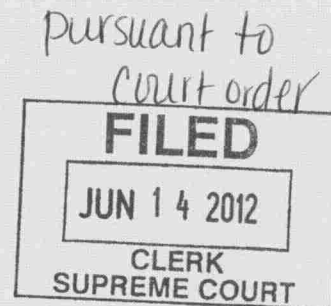


COMMONWEALTH OF KENTUCKY
SUPREME COURT
2011-SC-000202-D
2010-CA-000361



W.B., AN ADULT CITIZEN
OF JEFFERSON COUNTY, KENTUCKY

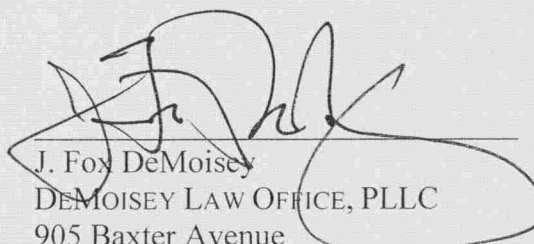
MOVANT/APPELLANT

v.

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

RESPONDENT/APPELLEE

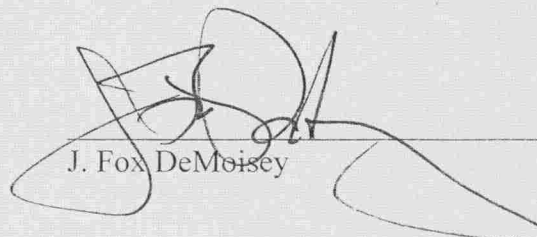
APPELLANT'S REPLY BRIEF



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Counsel for Movant, W.B.

CERTIFICATE OF SERVICE

I hereby certify the original and nine (9) copies of the forgoing was this 6th day of June, 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

Comes the Appellant, W.B., an adult citizen of Jefferson County, Kentucky, and for his Reply Brief submits as follows:

I. ISSUES TO BE ADDRESSED:

Having reviewed the "Brief for Appellee, Commonwealth of Kentucky, Cabinet for Health and Family Services, Department for Community Based Services," as those arguments were submitted juxtaposed against those issues presented by W.B., W.B. asserts that there are two (2) defining issues for this Court to now consider.

(i) First, W.B. asserts that the issues raised in this appeal are both defined and supported by the Kentucky Constitution and the Kentucky Bill of Rights thereto.

(ii) Second, in determining whether or not KRS 13B.150(2)(c) is unconstitutional, one must consider the internal statutory anomaly that exists in KRS 13B.150.

II. ARGUMENT:

(A) THE QUESTION OF THE AVAILABILITY OF A JURY TRIAL IS A KENTUCKY CONSTITUTIONAL ISSUE:

In Kentucky, the judiciary has gone so far as to recognize the *de facto* existence of a "fourth branch of government." (*American Beauty Homes v. Louisville & Jefferson County Planning Commission*, 379 S.W.2d 454 (Ky. 1964), footnote 4 and *Kentucky Commission on Human Rights v. Frazier*, 625 S.W.2d 852-857 (Ky. 1981). See also *Legislative Research Commission by and through Frazier v. Brown*, 664 S.W.2d 907, 916 (Ky. 1984). Despite the fact there are only three branches of government created by our Constitution, in *Brown* (supra) the Court suggested that the Legislative Research Commission was an "independent agency of state government," implying that the *de facto* "fourth branch of government" actually exists.

In order to accommodate this “fourth branch of government,” the Separation of Powers Doctrine is implicated and the violator is, without doubt, the Legislative Branch. However, the acceptance of the existence of the *quasi-judicial* functions within this “fourth branch” is simply a function of comity. It is a judicial function to finally decide the limits of the delegated authority of an administrative agency. (See *City of Greenup v. Public Service Commission*, 182 S.W.3d 535, 539 (Ky. App. 2005).

The Cabinet relies heavily on federal case law interpreting the federal Constitution and also upon decisions of sister states addressing similar administrative procedures in other states. W.B. asserts that his constitutional right to a jury trial, to protect his reputation, should be construed consistently with Kentucky’s Constitution and with the consideration of the Bill of Rights pertinent thereto which are rules specific and more inclusive than the rights secured under the federal system.

Courts of this Commonwealth have long recognized the protection of individual rights as being greater than the “federal floor” provided by the United States Constitution and the Bill of Rights thereto. The cases include *Ingram v. Commonwealth*, Ky. 801 S.W.2d 321 (1990), *Dean v. Commonwealth*, Ky. 777 S.W.2d 900 (1989), *Rose v. Council for Better Education, Inc.*, Ky. 790 S.W.2d 186 (1989).¹

The question now before this Court is to what extent the judiciary will allow the Legislature to invade this most sacred of constitutional rights by empowering an administrative agency to “take” W.B.’s personal reputation without benefit of a jury trial, and, in the alternative, without a full and complete application of due process, both procedural and substantive.

¹ For a more complete discussion, see *Commonwealth v. Wasson*, 842 S.W.2d 484, (Ky. 1992).

It is without question that the “penalty” that the Cabinet intends to visit upon W.B. is to defame his good name by putting him in a central registry, without sufficient evidence or cause, and to label him a sexual predator.

Section 14 of the Bill of Rights of the Kentucky Constitution requires that the Court shall be “open” to every person for injury done to him to include his reputation. Section 7 of the Bill of Rights of the Kentucky Constitution requires that the mode of trial by jury shall be held “sacred and the right thereof remain inviolate.”

W.B. asserts that the natural consequence of these two constitutional requirements that no person, including the state, may take and damage W.B.’s reputation without due process of law, to include a jury trial.

Moreover, the procedure devised by the Cabinet only provides the appearance of due process while actually granting to the Cabinet the ability to arbitrarily and capriciously adjudicate its own finding without adequate appeal or review by the judiciary.

(B) THE ANOMALY OF KRS 13B.150(2) :

KRS 13B.150(2)(c) prevents the judiciary from substituting its judgment for that of the agency as to the weight of the evidence on questions of fact. Moreover, KRS 13B.150(2)(c) permits the reviewing judiciary to reverse the “final order” of the administrative agency, in whole or in part, and remand the case back to the agency for further proceedings if the reviewing court finds the agency’s final order is “... without support of substantial evidence on the whole record....”

Recognizing there is a difference between “substantial evidence” and “a preponderance of evidence,” there is an anomaly existing in the operations of KRS 13B.150.

KRS 13B.090(7) requires the agency (the Cabinet in this case) have the burden of proof of going forward and the ultimate burden of persuasion as to whether to impose a penalty or to remove a benefit. The ultimate burden of persuasion is, by statute, to be one of “preponderance of evidence in the record” at administrative hearings.

Based on KRS 13B.150(2)(c), that statutory direction would suggest that the reviewing court may not review, from the administrative record, whether the original burden of proof (*i.e.*, a preponderance of evidence) was ever met.

Conversely, KRS 13B.150(2)(a) allows the court to review the actions of the administrative agency, on the record, as to whether the actions of the agency were in violation of “constitutional or statutory provisions.”

That being the case, if in fact the administrative agency did not actually produce a “preponderance of evidence” during the prosecution of its case at the administrative level, then the reviewing court should be able to reach that issue as that question would constitute a “statutory violation.” However, KRS 13B.150(2)(b) would seem to preclude that consideration.

While such may be a technical distinction, it brings into greater focus the underlying problem that is critical to W.B.’s case. Pursuant to this “procedure,” we do not have an elected judge, or even an attorney from the Attorney General’s Office from the Administrative Hearings Division who is the A.L.J. In this particular case, we have

an employee of the Cabinet, the Cabinet who also functions as the investigator, and prosecutor, and ultimately the adjudicator of a "recommendation" made by its employee.

Under the present circumstance, once the Hearing Officer makes a Recommendation, and the Cabinet reviews it, and issues "Final Orders," for all intents and purposes the actual sufficiency of the evidence becomes, by statute, non-reviewable in any meaningful way.

In sum, because of the limitations of KRS 13B.150(2)(c), a critical and important part of a judicial review is, by operation of the Legislature, removed from the review of the judiciary. The "judicial review" becomes so limited as to be a review in name only.

III. CONCLUSION:

"The two most precious things this side of the grave are our reputation and our life. But it is to be lamented that the most contemptible whisper may deprive us of the one, and the weakest weapon of the other." (Charles Caleb Colton).

Comity has its limitations. While the Legislature has chosen to invest more and more critical issues to the "fourth estate," that designated authority must have appropriate boundaries.

W.B. respectfully asserts that the boundaries that the Cabinet seeks to cross in order to assert a "penalty" upon W.B.'s reputation is in direct contravention of his constitutional rights, and should not be permitted.

Respectfully submitted,

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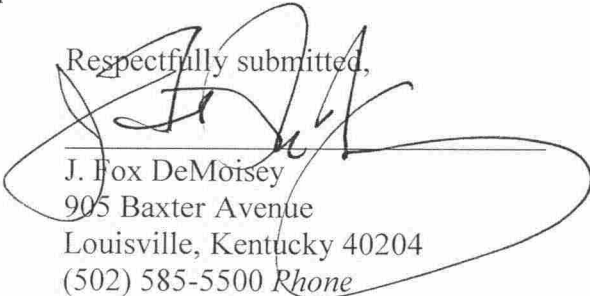
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