COMMONWEALTH OF KENTUCKY
SUPREME COURT
2011-SC-000599-D

BOARD OF EDUCATION OF FAYETTE COUNTY, KENTUCKY, and DR. TOM SHELTON, in his official capacity as Superintendent of Fayette County Schools — APPELLANTS

COURT OF APPEALS
CASE NO. 2010-CA-000840-MR

-vs-

APPEAL FROM THE FAYETTE CIRCUIT COURT
DIVISION VII
CIVIL ACTION NO. 09-CI-5311

ROSALIND HURLEY-RICHARDS — APPELLEE

BRIEF OF APPELLEE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this brief was served on September 24th, 2012 as follows: *original and ten copies via U.S. Express Mail (overnight) to:* Susan Stokley Clary, Clerk of the Supreme Court of Kentucky, 209 Capitol Building, 700 Capital Avenue, Frankfort, Kentucky 40601; *with copies via U.S. Mail to*: Sam Givens, Jr., Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9229; Hon. Ernesto Scorsone, Judge, Robert F. Stephens Courthouse, 120 North Limestone Street, Lexington KY 40507; Robert L. Chenoweth and Grant R. Chenoweth, Chenoweth Law Office, 121 Bridge Street, Frankfort, KY 40601; Nicole H. Pang, Assistant Attorney General, Capitol Building, Ste. 118, 700 Capitol Ave., Frankfort, KY 40601. Counsel further certifies that she has not removed the record from the Fayette Circuit Clerk's Office.

Attorney for Appellee

INTRODUCTION

This is an administrative action appeal involving a teacher tribunal decision. Appellee, Rosalind Hurley-Richards, a teacher in Appellant school system, was suspended without pay for a number of months by a teacher tribunal, and she appealed that decision pursuant to KRS 161.790 and KRS Chapter 13B to the Fayette Circuit Court. The circuit court determined that the tribunal's lengthy suspension of Ms. Richards was not based upon substantial evidence. Appellants now seek to reverse that trial court decision.

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COUNTERSTATEMENT OF THE CASE

1. Procedural History.

Rosalind Hurley-Richards (Hurley-Richards), the Appellee herein, is a teacher employed by the Fayette County Public Schools (FCPS). Hurley-Richards' contract of employment[1] was terminated and she was suspended without pay by FCPS Superintendent Stu Silberman by letter dated February 27, 2009. In the letter Silberman asserted that Hurley-Richards had engaged in conduct unbecoming a teacher, prohibited by KRS 161.790(1)(b).

Hurley-Richards appealed this termination, as provided in KRS 161.790, to a Tribunal, before whom a hearing was held on April 23-24, 2009 and September 1, 2009. The Tribunal heard evidence presented by the school district as well as Hurley-Richards, and at the close of the evidence, the Tribunal deliberated, and ultimately made Findings of Fact, Conclusions of Law and Final Order[2] ["Final Order"]. The Tribunal modified the Superintendent's termination, imposing instead a suspension without pay until June 30, 2010, and training. (Final Order, p. 7).

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[1] Hurley-Richards has a continuing service contract (i.e. tenure), as that term is used and defined in KRS 161.720(4).

[2] The Tribunal's Final Order is found in the record at R. 6-14, and pages referenced herein refer to the original pagination and numbered paragraphs of that Final Order. This document is also found as Appendix 3 to Appellants' Brief.

Hurley-Richards appealed the Tribunal's lengthy suspension without pay to the Fayette Circuit Court, pursuant to KRS Chapter 13B and KRS 161.790(9). In her appeal, she asserted that her conduct did not rise to the level of conduct unbecoming a teacher as a matter of law, and that the penalty imposed by the Tribunal was arbitrary. The Trial Court issued an Order[3] ["Trial Court Order"] in which it held, for reasons which are set out and discussed more fully below, that the penalty imposed on Hurley-Richards was not based upon substantial evidence, and remanded the matter.

The Appellant school district and superintendent appealed the circuit court's ruling, and the Court of Appeals affirmed the circuit court's decision ["Opinion"]. The Appellant school district and superintendent then moved for and were granted discretionary review by this Court.

2. Facts found by the Tribunal at the Hearing.

The Tribunal, as per the statutory scheme set out for Teacher Tribunal hearings in KRS 161.790, made findings of fact which reflect the following factual determinations, which were not challenged by Hurley-Richards on appeal, nor were these factual determinations disturbed by the Trial Court in its Order or the Court of Appeals in its Opinion.

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[3] The Trial Court's Order is found in the record at R. 112-116; and pages referenced herein refer to the original pagination of that Order. This document is also found as Appendix 2 to Appellants' Brief.

The incident that gave rise to the attempt to terminate Plaintiff's employment occurred on February 3, 2009 in the hallway of Cardinal Valley Elementary School where Hurley-Richards was assigned as a teacher. Before school began on that day, Hurley Richards observed three students, siblings MK (5th grader), ZK (2nd grader), and EK (Kindergartener).[4] The two younger students, ZK and EK, were running in the hall. Hurley-Richards advised them to "Walk, walk, walk," but they ignored her and continued to run until their older sibling MK told them to slow down. Hurley-Richards admonished the two younger siblings, and made them "go back up the hallway and walk down properly." However, second-grader ZK disobeyed, and ran back down the hallway. "When she [Hurley-Richards] chastised him [ZK], he responded that she could not tell him what to do." (Final Order, ¶ 3).

Hurley-Richards advised the older and the younger siblings, EK and MK, to go on into the cafeteria for breakfast, so that she could talk to ZK. (Final Order, ¶ 3). Then a tug-of war developed between EK and ZK, with the youngest sibling MK in the middle. ZK pulled MK's hair, while EK pulled MK's hand. Hurley-Richards put her arm around ZK's middle to disengage him from pulling his younger sister's hair. The eldest sibling, EK, moved toward the office with MK following behind. (Final Order, ¶ 4).

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[4] These students, minors, were referred to by their initials in the Final Order of the Tribunal, and thus will be referred to in the same manner herein.

Hurley-Richards advised ZK that they were going to go to the office too. ZK refused to move, so Hurley-Richards put her arm around ZK's back to urge him forward. The Tribunal found that "He squirmed and twisted. Richards propelled him forward. She was still holding paper and markers in her left arm and hand. . . they proceeded up the office hall with ZK moving under protest. ZK was protesting that she was choking him, and Richards was saying that she was not hurting him." (Final Order, ¶ 5).

The Tribunal modified the facts set out in the Superintendent's termination letter.[5] The Tribunal stated: "The Tribunal found that the factual charges against Richards should more accurately state that: On February 3, 2009, Rosiland Hurley Richards physically restrained a student whom she had scolded for running down the hall. As the student was being guided to the office, he resisted and turned to go back toward the cafeteria. At this point, Richards' arm was across ZK's front, sliding up and around the neck/shoulder area as she physically directed him toward the office. This may have been perceived as choking. She continued to speak loudly to the student." (Final Order, ¶ 13).

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[5] The factual charges set out in the Superintendent's termination letter were significantly overstated. In that letter the Superintendent alleged Hurley-Richards "physically attacked a student who you had scolded for running down the hall, by grabbing the student, placing your arm around his neck and choking him. You then dragged the student to the principal's office while continuing to keep the student's neck in a choke hold and berating and yelling at him." (Letter, Feb. 27, 2009).

Although the student was "protesting" that he was being choked as he proceeded down the hall, the Tribunal specifically found that "the adults who were at the situation did not react as if the child was in harm's way." (Final Order, ¶ 15).

The Tribunal then concluded that Hurley-Richards "demonstrated conduct unbecoming a teacher in using poor judgment in continuing to coerce ZK toward the office once he complained about choking." The Tribunal additionally specifically concluded that Hurley-Richards "had no intent to harm the child, and did not physically harm the child." (Final Order, ¶ 18).

The Tribunal modified the Superintendent's penalty of termination[6] decreasing it instead to a suspension without pay through June 30, 2010.[7] The Tribunal found, in relation to the Superintendent's penalty, that "no substantial evidence of any prior disciplinary record was presented. Also, Richards' contract was terminated without first considering the implementation of a corrective action plan." (Final Order, ¶ 16).

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[6] The Tribunal's issuance of a suspension instead of termination is consistent with the holding that "the superintendent's proposed sanction is not binding on the tribunal," in Fankhauser v. Cobb, 163 S.W.3d 389 (Ky. 2005).

[7] Hurley-Richards was suspended without pay from February 3, 2009 through June 30, 2010.

3. The Trial Court's Determination.

The Trial Court determined that the long-term suspension without pay imposed by the Tribunal was not based on substantial evidence. The Trial Court held: "The Court finds that the conclusions of the Final Order are without support of substantial evidence on the whole record. KRS 13B.150(2)(c). The Plaintiff was exercising her duty as a teacher when she attempted to discipline the student and escort him to the office." (Trial Court Order, p. 3-4). The Trial Court did not challenge or dispute the facts found by the Tribunal, but rather determined that the facts as found by the Tribunal did not support the significant suspension without pay, specifically:

> The Plaintiff's actions served to maintain order in the hallway at school. The child was insubordinate and unwilling to walk on his own to the office. Prior to escorting ZK to the office, the Plaintiff had to physically separate the child from his sibling, whom ZK was physically harming. The Plaintiff had reason to believe ZK posed a risk to those around him, which the Defendants allow would be a reasonable reason for physical restraint.
>
> ***The Court finds the factual conclusions of the Tribunal provide no evidentiary basis on which to support any suspension without pay, much less an 18-month suspension.*** Essentially, the Tribunal concluded the Plaintiff did not choke the child but suspended her anyway. ***The actions of the Plaintiff were reasonable given the circumstances and the conclusions made by the Tribunal are not based on the facts of the situation.***

(Trial Court Order, p. 4) (emphasis added). The Court remanded the case to the Tribunal for further proceedings, but the school district filed this appeal before the remand occurred.

4. The Court of Appeals Opinion

The school district and superintendent appealed the circuit court's ruling to the Court of Appeals. The Court of Appeals[8] affirmed the Trial Court's Order, holding that "conduct unbecoming a teacher" required "something more than one incident of physically coercing an unruly child to the office." ["Opinion" p. 5].

The Court of Appeals looked to the language of the statute and case law pertaining to "conduct unbecoming a teacher" and first acknowledged that: "[t]he phrase 'conduct unbecoming a teacher' has never been given a more expansive definition." (Opinion, p. 5). The Court then applied the term to the facts as found by the Tribunal: ***"However, when viewing the subsection as a whole 'conduct unbecoming a teacher' means something more than one incident of physically coercing an unruly child to the office."*** Id. (emphasis added). The Court of Appeals relied upon the statutory language to come to this conclusion: "The grouping of 'conduct unbecoming a teacher' in the same subsection as 'immoral character' implies that 'conduct unbecoming a teacher' is the type of

[8] The Court of Appeals Opinion is attached to Appellants' Brief as Appendix 1.

conduct which has the appearance or suggestion of immorality or conduct equally egregious." Id. And the Court of Appeals relied upon prior Kentucky cases where conduct unbecoming was found: "In fact, prior teacher disciplinary actions, based upon a finding of 'conduct unbecoming a teacher,' have always involved some sort of dishonest or corrupt behavior." Id.

Ultimately, the Court of Appeals held the Tribunal's conclusion was arbitrary and it was properly reversed and remanded by the trial court. (Opinion, pp. 5,6).

COUNTERARGUMENT

The courts below did not go outside of or beyond the Tribunal's factual findings in their decision. Rather, they determined that the facts as found by the Tribunal did not support a conclusion of conduct unbecoming a teacher, nor did those facts support the disciplinary penalty of a suspension without pay from February 3, 2009 until July 1, 2010. Those courts determined that the conclusions drawn by the Tribunal were not based on substantial evidence.

I. STANDARD OF REVIEW.

The parties are in agreement that KRS 13B.150 dictates the review of a final order by an administrative agency. The factual findings of the Tribunal were not challenged in the courts below. As this Court has held in reviewing a decision of a tribunal under KRS 161.790, "[t]he standard of review of the

tribunal's decision ... is the decision was arbitrary. Administrative action, such as that of the tribunal, is arbitrary if it is not supported by substantial evidence. 'Substantial evidence' is defined as evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." Fankhauser v. Cobb, 163 S.W.3d 389, 400-01 (Ky. 2005) (references omitted).

Appellants' argument concerning review for clear error pursuant to CR 52.01 pertains to factual determinations by trial courts, which is not clearly relevant to the instant appeal in which the *factual* determinations of the Tribunal are not in controversy. Instead, the question as to whether the Tribunal's decision was supported by substantial evidence was properly the focus of both the Trial Court and the Court of Appeals, and each court correctly reviewed the Tribunal's decision under the correct standard of review.

II. THE COURTS BELOW CORRECTLY RULED THAT THE TRIBUNAL'S ORDER WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AND THEY DID NOT SUBSTITUTE THEIR JUDGMENT FOR THAT OF THE TRIBUNAL.

Appellee properly preserved this issue by her Complaint, filed October 7, 2009, ¶13(a); her Brief in Support of Motion for Judgment on the Record, served December 15, 2009, pp. 5-16; in her Reply in Support of Plaintiff's Motion for Judgment on the Record, served February 26, 2010, pp. 1-3; her Appellee Brief to

the Court of Appeals, served November 30, 2010, pp. 13-23; her Response to Motion for Discretionary Review, served November 1, 2011, pp. 10-12.

A. The facts found by the Tribunal did not rise to the level of "conduct unbecoming a teacher" as a matter of law.

After reciting KRS 13B.150(2) in its entirety, the Trial Court determined that "conclusions of the Final Order are without support of substantial evidence on the whole record. KRS 13B.150(2)(c)." (Trial Court Order, p.3). The court specifically determined the Tribunal's conclusions as to penalty were not supported by substantial evidence: "The Court finds the factual conclusions of the Tribunal provide no evidentiary basis on which to support any suspension without pay, much less an 18-month suspension," and remanded the action. (Trial Court Order, p. 4). Under KRS 13B.160 the Court of Appeals upheld the Trial Court's Order, and further clarified that a determination of "conduct unbecoming a teacher" required "something more than one incident of physically coercing an unruly child to the office." (Opinion, p. 5).

A determination of "conduct unbecoming a teacher" is a mixed question of law and fact. As noted by the Court of Appeals in another Tribunal appeal under KRS 161.790:

> We recognize that whether a teacher challenging a disciplinary action engaged in "conduct unbecoming a teacher" is a ***mixed question of fact and law***. To support the discharge of a tenured teacher, the evidence must be sufficient to convince the tribunal, as a matter of fact, that the teacher

> engaged in improper behavior. ***As a matter of law, the evidence must demonstrate such a nexus between the teacher's misbehavior and employment that it implicates "the legitimate interests of government in protecting the school community and students from harm."*** Board of Education of Hopkins County v. Wood, 717 S.W.2d 837, 840 (Ky.1986) (citing *Weissman v. Board of Education of Jefferson County School District*, 190 Colo. 414, 547 P.2d 1267 (1976)).

Drummond v. Todd County Bd. of Ed, 349 S.W.3d 316, 320, n.2 (Ky.App. 2011) (emphasis added).

Courts have held that the unbecoming conduct must have a "direct connection" to the teacher's work in the classroom. Fowler v. Bd. of Ed. of Lincoln Co., 819 F.2d 657, 666 (6th Cir. 1987); *see also* Board of Ed. of Hopkins Co. v. Wood, 717 S.W.2d 837, 840 (Ky. 1986). And it has been held that in order to establish conduct unbecoming a public employee, the conduct in question must show a lack of fitness to perform the duties of the profession. In Cranston v. City of Richmond, 40 Cal.3d 755, 769, 710 P.2d 845 (Calif. 1985), the court was faced with the question of whether the phrase "conduct unbecoming" was too vague to pass constitutional muster. The court determined that the phrase was not too vague if the court narrowed it to refer "only to conduct which indicates a *lack of fitness* to perform the functions of a police officer." (emphasis in original). Thus the phrase conduct unbecoming must encompass conduct that is related to the teaching profession, and must indicate a lack of fitness to perform teaching duties, and as a matter of law must be actions that implicate the "legitimate

interests of the government in protecting the school community." Drummond v. Todd Co. Bd. of Ed, 349 S.W.3d at 320, n.2.

The single incident at issue here was in fact a student disciplinary matter. Teachers in Kentucky are required to hold students to strict account for their behavior:

> *Each teacher. . . shall* in accordance with the rules, regulations, and bylaws of the board of education made and adopted pursuant to KRS 160.290 for the conduct of pupils, ***hold students to strict account for their conduct on school premises. . .***

KRS 161.180(1) (emphasis added). The manner in which Hurley-Richards disciplined ZK, by guiding him down the hallway to the office after he directly disobeyed her and spoke to her in a disrespectful manner when he responded to her order that "she could not tell him what to do," and had also pulled the hair of another student, was within her discretion, as teachers do retain some discretion[9] with respect to the means by which they exercise the duty to supervise students and protect them from foreseeable harm. Nelson v. Turner, 256 S.W.3d 37, 42 (Ky.App. 2008).

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[9] Appellants have consistently incorrectly asserted that Hurley-Richards argues that "she enjoyed absolute discretion in regard to the manner of imposing and/or maintaining discipline." Appellants' Brief, p. 7. No teacher or school employee could be argued to have *absolute* discretion to impose discipline, and this is not what Hurley-Richards argued, however it is clear under KRS 161.180 and the decision in Nelson v. Turner, 256 S.W.3d 37, 42 (Ky.App. 2008) that teachers must have some degree of discretion in this area.

As found by the Tribunal, the incident did not raise the concern of other adults who witnessed it, and did not result in any physical harm to the student. (Final Order, p. 6). As such, this conduct does not rise to the level of behavior that is not appropriate or suited to one's status as a teacher within the plain meaning of "conduct unbecoming a teacher." Nor did this incident indicate any lack of fitness to teach as required for the purposes of conduct unbecoming. Further, as a matter of law, Appellee's actions did not in any way threaten the protection of the school community. Rather, Hurley-Richards was complying with her statutory duty to discipline students.

The facts of this case are analogous to those in Kentucky Board of Nursing v. Ward, 890 S.W.2d 641 (Ky. App. 1995). In that case a nurse, Elaine Ward, in "one isolated incident," used a "stern tone of voice" to alert an elderly patient as to what action would be taken if the patient did not follow instructions. *Id.* at 644. Specifically, she told a patient who was attempting to get out of his wheelchair that "[i]f you don't sit down and be quiet, I will take you to your room and tie you in the bed and you won't be able to get up." After a hearing, the state Board of Nursing suspended Ward's nursing license for one year, and assessed a $1,000.00 penalty against her. Id. at 642.

On review however, the Circuit Court and the Court of Appeals determined that Nurse Ward's actions did *not* rise to the level of verbal abuse of

a patient, the conduct prohibited by the statute. The Court of Appeals pointed out that the Board had also found that Nurse Ward had been commended in the past for patient care and had no prior complaints; that the patient was difficult, had fallen prior to the incident, and was in fact under a restraint order from his treating doctor; and that Ward spoke this way to him because she was concerned for his safety. Id. at 643. The Court of Appeals held, in reviewing all the facts as found by the Board, that Nurse Ward's conduct did not rise to the level of verbal abuse for which she could be punished. The Court stated:

> There is no question but that Ward uttered the warning/threat to Mr. Quick – that is an undisputed fact in this case. What must be questioned is whether, given *all* the facts as found by the Board, reasonable men would have been induced to convict Ward of verbal abuse based on her comment to Quick, a consideration of all the facts, and application of the pertinent statutes. We believe reasonable men would not have convicted Ward on the facts gleaned in this case. As Judge Schroering succinctly stated in his opinion, to-wit:
>
> > The statutes under which Ms. Ward is prosecuted require acts which are inconsistent with the practice of nursing or unfitness or incompetence to practice nursing. The act of shouting at a patient to accomplish an end consistent with the best interests of the patient simply does not rise to the level required by the statute. . . This conduct, by itself, is not sufficient to establish that she is unfit to provide nursing.

Id. at 643-44. The Court of Appeals affirmed the reversal of the Board's decision, finding that there was not substantial evidence to justify Nurse Ward's

suspension. As the Court of Appeals stated, "as undesirable as it may be, that oftentimes a stern tone of voice becomes necessary to get a patient's attention or to impress upon him the need to follow instructions or exercise caution, much the way as is often necessary in dealing with young children." Id. at 644.

Likewise, Hurley-Richards' use of the "attention getting" discipline technique of guiding the misbehaving student down the hall, which did not result in any physical harm to the student, does not rise to the level of conduct unbecoming a teacher, and was not evidence sufficient to subject her to a prolonged suspension without pay. Just as the Board of Nursing's attempt to impose a long-term suspension on Nurse Ward was not upheld on appeal, the suspension of Teacher Hurley-Richards was properly not upheld. Just as Nurse Ward's conduct did not rise to the level of conduct prohibited by the statute at issue in that case, the conduct found by the Tribunal in one isolated instance did not constitute substantial evidence, when given all the facts as found by the Tribunal, upon which "reasonable men would have been induced" to "convict," id. at 643, Hurley-Richards of conduct unbecoming, or that she is in any way unfit to teach.

In addition to the need for the conduct to negatively impact fitness to teach and implicate the need to protect the school community in general, a public employee's conduct must meet a certain threshold before it can be

considered sufficient "cause" for termination or discipline. This is a longstanding requirement of Kentucky law. In Bourbon Co. Bd. of Ed. v. Darnaby, 235 S.W.2d 66 (Ky. 1950), the court reviewed a school board's termination of a superintendent, which was based on six charges. The circuit court determined that the evidence did not establish legal cause for the removal of the superintendent, and provided the following definition of cause:

> The word 'cause' in a statute authorizing the removal of officers for cause means legal cause, and not any cause which the Board authorized to make such removal may deem sufficient. * * * It must be a cause relating to, and affecting, the administration of the office, and must be restricted to something of a ***substantial nature directly affecting the rights and interests of the public.***

Id. at 70 (emphasis added). This definition of cause was approved by the appellate court, and has been adopted in more recent cases as well. Hoskins v. Keen, 350 S.W.2d 467, 468 (Ky. 1961) (superintendent removal case); Martin v. Corrections Cabinet, 822 S.W.2d 858, 860 (Ky. 1991) (Kentucky Supreme Court adopted this definition of cause in public employee dismissal case); Martin v. Osborne, 239 S.W.3d 90, 92-93 (Ky. App., 2007) (jail employee removal case, Darnaby cause definition used where statute did not define cause).

Although unlike the superintendent removal statute at issue in Darnaby, KRS 161.790 sets forth particular grounds for which a teacher may be disciplined, the Darnaby court's articulation of the threshold quantum or gravity of conduct

that constitutes legal cause is particularly applicable when the statutory ground at issue, "conduct unbecoming a teacher," is subject to extremely broad interpretation and is nowhere defined by law with any degree of particularity. A one-time incident of disciplining a student, where the teacher is required by statute to hold students to strict account for their conduct on school property and which resulted in no physical harm to the student, was not conduct of a "substantial nature," nor did it directly affect the rights and interests of the public. Because the conduct at issue here did not rise to the level of conduct unbecoming a teacher, the Tribunal's decision on this issue was not based on substantial evidence and was properly reversed by the trial court pursuant to KRS 13B.150(2), which was properly upheld by the Court of Appeals.

Consistent with the longstanding requirement that public employees' conduct must be of a "substantial nature" before legal cause to discipline can be shown, courts reviewing conduct of Kentucky teachers have found conduct unbecoming a teacher only where serious misconduct of a substantial nature has occurred. For example, criminal and immoral conduct has been deemed conduct unbecoming. Wood, 717 S.W.2d 837 (teachers' conduct of smoking marijuana with students was unbecoming). Likewise, dishonesty related to the teacher's job has been deemed conduct unbecoming. Board of Ed. v. McCollum, 721 S.W.2d 703 (Ky. 1986) (teacher filing a false sick leave affidavit and lying about

time spent with home bound student was conduct unbecoming); Gallatin Co. Bd. of Ed v. Mann, 971 S.W.2d. 295 (Ky.App. 1998) (falsifying school time worksheet was conduct unbecoming). Additionally, a teacher who "abdicated her function as an educator" by showing a controversial and sexually explicit movie to a classroom of adolescents "without preview, preparation or discussion," exhibited a blatant lack of judgment, and such conduct was found to be unbecoming a teacher. Fowler, 819 F.2d at 666. Abusive treatment of young students, where the teacher has been previously warned to cease and desist all corporal punishment, has additionally been held conduct unbecoming. Mavis v. Bd .of Ed. Owensboro, 563 S.W.2d 738 (Ky. App. 1978).

The school district cites to Fankhauser v. Cobb, 163 S.W.3d 389 (Ky. 2005), for the proposition that a finding of conduct unbecoming in this case was warranted. It is submitted that bringing a weapon onto school property in violation of board policy, which was the conduct at issue in Cobb, was conduct "of a substantial nature," Darnaby, 235 S.W.2d at 70, sufficient to justify a determination of legal cause and the long-term suspension imposed in that case. Further, the tribunal in Cobb determined that the teacher's action of bringing a gun onto school property in violation of school board policy, was *both* insubordination *and* conduct unbecoming a teacher. In the case at bar, Hurley-Richards did not violate any school district policy and she was not charged with

nor found to have been insubordinate. Rather, she was complying with her statutory duty as a teacher to hold students to strict account for their behavior, as required by KRS 161.180(1). As the Tribunal found, Mrs. Hurley-Richards had no intent to harm the child and she did not physically harm the child. (Opinion, p.3). This single incident of student discipline is not the same as bringing a firearm to school in violation of school district policy.

Hurley-Richards' conduct, in this single isolated incident, does not in any way compare to the immoral, criminal, dishonest, or abusive conduct which has been deemed unbecoming a teacher in Kentucky cases set out above. The Appellants believe that the holdings in Mann, Cobb and McCollum, supra, reflect a common theme of "intentional conduct demonstrating poor judgment" that amounts to conduct unbecoming a teacher, which they assert is present in this case. However, those cases are distinguishable from the case at bar because they involved "something of a substantial nature directly affecting the rights and interests of the public," Darnaby, 235 S.W.2d at 70. In Cobb, the teacher/principal brought a gun on school property in violation of school board policy, which certainly was an act of a substantial nature and threatened the safety of the public. In Mann and McCollum, the teachers were ostensibly cheating the school district of money by falsifying time cards/leave affidavits, which certainly directly affects the interests of the public which funds the school district. In the

case at bar, Hurley-Richards's actions complied with her statutory duty to hold students to strict account for their behavior. KRS 161.180(1).

Other jurisdictions also require a substantial reason before a public employee may be disciplined for "cause." In Trustees of Lincoln County School District No. 13 v. Holden, 754 P.2d. 506 (Mont. 1988), the teacher made two "sarcastic and cutting" comments to students, and an attempt to fire him was made. The reviewing superintendent in that case stated that "[a]lthough sarcastic and cutting language is totally inappropriate in the classroom, it was not proven that Mr. Holden's language impaired his ability to 'discharge the duties of his position.'" The court held it was "not error for the County Superintendent to conclude that the two incidents were not good cause for Mr. Holden's dismissal." Id. at 509. *See also*: Batley v. Kendall County Sheriff's Department, 425 N.E.2d 1201, 1207 (Ill.App. 1981) (although off-duty officer's statement which included profanity indicated a "certain disloyalty to the Department," this statement alone was insufficient to warrant discharge; "cause" was defined as some "substantial shortcoming which renders the employee's continuance in office in some way detrimental to the discipline and efficiency of the service").

Hurley-Richards' conduct of guiding the pupil down the hallway to the office violated no rule, regulation or bylaw of the board of education. And it is

important that no person was harmed, nor was any harm threatened by her actions. Contrary to Appellants' claims, Hurley-Richards's actions in this case are distinguishable from the teachers and administrators whose actions have been deemed "unbecoming" by Kentucky appellate courts. Her conduct did not negatively impact her fitness to teach or implicate the need to protect the school community. Thus as a matter of law, her conduct did not rise to the level of "conduct unbecoming a teacher," and the decisions of the courts below should be upheld.

B. The courts below did not impermissibly substitute their judgment for that of the Tribunal.

A court may "not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." KRS 13B.150(2). Contrary to the Appellants' assertion, neither the Trial Court nor the Court of Appeals substituted its judgment for the Tribunal's as to the facts of this case. Instead, the courts below properly exercised their authority as reviewing courts with regard to legal questions based upon the facts presented to them.

Appellants devote several pages of their brief (pp.9-11) to legislative history discussion of the statutory ground at issue in this case before they assert on page 14 that a tribunal's statutory interpretation of "conduct unbecoming a teacher" is immune from judicial review. This erroneous contention is addressed below, but it flows from their historical analysis, which is also flawed.

Appellants invite the Court to ignore the linkage of "immoral character" to "conduct unbecoming a teacher" in KRS 161.790(1)(b). To do so, by their analysis, would leave a dangling ground for disciplining a teacher for "immoral character," which would at least arguably be subject to challenge as unconstitutionally vague or completely unenforceable as lacking in evidentiary support, if it were ever relied upon as an isolated ground for action against a teacher's contract.

The 1942 version of KRS 161.790, as cited by Appellants, should be read to have replaced both "immorality" and "misconduct" with "***immoral character or*** conduct unbecoming a teacher." (emphasis added). When the grounds for discipline of a teacher came into their current rubric in 1964, the ground for "immoral character" continued to be grouped with "conduct unbecoming a teacher." Compare 1944 version of KRS 161.790(1) as found in Item 1, Appendix to 1964 version as found in Item 2, Appendix. This formulation, whereby "immoral character" and "conduct unbecoming" are grouped as related bases for discipline of a teacher, remains in the current version of KRS 161.790(1)(b). To give meaning to the first word of the provision, "immoral" could be read as an adjective that modifies the entire phrase, "character or conduct unbecoming a teacher." This Court resolved the treatment of "immoral character", albeit in dictum, by referring to the ground for discipline in KRS 161.790(1)(b) as

"[c]onduct unbecoming a teacher or immoral conduct....", and *"conduct of an immoral nature* or conduct unbecoming a teacher..." in Board of Ed. of Hopkins Co. v. Wood, 717 S.W.2d at 839, 840.

When confronted in the instant case with the issue of interpreting "conduct unbecoming a teacher," the Court of Appeals viewed "the subsection *as a whole,*" and opined that "the grouping of `conduct unbecoming a teacher" in the same subsection as immoral character implies that "conduct unbecoming a teacher is the type of conduct that has the appearance of suggestion of immorality or conduct equally egregious." (Opinion. p.5) (emphasis added). This interpretation acknowledged the bearing of the introductory words of KRS 161.790(1)(b) on the rest of the phrase, which is consistent with the canon of statutory construction, "noscitur a sociis," instructing that the meaning of an unclear word or phrase should be determined by words immediately surrounding it. U.S. v. One TRW Model M14, 7.62 Caliber Rifle, 441 F.3d 416, 422 (6th Cir.(Ky.) 2006); *see* Commonwealth v. Louisville National Bank, 220 Ky. 89, 294 S.W. 815, 817 (1927) (applying maxim). Thus, the Court of Appeals' interpretation avoided rendering the words "immoral character" completely meaningless.

Appellants propose the Court adopt an approach to the zone of conduct encompassed by "conduct unbecoming a teacher" that would leave to the

"'sound discretion' of the final decision makers" what conduct falls within its parameters, based upon the 1931 decision in Gover v. Stovall, 35 S.W.2d 24 (Ky. 1931). This case was decided in an era before the protections of modern day civil rights statutes, the due process protections within KRS 161.790 and in KRS Chapter 13B, and decisions such as Darnaby, Wood and Ward, discussed supra.

Appellants' appeal for a free-wheeling approach to grounds for disciplining teachers for conduct unbecoming continues with their contention that as a result of the amendments to KRS 161.790 creating the tribunal system, "it is now for a tribunal panel to determine the intended zone of conduct by a teacher that is proscribed by the legal cause set out in KRS 161.790(1)(b) of "conduct unbecoming a teacher." (Appellants' Brief, p.11). Appellants conclude on page 14 that "[t]he decision of whether particular conduct constitutes a violation of the statutes is statutorily delegated to a trained tribunal, ... ***and a court should not substitute its judgment for that of the agency on matters within the specialized training and knowledge of the agency.***" Id. (emphasis added).

The Appellants are mistaken both about the nature of a teacher tribunal, and with regard to courts' scope of review of questions of law arising from administrative agency decisions. While it is true that that two of the three tribunal members hold teaching certificates, unlike the typical administrative agency established by the General Assembly, a teacher tribunal "is *ad hoc* in

nature in that a new tribunal is convened for each hearing." Fankhauser v. Cobb, 163 S.W.3d389, 396 (Ky., 2005). Therefore, the tribunal cannot be imbued with presumed on-going institutional wisdom with regard to interpretation of its governing statutes and regulations that may be assigned to administrative agencies. Although KRS 161.790(4) calls for training, there is no evidence of record that this *ad hoc* Tribunal was specifically trained in the scope of sanctionable "conduct unbecoming a teacher." In the absence of a statutory definition or one established by caselaw, there is little training that any tribunal members to date could receive on "conduct unbecoming" under KRS 161.790.

Moreover, on appeal from an administrative agency decision, the court has authority to review questions of law, including statutory interpretation and the application of legal principles to undisputed facts, as well as the determination of whether agency action is arbitrary and capricious. Kendall v. Beiling, 175 S.W.2d 489, 491-92 (Ky. 1943). "Certainly, where the facts undisputed, it is a peculiarly judicial matter to interpret and apply the law in relation thereto." Id.; Department of Ed. v Commonwealth, 798 S.W.2d 467 (Ky.App. 1996). Statutory construction is within the courts' province, and a reviewing court is not bound by the agency's construction of a statute. Commonwealth Cabinet for Human Resources v. Jewish Hosp. Healthcare Serv., Inc., 932 S.W.2d 388, 390 (Ky. App 1996).

This Court should clearly reject Appellants' plea for unfettered and unreviewable discretion by school administrators and teacher tribunals as to the meaning of "conduct unbecoming a teacher" for purposes of KRS 161.790.

C. The penalty of long-term suspension imposed by the Tribunal was also unsupported by substantial evidence.

Additionally, the long-term suspension without pay imposed by the Tribunal bore no relation to the facts as found by the Tribunal. While typically the penalty imposed on, or discipline of, a public employee is within the discretion of the agency, or in this case the Tribunal appointed under KRS 161.790, a penalty that is so disproportionate to the offense is an abuse of discretion and will be reviewed by the court. City of Louisville v. Milligan, 798 S.W.2d 454, 458 (Ky. 1990). The "test for abuse of discretion is whether or not the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." McKinney v. McKinney, 257 S.W.3d 130, 133 (Ky. App. 2008) (citation omitted).

Moreover, the long-term suspension of Hurley-Richards would not have promoted good order in the school system; rather it would have promoted the arbitrary suspension of a teacher for disciplining a student, which is in violation of not only the intent of the teacher tenure statutes as set out in Board of Education of Hopkins v. Wood, 717 S.W.2d 837, 839 (Ky. 1986), (*see* Counterargument IV, *infra*, at p. 39), but also undermines the ability of a teacher

to comply with her statutory duty to discipline students under KRS 161.180. As the trial court correctly determined in this case, the penalty decision of the Tribunal was not supported by substantial evidence, thus was arbitrary.

D. A finding of "poor judgment" alone cannot be equated with "conduct unbecoming a teacher."

As set out above, conduct unbecoming a teacher must, as a matter of law: negatively impact the teacher's fitness to teach; be connected to her work as a teacher; and impact the protection of the school community. (*See* Counterargument III.A., *supra* at pp. 10-11). To equate a finding of "poor judgment" with "conduct unbecoming," as Appellants argue (Appellants' Brief, pp. 11-12), would be the same sort of "abstract characterization of conduct" disdained by the court in Perez v. Comm'n on Professional Competence, 149 Cal App.3d 1167 (Cal.Ct.App. 1983). In that case the court explained the importance of having a measure or standard for the phrase "unprofessional conduct":

> We conclude that unsatisfactory teacher performance said to be unprofessional conduct should be measured by the standard of fitness to teach. Absent this objective measure of performance, the livelihood of the teacher is dependent upon an abstract characterization of conduct which will shift and change from board to board, district by district and year by year. Such discretion is required to be bridled by the restraints of the standard of fitness to teach.

Id. at 1174. Although the term "unprofessional conduct" is not the same as "conduct unbecoming" at issue here, and while it was classroom performance at

issue in that case as opposed to the one incident of student discipline at issue here, the court's explanation of the need for objective measures, including the standard of fitness to teach, for evaluating teacher conduct is instructive and is implicit in the Court of Appeals analysis in the instant matter.

A finding or conclusion of "poor judgment" cannot be equated with conduct unbecoming for the same reasons set out by the court above – "poor judgment" would shift and change from district to district, and there must be more a objective and concrete rubric for determining whether a teacher's conduct is unbecoming as a matter of law and that she should be disciplined under KRS 161.790. The Court of Appeals' determination that Hurley-Richards' conduct did not rise to the level of "conduct unbecoming a teacher" required for discipline to be imposed under KRS 161.790, should be upheld.

E. The Court of Appeals Opinion may be upheld for any of the above-stated reasons, or for any alternate reason as may be determined by this Court.

In addition and as a supplement to the arguments set out above, this Court may affirm a lower court decision on alternate grounds, or for any reasons supported by the record. Kentucky Farm Bureau Mutual Ins. Co. v. Gray, 814 S.W.2d 928, 930 (Ky. App. 1991). The authorities cited above and the arguments set out there in, are made both in direct and alternate support for the Court of Appeals decision.

III. THE COURTS BELOW DID NOT MISINTERPRET THE TRIBUNAL'S FINAL ORDER, OR MAKE FINDINGS OF FACT ON ISSUES NOT RAISED BEFORE THE TRIBUNAL.

A. The courts below did not misinterpret the Tribunal's Final Order, but reviewed all of the record.

As this issue only arose as a result of the Trial Court's Order, it was not addressed within or by the Trial Court. Appellee properly preserved this issue by her Appellee Brief to the Court of Appeals, served November 30, 2010, pp. 8-10.

The Court of Appeals determined that the facts found by the Tribunal did not rise to the level of conduct unbecoming a teacher for purposes of KRS 161.790. (Court of Appeals Opinion, p.5). Clearly, it is within the scope of review of a reviewing court to address the question of law as to whether the Tribunal's findings of fact support the Tribunal's conclusion of law. The Court of Appeals' conclusions, well within its scope of review, did not result from a misinterpretation of the Tribunal's Final Order.

The Trial Court's analysis began with the recitation of grounds for reversal of an administrative agency decision set forth in KRS 13B.150(2), and its summary conclusion that "the conclusions of the Final Order are without support of substantial evidence on the whole record. KRS 13B.150(2)(c)." (Trial Court Order, p. 3). The Trial Court, however, merged its further analysis of

whether there was substantial evidence to support a finding a conduct unbecoming, into its analysis of the penalty imposed, when it concluded on page 4 of its order "the factual conclusions of the Tribunal provide no evidentiary basis on which to support any suspension without pay, much less an 18-month suspension." Id. Although the Trial Court did not specifically expound on the issue of whether there was substantial evidence to support a finding of conduct unbecoming, it was correct in finding the unsupported penalty reversible. Under Gallatin Co. Bd. of Ed. v. Mann, 971 S.W.2d 295, 300-01 (Ky. App. 2006), where a Tribunal's factual findings do not support its conclusion of the sanction to be imposed, then the sanction is not support by substantial evidence and is arbitrary.

The Appellants assert that the Trial Court misstated language from the Tribunal's Final Order, and that this misstatement taints the Trial Court's determination. (Appellants' Brief, pp. 8-9). However, a review of the Trial Court decision makes clear that any misstatement of the Tribunal's Order was not fatal to its holding. The Tribunal concluded that "a reluctant, active, unhappy child cannot be delicately guided forward by a gentle hand on the backpack." (Final Order ¶ 15). On review, the Trial Court specifically set out this conclusion of the Tribunal in its Order, at page 2: "The ultimate conclusion of the Tribunal was 'that a reluctant, unhappy child cannot be delicately guided forward by a gentle

hand on the backpack.'" (Trial Court Order, p. 2). However the Trial Court erroneously stated elsewhere in its Order that the Tribunal concluded that the child was "delicately guided forward by a gentle hand on the backpack." (Trial Court Order, p. 4, *see also* p. 3).

Such mistakes in tracking the language of the administrative agency are not fatal to the decisions of the courts below, however. The Court of Appeals in Kentucky Board of Nursing v. Ward, 890 S.W.2d 641 (1995), reviewed a decision in a similar procedural posture to the case at bar, that is, the circuit court in Ward had also reversed and remanded the administrative agency's decision. Additionally, the circuit court's order in Ward also did not track the language of the Board's order exactly, and it was argued that for this reason the circuit court had ventured into inappropriate fact finding. The Court of Appeals in Ward dealt with the language discrepancy between the Board's Order and the circuit court's order in upholding the circuit court's determination. The Court opined:

> ***While the circuit court may not have tracked the exact language used by the Board in reciting facts in its opinion, the failure to do so does not result in impermissible fact-finding outside the scope of review.*** Indeed, a close reading of the circuit court's opinion reveals that the court agreed with the Board's findings of fact and that Elaine Ward's conduct was inappropriate. ***Accepting the Board's findings of fact, the question to be addressed by the circuit court was whether the evidence was substantial enough to support the Board's conclusions of law and disciplinary order.*** The circuit court found that the conduct complained of did not rise to the level of conduct the applicable statutes were designed to preclude.

> If the Board's decision is unsupported by substantial evidence or law, then it is clearly erroneous or arbitrary. That determination is properly within the appellate province of the circuit court. In our opinion, the circuit court did not exceed the bounds of its authority to review this matter.

Id. at 643 (emphasis added).

Likewise, even if the Trial Court here did not exactly track the language of the Tribunal's Final Order in each place where it cited that language, the Trial Court did not re-evaluate the facts found by the Tribunal, but agreed with those facts found. Specifically, the Trial Court correctly recited these factual findings of the Tribunal: "The Plaintiff physically restrained ZK and told him she was going to take him to the office;" and "ZK was moving 'under protest' and the Plaintiff forcibly propelled him forward;" that "Plaintiff had unintentionally slid her hand in front of the neck/chest area;" and "As the student resisted, the Plaintiff's arm was across the student's front in a manner that 'may have been perceived as choking.'" (Trial Court Order, p. 2).

All of these findings, which were made by the Tribunal and repeated by the Trial Court in its Order, make clear that the Trial Court, although it may have misstated some of the language from the Tribunal's Order, understood the facts found by the Tribunal and reviewed and relied upon those facts in making its determination. Moreover the mistake in tracking the language of the Tribunal is not fatal because the Trial Court did not solely rely upon the misstated language

in making its ultimate determination that the Tribunal's decision was not based upon substantial evidence.

This determination was "properly within the appellate province of the circuit court," as the Court of Appeals held in Ward, 890 S.W.2d at 643. As was the case in Ward, the Trial Court below accepted the facts of the Tribunal, but did not accept the conclusions drawn from those facts when it determined that Hurley-Richards' conduct did not warrant a suspension without pay for more than one year. A reviewing court may likewise determine that the facts found by the Tribunal did not support the punishment imposed. Gallatin Co. Bd. of Ed. v. Mann, 971 S.W.2d 295, 300-01 (Ky. App. 2006). The Trial Court's decision was within the scope of judicial review, and was properly upheld by the Court of Appeals.

B. The courts below did not make findings of fact on issues not raised before the Tribunal.

Appellants raised this issue in their Response to Plaintiff's Motion for Judgment on the Record, and Appellee responded this issue in her Reply in Support of Plaintiff's Motion for Judgment on the Record, served February 26, 2010, pp. 4-5; and she addressed the issue in her Appellee Brief to the Court of Appeals, served November 30, 2010, pp. 10-11; her Response to Motion for Discretionary Review, served November 1, 2011, pp. 12-13.

Appellants take exception to the Trial Court's Order because it refers to KRS 503.110, and assert that the Trial Court found its own facts to support the reference to the statute. Specifically, Appellants assert that "[r]easonableness is a factual determination, and the Trial Court erroneously made findings of fact regarding the application of KRS 503.110 where the Tribunal had not expressly done so..." and further that the Trial Court "invaded the province of the Tribunal with regard to whether Richards' conduct was reasonable under the justification statutue." (Appellants' Brief, pp. 7-8). However, "whether a teacher challenging a disciplinary action engaged in 'conduct unbecoming a teacher' is a *mixed question of fact and law*." The matter of law to be determined is whether the evidence found demonstrates "such a nexus between the teacher's misbehavior and employment that it implicates 'the legitimate interests of government in protecting the school community and students from harm.'" Drummond v. Todd Co. Bd. of Ed, 349 S.W.3d 316, 320, n.2 (Ky.App. 2011) (citations omitted). It is submitted that any question of "reasonableness" fits under this legal determination to be made, and which was made by the Trial Court below.

Additionally it is believed that Appellants misread the Trial Court's review of all the facts of the case, and misinterpreted that court's full review of all the facts of record as the Trial Court finding its own facts or substituting its judgment for that of the Tribunal. The Trial Court simply viewed *all* the facts in

determining that "the plaintiff's actions served to maintain order in the hallway at school," and that "[t]he actions of the Plaintiff were reasonable given the circumstances." (Trial Court Order, p. 4). It is incumbent upon the reviewing court to review all the facts found by the Tribunal, as the Court of Appeals made clear in Ward, 890 S.W.2d 641, 643 (Ky. App. 1995) ("What must be questioned is whether, given *all* the facts as found by the Board, reasonable men would have been induced to convict Ward of verbal abuse based on her comment to Quick, a consideration of all the facts, and application of the pertinent statutes.") (emphasis in original). This full review of all the facts found by the administrative agency is further required by KRS 13B.150(2)(c), which requires a review of the whole record by the court on appeal of an administrative decision.

Further, it must be noted that this determination of "reasonableness" was not the only factor upon which the Trial Court based its decision. The Trial Court also relied upon the facts that "the teacher intended no harm and that the child suffered no harm," and also that the "child was insubordinate and unwilling to walk on his own to the office," in determining that Hurley-Richards conduct did not warrant suspension for conduct unbecoming a teacher. (Trial Court Order, p. 4). Thus even if this Court were to determine that the Trial Court made some sort of impermissible finding of fact or substituted its judgment in terms of the reasonableness of Hurley-Richards' actions, the other findings of the Tribunal

relied upon by the Trial Court serve as sufficient basis for the Trial Court's determination that suspension was not supported by substantial evidence.

KRS 503.110, a statute that was brought to the Trial Court's attention by Appellants, recognizes that parents, guardians, and teachers may be justified in their use of force upon a minor. Justified force may be used not only "to promote the welfare of the minor," but, significantly, also "***to maintain reasonable discipline in a school.***" KRS 503.110(1)(a) (emphasis added). The Trial Court specifically cited to it for this reason: "KRS 503.110(1)(a) states that teachers are entitled to use physical force on a child if it will 'maintain reasonable discipline in a school, class or other group,'" and further, "[t]he Plaintiff's actions served to maintain order in the hallway at school." (Trial Court Order, p. 4).

Appellants, having raised the application of KRS 503.110 in the Trial Court, cannot now complain that court quoted the statute in its Order. In fact, Appellants attempted to compel the Trial Court, in citing to KRS 503.110, to conclude Hurley-Richards' conduct was not justified. They specifically argued in the Trial Court that Hurley-Richards "chose to engage in an unreasonable and unjustified use of physical force to physically manipulate ZK toward the office." (Response to Plaintiff's Motion for Judgment on the Record, served February 10, 2010, p. 3). Had the Trial Court agreed with Appellants, and determined instead

that her conduct was unjustified and unreasonable, that would presumably have been permissible in Appellants' view.

Appellants argue that City of St. Matthews v. Arterburn, 419 S.W.2d 730 (Ky. 1967) stands for the proposition that only the Tribunal can make factual findings as to the reasonableness or justification of Hurley-Richards actions. However, that case is distinguishable. The issue in Arterburn was whether a delay of five and half years between notice to the fiscal court of an ordinance proposing annexation, and the actual date of adoption of that annexation ordinance, was reasonable or justified. On the record in that case there was "nothing except the passage of time to indicate any unreasonable delay," thus, the reviewing court held that it was error to dismiss without a hearing on the cause of the delay. Id. at 732. Alternatively, in this case, there are numerous facts from which the justification of Hurley-Richards conduct was evaluated, *see infra*. The Arterburn case does not require questions of reasonableness to be found solely by the Tribunal, but rather that case holds where there are no facts upon which to make such a determination, the case must be remanded. Furthermore, the determination of whether the "legitimate interests of government in protecting the school community" Drummond v. Todd Co. Bd. of Ed, 349 S.W.3d at 320 n.2, is a matter of law, and it is submitted that this determination would include a determination of whether the teacher's actions were reasonable.

Finally, the Tribunal did *not* find Hurley-Richards's actions violated board policy, the school's policy or procedures on student discipline, or any other rule or directive governing student discipline. Nor did the Tribunal find that Hurley-Richards should have left the misbehaving and insubordinate student alone in the hallway and later submitted a disciplinary write-up, conduct suggested by Appellants in the court below. Nor did the Tribunal find that Hurley-Richards violated any provision of the Professional Code of Ethics for Kentucky Certified School Personnel, found at 16 KAR 1:020. The Trial Court decision was "properly within that appellate province of the circuit court" on review of an administrative decision, Board of Nursing v. Ward, 890 S.W.2d at 643, and as required by KRS 13B.150. The Court of Appeals likewise did not substitute its judgment or find facts outside the Tribunal's facts, and correctly upheld the Trial Court's decision.

IV. THE COURT OF APPEALS OPINION IS CONSISTENT WITH CANONS OF STATUTORY INTERPRETATION AND KENTUCKY CASE LAW INTERPRETING THE PHRASE "CONDUCT UNBECOMING A TEACHER."

The Court of Appeals' reflected on the phrase at issue:

> The phrase "conduct unbecoming a teacher" has never been given a more expansive definition. However, **when viewing the subsection as a whole**, "conduct unbecoming a teacher" means something more than one incident of physically coercing an unruly child to the office. The grouping of "conduct unbecoming a teacher" in the same subsection as "immoral character" implies that "conduct unbecoming a

> teacher" is the type of conduct which has the appearance or **suggestion of immorality or conduct equally egregious.** In fact, prior teacher disciplinary actions, based upon a finding of "conduct unbecoming a teacher," have always involved some sort or **dishonest or corrupt behavior.**

(Opinion, pp. 5-6). The Court of Appeals analysis conformed with the "cardinal rule of statutory construction," which 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). The legislature's intent in enacting the teacher tenure statutes was elucidated by this Court in this way: "[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." Board of Ed. of Hopkins Co. v. Wood, 717 S.W.2d 837, 839 (Ky. 1986). Furthermore, the power to discipline teachers "exists only because of the legitimate interests of the government in protecting the school community and the students from harm." Id. at 840.

Moreover, as a reviewing court, the Court of Appeals properly considered nearby language, consistent with the maxim of "noscitur a sociis", and it looked at the provisions of the whole law in expounding on a statute. Cabinet for Families and Children v. Cummings, 163 SW3d 425 (Ky. 2005). It is submitted that the Court of Appeals also made presumptions made in favor of the teachers

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).

Appellants however disagree that the grouping of the phrase "conduct unbecoming a teacher" with the phrase "immoral character" in KRS 161.790(1)(b) should be considered in defining conduct unbecoming. They recite the legislative history of the phrase in support of their position, (Appellants' Brief, pp. 15-16, 17), the faulty reasoning of which Appellee addressed herein in Counterargument II.B. (pp. 21-22).

Appellants further assert that the Court of Appeals has ignored the plain meaning of the phrase "conduct unbecoming." (Appellants' Brief, pp. 17). Appellants also set out a number of definitions of the term "unbecoming," but those only confirm the need for more concrete and objective measures for evaluating a teacher's conduct. For example, one of the definitions set out by Appellants for the word "unbecoming" was "not becoming; not appropriate: *unbecoming clothes*." (Appellants' Brief, p. 16). Yet one person's "not becoming" could be another person's "suitable." Moreover, it is the subjective nature of the term "unbecoming" that permits arbitrary application, and invites such archaic judgments as "unladylike" or "ungentlemanly."

Athough Appellants submit that poor judgment equates to conduct unbecoming, one person's "poor judgment" in one district may not be "poor

judgment" exercised by another person in another district as determined by a tribunal. This was exactly the point the Court of Appeals of California made when, in evaluating the term "unprofessional conduct," it highlighted the importance of an "objective measure of performance," namely fitness to teach, a measure not "dependent upon an abstract characterization of conduct which will shift and change from board to board, district by district and year by year." Perez v. Comm'n on Professional Competence, 149 Cal. App., 3d 1167, 1174 (Cal. Ct.App. 1983).

In holding that conduct unbecoming is the "type of conduct which has the **appearance or suggestion of immorality** or **conduct equally egregious**" and noting that Kentucky cases reviewing conduct unbecoming "have always involved some sort or **dishonest or corrupt behavior,**" the Court of Appeals' view is in keeping with the approach of nearby legislatures in Ohio and Tennessee, which have set out definitional standards for conduct unbecoming in their statutory teacher tenure and teacher licensing schemes. Tennessee's statutory tenure scheme specifically defines "conduct unbecoming to a member of the teaching profession" in this way:

> (3)"Conduct unbecoming to a member of the teaching profession" may consist of, but not be limited to, one (1) or more of the following:
>
> (A) **Immorality**;
>
> (B) Conviction of a felony or a crime involving **moral turpitude**;

> (C) **Dishonesty**, unreliability, continued willful failure or refusal to pay one's just and honest debts;
> (D) **Disregard of the teacher code of ethics** in part 10 of this chapter, in such a manner as to make one obnoxious as a member of the profession; or
> (E) Improper use of narcotics or intoxicants

Tenn. Code Ann. § 49-5-501. And in Ohio, the statutes governing the licensing of teachers in that state, Ohio Rev. Code. Ann. § 3319.31(B)(1), allow that teachers may be disciplined for conduct unbecoming teacher, which is further defined or explained in regulations, Ohio Admin. Code § 3301-73-21(A)(5), and (8), which set forth factors to consider when evaluating conduct unbecoming, including "crimes or misconduct involving the school community, school funds or school equipment/property," and "[a]ny other crimes or misconduct that negatively reflect upon the teaching profession." The Nebraska Court of Appeals interpreted the phrase "unprofessional conduct" as:

> . . . such conduct as is by general opinion or by opinion of appropriate professionals, **immoral, dishonorable,** unbecoming a member in good standing in the profession or **violative of professional codes of ethics** or professional standards of behavior. It is conduct which indicates an **unfitness to act** as a public school superintendent.

Boss v. Fillmore County School Dist. No. 19, 548 N.W.2d 1, 11 (Neb.Ct.App. 1996).

Although the term "conduct unbecoming a teacher" is not defined in KRS 161.790, and although that phrase has never been specifically defined by a court

reviewing that statute, multiple Kentucky cases have addressed "conduct unbecoming a teacher" as it applies to certain conduct, and a number of those cases were cited by the Court of Appeals in support of its decision. These cases, as the Court of Appeals correctly noted:

> . . . have always involved some sort of dishonest or corrupt behavior. *See, e.g.*, Gallatin County Bd. of Educ. v Mann, 971 S.W.2d. 295 (Ky.App. 1998) (teacher falsified employee time records); Board of Educ. of Hopkins County v. Wood, 717 S.W.2d 837 (Ky. 1986) (teachers smoked marijuana off campus with two 15-year-old students); Board of Educ. of Laurel Co. v. McCollum, 721 S.W.2d 703 (Ky. 1986) (teacher falsely called in sick in order to work another job); Hutchison v. Kentucky Unemployment Ins. Comm'n, 329 S.W.3d 353 (Ky.App. 2010)(teacher's behavior, leading to six violent and threatening criminal convictions, compromised her ability to be an example to the school community); Dixon v. Clem, 492 F.3d 665 (6th Cir. 2007) (teacher took photographs of female student while she was wearing no clothes above her waist). The factual findings provide no indication that Richards exhibited any such conduct.

(Opinion, p. 6). The Court of Appeals Opinion is consistent with the statute itself, KRS 161.790(1)(b), and Kentucky case law on this subject as set out above.

V. THE COURT OF APPEALS DID NOT USURP THE ROLE OF THE ADMINISTRATIVE TRIBUNAL.

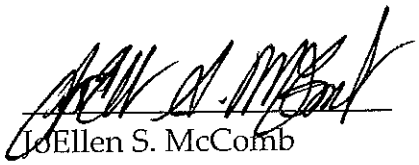
For the reasons set forth above throughout this Brief for the Appellee, (and particularly in Counterargument II.B. , pp 21-26 *supra)*, the Court of Appeals in no way usurped the authority of the Tribunal. Because the facts as found by the Tribunal do not support a charge of conduct unbecoming a teacher,

the only reason for remand is for the Tribunal to enter a final order consistent with the Court of Appeals decision. In that vein, the Trial Court did remand the case to the Tribunal "for further proceedings in accordance with this opinion," (Trial Court Order, p.5). Appellee submits that no additional proceedings are necessary except to enter an order dismissing the charge of conduct unbecoming a teacher, and directing that Appellee be made whole pursuant to KRS 161.790 for her lost wages and benefits.

CONCLUSION

For the foregoing reasons, the Court of Appeals Opinion should be upheld on appeal.

Respectfully Submitted,



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APPENDIX

KRS 161.790 (L.R.C. 1960) 1

KRS 161.790 (1987) 2