
IN THE SUPREME COURT OF MISSOURI

No. SC86233

STATE OF MISSOURI ex rel.
THE SCHOOL DISTRICT OF KANSAS CITY, MISSOURI, et al.,

Relators,

v.

THE HONORABLE J.D. WILLIAMSON, JR.,

Respondent.

SUBSTITUTE BRIEF OF WESTPORT COMMUNITY
SECONDARY SCHOOLS AND
THE HONORABLE J.D. WILLIAMSON, JR.
IN RESPONSE TO RELATORS' SUBSTITUTE BRIEF

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OBJECTION TO STATEMENT OF FACTS

AND STATEMENT OF ADDITIONAL FACTS OMITTED BY RELATORS¹

I. GENERAL OBJECTION:

The evidentiary facts are established by the trial court's Findings of Fact which are set out in Paragraphs 1 through 25 of Respondent's Order Granting Preliminary Injunction (L.F. pp. 519 - 525). Whereas Relators' "Statement of Facts" recites some of the Respondent's Findings of Fact, Relators have omitted several relevant evidentiary and procedural facts and have also included certain alleged "facts" which were contested and not proven at the preliminary injunction hearing. Facts alleged in pleadings or comprising disputed, inadmissible or unproven allegations should not be considered by this Court. Rather, this Court should defer to the trial court's findings of fact based upon the entirety of the evidence. Westport, therefore, objects to the following portions of Relators' statement of evidentiary facts:

a. **Page 12, Article IV, Line 1:** The charter application Westport submitted to the Kansas City, Missouri School District ("District") in or about November 1998 did not specify the proposed duration of sponsorship. The charter application, however, did not constitute the sponsorship agreement. The sponsorship agreement consisted of the charter application and the District's letter of acceptance of the charter application. (See Paragraph 4 of Respondent's

¹ References to the Legal File and/or Appendices shall be as follows: "L.F. at p. ____."

Conclusions of Law, L.F. p. 519). Respondent expressly found that the “charter agreement” did not expressly state its duration. (Respondent’s Findings of Fact, Paragraph 11, L.F. p. 520).

b. **Page 12, Paragraph 4, Lines 2 - 4:** Though District urged at the injunction hearing that its representatives thought the charter agreement would expire June 30, 2004,² the evidence regarding the parties’ intent or understanding as to the duration of the charter agreement was conflicting and contested and Respondent concluded that:

Defendant’s position that the charter terminated on June 30, 2004, is untenable in view of the fact that (1) Section 160.405.1(3) provides that a charter ‘shall be renewable’ and further that the District invited a renewal application on April 1, 2004, which application was provided by the ‘charter application revision.’

(Respondent’s Conclusions of Law, Paragraph 7, L.F. p. 520).

c. **Page 12, Paragraph 4, Lines 4 - 6:** It is undisputed that the Department of Elementary and Secondary Education (“DESE”) did not “approve” the charter agreement as a five-year agreement. Rather, pursuant to its statutory authority, DESE reviewed the charter agreement and did not reject it. (See Respondent’s Findings of Fact, Paragraph 10, L.F. p. 520). Jocelyn Strand, an employee of DESE, testified by deposition at the evidentiary hearing. Her Affidavit was not entirely consistent with her deposition testimony. Ms. Strand testified that DESE did not approve the charter as a five-year agreement and that it was not DESE’s role

² Westport objected to such parol evidence and only offered its own evidence of Westport’s beliefs after the court permitted District to present such parol evidence.

to conduct such a review or make such a determination. Further, Ms. Strand testified that she “assumed” the charter agreement would be for five years because the charter application referred to Westport’s intent to contract with Edison for “at least five years” and Westport’s initial budget was for five years. (See Strand Deposition Testimony, L.F. p. 386 Depo. p. 13, L. 9 - 12). Because the trial court did not find that the charter agreement was for a five-year term, Ms. Strand’s opinions or conclusions either in affidavit or deposition testimony did not constitute a “fact” for this Court’s consideration.

In addition to the above-stated objections, Westport and Respondent respectfully assert the following additional evidentiary facts, all of which are established by Respondent’s Findings of Fact and the record:

1. In October 2003, District received a letter from Commissioner Kent King of DESE in which DESE encouraged the District to provide notice to Westport no later than October of any school year which the District intended not to renew the charter agreement at the end of the school year. (Findings of Fact, Paragraph 12, L.F. p. 520).

2. As of December 31, 2003, the District had not obtained or commissioned an audit of Westport’s performance for the years 1999 - 2000, 2000 - 2001, 2001 - 2002, or 2002 - 2003 school years as required by Section 165.405.7(6) (RSMo.). (Findings of Fact, Paragraph 13, L.F. p. 520).

3. On April 22, 2004, District informed Westport’s President that review of the application for revision of charter had been completed but that there were some deficiencies in the application. In the communication of April 22, 2004, however, District did not inform

Westport's President that the District did not intend to approve the application for charter revision. (Findings of Fact, Paragraphs 17 and 18, L.F. p. 521).

4. On April 27, 2004, Westport submitted supplemental documentation intended to address any alleged deficiencies in the charter revision application. (Findings of Fact, Paragraph 19, L.F. p. 521).

5. On the morning of April 28, 2004, District delivered to Westport's President the Financial Review Report and Charter School Review Committee Report (the "performance audit") alleging certain deficiencies in performance by Westport. District had never provided to Westport any performance report or audit alleging performance deficiencies even though District was required by Section 165.405.7(6) to have done so at least every two years from the commencement of the sponsorship agreement. (Findings of Fact, Paragraphs 13, 20 and 21, L.F. pp. 520 - 521).

6. On the morning of April 28, 2004, District informed Westport's President that District would consider the application for revision or renewal of the charter at the school board meeting scheduled for the evening of April 28. (Findings of Fact, Paragraph 22, L.F. p. 521).

7. District did not give written notice in writing at least sixty days prior to April 28, 2004, of proposed action by the District to reject the charter application revision or to terminate the charter agreement and only allowed Westport's President about eight minutes to address the Board at its meeting on April 28. (Findings of Fact, Paragraph 24, L.F. p. 521).

8. Immediately upon receipt of the Appeals Court Order of August 17 suspending the preliminary injunction and rejecting Westport's motions for rehearing or application for transfer, counsel for Westport informed counsel for the District that an application for transfer to the Missouri Supreme Court would be filed by close of business on August 17 and requesting that District take no action to interfere with the appellate process and Westport's continued use of the school facilities pending ruling by the Missouri Supreme Court on Westport's motion for stay and application for transfer. (See Motion for Stay, L.F. pp. 1316 - 1322).

9. Late on the afternoon of August 17, 2004, but after counsel for District had been served with Westport's application for transfer and motion for stay filed in the Supreme Court, District filed a motion in the Court of Appeals seeking emergency relief that would have permitted District to take possession of the school buildings. (See Westport's Supplemental Suggestions in Support of Motion for Stay, L.F. pp. 2261 - 2269).

10. Early on the morning of August 18, before such time as Westport had had an opportunity to respond to the emergency motion and before the Court of Appeals had taken any action on the emergency motion, District employees broke into the school buildings, doing considerable damage to the facilities, and physically prevented Westport employees from entering the building on the morning of August 18 when they arrived for work. (See Supplemental Motion for Stay, L.F. pp. 2262 - 2263).

11. On August 19, this Court granted Westport's Motion for Stay and its Application for Transfer and ordered that all parties comply fully with the Respondent's preliminary injunction pending further order by this Court.

RESPONSE TO POINTS RELIED UPON

I. Relators Are Not Entitled to an Order Prohibiting Respondent from Granting Plaintiff a Preliminary Injunction and from Otherwise Exercising Jurisdiction over this Matter Because the Circuit Court Had Subject Matter Jurisdiction over Plaintiff's Claims to Review the Underlying Agency Proceeding Either under the Charter School Statute or under the Missouri Administrative Procedure Act.

A. Introduction:

This Court and the appellate courts for the Eastern, Western and Southern Districts of Missouri have unanimously held that a writ of prohibition is not a device by which to circumvent the normal appellate process to address alleged lower court error. (*State ex rel. Lopp v. Munton*, 67 S.W.3d 666 (Mo. App. S.D. 2003)). Accordingly, the writ of prohibition shall not issue unless the trial court has acted without or exceeded its jurisdiction or irreparable harm will be suffered if relief is not immediately available and there is no adequate remedy on appeal. (*State ex. rel. Ford Motor Credit Corp. v. Bacon*, 63 S.W.3d 641 (Mo. banc 2003)).

The error by the Western District Court of Appeals ("Appeals Court") in issuing prohibition in this case and the fallacy in the argument District presented in the Appeals Court and presents now is the focus upon whether the trial court erred in construing and applying the Charter School Statute, Section 160.405 - 420 (RSMo. 1999), or the Missouri Administrative

Procedure Act (“APA”) rather than focusing upon whether Respondent had jurisdiction to do so.

Not surprisingly, Westport urged at the preliminary injunctive hearing and in the Court of Appeals and continues to believe that Respondent had jurisdiction to resolve Westport’s claims and that it was necessary for Respondent to properly construe and apply the charter school statute or the APA in order to do so. While Westport remains steadfast in its belief that Respondent did not err in his construction of the charter school statute and the APA and that the construction of these statutes by the Court of Appeals, if permitted to stand, would conflict with precedent established by this Court’s opinions and with prior opinions by the Southern, Eastern and Western District Courts of Appeal, this Court need not and should not be drawn into the debate over construction of the charter school statute or the APA. Rather, with due respect to the Opinion by the Court of Appeals, the District in its argument and the Court of Appeals in its Opinion have missed the mark by a wide margin.

The only two issues that are before this Court for resolution are: (1) whether Respondent acted without or in excess of jurisdiction; and (2) whether District has an adequate remedy on appeal.

For the following reasons, which will be discussed sequentially in more detail below, Respondent had jurisdiction and did not exceed or abuse his power; and District has an adequate appellate remedy.

(1) Under the multiple alternative claims Westport presented for injunctive relief, Respondent had jurisdiction under Section 160.405.3 and .7 to construe and apply the charter

school statute as necessary to adjudicate and resolve the claims and defenses and under the evidence presented and Respondent's Findings of Fact and Conclusions of Law, the grant of preliminary injunction was not arbitrary, capricious or irrational and was necessary to maintain the status quo pending final determination on the merits; and/or

(2) Under the multiple alternative claims pled by Westport, it was necessary for Respondent to construe and apply Section 160.405.3(1) of the charter school statute and Section 536.100 - 536.140 of the APA in order to determine whether Westport had been deprived of due process rights to which it was entitled in either a contested or an uncontested case before an administrative agency and the grant of preliminary injunction was not arbitrary, capricious or irrational and was reasonably necessary to maintain the status quo pending final determination on the merits; and/or

(3) Under Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, the Respondent had jurisdiction under Section 478.070 (RSMo.) to adjudicate a claim alleging deprivation of property without due process of law; and

(4) Because Westport posted the required bond and had demonstrated over the period 1999 through 2004 its capability of adequately performing its obligations under the charter agreement to provide educational benefits and opportunities for its students that equaled or exceeded those that were offered or supplied by the District to its students in the same time period and because Westport was ready, willing and able to continue providing such benefits and opportunities during the pendency of any appeal, Respondent did not exceed his

jurisdiction by preventing District from taking back the schools or attempting to hire the teachers.

B. Jurisdiction Under the Charter School Statute:

1. Deference to Respondent's Findings of Fact:

Westport and Respondent respectfully suggest that, while this Court may consider the entire Legal File, this Court should give great deference to and rely upon the facts found by Respondent where such fact findings contradict or reject facts alleged by Relators. (*McAllister v. McAllister*, 101 S.W.3d 287 (Mo. App. E.D. 2003)).

The questions of whether the charter agreement was for a five-year term and when the charter agreement would be ripe for renewal were hotly contested. Respondent did not find that the Agreement was for five years and would expire June 30, 2004. Rather, Respondent concluded that neither District nor Westport had complied with the requirement of the charter school statute that the duration of the charter be expressly stated in the charter agreement. Accordingly, Respondent stated in Paragraph 11 of his Findings of Fact that because the charter agreement did not expressly state the termination date, the District's position that the agreement terminated on June 30, 2004 unless District affirmatively agreed to renew it was "untenable."

Relators' attempted reliance upon the Affidavit of a DESE employee (J. Strand) for the proposition that DESE found the agreement to be a five-year sponsorship is highly troubling. First, the Affidavit conflicts with Ms. Strand's testimony. Second, Ms. Strand admitted that DESE did not approve the agreement as a five-year deal. Third, Ms. Strand testified that she

simply assumed it was a five-year deal because Westport anticipated an agreement with Edison for “at least five years.” (Strand Depo. L.F. p. 386). Fourth, the Respondent considered this evidence before concluding that there was not a specific termination date established by the charter agreement.

This Court need not, therefore, delve into the testimony of witnesses regarding their subjective beliefs as to the duration of the charter agreement. (*See Ford Motor Credit Co. v. Housing Authority of Kansas City, Missouri*, 849 S.W.2d 588 (Mo. App. W.D. 1993)). Rather, for consideration of the Appeals Court issuance of prohibition, then, in reliance upon the facts found by Respondent and not mere allegations by the parties, this Court should consider the issues presented within the context of a renewable charter agreement that had no specified end date.

2. Subject Matter Jurisdiction Under the Charter School Statute:

Relators assert that the Court lacked subject matter jurisdiction because Westport sought judicial review under the Missouri Administrative Procedure Act of an uncontested case.³ Relators’ argument is contrary to applicable law and ignores the entirety of Westport’s

³ Pursuant to Rule 83.08, the substitute brief shall include all claims the party desires this Court to review and matters included in the Court of Appeals brief that are not included in the substantive brief are deemed abandoned. While District limits its argument in Point I to consideration of whether Respondent had jurisdiction under the APA to consider Westport’s challenge to the Board’s action as a “contested case,” it has been and remains Westport’s

claims and Respondent's Findings of Fact.

In its Petition for Preliminary and Permanent Injunctive Relief, Westport asserted three separate but interconnected bases of jurisdiction: (1) review of District's action under the Administrative Procedure Act; and/or (2) review of an action by a governmental agency that is unlawful or unconstitutional; and/or (3) review of revocation of a charter agreement in violation of Section 160.405.7.

The question of subject matter jurisdiction is not particularly complex. Subject matter jurisdiction is the authority of the court to determine all general questions involved. Pursuant to Section 478.070 (RSMo.) the Circuit Court shall have original jurisdiction over all cases and matters, civil and criminal. Unless, then, there is an express statutory prohibition depriving a circuit court of jurisdiction or creating exclusive jurisdiction in some other forum or barring

position that Respondent had jurisdiction to review this matter (1) as a contested case under the APA or (2) to review the District action as a revocation or non-renewal in violation of the charter school statute or (3) to review the Board's action as a wrongful, unlawful or unconstitutional action in an uncontested case. Though District appears to have abandoned any challenge to Respondent's jurisdiction under the charter school statute or to review the matter as an uncontested case, because Westport urged in the Court of Appeals and urges now that the Respondent's jurisdiction did not derive solely from the power to review a contested case under the APA, Westport includes in this substitute brief discussion of all potential sources of the court's jurisdiction.

an action by virtue of immunity, statute of limitations, or other such statutory bar, the dispute must necessarily originate in the circuit court. (*Beavers v. Empire Dist. Elect. Co.*, 944 S.W.2d 249 (Mo. App. S.D. 1997)).

If the Petition states a case belonging to the general class over which a court's authority extends, the court has "subject matter jurisdiction." (*Beavers, supra*, at 250). The power the Court derives once subject matter jurisdiction attaches includes every incidental power necessary to make effectual remedies. (*Shull v. Boyd*, 158 S.W. 313 (Mo. 1913)). After jurisdiction of the controversy and the parties has attached, then, the court has jurisdiction to determine all properly pleaded phases thereof. (*Howell v. Reynolds*, 249 S.W.2d 381 (Mo. 1952)).

At common law, there were no charter schools. The creation, organization and existence of charter schools is governed entirely by the charter school statute enacted in 1999. The District, as an agency of the state, can act only in compliance with law and its involvement with Westport is governed by the charter school statute. Hence, the relationship between Westport and District and the Plaintiff's claims arising therefrom, must be considered within the context of the governing effect of the charter school statute.

The charter school statute was enacted in response to the growing concern for inadequacy of education particularly for minority and low income students who rarely had the financial ability or opportunity to attend private schools and who, therefore, were compelled to attend "failing schools" in public school districts. By enactment of the charter school statute, the Missouri legislature evinced the intent to provide choice to parents of students who

would otherwise effectively have no choice but to attend failing schools. The clearly intended purpose, then, of the charter school statute was to establish a means and mechanism to encourage and foster the creation, development and growth of charter schools both to provide an alternative to failing public schools and to encourage competition that would enhance the performance of the public schools. Notably, the significant beneficial impact of the “charter school movement” has recently been the topic of federal legislation and is a national focus. Charter schools are an integral part of the “No Child Left Behind” national education initiative. (See 20 U.S.C. 6316(b)(1)(E) and 2316(b)(8)(B)(i); *see also* David Brooks, *The Era of Small Government is Over*, N.Y. Times, August 29, 2004, at 55).

Suffice it to say, when the charter school statute was enacted, the District availed itself of the opportunity to obtain the benefit to children in the Kansas City, Missouri metropolitan area that would foreseeably flow from the advent of charter schools by accepting the application from Westport for sponsorship of the Westport Middle School and High School. Though, as the evidence in this case and the briefs and Legal File confirm, the relationship between Westport and District has not been without some bumps along the way, the reality is that during the period of almost five years from commencement of the agreement, Westport had not only provided education and educational opportunities that were demonstrably superior to those provided by the District for its students but, further, District had made virtually no complaint of dissatisfaction with Westport’s performance under the charter agreement.

The charter school statute sets forth the procedures that must be followed in order to create and effectuate a sponsorship agreement and the mechanism for ensuring sufficient

performance both by the District and by the charter school by requiring that the sponsor provide to the charter school at least every two years a performance audit detailing any alleged deficiencies in performance. (Section 165.405.7(b) (RSMo.)).

The statute specifies at Section 160.405.3(1) that a charter agreement must be for no less than five years and no more than ten years and must expressly state the charter's precise duration and "shall be renewable." The statute specifies the right to judicial review of an action by DESE rejecting a proposed charter agreement.⁴ The charter school statute also expressly states the procedures attendant to revocation of a charter agreement and the right to judicial review of such action. While the agreement must be renewable, however, the statute is silent as to procedures governing consideration of renewal requests or charter revision applications or whether there is judicial review from a denial of an application to renew or revise a charter agreement.

Westport's charter application did not state the proposed term. When the District accepted the charter application, it did not expressly limit the duration of the Agreement by stating a term less than the statutorily permitted ten-year maximum. When DESE reviewed the Agreement, it did not reject the Agreement for failing to state the precise term. Hence, due to the failure of Westport to request more than five years AND the failure of the District to limit its agreement to less than ten years, combined with DESE's failure to require the parties

⁴ The statute does not require approval by DESE, but does permit DESE to reject a proposed agreement.

to state the duration of the term, the Agreement commenced July 1, 1999, and was operative between the parties for almost five years without stating the end date.

It was not until February 11, 2004 that the District unilaterally, and without employing any procedures involving notice or an opportunity to be heard, informed Westport for the first time of its position that the Agreement would terminate June 30, 2004, unless it was revised and instructed Westport to submit a revision application. District did not, however, inform Westport until April 28, 2004, that it did not intend to renew the agreement and District had failed prior to April 28, 2004, to provide Westport any performance audits or notice of allegedly deficient performance. By April 28, 2004, of course, District knew that Westport could not have obtained a new sponsor by commencement of the Fall 2004 school year on August 23, 2004.

On April 28, 2004, the District's Board voted to reject Westport's revision request and not to renew. Westport had less than twelve hours notice of the meeting and was given virtually no opportunity to rebut the performance audit.⁵ Westport viewed the District's action as a bad faith revocation or a termination in violation of Westport's statutory and constitutional rights. Because District's belated action rendered it impossible for Westport to obtain other sponsorship before the August 23, 2004, start of school, Westport sought immediate judicial review, the only remedy available to it.

⁵ The audit report of more than 100 pages was delivered the morning of April 28. Westport's President was given about eight minutes to address the Board.

Because the relationship between Westport and the District derives from and is governed by the statute, and because the statute expressly requires that a charter agreement be renewable, whether the District's action constituted a revocation, a termination, or a non-renewal are matters that fall within the ambit of the charter school statute and which implicate Westport's constitutionally protected rights in a vested contract. It is clear that the charter school statute does not expressly prohibit circuit courts from adjudicating disputes regarding non-renewal or termination decisions, nor does the statute establish exclusive jurisdiction for such disputes in some other court or forum. The statute implies, but does not clearly state, that the procedures that should be applicable to non-renewal decisions and the availability of judicial review are the same as would apply to revocation actions. (See Respondent's Legal Conclusions, Paragraphs 6 - 8, L.F. p. 520, and DESE interpretation in DESE Memorandum of September 20, 2003, L.F. p. 722).

Claims alleging denial of procedural or substantive rights regarding either a revocation or a non-renewal decision would, therefore, appropriately be presented in the first instance in the circuit court, the court of general jurisdiction in the State of Missouri. (Section 478.070 (RSMo.). If, of course, the aggrieved party was entitled to notice and an opportunity to be heard regarding either a revocation or a non-renewal decision, the matter would be defined under Missouri law as a "contested case." (*State ex rel. Yarber v. McHenry*, 915 S.W.2d 325 (Mo. banc 1995); *Herron v. Kempker*, – S.W.3d – , 2003 WL 22478741, W.D. Mo., motion for transfer to Supreme Court granted January 28, 2004; case dismissed as moot May 25, 2004.

Further, even if Westport's claims were not properly categorized as a "contested case," entitling Westport to immediate judicial review under the APA, because Westport alleged a sufficient factual predicate to establish deprivation of a vested property interest in violation of its constitutional rights, Westport was also entitled to judicial review either under that portion of the APA pertaining to "uncontested cases" or under Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution because of the Circuit Court's general jurisdiction to adjudicate claims of deprivation of constitutional rights.

Because the charter agreement was of indefinite duration but, by statute, was required to be renewable, as of April 28, 2004, when the Board voted to terminate the agreement without fair notice and an opportunity for Westport to be heard in opposition, Westport's contract was both in effect and renewable.

In *Bak-A-Lum Corp. v. Alcoa Building Products*, 351 A.2d 349 (N.J. 1976), the Court held that, while contracts of indefinite duration may not remain in existence in perpetuity, neither party to such a contract has the unilateral right to deprive the other party of its contract benefit by terminating the contract unreasonably, unfairly, in bad faith or without fair notice. Clearly, a contract of indefinite duration constitutes a vested property interest until there has been proper termination because, since there is no specified end date, the question of renewal or non-renewal is a mere fiction until the end of the term is established. Unless, therefore, District had the right to unilaterally determine that the contract would expire as of June 30, 2004, there was no contractual or statutory basis for District to vote on April 28 not to renew

the contract as of June 30, 2004. Hence, as of April 28, 2004, Westport had a vested property right in its existing contract and Westport could not be divested of its property right in a contract of indefinite term unreasonably, unfairly, in bad faith, and without adequate notice. (*See also Millet Co. v. Park & Tillford Distillers*, 123 F.Supp. 484 (N.D. Cal. 1954)).

On the basis of Westport's claim of unconstitutional deprivation of its property right, Respondent had jurisdiction to adjudicate the claim and his finding that the contract did not have a definite end date and that the District's Board acted unfairly and without adequate notice confirms the unconstitutionality of District's action. There was, therefore, jurisdiction under Section 478.070, even if there was not jurisdiction under the APA or the charter school statute.

Even if the charter agreement had expressly stated its duration, as the charter statute requires, Section 160.405.3(1) also expressly states that charter agreements "shall be renewable." Accordingly, the trial court correctly concluded that the statute is ambiguous by failing to establish the procedures that must be followed as conditions precedent to a non-renewal decision and as to the availability of judicial review. While Respondent also had subject matter jurisdiction to adjudicate Westport's claim as a contested case under the APA, because the District did not comply with the charter school statute by exercising its right to expressly limit the duration of the charter agreement to something less than five years, the District's argument that the trial court was without jurisdiction under the charter school statute to even consider the Relators' claims is without merit.

District's position, if adopted by this Court, would create the anomalous situation that even when a governmental entity has failed to strictly comply with a statute governing its contract obligations, a circuit court is without jurisdiction to consider the effect of such non-compliance. The ultimate result of District's argument would be to preclude the aggrieved party from any remedy whatsoever in the case of a unilateral action by a governmental entity that is not permitted by an applicable statute.

An action for injunctive relief is equitable in nature. Because equity abhors a forfeiture and because there must always be some reasonable remedy for every wrong, not only did the Respondent have subject matter jurisdiction to determine whether the District's purported action was permissible under the charter school statute or the APA but, further, the Court had both the power and the obligation to fashion an appropriate remedy to preserve the status quo if the Court concluded that the District's action was unlawful, unconstitutional, or substantially inequitable. (*State on Inf. of McKittrick v. American Ins. Co.*, 173 S.W.2d 519 (Mo. 1943)).

Confronted with the issue of how to apply Section 160.405.7(1) of the charter school statute in the case of a non-renewal or termination decision as to a charter that, contrary to statute, does not specify the duration of the agreement, Respondent had jurisdiction to construe and apply the statute.

District implicitly suggests that the charter school statute should be construed and applied so as to provide no remedy whatsoever to a charter school whose charter is not renewed or terminated suddenly and without warning even though the contract does not state the expiration date. Not only does the statute not state such a proposition but, as the

Respondent concluded, such an interpretation or construction of the statute would be unreasonable and inequitable. Suffice it to say, the DESE memorandum (L.F. p. 722) is consistent with the Judge's conclusions and the Respondent properly gave deference to the DESE position. (*See State ex rel. Competitive Telecommunications v. Missouri Public Service Comm.*, 886 S.W.2d 34 (Mo. App. W.D. 1994); *see also Grant of Charter School Application of Englewood*, 727 A.2d 15 (Super. Ct. N.J. 1999).

While it is well-established that a writ of prohibition is not a substitute for appeal and does not provide a means to circumvent the effect of an interlocutory ruling, that is precisely what Relators attempt to do in this case. Relator's response to Westport's Petition for Injunctive Relief raises an objection to jurisdiction. Relators could have sought to obtain a writ of prohibition at the outset when the trial court determined that it would proceed with a hearing on the preliminary injunction request. In the mistaken belief that it would prevail and that Westport would, then, be unable to appeal from the interlocutory denial of preliminary injunctive relief before the charter agreement ended June 30, 2004, District apparently elected not to proceed to seek a writ of prohibition at the outset. When Respondent entered his Order on June 25, 2004, granting preliminary injunctive relief and maintaining the status quo by precluding the District from withdrawing its grant of the right for Westport to use the schools and prohibiting the District from attempting to hire away the teachers and recruit the students, District sought to short-circuit the appeals process by seeking prohibition even before the preliminary injunction became permanent. Hence, District filed its petition for writ of prohibition without first (1) proceeding to or obtaining final judgment; or (2) seeking an order

of appealability of an interlocutory order under Rule 74.01. (*Gibson v. Brewer*, 952 S.W.2d 239 (Mo. banc 1997)).

While purporting to challenge Respondent's subject matter jurisdiction, in reality, District's Petition for Writ of Prohibition was little more than a collateral assault upon the Respondent's legal conclusion construing and applying Section 160.405.3 to provide due process rights for renewal disputes. Because a trial court having subject matter jurisdiction to entertain a claim clearly has the power to construe ambiguous contracts or ambiguous statutes and to resolve all claims pending before it, the District's assertion that the trial court had no jurisdiction was untenable and should have been rejected by the Appeals Court.

The Opinion by the Court of Appeals is wrong both substantively and procedurally. Initially, as will be discussed below, the Court of Appeals ignored its prior precedent in *Lohm v. The Personnel Advisory Board*, 948 S.W.2d 701 (Mo. App. W.D. 1997), and precedent established by this Court in *State ex rel. Baldwin v. Dandurand*, 785 S.W.2d 547 (Mo. banc 1990), by issuing prohibition even though the Petitioner had failed to plead or prove inadequacy or lack of an appellate remedy. In so doing, the Court of Appeals effectively sanctioned the use of prohibition as a means to circumvent the appellate process even when there is an adequate appellate remedy.

The issuance of prohibition in this case is doubly erroneous in that the Appeals Court: (1) failed to distinguish between the trial court's jurisdiction to construe a statute and the correctness of the trial court's construction; and (2) based its decision upon an erroneous construction of the charter school statute.

Because District did not comply with the statute by specifically stating the term of sponsorship, the trial court was obligated to adjudicate the effect of the absence of a stated expiration date in the contract. Having acquired jurisdiction to resolve that issue, among others, the court had the power to construe both the statute and the contract. Hence, while District would have a right to appellate review of the correctness of the trial court's construction of the statute, it was not entitled to prohibition preventing Respondent from exercising its judicial power to construe the statute.

It is also clear that the Court of Appeals' conclusion that the trial court erroneously construed the charter school statute is palpably incorrect. The Court of Appeals' determination that the charter school statute should be construed to mean that a charter contract that fails to specify its duration shall be deemed to be for a five-year term is without any legal support either in statutory construction, contract law, or public policy.

By enactment of the charter school statute, the legislature of Missouri expressed the public policy of Missouri to further choice for parents and children. By specifying that the term of a sponsorship agreement shall be for no less than five years and no more than ten years and shall be renewable, the legislature expressed the intention that, if a sponsor desires to limit the term of sponsorship, it has the power to do so but must expressly so state in the agreement. Since the purpose of the charter school statute is to encourage the creation of charter schools to benefit the public and provide more choice and competition that will encourage public schools to improve curriculum and performance, a construction of the statute that would tend to reduce or minimize the length of charter agreements would be unwarranted.

Suffice it to say, the opinion by the Court of Appeals does not state any legislative history or other reliable authority for the proposition that the charter school statute should be deemed to limit charter agreements to five years when the sponsoring organization has failed to avail itself of the statutory right to limit the term of its sponsorship.

It is significant to note that the Court of Appeals did not purport to construe the contract, instead it construed the statute. Under the holding in *Ford Motor Credit Co., supra*, the court could not have construed the contract so as to state a five-year term because the District, as a public agency, must act through written contracts. District, having failed to satisfy its statutory obligation to specify the precise duration of the contract, could not, therefore, rely upon oral statements of intention or understanding to fill in the missing term. Hence, the Court of Appeals resorted to construction of the statute but, in so doing, did not apply well-established rules of statutory construction. Clearly, if the intent of the statute is to enhance the use of charter schools so as to provide alternatives and choice and to increase competition for the benefit of children who might otherwise be required to attend failing, unaccredited or inadequate public schools, a construction of the statute that would both minimize the length of sponsorship agreements and permit sponsors to unilaterally terminate sponsorship agreements would conflict with the express language of the statute requiring specified duration and renewability and would be contrary to the purpose of the statute.

Notably, DESE, the state agency empowered and obligated to enforce the statute does not concur with District's action and there is no case law from Missouri or another jurisdiction construing or applying a similar charter school statute in this fashion. Quite the contrary,

because the charter school statute should be construed in a way that will further the public policy of permitting operation of charter schools, the Appeals Court's construction of the statute was contrary to Respondent's Findings of Fact and to public policy.

The Court of Appeals employed an incorrect standard of law in considering the Petition for Writ of Prohibition and erred in its construction of the charter school statute. Because the question before the Court of Appeals was limited to whether Respondent had the power to construe the statute, not whether Respondent was correct in his construction of it, this Court should set aside and vacate writ of prohibition and should remand the matter to the trial court for any further action necessary or appropriate under the petition.

C. Jurisdiction Under the APA:

District's argument that Respondent did not have jurisdiction under APA to review a decision by an administrative agency in a contested case misperceives this Court's holding in *State ex rel. Yarber v. McHenry*, 915 S.W.2d 325 (Mo. banc 1995) and the holding by the Western District Court of Appeals in *Herron v. Kempker*, WD No. 62328 decided Nov. 3, 2003, motion for transfer or rehearing denied Dec. 23, 2003; (2003 WL 22478741, W.D. Mo.) Essentially, District's argument depends entirely upon the unwarranted and demonstrably inaccurate suggestion that the sponsorship agreement had a five-year term. Even if that were true, District's argument wholly ignores the plain language of the statute specifying that the agreement "shall be renewable."

District violated the statutory obligation to specifically limit the duration of the charter agreement to something less than ten years if it chose to do so and now seeks to ignore the express clause of Section 160.405.3 requiring that the agreement be renewable.

District's argument works backward from the supposition that the statute expressly precluded judicial review of a non-renewal decision. District ignores the fact, however, that, in light of Westport's claims, it was necessary for the court to review the statute to determine whether there was any right to judicial review from a non-renewal decision. Hence, rather than starting with the proposition that the statute expressly precluded judicial review, this Court should start with the proposition that the trial court had jurisdiction to review the statute and, then, determine whether Westport was entitled to procedural due process under the statute in conjunction with a non-renewal decision. It is, of course, well-established Missouri law that when a statute is ambiguous or contains inconsistent clauses, the statute must be construed in a way that will reconcile the inconsistent clauses and will further the purpose and intent of the statute. (*Hovis v. Daves*, 14 S.W.3d 593 (Mo. 2000)).

The logical deficiency in District's argument is the failure to recognize and properly apply holdings in *McHenry* and *Kempker*. Therein, the Courts concluded that the hallmark of a "contested case", as that term is used in the APA, is not whether the agency conducted a hearing or has established procedures for a hearing, but whether the agency should have held a hearing. The holding in *Kempker* confirms the proper application of *McHenry*:

To hold otherwise is illogical, if not absurd, and thwarts one of
Chapter 536's primary purposes: To mandate what proceedings

must be followed in contested cases. Holding that a contested case is determined by what procedures an agency used in holding a hearing renders the General Assembly's definition in Section 536.010(2) meaningless.

(Herron v. Kempker at 3).

If the law were otherwise, administrative agencies could effectively prevent judicial review of their actions by making every case "non-contested" simply by refusing to conduct hearings with procedural formalities. Hence, the focus must be upon what the agency should have done, not what it actually did.

Respondent properly concluded that Section 160.405.3(1) is ambiguous or inconsistent with Section 160.405.7 because, whereas the charter school statute specifically contemplates renewal of a charter agreement by stating that the charter "shall be renewable" (Section 160.405.1(3)), and specifically sets out the procedures that must be followed in the event of revocation of a charter agreement (Section 160.405.7), the statute is silent as to what procedures must be followed for non-renewal decisions. Far from specifying that the charter school has no right to a hearing with procedural formality prior to a non-renewal decision by the sponsor, the statute is silent on that matter.

Hence, when Westport pled in Count I of its Petition that the District's action on April 28 constituted a contested case entitling Westport to judicial review, the Court had jurisdiction to determine: (1) whether the action was a revocation, in which event, Westport's statutory rights had clearly been violated; or (2) whether, even if the action was non-renewal, Westport

was entitled to due process rights prior to the non-renewal decision. In either event, this was a contested case entitling Westport to judicial review.

Moreover, Respondent concluded that the District's position that the charter terminated on June 30, 2004, was "untenable" in view of the fact that a charter agreement "shall be renewable" and that the District invited Westport to submit an application to revise the charter. Hence, Respondent further found and concluded that:

Because the statute specifically provides for renewal of a charter and Plaintiff made such application but was not provided with the statutorily required process, the District has no basis [sic] which to deny the Westport renewal. Because neither party followed the process set out in the statute for granting a charter application which the Court finds as an appropriate renewal or amendment, there has been no valid or effective termination of the charter granted to Plaintiff.

(Respondent's Conclusions of Law, Paragraph 8, L.F. p. 520).

The Respondent did nothing more than that which every judge is empowered to do when confronted with application of an ambiguous statute. He construed the language of the various sections in a way that was reasonably necessary to have the statute make sense and avoid an absurd or unfair result and to comport with the Court's equitable obligation to ensure that there is an appropriate remedy for a wrong established by the evidence. (*Hovis v. Daves*, 14 S.W.3d 593 (Mo. 2000)).

Because, under the holdings in *McHenry* and *Herron*, the existence of a contested case is governed by what procedural and substantive due process should have been afforded, not what was afforded, and because Westport properly pled sufficient facts to establish that it was deprived of any reasonably fair procedural or substantive rights in the termination of the sponsorship agreement, whether by revocation or non-renewal, Respondent had jurisdiction either under the statute or the contested case provision of the APA to review the District's action.

While Westport remains convinced that Respondent's construction of the charter school statute was correct, Westport urges that the issue of whether Respondent's construction was correct was not before the Court of Appeals and is not before this Court. Succinctly stated, the issue is not whether Respondent was right in his construction but, rather, whether Respondent had the right to construe the statute. Because, for the reasons stated above and under the rationale of *McHenry* and *Herron*, the District's action was a contested case, Respondent had jurisdiction under the APA and did not exceed his powers and the writ of prohibition should not have been issued.

D. Jurisdiction Over Uncontested Cases and General Jurisdiction to Decide Constitutional Claims:

Even if the District's non-renewal action were deemed an uncontested case, the trial court would still have had subject matter jurisdiction pursuant to that portion of Section 536.100 permitting judicial review of agency actions that are wrongful, unlawful or unconstitutional and under Section 478.070 to adjudicate claims of deprivation of due process.

The right to judicial review from a final decision by an administrative agency is constitutional, not merely statutory. Unless there is some other procedure for review that is established by statute, then, a party aggrieved by a final decision adversely affecting its liberty or property rights may proceed to judicial review. (*State ex rel. Burns v. Stanton*, 311 S.W.2d 137 (Mo. App. 1983)). When an agency engages in an action that is wrongful or unconstitutional, and there is no other administrative remedy available, judicial review is the only way the aggrieved party can obtain relief. (*Farm Bureau Town & Country Ins. Co. v. Angoff*, 909 S.W.2d 348 (Mo. 1995)).

Since the District did not avail itself of the opportunity to limit the length of the charter agreement to less than ten years by specifying the precise duration of the charter as the District was required to do by Section 160.405, the District's unilateral action in declaring the contract termination date to be June 30, 2004, was both wrongful and unlawful. Since there was no statutory or contractual authority for the District's action, even if the District's action were deemed to constitute an "uncontested case", the Court would still have had subject matter jurisdiction to review the District's action. (*Stanton, supra*).

Relators blithely assert that Westport did not have due process rights because it did not have a vested property interest in continuation of the charter agreement past June 30, 2004. This argument, however, is premised upon the faulty and unproven assertion that Westport had no reasonable expectation that the agreement would extend beyond June 30, 2004. Not only does the charter agreement fail to specify June 30, 2004, as the end of the term of agreement but, further, the trial court made no such finding. Quite the contrary, the trial court concluded

that, because the District's authority to enter into a charter agreement is strictly and solely derived from and governed by Section 160.405 and the that District did not comply strictly with that section of the Missouri statutes, District's claim that the contract expired June 30, 2004, was untenable. (Respondent's Conclusions of Law, Paragraphs 3 and 7, L.F. p. 519-20).

The charter school statute also states that the agreement "shall be renewable." Because the Agreement had no specified ending date, as of April 28, 2004, the date of wrongful action by the District's Board, Westport had a vested property interest in a contract that had no specified ending date and which was renewable. (*See Bordelon v. Chicago School Reform Board*, 8 F.Supp.2d 779 (N.D. Ill. 1998)). As a result, Respondent properly concluded that District's position that the contract ended June 30, 2004, and that Westport had no expectancy of renewal was untenable. The District's unilateral action deprived Westport of its vested right without due process.

As noted previously, under the holdings in *Alcoa Building Products* and *Park & Tillford Distillers*, a contract that does not specify the termination date cannot be unilaterally terminated by one party in bad faith, unfairly or without reasonably adequate notice to the other party. It is incontrovertible in this case, and Respondent so found, that the charter agreement does not specify the termination date. The fact that District may have unilaterally announced almost five years into the contract that the contract would end on June 30, 2004, was not binding upon Westport or the court. As of April 28, 2004, then, when the District's Board voted to terminate the contract as of June 30, 2004, without any fair notice to Westport, the contract was not only in effect and operational but, more importantly, the question of whether

the Board had the right to unilaterally terminate the contract as of June 30, 2004 remained in dispute.

Because an existing contract constitutes a vested property interest and because one cannot be divested of a property interest by a governmental entity without due process of law, Westport had a right under Section 478.070 (RSMo.) to seek immediate judicial relief to enjoin the District's allegedly unconstitutional deprivation of Westport's existing contract rights. District's reliance upon *Roth* and its progeny have no application in this case because, for reasons stated previously, the contract at issue here was in effect and had no specified end date. Unless District had the right to terminate the contract as of June 30, 2004, then, the District had no right even to address the question of renewal. As of April 28, 2004, it had not been determined when the contract would end. If, then, Respondent had no jurisdiction to adjudicate Westport's claim that the contract did not expire as of June 30, 2004, the natural question would be: In what forum could Westport have ever adjudicated its claim of deprivation of constitutional rights?

District attempts to avoid answering this question by urging, contrary to the facts in this case, that the contract terminated June 30, 2004. Why? Simply because District so declared? Westport disagreed! Because Respondent was not bound to accept as proven District's mere allegation as to the termination date, Westport had the right to contest District's claim as the basis for its deprivation of due process action seeking injunctive relief.

Confronted with Westport's claim that the District's action deprived it of a vested property interest without due process, Respondent had subject matter jurisdiction to

determine: (1) whether there was a property interest; and (2) if so, did the District's action on April 28, 2004, comport with due process. Since Westport's property interest in a "renewable" contract clearly existed as of April 28 because there was no specified termination date and the statute contemplates renewal, the Court, then, also had the power to determine whether there was a denial of due process. The District's argument that Respondent had no subject matter jurisdiction to review the denial of due process claim as an uncontested case under the APA or a denial of constitutionally protected rights under Section 478.070 is, therefore, without merit.

E. Adequate Appellate Remedy:

The Appellate Courts of Missouri have emphasized that a writ of prohibition is not a substitute for appeal or a cure for every alleged wrong. (*State ex rel. FAG Bearings Corp. v. Perigo*, 8 S.W.3d 118, 120 (Mo. App. S.D. 1999)). The writ of prohibition is not intended to provide a means for interlocutory appeal. (*State ex rel. Lopp v. Munton*, 67 S.W.3d 666, 670 (Mo. App. S.D. 2002)). Rather, a writ of prohibition may be appropriate to (1) prevent a court from acting without jurisdiction; or (2) to remedy an excess of jurisdiction or an abuse of discretion when the lower court lacks the power to act as intended; or (3) when a party may suffer irreparable harm if relief is not made available in response to the trial court's order. (*State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641 (Mo. banc 2002)).

In addition, because the writ of prohibition is not intended to provide the means for circumventing the appellate process, one who seeks prohibition must also plead and prove that there is no adequate appellate remedy. (*State ex rel. Baldwin v. Dandurand*, 785 S.W.2d 547

(Mo. banc 1990)). The holding in *Dandurand* is consistent with the holding by the Missouri Court of Appeals for the Western District in *Lohm v. The Personnel Advisory Board*, 948 S.W.2d 701 (Mo. App. W.D. 1997).

This Court's holding in *Dandurand* and the decision by the Western District Court of Appeals in *Lohm* are consistent with this Court's recent Opinion in *State ex rel. T.W. v. Ohmer*, 133 S.W.3d 41 (Mo. banc 2004), wherein the Court reaffirmed the three circumstances under which prohibition may be appropriate but did not specifically address adequacy of appellate remedy. It was not necessary for this Court in *Ohmer* to address adequacy of appellate remedy because the basis for prohibition in *Ohmer* was not lack of jurisdiction but, rather, irreparable harm precisely because there was no adequate appellate remedy.

Likewise, in *State ex rel. Proctor v. Bryson*, 100 S.W.3d 775 (Mo. banc 2003), it was unnecessary for the Court to reaffirm inadequacy of appellate remedy as a prerequisite to prohibition because, though prohibition was granted in *Proctor* because the court exceeded its jurisdiction, there was no adequate appellate remedy because by the time an appeal could have been processed, the defendant would already have been compelled to submit to the psychiatric evaluation that prohibition was intended to prevent.

Hence, whereas District urges that the holdings in *Ohmer* and *Proctor* effectively do away with the requirement in *Dandurand* that Petitioner plead and prove absence of an adequate appellate remedy, such is not the case.

District also urges that under the holding in *State ex rel. Director of Revenue v. McHenry*, 861 S.W.2d 562 (Mo. banc 1993), prohibition may be granted against an order granting injunctive relief without showing lack of appellate remedy. The holding in *McHenry* does not so state and does not directly or by implication weaken, modify or reverse this Court's holding in *Dandurand*. *McHenry* is a case that involved the question of whether the trial court could stay the automatic thirty-day suspension of driving privileges pending appeal. There clearly was no adequate appellate remedy because it would have taken far longer than thirty days for the appeal to proceed.

In the instant case, of course, not only did District fail to plead inadequacy of appellate remedy in its Petition for Writ of Prohibition but, further, District failed to provide any factual basis either in its Petition or its brief in the Appeals Court to establish inadequacy of appellate remedy. It is readily apparent that there is an adequate appellate remedy and has been from the outset. Because District did not raise the issue of inadequate appellate remedy on appeal, it cannot do so now. (*JAD v. FJD, III*, 978 S.W.2d 336 (Mo. banc 1998)).

Whereas a preliminary injunction order does not constitute a final appealable order, District had three readily available avenues that would have provided adequate appellate redress for District. First, because District and Westport agreed prior to the hearing on the preliminary injunction that all evidence taken at the preliminary injunction hearing would constitute evidence on further hearing for permanent injunction, and because the issues adjudicated at the preliminary injunction hearing were effectively dispositive with regard to the question of whether District improperly terminated or non-renewed the charter agreement,

District could have requested the trial court make the preliminary injunction order permanent so that an immediate appeal could follow. Second, District could have sought from Respondent an order declaring the preliminary injunction order appealable for purposes of resolution of the important issue involved. (Rule 74.01; *Gibson v. Brewer, supra*). District also failed to avail itself of such opportunity. Third, District could have given notice to Westport of the intended non-renewal and conducted an appropriate hearing. District chose not to do so.

The notion that District has no adequate remedy on appeal is also belied by the record. As a necessary precondition to grant of preliminary injunction, Respondent required Westport to post a bond and Westport did so. Pursuant to its agreement with District dating back to April 1999, Westport has conducted school operations under an oral license agreement with District for use of District's school buildings. The license to use the buildings for conduct of charter school operations was always linked to the sponsorship agreement (see Charter Application, p. 22, L.F. p. 1411) and was intended to remain in effect so long as the sponsorship agreement remained in effect.

Evidence at the injunction hearing established that the academic performance by Westport students has equaled or surpassed performance by high school and middle school students in the District. As of the date of Respondent's grant of preliminary injunction, Westport had teachers, a curriculum, facilities, equipment, supplies and funds available for the 2004-2005 school year. School was scheduled to start August 23, 2004, and has now commenced despite District's belated efforts on August 18 to disrupt and interfere with such

commencement. Even if District were to prevail on appeal and could establish any financial loss resulting from continued operation of the charter schools during the pendency of an appeal, then, the District would have an adequate appellate remedy.

Hence, not only was there no claim by District either in its petition for prohibition or in the Appeals Court that it had no adequate appellate remedy but, further, it is abundantly clear that there is an adequate appellate remedy. Because the standard for prohibition has not been met, this Court should vacate the writ and remand the matter to the trial court for any further action that may be appropriate.

F. Conclusion:

Even ignoring the issue of lack of appellate remedy, which District did not plead or preserve, if Respondent had jurisdiction, prohibition should not have issued. Under Westport's claims, Respondent had jurisdiction under one or more of the following theories:

- a. Statutory authority under Section 160.405.7 to review revocation actions; and/or
- b. Statutory authority under Section 160.405.3(1), as construed by the trial court, to review non-renewal/termination decisions; and/or
- c. Statutory authority under the APA to review decisions in contested cases; and/or
- d. Authority under the APA and Missouri and U.S. Constitution to review decisions in uncontested cases that involve unlawful, wrongful or unconstitutional action by an administrative agency.

II. Relators Are Not Entitled to an Order Prohibiting Respondent from Granting Plaintiff a Preliminary Injunction and from Otherwise Exercising Jurisdiction over this Matter Because the Circuit Court Had Subject Matter Jurisdiction over Plaintiff's Claims to Review the Underlying Agency Proceeding Either under the Charter School Statute or under the Missouri Administrative Procedure Act.

District also asserts that, even if the Respondent had subject matter jurisdiction, Respondent acted in excess of his jurisdiction. Reduced to its essence, the District urges that a judge exceeds his jurisdiction when he enters an order necessary to preserve the status quo pending final determination of a dispute.

To establish that a trial court has “exceeded its jurisdiction,” it is necessary that the Petitioner present reliable evidence to the Court of Appeals to show that Respondent’s action was prohibited by law or was an abuse of discretion. The abuse of discretion standard effectively requires a showing that the Respondent’s action was arbitrary, capricious, irrational, or without any meaningful evidentiary support.

Here, it was necessary for the Court to construe the ambiguous portions of the charter school statute. Certainly, if the Court had subject matter jurisdiction to resolve the disputes raised by Westport’s Petition, Defendants’ Answer and Westport’s Response to the Affirmative Defenses, the Court was required to apply Section 160.405.3(1). The Court not only had the power but the obligation to construe the statute and to apply it in a way that is fair,

reasonable, and would preclude an absurd result. (*In re Tant Bankruptcy*, 156 B.R. 1018 (W.D. Mo. 1993)).

Because the charter school statute is new, there has been virtually no case law in Missouri interpreting, construing or applying it. Respondent properly concluded that the statute is ambiguous in its failure to identify the procedures applicable with regard to non-renewal or revision of existing charter agreements. DESE is the state agency empowered to implement and supervise application of the charter school statute. Certainly, Respondent's construction of the statute conforms with the DESE memorandum of September 30, 2003 (L.F. p. 723) stating DESE's position that the notice and procedures specified in Section 160.405.7 applicable to revocations should also apply to renewal decisions and that final decisions not to renew should be subject to judicial review pursuant to Section 536 RSMo. Deference to the DESE interpretation would be consistent with the holdings in *Competitive Telecommunications*. See also *Application of Englewood*, 727 A.2d 15 (Super. Ct. N.J. 1999), concluding that "when interpreting a new statute, a reviewing court must accord substantial deference to the interpretation by the agency charged with implementing it." Respondent's construction of the statute was anything but arbitrary or irrational.

District did not assert in the court below and has not raised here any challenge to the sufficiency of the evidence to support Respondent's issuance of the preliminary injunction order under the standard of *State ex. rel., Director of Revenue v. Gabbert*, 925 S.W.2d 838 (Mo. banc 1996). Suffice is to say, because sufficiency of evidence is not a matter that can be challenged by way of prohibition, even if District had attempted to preserve the issue by

asserting it in the court below, sufficiency of the evidence for Respondent's Findings of Fact to support grant of preliminary injunction is not before this Court and it is, therefore, unnecessary for Westport to address that question. Since District cannot attempt to use the device of prohibition to directly challenge Respondent's Findings of Fact or Conclusions of Law supporting the grant of preliminary injunction, District is reduced in Point II of its Substitute Brief to presenting the facile and facially contradictory argument that Respondent exceeded his jurisdiction by including in the preliminary injunction order a prohibition against the District taking actions that would render the injunction moot and entirely ineffective by depriving Westport of school buildings, teachers, and students with which to carry out charter school operations.

It is significant to note a matter that District has entirely ignored and omitted from its briefing. The interference with Westport's continued use of the school buildings and the attempt to hire away Westport's teachers and to intimidate or scare Westport's students into enrolling elsewhere was not merely a contrived or imaginary threat. Rather, from the point that District informed Westport on April 28, 2004, that the Charter Agreement would terminate June 30, 2004, District also stated its intent to prevent Westport from using the buildings that District had permitted Westport to use as an integral part of the sponsorship agreement since 1999, and District began contacting Westport's teachers in an effort to induce them to contract with the District to teach at schools other than Westport in the Fall 2004-Spring 2005 school year. District also sent out a mass mailing to the Westport students and their families suggesting that Westport would not be open for school as a charter school in the Fall 2004-

Spring 2005 school year. Westport raised these issues with the judge at the commencement of the injunction proceedings. Respondent ordered all parties to desist in any further action during the pendency of the injunction proceeding that would disturb the status quo or interfere with Respondent's ability to enter an effective order after entertaining the evidence. Specifically, Respondent informed the parties and their counsel that there should be no more mass mailings or communications to teachers, parents, or students at Westport that would tend to encourage teachers to contract elsewhere or students to enroll elsewhere. Hence, when the Court entered the preliminary injunction order, inclusion of the restriction against District interfering with Westport's continued use of the school buildings or attempting to induce teachers who had contracted with Westport to contract with District to teach elsewhere or attempting to induce students to enroll at other schools was not only entirely rational as a result of District's prior demonstrable interference but was also necessary in order to effectuate the preliminary injunction.

District's argument is palpably incorrect and manifestly absurd in light of the primary purpose of a preliminary injunction, which is to maintain and preserve the status quo to prevent irreparable harm or injury to the public or the parties as the action proceeds to final adjudication on the merits of all of the claims.⁶ District's grossly unwarranted attempt to

⁶Westport asserted multiple alternative causes of action. The preliminary injunction order did not address or adjudicate all of Westport's claims, and they remain in the court below for final resolution on the merits.

disrupt the appellate process by staging a “midnight raid” to forcibly retake possession of the school buildings to preclude Westport from opening school on the morning of August 23 is indicative of the absurdity of District’s argument in Point II in this appeal.

It is undisputed that Westport is not a tenant of District in the school buildings under written lease. This fact is immaterial. The evidence received by Respondent established that District chose to proceed without a written lease. District’s argument that there is no contractual authority for Westport’s use of the school buildings is, however, manifestly incorrect. The charter agreement between District and Westport contemplated Westport’s use of District owned school buildings for the conduct of the charter school operations for the duration of the Agreement (see Charter Application, Page 22, L.F. p. 1411).

Charter school operations could not have commenced without the school buildings and cannot proceed now if the District were to withdraw the use of the buildings that District has allowed Westport to use since the inception of the agreement. If, then, the District is not entitled to terminate the Agreement, it would make no sense that the District should be permitted to withdraw the use of buildings that were and still are an integral part of the Agreement.

Whether Westport is a tenant is of no moment. Westport is, at the very least, a licensee pursuant to its charter agreement with District and the license to continue using the facilities that was to remain in effect unless and until the charter agreement expired or the parties mutually decided to end the license agreement. (*Hermann v. Lynnbrook Land Co.*, 806 S.W.2d 128 (Mo. App. 1992)).

The cases District cites in support of its argument are inapposite and unpersuasive. District wholly ignores the fact that the written charter application that was accepted by District and which comprises a part of the sponsorship agreement contemplated use of the District's school buildings. District also ignores the well-established body of case law in Missouri standing for the proposition that, even where a written agreement may be required under the statute of frauds, an exception exists when the evidence establishes that the party purporting to assert the statute of frauds as a bar to contract has accepted the other party's substantial partial performance without objection and has knowingly performed without requiring a written document or when it would be grossly inequitable to invoke the statute of frauds because of substantial part performance or detrimental reliance by the other. (*Grissum v. Reesman*, 505 S.W.2d 81 (Mo. 1974)).

Here, of course, District acknowledges and the evidence established conclusively that the agreement under which Westport has used and occupied the school buildings started in 1999 upon commencement of the sponsorship agreement and was performed knowingly by Westport and District without objection or complaint thereafter. District's purported reliance upon Section 432.070 under the facts established in this case is, therefore, legally unpersuasive, unwarranted and inequitable.

The suggestion that the trial judge abused his discretion by prohibiting the District from taking actions that would render the sponsorship agreement entirely meaningless and would leave the Westport students without school buildings in which to receive their education is,

quite frankly, shocking. Respondent certainly did not abuse his discretion by maintaining the status quo that is necessary to permit the Westport students to have a place to attend school.

Likewise, the notion that the Respondent could preserve the status quo without prohibiting the District from attempting to hire Westport's teachers to work at other schools or prohibiting the District from trying to scare the Westport students into leaving is also unpersuasive. The Respondent considered evidence that District was contacting Westport teachers seeking to hire them to teach at other schools commencing in summer and fall 2004 and had transmitted a mass mailing to parents of Westport students advising them of the potential closure of the Westport schools which would result in the need for the students to attend other schools in the Kansas City, Missouri School District. (L.F. pp. 723 - 725).

Respondent initially ordered all parties to desist from any such conduct during the pendency of the action. After the hearing, as a necessary portion of his preliminary injunction order to maintain the status quo pending further action on the merits and any appeals, Respondent's order precluded the District from attempting to hire away the teachers or from recruiting the students, or from interfering with the schools. Certainly, public policy requires that Westport have teachers to educate the children. If District could induce teachers to leave Westport, despite the continued existence of the charter agreement, the injunction would be meaningless and the Westport students would be deprived of their choice of school.

District plays fast and loose with the meaning and effect of Respondent's order. Respondent's order is limited, narrow and specific. It prohibits District from attempting "to induce teachers at Westport to contract to teach elsewhere . . ." Contrary to the implication

in District's substitute brief, Respondent's order does not interfere with or limit the constitutional, statutory or property rights of District or any teacher to free speech, free association or freedom of contract.

The evidence before Respondent (which is part of the record in this action) establishes that, at the time Respondent entered his preliminary injunction order, Westport had teachers, administrators and other staff under contract prepared to commence the Fall 2004 school year on August 23, 2004. At the time District entered into the sponsorship agreement, it contemplated that Westport would have teachers, administrators, staff and use of buildings to educate the students.

It is a cardinal principle of contract law that a party to a contract cannot do anything that would intentionally interfere with the ability of the other party to perform or would deprive the other party of the reasonably expected benefit of its bargain. (*Koger v. Hartford Life Ins. Co.*, 28 S.W.3d 405 (Mo. App. W.D. 2000)). The charter school statute from whence Westport derives its power to act as a charter school and from whence the District derives its power to sponsor a charter school clearly evinces the legislative intent that charter schools are in the public interest because they provide choice and an alternative, particularly for minorities and low income families, who would otherwise be required to attend "failing schools."

The District had no obligation to enter into an agreement to sponsor Westport. Having elected to do so in 1999, however, and having expressly agreed at that time to provide school buildings for the conduct of charter school operations and to otherwise conduct itself in a way that was conducive to Westport's performance as a charter school, District can hardly be heard

to suggest that efforts to induce teachers to resign their positions shortly before the school year would be consistent with District's obligations as charter school sponsor.

Again, District ignores the fact that Respondent has prohibited District from unilaterally terminating the sponsorship agreement without fair notice and an opportunity for Westport to be heard. Notably, Respondent did not say that District could not decide after notice and a hearing that it would not continue with the sponsorship agreement. Rather, Respondent preliminarily enjoined District from ending sponsorship without giving adequate notice and conducting a hearing. While the matter was proceeding before Respondent, District was busily contacting teachers in an effort to induce them to resign their teaching positions and to accept teaching positions with the District at other schools. Respondent, astutely recognizing that any preliminary injunction he might grant in favor of Westport precluding termination of the sponsorship agreement would be entirely ineffective if Westport had no students, no teachers to educate the children, and no school buildings required the parties to desist in such efforts pending the preliminary injunction hearing and, then, stated in the preliminary injunction order that District "shall not attempt to induce Westport's teachers to contract to teach elsewhere; shall not induce students to leave; and shall not interfere with use of the facilities."

Neither trial courts nor appellate courts are usually inclined to enter nonsensical or ineffectual orders. There is no purpose to a preliminary injunction that does not maintain the status quo or which does not preclude the parties from engaging in actions that would defeat the purpose of the injunction. A charter school without buildings, teachers and students is a

fiction. The notion, then, that District has a statutory right to withdraw the use of its buildings before the end of the sponsorship agreement or to interfere with and effectively defeat Westport's ability to conduct charter school operation by inducing Westport's teachers and students to leave Westport is beyond nonsense, it is manifest bad faith.

Far from exceeding his jurisdiction, the Respondent entered an order that was narrow, limited and specifically drawn so as to effectuate the preliminary injunction order pending further action by the District consistent therewith.

CONCLUSION

If District's argument were to prevail, the result would be that a charter school in Missouri would effectively be without any remedy to address a non-renewal decision by a sponsor when there is no specified termination date. As Respondent concluded, the statute neither expresses nor implies such an intention by the Missouri legislature. Quite the contrary, Respondent correctly found from the legislative scheme that procedures applicable to revocation should apply full force to non-renewal decisions.

Because for every wrong there must be a remedy, in an equitable action for injunction, a court has the subject matter jurisdiction to construe and apply contracts and statutes so as to provide appropriate remedies to aggrieved parties. If the District had satisfied its statutory obligation to specify the duration of the charter agreement, or had given timely notice of its intent not to proceed beyond June 30, 2004, this dispute might not have arisen. Because, however, District did not do so, and did not notify Westport until April 28 that it did not intend

for the Agreement to continue past June 30, 2004, District's argument that the trial court had no power to even address the non-renewal or termination issue is without merit.

Certainly, the District's "unclean hands" was not lost upon Respondent. The District acted in a heavy-handed, deceptive and intentionally obstructive way that certainly did not comport with traditional notions of fair play. Had the District truly intended to treat Westport fairly so as to protect the legitimate interests of the Westport students and their parents, the District would have complied with DESE's suggestion in Fall 2003 that notice of any intent not to renew be given in sufficient time for Westport to have looked for a new charter sponsor if necessary. Not only did District fail to comply with DESE's request, District misled Westport into believing that revision of its charter agreement or renewal of it was likely to occur.

Further, by failing to provide Westport with performance audits at least every two years as required by the charter school statute and by failing to inform Westport of alleged performance deficiencies or of alleged deficiencies in Westport's application for charter revision until immediately before the April 28 Board meeting, District made it virtually impossible for Westport to even address alleged problems.

The culmination of District's duplicitous and entirely unacceptable conduct was delivery to Westport of the alleged performance review audit (more than 100 pages in length) on the morning of April 28 and, then, giving Westport's president a total of approximately eight minutes to address the Board on the evening of April 28 regarding the alleged deficiencies.

Equity abhors a forfeiture and that is exactly what the District sought to work in this case. Equity will not aid one who has unclean hands and the District has unclean hands. For every wrong there must be a remedy and the Court fashioned an appropriate remedy to preserve the status quo to protect the interests of over twelve hundred students who presently attend the Westport schools and the teachers who are educating them.

District could have proceeded to final hearing on the merits to try to prevail in defeating the injunctive relief Westport sought or, District could have requested that Respondent make his preliminary Order permanent so that District could proceed on appeal. Alternatively, the District could have done, and still can do, precisely as Respondent ordered, that is, employ appropriate notice and procedures regarding intended termination of the charter agreement. In either event, the rights of the parties would be properly vindicated and the students and teachers at the Westport schools would be able to proceed in the 2004-2005 school year without the uncertainty that has been caused by the District's untimely, unwarranted and precipitous attempts to undo a charter agreement that has worked well for the past five years and to circumvent the appellate process.

For the above-stated reasons, then, this Court should set aside and vacate the Writ of Prohibition and remand to the trial court for further action necessary or proper to finally conclude this action.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

PURSUANT TO MO. R. CIV. P. 84.06(c) and 84.06(g)

I hereby certify that the above and foregoing brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 13,633 words.

I also hereby certify that the floppy disk containing the above and foregoing which is being filed concurrently herewith has been scanned for viruses using Trend Micro OfficeScan Corporate Edition and there were no viruses detected.

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