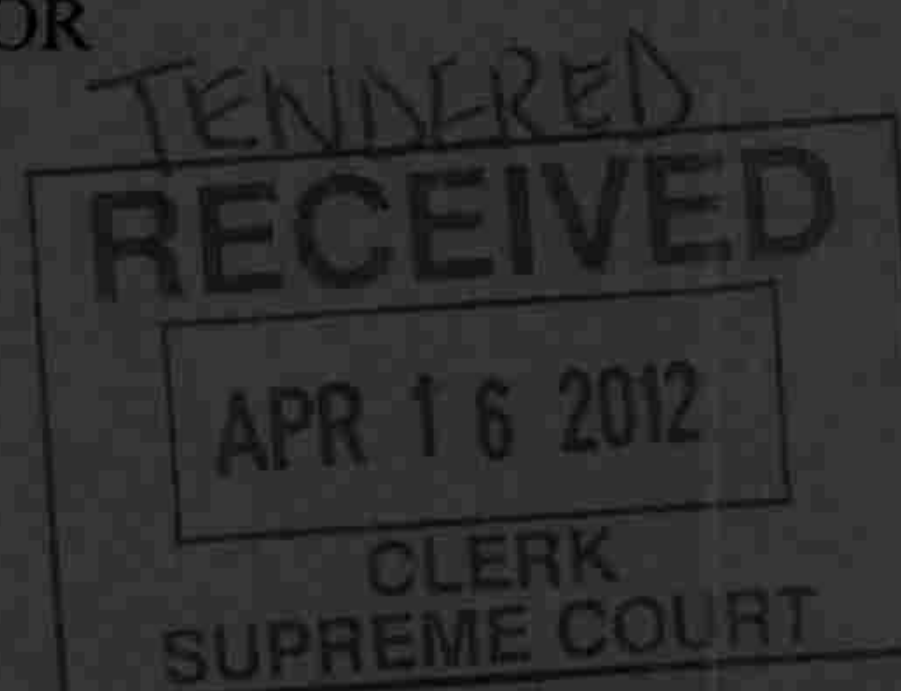


SUPREME COURT OF KENTUCKY
NO. 2011-SC-00145-D

ON REVIEW OF OPINION OF
COMMONWEALTH OF KENTUCKY COURT OF APPEALS
NO. 2008-CA-002274-MR
DATED JULY 9, 2010 AND ORDER DENYING PETITION FOR
REHEARING DATED FEBRUARY 15, 2011

APPEAL FROM FLOYD CIRCUIT COURT
HON. DANNY P. CAUDILL, JUDGE
ACTION NO. 07-CI-1038



HENRY WEBB, in his Official Capacity as
Superintendent of the Floyd County Schools;
and the BOARD OF EDUCATION OF
FLOYD COUNTY, KENTUCKY

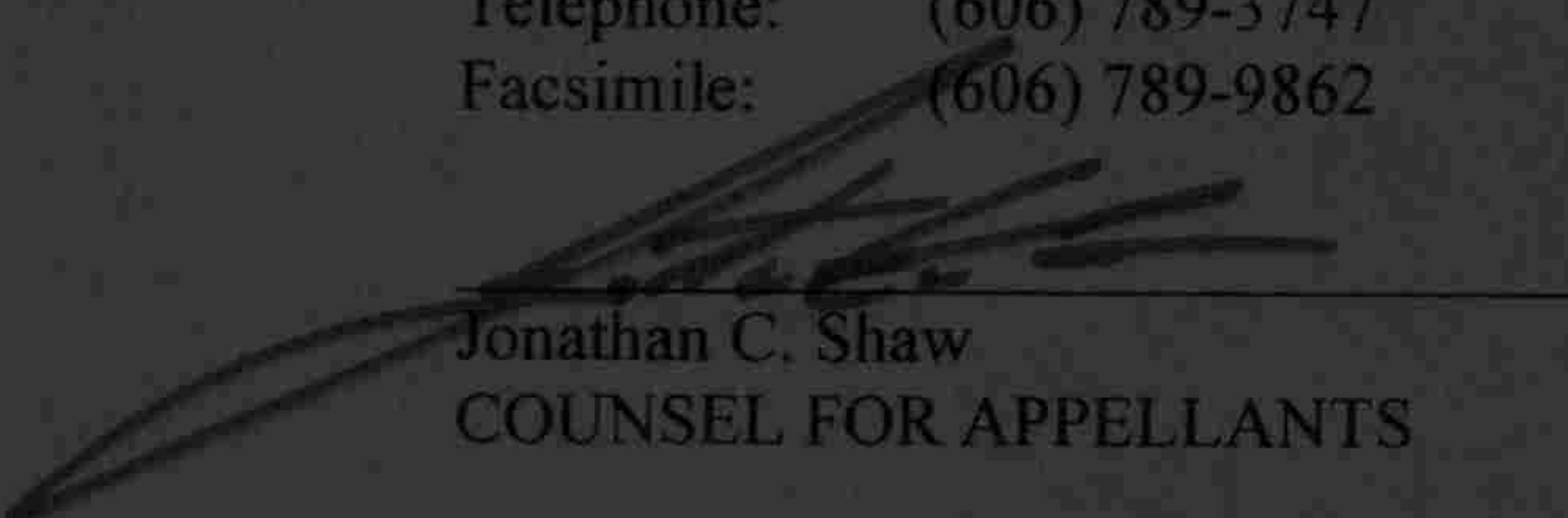
APPELLANTS

BRIEF FOR APPELLANTS

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CERTIFICATE OF SERVICE

In accordance with CR 76.12(6), I certify that a copy of this Brief for Appellants, HENRY WEBB, in his Official Capacity as Superintendent of the Floyd County Schools; and the BOARD OF EDUCATION OF FLOYD COUNTY, KENTUCKY, has been served on April 12, 2012, by United States Mail, postage prepaid, upon: Hon. J. Follace Fields, III and Hon. Carrie C. Mullins, Brooks, McComb & Fields, LLP, 1204 Winchester Road, Suite 100, Lexington, KY 40505; and Hon. Danny P. Caudill, Judge Floyd Circuit Court, Floyd County Justice Center, 127 South Lake Drive, Prestonsburg, KY 41653; Mr. Sam Givens, Jr., Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601-9229; and to Douglas Ray Hall, Clerk, Floyd Circuit Court, Floyd County Justice Center, 127 South Lake Drive, Prestonsburg, KY 41653. This is to further certify that the record on appeal was not removed from the Clerk's office.


Jonathan C. Shaw

II. STATEMENT CONCERNING ORAL ARGUMENT

The Appellant respectfully requests the Court to hold oral argument in this matter.

III. STATEMENT OF POINTS AND AUTHORITIES

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IV. STATEMENT OF THE CASE

Appellee was employed by the Floyd County Board of Education in the position of Family Resource Youth Service Center (FRYSC) Co-coordinator at Clark Elementary School for a period of 14 ½ years. Two Floyd County Board of Education elementary schools were closed and a new elementary school, Prestonsburg Elementary School, was opened in 2007. Contrary to Appellee's complaint, her employment was not terminated within the context of KRS 161.011, but rather, because of the lack of an available position for the Appellee, she was necessarily *reassigned* to another position which happened to involve lesser duties and was paid a lesser amount for performance of those duties. (See Complaint, Appendix 1). The lack of an available position for the Appellee was not the result of any act or omission on the part of the Appellant and there were clearly compelling and reasonable grounds for reassignment. The Appellants stated as an affirmative defense in their answer that there was no reduction in force as defined by policies of the Floyd County Board of Education or as defined by applicable statute and that by reason thereof, seniority played no role in reassignment of Appellee's position. As is also stated in the answer, the Floyd County School District does not have a seniority system and employment decisions are not made, absent a reduction in force, which is inapplicable here, or in absence of a Collective Bargaining Agreement, also not applicable here, on the basis of seniority.

Appellee claimed and the Court of Appeals agreed that the trial court did not err by applying KRS 161.011(8) as the reassignment was the result of a *reduction in force*. However, the applicable statute, KRS 161.011(8) provides that a reduction in force occurs only when there has been a "reduction in force." Reduction in force obviously

means where the District has fewer total employees than it had previously based on certain specified criteria. Not only do those criteria not exist in this case, the Floyd County School Board policy (03.271) specifically provides, with respect to reduction in force:

“Reduction in force of classified employees shall be defined as total separation from employment in the District. A change in duties or nonrenewal of either a full-time or part-time position when an employee holds more than one position shall not be considered a reduction in force.”

See policy 03.271 at Appendix 2.

Moreover, certain reemployment rights are provided when a reduction in force applies and those rights are only effective when there has been a separation from employment. Appellee’s employment contract additionally expressly provides that at

“4. MUTUAL AGREEMENT: g. It is agreed that in the event of a layoff due to a reduction in force pursuant to Board Policy #03.271 and to which KRS 161.011(7)(c) applies, that the Employee’s right of recall shall not extend beyond the failure or refusal by the employee to accept a position offered pursuant to recall within ten days of the extension of such offer by the District in writing. Acceptance of a position offered pursuant to recall shall be in writing and delivered to the Superintendent.”

See contract at Appendix 3.

In short, Appellee’s own contract defines a reduction in force to involve separation from employment. The Appellee’s employment was never terminated. She has undergone no separation of employment and there has been therefore no reduction in force.

On April 24, 2008, the Court entered an Order agreeing with Appellee’s contention that the wording of KRS 161.011(8)(a) applied to the job classification affected and found that there was a reduction of force as contemplated by the language of

KRS 161.011(8)(a). On November 21, 2008, the Court entered an amended order and judgment that was a final and appealable ruling on the issue of damages. (*See* Appendix 4 and 5).

Deposition testimony established: (1) that Clark Elementary School and Prestonsburg Elementary School were closed and that a new school was created and that each employee of the school, both certified and classified, was hired into positions at the school; (2) the FRYSC Advisory Council interviewed applicants for the new coordinator position which the Appellee previously held at Clark Elementary School. Appellee did not receive the highest evaluation. The individual who received the highest evaluation was employed in the position; (3) Appellee's employment was not a termination, but rather she was reassigned to a new position. Although this new position paid less money than the one she previously held, her duties were substantially reduced and in fact the position to which she was reassigned was the most comparable position available in the District; (4) That although Appellee's counsel claims that her employment contract was breached, the Appellee remained employed by Floyd County Schools. In fact, the one-year contracts under which the Appellee has been employed specifically provide as follows:

"4. Mutual Agreement:

f. 'The Superintendent may assign the employee to another job position within the District at any time during the term of this Employment Contract or any addition or supplement hereto.'

See contract at Appendix 3.

The contract also expressly provides that it is for one year only. Appellee was reassigned to a different position as permitted by her own employment contract. Further, as cited above, board policy 3.271 specifically states that:

“Reduction in force of classified employees shall be defined as total separation from employment in the District. A change in duties ... shall not be considered a reduction in force.”

FACTUAL BACKGROUND FROM TESTIMONY:

The discovery deposition of the Appellee, Pam Meyer, was taken on December 10, 2007. Ms. Meyer testified that her job changed because there was only one coordinator's position at the new school. (See Appendix 6, Deposition excerpt of Pamela Meyer, p. 14). She testified that Rebial Reynolds was the FRYSC coordinator at the old Prestonsburg Elementary School and that she is now the coordinator at the new Prestonsburg Elementary School. Id. at 15. Ms. Meyer testified at length regarding her interview process with the FRYCS Advisory Council. Id. at 17 – 21. Ms. Meyer testified that she was aware the policy for a family resource center was only one coordinator per center and that she had found out about three or four months prior to actual consolidation that there would not be two coordinators at the new Prestonsburg Elementary School. Id. at 18. Ms. Meyer also testified the position was posted and that she had to apply for it. Id. at 18. Further, Ms. Meyer was never notified that she was terminated and at no time has she had any lapse in her employment with the Floyd County Schools. Id. at 26. It was her understanding that the recommendation of the Advisory Council is followed by the Superintendent and that from her experience at Clark Elementary, the Advisory Council was involved in everybody that was hired. Id. at 33.

The discovery deposition of former Floyd County Board of Education Superintendent Paul Fanning was taken on January 11, 2008. Dr. Fanning testified that the new Prestonsburg Elementary School was a new school with its own identification number and that as such, the new school would require new staffing allocations. (See Appendix 7, deposition excerpt of Paul Fanning, p. 6.) Dr. Fanning explained that the Family Resource Center entity that was set up came through the Kentucky Education Reform Act. Those centers provide support to schools and the school community that deal with trying to negate the impact of non-cognitive factors, such as if a child needs clothing, resource centers provide those. Id. at p. 7. Dr. Fanning testified that FRYSC funds come through the State of Kentucky but they are not a part of the seat calculation. Id. These are separate grants and their accounting standards are somewhat different. Id. Dr. Fanning testified that for the family resource center that there was a new Advisory Council established that consisted of members from the old councils at Clark Elementary School and the old Prestonsburg Elementary School. Id. at pp. 8 & 9. Dr. Fanning testified that they essentially sat in the board conference room and took the listing from each school and basically drew names so that there would be no distortion of how selection or favoritism played as a factor. Id. Dr. Fanning testified that the FRYSC Coordinator was a new position. Id. at 11. Rebial Reynolds was selected as the new Resource Center Director at the new Prestonsburg Elementary School. Id. at 10. Dr. Fanning explained that the FRYSC Coordinator position at the new school was treated as a new position and that individuals applied for, went through an interview process with the FRYSC Advisory Council, and that he accepted the selection that the Advisory Council recommended. Id. at pp. 10 – 13.

Contrary to allegations that the new Prestonsburg Elementary School was built due to a decrease in enrollment, Dr. Fanning explained that funding for the new school was written into a bill and that they believed it was sponsored by Representative Greg Stumbo. This bill provided the funds for most of the facility's construction. Id. at 17. Dr. Fanning explained that the old Prestonsburg Elementary School had been identified through Facilities Management as a school that could not be renovated due to its age and the fact that it was located in a flood plain. Id. at 18. Clark Elementary School was also an old school with limited life and the school district looked at the bill that Representative Stumbo helped to push through as an opportunity to build a new, modern facility that was not located in the flood plain. Id. at 18 and 19. Dr. Fanning specifically testified that decreasing enrollment was not the reason that the District decided to build the new Prestonsburg Elementary School. Id. at p. 18, 21. Dr. Fanning testified that there was no reduction in force. Id. at 29. The reduction in force policy, FCBE Policy # 3.271, was introduced as Exhibit 4 to Dr. Fanning's deposition. Dr. Fanning testified that the policy specifically states that, **"A reduction in force of classified employees shall be defined as total separation of employment in the district. A change in duties ... shall not be considered a reduction in force."** Id. at 39. As discussed above, at no time did the Appellee suffer a "total separation" of employment in the District. Further, Ms. Meyer's classified employee contract specifically stated under Section 4, Mutual Agreement at Paragraph F that, **"The Superintendent may assign the employee to another job position with the District at any time during the term of this employment or any addition or supplement hereto."**

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The deposition testimony establishes that (1) that Clark Elementary School and Prestonsburg Elementary School were closed and that a new school was created and that each employee of the school, both certified and classified, was hired into positions at the school; (2) the FRYSC Advisory Council interviewed applicants for the new coordinator position which the Appellee previously held at Clark Elementary School. She did not receive the highest evaluation. The individual who received the highest evaluation was employed in the position; (3) Appellee's employment was not a termination, but rather she was reassigned to a new position. Although this new position paid less money than the one she previously held, her duties were substantially reduced and in fact the position to which she was reassigned was the most comparable position available in the District; (4) that although the Appellee's counsel claims that her employment contract was breached, the Appellee remains employed by Floyd County Schools. Appellee's contract specifically provided that the "Superintendent may assign the employee to another job position within the District at any time during the term of this Employment Contract or any addition or supplement hereto." The contract also expressly provides that it is for one year only. Appellee was reassigned to a different position as permitted by her own employment contract.

V. ARGUMENT

Pursuant to Civil Rule 76.12(4)(v), the following issues were raised were preserved as an affirmative defense in the answer filed in this matter and at all stages during briefing before the Circuit and Appellate Court.

Contrary to Appellee's complaint, her employment was not terminated within the context of KRS 161.011, but rather, because of the lack of an available position for the Appellee, she was necessarily reassigned to another position which happened to involve

lesser duties and was paid a lesser amount for performance of those duties. Appellee correctly states at Numerical Paragraph 9 of the complaint that two elementary schools were closed and a new elementary school to be called Prestonsburg Elementary School was opened. The lack of an available position for the Appellee was not the result of any act or omission on the part of the appellants. There were compelling and reasonable grounds for the reassignment. The Appellants have further claimed in their answer that there was no reduction in force as defined by policies of the Floyd County Board of Education or as defined by applicable statute and that by reason thereof, seniority played no role in reassignment of Appellee's position. As is also stated in the answer, the Floyd County School District does not have a seniority system and employment decisions are not made, absent a reduction in force, which is inapplicable here, or in absence of a Collective Bargaining Agreement, also not applicable here, on the basis of seniority.

A. THE COURT OF APPEALS ERRED BY REFUSING TO ADDRESS WHETHER OR NOT MEYER'S CLAIM FAILS AS A MATTER OF LAW BECAUSE NO SUCH STATUTE EXISTS WITH RESPECT TO THE DEMOTION OF A CLASSIFIED EMPLOYEE.

The Court, in denying Appellants' request to address argument concerning whether or not there was any basis in law or fact for Appellee's claims stated at page 5 of the Opinion that:

"The Board next argues that Meyer's claim that she was demoted was without any basis in law or fact. The Board argues that Meyer's claim must fail because no such statute exists with respect to the demotion of classified employees. Despite the Board's contention, its argument must fail because it was not ruled on by the trial court and was not further preserved by citation in the Board's brief."

Appellants clearly presented argument to the Floyd Circuit Court that, "The plaintiff's claim that she has been demoted is also without any basis in law or fact". See (1)

November 1, 2011 response to motion for declaratory judgment (ROA, Listed Separate, at pg 5) and (2) January 2008 supplemental brief (ROA 72). Likewise, the answer filed in this matter addressed this issue at numerical paragraph 10 as an affirmative defense (ROA 15 - 18). It is clear that the Court ruled on this matter **as there were specific findings that KRS 161.011 did, in fact, apply**. At page 2 of Appellants' appellate brief, it is stated that:

On April 24, 2008, the Court entered an Order agreeing with Appellee's contention that the wording of KRS 161.011(8)(a) applied to the job classification affected and found that there was a reduction of force as contemplated by the language of KRS 161.011(8)(a).

Further, the Appellants presented in their brief at page 8 that:

"The Appellants have further claimed in their answer that there was no reduction in force as defined by policies of the Floyd County Board of Education or as defined by applicable statute and that by reason thereof, seniority played no role in reassignment of Appellee's position".

Appellants also argued this issue in their brief at page 10. The fact that the Court held and specifically found that KRS 161.011(8) applied is clearly dispositive of this issue and this issue should have been addressed by the Court. The Floyd Circuit Court clearly addressed and ruled on this matter in finding that there was a basis in law (KRS 161.011(8)). Additionally, the Court at page 6 of the Opinion, held that this was a declaratory judgment (summary proceeding) matter wherein "Meyer requested that the trial court construe and apply the statute applicable to the parties' case where there was no factual dispute". **Whether or not there was a statutory basis for Appellee's claim was the threshold decision to be made in this matter; all other decisions flowed as a result thereof.**

B. THERE IS NO STATUTORY BASIS FOR APPELLEE'S CLAIM.

The Appellee's claim that she has been demoted is also without any basis in law or fact. The Court is well aware that rights arising out of an alleged demotion are a product of statutory law in Kentucky. For instance, statutes exist relative to demotion as it might apply to a certified administrative employee. (See KRS 161.765.) No such statute exists with respect to classified staff. Moreover, KRS 161.760 provides certain time limits when certified staff is to be provided notice of reduction in responsibilities and a commensurate reduction in pay. (See KRS 161.760). **There are no such statutes with respect to classified employees.** The Appellee's claim that she is entitled to hold her position indefinitely is not supported by any case law or statute. Even certified staff is not entitled to any particular position in a school district. (See KRS 161.760(4), which states: "Employment of a teacher, under either a limited or a continuing contract, is employment in the school district only and not in a particular position or school.")

C. THE COURT OF APPEALS ERRED BY FINDING THAT THERE WAS A "REDUCTION IN FORCE" WITH RESPECT TO THE DEMOTION OF A CLASSIFIED EMPLOYEE.

At page 4 of the Opinion, the Court held that:

"From a plain reading of the *statute*, the legislature has expressed a retention preference for employees with greater seniority and qualifications. *Id.* Further, reduction in force applies to the 'job classification affected', not all classifications."

It is Appellants' position that it is clear that the statute does not apply, so neither the "job classifications affected" nor "all classifications" becomes a factor to be addressed. The *plain meaning* of the phrase "**reduction in force**" refers to *an elimination of personnel, whereby the number of employees is diminished*. Looking for a definition of "*reduction in force*," one is instructed to "[s]ee LAYOFF." Black's Law Dictionary, pg 1305 (8th

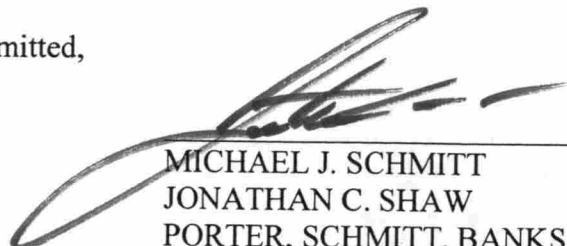
Ed.2004). Following this directive, the term “**layoff**” is then defined as “[t]he termination of employment at the employer's instigation; esp. the termination-either temporary or permanent-of many employees in a short time.-Also termed *reduction in force*.” Black's Law Dictionary, pg 906 (8th Ed.2004)ⁱ. These definitions help explain the statute's use of the phrase “reduction in force” (since it is not defined in the statute), as well as the intent of the legislature. As addressed by the Court of Appeals, terms are to be given their plain meaning unless otherwise defined. The language of the legislature makes it clear that a reduction in work force is a reduction in the number of employees that is affected by either a layoff or a permanent termination. This interpretation is constant with the Floyd County Board of Education's board policy and definition. Neither a *layoff* nor a *permanent termination* applies in this case and, as a result, there was insufficient basis as a matter of law to warrant entry of the declaratory judgment in Appellee's favor.

VI. CONCLUSION

Appellants, HENRY WEBB, in his Official Capacity as Superintendent of the Floyd County Schools; and the BOARD OF EDUCATION OF FLOYD COUNTY, KENTUCKY, request that the Court reverse that portion of the *Opinion Affirming* that was entered on July 9, 2010 finding at page 5 that, “Despite the Board's contention, its argument must fail because it was not ruled on by the trial court and was not further preserved by citation in the Board's brief” regarding there being no basis in law or fact for Appellee's claims. Appellants additionally request that the Court reverse the ruling concerning the application of KRS 161.011(8) to the facts of this matter and likewise

reconsider the finding that there was sufficient basis as a matter of law to warrant entry of the declaratory judgment in Appellee's favor.

Respectfully submitted,



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i reduction in force. See LAYOFF.

layoff. The termination of employment at the employer's instigation; esp., the termination - either temporary or permanent - of many employees in a short time. - Also termed *reduction in /Hire.* - lay off, *vfi.*

I. INTRODUCTION

HENRY WEBB, in his Official Capacity as Superintendent of the Floyd County Schools; and the BOARD OF EDUCATION OF FLOYD COUNTY, KENTUCKY appeals from the *opinion affirming* that was entered on July 9, 2010 finding at page 5 that, “Despite the Board’s contention, its argument must fail because it was not ruled on by the trial court and was not further preserved by citation in the Board’s brief” regarding there being no basis in law or fact for Respondent’s claims. Movants additionally request that the Court review the ruling concerning the application of **KRS 161.011(8)** to the facts of this matter and thus likewise reconsider the finding that there was sufficient basis as a matter of law to warrant entry of the declaratory judgment in Respondent’s favor. Rehearing was denied by the Court of Appeals on February 15, 2011.