



COMMONWEALTH OF KENTUCKY
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OAG 09-008

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Subject: Whether the Board of Regents of the Kentucky Community and Technical College System may, consistent with KRS 164.5807(3)(b), eliminate faculty tenure for future hires.

Requested by: Representative Rick Nelson
87th Legislative District

Written by: James M. Herrick
Assistant Attorney General

Syllabus: Since KRS 164.5807(3)(b) requires that new KCTCS faculty be able to earn tenure, the Board of Regents lacks the authority to eliminate tenure.

Statutes construed: KRS 164.350(1)(b), KRS 164.360(1)(b), KRS 164.365(1), KRS 164.365(2), KRS 164.5805(1)(d)(2), KRS 164.5807(1), KRS 164.5807(3)(b)

OAG cited: OAG 01-5

Opinion of the Attorney General

The Kentucky Community and Technical College System ("KCTCS") was created in 1997 by legislation combining Kentucky's technical college system ("Kentucky Tech"), till then operated by the Cabinet for Workforce Development, with the University of Kentucky Community College System. Power to govern the newly-formed system was vested in the KCTCS Board of Regents.

The new personnel system for KCTCS was created as part of KRS Chapter 164. Faculty who had been part of the Kentucky Tech personnel system gov-



erned by KRS Chapter 151B retained their tenure (referred to as "continuing status" in KRS 151B.010(7))¹ if they had earned it, and if still working toward tenure they were given the option by KRS 164.5805(1)(d)2 of completing that process under the Chapter 151B procedures:

Employees who have earned continuing status as defined in KRS 151B.010 ... shall be provided the same standing. Those employees who are transferred and are in the process of earning continuing status ... shall earn their standing based on the rules that were governing them on June 30, 1998, in [the Kentucky Tech system]. New employees within the system shall earn status based on the new policies established by the board[.]

KRS 164.5805(2) provides that "[n]ew employees hired after July 1, 1997, in the Kentucky Community and Technical College System shall be governed by the rules and regulations established by the board."

Likewise, community college faculty who had earned tenure under the former University of Kentucky rules retained that tenure, and those who had not were able to continue earning their tenure under the University procedures then in effect. KRS 164.5807(3) states in part as follows:

Employees in the University of Kentucky Community College System as of the effective date of the transfer of the management responsibilities of the University of Kentucky Community College System to the Kentucky Community and Technical College System shall be governed by the University of Kentucky administrative regulations as of the effective date of the transfer and any subsequent changes made by the university, except that appeals shall be to the board of regents or to the board's designee. The following provisions shall apply:

....

¹ "Continuing status" means the acquisition of tenure with all rights and privileges granted by the provisions of this chapter which must be preceded by four (4) years of successful employment." KRS 151B.070(3) provides that Kentucky Tech faculty with "continuing status" cannot generally "be demoted, disciplined, or dismissed without cause."

- (b) Employees with tenure shall retain their tenure. Employees without tenure shall earn tenure based on personnel policies in effect at the time of their employment. New employees without tenure shall earn tenure based on the new policies established by the board[.]

(Emphasis added.) KRS 164.5807(5) gives July 1, 1997, as the effective date after which new employees "shall be governed by the rules established by the board."

Representative Rick Nelson has requested an opinion as to whether a March 13, 2009, revision of KCTCS Board of Regents Policy 2.0 is contrary to KRS 164.5807(3)(b) insofar as it eliminates tenure for newly hired faculty. Specifically, Policy 2.0.1.2 states as follows:

Employment status determines an employee's right to continued employment with KCTCS. Based on the process by which the faculty or staff member is employed, the employee has a designated employee status.

KCTCS recognizes two (2) employment categories:

A. Term Contract Employment Status

Regular full-time faculty and staff shall be issued a term contract and have term contract employment status. Regular full-time faculty and staff may be offered a series of employment contracts with varying lengths over a long-term association with KCTCS.

Regular full-time faculty and staff may be offered a series of employment contracts with varying lengths over a long term association with KCTCS. Employment terms are as follows:

Years of Service	Contract Length
0-3	1 year or less
4-6	1 or 2 years
7+	1, 2, 3 or 4 years

Exceptions to these specified employment terms must be approved in advance by the KCTCS President.

Faculty and staff who are employed through a term contract are subject to the employment terms specified in their contract.

B. "At Will" Employment Status

Temporary faculty and staff (contract and non-contract) shall have "at will" employment status. Regular less than full-time faculty and staff shall have "at will" employment status.

As KCTCS acknowledges in comments received by this office, "The purpose and effect of the revised language of BOR Policy 2.0.1.2 is to eliminate tenure for faculty and staff hired after July 1, 2009." The question presented, therefore, is whether the Board of Regents has the statutory authority to eliminate tenure for newly hired faculty.²

KCTCS maintains that the Board derives its authority to eliminate tenure from the following statutes. KRS 164.350(1)(b) enables the Board to "[a]dopt bylaws, rules, and regulations for the government of its members, officers, agents, and employees, and enforce obedience to such rules." KRS 164.365(1) provides that "[a]nything in any statute of the Commonwealth to the contrary notwithstanding, the power over and control of appointments, qualifications, salaries, and compensation payable out of the State Treasury or otherwise, promotions, and official relations of all employees of ... the Kentucky Community and Technical College System [shall] be under the exclusive jurisdiction of [its] governing board[.]"³ Subsection (2) of that statute requires the Board to "develop personnel rules for the governing of its members, officers, agents, and employees." Finally, KRS 164.5807(1) requires the University of Kentucky Board of

² Our analysis is concerned with the application of KRS 164.5807(3)(b) to regular full-time faculty.

³ KCTCS contends that KRS 164.365 is "entitled in part 'Governing boards to have **exclusive control** of employment, **tenure**, and official relations of employees'" (emphasis added by KCTCS). In fact, the language quoted is not the title of the act, but only the "catchline" added by the Legislative Research Commission, which is not part of the law. KRS 446.140. The statute itself does not mention tenure.

Regents to delegate to the KCTCS Board its "management responsibilities," including "management of ... personnel," and states that the KCTCS Board "shall have the right to appoint and dismiss personnel and to set the compensation for the employees." Additionally, KCTCS cites the case of *Wells v. Board of Regents of Murray State University*, 545 F.2d 15, 17 (6th Cir. 1977), for the proposition that KRS 164.360 and KRS 164.365 confer "exclusive jurisdiction upon the governing board of [an institution] to determine the 'official relations' of all [its] employees, including the authority to fix tenure of faculty members."⁴

Our analysis of the question presented begins necessarily with KRS 164.5807(3)(b). By its unambiguous terms, KRS 164.5807(3)(b) requires that new faculty at KCTCS "shall earn tenure." "'Tenure,' [as] understood in the teaching profession, embraces the concept of permanent security in the academic position one holds." *Board of Regents of Kentucky State University v. Gale*, 898 S.W.2d 517, 521 (Ky. App. 1995). "'Shall' is mandatory." KRS 446.010(30). An unambiguous statute must be accepted according to its terms. *Mondie v. Com.*, 158 S.W.3d 203 (Ky. 2005). Therefore, new faculty at KCTCS must be able in some way to earn permanent security in their academic positions.

The interpretation of some other sections of KRS Chapter 164 advanced by KCTCS, under which the Board of Regents would have unlimited authority over tenure, including the authority to eliminate it, would create a conflict with the clear mandate of KRS 164.5807(3)(b). A construction of statutes that places them in conflict with other statutes is not to be favored. Rather, statutes *in pari materia* "should be construed together so that effect may be given to all of the provisions of each, if fairly and reasonably, such construction is possible." *Pendennis Club v. Alcoholic Beverage Control Bd.*, 287 Ky. 49, 151 S.W.2d 438, 440 (1941).

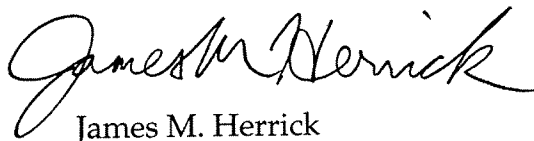
The conflict suggested by KCTCS is illusory. Although the Board has been given "exclusive authority" to govern KCTCS, such authority cannot be over and against that of the General Assembly. Rather, the authority of the Board of Regents to govern KCTCS is subject to the specific provisions of KRS Chapter 164. OAG 01-5. It is well established that specific statutory provisions

⁴ KRS 164.360(1)(b) states in part: "The board of regents for the Kentucky Community and Technical College System shall appoint a president, and on the recommendation of the president may, in its discretion, appoint all faculty members and employees and fix their compensation and tenure of service...."

prevail over general. *Land v. Newsome*, Ky., 614 S.W.2d 948, 949 (1981). If the specific mandate of KRS 164.5087(3)(b) is construed as an exception to the general governing authority of the Board of Regents, there is no conflict among the provisions.

Wells v. Board of Regents, *supra*, does not stand to the contrary. The *Wells* case was decided twenty years before the enactment of KRS 164.5807 and did not involve an attempt by a governing board to eliminate tenure. While the KCTCS Board of Regents has the authority to enact procedures and standards for how faculty are to earn tenure in the future, it is not free to eliminate tenure entirely. It is therefore the opinion of this office that KCTCS Board of Regents Policy 2.0.1.2 is contrary to the requirements of KRS 164.5807(3)(b)⁵ to the extent that it purports to eliminate tenure for faculty hired after July 1, 2009.

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⁵ Although KRS 164.5805(1)(d)2 arguably imposes the same requirements, that question has not been presented to us. In any event, KRS 164.5807(3)(b) is dispositive of the fundamental issue.