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**COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
CASE NO. 2009-SC-000821-D**

TECO MECHANICAL CONTRACTOR, INC. APPELLANT

v. **BRIEF OF APPELLANT**

COMMONWEALTH OF KENTUCKY,  
ENVIRONMENTAL AND PUBLIC PROTECTION  
CABINET, et al. APPELLANTS


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On Appeal from Kentucky Court of Appeals  
Case No. 2008-CA-000305  
Franklin Circuit Court, Civil Action No. 05-CI-00464

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

It is hereby certified that an original and ten (10) copies of the Brief of Appellant was served via hand-delivery upon the Clerk, Kentucky Supreme Court, 209 State Capitol, 700 Capital Avenue, Frankfort, Kentucky 40601; and copies mailed to Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Hon. Phillip J. Shepherd, Judge, Franklin Circuit Court, P.O. Box 678, Frankfort, Kentucky 40602; Mark F. Bizzell, Esq., Labor Cabinet, U.S. 127 Republic, South Messenger, Frankfort, Kentucky 40601; Irwin H. Cutler, Esq., 800 Republic Bank Building, 429 W. Muhammad Ali Blvd., Louisville, Kentucky 40202; David A. Velander, Esq., 105 S. Sherrin Ave., Louisville, Kentucky 40207, this 16<sup>th</sup> day of May, 2011.

## INTRODUCTION

The issues presently before this Court concern a civil matter wherein the Appellant, TECO Mechanical Contractor, Inc., challenges the constitutionality of the statutory and administrative scheme that pertains to investigation and enforcement of the prevailing wage laws. On appeal, the Kentucky Court of Appeals affirmed the trial court's ruling upholding the constitutionality of the subject provisions and actions by the Kentucky Labor Department.

## STATEMENT CONCERNING ORAL ARGUMENT

Based on the complex nature of the relevant constitutional issues and the attendant circumstances regarding Appellees' enforcement actions against TECO Mechanical Contractor, Inc., Appellant believes oral arguments would assist the Court in reaching its decision.

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## STATEMENT OF THE CASE

### *(a) The Parties*

- TECO Mechanical Contractor, Inc. (“TECO”) was the plaintiff in the circuit court action and the Appellant at the Kentucky Court of Appeals (“Court of Appeals”). TECO worked as a subcontractor on numerous public projects that were the subject of prevailing wage audits. (R. at 1; Complaint, ¶¶ 1,7).

- The Commonwealth of Kentucky Environmental and Public Protection Cabinet (the “Cabinet”) was the defendant in the circuit court action and the Appellee at the Court of Appeals. At the time, it included the Kentucky Department of Labor, which was responsible for enforcing the prevailing wage laws pursuant to KRS Chapters 336 and 337. (R. at 1; Complaint, ¶ 3).<sup>1</sup>

- McKnight & Associates, Inc., D.W. Wilburn, Inc., Isaac Tatum Construction, Inc., Todd Johnson Contracting, Inc., Burchfield & Thomas, Inc., Garrett Construction Company and Vector, LLC were the Third Party Defendants in the circuit court action. These parties acted as the prime contractors on the various public projects where TECO worked as a subcontractor. (R. at 146; Cross Claims). They have not participated substantively in this case.

- The Kentucky State Building and Construction Trades Council, AFL-CIO, the Associated General Contractors of Kentucky, Inc., the Associated Builders and Contractors of Kentuckiana, Inc. and the Mechanical Contractors Association of Kentucky, Inc. were each permitted to intervene in the circuit court action.

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<sup>1</sup> After a reorganization, the Labor Department was moved from the Commonwealth of Kentucky Environmental and Public Protection Cabinet and is now part of the newly formed Labor Cabinet. For simplicity, the term “Cabinet” herein encompasses, and shall refer to, The Labor Cabinet and the Labor Department.

*(b) Factual and Procedural Background*

TECO provided subcontractor services on multiple public works projects within the Commonwealth of Kentucky, each of which was bid as a public project. (R. at 1; Complaint, ¶¶'s 7,8). In and around 2002, the Cabinet performed several wage audits concerning TECO's classification of the work its employees performed on these projects, and on November 21, 2002, the Cabinet notified TECO that \$150,781.82 was owed in back wages to several of its employees based on TECO's alleged misclassification of the work performed as general labor as opposed to skilled labor. (R. at 18-29). After further investigation, the Cabinet amended its wage audits at least twice, once on March 4, 2004 reducing the amount allegedly owed by TECO to \$77,571.69 and later, in a telephone conversation on February 18, 2005, reducing the amount to \$63,494.21. (R. at 30; 34).

On February 25, 2005, the Cabinet advised TECO that if it did not pay \$51,620.65 (an amount equal to a compromised settlement proposal of \$47,620.65 in back wages and \$4,000.00 in civil penalties), then it would commence efforts to seek restitution from the prime contractors on the projects in question. (R. at 34). Following through on these threats, the Cabinet notified the respective prime contractors for each job in question, stating that TECO "failed to correctly compensate employees for hours worked on the above referenced project[s]" and demanded that the prime contractors pay the disputed amounts on or before March 31, 2005. (R. at 36-58).

Three of the affected prime contractors subsequently contacted TECO. The first, D.W. Wilburn, advised TECO as follows:

The Department of Labor has contacted D.W. Wilburn, Inc., in regards to your failing to pay your workers. As I am sure you are aware in turn we are required to pay the underpaid wages.

Needless to say this is not the way we prefer to do business. As a matter of fact we should feel comfortable that we are entering in to a contract with a competent Subcontractor that is capable of paying their payroll.

In closing, we should NOT be responsible for your payroll. If TECO Mechanical wants to pursue any further business endeavors with D. W. Wilburn, I suggest that you monitor the payroll requirements closely to ensure major discrepancies do not occur. Otherwise, I can assure you that your business relations with D.W. Wilburn could be jeopardized.

(R. at 59). The second contractor, McKnight & Associates, was equally direct. It advised:

The Department of Labor is requiring McKnight & Associates, Inc. to pay for underpaid wages on **YOUR** employees. According to the Department of Labor, you underpaid employees on the Juvenile Detention Center in London, KY.

I am very upset over the fact that you are refusing to pay your employees and we are being required to "foot the bill". If this is any indication of how you are going to run your business, then our business relationship may very well be in jeopardy.

In summary, we do not want to be responsible for paying **YOUR** employees' wages. If you continue to conduct your business in this manner we seriously doubt that we will accept any bids from TECO on further projects.

(Original emphasis). (R. at 60). The third contractor, Burchfield & Thomas, responded similarly. It's letter stated:

We have received a letter from the Kentucky Department of Labor informing us that we should pay some of your employee's back wages for scale rates that were not paid properly.

Please inform us what this is concerning and do we owe it. Should we have to pay your employee's [sic], we are going to be extremely upset and hesitate about working with you on future jobs.

(R. at 61).

In an effort to protect its reputation and prevent further damage to its business relationships with the prime contractors in question, TECO filed its Complaint and Petition for Declaration of Rights in the Franklin Circuit Court on March 30, 2005,



captioned Teco Mechanical Contractor, Inc. v. Commonwealth of Kentucky Environmental and Public Protection Cabinet, et al, and assigned Civil Action No. 05-CI-00464. (R. at 1). Therein, TECO raised two constitutional challenges to KRS Chapter 337: First, TECO claimed that the fact that the Cabinet is empowered to conduct a wage audit and enforce it against both the subcontractor and the prime contractor before either has an opportunity to be heard in an administrative hearing, or otherwise, constitutes a deprivation of due process; Second, TECO claimed that the statutes in question improperly delegate power to the Cabinet regarding classification of the labor performed, given the fact that the statutory scheme makes no attempt whatsoever to define the skills to which each prevailing wage applies.<sup>2</sup> TECO simultaneously filed a Motion for a Temporary Restraining Order, asking that the Cabinet be enjoined from continuing its efforts to collect the allegedly owed wages from the prime contractors before there was a decision on the merits. (R. at 10). The trial court issued the requested Restraining Order, thereby restraining the Cabinet from “attempting to collect the allegedly owed back wages...” (R. at 62).

In an amended answer, the Cabinet asserted counterclaims against TECO and filed Third Party Complaints against the various prime contractors seeking a judgment for the allegedly owed wages, as well as civil penalties against TECO. (R. at 146). After several parties were permitted to intervene, and after a period of written discovery, TECO moved for Summary Judgment on the constitutional issues. (R. at 366). TECO’s Motion was denied by the Opinion and Order of Franklin Circuit Court entered February 3, 2006 (R. at 592; Appendix B). TECO then filed a Motion to Alter, Amend or Vacate, which

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<sup>2</sup> TECO has never challenged the Cabinet’s authority to require employers to pay prevailing wages for various worker classifications on public projects. Rather, TECO’s suit concerned only the manner in which the Cabinet classifies work between skilled trades and general labor.

also was denied by the Franklin Circuit Court's Opinion and Order of April 13, 2006 (R. at 605; Appendix C). Subsequently, TECO and the Cabinet participated in a two day bench trial, after which the trial court entered a judgment in favor of the Cabinet for \$64,163.47 in back wages and \$9,000.00 in civil penalties (R. at 1039; Appendix D). TECO filed its Notice of Appeal and posted a Superseadeas Bond on February 13, 2008. (R. at 1076, 1078).

On review, the Kentucky Court of Appeals entered an Opinion Affirming in Part and Vacating in Part on November 20, 2009 (see Appendix A; hereinafter "Ct. App. Opinion"). Therein, the Court of Appeals affirmed the trial court's ruling as to the constitutional issues, but vacated the trial court's judgment in favor of the Cabinet and remanded the matter for further proceedings. Appellant then filed a Motion for Discretionary Review of the decision of the Court of Appeals with this Honorable Court seeking review only as to the constitutional issues ruled upon by the Court of Appeals. The Motion for Discretionary Review was granted on March 16, 2011. (See Appendix E).

## ARGUMENT

### **I. The Court of Appeals erred in upholding the constitutionality of the Act regarding the due process afforded to TECO**

As argued before both the Franklin Circuit Court and the Court of Appeals, TECO was entitled to a due process hearing prior to the imposition of civil penalties against it and the collection of back wages by the Cabinet. The lack of any formal administrative due process hearing procedures within the Act, combined with the enforcement actions taken by the Cabinet prior to any judicial proceeding, effectively precluded TECO from receiving a meaningful due process hearing sufficient to protect its Constitutional rights.

***(a) A post-enforcement judicial proceeding does not provide a constitutionally sufficient due process hearing in this case***

Kentucky law demands a due process hearing before any aggrieved party is finally deprived of a property interest:

Section 2 of the Kentucky Constitution prohibits the exercise of arbitrary power over the lives, liberty and property of the citizens of the Commonwealth. In the interest of fairness and in order to comply with the mandate of Section 2, a party whose rights are affected by an administrative action is entitled to procedural due process. Moreover, administrative proceedings which affect a party's rights but do not afford an opportunity to be heard could likewise be classified as arbitrary. Constitutional due process requires a trial type hearing for the purpose of determining the adjudicative facts necessary to decide the issue. (Internal citations omitted).

*Kaelin v. City of Louisville*, 643 S.W.2d 590, 591 (Ky. 1982). See also *Fayette County Bd. of Educ. v. M.R.D.*, 158 S.W.3d 195, (Ky. 2005)(administrative due process hearing conducted to determine whether Fayette County should reimburse private educational expenses for learning disabled child.); *Jenny Wiley Health Care Center v. Commonwealth of Kentucky Cabinet for Human Resources*, 828 S.W.2d 657 (Ky. 1992)(child care licensee may, within 20 days of receipt of written violation by Cabinet, request an administrative due process hearing in front of an impartial hearing officer to hear and decide.); *Cabinet for Human Resources Dep't of Health Servs. v. Kanter*, 898 S.W.2d 508 (Ky. App. 1995)(no due process violation when the Cabinet imposed sanctions upon food vendors contracting with the State because sanctions imposed only after full investigation and administrative due process hearing.); *Blackburn v. Board of Education*, 564 S.W.2d 35 (Ky. App. 1978)(tenured teacher entitled to full administrative due process hearing prior to termination of teaching contract.).

This principal has been echoed repeatedly by the United States Supreme Court in emphasizing that, although what constitutes a sufficient due process hearing may vary

depending on the particular circumstances of each case, the touchstone of due process is “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Supreme Court has identified “(1) the private interest that will be affected by the government action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute procedural safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail” as the factors to be balanced in determining the specific dictates of due process in a given circumstance. *Id.* at 335, citing *Goldberg v. Kelly*, 379 U.S. 254, 263-271 (1970).

The necessity of these fundamental due process requirements was not questioned by the Court of Appeals and, indeed, the Court of Appeals recognized the need for a hearing in this instance in order for the Cabinet to properly pursue civil penalties against TECO. (Ct. App. Opinion at 14-15)(“Finally, the Cabinet may seek civil penalties against anyone violating the Act by issuing a citation. If that citation is not paid within fifteen days, the cabinet shall initiate a civil action to collect the penalty.”). Nonetheless, the Court of Appeals upheld the lower court’s decision regarding the constitutionality of the Cabinet’s actions based on its determination that a sufficient due process hearing had in fact been afforded to TECO.

The Court of Appeals based its ruling upholding the constitutionality of the Cabinet’s actions largely, if not entirely, on the fact that the statutory scheme of the Act provided an adequate due process hearing procedure in that it afforded TECO the right to participate in a civil action in Circuit Court. Citing to KRS 336.985, the Court of Appeals

found that the Act provided a due process hearing because “in order to enforce any citation seeking a civil penalty, the Cabinet must first file a civil action...” (Ct. App. Opinion at 15). The Court of Appeals therefore concluded that “although the trial court cited to the wrong review process, it reached the correct conclusion that the Act does provide a process for aggrieved parties to be heard.” (Ct. App. Opinion at 15). Moreover, and relying entirely on the United States Supreme Court’s opinion in *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001), the Court of Appeals deemed the process set forth by KRS 336.985 to be constitutionally sufficient to satisfy due process in this instance insofar as “access to ordinary judicial process is due process.” (Ct. App. Opinion at 16).

The Court of Appeals’ reliance on, and application of, *Lujan* in reaching a determination in this matter was improper. As the Court of Appeals pointed out in its Opinion, the facts underlying the holding in *Lujan* differ significantly from those present here. (Ct. App. Opinion at 16) (“The case herein differs from *Lujan* because the Act does not specifically provide TECO with the right to bring a breach-of-contract suit.”). Although the Court of Appeals dismissed the legal significance of these differences, a closer examination reveals that the distinguishable factual scenario of *Lujan* belies the application of its holding in this case. In *Lujan*, the aggrieved party had a statutorily vested right to bring a breach-of-contract suit to pursue the payments that had been withheld from it due to the alleged violations. As a result, recourse to the civil courts (even if post-facto) was sufficient to safeguard the aggrieved party’s rights to the extent that the penalties were purely monetary and could be recouped by the aggrieved party, in full, through the subsequent judicial process.

In the instant case, however, no such statutory right was granted to TECO and the harm accruing to TECO as a result of the Cabinet's enforcement actions far exceeded the mere withholding of contractual payments as in *Lujan*. Here, the Cabinet not only sought to enforce the penalties against TECO, but simultaneously imposed fines and back wages on TECO's prime contractors. By taking enforcement actions against TECO's prime contractors, the Cabinet impugned TECO's reputation and damaged its ability to conduct business. Thus, by the very nature of the Cabinet's enforcement actions, a post-enforcement judicial proceeding would be insufficient to remedy the potential harm caused by the Cabinet with regard to TECO's reputation and ability to conduct business.

Applying the *Mathews* factors to these facts it is evident that: (1) TECO's interests were significantly and negatively impacted by the Cabinet's actions through the imposition of monetary penalties *and* immediate harm to TECO's reputation and ability to conduct business; (2) post enforcement judicial recourse is insufficient insofar as it cannot undue the damage to TECO's reputation and business interests, and this could be remedied simply by instituting a pre-enforcement hearing process<sup>3</sup>; and (3) no additional significant fiscal or administrative burdens would be placed on the government by virtue of requiring a pre-enforcement due process hearing.

Consequently, while a post-enforcement civil suit may arguably have served as judicial process sufficient to satisfy due process on the facts of *Lujan*, the same judicial process on the facts of this case would not provide the same nature and degree of redressability to TECO and would thus be insufficient to satisfy TECO's constitutional right to a due process hearing.

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<sup>3</sup> Significantly, the Court of Appeals' Opinion recognized this in taking note of the lower court's admission that "an administrative hearing prior to appeal might be a more efficient way to handle such disputes."

***(b) The Cabinet's preemptive enforcement action denied TECO of a constitutionally sufficient due process hearing under the Act***

Assuming arguendo that the statutory process identified and relied upon by the Court of Appeals would provide TECO with constitutionally sufficient judicial process with regards to the enforcement of civil penalties (which TECO expressly denies it did), that process was not complied with by the Cabinet in this case. Moreover, the judicial process afforded by KRS 336.985 applies only to the imposition of fines and therefore does not extend and apply to enforcement actions taken by the Cabinet with respect to the payment of back wages. Consequently, even under the Court of Appeals' reasoning, KRS 336.985 is insufficient to provide full constitutional due process with respect to the range of enforcement actions available to the Cabinet and indeed, TECO was not afforded a sufficient due process hearing herein.

***(i) The Cabinet does not follow the requirement of KRS 336.985***

As set forth above, KRS 336.985 permits the Cabinet to impose civil penalties and to issue a citation to the violating party. If the violating party does not pay the penalty imposed within fifteen (15) working days, the Cabinet "*shall* initiate a civil action to collect the penalty." KRS 336.985 (emphasis added). The requirement that the Cabinet initiate a civil action in order to collect the penalty is not cast in permissive terms, but is instead made mandatory. Thus, by the express language of the statute, the Cabinet is prohibited from taking certain enforcement actions for violations of the Act by any means other than through initiating a civil action.

The Court of Appeals expressed cognizance of this requirement in pointing out that "in order to enforce the provisions of the Act, the Cabinet must bring a legal action." (Ct. App. Opinion at 16). As the Court of Appeals made certain, the basis for requiring

the Cabinet to follow this process is to ensure that the aggrieved party is afforded a constitutionally sufficient due process hearing. (Ct. App. Opinion at 17) (“[b]ecause there is no provision in the Act for an administrative hearing regarding the propriety of a violation, fine, or assessment of back wages, any enforcement action by the Cabinet in the circuit court must allow for an adversarial trial on the merits.”).

The facts clearly demonstrate that the Cabinet failed to follow the procedure identified by the Court of Appeals as being a requisite for due process. Here, the Cabinet enforced the provisions of the Act by assessing fines and back wages against TECO and its prime contractors and did so without initiating a civil action against TECO. In so doing, the Cabinet demonstrated that it had no intention of filing a civil action to provide a due process hearing to TECO prior to enforcing the penalties against it, and instead left it to TECO to pursue a judicial hearing. As KRS 336.985 instructs and as the Court of Appeals alluded, it is the Cabinet who is permitted to seek enforcement against TECO using the ordinary judicial process set forth in KRS 336.985. The ability to initiate that process was solely with the Cabinet, and not with TECO. Consequently, any determination by the Court of Appeals that TECO was afforded a sufficient due process hearing by virtue of recourse in this post-enforcement proceeding was in error.

Significantly, the Cabinet’s actions herein are entirely consistent with its past practices. Again, the Court of Appeals has identified KRS 336.985 as the provision through which sufficient due process procedures are afforded to employers such as TECO. If that is the case, then the Cabinet’s actions demonstrate that the Cabinet is either wholly unaware of the statute’s existence or has intentionally disregarded its requirements. Moreover, the Cabinet’s course of conduct in handling such disputes



indicates that such pre-hearing enforcement actions are not just capable of repetition, but are likely. To wit, the cabinet routinely takes enforcement action against contractors without first providing any due process hearing. These enforcement actions include, without limitation, assessing back wages and fines against the employer, assessing back wages and fines against the employer's prime contractors, and, in some instances, the drastic measure of notifying the Finance and Administration Cabinet of the contractor's alleged non-compliance with the prevailing wage requirements and effectuating their debarment.

Pursuing debarment is a particularly damaging enforcement action insofar as it results in the employer being terminated from its current jobs, having money withheld for work already performed and being made ineligible to bid on new jobs. Additionally, 200 KAR 5:315 allows the Labor Cabinet to effectuate the debarment of a contractor such as TECO to whom it has issued a Notice of Violation without first filing suit to obtain a judgment supporting the violation. In all instances where the amount in controversy is nominal and the time and expense involved with a lawsuit is not warranted, a contractor such as TECO can be deprived of property and liberty rights solely on the basis of an allegation. Although debarment was not pursued against TECO in this particular action, the Cabinet's ability to take such action is a relevant and justiciable issue insofar as it is capable of repetition and demonstrates the degree to which the Cabinet can take significant pre-hearing enforcement action to deprive employers of vested property and liberty rights.

*(ii) KRS 336.985 does not provide a constitutionally sufficient due process hearing procedure with respect to the Cabinet's demand for payment of back wages*

KRS 336.985(3) states:

If a civil penalty is imposed pursuant to this section, a citation shall be issued which describes the violation which has occurred and states the penalty for the violation. If, within fifteen (15) working days from the receipt of the citation, the affected party fails to pay the penalty imposed, the secretary, or any person authorized to act in his or her behalf, shall initiate a civil action to collect the penalty. The civil action shall be taken in the court which has jurisdiction over the location in which the violation occurred.

Based on this language, and as set forth above, it is evident that the Cabinet is required to resort to the civil judicial process in order to enforce any civil penalty imposed pursuant to this section. It is less certain, however, whether this language is applicable to the assessment of back wages by the Cabinet.

To wit, the scope of the term "civil penalty" is arguably limited to the fines assessed by the Cabinet for violations of the wage laws and therefore does not extend to the imposition of back wages. To the extent that the process identified by KRS 336.985(3) does not apply to back wages, the Act lacks any provision, statutory or otherwise, for a due process judicial hearing associated with the Cabinet's imposition of back wages against TECO or its prime contractors.

As discussed herein, a significant component of the Cabinet's enforcement actions against TECO was the imposition of back wages against TECO and its prime contractors. Consequently, the Court of Appeals' determination that the Act was constitutional because the judicial process afforded under KRS 336.985 was sufficient to confer the benefits of a meaningful due process hearing upon TECO was in error because the plain language of the statute leaves open the possibility that such protections would

not extend to enforcement actions taken by the Cabinet relating to back wages. As set forth above, the Cabinet's enforcement actions in assessing back wages against TECO and its prime contractors impugned TECO's property and liberty rights by virtue of damaging its reputation and business operations. The occurrence of any such enforcement actions without a corresponding due process hearing violates TECO's constitutional rights and, thus, makes KRS 336.985 constitutionally deficient.

By virtue of the absence of any administrative hearing process in the Act, the Cabinet's failure to comply with the judicial process contained in KRS 336.985, and the lack of judicial process in KRS 336.985 relating to the imposition of back wages, TECO was left without any recourse to a due process hearing procedure at a meaningful time and manner; let alone prior to the Cabinet taking enforcement actions against it. As a result, TECO experienced a deprivation of rights causing significant pecuniary damage and damage to its reputation and ability to conduct business. As shown by the balancing of the factors set forth by the Supreme Court in *Mathews*, this post-enforcement civil proceeding initiated by TECO is insufficient to fully protect its constitutional rights in this case. As such, the Court of Appeals' ruling should be overturned.

**II. The Court of Appeals erred in upholding the constitutionality of the Act regarding the statutory scheme for determining worker classifications**

As argued below, KRS Chapter 337 is devoid of any definitions, guiding principles or criteria respecting how worker classifications are to be defined. Necessarily, therefore, and whether couched in terms of an improper delegation of judicial or legislative power, it is clear that in taking enforcement action against TECO the Cabinet acted outside of the powers vested to it under the Act by setting its own definitions of

worker classifications and then arbitrarily adjudicating whether TECO' actions adhered to those definitions. The Court of Appeals' decision to the contrary was reached in error.

In the present case, the Cabinet concluded that "TECO failed to correctly compensate employees for hours worked on the...project[s] in violation of KRS 337.530 for misclassification." (R. at 350; Exhibit 3 to TECO's Memorandum in Support of Motion for Summary Judgment). For example, the Cabinet contended that TECO paid certain employees at the prevailing wage for a "general laborer" when in fact those employees should have been paid the prevailing wage for a sheet metal worker. The inherent problem, of course, is that there is a complete absence of definitions or guidance from the legislature, statutory or otherwise, as to what the proper classifications of the workers at issue are or should be.

In affirming the trial court's decision upholding the constitutionality of the Cabinet's actions, the Court of Appeals determined, inter alia, (1) that TECO's own alleged failure to classify the jobs performed by its employees precluded it from complaining regarding the Cabinet's classification system and (2) that, somehow, there are sufficient constraints on the Cabinet's classifications by virtue of the process the Cabinet undertakes in setting prevailing wages. Once again, the Court of Appeals' determination was improper. As set forth below, the reasons identified by the Court of Appeals as supporting the constitutionality of the Cabinet's actions are insufficient to overcome the improper delegation of discretion given to the Cabinet by virtue of the lack of guiding criteria.

The present situation is not unlike the case of *Kerth v. Hopkins County Board of Education*, 346 S.W.2d 737 (Ky. 1961) wherein the Board of Education filed suit

challenging the statutes that permitted the Department of Industrial Relations to set a prevailing wage “based substantially upon union rates fixed in labor contracts.” In support of its challenge, the Board of Education argued that the General Assembly had not provided sufficient guidance to assist the Prevailing Wage Board in its determination of actual rates of wages for laborers, workmen and mechanics. The Franklin Circuit Court found for the plaintiffs. The administrative agency appealed and in reviewing the statutory scheme of KRS Chapter 337, the Kentucky Court of Appeals determined:

The law is completely silent with respect to the scope of the Board’s authority or duty in the establishment of prevailing wages. What is a proper “prevailing wage?” The statute does not even define the term. It does not identify a single factor the Board shall take into consideration. There is simply nothing in this legislation which offers any clue to what the legislature intended should guide and control the Board’s determination of proper “prevailing wage” rates. Not only is the Board left completely adrift with respect to how it should go about establishing proper prevailing wages for a particular contract, but no one, including this court, is furnished any criteria by which to determine whether the Board is carrying out the assumed legislative policy as the legislature intended or whether a particular action of the Board properly protects or actually impairs the legal rights of interested parties.

*Kerth*, 346 S.W.2d at 741.

In affirming the Franklin Circuit Court, the *Kerth* Court went on to hold that the prevailing wage statutes in KRS Chapter 337 were unconstitutional, as they violated the fundamental rule of law that “with respect to administrative agencies, it is fundamental that the legislature must prescribe some standard governing the scope of administrative action. Otherwise the law is invalid because it reposes in the agency an absolute, unregulated and undefined discretion.” *Id.*

Presumably in response to *Kerth*, the General Assembly amended that part of KRS Chapter 337 to direct the Cabinet to employ a number of specific factors when

setting the prevailing wage. See KRS 337.520(3)(a)-(c). There is no issue in this case as to what the actual prevailing wage should be for each classification of worker, but rather the sole issue is how the Cabinet went about defining which workers fall in which classifications.

As in *Kerth*, however, the Cabinet has once again exceeded its constitutional authority in reaching a determination without appropriate guidance from the legislature. Just as the Cabinet was deemed to have lacked sufficient guidance to determine proper prevailing wage rates in *Kerth*; the Cabinet herein was without any guidance as to how to determine worker classifications. Here again, the statutes are entirely silent as to (1) the scope of the Cabinet's authority to define worker classifications, and (2) any definition, criteria or intelligible principle to which the Cabinet can look for guidance in determining whether worker classifications have been complied with.

Admittedly, and as the Circuit Court stated, due to the "variety of skills and the nature of the labor covered by the prevailing wage laws" it may not be necessary (and indeed it may be impractical) for the Legislature to strictly define, by statute, every single category of worker classification. In order to withstand constitutional scrutiny, however, the Legislature must have, at the very least, provided by statute or otherwise *some* intelligible principal to which the Cabinet can look for guidance in determining classifications. Without the presence of any such guidance, the Cabinet is left free to make wholly arbitrary classifications and, moreover, entity's such as TECO are left without any guidance under which they can operate. As is the case herein, entities such as TECO are then left only with post-facto recourse through the courts of the Commonwealth, and only *after* they have already been fined and/or have suffered a

significant diminution in their ability to operate.<sup>4</sup> Simply put, the absence of any guiding criteria left the Cabinet with unfettered discretion in determining worker classifications which enabled the Cabinet to determine TECO to be in violation of “mis-classification” under KRS 337.530, resulting in the assessment of significant back wages and fines.

It remains undisputed that there are no statutory criteria or guidelines regarding the definition of worker classification for which the Cabinet determined that TECO engaged in misclassification. Consequently, the Cabinet’s actions (i) resulted from an improper delegation of authority by the General Assembly and (ii) represented an abuse of discretion by the Cabinet. Based on the arbitrary method by which the Cabinet is permitted to reach its own definitions for worker classifications, that part of KRS Chapter 337 which permits the Cabinet to investigate and enforce violations of the prevailing wage laws is unconstitutional and the Court of Appeals’ determination to the contrary should be overturned.

### CONCLUSION

Wherefore, for the reasons set forth herein, Appellant respectfully requests that this Court enter an Opinion and Order which (1) declares the statutory and administrative scheme pertaining to investigation and enforcement of the prevailing wage laws unconstitutional, and (2) reverses the judgment of the Court of Appeals on the issues of constitutionality.

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<sup>4</sup> As explained previously, this diminution in ability to operate stems from the fact that, once the Cabinet has made its determination, any challenge by TECO against the determination that includes a refusal to pay the back wages and fines will result in the Cabinet enforcing the back-wages against TECO’s prime contractors, which (as evidenced by the letters to TECO) necessarily causes the Prime Contractors to refrain from doing business with TECO.

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