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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002981-MR

GENERAL DRIVERS, WAREHOUSEMEN &
HELPERS, LOCAL 89

APPELLANT

v. APPEAL FROM MARTIN CIRCUIT COURT
HONORABLE JAMES A. KNIGHT, JUDGE
ACTION NO. 96-CI-00222

MARTIN COUNTY BOARD OF EDUCATION

APPELLEE

OPINION
REVERSING AND REMANDING
** ** * * * * *

BEFORE: BARBER, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: General Drivers, Warehousemen & Helpers, Local 89, has appealed from a judgment of the Martin Circuit Court entered on November 20, 1998, which dismissed its complaint. Local 89 had sought to compel the Martin County Board of Education to participate in the arbitration of a claim relating to the discharge of a classified employee.¹ Having concluded

¹Court of Appeals Case No. 1999-CA-000570-MR was heard with
(continued...)

that the trial court erred in refusing to compel the arbitration, we reverse and remand for further proceedings.

This case arose following the termination of the employment of school bus driver, Nancy Newsome, by William Slone, the superintendent of schools for the Martin County School District. Newsome, who was designated as a classified employee under Kentucky Revised Statutes 161.011(1)², filed a timely grievance with the Martin County Board of Education. Newsome's union, Local 89, subsequently requested arbitration of her grievance pursuant to Provision 21 of the collective bargaining agreement between the Board and Local 89.

The agreement required that the Board approve the termination of an employee, and further provided that a discharged employee had the right to have her discharge reviewed through a grievance and arbitration procedure. In refusing to arbitrate Newsome's claim, the Board contended that since the Kentucky Education Reform Act (KERA) empowered only the superintendent to dismiss classified personnel, this power could not be delegated to an arbitrator. Local 89 filed a lawsuit

¹(...continued)
this appeal. That case originated as Civil Action No. 98-CI-00217 and involved drivers Homer Mills, Robert Delong, Kimberly Charles and Joe Fletcher. It was filed in Division I of the Martin Circuit Court with the Hon. Stephen N. Frazier presiding. A summary judgment in favor of the Board was entered on March 5, 1999.

²KRS 161.011(1) defines a classified employee as "an employee of a local district who is not required to have certification for his position. . .," as is, for example, a teacher or principal.

against the Board seeking to compel it to arbitrate the grievance. After a bench trial, the trial court determined that it was improper for the Board to contract to deprive the school superintendent of a statutory duty and refused to order arbitration. This appeal followed.

When the parties entered into the collective bargaining agreement on November 6, 1995, KRS 161.011 expressly allowed the Board to enter into written contracts regarding classified employees:

(5) Local school districts shall enter into written contracts with classified employees.

(6) Local school boards shall develop and provide to all classified employees written policies which shall include, but not limited to:

- (a) Terms and conditions of employment;
- (b) Identification and documentation of fringe benefits, employee rights, and procedures for the reduction or laying off of employees; and
- (c) Discipline guidelines and procedures that satisfy due process requirements.

Provision 21 of the parties' collective bargaining agreement provided the Board with "the right to discharge or discipline an employee for just cause in relation to major offenses subject to the grievance and arbitration procedure. . ." provided in the agreement. In this appeal we must determine, in light of certain KERA provisions, whether this contract provision pertaining to the arbitration of the dismissal of a classified employee is legally binding upon the Board and the superintendent.

We believe it is important to point out initially that this case does not involve a dispute between the Board and the superintendent regarding each party's power to dismiss a classified employee. The collective bargaining agreement was signed by both Superintendent Slone and the chairman of the Board. Thus, we believe the trial court's statement that the Board "may not contract to strip a statutorily mandated duty from a School Superintendent" is misplaced. The discharged employee was not contending that the Board, rather than the superintendent, was required to discharge her. Instead, she was contending that under the collective bargaining agreement the question of whether the superintendent's discharge of her was appropriate was subject, as provided in the agreement, to "final and binding" arbitration "on both parties and any and all individual employees involved."

Local 89 is correct that "collective bargaining agreements to arbitrate disputes are routinely enforced." Unless the contract as written is ambiguous, "it will be strictly enforced according to its terms."³

Our former Court of Appeals has stated:

Federal substantive law has established a policy of judicial deference to arbitration and judicial restraint, prior to arbitration, from intervention into the interpretation of the provisions of collective bargaining agreements which provide for arbitration.

³Grey v. Wilson, Ky.App., 554 S.W.2d 869 (1977).

In United Steel Workers of America v. Warrior Gulf Navigation Company, [363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)], it was held that an order to arbitrate a particular grievance should not be denied unless it could be said with positive assurance that the asserted dispute was not subject to the arbitration clause of the agreement, with doubts resolved in favor of coverage.⁴

As stated in United Steel Workers v. American Manufacturing, supra, "the agreement [of the parties was] to submit all grievances to arbitration. . . ." ⁵

In the case sub judice, the agreement between the Board and Local 89 clearly stated that the discharge of an employee is subject to the grievance and arbitration procedures provided for in the contract. The agreement is unambiguous; and since the intentions of the parties are clear, we must uphold the contract. Again, the issue was not whether the Board or the superintendent could discharge a school bus driver. Everyone was in agreement that the authority to discharge rested with the superintendent. Rather, the issue was whether the employment action by the superintendent was subject to review by arbitration.

It was the Legislature in the first instance that empowered these entities to enter into contracts concerning

⁴United Brick & Clay Workers of America, Local 486 v. Lee Clay Products Co., Inc., Ky., 488 S.W.2d 331 (1972) (citing United Steel Workers of America v. American Manufacturing Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.E.2d 1403 (1960)); United Steel Workers of America v. Warrior and Gulf Navigation Co., supra; and United Steel Workers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)).

⁵American Manufacturing, 363 U.S. at 568.

personnel and the management of business affairs.⁶ KRS 160.370⁷ and 160.390⁸ are clear that the superintendent "shall be responsible for all personnel actions, including hiring, assignments, transfer, dismissal, suspension, reinstatement, promotion, and demotion. . ."⁹ and these statutes do not limit the superintendent's or the Board's ability to resolve these employment issues, including the use of arbitration in reviewing the dismissal of an employee. We believe the statutes clearly empower the superintendent to resolve disputes related to the discharge of an employee. Thus, if the superintendent and the Board are empowered to resolve a dispute related to personnel by settling a lawsuit filed by the discharged employee, then those same powers logically include the power to avoid or resolve litigation by arbitration. Alternative dispute resolution is a growing trend that has been embraced by the Legislature and the

⁶See KRS 160.370, 160.390 and 161.011.

⁷According to KRS 160.370, "[the superintendent] shall have general supervision, subject to the control of the board of education, of the general conduct of the schools, the course of instruction, the discipline of pupils, and the management of business affairs. He shall be responsible for the hiring and dismissal of all personnel in the district" [emphasis added].

⁸Pursuant to KRS 160.390, the superintendent is "responsible for all personnel actions including the hiring, assignments, transfer, dismissal, suspension, reinstatement, promotion, and demotion and reporting the actions to the local board" [emphasis added].

⁹See Chapman v. Gorman, Ky., 839 S.W.2d 232, 242 (1992), where the Supreme Court said that "it is the superintendent, under the new provisions in KERA, who is responsible for hiring, transferring, dismissing, assigning, promoting, and demoting school employees" [emphasis added].

courts.¹⁰ The actions of the parties of adopting binding arbitration as the mechanism to resolve a dispute related to the discharge of a classified employee was clearly within the Board's and superintendent's contractual authority.

Accordingly, the judgment of the Martin Circuit Court is reversed and this matter is remanded for entry of a judgment in favor of Local 89 that compels arbitration.

BARBER, JUDGE, CONCURS.

HUDDLESTON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HUDDLESTON, JUDGE, DISSENTING: After the Superintendent of the Martin County School District dismissed school bus driver Nancy Newman, a classified employee,¹¹ she filed a grievance with the Martin County Board of Education. General Drivers, Warehousemen & Helpers, Local 89, subsequently requested arbitration of the grievance pursuant to Provision 21 of the collective bargaining agreement entered into by the Board and Local 89. According to Provision 21, "[t]he Board shall have the right to discharge or discipline an Employee for just cause in relation to major offenses subject to the grievance and arbitration procedure in this Agreement." Claiming that the

¹⁰See United Steelworkers v. Enterprise Wheel & Car, supra; United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987); KRS Chapter 417; and Housing Authority of Louisville v. Service Employees International Union, Local 557, Ky., 885 S.W.2d 692 (1994).

¹¹ Ky. Rev. Stat. (KRS) 161.011(1) defines a classified employee as "an employee of a local district who is not required to have certification for his position . . . ," as is, for example, a teacher or principal.

Kentucky Education Reform Act (KERA) empowers only the superintendent to dismiss classified personnel, the Board refused to arbitrate. Local 89 sued the Board seeking to compel it to arbitrate the grievances, but the circuit court determined that the Board could not "contract to strip a statutorily mandated duty from a School Superintendent" and refused to order arbitration. Thereafter, Local 89 appealed to this Court.

Kentucky Revised Statutes (KRS) 160.370¹² and 160.390¹³ provide, in part, that the superintendent is responsible for all personnel actions including dismissals.¹⁴ According to KRS 161.011 (as amended in 1994):

(5) Local school districts shall enter into written contracts with classified employees.

(6) Local school boards shall develop and provide to all classified employees written policies which shall include, but not be limited to:

¹² According to KRS 160.370, "[the superintendent] shall have general supervision, subject to the control of the board of education, of the general conduct of the schools, the course of instruction, the discipline of pupils, and the management of business affairs. He shall be responsible for the hiring and dismissal of all personnel in the district." (Emphasis supplied.)

¹³ Pursuant to KRS 160.390, the superintendent is "responsible for all personnel actions including hiring, assignments, transfer, dismissal, suspension, reinstatement, promotion, and demotion and reporting the actions to the local board." (Emphasis supplied.)

¹⁴ See Chapman v. Gorman, Ky., 839 S.W.2d 232, 242 (1992), where the Supreme Court said that "it is the superintendent, under the new provisions in KERA, who is responsible for hiring, transferring, dismissing, assigning, promoting, and demoting school employees." (Emphasis supplied.)

- (a) Terms and conditions of employment;
- (b) Identification and documentation of fringe benefits, employee rights, and procedures for the reduction or laying off of employees; and
- (c) Discipline guidelines and procedures that satisfy due process requirements.

Local 89 argues that because KRS 161.011(6) requires local school boards to create written policies with respect to disciplinary matters, employee rights, terms and conditions of employment and due process, the grievance and arbitration procedures spelled out in Provision 21 are valid. Both parties to this appeal agree the superintendent had dismissal authority. Local 89, however, asserts that the superintendent's action is subject to the grievance procedure, including arbitration, as a result of the enactment of KRS 161.011(6).¹⁵

An arbitrator may not review a superintendent's dismissal decision if the General Assembly intended to confer this authority solely upon the superintendent. Accordingly, it must be determined whether KERA allows for arbitration of a superintendent's decision to dismiss a classified employee.¹⁶

¹⁵ KRS 161.011 was amended in 1998.

¹⁶ See Shultz v. Ohio County, 226 Ky. 633, 11 S.W.2d 702, 704 (1928), in which Kentucky's highest court said that "[t]he intention of the Legislature in enacting a law must be the controlling factor in its construction and interpretation . . . and where there is doubt as to the meaning of such laws the courts may look to 'the historical setting surrounding its enactment; the public policy of the state; the condition of its laws; the habits and manners of its people; and all other prior and contemporaneous facts and circumstances that throw

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In Rose v. Council for Better Education, Inc.,¹⁷ the Supreme Court determined that Kentucky's common schools as then constituted and financed were constitutionally deficient. In response, the General Assembly enacted KERA.¹⁸ The Supreme Court has observed that "[t]he essential strategic point of KERA is the decentralization of decision making authority so as to involve all participants in the school system"¹⁹

As part of this decentralization, "[KERA] removed many personnel decisions from the control of the local school boards."²⁰ One such decision involves the dismissal of personnel.²¹ KERA gave superintendents this authority in addition to the authority to make other personnel decisions.²²

KERA, however, provides for the reevaluation of certain

¹⁶ (...continued)
intelligent light on the intention of the lawmaking body.'" (Quoting Sewell v. Bennett, 187 Ky. 626, 220 S.W. 517, 522 (1920)) (other citations omitted).

¹⁷ Ky., 790 S.W.2d 186, 214 (1989).

¹⁸ Chapman, supra, n.4, at 235.

¹⁹ Board of Educ. of Boone County v. Bushee, Ky., 889 S.W.2d 809, 812 (1994).

²⁰ Chapman, supra, n.4, at 235.

²¹ Id.

²² Id. See also KRS 160.370 and 160.390; Estreicher v. Board of Educ. of Kenton County, Ky., 950 S.W.2d 839, 840 (1997) (noting that "KRS 160.390 . . . grants school superintendents broad power over personnel decisions . . .").

personnel actions. KRS 161.790,²³ for example, allows tribunal review of a teacher's termination by the superintendent.²⁴ And KRS 161.765²⁵ permits boards of education to hear an

²³ Prior to the 1996 and 1998 amendments, KRS 161.790 provided, in part, that:

(3) No contract [of a teacher] shall be terminated except upon notification of the board by the superintendent. Prior to notification of the board, the superintendent shall furnish the teacher with a written statement specifying in detail the charge against the teacher. The teacher may within ten (10) days after receiving the charge notify the chief state school officer and the superintendent of his intention to answer the charge, and upon failure of the teacher to give notice within ten (10) days, the dismissal shall be final.

(4) Upon receiving the teacher's notice of his intention to answer the charge, the chief state school officer shall appoint a three (3) member tribunal, consisting of one (1) teacher, one (1) administrator, and one (1) lay person, none of whom reside in the district, to conduct an impartial hearing within the district.

The 1996 and 1998 amendments to KRS 161.790 changed section (4) to read "to conduct an administrative hearing in accordance with KRS Chapter 13B within the district."

²⁴ See Reis v. Campbell County Bd. of Educ., Ky., 938 S.W.2d 880, 883 (1996), where the Supreme Court, citing KRS 161.790(4)-(6), observed that "the superintendent is now given authority to initiate termination of a teacher's contract" [] "The remaining powers of hearing the teacher's answer to the charge and terminating the teacher's contract by a majority vote, for so long within the sole province of the board of education, now resides in the three-member tribunal appointed by the chief state school officer."

²⁵ Pursuant to KRS 161.765:

(1) A superintendent may demote an administrator who has not completed three (3) years of administrative service, not including leave granted under KRS 161.770, by complying with the requirements of KRS 161.760.

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administrator's demotion contest.²⁶ KERA is, however, silent regarding review of a classified employee's dismissal.

As evidenced by KERA's decentralization goal and KRS 161.790 and 161.765, a superintendent's authority in personnel matters is not plenary. Nevertheless, as the General Assembly

²⁵ (...continued)

(2) An administrator who has completed three years of administrative service, not including leave granted under KRS 161.770, cannot be demoted unless the following procedures have been complied with:

(a) The superintendent shall give written notice of the demotion to the board of education and to the administrator. If the administrator wishes to contest the demotion, he shall, within ten (10) days of receipt of the notice, file a written statement of his intent to contest with the superintendent. If the administrator does not make timely filing of his statement of intent to contest, the action shall be final.

* * *

(c) Upon receipt of the statement of grounds for demotion the administrator shall, within ten (10) days, file a written answer. Failure to file such answer, within the stated period, will relieve the board of any further obligation to hold a hearing and the action shall be final. The board shall issue subpoenas as are requested.

(d) The hearing on the demotion shall be public or private, at the discretion of the administrator and shall be limited to the matters set forth in the written statement of grounds for demotion. The board shall provide to the administrator a verbatim transcript of the hearing. The board of education shall hear the case, with the board chairman presiding. The board, upon hearing the evidence and argument presented, shall retire to private chambers to arrive at a decision.

²⁶ See Estreicher, supra, n. 12, at 840, in which the Supreme Court observed that "KRS 161.765 . . . provides heightened procedural protections for school administrators."

has decided to give superintendents authority over classified employee dismissal decisions and has not provided a mechanism for review, there is no reason to believe that it intended to allow arbitration of that decision.

Contrary to Local 89's argument, KRS 161.011's requirement that local school boards create written policies with respect to certain personnel matters is not inconsistent with KRS 160.370's and 160.390's granting of dismissal authority to superintendents. Pursuant to KRS 161.011, a local board must develop and provide classified employees with written policies regarding the terms and conditions of employment, employee rights and discipline guidelines and procedures. Once promulgated, the superintendent, as executive agent of the board, carries "the regulations and policies of the district board of education . . . into effect."²⁷ The Board's dismissal and arbitration policies, however, cannot usurp the statutorily created powers of the superintendent.

I would, therefore, affirm the judgment.

²⁷ KRS 160.370.

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