IN THE COURT OF APPEALS OF IOWA

No. 0-939 / 09-1921
Filed April 27, 2011

JULIE HONSEY,
Plaintiff-Appellant,

vs.

BOARD OF DIRECTORS OF THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT and GINNY STRONG, As Its President,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

A teacher facing termination of her employment contract seeks reversal of the district court's dismissal of her petition for writ of mandamus. **AFFIRMED.**

Gene Lasuer and Becky S. Knutson of Davis, Brown, Koehn, Shors & Roberts, P.C., Des Moines, for appellant.

Andrew J. Bracken and Amanda G. Wachuta of Ahlers & Cooney, P.C., Des Moines, for appellees.

Heard by Vogel, P.J., and Doyle and Tabor, JJ.

TABOR, J.

A teacher facing termination of her employment contract with the Des Moines Independent Community School District seeks reversal of the district court's dismissal of her petition for writ of mandamus to the extent that the ruling prevents her from obtaining subpoenaed documents in advance of a private hearing before the board of directors. The board asks us to affirm the dismissal, but to correct the order in so far as it leaves the board no discretion whether to issue the teacher's requested subpoenas for production at the hearing.

Iowa Code section 279.16(2) (2009) governs the issuance of subpoenas in teacher-termination proceedings. The Iowa Supreme Court has twice interpreted this statute, first in *In re Gillespie*, 348 N.W.2d 233 (Iowa 1984) and more recently in *In re Gianforte*, 773 N.W.2d 540 (Iowa 2009). Because the district court accurately synthesized the analyses from *Gillespie* and *Gianforte* in dismissing the teacher's mandamus petition, we decline to reverse any portion of the order.

I. Background Facts and Proceedings

Julie Honsey worked as a Des Moines public school teacher. On June 5, 2009, Superintendent Nancy Sebring (the superintendent) notified Honsey that she was recommending to the board of directors (the board) that the teacher's contract be terminated. On June 11, 2009, Honsey served the board with a request for the issuance of eight subpoenas duces tecum. Honsey sought subpoenas for the superintendent, six other school district employees, and an attorney. The subpoenas requested that those individuals appear with any

documents in their possession falling into thirteen different categories, including their personnel files; records of disciplinary actions taken against any teacher, aid, or other employee for insubordination within the past ten years; student records and individual education plans (IEPs); and policies and procedures involving standardized testing. The subpoenas ordered the recipients to produce the documents at the office of Honsey's attorney "not later than June 19, 2009." Honsey further requested a private hearing with the board, which was set for June 29, 2009.

On June 19, 2009, general counsel for the superintendent sent a letter to the board's attorney asking that Honsey's request for subpoenas be quashed. The letter indicated that the superintendent would produce all of the witness names and documents required to be furnished under Iowa Code section 279.15 five days in advance of the hearing and had already provided Honsey's counsel with her complete personnel file. On June 24, 2009, the superintendent provided Honsey with a list of ten documents to be presented and thirteen people slated to address the board in support of the superintendent's recommendation to terminate the teaching contract.

Also on June 24, 2009, Honsey's attorney sent a letter to the board's attorney, noting that the board had not yet complied with her request to issue subpoenas pursuant to Iowa Code section 279.16 and citing authority in support of her position that the board did not have discretion to decline to issue the subpoenas. The letter also suggested that Honsey's private hearing be rescheduled from June 29, 2009, because the board's delay in issuing the

subpoenas left her without the information that she needed to defend the termination action.

On June 26, 2009, the superintendent's attorney again wrote to the board's attorney in response to Honsey's communication. The letter characterized Honsey's subpoena requests as "overly broad" and argued that the teacher must make "some threshold showing of relevance" before the superintendent should be required to comply with the discovery demand. The letter went on to say that "to comply with the due process requirement that Ms. Honsey be given the opportunity to prepare for her hearing," the superintendent agreed to provide ten different categories of information within the time frame prescribed in section 279.15. Those categories included personnel documentation and investigations relating to Honsey, IEPs for two students, schedules and student assignments for standardized testing centers, and various notes and emails relating to the pending matter.

On June 29, 2009, counsel for the board issued a "decision and order"—describing the requirements of section 279.16 and asserting that the board "must apply a rule of reasonableness to the Teacher's requests" for subpoenas. The order granted the teacher's subpoena requests for six of the thirteen categories of information she sought; the order denied in whole or part the information requested in the other seven categories.

Honsey's counsel responded to the board in a letter dated August 17, 2009. The teacher maintained that section 279.16 "has no provision for objection before any subpoena is issued." The teacher interpreted the code provision as

mandating that the board issue the subpoenas with "no restrictions as to content or timing." Honsey's attorney asserted that without access to the documents in the subpoena request she would not be able to prepare her defense. The attorney's letter closed by asking the board to inform her if it refused to issue the subpoenas so that she could take the necessary action to protect her client's constitutional rights.

On August 28, 2009, the board issued a second order, addressing some of the points raised in the teacher's August 17, 2009 letter, but concluding that its original order would stand. The second order also directed the superintendent to tender the documents in those categories that the board determined to be reasonably related to the termination proceedings.

On August 25, 2009, Honsey filed a petition for writ of mandamus, asking the court to require the board of directors to issue the subpoenas that she requested and that the documents be produced "at a date reasonably in advance of any hearing." She alleged that the board's failure to issue the subpoenas constituted a "refusal or neglect of the duty" imposed by section 279.16.

On September 23, 2009, the board responded to the mandamus petition by filing a "Motion to Dismiss or Recast." As grounds for its motion, the board asserted: "an action for a writ of mandamus will not lie when the plaintiff may file an action for a writ of certiorari." The board asked the court to dismiss Honsey's mandamus petition or order her to recast it as an action for writ of certiorari. Honsey resisted the board's motion—and relying on *In re Gillespie*, 348 N.W.2d at 236—asserted that "[i]ssuing subpoenas is a ministerial action to be taken by

the Board without exercise of discretion" and a writ of mandamus is the remedy used to compel ministerial actions.

The district court heard arguments from both sides on November 17, 2009. On November 24, 2009, the court ruled that neither mandamus nor certiorari was the appropriate remedy given the procedural posture of the matter. The court explained that when Honsey filed her petition and when the board moved to dismiss or recast, neither had the benefit of the supreme court's opinion in *In re Gianforte*, 773 N.W.2d 540, filed October 9, 2009. The court concluded:

> [G]iven the guidance in *Gianforte*, this case is not ripe for adjudication.
>
> Neither party has correctly followed the statutory framework provided in Iowa Code Sections 279.15 and 279.16 for the prehearing exchange of information and the issues of subpoenas as described in *Gianforte*.

The ruling explained that only the refusal to comply with the subpoenas by the superintendent or other witnesses at the hearing will transfer the matter to the district court. The court dismissed Honsey's petition "without prejudice to further litigation consistent with the guidance of *Gianforte*."

Instead of engaging in further litigation in the district court, Honsey appeals the dismissal of her mandamus petition. The teacher contends the court erred in concluding the documents she sought by subpoena did not have to be produced until the time of the hearing. The board asks us to affirm the district court's dismissal of the petition, but also argues that the ruling should be "corrected" to the extent that it finds the board's issuance of subpoenas under section 279.16 is a "ministerial act."

II. Scope of Review

Relying on *Gianforte*, 773 N.W.2d at 544, Honsey asserts that our review is for an abuse of discretion. The board counters that because the appeal fundamentally involves statutory interpretation, review is for errors at law. *See Blackford v. Prairie Meadows Racetrack & Casino, Inc.*, 778 N.W.2d 184, 187 (Iowa 2010). We agree that our review is for correction of legal error.

The procedural posture of this case differs from *Gianforte*. There, the district court intervened in the teacher-termination proceedings after witnesses refused to comply with the requested subpoenas. *Gianforte*, 773 N.W.2d at 544. The district court is given discretion when deciding discovery disputes. *Id*. Here, the issue came before the district court on the teacher's petition for writ of mandamus and the board's motion to dismiss or recast. A writ of mandamus, as an action in equity, is typically reviewed de novo. *Koenigs v. Mitchell Cnty. Bd. of Supervisors*, 659 N.W.2d 589, 592 (Iowa 2003). But we review a district court's ruling on a motion to dismiss only to correct legal error. *Worthington v. Kenkel*, 684 N.W.2d 228, 230 (Iowa 2004). In addition, when an appeal calls for us to interpret the scope and meaning of statutory provisions, our review is for correction of errors at law. *Mason v. Vision Iowa Bd*., 700 N.W.2d 349, 353 (Iowa 2005).

III. Statutes in Question

The process for terminating the employment contracts of public school teachers appears in Iowa Code chapter 279. Section 279.15(2) describes the notice to be given by a superintendent recommending termination of a teacher

and allows the teacher to request a private hearing before the board of directors and to obtain certain information in advance of that hearing. The superintendent's notification must include "a short and plain statement of the reasons, which shall be for just cause, why the recommendation is being made." Iowa Code § 279.15(2). As part of the termination proceedings, the teacher is to have access to his or her personnel file, complete with all periodic evaluations. *Id*. Within five days of receiving the superintendent's recommendation of contract termination, the teacher may request a private hearing with the board. *Id.* At least five days before that hearing, the board is required to furnish to the teacher any documentation which may be presented to the board and a list of persons who may address the board in support of the superintendent's recommendation at the private hearing. *Id*. At least three days before the hearing, the teacher is required to provide any documentation he or she expects to present, along with the names of any persons who may address the board on behalf of the teacher. *Id*. Section 279.15 states that this exchange of information shall be at the time specified unless otherwise agreed.

Section 279.16 outlines the procedure to be followed at the private hearing. Section 279.16(1) limits the evidence to be presented at the hearing to the specific reasons stated in the superintendent's recommendation of termination. At the hearing, the superintendent may present evidence and argument on all issues involved. *Id.* § 279.16(1). And the teacher may respond with cross-examination, evidence, and argument in the teacher's behalf relevant to all issues involved. *Id*. The parties also may stipulate to evidence. *Id.*

Section 279.16(2) addresses the availability of subpoenas for the teacher-termination proceedings, stating:

> The presiding officer of the board may administer oaths in the same manner and with like effect and under the same penalties as in the case of magistrates exercising criminal or civil jurisdiction. The board shall cause subpoenas to be issued for such witnesses and the production of such books and papers as either the board or the teacher may designate. The subpoenas shall be signed by the presiding officer of the board.

Section 279.16(3) sets out how the matter will be settled when a witness is subpoenaed and refuses to attend, or appears and refuses to testify or to produce the requested books or papers. The board is required to make a written report of such refusal to the district court. *Id.* § 279.16(3). The court then proceeds with the witnesses as though the refusal had occurred in a proceeding legally pending before the court. *Id*.

IV. Analysis

We note at the outset of our analysis that neither party addresses the doctrine of ripeness,[1] which was the reason cited by the district court for its dismissal of the mandamus petition. Instead, the parties attack different aspects of the district court's reasoning as they contemplate a return to the termination proceedings before the board. Honsey challenges the court's determination that sections 279.15 and 279.16 require production of the subpoenaed documents only at the time of the teacher's private hearing before the board. She asks that

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[1] A case is ripe for adjudication when it offers "an actual, present controversy, as opposed to one that is merely hypothetical or speculative." *State v. Iowa Dist. Ct.*, 616 N.W.2d 575, 578 (Iowa 2000). The concept of ripeness in our state courts is closely related to the doctrines of exhaustion and finality. *See Reedy v. White Consol. Indus., Inc.*, 503 N.W.2d 601, 603 (Iowa 1993).

the ruling be "reversed in part" and that our court determine that she is entitled to production of the documents "reasonably" in advance of the private hearing.

The board does not respond to Honsey's argument concerning the timing of the subpoenas. Instead, it shifts the focus to its position that Honsey pursued the wrong remedy in filing a petition for writ of mandamus rather than a petition for writ of certiorari. The board urges us to affirm the district court's dismissal of Honsey's mandamus petition on the ground that a mandamus action does not lie where certiorari is available. The board also contends that "[t]o the extent the district court ruled the Board's issuance of the subpoenas under section 279.16 is a ministerial act, this ruling must be corrected because it is inconsistent with the statutory scheme governing teacher-termination proceedings."

We agree with the district court's decision to dismiss Honsey's petition for writ of mandamus without prejudice to further litigation of the subpoena issue, but would justify dismissal on a slightly different ground. Rather than finding Honsey's claim was not ripe for adjudication, we simply reject the notion that an order of mandamus should issue against the board where the governing statute does not establish that Honsey was entitled to production of subpoenaed documents in advance of her private hearing.

A mandamus action is a special proceeding—authorized by Iowa Code chapter 661—"to obtain an order commanding an inferior tribunal, board, corporation, or person to do or not to do an act, the performance or omission of which the law enjoins as a duty." Iowa Code § 661.1. The purpose of a mandamus action is "'to enforce an established right and to enforce a

corresponding duty imposed by law.'" *Stafford v. Valley Cmty. Sch. Dist*., 298 N.W.2d 307, 309 (Iowa 1980) (citation omitted). "Mandamus is not available to establish legal rights, but only to enforce legal rights that are clear and certain." *Id*. Because mandamus is "a summary and extraordinary writ it will not be issued in doubtful cases but only where the rights and duties are clear and there is no other speedy and adequate remedy in the ordinary course of the law." *Reed v. Gaylord*, 216 N.W.2d 327, 332 (Iowa 1974).

As we will discuss in more detail below, we agree with the district court's reading of section 279.16(2)—and the case law interpreting it—as mandating the board perform the ministerial function of causing subpoenas to be issued for such witnesses and the production of such books and papers as the teacher may designate. We likewise agree with the district court's conclusion—based on the statutory interpretation in *Gianforte*—that the teacher is not entitled to production of the subpoenaed documents until the time of the hearing. Because the teacher's subpoenas requested production of documents in advance of the hearing, which was not her legal right, mandamus was not available for enforcement.

Rather than issuing an order of mandamus, the district court's ruling highlighted what it determined to be the eight procedural steps required under *Gianforte*:

> (1) a prompt private hearing should be scheduled; (2) if they have not already done so, the parties should engage in the prehearing exchange of information contemplated by section 279.15(2); (3) the parties *may* engage in *voluntary* prehearing discovery in a reasonable manner as suggested in *Gianforte*, [773 N.W.2d at 547] n.2; (4) if the Teacher desires the production of

> additional undisclosed documents, the Teacher may designate pursuant to Section 279.16(2). This demand should be narrowly tailored to the "production of documents that are reasonably necessary for the teacher's defense against a recommendation for termination." *See Gianforte*, [773 N.W.2d at 546]. The demand should also balance the ability of the Board or Superintendent to timely produce the documents in a manner consistent with the statutory goal of a prompt hearing. *Id*. at [547]; (5) the School Board should perform its ministerial and mandatory duty to issue the subpoenas upon demand by the teacher under Iowa Code section 279.16(2) without limitation. *In re Gillespie*, 348 N.W.2d 233, 236 (Iowa 1984); (6) if there is a dispute concerning the proper scope of the documents requested in the subpoenas, the parties should engage in a good-faith effort to resolve the dispute in a manner that promotes a fair and prompt private hearing and avoids the necessity for court intervention; (7) the Superintendent and/or other witnesses will have to choose to comply or refuse to comply with the subpoenas *at the hearing*. Refusal to produce the requested documents will transfer the matter to the district court for resolution under Section 279.16(3); and (8) at this point the Court will resolve the dispute in a manner consistent with *Gianforte*.

The district court surmised that neither party had followed the statutory framework as envisioned by *Gianforte.* Specifically, the court determined that Honsey "erred in demanding subpoenas duces tecum for *prehearing* discovery of the requested documents." In reaching this determination, the district court relied on the following sentence from the supreme court's decision: "No statutory provision specifically permits the teacher to discover or obtain other documents prior to the hearing." *Gianforte*, 773 N.W.2d at 545–46. The district court also found fault in the conduct of the school district: "The Superintendent and the School Board erred in presuming that the Board had discretion in deciding the proper scope of the Teacher's subpoenas." The district court read *Gillespie* to require the board to carry out its "ministerial duty" to issue the subpoenas

demanded by the teacher "without limitation." We will address both of the district court's contested determinations in turn.

A. Sections 279.15 and 279.16 do not authorize a teacher to compel production of documents in advance of the private hearing.

We first examine Honsey's claim that she is entitled to production of the documents she subpoenaed in advance of the private hearing before the board. We note straight away that *Gianforte* did not find statutory authority for the teacher's position.

> [T]he legislature only provided the teacher with two opportunities to formally obtain documents and information prior to the hearing. First, the teacher's complete personnel file of employment with the school district, including all periodic evaluations, must be made available to the teacher during the proceeding. Iowa Code § 279.15(2). Second, the teacher is entitled to receive all documentation expected to be presented to the board by the superintendent at the hearing in support of the recommendation to terminate the contract. *Id.*

Gianforte, 773 N.W.2d at 545–46.

The supreme court observed that in some cases a teacher may be able to show additional documents and information are needed to conduct an adequate defense to the termination recommendation. *Id*. at 546. The court reiterated that the statute did not describe a method for the teacher to discover the materials before the hearing, but does allow the teacher to request that the board secure the presence of witnesses who could produce the documents at the hearing. *Id*.

Honsey tries to distinguish *Gianforte*, which involved a suit to enforce subpoenas when the superintendent did not produce documents at the time of the private hearing, from her action to compel the board to issue subpoenas.

She points out that she delivered her subpoena requests as soon as she could under the statutory guidelines, compared to Gianforte, who waited until the eve of the rescheduled hearing to request thousands of additional documents. While it is true that the cases present different procedural postures, this distinction does not change the interpretation of the governing statutes.

If Honsey seeks more information than is provided pre-hearing under section 279.15(2), then she has two options: (1) she could engage in voluntary discovery with the board (*see Gianforte*, 773 N.W.2d at 547 n.2) or (2) she could demand the board cause subpoenas to be issued under section 279.16(2). The timeliness of the teacher's subpoena request is a factor in the reasonableness of a witness's decision whether to comply at the hearing. *Id*. at 547. It does not compel the board to require witnesses to produce the documents in advance of the hearing. Section 279.16 only contemplates the production of the documents by the witnesses at the hearing. *Id*. at 546 n.1.

We appreciate the logic of the teacher's argument that to "prepare a comprehensive defense, the documents must be both produced and reviewed" in advance of the hearing. But it is not our function to rewrite the statute. *See Thompson Wholesale Co. v. Frink*, 257 Iowa 193, 197, 131 N.W.2d 779, 781 (1964). In drafting sections 279.15 and 279.16, the legislature contemplated that a teacher be afforded "a prompt, informal and summary hearing." *See Gianforte*, 773 N.W.2d at 548; *see also* Iowa Code § 279.16(4) ("Process and procedure under sections 279.13 to 279.19 shall be as summary as reasonably may be."). The drafters anticipated that in most cases, the pre-hearing exchange of

information set out in section 279.15(2) would allow a teacher who is contesting termination to adequately prepare for the hearing before the board. In those cases where the teacher reasonably requested subpoenas for additional documents to be produced at the hearing, the parties acknowledged at oral argument that it would be possible to continue the hearing to allow the teacher additional time to review the information.

Honsey briefly argues on appeal that her statutory right to continued employment is protected by procedural due process. To the extent she is now asserting that due process requires the statutory provisions be read as mandating production of the subpoenaed documents in advance of the private hearing, that constitutional claim was not preserved in the district court for our review. Honsey did not raise a due process claim in her mandamus petition or her resistance to the board's motion to dismiss, and the district court did not address any due process considerations in its ruling. A separate due process claim is not properly presented in this appeal. *See Runyon v. Kubota Tractor Corp.*, 653 N.W.2d 582, 584–85 (Iowa 2002) (even constitutional issues are waived if not urged in the district court).

We decline to reverse the portion of the district court's order indicating that the teacher cannot compel production of the subpoenaed documents before the hearing.

B. Section 279.16(2) does not authorize the board to exercise its discretion in choosing which subpoenas to issue.

We turn next to the board's contention that the district court was mistaken in describing the issuance of the subpoenas as a ministerial act. The board asserts that "[s]ection 279.16(2), properly interpreted, describes a quasi-judicial function." That provision states, in pertinent part:

> The board shall cause subpoenas to be issued for such witnesses and the production of such books and papers as either the board or the teacher may designate. The subpoenas shall be signed by the presiding officer of the board.

The district court relied on the interpretation of this statute from *In re Gillespie*, 348 N.W.2d 233, 236 (Iowa 1984), in making the following directive: "the School Board should perform its ministerial and mandatory duty to issue the subpoenas upon demand by the teacher under Iowa Code Section 279.16(2) without limitation." *Gillespie* involved a teacher's application for judicial enforcement of a subpoena commanding the superintendent to produce certain documents. Gillespie complained on appeal that the superintendent should have been required to make his entire record regarding his failure to comply with the subpoena at the board hearing and should not have been allowed to amplify his reasons in the district court proceedings. The supreme court rejected the teacher's claim, finding that the board was not a "presiding decision maker" in the subpoena enforcement action:

> Under section 279.16, however, the board apparently has no discretion in issuing the subpoena, and no power to make an initial decision to enforce it. The enforcement proceeding in district court is not a review of the action of any other decision maker. Thus the ordinary considerations for requiring a complete record in the prior proceeding are absent here.

Gillespie, 348 N.W.2d at 236.

The board argues that the first sentence of the above passage from *Gillespie* is obiter dictum and, thus, does not control our interpretation of the statute. Even if the *Gillespie* court's reference to the board having no discretion in issuing the subpoena could be called dicta, we view it as "sound, judicial dicta and definitely declared the mind of the court." *See Carlton v. Grimes*, 237 Iowa 912, 929, 23 N.W.2d 883, 892 (1946). The legislature chose to use the term "shall" in describing the board's function of causing subpoenas to be issued. The word "shall" generally connotes a mandatory duty. Iowa Code § 4.1(30)(a); *In re Detention of Fowler*, 784 N.W.2d 184, 187 (Iowa 2010). It makes sense that *Gillespie* interpreted section 279.16 to impose a mandatory duty on the board.

We also find the holding of *Gillespie* rebuts the board's argument that causing the subpoenas to issue is a quasi-judicial function. The supreme court found that the enforcement proceeding in the district court was an original adjudication and not the review of board action. *See Gillespie*, 348 N.W.2d at 236. Accordingly, the board's duty to cause subpoenas to be issued cannot be characterized as a quasi-judicial function. As the district court noted, if the teacher requests the "production of documents that are reasonably necessary for the teacher's defense against a recommendation of termination," the board must cause the subpoenas to issue. *See Gianforte*, 773 N.W.2d at 546. If the witness subpoenaed to produce the information declines to do so, it is the district court that must "consider a teacher's need for the documents and the reasonableness of the request." *Id*. at 547. The legislature did not contemplate the board playing a gatekeeping role in this discovery process.

We are not unsympathetic with the board's concern that it could become a "rubber stamp" for whatever subpoenas a teacher facing termination may demand however overbroad, unreasonable, or burdensome. But we disagree with the board's assertion that section 279.16(2) is ambiguous when viewed in the context of the entire statutory scheme for teacher termination proceedings. If statutory language is unambiguous, "'[our] role is to give effect to the law as written,' not to rewrite it to reflect a policy different from that language." *See State v. Olsen*, 618 N.W.2d 346, 351 (Iowa 2000) (citation omitted). We do so here by reading the word "shall" as a command that the board cause to be issued the subpoenas designated by the teacher. If a teacher engages in unwarranted requests for the production of documents simply to harass or annoy the superintendent or other witnesses, those witnesses may refuse to produce the documents at the hearing, which transfers the case to the district court and delays the hearing until the matter is resolved. *See Gianforte*, 773 N.W.2d at 547. Moreover, if the board considers a teacher's request for subpoenas so sweeping that it presents an undue burden to cause the subpoenas to be issued, it may be possible for the board to seek declaratory judgment under Iowa Rule of Civil Procedure 1.1101, asking the court to announce the rights of the parties before the subpoenas are issued. *See generally Jones v. Loess Hills Area Educ. Agency 13*, 319 N.W.2d 263, 264 (Iowa 1982) (allowing declaratory judgment action to determine right to discovery in hearing called under section 279.24).

Because we find no legal error in the district court's interpretation of the statutes at issue, we reject the parties' invitations to correct portions of the order

dismissing the mandamus petition. The order provides a helpful roadmap for the parties to consult as they navigate the procedures under sections 279.15 and 279.16. We affirm the district court's dismissal, which was without prejudice to further litigation consistent with the guidance of *Gianforte*.

AFFIRMED.