COMMONWEALTH OF KENTUCKY
SUPREME COURT
2011-SC-000202-D
2010-CA-000361

W.B., AN ADULT CITIZEN
OF JEFFERSON COUNTY, KENTUCKY — MOVANT/APPELLANT

v.

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES,
DEPARTMENT FOR COMMUNITY BASED SERVICES,
A KENTUCKY ADMINISTRATIVE AGENCY — RESPONDENT/APPELLEE

APPELLANT'S BRIEF

J. Fox DeMoisey
DEMOISEY LAW OFFICE, PLLC
905 Baxter Avenue
Louisville, Kentucky 40204
(502) 585-5500 *Phone*
(502) 585-1386 *Facsimile*
Fox@DeMoiseyLaw.com
Counsel for Movant, W.B.

CERTIFICATE OF SERVICE

I hereby certify the original and nine (9) copies of the forgoing was this 5th day of March, 2012, served via US Express Mail, upon the Clerk, Supreme Court of Kentucky, 209 Capitol Bldg., 700 Capital Avenue, Frankfort, KY 40601-3488; with copies served via US Mail, postage prepaid, to Clerk, Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601, and Pursuant to CR 4.04(6) - Jack Conway, Esq., Attorney General for the Commonwealth of Kentucky, 118 State Capitol, 700 Capitol Avenue, Frankfort, KY 40601; Erika Saylor, Esq., Office of Legal Services, 908 West Broadway, 9E, Louisville, KY 40203, *Counsel for Commonwealth of Kentucky, Cabinet for Health and Family Services;* and Hon. Fredrick Cowan, Judge, Jefferson Circuit Court, Division Thirteen (13), 700 West Jefferson Street, Louisville, KY 40202.

J. Fox DeMoisey

I. INTRODUCTION:

This case questions the appropriateness and constitutionality of an administrative procedure which purports to adjudicate whether a citizen's name will be placed in a public registry as being a "substantiated" child abuser. Additionally, the Appellant questions whether this "punishment" be put upon a citizen, and his reputation "taken" without affording a jury trial upon proper demand.

II. STATEMENT CONCERNING ORAL ARGUMENTS:

Due to the complexity and interlocking elements of the issues presented, Appellant believes oral arguments may be helpful to the Court.

III. STATEMENT OF POINTS AND AUTHORITIES:

IV. STATEMENT OF THE CASE:

On April 20, 2009, the Appellant filed a Complaint for Declaratory Judgment in the Jefferson circuit Court (see Record, pages 1-11) against the Cabinet for Health and Family Services to contest the constitutionality of KRS 13B.150(2)(c), 922 KAR 1:330 Section 9 and Section 10, 922 KAR 1:480, and 922 KAR 1:470.

The uncontested factual allegations supporting the Complaint were:

(A) That the Appellant is an adult citizen residing in Louisville, Jefferson County, Kentucky.

(B) That the Department for Community Based Services is currently managing an administrative action concerning the Appellant and the location of that part of the administrative agency is located in Louisville, Jefferson County, Kentucky.

(C) That on or about August 22, 2008, an unidentified caller to the hotline maintained by the Defendant, Department for Community Based Services (hereinafter "Department") received an allegation that the Appellant had been implicated in a matter of abuse and/or neglect of a minor child.

(D) Pursuant to the procedure otherwise set out in 922 KAR 1:330, an investigation was initiated and on September 4, 2008. A forensic interview was conducted by the Jamestown Advocacy Center, wherein the concerned minor child and the minor child's siblings were interviewed. The interviews were recorded by video. On the same day, an interview was made of the father and mother of the concerned minor child by a detective. By operation of law, these videos are not available to the Appellant except by court order of competent jurisdiction.

(E) On September 4, 2008, pursuant to 922 KAR 1:330, Section 9, a Social Service worker (as defined by KRS 600.020(57)) "substantiated" the allegation of "sexual abuse" by making said determination based upon a "preponderance of evidence" even though there had been no opportunity for the Appellant to participate in that process, and despite there being no formal procedure which afforded any due process with which to make a determination of any weight of proof.

(F) That on or about September 27, 2008, a detective interviewed the Appellant and recorded said interview and recorded that process by video.

(G) At an unknown time and under circumstances unknown to the Appellant, criminal prosecution was not then initiated, and that determination may or may not be a final decision.

(H) On December 8, 2008 the Cabinet for Health and Family Services Community Based Services sent a letter to the Appellant advising him that an investigation had been made and an allegation of sexual abuse had been found to be "substantiated."

(I) Pursuant to 922 KAR 1:330, Section 10 (1), the Appellant gave notice of his intent to "appeal" and did assert an administrative appeal to the alleged "substantiation." According to the existing process, the Appellant is "appealing" the "substantiation" by the concerned social worker.

(J) Pursuant to the prevailing procedure (supra), an administrative action was set up with case number AHB DCBS 90-028, within which the Appellant was to be provided an administrative hearing process pursuant to the provisions and governed by the provisions in KRS Chapter 13B.

(K) After the initiation of that process, Appellant demanded a jury trial and was denied inasmuch as the procedure utilized in this process, and the provisions of KRS Chapter 13B, do not permit a trial by jury. That process directs the adjudication to be made by a hearing officer (an attorney) employed by the Division of Administrative Hearings of the Cabinet for Health and Family Services.

(L) At the time of the filing of the Complaint, an Administrative Hearing was scheduled in this matter for Thursday, May 7, 2009.

(M) Appellant asserted that to testify in the Administrative Hearing is to otherwise require the Appellant to waive his constitutional right to remain silent guaranteed him under the Fifth Amendment to the Bill of Rights of the United States Constitution, and also §11 of the Kentucky Constitution, Bill of Rights.

(N) The Appellant asserted that the "punishment" to be inflicted upon him, should the "substantiation" be upheld on "appeal," is to have his name published in a central registry as otherwise set forth and detailed in 922 KAR 1:470, which would provide to the public, through various means, the fact that his name had been associated with a "substantiation" of sexual abuse of a minor child. Appellant asserted that such a finding and publication would be *per se* defamation to the character and reputation of the Appellant, and a "punishment" to him not otherwise authorized by law.

(O) The stay of the Administrative Hearing was agreed upon by the parties in order to allow the Appellant's legal issues to be adjudicated.

(P) The Attorney General filed his Notice of Intention Not to Intervene (Record, pgs. 44-45). The Parties filed Memoranda in support of their respective positions and Oral Arguments were heard by the Trial Court.

(Q) As part of the Trial Courts inquiry, the Appellant filed an additional Memorandum so as to demonstrate that the Trial Court had proper jurisdiction and that the Court could reach the objections raised by the Appellant without having to first exhaust his administrative remedies (Record, pgs. 61-105).

(R) On January 25, 2010, the Trial Court entered its "Opinion and Order Granting Commonwealth's Motion to Dismiss" (Record, pgs. 106-113; **Appendix Exhibit B**).

(S) Notice of Appeal was filed by the Appellant on February 24, 2010 (Record, pgs. 115-124).

(T) After the briefing procedure was completed, the Court of Appeals rendered its "Opinion Affirming" on March 11, 2011. A copy of that Opinion is attached in the **Appendix** as **Exhibit A**.

(U) On April 11, 2011, the Appellant filed a Motion for Discretionary Review with this Court.

(V) On November 16, 2011, this Court issued its Order Granting Motion for Discretionary Review.

V. ARGUMENT:

(A) OVERVIEW:

It is a mathematical axiom that "the whole is the sum of its parts." Like that mathematical equation, Appellant asserts that the individual arguments, while considered separately, should also be considered as one in that each interconnects to the other and, in so doing, forms the "whole."

The first component piece is the lack of necessary due process available in this subject administrative proceeding. While the individual elements of the procedure each have their own failings, the effect of the overall procedural environment inevitably produces a "per se" denial of actual due process.

In this procedure, an administrative hearing is conducted by a "hearing officer" who is an employee of the Defendant agency. The employee hearing officer is not one of those hearing officers created within the Attorney General's Office as envisioned in KRS 13B.030(2). From the outside looking in, it is impossible to discern whether this individual hearing officer will discharge his duties in an appropriate and fair-minded manner, or he is one of those more concerned about retaining his job and seeking upward mobility.[1]

The critical problem involved with the utilization of a hearing officer as utilized in this procedure is the subsequent deference that his decision will inevitably be alleged to be "lawfully" due.

---

[1] See *Baker v. Commonwealth, KY Retirement* Systems, 207 WL 3037718 (Ky. App.) pg.15-16; Mr. Horsky was, and remains correct from this writer's experience.

In this case there is no known physical evidence. Thus, the hearing officer's decision will be, in large part, based upon "demeanor-based fact finding."[2] Once the decision is made and his recommendation has passed up the line within the Cabinet, the law requires that there then be a degree of deference owed by the agency head to the hearing officer that does not exist between a trial judge and a commissioner. This view was stressed in *Herndon v. Herndon*, 139 S.W.3d 822 (Ky. 2004).

In turn, when the agency head issues its "Final Order," this agency head will not be lending a definable or professional expertise into the matter as would the professional Boards such as the Board of Medical Licensure, Dentistry, Psychology, etc. Here, there is simply a decision by an attorney/hearing officer as to which party he might believe.

Noting that the high probability of a "rubber stamp" by the agency head will occur (as it almost always does), KRS 13B.150(2)(c) then comes into play. As set forth therein, the legislature has inappropriately mandated:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the final order or it may reverse the final order, in whole or in part, and remand the case for further proceedings if it finds the agency's final order is:
> (c) Without support of substantial evidence on the whole record; ..."

With these restrictions in play, the inevitable argument is then made that the hearing officer was in the "best position" to observe the demeanor of the witnesses and that his "findings" (*i.e.* personal opinions) equates to "substantial evidence." Thus, when

---

[2] This is of course becomes more important if the hearing officer allows the concerned child to testify without benefit of cross-examination (see 922 KAR 1:480 Section 6(a)). By this procedure, the concern child apparently does not normally testify.

the issue of sufficiency of evidence is subtracted from the reviewing court's zones of consideration, the only matters left to argue on review are "questions of law."

Thus, when this procedure is viewed in all of its parts, at the end of the day, the integrity of Appellant's name and reputation inevitably is left in the hands of one person's opinion. Recognizing that people are different, and that their perspectives may vary greatly, the concerned hearing officer's opinion must be subject to an examination as to whether or not that "opinion" is "arbitrary and capricious." There exists little if any "checks and balances" to this decision.

Second, Appellant asserts that the Commonwealth's attempt to "take" his good name requires a jury trial, in as much as it *is* a criminal-like punishment and "taking," and because he is constitutionally entitled to a "remedy by due course of law" from the court of justice for any injury done to his reputation.

With this overview, the Appellant suggests the following component pieces be examined in detail:

(B) THE ADMINISTRATIVE PROCEDURES IN THIS MATTER ARE CONSTITUTIONALLY INSUFFICIENT:

As articulated by the Court of Appeals in its Opinion, (**Exhibit B**, pg. 6), addressing whether this administrative procedure is constitutionally sufficient, the inquiry first turns to the "three-prong test" stated in *Mathews v. Eldridge*, 424 US 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976). The test requires the consideration of (1) the private interests that will be affected by the official action; (2) the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, (3) the Government's interest, including the

function involved in the fiscal and administrative burden that the additional or substitute procedural requirement would entail (*Mathews*, 424 US @ 335, 96 S.Ct. @ 903).

Addressing those three considerations, as set forth above and hereinafter, first there is no question that the Appellant's "private interest" would be affected by such an official action in as much as it would result in a "taking" of his "good name," resulting in substantial harm to his constitutionally protected "reputation."

Second, and without doubt, there is a legitimate governmental interest in attempting to appropriately identify persons who have proven to be abusers and/or neglectors of children. This is done in the context of criminal charges and criminal convictions. To adjudicate another class of people upon suspicion and the lack of sufficient evidence (at the time) to convict a person, is of questionable value.[3] Conversely, the Commonwealth has no legitimate interest in falsely denigrating an innocent person.

(C) THE PROCEDURE SET FORTH IN 922 KAR 1:480 COMPELS AN ILLEGAL USE OF THE STATUTORY PROCEDURE SET FORTH IN KRS CHAPTER 13B:

Set forth in 922 KAR 1:480, a person who finds himself in the same circumstances as Appellant (*supra*) may file an "appeal" of the "substantiation" pursuant to this administrative regulation. Set forth in that administrative regulation, the "appellant" is stated to be ". . . a **perpetrator** who requests an administrative hearing or on whose behalf an administrative hearing is requested by the **perpetrator's** legal representative. . ." A "perpetrator" is defined to mean (922 KAR 1:480 Section 1(7) as

[3] Are those "persons" to be penalized by the suspicion they have abused a child, based upon a "more likely than not" burden of proof?

being ". . . a person who, as a result of an investigation, has been determined by the Cabinet to have sexually abused or neglected a child. . ."

Of note in this proceeding are the following anomalies:

(1) Pursuant to 922 KAR 1:330 Section 9(3) the "social worker's" determination of a "substantiation" of abuse, neglect or dependency, is made after the worker has made an "assessment" of the information then available. A "substantiation" as allegedly based upon the existence of "a preponderance of evidence." Oddly enough, in Section 992 KAR 1:330 Section 9(3), the administrative regulation states:

> "A social worker's determination shall not be a judicial finding. . ." this is a true statement unless, of course, there is no appeal. Then and in that event it becomes an adjudicated "Final Order."

Presumably, it is this "substantiation" supported by an alleged "preponderance of evidence" that causes the Appellant to be designated as the "perpetrator/appellant" in this process.

However, a fair reading of KRS Chapter 13B indicates that the provisions of KRS Chapter 13B were never designed, or structured, so as to accommodate an "appeal" of a quasi-legal "substantiation" by an administrative agency, as otherwise set forth in the above administrative regulations relied upon by the Appellee.

The misuse of KRS Chapter 13B is evident when one attempts to put this administrative "square peg" into KRS Chapter 13B's procedural "round hole."

For example, pursuant to KRS 13B.090(7) the burden of proof is allocated to ". . . the party proposing the agency take action or grant a benefit." Appellant is attempting to vacate or remove (*i.e.*, "appeal") the designation of the "substantiation" of the agency. Traditionally, the "agency" has the burden to show the propriety of the agency's action,

or the entitlement to the benefit sought. . ." But, this "agency" has taken no action . . . only a social worker has made a non-adjudicative "substantiation." Moreover, there was never an "administrative complaint" issued. The administrative procedure was begun by a "Notice of Scheduled Hearing"[4]

Additionally, as set forth therein, KRS 13B.090 states that the "ultimate burden of persuasion in all administrative hearings" is met by a "preponderance of evidence" existing within the Record. The concerned administrative regulations do not authorize or permit the agency to prosecute the Appellant in an administrative proceeding so as to prove the alleged abuse. Simply put, it is outside of the authority granted this administrative agency.

To compound the problem, as set forth above, the films of the various interviews of the concerned minor child, her siblings, and the natural father and mother, made at an independent (not state created) agency, are not available in order for Appellant to prosecute/defend his appeal.[5] Yet, it is this very evidence that caused a social worker to make the "substantiation" by a "preponderance of evidence."

As noted in KRS 13B.090, the final Order of an agency must be based on the "whole Record." The critical part of this "appellate" Record is by statute, unavailable.

Typically, the "plaintiff" in a normal procedure would bear the burden of persuasion. However, in this particular arena, it is incumbent upon the Appellant to try to convince the very agency whose initial determination, without any significant participation by Appellant, was, in fact, not supported by a "preponderance of evidence." Such is neither fair nor practical.

---

[4] Index, **Exhibit C**; NOTE: Appellant is named as that "Appellant."
[5] See KRS 620.050(6)(a); these interviews are available within the context of a criminal prosecution (see KRS 620.050(10)).

On the counter-side of this argument, is the other statement set forth in KRS 13B.090 which states:

> ". . . the agency has the burden to show the propriety of a penalty imposed, or the removal of a benefit previously granted. . ."

The agency now takes the position that the "substantiation" and the projected publication in the central registry (as set forth above) is in fact a "penalty." If so, then and in that event, the Appellant asserts that he is entitled to a jury trial as set forth below.

The current system deprives Appellant of the necessary evidence that should otherwise be available to him. In particular, the Appellant should be able to evaluate these videos and to have the concerned child specifically evaluated in order to determine whether credibility should be afforded to her statements. As otherwise set forth in these proceedings, it is now known that, unfortunately, this child had been sexually abused by another person at a prior time which further complicates the matter.

Additionally, as set forth in 922 KAR 1:480 Section 6 (4), the Appellant is not directly permitted to compel evidence directly from the child and is specifically precluded from cross-examination.[6]

By procedurally withholding this information, the Appellant is fundamentally denied a fair adjudication and specifically denial of potential exculpatory evidence with the agency is statutorily required to provide (see KRS 13B.090(3)).

Aside from the obvious problems cause by attempting to utilize KRS Chapter 13B as an appellate proceeding, the problems with these proceedings as set forth above, and

---

[6] Cross-examination has always been viewed as a necessary component of due process in Kentucky (see *Kaelin v. City of Louisville*, 643 S.W.2d 590, 592 (Ky., 1982).

the problem with affording a meaningful due process under these circumstances is compounded by the lack of a meaningful judicial review.

The third component piece of the *Mathews* analysis is the focal point of this appeal. From Appellant's point of view, due to the flaws in the administrative procedural process at the adjudication stage, and due to the flaws in the judicial review stage, it is the Appellant's assertion that the risk of "erroneous deprivation" of this protected property interest through these procedures are impermissibly high.

In this context, the Appellant asserts that two procedural safeguards should be provided. Either a jury should be empanelled at the administrative stage, or KRS 13B.125(2)(c) needs to be modified/declared unconstitutional such that it actually provides a real and viable judicial oversight so as to bring down the otherwise impermissible high rate of erroneous deprivation. In sum, the Court's ability to address the presence, or lack thereof, of dispositive and compelling evidence needs to be restored to the Court of Justice.

(D) KRS 13B.150(2)(c) IS UNCONSTITUTIONAL INASMUCH AS IT VIOLATES THE SEPARATION OF POWERS ACT, AND, IN SO DOING, CAUSES A DENIAL OF MEANINGFUL DUE PROCESS:

As set forth above, KRS 13B.090(7) statutorily mandates that a "Final Order" from an administrative agency must be based upon the entire Record, and may only be done with the establishment of proof by a "preponderance of evidence."

However, KRS 13B.150(2) states in pertinent part:

> "(2) The Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The Court may affirm the final Order or it may reverse the final Order, in whole or in part, and remand the case for further proceedings if it finds the agency's final Order is:

> (c) without support of substantial evidence on the full record;. . ."

As set forth in *Kentucky State Racing Commission, et al. v. Fuller* (481 S.W.2d 298 at pp. 307-308 (Ky. 1972)) substantial evidence is defined as being"

> ". . . substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; **It is something less than the weight of the evidence**, and possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. . ." (*Emphasis added*). (Citing *Chesapeake Ohio Railroad Company v. United States,* 298 F.Supp. 734 (D.C., 1968)).

In *Fuller*, (*supra*) the Court also referenced a definition of "substantial evidence" as stated in *Blankenship v. Lloyd Blankenship Coal Company* 463 S.W.2d 62 (Ky. 1970) to the effect:

> "The test of substantiality of evidence is rather when taken alone or in light of all the evidence it has sufficient probative value to induce conviction in the minds of reasonable men. . ."

When one reviews the guidelines for evaluating the evidence in an administrative hearing, one is struck with a stark, inconsistent, and an improper circumstance. At the administrative hearing level, the party with the "burden of proof" must prove its case by "a preponderance of evidence." The "preponderance of evidence" standard has been generically held to be a circumstance wherein a conclusion ". . . is more likely or more probable than the other. . ."

However, pursuant to the Legislature's enactment, the courts, on review, are restrained from deciding whether or not, at the administrative level, the party with the "burden of proof" *actually* met that proscribed "burden."

Instead, on the "appellate" level, the Legislature has inappropriately "tied the hands" of the court. First, the Court is precluded from adjudicating whether the agency has violated a statute (*i.e.* KRS 13B.090(7)) by failing to require a preponderance of evidence. (See KRS 13B.150(2)(a)). Second, without being able to evaluate the "weight of evidence" on question of facts, the concerned agency is always able to point to "substantial evidence" – even though it doesn't actually exist in the Record if it were reviewable. Theoretically, only an absence of evidence could be addressed.

Thus, the sequelae of this anomaly is to often allow the concerned agency to actually prosecute its case on self-generated "substantial evidence."

Appellant asserts that the combination of these statutory circumstances has the cause and effect of denying Appellant an appropriate and meaningful review, and therefore, denies Appellant a necessary and constitutionally required element of "due process."

This issue is "reachable" by this Court in that KRS 13B.150(2)(c) violates the "Separation of Powers Doctrine."

Specifically, a fair reading of KRS 13B.150 and particularly KRS 13B.150(2)(c) clearly indicates that the Legislature has attempted to proscribe the parameters of the grounds upon which the Circuit Court may review a "final action" of an administrative agency.

As noted above, the most significant anomaly in this statute is the interplay between KRS 13B.150(2) and KRS 13B.150(2)(c):

Thus, if one reads the statute literally (as per KRS 446.080) then it would appear that this statute requires the Court to accept any "finding of fact" made by the agency

(whether supported by a preponderance of evidence, or substantial evidence) and, thereafter, when determining whether or not the entirety of the final Order is supported by "substantial evidence," the Court may only theoretically "weigh" the sum of evidence in the Record such that a reasonable mind might accept as adequate to support a conclusion.[7]

When one considers the interplay between these two legislative directives, one must come to the conclusion that:

(1) The Court never gets to the proposition as to whether or not the agency met its burden of proof (i.e., a preponderance of the evidence) as dictated by KRS 13B.090; and

(2) That since the Court is forbidden to weigh the evidence (substantial evidence or otherwise) supporting a "finding of fact" by the agency, then, by operation of that prohibition, there is no actual weighing of evidence to be done in order to determine whether there is the support of "substantial evidence" on the whole Record." In other words, if the "facts" as adjudicated by the agency cannot be tested, then in actuality, neither can the sum of those "facts" be weighed.

In typical practice, with the assistance of its "in-house" hearing officer, an agency can make any "finding of fact" that it cares to make, (see KRS 13B.120) whether it comports with a "preponderance of evidence" standard, or a "substantial evidence" standard. For all practical effects, the factual foundation for the "Final Order" is beyond any meaningful appellate review.

The Supreme Court of Kentucky has viewed this type of issue (i.e., Separation of Powers violations) on several occasions.

---

[7] See *Kentucky State Racing Commission v. Fuller*, *supra*, at pp. 307 and 308.

The most notable discussion of this issue is in *Smothers v. Richard A. Lewis, Commissioner, Department of Alcohol and Beverage Control, et al.* 672 S.W.2d 62 (Ky. 1984).

In discussing whether or not the Legislature may lawfully put an act a statute that could forbid the court system from issuing an injunction, the Supreme Court stated in pertinent part:

> "The control over this inherent judicial power, in this particular instance the injunction, is exclusively within the constitutional realm of the courts. As such, it is not within the purview of the Legislature to grant or deny the power nor is it within the purview of the Legislature to shape or fashion circumstances under which this inherently judicial power may be or may not be granted or denied and . . .
>
> The statutorily granted right to appeal under KRS 243.560 and KRS 243.570 was *Smothers'* basis for this action in the Franklin Circuit Court. However, the fact that the Legislature statutorily provided for this appeal does not give it the right to encroach upon the constitutionally granted powers of the judiciary. **Once the administrative action has ended and the right to appeal arises the Legislature is void of any right to control a subsequent appellate judicial proceeding. The judicial rules have come into play and have preempted the field. . .**" (*Smothers, supra*, a pp. 54-65) (*Emphasis added*).

There have been several occasions where the Court has accepted incursion upon its constitutionally proscribed territory by the Legislature. As set forth in *Commonwealth of Kentucky v. John Edgar Reneer*, 734 S.W.2d 794 (Ky. 1987) (at pp. 796-798) the Supreme Court held:

> "Nevertheless, it has not been the policy of this Court to nullify as a matter of course all legislation for which infringes to some extent upon a proper function of the judiciary. (Citing *Ex parte Farley*, 570 S.W.2d 617 (Ky. 1978) said:

> 'It is not our disposition to be jealous or hyper-technical over the boundaries that separate our domain from that of the Legislature. Where statutes do not interfere or threaten to interfere with the orderly administration of justice, what boots it to quibble over which branch of government has rightful authority? We respect the legislative branch, and in the name of comity and common sense are glad to accept with that cavil the application of its statutes pertaining to judicial matters, just as we accepted KRS 532.075, even though it has been argued with much force that there is no constitutional basis for a statute enlarging the scope of appellate review beyond the matters of record in the proceeding under consideration.'

In citing *Ex parte Auditor of Public Accounts*, 609 S.W.2d 682 (Ky. 1980), the Supreme Court stated:

> 'The correct principle, as we view it, is that the legislative function cannot be so exercised as to interfere unreasonably with the function of the courts, and that any unconstitutional intrusion is *per se* unreasonable, unless it be determined by the Court that it can and should be tolerated in a spirit of comity. . .'"

Clearly the Legislature has impermissibly encroached upon the Court's ability to provide a fair appellate process concerning a review of an administrative agency's final Order. In point of fact, KRS 13B.150 suggests an "appellate" process for a "review" by the Circuit Court. However, pursuant to KRS 23A.010 the "review" of a final Order (i.e., KRS 13B.150) is not actually an "appeal." KRS 23A.010(4) states:

> "The Circuit Court may be authorized by law to "review" the actions or decision of administrative agencies, special districts or boards. **Such reviews shall not constitute an appeal but an original action."** (*Emphasis added*).

Such being the case, the reach of KRS 13B.150 goes well beyond that which, at first glance, seems to be an "appeal." In point of fact, it is not, by statute, considered an

"appeal," but is considered to be an "original" action. Such being the case, the Legislature's restriction cannot apply under the guise of an "appellate-like" process.

There exists no good and sufficient reason to deny or limit a full measure of "due process" to a citizen of the Commonwealth, particularly under these circumstances. Appellant was not seeking a "benefit" or "authorization" from a state administrative agency (i.e., medical licensure, ABC liquor license, tax exclusion or public assistance benefit, etc.).

Not only does this not provide the Appellant with appropriate due process, it also, as set forth below, impermissibly denies Appellant his right to jury trial on the substantive and real issues of this case... is the Appellant actually (not administratively) guilty of child abuse?

(E) UNDER THE ATTENDANT CIRCUMSTANCES OF THIS CASE, THE APPELLANT IS IMPERMISSIBLY BEING DENIED HIS CONSTITUTIONAL RIGHT TO JURY TRIAL:

In this particular circumstance, Appellant asserts that he is entitled to a jury trial when the Commonwealth is engaged in a criminal penalty-like "taking":

(1) Defamation; an Injury to Reputation:

Without question, being "substantiated" as being a child abuser (either by neglect or sexually) would, if false, constitute "defamation" and, as set forth in the concerned regulations, would constitute a "penalty" to be visited upon Appellant.

The Defendants have devised a Central Registry that provides for information to be made available to the public concerning those people who have committed sexual abuse and/or child neglect.

In the first instance, the Central Registry provides an accessible database wherein all people who have been *convicted* (i.e., either by jury trial or by settlement in a criminal case) have their names and locations made available. This is done pursuant to the Commonwealth's "police power" in order to assist persons, and particularly parents, in protecting their children from known and convicted sexual predators.

In addition to those who have received a full measure of due process (*i.e.* "the criminally convicted"), the Cabinet now also seeks to enter people into the Central Registry who have been (civilly?) suspected (i.e., "substantiated") of having neglected and/or sexually abused a child.

As was done in this case, a "substantiation letter" was sent to Appellant and he was offered an opportunity "to appeal" the determination already made.[8]

922 KAR 1:470 Section 3 allows an individual, organization, or other entity to see the information in the Central Registry if, ". . . it is required by law. . ."

Additionally, 922 KAR 1:470 Section 3(3) states in pertinent part:

> "An individual who is not required by law to obtain information contained in the Central Registry shall submit an Open Records Request in accordance with 922 KAR 1:510. . ."

Appellant asserts that he has a constitutional right as to a jury trial with respect to these types of allegations of defamation and/or criminal-like "penalty." Appellant asserts that this penalty is the result of criminal-like prosecution in that there are no compensatory-like damages assessed to an injured party. This is purposefully "taking" from a person who is the target of this process.

---

[8] If the Appellant fails to appeal – either purposefully or through negligence – he is then adjudicated as an "abuser" and put into the registry.

In pertinent part, Section 14 of the Bill of Rights to the Kentucky Constitution states:

> "All Courts shall be open, and every person for an injury done him in his lands, goods, person, **or reputation**, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." (*Emphasis added*).

Section 7 of the Bill of Rights to the Kentucky Constitution states:

> "The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution."

With Appellant's personal reputation on the line, the "hook has been set." With the present configurations of administrative regulations and statutes, Appellant is compelled to participate in an administrative hearing in order to protect his reputation. However, that brings into play several other sets of issues, to wit:

(2) Potential Criminal Action:

As set forth above, a detective interviewed the Appellant without benefit of counsel and that interview was videotaped. As far as the Appellant has been advised at this point, the prosecutorial authorities have decided that there was insufficient evidence to pursue a criminal case. However, with the allegation otherwise being a felony, there is no "statute of limitations" on that decision.

Certainly, that issue could be revisited upon reviewing the evidence in the administrative action.

While that has certain benefits to the prosecution, from the other perspective, Appellant is being coerced into abandoning his Fifth Amendment privilege against

involuntary testimony in a criminal case, juxtaposed against his desire to save his reputation.

(3) **Subsequent and Potential Civil Action on Behalf of the Concerned Infant:**

The subject child of this matter is a young child. Her "cause of action" theoretically against Appellant would not run into a Statute of Limitations issue until her nineteenth birthday, a date that is a good number of years off.

Pursuant to KRS 446.070, and the case law published there under, the child, either as an adult, or through her parents, would theoretically have a cause of action against the Appellant for any damages and/or injuries suffered by the concerned child as a result of this conduct as now "proven" through an adjudication of a violation of a statute/administrative regulation.

If Appellant were directly sued for damages, he would be entitled to a jury trial. However, with an adverse determination at an administrative agency, the question as to whether or not the Appellant was "in fact" responsible for this alleged neglect and/or abuse, would be either: (a) *res judicata* of this "fact" question; or (b) a significantly prejudicial piece of evidence to which collateral estoppel might be specifically applicable as against Appellant.

The Supreme Court has recently addressed the question as to the availability for jury trials under circumstances that are being litigated within an administrative agency context.

In *Maggard v. Commonwealth of Kentucky, Board of Examiners of Psychology* 282 S.W.3d 301 (Ky. 2009) the Supreme Court held that jury trials were not available in all circumstances (*i.e.*, the right of jury trial is not entirely "inviolate").

In looking at the argument postured by Dr. Maggard (i.e., right of jury trial is "inviolate") the Court cited *Kentucky Commission on Human Rights v. Fraser* 625 S.W.2d 852, 854 (Ky. 1981) which propositioned that:

> "Indeed, there is no entitlement to a jury trial in an administrative proceeding where the right in question is created by statute. . ."

In the *Maggard* case, Dr. Maggard was [and is] a licensed psychologist in the Commonwealth of Kentucky. The matter under review was a disciplinary proceeding before the Kentucky Board of Examiners of Psychology. Thus, the "right" (i.e., the license to practice psychology) was created by statute, and the ability to issue and thereafter discipline that license was vested, by statute, in the Kentucky Board of Examiners of Psychology. As a result of that circumstance, KRS 13B.150 provided the appellate/original action with a "review" of the final Order concerning Dr. Maggard.

Thus, both the licensure, and the statutes involving the review of an administrative final Order, were all matters wherein ". . . the right in question is created by statute. . ." Such is not the case in this situation.

As noted above, the Appellant sought nothing from the state and in no other way engaged in any administrative function created by the Legislature and delegated to any administrative agency including the Department for Community Based Services.

In point of fact, Appellant is attempting (1) defend his personal reputation; (2) to defend a potential civil action; and (3) to defend potential and perhaps a pending (?) criminal action, all of which are not issues created by statute, and all which, by the Kentucky Constitution, and the Bill of Rights thereto, require a jury trial. All of these actions were recognized under common law at the time of the adoption of our state

Constitution and are specifically protected under the "Bill of Rights" thereto. The Cabinet should not be permitted to circumvent Appellant's jural rights by this administrative continuance.

(F) **THE "WHOLE" OF THIS PROCESS VIOLATES SECTION 2 OF THE KENTUCKY CONSTITUTION:**

Aside from, and individually different from the arguments set forth above, the entirety of this contrived regulatory and statutory "process" at the bottom line, is violative of Section 2 of the Kentucky Constitution in that it permits "arbitrary and capricious" conduct which, in turn, results in the trampling of core constitutional rights of this citizen of the Commonwealth of Kentucky.

As set forth in *Kentucky Milk Marketing v. Kroger Company*, 691 S.W.2d 893(1985) (at pg. 899), the Supreme Court of Kentucky long ago stated:

> "Section 2 is a curb on the Legislature as well as any other public body or public officer in the assertion or attempted exercise of political power. (Cite omitted.) Whatever is contrary to democratic ideals, customs and maxims is arbitrary. Likewise, whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interest of the people is arbitrary. No board or officer vested with governmental authority may exercise it arbitrarily. If the action taken rests upon reasons so unsubstantial or the consequences or so unjust as to work a hardship, judicial power may be interposed to protect the rights of persons adversely affected. . ." (Cites omitted).

When one applies the pronouncements of the Supreme Court as stated in *Kentucky Milk Marketing* (supra) against those elements which to be considered pursuant to the "*Mathews* three-prong test" they are both compatible and complimentary one unto the other.

The concerned hearing officer may not exercise governmental authority if that exercise is one of an "arbitrary" fashion. Without appropriate judicial review, providing all of the elements that make a judicial review viable, the "procedure" exceeds the "reasonable and legitimate interests of the people." Neither the Government nor the people of this Commonwealth have any legitimate interest in having a person's reputation "undertaken' circumstances where the citizen was not afforded "his day in court" and all of the due process consistent with that constitutional protection set forth in Section 14 of the Bill of Rights.

Appellant asserts that creating a procedural system appears to provide due process not an appropriate or lawful substitute for actual due process.

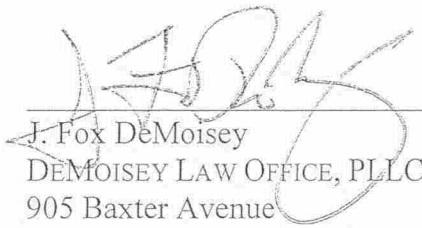
VI. CONCLUSION:

More and more personal and property rights are being decided in administrative forums, it is now entirely necessary that KRS 13B.150(2)(c) be declared unconstitutional and that the court of justice obtain a full panel plea of judicial review elements such that the constitutional rights of the citizens of the Commonwealth of Kentucky can be protected.

In pertinent point, the procedure set forth by the Cabinet by which the Cabinet seeks to adjudicate and penalize the Appellant should likewise be declared unconstitutional for its many procedural flaws.

The Appellant respectfully requests and opinion consistent with these arguments and that the trial court be so directed to enter a new judgment consistent with the rulings of this Court.

Respectfully submitted,



J. Fox DeMoisey
DEMOISEY LAW OFFICE, PLLC
905 Baxter Avenue
Louisville, Kentucky 40204
(502) 585-5500 *Phone*
(502) 585-1386 *Facsimile*
Fox@DeMoiseyLaw.com
Counsel for Movant/Appellant, W.B.