

No. 21-21

In The
Supreme Court of the United States

CAROLINE ROSS,

Petitioner,

v.

JUDSON INDEPENDENT SCHOOL DISTRICT,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether the Respondent, Judson Independent School District (JISD or District) violated Petitioner Caroline Ross's procedural due process rights under 42 U.S.C. § 1983 when, after an investigation into her violation of several JISD policies and a hearing, the JISD Board of Trustees voted not to renew Ross's term employment contract.

LIST OF PARTIES

Petitioner is:

Caroline Ross

Respondent is:

Judson Independent School District

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory

decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Tex. Const. Art. I, § 16:

Sec. 16. No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.

Tex. Educ. Code § 11.201:

(d) The duties of the superintendent include:

. . . .

(4) initiating the termination or suspension of an employee or the nonrenewal of an employee's term contract;

. . . .

Tex. Educ. Code § 21.203:

(a) Except as provided by Section 21.352(c), the employment policies adopted by a board of trustees must require a written evaluation of each teacher at annual or more frequent intervals. The board must consider the most recent evaluations before making a decision not to renew a teacher's contract if the evaluations are relevant to the reason for the board's action.



STATEMENT OF THE CASE

In this case, Petitioner Caroline Ross challenges the decision by Respondent Judson Independent School District's (JISD or District) Board of Trustees not to renew Ross's term employment contract, following an investigation and hearing on allegations that Ross had violated several JISD Board policies. Ross alleges her constitutional right to due process was violated due to the introduction of hearsay at the non-renewal hearing, by the Board not considering her most recent evaluation and disregarding its policy that only the superintendent may recommend non-renewal, and for non-renewing her for an action which was not prohibited until after she was non-renewed. JISD argues that Ross did not have a protected property interest in her term contract after the end of the contract's term, and she received all the process to which she was due.

A. Factual Background

The JISD employed Ross as a campus principal, pursuant to a term employment contract for the 2015-2016 school year.¹ Chapter 21 of the Texas Education Code governed her contract.² Pursuant to sections 5.1 and 5.2 of her contract, Ross was obligated to perform her assigned duties with reasonable care, skill and diligence, and to comply with all JISD Board policies and regulations.³ Under section 9.2 of Ross's contract, JISD

¹ ROA.145-46, ROA.757-58.

² ROA.757-58.

³ ROA.757-58.

had the right to non-renew the contract in accordance with Chapter 21 of the Texas Education Code and JISD Board policy.⁴

1. Investigation and Placement on Administrative Leave

JISD Board policy CAA (LOCAL) requires all employees who are involved in financial transactions to act with integrity and diligence in carrying out duties involving JISD's fiscal resources.⁵ JISD Board Policy CFD (LOCAL) provides that campus principals are responsible for the proper administration of District and campus activity funds and student activity funds in accordance with state law, local policy, and District-approved accounting practices.⁶ JISD Board policy DH (LOCAL) requires all JISD employees to perform their duties in accordance with state and federal law, District Board policy, and the ethical standards set out in the Texas Educators' Code of Ethics, found in policy DH (EXHIBIT).⁷

Ross received annual training on JISD Board policies and procedures relating to receiving, keeping, and disbursing campus activity funds, and had an understanding of what the process was and what she had to do in order to be in compliance with the requirements.⁸

⁴ ROA.757-58.

⁵ ROA.759-64.

⁶ ROA.765.

⁷ ROA.766-69, ROA.770-72.

⁸ ROA.773-74.

JISD's cash handling training made clear that the campus principal assumes the responsibility for activity fund transactions, approving disbursements in accordance with the procedures manual and the safe-keeping of funds.⁹

In addition to the annual activity fund training, JISD implements an Activity Fund Manual that includes an explanation of the policies and procedures for the handling of campus activity funds, including the handling and spending of those funds.¹⁰ The Activity Fund Manual makes clear that the campus principal is responsible for the proper collection, disbursement and control of all activity funds at the campus.¹¹

On January 9, 2014, Ross signed an Annual Activity Fund Review Acknowledgment Form for the 2013 accounting period, and received a copy of the internal review report that set out findings and recommendations intended to enhance the controls and procedures of the activity funds of Metzger Middle School (MMS), where Ross was the principal.¹² In signing the Annual Activity Fund Review Acknowledgment Form, Ross declared that she acknowledged, understood, accepted and agreed with the findings of the internal review, and stated the following:

⁹ ROA.784-95.

¹⁰ ROA.796-881, ROA.882-94.

¹¹ ROA.799.

¹² ROA.783, ROA.887, ROA.895-99.

I agree to adhere to the recommendations given to me by the business services department in order to ensure that the Funds at my campus are run efficiently and appropriately. I agree to improve the controls and procedures of our Funds so that the use of these funds enhance the education of our students. I understand that the policies and procedures for proper use of these Funds can be found in the Campus and Student Activity Fund Procedures Manual provided by the business services department. I also understand that if I do not follow district policy related to the transactions of these Funds I am subject to disciplinary action, which might include, but is not limited to, termination of employment.¹³

An Annual Activity Fund Review was conducted for MMS involving expenditures in 2014 and 2015, which resulted in a number of concerns, including checks that were not counter-signed by two individuals and transactions that did not have all of the documentation required before payments could be made.¹⁴

On February 24, 2016, Ross was placed on paid administrative leave pending the outcome of an investigation into these concerns regarding mishandling of funds at MMS.¹⁵ The investigation included interviewing multiple employees.¹⁶ The investigation uncovered multiple instances of conduct by Ross which violated

¹³ ROA.895.

¹⁴ ROA.888-89.

¹⁵ ROA.900.

¹⁶ ROA.901-08.

JISD Board policy and the terms of her employment contract.

During the investigation, a spreadsheet was prepared regarding MMS checks which reflected payments made with missing or insufficient documentation.¹⁷ A total of 49 checks from MMS were tested, and sixty percent (60%) of those checks showed errors involving either missing or incorrect documentation.¹⁸ In addition to the missing or incorrect documentation uncovered, problems such as failing to redeposit change from some vendor checks, paying sales taxes when not required, and failing to enter required electronic requests to spend funds were found in the audit.¹⁹ Several of these same concerns had been found in the prior audit that Ross received on January 9, 2014, yet she had failed to remediate the issues.²⁰

JISD requires two signatures on checks drawn on campus bank accounts as a safeguard to make sure money is being properly disbursed.²¹ In violation of policy, Ross had permitted and authorized her secretary to sign Ross's name to campus activity fund checks.²² During JISD's investigation, Ross instructed her secretary to falsely tell investigators that Ross was unaware that she [the secretary] was signing Ross's names

¹⁷ ROA.890-94, ROA.909.

¹⁸ ROA.893.

¹⁹ ROA.893-94.

²⁰ ROA.893-94, ROA.895-99, ROA.909.

²¹ ROA.886.

²² ROA.910, ROA.913.

to campus checks.²³ Based upon the findings made in connection with the most recent audit of the MMS campus activity funds, the investigation found that Ross was not fulfilling her duties as set out in JISD's Activity Fund Manual.²⁴

In addition, the investigation revealed that Ross charged fees, or permitted students to be charged fees, to attend campus pep rallies.²⁵ Charging students to attend pep rallies is not a permissible fund-raising activity in JISD.²⁶ Ross was also found to have charged or permitted students to be charged for composition books paid for by JISD funds.²⁷ Selling composition books paid for by district funds is not a permissible fund raising activity in JISD.²⁸

Ross also charged or permitted students to be charged to attend choir concerts, theater productions, and special events, and to get temporary student IDs.²⁹ When questioned by an assistant principal about the practice of charging students to attend student activities, Ross told the assistant principal that it was Ross's campus, and to follow Ross's lead.³⁰

²³ ROA.911, ROA.913.

²⁴ ROA.894, ROA.907-08.

²⁵ ROA.777, ROA.916-17, ROA.926-27.

²⁶ ROA.883-84.

²⁷ ROA.781-82.

²⁸ ROA.884.

²⁹ ROA.778-80, ROA.916, ROA.924-25, ROA.928.

³⁰ ROA.917-18.

During the investigation, it was further discovered that Ross charged faculty and staff to wear jeans at MMS and used some of the money obtained as a result of those charges to, among other things, pay parents for gas money.³¹ Additionally, some of the money Ross had collected went into a petty cash fund that Ross referred to as her “pot” and which she would use to pay non-District authorized expenses.³²

During the course of the investigation, JISD discovered that Ross’s Assistant Principal, Nato James, had observed a bottle of alcohol in Ross’s vehicle while it was parked on school property.³³ Another MMS Assistant Principal disclosed that Ross had appeared to be inebriated at a 2015 school ceremony for students and parents.³⁴ JISD Board policies DH (LOCAL) and DH (EXHIBIT) prohibit employees from possessing, using or being under the influence of alcohol or any alcoholic beverage on school grounds or at school-related activities.³⁵

JISD’s investigation also uncovered that Ross shared her passwords with her secretary and other JISD employees and had them perform her duties on JISD software applications.³⁶ JISD’s acceptable use

³¹ ROA.775-76.

³² ROA.915-16, ROA.922-23, ROA.932-36, ROA.937-41.

³³ ROA.944-45.

³⁴ ROA.919-21, ROA.928.

³⁵ ROA.767, ROA.946.

³⁶ ROA.904-06, ROA.910, ROA.912, ROA.913, ROA.915, ROA.928, ROA.947-48, ROA.952-54, ROA.955-56, ROA.960.

agreement and administrative policies relating to technology prohibit employees from sharing usernames and passwords.³⁷ Ross agreed to abide by JISD's acceptable use policy and violated its provisions by sharing her passwords and requiring others to perform her duties.³⁸

During the course of the investigation, it was also discovered that Ross, as a partner in a production company, was involved in the making of a private film about another employee of JISD, a film that was not authorized by JISD, and which Ross often worked on during school hours.³⁹ Ross furthermore had her campus secretary, Laura Hopkins, run personal errands for her during the workday.⁴⁰

2. Ross's Term Contract Non-renewal Hearing

On May 19, 2016, the JISD Board of Trustees voted to approve the Superintendent's recommendation to propose the non-renewal of Ross's employment contract at the end of the contract term.⁴¹ Contrary to Ross's assertion in her Petition, Superintendent Carl Montoya recommended to the Board at a public meeting that they propose Ross's contract for non-renewal.⁴²

³⁷ ROA.950-51, ROA.961-62, ROA.966-71.

³⁸ ROA.961-68, ROA.970, ROA.974-75.

³⁹ ROA.918-19, ROA.931.

⁴⁰ ROA.919, ROA.928, ROA.942-43.

⁴¹ ROA.984-87.

⁴² ROA.988-91.

The same day, JISD delivered a Notice of Proposed Non-renewal to Ross, which set out the reasons supporting non-renewal, as found in the applicable JISD Board policy, DFBB (LOCAL): (2) failure to fulfill duties or responsibilities; (3) incompetency or inefficiency in performance of duties; (6) failure to comply with Board policies or administrative regulations; (15) failure to meet standards of professional conduct; and (29) misrepresentation of facts to a supervisor or other JISD official in the conduct of District business.⁴³ The Notice of Proposed Non-renewal also notified Ross of her right to request a hearing, and provided her with the JISD Board policies that govern the hearing process, as well as some of the evidence supporting her proposed non-renewal.⁴⁴

On May 20, 2016, Ross, via her chosen representative, requested a hearing before the Board of Trustees on her proposed non-renewal.⁴⁵ Ross specifically requested that the hearing be open to the public, citing state law and JISD Board policy.⁴⁶ JISD provided Ross, via her representative, with notice on June 1, 2016, that Ross's secretary (Laura Hopkins) had resigned her employment and was refusing to appear at the non-renewal hearing.⁴⁷

⁴³ ROA.988-91.

⁴⁴ ROA.988-1015.

⁴⁵ ROA.1016-17.

⁴⁶ ROA.1016-17.

⁴⁷ ROA.1018-19.

On June 7, 2016, the Board of Trustees conducted a hearing on the proposed non-renewal of Ross's term contract.⁴⁸ As the hearing began, Ross confirmed on the record that she wanted the hearing to be open to the public.⁴⁹ The hearing was called to order at 9:27 a.m. and was concluded and adjourned at 6:44 p.m.⁵⁰ Both parties examined and cross-examined 11 witnesses, including Ross.⁵¹ Contrary to Ross's assertion in her Petition, she conceded in the trial court that the Board of Trustees considered her most recent evaluation at the non-renewal hearing; she merely takes issue with the weight and credibility the Board members allotted to the evaluation.⁵² Following the presentation of evidence, the Board voted to non-renew Ross's employment contract.⁵³

On June 9, 2016, Ross was notified by letter to her representative that her 2015-2016 contract with the JISD had been non-renewed, pursuant to the Board of Trustees public meeting held on June 7, 2016, based upon the testimony of the witnesses and the documentary evidence, and founded upon her job-related misconduct, as set out in the Notice of Proposed Non-renewal and follow-up communications.⁵⁴

⁴⁸ ROA.1020-27, ROA.1032-33.

⁴⁹ ROA.1026, ROA.1032-33.

⁵⁰ ROA.1020, ROA.1029.

⁵¹ ROA.1020-24.

⁵² ROA.1822-23.

⁵³ ROA.1028-29.

⁵⁴ ROA.1034-35, ROA.1036-37.

3. Texas Commissioner of Education Denies Ross's Appeal

Ross appealed her non-renewal to the Texas Commissioner of Education, and the Commissioner issued an opinion upholding Ross's non-renewal.⁵⁵ The Commissioner held that there was substantial evidence that Ross had violated JISD's pre-established Board policy reasons for non-renewal.⁵⁶ The Commissioner's opinion included the following Findings of Fact, based on substantial evidence:

- Ross was employed by JISD under a term contract as a principal.
- JISD's principals are responsible for the proper administration of activity fund transactions, in accordance with District policy, and JISD requires documentation for expenditures and two signatures per check.
- Ross failed on numerous occasions to have proper documentation for expenditures and two signatures per check. Further, Ross directed her secretary to sign checks for her. Ross denied that she allowed her secretary to sign checks for her, and told her secretary to lie to JISD investigators about this matter.
- Ross engaged in impermissible fundraising activities by charging students

⁵⁵ ROA.1038-43.

⁵⁶ ROA.1038-43.

for composition books paid for by JISD and for attending events such as pep rallies and performances. Ross also charged faculty and staff to wear jeans.

- Ross was in possession of alcohol on school property and appeared inebriated at a school ceremony.
- Ross improperly shared JISD passwords and directed others to perform her duties.
- Ross worked on an outside film project during her work hours and was not truthful with JISD officials when questioned about it.
- Ross had her secretary run personal errands for her during the workday.⁵⁷

Contrary to Ross's assertions, her non-renewal was upheld by the Commissioner and found to be supported by substantial evidence as to numerous JISD Board Policy violations, many of which had nothing to do with the testimony regarding her dishonesty, which she claims was hearsay.⁵⁸ Furthermore, and contrary to Ross's assertions, the substantial evidence supporting the non-renewal of her contract was neither stale nor impermissibly retroactive, as the Commissioner specifically found that Ross had violated JISD's

⁵⁷ ROA.1039-40.

⁵⁸ ROA.1039-40.

pre-established reasons for non-renewal, listed in its Board policy.⁵⁹

The Commissioner also held that Ross had failed to exhaust administrative remedies as to her claims that JISD's decision was arbitrary, capricious, or unlawful by wholly failing to cite to the local record or supporting authority as to these claims.⁶⁰ Contrary to Ross's assertion in her Petition, the Commissioner did not materially misapprehend the record; instead, she failed to cite to any evidence in the local record demonstrating that she had raised a hearsay objection.⁶¹ Ross's failure to cite to the record on this and other points is repeated in her Petition. Also contrary to Ross's assertion, the local record was properly submitted to the Commissioner.⁶²

The Commissioner further held that Ross's due process rights could not have been violated because there is no property interest in a term contract beyond the contract's term under the Texas Education Code, thus there is no entitlement to due process when an educator contract is non-renewed.⁶³ The Commissioner further determined that, pursuant to state law and its own policies, JISD was not required to apply the hearsay rule at the non-renewal hearing and that Ross failed to cite to the local record to support her assertion

⁵⁹ ROA.1038-43.

⁶⁰ ROA. 1040.

⁶¹ ROA.1040-41.

⁶² ROA.1038-43.

⁶³ ROA.1041, ROA.1043.

regarding hearsay objections, thus the hearsay had not been objected to at the hearing and was probative.⁶⁴

4. Procedural History

Ross did not exercise her right of judicial appeal of the Commissioner's decision and instead filed a new suit against JISD, alleging discrimination based on race, sex, and age in violation of the Texas Commission on Human Rights Act.⁶⁵ Ross subsequently added § 1983 claims for due process and free speech against JISD and added JISD administrators and Board of Trustees members as defendants.⁶⁶ The case was removed to federal district court on federal question grounds.⁶⁷ The district court issued summary judgment on all of Ross's claims, finding the "absence of a valid property interest in continued employment is fatal to Ross's claim," and while her "attacks on the reasonableness of the procedures used by JISD at the hearing, standing alone, will not support her property interest claim," JISD complied with state law and its own policies in conducting the non-renewal hearing.⁶⁸ Ross appealed to the Fifth Circuit Court of Appeals, which affirmed the district court's judgment in a published opinion.⁶⁹ Ross now petitions this Court to

⁶⁴ ROA.1041, ROA.1043.

⁶⁵ ROA.24-33.

⁶⁶ ROA.145-55.

⁶⁷ ROA.11-15.

⁶⁸ ROA.1874-76.

⁶⁹ Petitioner's Appx. C.

reverse the Fifth Circuit's decision. JISD asks this Court to deny the Petition.



REASONS FOR DENYING PETITION

Pursuant to Rule 10 of the Court's Rules, review on a petition for a writ of certiorari will be granted only for compelling reasons. *See* U.S. Supreme Court Rule 10. The Court should deny the Petition in this case because the underlying decision does not conflict with the decision of another court of appeals nor does the decision decide an important federal question in a way that conflicts with relevant decisions of the Court. *See id.* Moreover, this case does not involve an important question of federal law that "has not been, but should be, settled by this Court." *See id.* Instead, the Petition asserts error based on alleged erroneous factual findings and the misapplication of properly stated rules of law, which "rarely" results in a petition being granted. *See id.*

A. No Important Federal Question Is Presented; Ross's Property Interests Were Not Implicated When Her Employment Contract Was Not Renewed

To defeat summary judgment, Ross was required to show, through competent evidence, that a triable issue of fact existed as to whether: (1) she was deprived of a protected interest, either in liberty or property; *and* (2) she was deprived of the process to which she

was due. See *Kentucky Dep’t of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). The district court properly found that Ross’s due process claim failed on both counts.⁷⁰

In her Petition, Ross makes no argument that she had a property interest in her term contract, instead complaining about the process by which it was non-renewed. However, without a cognizable property right, a lack of process is insufficient to establish Ross’s claim. *Nunez v. Simms*, 341 F.3d 385, 387–88 (5th Cir. 2003).

In *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487, 1493 (1985), this Court held that a state-conferred property interest in continued employment cannot be deprived without due process of law. To succeed on her due process claim, Ross must have a “legitimate claim of entitlement” to a property interest, as determined by state law. *Nunez*, 341 F.3d at 387–88. However, pursuant to Texas law, there is no entitlement to due process protections when an educator’s term contract is non-renewed. Tex. Educ. Code § 21.204; see also *Ray v. Nash*, 438 Fed. Appx. 332, 335 (5th Cir. 2011); *Los Fresnos Consol. Indep. Sch. Dist. v. Vazquez*, 481 S.W.3d 742, 746 (Tex. App.—Austin 2015, pet. denied); *Nairn*, 366 S.W.3d at 245. Such a contract creates no property interest of any kind beyond the period of time stated in the contract. *Perry v. Sindermann*, 408 U.S. 593 (1972). Viewing Ross’s complaints in the light most favorable to her, at most she had a

⁷⁰ ROA.1873-76.

unilateral expectation of continued employment because she felt she was a strong principal and had received positive appraisals. “A unilateral expectation of continued employment, however, does not create a constitutionally protected property interest.” *Ray*, 438 Fed. Appx. at 335 (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)) (“To have a property interest in a benefit, a person clearly must have . . . more than a unilateral expectation of it.”). Because Ross does not have a constitutionally protected property interest in her position with JISD beyond her contract’s term, she is unable to establish a violation of due process. *See* Tex. Educ. Code § 21.204(e) (a teacher does not have a property interest in a contract beyond its term).

B. Ross Received All the Process She Was Due

Ross’s due process claim was properly denied because she received all the process to which she was entitled under state law, which more than meets the minimum constitutional requirements of notice and an opportunity to respond. *Loudermill*, 470 U.S. at 546.

The Texas Education Code provides the procedures which must be followed to non-renew an educator term contract such as Ross’s. The Board of Trustees must give written notice of its proposal to non-renew, and if the employee requests it, she is given a hearing on the proposed non-renewal before the Board. Tex. Educ. Code § 21.206, .207. The hearing shall be closed

unless the employee requests an open hearing, and shall be conducted in accordance with rules adopted by the Board. *Id.* at § 21.207. At the hearing, the employee may have a representative of her choice, hear the evidence supporting the reasons for non-renewal, cross-examine adverse witnesses, and present evidence. *Id.*

Following the hearing, the employee is entitled to notice of the Board's decision. *Id.* at § 21.208. An employee who disagrees with the Board's decision is entitled to appeal to the Commissioner of Education. *Id.* at § 21.209. Here, Ross was given written notice, requested a hearing before the Board, and requested that the hearing be open to the public. Ross was provided with notice of the charges against her, a pre-discharge hearing at which she was represented by counsel and allowed to call and cross-examine witnesses and administrative review of the non-renewal decision by the Texas Commissioner of Education.⁷¹

At the non-renewal hearing before the Board, Ross was represented by the advocate of her choice who presented evidence, cross-examined witnesses, and heard the evidence supporting her non-renewal.⁷² Ross complains in her Petition that the Board did not review her most recent performance evaluation at the non-renewal hearing, but conceded in the trial court that it was reviewed by the Board, she merely felt that it was not

⁷¹ ROA.1822-23, ROA.1825, ROA.1829.

⁷² ROA.750-51.

given adequate weight.⁷³ Furthermore, the statutory provision only requires that the Board even “consider the most recent evaluations before making a decision not to renew a teacher’s contract *if* the evaluations are relevant to the reason for the board’s action.” Tex. Educ. Code § 21.203. Here, the reasons for the Board’s action were serious policy violations, including misconduct and untruthfulness by Ross uncovered during an investigation triggered by negative audit findings, rather than remediable performance issues which might reasonably be addressed in an annual evaluation.

Contrary to Ross’s assertion, the rules of evidence are only applicable to a non-renewal hearing before a Board if the Board of Trustees provides for their application in its own policy. *Los Fresnos Consol. Ind. Sch. Dist. v. Vazquez*, 481 S.W.3d 742, 745 (Tex. App.—Austin 2015, pet. denied). As found by the Commissioner, JISD’s Board policy did not require the hearsay rule to be applied at non-renewal hearings, and contrary to Ross’s assertion, JISD followed its policy in conducting the hearing.⁷⁴ The Commissioner further found that Ross had failed to exhaust her administrative remedies as to her arguments that JISD’s decision was arbitrary, capricious, or unlawful.⁷⁵ The key consideration is the availability of due process, not whether the plaintiff has taken full advantage of it. “[N]o denial

⁷³ ROA.1822-23.

⁷⁴ ROA.1000-004, ROA.1038-43.

⁷⁵ ROA.1038-43.

of procedural due process occurs where a person has failed to utilize the state procedures available to him.” *Rathjen v. Litchfield*, 878 F.2d 836, 839–40 (5th Cir. 1989). When a school employee fails to exhaust administrative procedures available to her, she has not been deprived of due process. *Id.* at 841. Ross cannot ignore the process extended to her and later complain that she was not given due process. *Galloway v. State of La.*, 817 F.2d 1154, 1158 (5th Cir. 1987).

Contrary to Ross’s assertions, her contract was not non-renewed in violation of Texas’s constitutional prohibition on retroactive laws. Instead, even though she did not have a property right in her employment contract when it was non-renewed at the end of the contract term, she was still given all the process she was due, in accordance with state law and JISD Board policy, as held by the Texas Commissioner of Education, the district court, and the Fifth Circuit.



CONCLUSION

For the reasons shown above, the Petition should be denied.

Respectfully submitted,

KATIE E. PAYNE,

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