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 THE FAYETTE COUNTY PUBLIC SCHOOLS — APPELLANTS

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

v.

APPEAL FROM FAYETTE CIRCUIT COURT
CIVIL ACTION NO. 09-CI-5311
Division Seven, Hon. Ernesto Scorsone

ROSALIND HURLEY-RICHARDS — APPELLEE

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BRIEF ON BEHALF OF THE APPELLANTS BOARD OF EDUCATION OF FAYETTE COUNTY, KENTUCKY; and DR. TOM SHELTON, in his OFFICIAL CAPACITY AS SUPERINTENDENT OF THE FAYETTE COUNTY PUBLIC SCHOOLS

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CERTIFICATE REQUIRED BY CR 76.12(6)

I hereby certify that a true and accurate copy of this Brief has been mailed, first-class, postage prepaid, to Hon. Samuel Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Ernesto Scorsone, Judge, Division Seven, Fayette Circuit Court, 551 Robert F. Stephens Courthouse, 120 N. Limestone, Lexington, KY 40507; and to Arthur L. Brooks, Esq., and JoEllen S. McComb, Atty., BROOKS, McCOMB & FIELDS, LLP, 1204 Winchester Road, Ste. 100, Lexington, KY 40505, on this the 26th day of July, 2012.

Robert L. Chenoweth

INTRODUCTION

This matter originated as an administrative hearing, and is before this Court concerning the meaning of the phrase "conduct unbecoming a teacher" in KRS 161.790(1)(b); concerning the proper role of the Trial Court in conducting judicial review of an administrative hearing decision pursuant to KRS 161.790(9); and concerning the proper role of the Trial Court and Court of Appeals in reaching conclusions on issues which were never presented to the administrative tribunal for decision.

STATEMENT CONCERNING ORAL ARGUMENT

The Fayette County Board of Education and Superintendent Tom Shelton, appearing herein in only his official capacity, respectfully submit oral argument should be scheduled in this matter. The primary issue raised is believed to be one of first impression for this Court, to-wit: whether or not a public school teacher can be disciplined for conduct which is found to demonstrate poor judgment and to be inconsistent with her role as a teacher, notwithstanding whether or not the conduct displays an immoral character or constitutes egregious misconduct.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The Defendants/Appellants Board of Education of Fayette County, Kentucky (Board), and Tom Shelton (Shelton), in his official capacity as Superintendent of the Fayette County Public Schools (hereinafter, collectively "School District"), offer the following as the pertinent facts of this case as gleaned from the "Findings of Fact, Conclusions of Law, and Final Order; Notice of Appeal Rights" (Final Order) of the administrative Tribunal under KRS 161.790, included herewith as Item 3 in the Appendix. R. 6.[1] This matter was initiated in the Fayette Circuit Court as a judicial review of an administrative tribunal proceeding conducted by the Kentucky Department of Education ("KDE") pursuant to KRS Chapter 13B, as required by KRS 161.790(4), (9).

This action arises out of an incident which occurred on or about February 3, 2009. Final Order, p. 2; R. 7. On that morning, Plaintiff/Appellee Rosalind Hurley Richards (hereinafter "Richards"), engaged in conduct directed toward a second grade student, identified in the administrative record as Z.K., for which she was later disciplined. Final Order, pp. 3-4; R. 8-9. As found by the Tribunal, Richards was acting as hall monitor at the Cardinal Valley Elementary School in Lexington, Fayette County, Kentucky. Final Order, p. 2-3; R. 7-8. Richards observed three siblings, the youngest two of whom (including Z.K.) were running in the hallway. Final Order, p. 3; R. 8. Richards instructed the students to

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[1] References are to the page of the Trial Court record as certified to the Court of Appeals.

walk, but she was ignored. *Id.* The oldest sibling instructed the younger siblings to slow down, and they did. *Id.*

Richards instructed the two younger children to go back up the hall and walk back down the hall properly. *Id.* Instead, Z.K. ran down the hall again. *Id.* Richards chastised Z.K. who responded that Richards could not tell him what to do. *Id.* Richards instructed the other siblings to go to breakfast while she spoke to Z.K. *Id.* The siblings engaged in a tug-of-war, during which Z.K. was pulling his younger sister (E.K.) by the hair while their other sister (M.K.) was pulling E.K. by the hand. *Id.* Richards put her arm around Z.K.'s waist and this separated him from his sister.[2] *Id.* Z.K.'s sisters moved toward the office, and Richards instructed Z.K. to follow them. *Id.* He refused, so Richards put her arm around him to urge him forward. *Id.* Z.K. resisted by squirming and twisting. *Id.* Richards had to physically propel Z.K. up the office hallway due to his resistance. Final Order, p. 4; R. 9. Z.K. protested that Richards was choking him, and Richards disavowed that she was hurting him. *Id.*

An eyewitness observed Richards pulling Z.K. toward the office, and perceived that Richards had Z.K. around the neck. *Id.* Richards and Z.K. entered the principal's office, and the physical contact ended. *Id.* Richards reported Z.K.'s discipline issues to the principal, and the issue was passed to the principal at that point. Final Order, p. 5; R. 10. Subsequently, following an investigation, former Superintendent Stu Silberman (hereinafter "Silberman") determined Richards behaved inappropriately in using physical

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[2] Richards' physical contact with Z.K. to separate him from his sister is not the subject of the disciplinary action against Richards and is not at issue in the judicial review herein.

force against Z.K. to propel him down the hallway and into the office, and charged her with conduct unbecoming a teacher. Final Order, p. 5; R. 10. The Tribunal determined Richards was attempting to guide Z.K. down the hallway toward the office, and during his resistance, her arm went across his front and slid up around the neck and shoulder area. Final Order, p. 4; R. 9.

The Tribunal found the testimony of the eyewitness to be "particularly reliable." Final Order, p. 5-6, ¶14; R. 10-11. The Tribunal found the testimony of Richards to be "generally truthful and reliable," but found her memory to be "influenced by self-interest and later events." Final Order, p. 6; R. 11. Relating to Richards' credibility, the Tribunal did not believe her testimony that she was delicately guiding Z.K. forward with a gentle hand on his backpack, as they found this to be impossible in dealing with a "reluctant, active, unhappy child." Final Order, p. 6, ¶15; R. 11. The Tribunal determined Richards had no intent to harm Z.K. and that he suffered no physical harm. Final Order, p. 6; R. 11. Notwithstanding the absence of harmful intent or actual injury, the Tribunal determined Richards to have exercised poor judgment in continuing to apply physical force once Z.K. complained about choking. Final Order, p. 6; R. 11. The Tribunal determined this exercise of poor judgment constituted conduct unbecoming a teacher under KRS 161.790(1)(b). Final Order, p. 6; R. 11. As punishment for this misconduct, the Tribunal modified former Superintendent Silberman's recommended sanction from termination of Richards' contract to a suspension without pay through June 30, 2010, and also ordered Richards to undergo training regarding "child restraint/safe physical management, student behavioral management strategies and interpersonal relationship skills." Final Order, p. 7; R. 12. The issue of the

appropriateness of this sanction was not ruled upon by the Trial Court, was not presented to the Court of Appeals, and therefore is not before this Court on appeal.

The Final Order of the Tribunal was appealed by Richards on grounds that her conduct as found by the Tribunal did not constitute conduct unbecoming a teacher, and on the grounds that the penalty was excessive and/or beyond the authority of the Tribunal. Complaint, ¶¶ 12-13; R. 4-5. These arguments were briefed by the parties (R. 60, R. 83, and R. 94), and on April 20, 2010, the Trial Court issued the Order from which the appeal was first taken, included herewith as Item 2 in the Appendix. R. 112.

The Trial Court recited the above-referenced facts from the Tribunal's Final Order. Order, pp. 1-2; R. 112-113. The Trial Court then determined pursuant to KRS 13B.150(2)(c), that the conclusions of the Tribunal were "without support of substantial evidence on the whole record." Order, p. 3; R. 114. On this basis, the Trial Court found "the factual conclusions of the Tribunal [to] provide no evidentiary basis on which to support any suspension without pay." (Emphasis added.) Order, p. 4; R. 115. The Trial Court found Richards' conduct toward Z.K. to be reasonable and determined the Tribunal's conclusions to the contrary were incorrect. Order, p. 4; R. 115.

The Trial Court's Order was timely appealed to the Court of Appeals, which rendered its Opinion Affirming on September 2, 2011. This Opinion of the Court of Appeals, from which this appeal is taken, is included herewith as Item 1 in the Appendix. In the Opinion, the Court of Appeals affirmed the Trial Court's analysis of the findings of fact made by the Tribunal, then determined the phrase "conduct unbecoming a teacher" was intended by the General Assembly to constitute the "type of conduct which has the

appearance or suggestion of immorality or conduct equally egregious." Court of Appeals Opinion, p. 5. The School District timely sought discretionary review in this Court. By Order of May 16, 2012, this Court accepted this matter for discretionary review. The School District submits the following argument in support of reversal of the decision of the Court of Appeals and of the Fayette Circuit Court, and the reinstatement of the decision of the administrative Tribunal rendered below.

ARGUMENT

I. Standard of Review

A decision reached by an administrative tribunal under KRS 161.790 is subject to review consistent with KRS 13B.150. *See* KRS 161.790(9). Thus, The Trial Court's standard of review of the agency decision is dictated by KRS 13B.150(2): "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." The statute further authorizes a trial court to affirm or reverse, in whole or in part, on numerous legal grounds. The Trial Court's review is to be largely deferential: "The . . . court's role as an appellate court is to review the administrative decision, not to reinterpret or to reconsider the merits of the claim, nor to substitute its judgment for that of the agency as to the weight of the evidence." *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 131 (Ky. App. 2006) (citation footnote omitted).

Appellate review of a Trial Court's decision is dictated by CR 52.01, which requires that, in appeals of administrative agency decisions, appellate courts review the

factual determinations of the circuit courts for clear error. *Fayette County Bd. of Educ. v. M.R.D. ex rel. K.D.*, 158 S.W.3d 195, 201 (Ky. 2005). This Court, in *M.R.D.*, held "[t]he Court of Appeals should have reviewed the lower court's findings of fact only for clear error pursuant to CR 52.01 and reviewed its conclusions of law de novo." *Id.*

In *Ky. Ret. Sys. v. Brown*, 336 S.W.3d 8 (Ky. 2011), this Court cited approvingly the appellate standard of review articulated by the Court of Appeals in *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454 (Ky. App. 2003):

> When the decision of the fact-finder is in favor of the party with the burden of proof or persuasion, the issue on appeal is whether the agency's decision is supported by substantial evidence, which is defined as evidence of substance and consequence when taken alone or in light of all the evidence that is sufficient to induce conviction in the minds of reasonable people.

II. Preservation of Issues

The first issue on appeal is the Trial Court's misapplication of the standard of review by substituting its judgment for that of the administrative agency. Since this issue was created by the Trial Court's final order, the issue was not briefed at the Trial Court level. This issue was fully briefed by both parties before the Court of Appeals. The second issue on appeal involves the Court of Appeals' interpretation of the language of KRS 161.790(1)(b). As this issue was created by the Court of Appeals Opinion, the precise issue was not briefed at the appellate level below, though the scope of the statute was the subject of briefing by both parties in the Trial Court and the Court of Appeals. The specific issue of whether the Tribunal's Final Order concluding that Richards engaged in conduct

unbecoming a teacher was supported by their findings of fact was addressed on behalf of the Appellants at R. 83 at 83-91.

III. The Courts Below Committed Clear Error by Misinterpreting the Tribunal's Final Order, and by Making Findings of Fact on Issues not Raised before the Agency, by Substituting their Judgment for that of the Agency.

The Trial Court concluded Richards was exercising her duty as a teacher when she attempted to discipline Z.K. and escort him to the office, and cited KRS 503.110(1)(a), as the basis for this conclusion, notwithstanding that this "justification" defense had not been presented to the Tribunal and was not ruled upon in their Final Order. Order, pp. 3-4; R. 114-115. While it is acknowledged that the justification statute was briefed by the parties before the Trial Court, it was raised by the School District (R. 85) in response to Richards' argument that she enjoyed absolute discretion in regard to the manner of imposing and/or maintaining discipline. The Tribunal made no findings with regard to whether Richards' actions were reasonably necessary under the justification statute. However, their conclusion that Richards exercised poor judgment must be read as a conclusion that they rejected any argument that her conduct was reasonably necessary. Reasonableness 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 the Trial Court's findings of fact were inconsistent with the implied findings of the Tribunal with regard to the reasonableness of Richards' conduct. Order, p. 4, R. 115. Reasonableness and underlying questions of justification or excuse are fact issues. *City of St. Matthews v. Arterburn*, 419 S.W.2d 730, 732 (Ky. 1967). The Trial Court improperly invaded the province of the Tribunal by substituting its judgment for that of the Tribunal with regard to

whether Richards' conduct was reasonable under the justification statute. Reasonable minds can differ on whether Richards' conduct toward ZK was reasonable, and the fact the Trial Court disagreed with the administrative tribunal panel comprised of two (2) out of three (3) education professionals on the appropriate conclusion to this question is insufficient basis for the Trial Court to disregard the agency's findings.

Additionally, even if the Trial Court was at liberty to render findings of fact with regard to the applicability of KRS 503.110, the Trial Court misinterpreted the factual record. There is nothing in the record to indicate Richards was punished for her use of physical force in separating Z.K. from his younger sister when he was pulling her hair. There is no suggestion in the record that Richards' intervention in this sibling altercation was unreasonable or that former Superintendent Silberman took issue with or disciplined Richards' for her conduct separating the siblings. Instead, the record indicates Richards was disciplined for her use of inappropriate physical force in propelling Z.K. to the office after his siblings had already walked to the office voluntarily. There are no findings by the Tribunal that Z.K. posed a risk to others around him at the time Richards was physically leading him to the office, so the Trial Court's findings with regard to the application of KRS 503.110 are clearly erroneous, in that, with all due respect, those findings enjoy no support from the factual record from the administrative hearing.

The Trial Court misquoted and misinterpreted the Tribunal's findings of fact, directly leading to the Trial Court's erroneous ruling. What was stated in the Tribunal's Final Order as a credibility determination regarding Richards' testimony was cited by the Trial Court twice as an "ultimate" conclusion of the Tribunal regarding Richards' conduct

and intent. *See* Order, p. 2 ("The ultimate conclusion of the Tribunal was "that a reluctant, active, unhappy child cannot be delicately guided forward by a gentle hand on the backpack."), R. 113; and p. 4 ("The Tribunal ultimately concluded that the child was not choked, but was 'delicately guided forward by a gentle hand on the backpack.'"), R. 115; *cf.* Tribunal Final Order, p. 6, ¶15 ("Richards' memory was also influenced by self-interest and later events. The Tribunal felt that she was generally truthful and reliable but that a reluctant, active, unhappy child cannot be delicately guided forward by a gentle hand on the backpack."), R. 11. That is, the Tribunal disbelieved Richards' testimony that her physical contact with Z.K. constituted a "gentle hand" or "delicate guidance." However, the Trial Court interpreted this finding regarding credibility to be an ultimate conclusion that Richards had delicately guided Z.K. using a gentle hand on his backpack. It is this misinterpretation of the Tribunal's Final Order which informs the remainder of the Trial Court's erroneous ruling regarding the reasonableness of Richards' conduct.

Prior to 1942, among the causes for adverse personnel action had been that a teacher may be dismissed from employment "for immorality, misconduct, incompetency, insubordination or willful neglect of duty." (Emphasis added.) Carroll's Kentucky Statutes, Section 4472. In *Gover v. Stovall*, 237 Ky. 172, 35 S.W.2d 24 (1931), the former Court of Appeals addressed Section 4472 in regard to a teacher who spent "45 minutes to an hour without turning on any lights" in a school building "between 8 and 9 o'clock" with "three young ladies." 35 S.W.2d at 25. The Court stated:

> "The statute (section 4472) prescribing the grounds for dismissal employs, among others, the two terms 'immorality' and 'misconduct,' showing that it was the intention and purpose of the legislature to

> embrace more conduct than what is properly classified as 'immorality' and to incorporate as additional grounds not embraced strictly within its scope, such other facts as lay within the adjacent zone of 'misconduct,' and vested the school authorities with a sound discretion to determine the intended application of that term; and, as indicated, we do not believe the board in this case disabused that discretion."

35 S.W.2d at 26. It is literally evident in 1942 the General Assembly substituted the phrase "conduct unbecoming a teacher" for the word "misconduct." *See* KRS 161.790(1)(a) Kentucky Revised Statutes, 1st Edition (1942), listing as causes for termination of a teacher's contract "insubordination, immoral character or conduct unbecoming a teacher." Other causes of "inefficiency, incompetency, physical or mental disability or neglect of duty" were grouped into a separate subsection. *See* KRS 161.790(1)(b) (1942). In changing the statute from "misconduct" to "conduct unbecoming a teacher," the General Assembly, it is submitted, expanded the scope of actions of a teacher that could result in adverse personnel action being taken against them. As held in *Gover*, *supra*, teachers are to be an exemplar for students, and the intended identification of the zone of conduct that may serve as a basis for adverse personnel action remained within the "sound discretion" of the final decision makers under the statute. 35 S.W.2d at 26.

In 1990, with the enactment of the Kentucky Education Reform Act, KRS 161.790 was amended to remove boards of education as the final decision-maker on allegations of "conduct unbecoming a teacher," and to authorize the appointment of a three (3) member tribunal, to consist of "one (1) teacher . . ., (1) administrator . . ., and one (1) lay person . . .." KRS 161.790(4) (1990). The Court of Appeals, in *Gallatin Co. Bd. of Educ. v. Mann*, 971 S.W.2d 295 (Ky. App. 1998), and later this Court in *Fankhauser v. Cobb*, 163

S.W.3d 389 (Ky. 2005), determined a tribunal panel is the ultimate trier of fact and had exclusive control to determine, if facts were concluded to exist for adverse personnel action, what those sanctions would be. Consequently, 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."

The Tribunal here found that Richards exercised poor judgment constituting conduct unbecoming a teacher by responding to a defiant student with physical force and for continuing to apply such force after the student complained he was being choked. The Trial Court negated this finding by reciting that Richards did not intend to hurt the child and that the child was not harmed. By the Trial Court's reasoning, the standard for conduct unbecoming a teacher is directly related to whether someone is harmed by the teacher's conduct. By the Court of Appeals' reckoning, prior teacher disciplinary actions based upon a finding of conduct unbecoming a teacher, have "always involved some sort of dishonest or corrupt behavior." Court of Appeals Opinion, p. 6. These conclusions by both the Trial Court and Court of appeals are at odds with numerous prior published decisions of the appellate courts of this Commonwealth.

In *Fankhauser v. Cobb*, *supra*, the tribunal concluded that the teacher (principal), Cobb, "was guilty of . . . 'insubordination and conduct unbecoming a teacher' for bringing a gun onto school property." 163 S.W.3d at 392. The evidence was that Cobb was aware the gun was in her glove-compartment, and simply failed to remove it before driving to school. For her poor judgment regarding carrying the gun onto school property, despite the absence of harm to anyone at the school, the tribunal determined the appropriate sanction

was "a suspension without pay until the end of the 2000-2001 school year, a total of two years." There was no suggestion that Cobb's conduct was intended to harm anyone or that it caused any injury. There is also no available conclusion this conduct constituted "dishonest or corrupt behavior."

In *Board of Education v. McCollum*, 721 S.W.2d 703 (Ky. 1986), the teacher (McCollum) falsified his time sheet on one day to claim sick leave for time spent moonlighting for another employer. This Court upheld McCollum's termination for conduct unbecoming a teacher, finding this conduct to have a connection with his work, despite the absence of any evidence the conduct showed a lack of "technical professional competency in the classroom." 721 S.W.2d at 705. There was no suggestion that McCollum's conduct was intended to harm anyone or that it caused any injury.

In *Gallatin Co. Bd. of Educ. v. Mann, supra*, the teacher (Mann) falsified time sheets by signing in 1.5 hours earlier than she arrived at school for approximately three weeks. 971 S.W.2d at 296. The charge of conduct unbecoming a teacher was based on the falsification of records and the attempt to lay blame elsewhere. *Id.* "The tribunal agreed that Mann's conduct in falsifying her time records constituted conduct unbecoming a teacher." *Id.* at 300. The Court upheld Mann's termination for this falsification of records and found no basis for reducing the punishment to a suspension of three (3) years, as initially decided by the tribunal. *Id.* at 300-01. There was no discussion regarding Mann's intent to harm anyone or any harmful effect Mann's conduct had on students.

In *Board of Education v. Wood*, 717 S.W.2d 837 (Ky. 1986), the Court held that "[t]he school teacher has traditionally been regarded as a moral example for the

students." 717 S.W.2d at 839, *citing Gover v. Stovall, supra.* Consequently, it was for the Tribunal to determine whether Richards set an appropriate example for students by reacting to defiance with physical force. The Trial Court was clearly erroneous in substituting its judgment for that of the Tribunal with regard to whether Richards' conduct met the standard expected of teachers.

The Tribunal in the instant matter concluded that the conduct with which Richards was charged in fact occurred, *i.e.*, the use of physical force to manipulate a disobedient student. The Tribunal also concluded the conduct, though indicating poor judgment, was not done with any intent to harm the student, and did not result in harm to the child. In *Mann, Cobb*, and *McCollum, supra*, there was no discussion of any intent to harm students or any resulting harm to students in relation to the conduct of those employees. Nonetheless, those Courts upheld the termination or long-term suspension of all three certified employees (teacher/administrator) for acts of dishonesty (falsifying pay records) and/or violation of school policy (possessing gun on school property). Each of those acts was found to constitute conduct unbecoming a teacher, and each, like that of Richards, can be characterized as intentional conduct demonstrating poor judgment, but not involving performance of teaching duties in the classroom, not involving any intent to harm a student, and not resulting in any actual harm. In *Cobb, supra*, there is no conclusion that the conduct of violating a local board policy regarding possession of a handgun on school property constituted immoral behavior.

The tribunal process, as discussed by this Court in *Fankhauser, supra,* was created to allow decision-making regarding teacher discipline to be vested in an

administrative agency, like a civil service or merit system. As stated above, a tribunal empaneled under KRS 161.790 is comprised of "one (1) teacher . . ., one (1) administrator . . ., and one (1) lay person, none of whom reside in the district . . .." KRS 161.790(4). While the make-up is *ad hoc*, membership for each hearing is selected from a "pool of potential tribunal members who have been designated and trained to serve as tribunal members on a regular and ongoing basis . . .." KRS 161.790(4). The decision of whether particular conduct constitutes a violation of the statute is statutorily delegated to this trained tribunal, two-thirds of which are fellow educators of the teacher charged with misconduct believed deserving of sanction, and a court should not substitute its judgment for that of the agency on matters within the specialized training and knowledge of the agency.

The Trial Court erroneously substituted its judgment for that of the Tribunal in determining whether Richards' conduct displayed an exercise of poor judgment sufficient to constitute conduct unbecoming a teacher, and then ignored controlling precedent in holding that conduct by a teacher which was not intended to harm a student and did not result in harm was shielded from punishment in the form of adverse personnel action, albeit less than recommended by the superintendent. The Court of Appeals erroneously concluded that conduct unbecoming a teacher must have some element of dishonesty or corrupt behavior based on its incomplete review of prior cases involving a charge of conduct unbecoming a teacher. Both the Trial Court and the Court of Appeals ignored the intent of the General Assembly, as found by the former Court of Appeals in *Gover*, that the determination of whether a teacher has engaged in conduct which is intended to be covered by the statutory

listing of causes for discipline is vested in the sound discretion of the authorities who conduct the administrative hearing.

IV. The Court of Appeals Failed to Follow the Rules of Statutory Interpretation.

The first rule of statutory construction is to construe a statute according to its plain meaning, unless that meaning leads to an absurd or wholly unreasonable result. *Johnson v. Branch Banking & Trust Co.*, 313 S.W.3d 557, 559 (Ky. 2010). In KRS 446.080(4), the General Assembly instructs "[a]ll words and phrases shall be construed according to the common and approved usage of language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed according to such meaning." The phrase which is the subject of dispute in this litigation is "conduct unbecoming a teacher" as found in KRS 161.790(1)(b). The Court of Appeals did not examine the plain meaning of this phrase, but instead determined that the General Assembly grouped this phrase with "immoral character" in order to imply a different meaning than the common and approved usage of the phrase. This was erroneous as a matter of law.

The phrase "conduct unbecoming a teacher" was used to replace "misconduct" in 1942, and was grouped with insubordination and immoral character in KRS 161.790(1)(a) (1942). In 1964, the General Assembly amended KRS 161.790(1) to pull "insubordination" from its grouping with "immoral character" and "conduct unbecoming a teacher," and to provide a definition of insubordination at KRS 161.790(1)(a) (1964). The remaining two phrases were recodified as KRS 161.790(1)(b) (1964). The former KRS 161.790(1)(b) (1942) was also divided in 1964 so that "physical or mental disability" became

KRS 161.790(1)(c) (1964) and "inefficiency, incompetency, or neglect of duty" became KRS 161.790(1)(d) (1964). This enumeration of causes by the General Assembly in 1964 endures in the current statute.

The Court of Appeals held that "conduct unbecoming a teacher" is conduct which has the appearance or suggestion of immorality or conduct equally egregious. There is no support for this conclusion from the plain meaning of the words used. The phrase "conduct unbecoming a teacher" is not a technical word or phrase, and has not acquired a peculiar meaning in the law.[3] Thus, KRS 446.080 instructs that it should be construed according to its plain meaning. From at least 1892, "unbecoming" has been defined in a way which does not connote immorality or egregious misconduct. *See* Webster's High School Dictionary, p. 464, American Book Company, Springfield, MA (1892) ("[n]ot becoming; improper; unsuitable; indecent"); Webster's Secondary-School Dictionary, p. 740, American Book Company, Springfield, MA (1925) ("[n]ot becoming; unfit; indecorous; improper"); Thorndike•Barnhart Comprehensive Desk Dictionary, p. 834, Doubleday & Company, Inc., Garden City, NY (1954) ("1. not becoming; not appropriate: *unbecoming clothes.* 2. not fitting; not proper: *unbecoming behavior*"). There is no support for the Court of Appeals' conclusion that "conduct unbecoming a teacher" is conduct which has the appearance or suggestion of immorality or conduct equally egregious. It is, instead, conduct which is not proper or suitable for a teacher or which displays a lack of appropriate decorum for a teacher.

The Tribunal panel made no conclusion that Richards' behavior toward Z.K.

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[3] The phrase is not included in the "Words and Phrases" volume of West's Kentucky Digest 2d and is not included in Black's Law Dictionary, 3rd Ed., or 6th Ed.

was reasonable to restrain him from harming another child. In fact, the Tribunal made no finding of fact regarding the student Z.K. posing any risk of harm to those around him at the time Richards utilized physical force to propel him to the office. The Tribunal found that he had previously used physical force against his sibling requiring Richards to separate the students, but that his siblings had already proceeded to the office at the time Richards again used force on Z.K. to propel him to the office. *See* Appendix 3, page 3-4. It was the Trial Court which concluded for the first time, as accepted by the Court of Appeals, that "the Plaintiff [Richards] had reason to believe ZK posed a risk to those around him." *See* Appendix 2, p. 5. This finding of fact was not made by the Tribunal, and the trial court was not free to make its own findings of fact on matters within the exclusive province of the administrative agency. Thus, the conduct at issue here is not that of a teacher who was restraining a child from harming another child. Instead, it is that of a teacher who was physically manipulating a child to comply with her directions after he disobeyed a single verbal instruction to proceed to the office — *i.e.*, the teacher quickly resorted to physical force to resolve a verbal conflict. It was within the sound discretion of the tribunal to decide this was conduct which was intended to be covered by the statutory listing of causes for discipline, as held in *Gover*.

The Court of Appeals, after failing to give any discussion to the plain meaning of the phrase "conduct unbecoming a teacher," resorted to a secondary tool of statutory construction which is only to be used where the plain meaning cannot be discerned or where the legislative intent remains ambiguous after the plain meaning is determined. *See King Drugs, Inc. v. Comm.*, 250 S.W.3d 643, 645 (Ky. 2008) (if a plain reading "yields a

reasonable legislative intent, then that reading is decisive and must be given effect . . . regardless of our estimate of the statute's wisdom"). The Court of Appeals looked to the other words in the statute to determine a legislative intent which is not apparent from the plain meaning of the statute, and which is belied by the statutory history recounted above. It is clear that the legislature never intentionally grouped "conduct unbecoming a teacher" with "immoral character" so as to give a new meaning to the former by coupling it with the latter. Instead, the two phrases remained together as other causes for discipline were parsed into separate subsections. Thus, insubordination was pulled out by itself so that a definition could be given (KRS 161.790(1)(a)); disability was pulled out as a category of its own (KRS 161.790(1)(c)); inefficiency, incompetency, and neglect of duty were pulled out and given a modifier that such charges must be supported by a written statement which had been furnished to the teacher (KRS 161.790(1)(d)). Immoral character and conduct unbecoming a teacher were the last two remaining causes when the other causes which had been identified in the 1942 statute were parsed into separate subsections in 1964. This grouping does not show an intent to modify "conduct unbecoming a teacher" or any intent to alter what had been concluded by the former Court of Appeals in *Gover*, that the inclusion of terms other than "immorality" demonstrate an intention to "embrace more conduct than what is properly classified as 'immorality.'" The Court of Appeals decision below which requires "conduct unbecoming a teacher" to include only "conduct which has the appearance or suggestion of immorality or conduct equally egregious" is unsupported by the first rule of statutory construction (plain meaning) or by the legislative history of the KRS 161.790.

V. The Court of Appeals Usurped the Role of the Administrative Tribunal.

Notwithstanding each of the arguments presented above, it is submitted that the question of whether particular conduct displays an immoral character or is equally egregious must first be submitted to the original trier of fact, and that by deciding *ipse dixit*, that Richards' conduct toward Z.K. at issue herein did not meet this standard, the Court of Appeals usurped the role of the Tribunal panel to make particular findings of fact and conclusions on this issue. For the foregoing reason, even if the Court is otherwise persuaded that the Court of Appeals is correct in its interpretation of KRS 161.790(1)(b), the result should have been a remand to the tribunal for further proceedings in light of this new statutory interpretation.

CONCLUSION

For the foregoing reasons, and based on the weight of the authority cited, the Court is respectfully urged to reverse the Court of Appeals and Trial Court.

Respectfully submitted,

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APPENDIX