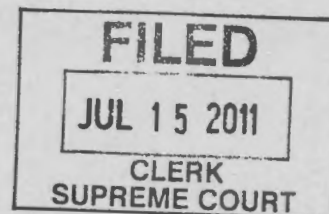


SUPREME COURT OF KENTUCKY
CASE NO. 2009-SC-00821-D



TECO MECHANICAL CONTRACTOR, INC.

APPELLANT

BRIEF OF APPELLEE

vs.

**KENTUCKY STATE BUILDING AND CONSTRUCTION
TRADES COUNCIL, AFL-CIO**

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

APPELLEES

On Appeal from the Kentucky Court of Appeals
Case No. 2008-CA-000305
Franklin Circuit Court, Civil Action No. 05-CI-000464

The undersigned does hereby certify that, on this 14th day of July, 2011, copies of this brief were served upon the following by U.S. Mail, first class postage prepaid: Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601; Hon. Phillip J Shepherd, Judge, Franklin Circuit Court, P.O. Box 678, Frankfort, KY 40602; Mark F. Bizzell, Kentucky Labor Cabinet, 1047 U.S. Hwy 127 S., Suite 4, Frankfort, KY 40601; David Guarnieri, McBrayer McGinnis Leslie & Kirkland, PLLC, 201 E Main St, Suite 1000, Lexington, KY 40507; Gerry L. Calvert, 115 West Short Street, Lexington, KY 40507-1301; and David A. Velandar, 105 S. Sherrin Ave, Louisville, KY 40207.

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STATEMENT CONCERNING ORAL ARGUMENT

Intervenor/Appellee Kentucky State Building and Construction Trades Council, AFL-CIO, agrees with the Appellant that oral argument may assist the Supreme Court in deciding the constitutional issues presented, and therefore requests oral argument.

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Declaration of Rights, in which it sought a judgment declaring the Act to be constitutional under both the United States and Kentucky Constitutions [R. 114-119, Council's Intervening Petition, ¶ 2 of Prayer for Relief (May 23 2005).]

B. Constitutional Issues Before the Circuit Court

In the initial stages of the litigation, TECO filed a motion for summary judgment on its constitutional claims. TECO made two constitutional arguments. TECO's first argument was that, when the Cabinet issued its wage audit and assessment of civil penalties against TECO, the Cabinet engaged in "agency adjudication" without providing TECO with an opportunity to be heard, in violation of the due process requirements of the Kentucky Constitution. [R. 330-363, TECO SJ Memo, pgs 5-8 (Sep 16, 2005).] TECO's second argument was that the Act's delegation to the Cabinet, under KRS 337.530, of the authority to determine work classifications for the purpose of prevailing wage rates constituted a "an unconstitutional delegation of judicial power to an administrative agency." [*Id.*, pgs 9-15.]

With its response to TECO's summary judgment motion, the Council filed a cross-motion for summary judgment seeking declaratory relief upholding the constitutionality of the Act. [R. 398-400, Council SJ Motion and Memo (Nov 09 2005).]

On February 3, 2006, the Franklin Circuit Court issued an Opinion and Order denying TECO's summary judgment motion. On the due process issue, the circuit court stated that "[t]he

located within the Cabinet for Environmental & Public Protection, the named Defendant/Appellee in this case. In 2008, in a subsequent reorganization, the Labor Cabinet and the Department of Workplace Standards were reestablished. The Cabinet/Department of Labor has been the agency with legislative authority to enforce the state's wage and hour laws since at least 1945. The Department/Office of Workplace Standards enforces the wage and hour provisions contained in KRS Chapters 207, 336, 337 and 339.

Cabinet has not attempted to enforce its decision against TECO,” and found that “TECO’s due process rights are fully protected by KRS Chapter 337 and that this chapter is constitutional.” [R. 592-597, Opinion and Order, pg 5 (Feb 3, 2006).] As subsequently noted by the Court of Appeals, the circuit court correctly concluded that TECO’s due process rights would be fully protected in a circuit court trial, but incorrectly cited an inapplicable statute – KRS 337.525, which governs appeals of wage rate determinations.

The circuit court also rejected TECO’s improper delegation argument, stating that “given the variety of skills and nature of the labor covered by the prevailing wage laws, it is impractical if not impossible for the [General Assembly] to statutorily define each work activity and assign a specific prevailing wage to it.” [*Id.*, pg 4.]

The circuit court subsequently denied TECO’s motion to alter, amend, or vacate the February 3, 2006, decision. [R. 904-908, Opinion and Order (Apr 13, 2006).]

After resolution of the constitutional issues, litigation continued on the Cabinet’s counter-claims against TECO for violations of the Act. A two-day bench trial was held in August 2007, resulting in a final judgment dated February 4, 2008. [R. 1039-1075, Findings of Fact, Conclusions of Law & Final Judgment (Feb 04 2008).] The Council did not participate in the trial and has limited its arguments on appeal to the constitutional issues raised by TECO.

C. Constitutional Issues Before the Court of Appeals

In the Court of Appeals, TECO repeated the two constitutional arguments that it had raised in the Circuit Court. TECO argued, first, that “it is improper for the General Assembly to empower the Cabinet to cite TECO for a violation of KRS 337.530 and to impose civil penalties without providing a due process hearing.” [TECO Court of Appeals Brief, pg. 8 of 24 (Jan 20 2009).]

TECO argued, second, that by purportedly failing to provide the Cabinet with any guidelines respecting the classification of work, the Act represents “an unlawful delegation of judicial power.”

[TECO Court of Appeals Brief, pg 15 of 24 (Jan 20 2009).]

D. Court of Appeals’ Decision on Due Process Issue

On TECO’s due process claim, the Court of Appeals found that the circuit court had mistakenly relied on an inapplicable statute in its analysis, but that the circuit court’s legal conclusions were correct:

[T]he Act provides a person several opportunities to be heard with regard to prevailing wage issues. The first opportunity is at the public hearing when a prevailing wage is set or revised. A person dissatisfied with the result of that hearing may then request a hearing before the prevailing wage review board and, if dissatisfied with the review board’s determination, may appeal to Franklin Circuit Court. KRS 337.522 and KRS 337.525.

* * * * *

As noted above, to enforce the Act, the Cabinet or an aggrieved employee may file a legal action. Furthermore, in order to enforce any citation seeking a civil penalty, the Cabinet must file a civil action. Therefore, 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.

[Court of Appeals Opinion, pg 15 (Nov 20 2009).]

The Court of Appeals then addressed the question of whether TECO’s opportunity to be heard in circuit court was “constitutionally sufficient,” finding the U.S. Supreme Court’s decision in *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001) to be persuasive on that issue. “[T]he underlying principle in *Lujan*, that access to ordinary judicial process is due process, applies

herein.” [Court of Appeals Opinion, pg 16 (Nov 20 2009).] The Court of Appeals concluded its discussion of the due process issue as follows:

In order to enforce the provisions of the Act, the Cabinet must bring a legal action. Because 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 Court must permit the Cabinet and the aggrieved party to fully present evidence regarding the propriety of the Cabinet’s actions. Upon conclusion of any such trial, the Court must weigh the evidence and make findings of fact and reach conclusions of law based on a *de novo* review of that evidence. Furthermore, because there is no provision for an administrative hearing, the circuit court shall not afford deference to any “findings” by the Cabinet.

Additionally, although the Act does not specifically provide for the filing of a direct action in circuit court by an aggrieved party, we hold that such a right is inherent in the Act. Because a “party to be affected by an administrative order is entitled to procedural due process[,]” *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky. 1964), absent the provision for an administrative hearing, a party affected by an administrative order must be entitled to seek relief in circuit court. As noted above, any proceeding in circuit court would be an original action, not an appeal from an administrative adjudication. Upon the foregoing, we uphold the constitutionality of the Act despite its failure to provide an administrative hearing.

Therefore, we hold that, from a due process standpoint, the Act is constitutional.

[Court of Appeals Opinion, pgs 16-17 (Nov 20 2009).]

E. Court of Appeals’ Decision on Delegation Issue

The Court of Appeals also rejected TECO’s argument that, by giving the Cabinet allegedly “unfettered discretion” to classify work, the Act represents an unconstitutional delegation of judicial power to the Cabinet. The Court of Appeals began its discussion noting that, since TECO

itself did not even attempt to classify the work in question, “TECO cannot now be heard to complain regarding the Cabinet’s classification system.” [Court of Appeals Opinion, pg. 18 (Nov 20 2009).] The Court of Appeals also cited three additional reasons for rejecting TECO’s unconstitutional delegation argument:

Second, the Cabinet is not performing a judicial function when it issues a citation or seeks back wages for an employee. It is performing an administrative function. Any judicial function takes place in a court after the Cabinet files a legal action to enforce the citation or collect the back wages. At that point, an aggrieved party may put on evidence contesting the Cabinet’s classification, much as TECO did before the Franklin Circuit Court.

Third, as noted by [Appellee Mechanical Contractors Association of Kentucky, Inc. (MCAK)], there are constraints on the Cabinet’s classifications. Determining prevailing wage consists of two factors; the first is classifying jobs. The second is setting the rate of pay for each classification. In determining the prevailing wage, the Cabinet is required to consider the wages paid “to the majority of laborers, workmen, and mechanics employed in each classification of construction upon reasonably comparable construction in the locality where the work is to be performed[.]” KRS 337.505(1). Furthermore, the Cabinet must obtain information regarding the number of workers employed in other projects and their rates of pay as well as collective bargaining agreements in the locality. KRS 337.520(3). These constraints, particularly those provided by the collective bargaining agreements, do not leave the Cabinet with unfettered discretion regarding classification.

Fourth, the primary case relied on by TECO, *Butler v. United Cerebral Palsy of Northern Ky., Inc.*, 352 S.W.2d 203 (Ky. 1961), deals with the delegation of legislative authority to an agency, not the delegation of judicial authority. Therefore, it has no application to TECO’s argument regarding the delegation of judicial authority. The other case on which TECO relies, *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852 (Ky. 1981), does deal with the delegation of judicial authority. However, as we previously stated, the Cabinet was not exercising judicial authority when it issued its citation and sought to collect back wages. Furthermore, even if the Cabinet were exercising judicial authority, the Act provides for

judicial review of the Cabinet's actions, which is a sufficient safeguard against abuse of discretion.

[Court of Appeals Opinion, pgs 18-19 (Nov 09 2009).]

F. Court of Appeals' Remand to Circuit Court

As noted above, the Court of Appeals' decision upholding the constitutionality of the Prevailing Wage Act was premised on TECO receiving a *de novo* review in circuit court of all factual allegations made by the Cabinet in support of its wage audit and civil penalty assessment. Because the Court of Appeals could not confidently discern whether, at the trial on the Cabinet's claims against TECO, the circuit court had reviewed the evidence under a *de novo* standard, it remanded the case to the circuit court:

Note, we are not directing the trial court what conclusion it should reach. We are simply instructing the trial court to re-weigh the evidence using the appropriate standard. After doing so, the trial court may or may not reach the same conclusion regarding the Cabinet's counterclaims.

[Court of Appeals' Opinion, pgs 20-21.]

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY FOUND THAT TECO WAS NOT DENIED DUE PROCESS

TECO argues, as it did before the Court of Appeals, that it was entitled to a due process hearing prior to the Cabinet's issuance of a notice of violation, assessment and demand for payment. The Court of Appeals properly rejected TECO's argument, finding that the Act provides a process for aggrieved parties to be heard in circuit court. "[A]ccess to ordinary judicial process is due process . . ." [Court of Appeals Opinion, pg 16 (Nov 20 2009).]

A. The Court of Appeals Correctly Noted that the Prevailing Wage Act Vests Judicial Authority Over Violations Solely With the Circuit Court

In its rejection of TECO's due process arguments, the Court of Appeals correctly observed that "the Cabinet was not exercising judicial authority when it issued its citation and sought to collect back wages." [Court of Appeals Opinion, pg 16 (Nov 20 2009).] "Any judicial function takes place in a court after the Cabinet files a legal action to enforce the citation or collect the back wages." [*Id.*, pg 18.]

The Kentucky General Assembly has granted the Cabinet investigatory and prosecutorial powers under the Prevailing Wage Act, but has left all adjudicative authority over prevailing wage violations with the judicial branch of government. In this respect, the Act's statutory scheme is fundamentally different from other statutes that give administrative agencies the authority to both investigate and adjudicate violations. *See, e.g., Jones v. Cabinet for Human Resources*, 710 S.W.2d 862 (Ky. App. 1986) (statute granting "investigative, prosecutorial, and adjudicative functions" to Cabinet for Human Resources in the regulation of family care homes); *Kentucky Comm'n on Human Rights v. Fraser*, 625 S.W.2d 852 (Ky. 1981) (upholding the legislature's authority to grant adjudicative power to administrative agencies so long as certain constitutional safeguards are provided). However, as noted by the Court of Appeals in this case, "there is no provision in the [Prevailing Wage] Act for an administrative hearing regarding the propriety the a violation, fine or assessment of back wages . . ." [Court of Appeals Opinion, pgs 16-17 (Nov 20 2009).]

First enacted in 1940, Kentucky's prevailing wage statutes were passed for the purpose of preventing contractors in the construction of public works from enhancing their profits

by exploiting the laborers they employ. *Cassady v. Board of Aldermen*, 277 S.W.2d 1, 2 (Ky. 1955); *Kerth v. Hopkins County Bd. of Ed.*, 346 S.W.2d 737, 739 (Ky. 1961).² The Act requires all contractors and sub-contractors who have contracts for the construction of public works within Kentucky to pay no less than the “prevailing rate of wages,” as determined by the Kentucky Labor Cabinet, Department of Workplace Standards (“Cabinet”). KRS 337.530(2). The term “prevailing wage” is defined as the basic hourly rate paid or being paid to the majority of construction workers “employed in each classification of construction in the locality where the work is to be performed.” KRS 337.505(1). In the event there is not a majority being paid the same rate, the prevailing wage shall be the average hourly rate paid to employees in a given classification. *Id.*

The Act requires that, in determining prevailing wage rates for a given locality, the Cabinet shall consider, among other things, the wage rates provided for in collective bargaining agreements between labor organizations and employers “which . . . apply or pertain to the localities in which the public works are to be constructed.” KRS 337.520(3)(c). Contractors and other interested parties are given an opportunity to participate in administrative hearings through which the prevailing wage rates for different localities are determined. *See*, KRS 337.522; KRS 337.525; 803 KAR 1:030 (Hearings on Prevailing Wage Determinations). An interested party may seek judicial review of the wage rates determined by the Cabinet. *Id.*

² The Kentucky Act has a federal counterpart in the Davis Bacon Act, “designed to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area.” *Universities Research Ass’n, Inc. v. Coutu*, 450 U.S. 754, 776 (1981), *quoting from* House Committee on Education and Labor, Legislative History of the Davis-Bacon Act, 87th Cong., 2d Sess., 1 (Comm. Print 1962) (Legislative History). “The purpose of the bill was ‘simply to give local labor and the local contractor a fair opportunity to participate in [public] building program[s].’” *Id.*, *quoting* 74 Cong.Rec. 6510 (1931).

As noted by the Court of Appeals, unlike the process for determination of prevailing wage rates, the Act does not create an administrative process for the adjudication of prevailing wage violations by particular employers. KRS 337.550 states that the Cabinet “shall investigate and enforce” the prevailing wage statutes. But the Cabinet’s sole means of compelling an employer to comply with its statutory obligation to pay prevailing wages is to file suit in circuit court. The Cabinet “shall bring all actions to collect wages due any laborer, workman or mechanic and shall take action against any contractor or subcontractor to restrain violations of KRS 337.505 to 337.550.” KRS 337.550(1). If the Cabinet determines that civil penalties should be assessed, it must also bring those claims in circuit court. KRS 336.985(3). If an employer is “found to be in violation” of the Act by a circuit court, the employer may be held to be ineligible to bid on future public works projects until it is in substantial compliance. [*Id.*]

In fulfillment of its statutory obligation to “investigate and enforce,” the Cabinet conducts “wage audits” of contractors to determine if the statute’s provisions are being complied with. Under KRS 337.530(2), every contractor and subcontractor shall keep full and accurate payroll records that are open to inspection by the Cabinet. Upon completion of a wage audit, the Cabinet determines if an employer has violated the prevailing wage statutes and, if so, what penalties may be assessed. KRS 337.990(12) provides that contractors and subcontractors who fail to pay the prevailing wage required by statute “shall be assessed a civil penalty of not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense.” *Id.* Full restitution must also be made to employees. *Id.* The statute further provides that “[t]he prime contractor shall be jointly and severally liable with a subcontractor for wages due an employee of the subcontractor.”

Id. For a flagrant or repeated violation, the contractor or subcontractor “shall be barred” from other public works contracts for a period of two years.

If a wage audit indicates one or more violations, as occurred in this case, the Labor Cabinet issues a notice of violation that demands restitution and assesses the penalties provided for in KRS 337.990(12). However, as found by both the circuit court and Court of Appeals, the only mechanism that the Cabinet has as its disposal for adjudication and enforcement of its demand for restitution and penalties is through an action in circuit court.³

B. TECO Was Not Entitled to an Administrative Hearing Before Issuance of the Cabinet’s Wage Audit and Civil Penalty Determinations

TECO argues that, prior to the Cabinet’s issuance of a notice of violation, assessment and demand for payment, the Cabinet was constitutionally required to conduct a trial-type adjudicative hearing with all the accouterments of procedural due process. The Court of Appeals properly rejected TECO’s argument, correctly stating as follows:

[T]he Cabinet is not performing a judicial function when it issues a citation or seeks back wages for an employee. It is performing an administrative function. Any judicial function takes place in a court after the Cabinet files a legal action to enforce the citation or collect the back wages.

³ Another statute with a similar enforcement scheme is the Kentucky Consumer Protection Act. KRS 367.110 to 367.300. When a consumer believes that he has been the victim of an “unfair, false, misleading, or deceptive” act or practice made unlawful by KRS 367.170, he may file a complaint with the Attorney General. Like the Labor Cabinet, the Attorney General is given statutory authority to investigate complaints and bring civil actions for violations of the statute, but has no independent adjudicative authority. KRS 367.240. The Attorney General may demand restitution and civil penalties, but must bring a *de novo* action in circuit court to enforce those demands. KRS 367.190 (civil action); KRS 367.200 (restitution); KRS 367.990(2) (civil penalties).

[Court of Appeals Opinion, pg. 18 (Nov 20 2009).] Citing *Lujan*, the Court of Appeals stated that “access to judicial process is due process , . . .” [*Id.*, pg 16.]

In its briefs to the Franklin Circuit Court and the Court of Appeals, the Council advanced two additional arguments, not relied on by either court, in favor of upholding the constitutionality of the Cabinet’s actions against TECO in this case. The Council submits, first, that TECO was not entitled to an adjudicative hearing prior to issuance of the Cabinet’s notice and demand because TECO was not at risk of losing a cognizable property interest until after trial and entry of judgment in the Franklin Circuit Court. Second, the record shows that the Cabinet provided TECO with multiple notices and opportunities to be heard prior to issuance of the Cabinet’s final notice of violation and demand for payment, as evidenced by the fact that the Cabinet reduced its assessment against TECO by more than 50% after meeting repeatedly with TECO representatives. Finally, in its arguments below, the Council will discuss TECO’s misplaced reliance on *Kaelin v. City of Louisville*, 643 S.W.2d 590 (Ky. 1982), and the other cases cited on page six of its Brief, and will respond to TECO’s new claim that the Act’s due process protections are different for back wage and civil penalty assessments.

1. TECO was Not Deprived of a Property Interest Prior to the Circuit Court’s Entry of a Final Judgment Adjudicating the Cabinet’s Wage Audit and Civil Penalty Determinations

TECO’s principal objection to the Court of Appeals decision is that it should have been given a full trial-type hearing prior to the Cabinet’s issuance of its wage audit determination, civil penalty assessment, and demand for payment. It is true that the Cabinet did not provide TECO the opportunity to participate in an administrative hearing prior to taking these actions. But the right

to a hearing is a procedural due process right, guaranteed by Section 2 of the Kentucky Constitution and the 5th and 14th Amendments to the U.S. Constitution. Before TECO may claim that its procedural due process rights have been violated, TECO must first establish that its property interests were impaired by the Cabinet's actions. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972); *Weiland v. Board of Trustees of Ky. Retirement Sys.*, 25 S.W.3d 88, 93 (Ky. 2000); *Marksberry v. Chandler*, 126 S.W.3d 747, 749 (Ky. App. 2003).

It is undisputed that, other than sending notices to TECO and its prime contractors, the Cabinet took no action to enforce its wage audit or notice of penalty prior to the adjudication of its claims in the Franklin Circuit Court. The Cabinet did not attempt to seize TECO's property or assets, and had no statutory authority to do so, except through enforcement of a judgment obtained in court. The Cabinet did not seek to have any amounts owed to TECO withheld or sequestered. And, despite TECO's repeated reference to "debarment" in its brief, the Cabinet in this case did not seek "debarment" of TECO from future prevailing wage contracts until after entry of final judgment by the Franklin Circuit Court.

Despite these undisputed facts, TECO contends it was entitled to a full blown trial-type hearing because the Cabinet's issuance of notice to TECO and its prime contractors was, by itself, sufficient to implicate its due process rights. TECO argues that, by notifying its prime contractors of the violations found, "the Cabinet impugned TECO's reputation and damaged its ability to conduct business." [Brief of Appellant, pg 9.] However, assuming for the sake of argument that TECO's reputation with its prime contractors was in fact harmed, the alleged harm to TECO's reputation did not constitute deprivation of a property interest. Reputation alone is not a constitutionally protected liberty or property interest. Only where the stigma of damage to a

reputation is coupled with loss of another constitutionally protected interest, typically a property interest in continuing public employment, is procedural due process protection triggered. *Paul v. Davis*, 424 U.S. 693, 701 (1976); *aff'd in Siegert v. Gilley*, 500 U.S. 226, 233 (1991); *Cutshall v. Sundquist*, 193 F.3d 466, 479 (6th Cir. 1999).⁴ “The Due Process Clause is implicated only when state conduct alters ‘a right or status previously recognized by state law.’” *Paul v. Davis*, 424 U.S. at 711. “[I]t is the alteration of legal status, such as the governmental deprivation of a right securely held, which, combined with the injury resulting from the defamation, that justifies the invocation of procedural safeguards.” *Khan v. Bland*, 630 F.3d 519, 534 (7th Cir. 2010) (internal quotes and cites omitted). “This has come to be known as the ‘stigma-plus’ test.” *Cutshall*, 193 F.3d at 479.

In this case, there is no stigma-plus. Even if the notices sent to TECO’s prime contractors are deemed to have harmed TECO’s business reputation, the notices were not accompanied by any action altering TECO’s legal status or depriving TECO of a legal right securely held.

TECO cites a number of Kentucky decisions discussing the requisites of due process, but none of the cases cited by TECO contravene the basic principle that the procedural due process protections contained in the Kentucky and United States Constitutions are only implicated where it can be shown that the plaintiff has been deprived of a cognizable property or liberty interest by government action. In this case TECO fails to meet that requirement and its due process arguments must therefore fail.

⁴ As stated in *Paul v. Davis*, “the Court has never held that the mere defamation of an individual, whether by branding him disloyal or otherwise, was sufficient to invoke the guarantees of procedural due process absent an accompanying loss of government employment.” 424 U.S. at 706.

2. The Cabinet Provided TECO with Ample Notice and Opportunity to Be Heard Prior to Issuance of its Final Demand for Payment in February 2005

Even if TECO was entitled to some level of due process prior to the Cabinet's issuance of a notice of violation and demand for payment, the Cabinet met its due process obligations when it met repeatedly with TECO representatives and, over the course of several months, reduced its assessment of back wages and civil penalties by more than half. The core requirements of due process are "notice" and an "opportunity to be heard." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Com. v. Raines*, 847 S.W.2d 724, 727 (Ky.1993). The precise nature of the "notice" and "opportunity to be heard" that must be provided varies greatly from situation to situation. In any given case, the question of whether procedural due process is required is only the first inquiry that must be made. The second, and often more determinative, inquiry is "what process is due?"⁵

An affidavit filed with the circuit court describes the notice and opportunity to be heard that were provided to TECO prior to the Cabinet's demand for payment in February 2005. [R. 575-580, Patterson Affidavit (Nov 29 2005).] Guy "Pat" Patterson worked for the Kentucky Labor Cabinet from 1977 until May 2004 and served as Director of the Division of Employment Standards, Apprenticeship and Training, from August 2002 until May 2004. One of Patterson's duties as Director was to oversee the enforcement of the prevailing wage law. In his affidavit,

⁵ For example, where a public employee receives a full adjudicative hearing after termination of employment, the employee is only entitled to "an opportunity to respond" prior to termination (i.e. an "opportunity to present reasons, either in person or in writing, why proposed action should not be taken"). *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542-548 (1985); *see also, Jefferson v. Jefferson County Pub. Sch. Sys.*, 360 F.3d 583, 585 (6th Cir. 2004).

Patterson details the communications that took place between TECO and the Cabinet prior to the issuance of the Cabinet's final notices in February 2005. Patterson states, "[a]s a result of these discussions and this investigation in which TECO representatives or its attorney participated, the amount of back wages which the Labor Department claimed was reduced from approximately \$155,350.84 to \$63,494.21." [R. 575, Patterson Affidavit, ¶ 4.]

TECO's brief confirms that there was significant communication back and forth between TECO and the Cabinet during the period November 21, 2002, to February 18, 2005, through which many of the contested issues between them were able to be resolved. TECO concedes that, whereas the Cabinet's initial notice stated that TECO owed \$155,350.84 in back wages, additional information provided to the Cabinet by TECO resulted in the amount being reduced to \$63,494.21, and an offer of settlement from the Cabinet for only \$51,620.65. [Brief of Appellant, pg. 2.] TECO was clearly provided whatever "notice" and "opportunity to be heard" to which it may have been entitled during the Cabinet's investigation.

3. *Kaelin* and the Other Cases Cited by TECO Do Not Support Its Claim That a Trial-Type Hearing Was Required Prior to the Cabinet's Issuance of the Notices in Question

TECO cites a number of cases in support of its argument that "a post-enforcement judicial proceeding does not provide a constitutionally sufficient due process hearing in this case." [Brief of Appellant, pgs 6-9.] As a preliminary matter, the Council takes issue with TECO's characterization of the judicial proceedings in this case as "post-enforcement." The only actions taken by the Cabinet prior to the circuit court action were issuance of a notice of violation and demand for payment to TECO, and the sending of a notice and demand for payment to TECO's

prime contractors, who by law were jointly and severally liable. As noted by the circuit court in its initial decision upholding the constitutionality of the Act, “[t]he Cabinet has not attempted to enforce its decision against TECO.” [R. 592-597, Opinion and Order, pg 5 (Feb 3, 2006).] But regardless of how the Cabinet’s actions are characterized, none of the court decisions cited by TECO provide support for its argument that it was entitled to a trial-type hearing prior to the Cabinet’s issuance of the notices in question.

TECO cites *Kaelin v. City of Louisville*, 643 S.W.2d 590 (Ky. 1982), for the proposition that an administrative agency must conduct a trial-type hearing whenever it takes action that affects the rights of private parties. [Brief of Appellant, pg. 6.] However, *Kaelin* is a zoning case, not an enforcement case. Zoning boards are constitutionally required to conduct trial-type hearings because they are exercising legislative functions for which *de novo* review in circuit court is constitutionally prohibited.⁶ In *Kaelin, supra*, the Kentucky Supreme Court reaffirmed its prior zoning decisions and held that, in a zoning dispute, “[a] trial type hearing is automatically required for disputes of adjudicative facts . . .” 643 S.W.2d at 591.

⁶ See, *American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm’n*, 379 S.W.2d 450, 453-455 (Ky. 1964) (holding that a zoning statute providing for a “*de novo*” trial in circuit court was an unconstitutional delegation of a legislative matter to the courts); *Morris v. City of Catlettsburg*, 437 S.W.2d 753, 755 (Ky. 1969) (holding that, because the fact-finding in a zoning proceeding must be done by the local zoning board, procedural due process requires zoning boards to conduct hearings, take evidence, and issue findings of fact); and *City of Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1971) (holding that because *de novo* review in court is unavailable, it is the legislative body that must provide property owners with “a trial-type due process hearing” upon which factual findings are made).

For a discussion of *American Beauty Homes* and its progeny in the context of the unique character of zoning proceedings, see *Brady v. Pettit*, 586, S.W.2d 29, 31-32 (Ky. 1979).

Kaelin and the zoning jurisprudence from which it arose have no relevance to the issues presented in this case. Unlike a zoning case, the claims and defenses in a prevailing wage enforcement action are adjudicated in court. The Kentucky Supreme Court's jurisprudence on procedural due process in zoning proceedings is thus not applicable and not instructive. Moreover, there is no dispute in this case that TECO was entitled to a *de novo* trial type hearing in Franklin Circuit Court.

The other cases cited by TECO on page six of its Brief of Appellant address the due process rights of parties litigating claims in adjudicative proceedings before administrative agencies.⁷ The Council agrees that trial-type hearings are required when an agency, pursuant to its statutory authority, takes adjudicative action depriving a person of a cognizable interest in property or liberty. But, in this case, the Kentucky General Assembly has not given the Labor Cabinet the authority to adjudicate disputes arising over the enforcement of prevailing wage laws, and the Cabinet has not assumed such authority.

The single distinguishing fact in the cases cited by TECO is that, in all of them, the statutory scheme established by the legislature gave the agency in question the authority to investigate, prosecute, and adjudicate violations of the statutes in question:

- In *Fayette County Bd. of Educ.*, the board of education was given explicit statutory authority under 20 U.S.C. § 1415(f)-(g) (2000) to adjudicate the claims of parents for reimbursement of private school expenses associated with the education of children with learning disabilities. *Fayette County*, 158 S.W.3d at 200 (“Under the IDEA, parents who

⁷ *Fayette County Bd. of Educ. v. M.R.D.*, 158 S.W.3d 195 (Ky. 2005); *Jenny Wiley Health Care Center v. Commonwealth*, 828 S.W.2d 657 (Ky. 1992); *Cabinet for Human Resources v. Kanter*, 898 S.W.2d 508, 510 (Ky. App. 1995); and *Blackburn v. Board of Education*, 564 S.W.2d 35 (Ky. App. 1978).

complain about the adequacy of their child's IEP may request a due process hearing to be conducted by the local educational agency.”).

- In *Jenny Wiley*, the Cabinet for Human Resources was given explicit statutory authority under KRS 216.567 to adjudicate nursing home licensure violations. *Jenny Wiley*, 828 S.W.2d at 661 (“The Cabinet, as previously noted, was granted authority under KRS 216.567(1) to adopt regulations necessary for reviewing the issuance of its citations.”).
- In *Kanter*, the Department of Health Services was given explicit federal authority under 7 CFR 246.9 to adjudicate violations of a federal nutrition program for children. *Kanter*, 898 S.W.2d at 510.
- In *Blackburn*, the board of education had explicit statutory authority under KRS 161.790 to adjudicate wrongful discharge claims from public school teachers. *Blackburn*, 564 S.W.2d at 35.⁸

Unlike the cases cited by TECO, the statutory scheme of the Prevailing Wage Act does not provide for agency adjudication by the Labor Cabinet of prevailing wage violations.

To the extent that *Fayette County Bd. of Ed.* and the other cases cited by TECO have any relevance to this case, it is only that, if the General Assembly had chosen to give the Labor Cabinet the statutory authority not only to assess penalties, but also to adjudicate them, it could have constitutionally done so. If the Cabinet had been granted such authority, its adjudicative process would have to comply with the dictates of due process. However, nothing in these cases hold that the legislature must assign adjudicative authority to the agency that exercises investigatory and

⁸ TECO is incorrect when it states that, under *Blackburn*, a teacher is entitled to a full administrative hearing prior to termination of employment. The administrative hearing required by KRS 161.790 occurs post-termination. See also, *Loudermill* and *Jefferson*, both *supra* at footnote 6, holding that public employees are not entitled to full a adjudicative hearing prior to termination if they are provided with one after termination.

prosecutorial functions. In this case, the Labor Cabinet has no adjudicative authority and takes no action to enforce payment of the wage audit and civil penalty determinations until after an employer has enjoyed the full panoply of due process protections in a court proceeding. The circuit court makes its own determinations as to whether the wage audit and penalty determinations made by the Cabinet are warranted. Nothing in any of the cases cited by TECO holds that it is unconstitutional for the General Assembly to leave the adjudicative function within the judicial branch of government, where it resided exclusively prior to the development of modern administrative law.

4. The Act Provides the Same Enforcement Mechanism, and the Same Due Process Guarantees, for Back Wage Assessments as for Civil Penalties

In a new argument made for the first time to this Court, TECO claims that, whatever due process protections the Act may provide with regard to civil penalty assessments, “it is less certain” whether those same due process protections are applicable to the Cabinet’s assessment of back wages. [Brief of Appellant, pgs 13-14.] TECO points out that claims for back wages are not mentioned in KRS 336.985(3), the statute that requires to Cabinet to initiate a circuit court action to collect civil penalties for violation of KRS Chapters 336, 337 or 339. However, another provision of the Act (KRS 337.550) expressly gives the Cabinet the same authority to bring a civil action for back wages as KRS 336.985 does for civil penalties:

- (2) A laborer, workman, or mechanic may by civil action recover any sum due him or her as the result of the failure of his or her employer to comply with the terms of KRS 337.505 to 337.550. The commissioner may also bring any legal action necessary to collect claims on behalf of any or all laborers, workmen, or mechanics.

KRS 337.550(2). There is no difference in the mechanisms available to the Cabinet for the enforcement of civil penalty and back wage assessments. In both instances, the Cabinet must file a *de novo* civil action in circuit court, thus providing the employer with full due process.

II. THE COURT OF APPEALS PROPERLY UPHELD THE CONSTITUTIONALITY OF THE STATUTORY SCHEME FOR DETERMINING CLASSIFICATION OF WORK

In its briefs to the Franklin Circuit Court and the Court of Appeals TECO framed its second constitutional argument in terms of the General Assembly impermissibly delegating judicial power over work classifications to an administrative agency. As one of its grounds for rejecting TECO's argument the Court of Appeals correctly stated "the Cabinet is not performing a judicial function when it issues a citation or seeks back wages for an employee." [Court of Appeals Opinion, pg. 18 (Nov 20, 2009).] In its brief to this Court, TECO now seeks to recast its argument by stating "whether couched in terms 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's action adhered to those definitions." [Brief of Appellant, pgs 14-15.] To the extent that TECO is now making a new argument that the Cabinet exceeded its statutory authority in the manner in which it classified work, that argument is not properly before this Court since it was not raised in either of the courts below. However, to the extent that TECO is continuing to argue that the General Assembly has impermissibly delegated to the Cabinet the authority to determine classifications of work, this Court should affirm the Court of Appeals and reject TECO's arguments on the merits.

As noted by the Court of Appeals, the General Assembly has not delegated any judicial power to the Cabinet. The Cabinet's only enforcement authority is through filing an action in circuit court, where the employer will have an opportunity to try all issues of fact, including the issue of work classification – an opportunity that TECO exercised during the two-day trial in this case.

Contrary to TECO's assertions, the General Assembly has provided the Cabinet with guidance in the area of job classifications:

[T]here are constraints on the Cabinet's classifications. Determining prevailing wage consists of two factors; the first is classifying jobs. The second is setting the rate of pay for each classification. In determining the prevailing wage, the Cabinet is required to consider the wages paid "to the majority of laborers, workmen, and mechanics employed in each classification of construction upon reasonably comparable construction in the locality where the work is to be performed[.]" KRS 337.505(1). Furthermore, the Cabinet must obtain information regarding the number of workers employed in other projects and their rates of pay as well as collective bargaining agreements in the locality. KRS 337.520(3). These constraints, particularly those provided by the collective bargaining agreements, do not leave the Cabinet with unfettered discretion regarding classification.

[Court of Appeals Opinion, pgs 18-19 (Nov 09 2010).] The directions to the Cabinet are clear – it must determine on a locality by locality basis what work is performed in each classification of construction. It may turn out that the Cabinet makes a classification that, based on evidence presented by an employer, is overturned by a circuit court – but that does not mean that the General Assembly's delegation of authority to make such classifications is unconstitutional.

In its briefs filed with the Court of Appeals, TECO relied heavily on the Kentucky High Court's decisions in *Butler v. United Cerebral Palsy of Northern Ky., Inc.*, 352 S.W.2d 203

(Ky. 1961), and *Miller v. Covington Development Authority*, 539 S.W.2d 1 (Ky. 1976). The issue in both cases was whether the statutes in question constituted an improper delegation of legislative power in violation of the Sections 26 and 28 of the Kentucky Constitution.

In *Butler*, the Court held that the General Assembly did not violate the Constitution when it delegated to the Department of Education the task of defining standards for determining the eligibility of private schools to receive public aid for the education of exceptional children. 352 S.W.2d at 207-209. The Court stated that, when evaluating a delegation of legislative authority, a statute must be examined “in terms of the practical needs of effective government, and in terms of safeguards against abuse and injustice.” 352 S.W.2d at 208. In upholding the statute, the Court relied, in part, on the expertise of the agency to which the General Assembly had delegated this authority:

The legislature wants to encourage and lend a modicum of support to the special education of a certain class of people. It does not wish, in so doing, to waste the taxpayers' money. The members of the legislature are allowed to meet in regular session only 60 days every two years. They have neither the time, facilities, nor qualifications to do more than indicate the class and fix the amount to be spent. At the state's disposal, however, is its board of education, an agency fully and better qualified than the legislature to establish and carry out whatever further policies and procedures may be necessary or desirable. This body also is one of the most responsible and long-established agencies of the state government.

352 S.W.2d at 208. The Court felt comfortable upholding the legislature's delegation of authority because “any discriminatory treatment is inherently reviewable by the courts.” *Id.*

In the *Miller* case, the General Assembly had delegated to newly established “local development authorities” (LDAs) the power to establish local preservation and revitalization districts – an inherently legislative function, like zoning. *Miller*, 539 S.W.2d 1. The Kentucky Supreme

Court found the delegation of legislative authority to be unconstitutional, in significant part, because there was no “safeguard of a long-established administrative agency such as a state highway department or department of education, with a track record of experience and expertise in a well-recognized field.” 559 S.W.2d at 4. The Court also stated that “[n]or, indeed are the powers delegated to the LDA confined to matters so involved or so beyond the technical competence of a legislative body that it would be unrealistic not to vest them in an administrative agency.” *Id.* The Court found that, with regard to the designation of preservation and revitalization districts, “there is no substantial reason for the ultimate choice not to be made by the legislative body, as it must be made, for example, in the case of zoning or urban renewal.” *Id.*

Both *Butler* and *Miller* hold that a delegation of authority to an administrative agency meets the “practical needs” and “safeguards” tests where (a) the agency is a long-established agency with a track record of experience and expertise in a well-recognized field; and (b) the matters involved are so detailed that they are beyond the competence of a legislative body. Delegating to the Department of Labor – an agency with a 60+ year history of enforcing wage and hour standards – the task of determining, on a locality by locality basis throughout the Commonwealth of Kentucky, the work performed by different job classifications meets both of these criteria. Moreover, requiring the Labor Department to take enforcement action in circuit court assures that all disputes regarding a prevailing wage determination will be fully aired in a judicial forum.

In its brief to this Court, TECO relies on *Kerth v. Hopkins County Board of Educ.*, 346 S.W.2d 737 (Ky. 1961), a case striking down amendments to the Prevailing Wage Act that were enacted in 1960. The 1960 statute created a prevailing wage board with authority to establish prevailing wages. The General Assembly had instructed the Board to set prevailing wage rates at

the same rate that prevailed in the locality under collective bargaining agreements “if there are such agreements . . . in the locality applying to a sufficient number of employees to furnish a reasonable basis for considering those rates to be the prevailing rates in the locality.” *Kerth*, 346 S.W.2d at 738. However, the statute provided no guidelines whatsoever for the determination of rates in localities where there were no labor agreements. The Board was undeterred by the lack of statutory authority and, in those localities lacking agreements, set rates based on agreements from localities that had agreements. The Court properly held that, in localities where there were no collective bargaining agreements, the Prevailing Wage Board had no “reasonable basis” under the statute for determining prevailing wage rates. 346 S.W.2d at 738.⁹

TECO’s attempt to draw a parallel between the total absence of statutory authority in *Kerth* and the delegation of authority, under the current statute, to determine work classifications is strained at best. In this case, the General Assembly has set a statutory standard that is based explicitly on locality. KRS 337.505(1) (definition of prevailing wage). The fact that the General Assembly did not itself determine which job functions are performed by which job classifications does not make the prevailing statute unconstitutional.

In sum, the General Assembly could not possibly have undertaken itself the task of classifying the varying job duties performed by construction workers across the Commonwealth. It was both reasonable and necessary to delegate that function to the Department of Labor, an agency with decades of expertise in the matter of wage enforcement. Moreover, the General Assembly did not delegate any judicial power to the Cabinet. The determinations made by the Cabinet in the

⁹ In 1962, the General Assembly amended KRS 337.520 to add additional criteria for the determination of prevailing wage rates in a given locality. *See*, KRS 337.520(3)

enforcement of the prevailing wage requirements are fully reviewable by a court on a *de novo* basis – and were in fact thoroughly reviewed in this case by the Franklin Circuit Court. [R. 1039-1075, Final Judgment, ¶¶ 86-94, pgs 27-33 (Feb 4 2008).] The Court of Appeals properly rejected TECO’s delegation arguments, finding that the Act’s provisions “do not leave the Cabinet with unfettered discretion regarding classification.” [Court of Appeals Opinion, pg 19 (Nov 09 2010).]

CONCLUSION

The Kentucky prevailing wage statutes are not unconstitutional. The laws of the Commonwealth provided Appellant with due process and the General Assembly did not unlawfully delegate authority (whether legislative or judicial) to the Labor Cabinet. Intervenor/Appellee Kentucky State Building and Construction Trades Council, AFL-CIO, respectfully requests that the Supreme Court uphold the constitutionality of the prevailing wage statutes and affirm the opinion of the Court of Appeals.

Respectfully submitted,

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