

June 16, 2009

The Marshall County Board of Education met in special called session on Tuesday, June 16, 2009, at 6:00 p.m. in the Board Conference Room at Jones School.

Members present were Mike Keny, Todd Tietgens, Delinda Owens, Mark Wilkerson, Ann Tears, Curt Denton, Kristen Gold, Craig Michael, and Randy Perryman. No members were absent.

#### Prayer/Pledge

To open the meeting, Chairperson Tears turned the meeting over to Chuck Cagle, School Board Attorney. Referring to the printed agenda, Mr. Cagle stated, with the chairman's agreement, there is no reason to recess for legal advice. He said that questions which had been posed to him thus far only require him to state what the condition of the law is in Tennessee, but if it gets to the point in the meeting where he is being asked how to enforce a law or his suggestions on how a law is to be enforced under a particular set of circumstances, the group may adjourn into an attorney/client privilege meeting. Mr. Cagle pointed out that the board is limited to only two occasions in which a private session takes effect: 1) student disciplinary hearing, and 2) when an attorney is representing his client in either threatened or pending litigation. He went on to say he did not see the need for an attorney/client privilege meeting at this stage, but would reserve the right to go into one should that situation arise.

The first issue Mr. Cagle addressed was in regards to the negotiated contract/hearings for non-tenured teachers. TCA 49-2-203B 8, states the School Board has the power to give a non-tenured teacher a hearing, but is not a mandatory duty of the school board. TCA 49-2-203A addresses the required duties of a school board; 203B is the discretionary duties of the board. He went on to say the Education Improvement Act of 1992 passed the power of not renewing non-tenured teachers from the school board to the director of schools. Mr. Cagle stated that the board can decide to exercise its option under 49-2-203B and give a non-tenured teacher a hearing; at the conclusion of that hearing, there is no decision the school board can make because the school board does not have the power to employ non-tenured teachers, nor does it have the power to grant tenure without the recommendation of the superintendent (TCA 49-2-301). Mr. Cagle mentioned he had been through one non-tenured teacher hearing in the

20+ years of his career; once you give a teacher reasons for non-renewal, that invokes their 14<sup>th</sup> Amendment right and they are entitled to a hearing at that point. He told the board the statute says the only thing to say to a teacher is “for the efficient operation of the school system you’ve been non-renewed.” Mr. Cagle said the school system has two responsibilities to non-rehires: give them a letter of non-renewal in writing, and deliver it prior to April 15.

Mr. Cagle recommended this remain a discretionary duty of the board and that the board not mandate those sorts of hearings. He said that non-tenured teachers are aware they are on continuing contract, unless the system gives them a non-rehire letter prior to April 15; if teachers do not receive a letter prior to April 15 it is understood their contract continues for another year.

In seeking clarification, Mr. Michael stated he did not hear Mr. Cagle say the LEA does not have the discretionary power to grant a hearing or to give reason to teachers for non-rehire. Mr. Cagle responded that the board could give a hearing, if it wished.

Mr. Tietgens asked Mr. Cagle what his recommendation would be regarding granting hearings. He responded the practical effect is that if a non-tenured teacher is evaluated properly and they’re given any reason besides budgetary reasons for non-renewal, if it is performance concerns they can be addressed in the evaluation process, particularly in the summative evaluation process. If the concerns are addressed during this process and the teacher receives a non-renewal letter prior to April 15, it should not come as a complete surprise.

Mr. Tietgens asked what if the evaluation was not poor. Mr. Cagle said the first thing he does in a teacher hearing (disciplinary hearing, grievance process) is he holds up the evaluation and says “this is a 45-minute snapshot in time.” He said evaluators are looking for some very objective things, but there is a time in the summative evaluation where other matters can be discussed, not only what was observed in the three 45-minute segments. If concerns are not addressed in the evaluations, then there should be some directive back to the principal to say we want to make sure they are apprising these teachers along the way of places where they need to improve. Mr. Cagle mentioned that he advocates improvement plans; this will either give proof that the employee involved is improving or it will give all the evidence the system needs for dismissal of the employee.

Mr. Keny agreed that accurate evaluations and improvement plans are vital, but what if the evaluation does not reflect poor performance? Mr. Cagle said evaluations are very objective. He said the way the state model for evaluation is set up, there is no way to give anything other than a top score (a 4 or 5) if the teacher met the responsibilities on the evaluation. He went on to say there is a point in the evaluation that's not used so well, and that's during the summative process. "Yes, you did *these* things, but there's still pending this set of issues." He said such things can be included, whether it be a classified or licensed employee, as attendance, tardiness, classroom management, and other things.

Mr. Wilkerson asked how this applies to support staff. Mr. Cagle said the director has complete control over support staff. Support staff must be notified by June 15, which is 15 days before the end of the contract. There should be some sort of formal or informal evaluation; he said some systems use improvement plans for support staff, as well, to make sure they are doing their job. Support personnel are on year-to-year contracts (fiscal year July 1-June 30).

Mr. Wilkerson asked if he signed a contract three years ago and never signed another annual contract, does he fall under the contract he signed three years ago? Mr. Cagle said yes. Mr. Wilkerson then clarified that if he received a non-renewal letter by June 15, that there's no action the board can take at that point in time. Mr. Cagle confirmed the comment, particularly for classified staff. Mr. Denton asked what if an employee didn't sign a contract. Mr. Cagle said by showing up for work and accepting a paycheck, that is a contract.

Mr. Michael stated that what bothers him is when teachers receive all positive evaluations including positive summation comments and then recommended for rehire by the immediate supervisor, but has never been reviewed by the person who has sole discretion to decide whether or not the person is fired. Mr. Cagle said the board can address in policy some sort of review the director has to go through before the non-renewal decision is made and fit it in before April 15. Before the decision is made, the director has to abide by a set of conditions in order to not renew a teacher, but ultimately that decision belongs to the director. Mr. Cagle said if the board is of the opinion that the director of schools is not fulfilling an obligation that he/she may have to those employees, board members can address it in the director's evaluation and indicate that he/she will have to do better.

Mr. Michael stated that the only purpose of holding a hearing in the case of a non-renewed non-tenured teacher would be to show respect to that individual, to have a platform to air what happened and what the process is, and perhaps give the public a better understanding of the importance of the board selecting the proper leadership. Mr. Cagle said that is one thing that could come out of the hearing; the other thing is that once you go to a hearing and the director of schools then gets specific about things he/she or a principal hasn't seen in a classroom, or there are discipline issues that have not been addressed, that provides the opportunity for future employers to look it up in the minutes possibly resulting in the teacher not getting hired by that employer. He said non-renewal is, in a sense, a way to fresh start people; once you start giving reasons in a hearing, that's on the record which may jeopardize future employment possibilities for that person. Mr. Wilkerson added that it could potentially cause litigation for the board; Mr. Cagle said not necessarily, but under certain circumstances, it could. Mr. Michael added if things came out that weren't in the file, that's a different story; Mr. Cagle said the director should have considered those things, and chose not to bring them up and not renew the teacher. If you bring those into a hearing (something that's regarding the teacher's performance, personal habits, reputation in the community, a disciplinary issue that no member of the board knew about, a circumstance about the teacher that no member of the community knew about), suddenly that becomes public, and what the board has done is jeopardize that person's future employment possibilities. Mr. Keny asked if giving reasons would open litigation to the board. Mr. Cagle said it's hard to tell; he added he teaches his students that if somebody asks him if he could be sued, the answer is always yes. He added it's a matter of proof.

Mr. Cagle continued to say that the legislature passed a statute that says a non-tenured teacher cannot be worked past three years without offering them tenure. If kept the fourth year, the director must make a recommendation for tenure; there is no waiver of tenure in Tennessee. Once tenure is granted, the process for dismissal gets much more complicated. Mr. Denton asked if a teacher receives a non-rehire letter at the end of the school year, then is rehired the following school year does that previous year taught count toward earning tenure. Mr. Cagle answered yes. He added that substitute teaching time does not count toward tenure; interim teaching time does count toward tenure; the last year must have been in a regular (not interim) position. Mr. Michael stated if a teacher has taught outside their certification on a waiver, that's irrelevant. Mr. Cagle stated that was correct.

Mr. Michael stated he didn't understand what could come out in a hearing for a non-tenured teacher that wasn't contained in the personnel file and what the legalities are for not having something in the file. Mr. Cagle stated the law allows the director of schools to look at the short term position of a school in a classroom, and the long term position of a school system in a classroom, and make a decision about whether or not a teacher is renewed based on performance indicators. He said the law in our state authorizes what is essentially a decision based on very subjective reasons, but the objective part of that, we measure in the evaluation process.

To conclude this session, Mr. Cagle addressed the board stating he was asked if he would recommend the routine giving of hearings; he answered no, he would not recommend that, because he sees much more professional jeopardy for a teacher coming out of a hearing than he can see good coming out of it. The second is, would he recommend going into a negotiation session and negotiating this into the contract; he stated you cannot do that under several provisions of the law. The legislature found there are some rights the school board has that cannot be delegated or negotiated; the right to determine whether or not there's a hearing rests solely with the school board. Mr. Cagle said it would be his position, under the Carter County Case, that that cannot be negotiated into an agreement. Mr. Wilkerson asked what if the board did that anyway. Mr. Cagle stated that portion of the contract would stand to be held null and void.

The second issue Mr. Cagle addressed was the open records law in Tennessee. Public records are open to any citizen in the state of Tennessee. The law says a person requests to view a file first. The second thing the school system has to be concerned about is the confidential information contained in personnel files. It's incumbent on the school district to accumulate the record and within a reasonable amount of time (no more than seven days), they give the citizen access to the record. The Public Records Commission established by the state of Tennessee has set up a charge for anything over an hour labor; these charges are allowable charges. The files are produced for inspection, and if that person wishes to purchase the copies, there's a charge for the purchase. If emails are requested, only the emails related to school business are produced.

Mr. Perryman asked that if a person comes in wanting to view someone's file here in the Central Office, is the personal information available. Mr. Cagle said no.

Mr. Cagle wanted to address an issue that had been handed to him on a piece of paper. The production of medical information is not a violation of HIPPA; that's information that's transferred via electronic means, for either diagnostic or billing purposes. Under certain circumstances, the ADA will state a medical record is confidential. There is no state law that says medical records are confidential, but can be raised as a concern under the Americans with Disabilities Act, which is a federal law.

Mr. Cagle stated if a school board member makes an individual request for a personnel record, a school board member is a private citizen making that request, so that person has to follow the same laws. He recommended the school board spend some time during a work session or retreat to study a TSBA-published work on public records in Tennessee.

Mr. Keny asked the time frame for getting personnel records together. Mr. Cagle said the law says a reasonable time not to exceed seven days, and the person whose file is being requested does not have to be notified of the request, unless stated otherwise in the contract.

Mr. Cagle said the law authorizes the board to put together a policy on the production of public records, which he urged the board to do. He also urged the board to adopt a standardized form authorized by the Public Records Commission and used by the state of Tennessee and by the Comptrollers Office, which details with specificity what records the person wishes to see.

Mr. Denton asked if the confidential information was released, what would be the consequences. Mr. Cagle said, in a worst case situation, the judge would say don't do that anymore. He went on to say to get the attention of the court in such a matter, one would have to prove (two of the three) the release of information was done maliciously, recklessly and intentionally.

Ms. Tears asked what if the board passed a motion which does not require board members to pay for copies. Mr. Cagle said that could be considered unconstitutional. Mr. Denton asked if board members would be charged for copies of budget requests. Mr. Cagle said copies of the budget are tools board members need in order to do their work, but if a board member comes in on any given day asking for copies which are not associated with the businesses pending before the board, that's a chargeable offense. Mr. Denton presented the scenario if he's representing a group of people who have come to him with a concern

asking for an investigation and he requests the copies, does he have to pay for the copies. Mr. Cagle said he would go to the director and ask if there's any other way, except for getting a bunch of copies. He went on to say school board members are considered an extension of the administrative staff, so they can come to the Central Office and view a personnel file without staff redacting the confidential information; if they ask for a copy, they will be subject to the charge. Anything else for a school board member would be considered a tool of what they are required to use for their school board business.

For clarification, Mr. Michael asked that if a school board member is a private citizen as far as making a request, when a school board member requests to address the board do they address the board as a citizen or as a school board member? Mr. Cagle said it depends in large part what the board member is going to say. He told the board members they are always private citizens, it's only when they're together as a school board that they are public officials with the power to take action.

For further clarification, Mr. Michael wondered is a school board member bound by the rules citizens are bound by when following the request format. Mr. Cagle said yes.

In referring back to personnel records, Mr. Keny asked about citizens coming to the Central Office to view the records. Mr. Cagle explained that when a citizen requests to view a record, confidential information must be redacted; however, school board members are considered an extension of the school system, so they are allowed access to confidential information, but they are required to keep the information confidential. Mr. Michael asked would that be considered a liability to the board and an individual if that information was misused. Mr. Cagle said yes and no, if the information was repeated to several school board members and they repeated it over and over, the whole school board would be held liable. As an individual, if you view a file and go out and tell the information recklessly, a corporate body such as a school board has the ability to not defend the board member in a lawsuit.

Ms. Tears asked that if a comment is made during a meeting, could that result in legal issues. Mr. Cagle said there is no immunity for the school board; members can individually and collectively be held responsible for statements made during the course of a school board meeting. Mr. Cagle went on to say when a meeting looks like it's reaching a point where personal attacks or confidential information

is liable to be released, he often advises the school board chairman (and members, if they wish) to call for a recess. He said lawsuits have been generated out of statements made by school board members in public session.

Mr. Denton asked about an email which indicated Mr. Cagle recommended a board member make a statement concerning a statement made by a board member in the 5-21-09 meeting, saying the statement made at the May meeting is strictly his own thoughts and does not reflect the thoughts of the remainder of the board. Mr. Cagle said he was called about a situation in which a board member made a remark, but he did not know the contents of the remark. Mr. Cagle went on to say when someone asks him the process he goes through where it is believed that any school board member has made a remark that has implications of liability to the board, he instructs the disclaimer be made. Ms. Owens asked if all board members are to voice the disclaimer or only one member. Mr. Cagle answered that a general statement from the chair would suffice. Ms. Tears asked when the disclaimer should be made. Mr. Cagle answered if a board member makes statements about an employee the chair says "That's your opinion, and we'll ask the director of schools to take a look at that." He went on to say the contract with Dr. Curtis says if a school board member has concerns, those concerns have to be expressed to Dr. Curtis first so that you don't get in a school board meeting and jeopardize either yourselves or the board.

Mr. Keny asked if most school boards have attorneys present at meetings. Mr. Cagle said no; only about half dozen attorneys in the state attend all meetings of the board. He does not recommend it.

In referring to the email trail referred to earlier by Mr. Denton, Mr. Michael said it originated from a meeting held by Dr. Curtis, two teachers and their MCEA representative. Mr. Michael questioned if it was good practice for only one person from an organization be present during a meeting concerning personnel issues. Ms. Tears explained the email in question was sent to all board members after learning about this meeting and talking with the director to learn what was going on and if there was anything the board should do. She went on to say that in an effort to protect the board she suggested contacting legal to learn what the board would need to do, and she sent the email to board members to keep them informed. In answering Mr. Michael's concerns, Mr. Cagle stated it's management's prerogative whether or not to have someone else present in a meeting; he went on to say that when he makes certain decisions in the law firm, he makes sure there is someone with him. He went on to say if the school

system's issue involves personnel, he can't say that in every case the director has to meet with someone else present. He said it is best that someone else, perhaps from Human Resources department, be in attendance to take notes or act as a witness.

Mr. Denton asked if a teacher and their union representative come in to meet with Dr. Curtis, did Mr. Cagle recommend someone else be in the meeting with him. Mr. Cagle said in situations where discipline infractions are involved or where there are allegations of breach of contract, it would be a reasonable practice to have the HR Director in the meeting. He added, if the question is to put that in a policy or is necessary every time, the answer is no, particularly if a teacher arrives with representation and states they would like to meet with the director in confidence; at that point the director should take notes. He concluded it is good business practice to have someone else in the meetings.

Mr. Cagle cautioned the board that emails between board members discussing board issues are open to the public. He advised that in their roles as school board members, less emails are better than more emails.

Mr. Michael told Mr. Cagle he had some information he would like Mr. Cagle to provide legal opinion on. Mr. Cagle asked Mr. Michael to get the information to him and give him a call; then if he advises the board an executive session is necessary, he will, or he will produce a written opinion and put it under attorney/client privilege.

Mr. Michael requested Mr. Cagle go over one more time the tenure situation in which a certified teacher has worked three of the last five years (27 months), whether as an interim position or in a waiver position, as long as the last year is full time in the teacher's certification, that that teacher has to be recommended for tenure. Mr. Cagle said yes, if the teacher is rehired. The formula: Three years out of the past five, or 27 months, the last year having been in a regular position. They must have a baccalaureate degree from an accredited university, must have a license to teach; then after that time, if they are going to be renewed for the fourth year, the superintendent must recommend to the board that that teacher acquire tenure. If the board says yes, then it's done. If the superintendent says I don't recommend, then the board can't grant. If a superintendent doesn't recommend tenure, then the superintendent cannot reemploy the person. Mr. Cagle said the school board has no authority to hire the person under the statute, nor do they have the authority to grant tenure. Mr. Michael added they only

have the authority to grant a hearing. Mr. Cagle said there's a permissive authority for the school board to grant.

Mr. Michael asked what happens if a teacher is hired for the fourth year but is not recommended for tenure. Mr. Cagle said it can't happen. Ms. Owens asked what if this has been done. Mr. Cagle said we go back and correct the record.

Mr. Denton asked if there's a recommendation to vote on tenured teachers as a group or individually. Mr. Cagle said either way, just as long as they vote.

The meeting was adjourned.

Respectfully Submitted,

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Ann Tears, Chairperson

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Dr. Stan Curtis, Director