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

TECO MECHANICAL CONTRACTOR, INC. APPELLANT

v.

BRIEF OF APPELLEE
MECHANICAL CONTRACTORS ASSOCIATION OF KENTUCKY, INC.

COMMONWEALTH OF KENTUCKY, ENVIRONMENTAL AND PUBLIC PROTECTION CABINET, ET AL. APPELLEES

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

I certify that a true copy of the brief of Appellee Mechanical Contractors Association of Kentucky, Inc. has been served on the following: Honorable Phillip J. Shepherd, Judge, Franklin Circuit Court, P.O. Box 678, Frankfort, KY 40602; Hon. David J. Guarnieri, 201 E. Main St., Suite 1000, Lexington, KY 40507; Hon. Mark F. Bizzell, Labor Cabinet, U.S. 127 Building, South Messenger, Frankfort, KY 40601; Hon. Irwin H. Cutler, 800 Republic Bank Building, 429 W. Muhammad Ali Blvd., Louisville, KY 40202, this 12th day of July 2011.

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STATEMENT CONCERNING ORAL ARGUMENT

Appellee Mechanical Contractors Association of Kentucky, Inc. ("MCAK") agrees with Appellant that oral argument will assist the Court in deciding the constitutional issues considered in this appeal, and thus requests that oral argument be scheduled.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

Appellee Mechanical Contractors Association of Kentucky, Inc. ("MCAK") accepts Appellant's Statement Of The Case.

ARGUMENT

I. **The Court of Appeals correctly upheld the constitutionality of the Act.**

In *Bobby Preece Facility v. Commonwealth*, 71 S.W. 3d 99, 102-103 (Ky. App. 2001) the court notes: A party challenging governmental action as amounting to an unconstitutional taking bears a rather hefty burden. Our courts are sensitive to the presumption of constitutionality, i.e., the rule that an act should be held valid unless it clearly offends the limitations and prohibitions of the Constitution. The one who questions the validity of an act bears the burden to sustain such contention. *Stephens v. State Farm Mutual Automobile Insurance Company*, Ky., 894 S.W.2d 624, 626 (1995). The alleged "violation of the Constitution must be clear, complete and unmistakable" in order to succeed on a claim that the law is unconstitutional. ***103** *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company*, Ky., 983 S.W.2d 493, 499 (1998). With respect to claims of substantive due process affecting "economic and business rights ... rather than fundamental rights," the statute at issue must be evaluated by the rational basis test--and the analysis is deferential in nature. *Stephens, supra* at 627; *see also Earthgrains v. Cranz*, Ky.App., 999 S.W.2d 218, 223 (1999).

In *Cornelison v. Commonwealth*, 52 S.W. 3d 570, 572 (Ky. 2001), the Supreme Court of Kentucky says:

It is a settled principle that when the legislature "has enacted a statute, [it] is presumed to have done so in accordance with the constitutional requirements, and that its provisions are not contrary to any constitutional right...." *Lakes v. Goodloe*, 195 Ky. 240, 242 S.W. 632, 635 (1922). A statute will not be struck down as unconstitutional "unless its violation of the constitution is clear, complete and unequivocal." *Sasaki v. Commonwealth*, Ky., 485 S.W.2d 897, 902 (1972), *vacated on other grounds*, 410 U.S. 951, 93 S.Ct. 1422, 35 L.Ed.2d 684 (1973). Moreover, the Commonwealth does not bear the burden of establishing the constitutionality of a statute, rather "[t]he one who questions the ***573** validity of an act bears the burden to sustain such a contention." *Stephens*

v. State Farm Mutual Auto Insurance Co., Ky., 894 S.W.2d 624, 626 (1995).

In *Holbrook v. Lexmark Intn'l Group, Inc.*, 65 S.W. 3d 908 (Ky. 2001), the Supreme Court of Kentucky states:

> Particularly when they involve the regulation of economic matters, the acts of the legislature are entitled to a strong presumption of constitutionality. *Delta Air Lines, Inc. v. Com., Revenue Cabinet*, Ky., 689 S.W.2d 14 (1985). A statute involving the regulation of economic matters or matters of social welfare complies with both due process and equal protection requirements if it is rationally related to a legitimate state objective. ***915** The constitutionality of a statutory classification will be upheld if the classification is not arbitrary, or if it is founded upon any substantial distinction suggesting the necessity or propriety of the classification. See *Kentucky Harlan Coal Co. v. Holmes*, Ky., 872 S.W.2d 446, 455 (1994); *Waggoner v. Waggoner*, Ky., 92); *Estridge v. Stovall*, Ky.App., 704 S.W.2d 653, 655 (1985). Thus, a party seeking to have a statute declared unconstitutional is faced with the burden of demonstrating that there is no conceivable basis to justify the legislation. *Buford v. Com.*, Ky.App., 942 S.W.2d 909 (1997).

Thus, it is quite apparent that Appellant in this case has a difficult task in attempting to convince the Court that the Kentucky prevailing wage statutes are unconstitutional. Appellant cannot reasonably argue that when it enacted the latest iteration of the Kentucky prevailing wage laws the legislature had no rational basis for so doing, or that there is no conceivable basis to justify the legislation. See for example Peter Philips, Kentucky's Prevailing Wage Law, Its History, Purpose and Effect (Oct. 1999), pages 9-19. (R. 493). Therefore, Appellant cannot succeed on its claim of the unconstitutionality of Kentucky's prevailing wage statutes.

(a) A post-enforcement hearing provides constitutionally sufficient due process in this case.

Appellant contends that the Kentucky prevailing wage statutes are unconstitutional because they do not afford either pre-determination or post-determination administrative hearings in cases of alleged violation of the prevailing wage

statutes. The facts of this case are almost identical to those in *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 121 S. Ct. 1446, 149 L.Ed.2d 391 (2001). In *Lujan*, a public works contractor filed suit against California's Labor Commissioner and others challenging the constitutionality of California's prevailing wage statutes under the federal due process clause because the statutes authorized withholding of money and assessment of civil penalties for alleged failure to comply with the applicable prevailing wage statutes. The plaintiff's position was that since there were no pre-determination or post-determination administrative hearings available to the Appellant, the requirements of the due process clause of the Constitution were not satisfied. The Court rejected the plaintiff's arguments and held against the plaintiff, finding that because plaintiff had access to California courts to assert its position, applicable due process criteria were satisfied.

The California statutes in *Lujan* and the Kentucky statutes in question are remarkably similar. The only factual difference between this case and the *Lujan* case is that in *Lujan* the contractor's payment was withheld by the state prior to payment to the contractor. Here, Appellant has already been paid and the Commonwealth is seeking to recover from the Appellant funds sufficient to pay the Appellant's employees in accordance with the dictates of the prevailing wage statutes. TECO has yet to pay any money whatsoever to the Cabinet. So, TECO is actually in a much more advantageous position than was the subcontractor in *Lujan*. According to the Supreme Court's holding in *Lujan*, if Appellant has access to Kentucky courts to obtain due process while asserting its position, the prevailing wage statutes are not unconstitutional.

So the question is, does Appellant have access to Kentucky courts to obtain due process while asserting its position that the Cabinet's "misclassification" of employees finding was incorrect? The answer is obviously in the affirmative. First, as Appellant has already demonstrated by filing this lawsuit seeking a declaratory judgment as to its rights, Appellant could just as easily have pursued this case solely on its theory that the

Cabinet's classification of employees was arbitrary and capricious. Indeed, in its Complaint Appellant asserts, "This Court has jurisdiction of this case pursuant to KRS 418.040" (Kentucky declaratory judgment statute) (R. 2). The Appellant prays "2. For judgment enjoining the defendant Cabinet from imposing civil penalties on the Plaintiff or seeking to collect back wages from the Plaintiff or the general/prime contractors with regard to the aforementioned public works projects;" (R. 6) and "3. For judgment enjoining the defendant Cabinet from acting in an arbitrary and capricious manner when performing back wage audits." (R. 6). Since the Court has jurisdiction to enter findings on those issues raised by Appellant pursuant to KRS 418.040 and KRS 418.945, Appellant has access to Kentucky courts to assert its position. That means the Appellant has not been deprived of due process.

The Trial Court relied on the *Lujan* case in its initial ruling on Appellant's motion for summary judgment. (R. at 592). Appellant then challenged the applicability of *Lujan* to this case in its Motion to Alter, Amend Or Vacate (R. at 605). The Trial Court made short work of Appellant's argument in ruling on that motion, stating:

> Teco first claims that this Court erred in its holding that under the United States Supreme Court case, *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001), Teco's Due Process rights were adequately protected. Specifically, it claims that the *Lujon* case is distinguishable from the present case because, "in California, the effected [sic] party was statutorily authorized to bring suit in cases where it disagreed with the Labor Department's investigation concerning worker classification and the payment of prevailing wages." Teco's Motion to Alter, Amend or Vacate, Page 2. Teco claims that in contrast, under the Kentucky system, they would not have an opportunity to be heard unless either the Cabinet or the prime contractor chose to sue. In fact, the statute at question in *Lujon* only allowed for "the contractor or his or her assignee" to sue. *Lujon* at 197. On the other hand, KRS 337.525(1) states, "**[a]ny** person or party claiming to be aggrieved by **any** final determination of prevailing wages by the prevailing wage review board may appeal to the Franklin Circuit Court." (emphasis added.) Teco, a person or party aggrieved by the Cabinet's prevailing wage determination in this case, is well within its rights to file suit in Franklin Circuit Court on its own account. As this Court has held, while this may not be the most efficient appeal procedure, it is adequate to

satisfy Due Process under the *Lujan* holding. (Emphasis in original). (R. at 904).

Appellant's brief at the Court of Appeals did not even mention the *Lujan* case, which was obviously the lynchpin of the Trial Court's holding on the constitutionality issues. Even so, the Court of Appeals found *Lujan* to be controlling ("We agree with the trial court, the Cabinet, and MCAK that *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 121 S.Ct. 1446, 149 L.Ed.2d 391 (2001), is persuasive.").

TECO's due process arguments in its brief here do not fully address the issue. While trying to distinguish *Lujan*, TECO ignores the core holding of that case, which is that in order for a party to be entitled to a pre-deprivation hearing as part of its procedural due process, that party must show not only that it has a property interest at stake, but also that there is a "present entitlement" to that property interest. *Lujan* at page 196. There is a good discussion of this distinction in *Simms v. Barbour*, No.: 3:09-cv-84-DPJ-FKB, page 6-7 (S. Dist MS 2010), citing *Lujon* (copy attached):

> Whether a breach-of-contract action satisfies Plaintiffs' due-process rights depends on the nature of the property interest (assuming there is one). In *Lujan v. G & G Fire Sprinklers, Inc.,* the Court distinguished those circumstances requiring pre-deprivation process from those contract-based claims for which civil suits provide an adequate remedy. 532 U.S. 189, 195-96 (2001). The Court determined that where a "present entitlement" to a property interest exists, a civil suit will not constitute sufficient process. *Id.* at 196. "Present entitlement" was not specifically defined, but the cases contrasted by the Court indicate that it includes plaintiffs seeking to "exercise ownership dominion over real or personal property, or to pursue a gainful occupation." *Id.*In such cases, a subsequent civil suit may not provide an adequate and timely remedy. Although the Fifth Circuit has never interpreted *Lujan,* other courts have concluded that "postdeprivation remedies appropriate to the deprivation of an interest to which there is a present entitlement are characterized by promptness and by the ability to restore the claimant to possession. The underlying concept seems to be that the remedy is available before the loss has become complete and irrevocable." *Baird v. Bd. of Educ. for Warren Cmtty. Unit Sch. Dist. No. 205,* 389 F.3d 685, 692 (7th Cir. 2004).
>
> By contrast, the plaintiff in *Lujan,* G & G, was deprived of contract payments that were withheld due to an alleged breach by G & G. The Court

> noted that "G & G has only a claim that it did comply with those terms and therefore that it is entitled to be paid in full, " and held: "Though we assume for purposes of decision here that G & G has a property interest in its claim for payment, it is an interest... that can be fully protected by an ordinary breach-of-contract suit." 532 U.S. at 196 (internal citation omitted).

TECO's claim in this case is not one of "present entitlement," so access to a post-deprivation hearing in Kentucky courts is all that is required. This is not a case in which TECO is seeking to exercise dominion over real or personal property, and TECO is not claiming (nor could it claim) that it is being deprived of the right to pursue gainful employment, as that type of claim is reserved for individual persons, not corporations. See *DeBoer v. Pennington*, 287 F. 3d 748, 750 (9th Cir. 2002), (Concurring opinion of Judge Canby, "The mere fact that D & M, as an entity, contracted to supply personal services to the City does not vest it with an interest protected by the due process clause; D & M stands in the position of a supplier, not in that of a tenured employee.").

Footnote 4 of the *Simms* case is also instructive on the application of *Lujan*:

> Numerous courts interpreting *Lujan* in analogous contexts have concluded that a breach-of-contract claim fully protects a plaintiff's procedural-due-process rights. *See, e.g., Ramirez v. Arlequin,* 447 F.3d 19, 25 (1st Cir. 2006) (affirming dismissal of due process claims brought by contractors who alleged that defendant municipality wrongfully withheld payments under a contract because plaintiffs failed to "allege that there is no complete and adequate remedy available under state law for the breach of contract"); *TriHealth, Inc. v. Bd. of Com'rs, Hamilton Cntty., Ohio,* 430 F.3d 783, 794 (6th Cir. 2005) (applying *Lujan* to affirm dismissal of due-process claim by plaintiff who was excluded from competitive bidding); *McCracken v. LockwoodSch. Dist. No. 26,* 208 Fed. App'x 513, 515-16 (9th Cir. 2006) (reversing denial of summary judgment where former employee sought benefits under a termination agreement and holding that "the lack of time-sensitive issues, the purely financial subject matter of the contract right asserted, and the availability of state-law remedies sounding both in tort and contract, demonstrate that McCracken's contract did not constitute a 'present entitlement' such that ordinary state judicial process is an insufficient remedy for his deprivation"); *Marshall v. Launault,* 372 F.3d 175, 186-87 (3rd Cir. 2004) (holding that dispute over interests in a trust failed to establish a "present entitlement" because the "ability to pursue their claim in the appropriate state court at the time of the Trust disposition provides all the process that is due... under the Fourteenth Amendment of

the United States Constitution"); *DeBoer v. Pennington,* 287 F.3d 748, 749-50 (9th Cir. 2002) (holding that "like the plaintiff in *Lujan,* [plaintiffs] are fully protected by an ordinary breach of contract suit"); *Sharp v. Lindsey,* 285 F.3d 479, 489 (6th Cir. 2002) ("Where, as here, the employee's livelihood has not been jeopardized by his allegedly premature dismissal from a fixed-term position, it is even clearer than it might otherwise be that the deprivation of the employee's finite interest is something that 'can be compensated adequately by an ordinary breach of contract action.'"); *MW Builders of Tex., Inc. v. City of Wichita Falls,* No. 7:08-CV-192-O, 2009 WL 2365443, at *6 (N.D. Tex. July 31, 2009) (same). *Id* at page 10.

In *Kahn v. Bland,* No. 09-1735 (7th Cir. 2010), the court relied on *Lujan* to find that the plaintiff's due process rights would be protected by a breach of contract action. The court states:

> In *Lujan v. G & G Fire Sprinklers, Inc.,* 532 U.S. 189, 191 (2001), the California Labor Code authorized the state of California to withhold payments due a contractor on a public works project if a subcontractor failed to comply with certain Code requirements and in turn, permitted the contractor to withhold those sums from the subcontractor. An unpaid subcontractor brought suit under the Due Process Clause of the Fourteenth Amendment because the statutory scheme did not afford it a hearing before or after the sums were withheld. *Id.* The Supreme Court assumed without deciding that the subcontractor had a property interest in payment, but held that California law afforded the subcontractor sufficient opportunity to pursue that claim in state court. *Id.* at 195. The Court distinguished this case from others where a reasonably prompt hearing was required because in such cases, "the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation." *Id.* at 196. The Court reasoned that "[u]nlike those claimants, [the subcontractor] ha[d] not been denied any present entitlement." *Id.* Rather, the subcontractor had been denied payment under a contract based on the state's determination that it failed to comply with the contract's terms. *Id.* Accordingly, the subcontractor's interest could be protected by an ordinary contract suit. *Id.*
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> Similarly, Khan has not been deprived a present entitlement, but rather, monies owed under his HAP contracts and lease agreements. His rights under the HAP contracts can be fully protected by bringing a breach of contract action. A postdeprivation process is appropriate in this case because Khan is not being deprived of his ability to rent housing to other tenants, only his ability to rent under the program. He can still pursue his occupation as a landlord; his need to remedy the deprivation is not particularly time sensitive. *See, e.g., DeBoer v. Pennington,* 287 F.3d 748,

> 750 (9th Cir. 2002) (applying *Lujan's* holding to the property interest of former managers of a city-owned cemetery whose management contract was terminated by the city and reasoning that because the "contract here has not given rise to a greater interest than the contract itself," the deprivation was a mere contractual injury that could be adequately protected by a state breach of contract suit); *cf. Baird v. Bd. of Educ. for Warren Cmty. Unit,* 389 F.3d 685, 691-92 (7th Cir. 2004) (distinguishing *Lujan* because a state law breach of contract action is not an adequate remedy for a terminated employee who possesses a present entitlement and who has been afforded only a limited pretermination hearing; it does not satisfy the requirement of promptness, which is essential for employees to pursue remedies such as reinstatement). *Id* at pages 25-26.

TECO does not claim it has been deprived of its ability to pursue other contracting opportunities while this case has been pending. Thus, according to the *Kahn* court, a postdeprivation hearing will suffice to provide TECO the due process it seeks.

Lujan has also been applied in cases in which the issue presented was not breach of contract. For example, in *TriHealth, Inc. v. Bd. of Com'rs, Hamilton Cntty., Ohio,* 430 F.3d 783, 794 (6th Cir. 2005), the court states:

> "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Lujan v. G & G Fire Sprinklers, Inc.,* 532 U.S. 189, 196, 121 S.Ct. 1446, 149 L.Ed.2d 391 (2001) (quoting *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961))
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> Here, TriHealth's claim of wrongdoing by the Board depends fundamentally on a novel theory, a theory with which the Board had never been confronted despite having distributed levy funds since 1966, and a theory with which it was not even confronted prior to the 2002 Agreement. The theory is based on an interpretation of arguably conflicting provisions of Ohio law on which the Ohio courts have yet to speak. To resolve this question of first impression, TriHealth's access to "ordinary judicial process" in the Ohio courts, *see Lujan,* 532 U.S. at 197, 121 S.Ct. 1446, through an action for declaratory and injunctive relief, is not only sufficient to comport with due process, but is clearly the best way for TriHealth to pursue its remedies. The pendency of just such an action, in which the state court has already denied motions to dismiss and is scheduled to hear arguments on summary judgment issues in December 2005, clearly evidences the adequacy of state law procedures to address the merits of TriHealth's grievance.

Stated differently, in TriHealth, the Sixth Circuit makes it very clear that if a plaintiff has access to "ordinary judicial process" in state court, that is all the due process that is necessary. In fact, *TriHealth* goes on to say that a declaratory judgment action, like the case at issue here, is "clearly the best way" for a plaintiff to pursue its remedies. *TriHealth* is directly on point.

In *Marshall v. Lauriault*, 372 F. 3d. 175 (3rd Cir. 2004), the court considered a claim against a trust estate by adopted children, clearly not a breach of contract case. Relying in large part on *Lujon*, the court states:

> At the outset, we note that due process is a flexible doctrine, requiring procedures as the situation demands and dependent upon the circumstances. *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *see Marincas v. Lewis,* 92 F.3d 195, 203 (3d Cir.1996). Any challenge to a state law, or the application of the law, on due process grounds begins with two inquiries: (1) "whether the State has deprived the claimant of a protected property interest," and (2) "whether the State's procedures comport with due process." *Lujan v. G & G Fire Sprinklers, Inc.,* 532 U.S. 189, 195, 121 S.Ct. 1446, 149 L.Ed.2d 391 (2001). *Id* at 185.
>
> The fundamental requirement 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, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). *Id* at 186.
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> The Supreme Court's recent opinion in *Lujan v. G & G Fire Sprinklers, Inc.,* 532 U.S. 189, 121 S.Ct. 1446, 149 L.Ed.2d 391 (2001) further supports our conclusion that the Appellants did not have a due process right to notice in this case. In *Lujan,* a California agency, acting under state law, withheld payments to a construction contractor because the agency alleged that the contractor had violated state minimum wage laws. 532 U.S. at 191, 121 S.Ct. 1446. The contractor complained that the withholding violated its due process rights because the state did not provide notice or a hearing before withholding the payments. The Court explained that the state's actions did not deprive the contractor of any property over which it could exercise present ownership dominion; the contractors' interest was limited to a future claim for payment under a contract with the state. *Id.* at 196, 121 S.Ct. 1446. Therefore, the Court held that "if California makes ordinary

> judicial process available to respondent for resolving its contractual dispute, that process is due process." *Id.* at 197, 121 S.Ct. 1446. *Id* at 186.
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> Applying the *Lujan* holding to the case at bar, it is clear that the Appellants' potential claim to Maria's interest in the Trust at the time of the adoption was not based on present ownership dominion. The potential claim to Maria's share of the Trust remained to be determined by the trustees or the Maryland courts. We hold, therefore, that the Appellants, as third parties, had no due process right to notice of the New Jersey adoption proceedings. The Appellants' ability to pursue their claim in the appropriate state court at the time of the Trust disposition provides all the process that is due them under the Fourteenth Amendment of the United States Constitution. *Id* at 186-187.

Following the reasoning of *TriHealth* and *Marshall*, the holding in *Lujon* is not limited to breach of contract actions. The key point is that if the complaining party has access to state courts' ordinary judicial process, that is sufficient to comport with due process requirements.

Kentucky courts have repeatedly stated that Section 2 of the Kentucky Constitution provides for review of the actions of administrative agencies. See *Shamaeizadeh v. Kentucky Board of Medical Licensure*, No. 2004-CA-001768-MR (Ky. App. 2006) ("[T]he Constitution of Kentucky very plainly protects all persons from the arbitrary acts of administrative agencies. As recognized in American Beauty Homes, supra, the non-ministerial orders of an administrative agency are inherently reviewable for abuse or arbitrariness **regardless of whether there is a statutory procedure established for that purpose** (emphasis added), citing *Triad Developmental/Alta Glyne, Inc. v. Gellhaus*, 150 S.W. 3d 43 (Ky. 2004) ("It has been held that there is an inherent right of appeal from orders of administrative agencies **regardless of whether there is an explicit right to appeal** because an agency is prohibited by Section Two of the Kentucky Constitution from acting arbitrarily (emphasis added). *See American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Comm'n,* Ky., 379 S.W.2d 450 (1964)). It is apparent that the Court of Appeals' reliance on *American Beauty Homes* in this case was entirely correct. As Judge Keller states: "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." *TECO Mechanical Contractor, Inc. v. Commonwealth of Kentucky*, No. 2008-CA-000305-MR at page 17 (Ky. App. 2009). Thus, TECO's argument that it is somehow deprived of its procedural due process rights because the Prevailing Wage statute does not provide for an administrative hearing prior to the Labor Cabinet's assessment of back wages and fines is totally without merit.

The Kentucky courts have not addressed the issue of "present entitlement" in the context of a procedural due process claim. Thus, as the *TriHealth* court notes, the proceeding in which the parties find themselves engaged in this case is precisely where they should be. TECO correctly filed a declaratory judgment action. That is all the procedural due process to which it is entitled.

(b) The Cabinet's enforcement action did not deny TECO a constitutionally sufficient due process hearing under the Act.

TECO does present some new arguments here related to the actions taken by the Cabinet. At pages 10-11 of its brief, TECO complains that the Cabinet did not file a civil action against it to enforce its fines and back wages determinations. That is a rather strange argument. TECO certainly had the right to file the declaratory judgment action that it did; it is clearly up to TECO to pursue its rights if it so chooses, and it has done so.

To complain that it has not been sued by the Cabinet is to make an entirely irrelevant argument. Next, at page 12 of its brief, TECO it makes an argument regarding debarment proceedings, yet it candidly admits that "debarment was not pursued against TECO in this particular action." This argument too is irrelevant. TECO claims that "[b}y taking enforcement actions against TECO's prime contractors, the Cabinet impugned TECO's reputation and damaged its ability to conduct business." (Brief of Appellant, page 9). First, if TECO thought it had a defamation claim against the Cabinet, it should have sued on that ground. It has not done so (and it is very doubtful that it would succeed on such a claim). Second, a careful look at the letters from prime contractors (see Brief of Appellant, page 3) on which TECO relies reveals that none of the prime contractors actually stopped taking bids from TECO or stopped doing business with TECO. The first letter says TECO's "business relationship with D.W. Wilburn could be jeopardized." The second states, "then our business relationship may very well be in jeopardy." The third letter says its writer may "may hesitate about working with you on future jobs." Not one of them says they refuse to do business with TECO in the future. All these contractors want TECO to do is take care of its statutory obligations. Their statements are hardly a basis for a claim of defamation.

Based on the foregoing and for the reasons stated in the previous sections, it is obvious that TECO has received (and is receiving by virtue of this appeal) all the due process to which it is entitled. Thus, the Cabinet's actions did not deny TECO its due process.

II. The Court of Appeals did not err in upholding the constitutionality of the Act regarding the statutory scheme for determining worker classification.

At the trial and Court of Appeals stages of this case, the Appellant claimed that the legislature has made an improper delegation of judicial power to the Labor Cabinet. There is only passing mention of this claim in TECO's brief with no direct argument on this issue. TECO has apparently abandoned this claim. Since it has not addressed that

argument directly in its brief here, the argument TECO does present should be ignored. If it is considered, the gravamen of Appellant's claim is that the legislature has not given the Cabinet any guidance with respect to the classification of employees. However, reference to the statutes themselves demonstrates that the legislature has indeed laid down adequate guidelines so that employee classifications may be determined by the labor commissioner:

> KRS 337.505 states in pertinent part:
>
> For the purpose of KRS 337.505 to 337.550, the term 'prevailing wage' for each classification of laborers, workmen, and mechanics engaged in the construction of public works within the Commonwealth of Kentucky, means the sum of: (1) The basic hourly rate paid or being paid subsequent to the labor commissioner's most recent wage determination 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.... (Emphasis added).
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> KRS 337.520 (2) states in pertinent
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> The commissioner shall require the filing of all wage contracts of all laborers, workmen, and mechanics in this state which have been agreed to between bona fide organizations of labor and an employer or association of employers. (Emphasis added).
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> KRS 337.520 (3) states that in making his determination of prevailing wages, he "shall consider the following criteria:"
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> (a) Wage rates paid on previous public works constructed in the localities. In considering the rates, the executive director shall ascertain, insofar as practicable, the names and addresses of the contractors, including subcontractors, the locations, approximate costs, dates of construction and types of projects, the number of workers employed on each project, and the respective wage rates paid each worker who was engaged in the construction of these projects.
>
> (b) Wage rates previously paid on reasonably comparable private construction projects constructed in the localities....
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> (c) Collective bargaining agreements or understandings between bona fide organizations of labor and their employers located in the Commonwealth of

> Kentucky which agreements apply or pertain to the localities in which the public works are to be constructed. (Emphasis added).
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> KRS 337.522 (2) says in pertinent part:
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> (2) A public authority or any interested person may request and shall be granted an additional hearing solely for the purpose of having considered a review of the executive director's determination of the prevailing wage schedule for the construction of public works in the locality.... (Emphasis added).
>
> KRS 337.525 (1) says in pertinent part:
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> Any person or party claiming to be aggrieved by any final determination of prevailing wages by the prevailing wage review board may appeal to the Franklin Circuit Court. (Emphasis added).

The legislature has told the Labor Cabinet to make its prevailing wage determinations for the laborers, workmen, and mechanics employed in each classification of construction upon reasonably comparable construction in the same locale. The legislature requires the filing of all wage contracts of all laborers, workmen, and mechanics in this state. In making its determinations, the legislature has instructed the Labor Cabinet to consider 1) wage rates paid each worker; 2) wage rates previously paid on similar projects; and 3) the collective bargaining agreements which pertain to the jurisdiction in question. The legislature has obviously tasked the Labor Cabinet with determining which classifications of employees shall be utilized on a given project. The Labor Cabinet is clearly qualified to make such determinations. Such determinations of classification by the Labor Cabinet are not an improper delegation of judicial authority. The Court may take judicial notice of the fact that the collective bargaining agreements filed with the Labor Cabinet contain detailed classification information. The Labor Cabinet has historically used such classifications in making its determinations. In the record at R. 498 and 502 are pertinent excerpts from the Building Construction Agreement between Laborers' International Union of North America, Kentucky Laborers' District Council acting on behalf of Local Union No. 576 and (employer) in force at the

applicable time, and pertinent parts of the applicable Kentucky Department of Labor Prevailing Wage Determination Current Revision for Locality No. 12 (the locality covered by Laborer's Local 576). The "classification" of laborers in these documents is virtually identical. Obviously the Labor Cabinet obeyed the dictate from the legislature to "consider" the applicable collective bargaining agreements. Appellant (or any other interested party) may challenge these classifications in accordance with the procedure set out in the statute (KRS 337.525 (1)). Clearly implicit in a party's ability to challenge the prevailing wage set by the Labor Cabinet is the ability to challenge the classifications used in setting those wages. It would be quite difficult to question a "prevailing wage schedule" without reference to the classifications used in the "schedule."

In 2001, the Kentucky Legislative Research Commission published its Research Report No. 304, *An Analysis of Kentucky's Prevailing Wage Laws and Procedures.* The entire report is found at www.lrc.ky.gov/lrcpubs/RR304.pdf. At page iv of the report, the Commission writes that the Labor Cabinet "appeared to be correctly administering the prevailing wage laws as they are directed by statute." (R. 508). Furthermore, at page 15 of the report, the Commission notes: "Virtually all union contractors and a majority of non-union contractors agree that prevailing wage classifications accurately reflect the work that their employees perform." (R. 510). Finally, although the Commission proposes seven (7) recommendations which it claims would permit the Labor Cabinet to "yield prevailing wages that would be more representative of local wages," not one of the recommendations has anything to do with the way the Labor Cabinet classifies employees. *Id. at page iv-v.* (R. 508-509). See also R. 499 and 505. Thus, the Appellant's argument that the Labor Cabinet is somehow adrift without adequate guidance from the legislature is clearly incorrect.

Finally, the legislature cannot possibly be expected to define in excruciating detail each term which the Labor Cabinet must use to set appropriate prevailing wages and enforce the statutes. In a case attacking alleged improper delegation of legislative (vs.

judicial) power, the Court notes in Butler v. United Cerebral Palsy of Northern Ky., Inc., 352 S.W.2d 203, 208 (Ky. 1961):

> 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.

The court in Butler goes on to say that any perceived discrepancies by the administrative agency are "inherently reviewable by the courts." *Id.* The Appellant cannot reasonably argue that the Labor Cabinet is without the necessary experience and resources to properly interpret and implement the Kentucky prevailing wage statutes.

For the reasons stated, the Kentucky prevailing wage statutes are not unconstitutional based on an improper delegation of power, judicial or otherwise, by the legislature.

CONCLUSION

The Kentucky prevailing wage statutes are not unconstitutional. The laws of the Commonwealth of Kentucky provide Appellant with due process, and the legislature has not improperly delegated authority to the Labor Cabinet. Appellee Mechanical Contractors Association of Kentucky, Inc. respectfully submits that the Opinion of the Court of Appeals as it relates to the constitutionality of the challenged statutes should be affirmed.

Respectfully submitted,

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