

SUPREME COURT OF KENTUCKY
NO. 2011-SC-00145-D; NO. 2012-SC-00113-D

ON REVIEW OF OPINION OF
COMMONWEALTH OF KENTUCKY COURT OF APPEALS
NO. 2008-CA-002274-MR; 2008-CA-002312
DATED JULY 9, 2010 AND ORDER DENYING PETITION FOR
REHEARING DATED FEBRUARY 15, 2011

APPEAL FROM FLOYD CIRCUIT COURT
HON. DANNY P. CAUDILL, JUDGE
ACTION NO. 07-CI-1038

HENRY WEBB, in his Official Capacity as
Superintendent of the Floyd County Schools;
and the BOARD OF EDUCATION OF
FLOYD COUNTY, KENTUCKY

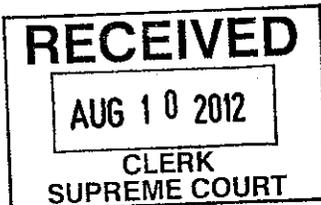
APPELLANTS / CROSS APPELLEES

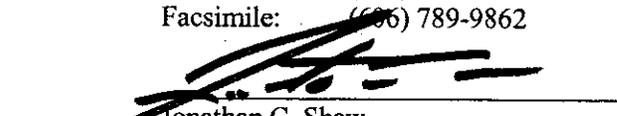
APPELLANTS REPLY / BRIEF FOR CROSS - APPELLEES

PAMELA MEYER

APPELLEE / CROSS APPELLANT

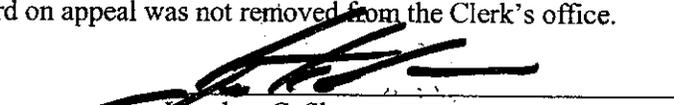
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CERTIFICATE OF SERVICE

In accordance with CR 76.12(6), I certify that a copy of this Reply Brief for Appellants, HENRY WEBB, in his Official Capacity as Superintendent of the Floyd County Schools; and the BOARD OF EDUCATION OF FLOYD COUNTY, KENTUCKY, has been served on August 8, 2012, by United States Mail, postage prepaid, upon: Hon. J. Follace Fields, III and Hon. Carrie C. Mullins, Brooks, McComb & Fields, LLP, 1204 Winchester Road, Suite 100, Lexington, KY 40505; and Hon. Danny P. Caudill, Judge Floyd Circuit Court, Floyd County Justice Center, 127 South Lake Drive, Prestonsburg, KY 41653; Mr. Sam Givens, Jr., Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9229; and to Douglas Ray Hall, Clerk, Floyd Circuit Court, Floyd County Justice Center, 127 South Lake Drive, Prestonsburg, KY 41653. This is to further certify that the record on appeal was not removed from the Clerk's office.


Jonathan C. Shaw

STATEMENT OF POINTS AND AUTHORITIES

APPELLANT'S REPLY.....1

 Black's Law Dictionary 1305 (8th ed.2004)1

 Black's Law Dictionary 904 (8th ed.2004)1

Cantrell v. Kentucky Unemployment Insurance Commission,
 450 S.W.2d 235, 237 (Ky.1970).....1

 KRS 161.760(4)1

 KRS 161.011.....2-4

 KRS 156.496.....2

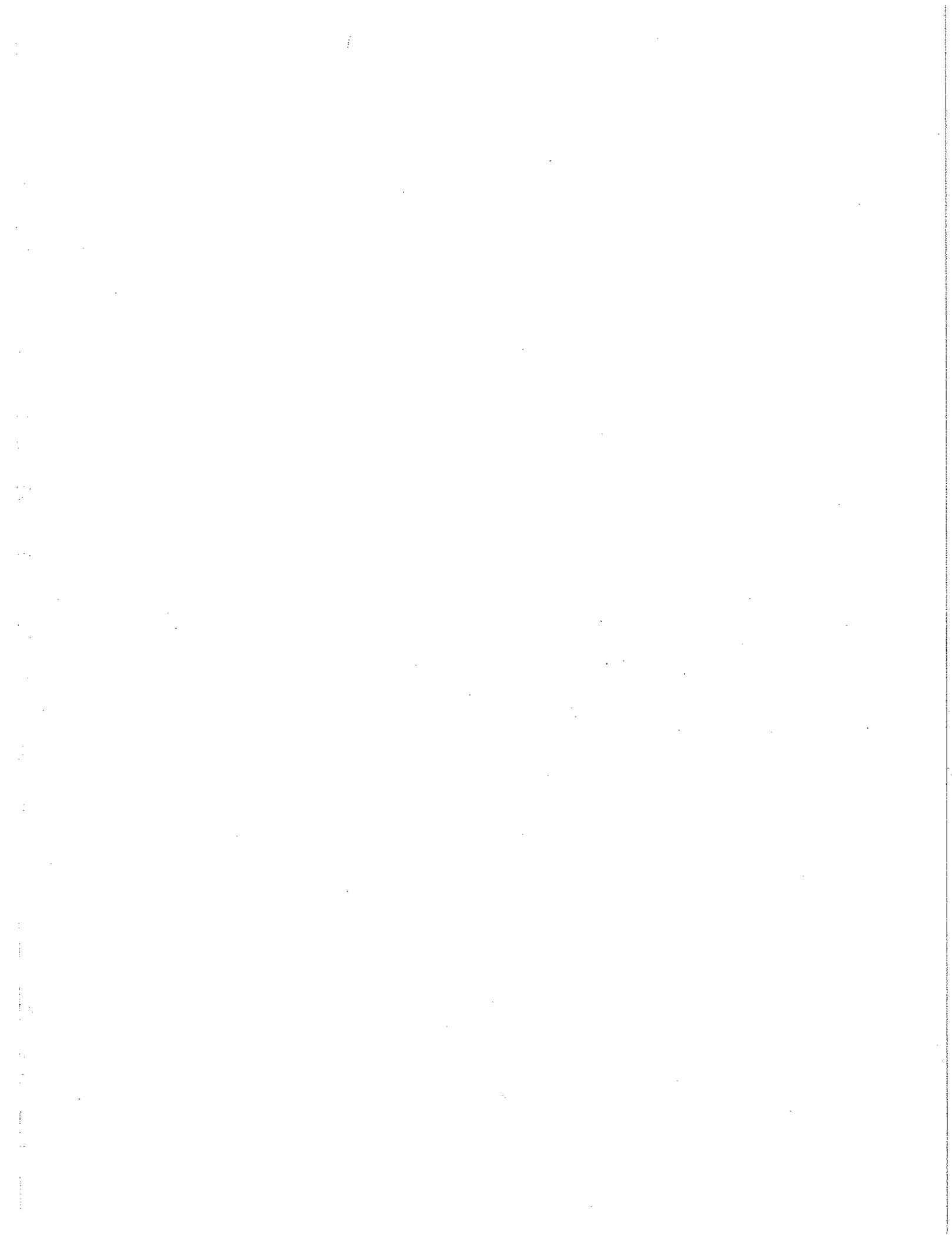
 KRS 156.4977.....2

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APPELLANT'S REPLY

Although there is a property interest in continued employment within the district, there is no property interest in holding a certain position at a school. Even certified staff are not entitled to any particular position in a school district. (See KRS 161.760(4), which states: "Employment of a teacher, under either a limited or a continuing contract, is employment in the school district only and not in a particular position or school."). Appellee Meyer's contract with the district was renewed and she was assigned to the new school. The position Appellee had held the year prior had been abolished by board action. The number of classified employees within the district was not reduced and there was no employment loss within the district. Here, Meyer was never "terminated", "fired", nor "let go" as is eluded to - there was at no time any separation from Appellee's employment with the Floyd County Board of Education. Appellee Meyer was necessarily reassigned (as opposed to terminated), not due to a reduction in force, but due to the closing of the school where she was previously assigned and the opening of a new school in the district. KRS 161.011 on its face is clearly inapplicable in this matter and thus there is no statutory basis for Appellee's claim.

As expressed by Justice Palmore, "[w]hen all is said and done, common sense must not be a stranger in the house of the law." *Cantrell v. Kentucky Unemployment Insurance Commission*, 450 S.W.2d 235, 237 (Ky.1970). The phrase "**reduction in force**" refers to an elimination of personnel, whereby the number of employees is diminished. Looking for a definition of "reduction in force," one is instructed to "[s]ee LAYOFF." Black's Law Dictionary 1305 (8th ed.2004). Following this directive, the term "**layoff**" is then defined as "[t]he termination of employment at the employer's instigation; esp. the termination-either temporary or

permanent-of many employees in a short time.-Also termed *reduction in force*.” Black's Law Dictionary 906 (8th ed.2004). These definitions help explain the statute's use of the phrase “reduction in force” as well as the intent of the legislature. Terms are to be given their plain meaning unless otherwise defined. The language of the legislature makes it clear that a reduction in work force is a reduction in the number of employees that is affected by either a layoff or a permanent termination. This interpretation is consistent with board policy. Neither a layoff nor a permanent termination applies in this case. The holding of the Floyd Circuit Court and Court of Appeals places the “cart before the horse” because it presumes that the application of KRS 161.011 and interpretation thereof to Appellee Meyer's reassignment was a foregone conclusion.

Floyd County Board of Education Policy # 3.271 (Reduction in Force) is consistent with the above definition and clearly states:

“Reduction in force of classified employees shall be defined as total separation from employment in the District. A change in duties ... shall not be considered a reduction in force.”

Policy #3.271 is almost identical to the reduction in force policies utilized by school districts throughout this Commonwealth.

Ms. Meyer's classified employee contract clearly states:

“4. Mutual Agreement:

f. The Superintendent may assign the employee to another job position within the District at any time during the term of this Employment Contract or any addition or supplement hereto.”

Here, KRS 161.011 is clearly not applicable under the plain language of the statute due to the fact that there was no “reduction in force” or “layoff”.

The Kentucky General Assembly created Family Resource and Youth Services Centers as an integral part of the Kentucky Education Reform Act (KERA). *See* KRS 156.496, and KRS 156.4977 as amended. The mission of these school-based centers is to help academically at-risk students succeed in school by helping to minimize or eliminate noncognitive barriers to learning. At the school level, the FRYSC Advisory Councils provide input and recommendations on the planning, development, implementation and coordination of center services, programs and activities. FRYSC Advisory Councils at the school level are responsible for certain duties according to the biannual Master Agreement between the school districts and the Kentucky Cabinet for Health and Family Services. As a requirement of the Kentucky Cabinet for Health and Family Services for participation and funding, the center Advisory Council (at each school) must have a shared role in the hiring of the center coordinator by recommending an applicant to the SBDM (if one is in place) and the Superintendent. *See* Appendix A, Cabinet for Health and Family Services FRYSC Continuation Program Plan, pp. 12-14. The decision as to who would serve as the coordinator at the new school did not rest solely with the Appellant. As was explained to the Appellee, the FRYSC Advisory Council chose someone else to serve as the school's coordinator. *See* Brief for Appellant, Appendix 3, attached June 21, 2007 letter.

As stated in Appellant's Brief, the deposition testimony establishes (1) that Clark Elementary School and Prestonsburg Elementary School were closed and that a new school was created; (2) that each employee of the old school, both certified and classified, was hired into positions at the new school; (3) that the FRYSC Advisory Council interviewed applicants for the new coordinator position which the Appellee previously held at Clark Elementary School;

(4) that Ms. Meyer did not receive the highest evaluation; (5) that the individual who received the highest evaluation was employed in the position; (6) that Appellee's employment was not a termination, but rather she was reassigned to a new position (although this new position paid less money than the one she previously held, her duties were substantially reduced and, in fact, the position to which she was assigned was the most comparable position available in the District; and (7) that although the Appellee's counsel claims that her employment contract was breached, the Appellee remains employed by Floyd County Schools. In fact, the one-year contract under which the Appellee has been employed specifically provides for a change in job position (see above). The contract also expressly provides that it is for only one year.

Contrary to Appellee's complaint, her employment was not terminated within the context of KRS 161.011, but rather, because of the lack of an available position for the Appellee, she was necessarily reassigned (after not being selected by the new Prestonsburg Elementary School's FRYSC council) to another position which happened to involve lesser duties and was paid a lesser amount for performance of those duties. Appellee correctly states at Numerical Paragraph 9 of the complaint that two elementary schools were closed and a new elementary school (Prestonsburg Elementary School) was opened. The lack of an available position for the Appellee was not the result of any act or omission on the part of the Appellants. There were compelling and reasonable grounds for the reassignment. The Appellants have further claimed in their answer that there was no reduction in force as defined by policies of the Floyd County Board of Education or as defined by applicable statute and that by reason thereof, seniority played no role in reassignment of Appellee's position. As is also stated in the answer, the Floyd County School District does not have a seniority system and employment decisions are not

made, absent a reduction in force, which is inapplicable here, or in absence of a Collective Bargaining Agreement, also not applicable here, on the basis of seniority.

In addition, Appellee's own employment contract expressly provides that at

"4. MUTUAL AGREEMENT:

g. It is agreed that in the event of a layoff due to a reduction in force pursuant to Board Policy #03.271 and to which KRS 161.011(7)(c) applies, that the Employee's right of recall shall not extend beyond the failure or refusal by the employee to accept a position offered pursuant to recall within ten days of the extension of such offer by the District in writing. Acceptance of a position offered pursuant to recall shall be in writing and delivered to the Superintendent."

In short, Appellee's own contract defines a reduction in force to involve *separation from employment*. The Appellee's employment was never terminated. She has undergone no separation of employment and there has been therefore no reduction in force. Moreover, as previously pointed out, Appellee's own employment contract provides that she may be reassigned during the school year to a different position. The trial court and Court of Appeals erred in finding that the selection of a Family Resource Center Coordinator at the new Prestonsburg Elementary School was in contravention of KRS 161.011(8)(a). Meyer was necessarily reassigned (as opposed to terminated), not due to a reduction in force, but due to the opening of a new school in the district. KRS 161.011 is clearly inapplicable in this matter and thus there is no statutory basis for Appellee's claim. As no statutory duty was breached, the district should be immune from any remaining state law claims by operation of governmental immunity.

CONCLUSION

For the reasons set forth above, the Opinion of the Floyd Circuit Court and Court of Appeals should properly be reversed with directions to dismiss the claims against the Appellants.

COUNTERSTATEMENT OF THE CASE
AND ARGUMENT ON CROSS-APPEAL

The facts of this matter have been fully developed in Appellant's brief. As to Appellee's cross appeal, the trial court and Court of Appeals properly found that the proper measure of damages would be based upon the salary schedule of the district for the relevant year and that had Ms. Meyer been employed during FY 2008 as a Family Resource Center Coordinator, she would have been paid based on the Floyd County Board of Education's approved salary schedule at an annual rate of **\$30,506.94**. The Court of Appeals concluded that the trial court's findings were not clearly erroneous. The trial court found that the Board adopted a uniform pay schedule for its employees but that some employees were "grandfathered" in, permitting them to earn a higher salary, including Rebal Reynolds. While Meyer argues for a higher award of damages, the trial court was permitted to use the Board's adopted pay schedule in determining her award for lost wages.

As explained in Cross Appellee's Memorandum and Supplemental Memorandum on the issue of damages, had Ms. Meyer been hired for the position at PES rather than Ms. Reynolds, Meyer would have been paid off the salary schedule at the rate submitted and explained in Mr. Wireman's affidavit attached to the prior response. It is clear that a person is hired into a position within the district based upon the approved salary schedule, not based upon the previous incumbent's salary. **Matthew Wireman**, a certified school financial manager and the Director of Finance/Treasurer/CIO for the Floyd County Board of Education, testified via affidavit that he had reviewed Appellee's supplemental response. It was his belief that prior calculations were correct and that had Ms. Meyer been employed during FY 2008 as a Family Resource Center

Coordinator, she would have been paid based on the Floyd County Board of Education's approved salary schedule at an annual rate of **\$30,506.94**. The difference in pay between those two positions for Pamela Meyer, employee number 12055, during FY 2008 would have been **\$11,299.92**.

Mr. Wireman explained in his affidavit that all salary schedules are approved by the Board of Education pursuant to board policy and applied as such. The Board of Education, prior to FY 2004, did pay each FRYSC director an amount for each center. All other positions in the district had salary schedules that paid based on years experience. A schedule was decided on that based pay on years and the number of students served. In the spring of 2005, it was determined that the schedule needed to be revised again to make one uniform schedule for all FRYSC directors. That schedule was approved and took effect for the 2005-2006 FY. All FRYSC directors that made less than what this new schedule would have paid them were given increases up to the schedule. All employees who made more than the schedule would have paid them were held harmless at the current salary plus any board approved and/or state mandated cost of living increases. The method of payment is not arbitrary, but situational. All new hires are placed on the schedule. All current employees, who are grandfathered, will continue to be paid the same amount plus COLA's until the salary schedule catches up to them, then they will be placed on the salary schedule.

The PES FRYSC Director position itself did not have a set salary. The salary schedule was for all FRYSC director positions. The current person employed as the PES FRYSC director was paid an amount in excess of the adopted scheduled for the 2005-2006 FY. In an attempt to hold the current employees harmless, they were "grandfathered" and "held harmless" and paid

the salary amount they were currently receiving rather than be paid a lower salary, as the new schedule would have required. Had Ms. Meyer been hired as the PES FRYSC director, she would have been paid from the salary schedule, not what the current employee was being paid. When the 2005-2006 salary schedule was adopted, she received an increase in pay because her salary at the time was less than what the schedule paid for her years of experience. The Board of Education does annually establish and follow salary schedules.

The 2003-2004 FRYSC Salary Schedule was divided into four categories. It was determined in the spring of 2005 (FY 2004-2005) that this salary schedule did not meet the needs of the district and was revised for FY 2005-2006 to present. Deedra Gearheart was paid from the 2004-2005 schedule, which was an amount higher than that in the schedule adopted for the 2005-2006 year, therefore she was grandfathered in.

Again, prior to 2003-2004, no salary schedule existed. When the FRYSCs were initially created by the state legislature, each FRYSC paid an amount determined by the individual schools advisory council and recommended to the Board for approval, which it was. This was done at a school by school level as opposed to a district level. It was not until 2003-2004 that it was deemed necessary to create a uniform schedule. As stated earlier, the FRYSCs were categorized by number of students served. Later in the spring of 2005, the schedule was merged into one uniform schedule for all FRYSCs.

Each of the three employees mentioned in the Appellee's brief (Michelle Keathley, Judy Handshoe, and Rebial Reynolds) were paid various amounts which exceeded the newly adopted uniform salary schedule and were grandfathered in at the salary they were currently paid plus COLA's. *See Appendix B, Affidavit of Matthew Wireman w/o attachments and TR, Supplemental*

Memorandum on Damages, Affidavit of Matthew Wireman, Exhibit 2 - attached supporting documentation with notes. Should any of the grandfathered employees retiree/resign/or vacate the position they hold, the new employee hired in that position will be paid based on the salary schedule as approved by the Floyd County Board of Education.

Appellee was employed by the Floyd County Board of Education in the position of Family Resource Youth Service Center (FRYSC) Co-coordinator at Clark Elementary School for a period of 14 ½ years. *See* Complaint at numerical paragraph 4. Prior to fall of 2003, each Family Resource Center Advisory Council set the salary for the Coordinator at their school. As is explained in the Classified Personnel Salary Change dated January 10, 2006 at Exhibit 1 to Cross Appellee's memorandum on damages, during the Fall of 2003 any coordinator whose salary was less than the new schedule was increased to match the new schedule. This action resulted in Ms. Meyer receiving a check for the amount of salary owed to her to get her up to the new schedule. However, if the Coordinator's salary was above the new schedule, salary increases would be based on the standard raises given during the fiscal year. Ms. Reynolds salary was above the new schedule.

As explained by Matt Wireman, Director of Finance/Treasurer/CIO for the Floyd County Board of Education, Pamela Meyer was employed during FY 2008 as a Family Resource Center Project Clerk and paid based on the Floyd County Board of Education's approved salary schedule at an annual rate of **\$19,207.02**. (*See* initial response, Matt Wireman Affidavit at Exhibit 2, and detailed check history attached thereto at Exhibit 2b). Had Ms. Meyer been employed during FY 2008 as a Family Resource Center Coordinator, she would have been paid based on the Floyd County Board of Education's approved salary schedule at an annual rate of

\$30,506.94. *Id.* The difference in pay between those two positions for Pamela Meyer, employee number 12055, during FY 2008 would have been **\$11,299.92.** *Id.*

CONCLUSION

Although the trial court and Court of Appeals findings on the issue of damages was a proper analysis, for the reasons set forth above, the Opinion of the Floyd Circuit Court and Court of Appeals should properly be reversed with directions to dismiss the claims against the Appellants.

Respectfully submitted,

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APPENDIX

- A. Cabinet for Health and Family Services FRYSC 2012 - 2013 Continuation Program Plan;
- B. Affidavit of Matthew Wireman w/o attachments and supporting documentation.