

DOCKET NO. 043-R10-06-2022

MICHAEL TOMAS,	§	BEFORE THE
Petitioner,	§	
	§	
v.	§	COMMISSIONER OF EDUCATION
	§	
SILSBEE INDEPENDENT SCHOOL	§	
DISTRICT,	§	
Respondent.	§	THE STATE OF TEXAS

DECISION OF THE COMMISSIONER

STATEMENT OF THE CASE

Petitioner, Michael Tomas, complains about actions and decisions of Respondent, Silsbee Independent School District. Christopher Maska is the Administrative Law Judge appointed by the Commissioner of Education to hear this cause. Petitioner is represented by Marivious Allen, Attorney at Law, Beaumont, Texas. Respondent is represented by Sierra D. Fisher, Attorney at Law, Silsbee, Texas.

The two major issues in this case are whether the Commissioner can reach Petitioner's claim that Respondent (1) failed to follow the procedures under Policy DCE(LEGAL) to end his contract and (2) failed to properly end his contract because it notified him that it had ended his contract before giving him a full hearing. Because Petitioner did not raise his Policy DCE(LEGAL) issue in the grievance process, the Commissioner cannot reach it on appeal. However, even if the Commissioner could reach this issue, Petitioner would not prevail because his contract is a Chapter 21 contract not governed by Policy DCE(LEGAL). Finally, while Petitioner is entitled to due process, he is not entitled to a full due process hearing before receiving notice that Respondent voted to end his contract. At most, Petitioner is entitled to a minimal hearing prior to contract termination. However, Petitioner did not plead or brief such a claim.

The Administrative Law Judge issued a Proposal for Decision recommending that Petitioner's appeal be dismissed. Exceptions and replies were timely filed and considered.

FINDINGS OF FACT

After due consideration of the record and matters officially noticed, it is concluded that the following Findings of Fact are supported by the record in this case.

1. Respondent employed Petitioner under a term contract for the 2021–2022 school year.

2. Petitioner’s contract is entitled **SILSBEE INDEPENDENT SCHOOL DISTRICT NON-CERTIFIED CONTRACT**. (Emphasis in original). Under the contract, Respondent employed Petitioner as an administrator for the 2021–2022 school year. The contract has the following provisions:

3.1 Certification and License Requirement. You agree to provide, before your start date each school year, the certification, license, service records, required by state and federal law, the Texas Education Agency (TEA), the State Board for Educator Certification (SBEC), or the district. You agree to maintain any applicable certification, permit, or licensure requirements through the term of this Contract. If you fail to fulfill the requirements necessary to extend a temporary or emergency certificate or permit, or if your certificate or permit expires, is cancelled, is relinquished, is suspended, or is revoked, the District may provide you with notice that is void pursuant to Texas Education Code § 21.0031.

8 Suspension. In accordance with Texas Education Code chapter 21, the District may suspend you without pay during the term of this Contract for good cause as determined by the Board.

9.1 Termination of Contract. This Contract will terminate, in accordance with procedures at Texas Education Code chapter 21, if the board determines that good cause of a financial exigency exists. This Contract will also terminate if you provide written notice of resignation before the penalty-free resignation date (see Tex. Educ. Code § 21.210).

9.2 Nonrenewal. The District may nonrenew this Contract in accordance with Texas Education Code chapter 21, as applicable, and Board policy.

The contract is signed by Respondent’s Board President.

3. Respondent’s Policy DCE (LOCAL) provides:

**Non-Chapter 21
Contracts**

The District shall employ on non-Chapter 21 contracts, not to be governed by Chapter 21 of the Education Code, the following positions: chief financial officer, director of maintenance, director of transportation, and administrative assistant.

**Appeal of
Employment Actions**

An employee may appeal discharge during the contract period in accordance with DCE(LEGAL).

An employee whose contract is not reissued at the end of the contract period may appeal to the Board in accordance with DCBA(LOCAL).

4. Respondent's Policy DCE(LEGAL) is not contained or described in the local record. Petitioner did not claim during the grievance process that Respondent violated Policy DCE(LEGAL) or that he did not have a Chapter 21 contract. Petitioner's claim through the grievance process was that he had a Chapter 21 contract.

5. Respondent's board of trustees informed Petitioner that it voted to end his contract for the following reasons:

- The Board voted that your contract be declared void as unauthorized by law and Board Policy DCB(Local) and terminated your at-will employment.
- To the extent you may have a valid Chapter 21 contract, the Board voted to declare your contract void for lack of certification pursuant to Texas Education Code § 21.0031(a)(1) and terminated your employment pursuant to § 21.0031(b)(1)(A).

DISCUSSION

Petitioner contends that Respondent's board of trustees erroneously ended his contract without affording him due process and failed to follow the procedures in Policy DCE(LEGAL) to end his contract. Respondent denies this and contends that the Commissioner lacks jurisdiction over this case or, alternatively, cannot reach its merits.

What type of contract is it?

There is much confusion over what type of contract Petitioner had with Respondent, due both to the contract's language and to Respondent's policies. The contract is entitled, **SILSBEE INDEPENDENT SCHOOL DISTRICT NON-CERTIFIED CONTRACT**. (Emphasis in original). Under the contract, Respondent employed Petitioner as an administrator for the 2021–2022 school year. A number of contract provisions are relevant to this case:

3.1 Certification and License Requirement. You agree to provide, before your start date each school year, the certification, license, service records, required by state and federal law, the Texas Education Agency (TEA), the State Board for Educator Certification (SBEC), or the district. You agree to maintain any applicable certification, permit, or licensure requirements through the term of this Contract. If you fail to fulfill the requirements necessary to extend a temporary or emergency certificate or permit, or if your certificate or permit expires, is

cancelled, is relinquished, is suspended, or is revoked, the District may provide you with notice that is void pursuant to Texas Education Code § 21.0031.

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9.2 Nonrenewal. The District may nonrenew this Contract in accordance with Texas Education Code chapter 21, as applicable, and Board policy.

Respondent's Board President signed the contract.

The contract facially raises questions: If it is a non-certified contract, why is there a certification and licensure requirement, and does the contract's references to Chapter 21 make it a Chapter 21 contract? Respondent's policies create additional confusion, providing:

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Contracts**

The District shall employ on non-Chapter 21 contracts, not to be governed by Chapter 21 of the Education Code, the following positions: chief financial officer, director of maintenance, director of transportation, and administrative assistant.

**Appeal of
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An employee whose contract is not reissued at the end of the contract period may appeal to the Board in accordance with DCBA(LOCAL).

As Petitioner held the position of Director of Maintenance and Transportation, he should have been given a non-Chapter 21 contract *not* governed by Chapter 21. However, by its own terms, his contract *is* governed by Chapter 21. Thus, the parties dispute what type of contract Petitioner had. Petitioner contends that it was a non-Chapter 21 contract created under Respondent's Policy DCE(LEGAL), with Chapter 21 protections. However, while Policy DCE(LOCAL), which is in the local record, references Policy DCE(LEGAL), Policy DCE(LEGAL) itself is not in the local record. Respondent contends that Petitioner had a Chapter 21 contract. As discussed further below, Respondent is correct.

Exhaustion before the school board

Respondent asserts that Petitioner failed to exhaust his administrative remedies because he argued before the school board that he had a Chapter 21 contract, while in his Amended

Petition for Review, he alleges that he has a contract governed by Policy DCE(LEGAL). The Amended Petition for Review reads, in relevant part:

The Board's decision to declare Petitioner's contract void and terminate his employment was improper and without legal basis. DCE (LOCAL); DCE (LEGAL); *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970). The District violated Petitioner's due process rights and DCE(LEGAL), which requires the District, prior to termination and discharge, to provide the employee with "reasonable notice of the cause or causes for the termination, set out in sufficient detail to fairly enable him or her to show any error that may exist and the names and the nature of the testimony of the witnesses against him. DCE (LEGAL); *Ferguson*, 430 F.2d at 856. Petitioner was given notice of the Board's final decision to terminate, without an opportunity for a hearing, depriving Petitioner of his property interest and due process rights.

Accordingly, Petitioner was terminated prior to being given a reasonable notice of the causes for termination and an opportunity for a hearing pursuant to DCE (LEGAL).

Thus, in his Amended Petition for Review, Petitioner challenges Respondent's decision to declare his contract void and to terminate it, arguing that the decision violates Policy DCE(LEGAL) and due process. He does not limit his argument to Policy DCE(LEGAL)'s provisions.

In his grievance and before the board, however, Petitioner did not make a Policy DCE(LEGAL) argument but instead argued that he had a Chapter 21 contract. Significantly, Policy DCE(LEGAL) is not contained or described with any specificity in the local record. While the Texas Supreme Court held in *Davis v. Morath*, 624 S.W.3d 215 (Tex. 2021), that following a school district's grievance policy is not jurisdictional, the Court went on to state:

We find no basis in § 7.057 to doubt that the Commissioner should deny relief to a party whose appeal arises from a grievance that was not timely brought at the District level. Although the Commissioner has *jurisdiction* over such an appeal so long as it meets the requirements of § 7.057(a), the proceeding is nonetheless an "appeal." *Id.* § 7.057(a). The Education Code authorizes the Commissioner to *review* local school board decisions and actions, but it does not authorize him to reach the merits of a complainant's arguments regardless of how the complaint was handled at the school-district level. If the District was prohibited by its internal procedures from reaching the merits of the grievance, the scope of the Commissioner's appellate review is likewise limited.

Id. at 222–23. Thus, while school district policies are not jurisdictional if under its policy a school board cannot reach an issue, the Commissioner likewise cannot reach it on appeal. In *Davis*, the Court applied this doctrine:

Further, the Commissioner observed that the Teachers had not made their employment contracts part of the record, so there was no proof that any Teacher's total compensation had been reduced. He also found that the claim must fail because the Teachers did not raise it before the school board. The court of appeals affirmed this portion of the Commissioner's decision. *Davis*, 590 S.W.3d at 103-04. The court reasoned that the claim was properly dismissed "because it was not raised at the local level" and because "even if it had been preserved, the reason for the increased insurance cost is unclear from the record." *Id.*

We agree with the court of appeals. The Teachers fail to demonstrate that their complaint regarding reduced take-home pay due to rising insurance premiums was raised at the District level or supported by the record.

Id. at 228.

As Petitioner did not raise a Policy DCE(LEGAL) violation before the school board, the Commissioner cannot now reach that issue. Moreover, while Policy DCE(LOCAL) is in the local record and might be useful in addressing some of the parties' claims, Petitioner does not base any claim on Policy DCE(LOCAL). However, he does have a claim under *Ferguson*, which sets forth the general standards for federal due process. Whether or not Petitioner has a contract subject to Policy DCE(LEGAL), he alleged that Respondent violated his due process rights under his contract. Petitioner's due process claim is distinct from his Policy DCE(LEGAL) claim and is his only potentially viable claim.

School laws of this state

Respondent is correct that Petitioner has not alleged a violation of the school laws of this state. Policies DCE(LEGAL) and DCE(LOCAL) are school district policies and, as such, not the school laws of this state. *See* Tex. Educ. Code § 7.057(f)(2); *Reeves v. Aledo Indep. Sch. Dist.*, Docket No. 106-R10-496 (Comm'r Educ. 1999). The Commissioner lacks jurisdiction over Policies DCE(LEGAL) and DCE(LOCAL) under Texas Education Code § 7.057(a)(2)(A). Respondent is also correct that Petitioner has not pled a violation of the school law of this state. Petitioner does not contend that under Texas Education Code § 21.0031, Respondent lacked cause to declare his contract void, other than claiming § 21.0031 does not apply because he had no Chapter 21 contract. As addressed above, the Commissioner cannot reach that issue because Petitioner did not raise it before the school board. Petitioner's only claim is that Respondent voided or terminated his contract without affording him due process.

Is the contract void?

Respondent raises a Texas Education Code § 21.0031 jurisdictional argument, asserting that Petitioner's contract is void because Respondent declared it so under § 21.0031.¹ Because Respondent raised the § 21.0031 issue, it will be addressed as part of Respondent's argument that since the contract is void, Petitioner could not have a § 7.057(a)(2)(B) claim.

Petitioner responds that his contract is not void because § 21.0031 did not apply to it, as it was not a Chapter 21 contract, and § 21.0031 only applies to Chapter 21 continuing, term, or probationary contracts. Petitioner is incorrect about the proper categorization of his contract. His contract provides that its certification, termination, suspension, and nonrenewal will be done in accordance with Chapter 21, and nothing about his contract is inconsistent with it being a Chapter 21 term contract. His contract is similar to one the Commissioner found to be a Chapter 21 contract in *Haynes v. Beaumont Independent School District*, Docket No. 012-R2-11-2012 (Comm'r Educ. 2015).² Thus, Petitioner had a Chapter 21 contract.

However, Respondent does not prevail in its argument that Petitioner's contract is void because Texas Education Code § 21.0031 makes a Chapter 21 contract voidable. Section 21.0031(a) states that a probationary, term, or continuing contract is void if an employee fails to hold or maintain a valid certificate or permit issued by the State Board for Educator Certification. The Commissioner has construed this section, read in its entirety, as meaning that a contract is voidable despite the word "void." *See Roberts v. Marlin Indep. Sch. Dist.*, Docket No. 021-R10-1204 (Comm'r Educ. 2007) (holding that since § 21.0031 gives a school district options that presuppose a contract still exists, then at most, this section makes a contract voidable). This is an important distinction. Even if Petitioner had violated § 21.0031, his contract would not be void for that reason. Therefore, Respondent did not establish that Petitioner lacked a valid contract.

¹ As noted above, Petitioner has not pled a potential violation of Texas Education Code § 21.0031. Hence, he cannot prevail on a § 21.0031 claim. However, Respondent makes a jurisdictional claim based on § 21.0031, the resolution of which requires examining § 21.0031.

² The distinction from *Haynes* is that *Haynes* did not contest the board's decision to declare the contract void under Texas Education Code § 21.0031. Here, Petitioner contends Respondent's declaration under § 21.0031 fails because he was not provided with due process.

Due process

Respondent contends that the Commissioner lacks jurisdiction under Texas Education Code § 7.057(a)(2)(B) over Petitioner's claim that Respondent violated due process in terminating his contract. However, the Texas Supreme Court has held:

“[L]aws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.” *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 550, 18 L. Ed. 403, (1866), *quoted in Smith v. Elliott & Deats*, 39 Tex. 201, 212 (1873); *see also Wessely Energy Corp. v. Jennings*, 736 S.W.2d 624, 626 (Tex. 1987). These protections were a material part of McCollough's contracts, which the school district could not unilaterally abrogate without committing a breach.

Cent. Educ. Agency v. George W. Indep. Sch. Dist., 783 S.W.2d 200, 202 (Tex. 1989) (alteration in original). Thus, due process is a term of Petitioner's contract. *See id.* Section 7.057(a)(2)(B) gives the Commissioner jurisdiction over violations of written employment contracts that cause or would cause monetary harm. Although Respondent cites *Clint Independent School District v. Marquez*, that case does not call into question the Commissioner's jurisdiction, as it provides:

First, when a person complains that a school board's conduct or decision violates *only* the person's state or federal constitutional rights, and the conduct or decision does not violate the school laws of the state or an employment contract, § 7.057(a) neither authorizes nor requires the Commissioner to hear the appeal.

487 S.W.3d 538, 552–53 (Tex. 2016) (emphasis in original). Thus, *Marquez* recognizes that the Commissioner lacks jurisdiction directly over constitutional violations. It does not stand for the proposition that the Commissioner cannot consider due process issues in determining whether a school board violated a contract provision under § 7.057(a)(2)(B). Accordingly, the Commissioner is not prohibited from hearing Petitioner's due process claim.

Voidable contract

Respondent contends that Petitioner's contract is void because the school board properly declared the contract void under Texas Education Code § 21.0031(c). The Commissioner held in *Harris v. Royce City Independent School District*, Docket No. 043-R10-06-2021 (Comm'r Educ. 2009), that a school district can voluntarily issue a Chapter 21 contract to an individual who is not required to be issued such a contract. While Respondent generally recognizes *Harris* as correct, it attempts to distinguish *Harris* by asserting that a school district can only grant a

Chapter 21 contract to someone not entitled to one if district policy allows it. Texas Education Code § 21.002(c) requires school boards to establish policies identifying the type of employees who receive term or continuing contracts. Under § 21.002(c), a district that offers both term and continuing contracts should specify the positions or categories of positions that receive them. Respondent argues that Petitioner's contract is void because Respondent did not establish a policy specifying whether Petitioner's position allows him to receive a term contract. Respondent contends that "when a school district exceeds its authority in entering into a contract its action and the contract is void," citing *Smith v. Alanis*, No. 03-01-00713-CV, 2002 Tex. App. LEXIS 5437*5 (Tex. App.—Austin July 26, 2002, no pet.) (mem. op., not designated for publication). Respondent's Br. at 18.

Smith, issued before January 1, 2003, and designated "do not publish," is not precedent. Furthermore, *Smith* is distinguishable because the board's decision to give Smith a term instead of a probationary contract violated two mandatory statutes that were merely restated in a district policy. Additionally, while *Smith* addresses §§ 21.002(a) and (b), it does not address (c), the section on which Respondent relies. Most importantly, *Smith* does not hold that a district's failure to comply with any statute related to a contract makes the contract void. When a school district grants a term contract to a person to whom it *could* grant a term contract, but such a contract is not permitted under its policies, the resulting contract is not void but voidable. Respondent does not prevail based on its claim that Texas Education Code § 21.0031 makes certain contracts void when it actually makes them voidable. *See Roberts*, Docket No. 021-R10-1204. If the contract is at most voidable, then the district must undergo a process to declare the contract void.

Entitlement to process

Respondent contends that because it acted appropriately to void Petitioner's contract, there is no contract. Respondent maintains that Petitioner has "no entitlement to Subchapter F or any other procedural 'process' and Respondent breached no law." Respondent's Br. at 20. Texas Education Code § 21.0031(c) provides:

A school district's decision under Subsection (b) is not subject to appeal under this chapter, and the notice and hearing requirements of this chapter do not apply to the decision.

This provision means that when a school district takes action to declare a Chapter 21 contract void, the employee is not entitled to the process under Texas Education Code Chapter 21, subchapter F that would normally be required before a school district could terminate or suspend a Chapter 21 contract. It also means that the employee cannot appeal the school district's decision to the Commissioner under Chapter 21, subchapter G. However, the inapplicability of subchapters F and G does not mean *no* process was required. Petitioner, who had a contract for the 2021–2022 school year, was still entitled to due process before Respondent ended his contract before its term.

The Commissioner can have jurisdiction over alleged violations of Texas Education Code § 21.0031 under Texas Education Code § 7.057(a)(2). Section 21.0031(c) removes claims under that section from the procedures under Texas Education Code Chapter 21, subchapters F and G. While Texas Education Code § 7.057 does not apply to Chapter 21, subchapter G cases, § 21.0031 is found in Chapter 21, subchapter A. Tex. Educ. Code § 7.057(e)(1). This could create a § 21.0031 claim over which the Commissioner has jurisdiction. However, Petitioner did not plead a § 21.0031 violation.

Waiver

Respondent argues that Petitioner waived the argument that his contract is a non-Chapter 21 contract referenced in Policy DCE(LOCAL) because he accepted the contract's benefits. It is true that one cannot accept the benefits of a contract and then contest its validity. *See Wittman v. Nelson*, 100 S.W.3d 356, 360 (Tex. App.—San Antonio 2002, pet. denied). However, Petitioner argues that his contract, interpreted in light of Policy DCE(LOCAL), is a non-Chapter 21 contract, not that it is invalid. Petitioner is not prohibited by the *Wittman* doctrine from making this argument.

Due process

Petitioner's due process claim is:

The District violated Petitioner's due process rights . . . , which requires the District, prior to termination and discharge, to provide the employee with "reasonable notice of the cause or causes for termination, set out in sufficient detail to fairly enable him or her to show any error that may exist and the names and nature of the testimony of witnesses against him."

Petitioner's Br. at 3. The quoted section is from *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970). One can question whether *Ferguson* supports the first part of Petitioner's sentence alleging a pre-termination process requirement. A fuller quotation reads:

The rudiments of due process fair play in school administrative proceedings have been well outlined in this circuit with regard to the rights of college students who were subjected to disciplinary suspensions. They are entitled to a statement of the charges against them, the names of witnesses, the nature of the testimony of those witnesses and the opportunity of presenting a defense. *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). These same minimum standards are applicable to teachers who have an expectancy of reemployment. However, the standards of procedural due process are not wooden absolutes. The sufficiency of procedures employed in any particular situation must be judged in the light of the parties, the subject matter and the circumstances involved.

Ferguson, 430 F.2d at 856. Further, the Supreme Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545–46, 105 S. Ct. 1487, 1495 (1985), suggests full due process is required only *after* termination. Prior to termination, only minimal process is required, giving the teacher an opportunity to explain why the contract should not be terminated. Because Petitioner was not entitled to full process prior to termination, his due process argument based on that contention fails. Petitioner does not argue that Respondent failed to afford him the pre-termination hearing that *Loudermill* requires. Further, he points to no record evidence in his brief to show he either did not receive either full due process, as he claims or limited pre-termination process under *Loudermill*. Further, the remedy for a lack of due process is generally the process that was due:

In general, however, the remedy for a denial of due process is due process. *See Perry v. Sindermann*, 408 U.S. 593, 603, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972) (upon proof of protected interest, professor whose contract was not renewed is not entitled to reinstatement but to hearing comporting with due process); *McIntire v. State*, 698 S.W.2d 652, 661-62 (Tex. Crim. App. 1985) (remedy for failure to grant hearing on motion for new trial is a hearing, not a new trial). Than is entitled to a fair hearing with notice of the charges and evidence to be used against him and with an opportunity to defend against the charges.

Univ. of Tex. Med. Sch. v. Than, 901 S.W.2d 926, 933–34 (Tex. 1995). Even if Petitioner had proved that he did not receive appropriate process, the proper remedy would be a remand.

Conclusion

Petitioner's appeal should be denied. Petitioner argued that he does not have a Chapter 21 contract and did not receive his required due process. However, Petitioner's contract is a Chapter 21 contract. Further, Petitioner did not meet his burden of proving his due process claims.

CONCLUSIONS OF LAW

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact, in my capacity as Commissioner of Education, I make the following Conclusions of Law:

1. The Commissioner has jurisdiction over this case under Texas Education Code § 7.057.
2. An issue is properly denied before the Commissioner in a Texas Education Code § 7.057 case if the issue was not properly raised through the grievance process.
3. Because Petitioner did not raise the issue that he did not have a Chapter 21 contract through the grievance process, he cannot raise that issue before the Commissioner. Even if he could raise this issue, Petitioner's contract is a Chapter 21 contract.
4. Respondent's claim that because Petitioner's contract was void when it was signed, that Petitioner has no Texas Education Code § 7.057(a)(2)(B) claim fails because at most, a failure to comply with Texas Education Code § 21.0031 makes a contract voidable.
5. A school district's failure to create a policy under Texas Education Code § 21.002 that designates positions held by non-teachers who will be given term or continuing contracts does not make a contract with such a non-teacher invalid.
6. Respondent's failure to create a policy that specifies he should have been given a term contract does not make his term contract void.
7. When a school district takes action to declare a contract void under Texas Education Code § 21.0031, it is not required to follow the process set out in Texas Education Code Chapter 21, subchapter F, and no appeal to the Commissioner is allowed under Texas

Education Code Chapter 21, subchapter G. Tex. Educ. Code § 21.0031(c). However, when a school district ends a contract under Texas Education Code § 21.0031, a teacher is entitled to due process that includes both a fairly perfunctory pre-termination hearing and a full due process hearing after termination.

8. Petitioner's argument that he was entitled to a full due process hearing prior to termination fails because such a hearing is only required after termination, and he asserts no other due process claims. Petitioner's due process claim fails.

9. Petitioner's Petition for Review should be denied.

ORDER

After due consideration of the record, matters officially noticed and the foregoing Findings of Fact and Conclusions of Law, in my capacity as Commissioner of Education, it is hereby ORDERED that the Petitioner's appeal be, and is hereby, DISMISSED.

SIGNED AND ISSUED this 11th day of January 2023.

Mike Morath Digitally signed by Mike Morath
Date: 2023.01.11 14:21:42
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MIKE MORATH
COMMISSIONER OF EDUCATION

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PROPOSAL FOR DECISION

STATEMENT OF THE CASE

Petitioner, Michael Tomas, complains about actions and decisions of Respondent, Silsbee Independent School District. Christopher Maska is the Administrative Law Judge appointed by the Commissioner of Education to hear this cause. Petitioner is represented by Marivious Allen, Attorney at Law, Beaumont, Texas. Respondent is represented by Sierra D. Fisher, Attorney at Law, Silsbee, Texas.

The two major issues in this case are whether the Commissioner can reach Petitioner's claim that Respondent (1) failed to follow the procedures under Policy DCE(LEGAL) to end his contract and (2) failed to properly end his contract because it notified him that it had ended his contract before giving him a full hearing. Because Petitioner did not raise his Policy DCE(LEGAL) issue in the grievance process, the Commissioner cannot reach it on appeal. However, even if the Commissioner could reach this issue, Petitioner would not prevail because his contract is a Chapter 21 contract not governed by Policy DCE(LEGAL). Finally, while Petitioner is entitled to due process, he is not entitled to a full due process hearing before receiving notice that Respondent voted to end his contract. At most, Petitioner is entitled to a minimal hearing prior to contract termination. However, Petitioner did not plead or brief such a claim.

FINDINGS OF FACT

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2. Petitioner’s contract is entitled **SILSBEE INDEPENDENT SCHOOL DISTRICT NON-CERTIFIED CONTRACT**. (Emphasis in original). Under the contract, Respondent employed Petitioner as an administrator for the 2021–2022 school year. The contract has the following provisions:

3.1 Certification and License Requirement. You agree to provide, before your start date each school year, the certification, license, service records, required by state and federal law, the Texas Education Agency (TEA), the State Board for Educator Certification (SBEC), or the district. You agree to maintain any applicable certification, permit, or licensure requirements through the term of this Contract. If you fail to fulfill the requirements necessary to extend a temporary or emergency certificate or permit, or if your certificate or permit expires, is cancelled, is relinquished, is suspended, or is revoked, the District may provide you with notice that is void pursuant to Texas Education Code § 21.0031.

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The contract is signed by Respondent’s Board President.

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4. Respondent’s Policy DCE(LEGAL) is not contained or described in the local record. Petitioner did not claim during the grievance process that Respondent violated Policy

DCE(LEGAL) or that he did not have a Chapter 21 contract. Petitioner's claim through the grievance process was that he had a Chapter 21 contract.

5. Respondent's board of trustees informed Petitioner that it voted to end his contract for the following reasons:

The Board voted that your contract be declared void as unauthorized by law and Board Policy DCB(Local) and terminated your at-will employment.

To the extent you may have a valid Chapter 21 contract, the Board voted to declare your contract void for lack of certification pursuant to Texas Education Code § 21.0031(a)(1) and terminated your employment pursuant to section 21.0031(b)(1)(A).

DISCUSSION

Petitioner contends that Respondent's board of trustees erroneously ended his contract without affording him due process and failed to follow the procedures in Policy DCE(LEGAL) to end his contract. Respondent denies this and contends that the Commissioner lacks jurisdiction over this case or, alternatively, cannot reach its merits.

What type of contract is it?

There is much confusion over what type of contract Petitioner had with Respondent, due both to the contract's language and to Respondent's policies. The contract is entitled, **SILSBEE INDEPENDENT SCHOOL DISTRICT NON-CERTIFIED CONTRACT**. (Emphasis in original). Under the contract, Respondent employed Petitioner as an administrator for the 2021–2022 school year. A number of contract provisions are relevant to this case:

3.1 Certification and License Requirement. You agree to provide, before your start date each school year, the certification, license, service records, required by state and federal law, the Texas Education Agency (TEA), the State Board for Educator Certification (SBEC), or the district. You agree to maintain any applicable certification, permit, or licensure requirements through the term of this Contract. If you fail to fulfill the requirements necessary to extend a temporary or emergency certificate or permit, or if your certificate or permit expires, is cancelled, is relinquished, is suspended, or is revoked, the District may provide you with notice that is void pursuant to Texas Education Code § 21.0031.

8 Suspension. In accordance with Texas Education Code chapter 21, the District may suspend you without pay during the term of this Contract for good cause as determined by the Board.

9.1 Termination of Contract. This Contract will terminate, in accordance with procedures at Texas Education Code chapter 21, if the board determines that good cause of a financial exigency exists. This Contract will also if you provide written notice of resignation before the penalty-free resignation date (see Tex. Educ. Code § 21.210)

9.2 Nonrenewal. The District may nonrenew this Contract in accordance with Texas Education Code chapter 21, as applicable, and Board policy.

Respondent's Board President signed the contract.

The contract facially raises questions: If it is a non-certified contract, why is there a certification and licensure requirement, and does the contract's references to Chapter 21 make it a Chapter 21 contract? Respondent's policies create additional confusion, providing:

**Non-Chapter 21
Contracts**

The District shall employ on non-Chapter 21 contracts, not to be governed by Chapter 21 of the Education Code, the following positions: chief financial officer, director of maintenance, director of transportation, and administrative assistant.

**Appeal of
Employment Actions**

An employee may appeal discharge during the contract period in accordance with DCE(LEGAL).

An employee whose contract is not reissued at the end of the contract period may appeal to the Board in accordance with DCBA(LOCAL).

As Petitioner held the position of Director of Maintenance and Transportation, he should have been given a non-Chapter 21 contract *not* governed by Chapter 21. However, by its own terms, his contract *is* governed by Chapter 21. Thus, the parties dispute what type of contract Petitioner had. Petitioner contends that it was a non-Chapter 21 contract created under Respondent's Policy DCE(LEGAL), with Chapter 21 protections. However, while Policy DCE(LOCAL), which is in the local record, references Policy DCE(LEGAL), Policy DCE(LEGAL) itself is not in the local record. Respondent contends that Petitioner had a Chapter 21 contract. As discussed further below, Respondent is correct.

Exhaustion before the school board

Respondent asserts that Petitioner failed to exhaust his administrative remedies because he argued before the school board that he had a Chapter 21 contract, while in his Amended Petition for Review, he alleges that he has a contract governed by Policy DCE(LEGAL). The Amended Petition for Review reads, in relevant part:

The Board's decision to declare Petitioner's contract void and terminate his employment was improper and without legal basis. DCE (LOCAL); DCE (LEGAL); *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970). The District violated Petitioner's due process rights and DCE(LEGAL), which requires the District, prior to termination and discharge, to provide the employee with "reasonable notice of the cause or causes for the termination, set out in sufficient detail to fairly enable him or her to show any error that may exist and the names and the nature of the testimony of the witnesses against him. DCE (LEGAL); *Ferguson*, 430 F.2d at 856. Petitioner was given notice of the Board's final decision to terminate, without an opportunity for a hearing, depriving Petitioner of his property interest and due process rights.

Accordingly, Petitioner was terminated prior to being given a reasonable notice of the causes for termination and an opportunity for a hearing pursuant to DCE (LEGAL).

Thus, in his Amended Petition for Review, Petitioner challenges Respondent's decision to declare his contract void and to terminate it, arguing that the decision violates Policy DCE(LEGAL) and due process. He does not limit his argument to Policy DCE(LEGAL)'s provisions.

In his grievance and before the board, however, Petitioner did not make a Policy DCE(LEGAL) argument but instead argued that he had a Chapter 21 contract. Significantly, Policy DCE(LEGAL) is not contained or described with any specificity in the local record. While the Texas Supreme Court held in *Davis v. Morath*, 624 S.W.3d 215 (Tex. 2021), that following a school district's grievance policy is not jurisdictional, the Court went on to state:

We find no basis in section 7.057 to doubt that the Commissioner should deny relief to a party whose appeal arises from a grievance that was not timely brought at the District level. Although the Commissioner has *jurisdiction* over such an appeal so long as it meets the requirements of section 7.057(a), the proceeding is nonetheless an "appeal." *Id.* § 7.057(a). The Education Code authorizes the Commissioner to *review* local school board decisions and actions, but it does not authorize him to reach the merits of a complainant's arguments regardless of how the complaint was handled at the school-district level. If the District was prohibited by its internal procedures from reaching the merits of the grievance, the scope of the Commissioner's appellate review is likewise limited.

Id. at 222–23. Thus, while school district policies are not jurisdictional if under its policy a school board cannot reach an issue, the Commissioner likewise cannot reach it on appeal. In *Davis*, the Court applied this doctrine:

Further, the Commissioner observed that the Teachers had not made their employment contracts part of the record, so there was no proof that any Teacher's total compensation had been reduced. He also found that the claim must fail because the Teachers did not raise it before the school board. The court of

appeals affirmed this portion of the Commissioner's decision. *Davis*, 590 S.W.3d at 103-04. The court reasoned that the claim was properly dismissed "because it was not raised at the local level" and because "even if it had been preserved, the reason for the increased insurance cost is unclear from the record." *Id.*

We agree with the court of appeals. The Teachers fail to demonstrate that their complaint regarding reduced take-home pay due to rising insurance premiums was raised at the District level or supported by the record.

Id. at 228.

As Petitioner did not raise a Policy DCE(LEGAL) violation before the school board, the Commissioner cannot now reach that issue. Moreover, while Policy DCE(LOCAL) is in the local record and might be useful in addressing some of the parties' claims, Petitioner does not base any claim on Policy DCE(LOCAL). However, he does have a claim under *Ferguson*, which sets forth the general standards for federal due process. Whether or not Petitioner has a contract subject to Policy DCE(LEGAL), he alleged that Respondent violated his due process rights under his contract. Petitioner's due process claim is distinct from his Policy DCE(LEGAL) claim and is his only potentially viable claim.

School laws of this state

Respondent is correct that Petitioner has not alleged a violation of the school laws of this state. Policies DCE(LEGAL) and DCE(LOCAL) are school district policies and, as such, not the school laws of this state. *See* Tex. Educ. Code § 7.057(f)(2); *Reeves v. Aledo Indep. Sch. Dist.*, Docket No. 106-R10-496 (Comm'r Educ. 1999). The Commissioner lacks jurisdiction over Policies DCE(LEGAL) and DCE(LOCAL) under Texas Education Code § 7.057(a)(2)(A). Respondent is also correct that Petitioner has not pled a violation of the school law of this state. Petitioner does not contend that under Texas Education Code § 21.0031, Respondent lacked cause to declare his contract void, other than claiming section 21.0031 does not apply because he had no Chapter 21 contract. As addressed above, the Commissioner cannot reach that issue because Petitioner did not raise it before the school board. Petitioner's only claim is that Respondent voided or terminated his contract without affording him due process.

Is the contract void?

Respondent raises a Texas Education Code § 21.0031 jurisdictional argument, asserting that Petitioner's contract is void because Respondent declared it so under section 21.0031.¹ Because Respondent raised the section 21.0031 issue, it will be addressed as part of Respondent's argument that since the contract is void, Petitioner could not have a section 7.057(a)(2)(B) claim.

Petitioner responds that his contract is not void because section 21.0031 did not apply to it, as it was not a Chapter 21 contract, and section 21.0031 only applies to Chapter 21 continuing, term, or probationary contracts. Petitioner is incorrect about the proper categorization of his contract. His contract provides that its certification, termination, suspension, and nonrenewal will be done in accordance with Chapter 21, and nothing about his contract is inconsistent with it being a Chapter 21 term contract. His contract is similar to one the Commissioner found to be a Chapter 21 contract in *Haynes v. Beaumont Independent School District*, Docket No. 012-R2-11-2012 (Comm'r Educ. 2015).² Thus, Petitioner had a Chapter 21 contract.

However, Respondent does not prevail in its argument that Petitioner's contract is void because Texas Education Code § 21.0031 makes a Chapter 21 contract voidable. Section 21.0031(a) states that a probationary, term, or continuing contract is void if an employee fails to hold or maintain a valid certificate or permit issued by the State Board for Educator Certification. The Commissioner has construed this section, read in its entirety, as meaning that a contract is voidable despite the word "void." See *Roberts v. Marlin Indep. Sch. Dist.*, Docket No. 021-R10-1204 (Comm'r Educ. 2007) (holding that since section 21.0031 gives a school district options that presuppose a contract still exists, then at most, this section makes a contract voidable). This is an important distinction. Even if Petitioner had violated section 21.0031, his contract would

¹ As noted above, Petitioner has not pled a potential violation of Texas Education Code section 21.0031. Hence, he cannot prevail on a section 21.0031 claim. However, Respondent makes a jurisdictional claim based on section 21.0031, the resolution of which requires examining section 21.0031.

² The distinction from *Haynes* is that *Haynes* did not contest the board's decision to declare the contract void under Texas Education Code section 21.0031. Here, Petitioner contends Respondent's declaration under section 21.0031 fails because he was not provided with due process.

not be void for that reason. Therefore, Respondent did not establish that Petitioner lacked a valid contract.

Due process

Respondent contends that the Commissioner lacks jurisdiction under Texas Education Code § 7.057(a)(2)(B) over Petitioner's claim that Respondent violated due process in terminating his contract. However, the Texas Supreme Court has held:

“[L]aws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.” *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 550, 18 L. Ed. 403, (1866), *quoted in Smith v. Elliott & Deats*, 39 Tex. 201, 212 (1873); *see also Wessely Energy Corp. v. Jennings*, 736 S.W.2d 624, 626 (Tex. 1987). These protections were a material part of McCollough's contracts, which the school district could not unilaterally abrogate without committing a breach.

Cent. Educ. Agency v. George W. Indep. Sch. Dist., 783 S.W.2d 200, 202 (Tex. 1989) (alteration in original). Thus, due process is a term of Petitioner's contract. *See id.* Section 7.057(a)(2)(B) gives the Commissioner jurisdiction over violations of written employment contracts that cause or would cause monetary harm. Although Respondent cites *Clint Independent School District v. Marquez*, that case does not call into question the Commissioner's jurisdiction, as it provides:

First, when a person complains that a school board's conduct or decision violates *only* the person's state or federal constitutional rights, and the conduct or decision does not violate the school laws of the state or an employment contract, section 7.057(a) neither authorizes nor requires the Commissioner to hear the appeal.

487 S.W.3d 538, 552–53 (Tex. 2016) (emphasis in original). Thus, *Marquez* recognizes that the Commissioner lacks jurisdiction directly over constitutional violations. It does not stand for the proposition that the Commissioner cannot consider due process issues in determining whether a school board violated a contract provision under section 7.057(a)(2)(B). Accordingly, the Commissioner is not prohibited from hearing Petitioner's due process claim.

Voidable contract

Respondent contends that Petitioner's contract is void because the school board properly declared the contract void under Texas Education Code § 21.0031(c). The Commissioner held in *Harris v. Royce City Independent School District*, Docket No. 043-R10-06-2021 (Comm'r Educ. 2009), that a school district can voluntarily issue a Chapter 21 contract to an individual who is

not required to be issued such a contract. While Respondent generally recognizes *Harris* as correct, it attempts to distinguish *Harris* by asserting that a school district can only grant a Chapter 21 contract to someone not entitled to one if district policy allows it. Texas Education Code § 21.002(c) requires school boards to establish policies identifying the type of employees who receive term or continuing contracts. Under section 21.002(c), a district that offers both term and continuing contracts should specify the positions or categories of positions that receive them. Respondent argues that Petitioner's contract is void because Respondent did not establish a policy specifying whether Petitioner's position allows him to receive a term contract. Respondent contends that "when a school district exceeds its authority in entering into a contract its action and the contract is void," citing *Smith v. Alanis*, No. 03-01-00713-CV, 2002 Tex. App. LEXIS 5437*5 (Tex. App.—Austin July 26, 2002, no pet.) (mem. op., not designated for publication). Respondent's Br. at 18.

Smith, issued before January 1, 2003, and designated "do not publish," is not precedent. Furthermore, *Smith* is distinguishable because the board's decision to give Smith a term instead of a probationary contract violated two mandatory statutes that were merely restated in a district policy. Additionally, while *Smith* addresses section 21.002(a) and (b), it does not address (c), the section on which Respondent relies. Most importantly, *Smith* does not hold that a district's failure to comply with any statute related to a contract makes the contract void. When a school district grants a term contract to a person to whom it *could* grant a term contract, but such a contract is not permitted under its policies, the resulting contract is not void but voidable. Respondent does not prevail based on its claim that Texas Education Code § 21.0031 makes certain contracts void when it actually makes them voidable. *See Roberts*, Docket No. 021-R10-1204. If the contract is at most voidable, then the district must undergo a process to declare the contract void.

Entitlement to process

Respondent contends that because it acted appropriately to void Petitioner's contract, there is no contract. Respondent maintains that Petitioner has "no entitlement to Subchapter F or

any other procedural ‘process’ and Respondent breached no law.” Respondent’s Br. at 20.

Texas Education Code § 21.0031(c) provides:

A school district’s decision under Subsection (b) is not subject to appeal under this chapter, and the notice and hearing requirements of this chapter do not apply to the decision.

This provision means that when a school district takes action to declare a Chapter 21 contract void, the employee is not entitled to the process under Texas Education Code Chapter 21, subchapter F that would normally be required before a school district could terminate or suspend a Chapter 21 contract. It also means that the employee cannot appeal the school district’s decision to the Commissioner under Chapter 21, subchapter G. However, the inapplicability of subchapters F and G does not mean *no* process was required. Petitioner, who had a contract for the 2021–2022 school year, was still entitled to due process before Respondent ended his contract before its term.

The Commissioner can have jurisdiction over alleged violations of Texas Education Code § 21.0031 under Texas Education Code § 7.057(a)(2). Section 21.0031(c) removes claims under that section from the procedures under Texas Education Code Chapter 21, subchapters F and G. While Texas Education Code § 7.057 does not apply to Chapter 21, subchapter G cases, section 21.0031 is found in Chapter 21, subchapter A. Tex. Educ. Code § 7.057(e)(1). This could create a section 21.0031 claim over which the Commissioner has jurisdiction. However, Petitioner did not plead a section 21.0031 violation.

Waiver

Respondent argues that Petitioner waived the argument that his contract is a non-Chapter 21 contract referenced in Policy DCE(LOCAL) because he accepted the contract’s benefits. It is true that one cannot accept the benefits of a contract and then contest its validity. *See Wittman v. Nelson*, 100 S.W.3d 356, 360 (Tex. App.—San Antonio 2002, pet. denied). However, Petitioner argues that his contract, interpreted in light of Policy DCE(LOCAL), is a non-Chapter 21 contract, not that it is invalid. Petitioner is not prohibited by the *Wittman* doctrine from making this argument.

Due process

Petitioner's due process claim is:

The District violated Petitioner's due process rights . . . , which requires the District, prior to termination and discharge, to provide the employee with "reasonable notice of the cause or causes for termination, set out in sufficient detail to fairly enable him or her to show any error that may exist and the names and nature of the testimony of witnesses against him."

Petitioner's Br. at 3. The quoted section is from *Ferguson v. Thomas*, 430 F.2d 852, 856 (5th Cir. 1970). One can question whether *Ferguson* supports the first part of Petitioner's sentence alleging a pre-termination process requirement. A fuller quotation reads:

The rudiments of due process fair play in school administrative proceedings have been well outlined in this circuit with regard to the rights of college students who were subjected to disciplinary suspensions. They are entitled to a statement of the charges against them, the names of witnesses, the nature of the testimony of those witnesses and the opportunity of presenting a defense. *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). These same minimum standards are applicable to teachers who have an expectancy of reemployment. However, the standards of procedural due process are not wooden absolutes. The sufficiency of procedures employed in any particular situation must be judged in the light of the parties, the subject matter and the circumstances involved.

Ferguson, 430 F.2d at 856. Further, the Supreme Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 545–46, 105 S. Ct. 1487, 1495 (1985), suggests full due process is required only *after* termination. Prior to termination, only minimal process is required, giving the teacher an opportunity to explain why the contract should not be terminated. Because Petitioner was not entitled to full process prior to termination, his due process argument based on that contention fails. Petitioner does not argue that Respondent failed to afford him the pre-termination hearing that *Loudermill* requires. Further, he points to no record evidence in his brief to show he either did not receive either full due process, as he claims or limited pre-termination process under *Loudermill*. Further, the remedy for a lack of due process is generally the process that was due:

In general, however, the remedy for a denial of due process is due process. *See Perry v. Sindermann*, 408 U.S. 593, 603, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972) (upon proof of protected interest, professor whose contract was not renewed is not entitled to reinstatement but to hearing comporting with due process); *McIntire v. State*, 698 S.W.2d 652, 661-62 (Tex. Crim. App. 1985) (remedy for failure to grant hearing on motion for new trial is a hearing, not a new trial). Than is entitled to a fair hearing with notice of the charges and evidence to be used against him and with an opportunity to defend against the charges.

Univ. of Tex. Med. Sch. v. Than, 901 S.W.2d 926, 933–34 (Tex. 1995). Even if Petitioner had proved that he did not receive appropriate process, the proper remedy would be a remand.

Conclusion

Petitioner's appeal should be denied. Petitioner argued that he does not have a Chapter 21 contract and did not receive his required due process. However, Petitioner's contract is a Chapter 21 contract. Further, Petitioner did not meet his burden of proving his due process claims.

CONCLUSIONS OF LAW

After due consideration of the record, matters officially noticed, and the foregoing Findings of Fact, in my capacity as Administrative Law Judge, I make the following Conclusions of Law:

1. The Commissioner has jurisdiction over this case under Texas Education Code § 7.057.
2. An issue is properly denied before the Commissioner in a Texas Education Code § 7.057 case if the issue was not properly raised through the grievance process.
3. Because Petitioner did not raise the issue that he did not have a Chapter 21 contract through the grievance process, he cannot raise that issue before the Commissioner. Even if he could raise this issue, Petitioner's contract is a Chapter 21 contract.
4. Respondent's claim that because Petitioner's contract was void when it was signed, that Petitioner has no Texas Education Code § 7.057(a)(2)(B) claim fails because at most, a failure to comply with Texas Education Code § 21.0031 makes a contract voidable.
5. A school district's failure to create a policy under Texas Education Code § 21.002 that designates positions held by non-teachers who will be given term or continuing contracts does not make a contract with such a non-teacher invalid.
6. Respondent's failure to create a policy that specifies he should have been given a term contract does not make his term contract void.

7. When a school district takes action to declare a contract void under Texas Education Code § 21.0031, it is not required to follow the process set out in Texas Education Code Chapter 21, subchapter F, and no appeal to the Commissioner is allowed under Texas Education Code Chapter 21, subchapter G. Tex. Educ. Code § 21.0031(c). However, when a school district ends a contract under Texas Education Code § 21.0031, a teacher is entitled to due process that includes both a fairly perfunctory pre-termination hearing and a full due process hearing after termination.

8. Petitioner's argument that he was entitled to a full due process hearing prior to termination fails because such a hearing is only required after termination, and he asserts no other due process claims. Petitioner's due process claim fails.

9. Petitioner's Petition for Review should be denied.

RECOMMENDATION

After due consideration of the record, matters officially noticed and the foregoing Findings of Fact and Conclusions of Law, in my capacity as Administrative Law Judge, it is hereby RECOMMENDED that the Commissioner of Education adopt the foregoing Findings of Fact and Conclusions of Law and enter an order consistent therewith.

SIGNED AND ISSUED this 9th day of November 2022.

Christopher Maska

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Maska

Date: 2022.11.09 15:43:19 -06'00'

CHRISTOPHER MASKA

DIRECTOR

DIVISION OF HEARINGS AND APPEALS