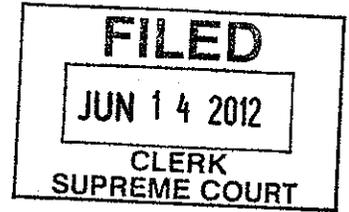


SUPREME COURT OF KENTUCKY
NO. 2011-SC-000145-D; 2012-SC-000113-D



ON REVIEW OF:
COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE NO. 2008-CA-002274; 2008-CA-002312

APPEAL FROM THE FLOYD CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 07-CI-1038

HENRY WEBB, in his official capacity
as Superintendent of Floyd County Schools;
and BOARD OF EDUCATION OF FLOYD COUNTY,
KENTUCKY

APPELLANTS

-vs-

PAMELA MEYER

APPELLEE/CROSS APPELLANT

BRIEF OF APPELLEE / CROSS APPELLANT

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this Brief was served on June 13, 2012 as follows: original and ten (10) copies via Overnight U.S. mail to Clerk, Supreme Court of Kentucky, Room 209, State Capitol, 700 Capital Ave., Frankfort, KY 40601; Sam Givens, Jr., Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601-9229; Hon. Danny P. Caudill, Floyd Circuit Court Judge, Floyd County Justice Center, 127 South Lake Drive, Prestonsburg, KY 41653; Douglas Ray Hall, Circuit Clerk, Floyd County Justice Center, 127 South Lake Drive, Prestonsburg, KY 41653; Michael J. Schmitt and Jonathan C. Shaw, 327 Main Street, P.O. Drawer 1767, Paintsville, KY 41240-1767.

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INTRODUCTION

Appellee/Cross-Appellant, Pamela Meyer, was a classified school employee denied her statutory rights in a reduction in force (RIF) under KRS 161.011(8), and was denied her right to an “annually renewed contract” under KRS 161.011(5) and (7), when the school district consolidated two elementary schools and reduced Ms. Meyer’s employment position and salary without any consideration of her tenure, seniority or contract. The trial court and the Court of Appeals correctly interpreted the statute and ruled in favor of Ms. Meyer below.

On cross appeal, Ms. Meyer asserts that her lost wages should be calculated based upon the salary paid for the position at the newly consolidated Prestonsburg Elementary.

STATEMENT REGARDING ORAL ARGUMENT

The Court’s interpretation of KRS 161.011 is a matter of first impression, which would impact classified employees and school districts across the Commonwealth. As such, oral argument may be useful to the Court in this case.

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COUNTERSTATEMENT OF THE CASE

Appellee/Cross Appellant Pamela Meyer (Ms. Meyer) is a classified employee, as that term is used and defined in KRS 161.011(1)(a), of the Board of Education of Floyd County (school district). The school district employed Ms. Meyer in the position of Family Resource Youth Service Center (FRYSC) Coordinator, a full-time classified position at Clark Elementary School, beginning on or about January 4, 1993 and continuing through June 30, 2007, for a total of fourteen and a half (14½) years at the time this action arose. As such, Ms. Meyer had completed more than four (4) years of continuous active service within the Floyd County Schools for the purposes of KRS 161.011.

In Floyd County there is a FRYSC at each school, with the exception of the alternative school. These FRYSCs are “designed to meet the needs of children and their families by providing services to enhance a student’s ability to succeed in school,” and pursuant to statute are to be located in or near each elementary school in which 20% of the student body are eligible for free or reduced meals. KRS 156.496. Each FRYSC in Floyd County is directed by a Coordinator employed by the school district. (Springer Dep., p. 7). For the 2006-07 school year there were fifteen (15) FRYSC Coordinators in the Floyd County Schools. (Springer Dep., Exh. 2).

Clark Elementary (the school to which Ms. Meyer was assigned), and Prestonsburg Elementary were closed at the end of the 2006-07 school year, and their students and service areas combined and consolidated to form the new Prestonsburg Elementary, which opened the 2007-08 school year. As a result of this consolidation, the number of FRYSC Coordinators in Floyd County was reduced from fifteen (15) to fourteen (14) for the 2007-08 school year. (Defendants’ Response to Interrogatories Nos. 1-3, served December 14, 2007, attached hereto as **Appendix A**; Springer Dep., pp. 12-13; Exh 2).

The school consolidation created a Reduction in Force within the job classification of FRYSC Coordinators. Former Floyd County Schools Superintendent Paul Fanning¹ (Fanning), testified about the consolidation of Clark and Prestonsburg Elementary Schools. (Fanning Dep., pp. 5-6). He admitted that both FRYSC Coordinator positions at Clark Elementary School and the old Prestonsburg Elementary School were abolished as a result of the consolidation: “[t]he two schools - - Those [FRYSC Coordinator] positions were abolished. I think I asked the Board of Education to abolish those positions.” (Fanning Dep., p. 11). Personnel Director Paige confirmed that prior to the closure of the schools there were two FRYSC Coordinators, but after the consolidation the number of Coordinators was reduced to one at the newly consolidated school. (Paige Dep., pp. 31-32). Thus for the 2007-08 school year there was one less FRYSC Coordinator position within the district than the previous year. (Fanning Dep., p. 24).

Fanning also admitted that school boundaries changed due to the consolidation and opening of the new Prestonsburg Elementary School: “the Board, I think by formal action, created a new attendance boundary for Prestonsburg Elementary School which encompassed their previous boundary and also the Clark boundary.” (Fanning Dep., p. 22).

Fanning stated that the district had experienced declining student enrollment: “I think the data is there to show the decreasing enrollment throughout the system.” (Fanning Dep., p. 20). He also testified that student enrollment was considered by the local planning committee in determining the consolidation and building of the new school. (Fanning Dep., p. 21). Phil Paige similarly testified that:

. . . projected enrollment, of both facilities would be lower for the upcoming year. In Floyd County, we’re losing kids every year. All

¹ Former Superintendent Paul Fanning was initially a named defendant in this case, but after his retirement, current Superintendent Henry Webb was substituted as party defendant in his official capacity pursuant to CR 25.04. (Plaintiff’s Motion to Substitute Defendant, served July 9, 2008).

Eastern Kentucky districts are. So our allocations generally are lower each year because we have fewer kids.

(Paige Dep., p. 15).

Although conditions for RIF enumerated in the statute were clearly present here, the school district has consistently denied that a RIF occurred. Fanning maintained that no RIF had occurred under the school district's policy:

Q. And it's your understanding that it only counts as a reduction in force if it's declared as such under the Board policy?

A.. That's the way I would interpret it.

(Fanning Dep., p. 32). Superintendent Fanning went on to state he had never declared a RIF during his term as superintendent: "[d]uring the time I was in office as Superintendent of the Floyd County Schools, I don't think I ever declared a reduction in force." (Fanning Dep., p. 33). Although Fanning denied that a RIF occurred, he did admit that *if* a RIF had occurred in this situation, then the seniority provisions of the statute and board policy would have applied to Ms. Meyer. (Fanning Dep., p. 13-14).

The school district did not retain Ms. Meyer as FRYSC Coordinator despite her "tenured" status and seniority. With 168 months of continuous active service in the Floyd County Schools, Ms. Meyer not only had more than four (4) years of continuous active service, but she was also near the top of the seniority list of the 15 FRYSC Coordinators at the end of the 2006-07 school year. Only 5 FRYSC Coordinators had more months of service than Ms. Meyer (4 FRYSC Coordinators had 180 months, 1 had 468 months), and two other FRYSC Coordinators had the same number (168) of months of continuous active service as Ms. Meyer. (Springer Dep., Exh. 2; Defendants' Answers to Interrogatories Nos. 1-3, attached hereto as **Appendix A**).

Of the remaining 7 FRYSC Coordinators with less seniority, there were two with less than four (4) years continuous active service at the end of the 2006-07 school year who should have been reduced before Ms. Meyer under KRS 161.011. FRYSC Coordinator Marilyn Bailey had only 12 months (1 year) of service in the district at the end of the 2006-07 school year, and FRYSC Coordinator Deedra Gearheart had only 24 months (2 years) of service at that time. (Paige Dep., p. 33, Exh. 2; *See also*, Defendants Response to Plaintiff's Interrogatories Nos. 1-3, attached hereto as **Appendix A**). These "non-tenured" FRYSC Coordinators continued in their positions for the 2007-08 school year despite the RIF. (Springer Dep., Exh. 2).

Despite Ms. Meyer's seniority and the presence of "non-tenured" FRYSC Coordinators in the school district, and almost two months after the April 30 statutory deadline to notify a classified employee of non-renewal of her contract, Ms. Meyer was notified she would be removed from the Clark FRYSC Coordinator position. By letter dated June 21, 2007, the school district notified Ms. Meyer that the FRYSC Coordinator for the 2007-08 school year was abolished as a result of the closing of Clark Elementary School, and that another classified employee had been selected to fill the position of FRYSC Coordinator at the new Prestonsburg Elementary School based on the recommendation of the FRYSC Advisory Council. This letter further advised that Ms. Meyer would be placed in the lesser position of FRYSC Clerk at the new Prestonsburg Elementary School, and her salary in this lesser position would be reduced by \$6,235.87 as a result. (Appellants' Brief, Appendix 1, Exh. B).

The position of FRYSC Project Clerk at the new school to which Ms. Meyer was improperly assigned for the 2007-08 school year, was a position school district Personnel Director Phil Paige (Paige) admitted was of "much less" salary and lesser responsibilities

than the FRYSC Coordinator position. (Paige Dep., p. 26). Ms. Meyer's salary as Project Clerk for the 2007-08 school year was ultimately reduced from the previous year in the amount of \$9,847.14 according to a July 10, 2007 letter from Superintendent Fanning. (Appellants' Brief, Appendix 1, Exh.C). This amounted to a one third (1/3) reduction to her income from the previous year.² Moreover, as Project Clerk at the newly consolidated elementary school, Ms. Meyer served under FRYSC Coordinator Reibal Reynolds, who had eight (8) months *less* seniority than Ms. Meyer. (Defendants Response to Plaintiff's Interrogatories Nos. 1-3, attached hereto as **Appendix A**).

Ms. Meyer filed a declaratory judgment action in Floyd Circuit Court asserting that her statutory rights had been violated. The parties conducted discovery and briefed the issues to that court. The trial court agreed with Ms. Meyer's position and issued its first order that the school district's actions violated KRS 161.011(8); and later issued a second order awarding Ms. Meyer lost wages in the amount of \$11, 299.92. Trial Court Orders, attached to Appellants' Brief, Appendices 4 and 5. Ms. Myer asserted in her Complaint and in her initial motion for summary judgment that she should be reinstated to a FRYSC Coordinator position for the 2008-09 school year. After the trial court ruled in her favor on the liability issue, Ms. Meyer was placed in a FRYSC Coordinator position for the 2008-09 school year.

The school district appealed the trial court decision, and the Court of Appeals unanimously affirmed the trial court's decision in favor of Ms. Meyer, and affirmed the trial court's decision as to damages on Ms. Meyer's cross appeal. *See* Court of Appeals Opinion, attached to Appellants' Brief, Appendix 8. The school district then sought and was granted Discretionary Review under CR 76.20. Ms. Meyer's Motion for Cross-Discretionary Review on the issue of the amount of lost wages was granted pursuant to CR 76.21.

² Ms. Meyer's salary as FRYSC Coordinator at Clark Elementary for the 2006-07 school year was \$29,054.23. (Complaint para. 6; admitted in Answer, para. 2).

COUNTER ARGUMENT

As a classified employee with more than four (4) years of continuous active service, Ms. Meyer had a statutory right not to be RIF'd before employees without tenure or with less seniority within her job classification under KRS 161.011(8), and a statutory right to an annually renewed contract under KRS 161.011(5) and (7). The trial court and the Court of Appeals correctly determined that the school district and superintendent violated Ms. Meyer's statutory employment rights by refusing to conduct this RIF in the order mandated by KRS 161.011(8).

I. STANDARD OF REVIEW.

This case involves the interpretation of KRS 161.011, a statute governing classified school employees. Interpretation of a statute is a matter of law. Floyd Co. Bd. of Ed v. Ratliff, 955 S.W.2d 921 (Ky. 1997). Generally on appeal, the lower courts' statutory interpretation is reviewed *de novo*. Daviess County Public Library Taxing Dist. v. Boswell, 185 S.W.3d 651, 656 (Ky. App. 2005). Moreover, the "proper standard of review of a question of law does not require the adoption of the decision of the trial court as to the matter of law, but does involve the interpretation of a statute according to its plain meaning and its legislative intent." Id. See also, Wheeler and Clevinger Oil Co., Inc. v. Washburn, 127 S.W.3d 609 (Ky. 2004). Along those lines, "[A]n appellate court may affirm a lower court's decision on other grounds as long as the lower court reached the correct result." Emberton v. GMRI, 299 S.W.3d 565, 576 (Ky. 2009).

II. KRS 161.011 WAS AMENDED IN 1998 TO GIVE "TENURED" CLASSIFIED SCHOOL EMPLOYEES, LIKE MS. MEYER, RETENTION RIGHTS IN THE EVENT OF A RIF AND CONTRACT RENEWAL RIGHTS.

In 1998 the Kentucky General Assembly passed legislation that expanded the rights of classified school employees by granting those with more than four (4) years continuous

active service heightened protection in their employment. The amendments to KRS 161.011 required that classified school employees with more than four (4) years continuous active service could not be terminated or non-renewed except on the basis of a “for cause” reason set out in the statute, and provided those employees with more than four (4) years continuous active service job protection in the event of a RIF. *Compare:* the 1998 version of KRS 161.011 (1998 Kentucky Laws Ch. 590 [S.B. 303], attached hereto as **Appendix B**) *with:* the previous version of that statute (1994 Kentucky Laws Ch. 25 [H.B. 50], attached hereto as **Appendix C**).³

These amendments to KRS 161.011 gave classified employees “the status of holding one’s position on a permanent basis . . . on the fulfillment of specified requirements,” otherwise known as “tenure” as that word is defined in Webster’s New World Dictionary, 3rd College Edition (1998), p. 1380. As such, the term “tenure” will be used throughout this brief to describe Ms. Meyer, even though this term is not set out in KRS 161.011 itself.

Although the school district in this case does not wish to acknowledge the heightened employment protections for classified employees enacted by the General Assembly in the 1998 amendments, they are the crux of Ms. Meyer’s claim. Those amendments are clear and indisputable, and it has been stated that “[w]hen a statute is amended, the presumption is that the legislature intended to change the law.” City of Somerset v. Bell, 156 S.W.3d 321, 326 (Ky.App. 2005).

The “cardinal rule of statutory construction” is that the intent of the legislature should be ascertained and given effect. Commonwealth Cabinet Human Resources v. Jewish Hospital Healthcare Services, Inc., 932 S.W.2d 388, 390 (Ky. App. 1996). Moreover,

³ Some basic rights for classified employees were added by the legislature in 1994, specifically the school district was required to enter into written contracts with classified employees and develop and provide written policies governing the terms and conditions of their employment. *See Appendix C*, p. 2.

a reviewing court should look at the provisions of the whole law in expounding on a statute. Cabinet for Families and Children v. Cummings, 163 SW3d 425 (Ky. 2005). Additionally, it is important when interpreting the words of a statute, to consider the conditions existing when it was enacted with their background and development. Green v. Moore, 135 S.W.2d 682, 683 (Ky. 1939). Finally, all presumptions will be made in favor of those for whose protection the enactment was made. Firestone Textile Co. Div. Firestone Tire and Rubber Co. v. Meadows, 666 S.W.2d 730, 732 (Ky. 1983). The application of these rules of statutory construction to KRS 161.011 make clear that Ms. Myer should not have been the FRYSC Coordinator to suffer reduction for the 2007-08 school year.

In addition to providing greater protection to classified employees by its plain language, the 1998 amendments to KRS 161.011 also created a property interest in continued employment for classified employees with more than four years of continuous active service. This property interest in continued employment cannot be terminated without due process. *See* Mitchell v. Fankhouser, 375 F.3d 477, 480 (6th Cir. 2004); Branham v. May, 428 F.Supp.2d 668 (E.D.Ky. 2006); 2005 OAG 06. Thus, just as the tenured teacher⁴ has a property interest in continued employment, since the 1998 amendments to KRS 161.011, the “tenured” classified employee does as well.

The school district twists Ms. Meyer’s claim however, and misstates her position, arguing that she believes she is entitled to some “forever” appointment to a certain position in the school district. The school district asserts that Ms. Meyer is claiming she is “entitled to

⁴ **Teacher tenure** is referred to as “continuing service contract” and “continuing status” in the statutes governing teacher tenure in Kentucky. *See* KRS 161.720(4) and (5). The Kentucky General Assembly first enacted the “Teachers’ Tenure Act” in 1942. OAG 79-204. Under the Act, a teacher must be properly certified and teach for four years and be re-employed for a fifth year to obtain a “continuing service contract,” or tenure. KRS 161.740(1)(a) and (b). This statutory contract is “a contract for the employment of a teacher which shall remain in full force and effect until the teacher resigns or retires, or until it is terminated or suspended.” KRS 161.720(4). *See also*, KRS 161.720(5). A teacher acquires tenure by operation of law when the conditions of the statute are satisfied. *See* OAG 73-421, OAG 76-282

hold her position indefinitely.” Appellants’ Brief, p. 10. This “argument” not only misstates Ms. Meyer’s position, it further misunderstands tenure, due process, and the employment rights enacted by the Kentucky General Assembly in 1998. No employee, certified or classified, has the “right” to “indefinite” employment in a certain position. What Ms. Meyer was entitled to, pursuant to statute, to only be reduced in a RIF situation in the order set out in the statute, and to only be non-renewed from her position for reasons set out in the statute. The school district’s apparent misunderstanding of tenure, due process and RIF rights is disheartening.

Tenure simply means, to the employee who attains it, that she cannot be fired or “let go” from her contract except for reasons set out in the statute. And it means, in terms of a RIF, tenured employees have retention rights. Kentucky courts have long understood the importance of tenure and the reasons underlying that status, and have expressed the intent of the General Assembly in enacting the teacher tenure law, which is believed to be applicable to the analogous classified employee “tenure” as well. In Board of Education of Hopkins v. Wood, 717 S.W.2d 837, 839 (Ky. 1986), this Court said: “[t]he purpose of teacher tenure laws is to promote good order in the school system by preventing the arbitrary removal of capable and experienced teachers by political or personal whim.”

III. THE SCHOOL DISTRICT CANNOT VIOLATE, DENY, OR LIMIT MS. MEYER’S RIF OR CONTRACT RIGHTS GUARANTEED BY KRS 161.011.

As a “tenured” classified employee Ms. Meyer had a statutory right to not be reduced if there were classified employees with less than four years of continuous active service in the job classification of FRYSC Coordinator, KRS 161.011(8)(a), or alternatively she had the right to placement by seniority under KRS 161.011(8)(b), and a statutory right to an annually renewed contract under KRS 161.011(5) and (7). The school district and superintendent

violated Ms. Meyer's statutory rights by removing her from the FRYSC Coordinator position without regard to the RIF order of reduction or her seniority, and violated her statutory contract rights by improperly removing her from the Coordinator position without timely notice or a statutorily required "for cause" reason.

A. The school district ignored Ms. Meyer's statutory rights under RIF.

Ms. Meyer has preserved this argument throughout this litigation. *See*: Complaint (Appellants' Appendix 1), paragraph 21; Plaintiff's Motion for Declaratory Judgment and Memorandum in Support, served October 17, 2007, pp. 10-12; Plaintiff's Supplemental Memorandum in Support of Motion for Declaratory Judgment, served January 25, 2008, pp. 10-14; Appellee Brief to the Court of Appeals, pp. 5-11; Response to Motion for Discretionary Review, served March 31, 2011, pp. 6-8.

KRS 161.011(8) as it was in effect in 2007⁵ set out the conditions creating a RIF, and the order of reduction that must be followed if a RIF takes place:

- (8) The superintendent shall have full authority to make a reduction in force due to **reductions in funding, enrollment, or changes in the district or school boundaries**, or other compelling reasons as determined by the superintendent.
 - (a) **When a reduction of force is necessary, the superintendent shall, within each job classification affected, reduce classified employees on the basis of seniority and qualifications with those employees who have less than four (4) years of continuous active service being reduced first.**
 - (b) If it becomes necessary to reduce employees who have more than four (4) years of continuous active service, the superintendent shall make reductions based upon seniority and qualifications within each job classification affected.

⁵ 2006, Ch. 211, Kentucky Acts § 90, effective July 12, 2006. This version of KRS 161.011(8) is substantially the same as the amendments of 1998. *See* Appendix B, attached hereto.

- (c) Employees with more than four (4) years of continuous active service shall have the right of recall positions if positions become available for which they are qualified. Recall shall be done according to seniority with restoration of primary benefits, including all accumulated sick leave and appropriate rank and step on the current salary schedule based on the total number of years of service in the district.

(Emphasis added). While there has been no case law yet in Kentucky interpreting the classified employee RIF and contract provisions of KRS 161.011, it should be remembered that the courts “very zealously guards the rights of all parties in these [teacher tenure and notice] matters.” Settle v. Camic, 552 S.W.2d 693, 694 (Ky.App. 1977).

Kentucky does have an analogous statute that governs the order of RIF reductions for certified school employees (teachers), in the same order required for classified employees set out above. KRS 161.800 requires that in the event of a RIF, reductions must be made in order of non-tenured teachers being reduced first, and if tenured teachers must be reduced, then the school district must reduce by seniority:

When by reason of decreased enrollment of pupils, or by reason of a suspension of schools or territorial changes affecting the district, a local superintendent decides that it shall be necessary to reduce the number of teachers, he shall have full authority to make reasonable reduction. **But, in making such reduction, the local superintendent shall, within each teaching field affected, give preference to teachers on continuing contracts and to teachers who have greater seniority.** Teachers whose continuing contracts are suspended shall have the right of restoration in continuing service status in the order of seniority of service in the district if teaching positions become vacant or are created for which any of the teachers are or become qualified.

This certified employee RIF statute has not been examined by a Kentucky appellate court; but the intent of the legislature is as clear there as it is in KRS 161.011 – tenured employees are to be retained, if possible, in the event of a RIF. Kentucky Attorney General Opinions bear this out. OAG 73-383; OAG 73-702; OAG 80-150.

Other states have interpreted their own similar teacher tenure and RIF provisions which are similar to the protections set out in KRS 161.011 in the manner that protects the tenured, most senior employees. In Trolson v Bd. of Ed. School Dist. of Blair, 424 N.W.2d 881, 882 (Neb. 1988), the court determined that in enacting the RIF statutes at issue there, “the Legislature has attenuated a school board’s discretion to pare its staff in the face of reduced needs and has imposed specified procedures for achieving a reduction in force.” And in Illinois, the reviewing appellate court held that “[t]he policy reflected in the [RIF] statute is a preference for qualified tenured teachers over qualified non-tenured teachers. This policy favoring experience is likewise evident in the statutes and case law of our sister states.” Catron v. Bd. of Ed. of Kansas Community Unified School Dist. #3 of Edgar Co., 467 N.E.2d 621, 624 (Ill. 1984)(citations omitted).

Similarly, in Ms. Meyer’s case, the school district was required to conduct this RIF in the order set out in the statute, and the school district violated her statutory and contract rights.

1. A RIF did occur in the job classification of FRYSC Coordinator when the school district consolidated Clark and Prestonsburg Elementary Schools.

The Court of Appeals affirmed the trial court’s determination that a RIF did occur here, stating: “In this case, two elementary schools, each having a family resource coordinator, were consolidated, which left only one position. Although the Board argues that there was no reduction in force because its total number of employees in the district was not reduced, the statutory language provides that a reduction in force occurs when the total number of employees in a particular job classification is reduced (affected). Accordingly, the trial court did not err by applying KRS 161.011(8)(a) in Meyer’s case and

ruling in her favor regarding her job placement.” Court of Appeals Opinion attached to Appellants’ Brief, Appendix 8, p. 5.

The school district admitted the statutory conditions were present for a reduction in force. There were changes in school boundaries due to this consolidation of schools. (Fanning Dep., p. 22). There were reductions in enrollment as well. (Fanning Dep., p. 20-21; Paige Dep., p. 15). Further, it is clear that a RIF occurred within the job classification of FRYSC Coordinator for the 2007-08 school year there was one less FRYSC Coordinator than the previous school year. (Fanning Dep., p. 24; Paige Dep., pp. 31-32).

Although the conditions set forth in the statute for a RIF are present, the school district argues that a RIF did not occur. They assert that the school district’s RIF policy, Board Policy 03.271, prevents the statute from applying to Ms. Meyer because they did not deem her to have suffered a complete separation from employment. The school district’s board policy on reduction in force provides: “Reduction in force of classified employees shall be defined as total separation from employment in the District.” (Floyd County Board Policy, Classified Employee Reduction in Force, 03.271, attached to Appellants’ Brief, Appendix 2). However the school district cannot improperly limit Ms. Meyer’s statutory RIF rights by citing to its own board policies requiring “total separation from employment in the district.”

While both the statute and Ms. Meyer’s contract of employment do require local school districts to adopt policies on classified employee reduction in force, *see* KRS 161.011(9)(b), and Ms. Meyer’s Contract, attached as Appendix 3 to Appellants’ Brief, p. 1, (2)(f)(2), those policies cannot contradict or disallow RIF protections to those for whom the statute was enacted. The fact that statute and contract require board to adopt RIF policies does not mean those policies trump Ms. Meyer’s rights under the statute.

This Court has held that a school board cannot restrict a school employee's statutory rights through district policy as the school district is attempting to restrict Ms. Meyer's statutory employment rights here. In Thompson v. Board of Education of Henderson County, 838 S.W.2d 390 (Ky. 1992), the court reviewed the statute governing teacher evaluations and the teacher's ability to appeal those evaluations. The statute authorized a local evaluation appeal panel to conduct the review necessary to insure that the teacher was "fairly evaluated," thus the statute had "no restriction on the authority of the panel to review the judgment conclusions of the evaluator of the teacher. The statute does not restrict the panel to a consideration of only procedural matters." Id. at 392-93.

Despite the non-restrictive nature of the statute, the school district in Thompson had a policy that curtailed the local appeal panel's scope of review, limiting this panel to reviewing only "procedural" irregularities in an evaluation. This Court disapproved of the school district's attempted limit on the teacher's statutory rights through board policy, and held that the school board could not limit the scope of the statute's protections of the teacher. The Court stated that the school board had:

. . . no authority to so limit the statutory jurisdiction of the panel. The rule making authority of the board pursuant to KRS 160.290(2) is restricted. The statute provides **the rules, regulations and by-laws made by a school board shall be consistent with the general school law of the state.**

Id. at 392. Just as the school district in Thompson attempted to limit the school employee's statutorily guaranteed right of evaluation appeal, the district here attempts to limit Ms. Meyer's statutorily guaranteed RIF reduction order rights by asserting under their policy there has been no RIF. However this board policy is not consistent with the school law of the state.

The statutory language here is *reduce*. When a RIF is necessary, the “superintendent shall, within each job classification affected, *reduce* classified employees on the basis of seniority and qualifications with those employees who have less than four (4) years of continuous active service being *reduced* first.” KRS 161.011(8)(a). If the legislature had meant the RIF protections only to apply to those employees who were “separated from employment,” as the school district argues, the legislature would have used that language. The word *reduce* does not have that meaning, and certainly applies to Ms. Meyer as her job responsibilities and salary were drastically *reduced* as a result of this RIF. The statutory language and the board policy language here are in conflict, and that conflict must be resolved in favor of the language of the statute. Singleton v. Com., 175 S.W. 372 (Ky. 1915) (words of the statute should be construed so as to carry out the purpose of the statute). The statutory language must be interpreted in favor of Ms. Meyer, a classified employee for whom the statute was enacted to protect. Firestone Textile Co. Div. Firestone Tire and Rubber Co. v. Meadows, 666 S.W.2d 730, 732 (Ky. 1983).

Other jurisdictions have similarly held that where school board policy and the statute conflict, the statute must prevail. For example in Stephenson v. Lawrence Co. Bd. of Ed., 782 So. 2d 192, 198-99 (Ala. 2000), the court held: “We simply hold that an act of the Legislature prevails over a policy of a school board where a conflict exists, and that a school board can never have the discretion to promulgate a policy that is contrary to law.” As the court stated in Babb v. Ind. School Dist. I-5 Rogers Co., 829 P.2d 973 (Okla. 1992): “While a school board may exercise wide latitude and autonomy in choosing method for reducing the teaching force, its RIF policy must nonetheless conform to the commands of tenure law.” Id. at 977.

The school district here could not “reduce” Ms. Meyer’s employment by one-third salary and significantly less job responsibilities, before any other FRYSC Coordinator in the district suffered a reduction. In Birk v. Bd. of Ed. of Flora Community School District, 472 N.E.2d 407 (Ill. 1984), the question was whether in a RIF situation the school district could reduce a tenured guidance counselor from ten months to nine months, while allowing a less senior, but tenured, guidance counselor’s employment stay at ten months. Like the statute at issue here, the statute in Birk provided tenured employees protection in the event of a RIF, and among tenured employees who were to be reduced, the school district was to look at seniority. The reviewing court determined that the school district could *not* cut the more senior counselor’s contract by one month under the statute while allowing the less senior employee to suffer no reduction, given the “legislature’s goal in creating teacher tenure was to assure continuous service on the part of teachers of ability and experience by providing those teachers with some degree of job security.” Id. at 257. Further, that “in keeping with the primary purpose of the tenure provisions of the School Code, we hold that the reduction of plaintiff’s contract entitled him to the protections of the statute.” Id. at 259. The wording of the statute at issue in Birk, supra, was “removed or dismissed.” Both the lower courts and the reviewing appellate courts in that case found that the terms “removed” and “dismissed” were broad enough to encompass “any reduction” in the extent of a teacher’s employment, and those terms “did *not* limit the applicability [of the statute] to instances of complete termination.” Id. at 256 (emphasis added).

In line with Kentucky Supreme Court and Court of Appeals decisions requiring that school districts comply with statutory protections of school employees, the Kentucky Attorney General has similarly stated that a school board cannot alter or limit a school employee’s statutory tenure rights. Specifically, a school district cannot go “over and above”

statutory tenure rules by requiring a teacher to obtain a masters degree before she can attain tenure: “[s]ince teachers’ tenure is regulated by statute, it may not be altered by any regulation of a local board of education,” OAG 73-421. The Kentucky Attorney General also determined that a superintendent must give a teacher a continuing contract (tenure) where teacher worked four years, was non-renewed and then re-hired. Under the statute teacher was entitled to tenure because she had worked four years and was brought back as a teacher for the fifth year. The Attorney General opined that a superintendent could not defeat a teacher’s tenure status when she had met the statutory requirements. OAG 72-664. (OAG 73-421 and OAG 72-664 are attached hereto as collective **Appendix D**). School board policy cannot dictate where legislature has already spoken through words of the statute. The statute governing the RIF of classified employees does not contain this “total separation from employment” language of the school board policy.

Alternatively, even if the board’s policy requiring total separation from employment did apply here, Ms. Meyer’s situation fits under that policy. She was in fact, totally separated from her statutory employment contract as FRYSC Coordinator at Clark Elementary, and re-assigned to the position of FRYSC Project Clerk at the new Prestonsburg Elementary. The Clark Coordinator position ceased to exist when the school ceased to exist. Certainly Ms. Meyer’s removal from that position and contract would qualify as a total separation from employment, if such separation is deemed necessary.

The school district additionally argues that language contained in Ms. Meyer’s contract of employment somehow prevents KRS 161.011(8) from applying to her, asserting that because the contract allowed Ms. Meyer’s assignment to be changed, the school district is absolved of compliance with KRS 161.011(8). Appellants’ Brief, p. 7. But the contract itself does not allow or permit its terms to conflict with the laws of the Commonwealth,

including KRS 161.011(8). To the contrary Ms. Meyer's contract specifically provided that the laws of the state were incorporated in its terms:

This contract, the laws and regulations of the United States, Commonwealth of Kentucky and local regulations and ordinances together with the written policies and procedures of the District constitute the full agreement between the parties. No other document, publication or oral statement may change the terms and conditions of this Contract.

Ms. Meyer's Contract is attached to Appellants' Brief, as Appendix 3, p. 3, Section (4)(e).

This contract provision is in keeping with longstanding Kentucky case law to the effect that that school employees have a "statutory contract" or a "legislative grant" concerning their employment, Board of Education v. Powell, 792 S.W.2d 376, 379 (Ky.App. 1990), meaning that their employment must be evaluated in light of the statutes that govern the employment of school employees. The school district cannot ignore the statutes that govern Ms. Meyer's employment by claiming her contract of employment allowed it to do so, because it clearly did not.

The school district further asserts that Ms. Meyer's contract "expressly" stated that it was for only one year, thus they were allowed to place her wherever they chose despite her RIF order of reduction rights. Appellants' Brief, p. 6. But again, the actual terms of this contract prove otherwise. The contract specifically and correctly states is that if the employee has more than four (4) years of service, her contract is exempted from the annual non-renewal provision:

It is agreed by the District and the Employee that this Contract ends June 30, 2007 and is subject to renewal at the sole discretion of the Superintendent ***unless*** Employee has been employed by the district for four (4) continuous years of active service provided in KRS 161.011(5).

Appellants' Brief, Appendix 3, p. 3, Section(4)(a). The school district's attempt to create some conflict between the terms of Ms. Meyer's contract, and the school district's

requirement to comply with the statute in the event of a RIF are not supported by the actual terms of the contract. In actuality, the contract requires the school district to comply with the laws of the state in regard to Ms. Meyer's employment.

The school district seems to defend this action by claiming no situation is a RIF until they declare it so, either through their policy or by proclamation. However, the superintendent's "full authority to make a reduction in force" set out in the statute does not include the authority to *deny* a RIF that has clearly occurred. Moreover, Kentucky law is clear that a superintendent and school board may not limit an employee's statutory employment rights, including her rights in the event of a RIF.

Both the board of education and the superintendent are required to follow Kentucky law in their policy and by their actions. KRS 160.290 requires "[t]he rules, regulations and bylaws made by a board of education shall be consistent with the general school laws of the state. . . ." KRS 160.370 requires the superintendent: "shall see that the laws relating to the schools . . . are carried into effect."

The argument implicit in the school district's position is that the Superintendent has the authority to decide whether a RIF has occurred, and the courts should not second guess his determination. However, as the Kentucky Court of Appeals stated, the court's interpretation of a statute does not impinge the superintendent's authority to administer the school district. In Medley v. Board of Education of Shelby County, 168 S.W.3d 398 (Ky. App. 2004), the superintendent did not allow a teacher access to school district videotapes of her own classroom. The superintendent asserted that the videos were protected student education records under FERPA (Family Education Rights and Privacy Act, 20 USC 1232g) and KFERPA (KRS 160.700 et seq.). The superintendent argued that the Court could not interpret these statutes in a way that would allow the teacher access to her own classroom

videos. The superintendent asserted that such an interpretation would undermine his “executive authority of the school administration by way of judicial override of such authority.” The Court of Appeals correctly quelled this argument:

We note that the superintendent has the power to exercise general supervision over the schools in his district. *The outcome of this case does not turn on the superintendent’s authority. It instead is a matter of statutory interpretation, a task clearly within the province of this Court.*

Id. at 406 (emphasis added). Likewise, in this case, the statute must be interpreted by the courts, and followed by the superintendent and school district.

The school district’s assertion that the Superintendent alone has the authority and ability to “declare” a RIF is not supported by the statute. The statutory rights of classified employees will be rendered meaningless if the superintendent, despite the existence of factors set out in the statute – like reduction of number of employees within the job classification of FRYSC Coordinator, changes in school boundaries, and reduction in student enrollment that were admitted here - can merely decree that a RIF has not occurred.

Although the superintendent is responsible for the general supervision over the schools within his district, he cannot limit Ms. Meyer’s statutory seniority rights. It is the superintendent’s duty to follow the statute. KRS 160.290, KRS 160.370; Medley v. Board of Education of Shelby County, supra.

2. The school district refused to follow the RIF reduction order set out in KRS 161.011(8).

After determining that a RIF did in fact occur, the Court of Appeals and the trial court determined that the school district did not comply with the statute in reducing Ms. Meyer’s employment in violation of the clear intent of the statute. The Court of Appeals held that “[f]rom a plain reading of the statute, the legislature has expressed a retention preference for employees with greater seniority and qualifications.” Court of Appeals

Opinion, attached to Appellants' Brief as Appendix 3, p. 4. This preference in the order of reduction makes sense - those classified employees with less than four years of continuous active employment (i.e. non-tenured) in a school district do not have the expectation of continued employment that employees with more than four years of such employment enjoy under KRS 161.011 as amended in 1998. *See generally Mitchell v. Fankhouser, supra.* Indeed, this same order of reduction applies to Kentucky certified employees (teachers) within a district undergoing a RIF - that is, non-tenured teachers (i.e. those having less than four years of service) are to be reduced first. KRS 161.800; OAG 73-383, OAG 73-702.

This same order of reduction has been adopted for school employees in other states as well. In Hankenson v. Board of Education of Waukegan Twncshp., 146 N.E.2d 194 (Ill. 1957), the court examined the public policy underlying the state's RIF and tenure statutes, and declared: "[t]he legislature has thus subsequently declared the public policy of this State to be that in cases such as this qualified tenure teachers are to be preferred over qualified nontenure teachers." In line with that interpretation, the court went on to hold that "when a board of education decides upon a justifiable decrease in its teaching staff, it may not retain nontenure teachers and dismiss tenure teachers who are qualified to do the work for which nontenure teachers are retained." *Id.* at 197. Similarly, an Oklahoma appellate court held in Babb v. Ind. Sch. Dist. No. I-5 of Rogers County, 829 P.2d 973 (Okla. 1992):

When declining enrollment requires a reduction in force, a school board must balance a district's needs against available resources and take appropriate action to certain personnel. **While a school board may exercise wide latitude and autonomy in choosing a method for reducing the teaching force, its RIF policy must nonetheless conform to the commands of tenure law.** Tenured faculty have a claim to preferential status over nontenured faculty in implementation of a reduction-in-force plan. **To hold otherwise would emasculate the statutory tenure policy and let school boards do indirectly what they cannot do directly.** Tenure rights must be protected and school boards afforded the necessary discretion to so shape quality

education programs as to make them meet available financial resources.

Id. at 976. *See also*: Barton v. Independent School Dist. No. I-99 of Custer Co., 914 P.2d 1041 (Okla. 1996).

Ms. Meyer should have remained, pursuant to KRS 161.011(8), in a FRYSC Coordinator position within the Floyd County Schools, instead of being removed from this position. Those classified employees having less than four years of continuous active service should have been reduced **first** in this RIF under KRS 161.011(8)(a).

As the Oklahoma Supreme Court stated in Babb, *supra*: “When, as here, a school board’s RIF plan gives tenure-like priority to nontenured faculty, the board in effect elevates its nontenured personnel to the status of tenured faculty. This, we hold, it cannot do for any purpose. A reduction-in-force plan must be so implemented so as to protect tenure status from erosion on grounds unsanctioned by law.” *Id.* at 977.

The school district did not have the authority, either by policy or by refusal to declare a RIF, to limit Ms. Meyer’s statutory RIF and contract rights under KRS 161.011. Moreover, the school district cannot hide behind the FRYSC Advisory Committee selecting another FRYSC Coordinator to serve as the new Prestonsburg Elementary School, as if that selection absolves them of responsibility to follow the statutory reduction order, because it does not. Ms. Meyer should not have been reduced, in any way before non-tenured FRYSC Coordinators.

B. Ms. Meyer’s right to a renewed contract of employment was violated by the school district.

Ms. Meyer has preserved this argument throughout this litigation. *See*: Complaint (Appellants’ Appendix 1), paragraphs 19, 20; Plaintiff’s Motion for Declaratory Judgment and Memorandum in Support, served October 17, 2007, pp. 5-9; Plaintiff’s Supplemental

Memorandum in Support of Motion for Declaratory Judgment, served January 25, 2008, pp. 8-9; Appellee Brief to the Court of Appeals, pp. 12-15.

Classified school employees are to have written contracts, which are to be renewed annually:

- (5) Local districts shall enter into written contracts with classified employees. Contracts with classified employees **shall be renewed annually** except contracts with the following employees:
 - (a) An employee who has not completed four (4) years of continuous active service, upon written notice which is provided or mailed to the employee by the superintendent, no later than April 30, that the contract will not be renewed for the subsequent school year. Upon written request by the employee, within ten (10) days of the receipt of the notice of nonrenewal, the superintendent shall provide, in a timely manner, written reasons for the nonrenewal.
 - (b) An employee who has completed four (4) years of continuous active service, upon written notice which is provided or mailed to the employee by the superintendent, no later than April 30, that the contract is not being renewed due to one (1) or more of the reasons described in subsection (7) of this section. Upon written request within ten (10) days of the receipt of the notice of nonrenewal, the employee shall be provided with a specific and complete written statement of the grounds upon which the nonrenewal is based. The employee shall have ten (10) days to respond in writing to the grounds for nonrenewal.

KRS 161.011(5) (emphasis added). Further, KRS 161.011 subsection (7) provided:

- (7) Nothing in this section shall prevent a superintendent from terminating a classified employee for incompetency, neglect of duty, insubordination, inefficiency, misconduct, immorality, or other reasonable grounds which are specifically contained in board policy.

As a classified employee with more than four (4) years continuous active service, Ms. Meyer's contract of employment "shall be renewed annually." The only exceptions to that

rule, set out in KRS 161.011(5)(b), are that the school district could have notified Ms. Meyer prior to April 30, 2007⁶ that her contract of employment would not be renewed for any of the “for cause” reasons set out in KRS 161.011(7), or the school district could have notified her of RIF under subsection (8). Because the school district did not timely notify her of either of these actions before April 30, 2007, her 2006-07 FRYSC Coordinator contract of employment was in fact renewed for the 2007-08 school year.

In Byrd v. Greene Co. Sch. Dist., 633 So.2d 1018 (Miss. 1991), a Mississippi teacher was discharged due to RIF after the April 8 deadline to notify of non-renewal or RIF. The specific question framed there was whether the school district had “‘good cause’ to rescind a teacher’s already renewed contract because [of] its finance woes.” Id. at 1023. The court in that case made clear that the teacher’s contract rights were not subject to the school district’s “eleventh hour realization of its financial predicament,” and that such financial predicament “was not good cause for the rescission of [this teacher’s] contract.” Id. at 1025. Likewise, the Floyd County school district’s post-April 30 decision to reduce Ms. Meyer’s already renewed contract of employment is not supported by the statute.

The school district cannot change the terms of employment so significantly by placing the classified employee in a lesser position with significantly less pay, otherwise KRS 161.011 is rendered meaningless. This was clearly a reduction in Ms. Meyer’s employment prohibited by KRS 161.011(8). In a somewhat analogous situation, a teacher who was not notified of a change in her position for the upcoming year was deemed re-employed in that same position for the next year. In Board of Education of Harrodsburg v. Powell, 792 S.W.2d 376, 379 (Ky.App. 1990), the Court of Appeals determined that “Powell [a teacher]

⁶ In the spring of 2007, when these actions took place, the statutory notification deadline was April 30. That deadline, in the current statute as amended in 2008, is now May 15. See 2008 Kentucky Acts Ch. 113, Section 6, effective April 14, 2008.

was not given notification as required by statute, and therefore her full-time 1986-87 contract was renewed for the succeeding year 1987-88.” Although the statutes at issue in Powell, supra, were worded differently than KRS 161.011 at issue here, the underlying premise applies here, that a school employee’s contract is renewed if she has not received timely notice that it is not renewed. Ms. Meyer’s contract was renewed for the same position as the previous year, because she was not timely notified otherwise.

The school district’s assertion that Ms. Meyer’s contract was for “one year only” does not comport with the statute or even the contract itself, and is not a correct statement of the law. Appellants’ Brief, p. 7. As stated previously, the 1998 amendments to KRS 161.011 *require* the renewal of employment contracts with classified employees with more than four years of continuous active service. The statute specifically states “Contracts with classified employees *shall be renewed annually,*” with exceptions for those who do not have four years continuous active service, or those who are non-renewed for cause. KRS 161.011(5). A school district may not just non-renew a classified employee who has more than four years of service. Rather, such an employee can only be non-renewed based upon a “for-cause” reasons set out in KRS 161.011(7), and such employee is entitled to a due process hearing if she is non-renewed in that manner. Mitchell v. Fankhauser, supra; Branham v. May, supra; 2005 OAG 06.

Since the school district’s actions against Ms. Meyer were taken after April 30, her FRYSC Coordinator contract was statutorily renewed and the only options available to the school district were either: (1) terminate her employment contract per subsection (5) and (7) of the statute; or (2) RIF her according to the order of reduction set out in the statute, section (8). Since the school district took neither of these options, but instead reduced her responsibility and salary, they violated her contract rights under the statute.

IV. EVEN HAD THE SCHOOL DISTRICT'S "DEMOTION" ARGUMENT BEEN PRESERVED IN THE LOWER COURTS, THAT ARGUMENT DOES NOT AUTHORIZE THE SCHOOL DISTRICT TO VIOLATE THE STATUTORY RIF ORDER OF REDUCTION AND CONTRACT RIGHTS OF MS. MEYER.

Although the school district did not properly preserve this issue below, Appellee did properly preserve by her Response to Motion for Discretionary Review, served March 31, 2011, pp. 8-10.

The Court of Appeals correctly determined that the school district's argument that it simply demoted Ms. Meyer and thus had no culpability for the violation of her RIF order of reduction rights and contract rights was not preserved: "The Board argues that Meyer's claim must fail because no such statute exists with respect to the demotion of classified employees. Despite the Board's contention, its argument must fail because it was not ruled on by the trial court and was not further preserved by citation in the Board's brief." Court of Appeals Opinion, Appellants' Brief, Appendix 8, p. 5.

The school district *still* fails to cite specifically to the record where this issue is preserved, as required by CR 76.12(4)(c)(v). This failure is due to the fact that the school district did not preserve the record on this issue. The trial court ruled that the school district violated Ms. Meyer's rights by not conducting the RIF in the order required by the statute. Trial Court Order, Appellants' Brief, Appendix 4, pp. 3-4. Even if the issue had been preserved by the school district in the trial court, it was not preserved for review on appeal before the Court of Appeals. It was not set out by the school district in its multi-page Pre-Hearing Statement, a pleading for which the school district's counsel moved for additional time to file, and thus presumably had ample time to prepare. *See* Motion for Enlargement of Time to File Prehearing Statement, filed in the Court of Appeals on January 7, 2009, and Tendered Prehearing Statement attached thereto. Within that pleading, the "issues proposed

to be raised on appeal” did not include that the school district had the right and ability to demote Ms. Meyer, regardless of her RIF rights. Pursuant to CR 76.03(8), the school district “shall be limited on appeal to the issues in the prehearing statement.” The Court of Appeals was well within its authority to deem this argument unpreserved. And, as the Court of Appeals held, it was “not further preserved by citation in the Board’s brief” before that court. Court of Appeals Opinion, Appellants’ Brief, Appendix 8, p. 5.

The school district attempts to obfuscate by pointing to places in its Court of Appeals briefing where it referenced the statute, KRS 161.011. However, these references, set out in Appellants’ Brief on page 10, are not to arguments that the school district was somehow entitled to demote Ms. Meyer in lieu of following the statutory order of reduction required for a RIF.

In the alternative, should this Court determine that the school district did properly preserve this argument, it is not determinative. The school district cannot assert that its placement of Ms. Meyer in a lesser position somehow absolves them from complying with the requirement to follow statutory order of reduction in the event of a RIF. The school district cannot ignore the statute that applies in this situation, remove a “tenured” FRYSC Coordinator while other “non-tenured” FRYSC Coordinators remained employed, then assert that they simply demoted Ms. Meyer. This “demotion” is rather a “reduction” in contravention of her statutory right to reduction in the order set out in the statute, and in violation of Ms. Meyer’s right to a renewed contract absent some for-cause reason for non-renewal coupled with timely notice.

STATEMENT OF THE CASE AND ARGUMENT ON CROSS-APPEAL

Ms. Meyer's argument as to the amount of lost wages owed her as a result of the schools district's statutory violations was properly preserved in the lower courts in the following places: Plaintiff's Supplemental Motion on Damages, filed July 9, 2008; Trial Court Order and Judgment dated November 5, 2008; Plaintiff's Notice of Cross Appeal, filed December 9, 2008; Appellee's Court of Appeals Brief, pp. 17-20; Cross-Motion for Discretionary Review, No. 2012-SC-000113-D, docketed February 29, 2012; and Order Granting Cross Motion for Review, April 18, 2012.

I. MS. MEYER WAS ENTITLED TO LOST WAGES BASED ON THE SALARY PAID TO THE FRYSC COORDINATOR AT THE NEW PRESTONSBURG ELEMENTARY SCHOOL FOR THE 2007-08 SCHOOL YEAR FORWARD.

After determining "there was a reduction in force within the meaning of the statute," the trial court proceeded with the action relative to Ms. Meyer's damage claims. Trial Court's Order, Appellants' Brief, Appendix 4, pp. 3-4. The parties conducted further discovery on the issue of damages, then submitted briefs to the trial court. The trial court then determined the damages to be awarded Ms. Meyer for the loss of pay she suffered for the 2007-08 school year at an amount of \$11,299.92, which was based on Ms. Meyer's previous salary as FRYSC Coordinator at Clark Elementary. Trial Court's Order and Judgment, Appellants' Brief, Appendix 5.

It is Ms. Meyer's contention that she was entitled to the salary paid to the FRYSC Coordinator employed at the new Prestonsburg Elementary the 2007-08 school year (\$37,339.01), *see* **Appendix E**, attached hereto, and that her total lost wages based on this salary figure would have been \$18,131.99 (\$37,339.01 - \$19,207.02 (amount she was paid as Project Clerk) = \$18,131.99). The school district however argued Ms. Meyer would have made a lesser salary as Coordinator, based on her prior salary set out on FRYSC Coordinator

salary schedule (\$30,506.94), and that the lost wages amount was only \$11,299.92 (\$30,506.94 – 19,207.02 = \$11,299.92). However, the salary schedule cited is not a uniform schedule based on legitimate factors, as it is only applied to 15% of the district's FRYSC Coordinators.

Back pay is an equitable remedy available to Ms. Meyer for the school district's statutory violations. McFerrren v. County Board of Education, 455 F.2d 199, 202 (6th Cir. 1972) citing to National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 49 (1937) (payment of back wages is an appropriate remedy in a proceeding for statutory enforcement). It cannot be disputed that she is entitled to recover damages for defendant's violation of a statute pursuant to KRS 446.070. Pari-Mutuel Clerks Union v. Kentucky Jockey Club, 551 S.W.2d 801, 803 (Ky. 1977) (if termination of employment proved to violate statute, employee is entitled under KRS 446.070, to recover from his former employer whatever damages he has sustained by reason of the violation), and Winco Block Coal Co. v. Stewart, 125 S.W.2d 738 (Ky. 1930) (employer coal company liable to an employee "check weighman" for his lost income because of their interference with his employment in contravention of a statute). Thus it is unquestioned that she was entitled to recover damages, including lost wages and benefits, she suffered because of the school district's violation of her rights under KRS 161.011.

After the lower court's ruling, the school district eventually re-employed Ms. Meyer as a FRYSC Coordinator for the 2008-09 school year. Thus, the damages issues are: (1) the amount of her lost wages (plus employee and employer retirement contributions and interest) for the 2007-08 school year when she was "re-assigned" to the Project Clerk position, and (2) the proper salary to be paid in the position of FRYSC Coordinator from 2008-09 forward.

A. The school district “salary schedule” for FRYSC Coordinators used to limit Ms. Meyer’s salary does not comply with statutory and board policy requirements.

The school district argues that Ms. Meyer’s 2007-08 salary should be calculated based on the alleged “salary schedule” which actually only applied to two (2) of the county’s fourteen (14) FRYSC Coordinators. This “salary schedule” however is not a uniform schedule based on any legitimate factors, and should not be used as a sword to limit Meyer’s lost wages.

A school board is required to “fix the compensation of employees.” KRS 160.290(1); KRS 64.590. The school system is required to annually establish “schedules for salaries and benefits for all classified personnel.” Floyd County Board Policy 03.22. Salary schedules for “each category of classified personnel” are to “be based on skills required, training, longevity, and supervisory responsibilities.” Floyd County Board Policy 03.221 AP1. (Wireman Dep., Exhibit 1; attached hereto as **Appendix F**).

The school district wants to use the approved salary schedule for FRYSC Coordinators to limit Ms. Meyer’s lost wages, but they deviate from the approved salary schedule for twelve (12) of the fourteen (14) FRYSC Coordinators who have been “grandfathered” in at *higher* salaries. The 2008-09 salary schedule itself is divided into two parts: the top shows a total of twelve (12) “GF” or “grandfathered” salaries which correspond to individual FRYSC Coordinators; while the bottom half of the page shows the “regular” salary schedule for FRYSC Coordinators, divided into steps that represent years of experience in the position. (Wireman Dep., p. 14-18, Exh. 2, attached as **Appendix G**). The salaries set out as “GF” do not account for skills, training, or longevity. (Wireman Dep., pp. 14-18). Reibal Reynolds, with eight months less experience than Ms. Meyer, was assigned to the new Prestonsburg Elementary FRYSC Coordinator position was paid

\$37,339.01 (attached as **Appendix E**), and Judy Handshoe, FRYSC Coordinator with the same number of months experience as Meyer employed at a different school was paid \$36,438.64 (attached as **Appendix I**). Yet Ms. Meyer, with the same or more longevity, training and responsibility, the school district asserts, should only be paid \$30,506.94 for that year.

Defendants have asserted that those FRYSC Coordinators employed after the adoption of the salary schedule in 2003 were placed on the adopted salary schedule. (Wireman Dep., p. 14; Springer Dep., p. 11). But not everyone hired after that date was placed on the revised salary schedule. Deedra Gearheart, who was hired after the adoption of the “revised” salary schedule for FRYSC Coordinators in 2003 (See Defendants’ Response to Plaintiff’s Motion for Judgment, p. 1; and Wireman Dep., p. 14), is nonetheless on the “GF” salary schedule, indicating that her salary was also “grandfathered,” even though she was hired after the date of the new salary schedule.⁷ For 2007-08 Ms. Gearheart was paid \$30,950.51. (Wireman Dep., Exh. 3, attached as **Appendix H**). Yet the 2007-08 salary schedule provided by Defendants does not designate \$30,950.51 as a salary for any step or level. (**Appendix G**). And, this “grandfathered” salary was significantly more than the salary Ms. Gearheart would have made if she were paid from the regular salary schedule. Her 2007-08 salary of \$30,950.51 would fall between step/level 14 and 15. Yet Ms. Gearheart was first employed as a FRYSC Coordinator in April 2005, which should put her, at most, on step/level 02 for 2007-08, at a salary of \$27,125.47 on the adopted salary schedule for FRYSC Coordinators. It should also be noted that Ms. Gearheart’s Coordinator salary for 2007-08 is greater than the \$30,506.94 salary the school district asserts Ms. Meyer would have made, despite the fact that Ms. Meyer would have had fourteen (14) years

⁷ Gearheart was hired as FRYSC Coordinator effective April 4, 2005 (**Appendix H**).

experience as Coordinator whereas Ms. Gearheart had only a maximum of three (3) years experience in the position for 2007-08.

This issue points out perfectly the reason for adopting and applying a uniform salary schedule – so that salaries are fixed, employees are paid according to their experience and not arbitrarily, and all parties are know what to expect in terms of compensation.

The calculation of Ms. Meyer’s lost wages for the 2007-08 school year based on the newly consolidated Prestonsburg Elementary FRYSC Coordinator salary would be equitable in light of her length of service and would bring the district salary schedule in compliance with the requirements of the statute and board policy governing a uniform salary schedule. The basically non-existent “salary schedule” should not be used as a bar to award Ms Meyer this proper lost wages amount.

CONCLUSION

Appellee/Cross-Appellant Pamela Meyer respectfully requests this court to uphold the decisions of the trial court and the Court of Appeals as to the statutory violation of her RIF rights, or on the basis of any of the reasons set out herein. Ms. Meyer respectfully requests this court to reverse as to the amount of damages, and award her damages based on the higher salary of the PES FRYSC Coordinator, as set out above.

Respectfully Submitted,

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