UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE
CIVIL ACTION NO. 83-53

BILLY K. BANKS)
)
PLAINTIFF)
)
)
VS.) PLAINTIFF'S PROPOSED
) SUPPLEMENTAL STIPULATIONS
)
JACK M. BURKICH, et al.)
)
DEFENDANTS)

* * * * * *

The plaintiff, Billy K. Banks, by and through counsel, hereby submits his supplemental list of proposed stipulations as per the Court's Order. The previous list filed by plaintiff in January, 1984 is hereby incorporated by reference.

Plaintiff further stipulates the following:

The salary schedules of the Letcher County Board of Education for the school years 1982-83, 1983-84 and 1984-85 are accurate as filed in the record by defendants to reflect the pay scales of the defendant Board for those years set out.

BROOKS, COFFMAN & FITZPATRICK

BY: Arthur L Brooks jvf
ARTHUR L. BROOKS

Jane V. Fitzpatrick
JANE V. FITZPATRICK
183 North Upper Street
Lexington, Kentucky 40507
Telephone: (606) 233-3366

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Plaintiff's Proposed Supplemental Stipulations was mailed, postage prepaid, to Honorable G. Wix Unthank, Judge, U.S. District Court, Eastern District of Kentucky, Federal Building, Main Street, Pikeville, Kentucky, 41501; Honorable James W. Craft, Polly, Craft, Asher and Smallwood, P. O. Box 786, Whitesburg, Kentucky, 41858, attorney for the defendants; and to Honorable Forrest Cook, P. O. Box 909, Whitesburg, Kentucky, 41858, attorney for the defendants, on this 30th day of August, 1984.

Jane V. Fitzpatrick

JANE V. FITZPATRICK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE
CIVIL ACTION NO. 83-53

BILLY K. BANKS,	)	
	)	
PLAINTIFF	)	PLAINTIFF'S SECOND
	)	PRE-TRIAL MEMORANDUM
VS.	)	
	)	
JACK M. BURKICH, et al.	)	
	)	
DEFENDANTS	)	

* * * * * *

The plaintiff, Billy K. Banks, by and through counsel, submits his second pre-trial memorandum supplementing those matters covered in plaintiff's preliminary conference memorandum and plaintiff's first pre-trial memorandum which was filed January 18, 1984.

I. REMEDIES

Reinstatement is a proper remedy for First Amendment violations. In Allen v. Autauga County Board of Education, 685 F.2d 1302 (11th Cir. 1982), a teacher lost her job due to First Amendment protected activities. The district court refused to order reinstatement as it found reinstatement would "breed difficult working conditions" for the plaintiff and that there would be a "lack of mutual trust" between the parties which would be essential in the school's operation.

Id. at 1305. The Seventh Circuit held, however, that although the district court's holding was understandable, it was not justifiable. The Allen court cited the Fifth Circuit in Sterzing v. Fort Bend Independent School District, 469 F.2d 92 (5th Cir. 1974) which held that an antagonistic relationship could not justify the refusal to reinstate a teacher who had been discharged for exercising First Amendment rights. Sterzing made it clear that enforcement of constitutional rights frequently had disturbing consequences, however, relief was not restricted to that which would be pleasing and irritation free.

Thus, a portion of the proper remedy in the case at bar is reinstatement of plaintiff Banks to the Director of Pupil Personnel (DPP) position. Defendants cannot argue that possible animosity or ill feelings would be justification to withhold the position from Banks.

II. IMMUNITY

Plaintiff has provided the Court with a lengthy discussion of the immunity question and the various forms of immunity in plaintiff's preliminary conference memorandum.

At the last hearing in this case, this Court was interested in plaintiff locating a case where a school board had been held liable under 42 U.S.C. § 1983. Such occurred in Moore v. Tangipahoa Parish School Board, 594 F.2d 489 (5th Cir. 1979) which held reinstatement and back pay could be awarded against the school district itself in a 42 U.S.C. § 1983 case.

In Moore, a black teacher had been illegally relieved of duty during a reduction in force for financial reasons. When whites with less seniority were rehired to positions when openings became available again, plaintiff filed suit under §1983. The school board argued in defense that it was not a "person" under §1983 and that the district court award of reinstatement and back pay against the school board could not stand.

In affirming the school board's liability, the Fifth Circuit stated that a school board is a person for purposes of §1983 under Monell v. New York City Department of Social Service, 436 U.S. 658 (1978). Furthermore, the court used the analysis enunciated in Mt. Healthy School District v. Doyle, 429 U.S. 274 (1977) to determine that a school board was not immune from back pay and reinstatement awards against it.

Moore is not the only case whereby a school board was found liable under § 1983. In Stoddard v. School District No. 1, Lincoln County, Wyoming, 590 F.2d 829 (10th Cir. 1979), a teacher's contract was not renewed for constitutionally impermissible reasons. The school board on appeal questioned whether it was a "person" and whether it could be held liable. The Tenth Circuit determined that the school board, through Monell, was a "person" within the meaning of § 1983 and that the school district was liable due to the illegal actions of the board. Under a Mt. Healthy analysis, the circuit court of appeals held that there was no Eleventh Amendment immunity as the school district was more like a city or county than an arm of the state.

As plaintiff's earlier analysis in his preliminary conference memorandum of the defendant Letcher County Board of Education under the Mt. Healthy test reveals, a Kentucky school board is not the alter-ego of this state. Therefore, the defendant board in this case can be held liable for reinstatement and back pay.

Respectfully submitted,

BROOKS, COFFMAN & FITZPATRICK

BY: Arthur L. Brooks Jr.
ARTHUR L. BROOKS

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Plaintiff's Second Pre-Trial Memorandum was mailed, postage prepaid, to Honorable G. Wix Unthank, Judge, U.S. District Court, Eastern District of Kentucky, Federal Building, Main Street, Pikeville, Kentucky, 41501; Honorable James W. Craft, Polly, Craft, Asher and Smallwood, P. O Box 786, Whitesburg, Kentucky, 41858, attorney for the defendants; and to Honorable Forrest Cook, P. O. Box 909, Whitesburg, Kentucky, 41858, attorney for the defendants, on this 30th day of August, 1984.

Jane V. Fitzpatrick
JANE V. FITZPATRICK

POLLY, CRAFT, ASHER & SMALLWOOD
ATTORNEYS AT LAW
104-B NORTH WEBB AVENUE - PHONE (606) 633-4460
WHITESBURG, KENTUCKY 41858

RONALD G. POLLY
JAMES W. CRAFT
JAMES D. ASHER
GENE SMALLWOOD, JR.

February 29, 1984

Hon. G. Wix UnThank
United States District Judge
United States Courthouse
Pikeville, Kentucky 41501

Re: Banks v. Burkich, et al
Civil Action No. 83-53

Your Honor:

Pursuant to numerical paragraph 2 of your Memorandum Opinion and Order dated February 9, 1984, this is to advise that the Answers to the Plaintiffs' Interrogatories propounded to the individual Defendants, Lucille Holbrook, Frank Wright and Bob Ison, were tendered on January 23, 1984, together with the motion to permit the filing of the same.

I have checked with your clerk and was advised that the aforesaid Answers to Interrogatories are contained in the record.

I hope this letter addresses the Courts' inquiries into the matter, but if it is not sufficient, I will be happy to do whatever is necessary to get the information the Court is seeking in regard to the same.

Very truly yours,

James W. Craft

JWC/jab

cc: Ms. Jane Fitzpatrick
183 North Upper Street
Lexington, Kentucky 40506

Mr. Forrest Cook
P.O. Box 909
Whitesburg, Kentucky 41858

Civil Action 83-53, BANKS v. LETCHER COUNTY BD. OF EDUC, ETC.

Prelim. Conf. 1 July 83, 10:30 AM

Plaintiff was fired from an administrative position (Director of Student Personnel) following school board elections in which he did not pick the winner. He was demoted and assigned to a teaching position with about $6,000 loss in yearly pay.

He appealed to Letcher Cir. Ct. Before adjudication, he was assigned to a principalship, but still lost about $1,000 yearly pay. Judge Hogg ruled for defendants and plaintiff appealed.

In Banks, 648 SW2 542 (Ky. App. 1983), the court of appeals held that the Board had not given him timely notice of his demotion, and directed the Board to re-instate him to his prior position, or to make up the balance of his lost pay. However, he was to be re-instated for one school year only. So, partioal victory on notice, but the Ct. of Appeals ~~seems to have otherwide preferred defendants~~ did not address the validity of the demotion otherwise.

Discovery in progress.

Pending motion. Superintendent Burchich failed to attend his own deposition and plaintiff has moved for sanctions, including fees for attendance. Ct. took this under advisement on 25 April 1983 (A noble date, the birthday of your diligent flunky).

Pending motion. Plaintiff has tendered an amended complaint and has moved the court for its filing. He adds §1983 language. Should be ordered filed.

Memoranda have been filed.

Arthur Brooks for Plaintiff; J.W. Craft, Forrest Cook for defendants;

Goomba for the right stuff!

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June 21, 1983

Hon. G. Wix Unthank
Judge, U.S. District Court
201-B Courthouse
P.O. Box 278
Pikeville, KY 41501

Re: Billy K. Banks v. Jack M. Burkich, et al.; U.S. District Court; Civil Action No. 83-53

Dear Judge Unthank:

Enclosed for your information is a copy of the Preliminary Conference Memorandum which has already been filed in the above case.

Sincerely,

Arthur L. Brooks by so

Arthur L. Brooks

ALB/so

Enclosure

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE
CIVIL ACTION NO. 83-53

BILLY K. BANKS,)
)
Plaintiff)
)
VS.) PLAINTIFF'S PRELIMINARY
) CONFERENCE MEMORANDUM
JACK M. BURKICH, et al.,)
)
Defendants)

* * * * *

This preliminary memorandum is submitted on behalf of the plaintiff, Billy K. Banks, pursuant to Order of this Court.

I. JURISDICTION OF THIS COURT

Jurisdiction for this action is found under Title 28 U.S.C. §§ 1343(3)(4) for violation of First and Fourteenth amendment rights protected by Title 42 U.S.C. § 1983. Said statute granting jurisdiction states:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . .
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights of citizens or of any persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Title 28 U.S.C. §§ 1343(3)(4).

Jurisdiction for this action is further founded on Title 28 U.S.C. §§ 1331 and 1343(3) for violation of rights protected under the first and fourteenth amendments to the United States Constitution. Title 28 U.S.C. § 1343(3) is set out above. Title 28 U.S.C. § 1331 provides, "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."

Plaintiff alleges that the defendants, the superintendent, the Board, and three members of the Board of Education of Letcher County, Kentucky, under color of their positions as such, denied plaintiff re-employment in his former position as Director of Pupil Personnel (hereinafter "DPP") for the 1982-83 school year and thereafter to punish and penalize him for exercising his First Amendment rights, in violation of the First and Fourteenth Amendments to the United States Constitution.

II. KIND OF ACTION

This is a civil rights action arising out of the defendants' failure to reinstate plaintiff as DPP in the Letcher County School System.

III. STATEMENT OF FACTS (* denotes disputed facts)

The plaintiff, Billy K. Banks, has been employed for many years as a teacher and administrator in the Letcher County School System, Whitesburg, Kentucky by the defendant, Board of Education of Letcher County, Kentucky (hereinafter "Board"). Defendant, Jack M. Burkich, has been superintendent of the Letcher County Schools for four years, including all times relative to this action.

Defendants, Bobby Joe Ison and Lucille Holbrook, have been members of the Board for six and one-half (6 1/2) years and seven (7) years respectively; they are currently serving on the Board. Defendant, Frank Wright, served on the Board for many years. He was defeated in his race for re-election in November 1982 and left office in January 1983. The three defendant Board members all were sitting Board members when all incidents relative to this case occurred.

During the 1980-81 school year, plaintiff Banks was assigned by the superintendent and Board to the position of DPP, the same position he had held the four previous years. In that position, he was employed and paid on the basis of twelve (12) months employment each school year.

Through a letter dated April 25, 1981, Banks was advised by the Board, through the Board chairman and the secretary, that the superintendent had recommended to

the Board that Banks be relieved of his duties as DPP and assigned as a classroom teacher for 1981-82. Banks was to be employed in 1981-82 on the basis of nine and one-fourth (9 1/4) months which would result in a salary loss of approximately $6,000.00 for the 1981-82 school year.

On June 2, 1981, Banks appeared with counsel at the demotion hearing held to remove him as DPP. Following the hearing, the Board, upon the superintendent's recommendation, voted to demote Banks and place him in the classroom, reducing his salary accordingly. He appealed the decision pursuant to KRS 161.790(6) to the Letcher Circuit Court.

Following the appeal to the Letcher Circuit Court, defendants placed Banks as principal at Kingdom Come Elementary School for the 1981-82 school year where he received approximately $1,500.00 less salary than if he had remained as DPP. To date, Banks still retains the position of Kingdom Come principal.

On February 18, 1982, the Letcher Circuit Court rendered its decision against Banks and for the defendants. Banks then appealed the decision to the Kentucky Court of Appeals which rendered its published opinion on April 15, 1983. Banks v. Board of Education of Letcher County, Kentucky, 648 S.W.2d 542 (Ky. App. 1983).

The Court of Appeals reversed the circuit court's decision holding that the Board failed to affirmatively act prior to May 15 to demote Banks and therefore failed to afford him the required statutory notice.

At the time of Banks's demotion and subsequently, the defendants have commented that plaintiff performed well as DPP and that if the position again became available, plaintiff would be reinstated. *

The DPP position Banks formerly held did become available in the Letcher County Schools for the 1982-83 school year. Plaintiff, upon learning of the opening, applied for the job. No action was taken to fill the position until Wednesday, November 24, 1982. At that tape recorded meeting, the Board entertained a recommendation from the defendant superintendent to fill the DPP position. Prior to the formal recommendation and vote, the floor was opened to a public discussion regarding hiring of personnel to fill the position.

Defendant, Bobby Ison, whom Banks openly opposed in Ison's bid for re-election to the Board in November 1980, stated that Banks should not be placed in the DPP position, since he had taken retaliation against the Board and sued them following the demotion. *

Furthermore, the defendant superintendent made known that Banks's actions following the demotion caused him not to recommend Banks as DPP. * The superintendent failed to recommend Banks due to Banks's appeal to the Letcher Circuit Court and the Kentcuky Court of Appeals, as well as public comments Banks had made regarding general

criticism of the superintendent and the job he was doing as superintendent. * Banks also failed to politically support Board members favorable to the superintendent. *

The superintendent then made a formal recommendation to hire Larry Ison as DPP, who had had no prior DPP experience. Bob Ison moved and defendant, Lucille Holbrook, seconded the motion to hire Larry Ison. The motion passed on a three to two vote with Bob Ison, Lucille Holbrook and defendant, Frank Wright, voting to hire Larry Ison and Board members, Ray Back and Tom Lewis, voting "no."

Not only has Banks sued the Board over his earlier demotion, but he has politely opposed and spoken openly against the defendants. * In addition to the political opposition mentioned earlier, Banks worked against Frank Wright in his bid for re-election in November of 1982. * The candidate opposing Wright was elected and took office in January 1983.

Furthermore, defendant, Lucille Holbrook, has been politically aligned with the superintendent and the other defendant Board members. * Banks has opposed this faction and sued the Board on which they all sat as a result of the demotion. *

Due to plaintiff's political opposition, statements and lawsuit, the defendants failed to hire plaintiff as DPP in November 1982. * This failure to rehire or promote

plaintiff to the DPP position was retaliation against him and action to punish plaintiff, in violation of federal constitutional rights and state law.

IV. ISSUES OF LAW (SUBSTANTIVE)

(A) FIRST AMENDMENT ISSUE

Generally, in a conflict between a teacher and a school system, a school system is prohibited from acting in retaliation for the exercise of the teacher's first amendment rights. As stated by the Supreme Court in Epperson v. Arkansas, 393 U.S. 97 at 107 (1968), ". . . it is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of Constitutional guarantees." Nor are "teachers. . . relegated to a watered down version of constitutional rights," Garrity v. New Jersey, 385 U.S. 493 (1967). In fact, ". . . the First Amendment [has] been given special meaning when teachers have been involved. Simply because teachers are on the public payroll does not make them second-class citizens in regard to their constitutional rights." Pred v. Board of Public Instruction, 415 F.2d 851, 855 (5th Cir. 1969).

On several occasions the Supreme Court has applied this principle for the protection of teachers employed in public education. In Speiser v. Randall, 357 U.S. 513 at

518-519 (1958), the Supreme Court stated, "this court has. . . rejected the contention that speech was not abridged when the sole restraint on its exercise was withdrawal of . . . the opportunity for public employment." In a number of other cases the Supreme Court has recognized that dismissal of a teacher, or refusal to re-employ a teacher, cannot be founded upon a purpose to deprive that teacher of his First Amendment rights. See Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979); Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977); Pickering v. Board of Education, 391 U.S. 563, 566 (1968); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960); Slochower v. Board of Education, 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183 (1952); Tinker v. Des Moines Community School District, 393 U.S. 503 (1969); Perry v. Sindermann, 408 U.S. 593 (1972); and Board of Regents v. Roth, 408 U.S. 564 (1972).

In Perry, supra, the Supreme Court stated:

> For at least a quarter century, this court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest -- expecially his interest in freedom of speech.

> For if the government could deny a benefit to a person because of his constitutionally protected speech or association, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which (it) could not command directly." Speiser v. Randall, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

In Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 287 (1977), the Supreme Court outlined a three-part test to apply in claims by public employees that their First Amendment rights were abridged by adverse action of government employees:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" -- or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to the respondent's reemployment even in the absence of protected conduct.

This test has been used by the Sixth Circuit in a number of cases involving claims by public employees that their employers penalized their exercises of First Amendment rights. See e.g., Hildebrand v. Board of Trustees of Michigan State University, 662 F.2d 439 (6th Cir. 1981); Columbus Education Association v. Columbus City School District, 625 F.2d 1155, 1159 (6th Cir. 1980); Hickman v. Valley Local School District Board of Education, 619 F.2d 606, 608 (6th Cir. 1980). These

three factors will be analyzed separately below. In conducting this analysis, it is the consistent rule that "[w]hen confronted with firings that implicate First Amendment rights, the courts are required to conduct an individualized and searching review of the factors asserted by the employer to justify the discharge [or other adverse personnel action]. The purpose of such review is to assure that those factors have been applied with the deference to be accorded First Amendment rights." Tygrett v. Barry, 627 F.2d 1279, 1283-84 (D.C. Cir. 1980).

1. The Plaintiff Has Engaged in Constitutionally Protected Activities

Pickering v. Board of Education, 391 U.S. 563 (1968), sets forth the test that controls whether public employees first amendment free speech activities are entitled to protection. "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 568. In Pickering, a high school teacher was dismissed for writing to a local newspaper criticizing certain budgetary and personnel policies of the school board. The Court found that Pickering's activities were protected by the First Amendment and did not "furnish the basis for his dismissal from public employment." Id. at 574.

In applying the balancing test, the Court identified certain relevant factors on each side of the equation. Among the factors considered relevant to the nature of the speech were whether the speech was knowingly and recklessly false and whether the activities related to an important matter of public interest. On the other side of the equation -- whether the employees' activities were unacceptably disruptive -- the Court also listed certain relevant factors to include in the First Amendment test. These factors include the content of the speech, co-worker harmony, the maintenance of discipline by immediate supervisors, and the need for personal loyalty and confidence between workers and supervisors. Id. at 369-70. In applying these factors since Pickering, courts predominantly have sought to determine whether the employees' activities have caused material and substantial disruption in the workplace. See Monsanto v. Quinn, 674 F.2d 990, 995 (3rd Cir. 1982).

In conducting the Pickering balancing test, the Fifth Circuit has stated:

> The First Amendment generally favors the marketplace testing of ideas and information rather than arbitrary control by the government. As it is, the government itself, and expecially its top officials, speak loudly in our society . . . The First Amendment ensures that even the most junior government clerk typist can criticize the speech and acts of the top officials in her office as freely as any citizen can . . . The First Amendment protects the ventilation of even the most noxious idea unless and until the government proves that the speech is so poisonous to government operations that, on balance, it is necessary to choke off the pungent exhalations of the sincere whistle-blower and suffer in the

> sadly thinner atmosphere that is left. Thus Pickering states that the First Amendment requires the government not just to show that certain employee speech injures the government, but to show that the benefits of preventing the injury actually outweigh the profound benefits of free speech in this society.

Porter v. Califano, 592 F.2d 770, 779 (5th Cir. 1979).

Furthermore, the right to file a legal action in the courts is protected by the First amendment as a portion of the right to petition the government for the redress of grievances. The Supreme Court has stated, "Certainly the right to petition extends to all departments of Government. The right of access to the courts is indeed but one aspect of the right to petition." California Transport v. Trucking Unlimited, 404 U.S. 508 (1972).

This right to petition under the First Amendment protects attempts to obtain redress through institution of judicial proceedings as well as through the executive and legislative branches of government. City of Long Beach v. Bozek, 645 P.2d 137 (Cal. 1982), vacated on other grounds, 103 S.Ct. 712 (1983). The right includes filing suit solely to obtain monetary compensation for individual wrongs as well as filing suit to draw attention to issues of broader public and political significance. Id.

It is against this background of authorities that the activities of the plaintiff, Billy Banks, must be measured. The facts show that Banks's First Amendment activities con-

stituted the substantial and motivating factor for not hiring him in the DPP position in November 1982.

The defendant superintendent stated under oath at the demotion hearing before the Board in 1981 that he would very definitely recommend Banks for a later DPP position in that he had experience and would make a contribution to the school system. However, when the position again became available, Banks was rejected in favor of a person with no prior DPP experience - a person who had agreed not to complain if he lost the position as DPP at a later date.

Following the demotion hearing, Banks had filed suit against the superintendent and Board and even appealed to the Kentucky Court of Appeals. Furthermore, he openly opposed Board candidates favorable to the superintendent and defendant Board members. In fact, one defendant Board member was defeated by the candidate Banks supported. Banks also was vocal concerning the operation of the Letcher County Schools by the superintendent.

After Banks had taken part in the above activities, the defendants refused to hire Banks as DPP in November 1982.

Billy Banks has engaged in constitutionally protected activity. It is clear that his activities deserve First Amendment protection.

2. The Defendants' Adverse Personnel Action was Motivated by the Protected Activities of the Plaintiff

As stated by the Sixth Circuit in Hildebrand v. Board of Trustees of Michigan State University, 662 F.2d 439 (6th Cir. 1981), if a court finds that an employee's conduct was protected by the First Amendment, the finder of fact must find (after determining the activity was protected) that the employee's protected conduct is a "substantial factor" or a "motivating factor" in the employer's decision not to rehire him. Citing Mt. Healthy School District v. Doyle, 429 U.S. 274 (1977); Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).

It is clear the Board and superintendent chose not to rehire Banks as DPP due to his First Amendment activity. When Banks left the DPP position in 1981, the superintendent was ready to recommend he be rehired to the position if the money became available. Then, following protected First Amendment activity by Banks, the defendants chose not to rehire him. Only the plaintiff's protected activities as discussed earlier intervened to motivate the defendants not to place the plaintiff as DPP.

3. The Defendants Cannot Show by a Preponderance of the Evidence that the Same Personnel Action Would Have Been Taken Even in the Absence of Protected Conduct.

Citing Mt. Healthy, supra, and Givhan, supra, the Sixth Circuit in Hildebrand, supra, determined that once an employee meets the burden of showing he has engaged in First Amendment activity which was a substantial or motivating factor in the employer's decision not to rehire him, the burden of proof shifts to the employer to prove that the same action would have been taken absent the protected conduct. Hildebrand at 443.

Based on the facts set forth earlier in this brief, there exist no factors absent plaintiff's protected activities to justify his not being placed in the DPP position.

(B) ARBITRARINESS

In Snapp v. Deskins, 450 S.W.2d 246 (Ky. 1970), the Kentucky Supreme Court considered the question of whether the superintendent of a school system may make transfers of personnel within the school system in a purely arbitrary manner. As the Court stated: "It is well established that a governmental administrative body may not deal in a purely arbitrary manner for the compensation or work assignment of its employees." Id. at 251. The Court pointed out that it is presumed that the superintendent acts in the best interest of his school system in making assignments and transfers, but that upon an affirmative showing by those questioning the transfers of non-justification, the burden of justification then shifts to the superintendent and Board to rebut the

inference of arbitrariness, which would of itself be sufficient to void the job assignment. In other words, the presumption that the school officials have acted in good faith in making job assignments may be overcome by an affirmative showing that such officials acted from an improper motive.

In Harlan County Board of Education v. Stagnolia, 555 S.W.2d 828 (Ky. 1977), the Kentucky Supreme Court again found arbitrary action within a school system. The Court pointed out that there need be no more than an inference of arbitrariness, citing Snapp v. Deskins, supra. Thus, once arbitrariness is suggested, it becomes incumbent upon the superintendent and Board to justify their action, by demonstrating that it was for a reason related to the proper administration of the school system.

In the present situation involving Banks, adverse action is immediately suspect due to his opposition to the defendants. In Dause v. Bates, 369 F.Supp. 139, 147 (E.D. Ky. 1983), the Court pointed out, including that actions of a school system were unlawfully arbitrary:

> ". . . where there are no previous complaints in the personnel records of teachers, and where the reasons given for demotion or termination are not fortified by specific proof of any professional failings or misconduct; and where the plaintiffs have been involved in speech or association with a cause which is not popular with the school

> Board. . . then the inference is very strong that the reasons given by the Board for their demotion were not the real reasons, and that the actual reason was to retaliate and make examples of the three principals who supported the walkout. See Hanover Township Fed. of Teachers v. Hanover Community School Corporation, 318 F.Supp. 757 (D.C.N.D. Ind. 1970), aff'd. in 456 F.2d 456 (Cir. 1972)

In Dause, the District Court relied upon Snapp v. Deskins, supra, in holding that the superintendent and Board voted arbitarily and capriciously in personnel actions involving three teachers in that case.

In this case, it is equally clear that the actions of the defendants were arbitrary. Defendants had stated in the past that plaintiff would be restored to DPP when the position again became available. Yet, when he appealed the demotion, politically challenged the defendants and commented upon the superintendent's job performance, he was not again placed in the position. Rather, an employee with no prior DPP experience was hired - an employee who agreed not to challenge any action to remove him from the DPP position as the plaintiff had done. It is clear that the failure to place the plaintiff in the DPP position was totally arbitrary.

(C) POLITICAL DISCRIMINATION

KRS 161.162 states: "No teacher or employee of any district board of education shall be appointed or promoted to, or demoted or dismissed from, any position or in any way

favored or discriminated against with respect to employment because of his political . . . opinions or affilations." No statute could be clearer that an employee's politics is not to be considered when decisions regarding any aspect of his employment are made.

Kentucky courts have held decisions regarding one's employment in the school district based on one's politics clearly establishes arbitrariness and are therefore void. Harlan County Board of Education v. Stagnolia, 555 S.W.2d 828 (Ky.App. 1977); Calhoun v. Cassady, 534 S.W.2d 806 (Ky. 1976). Where political activity motivates the employment action, the mere inference of arbitrariness invalidates the act. Stagnolia, supra.

Thus, the defendants' action in filling the DPP position is void under Kentucky law. Due to Banks's political opposition to the superintendent and the three defendant Board members, they failed to reinstate him as DPP. Such action is arbitrary and void. Id.

(D) REMEDIES

A teacher may bring an equity action for reinstatement and be awarded back pay as an appropriate ancillary equitable relief. See, e.g., McFerrin v. County Board of Education of Fayette County, Tennessee, 455 F.2d 199 (6th Cir. 1972), cert. denied, 497 U.S. 934 (1972); Harkless v. Sweeny

Independent School District, 427 F.2d 319 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971).

The plaintiff is also entitled to an award of interest on the back pay to which he is entitled. Whatever amount is finally determined to be due plaintiff as back wages will be a sum or sums owed him under his contract of employment, determined by the Board's salary schedules for the school years in question. The back wages for any year in question are a liquidated sum as opposed to an unliquidated sum, since the total salary due the plaintiff in any year in question was only a matter of mathematical computation from the salary schedule for that year.

In Bituminous Casualty Corporation v. Lynn, 503 F.2d 636 (6th Cir. 1974), in an appeal from Kentucky, the Sixth Circuit stated:

> Where the amount of a claim can be ascertained readily by reference to a formula in the contract and none of the facts is in dispute or when the amount of the claim itself is not disputed, the claim is liquidated.

Id. at 646.

If the amount of a claim is liquidated, interest follows as a matter of right. 22 Am.Jur. Damages, §§ 180-188; Clark v. Life & Casualty Ins. Co., Ky., 53 S.W.2d 968 (1932); Bituminous Casualty Corp. v. Lynn, supra; City of Covington v. South Covington, etc., Ky., 144 S.W. 17 (1912); McNutt v. State Farm Mut. Auto Ins. Co., W.D. Ky., 369 F.S.

381 (1973), aff'd, 6th Cir., 494 F.2d 1282 (1973); and General Acc. Fire & Life Assur. Corp. v. Judd, Ky., 400 S.W.2d 685 (1966). Compare Heustis v. Heustis, Ky., 381 S.W.2d 553 (1964), where interest on an unliquidated claim was held to bear interest from the date of the judgment. Thus, plaintiff, Billy K. Banks, is entitled to interest at the legal rate on the back wages which he is due. KRS 360.080.

(E) COMPENSATORY DAMAGES
and
(F) PUNITIVE DAMAGES

Entitlement to compensatory damages will be proven by plaintiff at trial. Additionally, the plaintiff is entitled to punitive damages. Punitive damages may be awarded in appropriate cases under 42 U.S.C. § 1983. Carey v. Piphus, 435 U.S. 247, 257 n. 11 (1978). In Kentucky, punitive damages may be awarded for willful and malicious action by defendants, and they are intended to punish the defendant and to discourage him and others from similar conduct in the future. Harrod v. Fraley, 289 S.W.2d 203 (Ky. 1956).

In this action, serious damage to has been done to First Amendment rights, long held in high esteem by the courts of this nation. If the action of the defendants is permitted to go unchecked, other teachers are being given a strong message that they should not participate in associational activity, nor should they criticize their superiors, try to

improve the school system, or pursue any court action to pursue their guaranteed rights.

Moreover, it is clear that the defendants swiftly punished plaintiff who had the audacity to exercise his First Amendment right to appeal successfully his earlier demotion from the DPP position. It is this proud defiance of the First Amendment which should be punished by punitive damages.

(G) ATTORNEY FEES

A successful plaintiff in an action under 42 U.S.C. § 1983 is entitled to reasonable attorney fees. 42 U.S.C. § 1988. The factors which are relevant to a fee award are the hours which are expended by plaintiff's attorneys and the reasonable value of those services. Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979). The expertise of attorneys in the matters of school law and employment discrimination should also be taken into account. Id.

V. ISSUES OF LAW (PROCEDURAL)

(A). IMMUNITY

Basically there are three types of immunities that could be raised by a Kentucky school board in different circumstances. Neither of the three forms -- sovereign immunity, Eleventh Amendment immunity or qualified immunity -- protects the Board from liability, as explained below. Defendants also assert good faith as a basis for their motion to dismiss. Generally, "good faith" immunity is equated with "qualified" immunity. The concepts are thus treated here as a unit.

"Municipal defenses -- including an assertion of sovereign immunity -- to a federal right of action are, of course, controlled by federal law." Owen v. City of Independence, Missouri, 445 U.S. 622, 63 L.Ed.2d 673, at 691 n. 30 (1980). The Court in Owen, discussing various immunities traditionally enjoyed by municipalities, stated by "[b]y including municipalities within the class of persons subject to liability for violations of the federal constitution and laws, Congress -- the supreme sovereign on matters of federal law -- abolished whatever vestige of the state's sovereign immunity the municipality possessed." Id. at _____, 63 L.Ed.2d at 691. It is clear that by virtue of the supremacy clause section 1983 admits of not state sovereign immunity.

Thus, this Court need not accede to the state law determination of whether school boards are "the sovereign" under Kentucky law. The question of federal immunity in federal courts amounts to an examination by the federal court of the entity which is created by state law. In Mt. Healthy School Dist. v. Doyle, 429 U.S. 274 (1977), the United States Supreme Court examined Ohio statutes and constitution, and concluded that Ohio boards of education were not entitled to Eleventh Amendment immunity in a § 1983 action. The Eleventh, aimed more narrowly than is state sovereign immunity, is not necessarily intended to shield all local subdivisions which might enjoy protection under the doctrine of state sovereign immunity. Thus, over-extending the scope of the Eleventh Amendment would eviscerate § 1983. It is significant that the court in Mt. Healthy looked to no state decisions to make its determination of whether the Ohio school board involved should partake of Eleventh Amendment immunity.

Nonetheless, plaintiff is aware of the decision in Burkey v. Marshall County Board of Education, 513 F.Supp. 1084 (N.D.W.V. 1981), where the federal district court deferred to the characterization of local school boards by the West Virginia Supreme Court of Appeals. Because of Burkey, then, this brief will also exmaine the characterization which

local school boards enjoy in Kentucky law, both in tort cases and outside the area of the law.

As the argument below will explain, however, regardless of the approach which is taken, a local school board in Kentucky enjoys no immunity in a § 1983 action.

1. Eleventh Amendment Immunity

The defense of immunity from suit in the federal courts, as apart from the defense of sovereign immunity under state constitutions or common laws, is dependent upon the Eleventh Amendment to the Constitution of the United States. In Mt. Healthy City School Dist. v. Doyle, supra, the United States Supreme Court held that a local school board in Ohio "was not entitled to assert any Eleventh Amendment immunity from suit in the federal courts." Id. at 281. In reaching this decision, the Supreme Court did not examine the Ohio law. Rather, it noted that Ohio school boards were characterized as "political subdivisions"; that the school board there in question was only one of many local school boards within the state of Ohio; that it was subject to some guidance from the State Department of Education; and that it received a great amount of money from the state. Notwithstanding these facts, the Court noted that the Board in question was authorized to issue bonds and to levy taxes, under certain restrictions of state law.

Similarly, in Cunningham v. Grayson, 541 F.2d 538 (6th Cir. 1976), cert. denied, 429 U.S. 1074 (1977), reh. denied, 430 U.S. 941 (1977), the Sixth Circuit Court of Appeals, in upholding the trial court's rejection of a desegregation proposal by the Board of Education of Jefferson County, held that the Eleventh Amendment is not a bar to recovering attorney fees from the Jefferson County Board of Education, because the Board is neither the state nor its alter ego. The Court cited as authority KRS 160.160 and the powers given school boards therein, as well as the powers of boards of education in Kentucky to establish curriculum and employment standards and to levy school taxes.

The decision in Cunningham v. Grayson, supra, is a correct analysis. Its underpinnings are totally consistent with Mt. Healthy, and other factors indicate the local automony of school boards. Local school boards in Kentucky are political subdivisions, not alter egos of the state. Running through the Kentucky statutes on education is a thread of autonomy at the local level, subject only to general control by the state pursuant to KRS 156.070. Boards of education are given powers to sue and be sued, to make contracts, and to buy and sell property, by KRS 160.160. Personnel matters, including appointment, nonrenewal, tenure, termination, etc., are totally within the control of a local board of education and its superintendent. See KRS 160.380; KRS 161.720-.810. These

powers are subject to review by the state only in disputed matters, under KRS 160.380.

While Kentucky statutes do not specifically designate local school boards as "political subdivisions," there is statutory recognition of the locally autonomous political process by which local board members are elected. See KRS 160.200-.260. Moreover, KRS 161.162 prohibits discrimination against board employees because of political affiliations, thereby recognizing the political autonomy -- and thus the capacity for such political discrimination -- enjoyed by a local board of education in Kentucky.

As with Ohio school boards under the Mt. Healthy analysis, the Board of Education of Letcher County, defendant here, is only one of many local school boards within the state; the Board does receive guidance from the State Department of Education and receives a significant amount of money from the state. See Ky. Const. § 184. Nonetheless, it enjoys the political powers also enjoyed by Ohio school boards, of issuing bonds and levying taxes. See KRS 160.460. Most significantly for the purposes of this motion to dismiss, KRS 160.160 recognizes that boards of education may sue and be sued. The decisions in Mt. Healthy and Cunningham v. Grayson, both supra, should apply equally in this case, to deny to the defendant Board any Eleventh Amendment immunity from suit in a 42 U.S.C. § 1983 action.

2. Sovereign Immunity

Even if Kentucky law did control this case, and even if a finding of state sovereign immunity were a prerequisite to a finding of Eleventh Amendment immunity, the Board is not immune from suit in a 42 U.S.C. § 1983 action. Plaintiff is aware that a federal district court in West Virginia has deferred to the West Virginia Supreme Court of Appeals' characterization of a West Virginia local school board, "in the spirit of federalism," Burkey v. Marshall County Board of Education, 513 F.Supp. 1984, 1096 n. 12 (N.D.W.V. 1981), and has grounded a finding of Eleventh Amendment immunity from suit under § 1983 on a state ruling that the local boards of education in West Virginia are immune from suit in tort actions. Aside from the obvious overextension of tort immunity to immunity from suit in § 1983 actions, counsel for plaintiff has reservations about the intertwining of the concepts of state sovereign immunity and Eleventh Amendment immunity, since such a step appears certain to abrogate 42 U.S.C. § 1983. Certainly § 1983 was aimed at the wrongdoing of local officials who enjoy the power to make decisions which have the potential to deprive one of his civil rights. Nonetheless, counsel for plaintiff will examine the issue under Kentucky state law, as developed in Kentucky courts.

First, it is significant to note that as recently as 1981, a § 1983 action was permitted by the Kentucky Court of Appeals against a board of education. In Scott v. Campbell County Board of Education, 618 S.W.2d 589 (Ky.App. 1981), the Kentucky Court of Appeals held that a motion to recover attorney fees in a § 1983 action must be made within ten days of final judgment. The Court did not question the trial court's damage award against a board, and specifically noted that a motion to quash a garnishment against the board, on grounds of sovereign immunity, was overruled by the trial court. Although the Court could have raised the barrier of sovereign immunity on its own motion, that being a jurisdictional issue, it did not do so.

It is significant that the same panel of the Court of Appeals which decided Scott v. Campbell County Board of Education, supra, had earlier ruled that the University of Louisville is protected by sovereign immunity, in both tort and contract action. University of Louisville v. Martin, 574 S.W.2d 676 (Ky.App. 1978), discr. review denied (Ky. 1978). In Martin, the Court of Appeals held that the University of Louisville is entitled to the protection of the doctrine of sovereign immunity; that KRS 273.171(2), which provides that the University shall

have the power "to sue and be sued, complain and defend," does not amount to a waiver of that immunity; and that any suit against the University of Louisville must be brought in accord with the Board of Claims Act, KRS Chapter 44.

A school board, as the preceding discussion explains, is not an arm of the state, and so is not entitled to sovereign immunity. Such is not the case with the University of Louisville. According to Martin, the University of Louisville is a "state institution" by virtue of KRS 164.010 and as such is sufficiently protected from civil negligence suits by the cloak of sovereign immunity. A local board of education, on the other hand, is not so clearly designated as an arm of the state legislature. Local boards are neither state agencies, KRS 293.020(1), nor state departments, KRS 120.010(1)(a). Moreover, the Board of Claims Act, which is a partial waiver of sovereign immunity in Kentucky, does not extend to local school boards, as is explained more fully below.

Due to its nature, then, the Board is not entitled to assert immunity from suit in the state court under the doctrine of sovereign immunity. Mt. Healthy City School District Board of Education v. Doyle, supra; Unified School District No. 480 v. Epperson, 551 F.2d 254 (10th Cir. 1977).

The Martin holding that no statutory waiver exists is also inapplicable to local school boards in Kentucky. KRS 273.171(2) is similar to a statute which controls boards of education: KRS 160.160 also contains the "sue and be sued" language. KRS 273.171(2) applies generally to non-stock, non-profit corporations; KRS 160.160, however, applies specifically and exclusively to school boards. The rationale in Martin was that only the legislature could waive sovereign immunity, and that it had not done so in the case of the University. However, the legislative intent could not be clearer regarding school boards: KRS 160.160 applies to no other entity besides local boards of education.

The most conclusive reason that Martin does not control local school boards of education is that a local board of education is not covered by the Board of Claims Act. The Court of Appeals made it very clear in Martin that the Board of Claims did present at least one avenue by which a plaintiff could obtain relief against the Unviversity, or against any other state agency which was cloaked in sovereign immunity. That avenue, however, is simply not available with local boards of education.

In order to use the Board of Claims Act, one must have a contract with the Commonwealth. KRS 44.270. "Commonwealth" is defined to mean the Commonwealth of Kentucky and any of its departments or agencies. KRS

44.260(1). "Agency" excludes counties and municipal corporations and districts which are limited geographically to local functions, as are local boards of education. KRS 293.020(1). Further, the definition of "department" also appears to exclude local boards of education. KRS 12.010 (1)(a). A "department" in Kentucky is on a much higher level. For example, the State Department of Education is a "department." KRS 12.020.

Because a local board of education is not a state agency or department, it cannot be sued under the Board of Claims Act, and similarly it is not even entitled to claim the doctrine of sovereign immunity in the first place. Therefore, Martin is applicable in this instance.

By enacting KRS 160.160, the Kentucky legislature has waived whatever sovereign immunity the Board might otherwise enjoy. Even if sovereign immunity did protect the Board, the waiver in KRS 160.160 means that the Board cannot claim the defense of sovereign immunity in order to escape from being assessed damages.

Even if this Court should find that the Board enjoys sovereign immunity and that KRS 160.160 does not completely strip the Board of that sovereign immunity, the doctrine cannot totally protect the Board from liability.

In Watkins v. Department of Highways, 290 S.W.2d 28 (Ky. 1956), the Kentucky Court of Appeals cautioned:

> While this [fact that sovereign immunity can be raised by state agencies] may generally be true, it has been recognized that a certain class of action may be brought against an agency of the state government even though not expressly authorized by the legislature. If the suit is to compel the performance of a ministerial duty by a state agency, it is not a suit against the state within the scope of sovereign immunity. In this latter category is an action to compel a state agency to perform a contract legally entered into.

Id. at 29 (citations omitted.)

"[The Kentucky Court of Appeals, now the Kentucky Supreme Court,] has consistently held that actions may be maintained to compel state officers or agencies to perform a duty imposed upon them by law or to refrain from doing something that the law directs them not to do and that such actions are not regarded as actions against the state." City of Louisville v. Martin, 144 S.W.2d 1034, 1036 (Ky. 1940). Because this action falls within the latter category, it is not a suit against the state.

The doctrine of sovereign immunity cannot totally absolve the defendants. The Board cannot claim sovereign immunity; the Board is not a state agency, and even if it were, the Kentucky legislature has, by statute, allowed the

Board to be sued. But even if this Court finds sovereign immunity could protect the Board, the Board still is liable for the plaintiff's damages because this suit is not one "against the sovereign."

Counsel for plaintiff is aware of Knott County Board of Education v. Mullins, 553 S.W.2d 852 (Ky.App. 1977), in which the Kentucky Court of Appeals held the doctrine of sovereign immunity protected a board of education from suit. However, on closer examination of Knott County Board of Education v. Mullins, the cases which it cites, and their predecessors, it is clear that school boards are immune from suit only in tort actions. See, e.g., Smiley v. Hart County Board of Education, 518 S.W.2d 785 (1974); Copley v. Board of Education of Hopkins County, 466 S.W.2d 952 (Ky. 1971); Cullinan v. Jefferson County, 418 S.W.2d 407 (Ky. 1967); Thacker v. Pike County Board of Education, 193 S.W.2d 409 (1946); and Wallace v. Laurel County Board of Education, 153 S.W.2d 915 (1941) (making the distinction between tort actions and other cases.)

Further clarifying the distinction between tort actions against a local school board in Kentucky and other actions are cases which have been maintained against local boards of education in Kentucky, outside the torts area. See, e.g., Scott v. Campbell County Board of Education, 618 S.W.2d 589 (Ky.App. 1981) (a 42 U.S.C. § 1983 action);

Carpenter v. Board of Education of Owsley County, 582 S.W.2d 645 (Ky. 1979); Phillips v. Board of Education of Muhlenberg County, 580 S.W.2d 730 (Ky.App. 1979); and Cook v. Board of Education of Carter County, 576 S.W.2d 270 (Ky.App. 1979). All of these actions which have been permitted against school boards in Kentucky occurred after the decisions in Knott County Board of Education v. Mullins and University of Louisville v. Martin, both supra.

Section 231 of the Kentucky Constitution directs that the legislature shall specify how and in what manner suits against the State shall be brought. Even assuming that local boards of education are, for this purpose, "the state," the legislature has so specified in KRS 160.160, which indicates that boards of education may sue and be sued. Thus, under this statute and the cases cited above, state sovereign immunity does not protect local boards of education outside the torts area, and state boards of education specifically are not protected in § 1983 actions in state courts. Scott v. Campbell County Board of Education, supra.

3. Qualified Immunity (Good Faith Immunity)

The final type of immunity relating to school boards is a common law immunity known as "qualified immunity" which extends to school board members. Wood v. Strickland, 420 U.S. 308 (1976). This is a limited immunity best viewed as a "behavioral immunity." Certain behavior is given a

qualified protection in order that public officials be able to carry out their discretionary duties expeditiously.

The actions of Superintendent Burkich and the Board members do not fall within this qualified immunity announced in Strickland. In Harlow v. Fitzgerald, 102 S.Ct. 2727 (1982), the United States Supreme Court ruled that a government official sued for civil rights violations is entitled to "qualified" or "good faith" immunity if his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The rights of public employees under the First Amendment have long been clearly established. Moreover, KRS 161.162 explicitly prohibits discrimination against Kentucky public school employees on the basis of political preference. The individual defendants should be charged with the knowledge that it is unlawful to deprive one of public employment on the basis of exercising First Amendment rights. The defense of "qualified" or "good faith" immunity simply is unavailable in this case.

(B) STANDING

Plaintiff Banks has standing to bring this § 1983 action, contrary to defendants' claims.

To establish standing under Title 42 U.S.C. § 1983, a plaintiff msut allege he suffered or will suffer injury in fact; furthermore, he must seek to protect an interest

arguably within the zone of interest protected by the statute in question. Citizens Council on Human Relations v. Buffalo Yacht Club, 438 F.Supp 316 (W.D.N.Y. 1977). The test for standing is whether the plaintiff has such a personal stake in the outcome of the controversy to warrant his invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf. Warth v. Seldin, 422 U.S. 490 (1975). Therefore, a cause of action under § 1983 is to be maintained by the person injured. Jones v. Hildebrant, 550 P.2d 339 (Colo. 1976), cert. gr., 429 U.S. 1961 (1977); cert. dism'd, 432 U.S. 183 (1977).

Under the law enunciated above, plaintiff Banks most certainly has standing. In his complaint, he has alleged that he has suffered injury in fact. Citizens Council on Human Relations v. Buffalo Yacht Club, supra. He has been denied promotion to or reinstatement in the job of DPP he formerly held. He also is seeking to protect his first amendment rights -- an interest within the zone of interest protected by the statute in question, 42 U.S.C. § 1983. Citizens Council on Human Relations v. Buffalo Yacht Club, supra. Additionally, Banks has a personal stake in the outcome of this case which warrants the federal court's jurisdiction and justifies it ordering a remedy on his behalf. Warth v. Seldin, supra. He has been denied an

employment position within the school system because of his First Amendment activity. The cause of action in this case is further being maintained by the injured party, the party denied the position. Jones v. Hildebrant, supra.

Thus Banks meets the test for standing under 42 U.S.C. § 1983

(C) EXHAUSTION OF STATE REMEDIES, SUBSTANTIAL FEDERAL QUESTION AND PENDENT JURISDICTION

Plaintiff Banks is not required to exhaust his state remedies as defendants have alleged in their Answer. The United States Supreme Court has made it clear that state judicial remedies need not be exhausted before a suit is filed under 42 U.S.C. § 1983. Ellis v. Dyson, 421 U.S. 426, 432 (1975); Steffel v. Thompson, 415 U.S. 452, 472-73 (1974).

Furthermore, contrary to the defendants' claim, a substantial federal question is involved in the case at bar and other questions based on state law claims may be decided by the Court based on its pendent jurisdiction.

Pendent jurisdiction may be invoked where (1) a federal claim asserted by the plaintiff has sufficient substance to confer subject matter jurisdiction on the court, (2) state and federal claims "derive from a common nucleus of operative facts," and (3) claims are such that the plaintiff "would ordinarily be expected to try them in one

judicial proceeding." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). The federal court has power to hear all the claims based on "considerations of judicial economy, convenience, and fairness to the litigants." Id. at 726. Furthermore, where defendants are already parties in a federal court suit based on Fourteenth Amendment claims under Title 28 U.S.C. § 1331 and Title 42 U.S.C. § 1983, the district court should not decline to exercise pendent jurisdiction on other claims based on the same facts. Culp v. Devlin, 437 F.Supp. 20 (E.D. Pa. 1977).

In the present case, there is a substantial federal question sufficient to confer subject matter jurisdiction on the court as required by Gibbs. The First Amendment question gives this power to the Court. The state and federal claims also derive from a common nucleus of operative facts in that all the claims arise from the defendants' action in failing to place Banks in the position of DPP when the job again came open. Too, Banks would expect to try this case in one judicial proceeding. Gibbs. In fact, since all the claims arose from the one incident, Banks might even be required to bring the claims together. Even if not required to do so, a great deal of judicial time would be wasted in two courts listening to the same testimony to determine the state and federal claims. Judicial economy, convenience and fairness to the litigants would be fostered by pursuing the case in one court.

Id.

Since the defendants are already parties under Fourteenth Amendment claims, the court should not decline acceptance of the pendent claims since a substantial federal question exists. Culp v. Devlin, supra.

(D) ABSTENTION

The defendants have claimed as well that this Court should abstain from hearing this case until the issue is decided in the state courts. However, at this point, all state court actions involving these parties have been finalized. The Kentucky Court of Appeals issued its opinion in April 1983 ordering that Banks be paid the difference in salary he earned as principal for 1981-82 and what he would have earned had he remained as DPP. Banks v. Letcher County Board of Education, 648 S.W.2d 542 (Ky. App. 1983). Therefore, there is not an earlier case to which this Court should abstain. All issues presently before this Court have arisen since the earlier suit was tried.

Additionally, this Court should accept pendent jurisdiction, as discussed above, rather than abstaining until state law questions are decided. Plaintiff agrees that a federal court may abstain if a state court issue is involved. Reetz v. Bozanich, 397 U.S. 82 (1970). However, the federal claim is still "reserved" for the federal court only. Id. Also, an adverse determination

in state court on the state claim would not be res judicata of the federal claim. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964). Thus, the federal court would not be saving judicial time by abstaining but would only prolong and duplicate litigation for these parties.

In cases brought under 42 U.S.C. § 1983 actions, abstention is generally not favored. Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974). The federal court is to abstain, in its discretion, when an unresolved question of state law exists which only the state courts can authoritatively construe. Conover v. Montemuro, 477 F.2d 1073 (3rd Cir. 1972). No such unresolved question exists in the case at bar.

Furthermore, it has been held that abstention is not justified in a teacher's civil rights case where one issue is a state court claim of "arbitrary action." Drexler v. Southwest Dubois School Corp. 504 F.2d 836 (7th Cir. 1974). The Drexler court determined the case should not be sent back to state court for a decision on the state claim of arbitrariness before the federal court would consider the plaintiff's First Amendment claim.

Similarly, abstention is unwarranted where a plaintiff claims the First, Fifth and Fourteenth Amendments were violated when the defendants fail to show state law

issues raised in the complaint dominate or special circumstances exist requiring deferral to local resolution of issues. Mabey v. Reagan, 376 F.Supp. 216 (N.D. Cal. 1974), rev'd on other grounds, 537 F.2d 1036 (9th Cir. 1976).

Under the above standards, this Court should not abstain in Banks's case. His federal claim predominates the suit, and no unresolved state issues exist to be determined.

(E) COLLATERAL ESTOPPEL

The plaintiff is not collaterally estopped from bringing this action due to prior state court action. Prior state court action among these parties did not involve the claim raised in this suit. In fact, the claim brought here did not exist at the time of the state court trial.

Plaintiff realizes that a federal claim litigated in state court action cannot be relitigated in a subsequent 42 U.S.C. § 1983 suit unless the state failed to provide a full and fair hearing. Allen v. McCurry, 449 U.S. 90 (1980). However, a court is to deny a claim of res judicata and/or collateral estoppel where the cause of action alleged by the plaintiff in the instant case was not an issue raised or determined in prior litigation. Glover v. New York, 401 F.Supp. 632 (E.D.N.Y. 1975), modified 446 F.S. 110.

In the present case, Banks contests the failure of the defendants to place him in the DPP position when it became available in November 1982. The former litigation between these parties was heard by the Letcher Circuit Court in 1981 and decided by that Court in early 1982. Thus, the cause of action alleged by Banks was not an issue raised or

determined in prior litigation. Glover, supra. In fact, said incident had not occurred at the time of trial or trial court decision in the earlier suit. Defendants' claim of collateral estoppel should thereby be dismissed.

(F) STATUTE OF LIMITATIONS

Plaintiff's action is not barred by the statute of limitations as claimed by defendants.

The United States Supreme Court stated in Board of Regents v. Tomanio, 446 U.S. 478 (1980) that in a 42 U.S.C. § 1983 action, a federal court must apply the analogous state statute of limitations. This has been recently applied in the Eastern District of Kentcky in a 42 U.S.C. § 1983 action in Hines v. Board of Education of Covington, 492 F.Supp 469 (E.D.Ky. 1980). Therefore, the Kentucky statute of limitation most analogous to a civil rights action would control. Id. Said statute of limitation would be no less than one year from the date of accrual. KRS Chap. 13.

Although state law determines the statute to apply, the time of accrual is a question of federal law. Lavellee v. Listi, 611 F.2d 1129 (8th Cir. 1980); Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975). Said time of accrual of a civil rights action is when the plaintiff knows or has reason to know of the injury which is the basis of the action. Cox v. Stanton, supra.

In the present case, the action occurred on November 24, 1982, when defendants hired another person in the position of DPP. Id. The suit was filed by plaintiff on February 10, 1983. Thus, applying Kentucky law, no statute of limitations would have run to prevent this action.

Respectfully submitted,

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Telephone: (606) 233-3366

BY: Arthur L. Brooks by JVF
ARTHUR L. BROOKS

BY: Jane V. Fitzpatrick
JANE V. FITZPATRICK

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing memorandum was mailed, postage prepaid, to Hon. Forrest Cook, Cook & Wright, 118 Hays Street, P.O. Box 909, Whitesburg, Kentucky 41858 and Hon. James W. Craft, 104 Webb Avenue, Whitesburg, Kentucky 41858, attorneys for defendants, on this 17th day of June, 1983.

Jane V. Fitzpatrick
JANE V. FITZPATRICK

Work file
Billy Banks

Pursuant to 42 U. S. C. 1988, plaintiff has moved for an allowance of attorney fees. The action in which the legal services were rendered was a 42 U. S. C. 1983 action against a governmental entity, Letcher County Board of Education, its officers and employees, superintendent and board members in an official and individual capacity.

A finding of a ~~constitutional~~ violation of plaintiff's constitutional rights was made. The violation ~~xw~~ was by reason of the actions of the superintendant and two board members in an individual capacity. It was determined these actions were in bad faith. Compensatory damages and punitive damages were allowed by reason of such acts. It was determined that the board of education as an entity and the remaining two board members concurred in the acts but that ~~thex~~ their acts were in good faith. ~~Compensatory~~ Compensatory damages were allowed by reason of these acts. (The compensatory damages allowed were the same compensatory damages previously named the liability for same was jointly against the superintendant, the Board and its members) No finding of baith faith and/or punitive damages were were given against the board and the remaining members.

What is troubling the court is the allowance of compensatory damages, the additional travel against he board as a governmental entity.

— Travel — ?

- Mileage
- Meals
- Lodging
- Parking

Photocopies (4pgs) 25.12

Typing (2pgs) 12.57

Exhibits (9pgs) 2.02

Cantrell v. Vickers
524 F Supp 512

Brooks

Appendix "A"

1st page - 27.80 hrs — 10%

2nd Page - 0.1C.

3rd Page - 0.1C

Fitzpatrick.

1st page - 0.1C.
2nd Page - 0.1C
3rd Page - 0.1C.
4th Page - 0.1C
5th Page - 0.1C.
6th Page - 0.1C.
7th Page - 0.1C
8th Page - 0.1C
9th Page - 0.1C
10th Page - 0.1C

Appendix "B"

Expenses

Copies of depositions (xs) 213.95

Transcript of proceedings (yes) 14.55

Witness fees (yes) 242.40

Telephone (yes) 100.22

50 1/2 hrs in Court at rate of 180.00.
to Collect $6,000 ?
thought it was 100 in Court

Al - 100
Jan - 80

40 hours dilatory tactics -

$242.50 - failure of Supt to appear at deposition

Costs in State Action

Costs in Federal Action

1981 - notified not to be hired as PPP for 81-2 year

Feb 82 - Fletcher Cir Ct upheld

April 83 - - Ct of appeals reversed

Nov. 82 - another person hired.

Thus is an action vs. a state or local governmental official in an official [redacted] and in individual capacity but against a state or local entity.

Thus is an action vs. ① a state or local government entity ② a state a local governmental official in an official capacity ③ a state or local governmental official in a private capacity.

Relief as granted vs. ① Entity

② official in official capacity and official in a private capacity.

Reduced by 10% to account for duplication of efforts by attorneys.

10 Hutcher - 593 F 2d 49
northcross v. Bd of Ed - 611 F 2d 624
Rothchild - 678 F 2d 658

10% Wesenberger - 593 F 2d 54 N-12
10% Oliver - 576 F 2d 714

5% Northcross.

See Kendall v Bd of Ed
627 F 2d 1.
6 CD 1980

Martin County Bd of Ed
v

Pennhurst State Sch. & Hosp
v. Halderman
1984.
79 L Ed 2d 67
104 S. Ct. 900

Judge's copy

Eastern District of Kentucky
FILED
DEC 12 1984
AT PIKEVILLE
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

PIKEVILLE DIVISION

Civil Action No. 83-53)
)
)
BILLY K. BANKS,)
)
PLAINTIFF,)
)
)
)
VS:) DEFENDANT'S REPLY BRIEF
)
)
)
JACK M. BURKICH, ET AL,)
)
DEFENDANTS.)

§ § § § §

INTRODUCTION

This brief is submitted on behalf of the Letcher County School Board in reply to Plaintiff's brief (received by this Defendant November 12, 1984).

STATEMENT OF POINTS AND AUTHORITIES

REINSTATEMENT IS NOT AN APPROPRIATE REMEDY IN THIS CASE.

Federal Cases:

Pickering v. Board of Education of Township High School, 391 U. S. 563 (1968) 3,4

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) 4

Equal Employment Opportunity Com. v. Kallir, Philip, Ross, Inc. (1976, DC NY) 420 F. Supp. 919, affd without op. (CA2) 559 F.2d 1203 4

Vant Hul v. Dell Rapids (DC SD) 462 F. Supp. 828 5

Wangsness v. Watertown School Dist. (1982 DC SD) 541 F.Supp. 332 6

U. S. Statutes:

42 U.S.C. §1983 3,4

42 U.S.C. §2000e 3,4

Kentucky Statutes:

K.R.S. 159.120 4

K.R.S. 159.140(8) 4

K.R.S. 161.765 6

STATEMENT OF FACTS

Defendant accepts the statement of facts recited in Plaintiff's brief, but adds:

(1) the uncontroverted proof at trial was that the Plaintiff is performing well in his present position as principal at Kingdom Come Elementary School, and that Larry Ison is doing a superior job as Director of Pupil Personnel;

(2) The job of Director of Pupil Personnel (DPP) requires a close working relationship between the Superintendent and the employee;

(3) The personal relationships between Plaintiff Banks and Jack Burkich have deteriorated during this litigation;

(4) Reinstatement will result in a surplus of DPPs.

ARGUMENT

UNDER THE FACTS OF THIS CASE REINSTATEMENT IS NOT AN APPROPRIATE REMEDY.

Although this court does possess the discretion, under 42 U.S.C. §§ 1983 and 2000e, to order reinstatement, it is abundantly clear that the decision is discretionary and the equities include consideration of the public interest. The Supreme Court in Pickering v. Board of Education of Township High School, 391 U.S. 563 (1968), took great pains to point out that the interests of the public employer in responsibly and effectively providing its service. Although our immediate fact situation is not specifically addressed in the context of the opinion, footnote 3, at 571, is notable for the following:

> It is possible to conceive of some positions of public employment in which the need for confidentiality is so great that even completely correct public statements might furnish a permissble ground for dismissal. Likewise, positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criti-

> cism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined.

The Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), also recognized the principle referred to by Pickering, i.e., striking a balance between the interests of the citizen and those of the state in the efficiency of public service, et cetera.

The working relationship between the Director of Pupil Personnel and the Superintendent of a local school district is just such a relationship as the Supreme Court referred to at footnote 3 of the Pickering decision. Under Kentucky law, the DPP reports directly to the Superintendent, the office of the DPP is to be located in the Superintendent's office (K.R.S. 159.120), and the records required by law (K.R.S. 159.140(8)) must be kept in the Superintendent's office. It is therefore obvious that the DPP must, in order to carry out the tasks required by law, and by good management, interact closely with the Superintendent and that both parties must be willing and able to work together, in harmony. It is obvious from the testimony at trial that the relationship between Mr. Burkich and Mr. Banks has deteriorated significantly, and as indicated by the testimony of several credible witnesses it is predictable that their personal differences will continue.

Interpreting 42 U.S.C. §2000e, the court in Equal Employment Opportunity Com. v. Kallir, Philips, Ross, Inc., (1976, DC NY) 420 F. Supp. 919, aff'd without op. (CA2) (559 F.2d 1203, under comparable circumstances, declined to rein-

state the Defendant to her former position with the employer because of the hostility which had arisen between the parties during the litigation. The court pointed out that the job from which the employee was discharged required a close working relationship between the employee and top executives of the Defendant agency, as well as frequent personal contact with the clients, and that a lack of complete trust and confidence between the employee and the agency could lead to misunderstandings, misrepresentations, and mistakes, and could seriously damage the agency's relationship with its clients. Finding that after three and one-half (3 1/2) years of bitter litigation the necessary trust and confidence would never exist between the employee and the agency, the court concluded that to order reinstatement would merely be to sow the seeds of future litigation and to unduly burden the agency.

Similarly, the court in Vant Hul v. Dell Rapids (DC SD) 462 F. Supp. 828, the court refused reinstatement where there was substantial friction between the employee and employer, and the nature of the job placed them in a close working relationship.

It is obvious from the standpoint of promoting an orderly and efficient administration of the schools it would be counterproductive to move Mr. Banks from the comparable position of principal to that of Director of Pupil Personnel. A second major consideration however is that to do so leaves us with three (3) Directors of Pupil Personnel, with state funds for

two (2) positions only. It was argued at this trial that the school board, in 1981, could have used local funds to pay for the second director's position even though state funding existed for only one (1) Director of Pupil Personnel. Of course that argument can be made anew, however presuming for the sake of argument that the Board is of the opinion that two (2) positions are adequate, and that continued state funding of the second position remains tenuous. Therefore, the Fair Demotion of Administrator's Act (K.R.S. 161.765) dictates that a due process hearing be held, and that the rather circuitious process of resolving grievances be renewed.

Under somewhat similar circumstances, in Wangsness v. Watertown School Dist. (1982, DC SD) 541 F. Supp. 332, a school teacher who was wrongfully discharged for exercising religious beliefs was not reinstated when it would result in dismissal of one fully tenured teacher.

The wisdom of rejecting reinstatement as an appropriate remedy is immediately apparent when we consider the result. If Larry Ison, a tenured administrator, remains as DPP, the Board is called upon to spend an additional $30,000.00 from local funds, and if he is displaced, the Board may be confronted with the expense and time involvement of further litigation. Absent reinstatement, Mr. Banks has his monetary damages as per the court's decision of October 10, 1984, and his comparable position of principal of the Kingdom Come Elementary School.

CONCLUSION

As indicated by the foregoing, it is apparent the public interest in efficient administration of the schools is best served by denial of the Plaintiff's request for reinstatement.

COUNSEL FOR DEFENDANT, LETCHER COUNTY BOARD OF EDUCATION

COOK, WRIGHT & TAYLOR

BY: Forrest E. Cook

FORREST E. COOK
P. O. Box 909
Whitesburg, KY 41858
(606) 633-9351

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Defendant's Reply Brief was mailed, postage prepaid, on this 10th day of December, 1984, to Hon. Arthur Brooks and Hon. Jane Fitzpatrick, 183 North Upper Street, Lexington, KY 40507, and Hon. James W. Craft, P. O. Box 786, Whitesburg, KY 41858.

Forrest E. Cook

COUNSEL FOR DEFENDANT, LETCHER COUNTY BOARD OF EDUCATION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

PIKEVILLE DIVISION

Civil Action No. 83-53	)	
	)	
	)	
BILLY K. BANKS,	)	
	)	
PLAINTIFF,	)	
	)	
	)	
	)	
VS:	)	A P P E N D I X
	)	
	)	
	)	
JACK M. BURKICH, ET AL,	)	
	)	
DEFENDANTS.	)	

§ § § § §

K.R.S. 159.120 . . . . . A-1

K.R.S. 159.140(8) A-1

K.R.S. 161.765 . . . . . A-2

expense of its directors of pupil personnel and assistants incurred in its district.

HISTORY: 1956 c 237, § 4, eff. 5-18-56
KS 4434-6

CROSS REFERENCES

School funds and expenditures, 68 Am Jur 2d, Schools § 85 to 108

---

192 Ky 690, 234 SW 292 (1921), Com v Meeks. Indictment under this section failed to negative the exceptions; it was demurrable.

159.120 Office quarters of directors of pupil personnel

The office of the superintendent of schools shall be the office of the director of pupil personnel and suitable space shall be provided therein or adjacent thereto for him.

HISTORY: 1956 c 237, § 4, eff. 5-18-56
KS 4434-7

1955 OAG 35,912. The attendance officer must take care of all records which shall be in the office of the superintendent or adjacent thereto. Neither the circuit court clerk nor the county clerk has any official duties in regard thereto.

159.130 Powers of directors of pupil personnel

The director of pupil personnel and his assistants shall be vested with the powers of peace officers, provided, however, that they shall not have the authority to serve warrants. They may investigate in their district any case of nonattendance at school of any child of compulsory school age or suspected of being of that age. They may take such action in accordance with law as the superintendent directs. They may under the direction of the superintendent of schools and the board of education or the state board for elementary and secondary education institute proceedings against any person violating any provisions of the laws relating to compulsory attendance and the employment of children. They may enter all places where children are employed and do whatever is necessary to enforce the laws relating to compulsory attendance and employment of children of compulsory school age. No person shall refuse to permit or in any way interfere with the entrance therein of a director of pupil personnel or in any way interfere with any investigation therein.

HISTORY: 1978 S 289, § 82, eff. 6-17-78
1956 c 237, § 5; 1946 c 30; KS 4434-12, 4434-13

Penalty, 159.990(1) to (3)

CROSS REFERENCES

Child labor, Ch 339

Powers and duties of administrative officers, 68 Am Jur 2d, Schools § 50 to 52

Truant or attendance officer's liability for assault and battery or false imprisonment, 62 ALR2d 1328

---

298 Ky 74, 182 SW(2d) 24 (1944), Bernard v Humble. Position of school attendance officer is public office. It is office created by law for fixed term; appointee is required to take oath of office and is invested with certain portions of functions of government to be exercised for public benefit.

OAG 77-514. The director of pupil personnel, under the direction of the superintendent of schools, the local board of education, or the state board of education, is authorized to institute proceedings against any person violating any provisions of the laws relating to compulsory attendance and willful failure to comply with the compulsory attendance laws. A violator is punishable by a fine. It is possible to charge the parent or legal guardian with the misdemeanor of unlawful transaction with a minor if a situation of habitual truancy of the child develops.

1956 OAG 38,882. It would depend upon the facts and situation in which the attendance officer finds himself before it could be determined whether he was authorized to carry a concealed deadly weapon for his own protection in the discharge of his duties.

1955 OAG 37,726. Truant officer does not have the authority to serve warrants on parents or children violating the attendance laws of schools.

159.140 Duties of directors of pupil personnel

The director of pupil personnel shall:

(1) Devote his entire time to the duties of his office;

(2) Enforce the compulsory attendance and census laws in the attendance district which he serves;

(3) Acquaint the school with the home conditions of the child, and the home with the work and advantages of the school;

(4) Ascertain the causes of irregular attendance and truancy, and seek the elimination of these causes;

(5) Secure the enrollment in school of all children who should be enrolled and keep all enrolled children in reasonably regular attendance;

(6) Visit the homes of children who are absent from school or who are reported to be in need of books, clothing or parental care;

(7) Ascertain and report to the superintendent of schools in the district in which the child resides the number and cost of books and school supplies needed by any child whose parent, guardian or custodian does not have sufficient income to furnish the child with the necessary books and school supplies;

(8) Keep the records and make the reports that are required by law, by regulation of the state board for elementary and secondary education, and by the superintendent and board of education.

HISTORY: 1978 S 289, § 82, eff. 6-17-78
1956 c 237, § 6; KS 4434-6, 4434-8 to 4434-10

Penalty, 159.990(2)

CROSS REFERENCES

Powers and duties of administrative officers, 68 Am Jur 2d, Schools § 50 to 52

Truant or attendance officer's liability for assault and battery or false imprisonment, 62 ALR2d 1328

---

299 SW(2d) 626 (Ky 1957), Bd of Ed of London v Miller. One person cannot be both a clerk and an attendance officer.

298 Ky 74, 182 SW(2d) 24 (1944), Bernard v Humble. Position of school attendance officer is public office. It is office created by law for fixed term; appointee is required to take oath of office and is invested with certain portions of functions of government to be exercised for public benefit.

161.765 Procedures for demotion of administrative personnel; appeal

(1) A local board of education may demote an administrator who has not completed three years of administrative service, not including leave granted under KRS 161.770, by approving the superintendent's recommendation for demotion and by complying with the requirements of KRS 161.760.

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

(a) If the superintendent recommends to the board of education that an administrator be demoted, the board shall note the recommendation and take no action. Within five (5) days of receipt of the recommendation, the board shall give written notice of the recommendation to the administrator. If the administrator wishes to contest the recommended demotion, he shall, within ten days of receipt of the board's notice, file a written statement of such intent to contest with the superintendent. If the administrator does not make timely filing of his statement of intent to contest, the board may take action on the superintendent's recommendation and such action shall be final.

(b) Upon receipt of the notice of intent to contest the demotion, a written statement of grounds for demotion, signed by the superintendent and board chairman, shall be served on the administrator. Said statement shall contain:

1. A specific and complete statement of grounds upon which the proposed demotion is based, including, where appropriate, dates, times, names, places and circumstances;

2. The date, time and place for a hearing, said date to be not less than twenty (20) nor more than thirty (30) days from the date of service of the statement of grounds for demotion upon the administrator.

(c) Upon receipt of the statement of grounds for demotion the administrator shall, within ten (10) days, file a written (10) answer. Failure to file such answer, within the stated period, will relieve the board of any further obligation to hold a hearing and it may then act on the superintendent's recommendation for demotion. The board shall issue such subpoenas as are requested.

(d) The hearing on the demotion shall be public or private, at the discretion of the administrator and shall be limited to the matters set forth in the written statement of grounds for demotion. The board shall provide to the administrator a verbatim transcript of the hearing. The board of education shall hear the case, with the board chairman presiding. The board, upon hearing the evidence and argument presented, shall retire to private chambers to arrive at a decision. Counsel or representatives for either party in the hearing shall not be consulted by the board unless the corresponding counsel or representatives for the other party are present and unless a verbatim transcript of such consultation is made for the record.

(e) Within five (5) days from the close of the hearing, the board of education shall advise the parties of its decision and shall take official action in the case.

(f) Appeal from final board action may be taken in the same manner and under the same provisions as an appeal from board action under KRS 161.790.

HISTORY: 1974 S 250, § 2, eff. 6-21-74.

CROSS REFERENCES

Resignation or removal of administrative officers, 68 Am Jur 2d, Schools § 42

superintendant. Plaintiff presented evidence that when the position was abolished he was promised by some members of the school board that they would vote for him if and when the position was reestablished. The plaintiff subequently filed an action against the board for placing him in a less comparable position and engaged in political activity against several members of the board. The reestablishment of the position was the genesis of this civil action.

The court accepts the finding of the jury that the plaintiff did not receive equal consideration and treatment by the superintendant because of their past political differences

21 April 1982

~~applications were~~

a

applications were accepted for the position in July 1982, interviews were held the position was reinstated and filed on 24 Nov 1982.

the jury is instructed that this is a multi-defendant action that is, there are more than 1 defend.

1:30

issues 1st Controversy
< 2nd Controversy

Billy K Banks

intent >

Principal at Lenefork
Certified

1964 – Began teaching in Whitesburg.
– Principal 1 yr
– " Fleming-Neon 2 yrs
1976 – Director of P.P.
Why attendance important
1981 – involuntarily left DPP.

D.P.P. – 5 years he was second D.P.P.

Rank 1 + 10 years experience
worked 12 months a year

lives – 2 miles from Whitesburg

1st placed in Letcher Grade School
14 miles from home
Before he began teaching he was placed in Kingdom Come School

II 1a–T – pictures of Kingdom Come Rd.

II 2

1550 - 82
1550 - 83
$1550 - 84.

} difference in pay
DPP - Principal

Travel

30 miles per day travel.
6.00 per day
225 days
$1350

Π Ex 3. (82 - 83)

Π Ex 4. (83 - 84)

Π Ex 50 (84 - 85)

Salary schedules.

effect
stays awake
~~gained~~ weighed
nervous

Wants to return

Cross – (Cook)

Cut as Superintendent
principal

82-83 – 24 Nov 82 to 30 June

$1550 approximate difference
caculation

C

83-84 – 11 1/4 months
hasn't made Cacul

84-85 –
hasn't made Caculation
as through to days date

Bd members put him in Central office.
3 Bd members did not elect him as Supt. in 1976
He worked in Election vs. them.
they abolished D p P. He sued them
they elected someone else & He sued them.
strict land - 420 U.S. 308

Harlow v. Fitzgerald
102 S Ct 2727.
457 US 800

159.080
Sub (1)

~~do~~
qualified in would be def.

a govt official must be shown to

~~ia g~~
a plaintiff must show that a govt official performing a discretionary act must violate clearly established slw

Ricky Flemming

Physical Therapy Helper

Knows Lucille Holbrook

In 1982 —

asked Lucille - who could he work for

She said Frank Wright

He handed out cards

ps by Lucille.

Daniel Isaacs

Self employed

Retail Lumber

In 1982 —

Bob Olson

asked how Frank Wright would do in his Area

He said, "Frank good man, ought to support him!"

John M. Bastolo

5 miles from Jenkins
Letcher Co Bd of Ed
Band Director

Fall 82
Discussed Election W/ Supt

"They say you are against us."

Frank Wright
I said, "I'm for you but
against Frank Wright

Carl Banks
Health Admr.

Always active in School Races

Write in Campaign
Billy worked with him

in opposition to Bob Ison

Ray Young Back

on Bd which appointed
Supt. Ray Burkich

On Bd when Banks first appointed

1st time Abolition.
Burkich brought up subject matter
reasons not sufficient funds to
pay 2nd official.
166 units fell below

Back
Lewis } agreed if came open
Wright again would give him
priority

Burkich - said if came open he
would recommend him for position.

Banks filed legal action

2nd time.
He and Lewis asked
Burkich to recommend -
reason "Could not work" with man

Nov 82

Larry Ison
Banks Chairman of Bd
3 - yes.
2 - No - He & Lewis

Wright didn't say why he changed vote.

LETCO
Advisory Counsel

Burkich didn't make any statement or give any reason for or against Billy Banks or Larry Ison

Jost said ready to make recommendation

Ison - made mention of Banks filing legal action.

Deputation of Tom Lewis

Bd member Ison said he would vote for anyone other than Billy Banks — He would not vote for Lewis.

Wright —

Atwill Turner
Kona, Key
Teacher.
16 yrs in Letcher Co. Key

President of Teacher Org

Burkich - ready to make recommendations.

3 Bd members
Bob Ison - whoever Supt
Recommend -
not for
Burkich!
" Banks performance after was
such he could not work w/him - "
Just couldn't work w/him
Jury must interpret this as to
Supt.

TT 'Ex

Tape
Side 2 —
Beginning
Few minutes to identify.

(1)
10 →
~~[illegible]~~
218 →
275 →
300 → Meeting was held
350 Persons recommended Banks
400

Duplications garbled

1/10 → Introductory remarks
10 →
288 → deleted
424 - End →
deleted
435 →
476 → - delete

(2) 495 → Recommendations
558 →

Irene Banks
wife of Billy K. Banks

depression
grippe
moody
sleeping is disturbed

didn't
increased appetite

beginning in 1982 (Nov)
to present time.

defendants, Ind.
1983.
What evidence of Malice.

619—606.

An official, such as the ~~school~~ ~~B members of the Letcher Co School~~ defendants herein

An individual School Board

The jury finds by a preponderance of the evidence, at the times and places contained therein, ~~the constitutional rights of the plaintiff Billy K Banks were violated by the Letcher County Board of Education by the collective acts of the ~~its~~ members~~

that ~~not~~ while the members of the Letcher County Bd of Education are not individually liable for the Acts of the Board their representative Acts as such members

Jordan vs: Edelman.

414 US 1301 - Stay of Lower at Paragraphs 5 & 6.
415 US 651
(1973)

A suit by private party seeking to impose a liability payable from public funds (in the state treasury) is foreclosed by the 11th Amendment if the state does not consent.

Young is prospective only but may allow is classified as equitable rest.
Back payments - equitable restitution"

XXX

377 US 218
Griffin v. School Bd.

1983 action subject to 11th Amendment

427 - 319

Moon v County of Alameda
411 U.S. 693

Cunningham v. Grayson
541 F2 538

School Bd is a body politic and Corporate may sue and be sued

Is this waiver of 11th Amendment to School Bds - 77

It was waiver as to Atty fees but does it go beyond

Shepperdinge

Harkless vs Sweeny Ind School District
427 F2d 319
5 CA. 1970

Back pay is equity.
School district may be sued under 1973.
Affirmed by implication —
xxx Cunningham v. Grayson.
541 F2d 538
(6 CA 1976)

School Bd
Reg. KRS 160.160

However, School Bd not
liable on Voting individually
if the member did not know

619 F 2d 606
6 CA 1980
Huckman v. Valley Local

9th Ct of Appeals

Immunity set forth there
in Huckman as to individuals
in Official Capacity—

X My problem is Cunningham
says a Ky School Bd ~~is~~ is, by
Statute, a body Corporate with power
to be Sued . . .
see also Moor v. County of Alameda
411 US 693
(1973)

Judge's Copy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION
CIVIL ACTION NO. 83-53

Eastern District of Kentucky
FILED
APR 10 1985
AT LEXINGTON
LESLIE G. WHITMER
CLERK, U.S. DISTRICT COURT

BILLY K. BANKS,

PLAINTIFF

VS.

JACK M. BURKICH, et al.

DEFENDANTS

Please give extra copy to the Judge. Thanks.

RESPONSE BY
ALS TO MOTION
NEY'S FEES

Comes the plaintiff, Billy K. Banks, by and through counsel, and hereby replies to the responsive brief filed on behalf of the individual defendants opposing plaintiff's request for attorney fees.

FACTS

The facts have been set forth in plaintiff's original brief and affidavits.

I. PLAINTIFF IS ENTITLED TO RECOVER ATTORNEY FEES EVEN THOUGH THE COURT FAILED TO GRANT HIM REINSTATEMENT.

The individual defendants have alleged that Billy Banks is not entitled to attorney's fees since the Court did not order him reassigned as Director of Pupil Personnel (DPP) as he requested. This same argument was made by the defendant Board of Education of Letcher County (hereinafter

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DEFENDANTS

REPLY TO RESPONSE BY INDIVIDUALS TO MOTION FOR ATTORNEY'S FEES

* * * * * * *

Comes the plaintiff, Billy K. Banks, by and through counsel, and hereby replies to the responsive brief filed on behalf of the individual defendants opposing plaintiff's request for attorney fees.

FACTS

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Please give
extra copy
to the Judge.
Thanks.

"Board") in its response. Plaintiff replied to said argument on pages 6-8 of his brief in reply to the Board's response and hereby refers the Court to that pleading.

In short form, however, plaintiff will reiterate that the defendants have misinterpreted Hensley v. Eckerhart, 76 L.Ed.2d 40 (1983). Plaintiff is entitled to fees as he prevailed on all claims he made even though he did not receive all relief requested. Furthermore, it has been held that the amount of the damage award is not determinative; in fact, the Sixth Circuit has refused to foreclose fees when only nominal damages were awarded. Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983); Kinney v. Rothchild, 678 F.2d 658 (6th Cir. 1982).

II. PLAINTIFF'S COUNSEL HAVE NOT REQUESTED FEES FOR TIME SPENT IN A LETCHER CIRCUIT COURT CASE NOR REQUESTED FEES FOR THOSE ALREADY REIMBURSED BY DEFENDANTS.

Defendants' counsel has alleged that plaintiff's attorneys have requested this Court to grant fees for time spent litigating in the Letcher Circuit Court to obtain the tape recording used as evidence in this case. Furthermore, he has alleged counsel has requested fees for time already reimbursed by defendants on an agreed order for sanctions. Plaintiff's counsel vehemently deny these allegations.

First, plaintiff's counsel took great pains in reviewing each daily time ticket to see that no time attributable to the Letcher Circuit Court case was included in the request for fees although there is some authority for doing

same. If such time and expense had been included, the fee requested for plaintiff's counsel would have been several thousands of dollars more.

Additionally, an examination of the record in this case reveals that defendants' counsel was given full credit for the $242.50 he paid to plaintiff's counsel. Plaintiff filed a motion for sanctions when defendant Burkich failed to appear for deposition. By agreement of the parties, the defendants reimbursed plaintiff $242.50 toward attorney's fees, travel and court reporter fee for that day. Plaintiff credited defendants with $25.00 on the Bill of Costs submitted to the Court on February 7, 1985. The balance ($217.50) was credited to defendants at the end of the itemization for total expenses requested as part of plaintiff's attorney's fees request. Thus, defendants' allegations are wholly unfounded.

III. PLAINTIFF'S SUIT WAS A VINDICATION OF HIS CONSTITUTIONAL RIGHTS GUARANTEED UNDER THE FIRST AMENDMENT AND 42 U.S.C. §1983 AND WAS NOT A PRIVATE TORT ACTION OF SUCH DESIGN AS TO DENY REIMBURSEMENT OF ATTORNEY'S FEES.

The individual defendants have alleged, as did the Board, that plaintiff's lawsuit was a private tort action in which he is not entitled to recover attorney's fees. Plaintiff has responded in full to the argument on pages 5 and 6 of his reply to the Board's response to the attorney's fees request. Plaintiff hereby refers the Court to his reply brief.

CONCLUSION

For the above-stated reasons and those set forth in his application for attorney's fees and his reply to the Board's response, plaintiff requests this Court to award plaintiff fees and expenses as requested as well as prospective fees from January 1, 1985.

BROOKS, COFFMAN & FITZPATRICK

BY: Arthur L. Brooks

ARTHUR L. BROOKS

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Telephone: (606) 233-3366

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Reply to Response by Individuals to Motion for Attorney's Fees was mailed, postage prepaid, to Hon. James W. Craft, Polly, Craft, Asher & Smallwood, P. O. Box 786, Whitesburg, KY, 41858; and Hon. Forrest Cook, P. O. Box 909, Whitesburg, KY, 41858, attorneys for defendants, on this 10th day of April, 1985.

Jane V. Fitzpatrick

JANE V. FITZPATRICK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 83-53

BILLY K. BANKS PLAINTIFF,

VS: MEMORANDUM OPINION AND ORDER

JACK M. BURKICH, et al DEFENDANTS.

* * * * * * * * *

The evidence reflects that plaintiff, Billy K. Banks, had been employed as a teacher and administrator in the Letcher County, Kentucky, School System by defendant, Board of Education of Letcher County, Kentucky. The defendant, Jack M. Burkich, has been the superintendent of the schools at all times relative to this action. The defendants, Bobby Joe Ison, Lucille Holbrook and Frank Wright, were members of the board at all times relevant to this action. There are other members of the Board of Education who individually are not parties to this action; the defendant, Frank Wright, is no longer a member of such board. Ison and Holbrook are current members of the board.

During the 1980-81 school year, plaintiff Banks served as second director of pupil personnel. The board determined by reason of lack of funds, failure of a grant, it was unable to continue the position. On 25 April 1981, plaintiff was notified that he was relieved of his DPP duties and assigned as a classroom teacher for year 1981-82 resulting in a salary loss.

Plaintiff contested the transfer and salary loss in state court proceedings and the Kentucky court of Appeals in reversing the lower court held the board failed to give a procedural required statutory notice. Banks v. Board of Education of Letcher County, Kentucky, 648 S.W. 2nd 542 (Ky. App. 1983). The appellate court declined to address

the termination of the position or whether the transfer was the result of purely aribitrary action by the board. It remanded the matter to the lower court with directions to reinstate the plaintiff as second director of pupil personnel, or to a comparable administrative position without loss of pay, or for the difference of salary he received as principal and classroom teacher. The board declined to fill the position and paid the plaintiff his salary loss.

The following budget year, 1982-83, the board received the necessary funds and announced that it would reinstate and fill the position of second director of pupil personnel. The plaintiff and others applied for this position. The superintendent recommended an applicant other than plaintiff which recommendation was approved by the board of education. The plaintiff filed this Title 42 U.S.C. 1983 action for violation of his constitutional rights.

The plaintiff perceives the issue to be the plaintiff's right to the reinstated position of second director of pupil personnel because some of the members of the board of education promised that, when and if it was reinstated, they would vote for him for the position.

This court does not perceive nor find that the issue is such. The Court finds that for the budget year 1981-82, because of the lack of funds the position was terminated. This finding is supported by the board of education paying the plaintiff his salary loss and the plaintiff accepting same. Moreover, this was a less expensive settlement for both parties.

When the position was reinstated and the plaintiff made application therefor, he had a constitutional right to be considered <u>for</u> the position but did not have a constitutional right <u>to</u> the position. Consequently, the fundamental issue was whether the superintendent of schools violated plaintiff's constitutional rights in considering the applicants for the position. Kentucky Revised Statutes, 160.370-380. This issue is reflected in the court's instruction to the jury, Interrogatory No. 1.

The court accepts the finding of the advisory jury that the defendant, superintendent of schools, withheld his recommendation of the plaintiff because of past political differences. Such finding does not destroy the clean hands doctrine of equity.

If ecclesiastical principles were followed neither party could have been the first to cast a stone.

The court accepts the finding of the advisory jury that had there been no past political differences the superintendent of schools would have recommended the plaintiff. This finding, while a step in the process of filling the vacant position KRS 160.370-380, does not establish the plaintiff's right to such position. Its purpose and finding is to establish that defendant's action was a substantial factor.

The court accepts the finding of the advisory jury that defendant, board member Bobby Joe Ison, had knowledge of the defendant, superintendent of schools, withhholding such recommendation and the purpose therefor. The court finds that there isn't sufficient evidence to support a finding that board members Frank Wright and Lucille Holbrook had such knowledge and declines to accept the finding of the advisory jury with regard to these defendants.

The court accepts the finding of the advisory jury that the defendants, superintendent of schools, and board member Bobby Joe Ison acted with malicious intent to cause a deprivation of constitutional rights to the plaintiff.

The court accepts the finding of the advisory jury that the Letcher County Board of Education, in a representative capacity, approved the recommendation of the superintendent, which was based upon constitutionally impermissive reasons. Therefore, may be held for atty fees but not for the 3,000 damage item

The court accepts the finding of the advisory jury that as a direct and proximate result of defendants acts the plaintiff incurred travel expense in the sum of Two Thousand ($2000) Dollars; the plaintiff suffered mental anguish and emotional distress in the sum of One Thousand ($1000) Dollars; the plaintiff is awarded punitive damages in the sum of Three Thousand ($3000) Dollars against the defendants, Bobby Joe Ison and Jack M. Burkich.

The plaintiff, in addition to the award of compensatory and punitive damages requests the court to grant him the following equitable relief: (a) to order the defendants to discharge the present second director of pupil personnel, and (b) to order the defendant,

superintendent of schools, to recommend the plaintiff for such position, and (c) order the Letcher County Board of Education, jointly and individually, to approve such recommendation and place the plaintiff in such position.

The court isn't convinced that it has such equiable powers. If it did have such power the court finds that such requested action would be inappropriate.

The individual presently serving as second director of pupil personnel wasn't a party to this action. The fact that plaintiff's constitutional rights were violated does not negate the fact that the Kentucky Statutory procedures were followed with regard to the employment of the present second director of pupil personnel. Plaintiff's requested relief would require acts by this court contrary to Kentucky law and the constitutional rights of the individual presently occupying the position. The chilling effect, if any, to the enforcement of civil rights cannot outweigh the educational problems of the peoples of Letcher County, Kentucky. These parties and their political differences are not resolved by this legal action. A compulsory future personal relationship such as superintendent and second director of pupil personnel will merely add to the problem rather than aid in the solution.

Judgment will be entered pursuant to this Memorandum Opinion and Order.

This 9th day of January, 1985.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 83-53

BILLY K. BANKS PLAINTIFF,

VS: **JUDGMENT**

JACK M. BURKICH, et al DEFENDANTS.

* * * * * * * * *

This action came on for trial before the court with an advisory jury. The action is a multiple party action with multiple issues. All issues of all the parties have been duly tried and a memorandum opinion containing a finding of fact and conclusions of law has been filed. Pursuant to same,

IT IS ORDERED AND ADJUDGED:

That the plaintiff, Billy K. Banks, recover of the defendants, Jack M. Burkich, Bobby Joe Ison and the Letcher County Board of Education, jointly and severally, compensatory damages in the sum of Three Thousand ($3000) Dollars with interest thereon at the rate of 9.08 percent as provided by law;

That the plaintiff, Billy K. Banks, further recover of the defendants, Jack M. Burkich and Bobby Joe Ison, jointly and severally, punitive damages in the sum of Three Thousand ($3000) Dollars with interest thereon at the rate of 9.08 percent as provided by law;

That the plaintiff, Billy K. Banks, recover of the defendants, Jack M. Burkich, Bobby Joe Ison and the Letcher County Board of Education, jointly and severally, his costs of action.

THIS IS A **FINAL JUDGMENT.**

This 9th day of January, 1985.

G. WIX UNTHANK, JUDGE

Office file

Banks
v.
Jack Burkich
Letcher Co Bd of
Ed

Jack Burkich

Cert to be Supt for 10 yrs

Fall 1957
principal of Whitesburg High

1979
Supt of Bd of Ed

5 applicants for Supt
Ritter
Caudill
Herbly
Burkich
Banks

1 July 1979 date act of
Bd in May 1979

2 Asst Supt
1. Bldg & Grounds
1. Const & Finance

2 Directors of Pupil personnel

5400 students in Letcher Co
280 Teachers
300 Uncert employees

Supt is also Sec to Bd

~~ma~~
Bd may not approve eventually it goes to State Bd of Ed.

5 members of Bd of Ed

Recommend 2nd position be abolished - lack of funding less students - verified fewer than 166 units

Teacher position was open he recommend transfer on a temporary basis - didn't spend any time there

had to use local funds to supplement

Banks applied for opening at
1. Cowan - principal
2. Kingdom - principal
3. Lunch Room director
4. Social director
5. Fleming neon - not certain of this
6. Basketball Coach - whitestone

81-82 - Kingdom Come principal.

Billy Stamper placed at Cowan as principal.

2nd time Director of Pupil personnel came open
it was — 9 months by State
2 months by local funds
11¼ months

Opening was advertised

3 applications received
Billy Banks - Principal KC.
Bobby Ison - Asst principal.
Truman - Holcomb - Asst principal

Holcomb w/drew his application
Supt. interviewed both applicants.

10 yrs maximum experience had by both
Ison has rank I plus 10 yrs
Banks " " " " "

Ison had program w/incentives
Banks program was negative

He recommended Ison

this School year DPP increased to 12 months and all paid by State

because of improvement in attendance

Director – 700
principal – 900 + Supervision of Students

Salary of Director – 15,701.44
(1) next 82-[illegible] [illegible]
Salary of princ $15,708.39
principal + 6.95 more

(2) 1983-84
Director 26,802.00
principal 27,011.00
principal + 309.00

(3) this year to date
240 days in year
84-85

Cross

supportive of Jacile
Bobby
Wright.

had Conversation w/ Billy
Banks —

Bd meeting at Colson

1st time public notice
of abolishing P.P.P.

Only reason financial.

Looking ~~after~~ after textbooks
extra duties given to Bank as
P.P.P.
wasn't given to Ison

81-82 - No director of P.P.
would have recommended

82-83

Travel expense

no [illegible] value

Given

6.
225 days
$1350.00

He and Banks worked together for 10 years at Whitesboro

But this changed after Burkich was elected Supt.

Lewis on Bach had made promises to Banks

Ison and Holbrook weren't titled in direction against Banks doesn't know reason.

Ison would vote either way

after June Bank would get Cattey

6 v 3 F 2d 1155

Picketing balancing test

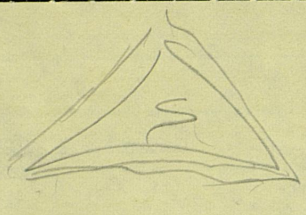
the Court must balance
(1) the interest of the ∏
vs.
(2) the interest of the △

in promoting the efficiency of the public services it performs through its employees.

(1) was the Conduct disruptive of School operations?

(2) Did it arouse intense animosity among Co workers

(3) Was there otherwise such flagrant and notorious misconduct



Bobby Joe Tison:

Lucille Holbrook

no political opposition by Billy K.

Threshold - objective

Under Harlow by pleading
a Π must show ~~[illegible]~~ that
~~[illegible]~~ an official performing a discretionary
act violated
Clearly established statutory
or Const rights of which a
reasonable person would have known.

Objective standard as well known
Not entitled to judicial immunity
Subjective standard

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 83-53

BILLY K. BANKS PLAINTIFF,

VS: **ORDER**

JACK M. BURKICH, et al DEFENDANTS.

* * * * * * * * * * *

All responsive pleadings having been filed, the above-styled action is hereby set for preliminary conference to be held in the Courtroom of the United States Courthouse, Pikeville, Kentucky, on the 1st day of July, 1983, at the hour of 10:30 A.M..

On or before the 17th day of June, 1983, each party shall prepare and file with the Court a preliminary trial memorandum as set forth by standing order of this Court, dated the 22nd day of September, 1980, a copy of which is attached hereto.

The Court suggests the presence of both party and counsel at the preliminary conference, but same is not mandatory if inconvenient to the party.

Failure to comply with the terms of this order will result in appropriate sanctions.

ORDERED this 25th day of April, 1983.

G. Wix Unthank

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

CIVIL ACTION NO. 83-53

BILLY K. BANKS, PLAINTIFF,

VS. ORDER

JACK M. BURKICH, ET AL, DEFENDANTS.

* * * *

The plaintiff has moved the Court for sanctions against defendant Jack M. Burkich for failure to attend own deposition, as well as for an order compelling discovery, pursuant to Rule 37(d), FRCP. Said defendant has filed no response or objection to plaintiff's motions. The Court being duly advised,

IT IS HEREBY ORDERED, as follows:

1. Plaintiff's motion to compel discovery, pursuant to Rule 37(a) and (d), is GRANTED. Defendant, Jack M. Burkich, is ordered to appear at the office of plaintiff's attorney, Arthur L. Brooks, 183 North Upper Street, Lexington, Kentucky, to give his deposition herein, at a date and time that is convenient to plaintiff and his attorney.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

CIVIL ACTION NO. 83-53

BILLY K. BANKS, PLAINTIFF,

VS. ORDER

JACK M. BURKICH, ET AL, DEFENDANTS.

* * * *

The plaintiff has moved the Court for sanctions against defendant Jack M. Burkich for failure to attend own deposition, as well as for an order compelling discovery, pursuant to Rule 37(d), FRCP. Said defendant has filed no response or objection to plaintiff's motions. The Court being duly advised,

IT IS HEREBY ORDERED, as follows:

1. Plaintiff's motion to compel discovery, pursuant to Rule 37(a) and (d), is GRANTED. Defendant, Jack M. Burkich, is ordered to appear at the office of plaintiff's attorney, Arthur L. Brooks, 183 North Upper Street, Lexington, Kentucky, to give his deposition herein, at a date and time that is convenient to plaintiff and his attorney.

2. Plaintiff shall provide said defendant reasonable notice of the date and time of deposition, pursuant to Rule 30 of the Federal Rules of Civil Procedure.

3. Plaintiff's motion for sanctions, including attorney's fees, is TAKEN UNDER ADVISEMENT until the preliminary conference herein.

This the 25th day of April, 1983.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

CIVIL ACTION NO. 83-53

BILLY K. BANKS, PLAINTIFF,

VS. ORDER

JACK M. BURKICH, ET AL, DEFENDANTS.

* * * *

The defendants, Jack M. Burkich, Frank Wright, Bobby Joe Ison, and Lucille Holbrook, by counsel, having moved the Court for an extension of time of 30 days from and after March 3, 1983 in which to file their answer herein, on the grounds that their attorney needs additional time for investigation and research to prepare said answer, the plaintiff having responded to said defendants' motion and objected to any extension of time, requesting the Court to require the remaining defendants to immediately answer the complaint, and the Court being duly advised,

IT IS HEREBY ORDERED, as follows:

1. The motion of the defendants, Jack M. Burkich, Frank Wright, Bobby Joe Ison, and Lucille Holbrook, for an extension of time in which to file their answer is SUSTAINED. Plaintiff's response to said motion is well-taken by the

Court; however, in the interest of fairness to all parties hereto, the Court can see no harm to any of the parties by granting an extension of time to file defendants' answer.

2. Said defendants are given to and including March 31, 1983 in which to file their answer herein.

This the 16th day of March, 1983.

G. WIX UNTHANK, JUDGE

Judge's Copy

FILED JUN 17 1983

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

PIKEVILLE DIVISION

Civil Action No. 83-53

BILLY K. BANKS,

PLAINTIFF,

VS:

JACK M. BURKICH, individually and as Superintendent of the Letcher County Schools; FRANK WRIGHT, BOBBY JOE ISON, and LUCILLE HOLBROOK, Individually and in their official capacities, respectively, as members of the Board of Education of Letcher County, Kentucky, and the BOARD OF EDUCATION OF LETCHER COUNTY, KENTUCKY, a corporate entity,

DEFENDANTS.

PRELIMINARY CONFERENCE

MEMORANDUM

§ § § § §

I. JURISDICTION OF THE COURT

In this action Plaintiff alleges violation of his civil rights under 42 U.S.C. §1983 and the First and Fourteenth Amendments to the U. S. Constitution. Under 28 U.S.C. §1343(3), this court has original jurisdiction to hear claims arising under U.S.C. §1983. Under U.S.C. §1331 and 1343, this court has jurisdiction to hear claims arising under the First and Fourteenth Amendments. The Plaintiff alleges damages in excess of Ten Thousand Dollars ($10,000.00).

II. KIND OF ACTION

This is an action to redress alleged violation of the Plaintiff's civil rights under U.S.C. §1983. Plaintiff alleges violation of his First and Fourteenth Amendment rights. He seeks injunctive, compensatory and punitive relief. The Supreme Court in, Carey vs. Piphus, 435 U.S. 247 (1978), interprets §1983 actions as federal tort actions, designed to compensate injured plaintiffs for deprivations of their federal rights.

III. STATEMENT OF FACTS

The following facts are undisputed:

1. During the 1980-81 school year, the Appellant had been Director of Pupil Personnel for the Letcher County Board of Education for five (5) consecutive years. He was employed as an administrator and paid on the basis of twelve (12) months employment.

2. On April 24, 1981, the Board, acting through its chairman and secretary, informed the Appellant that pursuant to KRS 161.765, the Superintendent had recommended that he would be reassigned to classroom duty for the 1981-82 school year. Such letter indicated that although the Board noted the recommendation of the Superintendent, they had taken no action on it at that time.

3. Within ten (10) days of the receipt of the letter of April 24, 1981, the Appellant respondent in writing to the Board, advising it of his intention to contest the recommendation of the Superintendent with respect to his demotion for the 1981-82 school year.

4. By letter dated May 11, 1981, the Appellant was advised by the Superintendent and the Chairman of the Letcher County Board of Education of the basis and grounds for his demotion. Specifically, that letter stated that there would not be available funding in the 1981-82 year for an additional Director of Pupil Personnel, barring the availability of state funds. Additionally, such letter notified the Appellant that a formal hearing on his proposed demotion would be held on June 2, 1981.

5. On June 2, 1981, the Appellant, together with his counsel, appeared before the Board for a hearing on the proposed demotion. Subsequent to the presentation of proof by both the Appellant and counsel for the Board, and based upon lack of

funding for a second Director of Pupil Personnel and seniority, Plaintiff was reassigned to a position as classroom teacher for the 1981-82 school year, subject to an administrative position becoming available.

6. On June 12, 1981, the Appellant appealed to the Letcher Circuit Court pursuant to KRS 161.790(6).

7. In August of 1981, the Appellant was placed as the Principal of the Kingdom Come Elementary School for the 1981-82 school year. In this position, he received approximately One Thousand Five Hundred Dollars ($1500.00) less than he would have received as Director of Pupil Personnel. Correspondingly, Plaintiff works fewer days per year as principal of the Kingdom Come Elementary School than he worked in his position of Director of Pupil Personnel. (See Transcript of Evidence taken November 18, 1981, pp. 56-57).

8. In November of 1981, the Circuit Court, sitting without a jury, heard proof with respect to the Appellant's allegations that the Board's action was politically motivated and that the Appellant had openly opposed one of the members of the Board in his bid for re-election in the fall of 1980. The Circuit Court subsequently dismissed the appeal.

9. Plaintiff appealed the Circuit Court decision to the Kentucky Court of Appeals. In that appeal, Plaintiff argued: (1) that the Board had failed to complete action on his transfer or demotion prior to the May 15 deadline (mandated by KRS 161.760(2)

in order for reduction of pay for the subsequent school year to become effective); (2) that the grounds for his transfer or demotion were not as specific and complete as required by KRS 161.765(2)(b)(1); and (3) that his transfer was the result of purely arbitrary action by the Board.

10. The position of Director of Pupil Personnel, formerly held by Plaintiff, again became available for the 1982-83 school year. Pursuant to his duty to recommend individuals to fill administrative positions under KRS 413.140, the Letcher County Superintendent recommended Larry Ison to fill that position. At a hearing and special board meeting on November 24, 1982, the Board approved Larry Ison to fill the position of Director of Pupil Personnel.

11. On February 14, 1983, Plaintiff filed this action in Federal District Court. The Kentucky Court of Appeals reversed the Circuit Court's Judgment, April 15, 1983, because the Board had not completed its action by May 15 (see 9(1), supra), interpreting "notice" under KRS 161.760(2) to require Board approval, not notice of the Superintendent's recommendations. The Appellate Court did not address Plaintiff's remaining arguments. (See 9(2)-(3), supra).

DISPUTED QUESTION

The only issue in this case is the nature of the motivation for transferring Plaintiff. Plaintiff contends that

transfer or demotion was purely arbitrary action. However, the record shows that attendance for the 1981-82 school year that the school system lost funding for the second Director of Pupil Personnel. (T.R., pp. 266-270).

IV. ISSUE OF LAW (SUBSTANTIVE)

(ARBITRARINESS)

The Board transferred Mr. Banks in good faith and said transfer was based upon financial considerations and matching personnel with the best available position. Phillips vs. Board of Education of Muhlenberg County, Ky. App., 580 S.W.2d 730, recognized that the Superintendent and the Board of Education are vested with broad discretion in the administration of schools. Likewise, so long as they are not arbitrary or unreasonable, the grounds for the demotion of an administrator are left to the sound discretion of the local Superintendent and Board of Education. See Miller vs. Board of Education of Hardin County, Ky. App., 610 S.W.2d 935. The action taken by the Board was not arbitrary. The funding for Mr. Banks' position would not be available from the state for the 1981-82 school year. (T.R., pp. 80-82; pp. 266-270). The Board could not commit itself to funding the position from local funds, since at the time the recommendation was made, the Superintendent honestly believed that such funds would not be available or should be used elsewhere. According to Earle vs. Harrison County Board of Education, Ky. 404

S.W.2d 455, a Board must only act in good faith upon a sound, just and reasonable basis.

Mr. Banks failed to make an affirmative showing that, from all the evidence presented, the Board was not justified in its action. Only upon such a showing would the burden of justifying its action shift to the Board. Snapp vs. Deskins, Ky. 450 S.W.2d 246. The Court in Snapp, supra, determined that . . . "there must be a strong indication that the assignment was essentially based upon arbitrary considerations." Id., p. 252.

Any examination of the Board's actions must consider the mandate of Snapp, supra:

> . . . the strength of the inferences [of arbitrariness] is to be measured in light of the very broad discretionary authority necessarily vested in the Superintendent and Board of Education. Their decisions as to personal assignments are not lightly to be overruled on mere slight indications of arbitrariness.

Appellant admits that there was a legitimate reason for the Board's action, but claims that the primary motivation behind such action was related to Appellant's political affiliation and his opposition to a Board member in the election. This was not supported by the evidence. The primary motivation behind the Board's action was economic. Mr. Daryl Boggs, Assistant Superintendent, calculated average daily attendance, using alternative methods requested by Appellant's counsel, but the resulting classroom units did not change the projected loss of funds. (T.R. pp.

80-82). The money was not available to fund Mr. Banks' position for another year. Since he was the second person hired for the position of Director of Pupil Personnel, the Board gave preference to the individual who had greater seniority. The Board's good faith is evidenced by subsequent developments: (1) classroom units for the following year decreased, and state funding for a second Director of Pupil Personnel was lost (T.R., pp. 266-270), and (2) Mr. Banks was reassigned to a comparable administrative position. (T.R., pp. 216-217).

QUALIFED IMMUNITY

The Defendants in this action are not liable for §1983 damages. The Supreme Court has specifically recognized a qualified immunity on the part of school board members. Wood vs. Strickland, 420 U.S. 308 (1975). The Wood test of qualified immunity had two parts, objective and subjective. The Wood case involved student discipline. The majority opinion in Wood stated:

> A school board member is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the constitutional rights of the student affected, or if he took the action with malicious intention to cause a deprivation of constitutional rights ...

The Supreme Court has subsequently removed the subjective aspect of the Wood test, leaving only the objective branch. Now the reasonableness of the action as it impacts upon the settled con-

stitutional rights of the individual is the test for qualified immunity for state officials. Harlow vs. Fitzgerald, 102 S.Ct. _____, 1982.

Clearly, under the reasonableness test set out above, the Superintendent and Board members cannot be said to have acted in a manner which they knew or reasonably should have known violated Plaintiff's settled constitutional rights. Defendants were merely acting pursuant to their duties as set out under Kentucky state law.

Since the Ruling of the Ky Ct of appeals Parties will advise Ct of

NO CASE OR CONTROVERSY

Plaintiff's cause of action is no longer justiciable. As the Kentucky Court of Appeals has already ordered that Plaintiff be reinstated as Director of Pupil Personnel for the 1981-82 school year, or to a comparable position without loss of pay; or that he recover the difference between what he earned as Principal of Kingdom Come Elementary School and what he would have earned as Director of Pupil Personnel, Plaintiff's cause of action is moot. (See decision of Kentucky Court of Appeals). The Supreme Court has held that dismissal is required where there is no longer any live dispute between the parties. Hall vs. Beals, 396 U.S. 45 (1969). There is no longer a case or controversy here as Plaintiff has already been accorded relief in the Kentucky State Courts. ????

If arbitrary - 14th amendment no problem

If 1st Amend. Viol - problem - May there be addln. damages ??

INJUNCTIVE RELIEF

An additional justiciability bar presented here is that Plaintiff has no standing to obtain injunctive relief. Before a federal court issues injunctive relief of any kind, it must determine that the legal remedy is inadequate even if available. Dobbs, Law of Remedies, 108 et seq. (1973). The Supreme Court now insists upon the existence of injury in fact, i.e., the court requires that a litigant show that the requisite injunctive relief would make a practical difference if granted. Warth vs. Seldon, 422 U.S. 490 (1975). The Plaintiff in this action has already been accorded relief in state court. Furthermore, Plaintiff has sustained no injury in fact. The record shows that Plaintiff was transferred to a position with the same base pay as he received as Director of Pupil Personnel. He merely works fewer days during the school year for correspondingly lower pay than he received as Director of Pupil Personnel. In fact, on a daily basis, Plaintiff received more pay as Principal of Kingdom Come Elementary School than he received as Director of Pupil Personnel. (T.R., pp. 239-248).

PUNITIVE DAMAGES

Plaintiff is not entitled to recover punitive damages in this action. The Supreme Court has held that punitive damages may not be awarded against local governments in §1983 actions. City of Newport vs. Fact Concerts, Inc., 101 S.Ct. 2748 (1981).

The Court there found that nothing in the history of §1983 suggests that Congress intended to abolish local government common law immunity from punitive damages.

Although cases awarding punitive damages against individuals in their capacity as government officials do exist, such cases often involve police officers who unnecessarily use deadly force and cause serious injury. On the other hand, courts have express concern with the effect of punitive damages on the willingness of persons to serve as school board members. This was a relevant factor in a Second Circuit case in which the Appellate Court affirmed the District Court's refusal to award punitive damages for a First Amendment violation. Stolberg vs. Members of Board of Trustees, 474 F.2d 485 (2d Cir. 1973).

ATTORNEY'S FEES

In Christiansberg Garment Co. vs. EEOC, 98 S.Ct. 694 (1978), the Supreme Court held that upon a finding that a Plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in bad faith, Defendants may be awarded attorney's fees in the court's decretion. Such an award is under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. §1988. Furthermore, Defendants are entitled to recover costs under 28 U.S.C. §§1920,1923.

V. ISSUES OF LAW (PROCEDURAL)

STATUTE OF LIMITATIONS

There is no federal statute of limitations applicable to §1983 actions. 42 U.S.C. §1988 requires that because of this deferring, state law must be applied where it does not discriminate against federal civil rights actions. Chambers vs. Omaha Pub. School District, 536 F.2d 222 (8th Cir. 1978). According to that case, statutes of limitations are discriminating when they single out federal causes of action for unduly short periods. The applicable statute of limitations for this action is one year under KRS 413.140.

The state action complained of herein was completed at the demotion hearing on June 2, 1981. The action herein was not filed until February 14, 1983. Therefore, this action is barred by the applicable Kentucky statute of limitations governing tort actions.

PENDENT JURISDICTION

Pendent jurisdiction is improperly involved in this action. This action arose out of alleged violations of state law, i.e., Plaintiff's transfer or demotion without proper procedures. In attacking his transfer within the school system, Plaintiff alleges no substantial federal claim. Therefore, Plaintiff has chosen an improper forum in which to litigate his state claim. A federal court only has jurisdiction to decide a state or federal claim over which federal courts would not

ordinarily have jurisdiction if such claims are joined with a substantial federal claim and derive from the same nucleus of perative fact as does the substantial federal claim. United Mine Workers vs. Gibbs, 383 U.S. 715 (1966).

CONCLUSION

The challenged action of the Board in transferring Plaintiff did not constitute arbitrary action under Kentucky law. Furthermore, under the current test for qualified immunity, the Board members are immune from damages under §1983.

In addition, this action should be dismissed as it is moot; Plaintiff has no standing to obtain injunctive relief; punitive damages may not be awarded against local governments; and it is against public policy to award punitive damages against individual school board members.

The Kentucky tort statute of limitations is applicable to this action, and that statute bars this action. Furthermore, Plaintiff has asserted no substantial federal question; and therefore, has improperly invoked pendent jurisdiction over his state law based challenges.

In light of the above, Defendants are entitled to attorney's fees and costs under applicable federal law cited herein.

Dated this 16th day of June, 1983.

Respectfully submitted,

COUNSEL FOR DEFENDANTS

COOK & WRIGHT

BY: Forrest E. Cook

FORREST E. COOK
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing Preliminary Conference Memorandum was mailed, postage prepaid, on this 16th day of June, 1983, to BROOKS, COFFMAN & FITZPATRICK, 183 North Upper Street, Lexington, Kentucky 40507, Counsel for Plaintiff, and to Hon. James W. Craft, POLLY, CRAFT, ASHER & SMALLWOOD, P. O. Box 786, Whitesburg, Kentucky 41858, Counsel for Defendants, Jack M. Burkich, Frank Wright, Bobby Joe Ison, and Lucille Holbrook, individually and in their official capacities, respectively, as Superintendent and members of the Board of Education of Letcher County, Kentucky.

Forrest E. Cook

COUNSEL FOR DEFENDANT, BOARD OF EDUCATION OF LETCHER COUNTY, KENTUCKY

(EDky-111)

CMEd

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

CIVIL MINUTES -- GENERAL

PIKEVILLE

Case No. 83-53 At PIKEVILLE Date July 1, 1983

Style BILLY K. BANKS VS: JACK M. BURKICH, individually and as Superintendent of the Letcher County Schools, ET AL

DOCKET ENTRY

PRESENT:

HON. G. WIX UNTHANK, JUDGE

M. Bevins
Deputy Clerk

S. Lindstrom
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Jane V. Fitzpatrick

ATTORNEYS PRESENT FOR DEFENDANTS:

Forrest E. Cook
James W. Craft

PROCEEDINGS: PRELIMINARY CONFERENCE

The matter was called for proceedings with counsel present as noted. The Court heard counsel and being sufficiently advised,

ORDERED HEREIN:

(1) Motion of plaintiff for sanctions for failure of Jack M. Burkich to attend deposition, for travel expenses, attorney fees and reporter fees, be, and hereby is, TAKEN UNDER ADVISEMENT;

(2) Motion of plaintiff to amend complaint, be, and hereby is, SUSTAINED. The tendered complaint, be, and hereby is, FILED as of the date of this order;

(3) Discovery and perpetuation of evidence by all parties shall be completed and filed with the Clerk on for before December 7, 1983;

(4) A pre-trial conference, be, and hereby is, set for Wednesday, February 1, 1984, at 11:00 A.M., in the United States Federal Courthouse, Pikeville, Kentucky;

(5) Upon the court's own motion, this matter shall be tried by an Advisory Jury;

(6) Trial, by Advisory Jury, be, and hereby is, set for Thursday, February 16, 1984, at 9:00 A.M., at the same locale as stated above.

IT IS FURTHER ORDERED

the clerk is directed to attach a copy of the standing pre-trial conference order, filed, as amended, on April 29, 1983, and Exhibit Order, filed April 29, 1982, to the distribution copy of this order for information of counsel.

This the 6th day of July, 1983.

Initials of Deputy Clerk MB

G. Wix Unthank

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

CIVIL ACTION NO. 83-53

BILLY K. BANKS, PLAINTIFF,

VS. MEMORANDUM OPINION AND ORDER

JACK M. BURKICH, ET AL., DEFENDANTS.

* * * *

Pursuant to the provisions of the Speedy Trial Act, 18 U.S.C. §3161, it was necessary to continue the pre-trial conference and advisory jury trial, scheduled during February of 1984, until the latter part of 1984. The advisory jury trial is now set for October 3, 1984, which is a delay of more than seven months.

Although the Court had no choice but to continue this matter, the Court has reviewed the record and finds there are several pending motions, outlined as follows:

1. At the preliminary conference, the Court took under advisement plaintiff's motion for sanctions against the defendant, Jack M. Burkich, due to his failure to attend his deposition, and for counsel's travel expenses for the wasted round-trip from Lexington to Whitesburg, Kentucky; for attorney's fees and court reporter fees.

2. Plaintiff moved the Court, pursuant to FRCP 37(a) and (d) to compel the individual defendants to answer the interrogatories propounded to them on November 7, 1983. The Court observes that plaintiff's motion was filed on December 20, 1983, and also encompassed a motion for sanctions and attorney's fees. As of this writing, the record reflects that only one of the individual defendants has responded to said interrogatories; the response of the defendant, Jack M. Burkich, was tendered to the Court on January 23, 1984, more than 75 days after being propounded to him.

3. Plaintiff also moved the Court to shorten the amount of time routinely allowed for a response to the motion to compel. Since this matter has been continued, plaintiff's motion is now moot.

4. The defendant, Board of Education of Letcher County, Kentucky, has moved the Court for summary judgment on the grounds that a Kentucky school board of education is not liable under 42 U.S.C. §1983, by reason of sovereign immunity against tort actions.

5. The defendants Jack M. Burkich, Bob Ison, Lucille Holbrook, and Frank Wright, have moved the Court to permit them to untimely file their answers to the plaintiff's interrogatories, propounded to them on November 7, 1983. Defendants' counsel advised the Court that the defendants' answers were tendered with their motion; however, the record

indicates that only the defendant, Jack M. Burkich, has answered said interrogatories. His response was tendered to the Court on January 23, 1984.

The Court is of the opinion that it would be in the best interests of all parties concerned to hear and dispose of, if possible, all of the foregoing motions prior to the pre-trial conference, which had to be continued until September 13, 1984. These motions should be heard before they become stale to the Court and to counsel.

Accordingly, the Court being duly advised,

IT IS HEREBY ORDERED, as follows:

1. Plaintiff's motion to shorten the time for the defendants to respond to plaintiff's motion to compel is PASSED, as it is now MOOT.

2. The motion of the individual defendants to file their answers to plaintiff's interrogatories is SUSTAINED, and the remaining defendants who have not responded to said interrogatories are given to and including March 1, 1984, to do so.

3. The response to interrogatories tendered to the Court on January 23, 1984, by defendant Jack M. Burkich is now FILED.

4. All remaining pending motions shall be heard on the 20th day of April, 1984, at the hour of 11:00 A.M.

This the 9th day of February, 1984.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 83-53

BILLY K. BANKS PLAINTIFF,

VS: **ORDER**

JACK M. BURKICH, et al DEFENDANTS.

* * * * * * * * *

The Court being sufficiently advised,

IT IS HEREBY ORDERED:

Because of the statutory preference assigned criminal actions by the Speedy Trial Act, 18 U.S.C. 3161, the pretrial conference set for the 1st day of February, 1984, is CONTINUED until the 13th day of September, 1984, at the hour of 9:00 A.M., and the advisory jury trial set for the 16th day of February, 1984, is CONTINUED until 3rd day of October, 1984, at the hour of 9:00 A.M. in the Courtroom of the United States Courthouse, Pikeville,
Kentucky.

This 24th day of January, 1984.

G. WIX UNTHANK, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE
CIVIL ACTION NO. 83-53

BILLY K. BANKS,	)	
	)	
Plaintiff	)	
	)	
VS.	)	AGREED ORDER
	)	
JACK M. BURKICH, et al.,	)	
	)	
Defendants	)	

* * * * * *

By agreement of the parties and the Court being sufficiently advised, IT IS HEREBY ORDERED that plaintiff be allowed up to and including December 19, 1983 in which to file depositions of defendants, Jack Burkich, Lucille Holbrook and Bobby Ison.

This 14th day of December, 1983.

JUDGE, UNITED STATES DISTRICT COURT

HAVE SEEN AND AGREED:

BROOKS, COFFMAN & FITZPATRICK

BY: Jane V. Fitzpatrick
JANE V. FITZPATRICK
ATTORNEY FOR PLAINTIFF

Forrest S. Cook
FORREST COOK
ATTORNEY FOR DEFENDANT, BOARD

James Wiley Craft
JAMES WILEY CRAFT
ATTORNEY FOR DEFENDANTS,
JACK BURKICH, LUCILLE
HOLBROOK AND BOBBY ISON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

PIKEVILLE

Civil Action No. 83-53

BILLY K. BANKS, PLAINTIFF,

VS: O R D E R

JACK M. BURKICH, et al, DEFENDANTS

Defendants Jack M. Burkich, Board of Education individual members, each individually and in their official capacities having filed out of time their answer to the amended complaint, and the court being sufficiently advised,

IT IS HEREBY ORDERED that same be FILED.

The 2nd day of August 1983.

G. WIX UNTHANK, JUDGE

Judge Unthank

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE
CIVIL ACTION NO. 83-53

BILLY K. BANKS,
PLAINTIFF

VS.

JACK M. BURKICH, et al.,
DEFENDANTS

PLAINTIFF'S TRIAL BRIEF

* * * * * *

This trial brief is submitted on behalf of plaintiff to supplement earlier memoranda and for use by the Court as a synopsis of previous lengthy arguments setting forth plaintiff's position.

STATEMENT OF POINTS AND AUTHORITIES

Page

A. THE DEFENDANTS' FAILURE TO REHIRE BANKS AS DPP WAS ACTION TAKEN TO RETALIATE AGAINST AND PUNISH HIM FOR HIS POLITICAL OPPOSITION TO DEFENDANTS, HIS PUBLIC STATEMENTS CRITICAL OF THE SCHOOL SYSTEM'S MANAGEMENT AND HIS SUCCESSFUL LAWSUIT AGAINST DEFENDANTS, ALL IN CONTRAVENTION OF CONSTITUTIONAL RIGHTS AND STATE LAW. 7

U. S. Constitution

First Amendment 8, 9, 10

Federal Cases

California Transport v. Trucking Unlimited, 404 U.S. 508 (1972) 10

Elrod v. Burns, 427 U.S. 347, 49 L.Ed.2d 547 (1976) 10

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 10

Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977) 8, 10

Perry v. Sindermann, 408 U.S. 593 (1972) 8

Pickering v. Board of Education, 391 U.S. 563 (1968) 10

Speiser v. Randall, 357 U.S. 513, 526 8

Columbus Education Association v. Columbus City School District, 623 F.2d 1155, 1159 (6th Cir. 1980) 9

Bueno v. Donna, 714 F.2d 484 (5th Cir. 1983) 10

Hickman v. Valley Local School District Board of Education, 619 F.2d 606, 608 (6th Cir. 1980) 9

Hildebrand v. Board of Trustees of Michigan State University, 662 F.2d 439 (6th Cir. 1981) 9, 10

Dause v. Bates, 369 F.Supp. 139 (E.D. Ky. 1973) 12

State Constitution

Kentucky Constitution §2 11

State Statutes

KRS 161.162 11

State Cases

Calhoun v. Cassady, 537 S.W.2d 806 (Ky. 1976) 11

City of Long Beach v. Bozek, 645 P.2d 137 (Cal. 1982), vacated on other grounds, 103 S.Ct. 712 (1983) 10

Harlan County Board of Education v. Stagnolia, 555 S.W.2d 828 (Ky. App. 1977) 11

Snapp v. Deskins, 450 S.W.2d 246 (Ky. 1970) 11, 12

B. PLAINTIFF BANKS IS ENTITLED TO REINSTATEMENT, BACK PAY, INTEREST, COMPENSATORY AND PUNITIVE DAMAGES AS WELL AS ATTORNEY'S FEES FROM DEFENDANTS 12

U. S. Statutes

42 U.S.C. §1983 13

42 U.S.C. §1988 13

U. S. Cases

Carey v. Piphas, 435 U.S. 247 (1978) 13

Bituminous Casualty Corporation v. Lynn, 503 F.2d 636 (6th Cir. 1974) 12

Harkless v. Sweeny Independent School District, 427 F.2d 319 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971) 12

McFerrin v. County Board of Education of Fayette County, Tennessee, 455 F.2d 199 (6th Cir. 1972), cert. denied, 497 U.S. 934 (1972) 12

Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979) 13

McNutt v. State Farm Mutual Auto Insurance Co., 369 F.Supp. 3871 (W.D. Ky. 1971) 12

State Cases

Clark v. Life and Casualty Insurance Co., 53 S.W.2d 968 (Ky. 1932) 12

Harrod v. Fraley, 289 S.W.2d 203 (Ky. 1956) 13

Secondary Authorities

22 Am. Jur., Damages, §§180-188 . . . . . 12, 13

FACTS

Plaintiff Billy K. Banks has been employed as a teacher and administrator in the Letcher County, Kentucky School System by defendant, Board of Education of Letcher County, Kentucky (hereinafter "Board.") Defendant Jack M. Burkich has been superintendent of the schools at all times relative to this action. Defendants Bobby Joe Ison, Lucille Holbrook, and Frank Wright were members of the Board at all times relevant to the Complaint. Defendant Wright was defeated in his race for re-election in November 1982 and left office in January 1983; Ison and Holbrook are current Board members.

During the 1980-81 school year, plaintiff Banks served as Director of Pupil Personnel (DPP), the same position he had held the four previous years, a position for which he had been employed and paid on the basis of twelve (12) months each school year.

By letter dated April 25, 1981, Banks was advised by the Board, through its chairman and secretary, that the Superintendent had recommended that Banks be relieved of his DPP duties and assigned as a classroom teacher for 1981-82 on the basis of nine and one-fourth (9-1/4) months resulting in a salary loss of approximately $6,000.00 per year.

On June 2, 1981, Banks appeared with counsel at the demotion hearing held to remove him as DPP. Following the hearing, the Board, upon the Superintendent's recommendation,

voted to demote Banks and place him in the classroom, reducing his salary accordingly. He appealed the decision pursuant to KRS 161.790(6) to the Letcher Circuit Court.

Following that appeal, defendants placed Banks as principal at Kingdom Come Elementary School for the 1981-82 school year where he received less salary than if he had remained as DPP. To date, Banks still retains that principalship.

On February 18, 1982, Letcher Circuit Court rendered its decision against Banks who then appealed to the Kentucky Court of Appeals which rendered a published opinion on April 15, 1983. Banks v. Board of Education of Letcher County, Kentucky, 648 S.W.2d 542 (Ky. App. 1983).

The Court of Appeals reversed the case holding that the Board failed to affirmatively act prior to May 15 to demote Banks and, therefore, failed to afford him the required statutory notice.

At the time of Banks' demotion and subsequently, the defendants have stated that plaintiff performed well as DPP and that if the position again became available, plaintiff would be reinstated.

The DPP position Banks formerly held once again become available in the school system for the 1982-83 school year. Plaintiff applied for the job. No action was taken to fill the position until Wednesday, November 24, 1982. At that tape recorded meeting, the Board entertained a recommendation from the defendant Superintendent to fill the DPP position. Prior to the formal recommendation and vote, the floor was

opened to a public discussion regarding hiring of personnel to fill the position.

Defendant Bobby Ison, who Banks openly opposed in Ison's bid for re-election to the Board in November 1980, stated that Banks should not be placed in the DPP position, since he had taken retaliation against the Board and sued them following the demotion.

Furthermore, the defendant Superintendent made known that Banks' actions following the demotion caused him not to recommend Banks as DPP. The Superintendent failed to recommend Banks due to Banks' appeal to the Letcher Circuit Court and the Kentucky Court of Appeals, as well as public comments Banks had made regarding general criticism of the Superintendent and school system. Banks also failed to politically support Board members favorable to the Superintendent.

The Superintendent made a recommendation to hire Larry Ison as DPP. Ison had no prior DPP experience. Bob Ison moved and defendant Lucille Holbrook seconded the motion to hire Larry Ison. The motion passed on a three-to-two vote with defendants Ison, Holbrook and Wright voting to hire Larry Ison and Board members Ray Back and Tom Lewis voting "no."

Not only has Banks sued the Board over his earlier demotion, but he has politically opposed and spoken openly against the defendants. In addition to the political opposition, Banks worked against Frank Wright in his unsuccessful bid for re-election in November of 1982.

Furthermore, defendant Lucille Holbrook has been politically aligned with the Superintendent and the other defendant Board members. Banks has opposed this faction and sued the Board on which they all sat as a result of the demotion.

Due to plaintiff's political opposition, statements and lawsuit, the defendants failed to hire plaintiff as DPP in November 1982. This failure to rehire or promote was in retaliation for plaintiff's actions to punish him thereby violating federal constitutional rights and state law.

III. STATEMENT OF ISSUES

1. WHETHER DEFENDANTS' FAILURE TO REHIRE BANKS AS DPP WAS RETALIATION FOR PLAINTIFF'S EXERCISE OF PROTECTED FIRST AMENDMENT ACTIVITIES.

2. WHETHER PLAINTIFF IS ENTITLED TO REINSTATEMENT WITH BACK WAGES AND INTEREST THEREON, COMPENSATORY AND PUNITIVE DAMAGES AS WELL AS ATTORNEY'S FEES.

IV. ARGUMENT

A. THE DEFENDANTS' FAILURE TO REHIRE BANKS AS DPP WAS ACTION TAKEN TO RETALIATE AGAINST AND PUNISH HIM FOR HIS POLITICAL OPPOSITION TO DEFENDANTS, HIS PUBLIC STATEMENTS CRITICAL OF THE SCHOOL SYSTEM'S MANAGEMENT AND HIS SUCCESSFUL LAWSUIT AGAINST DEFENDANTS, ALL IN CONTRAVENTION OF CONSTITUTIONAL RIGHTS AND STATE LAW.

Plaintiff's proof will show that Billy K. Banks actively politically opposed the individual Board members in their races for re-election or races of board members aligned

with them. Furthermore, Banks was publicly critical of the Superintendent's administration of the schools and additionally had successfully brought suit against defendants appealing his demotion from DPP in the spring of 1981. When the DPP position again became available for the 1982-83 school year, defendants failed to hire plaintiff for the position due to his actions set forth above.

The defendants in this case are prohibited from acting in retaliation for the exercise of the teacher's First Amendment rights. The Supreme Court explicitly set forth this principal in Perry v. Sindermann, 408 U.S. 593 (1972).

> For at least a quarter century, this court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not act. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest -- especially his interest in freedom of speech.
>
> For if the government could deny a benefit to a person because of his constitutionally protected speech or association, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which (it) could not command directly." Speiser v. Randall, 357 U.S. 513, 526. Such interference with constitutional rights is impermissible.

In Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 287 (1977), the Supreme Court outlined a three-part test to apply in claims by public employees that their First Amendment rights were abridged by adverse action of government

employees:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" -- or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to the respondent's reemployment even in the absence of protected conduct.

This test has been used by the Sixth Circuit in a number of cases involving claims by public employees that their employers penalized their exercises of First Amendment rights. See e.g., Hildebrand v. Board of Trustees of Michigan State University, 662 F.2d 439 (6th Cir. 1981); Columbus Education Association v. Columbus City School District, 623 F.2d 1155, 1159 (6th Cir. 1980); Hickman v. Valley Local School District Board of Education, 619 F.2d 606, 608 (6th Cir. 1980).

Thus, in the present case, plaintiff must show that his activities were constitutionally protected and that such activities were "motivating factors" in defendants' decision not to place him as DPP. Upon such proof, it then becomes the defendants' burden to show they would have reached the same decision even if plaintiff had not engaged in the protected activities.

It is clear that the United States Constitution provides First Amendment protection for Banks' actions. Filing a lawsuit to challenge his earlier demotion is protected activity under the First Amendment as a portion of the

right to petition the government for redress of grievances. California Transport v. Trucking Unlimited, 404 U.S. 508 (1972); City of Long Beach v. Bozek, 645 P.2d 137 (Cal. 1982), vacated on other grounds, 103 S.Ct. 712 (1983).

Similarly, plaintiff's actions in actively working in school board elections are protected First Amendment activities. The United States Supreme Court decided in Elrod v. Burns, 427 U.S. 347, 49 L.Ed. 2d 547 (1976), that employment cannot be denied due to one's political affiliation or alignment. See Bueno v. Donna, 714 F.2d 484 (5th Cir. 1983).

Furthermore, plaintiff's criticism of the school's administration is protected speech activity. Pickering v. Board of Education, 391 U.S. 563 (1968).

Plaintiff's proof will show that the protected activities set forth above were the "substantial factors" or "motivating factors" in the defendants' decision not to rehire plaintiff as DPP. Hildebrand v. Board of Trustees of Michigan State University, 662 F.2d 439 (6th Cir. 1981).

Once the plaintiff has borne the above burden, defendants will be required to show that they would have taken the same action even if plaintiff had not engaged in protected activity. Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977); Hildebrand v. Board of Trustees of Michigan State University, supra. Based on the facts set forth above and those in the record of this case, there exist no factors other than plaintiff's protected

activities to justify his not being rehired as DPP.

The actions of defendants have further violated Kentucky law. KRS 161.162 states:

> No teacher or employee of any district board of education shall be appointed or promoted to, or demoted or dismissed from, any position or in any way favored or discriminated against with respect to employment because of his political . . . opinions or affiliations.

Furthermore, Section 2 of the Kentucky Constitution provides, "Absolute and arbitrary power over the lives, liberty and property of freeman exists nowhere in a republic, not even in the largest majority." In applying the facts in the present case to state law, it is obvious defendants' actions have violated both KRS 161.162 and Section 2.

Both of Kentucky's appellate court levels have determined that decisions made regarding one's employment in the school district based on one's politics clearly establishes arbitrariness and therefore such decisions are void. Calhoun v. Cassady, 537 S.W.2d 806 (Ky. 1976); Harlan County Board of Education v. Stagnolia, 555 S.W.2d 828 (Ky. App. 1977).

Additionally, the Kentucky Supreme Court has held that personnel assignments in a school system may not be made in an arbitrary manner. Snapp v. Deskins, 450 S.W.2d 246 (Ky. 1970). All the plaintiff need do is show an inference of arbitrariness in the making of job assignments by the superintendent for the burden to shift to the superintendent and Board to rebut the inference of arbitrariness. Harlan County Board of Education v. Stagnolia, supra. Such inference of

arbitrariness is sufficient to void the personnel action. Snapp v. Deskins, supra.

Dause v. Bates, 369 F.Supp. 139 (E.D. Ky. 1973), concluded that where school employees have no previous complaints in their personnel records and where reasons for adverse action is not fortified by specific proof of professional failings or misconduct, and where the employees have been involved in protected activity, the inference is very strong that actual reasons for the retaliation are arbitrary.

Thus, defendants' actions not to reinstate Banks violate both federal and state law and therefore are void.

B. PLAINTIFF BANKS IS ENTITLED TO REINSTATEMENT, BACK PAY, INTEREST, COMPENSATORY AND PUNITIVE DAMAGES AS WELL AS ATTORNEY'S FEES FROM DEFENDANTS.

When a teacher brings a legal action, reinstatement and back pay are appropriate ancillary equitable relief. See McFerrin v. County Board of Education of Fayette County, Tennessee, 455 F.2d 199 (6th Cir. 1972), cert. denied, 497 U.S. 934 (1972); Harkless v. Sweeny Independent School District, 427 F.2d 319 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971).

In addition, plaintiff is entitled to interest on back pay that is awarded since such back wages are liquidated sums. Bituminous Casualty Corporation v. Lynn, 503 F.2d 636 (6th Cir. 1974); McNutt v. State Farm Mutual Auto Insurance Co., 369 F.Supp. 3871 (W.D. Ky. 1971); Clark v. Life and Casualty Insurance Co., 53 S.W.2d 968 (Ky. 1932); 22 Am. Jur.

Damages, §§180-188.

Furthermore, under Carey v. Piphas, 435 U.S. 247 (1978), plaintiff is entitled to compensatory and punitive damages. In the same line, Harrod v. Fraley, 289 S.W.2d 203 (Ky. 1956), authorizes awards of punitive damages in Kentucky to punish defendants for willful and malicious action and discourage defendants and others from similar future conduct.

Besides the above, a successful plaintiff under 42 U.S.C. §1983 is entitled to attorney's fes under 42 U.S.C. §1988. The Sixth Circuit has concluded in Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979) that in awarding a fee a court should consider hours expended and the reasonable value of those hours in light of the attorney's expertise in matters of school law and employment discrimination.

CONCLUSION

For the above stated reasons, plaintiff respectfully requests the Court, following trial, to enter judgment for plaintiff and order reinstatement with back pay and interest, and further award compensatory and punitive damages as well as attorney's fees.

BROOKS, COFFMAN & FITZPATRICK

BY: Arthur L. Brooks /gs
ARTHUR L. BROOKS

BY: Jane V. Fitzpatrick
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Lexington, Kentucky 40507
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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Plaintiff's Trial Brief was hand delivered to Honorable Judge G. Wix Unthank, 201-B Federal Courthouse, P. O. Box 278, Pikeville, Kentucky, 41501; Honorable James W. Craft, Polly, Craft, Asher and Smallwood, P. O. Box 786, Whitesburg, Kentucky, 41858, attorney for the defendants; and Honorable Forrest Cook, P. O. Box 909, Whitesburg, Kentucky, 41858, attorney for the defendants, on this 13th day of September, 1984.

Jane V. Fitzpatrick

JANE V. FITZPATRICK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

MEMBERS OF THE JURY:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find therein from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

DUTY TO FOLLOW INSTRUCTIONS

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the fact, to base a verdict upon anything other than the evidence in the case.

In deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and reach a just verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community and holding the same or similar stations in life. The law is no respecter of persons, and all persons stand equal before the law and are to be dealth with as equals in a court of justice.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

BURDEN OF PROOF

The burden is on the Plaintiff in a civil action such as this to prove every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, the jury may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardlesss of who may have produced them. If the proof should fail to establish any essential element of Plaintiff's claim by a preponderance of the evidence, the jury should find for the Defendant as to that claim.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

CREDIBILITY OF WITNESSES

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider his relationship to the Plaintiff or to the Defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

IMPEACHMENT

A witness may be discredited or "impeached" by contradictory evidence, by a showing that he testified falsely concerning a material matter,or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

CONSIDERATION OF THE EVIDENCE, ETC.

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

So, while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

14

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

DUTY TO DELIBERATE

Of course, the fact that I have given you instructions concerning the issue of Plaintiff's damages should not be interpreted in any way as an indication that I believe the Plaintiff should, or should not, prevail in this case.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are judges -- judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

VERDICT FORMS

Upon retiring to the jury room you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesman here in court. A form of verdict has been prepared for your convenience.

You will take the verdict form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreman or forewoman fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreman or forewoman, and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom as that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should never state or specify your numerical division at the time.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

CLAIMS INSTRUCTION

IN THIS CASE THE PLAINTIFF CLAIMS DAMAGES ALLEGED TO HAVE BEEN SUSTAINED BY HIM AS THE RESULT OF A DEPRIVATION, UNDER COLOR OF STATE LAW, OF A RIGHT SECURED TO THE PLAINTIFF BY THE CONSTITUTION AND LAWS OF THE UNITED STATES.

SPECIFICALLY, THE PLAINTIFF ALLEGES THAT WHILE THE DEFENDANTS WERE ACTING UNDER COLOR OF AUTHORITY OF THE STATE OF KENTUCKY AS OFFICERS, MEMBERS AND EMPLOYEES OF THE LETCHER COUNTY BOARD OF EDUCATION THEY SUBJECTED THE PLAINTIFF TO THE DEPRIVATION OF RIGHTS AND PRIVILEGES SECURED AND PROTECTED TO HIM BY THE CONSTITUTION AND LAWS OF THE UNITED STATES, NAMELY, THE CONSTITUTIONAL RIGHT NOT TO BE DEPRIVED OF HIS FREEDOM OF SPEECH OR REDRESS OF GRIEVANCE.

YOU ARE INSTRUCTED AS A MATTER OF LAW THAT UNDER THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES EVERY CITIZEN HAS RIGHTS TO HIS FREEDOM OF SPEECH AND REDRESS OF GRIEVANCE.

YOU ARE FURTHER INSTRUCTED THAT SECTION 1983 OF TITLE 42 OF THE UNITED STATES CODE PROVIDES THAT ANY CITIZEN MAY SEEK REDRESS IN THIS COURT BY WAY OF DAMAGES AGAINST ANY PERSON OR PERSONS WHO, UNDER COLOR OF ANY STATE LAW OR CUSTOM, SUBJECTS SUCH CITIZEN TO THE DEPRIVATION OF ANY RIGHTS, PRIVILEGES, OR IMMUNITIES SECURED OR PROTECTED BY THE CONSTITUTION OR LAWS OF THE UNITED STATES.

IN ORDER TO PROVE HIS CLAIM, THEREFORE, THE BURDEN IS UPON THE PLAINTIFF TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE IN THE

CASE EACH OF THE FOLLOWING ELEMENTS:

1. THAT THE DEFENDANTS PERFORMED ACTS WHICH OPERATED TO DEPRIVE THE PLAINTIFF OF HIS FEDERAL CONSTITUTIONAL RIGHT PREVIOUSLY MENTIONED;
2. THAT THE DEFENDANTS THEN AND THERE ACTED UNDER COLOR OF THE AUTHORITY OF THE STATE OF KENTUCKY;
3. THAT THE DEFENDANTS' ACT OR ACTS WERE THE PROXIMATE OR LEGAL CAUSE OF DAMAGES SUSTAINED BY THE PLAINTIFF.

ACTS ARE DONE "UNDER COLOR OF THE AUTHORITY" OF A STATE, NOT ONLY WHEN STATE OFFICIALS ACT WITHIN THE BOUNDS OR LIMITS OF THEIR LAWFUL AUTHORITY, BUT ALSO WHEN SUCH OFFICERS ACT WITHOUT AND BEYOND THE BOUNDS OF THEIR LAWFUL AUTHORITY. IN ORDER FOR UNLAWFUL ACTS OF AN OFFICIAL TO BE DONE"UNDER COLOR OF AUTHORITY", HOWEVER, THE UNLAWFUL ACT MUST BE DONE WHILE THE OFFICIAL IS PURPORTING OR PRETENDING TO ACT IN THE PERFORMANCE OF HIS OFFICIAL DUTY; THAT IS TO SAY, THE UNLAWFUL ACT MUST CONSIST IN AN ABUSE OR MISUSE OF POWER WHICH IS POSSESSED BY THE OFFICIAL ONLY BECAUSE HE OR SHE IS AN OFFICIAL; AND THE UNLAWFUL ACTS MUST BE OF SUCH A NATURE, AND BE COMMITTED UNDER SUCH CIRCUMSTANCES, THAT THEY WOULD NOT HAVE OCCURRED EXCEPT FOR THE FACT THAT THE PERSON COMMITTING THEM WAS AN OFFICIAL PURPORTING TO EXERCISE HIS OR HER OFFICIAL POWERS.

THE FIRST ASPECT OF THE PLAINTIFF'S CLAIM IS THAT WHILE HE WAS AN EMPLOYEE OF THE LETCHER COUNTY BOARD OF EDUCATION HE WAS DEPRIVED OF HIS RIGHT TO FREEDOM OF SPEECH OR REDRESS OF GRIEVANCE.

BEFORE THE JURY CAN DETERMINE, THEN, WHETHER OR NOT THE PLAINTIFF WAS DEPRIVED BY THE DEFENDANTS OF HIS RIGHT TO FREEDOM OF

SPEECH OR REDRESS OF GRIEVANCE, THE JURY MUST FIRST DETERMINE FROM A PREPONDERANCE OF THE EVIDENCE IN THE CASE WHETHER THE DEFENDANTS DID THE ACTS ALLEGED, AND, IF SO, THE DEFENDANTS, BY SUCH ACTS, INTENDED TO PUNISH THE PLAINTIFF FOR EXERCISING HIS RIGHT TO FREEDOM OF SPEECH OR REDRESS OF GRIEVANCE AND FURTHER THAT SUCH INTENT WAS A SUBSTANTIAL OR MOTIVATING FACTOR IN THE BRINGING ABOUT OF THE ACTS OF THE DEFENDANTS.

THE TERM FREEDOM OF SPEECH ENCOMPASSES AND INCLUDES POLITICAL BELIEFS, EXPRESSIONS, ASSOCIATIONS OR AFFILIATIONS. THE TERM "RIGHT TO REDRESS" ENCOMPASSES AND INCLUDES THE RIGHT TO CAUSE THE FILING OF A LEGAL ACTION TO SEEK ADJUDICATION OF ONE'S RIGHTS.

USING THE TERM "SUBSTANTIAL OR MOTIVATING FACTOR" IN THE POPULAR SENSE THERE MAY BE SEVERAL SUBSTANTIAL OR MOTIVATING FACTORS IN ANY GIVEN CASE. NORMALLY, IN ORDER TO BE A SUBSTANTIAL OR MOTIVATING FACTOR IT MUST BE SHOWN BOTH THAT THE ACT WOULD NOT HAVE HAPPENED BUT FOR SUCH SUBSTANTIAL OR MOTIVATING FACTOR AND THAT SAME WAS SO IMPORTANT IN BRINGING ABOUT THE ACTS COMPLAINED OF THAT A REASONABLE PERSON WOULD REGARD IT AS A CAUSE AND ATTACH RESPONSIBILITY TO IT.

A "REASONABLE PERSON" IS AN ORDINARY PERSON UNDER SAME OR SIMILAR CIRCUMSTANCES.

THE JURY IS INSTRUCTED THAT A SUPERINTENDENT OF SCHOOLS UNDER THE JURISDICTION AND CONTROL OF THE LETCHER COUNTY BOARD OF EDUCATION HAS THE DUTY AND RIGHT TO RECOMMEND TO THE BOARD THE APPLICANT WHICH THE SUPERINTENDENT, IN GOOD FAITH, BELIEVES TO BE THE BEST APPLICANT TO PERFORM THE DUTIES OF SUCH JOB OR POSITION; HOWEVER, THE SUPERINTENDENT CANNOT PENALIZE NOR PUNISH AN APPLICANT FOR EXERCISING HIS RIGHT TO FREEDOM OF SPEECH OR REDRESS OF GRIEVANCES BY WITHHOLDING HIS RECOMMENDATION WHEN THE INTENT FOR SUCH ACT IS THE SUBSTANTIAL OR MOTIVATING FACTOR

IN BRINGING ABOUT SUCH ACT OF WITHHOLDING RECOMMENDATION.

IN THAT REGARD THE JURY IS INSTRUCTED THAT THE LETCHER COUNTY BOARD OF EDUCATION, IN SELECTING AND APPOINTING A DIRECTOR OF PUPIL PERSONNEL, HAS THE RIGHT AND DUTY TO CONSIDER ALL THE QUALIFIED APPLICANTS FOR SUCH POSITION. IT FURTHER HAS THE RIGHT AND DUTY TO SELECT AND APPROVE THE APPLICANT, WHICH THE BOARD, IN GOOD FAITH, BELIEVES TO BE THE BEST INDIVIDUAL TO PERFORM THE DUTIES OF SUCH JOB OR POSITION.

THE JURY IS INSTRUCTED THAT THE LETCHER COUNTY BOARD OF EDUCATION SHALL NOT APPROVE THE RECOMMENDATION OF THE SUPERINTENDANT WHEN IT KNEW OR SHOULD HAVE KNOWN THAT SUCH RECOMMENDATION WAS TO PUNISH THE PLAINTIFF, ANOTHER APPLICANT, FOR EXERCISING HIS CONSTITUTIONAL RIGHTS AND THAT THE INTENT TO SO PUNISH WAS THE SUBSTANTIAL OR MOTIVATING FACTOR FOR THE ACT OF WITHHOLDING HIS RECOMMENDATION AND RECOMMENDING ANOTHER.

NOW, IN SUMMARY, IF YOU FIND FROM A PREPONDERANCE OF THE EVIDENCE IN THIS CASE, AFTER APPLYING THESE INSTRUCTIONS OF LAW, THAT THE PLAINTIFF HAS PROVED HIS CLAIM THAT THE ACTS OF THE DEFENDANTS DEPRIVED HIM OF HIS CONSTITUTIONALLY PROTECTED RIGHT TO FREEDOM OF SPEECH, AND REDRESS OF GRIEVANCES, TO PUNISH HIM FOR EXERCISING SUCH RIGHTS AND THE INTENT TO SO PUNISH THE PLAINTIFF WAS A SUBSTANTIAL OR MOTIVATING FACTOR IN BRINGING ABOUT THE DEFENDANT'S ACTS, THEN THE JURY WILL SO INDICATE IN ITS ANSWER TO THE SPECIAL INTERROGATORIES GIVEN TO IT BY THE COURT; IF, ON THE OTHER HAND, THE JURY FINDS THAT THE PLAINTIFF HAS FAILED TO PROVE HIS CLAIMS, BY A PREPONDERANCE OF THE EVIDENCE, THE JURY WILL LIKEWISE INDICATE ITS FINDINGS AND DETERMINATION IN SAID SPECIAL INTERROGATORIES.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

QUALIFIED IMMUNITY

An individual School Board Member defendant herein is immune from liability for damages unless he, or she, knew or reasonably should have known that the action taken within his or her sphere of official responsibility would violate the constitutional rights of plaintiff.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

THE COURT'S INSTRUCTIONS TO THE JURY:

INTERROGATORY NO. _____

DOES THE JURY FIND BY A PREPONDERANCE OF THE EVIDENCE THAT THE SUPERINTENDENT OF SCHOOLS OF THE LETCHER COUNTY BOARD OF EDUCATION, JACK M. BURKICH, WITHHELD HIS RECOMMENDATION OF THE PLAINTIFF, BILLY K. BANKS, FOR THE POSITION OF DIRECTOR OF PUPIL PERSONNEL TO PUNISH THE PLAINTIFF, BILLY K. BANKS, FOR EXERCISING HIS CONSTITUTIONAL RIGHTS :

(a) FREEDOM OF SPEECH AND EXPRESSION BY PARTICIPATING IN AN ELECTION INVOLVING THE MEMBERS OF THE LETCHER COUNTY BOARD OF EDUCATION.

YES _____ NO _____

(b) CAUSING THE FILING OF A LEGAL ACTION AGAINST THE MEMBERS OF THE LETCHER COUNTY BOARD OF EDUCATION.

YES _____ NO _____

IF THE JURY'S ANSWER TO EITHER (a) or (b) IS "YES" IT WILL ANSWER THE FOLLOWING INTERROGATORY; IF THE JURY'S ANWER IS "NO" TO BOTH (a) AND (b) THE FOREPERSON WILL ENTER THE DATE AND AFFIX A SIGNATURE IN THE APPROPRIATE BLANKS AND REPORT TO THE COURT.

DATE: _____

_____
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

THE COURT'S INSTRUCTIONS TO THE JURY:

INTERROGATORY NO. _____

DOES THE JURY FIND BY A PREPONDERANCE OF THE EVIDENCE AT THE TIME AND PLACE CONTAINED THEREIN, THAT THE ACTS OF THE DEFENDANT, JACK M. BURKICH, SUPERINTENDENT OF SCHOOLS, AS CONTAINED IN INTERROGATORY NOS. _____ AND _____ WERE THE PROXIMATE AND LEGAL CAUSE OF DAMAGES SUSTAINED BY THE PLAINTIFF, BILLY K. BANKS.

YES _____ NO _____

IF THE JURY'S ANSWER IS "YES" IT WILL ANSWER INTERROGATORY NUMBER _____; IF THE JURY'S ANSWER IS "NO" THE JURY WILL ANSWER INTERROGATORY NUMBER _____.

DATE: _____

_____
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

THE COURT'S INSTRUCTIONS TO THE JURY

INTERROGATORY NO. _____

DOES THE JURY FIND BY A PREPONDERANCE OF THE EVIDENCE, AT THE TIME AND PLACE CONTAINED THEREIN, THAT THE ACTS OF THE MEMBERS OF THE BOARD OF EDUCATION FOR LETCHER COUNTY, KENTUCKY, AS CONTAINED IN INTERROGATORY NUMBER _____, WERE THE PROXIMATE AND LEGAL CAUSE OF DAMAGES SUSTAINED BY THE PLAINTFF, BILLY K. BANKS.

(a)	Frank J. Wright	Yes ____	No ____
(b)	Bobby Joe Ison	Yes ____	No ____
(c)	Lucille Holbrook	Yes ____	No ____

IF THE JURY'S ANSWER IS "YES" IT WILL ANSWER INTERROGATORY NO. _____; IF THE JURY'S ANSWER IS "NO" IT WILL ANSWER INTERROGATORY NO. _____.

DATE: _____

_____
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

THE COURT'S INSTRUCTIONS TO THE JURY:

INTERROGATORY NO. _____

DOES THE JURY FIND BY A PREPONDERANCE OF THE EVIDENCE THAT THE SUPERINTENDENT OF SCHOOLS FOR THE LETCHER COUNTY BOARD OF EDUCATION, JACK M. BURKICH, AT THE TIME AND PLACE CONTAINED IN THE EVIDENCE, WOULD HAVE RECOMMENDED THE PLAINTIFF, BILLY K. BANKS, FOR THE POSITION OF DIRECTOR OF PUPIL PERSONNEL HAD HE NOT PARTICIPATED IN THE SCHOOL BOARD ELECTIONS OR FILED A LAWSUIT AGAINST THE LETCHER COUNTY BOARD OF EDUCATION?

YES _____ NO _____

IF THE JURY'S ANSWER IS "YES" IT WILL ANSWER THE FOLLOWING INTERROGATORY; IF THE JURY'S ANSWER IS "NO" THE FOREPERSON WILL ENTER THE DATE AND AFFIX A SIGNATURE IN THE APPROPRIATE BLANKS AND REPORT TO THE COURT.

DATE: _____

_____
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

THE COURT'S INSTRUCTIONS TO THE JURY:

INTERROGATORY NO. _____

DOES THE JURY FIND BY A PREPONDERANCE OF THE EVIDENCE THAT THE MEMBERS OF THE LETCHER COUNTY BOARD OF EDUCATION AT THE TIME AND PLACE CONTAINED IN THE EVIDENCE KNEW OR REASONABLY SHOULD HAVE KNOWN THAT THE FAILURE TO RECOMMEND THE PLAINTIFF, BILLY K. BANKS, FOR THE POSITION OF DIRECTOR OF PUPIL PERSONNEL WAS BECAUSE OF AN INTENT TO PUNISH THE PLAINTIFF FOR EXERCISING HIS CONSTITUTIONAL RIGHTS AND THAT SUCH INTENT WAS A SUBSTANTIAL OR MOTIVATING FACTOR IN THE SUPERINTENDENT OF SCHOOL, JACK M. BURKICH'S, DECISION TO WITHHOLD SUCH RECOMMENDATION.

(A) FRANK WRIGHT YES _____ NO _____

(B) BOBBY JOE ISON YES _____ NO _____

(C) LUCILLE HOLBROOK YES _____ NO _____

IF THE JURY'S ANSWER TO EITHER "A", "B" OR "C" IS "YES" IT WILL ANSWER THE FOLLOWING INTERROGATORY NO. _____; IF THE JURY'S ANSWER IS "NO" THE FOREPERSON WILL ENTER THE DATE AND AFFIX A SIGNATURE IN THE APPROPRIATE BLANKS AND REPORT TO THE COURT.

DATE: _____

_____
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

THE COURT'S INSTRUCTIONS TO THE JURY:

INTERROGATORY NO. _____

DOES THE JURY FIND BY A PREPONDERANCE OF THE EVIDENCE AT THE TIME AND PLACE CONTAINED THEREIN, THE MEMBERS OF THE LETCHER COUNTY BOARD OF EDUCATION VOTED TO APPROVE THE NOMINATION OF THE SUPERINTENDENT OF SCHOOLS, JACK M. BURKICH, WHEN SUCH INDIVIDUAL SCHOOL BOARD MEMBER KNEW OR REASONABLY SHOULD HAVE KNOWN THAT THE APPROVAL OF SUCH NOMINATION WOULD VIOLATE THE CONSTITUTIONAL RIGHTS OF THE PLAINTIFF, BILLY K. BANKS:

(A) FRANK WRIGHT YES _____ NO _____

(B) BOBBY JOE ISON YES _____ NO _____

(C) LUCILLE HOLBROOK YES _____ NO _____

IF THE JURY'S ANSWER TO EITHER "A", "B" OR "C" IS "YES" IT WILL ANSWER THE FOLLOWING INTERROGATORY NO. _____.

DATE: _____

_____
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

INTERROGATORY NO. _____

DOES THE JURY FIND BY A PREPONDERANCE OF THE EVIDENCE, AT THE TIMES AND PLACES CONTAINED THEREIN, THAT WHILE THE INDIVIDUAL MEMBERS OF THE LETCHER COUNTY BOARD OF EDUCATION WERE NOT LIABLE FOR THE ACTS OF THE BOARD, NEVERTHELESS THE REPRESENTATIVE ACTS OF SUCH MEMBERS VIOLATED THE PLAINTIFF, BILLY K. BANKS' CONSTITUTIONALLY PROTECTED RIGHTS OF FREEDOM OF SPEECH AND REDRESS OF GRIEVANCE AND SAID VIOLATION WAS A SUBSTANTIAL OR MOTIVATING FACTOR IN BRINGING ABOUT THE SAID REPRESENTATIVE ACTS OF SAID BOARD.

YES _____ NO _____

DATE: _____

_____
FOREPERSON

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTIONS TO THE JURY:

DAMAGES

THE JURY HAS ANSWERED SPECIAL INTERROGATORIES FINDING THAT A DEFENDANT OR DEFENDANTS HAVE COMMITTED AN ACT OR ACTS CONTRARY TO TITLE 42 U.S.C.A. 1983. THE JURY FURTHER HAS MADE A FINDING AND DETERMINATION AS A DIRECT AND PROXIMATE RESULT OF SAID ACT THE PLAINTIFF HAS SUFFERED DAMAGE OR DAMAGES.

IN CONSIDERING THE ISSUE OF PLAINTIFF'S DAMAGES, YOU ARE INSTRUCTED THAT YOU SHOULD ASSESS THE AMOUNT YOU FIND TO BE JUSTIFIED BY A PREPONDERANCE OF THE EVIDENCE AS FULL, JUST, AND REASONABLE COMPENSATION FOR ALL OF THE PLAINTIFF'S DAMAGES, NO MORE AND NO LESS. DAMAGES MUST NOT BE BASED ON SPECULATION BECAUSE IT IS ONLY ACTUAL DAMAGES -- WHAT THE LAW CALLS COMPENSATORY DAMAGES -- THAT ARE RECOVERABLE.

ON THE OTHER HAND, COMPENSATORY DAMAGES ARE NOT RESTRICTED TO ACTUAL LOSS OF TIME OR MONEY; THEY COVER BOTH THE MENTAL AND PHYSICAL ASPECTS OF INJURY -- TANGIBLE AND INTANGIBLE. THEY ARE AN ATTEMPT TO RESTORE THE PLAINTIFF, THAT IS, TO MAKE HIM WHOLE OR AS HE WAS IMMEDIATELY PRIOR TO SAID INJURIES.

I.

ACTUAL - COMPENSATORY DAMAGES

YOU SHOULD CONSIDER THE FOLLOWING ELEMENTS OF DAMAGE TO THE EXTENT YOU FIND THEM PROVED BY A PREPONDERANCE OF THE EVIDENCE, AND, EXCEPTING AS STATED IN THE INSTRUCTION ON DAMAGES, NO OTHERS:

(a) MENTAL ANGUISH OR EMOTIONAL DISTRESS:

NO EVIDENCE OF THE VALUE OF SUCH INTANGIBLE THINGS AS MENTAL ANGUISH OR EMOTIONAL DISTRESS HAS BEEN OR NEED BE INTRODUCED. IN THAT RESPECT IT IS NOT VALUE YOU ARE TRYING TO DETERMINE, BUT AN AMOUNT THAT WILL FAIRLY COMPENSATE THE PLAINTIFF FOR THE DAMAGES HE HAS SUFFERED. THERE IS NO EXACT STANDARD FOR FIXING THE COMPENSATION TO BE AWARDED ON ACCOUNT OF SUCH ELEMENTS OF DAMAGE. ANY SUCH AWARD SHOULD BE FAIR AND JUST IN THE LIGHT OF THE EVIDENCE.

(b) TRAVEL EXPENSE

THE REASONABLE EXPENSE FOR TRAVEL BROUGHT ABOUT AS A DIRECT AND PROXIMATE RESULT OF PLAINTIFF'S INJURY.

II.

NOMINAL DAMAGES

ONCE A DEPRIVATION OF A CONSTITUTIONAL RIGHT HAS BEEN FOUND, A JURY, IN ITS DISCRETION, MAY AWARD NOMINAL DAMAGES IN SOME NOMINAL

I.

ACTUAL - COMPENSATORY DAMAGES

YOU SHOULD CONSIDER THE FOLLOWING ELEMENTS OF DAMAGE TO THE EXTENT YOU FIND THEM PROVED BY A PREPONDERANCE OF THE EVIDENCE, AND, EXCEPTING AS STATED IN THE INSTRUCTION ON DAMAGES, NO OTHERS:

(a) MENTAL ANGUISH OR EMOTIONAL DISTRESS:

NO EVIDENCE OF THE VALUE OF SUCH INTANGIBLE THINGS AS MENTAL ANGUISH OR EMOTIONAL DISTRESS HAS BEEN OR NEED BE INTRODUCED. IN THAT RESPECT IT IS NOT VALUE YOU ARE TRYING TO DETERMINE, BUT AN AMOUNT THAT WILL FAIRLY COMPENSATE THE PLAINTIFF FOR THE DAMAGES HE HAS SUFFERED. THERE IS NO EXACT STANDARD FOR FIXING THE COMPENSATION TO BE AWARDED ON ACCOUNT OF SUCH ELEMENTS OF DAMAGE. ANY SUCH AWARD SHOULD BE FAIR AND JUST IN THE LIGHT OF THE EVIDENCE.

(b) LOSS OF EARNINGS

ANY EARNINGS OR WAGES LOST IN THE PAST.

II.

NOMINAL DAMAGES

ONCE A DEPRIVATION OF A CONSTITUTIONAL RIGHT HAS BEEN FOUND, A JURY, IN ITS DISCRETION, MAY AWARD NOMINAL DAMAGES IN SOME NOMINAL

SUM SUCH AS ONE DOLLAR, ALTHOUGH THE JURY IS UNABLE TO FIND THAT THE PLAINTIFF HAS SUSTAINED ACTUAL DAMAGES.

III.

PUNITIVE DAMAGES

THE PLAINTIFF ALSO CLAIMS THAT THE ACTS OF THE DEFENDANT WERE DONE WILLFULLY, INTENTIONALLY, OR WITH CALLOUS AND RECKLESS INDIFFERENCE TO PLAINTIFF'S RIGHTS, SO AS TO ENTITLE HIM TO AN AWARD OF PUNITIVE DAMAGES IN ADDITION TO COMPENSATORY DAMAGES.

IF YOU FIND FOR THE PLAINTIFF, AND IF YOU FURTHER FIND THAT THE DEFENDANT DID ACT WITH MALICE, WILLFULNESS, OR CALLOUS AND RECKLESS INDIFFERENCE TO THE RIGHTS OF OTHERS, THE LAW WOULD ALLOW YOU, IN YOUR DISCRETION, TO ASSESS PUNITIVE DAMAGES AGAINST THAT DEFENDANT AS PUNISHMENT AND AS A DETERRENT TO OTHERS.

(a) "MALICE"

AN ACT IS DONE "MALICIOUSLY" IF PROMPTED OR ACCOMPANIED BY ILL WILL OR SPITE OR A GRUDGE TOWARD THE PERSON AGAINST WHOM THE ACT WAS DIRECTED.

(b) "WILLFULNESS"

AN ACT IS DONE "WILLFULLY" IF DONE VOLUNTARILY AND INTENTIONALLY, AND WITH THE SPECIFIC INTENT TO DO SOMETHING THE LAW FORBIDS; THAT IS TO SAY, WITH BAD PURPOSE EITHER TO DISOBEY OR TO DISREGARD THE LAW.

IF YOU FIND THAT PUNITIVE DAMAGES SHOULD BE ASSESSED AGAINST THE DEFENDANT, YOU MAY CONSIDER THE FINANCIAL RESOURCES OF THE DEFENDANT IN FIXING THE AMOUNT OF SUCH DAMAGES.

IF YOU FIND FOR THE PLAINTIFF AND AWARD HIM ACTUAL OR COMPENSATORY OR NOMINAL DAMAGES, YOU MUST DECIDE WHETHER IT APPEARS FROM A PREPONDERANCE OF THE EVIDENCE IN THE CASE THAT THE ACTS AND CONDUCT OF THE DEFENDANT TOWARD THE PLAINTIFF, AT THE TIME AND PLACE IN QUESTION, WERE MALICIOUSLY, OR WANTONLY, OR OPPRESSIVELY DONE; AND, IF SO, WHAT AMOUNT, IF ANY, OF PUNITIVE AND EXEMPLARY DAMAGES SHOULD BE ADDED TO THE AWARD OF ACTUAL OR COMPENSATORY OR NOMINAL DAMAGES.

IF YOU DO NOT FIND THAT PLAINTIFF SUSTAINED ANY ACTUAL OR COMPENSATORY DAMAGES, YOU MAY THEN AWARD THE PLAINTIFF NOMINAL DAMAGES AND ALSO SUCH PUNITIVE OR EXEMPLARY DAMAGES, IF ANY, AS YOU THINK ARE WARRANTED UNDER THESE INSTRUCTIONS.

YOU MAY AWARD PUNITIVE OR EXEMPLARY DAMAGES IN ADDITION TO ACTUAL, OR COMPENSATORY, OR NOMINAL DAMAGES, OR YOU MAY AWARD ACTUAL, COMPENSATORY, OR NOMINAL DAMAGES WITHOUT PUNITIVE DAMAGES, ALL IN ACCORDANCE WITH THE FACTS WHICH YOU FIND AND IN ACCORDANCE WITH THE COURT'S INSTRUCTIONS.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

SPECIAL INTERROGATORY NO._____

THE JURY FINDS FROM A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF, BILLY K. BANKS, SHOULD RECOVER LOSS OF WAGES AS A DIRECT AND PROXIMATE LOSS OF THE ACTS OF THE DEFENDANTS.

YES_____ NO_____

IF THE JURY'S ANSWER IS "NO", IT WILL PROCEED TO THE NEXT INTERROGATORY; IF THE JURY'S ANSWER IS "YES", IT WILL INSERT THE SUM, SO AWARDED, IN THE APPROPRIATE BLANK, AND PROCEED TO THE NEXT INTERROGATORY.

LOST WAGES $_____

(THE TOTAL AMOUNT OF WAGE LOSS TO BE AWARDED, IF ANY, MAY NOT EXCEED THE TOTAL AMOUNT CONTAINED IN THE EVIDENCE OF $_____.)

_____
FOREPERSON

DATE:_____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

SPECIAL INTERROGATORY NO._____

THE JURY IS UNABLE TO FIND, BY A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF, BILLY K. BANKS, SUSTAINED SUBSTANTIAL ACTUAL DAMAGES. HOWEVER, THE JURY FINDS THAT THE PLAINTIFF IS ENTITLE TO NOMINAL DAMAGES IN SOME NOMINAL AMOUNT AGAINST THE DEFENDANTS.

YES_____ NO_____

IF THE JURY'S ANSWER IS "NO", IT WILL PROCEED TO THE NEXT INTERROGATORY; IF THE JURY'S ANSWER IS "YES", IT WILL INSERT THE SUM SO AWARDED, AND PROCEED TO THE NEXT INTERROGATORY.

NOMINAL DAMAGES $_____

_____
FOREPERSON

DATE:_____

DC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

SPECIAL INTERROGATORY NO. _____

THE JURY FINDS BY A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF, BILLY K. BANKS, IS ENTITLED TO AN AWARD FOR MENTAL ANGUISH AND EMOTIONAL DISTRESS BY REASON OF THE ACTS OF THE DEFENDANTS, AT THE TIME AND PLACE MENTIONED IN THE EVIDENCE:

YES _____ NO _____

IF THE JURY'S ANSWER IS "NO", THE JURY WILL PROCEED TO THE NEXT INTERROGATORY; IF THE JURY'S ANSWER IS "YES", IT WILL INSERT THE SUM, SO AWARDED IN THE APPROPRIATE BLANK, AND PROCEED TO THE NEXT INTERROGATORY.

COMPENSATORY DAMAGES: $ _____

_____
FOREPERSON

DATE: _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

SPECIAL INTERROGATORY NO._____

THE JURY FINDS BY A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF, BILLY K. BANKS, IS AWARDED DAMAGES IN SUCH SUM AS IS HEREINAFTER INDICATED AGAINST THE DEFENDANT OR DEFENDANTS INDICATED:

AWARD TO PLAINTIFF

NOMINAL DAMAGES $_____

TRAVEL EXPENSE $_____

MENTAL ANGUISH AND EMOTIONAL DISTRESS $_____

PUNITIVE DAMAGES (NOT TO EXCEED $_____) $_____

AWARD AGAINST DEFENDANT, FRANK WRIGHT $_____

AWARD AGAINST DEFENDANT, LUCILLE HOLBROOK $_____

AWARD AGAINST DEFENDANT, BOBBY J. ISON $_____

AWARD AGAINST DEFENDANT, JACK M. BURKICH $_____

AWARD AGAINST DEFENDANT, BOARD OF EDUCATION OF LETCHER COUNTY $_____

_____
FOREPERSON

DATE:_____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

SPECIAL INTERROGATORY NO._____

THE JURY FINDS BY A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF, BILLY K. BANKS, IN ADDITION TO COMPENSATORY DAMAGES, IS ENTITLED TO AN AWARD OF PUNITIVE DAMAGES BY REASON OF THE ACTS OF THE DEFENDANTS, AT THE TIME AND PLACE MENTIONED IN THE EVIDENCE.

YES_____ NO_____

IF THE JURY'S ANSWER IS "NO", THE JURY WILL PROCEED TO THE NEXT INTERROGATORY; IF THE JURY'S ANSWER IS "YES", IT WILL INSERT THE SUM SO AWARDED, IN THE APPROPRIATE BLANK, AND PROCEED TO THE NEXT INTERROGATORY.

PUNITIVE DAMAGES $_____

_____
FOREPERSON

DATE:_____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

SPECIAL INTERROGATORY NO. _____

THE JURY FINDS FROM A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF, BILLY K. BANKS, SHOULD RECOVER TRAVEL EXPENSES INCURRED A DIRECT AND PROXIMATE LOSS OF THE ACTS OF THE DEFENDANTS.

YES_____ NO_____

IF THE JURY'S ANSWER IS "NO", IT WILL PROCEED TO THE NEXT INTERROGATORY; IF THE JURY'S ANSWER IS "YES", IT WILL INSERT THE SUM, SO AWARDED, IN THE APPROPRIATE BLANK, AND PROCEED TO THE NEXT INTERROGATORY.

LOST WAGES $_____

(THE TOTAL AMOUNT OF TRAVEL EXPENSE TO BE AWARDED, IF ANY, MAY NOT EXCEED THE TOTAL AMOUNT CONTAINED IN THE EVIDENCE OF $4,050.00.)

_____
FOREPERSON

DATE: _____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

COURT'S INSTRUCTION TO THE JURY:

THE JURY IS INSTRUCTED THAT THIS IS A MULTI-DEFENDANT ACTION. THAT IS, THERE ARE MORE THAN ONE DEFENDANT. UNDER THE EVIDENCE OF THIS CASE, THE JURY MAY FIND FOR OR AGAINST NONE, ONE, LESS THAN ALL OF THE DEFENDANTS OR ALL OF THE DEFENDANTS.

THE JURY IS FURTHER INSTRUCTED THAT IT MAY NOT FIND THAT THE PLAINTIFF HAS SUFFERED A DAMAGE AND IMPOSED LIABILITY FOR THE SAME AMOUNT AGAINST MORE THAN ONE DEFENDANT SO AS TO IMPOSE DOUBLE DAMAGES. THE AMOUNT OF LIABILITY IMPOSED AGAINST TWO OR MORE DEFENDANTS CANNOT EXCEED THE SINGLE AWARD OF A DAMAGE TO THE PLAINTIFF.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE
CIVIL ACTION NO. 83-53

BILLY K. BANKS,)
)
PLAINTIFF)
)
)
VS.)
)
)
JACK M. BURKICH, et al.,)
)
DEFENDANTS)

SUPPLEMENTAL LIST
OF PROPOSED TRIAL
WITNESSES FOR PLAINTIFF

* * * * * * *

The Plaintiff, Billy K. Banks, by and through counsel, hereby submits the following supplemental list for proposed witnesses for trial to testify on behalf of Plaintiff.

The previous list filed by Plaintiff on January 18, 1984, is hereby incorporated by reference. Plaintiff intends to call each of those witnesses listed thereon.

Plaintiff additionally expects to call:

Ricky Fleming.

Mr. Fleming will testify regarding the 1982 school board election at which time defendant Frank Wright was a candidate for reelection supported by defendant. Lucille Holbrook.

Daryl Boggs

Mr. Boggs, Assistant Superintendent of the Letcher County Schools, will testify regarding the salaries of Billy K. Banks and Larry Ison for the 1982-83, 1983-84,

and 1984-85 school years and the salary Banks would have earned had he been DPP during those years.

BROOKS, COFFMAN & FITZPATRICK

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Arthur L. Brooks
183 North Upper Street
Lexington, KY 40507
Telephone: (606) 233-3366

BY: Jane V. Fitzpatrick
Jane V. Fitzpatrick
183 North Upper Street
Lexington, KY 40507
Telephone: (606) 233-3366

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Supplemental List of Proposed Trial Witnesses for Plaintiff was mailed, postage prepaid, to Honorable Judge G. Wix Unthank, 201-B Federal Courthouse, P. O. Box 278, Pikeville, Kentucky, 41501; Honorable James W. Craft, Polly, Craft, Asher and Smallwood, P. O. Box 786, Whitesburg, Kentucky, 41858, attorney for the Defendants; Honorable Forrest Cook, P. O. Box 909, Whitesburg, Kentucky, 41858, attorney for Defendants on this 30th day of August, 1984.

Arthur L Brooks jr
Arthur L. Brooks

Jane V. Fitzpatrick
Jane V. Fitzpatrick