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

# REPLY BRIEF FOR APPELLANT

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned does hereby certify 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 August 27, 2009.

COUNSEL FOR APPELLANT

## STATEMENT OF POINTS AND AUTHORITIES

## ARGUMENT

### I. INTRODUCTION

This Court should consider all of the arguments raised in Petitioner Cara Sajko's ("Petitioner" or "Sajko") Brief. The Court of Appeals, in its Modified Opinion (attached to Sajko's Brief at Appendix 5), engaged in improper fact finding to find a date that Sajko received notification of her contract termination from the Superintendent of the Jefferson County Board of Education (the "Schools" or "Appellees"). Based on this improper factual finding, the Court of Appeals held that the Tribunal did not have jurisdiction to hear Sajko's appeal. This decision was in error and should be reversed.

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. As discussed below, this Court has the authority to consider the substantive issues and, in the interest of judicial economy, should do so.

### II. THE COURT OF APPEALS ENGAGED IN IMPROPER FACT FINDING BECAUSE THE TRIBUNAL DID NOT FIND THE DATE SAJKO RECEIVED THE TERMINATION LETTER AND AN ISSUE OF FACT EXISTS AS TO WHEN SHE DID BASED ON THE EVIDENCE.

#### a. The Court of Appeals made an improper finding of fact.

The Final Order of the Tribunal does not contain a finding regarding the date on which Sajko received the notice of her contract termination. *See* Final Order of the Tribunal, attached to Sajko's Brief as Appendix 2. That the Tribunal did not find this fact is not in dispute. *See* Appellees' Brief at p. 22. Neither the Jefferson Circuit Court nor the Court of Appeals, both sitting as appellate courts in this matter, had the authority to find

this fact that was not found by the Tribunal. *See New v. Commonwealth*, 156 S.W.3d 769, 773 (Ky. App. 2005).

The evidence regarding the date on which Sajko received the notice of her termination is disputed. Throughout these proceedings, Sajko has stated that she did not receive the termination letter until Tuesday, March 29, 2005: "Q. But your recollection is, you didn't have [the termination letter] in your hands until the next day March 29th, is that your testimony? A. Correct." Tribunal Hearing Transcript at Vol.VII at p. 1910 (testimony of Sajko on cross-examination). On the other hand, the Schools point to testimony indicating that the termination letter was left in a visible location at the address they had on record for Sajko on March 28, 2005, and to testimony indicating that Sajko may have received the letter on that date. *See* Appellees' Brief at 22-23. Contrary to the Schools' assertions, the evidence on this issue is not clear and does not support only one conclusion. Rather, there is an issue of fact based on this evidence which can only properly be determined by the fact-finder.

"[T]he 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)). In fact, "[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)). The Tribunal was the fact-finder in this matter and the evidence regarding the date Sajko received the termination

letter is in dispute. The Schools essentially argue that evidence unfavorable to their position should be ignored. However, that is not for the Schools, the Jefferson Circuit Court, or the Court of Appeals to decide as only the Tribunal has the privilege of hearing and weighing the disputed evidence to determine the date on which Sajko received the termination letter. It is undisputed that the Tribunal did not make this finding.

**b. The Jefferson Circuit Court did not and could not make a finding regarding the date Sajko received the termination letter.**

The Schools latch on to the dictum from the Jefferson Circuit Court Opinion and Order which states that "Sajko received her termination letter on March 28, 2005" to argue that the issue of the date Sajko received the termination letter was not preserved. Jefferson Circuit Court Opinion and Order at 3, attached Sajko's Brief at Appendix 3. This argument is fatally flawed precisely because the statement in the Circuit Court Opinion was merely dictum.

The test to determine whether a statement is dictum "'is whether the statement was or was not necessary to the determination of the issues raised by the record and considered by the court.'" *Brown v. Diversified Decorative Plastics, LLC*, 103 S.W.3d 108, 111 (Ky. App. 2003) (quoting *Utterback's Adm'r v. Quick*, 19 S.W.2d 980, 983 (Ky. 1929)). The Opinion and Order issued by the Jefferson Circuit Court did not require a determination of the date that Sajko received the termination letter: the hearing officer found jurisdiction to exist without determining whether the termination letter was received on March 28 or March 29; the Jefferson Circuit Court simply found no basis to reverse this determination. Since dicta of a circuit court is not controlling, Sajko had no reason to appeal the stray

statement in the Jefferson Circuit Court's Opinion and Order. *See id.* This is especially true since the issue was decided in her favor in any event. In contrast, the date that Sajko received the termination letter was necessary to the decision reached by the Court of Appeals and Sajko timely sought review of that decision.

**c. Sajko's appeal period started when she had the termination letter in hand.**

The Schools attempt to play fast and loose with the requirements of KRS 161.790(3) concerning when the ten day period for a teacher to appeal his or her termination begins to run. KRS 161.790(3) required the Schools to "furnish" a statement of charges to Sajko, but also states that "[t]he teacher may within ten (10) days after receiving the charge notify" the parties required by the statute. KRS 161.790(3) (emphasis added). The Schools appear, without support, to argue that furnishing the termination letter by leaving it at what was believed to be Sajko's address is the same as Sajko receiving the letter. "Constructive" receipt is not possible and Sajko cannot have received the letter until it was actually in her possession–in this case, March 29, 2005.

A fundamental rule of statutory construction is that words are to be given their "'ordinary, contemporary, common meaning'" so long as they are not otherwise defined. *Hall v. Hopitality Res., Inc.*, 276 S.W.3d 775, 784 (Ky. 2008) (quoting *U.S. v. Plavcak*, 411 F.3d 655, 660 (6th Cir. 2005)). "Receipt" is not defined for purposes of KRS 161.790. The common meaning for "receiving" a letter is actual possession, and there is no special legal meaning that would change that.

In its Response Brief, the Schools state that the language used in KRS 161.790(4) which states particular actions that the Commissioner must undertake "[u]pon receiving the

teacher's notice of his intention to answer the charge" (KRS 161.790(4) (emphasis added)) makes sense as referring to a time after the Commissioner has actually received notice. *See* Appellees' Response Brief at 18 n.51. The same language is used in discussing when the ten day appeal period starts to run: "The teacher may within ten (10) days after receiving the charge notify the. . . ." KRS 161.790(3) (emphasis added). The Schools cannot have it both ways. As acknowledged by the Schools, it is clear that the ten day period starts to run after actual, in-hand receipt.

KRS 161.790(3) imposes an obligation on the teacher to "notify" and "give notice" of her intention to appeal. The legislature did not use the same language in stating what must be accomplished to start the ten day period running and what must be accomplished during the ten day period to effectuate an appeal. Since the legislature specified that the letter must be *received* by the teacher, as opposed to notice simply being given to or provided to the teacher, it is clear that more than leaving the letter at a residence was required to start the ten day period running. Rather, the statute contemplates the ten day period starting when the teacher actually has the letter in hand.

Sajko's testimony on this point is not ambiguous. She testified that she did not have the termination letter in hand until March 29, 2009. Tribunal Hearing Transcript at Vol.VII, p. 1910. For purposes of determining when she received the letter as contemplated by the statute, it is irrelevant what day the letter was delivered to the residence. The date that matters is the date that Sajko actually received the letter. The Schools unsuccessfully attempt to discredit Sajko's testimony on irrelevant points. However, the Schools cannot overcome the fact that the evidence on this issue is in dispute

and it is for the Tribunal to weigh the evidence and make a finding.

## III. THE NOTICE OF APPEAL PROVIDED BY SAJKO WAS SUFFICIENT.

It bears repeating that Sajko did not receive the termination letter, and the ten day appeal period did not start running, until March 29, 2005. The Schools acknowledge that the Jefferson County Superintendent ("Superintendent") and the Kentucky Commissioner of Education ("Commissioner") received written notice of Sajko's intention to appeal within ten days of March 29, 2005. *See* Appellees' Brief at p. 15. There is no question about the effectiveness of Sajko's notice if it is found that she received the termination letter on March 29, 2005. However, even if the ten day period were found to start on March 28, 2005, as held by the Court of Appeals, Sajko's notice was sufficient as discussed below.

### a. Sajko timely provided adequate notice to the parties in interest.

Sajko certified and mailed letters asserting her appeal right to the Superintendent and Commissioner on the tenth day following March 28, 2005. Doing so provided sufficient notice under KRS 161.790(3).

The Schools correctly note that there are no Kentucky cases interpreting the requirements in KRS 161.790 for notice that a teacher must provide for an appeal. However, the Schools' reference to *Energy Regulatory Commission v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980) for the proposition that "it is not the sending but the receipt of a letter that constitutes true notice" is seriously misplaced.

First, the notice involved in *Energy* was actually service of a complaint. The statute at issue in *Energy* required a party bringing an action against the Energy Regulatory

Commission to give notice of the institution of the action to all other parties before the commission, stating: "[n]otice of the institution of such action shall be given to all parties of record before the commission." KRS 278.410(1) (prior version, effective April 1, 1979). In finding the letter mailed as notice in that case insufficient, the *Energy* court held that "notice" under KRS 278.410(1) required "the issuance of summons of process, or [demonstrating] by other concrete evidence the receipt of notice." *Energy Regulatory Comm'n*, 605 S.W.2d at 51. The *Energy* court continued, stating that "[a] certificate or affidavit of sending notice falls short." *Id.* at 52. The out-of-context statement from *Energy* relied upon by the Schools thus has no application to the current matter.[1]

Second, as discussed in Sajko's Brief, the case cited by the *Energy* court, *Baldwin v. Fidelity Phoenix Fire Insurance Company of New York*, 260 F.2d 951 (6th Cir. 1958), concerns notice from a policyholder to an insurance company. "Contract terms such as 'giving' and 'mailing' notice are well established in the insurance law." *Pence Mort. Co. v. Stokes*, 559 S.W.2d 500, 506 (Ky. App. 1977). As such, the interpretation applied in *Baldwin*, and relied upon by *Energy*, to language about giving notice is not relevant to interpretation of KRS 161.790(3).

Third, *Energy* and *Baldwin* involved analysis of notice requirements where sophisticated business entities were involved. The Schools attempt to brush this concern aside, saying that teachers in general, and Sajko in particular, should not be entitled to a different standard for what notice is required. *See* Appellants' Brief at 18-19. This

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1 Interestingly, the Schools argue in Part I.E. of their Brief that the decision of the Court of Appeals does not require a teacher to effect personal service in providing notice of intention to appeal. However, their reliance

conclusion is not supported because, as discussed above, the analysis in *Energy* and *Baldwin* leading to the Schools' conclusions about the notice requirements are not relevant to this case. Further, holding teachers with no legal training to a slightly different standard makes equitable sense. After all, surely the Schools would not require the teachers to formally serve their notice of intention to appeal as was required by the *Energy* court.

The language of KRS 161.790(3) will support application of a "mailbox rule". There is no Kentucky caselaw on point. The cases cited by the Schools (and by the Court of Appeals in its Modified Opinion), *Energy* and *Baldwin*, are not relevant to this case and the statutes involved. Mailing notice to the Commissioner and the Superintendent on the tenth day of the appeal period should be sufficient to preserve the teacher's appeal rights.

## IV. SAJKO'S ARGUMENTS WHICH ARE LIKELY TO RECUR IF THIS CASE IS REMANDED SHOULD BE ADDRESSED BY THIS COURT.

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. The Court of Appeals avoided ruling on these issues by deciding the case on the procedural notice issue. Following reversal of the Court of Appeals, these substantive 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.*, *Terry v. Com.*, 153 S.W.3d 794, 797 (Ky. 2005); *Ice v. Com.*, 667 S.W.2d 671, 680 (Ky. 1984).

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on *Energy* to interpret the meaning of the language in KRS 161.790(3) would lead to a different conclusion.

The Schools misinterpret the approach taken by this Court in *Terry* and *Ice*. In *Terry*, this Court considered issues that were not addressed by the Court of Appeals and which were "likely to recur upon retrial." *Terry*, 153 S.W.3d 794, 797-802 (Ky. 2005). The Schools incorrectly argue that this approach was only applied to issues determined by the trial court and about which this Court disagreed. *See* Appellees' Brief at 31-32. Rather, the Court addressed several issues as guidance for retrial without expressing any opinion as to how the issues were handled by the trial court. *See id.* at 801-02 (explaining which version of evidence rule to use and giving a framework for questioning of witnesses by judges). *Terry* and *Ice* are applicable to the current case for the proposition that this Court has the authority to address issues likely to recur on rehearing.

The Schools further argue that Sajko cannot prevail on this appeal because they allege that all substantive issues have been decided against her and that this Court cannot consider those issues. This argument is absurd. In support, the Schools cite to *Gailor v. Alsabi*, 990 S.W.2d 597 (Ky. 1999) for the proposition that issues raised but not decided on appeal will be deemed decided against the party raising them if not raised in a motion for discretionary review. *See* Appellees' Brief at 32. The Schools have misquoted and misinterpreted *Gailor*. The *Gailor* court was actually considering an issue where a respondent to a motion for discretionary review failed to file a *cross-motion for discretionary review* pursuant to CR 76.21. *See Gailor*, 766 S.W.2d at 51-52. CR 76.21 and analysis of it are inapplicable to the argument advanced by the Schools.

Further, the cases relied upon for the real proposition contained in *Gailor* were decided under Kentucky's old single-tiered appellate system. Under such a single-tiered

system, when a case was reversed and remanded it required a conclusion that the undecided issues had been decided against the party asserting them. *See id.* at 54-55 (J. Leibson dissenting). Under Kentucky's current two-tiered system, such a conclusion is not required. Even if this Court does not consider the substantive issues raised by Sajko, if it finds in her favor and reverses the Court of Appeals on the procedural notice issue, then the previously raised substantive issues will remain to be decided on remand. Finally, despite the proposition cited by the Schools, the *Gailor* court considered the issues which were not presented in a cross-motion for review. *See id.* at 98-99. Judicial economy dictates deciding the substantive issues now.

## CONCLUSION

The Opinion of the Court of Appeals should be reversed. The Court of Appeals, in the face of disputed evidence, made an improper finding of fact which was never reached below in the administrative proceeding, and then based its decision on that improper factual finding. 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.

Respectfully Submitted,

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