an administrative review system governing someone in McCarty's situation; it simply gives the school board the authority to "adopt a policy providing for the employment and duties of district personnel." TEX. EDUC. CODE § 11.163.

I cannot interpret that general provision to give local school boards authority to impose jurisdictional deadlines on employees who assert a statutory claim for retaliatory discharge. I agree

with the court of appeals that strict compliance with the seven-day deadline was not a jurisdictional prerequisite to filing suit. The deadline was rather a local administrative requirement that the Board could waive. *See, e.g.*, *Grigsby v. Moses*, 31 S.W.3d 747, 750 (Tex. App.–Austin 2000, no pet.) (school board did not waive fifteen-day deadline for employee to initially present grievance by listening to employee's complaint without receiving evidence or acting on the merits); *Hernandez v. Meno*, 828 S.W.2d 491, 494 (Tex. App.–Austin 1992, writ denied) (school district waived ten-day deadline for employee to request a hearing by actually conducting an evidentiary hearing on the merits). Indeed, the grievance policy itself expressly contemplated that the deadlines could be waived by mutual consent. That the Board ultimately rejected McCarty's extension request as well as the merits of his case does not mean that he failed to invoke the administrative grievance process for exhaustion purposes.

It is important to keep in mind in cases like this the general purpose of the exhaustion-of-remedies doctrine, which is to prevent courts from interfering with administrative procedures before an agency has been allowed to complete its own decision and review process. *United States v. Paternostro*, 966 F.2d 907, 912 (5th Cir. 1992). That purpose has been met here. By requesting that the Board grant him a hearing and waive the untimeliness of his request, McCarty gave the school board the first chance to consider his grievance, which it did by conducting an evidentiary hearing and denying the grievance.[3] There were no further administrative requirements, pursuant to either

[3] The Court expresses doubt as to the nature of the evidence presented at the closed hearing. ___ S.W.3d at ___ n.13. But the District does not dispute that the Board rendered an alternative decision on the merits; rather, it contends there was no waiver because of the Board's independent denial of McCarty's grievance based on his failure to meet the deadline.

the statute or the local policies, for McCarty to meet before filing his statutory suit for retaliatory discharge.

I would hold that McCarty exhausted his administrative remedies and that the district court had subject matter jurisdiction over his retaliatory discharge lawsuit. Because the Court holds otherwise, I respectfully dissent.

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Harriet O'Neill
Justice

OPINION DELIVERED: May 27, 2005