COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2009-SC-000021

CARA SAJKO — APPELLANT

V.

Appeal from the Court of Appeals
Case No. 2007-CA-000128-MR
AND
Case No. 2007-CA-000130-MR

JEFFERSON COUNTY BOARD OF EDUCATION; JEFFERSON COUNTY SCHOOLS; AND STEPHEN DAESCHNER, SUPERINTENDENT — APPELLEES

BRIEF FOR APPELLANT, CARA SAJKO

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby that the original and ten (10) copies were hand-delivered to the Kentucky Supreme Court and true and accurate copies of the foregoing were served upon the following via U.S. Mail, postage prepaid: Byron E. Leet, Wyatt, Tarrant & Combs, LLP, 2500 PNC Plaza, 500 W. Jefferson Street, Louisville, Kentucky 40202; W. Douglas Kemper, Judge, Jefferson Circuit Court, 7th Fl. Judicial Center, 700 W. Jefferson Street, Louisville, Kentucky 40202; and Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601 on June 12, 2009.

COUNSEL FOR APPELLANT

INTRODUCTION

This is an appeal of a decision by the Court of Appeals affirming termination of a teacher pursuant to KRS 161.790.

STATEMENT CONCERNING ORAL ARGUMENT

Sajko requests an oral argument in this matter. Given the novel legal issues involved, and a complex factual and procedural history, Sajko believes oral argument will assist the Court in reaching a decision.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

By letter dated March 28, 2005, the school system through Superintendent Stephen Daeschner ("Daeschner") indicated its intent to terminate Sajko's employment. (Transcript of Record for Civil Action No. 05-CI-9088 ("TR") 66-72, Letter of March 28, 2005, from Daeschner to Sajko ("Termination Letter"), attached hereto at Appendix 1.) The Termination Letter charged Sajko with insubordination and conduct unbecoming a teacher as provided in KRS 161.790(1)(a) and (b) respectively. A series of incidents, dating as much as seventeen months prior to the date of the Termination Letter, were set forth in the Termination Letter as support for the charges against Sajko. A careful examination of when the incidents allegedly supporting the conduct occurred, when and what the punishment was for each incident, and what conduct may support the charges in the Termination Letter is required to properly address the issues in this appeal. Paragraph (1) of the Termination Letter states that Sajko failed to follow instructions to provide progress reports on 75 of her students as requested by Louisville Male Traditional High School ("Male") personnel. The specific progress reports at issue were first requested of Sajko by Male freshman counselor Dianne Meredith on October 20 or 21, 2003. Sajko received a reprimand for this alleged act of insubordination by letter dated November 20, 2003 ("First Reprimand"). (Termination Letter, Appendix 1.) The First Reprimand was sent to Sajko, Sajko's supervisor, and placed in Sajko's personnel file.

Paragraph (2) of the Termination Letter states that, in response to parent complaints received by the school system on or about October 21, 2003, Sajko was instructed not to throw students' work in the trash when the homework contained a

mistake. *There is no assertion in the Termination Letter that Sajko ever failed to adhere to this directive.* (Termination Letter, Appendix 1.)

During November, 2003, according to paragraph (3) of the Termination Letter, Male Principal David E. Wilson ("Wilson") instructed Sajko to remove questions pertaining to certain topics from a test she planned to give. The Termination Letter asserts that Sajko did not appropriately adjust the test questions, and Sajko received a reprimand for this alleged act of insubordination by letter dated November 20, 2003 (the "Second Reprimand"). The Second Reprimand was also sent to Sajko's supervisor and placed in Sajko's personnel file.

The fourth paragraph of the Termination Letter involves the alleged failure of Sajko to provide Wilson with a particular student's folder by the end of the day on November 19, 2003, after having been instructed to do so. (Termination Letter, Appendix 1 at paragraph (4).) Sajko was then given a letter, also dated November 20, 2003, formally reprimanding her for this alleged act of insubordination (the "Third Reprimand"). As with the first two reprimands, this Third Reprimand was also sent to Sajko's supervisor and placed in her personnel file.

Continuing to the next occurrence alleged to support the charges against Sajko, paragraph (5) of the Termination Letter states that Sajko failed to adequately follow a December 5, 2003, directive requiring her to submit written changes to her classroom procedures. As with the previous occurrences, a reprimand was issued to Sajko for this alleged act of insubordination by letter dated December 17, 2003 (the "Fourth Reprimand"). This Fourth Reprimand was likewise sent to Sajko's supervisor and placed in her personnel file.

The next occurrence is discussed in paragraph (5)C. of the Termination Letter. In that paragraph it was alleged that Sajko's "actions indicated a lack of responsiveness to" the December 5, 2003 directive in that she "berated one of [her] students in front of other students." (Id.) Sajko was suspended for five days without pay for this action by letter dated January 22, 2004 (the "First Suspension"). The letter informing Sajko of this suspension was placed in her personnel file and distributed to her supervisor.

Paragraph (5)D. of the Termination Letter discusses events of December 14, 2004, in which Sajko dropped a book beside a student who was not sitting up and whacked a tabletop beside him. The Termination Letter states that this behavior indicated a "lack of responsiveness" to the December 5, 2003, directive. Also addressed in paragraph (5)D. is an alleged statement by Sajko on December 15, 2004 that she continued to deduct academic points for procedural reasons and allegedly contrary to the December 5, 2003 directive. Finally, paragraph (5)D. discusses an occurrence in which Sajko rummaged through a student's books and folders on his desk after the student had been touching items on Sajko's desk. This last occurrence is characterized as "unprofessional behavior towards a student." All of the incidents discussed in paragraph (5)D. were cited as the basis for a five day suspension without pay that Sajko was notified of by letter dated December 15, 2004 (the "Second Suspension"). The letter informing Sajko of her Second Suspension was also placed in her personnel file and distributed to her supervisor.

Finally, the Termination Letter discusses a direction to Sajko on January 11, 2005, to attend an "occupational evaluation" arranged by the school district following the end of the Second Suspension. Sajko refused to attend the occupational evaluation and

because of this refusal received a letter on January 27, 2005, suspending her without pay pending recommendation of the termination of her teaching contract. *Sajko's refusal to attend the occupational evaluation is the only instance of potential insubordination mentioned in the Termination Letter after the date of the Second Suspension.*

Sajko timely exercised her right to contest the charges in the letter pursuant to KRS 161.790. See Tribunal Hearing Transcript at 1909-10. An eight day evidentiary hearing was conducted between May and September, 2005, resulting in the Final Order of the Tribunal dated September 22, 2005. (TR 73-85, Final Order of the Tribunal (the "Final Order"), attached hereto as Appendix 2). In the Final Order, the Tribunal upheld Sajko's termination, though on more limited grounds than charged by the Superintendent. Specifically, "the Tribunal unanimously conclude[d that] Cara Sajko was *not guilty of conduct unbecoming a teacher*" (Final Order, Appendix 2 at paragraph 5 (emphasis added)) and unanimously concluded "that the Schools lacked authority to order Ms. Sajko to an occupational evaluation (Final Order, Appendix 2 at paragraph 6). The *only* charge on which the Tribunal found Sajko guilty was insubordination. However, the reasons stated for doing so are vague, based on inadmissible evidence, and/or based on incidents for which Sajko had *already received punishment.*

Both parties timely appealed the Final Order to the Jefferson Circuit Court pursuant to KRS 161.790(9), the actions were consolidated, and the Jefferson Circuit Court upheld the Final Order in all respects. (TR 150-56, Opinion and Order (the "Circuit Court Order"), attached hereto as Appendix 3.) Subsequently, Sajko filed her Notice of Appeal to the Court of Appeals on January, 16, 2007 (TR 204-05), and the school system filed its Notice of Cross-Appeal on the same date (TR 206-07). The Court

of Appeals issued an Opinion Affirming the decision of the Jefferson Circuit Court, but on different grounds. (Opinion Affirming, attached hereto as Appendix 4.) The Opinion Affirming held that that Tribunal did not have jurisdiction to hear Sajko's appeal because the superintendent and the commissioner of education did not "receive" Sajko's notice of intention to answer the charges within the time period required by KRS 161.790(3). In order to reach this conclusion, the Court of Appeals made an impermissible finding of fact as to when Sajko received the notice of charges.

Sajko then filed a Motion to Reconsider. The Court of Appeals modified its Opinion in certain respects, but left its flawed reasoning intact. (Opinion Modifying and Reversing, (the "Modified Opinion") attached hereto as Appendix 5.) Sajko timely filed a Petition for Discretionary Review with this Court, which was granted on April 15, 2009.

The Final Order of the Tribunal was fatally flawed because the hearing officer allowed in prejudicial evidence of actions that were not part of the charges against Sajko and which he had previously ruled inadmissible, because Sajko's termination is the second instance of punishment against Sajko for exactly the same conduct, and because the finding of insubordination by the Tribunal and the Circuit Court was based on charges Sajko was not charged with in the Termination Letter. Accordingly, the decisions of the Tribunal, the Jefferson Circuit Court and the Court of Appeals should be reversed.

ARGUMENT

I. INTRODUCTION

The Court of Appeals, in its Modified Opinion (Appendix 5), held that the Tribunal did not have jurisdiction to hear Sajko's appeal. By basing its decision on that ground, the Court of Appeals did not reach any of the other substantive bases for reversal raised by Sajko. All of the reasons for reversal urged by Sajko are likely to recur upon the rehearing of this matter. They consist of the improper admission of evidence that likely will be sought to be admitted again and attacks on the ability of the Schools to bring certain charges against Sajko at all. Since these issues are likely to recur on rehearing of this matter, and because it is in the interest of judicial economy, this Court should address the substantive arguments raised by Sajko in the Court of Appeals. See e.g., Ice v. Com., 667 S.W.2d 671, 680 (Ky. 1984) ("Since we have reversed this case for the reasons previously given, we will not discuss the other points raised by appellant inasmuch as they are unlikely to recur on retrial of this case."); Terry v. Com., 153 S.W.3d 794, 797 (Ky. 2005) ("We will also address other issues that are likely to recur upon retrial."). Those arguments, in a slightly revised form to that presented to the Court of Appeals, appear in this Brief in Sections IV-V.

II. THE COURT OF APPEALS' MODIFIED ORDER MUST BE REVERSED BECAUSE IT WAS BASED ON AN IMPROPER FINDING OF FACT THAT THE COURT OF APPEALS DID NOT HAVE THE AUTHORITY TO MAKE.

A. The Court of Appeals, when acting as an appellate court, cannot make findings of fact in the face of disputed evidence.

The Court of Appeals, in the face of disputed evidence, made a finding of fact which was never reached below in the administrative proceeding, and then based its decision on

that factual finding. The Court of Appeals' decision (to be published) violates the "settled principle that the fact-finder in an administrative proceeding . . . rather than the reviewing court has the sole discretion 'to determine the quality, character and substance of the evidence[.]'" New v. Commonwealth, 156 S.W.3d 769, 773 (Ky. App. 2005) (quoting Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418, 419 (Ky. 1985)). The New court continues, noting that "[t]he fact-finder 'has *the sole authority* to judge the weight, credibility and inferences to be drawn from the record.'" Id. (emphasis added) (quoting Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329, 331 (Ky. 1997)); see also, e.g., Hibbard v. Astrue, 537 F.Supp.2d 867, 871-72 (E.D. Ky. 2008) ("Further, when reviewing the ALJ's decision, the Court cannot review the case de novo, resolve conflicts in the evidence, or decide questions of credibility."); Maryland Sec. Com'r v. U.S. Sec. Corp., 716 A.2d 290, 296-97 (Md. App. 1998) ("A reviewing court may not make its own findings of fact, or supply factual findings that were not made by the agency."). This concept is echoed in KRS 161.790 where it addresses the standard of review on appeal of the decision of a Tribunal: "the Tribunal shall be the ultimate trier of fact." KRS 161.790(6).

It is in this context that the Court of Appeals made an improper factual determination that Sajko received the Termination Letter on March 28, 2005. The disputed nature of the evidence as to when Sajko received the notice is clear: i) Sajko testified that she did not receive the notice until March 29, 2005 (Tribunal Hearing Transcript at 1909-10]); ii) other testimony indicates that Sajko received the notice on March 28, 2005 (Tribunal Hearing Transcript at Vol. 5, 1343-44); and iii) the Tribunal did not make a finding regarding the date when Sajko received notice of the charges (Final Order, Appendix 2). As the ultimate trier of fact, only the tribunal appointed pursuant to KRS 161.790 could find this fact one

way or the other. KRS 161.790(6). Finding this fact required determining the quality, character, and substance of the evidence, and is therefore not the proper role of an appellate court. New, 156 S.W.3d at 773.

The Court of Appeals misleadingly suggests in its Modified Opinion that there is no legitimate factual dispute regarding the date of service of the termination letter upon Sajko. (Modified Opinion, Appendix 5 at 5 n.3.) However, the Court of Appeals itself acknowledged the dispute in its initial Opinion: "Although Sajko *denies receiving* the notice on March 28, 2005, the school system *employees* as well as Sajko's union representative *testified that she received it* on that date." (Modified Opinion, Appendix 5 at 3) The Modified Opinion also refers to Sajko's failure in the initial briefing to provide a record cite for her denial of receipt of the notice, implying no such evidence exists. First, Sajko's failure to provide a record cite initially was based upon the undisputed state of the evidence—the schools contended that Sajko received the notice on the 28th and Sajko consistently maintained she received it on the 29th. There was no need for "further argument" on the matter as suggested by the Court of Appeals. There was never a contention by the schools that Sajko had testified differently. In other words, there is no basis for the Court of Appeals to assume Sajko did not testify that she received her letter on the 29th. Rather, the Schools acknowledged (if not agreed with) Sajko's denial throughout the course of the proceedings, and therefore it was enough for Sajko to simply state her denial. Second, and more importantly, even if Sajko can be faulted for failing to cite to the record in the initial briefing, any such error was corrected in Sajko's Petition for Rehearing, wherein Sajko's testimony on the issue was referenced.

B. The Jefferson Circuit Court did not have the authority to make a factual determination on the face of disputed evidence as to when notice was received, and therefore, the Court of Appeals could not rely on the Jefferson Circuit Court's improper factual finding.

The Court of Appeals also attempted to rely upon the Circuit Court's finding regarding the date Sajko received the charges to support its own improper factual decision. (Modified Opinion, Appendix 5 at 5 n.3.) However, in reviewing an appeal of an administrative decision the Circuit Court has no more authority to make an initial finding of fact than does the Court of Appeals. As a result, an improperly made factual finding by the Circuit Court does not permit the Court of Appeals to adopt the same finding. The Court of Appeals' Modified Opinion should be reversed.

III. THE COURT OF APPEALS ERRED IN ITS INTERPRETATION OF THE NOTICE REQUIREMENTS CONTAINED IN KRS 161.790

A. The Tribunal had jurisdiction to hear Sajko's defense because Sajko provided the notice required by KRS 161.790(3).

Sajko denies actually receiving the Schools' termination letter on March 28, 2005. See Tribunal Hearing Transcript at 1909-10. However, even if the Tribunal had determined that the 28th was the date of receipt, she still provided the notice required by KRS 161.790(3). The relevant portions of KRS 161.790 state:

> (3) No contract shall be terminated except upon notification of the board by the superintendent. Prior to notification of the board, the superintendent shall *furnish the teacher with a written statement* specifying in detail the charge against the teacher. The teacher may within ten (10) days after *receiving* the charge *notify the commissioner of education and the superintendent of his intention to answer the charge*, and upon failure of the teacher *to give notice* within ten (10) days, the dismissal shall be final.
>
> (4) Upon *receiving the teacher's notice* of his intention to answer the charge, the commissioner of education shall appoint a three (3) member tribunal. . . . The hearing shall begin no later

than forty-five (45) days after the teacher *files the notice of intent* to answer the charge.

KRS 161.790(3)-(4) (emphasis added). The parties agree that April 7 is the tenth day after March 28 for purposes of the statute.

KRS 161.790(3) sets the limitations period for a school teacher to respond to charges against him or her. "Statutes of limitation in general are designed to bar stale claims arising out of transactions or occurrences which took place in the distant past[,]" and KRS 161.790(3) is no different in that respect. Commonwealth v. Ky. Ins. Guar. Ass'n, 972 S.W.2d 276, 280 (Ky. App. 1997). "Although the previous rule in Kentucky was that statutes of limitations should be strictly construed, KRS 446.080 provides that '[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature.'" Plaza Bottle Shop, Inc. v. Al Torstrick Ins. Agency, Inc., 712 S.W.2d 349, 351 (Ky. App. 1986) (internal citations omitted). It is a very harsh result, which is not in keeping with the overall protections offered teachers under KRS 161.790, to bar a teacher's right to appeal charges against him or her where, as here, the teacher certified and mailed the required notice within the statutory window, but the required notice was not actually received until one day after that period ended.

i. Even if the Schools' date for Sajko's receipt of the notice is accepted, Sajko provided constructive notice of her intention to answer within the statutory 10 day window.

The notice Sajko provided accomplished its true purpose of placing the parties in interest on notice, within the ten day window, of her intent to answer the charges. Counsel for the Schools received the letter giving notice of Sajko's intent to answer the charges on April 7. This notice constitutes constructive notice to Superintendent Daeschner. Notice to

Daeschner and to the attorney for the Schools is the notice for which timeliness matters most in the present case. Timely notice to the Schools is the party required so that it may begin preparing its formal case to present to a tribunal. In contrast, the commissioner of education merely appoints a three member tribunal "[u]pon *receiving* the teacher's notice of his intention to answer the charge." KRS 161.790(4) (emphasis added). A delay of a few hours, or even a few days (which is not the situation here), in actual receipt of the notice by the commissioner of education will not prejudice any of the parties to this proceeding. The Schools received, at a minimum, constructive notice of Sajko's intent to answer the charges *within the ten day period.* Thus, the Schools could begin preparing its case and was not prejudiced by any alleged defect in the notice provided.

ii. Even if the Schools' date for Sajko's receipt of the notice is accepted, the notice provided by Sajko also complies with requirements of KRS 161.790(3).

Sajko's action of certifying and mailing the letters to Daeschner and to the commissioner of education satisfies the notice requirement in KRS 161.790(3). KRS 161.790(3) is satisfied when notice is *placed in the mail.* KRS 161.790(3) does not specify the type of notice that the teacher must provide within the ten day period. "Where the statute does not prescribe the character of the notice, some sort of reasonable notice must be given." Thomson v. Tafel, 218 S.W.2d 977, 981 (Ky. 1949). A letter, sent by certified mail during the 10 day window, and stating a teacher's intention to answer charges is "reasonable notice." As the hearing officer held, and the Jefferson Circuit Court affirmed, that the method of serving notice on the commissioner of education was sufficient under KRS 161.790(3).

The language of KRS 161.790 strongly supports the determination that Sajko

complied with the notice requirements of KRS 161.790(3). As a preliminary matter, it is important to note that KRS 446.130 states that "[t]he Kentucky Revised Statutes of 1942 are intended to speak for themselves." It is within this context that one should examine the precise language used in KRS 161.790. KRS 161.790(3) uses the words "notify" and "give notice" when stating what a teacher's obligations are regarding notice in answering charges against him or her. This language indicates something different from the words used in KRS 161.790(4): "upon *receiving* the teacher's notice" and "after the teacher *files* the notice of intent to answer the charge." KRS 161.790(4) (emphasis added). KRS 161.790(4) is clearly phrased to refer to a time *after* notice has been actually *received* by the commissioner of education and/or the superintendent.

This distinction is not made in KRS 161.790(3). Rather, KRS 161.790(3) does not require that notice be *received* by the commissioner or superintendent during the ten day period, saying only that the teacher must "notify" and/or "give notice." KRS 161.790(3). This language indicates that something less than actual receipt of notice during the ten day time period will satisfy KRS 161.790(3). Sajko's mailing of the certified letters to the commissioner of education and to Daeschner on April 7 satisfies the requirement of KRS 161.790(3) for her to "give notice."

Caselaw from a number of other jurisdictions recognizes a situation in which notice is achieved when the written notice is *placed in the mail*. See, e.g., Ford v. Genereux, 87 P.2d 749 (Colo. 1939); Wasden v. Foell, 117 P.2d 465 (Idaho 1941); Davis v. Mosely, 55 S.E.2d 329 (N.C. 1949). Admittedly, these cases are factually different from the case at bar in that each involves a statute where notice is specifically authorized to be sent by registered mail. While KRS 161.790(3) does not specifically authorize notice by registered mail,

neither does it prohibit, or otherwise specify, any particular manner by which notice may be accomplished. Again, "[w]here the statute does not prescribe the character of the notice, some sort of reasonable notice must be given." Tafel, 218 S.W.2d at 981. The notice provided by Sajko is reasonable and should be held effective from the time that the letters were certified and placed in the mail.

The Schools argued below that notice by mail is only effective when it is received and not when it is mailed, citing to Baldwin v. Fidelity Phoenix Fire Insurance Company of New York, 260 F.2d 951 (6th Cir. 1958) and to Energy Regulatory Commission v. Kentucky Power Company, 605 S.W.2d 47 (Ky. App. 1980). The Court of Appeals blithely adopted these cases to support its conclusion, cherry-picking quotes, but failing to provide any analysis as to the relevancy of Energy Regulatory Commission and Baldwin to the issues involved here. On the surface, Baldwin appears to support flat application of the rule urged by the Schools. However, closer inspection reveals key differences between Baldwin and the present case.

For instance, Baldwin interpreted the notice requirements of an automobile insurance policy; specifically, the notice that a policyholder is required to give the insurance company when an accident occurs. Baldwin discusses the meaning of "giving" notice in the insurance context. "Contract terms such as 'giving' and 'mailing' notice are well established in insurance law." Pence Mortgage Co. v. Stokes, 559 S.W.2d 500, 506 (Ky. App. 1977). Baldwin was interpreted in light of these specialized meanings as evidenced by statements like, "the term 'written notice shall be given' carries with it the implication of receipt or delivery." Baldwin, 260 F.2d at 953. The instant case involves interpretation of KRS 161.790—application of rules of construction for specialized insurance contracts has no

place in its interpretation.

The rule in Baldwin, that notice is complete on receipt of a letter rather than on mailing, is also not applicable to this case because the purposes underlying the notice requirement in Baldwin and in the case at bar are so different. In Baldwin, the requirement of notice from the policyholder to the insurer of when an automobile accident occurs is interpreted very strictly because the insurer needs to act quickly "to investigate the accident, to secure witness [sic] while the accident is fresh in their minds, and to make ready to defend the case." Baldwin, 260 F.2d at 954. The need to quickly secure evidence makes time much more of the essence in the automobile insurance context than it is in the present case. The reasons supporting a strict interpretation of notice requirements, using rules of construction specific to insurance contracts, as seen in Baldwin simply do not exist when interpreting the notice requirement in KRS 161.790(3).

Energy Regulatory Commission is likewise inapplicable to the case at bar because it is based on the same reasoning as that contained in Baldwin and because the notice statute at issue in it must be interpreted under a different analytic framework than KRS 161.790(3). Energy Regulatory Commission involved Kentucky Power Company's appeal from a decision of the Public Service Commission ("PSC") and whether the notice given by Kentucky Power Company to other parties to the proceeding was adequate under KRS 278.410(1). The notice requirements in KRS 278.410(1) typically apply to sophisticated business entities, Kentucky Power Company for instance, and must be complied with before these business entities may appeal to protect their rights. On the other hand, KRS 161.790(3) will always involve the notice required of a school teacher who has received some charge from the school board. The case at bar involves a school teacher with no legal

training who did not retain the lawyer who represented her at the tribunal hearing until April 6, 2005. Equity requires a different interpretation of what constitutes adequate notice where a school teacher is trying to protect his or her rights as opposed to where a sophisticated business entity is trying to protect its rights.

There is *no Kentucky case law* interpreting the method by which notice must be provided under KRS 161.790. The language used in KRS 161.790 draws distinction between "receiving" notice and simply "providing" notice. A teacher sending notice of her intention to answer charges against her by certified mail within the time period allotted in KRS 161.790(3) is reasonable notice under the circumstances. None of the parties are prejudiced by this result, Sajko did not sit on her rights, and Sajko was entitled to the opportunity to answer the charges against her. The Court of Appeals applied too strict a standard, which is not supported by KRS 161.790(3) in requiring notice to be *received* within the ten day period and the Modified Opinion of the Court of Appeals should be reversed.

B. KRS 161.790(3) should not be interpreted to require personal service on the superintendent and the education commissioner.

The precedent established by the Court of Appeals' Modified Opinion would negatively, and clandestinely, affect thousands of public school teachers in the Commonwealth. There is no requirement in KRS 161.790(3) which tells a teacher such notice is required. Although the Court of Appeals' Modified Opinion states that it does "not imply that there must be personal service on the superintendent and the commissioner" under KRS 161.790(3), the Modified Opinion leaves teachers with few alternatives to guarantee that they will not be denied their right to contest disciplinary action against them. (Modified

Opinion, Appendix 5 at 6 n.4)

The Modified Opinion's cursory discussion on this issue simply states: "As neither the superintendent nor the commissioner *received* Sajko's letter notifying them of her intent within ten days of her receipt of the superintendent's letter, Sajko failed to strictly comply with the notice requirements of the statute." Id. In order to reach this conclusion, the Court of Appeals first had to make an impermissible finding of fact regarding when Sajko received the superintendent's letter, as discussed supra. Next, the Court of Appeals also had to accept the proposition that "notice" is accomplished on "receipt" rather than "sending" as stated in two cases that are inapplicable to the issue involved here, Baldwin and Energy Regulatory Commission. Through these contortions, the Court of Appeals ended up holding that KRS 161.790(3) requires the appropriate superintendent and the commissioner of education to "receive" (meaning *actual* receipt) a teacher's notice of intent to contest charges within the statutory ten-day period. See Id., at 5-6.

The Court of Appeals' Modified Opinion creates uncertainty in the law that only harms teachers across the state. Based on the Court of Appeals' Modified Opinion, a teacher who receives a charging letter from a superintendent will have to make sure that both the superintendent and the commissioner of education actually received the notice to contest within the ten-day window. Based on the Court of Appeals' Modified Opinion, it is certain that receipt by the superintendent and commissioner means more than certifying and mailing a notice to contest to each of them. But what exactly does "receipt" require? A series of examples will serve to illustrate the dilemma faced by a teacher attempting to respond to charges in the wake of the Modified Opinion:

1) Teacher A receives the notice of charges and, on the tenth day at 5:01 p.m.,

sends a notice of intention to answer to both the superintendent and the commissioner via facsimile. Teacher A receives a confirmation showing that her facsimile was successful. However, Teacher A has no guarantee that the superintendent and/or commissioner will actually receive her faxed letter within the statutory window, even though their offices did. After all, the superintendent and/or commissioner might be on a two-week vacation. Suppose as well that everyone left both offices at 5:00 p.m.—was the notice "received" on the tenth day? Further, was the notice "received" on the tenth day since it arrived after normal business hours?

2) On the seventh day after receiving the notice of charges, Teacher B certifies and mails a notice of intention to answer from within the state to both the superintendent and the commissioner. In this example the teacher has a reliable approximation regarding when the mail will be delivered. However, if a problem arose with delivery, the teacher would not know until it was too late. Further, just as in the first example, there is no guarantee that the superintendent and/or commissioner would be in the office to receive the notice during the statutory window.

3) Teacher C receives the notice of charges and, on the tenth day after receiving the notice of charges, hires the local constable to personally serve her notice of intention to answer on both the superintendent and the commissioner. The constable successfully serves both.

Teacher C is the only one of these three who can be certain that her rights are preserved.

By simply stating that undefined "receipt" by the superintendent and the commissioner is required, the Court of Appeals would force teachers to attempt personal service so as not to lose their appeal rights. A teacher choosing to provide notice in some manner other than personal service risks losing her appeal rights and invites counsel for the schools to challenge any potential doubt regarding the superintendent and/or the commissioner "receiving" the notice during the statutory period. As demonstrated by the present action, this concern is not simply academic.

Teachers will incur unnecessary expense attempting to exercise their statutory rights if they must resort to personal service on the superintendent and the commissioner. Surely, this is not the result intended by the legislature or, admittedly, by the Court of Appeals. From a practitioner's perspective, there is no other option. The decision of the

Court of Appeals must be reversed, or at a minimum, modified to avoid imposing unnecessary burdens on our state's teachers in the exercise of their statutory rights.

IV. THE JEFFERSON CIRCUIT COURT'S FINDING OF INSUBORDINATION WAS ERRONEOUSLY BASED ON IMPROPERLY ADMITTED EVIDENCE.

A. Sajko was not charged with insubordination for throwing students' work away.

Absent from the termination letter to Sajko is any allegation that Sajko threw students' work away after she was given an oral directive from Assistant Principal Todd Barber ("Barber") on November 5, 2003, instructing her "to cease and desist from [throwing away students' work] or any other practices that are prohibited under students' rights to freedom from abuse." (Termination Letter, Appendix 1) In fact, during the Tribunal Hearing, counsel for the Schools admitted that Charge 2 in the Termination Letter, the only charge which mentions throwing away student work, was solely addressed to a charge of conduct unbecoming a teacher, and *not* insubordination. (Transcript of Tribunal Hearing, Vol. I at 47-48) Therefore, this evidence was improperly relied on to support a finding of insubordination.

B. Sajko did not receive *any* notice of a charge alleging that she threw away student work *after* receiving the November 5, 2003, directive from Barber.

The Termination Letter states that, on October 21, 2003, parents of two students complained about Sajko throwing away student work. (Termination Letter, Appendix 1at Charge 2) This is the *only* mention in the Termination Letter of Sajko throwing away student work. (Termination Letter, Appendix 1). When the Tribunal Hearing started, Sajko did not know that the Schools planned to present evidence that she threw away student work after November 5, 2003. She did not know the identity of the witnesses who would be used

to put on this evidence, what the witnesses claimed they saw, or when they claimed they saw it. (Transcript, Vol. III at 490-91) As a result, Sajko did not have a fair opportunity to prepare an adequate defense to such allegations.

The notice provided to Sajko regarding the post-November 5, 2003 incidents of throwing away student work was nonexistent, and therefore inadequate. KRS 13B.050(1)(3)(d), requires the following concerning notice of charges:

> (3) The notice required by this section shall be in plain language and shall include:
>
> > (d) A statement of the factual basis for the agency action along with a statement of issues involved, in sufficient detail to give the parties reasonable opportunity to prepare evidence and argument.

Sajko did not have an opportunity to prepare evidence and argument regarding the alleged additional incidents of throwing away student work because the Schools provided zero factual basis regarding that charge, much less an indication that the charge was even being considered.

In the courts below, the Schools relied heavily on Mavis v. Board of Education of the Owensboro Independent School District, 563 S.W.2d 738 (Ky. App. 1977) in their efforts to show that the notice provided to Sajko of this phantom insubordination charge was adequate. However, Mavis demonstrates just how deficient the notice to Sajko was. In Mavis, a tenured teacher had his contract terminated based on charges of insubordination and conduct unbecoming a teacher. The teacher did not raise an issue regarding the adequacy of the notice of the charges at the time of the hearing, but did raise that issue on appeal. Regarding the specificity of the charges, the Mavis court stated that "[b]oth charges were spelled out in more detail with statements furnished to appellant of

witnesses to be called by the Board and the substance of what they would testify." Mavis, 563 S.W.2d at 739. The teacher in Mavis argued unsuccessfully that he did not realize a directive against corporal punishment given while he taught at one school in the district continued to apply after he was transferred to a different school in the district. See id.

Aside from a notice issue, there is no analogy between Mavis and the present case. Sajko was provided with sufficient detail in the notice of some of the charges against her, but was not provided with *any* notice concerning the charge of throwing away student work following November 5, 2003. The Mavis court found that the information provided to the teacher and the charges "were adequate to meet the requirements of KRS 161.790(3) and were also sufficiently specific as to inform him of the acts which he had to defend against." Id. Sajko was not afforded the same luxury. As in Blackburn, Sajko "was not told the names, dates, occurrences, or other data upon" which the unwritten, phantom charge of insubordination was based. Blackburn v. Bd. of Educ., 564 S.W.2d 35, 37 (Ky. App. 1978).

C. The Hearing Officer erred by allowing into evidence for all purposes testimony that Sajko threw away student work subsequent to the November 5, 2003, directive.

On the second day of the Tribunal Hearing, T.M. gave testimony that he witnessed Sajko throw student work away after the November 5, 2003, directive was issued. (Transcript, Vol. II at 445) This testimony was elicited by the Schools on the day after the Hearing Officer ruled that such testimony would be inappropriate because Sajko had not received any notice of being charged with those actions. (Transcript, Vol. I at

260-62) Even subsequent to T.M.'s testimony being allowed into evidence, the Hearing Officer restated his ruling and specifically instructed counsel for the school system not to bring about any proof concerning allegations that Sajko threw away student work after November 5, 2003. (Transcript, Vol. III at 546, id. at 544-45)

The Hearing Officer erred by allowing T.M.'s testimony on this issue and then further by refusing to give the Tribunal members an admonishment regarding the testimony. It is a substantive requirement of KRS 13B.050 and the Court of Appeals' decision in Blackburn v. Board of Education, 563 S.W.2d 738 (Ky. App. 1978) that Sajko receive notice of the charges against her. She did not receive the required notice. Allowing T.M.'s testimony into evidence for all purposes had the effect of waiving this substantive notice requirement and is therefore reversible error.

D. The Tribunal's finding of insubordination should be reversed because it was influenced by and based in part on inadmissible evidence.

The Tribunal's entire finding of insubordination should be reversed because of the prejudice caused by the Hearing Officer's decision to allow T.M.'s testimony and the Tribunal's resulting reliance on that testimony.

The Tribunal based its finding of insubordination, at least in part, on the following finding of fact:

> On at least two occasions in the fall of 2004, Ms. Sajko threw students' homework in the trash for "procedural" errors. During the fall of 2004, Ms. Sajko also dropped a book on a table beside the head of a sleeping student to wake him up. These actions were violations of the November 5, 2003, directive to refrain from violating students' right to be free from abuse, and the December 5, 2003, directive to refrain from behavior that adversely affected the emotional needs of her students. Although these incidents were not significant breaches of good teaching practice, in the context of the ongoing situation, Ms. Sajko's actions

> constituted failure to follow directives her superiors had legitimately given her.

(Final Order of the Tribunal, Appendix 2 at paragraph 27). The only evidence about Sajko allegedly throwing away student work after she was told not to is the impermissible testimony of T.M. It is clear from the above-quoted finding that not only did T.M.'s testimony come into evidence for all purposes, but the Tribunal *specifically* relied upon it in finding against Sajko on the charge of insubordination.

"The scope of review of an administrative action requires that the decision be affirmed if there is substantial evidence of probative value to support the agency's factual findings and if it correctly applied the law to the facts." Competitive Auto Ramp Servs., Inc. v. Kentucky Unemployment Ins. Comm'n, 222 S.W.3d 249, 252 (Ky. App. 2007). The Tribunal failed to correctly apply the law to the facts with regard to its finding of insubordination. Specifically, as evidenced by its findings, the Tribunal found Sajko guilty of something she was not charged with: insubordination for throwing away student work after November 5, 2003. Further, the impermissible testimony from T.M. caused the Tribunal to assume that Sajko lied about when and how many times she threw away student work. This prejudicial inference colored the Tribunal's opinion of all other evidence in the case. As a result of the Hearing Officer's error in allowing T.M.'s testimony and the Tribunal's error in relying upon T.M's impermissible testimony to find Sajko guilty of an act of uncharged insubordination, the finding of insubordination must be reversed.

V. THE JEFFERSON CIRCUIT COURT ERRED IN UPHOLDING THE DECISION OF THE TRIBUNAL BECAUSE SAJKO WAS NOT FOUND INSUBORDINATE FOR REFUSING TO UNDERGO AN OCCUPATIONAL EVALUATION, AND THEREFORE THERE WAS NO VIOLATION WHICH TRIGGERED HER DISMISSAL OR FOR WHICH SHE HAD NOT ALREADY RECEIVED DISCIPLINE.

Following her second suspension, Sajko returned to teaching at Male High School on the morning of January 11, 2005. As of that morning, the school system had knowledge of every fact and event described in paragraphs 1-5 of the Termination Letter, and yet Sajko was allowed to return to work. As of January 11, 2005, the school system made the affirmative decision *not* to terminate Sajko for the very conduct it now claims formed the basis of its decision to terminate her. If the school system had not requested that Sajko undergo an occupational evaluation, she would still be employed. If Sajko had agreed to the occupational evaluation as requested, she would still be employed.[1] The school system cannot legitimately contend that Sajko would have been terminated in absence of her refusal to submit to the evaluation, because there was no triggering event leading the Schools to terminate her employment; she had already been disciplined for all actions *except* her refusal to submit to the occupational evaluation.

A. KRS 161.790 applied to the pre-termination suspensions without pay and private reprimands received by Sajko.

In the courts below, the Schools argued that KRS 161.790 does not prohibit a superintendent "from taking action just because the teacher previously received discipline at the teacher's school" and that therefore the Schools acted properly in this case. Schools' Combined Brief before the Court of Appeals, at 18. There are several

1 Importantly, the Tribunal specifically found that the Schools did *not* have the right to require Sajko to attend the occupational evaluation.

problems with this line of reasoning. KRS 161.790(10) states that the superintendent may, "[a]s an alternative to termination of a teacher's contract . . . impose other sanctions, including suspension without pay, public reprimand, or private reprimand." Contrary to the Schools' argument, the provisions of KRS 161.790 are *not only* triggered "when a superintendent decides that conduct by a teacher is of the type that would warrant *termination*." Id. (emphasis added). Rather, KRS 161.790 comes into play any time that the disciplinary actions outlined in KRS 161.790(1) and (10) are taken.

KRS 161.790 applied to the pre-termination suspensions without pay and reprimands received by Sajko. It is a well-settled proposition that "the authority of [an administrative] agency is limited to a direct implementation of the functions assigned to the agency by the statute." Flying J Travel Plaza v. Commonwealth, 928 S.W.2d 344, 347 (Ky. 1996). What this means in the present case is that in order for the disciplinary sanctions of termination, suspension without pay, public reprimand, or private reprimand to be imposed by the school system, then KRS 161.790 must apply because that is the only source of the school system's authority for taking such actions.

The Schools also claimed below that not all of the procedural requirements for KRS 161.790 discipline were complied with. However, that does not mean that statute did not apply to the pre-termination suspensions and reprimands received by Sajko. KRS 161.790 specifies the process and protections required when one of the specified sanctions is imposed by the school system. Whether KRS 161.790 applies to the imposition of a particular disciplinary sanction at all and whether the procedural requirements set forth in KRS 161.790 were complied with in imposing a particular disciplinary sanction are two separate inquiries; you do not even get to the second inquiry

unless the statute is found to apply in the first instance. KRS 161.790 applied to the pre-termination suspensions and reprimands received by Sajko because that statute is the source of the Schools' authority to impose those sanctions and also details the procedures required when one of those sanctions is imposed. Failure to comply with the procedural requirements of KRS 161.790 does not affect whether the statute applies.

Per the terms of KRS 161.790, the same requirements apply whether the contemplated sanction is termination, suspension without pay, public reprimand or private reprimand: the superintendent must notify the board and provide written notification of the charges to the teacher. See KRS 161.790(3) and (10). The statute does not draw a distinction between these various sanctions with regard to the procedure that must be followed. Accordingly, the school system does not have authority to impose the enumerated sanctions except as provided in KRS 161.790.

Further, "[i]t is a fundamental, 'primary rule of statutory construction that the enumeration of particular things excludes the idea of something else not mentioned." Kearney v. City of Simpsonville, 209 S.W.3d 483, 485 (Ky. App. 2006) (quoting Stewart v. Univ. of Louisville, 65 S.W.3d 536, 539 (Ky. App. 2001)). Based upon this rule of statutory construction, the particular procedures required for the imposition of the sanctions specified in KRS 161.790 identify the way those sanctions must be handed out and exclude alternative methods of doing so. This is further supported by the fact that the statute would essentially be abrogated if the specific sanctions identified in KRS 161.790 could be imposed in a different manner than set forth in the statute without triggering the protections for teachers contained in the statute. The legislature did not

intend to leave such an easy path around the protections of KRS 161.790 so as to render that statute irrelevant.

The requirements in KRS 161.790 that the superintendent impose the discipline and provide the required notice are procedural requirements that reflect the legislature's opinion of the seriousness of the disciplinary sanctions involved. It defies logic, the language of the statute, and rules of statutory construction if a school system could deny a teacher the procedural protections of KRS 161.790 simply by having an official other than the superintendent impose the discipline. Whether or not the schools have complied with all of the procedural requirements of KRS 161.790 in the first place, Sajko's pre termination suspensions and reprimands still came within the purview of KRS 161.790.

B. The Schools are prohibited by the language of KRS 161.790 from disciplining Sajko a second time for the same conduct for which she was previously disciplined.

KRS 161.790 identifies how and when a teacher may be terminated, or sanctioned. See KRS 161.790. The framework established by KRS 161.790 contemplates imposition of one of several alternative forms of discipline.

The statute specifically states: "As an *alternative* to termination of a teacher's contract, the superintendent upon notifying the board and providing written notification to the teacher of the charge may impose other sanctions, including suspension without pay, public reprimand, *or* private reprimand." KRS 161.790(10). The only options for discipline are thus identified by the statute: i) termination; ii) suspension without pay; iii) public reprimand; *or* iv) private reprimand. There is no language indicating that other disciplinary options are available and, in fact, the statute specifically says what "other sanctions" includes. Additionally, under KRS 161.790, the disciplinary options are

presented in the alternative; a teacher cannot receive more than one form of discipline for the same conduct. The statutory language also supports this fact. The sanctions which may be imposed "as an *alternative* to termination" are "suspension without pay, public reprimand, *or* private reprimand." KRS 161.790(10) (emphasis added).

The statute itself thus prohibits Sajko from being terminated for the same actions for which she was already reprimanded or suspended. KRS 161.790 contemplates that *either* termination, suspension without pay, public reprimand, or private reprimand will be imposed for a particular transgression. As detailed in the Statement of Facts, supra, and in the Termination Letter, Sajko was disciplined through either a private reprimand or a suspension for every alleged act of insubordination addressed in the Termination Letter. Therefore, under the statute, Sajko cannot now be terminated based on the same conduct that was the basis for prior reprimands or suspensions.

Courts in other states have reached the same conclusion under similar statutes. For instance, in New York, "Education Law § 3020-a(4) provides that the penalty shall consist 'of a reprimand, a fine, suspension for a fixed time without pay or dismissal.'" McSweeney v. Bd. Of Educ. of Johnsburg Cent. Sch. Dist., 525 N.Y.S.2d 956, 959 (N.Y. App. Div. 1988). The McSweeney Court, in lifting one of two penalties imposed on the teacher, held that, "[g]iven the wording of the statute, the Hearing Panel was required to choose only one of the penalties." Id.

The same rule should apply in the present case. Similarly, KRS 161.790 contemplates that only one of the penalties may be chosen for a particular action. Sajko was not found guilty of any charged action for which she had not already received a reprimand or suspension. Accordingly, the Order of the Jefferson Circuit Court

upholding the Tribunal's decision should be reversed because it failed to correctly apply the law to the facts of this case.

C. There must be a "triggering event" upon which the decision to impose discipline is predicated before the right to impose discipline arises.

The Termination Letter sets forth the basis for the school system's decision to terminate Sajko's employment. The Statement of Facts, supra, discusses each of the charges and the incidents giving rise to the charges in the Termination Letter. An examination of these facts shows that the school system disciplined Sajko for every incident identified in the Termination Letter which occurred prior to the allegation triggering termination.[2]

Upon her return to work on January 11, 2005, Sajko was directed to submit to an occupational evaluation. Sajko refused the directive, and as a result, was terminated. (Termination Letter, Appendix 1at paragraph 6) Sajko's refusal to submit to the occupational evaluation is the *only* incident occurring after the Second Suspension (Sajko's last discipline prior to termination) that the school system asserts as supporting any portion of the charges. But for Sajko's refusal to submit to the occupational evaluation, she would not have been terminated.

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2 A question may exist as to whether Sajko received any specific discipline as contemplated in KRS 161.790 for throwing away student work prior to November, 2003. See T.R. 67, Termination Letter at paragraph (2). Sajko participated in a conference with an assistant principal at Male in which she was directed to stop throwing away student work and Sajko also received a letter in November, 2003, instructing her not to throw away student work. See id. Subsequently, Sajko received discipline in the form of four reprimands and two suspensions without pay for other incidents. The school system had ample opportunity to discipline Sajko for throwing student work away prior to November, 2003, and appears to have taken all the action it deemed necessary with respect to that issue prior to her termination. As shown above, the allegations contained in paragraph (2) of the Termination Letter cannot form the basis for a charge of insubordination.

The vast majority of evidence presented by the school system at the hearing related to events predating Sajko's two earlier suspensions. The Tribunal made findings of fact relating to those events, and based its decision to terminate Sajko on those events. (Final Order, Appendix 2 at Findings of Fact paragraphs 2-29. The Tribunal ruled in Sajko's favor on the one charge which actually led to the March 28, 2005, termination action, finding she was *not insubordinate in refusing to submit to an occupational evaluation*. (Final Order, Appendix 2) Yet, the Tribunal terminated Sajko for previous conduct for which she had already received discipline.

The Tribunal's decision was in error. "The general rule is that *discipline cannot be imposed again for the same misconduct*, but prior conduct can be taken into account as a circumstance in determining the *penalty* to be imposed for *later violations*. . . ." Silver, Public Employee Discharge and Discipline, Section 5.20[B] (emphasis added). For example, in Appeal of Joseph Ditko, 123 A.2d 718 (Pa. 1956), Officer Ditko was dismissed from his position as a police officer in Reading, Pennsylvania, based upon two separate events, the first occurring in December, 1953, and the second in August, 1954. Although the court affirmed Ditko's termination, it did so solely on the basis of Ditko's actions in the 1954 incident.

> The incident relating to conduct unbecoming a police officer set forth in the second charge [which relates to the 1953 incident] resulted in appellant's being warned, reprimanded and suspended without pay by his superior officers for a period of five days. Were this the only charge considered by Council and established under the evidence, we would hesitate in finding that appellant was properly discharged. It is apparent that for the offense in question [i.e., the 1953 incident,] appellant has already been punished, and *it would offend against our concept of justice that a year thereafter appellant could be subjected to the penalty of dismissal after having previously been suspended for his actions*. The service record of appellant showing prior misconduct and suspension is relevant and admissible, however, in so far as

> it may relate to proper punishment in the event appellant is guilty of the misconduct alleged in the [1954] charge. . . . It would appear that appellant accepted without question the punishment meted to him by his superiors for the act of misconduct alleged in the [charge concerning the 1953 incident], and in our opinion that incident thereafter was closed and is only relevant in the matter of determining what punishment is merited for offenses subsequent thereto. (emphasis added)

Id. at 720. Similarly, in Dept. of Transp. v. Career Serv. Comm'n, 366 So.2d 473 (Fla.App. 1979), the court held:

> Although the Commission may have inartfully used the term "double jeopardy", its reversal was based on sound reasoning. D.O.T. not only lacked authority to discipline Woodward twice for the same offense but its action was fundamentally unfair. The same offense may be a proper ground for *either a suspension or a dismissal but the statute and rules contemplate that these are mutually exclusive disciplinary alternatives.* Otherwise, an agency could repeatedly punish an employee and the employee would never be secure in his employment. . . . Nevertheless, having concluded its investigation and reached its decision as to the disciplinary action it will administer to an employee, the disciplinary action administered may not be increased at a later date nor may an agency discipline an employee twice for the same offense. (emphasis added)

Id. at 474; see also Nicholas v. Housing Auth. of New Orleans, 477 So.2d 1187, 1191 (La. Ct. App. 1985) ("Where an employee has been reprimanded or disciplined for particular action or inaction this court has refused to allow the appointing authority to resurrect this incident as grounds for further disciplinary action."); Dept. of Corrections v. Duncan, 382 So.2d 135, 136 (Fla. Dist. Ct. App. 1980).

The policy reasons underlying the cited cases are equally applicable to this case. It is fundamentally unfair for a teacher or any employee to be subject to repeated discipline for the same conduct. If the school system had the authority to punish Sajko multiple times for the same conduct (which they do not under the statutes as shown in Argument V., B., supra), then there would never be closure to any disciplinary proceeding against her for any alleged

transgression; she could be fired at any moment based on actions that occurred in the past and for which she had already been punished. Such a system would reduce the effectiveness of any discipline prior to termination and would not foster the best teaching environment.

Here, the Tribunal found that Sajko was not insubordinate on the only insubordination charge not addressed by the prior discipline which is the requirement that she undergo an occupational evaluation. (Final Order, Appendix 2 at Finding of Fact 30 and Conclusion of Law 6). Once the Tribunal cleared Sajko of that charge, it could not punish Sajko again for the earlier incidents. Allowing Sajko to be punished for the earlier incidents, while being cleared of the insubordination charge for refusing the occupational evaluation, creates a situation where Sajko was terminated solely on the basis of past incidents for which she was already disciplined once and which occurred months prior to her termination.

The school system argued below that "Sajko was not terminated because of the same discipline she received at the school level in late 2004", but rather that "Sajko's employment was terminated based upon the cumulative history of her misdeeds dating back to the fall of 2003." (TR 88, The Schools' Response to Sajko's Appeal, at 3.) This argument falls into exactly the trap that the above-cited cases seek to avoid. If Sajko really was terminated based on the "cumulative history" of her conduct, and nothing else, she never could be secure in her employment from the moment that she committed a single transgression, regardless of whether the school system exacted discipline on her for that action or not. The correct use of Sajko's "cumulative history" is to determine the *appropriate level* of *discipline to punish a particular, later violation.* See Silver, Public Employee Discharge and Discipline, Section 5.20[B]. Since Sajko was cleared on the

insubordination charge concerning the occupational evaluation, there was not a later violation that Sajko could be punished for and Sajko's "cumulative history" did not become relevant. Even the language of KRS 161.790 requires a triggering event, stating that "[t]he contract of a teacher *shall remain in force during good behavior and efficient and competent service*." KRS 161.790(1) (emphasis added).

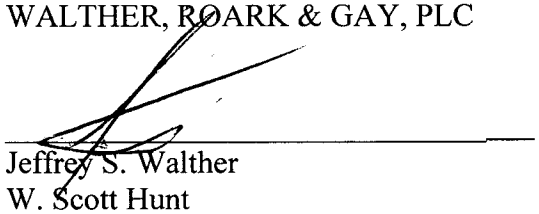
The Jefferson Circuit Court erred in failing to reverse the decision of the Tribunal on the ground that Sajko could not be punished twice for the same conduct, and only that conduct. Sajko received a reprimand or a suspension for every potential act of insubordination alleged by the school system in the Termination Letter. Since Sajko was found not to have been insubordinate in refusing to attend the occupational evaluation, there was no other allegation in the Termination Letter for which she had not already been punished. Based on principles of fairness as applied in the cited legal authorities and on common sense, the decision of the Tribunal to terminate Sajko must be reversed.

CONCLUSION

The Court of Appeals made an impermissible finding of fact as the foundation for its Modified Opinion. The conclusion reached by the Court of Appeals creates an untenable situation that is not supported by the text of KRS 161.790 or public policy. As a result, the Court of Appeals' Modified Opinion should be reversed. Further, because the Tribunal found in Sajko's favor on the single charge they were legitimately entitled to consider, the decisions of the Jefferson Circuit Court and of the Tribunal must also be reversed, and Sajko reinstated to her position with back pay. KRS 161.790(8).

Respectfully Submitted,

WALTHER, ROARK & GAY, PLC



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