1979

Kentucky Law Survey: Education: Teachers’ Rights

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Education: Teachers' Rights

BY KEITH GRAHAM HANLEY* AND ROBERT G. SCHWEMM**

INTRODUCTION

Tenure occupies an important place in the mind of any new teacher. During the past survey year, the Kentucky courts have demonstrated that this status is not only important to teachers generally; it is essential to continued job security. The aegis of tenure provides not only the substance of teachers' rights but also the procedure used to protect those rights.

Discharged teachers have alleged violations of the 14th amendment of the U.S. Constitution in both its equal protection1 and due process aspects2 and violations of the Kentucky constitution.3 However, in each instance the courts have summarily dismissed these claims, preferring instead to confirm the legislative tenure scheme as a judicial touchstone and a teacher’s sole shield.

This article will survey the past year's developments in the Kentucky case law concerning: (1) statutory due process for tenured-teachers and administrators;4 (2) the status of non-tenured teachers;5 and (3) employee unionization in an education context.6

I. STATUTORY DUE PROCESS FOR TENURED TEACHERS

A. Background on Continuing Service Contracts

Upon being hired for a fifth year of teaching in a school district, a certified teacher receives a statutorily-mandated “continuing service contract.”7 Such a teacher thereby ac-
quires what is commonly known as tenure. Once the teacher achieves this status, his or her contract is renewed on a year-to-year basis as a matter of course unless cause for nonrenewal is demonstrated in accordance with a specific procedure.\textsuperscript{8} The statute requires that the teacher receive in writing notice of: (1) the board’s intent not to rehire; (2) the charge which precipitated the decision; and (3) the date and place at which the teacher may appear to contest these charges.\textsuperscript{9} Further, the statute permits only certain types of charges to constitute cause for discharge.\textsuperscript{10}

The teacher has ten days from the receipt of written notice to notify the board of his or her intention to appear and contest the charges.\textsuperscript{11} If the teacher does not comply with this requirement, the board may consider the right to appear as waived and proceed unilaterally to terminate the teacher’s employment.\textsuperscript{12}

If the teacher decides to answer the charges, witnesses may

\textsuperscript{8} KRS § 161.790(1) (1971) provides: "The contract of a teacher shall remain in force . . . and shall not be terminated except for any of the following causes . . . ."

\textsuperscript{9} KRS § 161.790(3) (1971).

\textsuperscript{10} (a) Insubordination, including but not limited to 1. violations of lawful rules and regulations established by the local board of education for the operation of schools, and 2. refusal to recognize or obey the authority of the superintendent, principal, or any other supervisory personnel of the board in the performance of their duties;

(b) Immoral character or conduct unbecoming a teacher;

(c) Physical or mental disability;

(d) Inefficiency, incompetency or neglect of duty, when a written statement identifying the problems or difficulties has been furnished the teacher or teachers involved.


\textsuperscript{11} KRS § 161.790(3) (1971).

\textsuperscript{12} Id.
be subpoenaed for both sides, sworn under oath, and their testimony received and recorded. In addition, both the teacher and the board may be represented at the hearing by an attorney. Should the board vote not to rehire the teacher, the teacher may appeal to circuit court within thirty days for a de novo hearing. Decisions of the circuit court may be appealed pursuant to the Rules of Civil Procedure; it is this higher level of review which provides the setting for the following cases decided by the Kentucky Supreme Court and Court of Appeals.

B. Specificity of Charges and Documentation

The Court of Appeals decided two cases in the last two years in which specificity and documentation of charges against a tenured teacher comprised the main issue. In the first, Blackburn v. Board of Education of Breckinridge County, the appellant teacher received timely notice of the board’s intention not to rehire him, along with five reasons for its action. The Court of Appeals’ opinion did not recite the exact charges, but implied that all were couched in general terms and parroted the reasons enumerated in Kentucky Revised Statutes § 161.790 as just cause for dismissal. The court relied on earlier decisions of the Kentucky Supreme Court which held that bare conclusory characterizations (such as the terms used in the statute) do not give a teacher sufficient notice to permit formulation of a reasonable defense. The court particularly criticized the use of the terms “inefficiency” and

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14 Id.
16 Id.
17 564 S.W.2d 35 (Ky. App. 1978).
18 Id. at 36-37.

It is well settled in Kentucky that in a termination proceeding under KRS 161.790, the giving of mere notice of a general grounds for termination is not sufficient to inform a teacher of the specific nature of the charges against him, so as to permit the preparation of an adequate defense. . . . Knox County Board of Education v. Willis, Ky., 405 S.W.2d 952 (1966); Osborne v. Bullitt County Board of Education, Ky., 415 S.W.2d 607 (1967) and Sparks v. Ashland Independent School District, Ky. App., 549 S.W.2d 323 (1977).
“incompetency” without reference to specific “names, dates, [or] occurrences . . .” as being “not in sufficient detail to satisfy the statutory requirements . . . .” Further, the opinion noted that the lack of specificity was inexcusable, since detailed information was available to the superintendent before the board initially gave the teacher notice of nonrenewal of his contract.

The school administration also failed to give Blackburn any written indication that his job performance was unsatisfactory at the time of the defective performance. Failure to give contemporaneous written notice rendered impossible any dismissal for incompetency or inefficiency, even though the Court expressed little doubt that Blackburn was incompetent, since at the hearing “he was unable to remember his birthdate, could not recall the names of ten of his students and was unable to explain elementary aspects of certain terms.” This demand for contemporaneous communication of deficiencies serves an important prophylactic purpose by providing protection against stale charges and an opportunity to mend unacceptable ways; the court therefore concluded that compliance with the requirement was a prerequisite to dismissal.

Finally, the court observed that the statute required the board to produce written records of teacher performance. The court found that this requirement was not satisfied by the introduction of a single evaluation written only three weeks before the teacher was given notice of the board’s decision not to rehire him after his ninth year of teaching. However, this poor timing of evaluations might not be decisive where, for instance, previous written evaluations were satisfactory and the charge arose out of an acute incident, or series of incidents, rather than a chronic condition such as general incompetency or inefficiency.

The facts of Blackburn stand in stark contrast to those of

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19 Id. at 37.
20 Id.
21 Id.
22 The Court noted in its opinion that many of these procedural problems could have been avoided if local legal counsel had “been engaged to advise the Board of Education at the inception of the problems which ultimately led to the termination of the teacher. The failure to obtain legal counsel early is false economy.” Id.
Mavis v. Board of Education of Owensboro\textsuperscript{23} where the Court of Appeals held that a teacher was properly dismissed for infliction of physical and psychological punishment on students. Here, the teacher did not object to any lack of specificity in the charges at the time of the initial hearing; the charges were supported by written evaluations and complaints from parents; and Mavis had previously been ordered to cease the use of corporal punishment and had been transferred to another school for just that reason. The potential existence of two justifications for the discharge caused the court to consider whether the Board needed to announce a specific finding on each charge. Since both charges were supported by the evidence, the court's comment serves primarily as a warning to school boards in more questionable cases. "We think better procedure would indicate a need for a finding by the Board, but it is not required by statute . . . . A different holding might become necessary if several charges are preferred and the evidence supports some of the charges but not the others."\textsuperscript{24} The implication is clear that even complete compliance with the statute might not satisfy due process requirements in certain situations. As a result, Mavis stands alone among recent Kentucky appellate decisions in its implication that KRS § 161.790 fails to satisfy the basic requirements of due process in some cases.

C. Procedural Due Process Challenges to the Board Hearing Mechanism

During the past survey year, Kentucky's Court of Appeals turned down several due process challenges to the statutory procedure for terminating the contracts of tenured teachers. In four of these cases,\textsuperscript{25} the dismissed teacher challenged the fairness of the initial hearing where "the school board is cast into and occupies the roles of employer, investigator, accusor, prosecutor, jury and judge"\textsuperscript{26} and the form of subsequent review by

\textsuperscript{23} 563 S.W.2d 738 (Ky. App. 1977).
\textsuperscript{24} Id. at 739.
\textsuperscript{25} Blackburn v. Board of Ed. of Breckinridge County, 564 S.W.2d 35 (Ky. App. 1978); Mavis v. Board of Ed. of Owensboro Independent School Dist., 563 S.W.2d 738 (Ky. App. 1977); Kelly v. Board of Ed. of Monticello Independent School Dist., 566 S.W.2d 165 (Ky. App. 1977); Burkett v. Board of Ed. of Pulaski County, 558 S.W.2d 626 (Ky. App. 1977).
\textsuperscript{26} Burkett v. Board of Ed. of Pulaski County, 558 S.W.2d 626, 627 (Ky. App. 1977).
the circuit court. Each case presented a different attack on this process, yet none succeeded.

In *Kelly v. Board of Education of Monticello Independent School District,* the teacher had been given proper and timely notice of the board's intention to terminate his contract due to alcohol, drug, and psychiatric problems and their effect on his teaching. At the hearing, Kelly's counsel conducted a voir dire examination of the board members regarding their opinion as to the truth of the charges. While every member indicated that he had some pre-existing belief in the truth of the charges, each refused to disqualify himself. Proof was offered and the board found Kelly "physically and mentally unable to perform the duties of a full-time teacher." Kelly appealed his dismissal to circuit court.

In the circuit court proceeding, the judge permitted the board to introduce additional medical evidence, although the judge reserved the right to either later exclude the evidence from consideration or allow Kelly the opportunity to gather and introduce repudiatory evidence. The deposition of a psychiatrist who had examined Kelly on an earlier occasion was admitted on behalf of the board, but Kelly declined to offer any additional evidence on his own behalf. The circuit court affirmed the board's decision, and Kelly appealed once again.

Before the Court of Appeals, Kelly argued that procedural due process required not only that he receive notice and an opportunity to be heard but also "that he have the right to have those charges initially tried before an impartial tribunal or decision maker." Kelly essentially challenged the constitutionality of the entire statutory framework for removal, since the statute specified that the initial tribunal is to be the board itself rather than an appointed hearing officer or other "removed" party. Certainly the additional expense, loss of expertise, and inherent delay in the use of "removed" tribunals make such an alternative undesirable as a practical matter. However, the Court of Appeals did not reach these pragmatic considerations, deciding instead that "the opportunity for a de

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7 566 S.W.2d 165 (Ky. App. 1977).
16 Id. at 167.
17 Id. at 167 (emphasis added).
novo hearing at the circuit court level with the right to offer additional evidence, if so desired, was intended by the legislature to cure any deficiencies in the due process hearing at the Board level.” In reaching this conclusion, the court relied on a portion of the United States Supreme Court’s opinion in Hortonville Joint School District No. 1. v. Hortonville Educational Association for the proposition that in an educational context:

[m]ere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decision maker . . . . Nor is a decision maker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not “capable of judging a particular controversy fairly on the basis of its own circumstances.”

However, Hortonville involved group disciplinary action against striking teachers, more a policy than an adjudicatory decision. The U.S. Supreme Court noted: “The Board’s decision was only incidentally a disciplinary decision; it had significant governmental and public policy dimensions as well.”

Despite this significant distinction, the Court of Appeals relied heavily on Hortonville in cases in addition to Kelly, citing Hortonville to turn aside procedural due process attacks on board hearings that were adjudicatory of individual teacher’s rights rather than decisions of policy.

The court in Kelly also relied heavily on the de novo circuit court proceeding as a cleansing mechanism for any due process infringements occurring during the board hearing. But the court’s opinion itself is contradictory in a crucial element in this analysis: viz., the scope of a teacher’s right to introduce new evidence at the circuit court level. At one point in the opinion, the court stated “that the opportunity for a de novo hearing at the circuit court level with the right to offer additional evidence . . . was intended by the legislature to cure any

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30 Id. at 168.
31 426 U.S. 482, 493 (1976) (quoting from United States v. Morgan, 313 U.S. 409, 421 (1941)).
32 Id. at 495.
deficiencies in the due process hearing at the Board level.”\textsuperscript{33} Such an unfettered right would guarantee a truly de novo hearing. But if the teacher indeed has such a right, it is not clear that the circuit court has a corresponding duty to admit and consider this additional evidence. In fact, the circuit court relies on the transcript of the board’s hearing and “such additional hearings as it [the court] may deem advisable, at which it may consider other evidence in addition to such transcript and record.”\textsuperscript{34} The court in \textit{Kelly} recognized this judicial discretion and seemed to contradict its earlier statement by noting “that it was the manifest intention of the legislature that either side have an opportunity to present additional evidence at the de novo hearing, if the circuit court deems it advisable.”\textsuperscript{35}

If indeed this judicial discretion suprecedes any right to present additional evidence at a de novo hearing, then the review of the board’s decision by the circuit court seems to lack any substantial meaningful purpose, particularly in view of the already significant limitations on such review. The circuit court “cannot inquire into the motives of the Board and cannot say that the testimony of one witness should be believed rather than that of another;”\textsuperscript{36} nor can it “choose between conflicting testimony on which the school board has the right to base its decision.”\textsuperscript{37}

The \textit{Kelly} court relied on the opinion of this state’s highest court in \textit{Bell v. Board of Education of McCreary County}\textsuperscript{38} to establish that teacher dismissal hearings before the school board are intended only to establish a record which can later be examined for arbitrariness. However, the appellant in \textit{Bell} was a dismissed superintendent who was found by the Court to have no right to a board hearing. Thus his gratuitous hearing before the Board was immune from due process attack, beyond an examination for arbitrariness.\textsuperscript{39} Where teachers are in-

\begin{footnotes}
\item[33] 566 S.W.2d at 168 (emphasis added).
\item[34] KRS § 161.790(6) (1971) (emphasis added).
\item[35] 566 S.W.2d at 169 (emphasis added).
\item[36] Bell v. Board of Ed. of McCreary County, 450 S.W.2d 229, 233 (Ky. 1970) (quoting from Hoskins v. Keen, 350 S.W.2d 467, 469 (1961)).
\item[37] \textit{Id}.
\item[38] 450 S.W.2d 229 (Ky. 1970).
\item[39] \textit{Id}.
\end{footnotes}
involved, however, as in *Kelly*, this logic breaks down, since teachers are statutorily guaranteed a hearing as a matter of right. As a result, due process scrutiny of a teacher dismissal hearing should go beyond the issue of simple arbitrariness treated in *Bell*; reliance by the *Kelly* court on the *Bell* decision seems improper from a constitutional perspective.

The Court of Appeals has refused to reverse circuit court decisions on teacher dismissals except when the circuit court's findings were "clearly erroneous." In recent cases the appellate courts have approved: tremendous lower court deference to a school board's decision regarding conflicting testimony; a decision to dismiss a teacher made after voir dire demonstrated that the school board members lacked impartiality in the matter; a decision made without public deliberation and unsupported by specific findings of fact; and denial of an absolute right of teachers to submit evidence at the circuit court level. Under such circumstances, it seems doubtful that the statutory mechanism for dismissals satisfies the procedural due process requirements outlined by the United States Supreme Court in the *Hortonville* case, which has been quite frequently relied on by the Kentucky courts to justify their actions.

In *Hortonville*, the Supreme Court held that the procedural due process rights of teachers were not violated when the school board dismissed the teachers after an extended strike against the school board. The Court found that the school board's dual function of bringing disciplinary charges as well as conducting the disciplinary hearing was not a sufficient indication of bias or prejudice to invalidate the dismissals on con-

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5 See text accompanying notes 36-37 *supra*.
9 *Id. at 434; Mavis v. Board of Ed. of Owensboro Independent School Dist.*, 563 S.W.2d 738, 739 (Ky. App. 1977).
10 See text accompanying notes 34-35 *supra*. Further, in *Bell*, the court explicitly held that a circuit judge "may, but is not required to, conduct a further hearing." 557 S.W.2d 433, 434 (Ky. App. 1977).
11 *Burkett v. Board of Ed. of Pulaski County*, 558 S.W.2d 626, 628 (Ky. App. 1977).
stitutional grounds. However, the situation before the Court in *Hortonville* differed significantly from the disciplinary proceedings usually reviewed by the Kentucky courts in that disputed issues of fact must often be resolved by Kentucky school boards, while the significant facts were undisputed in *Hortonville*. When the board performs an adjudicatory function by making determinations on disputed issues of fact, the potential bias of the board must be scrutinized far more closely. The *Hortonville* Court repeatedly emphasized that the absence of any board fact-finding was an important component of its decision. As a result, the terminations recently reviewed by the Kentucky courts were different from the *Hortonville* situation in at least one essential respect and therefore should be more closely scrutinized for indications of school board partiality.

This additional scrutiny of board biases and prejudices is necessary to prevent enforcement of unfair decisions which cannot be cured by judicial review. Since the circuit judge accepts board conclusions as to disputed testimony and the appellate courts will reverse only for clear error, meaningful judicial review can be thwarted by the bias of the initial decision-maker (the board). Perhaps for this reason the Court of Appeals in *Kelly* ignored the earlier Kentucky Supreme Court decision in *Board of Education of Pulaski County v. Burkett*. *Burkett*, in turn, was based on the decision of the United States Supreme Court in *Withrow v. Larkin*, which held that the "additional and sufficient blankets of protection" provided by judicial review could cure certain procedural due process deficiencies.

However, in *Withrow*, an administrative body made a determination involving individual property rights only after an

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48 Id. at 496.
49 Id. at 489.
51 426 U.S. at 424.
52 Kelly v. Board of Ed. of Monticello Independent School Dist., 566 S.W.2d 165 (Ky. App. 1977).
53 525 S.W.2d 747 (Ky. 1975).
54 421 U.S. 35 (1975).
55 525 S.W.2d at 747.
investigation and adversary hearing.⁵⁶ On the other hand, in 
Kelly and similar challenges, the board held an adversary hear-
ing only after it had made the decision to terminate. The differ-
ence between a hearing before a decision and one after a deci-
sion is important; in fact, the Supreme Court in a footnote to 
Withrow distinguished its own earlier decisions which had 
found due process violations on this basis. "Each held that 
when review of an initial decision is mandated, the decision-
maker must be other than the one who made the decision under 
review."⁵⁷ At present, the board does not fulfill this reviewing 
function, since the board first terminates the contract and then 
itself conducts a hearing concerning the termination. Nor does 
the circuit court seem to fulfill this function when introduction 
of evidence is not by right, and the court must give conflicting 
testimony received at the board hearing the same interpreta-
tion given it by the board.

Correction of this possible deficiency may not be simple. 
Isolating the board from any investigation prior to giving notice 
of termination is counterproductive, as discussed earlier. Fur-
ther, the statute treats the board’s determination as a 
“decision”; the teacher’s dismissal is inevitable if he or she 
does not contest the charges, and any notice after receipt of the 
superintendent’s recommendation is at the board’s discretion. 
A better solution to the constitutional problem would result 
from permitting the circuit court to examine the board’s deci-
sion regarding conflicting testimony. Certainly, the courts do 
not wish to become a super school board reviewing every per-
sonnel matter. Nevertheless, to assure procedural due process 
protection of a teacher’s vested property rights, the courts 
should interpret the statutory scheme in a manner that takes 
full advantage of the circuit court’s position as an impartial 
decision maker.

II. NON-TENURED TEACHERS’ RIGHTS

Twice during a teacher’s career he or she will lack the 
protections of tenure: (1) during the first four years of teaching

⁵⁶ 421 U.S. at 57-58.
⁵⁷ Id. at 58 n.25.
in a particular system;\(^5\)\(^8\) and (2) upon being rehired for a teach-
ing year after reaching age sixty-five.\(^5\)\(^9\) A non-tenured teacher
has only a limited contract with the school board. In contrast
to a teacher with a continuing service contract, a teacher with
a limited contract has no right to a dismissal hearing and, as
the Kentucky Supreme Court made quite clear this year, the
reasons for dismissal given a non-tenured teacher may be very
broad and general.

In *Tucker v. Miller,*\(^6\)\(^0\) the Court clearly indicated that a
non-tenured teacher had no protection beyond the notice re-
quirements of the statute. Tucker was given timely notice of
the board’s decision not to rehire her for the next year. At her
request, the superintendent informed her that the reasons for
the board’s decision were her “inability to work well with the
students, inadequate relationships with other faculty mem-
bers, poor community relations and an inability to carry out
instructions of the principal.”\(^6\)\(^1\) Tucker contended that these
cited deficiencies were vague and did not meet the statutory
requirement of “specific reason or reasons”\(^6\)\(^2\) for the discharge
of a non-tenured teacher and therefore her dismissal was in-
valid due to lack of proper notice. While this general statement
of reasons for dismissal would probably not have sufficed as
proper notice to a tenured teacher, the Court held that in the
case of a non-tenured teacher neither due process nor the stat-
utes required specificity, since a teacher with a limited con-
tract has no right to a hearing and thus no need for great
specificity in the notice. The statutory requirement of “specific
reason or reasons” serves only to provide the teacher with infor-

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\(^{58}\) KRS § 161.750(1) (Supp. 1978).
\(^{59}\) KRS § 161.720(4) (Supp. 1978).
\(^{61}\) Id. at 2.
\(^{62}\) Prior to a 1976 amendment, KRS § 161.750(2), the governing statute, required
that “upon request by the teacher such written notice shall contain the specific reason
or reasons why the teacher is not being reemployed.” The relevant portion of KRS §
161.750(2) (Supp. 1978) now reads: “Upon receipt of a request by the teacher, the
board shall provide a written statement containing the specific, detailed and complete
statement of grounds upon which the nonrenewal of contract is based.”
This broad interpretation of the statutory notice requirement seems appropriate when considered in light of the board’s almost complete discretion in granting limited contracts. The Court of Appeals recently reaffirmed this complete discretion, citing an earlier Kentucky Supreme Court decision which held that “cause is not required for denial of reemployment under a limited contract.” However, the board still must provide some reason for dismissal to comply with the statute. Certainly the right to notice cannot be completely disregarded, since it lays the foundation for the teacher’s pursuit of a remedy for any violations of the U.S. Constitution or federal statutes.

In Belcher v. Gish, the Kentucky Supreme Court considered the implications of the termination of tenure at age sixty-five. The Central City Board of Education had passed a resolution providing that all teachers had to retire at the end of the school year in which they reached age sixty-five. The plaintiffs’ eligibility for continuing service contracts lapsed under the state statute at the end of the same school year. They were then eligible only for a limited contract. When the plaintiffs requested specific reasons for their dismissal, the board simply reiterated the policy announced in its earlier resolution.

The Court upheld the dismissal, saying that this policy fell within the general powers granted to the board by statute. In so doing, the Court tacitly accepted the proposition that the “specific reason or reasons” for a board’s decision not to rehire can be that a teacher falls into a given classification which the board has determined will not be considered for teaching contracts. If this is the case, then an individual teaching under a limited contract possesses nothing that can properly be called a right to continue his employment from year to year. Justice Jones gave perhaps the best summary of the “new” or “modern” cases in this area when he stated that at sixty-five

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41 No. 75-109 at 3.
45 555 S.W.2d 264 (Ky. 1977).
46 Id. at 265.
47 KRS § 160.290(2) (Supp. 1978) gives local boards of education the power to promulgate rules and regulations for the management of the schools, including the qualification and employment of teachers. Justice Sternberg dissented on this issue. 555 S.W.2d at 268-69.
"[t]he cloak of tenure falls from his [the teacher's] shoulders, and his reemployment on a yearly basis is dependent on the grace of the board of education." 

Belcher and a similar case this year also raise the interesting constitutional question of whether the board's policy decision not to rehire a teacher after his or her sixty-fifth birthday violates equal protection and due process. The Court chose not to address these claims in its opinions, leaving those substantial issues unanswered. Those issues are explored more fully elsewhere in this publication.

III. Unions in an Educational Context

Kentucky's Supreme Court and Court of Appeals each heard one case this year in which collective bargaining issues were raised in an educational setting. In Board of Trustees of the University of Kentucky v. Public Employees Council No. 51, the Supreme Court explored some of the implications and complications of public employee collective bargaining in education. The case arose when representatives of the union approached the trustees with a "substantial number" of representative designation cards signed by nonacademic employees of the university. The trustees filed a declaratory judgment action to clarify their rights and duties with respect to bargaining with the union.

The trial court answered most of the general questions presented by the trustees, and the Supreme Court affirmed its decision. However, the Court found only one determination to be crucial—that the employees were public employees not covered by the statute authorizing union activity and "consequently, there is no duty placed by the legislature on the Board of Trustees to recognize, negotiate or bargain with the group of nonacademic employees here." The Court relied on

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48 Id. at 266 (emphasis added).
49 The Supreme Court relied solely on Belcher in its memorandum opinion per curiam in Pendleton v. Estes, No. 75-958 (Ky. Oct. 28, 1977) (per curiam).
51 571 S.W.2d 616 (Ky. 1978).
52 KRS § 336.130 (Supp. 1978).
53 571 S.W.2d at 620.
its earlier decision in *Jefferson County Teachers Association v. Board of Education of Jefferson County*\(^7\) which held that public employees were excluded by the legislature when it gave employees in general the rights to bargain collectively, picket, and strike.\(^7\) The Court reiterated that although this exception was dropped because of oversight in the 1942 revision of the statutes, the original intent of the legislature to except public employees was still applicable.\(^7\)

The Court recognized, however, that the employees' rights of freedom of expression and association meant that they had "a right to join a national labor union and to organize themselves to carry out their collective wishes."\(^7\) This conclusion results in a confused state of affairs. If the trustees are under no duty to recognize or bargain with an agent and the employees have no right to strike, how can the employees "carry out" any of their collective wishes more effectively through organization?\(^8\)

\(^7\) 463 S.W.2d 627 (Ky. 1970), cert. denied, 404 U.S. 865 (1971).
\(^8\) 571 S.W.2d 620 (Ky. 1978).
\(^7\) The Court in *Board of Trustees* quoted at length from *Jefferson County Teachers*:

"In 1940 the legislature enacted the Hunnicutt Act as Chapter 105 of the Acts of the General Assembly. This Act related to employer-employee relations, and recognized the right to collectively bargain, strike, picket, etc. Article V of this Chapter provided specifically that there were exempted from all of the provisions of the Act . . . employees of the United States, the State and any and all political subdivisions or agencies thereof." In Baldwin's February 1941 Supplement to Carroll's Kentucky Statutes this Act was incorporated as Chapter 42bb. The exemption provision (Article V) appears as section 1599c-39.

"In 1942 the statutes were completely revised as the Kentucky Revised Statutes. In the revised statutes, Carroll's Chapter 42bb was incorporated in KRS Chapters 336, 337 and 338. What had been Carroll's section 1599c-39 (Article V) was compiled in KRS 336.050, 337.010 and 338.010. The exemption provision was incorporated in KRS 337.010(2), for Chapter 337, relating to "Wages and Hours", and in KRS 338.010(3), for Chapter 338, relating to "Safety and Health of Employees", but was not included in KRS 336.050, nor in any section of Chapter 336.

"The original Act pertaining to employer-employee relations clearly and expressly excluded public employees from the granted right to strike. The apparently inadvertent omission of this exclusion in Chapter 336 when the statutes were revised cannot be held to have changed the legislative policy and the law. Therefore appellants cannot properly claim the legislature has granted them such a right, and their principal contention must fall."

571 S.W.2d at 619 (quoting from 463 S.W.2d 627, 629 (Ky. 1970)).
Nonetheless, the Court recognized the trustees’ ability to negotiate with any group of employees or their representatives. Justice Stephenson’s opinion reasoned that as the trustees had the power to negotiate employment terms with any individual employee, “[n]egotiating with two or more employees, or their chosen representative, cannot logically be held to exceed the implied authority of the Board.”

Such negotiations, however, are not to be of the type usually undertaken in the private sector. While the negotiations may lead to an enforceable contract concerning hours, wages, retirement, or other conditions of employment, the trustees cannot recognize the union representative as an exclusive representative for any employees other than those who have authorized the representative to be their agent. The Court mandated this prohibition because the “power, authority and duties of the Board [of Trustees] are derived from the statutes enacted by the General Assembly . . . .” KRS § 164.225 provides that the Board of Trustees shall have “exclusive jurisdiction” over the terms of employment of all its employees. The Court concluded that any recognition of an exclusive bargaining agent that would prohibit the trustees from negotiations with independent employees or their separate agent “would be a clear violation of the statute imposing exclusive jurisdiction, power and control in the Board with regard to all aspects of employment.”

This determination—prohibiting recognition of an exclusive agent—further undercuts the employees’ ability to “carry out” their collective desires. In fact, the union argued that such an exclusive agent “is a necessary concomitant to any effective bargaining relationship.” It is ironic that the Court found the trustees’ binding themselves contractually to a fixed wage, hour, or retirement scale did not violate their exclusive control while binding themselves to a particular exclusive agent would

“delving into theoretical questions in areas where all the implications are not readily discernible.” Id. Further, the Court’s statements about what the trustees could do if they chose may be considered dicta since the trustees stated that they did not wish to recognize, negotiate, or bargain with the union.

Id. at 621.

Id.

Id.

Id.
constitute such a violation. In either case, the Board unilaterally controls the terms of employment as long as employees lack the right to strike. It seems as though the Court is actually protecting only an employee’s right to represent himself or choose his own representative on an individual basis for negotiations, a “protection,” in turn, that severely inhibits the employees’ ability to act as a powerful, united group.

It is difficult to determine whether the Court in *Board of Trustees* based its decision solely on the explicit legislative grant of exclusive power to the trustees or on a more general prohibition against public employee bargaining in the educational field. However, the Court of Appeals considered a similar question last year in *Board of Education of Louisville v. Louisville Education Association*. There the local board of education and a teachers’ association (LEA) “entered into a Professional Agreement pertaining to wages, hours and working conditions of certificated teachers employed in the system.” The agreement contained a grievance procedure as well as a clause providing that the authority granted by the legislature to the board for the exclusive control of the school system would not be limited by the agreement.

A majority of the court held that two teachers with limited service contracts did not have a grievance within the terms of the agreement and that simple compliance with the statutory termination procedure of KRS § 161.750 would be sufficient, notwithstanding the Professional Agreement. The court added that even if termination could be considered a grievance, the additional steps for termination imposed by the contract would “alter” the statutory mandate that the board maintain exclusive control of the school system and would therefore be void.

The court cited an 1894 Wisconsin case, *Gillian v. Board of Regents of Normal Schools*, which held that dismissal of a teacher was a right of a board of education which could not be

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12 *Id.* at 1.
13 For a discussion of KRS § 161.750, see text accompanying notes 58-59 *supra*.
14 No. 75-742 at 3.
15 *See* KRS §§ 160.160, .290.
16 58 N.W. 1042 (Wis. 1894).
limited by contract. Judge Howerton, in his dissent, noted that "Gillan was undoubtedly a good decision in 1894, but it is so removed from the facts of life today that it simply must not be authority for a teacher-school board contract in Kentucky in 1974." It is unclear whether the Court of Appeals interpreted Kentucky's statutes to prohibit a school board from contracting away any of its "exclusive control" or whether the decision not to rehire simply fell outside of the definition of grievance in the Professional Agreement. As a result, neither the Court of Appeals nor the Supreme Court definitively answered the key question, whether educational collective bargaining is permissible under any circumstances.

CONCLUSION

This past survey year saw Kentucky's appellate courts forego aggressive confrontation of key issues in the area of teachers' rights. The courts avoided breaking new ground where age discrimination, due process, and collective bargaining questions were raised. In so doing, the courts refined statutory construction in these areas and then relied almost totally on their construction of those statutes. The only clear result of this course of action was a further widening of the gap between the rights of teachers employed under a limited service contract and those working under a continuing service contract.

No. 75-742 at 5.