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Commonwealth of Kentucky

Court of Appeals

NO. 2001-CA-001933-MR

MARY ROBINSON — APPELLANT

v.

APPEAL FROM GREENUP CIRCUIT COURT
HONORABLE LEWIS D. NICHOLLS, JUDGE
ACTION NO. 99-CI-00445

RONALD BACK, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF RUSSELL INDEPENDENT SCHOOLS; AND BOARD OF EDUCATION OF RUSSELL INDEPENDENT SCHOOL DISTRICT — APPELLEES

OPINION

AFFIRMING IN PART - REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: THE FULL COURT SITTING *EN BANC*.

PER CURIAM: This appeal has been taken from summary judgments entered by the Greenup Circuit Court denying relief to the appellant on her claims against the superintendent and board of the Russell Independent Schools. The appellant alleged a violation of KRS 160.345 and also alleged gender discrimination in the failure of the superintendent to submit her application for a position as principal to the Russell High School Site

Based Decision Making Council. The appellant also sought compensation alleged to be due her as a result of extra work performed at the end of a previous school year.

After hearing oral argument, the panel to whom this appeal was initially assigned split on the issue of whether KRS 160.345 had been violated. Because there were a number of other cases pending presenting variations on this issue, the Court elected to present the issue to the full Court for a consensus decision binding on the Court in all other pending matters. The other issues presented have been decided by the original panel.

The decision of the Court will be announced in the following sequence: (1) The opinion of Judge Guidugli writing for the panel affirming the summary judgment on the claim for additional compensation for the 1995-1996 school year and reversing and remanding on the gender discrimination claim; (2) the opinion of the Chief Judge writing for a majority of the full Court reversing and remanding on the issue of the construction of KRS 160.345; (3) the opinion of Judge Knopf concurring by separate opinion; (4) the opinion of Judge Guidugli dissenting on the issue of the construction of KRS 160.345.

The decision of the Greenup Circuit Court is affirmed in part and reversed in part, and this case is remanded for further proceedings in accordance with this opinion.

* * * *

GUIDUGLI, JUDGE, WRITING FOR THE PANEL AFFIRMING THE SUMMARY JUDGMENT ON THE CLAIM FOR ADDITIONAL COMPENSATION FOR THE 1995-1996 SCHOOL YEAR AND REVERSING AND REMANDING ON THE GENDER DISCRIMINATION CLAIM:

GUIDUGLI, JUDGE. Mary Robinson (hereinafter Robinson) appeals from the Greenup Circuit Court=s orders granting summary judgment to Ronald Back, in his official capacity as Superintendent of Russell Independent Schools (hereinafter Back) and the Board of Education of Russell Independent School District (hereinafter the Board) (collectively the appellees).

The facts leading up to summary judgment were set forth by Judge Nicholls of the Greenup Circuit Court and are adopted as follows.

> The plaintiff [Robinson] filed a complaint on September 21, 1999, alleging three (3) separate counts.
>
> 1. Violation of KRS 160.345
>
> 2. Violation of KRS Chapter 344, Sex Discrimination case
>
> 3. Failure to pay Plaintiff for extra work she performed at the end of the 1995-1996 school year.
>
> During the 1996-1997 school year the Plaintiff filed an application with the Russell School Board for the Position of principal at Russell High School. She and ten to twelve (10-12) other applicants applied for the job. (Back deposition at page 8, line 14). Pursuant to KRS 160.345(2)(h) the superintendent forwarded four (4) applications to the Russell High

School Site Based Council (hereinafter named SBC). The Superintendent deposed that the only special qualification he was looking for was Amarvelous leadership skills. We didn=t set any other qualifications - the Council didn=t set any other qualifications, no.@ (Back deposition at page 10, line 13). The SBA went into closed session to discuss with Mr. Back if he would send additional qualified candidates [to the SBC for review]. Karen Cooke, a business education teacher on the SBC deposed that AThe purpose for that meeting was based upon the fact that the five of us were aware that the four candidates did not meet the criteria asked for by the parents and the teachers. And we knew that there were more applicants, and we wanted him to send us additional credentials.@ (Deposition of Karen Cooke, page 9, lines 18-23) Apparently the SBC established criterion, but the superintendent was not aware of it.

The SBC met and eventually decided it was not satisfied with the four (4) applicants submitted by the superintendent. So, the SBC requested additional qualified applicants be forwarded to them for consideration. The superintendent told the SBC Athere were no more qualified applicants for the position.” (Deposition of Mary Smith page 13 line 19). The Superintendent explained that he had received advice from people, Ain Frankfort, authority figures and department chairs and attorneys that the term qualified when it comes to principalship selections, means that they have the certifications and they have my [the superintendent=s] recommendations. That=s what the term qualified means when it comes to principalship selection.@ (Back Deposition page 29, lines 14-24).

The superintendent explained to the SBC that if they could not select a principal from the four (4) names, then he would advertise next spring for the position and select an interim principal until a permanent one was

> chosen. The SBC did not ask the superintendent to appoint an interim principal until a permanent one was chosen. Instead, they elected Mr. Randy Everly, a male, from the four (4) previous submitted applications to the principalship for the 1998-1999 school year.

Robinson petitioned the Greenup Circuit Court for a partial summary judgment on the grounds that she was entitled to have had her name submitted to the SBC as a Aqualified@ candidate pursuant to KRS 160.345(2)(h). Back and the Board responded with a cross motion claiming that there was no genuine issue of material fact and requested summary judgment on this issue. They contended that a candidate for principal was Aqualified@ only when the candidate possessed both the requisite certifications and a recommendation from the superintendent of the school district. Absent such recommendation, a candidate would not be qualified to have his or her application for the principal position submitted to the SBC.

Following depositions, the appellees filed a motion and an accompanying memorandum in support requesting summary judgment. In the memorandum, they asserted that KRS 160.345 (2)(h) required a recommendation from the superintendent of a school district in order for a candidate for a principalship to be Aqualified.@ They contended that since Robinson was not recommended by Back she was thereby not Aqualified@ and thus Back

was under no statutory obligation to submit her application to the SBC.

While the appellees conceded that neither Back nor the Board would be protected by sovereign immunity under Section 231 of the Kentucky Constitution for a gender discrimination claim pursuant to Ammerman v. Board of Education of Nicholas Co., Ky., 30 S.W.3d 793 (2000), they asserted that Robinson should be precluded from bringing this action under the doctrine of election of remedies. The appellees further asserted that there was no factual basis in the record to support Robinson=s claim of gender discrimination and thus summary judgment was appropriate. They also contended that the employment contract claim brought for alleged extra work was barred by sovereign immunity and thus summary judgment was appropriate.

Robinson also filed a memorandum in support of her renewed motion for partial summary judgment. Robinson stated that based on her education and experience she was Aqualified@ to serve as principal. Therefore, failure to submit her application to the SBC when asked for additional qualified applicants was, in her view, a violation of KRS 160.345(2)(h). Robinson also relied on the last sentence of KRS 160.345(2)(h) and OAG Opinion 95-10 as support for her position that being certified made her a qualified applicant and that her

application should have been forwarded to the SBC once the SBC requested additional qualified applicants.

Robinson also addressed the appellees= claim of sovereign immunity asserting that they were not protected under this doctrine from her gender discrimination claim. She also asserted that her Chapter 344 gender discrimination claim was not subject to the doctrine of election of remedies and that she had made out a prima facie case of gender discrimination sufficient to withstand a motion for summary judgment. The trial court denied Robinson=s motion for a partial summary judgment and granted the appellees= cross motion for summary judgment with respect to both the KRS 160.345 claim and the gender discrimination claim. While the trial court initially denied the appellees= motion for summary judgment on the extra work claim, it later granted the motion for partial summary judgment on this issue. Robinson appeals these orders.

Summary judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances. Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480 (1991). However, a party opposing a properly supported summary judgment motion cannot defeat that motion without presenting at least some affirmative evidence demonstrating that there is a genuine issue of material fact requiring trial. Hubble v. Johnson, Ky., 841 S.W.2d 169,

171 (1992). The circuit court must view the record Ain a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.@ Steelvest, supra at 480. On appeal, the standard of review is Awhether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.@ Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996). Since factual findings are not at issue, deference to the trial court is not required. Id.

GENDER DISCRIMINATION

The trial court incorrectly applied the doctrine of election of remedies to the gender discrimination issue in this case. The doctrine of election of remedies provides that when a person has at her disposal two modes of redress that are contradictory and inconsistent with each other, her deliberate and settled choice and pursuit of one will preclude her later choice and pursuit of the other. Wilson v. Lowe's Home Center, Ky. App., 75 S.W.3d 229 (2001). The trial court relied on Vaezkoroni v. Domino's Pizza, Inc., Ky., 914 S.W.2d 341 (1995), as authority for its finding that Robinson=s action in filing a claim with the Equal Employment Opportunity Commission (hereinafter EEOC) in 1998 precluded her from bringing this action. The trial court stated that the Afiling of an

administrative complaint bars such court action under the doctrine of election of remedies.@

While it is true that Vaezkoroni established a standard in the Commonwealth that provides both administrative and judicial sources of relief for claims arising under the Kentucky Civil Rights Act, the facts of Vaezkoroni and the statute indicate that this standard applies only to the Kentucky Human Rights Commission and local commissions. On appeal, the appellees argue that the case of Founder v. Cabinet for Human Resources, Ky. App., 23 S.W.3d 221 (1999), is controlling on this issue. This panel is of the opinion that Founder should be viewed narrowly. Furthermore, the opinion of Grego v. Meijer, Inc., 187 F.Supp.2d 689 (W.D.Ky. 2001), and this Court=s more recent opinion of Wilson, supra, are more persuasive.

The trial court's reliance on the doctrine of election of remedies in this case was misplaced. Robinson filed a charge of discrimination with the EEOC. After filing the charge, she was notified by the EEOC that her file was being closed and she was informed of her right to sue. It is not alleged that Robinson ever filed a complaint with any agency of the Commonwealth other than the instant circuit court action. As such, the trial court's reliance on the doctrine of election of remedies to grant summary judgment was inappropriate.

The trial court also examined the sex discrimination claim to determine if there was a genuine issue of material fact. The trial court utilized the test set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973), and determined that Robinson did not meet the first prong of the test because she failed to prove a prima facie case of sex discrimination, and that summary judgment was therefore appropriate. While the test used by the trial court was proper, it did not correctly apply this test to the facts of this case because it focused on whether or not Robinson was Aqualified@ to be a principal under KRS 160.345. In order to establish a prima facie case for sex discrimination, a plaintiff must show (1) that she is a member of a protected class; (2) that she is qualified for the available position; (3) that she did not receive the job; and (4) that the position remained open and the employer sought other applicants (or filled the job with a male as in this case). Id. We accept Robinson=s position that viewing the facts of this case in the light most favorable to her, as the non-moving party, she objectively has presented the elements to establish a prima facie case for sex discrimination.

Accepting that Robinson has demonstrated that she met the four-part test in McDonnell Douglas Corp., supra, and thus established a prima facie case of discrimination, the burden shifts to the employer [the appellees in this case] to

articulate a legitimate and nondiscriminatory reason for its action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). The plaintiff then "bears the burden of showing by a preponderance of the evidence that the 'legitimate reason' propounded by the employer is merely pretext to camouflage the true discriminatory reason underlying its actions.@ Turner v. Pendennis Club, Ky. App., 19 S.W.3d 117, 120 (2000). Robinson=s claim of sex discrimination is based upon her belief that her application should have been submitted to the SBC pursuant to KRS 160.345 and upon the fact that Back only submitted male applicants. Appellees argue that Back=s only reason for not submitting her application was his reservation about her leadership skills. We believe that under these circumstances, summary judgment was inappropriate. Whether or not Robinson will ultimately be successful in her claim is not the standard by which her claim is to be decided. There are genuine issues of material fact still in controversy. As such, we reverse the trial court=s order granting summary judgment and remand for additional proceedings on this issue.

Failure to Compensate

Robinson also argues that the trial court=s Afailure to apply the appropriate law to the facts of the case is reversible error.@ However, this panel holds that the trial court applied the appropriate law to the facts of the case. Thus, the entry

of a summary judgment was appropriate. Robinson=s oral agreement with a former principal could not obligate either of the appellees. Public agencies cannot become liable under implied contracts. Ramsey v. Board of Education of Whitley Co., Ky. App., 789 S.W.2d 784, 786 (1990), citing, Boyd Fiscal Court v. Ashland Public Library Board of Trustees, Ky., 634 S.W.2d 417, 418 (1982).

McANULTY AND TACKETT, JUDGES, CONCUR WITH THIS OPINION.

* * * *

EMBERTON, CHIEF JUDGE, WRITING FOR THE MAJORITY OF THE FULL COURT ON THE ISSUE OF THE APPLICATION OF KRS 160.345:

EMBERTON, CHIEF JUDGE. The court is sitting *en banc* only as to the question of whether under KRS 160.345(2)(h) the superintendent of a local school district is required to provide to the Site Based Decision Making Council additional applicants for a principalship when applicants are available and qualified but do not have the recommendation of the superintendent.

In view of Judge Guidugli's adoption of the trial court's statement of facts we find no reason to reiterate them here. However, we do find it necessary to more fully address the objectives of the General Assembly in its effort, through passage of the Kentucky Education Reform Act, to rid the educational system of favoritism, nepotism and the overall damaging effects from generations of political influence. In

Rose v. Council for Better Education, Inc.,[1] the Kentucky Supreme Court directed that the General Assembly "recreate and redesign a new system that will comply with standards . . ." set out by the Court. Among those standards are: "(6) Common schools shall be monitored by the General Assembly to assure that they are operated . . . with no political influence."[2]

Given the court's directives in Rose and being aware of the history in Kentucky that school systems have served as vehicles through which many superintendents and school board members have provided jobs for family members, friends and friends of friends, for countless years, the 1990 General Assembly enacted the Kentucky Education Reform Act. Not only did KERA revolutionize the concept of public education in Kentucky, but perhaps equally important, it provided the changes necessary to minimize negative political influence on the administration of the system. Indeed many regional political dynasties of less than a generation ago were built over time through the power and influence of local school systems.

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[1] Ky., 790 S.W.2d 186, 212 (1989).

[2] Board of Education of Boone County v. Bushee, Ky., 889 S.W.2d 809, 811 (1994)(quoting Rose, supra, at 213).

Without the ability to control hiring the political dynasties of many districts could no longer survive.

By reform of the hiring process through KERA, the General Assembly has now virtually eliminated the opportunity for board members and superintendents to engage in favoritism and nepotism. As a result practically every district in Kentucky is now, for the most part, free from such political influence. However, to follow the interpretation given KRS 160.345(2)(h) in the trial court's holding, diminishing the authority of the Site Based Decision Making Council and enabling the superintendent to name the principal, defeats the primary intent of KERA.

In order to assure that the enumerated standards mandated by Rose are followed – standards such as monitoring by the General Assembly to assure the systems are operated with no political influence – the General Assembly declared the essential strategic point of KERA to be the decentralization of decision making authority so as to involve all participants in the school system.[3]

Setting forth specifically the responsibility and limitations of the superintendent and describing particularly

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[3] Id. at 812.

the function of the council and the principal, KRS 160.345(2)(h) states:

> From a list of applicants submitted by the local superintendent, the principal at the participating school shall select personnel to fill vacancies, after consultation with the school council, consistent with subsection (2)(i)10 of this section. The superintendent may forward to the school council the names of qualified applicants who have pending certification from the Education Professional Standards Board based on recent completion of preparation requirements, out-of-state preparation, or alternative routes to certification pursuant to KRS 161.028 and 161.048. Requests for transfer shall conform to any employer-employee bargained contract which is in effect. If the vacancy to be filled is the position of principal, the school council shall select the new principal from among those persons recommended by the local superintendent. When a vacancy in the school principalship occurs, the school council shall receive training in recruitment and interviewing techniques prior to carrying out the process of selecting a principal. The council shall select the trainer to deliver the training. Personnel decisions made at the school level under the authority of this subsection shall be binding on the superintendent who completes the hiring process. Applicants subsequently employed shall provide evidence that they are certified prior to assuming the duties of a position in accordance with KRS 161.020. The superintendent shall provide additional applicants upon request when qualified applicants are available. (Emphasis added).

In following the statute as a literal instruction to the council and the superintendent in hiring a principal, it is first the duty of the local superintendent to submit to the council a list of candidates he recommends for the position. It

then becomes the responsibility of the council to choose from such list one of the applicants to fill the vacancy, unless, following its interviews and other appropriate considerations, it elects not to accept any of those recommended. The council may then request that additional applicants be provided by the superintendent and, he, being bound by the decision of the council, shall comply with such request when qualified candidates are available.

The trial court accepted the argument of Superintendent Back that the recommendation of the superintendent is to be encompassed in the meaning of "qualified" as it is used in the last sentence of subsection (h).

KRS 160.345(2)(h) is a confusingly constructed section making it unusually difficult to determine clearly its meaning. However, it seems clear that with the broad range of meanings that might be given to "qualified," the writer of the statute would deem it critical to use the word "recommend" if that were indeed his intent.

The trial court's effort to find in subsection (h) a meaning that is clearly not stated, resulted in an interpretation contrary to one of the primary objectives of KERA, the decentralization of decision making authority. One of the objectives to be met by decentralization was in response to standard number 6 in Rose, relating to elimination of political

influence. However, the trial court's interpretation substantially weakens decentralization and could well result in an eventual reversion to the pre-KERA hiring practices.

Under the holding of the trial court nothing prevents a superintendent from manipulating the system since the council would not be entitled to request, receive and choose from all additional applicants. He could recommend with impunity, only one applicant out of ten or twelve and refuse to provide more, in effect forcing the council to select his choice.

With at least some attribution to the decentralization of decision making authority in hiring practices, Kentucky's school system is rapidly becoming one of the nation's finest, one presently led by capable and dedicated educators as superintendents of most districts. However, the trial court's interpretation of KRS 160.345(2)(h) would eventually be detrimental to many school districts in Kentucky.

Because the trial court's holding is contrary to the General Assembly's declared intent to create a decentralized decision-making authority, we hold that the application of the appellant and all other applications requested by the Site Based Decision Making Council, so long as they possess the qualifications as required by statute, must be provided to the Council by the superintendent for its consideration in selection of the principal.

BAKER, BARBER, BUCKINGHAM, JOHNSON, AND TACKETT, JUDGES, CONCUR WITH THIS OPINION.

* * * *

KNOPF, JUDGE, CONCURRING WITH SEPARATE OPINION:

KNOPF, JUDGE. I agree with much of the reasoning and the result of the majority opinion, but I write separately to address certain positions expressed in both the majority and dissenting opinions. The *en banc* majority and the dissent argue, respectively, that neither school superintendents nor site-based-decision-making (SBDM) councils can be trusted to rise above their own political concerns to hire the most qualified applicant as principal. I cannot agree with either sentiment. As the dissent correctly notes, the vast majority of school superintendents endeavor to exercise their authority fairly and in accord with their best judgment. However, the dissent then launches into a criticism of teachers controlling the hiring of the school principals. Not only is this assertion factually incorrect – three out of six members of the SBDM council do not comprise a "majority" – but also the characterization of teachers as "foxes guarding the henhouse" is simply unfair.

Moreover, it is not up to this Court to decide whether school superintendents or SBDM councils should select principals. The legislature has made that decision. One of the primary objectives of KERA was to decentralize authority away from the school superintendent in favor of administrators,

students, teachers, and parents who are most affected by what occurs at that school. Board of Education of Boone County v. Bushee, Ky., 889 S.W.2d 809, 814 (1994). To this end, and contrary to the argument advanced by the dissent, KRS 160.345(2)(h) expressly vests the SBDM council, not the superintendent, with the authority to select the principal. Although the superintendent actually hires the principal, the superintendent is bound by the choice made by the SBDM council.

Our function is to determine the role of the superintendent within this statutory scheme. As set out in KRS 160.345(2)(h), the superintendent has the authority to make the initial review of the applications and to recommend particular qualified applicants to the SBDM council. Such a review encompasses two general elements: an objective determination of whether the applicant meets the minimum statutory and professional criteria for the position; and a subjective consideration of whether the applicant possesses the experience and the philosophy necessary to be the most effective principal. Superintendent Back testified that he was looking for someone with "marvelous leadership skills." Taking this statement at face value, such a consideration is still entirely subjective.

But while Superintendent Back had the discretion to recommend applicants who he felt possessed intangible leadership qualities, the Russell SBDM Council was not bound to accept his

judgment. The SBDM Council could choose a principal from the list of applicants recommended by the superintendent, or it could ask Superintendent Back to provide "additional applicants upon request when qualified applicants are available." Allowing a superintendent to withhold objectively qualified applicants based upon the superintendent's subjective opinion would skew the process and would undermine the authority of the SBDM council to choose the new principal. Therefore, I agree with the majority that the term "qualified applicants" as used in KRS 160.345(2)(h) means those applicants who meet the minimum legal and objective criteria for the position of principal.

JOHNSON AND PAISLEY, JUDGES, CONCUR WITH THIS OPINION.

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GUIDUGLI, JUDGE, DISSENTING ON THE ISSUE OF THE CONSTRUCTION OF KRS 160.345:

GUIDUGLI, JUDGE. I must respectfully dissent from the majority opinion relative to KRS 160.745(2)(b).

In reviewing the record, I believe the well-reasoned opinion of the Greenup Circuit Court aptly discusses the complexities of this issue and I, therefore, adopt it as set forth below:

> In 1999, the Kentucky legislature adopted SBC decision making to provide the teachers and parents with a voice in determining the principal at individual schools. The procedure for selection of a principal is spelled out in the following statute:

> From a list of applicants submitted by the local superintendent, the principal at the participating school shall select personnel to fill vacancies, after consultation with the school council consistent with subsection (2)(i)(10) of this section. Requests for transfer shall conform to any employer-employee bargained contract which is in effect. If the vacancy to be filled is the position of principal, the school council shall select the new principal from among those persons recommended by the local superintendent. When a vacancy in the school principalship occurs, the school council shall receive training in recruitment and interviewing techniques prior to carrying out the process of selecting a principal. The council shall select the trainer to deliver the training. Personnel decisions made at the school level under the authority of this subsection shall be binding on the superintendent who completes the hiring process. The superintendent shall provide additional applicants upon request when qualified applicants are available. KRS 160.345(h) (Emphasis added).

The statute states that the SBC shall select the new principal from among those persons recommended by the local superintendent. The Legislature appears to be saying that the superintendent had discretion in who the SBC shall hire by its use of the word Arecommended@. Webster=s Dictionary defines recommend, Ato name or speak favorably as suited for some use, function, position, etc.@ Webster=s New 20th Century Dictionary, Second Edition, The World Publishing Company, (1958).

Thus, the superintendent must select those applicants of which he can speak favorably and send them to the SBC. This is

exactly what the Superintendent did. He recommended four (4) applicants out of 10-12. But, the Statute goes on to state that, AThe Superintendent shall provide additional applicants upon request when qualified applicants are available.@ This indicates that the Superintendent has no discretion. If the SBC asks for additional applicants, then the Superintendent must provide the names of additional Aqualified@ applicants. So, the question becomes when is an applicant Aqualified?@

The Office of the Attorney General opined that pursuant to KRS 160.345(2)(h) the Superintendent must submit the names of all applicants who meet the minimum legal and school board policy requirements when the SBC asks for them. OAG 95-10(1995)

The OAG opinion does not finally decide the issue. The OAG had to issue its opinion because there is an apparent conflict in the law, and the citizens of the Commonwealth needed legal guidance prior to a court ruling. Thus, the opportunity has now arisen when the Court can attempt to resolve this conflict and have it subjected to the scrutiny of an appellate decision that will be binding on all school boards throughout the Commonwealth.

The Legislature chose in drafting this statute to use the word Aqualified@ rather than Acertified.@ Kentucky Administrative Regulations lay out the prerequisites for principal certification. AA new applicant for certification for school principal,...shall successfully complete prerequisite tests...prior to certification as a school principal.@ 704 KAR 29:460 ' 1 (1). The drafters of this KAR chose to talk about Acertification@ rather than Aqualification.@ Webster=s Dictionary defines Aqualified@ as Ahaving met conditions or requirements set, or having the necessary or desirable qualities; fit; competent.@ For one to meet the requirements set would indicate a person

meeting all of the qualifications necessary to be certified. That is, they meet the minimum statutory and regulatory school board policy requirements to be eligible for the Board to legally hire the person.

On the other hand one possessing desirable qualities, being fit, or competent for a job implies a little more than merely meeting the minimum statutory regulatory school board policy requirements. Fitness and competency require a person who can exercise sound judgment when making decisions. When recommending an applicant for a principalship, the superintendent must consider not only if the person meets the minimum prerequisites for certification, but must ask himself or herself whether that person can make sound decisions.

In what context did the Legislature use the word Aqualified@ in this statute? Certification is a word of precision utilized in KAR=s and statutes indicating that a person possesses the basic minimum statutory, regulatory and school board policy requirements to fulfill a job. 704 KAR 20:400, 460, 710; KRS 161.027. The Legislature chose to use the word Aqualified@ in the same statute [KRS 160.345(1)(h)] that first uses the word Arecommended@ which is clearly a discretionary function. It seems unlikely that the Legislature would grant discretionary powers to a superintendent to assist a SBC in selecting a principal, then negate that discretion by taking it away in the next sentence. If the Legislature intended to mean that the superintendent must send the names of additional applicants that were certified, then it is more likely they would have used the word Acertified@ rather than Aqualified@.

The Legislature recognizes that public education involves shared responsibilities. KRS 158.645. The SBC and superintendent must each share in their responsibilities to select the best person for principal among

the applicants. The Legislature designed a process in which the parents, teachers and superintendent each have a role in determining who the principal will be at a given school. First, the superintendent must exercise his discretion in sending only those names of applicants that meet the minimum statutory, regulatory and school board policy requirements to do the job, and that he/she believes can do the best job for the school system. Next, the SBC must exercise its discretion in determining whom they desire to be principal among the names initially sent by the superintendent. If the SBC is not satisfied with the applicants, then the SBC can ask for the additional applicants. The superintendent must then exercise his/her discretion to provide additional applicants only if the superintendent believes, in good faith, that the applicant can do the job. This process has the greatest success of producing an applicant that can best perform the duties of principal among the field of applicants.

Of course the Court=s decision today would leave open the possibility that an unscrupulous superintendent could recommend only one (1) person as his choice, claiming he is the only one qualified, but that is not what happened here. The SBC members had four (4) applicants that the superintendent thought were qualified. By the same token, an unscrupulous SBC could refuse to make a selection among every pick if the court were to rule differently. Clearly the SBC and the superintendent must perform their duties in a good faith cooperative spirit to select a principal.

It is the ruling of the Court that Aqualified@ in the context of KRS 160.345(2)(h) means the applicant must meet all statutory, regulatory and school board policy requirements and be recommended by the superintendent of the School Board before the superintendent has the duty to provide the

> name of the applicant upon request by the SBC.

I agree with the trial court=s analysis on this issue and, hence, find no error in its determination that an applicant for a principalship must meet all necessary statutory, regulatory and school board policy requirements and be recommended by the superintendent in order to have the applicant=s name forwarded to the SBC for consideration. To do otherwise, is to eliminate the superintendent from the hiring process. Why require the SBC to request more certified applicants when all certified applications are eligible? The superintendent's only duty according to the majority is to forward the names of all certified applicants and let the SBC make its decision.

With that said, I believe I must now specifically address the majority opinion. It appears that the majority's main concern is the perception that historically superintendents throughout Kentucky were not interested in education but rather favoritism and nepotism. Maintenance of the superintendent's political dynasty was paramount and education of the masses a distant second fiddle to his political power and control. While even I must concede that tales of such exploits dominate Kentucky education history, I believe those situations to be in the minority and not the general practice. If one was to believe the sentiment contained in the majority opinion, one

would wonder why the General Assembly continued to maintain the position of superintendent following the Rose decision. I believe the majority does a great disservice to the hard-working, sincerely dedicated and concerned superintendents that have faithfully served this Commonwealth in the past and continue to do so today. The vast majority of superintendents in the past and those presently serving have struggled long and hard to serve the children of Kentucky and provide them with the best education possible despite the often insurmountable historical, political, economical and social odds against them. To strip the superintendent of the ability to have even minimal input in the hiring of principals is to delegate them to mere administrators and not educators.

KRS 160.370 sets forth the duties of the superintendent. Included in those enumerate duties is the responsibility for the hiring and dismissal of all personnel in the district. KRS 160.380(2)(a), in relevant part, states, "[a]ll appointments, promotions, and transfers of principals, supervisors, teachers, and other public school employees shall be made only by the superintendent of school, who shall notify the board of the action taken." It is obvious that the superintendent, as the executive agent of the local school board, is primarily responsible for all employment related issues within the district. Even the statute in question, KRS

160.345(2)(h), empowers the superintendent with the authority to submit a list of potential school personnel applicants to the principal, who, after consultation with the SBC, will fill vacancies. The SBC has no power to request additional names to fill these employment positions. Yet, the majority gives the SBC the ultimate authority to determine who is to be employed in the trusted position of principal. It is important to note that the SBC is composed of two (2) parents, three (3) teachers, and the principal or administrator. See KRS 160.345(2)(a). Thus, the majority opinion gives the teachers, who must always have a controlling membership of a SBC, the final say in who is to be principal. To me this amounts to allowing the fox to guard the henhouse.

The superintendent who has numerous statutory duties and who is subject to removal by the board for cause or malfeasance as well as subject to numerous criminal penalties under KERA enacted legislation has no authority to fill the most trusted and important position in implementing school policy (aside from the superintendent himself), but a mere majority of three hired teachers does. To me such an interpretation of Rose, KERA, and KRS Chapter 160 is ludicrous. I believe Greenup Circuit Judge Lewis D. Nichols properly interpreted the terms "recommend," "qualified" and "certified" in his order addressing KRS 160.345(2)(h) and in his determination that an applicant

must be qualified and recommended before the superintendent has the duty to provide the name of the applicant upon request to the SBC. Therefore, I would affirm the trial court on this issue.

COMBS, HUDDLESTON, McANULTY, AND SCHRODER, JUDGES, CONCUR WITH THIS OPINION.

DYCHE, JUDGE, NOT SITTING.

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