

RENDERED: AUGUST 7, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-000074-MR

DENISE YONTS, IN HER OFFICIAL
CAPACITY AS SUPERINTENDENT
OF THE LETCHER COUNTY SCHOOLS;
AND THE BOARD OF EDUCATION
OF LETCHER COUNTY, KENTUCKY

APPELLANTS

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE JAMES W. CRAFT, II, JUDGE
ACTION NO. 18-CI-00167

VANESSA ROUSE

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: GOODWINE, LAMBERT, AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Denise Yonts, in her official capacity as Superintendent of the Letcher County Schools (the Superintendent),¹ and the Board of Education of Letcher County (the Board) appeal from an order of the Letcher Circuit Court concluding that Vanessa Rouse is entitled to reinstatement to her employment with a continuing service contract beginning August 2017. We conclude that the years Rouse performed work for the Letcher County School District as an independent contractor cannot be counted toward Rouse's entitlement to a continuing service contract and reverse.

In 2007, the Board adopted a "certified job description" for a Speech and Language Pathologist. In addition to detailing the general and specific duties of the position (totaling twenty-seven) the description states: "Teachers shall be appointed annually, upon the recommendation of the Principal to the Superintendent."

Rouse attained tenure status while employed with the Perry County Board of Education. However, she had a break in her employment and did not work in any capacity for over five years, nullifying her tenure status.

In 2011, Rouse entered into a contract with the Letcher County Board of Education for the 2011-2012 school year. At the time, she was certified by the

¹ Tony Sergent was the Superintendent when this action was filed and was named as a party. After Yonts was hired as Superintendent she, by agreed order, was substituted for Sergent.

Education Professional Standards Board (EPSB) effective July 1, 2000 through June 30, 2015, for “TEACHING EXCEPTIONAL CHILDREN— COMMUNICATIONS DISORDERS/SLPA ONLY.” The document executed by the Board (referred to in the contract as the **FIRST PARTY**) and Rouse (referred to in the contract as the **SECOND PARTY**) is entitled “**CONTRACT**” and provides Rouse agreed to perform the following services:

- A. Speech-Language Screening(s) and/or Evaluation(s).
- B. Speech-Language Therapy-Individual and/or Group.
- C. Admissions and Release Committee (ARC) Work (e.g. student placement and/or services).
- D. All associated paperwork (e.g. report writing, test scoring, ARC meeting preparation, entering data Infinite Campus and providing copies of all paperwork to case managers).

The contract further states as follows:

- 2. **FOR THE SERVICES** described in this **CONTRACT**, the **FIRST PARTY** does hereby agree to pay the **SECOND PARTY** \$40.00 (forty dollars) per hour and a travel rate consistent with Board Policy.
- 3. **THE LOCATION** of the Letcher County Public Schools to be served shall be agreed upon by the **SECOND PARTY** and the **DIRECTOR OF SPECIAL PROGRAMS** of the Letcher County Public Schools.
- 4. **EITHER PARTY** shall have the express right to terminate this **CONTRACT** upon at least thirty (30) days’ written notice to the other **PARTY**.

5. **THE SECOND PARTY** does hereby agree to perform/provide the preceding described services as an **INDEPENDENT CONTRACTOR**, and **SECOND PARTY** shall be responsible for payment of FICA, Federal, State, and Local Taxes.

The contract was signed by the chairman of the Board, the secretary of the Board, and Rouse. Contracts containing the same provisions were executed for the 2012-2013 and 2013-2014 school years. We refer to these three contracts as the Board contracts.

On March 10, 2014, Rouse was issued an EPSB certificate for “teaching exceptional children-Communications Disorders. Grades Primary Through 12.” After receiving that new certification, in April 2014, Rouse completed an application for employment with the Letcher County School District, interviewed, and was hired under a new contract entitled “LIMITED CONTRACT OF EMPLOYMENT” for the 2014-2015 school year. That contract provided that it was entered into pursuant to Kentucky Revised Statutes (KRS) 161.730 and that Rouse (referred to in the contract as “teacher”) was appointed by the Superintendent of the Letcher County schools. Under that contract, effective for a period of one year, Rouse was paid a salary and all benefits in accordance with state law, the rules and regulations of the State Board for Elementary and Secondary Education, and the rules and regulations of the school district. The limited contract further provided that the contract would remain in full force unless

and until terminated in compliance with applicable statutes. The contract was signed by Rouse and the Superintendent. The same limited contracts were entered into for the 2015-2016, 2016-2017, and 2017-2018 school years.

On April 30, 2018, and prior to her completion of four years of employment under the limited contracts, Rouse received a letter of nonrenewal of her employment from the Superintendent. She did not request the Superintendent state the reasons for nonrenewal. However, she had been informed the previous year that she would not be reemployed unless she obtained certification by the American Speech-Language-Hearing Association (ASHA) which was required so that the school district could bill Medicaid for services rendered by Rouse. *See* 907 Kentucky Administrative Regulations (KAR) 1:715, Section 4 (requiring that to be reimbursed by Medicaid for speech and language services, the services shall be provided by a speech-language pathologist who has a current ASHA certification). Rouse could not receive ASHA certification because she had two felony convictions, one for Medicaid fraud and the other for tampering with a witness.

After receiving the nonrenewal notice, Rouse requested a tribunal hearing. The hearing officer dismissed the request on a motion by the Board concluding that he lacked jurisdiction to make a legal determination as to whether Rouse was entitled to a continuing service contract.

Rouse filed this declaratory judgment action in the Letcher Circuit Court for a declaration of her statutory rights applicable to teachers and her right to a continuing contract unless terminated for cause. The circuit court found that although under the Board contracts Rouse was clearly an independent contractor, the services Rouse provided pursuant to those contracts closely mirrored those listed in the school district's certified job description for a speech and language pathologist. The circuit court ruled that the speech and language pathologist position is a certified teaching position and the only contracts that could be executed for all teachers had to be either limited or continuing contracts. The circuit court reasoned that although Rouse was clearly an independent contractor for the 2011-2012, 2012-2013, and 2013-2014 school years, those contracts would be deemed to be limited contracts of employment during those years. The circuit court declared that Rouse is entitled to reinstatement to employment in the Letcher County School District, with a continuing service contract no later than August 2017 forward, without loss of salary or benefits, including full salary and wages under the district's adopted salary schedules, years of experience in the district, and retirement contributions. That order, entered on December 21, 2018, was made final and appealable. Yonts appealed on January 10, 2019.

After this appeal was filed, Rouse filed a motion to show cause why the appellants should not be held in contempt for not immediately reinstating

Rouse to employment. A contempt hearing was scheduled but cancelled after Rouse was placed in a position of employment with the school district.

“A party seeking to . . . obtain a declaratory judgment may, at any time . . . move with or without supporting affidavits for a summary judgment in his favor[.]” Kentucky Rules of Civil Procedure (CR) 56.01. “In cases where a summary judgment has been granted in a declaratory judgment action and no bench trial held, the standard of review for summary judgments is utilized.” *Ladd v. Ladd*, 323 S.W.3d 772, 776 (Ky.App. 2010). “The general formula Kentucky courts at all levels employ to determine whether summary judgment is proper is to ask whether there are genuine issues of material fact, and, if not, whether the movant is entitled to judgment as a matter of law.” *Smith v. O’Dea*, 939 S.W.2d 353, 355 (Ky.App. 1997).

KRS 161.730 provides: “Each local district shall enter into written contracts, either limited or continuing, for the *employment* of all teachers.” (Emphasis added). A limited contract is “a contract for the employment of a teacher for a term of one (1) year only or for that portion of the school year that remains at the time of employment.” KRS 161.720(3). Teachers employed under limited contacts “have very few rights under our statutory scheme.” *Gibson v. Board of Education of Jackson County*, 805 S.W.2d 673, 675 (Ky.App. 1991). If the superintendent decides not to renew a teacher’s limited contract all that is

required is “written notice to the teacher that the contract will not be renewed no later than May 15 of the school year during which the contract is in effect” and, upon receipt of a request by the teacher, “a written statement containing the specific, detailed, and complete statement of grounds upon which the nonrenewal of contract is based.” KRS 161.750(2).

A “continuing service contract” is a contract for the employment of a teacher which shall remain in full force and effect until certain contingencies occur, including the teacher’s resignation, retirement, or the “contract is terminated or suspended as provided in KRS 161.790 and 161.800[.]” KRS 161.720(4).

Pursuant to KRS 161.790, a teacher employed under a continuing service contract can be terminated only for cause as provided for in the statute and, if timely notice is given to the Commissioner of Education and the superintendent of his or her intent to contest the termination, the teacher is entitled to a tribunal hearing.

At issue is whether Rouse was entitled to a continuing service contract prior to receiving the notice of nonrenewal on April 30, 2018. A teacher is entitled to a continuing service contract, commonly referred to as tenure, when the requirements of KRS 161.740(1)(b) are met. That statute mandates “[w]hen a currently employed teacher is reemployed by the superintendent after teaching four (4) consecutive years in the same district . . . the superintendent shall issue a written continuing contract if the teacher assumes his or her duties[.]”

Rouse was given a notice of nonrenewal prior to working for four years under the limited contracts of employment and, therefore, unless she can count at least one year working under the Board contracts, she was not entitled to a continuing service contract at any point. *Kidd v. Bd. of Educ. of McCreary Cty.*, 29 S.W.3d 374, 377 (Ky.App. 2000). Rouse argues that the years she worked pursuant to the Board contracts count toward four consecutive years of employment as a teacher, entitling her to a continuing service contract at the beginning of the 2015-2016 school year. If Rouse is correct, the notice of nonrenewal provided to her by the Superintendent in 2018 for a reason other than those listed in KRS 161.790 was ineffective.

As observed in *Belcher v. Gish*, 555 S.W.2d 264, 266 (Ky. 1977), “[a]ny legal rights which a teacher has to employment as such must rest on the contract.” *Id.* While tenure is a right conferred by statute, whether a teacher had a contract under which he or she was employed for the required time to confer that right is governed by contract law. *Id.*

It is basic contract law that “[a]bsent an ambiguity in the contract, the parties’ intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence.” *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky.App. 2002). The Board contracts were not ambiguous. The contracts were clear that during the years in question, Rouse was

not employed by the school district but was an independent contractor. In addition to plainly stating that Rouse was an independent contractor, the Board contracts provided that Rouse worked at an hourly rate and she did not receive the benefits to which a full-time certified employee is entitled under KRS 161.720(4) such as paid health insurance, paid time off, and she did not contribute to the Kentucky Teachers Retirement System.

Under contract law, there is no basis upon which this Court can reform the Board contracts into limited contracts. Reformation of a contract is an equitable remedy based on mutual mistake. As explained in *Nichols v. Zurich American Insurance Co.*, 423 S.W.3d 698, 702-03 (Ky. 2014) (quoting *Abney v. Nationwide Mutual Insurance Co.*, 215 S.W.3d 699, 704 (Ky. 2006)):

To reform a written contract upon the equitable grounds of mutual mistake, the proponent of the reformation must satisfy these three elements: “First, it must show that the mistake was mutual, not unilateral. Second, ‘[t]he mutual mistake must be proven beyond a reasonable controversy by *clear and convincing evidence*.’ Third, ‘it must be shown that the parties had actually agreed upon terms different from those expressed in the written instrument.’”

Here, there was no mutual mistake as to the terms of the contract.

To be clear, Rouse does not dispute the terms of the Board contracts, that she was aware she worked as an independent contractor for the years in question, or suggest the Board made any misrepresentation to her as to her

employment status. Relying on KRS 161.730, she argues that any contract she had with the Board had to be either a limited or continuing contract to fill a certified teaching position.

The Board counters that KRS 161.730 only mandates limited or continuing contracts for the *employment* of all teachers, and that it had authority to retain Rouse as an independent contractor pursuant to KRS 160.290(3), which confers the power on the Board to make contracts. The Board also argues that even if Rouse was employed under the Board contracts, until the 2014-2015 school year she worked as a speech and language pathologist assistant, pointing out that her EPSB certification stated she was certified for “SLPA ONLY” and under KRS 161.053(3), was a classified rather than a certified employee entitled to tenure.

Regardless of whether Rouse or the Board is correct, we reach the conclusion that the years Rouse worked as an independent contractor cannot count toward her claim for a continuing service contract. If the Board is correct that it had the authority to enter into the contracts with Rouse as an independent contractor, the matter is resolved unfavorably to Rouse because as an independent contractor, she was not employed in the school district until the 2014-2015 school year. If Rouse is correct and any contract for her services as a speech and language pathologist had to be either limited or continuing, it does not follow that

she was entitled to a continuing service contract at the beginning of the 2015-2016 school year.

As part of the Kentucky Education Reform Act, changes were made as to who makes personnel decisions within school districts. Local school board members are not involved in hiring employees except for the superintendent and the school board attorney. KRS 160.180(3). All other employment decisions, including entering into either limited contracts or continuing contracts for the employment of teachers, is the exclusive responsibility of the superintendent. KRS 160.370.

Although decided long before the Kentucky Education Reform Act, in *Beverly v. Highfield*, 307 Ky. 179, 209 S.W.2d 739 (1948), the Court addressed whether a school year worked under a limited contract entered into with a principal by a school board acting outside its statutory authority could be used by the principal to support his claim of entitlement to a continuing service contract. At the time, the applicable statute provided in effect that all appointments, promotions, and transfers of principals, supervisors, teachers, and other public employees shall be made only upon recommendation of the superintendent of schools subject to the approval of the board. *Id.*, 209 S.W.2d at 740-41. The Court held:

In the instant case the Board named Long as Principal for the year 1946-1947 without the

Superintendent having recommended him. This it had no right or authority to do and Long's appointment or election was void. As this contract was void, Long cannot use it as a foundation upon which to rest his claim that because of it the Board is compelled to continue his employment.

Id. at 741 (citations omitted).

In this case, the circuit court judicially created void contracts when it ruled that the Board contracts were limited contracts employing Rouse as a certified teacher. Under the legislative scheme, the Board had no authority to enter into a limited contract for the employment of a teacher. That authority is conferred exclusively upon the Superintendent. Because the Board had no authority to employ Rouse as a certified teacher, the Board contracts cannot be deemed by this Court to be limited contracts as a foundation upon which Rouse can rest her claim for continued employment. *Id.*

For the reasons stated, the findings of fact, conclusions of law, and order of the Letcher Circuit Court are reversed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Larry G. Bryson
London, Kentucky

BRIEF FOR APPELLEE:

J. Follace Fields II
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