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

CARA SAJKO APPELLANT

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

v.

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

BRIEF FOR APPELLEES

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that the original and ten (10) copies were were served by Federal Express upon Susan Stokely Clary, Clerk, Kentucky Supreme Court, 700 Capitol Avenue, Frankfort, KY 40601; and by U.S. Mail upon Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; the Honorable May Shaw, Judge, Division Five, Jefferson Circuit Court, 700 W. Jefferson Street, Louisville, KY 40202; and Counsel for the Appellant Jeffrey S. Walther, W. Scott Hunt, WALTHER, ROARK & GAY PLC, 163 East Main Street, Suite 200, Lexington, Kentucky 40507 on August 11, 2009.

INTRODUCTION

The Superintendent of the Jefferson County Public Schools terminated Appellant Cara Sajko's teaching contract after repeated acts of misconduct and insubordination, and an administrative tribunal, the Jefferson Circuit Court, and the Court of Appeals all concluded that the termination should stand. Sajko did not timely appeal the termination of her teaching contract under KRS 161.790 and has failed to properly preserve many of the arguments by which she asks this Court to reverse her termination.

STATEMENT CONCERNING ORAL ARGUMENT

Appellee does not believe oral argument is warranted in this matter, as the Court of Appeals decision thoroughly identified and discussed the relevant issue of statutory construction. However, if this Court believes that oral argument will be helpful, Appellee will gladly participate.

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COUNTERSTATEMENT OF THE CASE

Cara L. Sajko ("Sajko") taught Science to freshmen at Louisville Male High School, where her inappropriate teaching methods and refusal to accept correction made her a thorn in the sides of her students, their parents, and the school administrators. The story behind Sajko's termination is not a short one. Over a period spanning two school years, the Male High administration tried time and again to curb Sajko's behavior, which went far beyond orthodoxy into mental abuse of her students. Time and again, Sajko's response to the disciplinary measures imposed on her by Male High officials was to ignore the directives and stubbornly return to her unacceptable practices. Finally, Sajko's pattern of misconduct and disobedience came to the Superintendent of the Jefferson County Board of Education ("the Schools" or "JCBE"), and she was terminated pursuant to KRS 161.790.

Procedural History

On March 28, 2005, Sajko's teaching contract was terminated by the Superintendent under KRS 161.790, for insubordination and conduct unbecoming a teacher after a series of incidents that occurred over the course of two school years (detailed more fully below). Sajko responded by requesting a trial before a three-member Tribunal, and although the Schools protested that Sajko's request was untimely under the governing statute, her trial commenced in May 2005.

The Tribunal heard a great quantity of evidence and agreed with the Superintendent's decision to discharge Sajko. In addition to finding Sajko was repeatedly insubordinate, the Tribunal also concluded that some of her actions toward students "subjected students to demeaning and humiliating situations and violated students' right to be free from abuse" and that "she did not use good teaching methods, inappropriately and unnecessarily berating, demeaning, and frustrating her

students." The Tribunal was permitted by statute to impose a discipline short of termination, but concluded that Sajko "would consider any reduction in the sanction as vindication of her inappropriate teaching methods and her unacceptable responses to Male High School officials' directives."

Sajko appealed to Jefferson Circuit Court, which upheld the decision of the Tribunal, citing the substantial evidence of insubordination supporting Sajko's termination. Next, Sajko appealed to the Court of Appeals. The Court of Appeals took notice of the argument by the Schools that Sajko had not been entitled to a tribunal hearing in the first place because she failed to timely provide notice that she would appeal her discipline. The Court of Appeals concluded that the Tribunal did not have jurisdiction to hear Sajko's appeal because Sajko had not complied with the requirements for notice under KRS 161.790; it granted the Schools' cross-appeal and dismissed Sajko's appeal.

Sajko moved for discretionary review, urging this Court to consider the parameters of the notice required under KRS 161.790(3) as a matter of statutory interpretation - the issue raised by the Schools' cross-appeal. This Court granted discretionary review to consider that issue. In her brief, Sajko did not limit herself to the topic on which she sought discretionary review, that is, construction of the statute on which the Court of Appeals dismissed her appeal. Instead, she discussed the underlying facts of her termination at length and urged this Court to set aside the merits decision of the Tribunal, upheld by the Circuit Court but which the Court of Appeals never addressed. Although the Schools believes that only the statutory construction issue is properly before this Court, it will respond to Sajko's portrayal of the facts.

Factual Background

In the first six weeks of the fall of 2003, Sajko failed 75 freshmen students at Male High.[1] As a result, Male High received numerous complaints about Sajko's teaching and grading practices, alleging that she failed to update parents on student grades; she engaged in arbitrary grading, failing roughly half her students, often for "procedural" mistakes such as placement of staples; she threw students' homework in the trash can if the students made such a mistake, requiring students to dig the papers out of the trash; she directed students to read a 500-page book over the weekend and then gave a quiz on Monday, with one class learning it needed to read the 500 pages only minutes before the quiz; and she engaged in other unprofessional behavior toward her students.[2] Male High officials issued a number of directives to Sajko regarding this behavior, all of which Sajko eventually disobeyed.

Failing to Complete Student Progress Reports. After Sajko's fall 2003 student-failing spree, Male High officials received complaints from parents of many of Sajko's students that Sajko was not notifying them of their children's academic performance on a timely basis as required by JCBE guidelines.[3] As a result, Male High officials directed Sajko to complete student progress reports for those students who

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[1] Other than Sajko's students, almost no one in the entire Male High failed the first six weeks in the fall of 2003. Final Order [Appendix C hereto], 3.

[2] *See, e.g.*, Trial Exhibits 1, 2, 4, and 55; Testimony of Todd Barber, Vol. 1, 137-46; Testimony of Gary Hurt, Vol. 2, 454-55, 461-65; Testimony of Cara Sajko, Vol. 7, 1825-28; 1833-34; 1838-39; 1851-52; 1857; 1913-18; Vol. 8, 2243-44.

[3] Testimony of Todd Barber, Vol. 1, 140, 143-46; Trial Exhibit 2. The Schools' Student Progression, Promotion, and Grading book provides that "If a student is exhibiting unsatisfactory performance or is experiencing changes in performance, parents/guardians must be notified in a timely manner prior to the distribution of the progress report or report card." Trial Exhibit 3. The Schools' Traditional Program Guidelines, applicable to Male High, provide that if a teacher observes a decline in a student's work, the teacher will "immediately notify the parent." Trial Exhibit 28.

had failed the first six week period by October 24.[4] She never complied with this directive.[5]

Throwing Student Papers in the Trash and the Directive to Stop Any Demeaning Conduct. In the fall of 2003, parents of Sajko's students complained that Sajko was throwing their children's homework in the trash can if there was a "procedural" mistake (such as a staple or title or signature missing or out of place), requiring students to dig their work out of the trash.[6] In a conference on November 5, 2003 and in writing that day, Assistant Principal Todd Barber directed Sajko to stop throwing students' work in the trash can and having them pick it out and to stop any "punishments that are cruel and unusual, demeaning, degrading, humiliating, excessive or unreasonable" or any other practices "prohibited under the student's rights to freedom from abuse."[7]

Failing to Deliver a Student Folder. On November 19, 2003, Male High Principal Wilson sent a note to Sajko requiring her to deliver a student's folder to him before she left school for the day because that student's mother was coming to school early the following morning to review the folder and talk with Wilson about her son's performance.[8] The directive was clear but Sajko did not comply with it. As a result, the parent arrived the following morning but, because she was unable to review the folder, left the school angry and upset.[9] Sajko claimed she locked her keys in the car

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[4] Trial Exhibit 13.

[5] Final Order, 4; Testimony of Cara Sajko, Vol. 7, 1860-66; Testimony of Dave Wilson, Vol. 3, 526-27; Trial Exhibits 17 and 22.

[6] Testimony of Todd Barber, Vol. 1, 153-59; Trial Exhibit 4.

[7] Testimony of Todd Barber, Vol. 1, 158-59; Trial Exhibit 4.

[8] Testimony of Dave Wilson, Vol. 3, 577-80; Trial Exhibit 25.

[9] Testimony of Dave Wilson, Vol. 3, 580-81.

and thus could not deliver the folder, but she did not tell Wilson either at school or in the evening of her inability to deliver the folder as directed.[10]

2003 Reprimands and the December 2003 Directive. On November 20, 2003, in the wake of all these mounting issues, Principal Wilson issued a written reprimand to Sajko for insubordination for her failure to comply with his directive regarding the student's folder and directed her in writing to follow his directives and the directives of other administrators at Male High.[11]

On December 5, 2003, in order to address complaints regarding Sajko's teaching and grading practices, Principal Wilson issued a substantial written directive to Sajko, directing her to submit changes to her grading and/or assessment system (including discontinuing the deduction of points for staples and the like), her behavior management system, and her parental contact system.[12] The directive instructed Sajko to follow the guidelines for grade determination that were part of school board policy and plainly stated, in bold type, **"You will not deduct academic points for procedural reasons."** Principal Wilson also reiterated the November 5 directive for her to refrain from any action "that would adversely affect the physical, mental, and emotional needs of [her] students."[13]

Sajko responded in writing on December 10, 2003.[14] That response speaks volumes about her lack of regard for her superiors' directives. With mounting complaints and a substantial written directive on December 5, 2003, Sajko's response was, as the Tribunal later put it, "not a serious attempt to respond to the December 5

[10] Trial Exhibits 25 and 26.

[11] Trial Exhibit 26.

[12] Trial Exhibit 27.

[13] Trial Exhibit 27.

[14] Trial Exhibit 29.

directive."[15] It included incomplete sentences, misspelled words, and other basic errors Sajko never would have tolerated from her students. Moreover, Sajko's response showed that her "new" grading system included the very same grading practices she had been directed to change. Although she had been directed not to deduct academic points for procedural reasons, her response provided that assignments with procedural errors would not even be accepted.[16] The practical effect was the same -- academic consequences for procedural errors.[17] On December 17, 2003, Wilson met with Sajko and gave her another written reprimand for insubordination for her failure to comply with his December 5 directive.[18]

January 2004 Suspension. Sajko returned from the Christmas Break in early January 2004 and almost immediately resumed her inappropriate behavior. On January 8, she warned a class that everyone would lose extra credit if one more person spoke out. When one student talked, Sajko made her stand and announced to the class that this student had caused the entire class to lose extra credit points.[19]

Students in the Jefferson County system are entitled to have their academic grades based upon their individual academic performances; conduct affects only conduct grades. The Schools' Student Progression, Promotion, and Grading book provides: "The academic grade reflects what the student knows and is able to do.... academic grades will not be reduced as punishment for misconduct."[20] The Schools'

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[15] Final Order, 7.

[16] Trial Exhibit 29.

[17] Final Order, 7.

[18] Trial Exhibits 30 and 31.

[19] Trial Exhibit 33; Testimony of Dave Wilson, Vol. 3, 648-50; Testimony of Cara Sajko, Vol. 7, 1935-38.

[20] Trial Exhibit 3 (emphasis added).

Code of Acceptable Behavior and Discipline and the Student Bill of Rights confirms that students are entitled to have their academic grades based upon their academic performance:

> Academic grades will be assigned based on academic performance. Academic grades will not be reduced as punishment for misconduct.[21]

Yet in this instance Sajko was proposing to base not only one student's academic grade, but an entire class's academic grades, on the conduct of one student. On January 22, 2004, Sajko received a suspension for five days for this latest incident and was again directed to follow directives at Male High.[22]

Continuing Grading Problems. In the fall of 2004, without any notification to the administration at Male High and despite the clear instructions in the December 5, 2003 directive, Sajko instituted a new grading system that was not a part of the plan approved by Male High. Sajko's "new" grading system continued to deduct academic points for procedural reasons. Now Sajko began assigning a check, check +, or check - to homework based on the very same procedural requirements that caused problems in the fall of 2003. She now deducted up to 50 points for a check -, which resulted in a failing grade.[23] On December 15, 2004, Sajko admitted to Principal Wilson that she was still deducting academic points for so-called procedural reasons despite the earlier directive.[24]

Demeaning Conduct Resumes and Another Suspension Follows. By the fall of 2004, Sajko had been given three directives -- in November and December 2003 and

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[21] Trial Exhibit 5.

[22] Trial Exhibit 34.

[23] Testimony of T. M., Vol. 2, 437-40; Testimony of Cara Sajko, Vol. 7, 1948-52.

[24] Trial Exhibits 1, 35, and 36. Testimony of Dave Wilson, Vol. 3, 676-77; Testimony of Cara Sajko, Vol. 7, 1953-55.

January 2004 -- to stop her demeaning and abusive treatment of students. Yet in the fall of 2004, she again engaged in demeaning conduct. She dropped a book on a table beside a student's head to startle him. On the first page of her written response to that incident on December 20, Sajko denied that she was singling out the student ("I was not singling him out"), instead offering as justification that she was teaching a lesson on deer and their velvety antlers and rut.[25] Yet in the conference with Principal Wilson she admitted the act was directed at this student, who she alleged previously caused her problems. Therefore, she did single him out.[26] These actions were violations of both 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. And on at least two occasions in the fall of 2004, according to Sajko's own student aide, Sajko again threw students' homework in the trash for procedural mistakes.[27]

On December 15, 2004, in light of Sajko's continued insubordination and inappropriate conduct, Principal Wilson suspended Sajko without pay for five days.[28]

In January 2005, when school resumed after the holidays, the Schools directed Sajko to report for an evaluation to determine if there was some particular problem that prevented her from complying with the directives.[29] The Schools had made numerous similar requests of other teachers, who complied with those requests.[30] Sajko refused to submit to an occupational evaluation.

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[25] Trial Exhibit 35.

[26] Trial Exhibit 35; Testimony of Dave Wilson, Vol. 3, 660-62.

[27] Testimony of T. M., Vol. 2, 443-46.

[28] Trial Exhibit 37.

[29] Trial Exhibits 47, 48, and 49.

[30] Testimony of Carolyn Meredith, Vol. 4, 1071-72, 1080.

Notice of Termination and Sajko's Untimely Response. Based on the reports about the many instances of Sajko's insubordination and inappropriate behavior as outlined above and the history of discipline at Male High, the Superintendent made the decision to dismiss Sajko. On March 28, 2005, an employee of the Schools delivered to Sajko's home a letter signed by the Superintendent notifying her of the termination of her contract and specifying the charges against Sajko on which the termination was based, as required by KRS 161.790. Those grounds were insubordination and conduct unbecoming a teacher.[31] Her union representative testified Sajko received the termination letter that day.[32]

In response to her termination, Sajko was entitled to demand arbitration under the contract between JCBE and the teachers union or a Tribunal proceeding pursuant to KRS 161.790. She opted for the latter. On April 7, 2005, the tenth day after the termination letter was delivered to her, Sajko's counsel faxed a letter to the office of the Schools' general counsel stating that "Ms. Sajko intends to answer the charges against her, and will be sending this letter to the Commissioner, Kentucky Department of Education, and to the Superintendent of Jefferson County Public Schools." The letter was faxed to the Schools' general counsel after normal business hours and not actually received and read by her until April 8.[33] The Commissioner of Education and the Superintendent (the persons to whom KRS 161.790 requires that notice be given) did not receive their mailed copies until April 8, 11 days after Sajko's termination.

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[31] Trial Exhibit 1 [attached hereto as Appendix E]. Affidavit of Carolyn Meredith and Affidavit of Danny Harrell, attached to the Schools' Motion to Dismiss on April 27, 2005.

[32] Testimony of Elana Crane, Vol. 5, 1343-44.

[33] Affidavit of Rosemary Miller, attached to the Schools' Motion to Dismiss on April 27, 2005.

The Schools moved to dismiss Sajko's request for a Tribunal trial because Sajko did not notify the Superintendent and the Commissioner of her intention to answer the charges within the ten-day period provided by KRS 161.790. By Order dated May 11, 2005, the Hearing Officer denied the Schools' motion, finding the statute ambiguous as to the manner of notice required.[34]

The Tribunal Trial. The Tribunal was then convened and the trial commenced on May 24, 2005. It continued on May 25 and 31, June 1, July 1 and 5, and September 13 and 14, 2005. The Schools called 19 witnesses to testify and introduced some 42 exhibits. Sajko called 11 witnesses to testify at the trial and introduced some 20 exhibits. At the conclusion of the proof and following its deliberations, the Tribunal voted to uphold Sajko's termination.[35] The Tribunal concluded that Sajko was guilty of insubordination in violation of KRS 161.790(1)(a) for failing to comply with a number of directives:

- Sajko never complied with the October 2003 directive to complete student progress reports.
- In the spring and fall of 2004, Sajko violated the November 5, 2003 directive from Assistant Principal Barber prohibiting demeaning or abusive treatment of students and the December 5, 2003 directive to change her behavior management systems and to refrain from any actions that adversely affected the mental or emotional needs of her students.[36]
- Sajko's actions in January 2004 threatening the entire class with academic consequences for one student's conduct were a violation of the November 5 directive to refrain from violating students' right to be free from abuse and the December 5 directive regarding her behavior management system.[37]

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[34] Hearing Officer's Order.

[35] Final Order of the Tribunal [Appendix C].

[36] Final Order, 4, 7-8.

[37] Final Order, 7-8.

- "[I]n the context of the ongoing situation, Ms. Sajko's actions [dropping a book to startle a student in the fall of 2004] constituted a failure to follow directives her superiors had legitimately given her."[38]

- In the fall of 2004 Sajko threw student work in the trash in violation of the November and December 2003 directives.[39]

- The grading system Sajko instituted in the fall of 2004 violated the December 5, 2003 directive to change her grading system.[40]

- And Sajko failed to follow the November 2003 directive from Principal Wilson to deliver the student folder to him.[41]

The Tribunal disagreed that the Schools had the authority to direct Sajko to undergo an occupational evaluation. But the Tribunal concluded that Sajko "accepted no responsibility for her students' poor performance ... and displayed no remorse and no willingness to change her methods or behavior."[42] The Tribunal found as fact that "some of her actions toward students were not best teaching practices, and they subjected students to demeaning and humiliating situations and violated students' right to be free from abuse." However, the Tribunal concluded those actions "did not rise to the level of conduct unbecoming a teacher."

Turning to the appropriateness of terminating Sajko as opposed to some lesser discipline, which the Tribunal had the discretion to impose, the Tribunal's message was clear, explaining Sajko "would consider any reduction in the sanction as vindication of her inappropriate teaching methods and her unacceptable responses to

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[38] Final Order, 9.

[39] Final Order, 9.

[40] Final Order, 8.

[41] Final Order, 5-6.

[42] Final Order, 11.

Male High School officials' directives." The Tribunal therefore concluded it was appropriate to affirm the termination of Sajko's teaching contract.[43]

<u>**The Appeals.**</u> Sajko appealed to Jefferson Circuit Court, asserting that the Tribunal decision to uphold her termination was unsupported by the evidence. The Schools cross-appealed on both procedural and substantive grounds: Sajko was not entitled to a hearing at all since she had not given timely notice under the statute, and the Tribunal's factual finding that she had been abusive to students should have dictated a conclusion that Sajko engaged in conduct unbecoming a teacher. By Opinion and Order dated December 27, 2006, citing the "tremendous amount of evidence" considered by the Tribunal, the Circuit Court found that Sajko's termination for insubordination was supported by substantial evidence and thus was not arbitrary; accordingly, the Circuit Court upheld the Tribunal determination.[44]

Sajko appealed to the Court of Appeals.[45] Again, the Schools filed a cross-appeal to raise the two additional grounds which could form the basis for upholding Sajko's termination.[46] The Court of Appeals took up one of the issues raised in cross-appeal -- Sajko's untimely request for a Tribunal trial -- and determined that the Tribunal had lacked jurisdiction to consider Sajko's termination.[47] The Court of Appeals concluded that Sajko had not complied with the statutory requirement that the Commissioner of Education and the Superintendent should be notified of her intent to appeal within ten days, where Sajko had put her notice in the mail on the tenth

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[43] Final Order, 11.

[44] Circuit Court Opinion [Appendix B hereto], Record 150-56.

[45] Record, 204-05.

[46] Record, 206-07.

[47] Court of Appeals Modified Opinion [herein the "Opinion," Appendix A hereto] at 2.

day.[48] The Court of Appeals held that strict compliance with the statute was necessary, and Sajko's tenth-day mailing was not sufficient because KRS 161.790 speaks of "receipt" of notice and does not incorporate a mailbox rule.

Sajko sought discretionary review of the Court of Appeals decision. Her Motion for Discretionary Review recited only the facts relevant to whether she had provided timely notice to the Superintendent and the Commissioner, and the six legal issues she listed all revolved around the proper interpretation of KRS 161.790.[49] This Court granted the Motion for Discretionary Review to consider those issues.

ARGUMENT

This Court should consider only the procedural holding of the Court of Appeals. The Court of Appeals was faced with an appeal of substantive issues by Sajko challenging her termination for insubordination, a cross-appeal by the Schools regarding the substantive issue of the Tribunal's finding that Sajko was not guilty of conduct unbecoming a teacher, and the procedural issue of whether the Tribunal had jurisdiction over Sajko's challenge to her termination. Only the last of these issues was ruled on by the Court of Appeals; the last was the only subject raised by the Motion for Discretionary Review; and the last is the only issue properly before this Court. The Court of Appeals was right to hold that the Tribunal had no jurisdiction to review the discipline against Sajko.

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[48] The Court of Appeals observed that even if Sajko had given constructive notice to the Superintendent by faxing a copy of her notice after business hours to the General Counsel for the Schools, this could not cure her failure to give timely notice to the Commissioner. Opinion at 5.

[49] Motion for Discretionary Review, 2-4.

I. THE COURT OF APPEALS CORRECTLY HELD THAT DUE TO SAJKO'S FAILURE TO GIVE TIMELY NOTIFICATION, THE TRIBUNAL HAD NO JURISDICTION TO HEAR HER APPEAL.

The Court of Appeals decided this case based on its interpretation of KRS 161.790(3), the statute which creates Sajko's right to appeal. Sajko argues that because it is a statute of limitations, KRS 161.790(3) should be "liberally construed" [Appellant's Brief at 10] - by which she means that the statute should be read to mean something other than what it says. She made this same argument to the Court of Appeals, without success. As a preliminary matter, KRS 160.790(3) is not a true statute of limitation: it was not enacted to restrict a common-law right of action. Instead, KRS 160.790 creates a right to a tribunal hearing, and defines the condition under which it may be exercised. "A lapse of the statutory period operates, therefore, to extinguish the right altogether. To such limitations the rules of law governing pure statutes of limitation ... have no application." *Lilly v. O'Brien*, 6 S.W.2d 715, 718 (Ky. 1928) (analyzing former KS 1596a12, which permitted an election contest when the petition was filed within 10 days after certification of the election results).

Because appeals in administrative proceedings are created by statute and do not exist as a matter of right, the Court of Appeals emphasized the need for Sajko to strictly comply with KRS 161.790(3). The Court of Appeals quoted this Court's holding in *Robert v. Watts*, 258 S.W.2d 513 (Ky. 1953) to say: "When the right is conferred by statute, a strict compliance with its terms is required." [Opinion at 5.] The terms of KRS 161.790(3) clearly state that a teacher must "notify" two persons -- the Commissioner of Education and the Superintendent of the Schools -- of her intent to appeal within ten days of receiving her notification of termination:

> (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. (Emphasis added.)

The Court of Appeals concluded that, as a matter of law, Sajko's facsimile transmission to the general counsel for the Schools on the tenth day of the appeals period did not strictly comply with the statute's requirement that she should give notice to the Superintendent and Commissioner within ten days. That interpretation was correct, and this Court should affirm it and uphold the dismissal of Sajko's appeal of her termination.

A. "Constructive Notice" To The Schools' Attorney Does Not Meet The Statutory Requirement To Notify The Superintendent And The Commissioner.

Sajko argued below as she does here [Appellant's Brief at 10-11] that she provided "constructive notice" of her intent to appeal on the tenth day of her appeal period: April 7, when her counsel faxed a letter to the office of the Schools' general counsel stating, "Ms. Sajko intends to answer the charges against her, and will be sending this letter to the Commissioner, Kentucky Department of Education, and to the Superintendent of Jefferson County Public Schools." Since this letter was sent after business hours, it was not actually received and read by the general counsel until April 8. More significantly, the Commissioner of Education and the Superintendent -- the persons required by KRS 161.790 to receive the response -- did not receive their mailed copies of the April 7 letter until April 8, the eleventh day after Sajko's termination.[50]

[50] Affidavit of Rosemary Miller.

The Court of Appeals rejected the notion that Sajko's fax to the Schools' attorney sufficed to meet her statutory burden, for two reasons. First, it observed that even if the letter could constitute constructive notice to the Superintendent, it cannot possibly be construed as notice to the Commissioner. [Opinion at 5.] The Court of Appeals went on to reject the basic premise that it was good enough for Sajko to notify the Schools' attorney, in place of the Superintendent. "Furthermore, notice to the school board's attorney does not strictly comply with the requirement of KRS 161.790(3) that the superintendent and commissioner be notified." [Opinion at 5.] Clearly, the Court of Appeals is correct. Strict compliance is the rule, and Sajko did not meet it.

In her brief to this Court, Sajko jettisons any legal principle of strict compliance. She glosses over her substitution of the Schools' general counsel for the Superintendent. And she claims that the Superintendent is really the important party and there is no prejudice if the notice to the Commissioner is "a few hours, or even a few days" late. [Appellant's Brief at 11.] Sajko asserts that notice to the Superintendent "is the notice for which timeliness matters most," since the Commissioner merely needs to convene the tribunal panel, whereas the Superintendent must direct the Schools to prepare its case. [*Id.*] This argument is backwards: the critical element of giving notice is to allow the Commissioner to convene the Tribunal; the Schools' preparation does not matter unless and until that happens. But more elementally, KRS 161.790 specifically names the Superintendent <u>and</u> the Commissioner as the persons to receive notice within the statutory ten-day window. Sajko cannot rewrite the statute for her own convenience.

The proper inquiry is not whether the Schools was prejudiced, or whether the statute might have been written differently, but whether Sajko complied with the

requirements of the statute. She did not. This Court should affirm the Court of Appeals and refuse Sajko's invitation to disregard the plain language of the statute that requires notice to the Commissioner and the Superintendent within the allotted time.

B. The Date of Receipt Is Determinative, Because KRS 161.790(3) Does Not Include A "Mailbox Rule."

The Court of Appeals further held that Sajko did not satisfy her burden to notify the Commissioner and Superintendent within ten days merely because she mailed her notice on the tenth day. There are no Kentucky cases interpreting KRS 161.790, but the Court of Appeals quoted *Energy Regulatory Commission v. Kentucky Power Co.*, 605 S.W.2d 47 (Ky. App. 1980) ("it is not the sending but the receipt of a letter that constitutes true notice"), and *Baldwin v. Fidelity Phenix Fire Ins. Co. of New York*, 260 F. 2d 951, 953-54 (6th Cir. 1958) ("[i]t is not, therefore, the sending but the receipt of a letter that will constitute notice") to conclude that the dispositive question was not the date Sajko mailed her letters but when they were received.

In *Energy Regulatory Comm'n*, the Court of Appeals interpreted a statute (KRS 278.410) which provides simply, "Notice of the institution of such action shall be given to all parties of record before the commission," relying on *Baldwin* to hold that the date of the receipt, not the sending, of such notice was dispositive. The Sixth Circuit in the *Baldwin* case explained the basis for the rule, with citation to additional authorities:

> [T]he term "written notice shall be given" carries with it the implication of receipt or delivery. As pointed out in *Rapid Motor Lines, Inc. v. Cox*, 134 Conn. 235, 56 A.2d 519, 521, 175 A.L.R. 296, "One meaning of the verb 'give' is ... 'to deliver or transfer; to ... hand over.'" See Webster's New International Dictionary, Second Edition, definitions of the word "give." As declared in the *McSparran* case, supra, 193 Pa. 191, 44 A. 318, "Notice is knowledge or information legally equivalent to knowledge, brought home to the party notified in immediate connection with the subject to which the notice relates. It is not,

therefore the sending, but the receipt, of a letter that will constitute notice ...." Cf. 66 C.J.S. Notice § 18, p. 663.

Baldwin, 260 F.2d at 953-54.

Sajko argues that these cases are not authoritative, as KRS 161.790(3) does not require that the notice be received within ten days, but only that the teacher should "notify" or "give notice" in that time frame.[51] [Appellant's Brief at 12.] But Sajko's argument would apply with equal force to the language of the statutes at issue in *Energy Regulatory Comm'n* ("notice shall be given"), and in *Baldwin* ("written notice shall be given"). The only authority Sajko cites for her effort to import a "mailbox rule" into KRS 161.790 so as to look at the date of sending notice over the date of receipt are cases foreign to this jurisdiction, and as she admits, each involves a statute that explicitly allows for using registered mail to satisfy the statute of limitations. [Appellant's Brief at 12.] KRS 161.790 makes no such reference, and there is no authority and no compelling reason to support reading into the statute this extension of Sajko's time to appeal. If the General Assembly meant for this statute to incorporate a mailbox rule, it could have written one.

Sajko attempts to get out from under the analysis offered in *Baldwin* by framing that case as merely an insurance dispute, to be construed differently than a matter of statutory interpretation [Appellant's Brief at 13], and one in which the purpose of timely notice is different. In *Baldwin*, she says, the notice requirement "is interpreted very strictly because the insurer needs to act quickly...." [*Id.* at 14.] Sajko ignores the tight time frame upon which the appeal is to take place according to

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[51] Sajko also points to KRS 161.790(4), directing activity the Commissioner must undertake "<u>[u]pon receiving the teacher's notice</u> of his intention to answer the charge...," which she says "is clearly phrased to refer to a time after notice has been actually received." Of course, the Commissioner can hardly be expected to act before he has received notice. This section adds nothing to the examination of whether KRS 161.790(3) incorporates a mailbox rule.

KRS 161.790: the Tribunal must be convened within 45 days, a span that allows very little time to appoint a panel, assemble evidence, interview witnesses, and prepare a case.

Likewise, Sajko tries to evade the holding in *Energy Regulatory Comm'n* by proclaiming that the statue in that case typically applies to "sophisticated business entities." [*Id.*] She says equity requires a different outcome where the person giving notice is a mere school teacher, one who in this case had no legal representation until the day before her appeal time expired. But the termination letter itself advised Sajko she had ten days to appeal, told her exactly where to send the appeal, and enclosed a copy of the applicable statute. It is also worth noting that, while she may not yet have had a legal representative, Sajko spoke to her union representative the very same day that she received her notice of termination. Sajko's appeal period began to run upon her own receipt of notice of her termination, not upon her hiring of counsel. Her plea for lenience rings hollow coming from someone who saw fit to flunk 75 freshman students in one six-week period for reasons such as not following her far more arbitrary rules about the placement of staples on homework assignments.

The General Assembly chose to use the same language in framing the notice requirements for automobile insurance policyholders, corporations doing business before the Public Service Commission, and school teachers. With all respect, it is not the role of this Court to override that determination on the premise that school teachers should be given more leeway. This Court can and should affirm the statutory construction of the Court of Appeals, which respects the statute's language and carefully follows authority interpreting similar statutes.

C. The Court Of Appeals Did Not Engage In Improper Fact Finding, But Relied On Facts Established In the Record Below.

In both its September 19, 2008 Opinion and its December 12, 2008 Modified Opinion, the Court of Appeals held that Sajko did not timely notify the Superintendent or the Commissioner of her intention to answer the charges contained in her termination letter and that the Tribunal, therefore, lacked jurisdiction to consider her defense to the charges. Sajko claims those Opinions were based on improper fact finding because the Court of Appeals determined Sajko received the termination letter on March 28, 2005. But as the Court of Appeals points out in its Modified Opinion, <u>the Circuit Court opinion stated that Sajko received the letter on March 28, 2005.</u>[52]

Sajko now complains that the Circuit Court had no authority to make that finding [Appellant's Brief at 9], but her complaint comes too late. Sajko did not challenge the Circuit Court's determination that she received the letter on March 28, 2005 when she came to the Court of Appeals. Instead, she let that determination stand. Sajko's Prehearing Statement listed only three issues to be raised on appeal:

> 1. Did the Circuit Court err in failing to reverse the decision of the Tribunal constituted pursuant to KRS 161.790?
>
> 2. Did the Circuit Court err in failing to find that the Tribunal impermissibly punished Sajko twice for the same conduct?
>
> 3. Did the Circuit Court err in failing to reverse the decision of the hearing officer to allow testimony regarding an incident which was not charged by the school system?

Sajko did not challenge the Circuit Court's statement that she received the letter on March 28, 2005 by claiming that it improperly acted as fact finder on that issue. Simply put, Sajko did not properly preserve the issue of whether the Circuit Court erred in deciding when she received the letter. Accordingly, this Court should

[52] Opinion at 5 n. 3; Circuit Court Opinion at 3.

disregard Sajko's argument that the Circuit Court acted improperly. "It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court." *Newell Enterprises, Inc. v. Bowling*, 158 S.W.3d 750, 755 (Ky. 2005) (internal citations omitted). The Court of Appeals did not find facts regarding when Sajko received the letter: it relied on the determination found in the record below, reported in the Circuit Court's Opinion.

Moreover, even if the issue were preserved for review, both the Circuit Court and the Court of Appeals acted well within their power by making a determination regarding when Sajko received the letter. The evidence was so one-sided as to permit only one conclusion: Sajko received the letter on March 28, 2005. Accordingly, there is no need to remand to the Tribunal for further proceedings on this question.

D. There Is No Genuine Factual Question That Sajko Received Notice From The Schools On March 28, 2005.

When the hearing officer denied the Schools' motion to dismiss, he noted the Schools' proffered evidence regarding the delivery of the letter on March 28, 2005, and the assertion of Sajko's counsel that she would testify she had not received the letter on that day without making a finding.[53] But instead of withholding a ruling based on a dispute of fact, the hearing officer concluded that KRS 161.790 was ambiguous in its requirements, might allow for constructive notice to the Superintendent via the fax to the School's counsel, and might allow Sajko to notify the Commissioner by mailing her notice on the tenth day of her appeal period. This legal interpretation by the hearing officer was overturned by the Court of Appeals.

In his Order, the hearing officer stated that if he were to interpret the statute differently, finding Sajko's conduct on April 7 legally insufficient to comply with the

[53] The Order of the Tribunal Hearing Officer is Appendix D hereto.

statutory requirements, "a preliminary evidentiary hearing would need to be held regarding [Sajko's] denial of the affidavit assertions." (Emphasis added.) There is no need to conduct that preliminary evidentiary hearing at this late date. After the hearing officer denied the Schools' motion, the matter proceeded to a full Tribunal. And the Tribunal heard all the relevant evidence as to the date Sajko received the letter. The record, developed fully at the hearing, supports only one conclusion - that Sajko received the letter on March 28, 2005.

While the Tribunal did not make a specific factual finding regarding when Sajko received the termination letter, the evidence of record overwhelmingly supports the conclusion that that she did, in fact, receive it on March 28, 2005, when both the Schools and her own union representative swore that she received it. In *Clark Mechanical Contractors, Inc. v. KST Equipment Co.*, 514 S.W.2d 680, 682 (Ky. 1974), this Court held that remand is not necessary in all cases where the fact finder fails to make explicit findings:

> While it is true that CR 52.01 requires the trial court in all actions tried on the facts without a jury to make findings of fact and conclusions of law . . . it is nevertheless true that **not all cases must be** reversed and **remanded** because of such error. . . . In cases where the record is so clear that the court does not need the aid of findings it may waive such a defect on the ground that the error is not substantial in the particular case.

(Emphases added.) *See also J.P. Perry v. J.M. McLemore*, 414 S.W.2d 141 (Ky. 1967) ("It is not in all cases that the error [in failing to make findings of fact] must or will result in remand of the proceedings for compliance."). Here, even though the Tribunal did not make an explicit finding regarding when Sajko received the letter, the record is comprehensive on that point, making remand unnecessary.

On appeal of an administrative decision, while the reviewing court must give weight to the fact finder's determinations, it may examine the evidence and set aside

findings of fact that are clearly erroneous. *See, e.g, Commonwealth v. Harrelson*, 14 S.W.3d 541, 548 (Ky. 2000); *Laffosse v. Laffosse*, 564 S.W.2d 220 (Ky. 1978); *Yates v. Wilson*, 339 S.W.2d 458, 464 (Ky. 1960). Similarly, courts outside Kentucky have held that reviewing courts may make factual determinations in situations when the record is sufficiently clear. *See, e.g., Leonard v. Smith*, 29 A. 915, 916 (Pa. 1894) (when the fact finder refuses to make a factual determination "either way," the appellate court is permitted to assess the evidence and make the factual determination); *Wood v. Wood*, 855 P.2d 473, 475 (Idaho 1993) ("We may not disregard a trial court's failure to make findings unless the answers are obvious in light of a clear record.") (Emphasis added.)

As the Court of Appeals points out in footnote 3 of its Modified Opinion, the evidence from the Schools is not seriously contested:

> In her briefs, Sajko does not cite to the record or make further argument in this regard [*i.e.*, Sajko's denial that she received the letter on March 28, 2005]. And the Circuit Court noted that Sajko received the termination letter on March 28, 2005. That Sajko received the letter on that date is supported by the affidavits of two school employees and by the testimony of Sajko's union representative.

The Schools complied with the KRS 161.790 requirement that the superintendent "furnish" the teacher with a written statement detailing the charges against her by delivering the termination letter to her residence of record on March 28, 2005 - a fact that stands undisputed. It is perfectly clear from the record that the termination letter was delivered to Sajko on March 28, 2005. Carolyn Meredith, the Schools' Director of Employee Relations, and Danny Harrell, the Schools' employee who actually delivered the letter, submitted sworn affidavit testimony that on that day, Mr. Harrell delivered the termination letter to Sajko's residence of record - an address where the Schools had delivered other information to her on numerous occasions. Their evidence was unrebutted.

Moreover, Sajko called her own union representative Elana Crane as a witness before the Tribunal, and Ms. Crane testified that Sajko called her on March 28, 2005, because Sajko had received the termination letter and wanted to discuss it with her.

> Q: ... Did Ms. Sajko contact you about the fact that she had received that [termination] letter?
>
> A: Yes.
>
> Q: And do you recall when she contacted you, Ms. Crane?
>
> A: I believe it was that afternoon.
>
> Q: And by that afternoon, you mean the afternoon of March 28th?
>
> A: Yes. Was that a Monday?
>
> Q: Yes, it was.
>
> A: Okay.
>
> Q: And when she contacted you at that time did she indicate to you that she actually had the letter?
>
> A: I believe so.
>
> Q: That's the way you recall it anyway?
>
> A: Yes.[54]

As the hearing officer properly observed, if his interpretation of the statute were incorrect (as the Court of Appeals has ruled it was), Sajko would need to deny the affidavit assertions. The evidence Sajko produced did not do that. At the hearing, Sajko was unable to challenge the proof that Mr. Harrell personally delivered the letter to her home address on March 28, 2005. "This is not a case where there was sufficiently credible evidence on both sides of the issue." *Commonwealth v. Harrelson*, 14 S.W.3d 541, 549 (Ky. 2000).

Instead, on cross-examination, Sajko offered non-responsive comments denying that the package was hand-delivered to her and internally inconsistent testimony

[54] Tribunal Hearing Transcript, pp.1343-44.

about where she got the letter and whether she spoke with Ms. Crane on March 28, 2005:

> Q: Elana Crane's testimony was that she spoke to you the day of the [termination] letter. You had received it, and you called her to talk about it. Is your recollection different?
>
> A: My recollection is that they keep saying that it was hand-delivered to me. I did not have anything hand-delivered to me. It was delivered to an address that I'm not living at. And I had a Tuesday morning conference or a grievance level two I believe it was, with Carolyn Meredith, Mr. Wilson and Elana Crane. When I got ready to leave [from the address where she was not living?], I looked and saw the packet, picked it up, took it with me, told her about it. And we went through it after that.[55]

Thus, Sajko testified both that the letter was delivered somewhere she no longer lived, and that she first saw the letter as she got ready to leave that same house the following morning. Sajko's evasive and ambiguous testimony regarding when she read the letter does not speak to the issue flagged by the hearing officer when he denied the Motion to Dismiss. It is not probative of the question, that is, the date she "received" the letter pursuant to the statute.

All Sajko said was that the letter was not "hand-delivered" (apparently meaning that it was not handed to her), and that she did not collect and review the letter until the following day. The first point is undisputed and irrelevant as KRS 161.790 does not call for hand delivery. And even if the latter point were true, it too

[55] Tribunal Hearing Transcript, p. 1910. Sajko's testimony is not probative because it is simply "incredible and unbelievable." *See Commonwealth v. Friend,* 500 S.W.2d 405, 406-07 (Ky. 1973) ("Sometimes there is testimony which taken at its face value will support the verdict but which nevertheless runs counter to all human experience and this court knows from its own background and experience that such testimony is incredible and unbelievable, not fit to induce conviction in the minds of reasonable men, and therefore does not have probative value.") The Final Order indicated that the Tribunal that heard all the evidence had concerns as to a variety of issues about Sajko's credibility as a witness on her own behalf, even bluntly stating on another topic, "[t]he Tribunal is unconvinced regarding Ms. Sajko's assertion." *See* Final Order at 6.

would be irrelevant: there was no need for the Schools to place the letter in Sajko's hand to accomplish its delivery and receipt. Sajko might have avoided the package at her front door for a week without affecting the legal date of receipt.

The letter was "furnished" and Sajko had "receipt" of it on March 28, 2005, the day that the Schools' employee carried the letter to Sajko's residence of record and left it there in a prominent place for her to collect. What is more, her own witness's testimony shows that Sajko actually did have the letter in hand on that date. There can be no genuine doubt that the termination letter was "furnished" and Sajko "received" it on March 28. Sajko's nonresponsive testimony does not rebut the testimony of the two Schools' employees as to the date the letter was delivered to her residence of record, and thus fails to create a fact issue warranting remand. Sajko was aware before the Tribunal hearing began that the Schools protested her appeal as untimely. If she had had any proof that the package was not delivered to her residence of record on March 28, 2005, she surely would have offered it at the hearing. Instead she quibbled over irrelevant points.

All the evidence that could be proffered is already in the record, and there is no need to remand to the Tribunal for a formal finding of fact. A finding that the termination letter was not furnished to Sajko on March 28, 2005 would <u>not</u> be supported by substantial evidence. In fact, it would be clearly erroneous. The evidence leads to but one conclusion: the termination letter was "furnished" to Sajko per the statute's requirement on the day it was delivered to her residence of record. Sajko's vague testimony (controverted by her own witness) that she may not have reviewed and discussed the letter until the next day is not sufficient to show otherwise. The Court of Appeals properly determined that Sajko received the letter on the day it was furnished to her: March 28, 2005.

E. The Court of Appeals Did Not Require A Teacher to Effect Personal Service and Has Not Placed an Unreasonable Onus on Teachers.

Sajko has never suggested that either the Commissioner or the Superintendent actually received Sajko's notice by April 7, the last day of the 10-day statutory period. Sajko did not give notice of her intention to answer the charges against her within the 10-day period required by KRS 161.790(3), and the statute is clear about the effect of such a failure to give timely notice: "upon failure of the teacher to give notice within ten (10) days, the dismissal shall be final." Sajko's April 7 letter acknowledged Sajko's statutory requirement to give notice to the Commissioner and the Superintendent of her intention to answer the charges against her, and clearly stated her future intention to fulfill that requirement. The April 7 letter stated that "Ms. Sajko intends to answer the charges against her, and will be sending this letter to the Commissioner, Kentucky Department of Education, and to the Superintendent of Jefferson County Public Schools." (Emphasis added.)

The Court of Appeals concluded that it was not enough to put the notice of appeal in the mail to the Commissioner and the Superintendent on the tenth day of the appeals period. [Opinion at 6.] In response, Sajko offers a series of hypotheticals designed to indicate that only a teacher who "hires the local constable to personally serve her notice ... on both the superintendent and the commissioner" "can be certain that her rights are preserved." [Appellant's Brief at 17.] Even though the Court of Appeals modified its Opinion at Sajko's request to specifically note that personal service is not required [Opinion at fn 4], Sajko insists that, practically speaking, "there is no other option." [Appellant's Brief at 17.]

Of course, there are many other options. On the seventh day of the appeals period, a teacher could certify and mail her notice with some confidence that it will

arrive in a timely fashion; a cautious person might follow up with a phone call on the tenth day to confirm that the letter was received if the return receipt had not come back to her. On the ninth day of the appeals period, a teacher could send the notice by overnight mail, UPS, or Federal Express, and track the letter with the various internet programs offered for that purpose to ensure that it was timely received the next day. On the tenth day of the appeal period, a teacher could fax her notice to the office of the Commissioner and the office of the Superintendent (not the office of the Schools' attorney) during business hours, with an electronic confirmation that the faxes had transmitted properly.

Sajko posits that even such a confirmation would not be enough, since even though the offices of the Superintendent or Commissioner would have the faxed letter, "the superintendent and/or commissioner might be on a two-week vacation." [Appellant's Brief at 17.] This suggestion furthers Sajko's misconception about what it means to be in "receipt" of a document. No court would hold that notice had not been "received" in these circumstances, just as it is irrelevant that Sajko may not have read her own termination letter on the day it was brought to her home. "Receipt" does not mean that the letter must be handled and read by the person to whom it is addressed. As explained above in regards to Sajko's receipt of the termination letter, the crucial date is not when the individual who must receive notice actually reads the document, but when he or she has the opportunity to read the document because it has been delivered.

The delivery of the Superintendent's termination letter to Sajko's home and the mailing of her counsel's letter to the Commissioner of Education and the Superintendent were reasonable forms of notice. In each case, however, the notice could not be effective until it was received, and Sajko's mailings were not received

until after her ten-day period expired. Sajko's brief warns that the Court of Appeals "creates uncertainty" in that a teacher who appeals her discipline under KRS 161.790 "will have to make sure that both the superintendent and the commissioner actually received the notice to contest within the ten-day window." [Appellant's Brief at 16.] There is no uncertainty here. The Court of Appeals made a simple and commonsense interpretation of KRS 161.790 that comports with other authority within this Commonwealth as to the meaning of "notice" in statutes that do not include any mailbox-rule language. The General Assembly has put the burden on Sajko and other teachers to make sure that a notice of appeal is "received" during the ten days the statute allots for that purpose, just as others who are subject to similar statutes must do so.

In seeking to pursue an administrative right to appeal, Sajko had the burden of strictly complying with the requirements of the statute that created her right. Sending a fax after business hours on the last day of the appeal period to an individual who is neither of the two persons the statute says must receive notice is not strict compliance in any sense. Sajko's appeal was untimely filed, and this Court should affirm the ruling below holding that the Tribunal had no jurisdiction to hear her protest of the discipline against her. Her termination must stand.

II. THE ONLY ISSUE BEFORE THIS COURT IS WHETHER THE COURT OF APPEALS ERRED IN DETERMINING THAT THE TRIBUNAL LACKED JURISDICTION.

The Court of Appeals disposed of this matter on the grounds of Sajko's untimely appeal and thus did not address the substantive issue of whether the Superintendent's termination of Sajko was justified. Sajko sought discretionary review from this Court based only on the procedural issue, claiming that the Court of Appeals improperly made a factual determination and improperly construed KRS 161.790 with regard to its

notice requirements. Her Motion for Discretionary Review does not list any substantive issues as to whether the Tribunal properly upheld her termination for insubordination.

In her Appellant's Brief, though, Sajko has asked this Court to consider all issues raised before the Court of Appeals -- even those on which the Court of Appeals made no determination and which were not listed as grounds for review by this Court. This Court should decline Sajko's invitation by holding true to two long-standing fundamental principles of Kentucky jurisprudence. First, a reviewing court will not consider issues not decided by the lower court. *See, e.g., Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 734 (Ky. 2009) (where an issue was raised by the parties in brief but "not addressed by the Court of Appeals," the Supreme Court would not review that issue); *Gailor v. Alsabi*, 990 S.W.2d 597, 602 (Ky. 1999) ("We will not discuss issues raised but not decided by the Court of Appeals."). Second, this Court will not consider issues that were not raised in the Motion for Discretionary Review. *See, e.g., Brooks*, 283 S.W.3d at 738 ("[I]ssues not raised in the Motion for Discretionary Review will not be addressed by this Court despite being briefed before us and addressed at oral argument." (*quoting Wells v. Com.*, 206 S.W.3d 332, 335 (Ky. 2006)); *Ellison v. R & B Contracting, Inc.*, 32 S.W.3d 66, 72 n. 7 (Ky. 2000)("Although those issues [which were not mentioned in the Motion for Discretionary Review] were briefed before us and addressed at oral argument, we find that [neither issue] is properly before this Court.").

Sajko cites two cases to support her position that this Court should review the entire case, despite the fact that Court of Appeals did not rule on any of the substantive issues raised by her direct appeal to that court. In the first, *Ice v. Commonwealth*, 667 S.W.2d 671 (Ky. 1984), the fifteen-year-old appellant who had

been sentenced to death sought reversal based on a myriad of complex evidentiary and constitutional legal issues as well as various allegations of improper prosecutorial conduct. This Court's opinion discussed several of these issues, finding a few in particular sufficient to remand the case. After doing so, this Court stated that it need not discuss a host of other issues raised by appellant.

Sajko seizes on the following language to argue that this Court should violate the fundamental principle that it cannot rule on issues not determined by the Court of Appeals: "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." But this reasoning actually supports the argument that the Court need not discuss extraneous issues. The only issue before this Court is whether the Court of Appeals erred in determining that the Tribunal lacked jurisdiction to hear Sajko's case because she did not give timely notice of her intent to appeal her termination. That is the only issue that the Court of Appeals considered and it is dispositive of this particular appeal. Therefore, as in *Ice*, this Court need not rule on extraneous issues.

The second case, *Terry v. Commonwealth*, 153 S.W.3d 794 (Ky. 2005), likewise included a host of evidentiary issues involved in the appellant's criminal trial. While this Court "primarily" remanded the case based on one particular issue, it chose to address other issues that also warranted reversal because it believed they were "likely to recur upon retrial." This Court felt it necessary to instruct the trial court regarding additional evidentiary issues and errors in its rulings. *Terry,* however, is certainly distinguishable from this case because the Court of Appeals never decided the issues Sajko asks this Court to determine. In contrast, in *Terry,* the trial court had already determined the issues and this Court disagreed with its determinations. Here, this

Court cannot find error in the Court of Appeals holdings on the substantive issues because it never made any determination about them.

Neither case cited by Sajko mandates that this Court should consider the issues not addressed by the Court of Appeals. In fact, Sajko's position contradicts bedrock legal principles embraced by this Court, namely that it will not consider issues that were not decided by the Court of Appeals and that it will not consider issues that were not raised in the Motion for Discretionary Review. This Court should, therefore, limit its review to the procedural issue of whether the Tribunal had jurisdiction over Sajko's challenge to her termination.

What is more, Sajko's failure to raise the substantive issues in her Motion for Discretionary Review is fatal to her case. This Court has held that "issues raised on appeal but not decided will be treated as settled against" the party raising those issues unless it raises those issues in the Motion for Discretionary Review. *See Gailor*, 990 S.W.2d at 602. Thus, even if this Court finds that the Court of Appeals erred on the procedural issue, there is nothing left for this Court to remand to the Court of Appeals. The substantive issues raised by Sajko's appeal are deemed decided against her and she failed to preserve them for further review. Thus, her termination must be upheld under any scenario. Sajko simply cannot prevail on this appeal.

Sajko would urge this Court to overlook the omissions from the Motion for Discretionary Review, and look past its holding in *Gailor* that would construe against Sajko the issues on which Sajko did not move for discretionary review and which the Court of Appeals did not consider. If she convinces this Court that this path is appropriate, and if this Court disagrees with the Court of Appeals as to the dispositive procedural issue, this Court may choose to examine the merits of Sajko's termination. In so doing, this Court need only look back to the decision of the Circuit Court, where

the reviewing judge considered the Tribunal findings and concluded that the record supported the Tribunal's decision to uphold Sajko's termination.

III. THE CIRCUIT COURT PROPERLY DECLINED TO OVERTURN THE TRIBUNAL'S ACCEPTANCE OF THE SUPERINTENDENT'S DECISION TO TERMINATE SAJKO.

KRS 160.370 provides that the Superintendent "shall be responsible for the hiring and dismissal of all personnel in the district." Thus, in Kentucky only the Superintendent -- not the Board of Education, a school council, nor a principal -- can terminate the employment of a teacher. Any such dismissal of a teacher by a Superintendent must be undertaken in accordance with KRS 161.790.

In March 2005, after Sajko had defied directives from Male High officials for more than a year, the Superintendent took disciplinary action against Sajko under Kentucky's teacher termination statute. Although Sajko had been disciplined repeatedly at the school level, her termination triggered the procedural protections of KRS 161.790 for the first time. As the termination letter pointed out in detail, Sajko's employment was terminated based upon the cumulative history of her misdeeds dating back to the fall of 2003, not because of any discrete act in the series. The Superintendent explained in the termination letter:

> After considering the seriousness of the violations outlined in this letter, and your previous disciplinary record that includes two suspensions and numerous written reprimands and warnings, I have concluded that termination of your contract of employment as a teacher in the Jefferson County School District is warranted.[56]

On review of the Superintendent's decision, the Tribunal disagreed with the final insubordination charge in the Schools' seven-page termination letter (the charge that she was insubordinate for refusing to undergo an occupational evaluation in January 2005). The Tribunal might have used that conclusion as a basis for rejecting

[56] Appendix E, p. 6-7.

the Superintendent's decision to terminate Sajko altogether or modify the discipline. The Tribunal enjoys wide latitude in this regard. *See Fankhauser v. Cobb*, 163 S.W.3d 389, 400 (Ky. 2005) (stating the tribunal alone "has the discretion to accept or reject the sanction proposed by the superintendent and the discretion to impose an alternative or less severe sanction"); *Gallatin County Board of Education v. Mann*, 971 S.W.2d 295, 300 (Ky. App. 1998) ("The tribunal's power to make findings of fact inherently includes the authority to reach a conclusion different than that reached by the Superintendent."). Instead the Tribunal concluded that, even without accepting the final charge, terminating Sajko's employment was the only appropriate response to her inexcusable pattern of misconduct: after hearing Sajko testify on her own behalf, the Tribunal found that Sajko "would consider any reduction in the sanction as vindication of her inappropriate teaching methods and her unacceptable responses to Male High School officials' directives."[57]

Sajko complains that she was terminated "for conduct which had previously been the basis of two different suspensions," and therefore she was somehow improperly subjected to double jeopardy. <u>Sajko makes no effort to find such a prohibition in the language of KRS 161.790 or to cite any Kentucky law for this proposition. That is because under Kentucky's teacher discipline system no such prohibition exists</u>. The substantial discipline that Sajko received prior to receipt of the termination letter did not involve a notification of charges under KRS 161.790 and/or notification to the school board. That prior discipline was given at Male High by the school principal and his representatives. Thus the prior discipline fell outside the protection of KRS 161.790. Under Kentucky's teacher disciplinary scheme, the

[57] Final Order, 11.

Superintendent's termination letter of March 28, 2005 was the first disciplinary action against Sajko that triggered the protections of KRS 161.790.

KRS 161.790 does not apply every time a teacher receives any discipline. It only applies when a superintendent decides that a teacher's conduct warrants termination. *See* KRS 161.790(1) (stating the "contract of a teacher ... shall not be terminated except ...); OAG 73-342 (distinguishing termination, controlled by KRS 161.790, from reassignment of duties and reduction in salary, governed by KRS 161.760). When a superintendent notifies a teacher of his or her termination, that triggers the statute and all of its procedural protections, including notification to the school board. A superintendent who takes action under KRS 161.790 may choose an alternative sanction, KRS 161.790(10), but must in any event notify the teacher of the charges and also notify the school board. Nowhere does KRS 161.790 prohibit a superintendent in Kentucky from taking action just because the teacher previously received discipline at the teacher's school.

Sajko made the same "double jeopardy" protest to the Tribunal and to the Jefferson Circuit Court that she now makes to this Court. She alleged she had been punished enough and that the Tribunal should exercise its discretion to choose a lesser punishment short of termination. The decision to mete out discipline, if any, for Sajko's conduct rested with the Tribunal. *See Fankhauser v. Cobb, supra.* The Tribunal could have agreed with Sajko and decided merely to suspend or reprimand her yet again, hoping that one more warning would finally cause Sajko to follow directives and discontinue her insubordination and inappropriate conduct. But the Tribunal reviewed Sajko's entire history and chose not to do that. As the Hearing Officer pointed out in his Order regarding the instructions after the conclusion of the Tribunal trial, the Tribunal concluded that the autumn 2004 incidents enumerated in

the Superintendent's termination letter did in fact occur. The instructions "mirrored the charges contained in the Superintendent's termination letter, and the Tribunal concluded the proposed termination should be upheld even though the evaluation order was not upheld."[58] That administrative decision is entitled to deference and respect.

To support her contention that the Superintendent was prohibited from terminating her in light of the prior discipline, Sajko relies upon case law that is inapplicable under Kentucky's statutory scheme. In *Department of Transportation v. Career Services Commission*, 366 So.2d 473 (Fla. App. 1979),[59] the Florida court held that the statute and rules at issue only allowed the Department of Transportation to choose between a suspension or dismissal for misconduct. The agency could not impose both. Similarly, in *Appeal of Joseph Ditko*, 123 A.2d 718 (Pa. 1956), the police officer had previously been suspended for misconduct under the statutory authority for fining, suspending, or discharging civil services employees. The Pennsylvania statute required that one (but not more than one) of those options had to be selected as discipline for his subsequent conduct.

KRS 161.790 only contemplates imposition of one form of discipline or another by the Superintendent. *See* KRS 161.790(10). But Sajko only received one discipline from the Superintendent under KRS 161.790. Under KRS 161.790, the Superintendent had to choose whether to terminate or otherwise discipline Sajko for insubordination and unbecoming conduct, and he chose to terminate her employment. The prior discipline that was handed down to Sajko at Male High did not trigger the procedural protections of KRS 161.790.

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[58] Final Order [Appendix C].

[59] All cited foreign authority is attached hereto in the Appendix.

To take Sajko's double jeopardy argument seriously, every sanction issued by the Male High principal would come before the Superintendent for a decision: worth termination or no? If the Superintendent did not consider the matter sufficiently advanced for his attention, it could be returned to the Male High principal to mete out a lesser punishment. In such a case, Sajko might have a better argument that it was unfair for the Superintendent to terminate her over the same matters for which she had already been disciplined. But clearly this system of discipline would be unworkable. The Superintendent could easily spend all his time on teacher discipline if he were required to address any issue with any teacher in the district.

Kentucky's system of teacher discipline is constructed to allow for two decision-makers, giving a principal the authority to react to matters on the ground that need not rise to the level of involving the Superintendent. But KRS 160.370 acts as a limiting principle on the disciplinary authority of a principal: a principal cannot fire a teacher. Whether it be one dramatic event or a series of smaller happenings, a principal faced with a teacher whose conduct has gone beyond the pale must turn the matter over to the Superintendent. Accordingly, KRS 161.790 only recognizes one decision-maker: the Superintendent.

Sajko's demand for a "triggering event" before the Superintendent can hand down discipline under KRS 160.790 would mean that a principal would have to allow a serial bad actor to go unpunished for at least one and perhaps more acts of student abuse or insubordination before a superintendent would terminate the teacher. This suggestion smacks of entrapment, and runs contrary to the notion of progressive discipline which contemplates and therefore permits consideration of an employee's past record when the penalty requested is termination. *See* Elkouri & Elkouri, *How*

Arbitration Works, 926-29 (5th ed. 1997).[60] If Sajko had opted for arbitration under her union contract instead of a Tribunal proceeding, her double jeopardy argument would fail. It should also fail here.

The foreign legal authority Sajko relies upon confirms that any prohibition against further discipline does not apply when an employee's discipline is considered in light of the employee's entire record. *See* Tim Bornstein, et al., *Labor and Employment Arbitration*, § 15.07[2][c] (an arbitration proceeding had determined that double jeopardy did not occur when a thirty-day suspension was imposed for three tardies in light of an overall poor attendance record, even though each of the infractions was the subject of a previous discipline). Indeed, in one of the very cases cited by Sajko, *Appeal of Joseph Ditko, supra*, even though one charge against the employee was not considered as a grounds for termination due to concerns the employee was previously disciplined for that, that same suspension was considered by the court in determining the appropriate punishment for Ditko's other misconduct and the termination was upheld.

It was on the basis of Sajko's long history of insubordination and inappropriate conduct that the Tribunal properly concluded that her termination was justified, and indeed, necessary. Thus, even assuming Sajko's premise were correct -- that she cannot be punished twice for the same conduct -- that simply did not occur here. Sajko was warned, given directives, and suspended by the Male High principal for multiple discrete acts of misconduct in 2004. She was ultimately terminated because, after more than a year of reprimands, warnings, and discipline, she gave the Superintendent no other real choice. It was her pattern of misconduct and her

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[60] All cited foreign authority is attached hereto in the Appendix.

obstinate refusal to comply with repeated directives from Male High officials that caused the Superintendent to make the decision to terminate her employment.

KRS 13B.151 prohibits this Court from second-guessing the Tribunal in the manner suggested by Sajko: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." The Tribunal was presented with a question of fact - what discipline, if any, is appropriate for Sajko's conduct. Like any jury, the Tribunal could have decided this case any number of ways, including modifying the sanction in some fashion. In its role as a finder of fact, an administrative agency is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact. *See Gallatin County Board of Education v. Mann, supra,* 791 S.W.2d at 300. Having decided that in light of a mountain of evidence of insubordination, Sajko's employment should be terminated, the Tribunal's decision is certainly supported by substantial evidence and should be upheld.

Even though it did not agree with the final insubordination charge, the Tribunal -- the jury Sajko chose when she requested a Tribunal trial instead of an arbitration proceeding under her union contract -- still concluded that termination was warranted. After hearing from all the witnesses including Sajko personally, the Tribunal concluded that Sajko "displayed no remorse and no willingness to change her methods or behavior," and that she "would consider any reduction in the sanction as vindication of her inappropriate teaching methods and her unacceptable responses to Male High School officials' directives."[61] For these reasons, the Tribunal concluded that terminating Sajko's teaching contract was the only appropriate action. This Court

[61] Final Order, 11.

should not disturb those findings based on an argument against progressive discipline that neither Kentucky's teacher termination statute nor case law has ever recognized.

IV. THE CIRCUIT COURT CORRECTLY DECLINED TO REVERSE THE TRIBUNAL'S FINDING THAT SAJKO VIOLATED THE NOVEMBER 5, 2003 DIRECTIVE TO CEASE AND DESIST FROM DEMEANING OR ABUSIVE TREATMENT OF STUDENTS.

When a party appeals from an administrative decision like that of the Tribunal below, the reviewing court must determine whether the agency's -- here the Tribunal's -- decision was arbitrary, meaning that the decision was not supported by substantial evidence of probative value. *See, e.g., James v. Sevre-Duszynska*, 173 S.W.3d 250, 255-56 (Ky. App. 2005); *Gallatin Co. Bd. of Educ. v. Mann, supra*, 971 S.W.2d at 300. "Substantial evidence means evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men." *James*, 173 S.W.3d at 256.

Sajko claims that when it found substantial evidence to support the Tribunal's finding that she was insubordinate, the Circuit Court relied on improperly admitted evidence regarding her practice of throwing students' papers in the trash and ordering students to dig them out. [Appellant's Brief at 18.] This is simply not so. Sajko contends she did not receive adequate notice that she was being charged with throwing student papers in the trash after the November 5, 2003 directive from Assistant Principal Barber. [Appellant's Brief at 18-20.] But she cannot say she was not afforded due process and did not know the nature of the charges against her. Her official Response to the Superintendent's letter demonstrates Sajko understood that the charges included this conduct because she stated her position simply and unequivocally:

I only threw papers in the trash twice, and after Mr. Barber spoke with me about discontinuing this practice, I did.[62]

Unfortunately for Sajko, both aspects of her Response were false and the Tribunal figured that out.

First, "twice" did not mean two times. For Sajko it meant that on two different days she threw student papers in the trash in each of her five classes.[63] So "twice" meant at least 10 times. Second, Sajko did not discontinue this practice after she was directed to stop. Even after the November 5, 2003 directive, she continued to throw papers in the trash for procedural errors. Her own student aide testified about it and the evidence came in with no objection.[64] Sajko's attorney interviewed Sajko's student aide -- the witness to this misconduct -- prior to his testimony at the Tribunal trial.[65] Sajko understood the charges, she responded clearly and unambiguously (although falsely), and the Tribunal did not believe her.[66]

Sajko claims that the Hearing Officer erred in allowing evidence about Sajko's disobedience to the November 5 directive against throwing away student work. [Appellant's Brief at 20-22.] But Sajko's official Response to the charges "opened the

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[62] Trial Exhibit 62.

[63] Testimony of Cara Sajko, Vol. 7, 1838-39; 1869-70.

[64] Testimony of T. M., Vol. 2, 443-46.

[65] Tribunal Transcript, Vol. 2, 447 (Attorney to Student Aide: "Remember, we talked about this.")

[66] This was not the only instance of the Tribunal simply not believing Sajko. The Final Order indicates a number of concerns on the part of the Tribunal about Sajko's credibility, although the Tribunal was respectful. For example, the Tribunal questioned Sajko's claim that she did not count the quiz grade for students who were directed to read a 500-page book in a matter of minutes, rejected her claim that one parent orchestrated comments at the public school board meeting, remarked that she avoided setting parent conferences and blamed students for their failures, and flatly rejected her claim that she was advised by another Male High School official that she could turn in a student folder the following day ("The Tribunal is unconvinced regarding Ms. Sajko's assertion"). Final Order, 3, 5, 6.

door" to a full discussion of whether Sajko had in fact only thrown papers in the trash twice and then discontinued the demeaning practice. The Hearing Officer expressly warned that Sajko could herself open the door to the Tribunal's hearing further testimony regarding this practice,[67] and that is precisely what she did by admitting her Response into evidence before the Tribunal.[68] Accordingly, when her own student aide testified about instances in 2004 in which Sajko threw students' papers in the trash and had them dig out the papers, her counsel properly declined to object to the testimony.[69]

Sajko's claim that she had no opportunity to prepare a defense to the allegation that she continued the practice of throwing students' papers in the trash is not credible. Sajko fully and succinctly stated her defense to that allegation in her very initial Response to the charges. The problem for her was not notice; the problem was her defense was not truthful.

But it is important to note that Todd Barber's November 5, 2003 directive to Sajko was not simply a directive not to throw homework in the trash can. The directive included that practice "or any other practices that are prohibited under students' rights to freedom from abuse."[70] Sajko's subsequent conduct during 2004 violated that directive in several respects and she fails to explain to this Court why it should overturn the Tribunal's finding that she failed to comply with this element of the November 2003 directive in its entirety. The Superintendent's termination letter to Sajko cited, among other things, her practice of throwing students' homework in

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67 Tribunal Transcript, Vol. I, 261.

68 Trial Exhibit 62.

69 Tribunal Transcript, Vol. 2, 443-46; Vol. 3, 492.

70 Trial Exhibit 4.

the trash can if there was a mistake and requiring students to dig it out and the directive on November 5, 2003 that she cease and desist from this practice "or any other practices that are prohibited under students' rights to freedom from abuse."[71]

Tracking the language of the Superintendent's letter, Interrogatory 4 in the Instructions to the Tribunal properly asked the Tribunal to decide whether Sajko failed to follow Todd Barber's November 5, 2003 directive to cease and desist from throwing students' work in the trash and having them pick it out and cease and desist from any other practice prohibited under students' right to be free from abuse. Sajko would have this Court focus exclusively on the first half of that interrogatory. But Sajko's abusive treatment of students even after November 5, 2003 -- and thus her violation of Todd Barber's directive -- would be well established even if she had discontinued the practice of throwing student papers in the trash.

The termination letter detailed Sajko's continued demeaning and abusive conduct other than throwing away student papers after the Todd Barber directive of November 2003. On January 8, 2004, Sajko directed one of her students to stand in the midst of the class and indicated that this student had caused the entire class to lose extra credit points.[72] Thus she threatened not only to have this student's academic grade affected by conduct, in violation of the Schools' Student Progression, Promotion, and Grading book and the Student Bill of Rights, but also to have everyone's academic grade affected by one student's conduct. Then, in December 2004, she dropped a book beside a student's head to startle him, admitting she singled him out but offering a baffling justification about deer and their velvety antlers and rut. These actions, among others, were violations of Todd Barber's November 5, 2003

[71] Trial Exhibit 1, p. 2.

[72] Trial Exhibit 33; Testimony of Cara Sajko, Vol. 7, 1935-38.

directive. As the Tribunal put it, "in the context of the ongoing situation, Ms. Sajko's actions constituted a failure to follow directives her superiors had legitimately given her."[73]

Under KRS 161.790(5), the Tribunal sits as the ultimate trier of fact. Its factual finding that Sajko violated Barber's November 2003 directive cannot seriously be challenged. That finding is not arbitrary and cannot be overturned. Sajko makes no effort to argue why her "other" demeaning conduct in 2004 did not violate the November 2003 directive, as the Tribunal concluded, irrespective of throwing student work in the trash.

Sajko cites to *Blackburn v. Board of Education*, 564 S.W.2d 35 (Ky. App. 1978), to support her assertion that she received insufficient notice of the charges against her. In *Blackburn*, the court did conclude that the teacher received insufficient notice of the allegations against him but notice in that case was far less adequate than what Sajko received: "He [Blackburn] was not told the names, dates, occurrences or other data upon which his supervisor relied to prove his inefficiency as a classroom teacher." *Id.* at 37. The *Blackburn* court specified that the bare allegations of inefficiency in that case were insufficient to support the teacher's termination because "they did not afford him the notice to adequately prepare a defense." Yet Sajko knew exactly what she was charged with. The seven-page termination letter and its 35 exhibits set out the circumstances of her repeated insubordination and conduct unbecoming a teacher in great detail.

Sajko's Response to the termination letter, including specifically her Response to the claim that she threw student papers in the trash, proves she had adequate notice. *Blackburn* is inapposite to Sajko's circumstances. Sajko cannot seriously

[73] Final Order, 9.

contend that the Superintendent's termination letter did not adequately apprise her that she was being terminated for failing to follow Todd Barber's November 5, 2003 directive and Principal Wilson's December 2003 directive to cease and desist from abusive treatment of students, whatever form that treatment took, and the Superintendent's letter set out Sajko's abusive treatment in detail.[74]

Accordingly, Sajko's situation is far more akin to that of the teacher in *Mavis v. Board of Education*, 563 S.W.2d 738 (Ky. App. 1977), where the teacher was terminated for insubordination and conduct unbecoming a teacher after he continued to administer corporal punishment despite several directives not to do so. In that case, as here, the teacher was provided with specific information detailing the substance of the charges giving rise to termination. The teacher protested that he had not received adequate notice of certain evidence admitted at the hearing and that the charges were not sufficiently specific. But the court found "no basic unfairness which deprived appellant of due process." *Id.* at 739. Despite Sajko's attempts to distinguish this case, *Mavis* is clearly on point here. Sajko was entitled to enough notice to defend herself. Sajko received that notice and then some. The problem for Sajko was not the notice; it was the facts.

V. THE TRIBUNAL'S FINDINGS THAT SAJKO SUBJECTED STUDENTS TO DEMEANING AND HUMILIATING PRACTICES, VIOLATED THEIR RIGHT TO BE FREE FROM ABUSE, AND INAPPROPRIATELY AND UNNECESSARILY BERATED, DEMEANED, AND FRUSTRATED THEM WARRANT HER DISMISSAL.

If this Court accepts Sajko's invitation to look past the matters in the Motion for Discretionary Review, then the Schools suggests that this Court must also consider whether Sajko's conduct constituted "conduct unbecoming a teacher," an issue that

[74] Appendix E, p. 5.

the Schools properly preserved by cross-appeal at the Circuit Court and Court of Appeals.[75]

The Schools is not asking this Court to substitute its judgment for the judgment of the Tribunal that heard the evidence over several months and found the facts. KRS 13B.151 specifically prohibits that: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." The Schools does not quarrel with the Tribunal's factual findings. But the Tribunal erred in a legal conclusion when it found all the facts necessary to establish that Sajko engaged in conduct unbecoming a teacher and yet, for whatever reason, let her off the hook.

In an opinion issued in 1983, the Kentucky Attorney General's office acknowledged that there are no definitions under KRS 161.790(1)(b) to guide a school superintendent on just what "conduct unbecoming a teacher" means. Yet the Attorney General opinion stated that a single act showing conduct unbecoming may be sufficiently serious on its own to stand as the basis for termination of a teacher contract. *See* OAG 83-362. However, there must be a nexus between the conduct and school purposes.

Students in the Jefferson County Public School system have a right to be free from punishments that are cruel and unusual, demeaning, degrading, humiliating, excessive, or unreasonable:

> A student has the right to freedom from verbal or physical abuse by school staff or other students. Punishments that are cruel and unusual, demeaning,

[75] Because the Motion for Discretionary Review limited itself to the procedural issue on which this matter was resolved by the Court of Appeals, the Schools did not cross-move on this substantive ground.

degrading, humiliating, excessive, or unreasonable are prohibited.[76]

The Tribunal heard proof of Sajko's teaching and grading practices and her treatment of students. The Tribunal considered all of the testimony and demeanor of the witnesses and concluded that Sajko's practices were "demeaning and humiliating to students, and a poor teaching method" and that she "subjected students to demeaning and humiliating situations and violated [their] right to be free from abuse" and that she inappropriately and unnecessarily berated, demeaned, and frustrated her students.[77]

When the Tribunal heard all the evidence and concluded Sajko violated students' right to be free from abuse, what it said was "Sajko abused students." The Tribunal found those shocking facts, yet the Tribunal concluded Sajko's actions somehow did not rise to the level of conduct unbecoming a teacher.[78] Once the Tribunal concluded that Sajko's conduct had in fact been demeaning, humiliating, and abusive -- terms expressly set forth in the Student Bill of Rights -- the Tribunal was obligated to conclude Sajko engaged in conduct "unbecoming a teacher." What kind of conduct could be more unbecoming a teacher than to berate, demean, humiliate, and abuse students?

The unbecoming conduct that Sajko engaged in was not some remote conduct that occurred well away from her classroom obligations. Her conduct occurred right there in the classroom. Accordingly, the nexus required by OAG 83-362 between the unbecoming conduct and performance of duties as a school teacher is certainly met.

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[76] Trial Exhibit 5.

[77] Final Order, 3, 10.

[78] Final Order, 10.

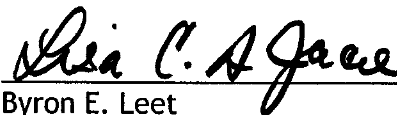
This is another ground on which the Superintendent's termination of Sajko's teaching contract can and should be upheld.

CONCLUSION

Cara Sajko failed 75 of her freshman high school students for infractions as minor as writing their names in the wrong place on a homework assignment. But she wants this Court to interpret KRS 160.790 to allow for "constructive notice," accepting as sufficient her tenth-day after-hours facsimile transmission of her notice of appeal to an individual who is neither of the persons whom the statute says must receive notice within ten days after a teacher is terminated. Then, Sajko wants this Court to set aside its own rules regarding the need to properly identify issues in motions for discretionary review to consider the substance of whether her termination was proper.

This Court should refuse to allow Sajko this leeway. The construction of KRS 160.790 by the Court of Appeals comports with other Kentucky case law and does not unreasonably restrict a teacher's opportunity to appeal from discipline. This Court should affirm the Court of Appeals. And this Court can be assured that the Tribunal was supported by substantial evidence when it found that terminating Sajko's employment was the only appropriate response to her insubordination mistreatment of students.

Respectfully submitted,



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