

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 17, 2004 Session

**GLORIA WINDSOR v. DEKALB COUNTY
BOARD OF EDUCATION, ET AL.**

Appeal from the Chancery Court for DeKalb County
No. 01-154 Vernon Neal, Chancellor

No. M2002-00954-COA-R3-CV - Filed April 22, 2004

This appeal involves an attempt by a dismissed tenured teacher to obtain common-law certiorari review of her dismissal. After voluntarily dismissing her own Petition for Review properly filed pursuant to Tennessee Code Annotated section 49-5-513, she challenges the chancellor's Order dismissing her Petition for Common Law Writ of Certiorari. We affirm the action of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed and Remanded**

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Gloria Windsor, Auburntown, Tennessee, Pro Se.

Sue N. Puckett-Jernigan, Smithville, Tennessee, for the appellees, Aubrey Turner and Weldon Parkinson.

OPINION

Appellant Gloria Windsor was a tenured special education teacher with DeKalb County High School. On September 11, 2001, at its monthly meeting, the DeKalb County School Board certified charges against Appellant alleging incompetence, inefficiency, insubordination and unprofessional conduct. On November 19, 2001, after a five-day hearing, the DeKalb County School Board dismissed Ms. Windsor. The record on appeal reveals that a transcript of that November 19 hearing was prepared and that Appellant Windsor was represented by counsel at the proceeding. The record also contains a newspaper article relating the result of the hearing. No transcript of that hearing appears in the otherwise voluminous record on appeal.

Before proceeding to the consideration of Appellant's issue on appeal we must relate the convoluted procedural history of the actions involving Gloria Windsor and the DeKalb County School Board. The record before us reveals that, pursuant to the Tennessee Teacher Tenure Act, Appellant filed a petition in Chancery Court for DeKalb County seeking judicial review. Her petition was filed on December 21, 2001. On January 12, 2002, Petitioner also filed a Petition for Common-Law Writ of Certiorari in the circuit court seeking review of the same DeKalb County School Board action. Counsel for DeKalb County defended vigorously against both petitions. This defense included arguing for dismissal of Appellant's petition in circuit court on the basis that pursuant to certiorari procedure, the sole remedy available to Petitioner was under the Tennessee Teacher Tenure Act, specifically Tennessee Code Annotated section 49-5-513. The circuit court, although apparently persuaded by the school board's argument, was disinclined to grant dismissal. As an alternative, the court transferred the petition to chancery court for consolidation with Appellant's Petition for Judicial Review. After that transfer and for reasons undisclosed in this record, Ms. Windsor voluntarily dismissed her Petition for Judicial Review on March 21, 2002. On March 22, 2002, the trial court granted the DeKalb County Board's Motion to Dismiss the Petition for Writ of Certiorari. Petitioner then filed her Notice of Appeal on April 19, 2002, challenging the dismissal of the Petition for Writ of Certiorari. The scope of review under a common law petition for writ of certiorari is limited:

Generally, under common law certiorari, the scope of review is limited to the record to determine as a question of law whether there is any material evidence to support the agency's findings. However, new evidence is admissible on the issue of whether the administrative body exceeded its jurisdiction or acted illegally, capriciously or arbitrarily. *Watts v. Civil Services Board of Columbia*, 606 S.W.2d 274, 276- 7 (Tenn.1980). *See also* Cantrell, *Review of Administrative Decisions by Writ of Certiorari in Tennessee*, 4 Memphis St.L.Rev. 19 (1973).

Davison v. Carr, 659 S.W.2d 361, 363 (Tenn.1983). (emphasis added.)

The time for filing such a petition is within sixty (60) days from the entry of the adverse order. *Davison*, 659 S.W.2d at 362; Tenn. Code Ann. § 27-9-102. The procedural framework for the petition and issuance of the writ is described in Tenn. Code Ann. §§ 27-9-101 to 114. *See also* *Fairhaven Corp. v. Tennessee Health Facilities Comm'n*, 566 S.W.2d 885, 886 (Tenn.Ct.App. 1976). T. C. A. 27-9-101 also provides that:

Anyone who may be aggrieved by any final order or judgment of any board or commission functioning under the laws of this state may have the order or judgment reviewed by the courts, where not otherwise specifically provided, in the manner provided by this chapter.

Tenn. Code Ann. §27-9-101 (emphasis added.)

The undisputed facts of this case indicate that Appellant, a tenured teacher was dismissed as a result of the school board action. The Tennessee Teacher Tenure Act provides the method by which a dismissed teacher can seek judicial review:

(a) A teacher under “permanent tenure” or “limited tenure” status who is dismissed or suspended by action of the board may petition for a writ of certiorari from the chancery court of the county where the teacher is employed.

(b) The petition shall be filed within thirty (30) days from the receipt by the teacher of notice of the decision of the board. The petition shall state briefly the issues involved in the cause, the substance of the order of the board, or the respects in which the petitioner claims the order of the board is erroneous, and praying for an accordant review. The petition shall be addressed to the presiding chancellor and shall name as defendants the members of the board and such other parties of record, if such, as were involved in the hearing before the board.

....

(g) The cause shall stand for trial and shall be heard and determined at the earliest practical date, as one having precedence over other litigation, except suits involving state, county or municipal revenue. The review of the court shall be limited to the written record of the hearing before the board and any evidence or exhibits submitted at such hearing. Additional evidence or testimony shall not be admitted except as to establish arbitrary or capricious action or violation of statutory or constitutional rights by the board.

Tenn. Code Ann. § 49-5-513 (1992).

Appellant argues that the permissive use of the word “may” in subparagraph (a) suggests a non-restrictive interpretation and application of section 513 to permit the filing of other petitions in circuit or chancery to challenge administrative actions. Unfortunately, for the appellant, the plain language of Tennessee Code Annotated section 27-9-101 and 49-5-513 clearly indicate that the only method of review is pursuant to section 513. Much is made in Appellant’s brief of the “restricted review” available under Tennessee Code Annotated section 49-5-513 after the amendment by Chp. 535 of the Public Acts of 1992. Indeed, subsection (g) mandates consideration limited to the written record of the board hearing. The supreme court’s latest opinions on the subject apply the statute as it existed prior to the 1992 amendment adding the restrictive language and suggest that the hearing in chancery was *de novo* upon the record and any oral testimony with no presumption of correctness. attaching to the written record. *See Cooper v. Williamson Co. Bd. Of Ed.*, 746 S.W.2d 176 (Tenn. 1987); *see also Saunders v. Anderson*, 746 S.W.2d 185 (Tenn. Ct. App. 1988).

The difficulty with the position of the obviously intelligent pro se Appellant is that she has voluntarily dismissed her most promising appellate proceeding in favor of a far less viable procedure.

As a tenured teacher, her remedy for judicial review is established by Tennessee Code Annotated section 49-5-513. Prior to the effective date of Chapter 535 of the Public Acts of 1992, this statute provided a broad and expansive review by the chancellor which included a right to proceed by oral testimony in the chancery court.

Although T.C.A. § 49-5-513(b) contemplates a review of the board’s decision, the Chancellor, ordinarily affording expedited treatment of these petitions, holds a “hearing [that] *shall be de novo* and may be on deposition and interrogatories, or on oral testimony.” T.C.A. § 49-5-513(g) (emphasis added). Unlike T.C.A. § 49-8-304, which was construed in *Frye v. Memphis State University*, 671 S.W.2d 467 (Tenn. 1984), this statute does not require that the record of the proceedings before the school board be certified and transmitted to the Chancery Court and the express terms of the statute clearly permit presentation of evidence different from or in addition to the transcript of the proceedings before the school board, including oral testimony in the Chancery Court itself. Upon hearing the evidence and considering the arguments at the hearing *de novo*, the Chancellor must reduce findings of fact and conclusions of law to writing for the record. T.C.A. § 49-5-513(h). Appeal from the Chancellor’s decision is directly to this Court, “where the cause shall be heard on the transcript of the record from the chancery court.” T.C.A. § 49-5-513(i). This last provision stands in contrast to the more expansive scope of review contemplated by subsection (g) in the Chancery Court.

....

Unlike the situation in an appeal to a court of record from General Sessions Court, which does not ordinarily preserve a record of its proceedings, a record of the hearing before the school board may be preserved and transmitted to the Chancery Court and this record can become a part of the evidence before the Chancellor. We reiterate that a transcript of the board hearing is *not* required to be transmitted to the Chancery Court under the terms of this statute but we do not think any party is precluded from having such a record submitted to the Chancellor.

We think that review under T.C.A. 49-5-513 manifestly requires the Chancellor to reconsider and determine all issues of fact as well as law as if no such determination had been previously made. T.C.A. § 49-5-513(h) requires the Chancellor to “reduce his findings of fact and conclusions of law to writing and make them parts of the record.” A ruling that the evidence preponderates for or against the determination of the school board does not comply with this provision of the statute.

Cooper v. Williamson County Bd. of Educ., 746 S.W.2d 176, 180-182 (Tenn. 1987).

Under such a rule, Appellant would have been entitled under her Tennessee Code Annotated 49-5-513 petition not only to have abandoned the record made before the school board, but to have demanded a trial *de novo* in chancery court on oral testimony.

By Chapter 535 of the Public Acts of 1992 the right to introduce testimony in the chancery court was abrogated and Tennessee Code Annotated section 49-5-513(g) was amended to provide “the review of the court shall be limited to the written record of the hearing before the board and any evidence or exhibits submitted at such hearing. Additional evidence or testimony shall not be admitted except as to establish arbitrary or capricious action or violation of statutory or constitutional rights by the board.”

While Appellant correctly asserts that the 1992 amendment eliminated her right to present additional evidence in the chancery court, the amendment did not affect the fact that the review contemplated by Tennessee Code Annotated section 49-5-513 was a *de novo* review of the facts made in the record before the board. This still provided her with the only avenue of appeal that would involve judicial review of the facts. Since none of the findings of the school board, made after a five day hearing, were unanimous, such a factual review in chancery might well have yielded profitable results for Appellant.

After filing her petition in chancery court pursuant to Tennessee Code Annotated section 49-5-513 on December 21, 2001, Appellant then, on January 12, 2002, filed a Petition for a Common Law Writ of Certiorari in the Circuit Court for DeKalb County seeking review of the same DeKalb County School Board action.

Apparently, Appellant reached the conclusion that the common law writ of certiorari sanctioned by Article 6, section 10 of the Constitution of Tennessee and legislatively recognized by Tennessee Code Annotated section 27-8-101 provided much broader relief to her than it actually does. Although the heading of section 27-8-101 is “constitutional basis” it is correct to observe that this heading is somewhat misleading. The writ provided for in this statute is nothing more and nothing less than the ancient common law writ of certiorari dating from remote antiquity.

The writ of certiorari does not owe its existence to constitutional provision or statutory enactment. It is a common-law writ, of ancient origin, and one of the most valuable and efficient remedies which come to us with that admirable system of jurisprudence.

This court, the highest tribunal in the State, with appellate and supervisory jurisdiction over proceedings and judgments of all inferior courts, has the inherent power to grant it whenever necessary in the exercise and enforcement of this jurisdiction. It is not restricted from its use by section 10 of article 6 of the constitution, providing that the judges of inferior courts of law and equity shall have power to issue it in civil cases to remove them from any inferior jurisdiction into a court of law. This provision was only intended as a guarantee of the continuance of power with which these judges were already vested.

The use of the writ was originally confined to criminal cases, and its extension by the judges of this class of the courts of North Carolina, when Tennessee was yet a part of that State, to civil cases, was controverted, for which reason, upon the organization of this State, in order to settle the matter beyond all controversy, a

provision was placed in its first Constitution in substance the same as that contained in the present Constitution, and above stated.

Tennessee Central Railroad Co. v. Campbell, 109 Tenn. 640, 645-46 75 S.W. 1012, 1012-1013 (1902) (footnotes omitted).

The common law writ of certiorari envisioned by Tennessee Code Annotated section 27-8-101 stands in stark contrast to the statutory writ of certiorari authorized by section 27-8-102.¹

Section 27-801 T.C.A. provides that the writ of certiorari may be granted whenever authorized by law and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy.

Section 27-802 T.C.A. provides, “Certiorari lies: (1) on suggestion of diminution; (2) where no appeal is given; (3) as a substitute for appeal; (4) instead of *audita querela*; (5) instead of writ of error.”

In *Hoover Motor Express Co. v. R.R. & Pub. Utilities Commission*, *supra*, the Court said that it has been expressly held that the distinction between the common law writ of certiorari, Code Sec. 8989 (§ 27-801 T.C.A.) and the statutory writ in lieu of appeal, Code Sec. 8990 (§ 27-802 T.C.A.) was not destroyed by the enactment of these later Code Sections. However, they did not operate to enlarge the scope of review under the common law writ. The Court further stated that the writ has never been employed to inquire into the correctness of the judgment rendered where the court had jurisdiction and was, therefore, competent. Hence, it has been held that the supervisory jurisdiction of the Court on certiorari must be restricted to an examination of the external validity of the proceedings had in the lower Court, and cannot be exercised to review the judgment as to its intrinsic correctness either on the law or the facts of the case. In the later case of *McGee v. State*, *supra*, the Court referring to an earlier decision in *State ex rel. McMorrow v. Hunt*, 137 Tenn. 243, 192 S.W. 931, and quoting therefrom, said:

“Without undertaking to define that phrase of the statute with exactness or to say what it includes, we think it clear that the common-law writ, as distinguished from the statutory writ, or certiorari in lieu of appeal, may not be resorted to for the correction

¹ Tennessee Code Annotated section 27-8-101 was section 3123 of the Code of 1858, section 4853 of Shannon’s Code, section 8989 of the Code of 1932, and section 27-801 of the original addition of Tennessee Code Annotated. Tennessee Code Annotated section 27-8-102 was section 3124 of the Code of 1858, section 4854 of Shannon’s Code, section 8990 of the Code of 1932, and section 27-802 of the original addition of Tennessee Code Annotated. What is known in the law as a common law writ of certiorari is that writ discussed in Tennessee Code Annotated section 27-8-101. What is referred to as the statutory writ of certiorari or certiorari in lieu of appeal is the writ provided by section 27-8-102. *Hoover Motor Express Co. v. Railroad and Public Utilities Comm’n*, 261 S.W.2d 233 (Tenn. 1953).

of technical or formal errors, not affecting jurisdiction or power, or for the correction of defects that are not radical, amounting to an illegality that is fundamental, as distinguished from an irregularity.”

Cummings v. Patterson, 388 S.W.2d 157, 163-64 (Tenn.Ct.App. 1964).

Aside from the fact that Appellant does not claim a right to a statutory writ of certiorari pursuant to Tennessee Code Annotated section 27-8-102, it is clear that no relief would be available for this type of certiorari in lieu of appeal, since not only does section 49-5-513 provide a remedy by review to the chancery court but, in fact, Appellant in this case did seek such a review by filing her petition in the chancery court on December 21, 2001. Appellant faces insurmountable impediments to a meaningful review in this Court of the facts underlying her dismissal as a tenured teacher.

1. She has voluntarily dismissed her petition in the chancery court filed pursuant to Tennessee Code Annotated section 49-5-513.
2. The only matter then left pending was her petition for a writ of common law certiorari filed in the circuit court and by that court, transferred to chancery court.
3. No record of the proceedings before the DeKalb County School Board has been preserved for review.
4. The right of review provided by Tennessee Code Annotated section 27-9-101 is not available because review is otherwise provided by section 49-5-513.
5. The chancery court has properly dismissed Appellant’s Application for Common Law Certiorari.

We hold that the chancellor’s dismissal of the Petition for Writ of Certiorari was proper. The only remedy available to Appellant was the very Petition she dismissed of her own volition. Costs on appeal are taxed against Appellant.

WILLIAM B. CAIN, JUDGE