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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REPLY BRIEF ON BEHALF OF THE APPELLANTS

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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 9th day of October, 2012.

Grant R. Chenoweth

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

Throughout her response brief, the Plaintiff/Appellee, Rosalind Hurley-Richards (hereinafter "Richards"), repeats a refrain from the Court of Appeals decision which is demonstrably false. The Court of Appeals held that "prior teacher disciplinary actions, based upon a finding of 'conduct unbecoming a teacher,' have always involved some sort of dishonest or corrupt behavior." Opinion, p. 6. Neither the Court of Appeals nor Richards attempt to apply this statement to the conduct at issue in *Fankhauser v. Cobb*, 163 S.W.3d 389, 392 (Ky. 2005), which was found to support the finding of conduct unbecoming a teacher. There, the teacher (principal) was determined to have knowingly brought a gun onto school property in the glove-compartment of her car. While Richards argues this was conduct "of a substantial nature," she does not even attempt to connect this behavior to the "dishonest or corrupt" label which the Court of Appeals determined to characterize the conduct in every previous case involving conduct unbecoming a teacher.

Richards argues that the decisions of the Trial Court and Court of Appeals properly addressed the question of whether the Tribunal decision was supported by substantial evidence. The standard of substantiality of the evidence articulated *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972), is "whether when taken alone or in the light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men." (Citations omitted.) The Trial Court substituted its judgment for that of the Tribunal by concluding that Richards' conduct at issue was reasonable under the circumstances, after the Tribunal had concluded her conduct was unreasonable, in that it demonstrated poor judgment. The Trial Court did not conclude that

no reasonable man could conclude Richards' conduct to have been unreasonable, but instead made findings of fact regarding the reasonableness of Richards' conduct and substituted its judgment for that of the Tribunal with regard to the weight of the evidence. The Trial Court concluded that Richards "had reason to believe [the student] posed a risk to those around him" even though the Tribunal had made no such finding. The Trial Court quoted from the Tribunal's finding regarding Richards' credibility and found it to be an ultimate conclusion of the Tribunal, stating that Richards had "delicately guided [the student] forward by a gentle hand on the backpack" when this language was used by the Tribunal in characterizing the un-believability of this characterization by Richards of her own conduct. The Trial Court found Richards' conduct to be justified under KRS 503.110, even though no finding on this justification defense was made by the Tribunal.[1] Richards even admits in her brief to this Court that the Trial Court failed to "specifically expound on the issue of whether there was substantial evidence to support a finding of conduct unbecoming . . .." Richards' brief, p. 30. Notwithstanding this admission, Richards continues to urge that the Trial Court appropriately engaged in the narrow judicial review authorized by KRS 13B.150 and did not make its own findings of fact.

The Court of Appeals compounded the error by determining the legal standard for "conduct unbecoming a teacher" to be different than the standard on which the Tribunal

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[1] Richards' argues that since the School District injected KRS 503.110 in its Trial Court brief, the School District cannot argue the impropriety of the Trial Court relying on said statute to make findings of fact which were never made by the Tribunal in relation to whether Richards' conduct was justified. It is submitted a Trial Court is never authorized to make a finding of fact, and a party's appellate argument regarding the absence of a finding on an issue is not a justification for a trial court to usurp the role of the administrative trier of fact.

was instructed, but instead of remanding the matter to the tribunal for initial findings of fact after being instructed on this newly announced legal standard, the Court of Appeals made findings of fact with regard to whether the evidence would satisfy this legal standard. It is submitted a tribunal could reasonably conclude that the student no longer posed a risk of harm to anyone around him, but was merely being defiant, and that Richards' resort to physical force was unjustified, but instead constituted serious conduct of a substantial nature which rendered her unfit to teach. On the theory that students are taught by example as well as by instruction, Richards confronted a child who had recently used physical force on his own sister and applied physical force to that child, reinforcing in the child's mind the propriety of resorting to physical force to obtain one's objectives. The Tribunal was not instructed on this question, or on the legal standard announced by the Court of Appeals. Instead, the Trial Court and Court of Appeals have taken the issue away from the Tribunal by making findings of fact and substituting their judgment for the Tribunal on questions never even presented to the Tribunal.

The Education Professional Standards Board, in 16 KAR 1:020, has articulated conduct which renders a person unfit to teach, and has listed obligations owed to students, parents, and the education profession. A violation of this code of ethics can result in the revocation of a teacher's certificate, but under Richards argument and the holding of the Court of Appeals, many of these same violations would be insufficient to constitute conduct unbecoming a teacher. Certainly a breach of student or coworker confidentiality or making a disparaging comment about a student would not be deemed to be conduct of an

immoral nature or conduct of an equally serious nature. Nonetheless, it is submitted any violation of the teacher code of ethics is, *per se*, conduct unbecoming a teacher.

Richards repeatedly quotes KRS 161.180(1) for a conclusion unsupported by the statutory language. The statutory mandate is not merely to hold students to a strict account for their conduct. Instead, the mandate is for each teacher to hold students to a strict account for their conduct "in accordance with the rules, regulations, and bylaws" adopted by a board of education relating to conduct of pupils. (Emphasis added.) Richards does not articulate how her conduct toward the student was "in accordance with the rules, regulations, and bylaws" of the School District, but instead simply urges the Court to conclude that any conduct is satisfactory if it is not intended to harm a student, does not harm the student, and is intended to ameliorate student misconduct. This is not what KRS 161.180 says or means, and this Court should not be led astray by Richards' repeated improper reliance on the "strict account" language in the statute. Moreover, the Tribunal made no findings of fact with regard to whether Richards' conduct was consistent with the rules, regulations, or bylaws of the School District, *e.g.*, the discipline code enacted pursuant to KRS 158.148(4).

Many of the cases relied upon by Richards either relate to other professions governed by different organic statutes, or arise in other states which have articulated their own standards for discipline of public employees, including teachers, and are therefore inapposite to the Court's determination of the correct meaning of KRS 161.790(1)(b). The cases relied upon by Richards interpreting "cause" and "legal cause" relate to statutes that authorize termination "for cause" without further articulating any standard, and thus are

inapposite to the Court's consideration of KRS 161.790 which expressly identify the categorical causes for discipline.

Richards places substantial weight on the case of *Kentucky Board of Nursing v. Ward*, 890 S.W.2d 641 (Ky.App. 1995). The Court is urged to confine *Ward* to its facts and to the statute at issue therein. First, *Ward* did not involve whether the employer could penalize the employee for certain conduct, but involved whether the State licensing agency could take action on the individual's certificate. Additionally, the Court found the nurse's conduct, viewed in light of all the surrounding circumstances, to be consistent with the duty owed to the patient, *i.e.*, to prevent the patient from injuring himself. Richards was indeed obligated to supervise student conduct. But her poor judgment in choosing the means to accomplish this end did not serve the benefit of the student at issue, but instead exposed him to a risk of harm. His conduct could as easily have been addressed by the filing of a disciplinary referral, rather than by physically wrestling him down the hallway. The facts and law at issue in the *Ward* case are completely inapposite to the matter herein. Nurse Ward's need to get a patient's attention with regard to the risk he posed to his own welfare simply bears no relation to Richards' decision to use physical force to gain a student's attention when the student's verbal defiance was not found by the Tribunal to pose any risk to the physical welfare of himself or others. That is, Richards' actions exposed the student to a greater risk of harm than his own conduct. The Tribunal properly found this to constitute poor judgment warranting the "attention getting" discipline of a suspension without pay.

Richards argues that KRS 161.790(1)(b) perhaps should be interpreted such that "immoral" is the modifier of both "character" and "conduct" even though this argument

was not made below. In support of this argument, Richards suggests that "immoral character," standing as a lone charge, would be unconstitutionally vague or unenforceable. In making this argument, Richards implicitly attacks the holding of this Court in *Board of Education v. Wood*, 717 S.W.2d 837 (Ky. 1986). This Court's unanimous conclusion in *Wood* was that "the contracts of tenured teachers may be terminated for conduct unbecoming a teacher or immoral conduct . . .." By Richards' reasoning, this Court altered the meaning of KRS 161.790(1)(b) by reversing the order of these statutory phrases. Moreover, Richards' argument that "immoral character" cannot be intended to be a stand-alone standard for discipline constitutes an implicit attack on the viability of countless statutes: KRS 161.120(1)(c) (authorizing the Education Professional Standards Board to take disciplinary action relating to a teacher for "immoral conduct"); KRS 164.230 (authorizing the removal of a president, professor, or teacher at a public university for "immoral conduct"); KRS 164.360 (authorizing the removal of a president or faculty member of the Kentucky Community and Technical College System for "immoral conduct"); KRS 164.370 (authorizing suspension or expulsion of public college students for "immoral conduct"); KRS 309.362(1)(e) (authorizing the Kentucky Board of Licensure for Massage Therapy to take disciplinary action relating to a massage therapist for engaging in "immoral conduct" with a patient); KRS 317B.045(1)(f) (authorizing the Kentucky Board of Hairdressers and Cosmetologists to take disciplinary action relating to an esthetician for "immoral conduct"); KRS 319C.110(2)(c) (authorizing the Kentucky Applied Behavior Analysis Licensing Board to take disciplinary action relating to a licensee for "immoral conduct"); KRS 327.070(2)(c) (authorizing the Board of Physical Therapy to take disciplinary action relating to a physical

therapist for "immoral conduct"); as well as statutes too numerous to list which define eligibility for government appointment or employment or licensure to include being of good "moral character."

Richards' plea for the Court to apply the theory of *noscitur a sociis* is inappropriate in the present case, as there is no unclear word or phrase to be interpreted. In interpreting a statute, the Court is asked to first identify the clear meaning of the statute, and only resort to such tools if a clear meaning cannot be discerned from the language used by the General Assembly. Thus, the Court must first conclude that "conduct unbecoming a teacher" is unclear before resorting to neighboring words to imply a meaning not revealed by the phrase itself. The School District's argument regarding statutory history is intended solely to demonstrate that immorality and misconduct were deemed to be separate charges, and that there is no reason to interpret the change of these terms to "immoral character" and "conduct unbecoming a teacher," respectively, as intending to cause one phrase to inform or alter the meaning of the other phrase.

Richards, understanding that this Court might well conclude that the Trial Court and Court of Appeals misconstrued the statute and exceeded the scope of their review of the administrative decision, argues that the penalty imposed by the Tribunal was excessive. In support of this contention, Richards cites *City of Louisville v. Milligan*, 798 S.W.2d 454 (Ky. 1990). *Milligan*, however, does not stand for the principle that a reviewing court can reduce the sanction imposed by an administrative agency, but instead holds that the administrative agency may reduce the employer's recommended penalty if the agency finds the employer's recommended penalty to be disproportionate. The Tribunal below has already

done so by reducing Richards' punishment from termination to a suspension without pay. The Board has not appealed this reduction. There is no standard by which this Court may adjudge whether the duration of Richards' punishment is in proportion to the conduct in which she engaged. Richards has not suggested to this Court any rubric by which a determination could be made that a suspension of some length less than 16 months would be more appropriate to her misconduct than the penalty imposed. Certainly the penalty imposed on Richards was shorter than that imposed on the teacher in *Cobb*, *supra*, whose unbecoming conduct consisted solely of a single instance of possessing a gun in her glove compartment on school property, where no students were exposed to any immediate risk of harm. Richards' conduct did expose a student to an immediate risk of harm, even if no harm was intended and no harm resulted. There is simply no legal basis for this Court to determine that Richards' conduct directed at an elementary school student was some degree less egregious than that of the teacher in *Cobb* which had no direct impact on students, or even some degree less egregious than the conduct of the teachers in other cases relied upon by Richards which also had no direct impact on students but which was found to warrant termination.

CONCLUSION

For the reasons set forth above, and in the Appellants' principal brief, the decision of the Court of Appeals and the Trial Court must be reversed and the Final Order of the Tribunal must be reinstated.

Respectfully submitted,

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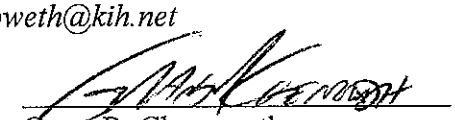
BY: 
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