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

TECO MECHANICAL CONTRACTOR, INC. APPELLANT

v.

REPLY BRIEF OF APPELLANT

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

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

Respectfully submitted,

MCBRAYER, MCGINNIS, LESLIE
& KIRKLAND, PLLC
201 E. Main Street, Suite 1000
Lexington, KY 40507
(859) 231-8780

DAVID J. GUARNIERI
W. CHAPMAN HOPKINS

GERRY L. CALVERT
115 W. Short Street
Lexington, KY 40507
ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

It is hereby certified that an original and ten (10) copies of the Reply 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 1st day of August, 2011.

DAVID J. GUARNIERI

STATEMENT OF POINTS AND AUTHORITIES

I. THE ARGUMENTS OF THE APPELLEES FAIL TO DEMONSTRATE THAT TECO WAS AFFORDED DUE PROCESS UNDER THE ACT

(a) The Appellees fail provide a statutory or common law remedy which would make Lujan applicable to TECO's case

The Appellees' primary argument relies on the application of *Lujan v. G & G Fire Sprinklers, Inc.* 532 U.S. 189 (2001). However, in their collective briefs they fail to rebut the fact that *Lujan* is distinguishable from this case because "the aggrieved party had a statutorily vested right to bring a breach-of-contract suit to pursue payment that had been withheld." (Appellant's Brief at 8). And, the Labor Cabinet's argument that "the facts of the case at bar are nearly indistinguishable from the facts in the *Lujan* case" (Labor Cabinet at 9), is contrary to the law of this case as the Kentucky Court of Appeals stated below that, "The case herein *differs* from *Lujan* because the Act does not specifically provide TECO with the right to bring a breach-of-contract suit." (Ct. App. Opinion at 16) (Emphasis added). It was this statutory right to sue in contract that the United States Supreme Court relied upon in finding that the California legislature had provided for due process in its statutory scheme. The very reason TECO had to file a declaratory judgment action is because Kentucky's prevailing wage statute offers *no* statutory rights for an aggrieved contractor to assert a claim or receive a hearing to protect its due process rights. The Labor Cabinet certainly had the power to file an action against TECO, but it did not. Without initiating an action, it sent demand letters to TECO and its prime contractors that demanded payment. TECO was then at the mercy of the Labor Cabinet as to whether it would ever receive due process for the claims against it, which is distinct from the situation of the aggrieved party in *Lujan* who controlled its due process destiny.

The Appellees also suggest that TECO's filing of a declaratory judgment action in circuit court resulted in due process being provided. They rely upon *American Beauty Homes Corp, v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450 (C.A.Ky 1964) for this proposition. Again, the Appellees' arguments lack merit as *American Beauty Homes* did not involve a direct action in circuit court. Instead, *American Beauty Homes* involved a, "zoning case which raises a very important question of administrative *appeal*." *Id.* at 452 (Emphasis added). In *American Beauty Homes*, the zoning commission denied the plaintiff's request to change the zoning classification of a particular area. This denial, as was the case in all decisions made by a local zoning commission, came only after a full hearing, which the Court's opinion described as a "detailed administrative process." Thus, the first difference from this case and *American Beauty Homes* is that the aggrieved party in *American Beauty Homes* received a full evidentiary hearing before the decision of the agency was made, unlike TECO.

The Plaintiffs in *American Beauty Homes* appealed the decision of the zoning commission to the circuit court under a statutory provision that provided *de novo* judicial review of the decision of the Commission. Though the Appellees have portrayed the burden of proving unconstitutionality as a practical impossibility, the Court found this statute to be unconstitutional on the basis of the fact that the review of the agency decision was *de novo*. The court explained:

> The futility of the initial [administrative] proceedings is obvious when we recognized that all of the steps taken before the Commission are nullified by taking an appeal. The detailed administrative process is a mockery. This procedural absurdity may be traced to the unconstitutionality of the de novo provision.

American Beauty Homes, 379 S.W.2d at 455. The Appellees have argued this case to say the reverse of the principle on which it stands. *American Beauty Homes* first and foremost states that it is unconstitutional for the Legislature to push upon the courts administrative duties for which it has no expertise. Thus, *American Beauty Homes* could not possibly stand for the notion that an aggrieved party may find his due process by seeking some common law hearing in a circuit court that lacks the expertise of the agency, which should have been the entity that held the hearing in the first place.

American Beauty Homes provides an inherent right of appeal of an agency decision not to satisfy due process, as Appellees have asserted, but to determine if due process has been satisfied. In the words of the *American Beauty Homes* Court:

> Judicial review of an agency action is concerned with the question of arbitrariness...there is an inherent right of appeal from orders of administrative agencies where constitutional rights are involved, and section (2) of the Constitution prohibits the exercise of arbitrary power... In the interest of fairness, a party to be affected by an administrative order is entitled to procedural due process. Administrative procedures which do not afford an opportunity to be heard could likewise be classified as arbitrary.

American Beauty Homes, 379 S.W.2d at 455. *American Beauty Homes* thus found that the aggrieved party had an inherent right to appeal from a decision arising from an agency hearing to determine whether the decision was arbitrary. Failure to provide due process was one such basis the court determined that would cause adjudication that a decision was arbitrary. Until it did so in TECO's case, the Court of Appeals had never found a common law right for a party being aggrieved by an agency enforcement action to receive its due process in an original action filed in the circuit court in the absence of any agency hearing. Rather, the reverse was recognized in *American Beauty Homes* and has always been the policy of this Commonwealth: when a party believes himself

aggrieved by the arbitrary action of an administrative agency he may challenge the ruling in circuit court on the basis that the agency's procedures did not comport with due process. This does not provide due process, but invalidates the decision of the agency on the basis that the deprivation of due process by the agency made its decision arbitrary.

Therefore, the Appellees' arguments make the misapplication of *American Beauty Homes* by the Kentucky Court of Appeals clear. *Lujan* provides that when an aggrieved party has a statutory right or a common law right of contract, the resulting suit provides adequate due process. However, TECO has neither a statutory right nor a common law right upon which to base a review of the agency's decision. *American Beauty Homes* does not provide such a common law action that would sufficiently constitute a hearing for due process purposes. Rather, *American Beauty Homes* contemplates that on an appeal from an agency order, the courts may judicially review the decision of the agency to determine if that decision was arbitrary. Determining that the decision of the agency was arbitrary does not provide due process, but is merely a determination of whether due process is satisfied. Therefore, it is clear that the arguments of the Appellees, like that of the Court of Appeals, fall short of demonstrating that any process is available to TECO under the prevailing wage statutes, and suggests that the statute's failure to provide for any type of hearing in any forum is unconstitutional.

(b) The Appellees fail to demonstrate that due process may be satisfied without a pre-enforcement administrative hearing

Even if Kentucky common law did provide this nebulous inherent right that absent the provision of an administrative hearing a party affected by an administrative order is entitled to seek its due process in circuit court, and TECO maintains that it does not, the Appellees' arguments fail to adequately address that any process given TECO by

the circuit court trial was given too late. In its initial Brief to this Court, TECO cited *Kaelin v. City of Louisville*, 643 S.W.2d 590, 591 (Ky. 1982) to stand for the proposition that, "constitutional due process requires a trial type hearing for the purpose of determining the adjudicative facts necessary to decide the issue." (Appellant's Brief at 6). In an attempt to distinguish *Kaelin* from the case at bar, Appellees assert that because *Kaelin* is a zoning case it is inapplicable. Specifically, the Brief for the Kentucky State Building and Construction Council stated, "*Kaelin* and the Zoning Jurisprudence from which it arose have no relevance to the issues presented in this case" (KSBCC at 18). The Labor Cabinet likewise stated, "*Kaelin* and other zoning procedural due process cases are not applicable." (Labor Cabinet at 14).

For the Appellees who argue that *Lujan* applies to this case because of a common law right of action found in *American Beauty Homes*, this is a curious argument, indeed. For not only is *American Beauty Homes* a zoning case, it is the cited source for the majority of the quote from *Kaelin* that was asserted by TECO in its original brief to this Court. Thus, in essence, the Appellees argue that *America Beauty Homes* should give rise to a *Lujan* common law right of action in this case, even though it is "not applicable," and has "no relevance" because it is part of the "zoning jurisprudence" from which *Kaelin* comes. This argument is contradictory and unsound. *American Beauty Homes* and *Kaelin* are applicable in this context as both stand for the proposition that failure to provide a right to be heard is an arbitrary action on the part of *any agency* and violates due process.

Moreover, the Kentucky Supreme Court's discussion in *Kaelin* appears to be one of general applicability and not merely to zoning cases. The *Kaelin* Court stated:

> The purpose of a "trial-type" hearing...is to permit the development of all relevant evidence that will assist the *administrative body* in reaching its decision. In such a hearing, as we view it, the parties must have the opportunity to subject all evidence to close scrutiny so as to determine its trustworthiness. A trial type hearing thus implies the opportunity for a full rebuttal, and the opportunity to impeach witnesses. Cross examination is a time tested method of assisting in the quest for truth. Under the rules of the commission, there is no opportunity to demonstrate the incompleteness, the untruth, the partiality or other weakness or defect in the testimony of a witness. Without such opportunity, the search for truth may very well be impeded or restricted.

Kaelin, 643 S.W.2d at 591-592 (emphasis added). As is clear, the rule articulated in *Kaelin* is one applying to all administrative bodies, which would include the Labor Cabinet. Moreover, the purpose behind the "trial-type" hearing is not unique to zoning, as all administrative agencies ought to be on an unimpeded and unrestricted quest for truth. Therefore, just as the zoning commission's failure to conduct a full and complete evidentiary hearing before taking action was fatal in *Kaelin*, the Labor Cabinet's action against TECO without a full administrative hearing also violates the Constitution.

The United States Supreme Court analysis on this subject yields the same conclusion. In its initial Brief to this court, TECO discussed the ruling of the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976), in which the Court stated that the touchstone of due process was, "the opportunity to be heard *at a meaningful time* and in *a meaningful manner*." (Appellant's Brief at 7) (Emphasis added). In all of the cases that are cited by Appellees, it is telling that *Mathews v. Eldridge*, a bedrock Supreme Court opinion in the due process arena, is not among them. The Appellees have no argument to refute that under the *Mathews* test, process was due *before* action was taken by the Labor Cabinet, and the circuit court trial after the fact is not sufficient to satisfy this requirement.

(c) Appellees fail to demonstrate that the demand letters sent by the Labor Cabinet to TECO and its prime contractors did not constitute enforcement actions

When reading the Labor Cabinet's brief, it is difficult to tell that the Cabinet had any adverse interaction with TECO at all. As the Cabinet frames the issue, "the Cabinet did not take enforcement action against TECO…also, the Cabinet did not issue a notice of violation or citation for civil penalties against any of TECO's prime contractors. The Cabinet *merely sent letters informing them* of their liability for the unpaid wages under KRS 337.990(12) and requested payment." (Labor Cabinet at 10-11) (Emphasis added).

If this is how the Labor Cabinet understood its action, it was alone in such understanding. The Court of Appeals stated, "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 on the penalty." (Ct. App. Opinion at 14-15). Clearly, the Court of Appeals recognized that when the citation was given to TECO, an enforcement action had been initiated, thereby requiring due process. Additionally, the correspondence between the Cabinet and TECO's prime contractors seem to have evoked a very strong response for mere informative letters. As quoted in the Appellant's brief, McKnight and Associates, one of TECO's prime contractors, responded by stating that, "the Department of Labor is *requiring* McKnight and Associates to pay for underpaid wages on YOUR employees." (Appellant's Brief at 3) (Emphasis added). The same contractor concluded that, "If you continue to conduct your business in this manner, we seriously doubt that we will accept any bids from TECO on future projects." Based on theses same mere informational letters, Burchfield & Thomas, another prime contractor, 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." Clearly the reaction of the prime contractors indicated that they, like the Court of Appeals and TECO, believed the Cabinet had taken an enforcement action.

The Labor Cabinet seeks to argue both sides of the coin. When it is seeking collection on its citation of civil penalties and back pay, the Labor Cabinet represented that its action was an enforcement of its decision to collect the money from TECO and its prime contractors. However, when it seeks to avoid providing due process, it represents these demands as mere informational bulletins generated to provide a friendly warning to TECO and its prime contractors. The Franklin Circuit Court and Court of Appeals clearly and correctly found that the demand for civil penalties and back pay issued by the Cabinet were citations to enforce the judgment of the Cabinet. Though filing suit in circuit court would have certainly constituted an enforcement action, it would have been a subsequent enforcement action to the issuance of a citation to pay civil penalties and demanding back pay. By issuing such citations and making such demands on TECO and its prime contractors, the Cabinet was required to provide fundamental due process. Failure to do so makes the Cabinet's decision arbitrary, and failure of the statute to require the provision of a hearing to satisfy due process requirements further shows that the statute is unconstitutional.

II. THE ARGUMENTS OF THE APPELLEES FAIL TO DEMONSTRATE THAT THE STATUTORY SCHEME FOR DETERMINING WORKER CLASSIFICATIONS WAS CONSTITUTIONAL

In its Brief to this Court, TECO stated that, "[W]hether 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 the power vested to it under the ACT by setting its own definitions of worker classifications and then arbitrarily adjudicating whether TECO's actions adhered to those definitions." (Appellant's Brief at 15). The Kentucky State Building and Construction Trades Council accuses TECO of advancing a new argument stating, "to the extent that TECO is making a new argument that the Cabinet exceeded its statutory authority in the manner in which it classified the work, that argument is not properly before this court since it was not raised in either courts below." (KSBCTC at 21). However, citing the exact same language from Appellant's Brief, the Labor Cabinet states, "TECO made this same argument before the Court of Appeals..." (Labor Cabinet at 23). Regardless, the Kentucky Supreme Court found that improper delegation of authority and agency action outside of its authority has the same result. On this point this court stated:

> In the foregoing cases the laws in question were declared invalid on the constitutional ground that there was an unlawful delegation of legislative power. We do not quite reach that point in the present case because it is not clear that the legislature intended to delegate to the Board an unrestricted discretion to fix prevailing wage rates when collective labor agreements or understandings did not furnish a usable yardstick. However, the result is the same.

Kerth v. Hopkins County Bd. of Ed., 346 S.W.2d 737, 742 (Ky. 1961). Thus, not only has this argument been advanced below as indicated by the Labor Cabinet, but as articulated by the Supreme Court, the arguments are one in the same.

As advanced in the Appellant's Brief to this Court, the decision in *Kerth* provides guidance in this case. Appellants argue that *Kerth* is of no value here because it applies only when there is a "total lack of statutory authority." (Labor Cabinet at 24). However,

the Supreme Court's reasoning does not cut as narrowly as the interpretation of the Labor Cabinet. In *Kerth* this Court stated:

> The deficiency falls within the scope of the rule that where the intention of the legislature is so obscure as to defy a rational meaning, the law cannot be given effect...Where the law-making body, in framing the law, has not expressed its intent intelligibly, or in language that the people upon whom it is designated to operate or whom it affects can understand, or from which the courts can deduce the legislative will, the statute will be declared inoperative and void.

Kerth, 346 S.W.2d at 741 (internal citations omitted). It is clear from this statement that this Court has not only condemned statutes that fail to provide any authority for agency action, but also statutes that contain no intelligible principle upon which the agency may base its decision and those governed by the law may rely when carrying on their business. Therefore, under the express principles of *Kerth*, if the Legislature does not provide an intelligible principle that can be understood by both the agency and those affected by the rule, then the statute is "inoperative and void."

In its Brief to this Court, Mechanical Contractors Association of Kentucky (MCAK) has cited many a statute and underlined for emphasis several statutory phrases concerning prevailing wage, but is unable present to the Court an intelligible principle from those statutes that could possibly guide the agency or inform those it regulates on the classification of workers. (MCAK at 13-14). MCAK cites KRS 337.505, which defines the term "prevailing wage." In defining prevailing wage the statute makes clear that workers *within* each classification are to receive a wage determination based on what the majority of workers *within* that classification make for a reasonably comparable construction in the locality. And though this would seem to be the ideal location for the Legislature to explain this nebulous concept of classifying workers, KRS 337.505

advances no definitions of "classification of laborers, workmen, and mechanics," nor provides any useful criteria in creating such classifications. Thus, KRS 337.505 cannot be advanced as a statute which provides an intelligible principle upon which the agency could base it decisions or TECO could have relied in conducting its business.

The other statutes advanced by MCAK fare no better in providing an intelligible principle for classification. MCAK cites KRS 337.520, which provides a detailed set of criteria for determining prevailing wage *within* each classification of workers. (MCAK at 13-14). This portion of the statute is critical for determining the process by which the Labor Cabinet must determine the wage that prevails *within* a classification of workers; however, it is completely silent as to the process by which the workers are to be classified. If anything, this statute does not demonstrate an intelligible principle but highlights the irregularity of its absence. When the Legislature delegated authority to the Labor Cabinet to determine a prevailing wage *within* a classification, the General Assembly provided the Cabinet with the criteria and process to determine that prevailing wage. However, in KRS Chapter 337, the Legislature merely presupposes these worker classifications and, though they are central to the scheme, provides no criteria for classifying workers. Thus, it is clear that the method of classification is broken at the statutory level and this Court's intervention is required to set it within constitutional bounds.[1]

MCAK's citation of KRS 337.520 reemphasizes the applicability of *Kerth* to this case. In *Kerth* the process for determining the prevailing wage was broken in that the Legislature had not provided a mechanism to determine the wage that ought to prevail in

[1] It is important here to note that many of the classifications (i.e. insulators) are not licensed occupations. Accordingly, there is no independent criteria an employer could look to for guidance in classifying the type of work being performed by their employees.

an area where the majority of laborers were not covered by a collective bargaining agreement. Undeterred, the Labor Cabinet concocted its own plan with no statutory basis. This Court determined that because there was no intelligible principle upon which the Labor Cabinet's decision could be made, the decision of the Labor Cabinet and the statute upon which that decision was based could not stand. The Legislature then revised the statue to provide a clearer and more complete process for determining the prevailing wage in all areas. In likeness, in this case the Legislature has provided no mechanism to determine how the workers ought to classified, or at best have provided such limited guidance to the Cabinet that neither the Labor Cabinet nor any entity it regulates could possibly deduce the legislative will. However, undeterred, the Labor Cabinet has once again concocted its own classification plan with no statutory basis. Therefore, this Court should once again determine that because there is no intelligible principle upon which the Labor Cabinet's decision could be made, the decision of the Labor Cabinet and the statutes upon which it was allegedly based cannot stand. The Legislature would then, once again, be able to reconsider the statute and provide better direction to the Labor Cabinet and those it regulates.

Kerth also demonstrates that the Appellees place too little faith in the Legislature. In *Kerth* the process for determining prevailing wage as articulated by KRS 337.520(3) was determined to be arbitrary, capricious, and unlawful. However, in the wake of *Kerth* the Legislature revised KRS 337.520(3) to provide a more detailed and clear process for determining the prevailing wage amount. It is myopic to believe that the Legislature would be powerless to perform the same type of clarification to the classification procedures as it did to the prevailing wage amount determinations. Appellees seem to

envision that the Legislature would need to produce volumes of individual categories of workers to provide the type of guidance TECO seeks. However, the Legislature did not have to provide the Cabinet an exhaustive list of worker data in order to remedy the statutory failures of *Kerth*, but merely added two additional criteria for the Labor Cabinet to follow. The Legislature's addition of any criteria or process to the current void on the subject would not be an insurmountable hurdle as the Appellees suggest, but with a minimum amount of guidance, regulated entities like TECO would be better able to deduce the legislative will of the statute and compensate each class of its workers accordingly.

However, as KRS Chapter 337 is currently drafted, the Appellees have been unable to advance to the Court any 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 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 portion of KRS Chapter 337 which permits the Cabinet to investigate and enforce violations of 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 issue of constitutionality.

Respectfully submitted,

MCBRAYER, MCGINNIS, LESLIE
&KIRKLAND, PLLC
201 E. Main Street, Suite 1000
Lexington, KY 40507
(859) 231-8780

DAVID GUARNIERI
W. CHAPMAN HOPKINS

and

GERRY CALVERT
115 Short Street
Lexington, KY 40507

ATTORNEYS FOR APPELLANT