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Supreme Court of Texas.
Presidio Independent School District, Petitioner,
v.
Robert Scott, as Commissioner of Education, Respondent; Samuel Papa, Interested Party.
No. 08-0958.
January 19, 2010.

Oral Argument

Appearances:Ken Slavin, Kemp Smith LLP, El Paso, TX, for petitioner.

Daniel L. Geyser, Office of the Texas Attorney General, Austin, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson, Don R. Willett and Eva M. Guzman, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument now in 08-0958, Presidio Independent School District vs. Robert Scott, Commissioner of Education.

MARSHALL: May it please the Court, Mr. Slavin will present argument for the Petitioner. The Petitioner has reserved three minutes for rebuttal.

ORAL ARGUMENT OF KEN SLAVIN ON BEHALF OF THE PETITIONER

ATTORNEY KEN SLAVIN: May it please the Court, Section 21.307 of the Texas Education Code does not require the agreement of the Commissioner to a judicial appeal of his decision to a Travis County District Court. Section 21.307 sets forth the process and the limits of a judicial appeal of the Commissioner's administrative decision. And in a dispute that's between a teacher and a school district, either party can appeal the Commissioner's decision under 21.307(a) either to the school district, to the county, District Court in the school district's county or to Travis County District

Court by agreement of the parties. After the decision is made where to file the appeal, the statute requires that the Commissioner be joined as a party to that appeal. The Commissioner is not a party to the administrative proceeding; the Commissioner is the appellate-- administrative appellate tribunal. What happens in the process is as happened in this case, is there was a recommendation to terminate the teacher, there was a hearing examiner appointed who created a record, a factual record and issued a recommendation to the School Board to terminate the teacher. The School Board acted and terminated the teacher, the teacher then appealed that decision to the Commissioner who then took a look at the record created. I don't believe the Commissioner in this case took any additional evidence, although a Commissioner can under the procedures, and then ruled in favor of the teacher holding that he was wrongfully terminated and ordered reinstatement and back pay and benefits. Then at that point, Section 21.307 provides what they call the "Judicial Appeal." And it's important to look at what this creature is and especially what it is not. It's very limited. All that's allowed by the District Court is to look over the record that was created below in the administrative proceeding, then the District Court cannot reverse the decision of the Commissioner unless he finds there was no substantial evidence to support that decision or he finds that the Commissioner did not correctly apply the law or made erroneous legal conclusions. That is all that occurs in a Judicial Appeal. There's no discovery, there's no additional evidence that comes into play, there's no jury trial, there are no claims that can be asserted against the Commissioner or the agency, and it's only a review of the dispute between the teacher and the school district that's determined by that.

JUSTICE NATHAN L. HECHT: You say the Commissioner can take additional evidence, but it's pretty limited, right?

ATTORNEY KEN SLAVIN: It is pretty limited.

JUSTICE NATHAN L. HECHT: Basically it's just to see if there was a procedural problem before the Board of Trustees, right?

ATTORNEY KEN SLAVIN: That's correct. If there's some procedural irregularities that impacted and led to an erroneous decision by the Commissioner.

JUSTICE NATHAN L. HECHT: Does--you know the administrative system is very complex and diverse. Sometimes a tribunal like the PUC has regulatory authority in addition to adjudicative authority. Is that true here? Does the Commissioner have any policy input to this decision-making or regulatory input like some other agencies would?

ATTORNEY KEN SLAVIN: I'm not sure, Your Honor. I know the Commissioner was tasked with recommending changes to the procedures to streamline this process, which is what happened and led to the statute we're talking about today, but I don't --

JUSTICE NATHAN L. HECHT: Well, I mean in a case. Like when this case came up, does--is part of the Commissioner's responsibility to decide what's good policy for hiring and firing teachers, or just to call the balls and strikes?

ATTORNEY KEN SLAVIN: I believe it's to call the balls and strikes. Under the procedure, I believe he is actually -- it's an appeal, although in the administrative sense it's an appeal of what the hearing examiner recommended

and determined. The hearing examiner develops the record, the factual record, and the hearing examiner makes recommendations, findings of facts and conclusions of law. We hear a lot of language similar to nonjury bench trial appeals or things of that nature. The hearing examiner makes those recommendations, then I guess the school board can either accept those or reject those or whatever. In this case, the school board accepted the hearing-- the independent hearing examiner's recommendation and terminated the teacher. At that point I believe the procedure says the Commissioner can't -- they can appeal the Commissioner, but he looks over the record that was developed by the hearing examiner and essentially determines whether or not he made the correct call on the substantial evidence and on the law. The same that the District -- the same process that the District Court goes through yet again when looking at what the Commissioner did. That's my understanding of the process. Section 21.307(a) is clearly referencing the parties to the Commissioner's decision with respect to who needs to agree to the venue of that decision. It begins by allowing either party to appeal to a District Court the decision of the Commissioner, and then it becomes where do the parties agree to do that or not agree.

JUSTICE EVA GUZMAN: So the -- pardon me.

ATTORNEY KEN SLAVIN: Yes, ma'am?

JUSTICE EVA GUZMAN: The Commissioner under 21.307(c) does not become a party until after the initial parties decide?

ATTORNEY KEN SLAVIN: That's what the statute says. It just requires that the Commissioner be made a party to the Judicial Appeal. Obviously that occurs when it's filed. Conceptually that cannot occur before it's filed because it says when it -- it either occurs when it's filed or there is no -- really, the statute is unclear about when that has to occur. I suppose he could be added a week later, but under the Commissioner's argument that would be a subject matter jurisdiction problem and would render any judgment void of that decision. But the statute doesn't say he has to be made a party before or at the time it is filed, it just says he has to be made a party to the appeal. I guess we can assume logically that should be done at the beginning, but the statute doesn't say that.

JUSTICE EVA GUZMAN: So when A(2) says, “If agreed by all parties,” they don't contemplate the fact that the Commissioner will eventually be made a party under C; is that right?

ATTORNEY KEN SLAVIN: No, because at that time, the Commissioner is not statutorily required to be a party. He is only required by the statute to be a party to the appeal. At the time that there's an agreement discussed or made about where to file this appeal, that is before the appeal is filed, so --

JUSTICE HARRIET O'NEILL: Well, as a practical matter why would the Commissioner ever not consent to jurisdiction in Travis County?

ATTORNEY KEN SLAVIN: That's one of our -- I have no earthly idea. Well, we know in this case, they were very candid.

JUSTICE HARRIET O'NEILL: We know why in this case because --

ATTORNEY KEN SLAVIN: Yes, and they're not --

JUSTICE HARRIET O'NEILL: -- it gets rid of the suit. But as a practical matter, I can't think of any reason why the Commissioner who is in Travis County would --

ATTORNEY KEN SLAVIN: I think it was probably a shock to the school lawyer below when the Commissioner raised the issue that they did not want it filed or did not agree to it being in Travis County. But of course the reason for that was to not have his decision reviewed as opposed to wanting Presidio County to be the location.

JUSTICE HARRIET O'NEILL: No, I understand. It just seems to me that the Legislature in writing the "all parties must consent," I wonder how they would have had in mind the Commissioner because --

ATTORNEY KEN SLAVIN: We know from the legislative history when they discuss this provision, they don't even mention the Commissioner. They talk about the parties to the Commissioner's decisions as the one to decide whether to agree to do it in Travis County or not to.

CHIEF JUSTICE WALLACE B. JEFFERSON: And doesn't 307(c) suggest that there's a distinction between the parties and the Commissioner?

ATTORNEY KEN SLAVIN: Yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: C says, "The Commissioner and each party to the appeal must be made a party."

ATTORNEY KEN SLAVIN: That's correct. So it's clearly, it's contemplating something that occurs after the parties have decided where the appeal shall take place. And the purpose of that again is this is not an immunity, a sovereign immunity issue at all. The purpose of that provision is to allow the Commissioner the opportunity to defend his decision if he chooses to do so. The Commissioner doesn't have to come in, he's aligned with the party who prevailed in the administrative proceeding, but if he wants to add to that defense, he certainly has the opportunity to do so.

JUSTICE NATHAN L. HECHT: Well, I'm confused why he should care? Why should he care about defending --

ATTORNEY KEN SLAVIN: As an impartial arbitrator of the deal, I don't think he should, but --

JUSTICE NATHAN L. HECHT: Maybe I just come from a framework of thinking it would be odd to make the trial judge a party to an appeal and having --

ATTORNEY KEN SLAVIN: We used to make trial judges parties to mandamuses and I know at least in the years I've been doing this, there has on occasion been a trial judge that has filed some briefing on a mandamus to support what he did, so I assume it's in that same vein, Your Honor, that they would have an interest in supporting or --

JUSTICE HARRIET O'NEILL: Except that isn't the review and the trial court limited to substantial evidence?

ATTORNEY KEN SLAVIN: It is.

JUSTICE HARRIET O'NEILL: So I'm not sure what could be offered in addition? You couldn't supplement.

ATTORNEY KEN SLAVIN: Well, it's just argument that really can be offered. There's nothing else that the Trial Judge -- as the Commissioner did, just does the same thing the Commissioner did, but only in a judicial setting as opposed to an administrative setting.

JUSTICE NATHAN L. HECHT: But for example, when the PUC or the Railroad Commission or other agencies are here in Court in an appeal of a contested case, they have a separate issue apart from the parties, which is the good of the state, and they're charged with some regulatory authority trying to make things run right, wholly apart from the decision in a particular case. But is there anything like that here?

ATTORNEY KEN SLAVIN: I have not come across anything like that here, Your Honor, so I don't--I have not seen that. Therefore a reasonable construction of 21.307(a)2 is that it refers to the parties listed in that provision, either party to the Commissioner's decision as being the parties that must agree to venue. That alone requires the plea to the jurisdiction to be denied. The interesting issue at which the Court deals with a lot is the sovereign immunity and jurisdictional issue in this case. Not all statutory provisions implicate sovereign immunity, and it's our position that this provision on Judicial Appeal is not a statute that implicates sovereign immunity, other than in one perhaps one unrelated context. And that would be not sovereign immunity, but the governmental immunity of the school district, for example, would be implicated by the statute if the teacher did not prevail and wanted to appeal the decision against the school district. I can see that as being in that context alone the statute might have some immunity implications because the teacher is attempting to recover from the school district his job, his back pay, his monetary costs. But as far as the Commissioner goes, a provision -- sovereign immunity, of course, is designed to protect the state from lawsuits against it that assert either money damages or some sort of equitable relief of injunction to control the state's actions. In other words, waiver of that sovereign immunity allows the choice to the party to sue the state agency that would otherwise be barred by sovereign immunity. So we have immunity to suit of course and immunity to liability and we're focused on immunity to suit at this point. So a provision that mandates that the Commissioner be made a party to a Judicial Appeal between two litigants is not something that implicates sovereign immunity. The school district did not decide it wanted to bring in the Commissioner; the school district did not file any claims and under the section cannot file any claims against the Commissioner for anything or against the state. The limited review in this creature called a “Judicial Appeal,” it's not a lawsuit against the state at all, which is what governmental immunity applies to in the section they refer to because it talks about statutory prerequisites to a suit against a governmental entity. There's nothing in this Judicial Appeal section that makes this a suit against the Commissioner or the State therefore sovereign immunity is simply not implicated at all by this provision as it relates to the Commissioner or the State of Texas. I think according to the Commissioner it's their view that Section 21.307(a)2 is the statute that confers subject matter jurisdiction by the agreement of the parties. Of course, long precedent is you cannot confer subject matter jurisdiction on a court by agreement of the parties. So if you construe this statute to do so, to be a subject matter jurisdiction issue, you're violating that long-standing policy because basically what they're saying is it's a subject matter jurisdiction issue that we were required to agree, we did not

agree, therefore a plea to the jurisdiction is appropriate. That would be contrary to that long-standing principle.

JUSTICE NATHAN L. HECHT: But the Legislature could do that if it wanted to?

ATTORNEY KEN SLAVIN: Yes, but if you look at this statute, we do not believe the text of this statute indicates that the Legislature intended for any of these provisions that are in issue to be jurisdictional, and for those reasons we would request that the Court reverse the decision of the Court of Appeals. If there are no other questions --

JUSTICE PAUL W. GREEN: I have a question for you.

ATTORNEY KEN SLAVIN: Yes, Justice Green.

JUSTICE PAUL W. GREEN: About Mr. Papa's interest in this. If the State prevails or the Commissioner prevails on this, then he remains reinstated and the matter is dismissed, and so the Presidio School District's interest goes away? Is that it?

ATTORNEY KEN SLAVIN: I believe Mr. Papa has filed separate and independent counterclaims below in the District Court below outside of the 21.307 context for breach of contract, for --

JUSTICE PAUL W. GREEN: Okay, so none of that [inaudible]--

ATTORNEY KEN SLAVIN: That's still there. I apologize I don't know the status of that separate lawsuit, but if --

JUSTICE PAUL W. GREEN: The effect of this would be what? I mean if we leave the case as it is, if we agree with the counsel for the Commissioner here, the appeal is dismissed, the Judicial Appeal is dismissed, where does that leave Mr. Papa?

ATTORNEY KEN SLAVIN: That would leave him with the Commissioner's ruling that he's reinstated, that would require the school district to cover his back pay, his benefits, and if it chooses, in lieu of reinstatement to payment of an entire year of his salary under the Commissioner's ruling.

JUSTICE PAUL W. GREEN: So the State's, so the Commissioner's position here cuts against your clients?

ATTORNEY KEN SLAVIN: Exactly. He's aligned with Mr. Papa.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel.

ATTORNEY KEN SLAVIN: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Geyser will present argument for the Respondent.

ORAL ARGUMENT OF DANIEL L. GEYSER ON BEHALF OF THE RESPONDENT

ATTORNEY DANIEL L. GEYSER: May it please the Court, the Education Code does require the Commissioner's consent for a suit brought in Travis County, and the failure to obtain that consent has jurisdictional consequences for two reasons.

JUSTICE PAUL W. GREEN: Well, let me ask you a question, I mean just following it up. Do you agree that your interests are aligned with Mr. Papa?

ATTORNEY DANIEL L. GEYSER: We are aligned with Mr. Papa in this case.

JUSTICE PAUL W. GREEN: But you're asserting an immunity position on behalf of Mr. Papa?

ATTORNEY DANIEL L. GEYSER: That's not right, Your Honor. The Commission is aligned with Mr. Papa in the sense that the Commissioner is defending his judgment in the administrative tribunal, and that judgment isn't just calling balls and strikes. This is a judgment that is construing state law so that it makes sense not just for these teachers in these school districts, but for all teachers in school districts across the state. The adjudication process does have a policy outline, that a Commissioner relies on his expertise to construe state law in a way that makes sense given that he is closest to the ground and has a unique perspective that is different than what a teacher in any given dispute might think or what a school district in any given dispute might think. So this is a policy decision and the Commissioner is there defending the judgment just as the PUC and the Railroad Commission would to make sure that when the Court does look at the Commissioner's decision, it's doing so in light of the expertise of the agency charged with insuring that there is an efficient and orderly system for the state in resolving teacher and school district disputes.

JUSTICE HARRIET O'NEILL: Can you give me a reason, a practical reason, why the Commissioner would ever not consent to suit in Travis County?

ATTORNEY DANIEL L. GEYSER: Of course, Your Honor, I think it's actually the main reason driving Subsection A(2), and it's forum shopping. Geographic convenience is not the only factor that parties take into account when deciding where to sue. They also might be seeking either a friendlier panel or even better precedent. And if the Commissioner, when he's resolving an administrative dispute, if there's a split between say the El Paso Court of Appeals and the Austin Court of Appeals, he has to decide what law to follow and he may-- that may influence his decision.

JUSTICE HARRIET O'NEILL: But isn't this just substantial evidence review?

ATTORNEY DANIEL L. GEYSER: Not entirely, Your Honor. If you look to Subsection F of Section 21.307, the Court is also permitted to review the conclusions of law. So it actually matters very much to the Commissioner that he knows that a party who has brought a suit in a certain forum where the Commissioner is then presumably applying the law of that forum, realizing that the losing party can invoke the local forum as a matter of right, because Subsection A(1) gives the losing party an absolute entitlement to file suit in the default venue. To make sure that that forum then isn't uprooted for an Austin Court of Appeals decision that would result in the automatic and quick reversal of the Commission's decision.

JUSTICE PAUL W. GREEN: But that doesn't make any sense to me. You have opposing parties who obviously have very diverse interests here joining

together to go forum shopping around the state?

ATTORNEY DANIEL L. GEYSER: No, Your Honor, and normally what will happen is one party, and this has actually happened in a case recently, if the winning party at the administrative level realizes what's going on, they will object and they won't consent to Travis County venue, even if Travis County is more convenient for them for other geographic reasons. But sometimes the winning party might not realize what's going on, they don't have the same perspective and expertise as the Commissioner, and the Legislature sensibly realized that the Commissioner isn't forced to rely on the counsel for a private party when defending his own interests once he get the Judicial Appeal.

JUSTICE EVA GUZMAN: Wait a minute. I'm interested in Justice Paterson's dissent and her analysis of the statute and the plain language. When would the Commissioner at that stage have an interest in appealing his own ruling? Because we're looking at the statute and we're talking first about where you're going to appeal.

ATTORNEY DANIEL L. GEYSER: Justice Guzman, I think that the way the statute works is it says that if you look to Subsection C, “The Commissioner must be made a party to an appeal under this section.” So we know that the Commissioner has to be made a party --

JUSTICE EVA GUZMAN: But let's start with the beginning, though, Subsection A.

ATTORNEY DANIEL L. GEYSER: Subsection A, it says, “Either party may appeal the Commissioner's decision.” I think this actually shows that the Legislature did not intend for the Commissioner to be excluded as the only party without a say.

JUSTICE EVA GUZMAN: When would the Commissioner have an interest in appealing his own decision?

ATTORNEY DANIEL L. GEYSER: He wouldn't under the introductory clause of Subsection A, but he has a distinct interest in dictating where the suit is filed against him because at that point he is a party. And if the Legislature had wanted to exclude the Commissioner --

JUSTICE EVA GUZMAN: He's a party at the initial stage when you're deciding whether or not to appeal?

ATTORNEY DANIEL L. GEYSER: He is not a party at the administrative stage, which is why the Legislature did not have to expressly exclude him from the introductory clause of Subsection A, the Commissioner doesn't appeal his own decision.

CHIEF JUSTICE WALLACE B. JEFFERSON: When does he become a party?

ATTORNEY DANIEL L. GEYSER: He should become a party when the suit is filed. If he isn't, then under Subsection C, the suit is jurisdictionally defective and would have to be dismissed. So it's not the case that the Commissioner could be added a week later.

CHIEF JUSTICE WALLACE B. JEFFERSON: Under C, why is the Commissioner named at all? It says, “The Commissioner and each party to the appeal of the Commissioner must be made a party.” If he's already a party at that point, why would the Legislature include, designate him under Subsection C?

ATTORNEY DANIEL L. GEYSER: Mr. Chief Justice, Subsection C I think is designating the parties that have to be in the Judicial Appeal. Under that logic and under Presidio's logic that would mean that the winning party also wouldn't have to be a party to the Judicial Appeal. Presidio could presumably file an appeal that names no one and simply add other parties later. The Commissioner is a party to the appeal in the very same way that the prevailing party is a party to the appeal. Just as Presidio has to contact the prevailing party before filing the Judicial Appeal to know whether the Court has jurisdiction in Travis County, they also have to contact the Commissioner to see if they consent to an appeal in Travis County.

JUSTICE PHIL JOHNSON: Well, or they could just file an appeal in both places and then talk about it. Which is really what's going to happen now because that's the net effect of this if you prevail because Presidio next time is going to file it in both places, and if you object in Austin, then they're going to out to -- isn't that what an appealing party is going to have to do in every case to protect themselves if they want to be in Travis County? They're going to have to file two lawsuits.

ATTORNEY DANIEL L. GEYSER: I don't think so, Your Honor, for the reason that this statute, and especially after the decision below makes it explicitly clear what's required for a party to sue in Travis County. And this is not an onerous duty.

JUSTICE PHIL JOHNSON: Of course, sometimes the State's been known to say, “We're not sure what our position is yet.”

ATTORNEY DANIEL L. GEYSER: Not in this case. In this case, the Commissioner --

JUSTICE PHIL JOHNSON: But they have been known to say that and a prudent party might just say, “Look, let's pay an extra filing fee get it filed. We're going to go one place or the other, then we'll argue with the Commissioner.”

ATTORNEY DANIEL L. GEYSER: I apologize for occasional equivocation, but we don't equivocate when it comes to this issue. The Commissioner is quite clear. When he's approached, either he agrees to the Travis County venue or he doesn't. If he says no, then parties sue in the default forum where they have an absolute entitlement to sue. This is really a statute that sets up a default forum. The default forum is the local forum. That's where the Commissioner assumes the appeal will be filed, and then if a party decides to attempt to uproot the default which they have no right to do. If Papa in this case, the teacher, had objected to Travis County venue, Presidio would have no right to sue in Travis County, and they also then presumably could file two appeals to see what Papa would say after the fact, but I think the statute sensibly sets up the system where you approach the other parties to the appeal and the Commissioner is a party, so you approach the Commissioner as one of the “all parties” that you have to consult and ask if they will consent to a Travis County venue. If the Legislature had intended to exclude the Commissioner from Subjection A(2), it would not have used the phrase, “all parties.” The grammatical paring for either party is both parties or the other party. You wouldn't say, “If either party appeals, then if all parties agree,” if you're only talking about two people.

JUSTICE HARRIET O'NEILL: Well, there could be more than one party below. I

mean you could have several teachers in one suit, so “all parties” would cover that scenario.

ATTORNEY DANIEL L. GEYSER: Your Honor, but that's not what the Legislature had contemplated in Subsection A, and we know that because it said “either party.” It didn't say either side, it didn't say that any party can appeal, it used the language that shows the Legislature was considering this subsection as dictating the rules for either party, meaning either a single teacher or a single school district, not multiple teachers or multiple school districts.

CHIEF JUSTICE WALLACE B. JEFFERSON: Why does 307(c) have to have the word “the commissioner” in it?

ATTORNEY DANIEL L. GEYSER: Because if it doesn't, it will be entirely unclear that the Commissioner has to be made a party to the appeal.

CHIEF JUSTICE WALLACE B. JEFFERSON: “Each party to the appeal” would be under your argument “all parties.” So it would include, it would incorporate the Commissioner, correct?

ATTORNEY DANIEL L. GEYSER: No, Your Honor, because I think the Legislature in Subsection C was trying to be explicit as to who has to be a party to a Judicial Appeal, and instead of --

JUSTICE EVA GUZMAN: I thought I heard you say earlier that the Commissioner was automatically a party in A, so why would you need to specifically identify the Commissioner in C if he's automatically a party?

ATTORNEY DANIEL L. GEYSER: I'm sorry, Your Honor, I may have misspoke.

JUSTICE EVA GUZMAN: I might have misunderstood.

ATTORNEY DANIEL L. GEYSER: No, I'm sure it was my fault. The introductory clause of Subsection A, it says “either party,” and at that point it's clear the “either party” is referring to the teacher or the school district. When you get to Subsection A(2) it says “if agreed by all parties.” At this point, we know from Subsection C that the Commissioner must be made a party to an appeal under this section. It doesn't say under Subsection C, it doesn't say Subsection C through G, it says, “Under the section in its entirety,” which would include Subsection A(2). The use of the word “all” is a word that connotes kind of a categorical sweep. It doesn't mean just a few or just some; it says “all.” And so I think when --

CHIEF JUSTICE WALLACE B. JEFFERSON: If the Legislature had omitted the Commissioner in C, would the Commissioner still be included in C?

ATTORNEY DANIEL L. GEYSER: If the Legislature had omitted Subsection C --

CHIEF JUSTICE WALLACE B. JEFFERSON: Not Subsection C, just “the Commissioner,” and so it says, “Each party to the appeal to the Commissioner must be made a party,” would the Commissioner be included in that phrase?

ATTORNEY DANIEL L. GEYSER: No, Your Honor, and in fact under that circumstance the Commissioner's immunity would bar any suit against him as attempt to join him as a party in this lawsuit. So --

JUSTICE NATHAN L. HECHT: That doesn't make sense to me either. How is this a suit against the Commissioner?

ATTORNEY DANIEL L. GEYSER: In a very real sense, the Commissioner, if you look to the caption alone, is a defendant in the suit. He has to take away his time and attention from his other duties to defend the lawsuit. The Attorney General's office represents the Commissioner, public funds go into the defense of the suit, and in the very same way that the PUC or the Railroad Commission is certainly a party to the suit and certainly defending suits against their entities when they're defending even just administrative rulings that they've made, the Commissioner here too is defending an administrative decision.

JUSTICE NATHAN L. HECHT: Well, that's the part I don't understand. If they were here on a rule making or something that involved the regulation of education, I could understand why the Commissioner would have a stake in it, but if it's just a contested case, one teacher and one school district, it's hard to see why the Commissioner has a dog in that hunt.

ATTORNEY DANIEL L. GEYSER: Justice Hecht, I understand your concern, but I think there is rule making through adjudication. When the Commissioner looks at this rule, and just in this case we're dealing with a statute, it's a matter of first impression, where the Commissioner is trying to decide not just for this dispute but for all disputes, how should this statute be construed for administrative disputes between teachers and school districts in the State of Texas. So I think that the pronouncement in this case does have a policy underbelly to it, and it is important that the Commissioner have an opportunity to defend that ruling in Court when a judicial body is looking and deciding what the law should be.

JUSTICE NATHAN L. HECHT: Is there another statute like 307(c)?

ATTORNEY DANIEL L. GEYSER: I'm not aware off the top of my head of any that are like it or not like it, but I do know that the PUC and the Railroad Commission and other bodies frequently defend the decisions that they've made. And I think this is common place too on the federal side, where they're not only entities on the federal agencies that defend their rulings in courts like the DC Circuit, but their immunity is clearly in place. And when the Legislature --

JUSTICE NATHAN L. HECHT: Our experience is that it's usually split up three ways. The private parties are split two ways, at least two ways, and then the regulatory authority may have even yet a third or a different position. Does that ever happen here? I mean is the Commissioner ever take--is the Commisioner ever unaligned with the party that it ruled for?

ATTORNEY DANIEL L. GEYSER: I can conceive of a situation where that would happen, where for example a party only gets partial relief, or the Commissioner disagrees with both the teacher and the school district for maybe taking extreme views and adopts more of a middle approach, in which case both parties might be appealing the decision. So I think that what the Legislature did, and this just isn't our sense of good policy, this is from the text of the statute, we know the Legislature thought it important that the Commissioner participate in these proceedings, and we know that because the Legislature didn't simply say “The Commissioner may participate,” but in fact if the Commissioner is not made a party, then this suit is jurisdictionally defective. So once the Commissioner must be made a party to

an appeal under this section, we know then that the Legislature wanted the Commissioner to have the same rights as the other parties to the appeal under this section. In fact, it would be unusual for the Commissioner to be the only party defending the decision below without any say in where the suit against him is filed, given the forum shopping concerns that I think are readily apparent just on the face of the statute.

JUSTICE PAUL W. GREEN: Okay. So you say that if this case did go forward in Travis County under these circumstances, nobody here is raising this jurisdictional issue, that some years down the road somebody could jump up and say, “Oh, there was no jurisdiction there, it's all void.”

ATTORNEY DANIEL L. GEYSER: Under the way that this Court has viewed jurisdictional defects that would be true. It's conceivable that the actual, the better approach is to say that once a decision is final and nonappealable, then it can't be reopened to jurisdictional attack. But if Texas continues to abide by the rule that it's followed in the past, then that's absolutely true. But that's the same consequence for any --

JUSTICE PAUL W. GREEN: Do you think that's a good rule in this kind of case?

ATTORNEY DANIEL L. GEYSER: I'm not sure if I think it's a good rule, but I know the Legislature clearly does because in Section 311.034 they amended the Code Construction Act in 2005 to say that the statutory prerequisites are jurisdictional in suits against the government, and they understood then the consequence at that time of what that ruling meant, because they were effectively restoring the rule in Mingez [Ph.], which involved a venue requirement for suits against governmental entities knowing that under the analysis in Dubai [Ph.], those judgments could be reopened to attack even after final judgment, which just goes to show why it's important to meet the statutory requirements. And these requirements are not ambiguous, they're not hard to follow, they're very clear, and under the lower court's decision they are especially clear. So I don't think it's much of a concern that these suits typically will be reopened, assuming that any party after the dispute has been resolved will actually think of reopening it.

JUSTICE EVA GUZMAN: Can you elaborate on your comment about that it would not be, I guess, good policy that the Commissioner not have any say where suit is filed? What are the reasons that would support that statement?

ATTORNEY DANIEL L. GEYSER: I think the primary and the most fundamental reason is the anti-forum shopping concern. The Commissioner has a very distinct interest in ensuring an orderly and efficient and very predictable administrative system. If the Commissioner is reaching decisions on the understanding that the local Court of Appeals precedent will apply, and then the dispute is uprooted to Austin where now the Austin Court of Appeals precedent applies, the Commissioner is going to be stuck relitigating disputes at the administrative level without knowing what law to apply. So if there is a split, the Commissioner has a --

JUSTICE EVA GUZMAN: Are they really relitigating though?

ATTORNEY DANIEL L. GEYSER: Well, certainly their decision is being overturned, so in a way they're kind of spinning their wheels in the initial stage, and if they are overturned and there's a remand, apply a different set of rules, then they are stuck adjudicating the dispute at the administrative level again, which takes additional time and energy and taxpayer dollars in

furthering the administrative process.

JUSTICE DALE WAINWRIGHT: Under your approach, the teacher has just as much power to determine jurisdiction as the Commissioner because all parties have to agree.

ATTORNEY DANIEL L. GEYSER: All parties have to agree, so that is correct. The Commissioner could consent, and the teacher--where the teacher prevails below could withhold consent.

JUSTICE DALE WAINWRIGHT: So you think the Legislature intended to make this appeal jurisdictional based on a case-by-case determination of whether the parties say yes or no?

ATTORNEY DANIEL L. GEYSER: I think that's --

JUSTICE DALE WAINWRIGHT: Not as a category of cases, but they will be all over the map. Sometimes yes, sometimes no, teacher yes, Commissioner yes, Commissioner no. And what if they withdraw agreement after it's filed, five minutes later say, “I've changed my mind. I was wrong”?

ATTORNEY DANIEL L. GEYSER: Well, this of course doesn't present the last question, whether they withdraw the consent. I think the --

JUSTICE DALE WAINWRIGHT: I'm considering the implications of your position.

ATTORNEY DANIEL L. GEYSER: I think that our position is the same, whether the teacher then will withdraw the consent or the Commissioner withdraw the consent, that problem is present in the statute no matter how it's construed with respect to the Commissioner. But I think that kind of the more fundamental point is that the Commissioner, he is-- because he is a party to the dispute and because he is defending his decision, the Legislature would want him to have a say in where it's filed, and I think that the jurisdictional consequences of that even if they are and do appear case by case, they're no more case by case than an exhaustion requirement or a notice requirement where sometimes exhaustion is satisfied, sometimes it's not. Sometimes notice is provided, other times it's not.

JUSTICE DALE WAINWRIGHT: Well, your approach also means that not only did the Legislature want the Commissioner to have say as to where the appeal is handled, the Legislature also wanted the teacher to have equally as much say.

ATTORNEY DANIEL L. GEYSER: Of course, Your Honor, and I think that follows from the idea that the Commissioner is an active litigating defendant in these suits, just the same as the prevailing teacher is.

JUSTICE DALE WAINWRIGHT: So what if the lawsuit's proceeding, it's been on file a week and the Commissioner says, “I don't agree that it be in Travis County, I've changed my mind”?

ATTORNEY DANIEL L. GEYSER: I think that --

JUSTICE DALE WAINWRIGHT: Given your position that this is jurisdictional, not just a venue matter or a defense, it's jurisdictional, can the agreement be changed?

ATTORNEY DANIEL L. GEYSER: Your Honor, I do not know. That's not factually

presented here. I do think that jurisdiction vests typically at the time the suit is filed, and at the time the suit is filed if the Commissioner had provided his consent, then there would be jurisdiction in Travis County. I also think though, again I think this is what's really important, if that concern, if this consideration does concern the Court, that concern applies whether the Commissioner's consent is required or not. It's not a consequence of our reading of the statute; it's a consequence of the other side.

JUSTICE DALE WAINWRIGHT: I understand, but it does raise broader and perhaps more important implications if it's a jurisdictional matter as opposed to just a defensive matter that results in dismissal of the case in that court. What statutory prerequisites in your opinion are not jurisdictional?

ATTORNEY DANIEL L. GEYSER: They're -- in this statute, I think I could go through and try to find ones that aren't, but I think it's easier to find the ones that are.

JUSTICE DALE WAINWRIGHT: Do you think that 311.034 requires all statutory prerequisites to suit, venue, of course, notice because the Legislature intended to change Lotsenheiser [Ph.], so we know notice, but do you think any statutory prerequisites to suit would be jurisdictional?

ATTORNEY DANIEL L. GEYSER: I think that under the plain text of 311.034 all statutory prerequisites by its very terms are jurisdictional. The question is what is a statutory prerequisite? In this case Presidio has conceded that both the agreement, the consent requirement and the venue requirement are prerequisites, the only question is are they jurisdictional prerequisites? I see my time has expired.

CHIEF JUSTICE WALLACE B. JEFFERSON: Have you concluded your answer to that question?

ATTORNEY DANIEL L. GEYSER: I won't take up more of the Court's time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel.

ATTORNEY DANIEL L. GEYSER: Thank you.

REBUTTAL ARGUMENT OF KEN SLAVIN ON BEHALF OF PETITIONER

ATTORNEY KEN SLAVIN: I believe, Justice Green, that finality of judgments is a good policy, and I believe that strictly construing the statute so as not to divest a court of subject matter jurisdiction is a good policy, and those are the policies of this state. That is why I do not believe this statute implicates sovereign immunity or rises to jurisdictional level. There are requirements in the statute, they're not clear of timing issues, they're not clear how the agreement even should be. Is it in writing, when does it have to be reached? For example, let's say the school district and the teacher's attorney, he understands the teacher's attorney would prefer the case to be filed in Travis County in conversations. The deadline is approaching, he can't reach him. That's his understanding, he files the appeal in Travis County and then a week later the teacher says, “Okay, I'll agree to file it,” but he didn't agree beforehand. Under the Commissioner's position, subject matter jurisdiction would defeat any judgment rendered in that case even if the Commissioner never objected, even if no one else ever objected, despite anything in the statute that sets the deadline that says specifically these

things have to occur prior to suit. In fact, the Commissioner being joined as a party is not a prerequisite to the suit; it's something that happens at the time the suit is filed. So none of these provisions, while they may be requirements, can be seen as jurisdictional in our position. And for --

JUSTICE HARRIET O'NEILL: Has the Attorney General's position on the forum shopping aspect of the Commissioner's permission, this seems to me like just a substantial evidence review adjudication of fact finding basically and it's hard for me to see how the different laws of the forum could invite forum shopping.

ATTORNEY KEN SLAVIN: Well, I don't understand the forum shopping because opposing parties have to agree. The litigants with a stake in the outcome, one who has prevailed and one who has not or maybe that had partially prevailed have to consent to jurisdiction in Travis County, so I don't see how that implicates forum shopping to begin with.

JUSTICE HARRIET O'NEILL: Well, in terms of the Commissioner, why the Commissioner might not want to be in Travis County if the Third Court of Appeals has construed some regulation in a way that's not favorable to the Commissioner's decision, they might want to end up if there's a split in the circuits, or in the courts of appeal.

ATTORNEY KEN SLAVIN: Well, I think we need to -- I understand the concern, but I think we need to presume that all appellate tribunals and trial tribunals are attempting to construe the laws and apply them correctly, and that's why we have Appellate Courts and the Supreme Court if necessary to be the final arbiter on those legal conclusions. But it's no different; there is no policy difference between the Commissioner wanting to support his rulings, his legal conclusions, and a trial judge wanting to support his legal conclusions on an appeal. I mean the Commissioner is not in any separate or distinct policy situation, and all of these, Justice, like you said, all that we're looking at is the record that's been developed below and the legal conclusions drawn from that evidence and whether or not they were correctly decided.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Slavin.

ATTORNEY KEN SLAVIN: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The cause is submitted and the Court will take another brief recess.

MARSHALL: All rise.

[End of proceedings.]

Presidio Independent School District, Petitioner, v. Robert Scott, as Commissioner of Education, Respondent; Samuel Papa, Interested Party.
2010 WL 303246 (Tex.) (Oral Argument)

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