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Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000351-MR

LETA AYERS — APPELLANT

v. — APPEAL FROM ALLEN COUNTY CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
CIVIL ACTION NO. 99-CI-00374

BOARD OF EDUCATION OF
ALLEN COUNTY, KENTUCKY and
KENTUCKY DEPARTMENT OF EDUCATION — APPELLEES

NO. 2001-CA-000413-MR

BOARD OF EDUCATION OF
ALLEN COUNTY, KENTUCKY — APPELLANT

v. — APPEAL FROM ALLEN COUNTY CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
CIVIL ACTION NO. 99-CI-00374

LETA AYERS and KENTUCKY DEPARTMENT
OF EDUCATION — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUDGEL, Chief Judge; COMBS and HUDDLESTON, Judges.

HUDDLESTON, Judge: Leta Ayers appeals and the Board of Education of Allen County, Kentucky, cross-appeals from an Allen Circuit Court judgment reversing a tribunal's final order finding that

Ayers was guilty of insubordination while affirming its finding that she was guilty of conduct unbecoming a teacher and the tribunal's reduction of the suspension imposed by the superintendent as a sanction.

Ayers is a tenured Title I teacher at James E. Bazzell Middle School. Her continuing employment contract has been in effect since April 20, 1992. On October 7, 1999, Larry Williams, Superintendent of the Allen County Public Schools, delivered to Ayers a written statement of charges against her pursuant to Kentucky Revised Statutes (KRS) 161.790(3), advising her of his determination that she had engaged in conduct unbecoming a teacher and insubordination and thus would be suspended without pay for the remainder of the 1999-2000 school year.

Ayers's allegedly unacceptable conduct included cursing at Tammy Dinkins[1] in the presence of two school district employees; referring loudly to Dinkins as a "bitch" and a "whore" in the presence of students, two of whom overheard the comments; accusing fellow teachers of approving, condoning and/or practicing adultery; and violating a school policy which requires staff members to use their electronic mail account for educational purposes only by sending an e-mail to the assistant principal of the middle school

[1] Dinkins is married to Barry Dinkins, Ayers's former husband. According to Ayers, Dinkins was responsible for the demise of her marriage to Barry as Dinkins had an adulterous affair with Barry during his marriage to Ayers. Dinkins was first employed by the school as a substitute teacher in August 1999. Allegedly, Dinkins has assaulted Ayers on two prior occasions which predated Dinkins's employment with the school by six or seven years. On September 10, 1999, Ayers notified the school's assistant principal of her personal history with Dinkins and indicated that she would be extremely uncomfortable if Dinkins continued working there.

which was not work-related and which contained statements that could be considered defamatory as they referred to another teacher's (not Dinkins) alleged adultery. Williams also cited Ayers's failure to appreciate the gravity of her actions — despite the fact that he emphasized the seriousness of the situation to her — as further justification for the sanction.

Pursuant to KRS 161.790(3), Ayers gave notice of her intent to answer Williams's charges, at which point the chief state school officer appointed a tribunal (as provided for in KRS 161.790(4)) that conducted an administrative hearing[2] in accordance with KRS Chapter 13B on November 30 and December 1, 1999. At the hearing, twelve exhibits were introduced, fourteen witnesses testified and a 428 page transcript was generated. After hearing the evidence presented by both sides and closing arguments of counsel, the tribunal rendered written findings of fact, conclusions of law and a final order.

In relevant part, the tribunal's factual findings are as follows:

> 2. On Thursday, September 16th, 1999, Ayers referred to Tammy Dinkins as a bitch and a whore in the presence of students, and Ayers comments were overheard by school district employees and by students.
>
> 3. On Sunday, September 19th, 1999, Ayers sent electronic mail to the assistant principal's address at

[2] At Ayers's request, the hearing before the tribunal was closed. Ky. Rev. Stat. (KRS) 161.790(5). There is no provision in the statute which requires the tribunal's decision or our review of it to be kept confidential.

the school, and in that mail she raised issues regarding her ex-husband and his current wife and made statements regarding another teacher's alleged adultery.

4. On Friday, September 17th, 1999, teachers came into Ayers's classroom uninvited, and Ayers did nothing improper while they were in the room.

5. On that same day, the assistant principal did not have to come into the classroom to restore calm, and without the provocation by the other faculty members, Ayers would not have exhibited behavior which would have required her to be sent home.

6. Ayers knew or should have known of school board policy 08.2323 relating to the use of electronic mail, but she did not violate that policy by sending the electronic mail to the assistant principal.

7. The electronic mail included inappropriate statements regarding fellow teachers.

8. There was a written record of teacher performance by the superintendent, principal, or other supervisory personnel of the district in support of the charge of insubordination, including the requirement in her teacher contract that she perform in a thorough and professional manner and in the school district's policy regarding the use of electronic mail.

* * *

10. Based upon the testimony and the evaluations presented at the hearing, other than this one incident,

Ayers has been an exemplary teacher for the past 11 years.

Based on these findings, the tribunal reached its conclusions of law which, in pertinent part, are set forth below:

5. Ayers is guilty of conduct unbecoming a teacher in violation of KRS 161.790 for using inappropriate language in the presence of students and faculty and for sending electronic mail which contained unprofessional comments about fellow colleagues.

6. Ayers is guilty of insubordination in violation of KRS 161.790 for the inappropriate use of language in the presence of students and faculty.

7. Based upon the fact that Ayers has been an exemplary teacher for the past 11 years, and based upon the school's failure to act on Ayers's stated concerns about her relationship with Dinkin, the length of the suspension imposed by the superintendent was not appropriate.

Ultimately, the tribunal set forth its final order finding Ayers guilty of both conduct unbecoming a teacher and insubordination and imposing a 70-day suspension as opposed to the 139-day suspension imposed by Williams.

Acting pursuant to KRS 161.790(8), Ayers sought judicial review of the tribunal's final order in the circuit court. As such a proceeding is expressly designated as an appeal in the statute,

the court addressed all of the issues on their merits,[3] denying both parties' motions for summary judgment.

On appeal to the circuit court, Ayers maintained that both her use of derogatory language on September 16, 1999, and her subsequent comments about adultery which specifically referenced a fellow employee are constitutionally protected,[4] that the insubordination charge was not supported by written records of teacher performance as mandated by the governing statute and that the tribunal's actions amounted to an abuse of discretion as they were arbitrary and capricious. She urged the court to vacate the tribunal's order and award her back pay.

The Board, on the other hand, argued that the tribunal's findings and conclusions as to both charges against Ayers were consistent with applicable authority and the evidence presented at the hearing. However, the Board contested the propriety of the tribunal's decision to reduce the length of Ayers's suspension as it was not accompanied by a finding that the sanction imposed by Williams was "arbitrary, unfair, discriminatory, or disproportionate." The Board sought to have the court affirm the tribunal's finding that Ayers was guilty of conduct unbecoming a teacher and insubordination, reverse the tribunal's final order as

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[3] In so doing, the court observed that it would consider the merits of the Board's argument since no one raised the issue of the Board's failure to effectuate a cross-appeal which it had an inherent right to do under Reis v. Campbell County Board of Education, Ky., 938 S.W.2d 880 (1996).

[4] Ayers's constitutional claims are based on the freedoms guaranteed by Sections 1 and 5 of the Kentucky Constitution and the First Amendment to the United States Constitution.

to the reduced suspension and reinstate the remainder of the sanction imposed by Williams.

KRS 13B.150, which governs the scope of the circuit court's review of an agency order and specifies the permissible grounds for reversal, explicitly forbids the court to substitute its judgment for that of the agency as to the weight of the evidence on questions of fact and authorizes the court to reverse the agency's final order in whole or in part, only if it determines the order is:

> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of the statutory authority of the [tribunal];
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> (c) Without support of substantial evidence on the whole record;
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> (d) Arbitrary, capricious, or characterized by abuse of discretion;
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> (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
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> (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
>
> (g) Deficient as otherwise provided by law.[5]

[5] KRS 13B.150(2).

Guided by this limited scope of review, the circuit court concluded that it was obliged to accept the tribunal's factual findings as they were supported by substantial evidence, but was not required to give deference to the tribunal as to the legal questions of whether Ayers's actions amounted to conduct unbecoming a teacher and insubordination. Giving the words in KRS 161.790(1)(b) their ordinary meaning, the court readily determined that Ayers's conduct on September 16, 1999, as revealed by the tribunal, constitutes conduct unbecoming a teacher. As to the insubordination charge, the court concluded that Ayers's words and behavior on September 16 as found by the tribunal do not amount to insubordination because there was no evidence that she defied or disobeyed any person in authority and the record did not reflect that the Board had established any rule or regulation which Ayers violated. This determination rendered moot the issue of whether a written record of Ayers's performance had been provided as required by KRS 161.790(2).

Next, the court addressed the merits of Ayers's constitutional arguments, first observing that no constitutional arguments were raised before the tribunal and expressing its doubt as to whether she could properly assert those claims for the first time in that proceeding.

"[W]here no question of fact is at issue and only questions of law are involved, the arm of the court may not be shortened" in its review of administrative actions.[6] However,

[6] Kendall v. Beiling, 295 Ky. 782, 175 S.W.2d 489, 491 (1943).

"[a]s a general rule, exhaustion of administrative remedies is a jurisdictional prerequisite to seeking judicial relief."[7] One of the exceptions to this requirement is that a party is not required to exhaust such remedies when to do so "would be an exercise in futility."[8] With respect to review of constitutional issues, the Kentucky Supreme Court has distinguished between facial and as-applied challenges, finding that exhaustion of administrative remedies is unnecessary when attacking the constitutionality of a statute or a regulation as void on its face as an administrative agency cannot decide constitutional issues of that nature.[9] Thus, to raise the issue of whether a statute or regulation is facially valid at the administrative level would be futile.

This exception does not apply here as Ayers has alleged that the statute in question is unconstitutional as applied to her, i.e., with her speech and conduct in the presence of students and faculty on September 16, 1999, and the message conveyed in her e-mail to the assistant principal on September 19, 1999, she was exercising her First Amendment rights and the finding that her behavior constituted conduct unbecoming a teacher and insubordination under KRS 161.790 infringed upon those rights. In that context, exhaustion of administrative remedies is not futile. "Quite the contrary, it is the administrative action which

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[7] Commonwealth v. DLX, Inc., Ky., 42 S.W.3d 624, 625 (2001).

[8] Id. at 626.

[9] Id.

determines the extent, if any, of the constitutional injury."[10] Accordingly, Ayers was required to raise her constitutional claims before the tribunal. However, like the circuit court, we will, in an abundance of caution, address the arguments on their merits, allowing for the possibility that the issues may arise at a later date.

In reducing the length of Ayers's suspension, the tribunal relied upon its findings that Ayers had been an exemplary teacher for eleven years and that the Board failed to take action when she expressed concern over the prospect of having to work in proximity with Dinkins. As those findings were supported by substantial evidence, the court concluded that the tribunal's decision was not arbitrary and had to be affirmed.

Noting Ayers's failure to cite authority in support of her claim that a teacher's use of profane language in the presence of students and fellow employees and derogatory comments about a fellow employee's private life merit constitutional protection and the fact that she was not being punished for her beliefs or activities in furtherance of those beliefs, the court rejected Ayers's argument that her conduct amounted to an exercise of religion. Similarly, with respect to the freedom of speech argument, the court again noted an absence of citation to authority and concluded that Ayers's remarks could not properly be classified as protected speech since she was not being punished for having or expressing her belief that Dinkins was not fit to serve as a teacher, but rather her choice of words and the utterance of those

[10] Id.

words in the presence of students and fellow employees. As to Ayers's claim that her words and conduct constituted a petition for redress, the court determined that, while the marital infidelity of public school teachers is arguably a public concern, there was no showing that Ayers's interest in disclosing such conduct by a fellow employee outweighed the right of the Board to promote the efficiency of the public service which it performs through its employees.

Ayers has appealed the determination that she was guilty of conduct unbecoming a teacher for which she was suspended for seventy days, while the Board has cross-appealed requesting that this Court reverse the circuit court's judgment reversing the tribunal's finding of insubordination and affirming the tribunal's reduction of Ayers's suspension and reinstate the original suspension.

In the present case, the circuit court adopted the tribunal's findings of fact without modification. "'The position of the circuit court in administrative matters is one of review, not of reinterpretation.'"[11] If administrative findings of fact are based upon substantial evidence, those findings are binding upon the appellate court and the only question remaining for the appellate court to address is whether the agency applied the law to

[11] Kentucky Bd. of Nursing v. Ward, Ky. App., 890 S.W.2d 641, 642 (1994) (citation omitted). As noted by the circuit court, this case predates KRS Chapter 13B. Under KRS 13B.140 (incorporated by reference into KRS 161.790(8)), the court was required to accept the tribunal's factual findings if they were supported by substantial evidence.

those facts correctly.[12] If an administrative agency bases its ruling on an incorrect view of the law, the reviewing court may substitute its judgment for that of the agency.[13]

When reviewing an agency's action, the court is concerned with arbitrariness, that is, a decision which is not supported by substantial evidence.[14] Substantial evidence is defined as evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons.[15] In weighing whether an agency's decision is supported by substantial evidence, a reviewing court must adhere to the principle that the factfinder is afforded great latitude in its evaluation of the evidence heard and the credibility of the witnesses appearing before it.[16] There may be substantial evidence to support an agency's decision even though a reviewing court may have arrived at a different conclusion.[17] If an agency's findings are supported by substantial evidence, "the findings will be upheld, even though there may be conflicting evidence in the record."[18]

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[12] Id.

[13] Id.

[14] Id.

[15] Bowling v. Natural Resources, Ky. App., 891 S.W.2d 406, 409 (1994).

[16] Kentucky State Racing Comm'n v. Fuller, Ky., 481 S.W.2d 298, 308 (1972).

[17] Id.

[18] Kentucky Commission on Human Rights v. Fraser, Ky., 625 S.W.2d 852, 856 (1981).

Guided by this background regarding our scope of review, we turn our attention to an examination of the circuit court's action and ruling. Initially, we agree with the court's assessment in that most of the evidence is undisputed as to the significant details of what Ayers said and did with the controversy being centered around why she did it. Suffice it to say that Ayers admitted in her testimony before the tribunal that she called Dinkins a "bitch" and a "whore" on September 16, 1999, in a hallway on the second floor of the middle school, with approximately thirty students in the immediate vicinity and within hearing range of at least two students and three fellow employees.[19] While Ayers testified that she did not intend for the students to hear her comments, upon learning that at least one student had overheard her remarks, she responded that "the kids ought to know what she [Dinkins] is or something, or something to that extent." Testimony from students and employees clearly establishes that Ayers was visibly upset at the time she spoke those words and, consequently, she said them in a tone louder than one used in normal conversation.[20]

Likewise, Ayers concedes that, on the evening of September 19, 1999, she sent an e-mail message to the assistant principal at his school office which the principal received the

[19] According to Ayers's testimony, she "ducked" behind the water fountain in order to avoid Dinkins when she saw her coming down the hall and her negative comments about Dinkins were directed to but one other faculty member.

[20] Allegedly, she was also "shaking her finger" at Dinkins as she made the remarks that Dinkins admittedly did not hear. According to Ayers, she may have been pointing.

next morning in the assistant principal's absence. While the e-mail in question began as an incident report explaining the events of Friday, September 17, 1999, it evolved into a message detailing her abhorrence of adultery and the religious basis for her feelings. Admittedly, Ayers went beyond expressing her own beliefs in order to explain her actions and criticized a fellow employee by name, labeling the employee's recent marriage "a celebration of adultery."[21] Although there are discrepancies among the eyewitness accounts of the incident on September 16 and somewhat different versions of the subsequent incidents, the above information is unchallenged. Standing alone it constitutes substantial evidence to support the tribunal's factual findings. As such, the circuit court properly left the findings undisturbed.

In determining that Ayers engaged in "conduct unbecoming a teacher" because she used profanity in the presence of students and faculty and made inappropriate comments about a fellow employee in an e-mail message, the tribunal resolved a question of law. As such, we are not required to grant deference to the tribunal's judgment.[22] The question then becomes whether Ayers's remarks and conduct on September 16 as found by the tribunal can properly be classified as conduct unbecoming a teacher in accordance with KRS 161.790(1)(b).

No statutory definition or judicial interpretation of the term "conduct unbecoming a teacher" has been cited, nor is the

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[21] A copy of the e-mail message is included in the record and, as observed by the circuit court, "it speaks for itself."

[22] See Mill Street Church of Christ v. Hogan, Ky. App., 785 S.W.2d 263 (1990).

Court aware that such exists in the context at issue, i.e., when the unacceptable speech and behavior occurred on school premises during school hours. In Board of Education of Hopkins County v. Wood,[23] the Supreme Court provided some guidance on the subject. In holding that tenured teachers could be discharged under KRS 161.790 for smoking marijuana with two fifteen-year-old students off-campus, the Court observed that one standard for judging a teacher's conduct requires consideration of "such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, and the proximity or remoteness in time of the conduct."[24] When the conduct does not involve the teacher's professional competency in the classroom, it should have some nexus to the teacher's occupation.[25]

Here, there is some debate as to the extent of harm that Ayers's words actually inflicted on the students, but no credible argument can be made that the potential for harm did not exist. As to the proximity consideration, again, while there may be some dispute regarding the particulars, the testimony offered at the hearing established that several faculty members and, most importantly, a group of students were nearby when Ayers made the inappropriate remarks about Dinkins, and several of those individuals overheard what she said regardless of her intentions. The requisite nexus exists. While we are not unsympathetic to Ayers's dilemma, the fact remains that she is a teacher entrusted

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[23] Ky., 717 S.W.2d 837 (1986).

[24] Id. at 840 (citation omitted).

[25] Id.

with the supervision and education of children and that responsibility is accompanied by an expectation that she will set a good example. Ayers did a disservice to herself as well as the students who view her as a role model by exhibiting unprofessional, impermissible behavior.

With respect to the content of the e-mail message Ayers sent to the assistant principal, even giving her the benefit of the doubt as to its intended purpose and recipients, her gratuitous criticism of a fellow employee was unnecessary and impermissible. Giving the words of the statute their ordinary meaning and keeping in mind the aforementioned considerations, Ayers's inappropriate behavior in both instances amounted to conduct unbecoming a teacher for which she can be punished.

The next issue for consideration is whether, as a matter of law, Ayers's utterances on September 16 also amounted to insubordination as set forth in KRS 161.790(a).[26] If so, then the inquiry becomes whether the requirement that a "written record" documenting such insubordination be provided as mandated by KRS 161.790(2) has been met.

For ordinary purposes, insubordination is defined as the "[r]efusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a wil[l]ful or intentional disregard of the lawful and reasonable instructions of the employer."[27] Under this definition, Ayers is not guilty of

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[26] No argument has been raised that the two charges are mutually exclusive.

[27] Black's Law Dictionary, pg. 801 (6th ed. 1990).

insubordination as there was no order and there is no allegation that she intentionally ignored specific directives. However, the inquiry does not end there because, in addition to the refusal to recognize or obey authority in the performance of duties, the statute elaborates on the meaning of insubordination as follows: "Insubordination, including but not limited to violation of the school laws of the state or administrative regulations adopted by the Kentucky Board of Education, the Educational Professional Standards Board, or lawful rules and regulations established by the local board of education for the operation of schools . . . ."[28]

Like the court below, we have searched the record to no avail for evidence establishing the existence of any such rules and regulations promulgated by the Board which forbid the type of conduct Ayers displayed on September 16. In lieu of such evidence, the Board argues that Ayers's behavior violated her obligation to perform in a "professional manner" as required by her continuing employment contract. Such an argument is not persuasive since the statute does not equate an employment contract with "rules and regulations." If a statute is intelligible on its face, as is the case here, we are not at liberty to interpret it in a manner at variance with its explicit language.[29] When determining legislative intent, a court must refer to "'the words used in enacting the

[28] KRS 161.790(1)(a).

[29] Commonwealth v. Allen, Ky., 980 S.W.2d 278 (1998).

statute rather than surmising what may have been intended but was not expressed.'"[30]

Because the record does not demonstrate that the Board had a rule or regulation in place addressing the type of conduct in question, it stands to reason that Ayers could not have disregarded one. In light of that fact and in the absence of any evidence that Ayers defied or disobeyed any person in authority, as a matter of law her conduct did not rise to the level of insubordination. Such a determination renders any discussion regarding the statutory requirement that a written record of performance be provided unnecessary.

We will now address Ayers's remaining claims alleging that her actions were protected as an exercise of her First Amendment right to freedom of religion, freedom of speech and freedom to petition the government for redress of grievances.

Ayers's argument that her words and actions on September 16 and the e-mail she sent on September 19 qualify as an exercise of religion is premised mainly on Hooks v. Smith.[31] However, her reliance is misplaced. In Hooks, the findings of the trial court indicated that Hooks's exercise of her religious beliefs was a motivating factor in her. This Court remanded the case to the trial court to determine whether a preponderance of the evidence showed that she would have been demoted even in the absence of what

[30] Id. at 280 (citation omitted).

[31] Ky. App., 781 S.W.2d 522 (1989).

the Board admitted was protected conduct.[32] Nothing in that case suggests that a teacher's use of profane language in the presence of students and fellow employees or passing judgment on a fellow employee's private conduct in correspondence to someone in a position of authority comes under the penumbra of protected religious activities. Here, Ayers professed exercise of her religious beliefs played no role in the tribunal's determination that she was guilty of the charges brought against her as evidenced by the tribunal's findings. None of the authorities cited by Ayers justifies a finding that her words and conduct merit constitutional protection. It must be remembered that Ayers has not been disciplined for her beliefs or for activities in furtherance of those beliefs. Rather, she was suspended because of the time, place and manner in which she chose to express herself.

Assuming, arguendo, that Ayers's comments can be construed as an expression of her religious beliefs, her speech is not protected as the First Amendment embraces two distinct but related concepts — the freedom to believe and the freedom to act.[33] The first is absolute while the second, which is at issue here, is not.[34] Although Ayers's denouncement of Dinkins and other employees might stem from her sincere convictions and moral code, that does not transform the conduct which resulted in her suspension into an exercise of religion deserving of constitutional protection. "Conscientious scruples have not, in the course of the long

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[32] Id. at 524.

[33] Hooks, supra, n. 31, at 524.

[34] Id.

struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."[35] When prohibiting the exercise of religion is not the object of a law or regulation but merely the incidental effect of "a generally applicable and otherwise valid provision, the First Amendment has not been offended."[36]

Ayers's assertion that her words and conduct on September 16 and the September 19 e-mail message amount to protected free speech and/or a petition for redress presents a closer question. Arguably, there is a connection between Ayers's conduct on September 16 and her September 19 e-mail and her right to have and express an opinion concerning Dinkins's suitability to serve as a teacher and express opposition to allegedly immoral conduct engaged in by school employees on the basis that it is adverse to the students' best interests. However, we agree with the circuit court's reasoning as to these issues and also conclude that her arguments must fail for two reasons.

First, regarding Ayers's conduct on September 16, the same analysis that dispensed with her freedom of religion claim also applies here. Ayers is being punished for when, how and where she voiced her concerns, not for having or expressing her belief that Dinkins is not fit to teach and that infidelity is indicative of a teacher's lack of moral fitness to perform her duties. In the absence of any authority to substantiate her claim that, in this

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[35] Employment Division, Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 879, 110 S.Ct. 1595, 1600, 108 L.Ed.2d 876 (1990).

[36] Id.

context, her chosen words amount to speech intended to receive protection, we decline to so hold.

With respect to the e-mail message at issue (which the tribunal determined had an adequate educational purpose), in order to establish that her constitutional right to free speech has been violated, Ayers must demonstrate that the "speech" contained in her message addresses a matter of public concern, and that her interest in expressing that concern outweighs the Board's interest in promoting the efficiency of the public service which it performs through its employees.[37] If she were able to so demonstrate, Ayers would then have the burden of showing that the speech was a "motivating" factor in Williams's decision to suspend her.[38]

Even if it is assumed that there is a sufficient correlation between marital infidelity and fitness as a teacher so as to constitute a matter of public concern, Ayers has made no showing that her interest in disclosing that a fellow employee has engaged in such conduct outweighs the Board's interest in promoting the efficient performance of its employees by ensuring that their private lives are not exposed and subjected to denunciation in the workplace.

In regard to the reduction of Ayers's suspension, the Board argues that the tribunal acted improperly since, having found Ayers guilty of conduct unbecoming a teacher, it was obliged to impose the sanction recommended by Williams as it failed to make a

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[37] Bailey v. Floyd County Board of Education, 106 F.3d 135, 144 (6th Circ. 1997).

[38] Id.

finding that his punishment was arbitrary, unfair, discriminatory or disproportionate. While we agree with the Board as to the controlling authority on this issue, we disagree with its interpretation of that case.

In Gallatin County Board of Education v. Mann,[39] the question before this Court was whether a tribunal established pursuant to KRS 161.790 can modify the employment sanctions imposed by a superintendent on a tenured, certified teacher. In reversing the trial court, we found that the tribunal's decision to impose a lesser sanction in that instance was "unsupported by substantial evidence, and contrary to the tribunal's express findings of fact."[40] However, we emphasized that a tribunal has the "inherent authority to affirm, reject, or modify an employment sanction imposed by the superintendent."[41] "The tribunal's power to make findings of fact inherently includes the authority to reach a conclusion different than that reached by the superintendent."[42] Accordingly, KRS 161.790 does not limit the authority of the tribunal to choose the most appropriate sanction as long as its action is not arbitrary, i.e., unsupported by substantial evidence, with the exception that it prohibits the tribunal from considering a private reprimand.[43]

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[39] Ky. App., 971 S.W.2d 295 (1998).

[40] Id. at 296.

[41] Id.

[42] Id. at 300.

[43] Id. This issue has been more thoroughly addressed in a recent "to be published" decision which is not yet final, (continued...)

The present case is clearly distinguishable from Mann in that, here, the tribunal expressly found that Ayers had been an exemplary teacher for eleven years and that the Board's employees had failed to act on Ayers's voiced concerns over the prospect of working in proximity with Dinkins. Relying on those findings, the tribunal concluded that the sanction imposed by Williams was not appropriate. As we are persuaded that those findings are supported by substantial evidence, the tribunal was acting within its inherent authority when it reduced Ayers's suspension. Reasonable minds can differ as to whether Williams's recommended sanction was too harsh and/or the reduced sanction imposed by the tribunal was too lenient. However, the tribunal's imposition of the reduced sanction is supported by a sufficient factual predicate and, as such, it cannot be deemed arbitrary.

The court's order reversing the tribunal's final order to the extent that Ayers was found guilty of insubordination, affirming as to the finding that she is guilty of conduct unbecoming a teacher, and affirming the reduced suspension (70 days) is affirmed.

ALL CONCUR.

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[43] (...continued)
Frankhauser v. Cobb, Ky. App., ___ S.W.3d ___ (rendered 3/29/02).

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NO BRIEF FILED FOR APPELLEE KENTUCKY DEPARTMENT OF EDUCATION