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Kentucky Law Survey: Education

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Education

By Carolyn S. Bratt*

Introduction

During the past survey year, the Kentucky Court of Appeals decided several cases in which public education was the common denominator. Developments occurred in the areas of student discipline,[1] merger of first class city-county school districts[2] and due process requirements for removal of tenured teachers.[3] The most significant case, however, was *Dorr v.*

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[1] In Dorsey v. Bale, 521 S.W.2d 76 (Ky. 1975), the appellee, Bale, was suspended from school for 4 days for possession and consumption of alcoholic beverages on school property in violation of school regulations. The school also invoked its unexcused absence rule, which required the reduction of a student's semester grades by five percentage points for each day of unexcused absence. The Court held that Ky. Rev. Stat. § 158.150 (Supp. 1974) [hereinafter cited as KRS] preempts the right of school officials to promulgate disciplinary regulations that impose additional punishment for conduct that results in a suspension. However, the Court specifically expressed no opinion as to whether the unexcused absence rule was a reasonable regulation as applied to students generally.

[2] In Bd. of Educ. of Louisville v. Bd. of Educ. of Jefferson County, 522 S.W.2d 854 (Ky. 1975), the Court was faced with determining the validity of certain statutes (KRS § 160.042, .044 and provisions of KRS § 160.160, .200 and .210 added by Ky. Acts ch. 224 (1974)) making special provisions for transitional and permanent structuring of a board of education where an independent school district embracing a city of the first class (Louisville is the only such city) merges with the county school district. Section 59 of the Kentucky Constitution prohibits "special or local" legislation on "the management of common schools." However, in previous Court of Appeals' opinions this prohibition has been found to be inapplicable when the classification upon which the legislation is made is dependent upon natural, real and substantial distinctions. In the instant case, the Court concluded that the large size of the student population, the great amount of property to manage, the extensive financing requirements, and the existence of localized enclaves populated almost exclusively by minority groups who must be assured fair representation were considerations relevant to size and population which made the legislatively created classification based on size and population acceptable.

[3] In Bd. of Educ. of Pulaski County v. Burkett, 525 S.W.2d 747 (Ky. 1975) the circuit court had determined that KRS § 161.790(3)&(4) violated the due process clause of the fourteenth amendment of the United States Constitution because the mechanism, which provided for removal of a "tenured teacher," casts the school board into the roles of employer, investigator, accuser, prosecutor, judge, and jury. The Court of Appeals reversed in light of the United States Supreme Court's decision in Withrow v. Larken, 421 U.S. 35 (1975). In *Withrow* the Supreme Court was faced with a similar challenge to the validity of the combination of investigative and adjudicative func-

Fitzer,[4] which involved the authority of a county board of education to reject, without cause, a school superintendent's recommendation that a teacher with four consecutive limited service contracts[5] be granted a continuing service contract.[6] In deciding this issue, the Court more precisely defined and significantly reshaped the contours of the Kentucky Teacher's Tenure Law.[7] The effect and propriety of this decision will serve as the subject matter of this article.

I. DORR v. FITZER

Helena Dorr had taught in the Boyd County School system for 4 consecutive years under annual limited service contracts. This length of service made her eligible for tenure under Kentucky Revised Statutes § 161.740(1)(b) [hereinafter cited as KRS].[8] Thus, in 1970, her name appeared on a list prepared by the superintendent of schools entitled, "Teachers Eligible for Continuing Contracts." The school board treated the list as a recommendation for a continuing service contract by the su-

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tions. It held that the mere combination of functions in an administrative proceeding does not constitute a due process violation per se. There must be a demonstration that the combination creates an unconstitutional risk of bias in administrative adjudication, and a presumption of honesty and integrity on the part of those serving as adjudicators must be overcome. The party asserting the denial of due process also bears the burden of convincing the court that under a realistic appraisal of psychological tendencies and human weakness, there is a great risk of actual bias or prejudgment when investigative and adjudicative powers are combined in the same individuals. Because none of these factors were shown and because previous Kentucky cases had defined the form of the hearing and the process of judicial review provided by KRS § 161.790(6), the circuit court's decision was reversed.

[4] 525 S.W.2d 462 (Ky. 1975).

[5] KRS § 161.750 provides that: "A written limited contract shall be entered into by each board of education with each teacher who is not eligible for a continuing contract as defined in KRS 161.740." The term "limited contract" is defined in KRS § 161.720(3) as a contract "for a term of one (1) year only or for that portion of the school year that remains at the time of employment."

[6] A teacher is eligible for continuing service status, *i.e.*, tenure, if he holds a standard or college certificate, is recommended for reemployment and has taught 4 consecutive years in the same district, the year of present employment included. KRS § 161.740(1)(a),(b). A "standard" or "college" certificate is "any certificate issued upon the basis of graduation from a standard 4 year college." KRS § 161.720(6).

[7] KRS § 161.720-.810.

[8] *See* note 6 *supra*. A continuing service contract remains in full force and effect until the teacher resigns, retires, reaches age 65, or until the contract is terminated or suspended as provided in KRS § 161.790,.800. *See* KRS § 161.720(4).

perintendent, but voted, in his absence, not to reemploy Ms. Dorr.

In September of that year Ms. Dorr filed suit in circuit court claiming a "vested right"[9] to a teaching position based upon KRS § 160.380, which provides: "All appointments [and] promotions . . . of teachers . . . shall be made only upon the recommendation of the superintendent of schools, subject to the approval of the board." This statute had been construed in numerous cases to mean that a board of education could not reject a superintendent's recommendation unless the teacher in question was morally or educationally unqualified for the position.[10] The circuit court, evidently relying on KRS § 161.740, the continuing contract statute, which provides that after the superintendent's recommendation a continuing contract shall be granted "if the teacher is employed by the board of education . . . .," dismissed Ms. Dorr's complaint. On appeal, the state's high court recognized that the two statutory provisions had never been construed together, and framed the issue as "whether [in light of these two provisions] the board cannot reject the superintendent's recommendation for a continuing contract unless the board determines that the person is morally unfit or educationally unqualified."[11]

The Court, with two justices vigorously dissenting, found against Helena Dorr.[12] The majority first noted that after the rejection the superintendent had acquiesced in the board's decision. This conduct was construed by the Court as an implied withdrawal of the recommendation.[13] Not willing, however, to

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[9] 525 S.W.2d at 464.

[10] *See* notes 19-28 *infra* and accompanying text.

[11] 525 S.W.2d at 463.

[12] The separate dissenting opinions of Justices Sternberg and Jones take the position that once a teacher is recommended for reemployment after having taught 4 consecutive years in a school district, that teacher acquires a vested right to teach. A board's action in refusing to grant a continuing service contract, absent a showing of immoral conduct or lack of educational qualifications, is a deprivation of a vested property right within the meaning of the fourteenth amendment due process clause. A teacher can only be divested of this right after a hearing. 525 S.W.2d at 464-69.

[13] Both dissenting justices convincingly demonstrate that the evidence did not and could not support a finding that the superintendent directly or indirectly withdrew his recommendation of the appellant. *Id.* at 465, 467. In fact, it appears that not even the majority was convinced of the soundness of its description of the facts implying withdrawal of the nomination. The entire case could have been disposed of on the basis of

base its decision on a theory of subsequent implied withdrawal, the Court held that a board of education is not required to accept the superintendent's recommendation to issue a continuing service contract, and furthermore, that the board may reject his recommendation without cause.[14] KRS § 160.380, the Court said, was "not applicable."[15]

The brevity of the majority's opinion belies its significance. The decision represents a major departure from a line of cases recognizing the power[16] of the school superintendent to make all appointments, promotions and transfers vis a vis the rejection power of the board of education. Prior to *Dorr* the board's power was *required* to be exercised in favor of the nominee, absent a determination of moral unfitness or educational deficiency.[17] To fully appreciate the magnitude of this unprecedented decision, it is necessary to review the decisions of the Court of Appeals in this area, both prior and subsequent to the adoption of the Teacher's Tenure Law in 1942.[18]

II. CASE LAW PRIOR TO THE TEACHER'S TENURE LAW

Prior to 1942, by statute, no teacher was permitted to be employed under a contract for a term of more than 1 year.[19] Therefore, the issue of the relationship between a superintendent's power to appoint and a school board's power to reject did not arise in the context of continuing service contracts. The earlier statute concerning appointive and approval powers over teacher employment, a predecessor of KRS § 160.380, provided:

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a withdrawal, thereby avoiding the knottier issue of the permissible basis for a board's rejection of a superintendent's nominee.

[14] 525 S.W.2d at 464.

[15] *Id.*

[16] *See* notes 19-28 *infra* and accompanying text. The only exception to this rule prior to *Dorr* was in situations in which the nominee was related to one of the board members. In order to effectuate the policy of eradicating nepotism which was embodied in what was then § 4399-22, members of school boards could refuse employment to a teacher related to a board member for reasons other than lack of moral and educational qualifications. Hall v. Boyd County Bd. of Educ., 97 S.W.2d 38 (Ky. 1936).

[17] KRS § 160.380.

[18] The Teacher's Tenure Law was originally enacted in 1942, KY. ACTS ch. 113 (1942) and was amended on four subsequent occasions. KY. ACTS ch. 98 (1944); ch. 60 (1954); ch. 41 (1964); ch. 356 (1974).

[19] KY. STATS. § 4399-34 (Carroll 1936), *as amended,* KRS § 160.380 (1974).

> [A]ll appointments, promotions, transfers and dismissals of . . . teachers . . . shall be made only upon recommendation of the superintendent of schools, subject to the approval of the board . . . . In the event the board of education cannot agree with the superintendent as to any certified person recommended by such superintendent, such board of education may appeal to the State Board of Education to review the case and the decision of the State Board of Education shall be final.[20]

This provision, and its predecessor,[21] were consistently construed as limiting a board of education's right to reject a superintendent's nominee to those situations where the nominee was found to be morally or educationally unfit.[22] This determination rested in the sound discretion of the board, and was viewed by the Court of Appeals as merely a statutory method to ensure the qualifications of teachers. The entire nomination and approval system was interpreted as furthering the general principles of checks and balances which prevent "the exercise of arbitrary or dictatorial powers by any individual or group of public officers."[23]

Under the pre-1942 law, if the school board rejected the nominee, there were two possible consequences. First, if the rejection was without cause, the superintendent could acquiesce in the rejection and nominate another candidate. This was construed by the Court as a withdrawal of the first nomination by the superintendent, and allowed the board to approve the second candidate as if he had been the original nominee.[24] Second, when a good faith conflict arose between the county board of education and the superintendent, an appeal to the State Board of Education was available. However, the school board had no right of appeal to the State Board of Education if the refused approval was arbitrary, without legal justifica-

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[20] *Id.*

[21] KY. STATS. § 4399a-7a-11 (1930).

[22] *See* Duff v. Chaney, 164 S.W.2d 483 (Ky. 1942); O'Daniel v. McDaniel, 160 S.W.2d 331 (Ky. 1942); Beckham v. Kimbell, 139 S.W.2d 747 (Ky. 1940); Cottingham v. Stewart, 127 S.W.2d 149 (Ky. 1939); Stith v. Powell, 64 S.W.2d 491 (Ky. 1933).

[23] Beckham v. Kimbell, 139 S.W.2d 747, 748 (Ky. 1940). *See also* Stith v. Powell, 64 S.W.2d 491 (Ky. 1933).

[24] Hall v. Boyd County Bd. of Educ., 97 S.W.2d 38 (Ky. 1936).

tion, and the nominee or superintendent had sought relief in the courts.[25]

This pre-1942 legislation produced judicial recognition of a nominee's "vested right" to be appointed absent a showing of cause. The Court of Appeals, in *Cottingham v. Stewart*,[26] stated: "In the absence of a showing of cause to the contrary, each [nominee has] a vested right to have her nomination recognized by the Board of Education before the school year [begins] . . . ."[27] This choice of language was not aberrational, as subsequent cases referred to a teacher's "vested rights" to a new contract when nominated by the superintendent.[28]

III. KENTUCKY TEACHER'S TENURE LAW

In 1942, the Kentucky legislature enacted the Teacher's Tenure Law, a comprehensive statutory scheme creating two distinct categories of teachers. Depending upon the teachers' status, each category has a different contractual relationship with the employing school board.[29] The line of demarcation between the two groupings is 4 years of consecutive service in the same school district.[30] Those who have taught less than 4 consecutive years in the same district are employed under successive 1-year contracts.[31] Teachers who meet the service requirements and hold standard or college teaching certificates are eligible for continuing service contracts.[32] Once issued by the board of education, this contract remains in force until the teacher resigns, retires or reaches the age of 65, or until the contract is terminated or suspended in accordance with statu-

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[25] Beckham v. Kimbell, 139 S.W.2d 747, 749 (Ky. 1940).

[26] 127 S.W.2d 149 (Ky. 1939).

[27] *Id.* at 152.

[28] *See* Duff v. Chaney, 164 S.W.2d 483 (Ky. 1942); O'Daniel v. McDaniel, 160 S.W.2d 331 (Ky. 1942); Amburgey v. Drauhn, 155 S.W.2d 331 (Ky. 1942); Wisdom's Adm'r v. Sims, 144 S.W.2d 232 (Ky. 1940); Cottingham v. Stewart, 142 S.W.2d 171 (Ky. 1940).

[29] KY. ACTS ch. 113 (1942).

[30] More precisely, the service requirement is 4 consecutive years of employment or 4 years of employment which shall fall within a period not to exceed 6 years in the same district. KRS § 161.740(1)(b).

[31] KRS § 161.720(3).

[32] KRS § 161.740(1)(a)&(b).

tory procedures.[33]

As noted previously, the procedure for obtaining a continuing service contract is that "the superintendent shall recommend said teacher, and, if the teacher is employed by the board of education, a written continuing contract shall issue."[34] The significance of such a contract is the security from arbitrary termination of employment that it affords the teacher. Under a limited service contract, a teacher is granted only minimal due process protection. Although the teacher is deemed to be reemployed at the same salary (adjusted by the salary schedule) upon expiration of the limited contract, the board may terminate the employment by giving written notice of its intention not to reemploy on or before May 15. If the teacher so requests, the written notice must contain the specific reason or reasons why reemployment is being denied.[35] If, however, the teacher is serving under a continuing service contract, employment can be terminated by the employer only for cause.[36] Prior to the final decision, the teacher must be furnished a written statement specifying the charges in detail, and afforded an opportunity to rebut the charges at a hearing before the board.[37] Moreover, the board's administrative decision is reviewable by the courts.

The intent of the Teacher's Tenure Law was to protect public educators with lengthy service in a school district from capricious or arbitrary termination by the school board. At the same time the legislature was extending new protections and creating new rights under the new tenure provisions, it left substantially unchanged the prior legislation which had defined the power relationship between the superintendent and the board of education.[38] KRS § 160.380 provides: "All appointments, promotions and transfers shall be made *only* upon the recommendation of the superintendent of schools, subject to

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[33] KRS § 161.720(4).

[34] KRS § 161.740.

[35] KRS § 161.750(2).

[36] Cause is defined as insubordination, immoral character, conduct unbecoming a teacher, physical or mental disability, inefficiency, incompetency, or neglect of duty. KRS § 161.790 (1)(a)-(c).

[37] KRS § 161.790(3)-(6).

[38] KY. ACTS ch. 113 (1942).

the approval of the board."[39] The appellate procedure to the State Board of Education in case of dispute was likewise left intact.[40]

KRS § 160.380 is essentially the same statutory provision that was construed by the Court of Appeals in its pre-Tenure Law decisions as providing teachers with certain "vested rights" in continued employment, absent a showing of cause for dismissal. It is unlikely that the legislature was unaware of the judicial limitation imposed on the school board's right to reject nominees of the superintendent, and there is nothing in the tenure legislation to suggest that the traditional relationship between the superintendent's power to nominate and the board's power to reject was to be disturbed for only that group of teachers who become eligible for continuing service contracts. To the contrary, such an interpretation is inconsistent with the reform nature of the enactment. The intent of the legislation was obviously to create new protections for teachers, not to destroy existing ones.

IV. DECISIONS SUBSEQUENT TO THE KENTUCKY TEACHER'S TENURE LAW

Because the specific issue in *Dorr v. Fitzer* was whether a school board can reject a superintendent's nominee for a continuing service contract for reasons other than moral or educational unfitness, the Court necessarily had to determine the relationship between KRS § 160.380, which defines the powers of the superintendent and the board, and KRS § 160.740(1)(b), which establishes the procedure for issuing a continuing service contract. The majority's observation that the statutes had never been construed in relation to each other was technically correct. However, the Court was not writing on a clean slate when it decided that KRS § 160.380 "is not applicable" to a situation in which an eligible teacher is recommended for a continuing service contract.[41]

Even though the pre-1942 cases could not construe the precursor of KRS § 160.380 in relation to KRS § 161.740(1)(b),

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[39] Emphasis supplied.
[40] KRS § 160.380.
[41] 525 S.W.2d at 464.

they did firmly establish that a board of education's right to reject a superintendent's nominee for reemployment was contingent upon a finding of moral or educational unfitness. As noted above, the Teacher's Tenure Law does not suggest that these decisions were legislatively overruled, and Court of Appeals cases subsequent to the Tenure Law have either expressly or impliedly recognized the vitality of KRS § 160.380 in relation to teachers eligible for continuing service contracts.

In *Beverly v. Highfield*,[42] the Court of Appeals affirmed that at least part of the previously delineated power relationship between the board and the superintendent was applicable to the new situation created by the granting of continuous service contracts. The superintendent of the Henry County schools successfully enjoined the board of education from appointing John W. Long to a principal's position without her recommendation. Long had taught in the Henry County schools for a sufficient time to be eligible for a continuing service contract under KRS § 161.740. The Court, however, relying on *Stith v. Powell*,[43] a pre-Teacher's Tenure Law case, held that Long's appointment without the superintendent's recommendation was void under KRS § 160.380.

The Court of Appeals in *Smith v. Beverly*[44] again confirmed the applicability of KRS § 160.380 to cases arising under the Teacher's Tenure Law when confronted with a superintendent's recommendation that a teacher with limited contract status be reemployed with that status for the next school year. The teacher had taught in the school system for 2 of the 3 years prior to his nomination, but the board of education rejected him without cause. The Court found the board's rejection to be illegal because the nominee's rights had accrued upon the superintendent's recommendation. It was, the Court said, the mandatory duty of the board to rehire the nominee if he possessed the necessary moral and educational qualifications. The Court added:

> [I]n passing on any recommendation made by its superintendent, no board has the right to arbitrarily reject a recom-

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[42] 209 S.W.2d 739 (Ky. 1948).

[43] 64 S.W.2d 491 (Ky. 1933). *See* note 22 *supra* and accompanying text.

[44] 236 S.W.2d 914 (Ky. 1951).

> mendee, but it is limited in its right of rejection, in the exercise of sound discretion, to determine whether the recommendee is morally fit or educationally qualified for the position to which he is recommended.[45]

Thus, based upon this case, a nominee for renewal of a limited service contract has a vested right to such renewal, unless the board finds legal cause justifying rejection of the nomination. The broad language of the decision, although not necessary to a resolution of the case, indicates that the Court was applying the same rules and rationales it had developed and articulated in the pre-Teacher's Tenure Law cases.

In *Taylor v. Hampton,*[46] each of the five appellants had a minimum of 7 consecutive years of service when the school board notified them that they would not be rehired. Purportedly, all service had been rendered under the terms of limited contracts, and none of the appellants had ever received a "continuing contract," even though each had requested one after four years of service. In setting aside the dismissals, the Court of Appeals determined that the teachers, by their length of service, had attained continuing service status. In doing so, the Court described KRS § 160.380 as defining the powers of the superintendent, while KRS § 161.740 was characterized as concerning the "form of the contract."[47] Although the case did not raise the issue of a superintendent's powers, the Court had "no inclination to depart from the cases which interpret the provisions of . . . KRS § 160.380 dealing with the power of the superintendent and which affirm the broad powers given to him by the legislature . . . ."[48]

These post-Teacher's Tenure Law cases do not support the Court's assertion in *Dorr* that KRS § 160.380 is inapplicable to a situation where a teacher has the necessary service and is recommended for tenure by the superintendent. Prior to *Dorr,* in situations slightly distinguishable, the Court had consistently given effect to KRS § 160.380 within the framework of the Teacher's Tenure Law. By its decision in *Dorr,* despite its

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[45] *Id.* at 917.

[46] 271 S.W.2d 887 (Ky. 1954).

[47] *Id.* at 889.

[48] *Id.*

protestations of inapplicability, the Court has significantly limited the previous impact of KRS § 160.380.

V. STATUTORY CONSTRUCTION ANALYSIS IN DORR

In reaching its decision in *Dorr* to expand the power of the board of education, the Court failed to apply the accepted rule of statutory construction that laws in *pari materia* are to be construed with reference to each other. Unless the statutes are in irreconcilable conflict, the court has a duty to harmonize the inconsistent statutory provisions. The basis for this duty is the presumption that the legislature would not intentionally enact a provision that is in conflict with another statute.

Both KRS § 160.380 and KRS § 161.740 were enacted in chapter 113 of the Kentucky Acts of 1942 as part of a comprehensive statutory tenure scheme. The former provision had been interpreted as creating vested rights, and the latter arguably placed the decision to issue a continuing contract in the unfettered discretion of the board of education. Under the rule of *pari materia,* it was incumbent upon the Court to harmonize these two statutes.

Although the Court failed to apply *pari materia,* the two provisions can be harmonized. KRS § 160.380 defines the appointive power of the superintendent vis a vis the rejection power of the school board. KRS § 161.740 delineates the contractual relationship available between the board of education and distinct categories of teachers. If KRS § 161.740 in any way defeats the absolute language of KRS § 160.380, it is in the fact that under the latter provision the superintendent is required to recommend teachers who have fulfilled the service and education requirements.[49] It can in no way be read as expanding the board's rejection power, as defined by case law. The case law required "cause" for a rejection, even in the face of the statute making such appointments "subject to the approval of the board."

[49] KRS § 161.740 was amended in 1954. KY. ACTS ch. 60 (1954). This amendment repealed subsection 2 which had required the superintendent's recommendation before continuing service status could be attained. Under the 1954 amendment, subsection (1)(b) provided that when a teacher has been recommended for reemployment after teaching the requisite period of time, the superintendent must recommend a continuing service contract. Moore v. Babb, 343 S.W.2d 373, 375-76 (Ky. 1961).

Interestingly, KRS § 161.740 attaches a similar condition to the issuance of a continuing service contract—"if the teacher is employed by the board of education." Although this condition could be read as giving the board absolute discretion to reject a nominee for a continuing service contract, a better interpretation is that KRS § 161.740 was intended to have no direct impact on the law developed under KRS § 160.380. Instead, KRS § 161.740 was to be applicable only after final approval had been granted under the KRS § 160.380 process. Such an interpretation would have permitted the Court to read "if the teacher is employed by the board" as a restatement of the traditional superintendent-board relationship embodied in KRS § 160.380.

In addition to ignoring the rule of *pari materia,* the Court in *Dorr* partially rested its conclusion "that the board has an open choice to make the employment that will result in a continuing contract"[50] upon the wording of KRS § 161.740, as it appeared *before* a 1964 amendment.[51] KRS § 161.740 prior to amendment provided that a teacher would be granted tenure upon a recommendation by the superintendent, unless the recommendation was rejected by a four-fifths vote of the board. The Court reasoned that:

> Obviously this contemplated rejection without regard to cause, for if cause existed there would be no reason to require a four-fifths vote. And we find nothing in the words of the statute in its present form to require the construction that cause now is required to reject a recommendation for a continuing contract.[52]

The Court's reasoning is faulty. Even assuming, as did the Court, that KRS § 161.740 prior to its amendment "contemplated rejection without regard to cause,"[53] any language which might have supported such a conclusion was deleted when the statute was amended. There can be no presumption that an existing statute and a differently worded repealed statute share the same meaning. The converse is true generally, and particu-

[50] 525 S.W.2d at 464.
[51] KY. ACTS ch. 41 (1964).
[52] 525 S.W.2d at 464.
[53] *Id.*

larly so in the case of KRS § 161.740. The presumption should be that by deleting the statutory language which arguably granted boards the right to reject nominees without cause, the General Assembly intended that a nominee could only be rejected upon a showing of cause.[54]

VI. CONCLUSION

The *Dorr* decision creates an anamolous situation concerning the employment protection afforded teachers. KRS § 160.380 and its companion case law protect nominees for initial teaching positions and nominees for reemployment under limited service contracts from arbitrary rejection by a board of education, and the Teacher's Tenure Law assures these teachers minimal notice protection before reemployment is denied. Teachers holding continuing service contracts cannot be dismissed without cause, and are guaranteed full due process protection from arbitrary termination. In between are left nominees for continuing service contracts, who are afforded neither case law nor statutory safeguards. The result is that the carefully defined system of checks and balances that normally exists in the superintendent-school board relationship inexplicably disappears in this one limited situation. Suddenly the board is given unchecked discretion to override the superintendent's nomination, in total disregard of one of the fundamental policies underlying the Teacher's Tenure Law—protection of teachers from arbitrary and capricious termination of their employment.

The *Dorr* decision is not only unsupported by prior case law, it does violence to the very spirit of the prior decisions. The holding was not mandated by the statutory language as it existed prior to the 1964 amendment, and certainly is not justified under the present statutory wording. The Court's reasoning violates accepted rules of statutory construction, and is completely disruptive of the traditional relationship between the superintendent of schools and the board of education. It leaves one small group of teachers totally vulnerable to arbitrary and capricious board action in contravention of the spirit

[54] Whitley County Bd. of Educ. v. Meadow, 444 S.W.2d 890 (Ky. 1969).

of the Teacher's Tenure Law.

As the dissenters suggest, the appellant attained continuing service status as soon as she was recommended for reemployment and was eligible under the statute. This interpretation of KRS § 161.740, coupled with United States Supreme Court decisions in *Perry v. Sinderman*[55] and *Board of Regents v. Roth*,[56] mandated a finding that the board of education was attempting to deprive Helena Dorr of a vested property right. Such action by the state entitled her to a hearing under the due process clause of the fourteenth amendment. At a minimum, the Court of Appeals should have found that KRS § 161.740 is subject to the same interpretation as that given KRS § 160.380, which requires a board of education to accept the superintendent's recommendation absent a determination of moral unfitness or lack of educational qualifications. Since the board did not dispute the moral fitness or educational qualifications of the appellant, she was entitled, as a matter of law, to a continuing service contract.

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[55] 408 U.S. 593 (1972).

[56] 408 U.S. 564 (1972). In both *Perry v. Sinderman* and *Board of Regents v. Roth* the Supreme Court enumerated the principles upon which public employees could establish a claim that they possess a constitutionally protected property interest in their positions. To have a property interest in continued employment a person must have more than an abstract need or desire for the position or a unilateral expectation of employment. He must have a legitimate claim of entitlement to it. Property interests are not created by the Constitution but can be created and their dimensions defined by existing rules or understandings from state law. Once within the statutorily defined terms of eligibility, a public employee is protected.