COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2018-SC-00419-TG
AND
CASE NO. 2018-SC-000421-TG

MATTHEW G. BEVIN, in his official capacity
as Governor of the Commonwealth of Kentucky; APPELLANT

v. On Appeal from Franklin Circuit Court, Division I
Civil Action Nos. 2018-CI-000379 and 18-CI-000414

COMMONWEALTH OF KENTUCKY
ex rel. ANDY BESHEAR, ATTORNEY GENERAL;
KENTUCKY EDUCATION ASSOCIATION; and
KENTUCKY STATE LODGE OF THE
FRATERNAL ORDER OF POLICE APPELLEES

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this brief was served this 10th day of September, 2018, by hand-delivery and email, upon: M. Stephen Pitt, S. Chad Meredith, Office of the Governor, 700 Capitol Avenue, Suite 101, Frankfort, KY 40601; and by U.S. Mail to Hon. Phillip Shepherd, Franklin Circuit Judge, 222 St. Clair Street, Frankfort, KY 40601; Mark Blackwell, Katherine Rupinen, and Joseph Bowman, Kentucky Retirement Systems, 1260 Louisville Road, Frankfort, KY 40601; Robert B. Barnes, Teachers' Retirement System of Kentucky, 479 Versailles Rd. Frankfort, KY, 40601; and Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601. I further certify that the record has been returned to the Clerk's Office.

Andy Beshear
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STATEMENT CONCERNING ORAL ARGUMENT

This Court has already determined that this case is of great and immediate public importance when it granted the Attorney General's motion to transfer the appeal. On August 10, 2018, pursuant to CR 76.16, this Court set oral argument in this matter on Thursday, September 20, 2018 at 10:00 a.m., in the Supreme Court courtroom. The Appellees are ready and willing to present oral argument at that time.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE[1]

On March 29, 2018, the General Assembly violated the Kentucky Constitution and state law by turning an 11-page sewer bill into a 291-page pension bill and passing it in roughly six hours. (Vol. XII, R. at 1737-49.) The process by which this was done – a process that Governor Matthew G. Bevin now defends – was government at its worst, rushing legislation through without any public comment, without the required analysis on whether it would work, without giving legislators the time to read it, and without the necessary number of votes. The Kentucky Constitution explicitly prohibits this process.

Even if the General Assembly had followed a constitutional process, Senate Bill 151 ("SB 151") would still be unconstitutional because it violates and substantially impairs the inviolable retirement rights and benefits this Commonwealth guaranteed to over 200,000 of its teachers, police officers, firefighters, social workers, EMTs, and other public servants.

As detailed below, SB 151 violated Section 46 of the Kentucky Constitution because it was read only one time in the House of Representatives after becoming a 291-page pension bill, and only by the following title: "AN ACT relating to the local provision of wastewater services." (Vol. XII, R. at 1738.) After this reading, the House passed SB 151 by a constitutionally deficient number of votes, securing only 49 in favor. (Vol. XII, R. at 1739.) The Senate then failed to give SB 151 a single reading as a 291-page pension bill. (Vol. III, R. at 342.)

[1] The Appellees do not accept the Governor's "Statement of the Case" as accurate and submit the following "Counterstatement of the Case" in order to ensure this Court is apprised of the facts and procedural events necessary to fully understand the issues presented by the appeal, in accordance with CR 76.12(4)(c)(iv) and (d)(iiii). (*See* Gov. Br. (Aug. 27, 2018)).

Based on these failures, the Franklin Circuit Court ("Trial Court") struck down SB 151 on June 20, 2018 as unconstitutional and void *ab initio*. (Vol. XII, R. at 1757, 1761, and 1767.) It held that "…SB 151 as enacted by the 2018 General Assembly is unconstitutional and void because the General Assembly violated the Kentucky Constitution, specifically the three-readings requirement of Section 46 and the majority-vote requirement of Section 46[.]" (Vol. XII, R. at 1757, 1761, and 1767.)[2] The Trial Court then permanently enjoined the enforcement of SB 151. (Vol. XII, R. at 1767.)

The facts in this case are uncontroverted, are based on the public record, and were largely adopted by the Trial Court. (Vol. XII, R. at 1736, n. 1.) This Court should affirm based on this record.

I. The Senate Fails To Pass Pension Legislation Through The Constitutional Process.

In his Statement of the Facts, the Governor focuses extensively on Senate Bill 1 ("SB 1"), a bill that is not at issue and that failed to pass during the 2018 General Assembly. SB 1 was introduced on February 20, 2018 and assigned to the Senate's State and Local Government Committee. (Vol. XII, R. at 1736.) Titled "AN ACT relating to retirement," SB 1 proposed various changes to the Kentucky Employees Retirement Systems ("KERS"), County Employees Retirement Systems ("CERS"), State Police Retirement System ("SPRS"), and the Kentucky Teachers' Retirement Systems ("KTRS"). (Vol. XII, R. at 1736.) Among other things, SB 1 proposed to cut annual cost of living adjustments ("COLAs") for teachers, moved new hires into a hybrid cash

[2] The Franklin Circuit Court also held that SB 151 did not violate Section 56 of the Kentucky Constitution, and that Speaker Pro Tempore Osborne was duly authorized to sign all legislation as the presiding officer of the House of Representatives. (Vol. XII, R. at 1763.) The Appellees do not raise any challenge to that determination in this brief.

balance plan, eliminated uniform allowances for law enforcement, and capped the amount of sick leave that could be used in the calculation of benefits. (Vol. XII, R. at 1736.)

The Attorney General was not provided with an advance copy of SB 1. (Vol. I., R. at 79.) Nor was he asked by either the General Assembly or the Governor to provide them any advice about its contents. (Vol. I., R. at 79.) Instead, as the people's lawyer, the Attorney General reviewed the bill and identified at least twenty-one (21) violations of Kentucky law, through which SB 1 violated the inviolable contract with Kentucky's teachers, firefighters, social workers, police officers, and other hardworking public employees. (Vol. I, R. at 79-84.) He urged – by way of letter – that the General Assembly remove these violations. (Vol. I., R. at 79-84.)

While the Governor claims the General Assembly somehow relied on the Attorney General's letter, the uncontested record disagrees. Indeed, on the very day the letter was sent, February 28, 2018, the Senate State and Local Government Committee held a hearing on SB 1. The Chairman of that committee and sponsor of SB 1, Senator Joe Bowen – far from having asked for or relied upon the Attorney General's advice – expressed displeasure, stating, "… in the 11th hour the attorney general has decided to weigh-in on this, and I think that's quite unfortunate."[3]

Several days later, a proposed committee substitute ("SCS 1") for SB 1 was published. (*See* Vol. I, R. at 85.) Again, the General Assembly neither provided the Attorney General with an advance copy of the substitute nor asked for advice about its

[3] Deborah Yetter, Feb. 28, 2018, *New Bill illegal, Beshear Says*, available at https://www.courier-journal.com/story/news/politics/2018/02/28/kentucky-pension-reform-illegal-beshear/380932002/ (last visited Aug. 31, 2018).

provisions. (Vol. I, R. at 85.) On March 6, 2018, the Attorney General sent the General Assembly a second letter stating the committee substitute also violated Kentucky law and breached the inviolable contract with Kentucky's hardworking public employees. (Vol. I, R. at 85-90.)

The General Assembly ignored the Attorney General and advanced the substitute. On March 7, 2017, Senator Bowen introduced the committee substitute, and after a mere half an hour of debate, held a vote on the bill. The Committee passed SB 1, as amended by SCS 1, on a 7-4 vote. (Vol. III, R. at 334, n. 1.) It was reported to the Senate, and placed in the orders of the day. (Vol. III, R. at 334, n. 1.)

Meanwhile, in protest of these proposed changes, thousands of teachers, public employees, and concerned citizens from around the Commonwealth gathered at the State Capitol Building to voice their concerns during the weeks prior to and days following the introduction of SB 1 and its committee substitute. (Vol. III, R. at 428, 450-51; Vol. XII, R. at 1736.) This historic public opposition stopped movement on SB 1. SB 1's sponsor declared the bill was "on life support," (Vol. III, R. at 334-35) and the President of the Senate stated there was "little hope" the bill would pass. (Vol. III, R. at 335.)

On March 9, 2018, SB 1 failed to secure the necessary votes to pass the Senate. (Vol. XII, R. at 1736-37.) No further action was taken on SB 1. (Vol. III, R. at 408.) The Senate had tried – but failed – to pass its pension legislation in the constitutionally required procedure. This process, complete with public notice, hearings, and multiple readings on multiple days, had provided both transparency and public participation through which the people of Kentucky defeated SB 1.[4]

[4] In his Brief, the Governor – for the first time and without any record citation – claims SB 1 was not killed by public opposition, but that somehow the General Assembly relied upon the Attorney General's letters

II. The House State Government Committee Strips An 11-page Sewer Bill, Turning It Into A 291-page Pension Bill.

Twenty days later, and with only three days remaining in the 2018 Kentucky Regular Session, the Kentucky House of Representatives called for a recess so that its Committee on State Government could meet around 2:00 p.m. (Vol. XII, R. at 1737.) This meeting was a surprise. (Vol. III, R. at 335, Vol. XII, R. at 1737.)[5] Instead of being held in the large legislative hearing rooms in the Capitol Annex, the Committee meeting was held in a small conference room in the Capitol, to the exclusion of the public – including hundreds of teachers rallying in the hallway. (Vol. III, R. at 335; *see also*, Vol. XII, R. at 1737.)

Representative Jerry T. Miller, Chairman of the House Committee on State Government, opened the meeting and called SB 151, a sewer bill that had passed the Senate with little opposition. (Vol. XII, R. at 1737.) This bill was titled "AN ACT relating to the local provision of wastewater services." (Vol. XII, R. at 1737.) It consisted of 11 pages and, according to its title, related to contractual agreements for the acquisition of wastewater facilities. (Vol. XII, R. at 1737.) Prior to the Committee's meeting, this "sewer bill" had received three readings by title – in its sewer form – before

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and therefore later took action with SB 151. (Gov. Br. at 14, 23, 68-69, 98-99.) This claim is entirely manufactured, and is contrary to all of the record as well as every public statement of the two bills' sponsors, (Vol. III, R. at 336, 430, 438 450-51), and the applicable committee chairman. (Vol. III, R. at 336, 429, 450-51.)

[5] Legislative Amici devote nearly a page of their brief to their claim that the public and the Office of the Attorney General were informed *in advance* of the Committee meeting, and that Appellees' argument to the contrary is a "misstatement of fact." (Vol. IV, R. at 546-47.) But their own evidence shows that the General Assembly falsely told the public and the Office of the Attorney General that SB 151 was on the agenda as a sewage bill. (Vol. IV, R. at 546-47.) These documents demonstrate that the legislators responsible for the passage of SB 151 were engaged in a concerted effort to keep the public from participating.

the Kentucky Senate, and two readings by title – in its sewer form – before the Kentucky House of Representatives. (Vol. XII, R. at 1737.)

Shortly after Chairman Miller called SB 151, Representative John "Bam" Carney introduced a committee substitute to the bill. (Vol. XII, R. at 1737.) The substitute stripped every word of SB 151, including all language related to sewers/wastewater facilities. It then added 291 pages of new pension legislation, making massive changes to dozens of statutes governing the retirement plans of hundreds of thousands of current and future public employees. (Vol. XII, R. at 1737.) Unquestionably, the entire subject of SB 151 changed, with the new topic (pensions) being in no way germane to the original one (sewers). (Vol. III, R. at 335.) The committee substitute was nevertheless adopted on a voice vote.

As the Trial Court noted, *some* of the changes mirrored the defeated proposals of SB 1. (Vol. XII, R. at 1737.) But in the Committee, Representative Carney testified at length about how SB 151 was different from SB 1, stating there were fewer "substantial change[s]," and that he was "basically try[ing] to put this on future hires." (Vol. III, R. at 336, 430, 450-51.) Chairman Miller likewise stated "[t]his is not Senate Bill 1." (Vol. III, R. at 336, 429, 450-51.) To ensure absolute certainty, Representative Will Coursey further questioned Representative Carney as to whether SB 151 was the same as SB 1. (Vol. III, R. at 336, 437, 450-51.) Representative Carney stated, "I would, I would argue that it's not; otherwise, I wouldn't be here …." (Vol. III, R. at 336, 438, 450-51.)

Despite the fact that the majority of the Committee had never seen, much less had time to read the new 291 pages of legislation, Chairman Miller stated that the Committee would vote on the new SB 151 during the meeting. (Vol. III, R. at 335, 428, 450-51.)

Numerous legislators objected, raising questions regarding the procedure by which the committee substitute was being considered. (Vol. XII, R. at 1737.) Representative Rick Rand stated that the new SB 151 was a "291-page document that I just saw 10 minutes ago." (Vol. III, R. at 335, 431, 450-51.) Representative Derrick Graham later stated, "[t]his is a bill we have been given today, which we don't really know what's in the bill." (Vol. III, R. at 337, 432, 450-451.)

In addition, the Committee's consideration of SB 151 raised several legal concerns. Representative Jim Wayne raised a point of order, asking if the new SB 151 had an actuarial analysis. In response, House Majority Leader Jonathan Shell acknowledged that there was no actuarial analysis for SB 151, stating "[w]e ***do not have an actuarial analysis*** on the full plan before you." (Vol. III, R. at 337, 427, 450-51.) Nevertheless, Representative Shell stated the Committee should "move forward without an actuarial analysis." (Vol. III, R. at 337, 427, 450-51.)

Representative Wayne then stated that SB 151 could not be voted out of the Committee without the actuarial analysis under KRS 6.350. (Vol. III, R. at 337, 428, 450-51.) Chairman Miller stated that it "…will be dealt with on the floor," and ruled that the Committee would consider SB 151 despite the lack of actuarial analysis. (Vol. III, R. at 337, 428, 450-51.) Representative Wayne objected, stating that the text of KRS 6.350 prohibited the Committee from voting on SB 151 without the analysis. (Vol. III, R. at 337, 429, 450-51.)

There was also no fiscal note analyzing the impact of the bill on local governments as required by KRS 6.955. In the Committee, Representative Wayne inquired whether SB 151 had a fiscal note attached. (Vol. III, R. at 337, 436, 450-51.)

Chairman Miller acknowledged there was none. (Vol. III, R. at 337-38, 436, 450-51.) Voicing additional concerns, Representative Wayne asked whether SB 151 had a local government impact study attached. (Vol. III, R. at 338, 434, 450-51.) Representative Carney stated, "[s]taff is telling me there is not one." (Vol. III, R. at 338, 435, 450-51.)

The Committee allowed no public testimony. (Vol. III, R. at 338, 431-33, 450-51.) Nor did it make a single copy of the bill available to the public during the meeting. Several legislators, including Representative Graham, argued it was inappropriate to consider the bill when stakeholders and the public were excluded from the hearing. (Vol. III, R. at 338, 432, 450-51.) Representative Wayne asked whether a Kentucky teacher would be permitted to speak on the bill. (Vol. III, R. at 338, 433, 450-51.) Chairman Miller refused. (Vol. III, R. at 338, 433, 450-51.) Representative Rand objected to the process, noting when the General Assembly passed pension reform in 2013, it had conducted open public meetings across the state. (Vol. III, R. at 338, 431, 450-51.)[6]

Just an hour after SB 151 was entirely stripped of its 11 pages of sewer legislation and 291 pages of pension legislation were substituted, Chairman Miller called for a vote. (Vol. XII, R. at 1738.) He did so despite most Committee members admitting that they had not seen, much less read the 291-page amendment. (Vol. III, R. at 339.) Just after 3:00 p.m., the Committee voted SB 151 out of Committee, reporting it favorably to the House floor. (Vol. XII, R. at 1738.) The circumstances were such that the Committee

[6] SB 151 stands in stark contrast to the open and deliberative process that marked the 2013 pension reform package. *See* 2013 SB 2; 2013 HB 440. Unlike with SB 151, which was passed in hours without hearings, an actuarial analysis, or fiscal note, in 2012 the General Assembly created a bipartisan task force dedicated to addressing growing public-sector pension fund liabilities. *See* 2012 HCR 162. After a year of public meetings and suggestions from a range of stakeholders, the task force made agreed recommendations to the General Assembly. Those recommendations included benefit modifications for future hires and revenue increases to help fund the pension plan. In 2013, the General Assembly passed these reforms with wide bipartisan support.

voted to report SB 151 before it even amended its original title: "AN ACT relating to the local provision of wastewater services." (Vol. III, R. at 339, 439, 450-51.)

III. The House Gives SB 151 – As A Pension Bill – A Single Reading By Its "Sewer Title," And Secures Only 49 Votes In Favor.

SB 151 was then immediately called on the floor of the full House. Notably, SB 151 had received two readings by title in the House, but only as a *sewer* bill. As a new *pension* bill, SB 151 had not received any readings. When called, the House read it once, and only by its original title: "AN ACT relating to the local provision of wastewater services." It read it by this "sewer" title despite the fact that its subject and every word of wastewater legislation had been removed. (Vol. XII, R. at 1738.)

On the House floor, Representative Carney explained the new SB 151. (Vol. III, R. at 340, 403, 450-51.) He made this explanation even though, in its new form, SB 151 had no public hearings, no public posting, no actuarial analysis, no fiscal note, and no local government impact study. As the sponsor, Representative Carney again clarified that SB 151 and SB 1 were substantially different. (Vol. III, R. at 340, 411, 450-51.)

Several legislators, including Representative Wayne, again raised concerns about the lack of actuarial analysis, fiscal note, public hearings and input, and the limited time available to review the bill. (Vol. XII, R. at 1738.) Representative Jeffery Donohue questioned Representative Carney about why an actuarial analysis had not been provided for SB 151. (Vol. III, R. at 340, 408, 450-51.) Representative Carney responded that there was no actuarial analysis because "[w]hen I got the [committee] sub[stitute] ready, ***they have not had time to do that***." (Vol. III, R. at 340, 408, 450-51) (emphasis added). Representative Donohue responded "[t]hat's not a good answer…. [I]t's our job to do things right…so that we can make an informed decision." (Vol. III, R. at 340, 411, 450-

51.) Twenty minutes later, Representative Carney again acknowledged the lack of an actuarial analysis stating, "on the specific sub, it's not been done yet because of time." (Vol. III, R. at 340, 411, 450-51.) Representative Graham stated "[n]o actuary analysis is on hand, and yet the majority party is asking us to pass this bill with no materials for us to help us to make a proper and sound decision on this important issue." (Vol. III, R. at 340-41, 414, 450-51.)

Several legislators voiced concerns that they had not had an opportunity to read the bill. Representative Jeff Greer stated "…we've had a very limited time to read this bill." (Vol. III, R. at 341, 416, 450-51.) And Representative Jim Wayne observed, "I dare say no one in this chamber has read the bill." (Vol. III, R. at 341, 406, 450-51.)

Ultimately, Representative Carney moved for the House's final passage of the bill. Despite the constitutional requirement of three readings on three separate days, the representatives were forced to vote on SB 151, without reading it, without public testimony, without an actuarial analysis, and without any fiscal note. (Vol. III, R. at 341.) Only 49 of the 100 state representatives voted for the bill, with 46 voting against and five not voting. *See* Vote History of SB 151.[7]

The Speaker Pro Tempore of the House nevertheless declared the bill had passed, signed the bill, and immediately referred it to the Senate. (Vol. III, R. at 341.) Notably, because the subject matter of the new pension bill was entirely different from the old sewer bill, the House also adopted a title amendment changing the bill's title to "AN ACT relating to retirement," in order to comply with Section 51 of the Kentucky Constitution. (Vol. XII, R. at 1738.)

[7] Available at http://www.lrc.ky.gov/record/18RS/SB151/vote_history.pdf (last visited Sept. 5, 2018).

IV. The Senate Passes SB 151 As A Pension Bill Without A Single Reading.

SB 151 was then immediately rushed through the Senate, avoiding any hearings or public participation. (Vol. III, R. at 341.) The Senate Rules Committee met and posted SB 151 in the Orders of the Day. Senate Majority Floor Leader Damon Thayer moved that the House Committee Substitute to SB 151, which was reported as a wastewater bill, be adopted. (Vol. III, R. at 341.)

Senate Minority Leader Ray Jones informed the Senate that no "actuarial analysis" was attached to SB 151, that he had not seen one, and that the bill should be reviewed. (Vol. III, R. at 341, 416, 450-51.) He then moved to table the bill. The motion to table the bill failed. (Vol. III, R. at 341, 416, 450-51.)

Shortly thereafter, Senator Joe Bowen, the sponsor of SB 1 and the original sewer version of SB 151, was called upon to explain the bill. In direct contradiction to Representative Carney (the sponsor of the House Committee Substitute), Senator Bowen claimed that SB 1 and SB 151 were essentially the same. (Vol. III, R. at 342, 417, 450-51.) He then argued that the actuarial analysis for SB 1 worked for SB 151 as well. (Vol. III, R. at 342, 417, 450-51.) Responding to questions about whether an actuarial analysis accompanied SB 151, Senator Bowen argued that the actuarial analysis provided for SB 1 "[i]s available" for SB 151. (Vol. III, R. at 342, 417, 450-51.)

Despite constitutional mandates, the Senate did not conduct ***any*** readings of SB 151 in its new 291-page form – not even by title. (Vol. III, R. at 342.) Instead, Senator Bowen moved for final passage of the bill, the roll was called, and the bill passed by a 22-15 vote. (Vol. III, R. at 342.) The effective date of some provisions of the bill, in particular changes in Section 19 of the bill for current cash balance plan members, was

July 14, 2018. The remaining provisions were to become effective January 1, 2019. (Vol. XII, R. at 1739.)

On April 10, 2018, the Governor signed SB 151.

V. The Attorney General, KEA, And FOP Challenge The Constitutionality And Legality Of SB 151.

The next day, April 11, 2018, the Attorney General, the KEA, and the FOP filed a complaint in Franklin Circuit Court challenging the legality and constitutionality of SB 151. The Appellees' Complaint stated that SB 151 violated Sections 2, 13, 19, 46, and 56 of the Kentucky Constitution, as well as KRS 6.350 and KRS 6.955. The Governor responded on April 17, 2018, with a Motion to Disqualify the Attorney General and his entire Office. (Vols. I-II, R. at 150-163, 229-239.)

On April 19, 2018 the Trial Court held a pre-trial hearing to address scheduling and briefing matters. (Vol. II, Video R. at 167.) After discussing the three-readings portion of Section 46, the Trial Court stated it would like to ensure that both sides fully briefed the question of whether SB 151 created an appropriation, and, if so, the number of votes that were necessary to pass the legislation under Section 46. (Vol. II, Video R. at 167.) The Court explicitly stated that it wanted to "put everyone on advanced notice of that so we can make sure that everybody fully briefs" the issue. (Vol. II, Video R. at 167.) The Court then invited the parties to add anything that needed to be addressed, at which time they could offer objections. (Vol. II, Video R. at 167.) Counsel for the Governor did not, responding "Nothing your Honor." (Vol. II, Video R. at 167.)

On April 20, 2018, the Trial Court issued an Order setting the briefing schedule and consolidating a new petition filed by the Governor with the Appellees' original suit

challenging the legal and constitutional validity of SB 151.[8] (Vol. II, R. at 195-199.) In this order, the Trial Court again requested that all parties fully brief whether SB 151 made an appropriation or created a debt, and therefore required a majority vote under Section 46. (Vol. II, R. at 196.)

The following week, from the bench, the Trial Court denied the Governor's motion to disqualify the Attorney General and his office. (Vol. II, Video R. at 242.) It followed the oral ruling with a May 1, 2018 written Order. (Vol. II, R. at 299.) The Trial Court held that "…the Attorney General could not possibly have a conflict of interest…" because "[t]he long established controlling law on this point emphatically provides that the Attorney General's true clients, to whom he owes his legal and fiduciary duty of loyalty, are the citizens of Kentucky and not any officeholder, department or agency." (Vol. II, R. at 299.) The Trial Court reasoned that "[g]iven this duty, the letters sent by the Attorney General to the General Assembly cannot operate to create a conflict of interest which would disqualify him from participating in this case." (Vol. II, R. at 299.)

Pursuant to the Trial Court's scheduling Order, on May 2, 2018, the Appellees filed their Brief on the Merits, requesting the Trial Court grant summary judgment, and declare that the passage of SB 151 violated Sections 2, 46, and 56 of the Kentucky Constitution as well as KRS 6.350 and KRS 6.955. (Vol. III, R. at 332-384.) Pursuant to the Trial Court's Order, Appellees included four (4) pages addressing the vote requirement under Section 46. (Vol. III, R. at 350-53.) In addition, the Appellees requested the Trial Court to further find SB 151 unconstitutional and void on the grounds

[8] The Governor filed a separate Petition for Declaration of Rights against the Attorney General in Franklin Circuit Court. (Vol. I, R. at 1-14.) That petition asked the Court to issue declaratory relief finding that Representative Osborne was the "presiding officer" of the House of Representatives for the purpose of signing every other bill in the 2018 legislative session. (*Id.*)

that it breached the inviolable contract in violation of Sections 13 and 19 of the Kentucky Constitution. (Vol. III, R. at 332-384.) On the same day, the Attorney General filed a motion to dismiss the Governor's consolidated petition. (Vol. I, R. at 83-91.)

On May 23, 2018, the Governor filed his Combined Memorandum in Support of Motion For Summary Judgment and Response to Plaintiffs' Motion for Summary Judgment. (Vols. VIII-IX, R. at 1161-1255.) The Legislative Defendants also filed their respective briefs, including a motion to dismiss the Plaintiffs' Verified Complaint. (Vols. IV-V, R. at 535-626; Vol. VIII, R. at 1145-60.) Both addressed the necessary votes under Section 46, providing over twelve (12) pages of argument on the subject. (Vol. IV, R. at 585-590; Vol. IX, R. at 1287-93.)

On May 30, 2018, the Plaintiffs filed their Reply Brief and Response to the Legislative Defendants' Motion to Dismiss. (Vol. IX, R. at 1268-1319; Vol. X, R. at 1357-67.)[9]

VI. The Trial Court Voids SB 151 For Violating The Three-Readings Requirement And The Majority-Vote Requirement Under Section 46 Of The Kentucky Constitution.

On June 7, 2018, the Trial Court held oral argument pursuant to the briefing schedule. (Vol. XII-XIII, R. at 1772-1887.)[10] On June 20, 2018, the Trial Court entered

[9] On the same day, the Governor sent a letter to the presiding judge of the Trial Court, requesting he recuse himself. (Vol. X, R. at 1373-76.) On May 31, 2018, the Trial Court entered an Order denying the request. (Vol. X., R. at 1368-78.) On Tuesday, June 5, 2018 – two days prior to the scheduled oral argument on the merits – the Governor filed a Notice and an affidavit in Franklin Circuit Court requesting the Chief Justice of this Court disqualify the judge and appoint a special judge. (Vol. X-XI, R. at 1433-1719.) On June 6, 2018, the Chief Justice entered an Order denying the Governor's request, determining that the Governor "…failed to demonstrate any disqualifying circumstance that would require the appointment of a special judge…" (Vol. XII, at 1732.)

[10] Less than a week after oral argument and full submission of the case, the Governor filed an Amended Petition seeking to further delay the Trial Court's resolution of this case. (Vol. XIV, R. at 1962-63.) The very next day, June 14, 2018, the Attorney General filed a Motion to Strike. (Vol. XIV, R. at 1962-63.) The Governor would later voluntarily dismiss his purported amended petition. (Vol. XIV, R. at 1962-63.)

its Opinion and Order on the merits, finding SB 151 "procedurally deficient and therefore null and void[,]" under Section 46 of the Kentucky Constitution. (Vol. XII, R. at 1745.) The Trial Court specifically determined that "SB 151 violated Section 46's three-readings requirement and is therefore unconstitutional and void *ab initio*." (Vol. XII, R. at 1757.) The Trial Court also determined that SB 151 failed to receive the 51 votes required under Section 46 as a bill for the appropriation of money and the creation of a debt. (Vol. XII, R. at 1757-61.) Accordingly, the Trial Court declined to address whether the substantive provisions of SB 151 violated Sections 2, 13, or 19 of the Kentucky Constitution.

On June 29, 2018, the Governor filed a motion to alter, amend, or vacate, asking the Trial Court to "amend its decision to resolve whether SB 151 violates the 'inviolable contract' and the Contracts Clause of the Kentucky Constitution." (Vol. XIII, R. at 1888.) The Governor continued to address the necessary votes under Section 46, requesting the court "determine whether the provisions of [SB] 151 that the Court invalidated under the 51-vote requirement of Section 46 of the Constitution are severable from the larger bill…." (Vol. XIII, R. at 1888.)

The Trial Court declined the Governor's invitation to issue an advisory opinion about the constitutional validity of the bill's substance, stating "…SB 151 failed to comply with constitutional requirements for passage and is therefore void; as such, the substantive arguments no longer present[] a live controversy for this Court to decide." (Vol. XIII, R. at 1914.) (internal citations omitted). In addition, the Trial Court found that without its unconstitutional appropriation provisions, the remaining provisions of SB 151 are "incomplete and incapable of being executed[,]" and therefore are not severable. (Vol. XIII, R. at 1922.)

On August 10, 2018, the Governor appealed the decision of the Trial Court. (Vol. XIII, R. at 1925-27.) The Appellees moved to transfer the appeal to this Court and to advance it on the docket because this case is of great and immediate public importance. (Appellees' Mot. to Transfer and Mot. to Advance (Aug. 10, 2018)). The Governor also filed a motion to transfer and a motion to advance. (Gov. Mot. to Transfer (Aug. 10, 2018)). The same day, this Court transferred the Governor's appeal and set an expedited briefing schedule and oral argument. (Order Granting Transfer, Expediting Briefing, and Setting Oral Argument (Aug. 10, 2018)).

This Court should affirm the Trial Court's holding that the passage of SB 151 violated Section 46 of the Kentucky Constitution. This Court should also accept the Trial Court's invitation to re-visit its prior ruling in *Board of Trustees of the Judicial Form Retirement System v. Attorney General of the Commonwealth*, 132 S.W.3d 770 (Ky. 2003), and hold SB 151 violated KRS 6.350 and KRS 6.955.

STANDARD OF REVIEW

The facts are not in dispute: SB 151 – as a pension bill – received only one reading in the House, and that reading was the title of the old bill, "AN ACT relating to the local provision of wastewater services." It never received a single reading – as a pension bill – in the Senate. SB 151 further received only 49 votes in favor in the House. Finally, SB 151 was moved out of committee and voted on without an actuarial analysis or fiscal note. This appeal therefore turns on the purely legal questions of whether the General Assembly violated Section 46 of the Constitution by nevertheless passing SB 151, and whether KRS 6.350 and 6.955 are binding on the General Assembly.

On appeal, "[t]he standard of review . . . of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Sys., Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). Since no facts are in dispute, review is *de novo*. *Caniff v. CSX Transp., Inc.*, 438 S.W.3d 368, 372 (Ky. 2014) (citation omitted).

ARGUMENT

I. The Trial Court Properly Voided SB 151 Because It Did Not Receive Three Readings.

The Trial Court correctly determined that "SB 151 violated Section 46's three-readings requirement and is therefore unconstitutional and void *ab initio*." (Vol. XII, R. at 1757.) The uncontested record shows that, after turning SB 151 from an 11-page sewer bill into a 291-page pension bill, the General Assembly passed it in mere hours. It thereby avoided any public participation, refused to conduct the statutorily required analysis, and did not allow legislators the time to even read the bill. (Vol. III, R. at 334-42.) In doing so, the General Assembly read SB 151, after becoming a pension bill, only once in the House, and only by its sewer title. It failed to read SB 151 a single time, as a pension bill, in the Senate. (Vol. III, R. at 342.) This Court should affirm the Trial Court.

A. The Three-Readings Requirement Under Section 46 is Mandatory.

"Section 46 of the Kentucky Constitution sets out certain procedures that the legislature ***must*** follow before a bill can be considered for final passage." *D & W Auto Supply v. Dep't of Revenue*, 602 S.W.2d 420, 422 (Ky. 1980) (emphasis added). Among these requirements is that "[e]very bill shall be read at length on three different days in

each House . . . ." KY. CONST. § 46.[11] This "requirement that the reading of the bills shall be on different days is ***mandatory***." *Kavanaugh v. Chandler*, 72 S.W.2d 1003, 1004 (Ky. 1934) (emphasis added).

As the Trial Court held, the three-readings requirement "goes to the heart of what it means to be a republic," and it is "essential to the legitimacy of the legislative process." (Vol. XII, R. at 1752.) This is because the Framers "designed" the three-readings requirement "to provide public notice of the contents of the legislation, the most fundamental requirement of any legislative process based on the consent of the governed." (Vol. XII, R. at 1752.)

B. The Three-Readings Requirement Under Section 46 is Justiciable.

The Trial Court correctly held that the General Assembly's failure to comply with Section 46 of the Kentucky Constitution is justiciable. (Vol. XII, R. at 1748-53.) It noted that "the Kentucky Supreme Court has repeatedly made clear that it is the historic and fundamental role of the judiciary to enforce the letter and the spirit of … constitutional restrictions." (Vol. XII, R. at 1751.) As such, the Trial Court held that it had "the duty … to interpret the Constitution and to ensure that the legislative and executive branches do not exceed the authority allotted to them by its terms." (Vol. XII, R. at 1751.) This Court should affirm the Trial Court's decision.

Section 228 of the Kentucky Constitution requires the judiciary to "support … the Constitution of this Commonwealth." *D & W Auto Supply*, 602 S.W.2d at 424. As such, courts are "sworn to see that violations of the constitution by any person, corporation,

[11] While Section 46 allows that "the second and third readings may be dispensed with by a majority of all the members elected to the House in which the bill is pending," it is uncontested that there was no vote in either House to dispense with the second and third readings.

state agency or branch of government are brought to light and corrected. To countenance an artificial rule of law that silences [a court's] voice[] when confronted with violations of the constitution is not acceptable… ." *Id.*

Pursuant to Section 26 of the Kentucky Constitution, courts must exercise their judicial authority and void legislation that violates the Kentucky Constitution and the procedures that it mandates. *Id.* Indeed, in *D & W Auto Supply*, this Court voided legislation for failure to follow Section 46 of the Kentucky Constitution, the very section invoked by the Trial Court. *Id.* at 424-25.

In decision after decision, this Court (and its predecessor) has repeatedly ruled on the constitutionality of the General Assembly's process and/or actions, stating it has a "duty" or "constitutional responsibility" to do so. *See Stephenson v. Woodward*, 182 S.W.3d 162, 174 (Ky. 2005) ("[J]ust as this Court will not infringe upon the independence of the legislature, we will not cast a blind eye to our own duty to interpret the Constitution and declare the law."); *Philpot v. Patton*, 837 S.W.2d 491, 494 (Ky. 1992) (holding that suit may be brought to challenge constitutionality of legislative rule); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 208-09 (Ky. 1989) (holding General Assembly violated constitutional mandate to provide efficient system of common schools); *Gillis v. Yount*, 748 S.W.2d 357, 360 (Ky. 1988) (holding tax violated KY. CONST. § 171, and observing that the "judiciary cannot abdicate its responsibility by deferring to the legislature"); *Farris v. Shoppers Vill. Liquors, Inc.*, 669 S.W.2d 213, 214 (Ky. 1984) (declaring statute unconstitutional and enjoining enforcement because it was not germane to the subject matter suggested by the title); *District Bd. of Tuberculosis Sanitarium for Fayette Cnty. v. Bradley*, 222 S.W. 518, 519 (Ky. 1920) ("All provisions

of the Constitution are mandatory, and the duty imposed upon the courts is to construe and enforce them in accordance with their meaning and purpose."); *Varney v. Justice*, 6 S.W. 457, 459 (Ky. 1888) (recognizing the fundamental law of Kentucky, the Constitution, "was designed by the people adopting it to be restrictive upon the powers of the several departments of government created by it," including the Legislature);[12] *Norman v. Kentucky Bd. of Mgrs. of World's Columbian Exposition*, 20 S.W. 901, 903 (Ky. 1892) ("… when this court is called upon to exercise a power, respect for a co-ordinate department of the government cannot be suffered to override fundamental law, by virtue of which both act and exist.").

The Governor attempts to create exceptions to this extensive precedent, citing *Philpot v. Haviland.* But, as the Trial Court held, *Philpot* is simply not on point. (Vol. XII, R. at 1749-50.)[13] In *Philpot*, this Court upheld a Senate *rule* allowing an individual senator to call a bill held for committee for a floor vote if the bill had been held in committee for an "unreasonable time" in violation of Section 46 of the Constitution. *Philpot v. Haviland*, 880 S.W.2d 550, 552 (Ky. 1994). The Court declined to hold the rule unconstitutional for two reasons, both of which are distinguishable. First, the Constitutional Debates reveal that the Framers intended for the constitutional provision at

[12] Legislative Amici's claim that the Framers were aware of and relied on a Missouri Supreme Court case from 1879 ((Legislators Br. at 8-9. (Aug. 27, 2018.)) 8-9) is wrong because *Varney* was decided in 1888 – two years before the Constitutional Convention. Moreover, it expressly held that nothing in the constitution is discretionary. *See id.*

[13] The Trial Court held that *Philpot v. Haviland* does not apply here because, unlike the subjective "unreasonable time" requirement at issue there, "the requirement of three readings 'on three different days' is objective and enforceable." (Vol. XII, R. at 1749.) The Trial Court further observed that the holding in *Philpot*, "relied heavily on the Constitutional Debates, which in the present case support a strict interpretation of the requirement for three readings on three separate days." (*Id.*) It therefore held that the three-readings clause must be enforced because "[i]t is a constitutional mandate—not an internal procedural rule of the General Assembly." (*Id.* at 1750.)

issue to permit the action encompassed by the rule, *i.e.*, for the General Assembly to call a bill from committee upon a determination that it had languished an unreasonable time. *Id.* Second, the Court faced a determination of a "vague phrase" – "unreasonable time" – which it determined presented a "political question." *Id.* at 553-54.

This case is entirely different. As set forth below, the Constitutional Debates show that the Framers explicitly intended the three-readings requirement to prevent – and not allow – exactly what happened here, *i.e.*, a bill being rushed through in mere hours, excluding the public, and not providing time for legislators to even read it. *See* Section I(C), *infra*. Moreover, there is an obvious difference between a judgment of what is an "unreasonable time" versus whether something has had "three" readings on "three" different days. One requires a subjective judgment, while the other simply requires counting. Finally, unlike the narrow issue in *Philpot*, the failure to enforce the three-readings clause would nullify what this Court has already ruled is a mandatory procedure. *See Kavanaugh*, 72 S.W.2d at 1004 (the three-readings requirement "is mandatory").

The three-readings requirement is justiciable and enforceable.

C. Section 46 was Intended to Prevent Exactly What Occurred Here.

The Framers of our Constitution created the three-readings mandate to stop "abuses" by the General Assembly. The specific "abuse" they sought to address is exactly what happened here: a secret deal by legislative leadership, followed by a reckless "haste" to pass a bill, all without adequate reflection or time to read the bill by the Legislature, and without any input from the people affected by the law.

In debating Section 46 of the Constitution, Delegate Simon B. Buckner described this exact scenario, stating the three-readings requirement was necessary to protect both the people and the legislature itself:

> We all know that many abuses exist in legislative bodies in the passage of acts. . . . There was, in the opinion of the Committee, a very serious abuse of the legislation ***in the haste*** with which bills are passed. . . . On one occasion, during the last Legislature, a bill involving large interests, the interests of the people of two large and populous counties, passed through both bodies of the Legislature in thirty-five minutes, and was laid before the Executive in a short time after that. . . . It is probable that not ten men in the Legislature knew what they were voting on . . . . The people are too apt to criticise legislative bodies, and say, because of ***hasty*** legislation like this, the body is corrupt. This ***hasty*** mode of legislation ought to be checked, not only in the interest of the people, but in the interest of the legislative body itself.

3 DEBATES OF CONSTITUTIONAL CONVENTION 3868-69 (1891) (Vol. IV, R. at 453-54) (emphasis added).

Another delegate – Delegate Frank P. Straus – described the same problem:

> Sometimes it has happened in the history of our State, as of other states, that very important measures, affecting the interest of the whole people, especially revenue matters, have been introduced, without referring them to any Committee, frequently at the end of a session, without printing, and pushed through to the great loss and detriment of the State. . . . We thought they ought to give each general measure that degree of consideration which would secure accuracy, and we put this into secure that consideration. ***Now under our old Constitution, the reading of a bill for three consecutive days was evaded***.

(*Id.* at 3858) (emphasis added); (Vol. XII, R. at 1753.)

Thus, Section 46 of the Constitution was specifically designed to prevent "hasty" legislation and to prohibit any bill from being passed in a single day. It was further devised to ensure that all members of the General Assembly had time to read and fully understand what they voted on. It was calculated to protect "the interests of the people," so that bills could not be rushed through without public knowledge and participation. As Delegate Buckner stated, a system that did not satisfy these concerns would be viewed as "corrupt." Indeed, as one delegate warned, "Whenever a man wants to pass any thing

that is wrong, he tries to keep it from being printed; he tries to keep its contents unknown." (*Id.* at 3859); (Vol. XII, R. at 1752-53.)

The requirements of Section 46 prevent such corruption and address these concerns in two ways: (1) by requiring the printing of the bill, and (2) by mandating it be read at length on three separate days. Again, as stated by Delegate Buckner:

> We have sought, in recommending this to your consideration, to remedy, in great part, the evil, by requiring that, before consideration by the House before which the bill comes, it shall be printed, so that every member shall have an opportunity at least of knowing what he has voted on. Then it shall be read. The report provides three subsequent days … .[14]

(*Id.* at 3869) (Vol. IV, R. at 454.)

In this case, the evidence is uncontested that neither house of the General Assembly met the three-readings requirement of Section 46 after SB 151 was entirely stripped of its original sewer language, its very subject was changed, and 291 pages of new and different text were added. In this new form, it received only one reading by title in the House, and that reading was by the title of the old bill, "AN ACT relating to the local provision of wastewater services." (Vol. XII, R. at 1738.) That one title reading was on the same day SB 151 was passed, only hours after it was revealed to legislators for the first time, and before the public could participate. As such, the process contained the same "abuses" Delegate Buckner outlined: (1) the haste of passing a bill in one day, (2) whereby Legislators did not have time to read or understand it, and (3) where the "public interest" was excluded, having no chance to testify or otherwise comment on the bill.

[14] Delegate Buckner further observed that "the amendment of the Delegate from Shelby, which I believe meets with the approbation of most of the members of the Committee, modifies that by enabling the Legislature itself to dispense with the two subsequent readings." (Vol. IV, R. at 454.) As previously noted, there was no such vote to dispense with the second and third readings in this case.

The Committee and floor speeches confirm these abuses. Representative Graham raised the haste abuse in that SB 151 was moving so fast that he and others did not have the necessary materials to make an informed vote. (Vol. III, R. at 413-14.) He stated: "[n]o actuary analysis is on hand, and yet the majority party is asking us to pass this bill with no materials for us to help us to make a proper and sound decision on this important issue." (Vol. III, R. at 413-14.) Representative Wayne raised the abuse of legislators not having read the bill, stating, "I dare say no one in this chamber has read the bill." (Vol. III, R. at 341, 406, 450-51.) He also noted that the public interest was being excluded, requesting that a Kentucky teacher be permitted to speak on the bill. (Vol. III, R. at 338, 433, 450-51.) Chairman Miller denied that request.

The handling of the new SB 151 in the Senate was even more troubling. Despite the Section 46 mandate, the Senate did not conduct ***any*** readings of SB 151 in its new 291-page form. (Vol. III, R. at 342.) Like the House, the Senate acted as though the previous readings of SB 151 by its prior title –"AN ACT relating to the local provision of wastewater services" – satisfied the constitutional mandate. The Senate then passed the new SB 151 without performing any reading of it in its new form, "AN ACT relating to retirement." (Vol. III, R. at 342.)

The result was exactly as Delegate Buckner predicted. The public has since expressed distrust in the legislative process, including one teacher who described it as "absolutely corrupt government." (Vol. III, R. at 346.) Indeed, more than 12,000 Kentuckians marched on the State Capitol in Frankfort to protest the passage of SB 151 just days later.

D. Because the Substitute was not Germane, Section 46 Required SB 151 be Re-read.

The Trial Court correctly held that the fact that SB 151 was read (by title) in the House and the Senate *as a sewer bill* cannot and does not satisfy the three-readings requirement. (Vol. XII, R. at 1753-57.) Instead, the "wholesale changes in SB 151 rendered the first three readings in the Senate and two readings before the House meaningless." (*Id.* at 1756.) The Trial Court noted that the Constitutional Debates compel this conclusion, because the public cannot meaningfully participate in the drafting and passage of one bill if it is disguised as an entirely different bill. (*Id.* at 1755.) To hold otherwise would render the three-readings mandate meaningless. Where, as here, "the Constitution speaks in plain and unambiguous terms, it is our mandatory duty to give effect to its provisions, although the consequences are such as we would like to avoid if possible." *Booth v. Bd. of Educ. of City of Owensboro*, 17 S.W.2d 1013, 1014 (Ky. 1929).

The Trial Court then ruled that where a bill has been changed so significantly that its title must be amended (as required by Section 51 of the Constitution), and its new subject is not germane to the original bill, then any prior readings cannot satisfy the three-readings requirement of Section 46. (Vol. XII, R. at 1756.)

In reaching this decision, the Trial Court was in conformity with every state that – like Kentucky – does not follow the enrolled bill doctrine.[15] *See, e.g.*, *Hoover v. Bd. of Cnty. Comm'rs, Franklin Cnty.*, 482 N.E.2d 575, 579 (Ohio 1985) (holding that if amendments "vital[ly] alter[]" or "wholly change[]" a bill, the amended bill must receive

[15] That fact that every state court to confront the issue has managed to enforce the three readings requirement definitively disproves the claim of Legislative Amici that "there is a lack of judicially discoverable and manageable standards for" enforcing this constitutional provision. (Legislators Br. at 5.)

three new readings on three separate days); *Magee v. Boyd*, 175 So. 3d 79, 114 (Ala. 2015) (holding that prior readings only count if the amended bill "has a common purpose" with and "is germane to the original bill"); *Stilp v. Commonwealth*, 905 A.2d 918, 958 (Pa. 2006) ("[A] bill does not have to be considered on three separate days, . . . if the amendments to the bill added during the legislative process are germane to and do not change the general subject of the bill."): *People v. Clopton*, 324 N.W.2d 128, 130 (Mich. App. 1982) ("[S]o long as the amended version or substitute serves the same purpose as the original bill, is in harmony with the objects and purposes of the original bill, and is germane thereto"); *Frazier v. Bd. of Comm'rs of Guilford Cnty.*, 138 S.E. 433, 437 (N.C. 1927) (rereading of a bill is necessary only when the bill is amended "in a material matter"). *Giebelhausen v. Daley*, 95 N.E.2d 84, 95 (Ill. 1950) (holding that a complete substitute must be re-read, because otherwise constitutional three-readings requirement is rendered "nugatory"); *State v. Ryan*, 139 N.W. 235, 238 (Neb. 1912) (holding that any substitute must be "germane to the subject of the original bill and not an evident attempt to evade the Constitution, ...").

Indeed, as the Trial Court observed, neither the Governor nor the General Assembly has identified ***a single state*** in which the three-readings requirement can be met by reading one bill, and then – after such readings – substituting an entirely different bill. (Vol. XII, R. at 1756.) Even in the states that provide the maximum latitude to their General Assembly, where a bill is stripped of its language, and its subject is changed to an entirely different and non-germane subject, it must be re-read the full three times. *See, e.g.*, *State ex rel. Ohio AFL-CIO v. Voinovich*, 631 N.E.2d 582, 589 (Ohio 1994) (distinguishing *Hoover* "where the entire contents of the original bill were removed and

replaced by a totally unrelated subject," and upholding "a bill that has been heavily amended and yet retains its common purpose to modify the workers' compensation laws"); *State v. Hocker*, 18 So. 767, 770 (Fla. 1895) (holding that re-reading is not necessary only where "amendments that [are] adopted . . . are germane to [the original bill's] general subject"). This is because as the Trial Court noted: "The principle is well established that 'the General Assembly cannot do by indirection what it cannot do directly because of constitutional restrictions.' *Commonwealth v. O'Harrah*, 262 S.W.2d 385, 389 (Ky. 1953) (citations omitted)." (Vol. XII, R. at 1740.)

The Trial Court's ruling and these same authorities readily defeat the Governor's argument that SB 151 was merely "amended," and therefore did not require any new readings. A non-germane substitute is an entirely new bill – not simply an amendment. 291 pages of new pension legislation cannot be seen as an amendment to sewer language, especially when all such sewer language is deleted. Indeed, the Constitutional Debates conclusively show that the Framers believed that an amendment could not and should not completely transform a bill, because under the Convention rules, substitutes that were not germane were repeatedly ruled out of order. (*See, e.g.*, 3 DEBATES OF CONSTITUTIONAL CONVENTION 3121 (1891) ("The President. The substitute must be germane.")) (Vol. IX, R. at 1332.)

The Governor dismisses this overwhelming authority from other states in a single sentence as "simply not the law of Kentucky." (Gov. Br. at 70.) He then offers a single case – from Mississippi – where a court refused to enjoin a House rule providing for the manner in which Mississippi read its bills. That case, *Gunn v. Hughes*, 210 So.3d 969, 970 (2017), is entirely distinguishable. First, Mississippi follows the enrolled bill

doctrine, which this Court explicitly rejected. *See id.* at 972 (quoting *Hunt v. Wright*, 11 So. 608, 610 (Miss. 1892), which held that courts apply "the conclusive and irrebuttable presumption" that the legislature complied with the constitution in passing laws). Second, the challenge in *Gunn* was about a House *rule*, and "not a request to invalidate a statute," as it is here. *Gunn*, 210 So.3d at 982. Third, the Mississippi constitution contains a provision that "necessarily commits upon the Legislature the obligation to determine how [the reading] requirement will be carried out," by providing that reading in full only occur "upon the demand of any member." *Id.* Kentucky's three-readings requirement contains no such delegation.[16]

Faced with this reality, Legislative Amici argue that Section 46 of the Constitution secures rights belonging *to the General Assembly*, and that the *General Assembly* can therefore waive those rights. (Legislators Br. at 12.) But the Constitution protects the rights of the people, not the General Assembly. *See* KY. CONST. Preamble ("We, the people of the Commonwealth of Kentucky… do ordain and establish this Constitution.") It may not be "waived" or otherwise ignored by ***any*** public official.

As noted above, Section 46 is mandatory. *See Kavanaugh*, 72 S.W.2d at 1004. Its text states the General Assembly "shall" follow its procedure. KY. CONST. § 46. As such, this Court must enforce the constitutional mandate and void SB 151. *See Rose*, 790 S.W.2d at 209 ("The duty of the judiciary in Kentucky was so determined when the

[16] The Governor also contends that the three-readings requirement is satisfied because the legislators read the bills "to themselves," *i.e.*, silently. (Gov. Br. at 67-68.) That argument ignores both the text and purpose of the constitutional provision. If the requirement is satisfied by silent reading, then it is satisfied by *printing*. But the Constitution requires both printing and reading, and it specifies that the reading must occur on separate days. KY. CONST. § 46. The reason for requiring reading on separate days is abundantly clear from the Constitutional Debates: to slow the "hasty" legislative process that was subject to abuse and the appearance of corruption.

citizens of Kentucky enacted the social compact called the Constitution and in it provided for the existence of a third equal branch of government, the judiciary."); *Philpot v. Patton*, 837 S.W.2d at 494 (stating "it is our constitutional responsibility to tell [the General Assembly] whether the system in place complies with or violates a constitutional mandate, and, if it violates the constitutional mandate, to tell them what is the constitutional 'minimum.'").

E. The Trial Court Correctly Rejected the Governor's "Parade of Horribles."

Faced with the plain language of the Constitution, the Governor continues to argue that this Court should ignore its duty and refuse to enforce the three-readings requirement. He contends that invalidating SB 151 will create numerous additional lawsuits and could invalidate numerous other laws. (Gov. Br. at 69-73.) This exact argument was rejected by this Court in *D & W Auto Supply*.

In *D & W Auto Supply*, this Court analyzed and overturned the enrolled bill doctrine. In doing so, its ruling opened the door for new challenges, and the Court unquestionably faced the same parade of horribles offered by the Governor. Yet the Court held that the "fact that the number and complexity of lawsuits may increase is not persuasive if one is mindful that the overriding purpose of our judicial system is to discover the truth and see that justice is done. The existence of difficulties and complexities should not deter this pursuit and we reject any doctrine or presumption that so provides." *D & W Auto Supply*, 602 S.W.2d at 424.

The same approach is required here. The argument that "difficulties" may arise cannot deter this Court from its duty "to see that violations of the constitution by any

person, corporation, state agency or branch of government are brought to light and corrected." *Id.*

Moreover, the Governor's argument is misdirection: SB 151 is the only bill before this Court. (Vol. I, R. at 8-44.) As the Trial Court recognized, courts may apply numerous doctrines to bills that, unlike SB 151, were not challenged before they became law. The Trial Court noted that courts "have many tools to fashion remedies that will guard against an injury to the public interest, including applying equitable principles of waiver, estoppel, laches, and fashioning prospective relief." (Vol. XII, R. at 1765.)

More importantly, however, it is no excuse for unconstitutional actions to say that the General Assembly has regularly violated the Constitution – a fact admitted at oral argument by counsel for both the Governor and the General Assembly. (*See e.g.*,Vol. XIII, R. at 1819; *id.* at 1857 ("THE COURT: This is -- this is kind of, in my view, a pretty extreme end of the continuum, though, of employing those rules because it is not normal, or it is not routine, I don't think, to take a bill, to strip it completely of all of its language and then to substitute an entirely new bill on an entirely different subject. MR. FLEENOR: It happens more than you might think, Your Honor.").) Indeed, the Governor's argument – that the General Assembly repeatedly violates the Constitution – compels this Court to stop this unlawful practice. This Court must stop the pattern of abuse and violation of the three-readings clause by the General Assembly, and affirm the Trial Court.

II. The Trial Court Properly Voided SB 151 Because It Did Not Receive 51 Votes.

The Trial Court also ruled that SB 151 violates Section 46 of the Constitution and is void *ab initio* for the additional reason that it contains self-executing appropriations

and creates a debt, but did not receive the vote "of a majority of all the members elected to" the House that was necessary for passage. (Vol. XII, R. at 1757-61.)

In his briefs the Governor does not contest that: (1) the majority requirement is justiciable; (2) if SB151 contains an appropriation or creates a debt, it needed 51 votes in the House; and (3) SB 151 did not receive 51 votes in the House. Instead, he makes two arguments. First, he argues that SB 151 does not contain an appropriation or create a debt. (Gov. Br. at 78-94.) Second, he claims that the Trial Court should not have addressed the issue – despite the fact that the Attorney General and the Governor extensively briefed it – simply because it did not originally appear in the initial complaint. (Gov. Br. at 75, 76.)

A. SB 151 Contains an Appropriation.

It is undisputed that: (1) appropriations bills require a majority vote under KY. CONST. § 46; (2) whether a bill received the majority vote presents a justiciable issue; (3) the Court must declare void an appropriation that did not receive 51 votes; and (4) SB 151 failed to secure a majority of votes in the House. The only disputed issue is whether SB 151 contains an appropriation. This Court's precedent clearly holds that it does. (Vol. XII, R. at 1757-61.)

Section 46 of the Constitution provides, in relevant part:

> No bill shall become a law unless, on its final passage, it receives the votes of at least two-fifths of the members elected to each House, and a majority of the members voting, the vote to be taken by yeas and nays and entered in the journal: Provided, ***Any act or resolution for the appropriation of money*** or the creation of debt ***shall, on its final passage, receive the votes of a majority of all the members elected to each House***.

(Emphasis added).

This majority-vote requirement first appeared in the Constitution of 1850. *See* KY. CONST. of 1850, art. II, § 40. Delegate Thomas James, who introduced the provision, explained that it was designed to "prevent the representatives of the people from putting their hands into the treasury without proper authority and due reflection." DEBATES OF CONSTITUTIONAL CONVENTION 1031 (1849). The Framers of the current Constitution included the same provision "to require deliberation and good reason to be given before you appropriate money, such reasons as will induce a majority of the members to vote for the measure." 2 DEBATES OF CONSTITUTIONAL CONVENTION 1655 (1891). It had proven to be "a wise provision to protect the Treasury." *Id.*

Thus, any bill that provides for an appropriation requires at least 51 votes in the House and 20 votes in the Senate. *See D & W Auto Supply*, 602 S.W.2d at 422 (holding bill containing appropriations void, because it "received less than 51 votes in the House").

This Court has explained that "[w]here the General Assembly has mandated that specific expenditures be made on a continuing basis, or has authorized a bonded indebtedness which must be paid, such is, in fact, ***an appropriation***." *Fletcher v. Commonwealth*, 163 S.W.3d 852, 865 (Ky. 2005) (emphasis added). The Court further explained that "appropriations" can be made outside a budget bill, stating that legislation may "mandate appropriations even in the absence of a budget bill." *Id.*

As an example of such an appropriation, *Fletcher* identified the exact pension statutes at issue here, specifically KRS 61.565(1) ("Each employer participating in the State Police Retirement System . . . and each employer participating in the Kentucky Employees Retirement System . . . shall contribute annually to the respective retirement

system . . . ."). *Id.* That very law is changed, altered, and amended by SB 151. SB 151 amends KRS 61.565(1)(a) as follows:

> Each employer participating in the State Police Retirement System as provided for in KRS 16.505 to 16.652, [~~each employer participating in~~]the County Employees Retirement System as provided for in KRS 78.510 to 78.852, and [~~each employer participating in~~]the Kentucky Employees Retirement System as provided for in KRS 61.510 to 61.705 shall contribute annually to the respective retirement system an amount ***determined by the actuarial valuation completed in accordance with KRS 61.670 and as specified by this section. Employer contributions for each respective retirement system shall be*** equal to the ***sum of*** [~~percent, as computed under subsection (2) of this section, of the creditable compensation of its employees to be known as~~] the "normal ***cost contribution***[~~contributions,~~]" and [~~an additional amount to be known as~~] the "actuarially accrued liability contribution**.**"

SB 151, § 18. SB 151 goes on to provide the method of calculating these contributions. *See id.* (amending KRS 61.565(b)-(e)). Because it amends KRS 61.565(1), which the Supreme Court has identified as an appropriation, SB 151 required 51 votes for passage.

Like KRS 61.565, SB 151 requires employers – *i.e.*, state agencies – that participate in KERS or CERS to contribute annually to retirement plans. Section 12 of SB 151 mandates contributions by these public employers to hybrid cash balance plans of state employees. It requires the state to provide a "contribution of four percent (4%) of the creditable compensation earned by the employee for each month the employee is contributing" to their plan. SB 151, § 12(2)(b); *see also* SB 151, § 14(45). Put simply, these sections of the bill require a contribution – defined in *Fletcher* as an appropriation under law – by public employers based on a set calculation. These annual contributions are the definition of a self-executing appropriation.

Here, as in *Fletcher*, there is a state law requiring public employers to contribute annually to retirement accounts. *Fletcher* definitively ruled that such payments were self-executing appropriations under the state Constitution. *Id.* at 868 (holding that,

"absent a statutory … mandate," such as the statutes establishing self-executing appropriations, "Section 230 precludes the withdrawal of funds from the state treasury except pursuant to a specific appropriation by the General Assembly").

The Governor contends on appeal that SB 151 is not an appropriation because the *only* legal definition of appropriation is "the setting apart of a particular sum of money for a specific purpose." (Gov. Br. at 79) (quoting *Davis v. Steward*, 248 S.W. 531, 532 (Ky. 1923)). That contention is tantamount to arguing that an appropriation must be in the form of a budget bill. Kentucky law has conclusively rejected that argument. In *Bosworth v. State University*, 179 S.W. 403, 405 (Ky. 1915), the Court held the provision at issue was an "appropriation" pursuant to Sections 46 and 230 of the Constitution, even though it was placed in a bill other than a budget bill.

Similarly, in *D & W Auto Supply,* this Court struck down a law for lack of the necessary votes under Section 46, even though the bill at issue was not a budget bill and did not include any "specific" sum of money. There, the statute at issue placed an assessment on the gross proceeds from the sale of designated items, and then "directed the Department of Revenue to collect and disburse the monies from a fund 'within the state treasury' to implement the purposes of the Act." 602 S.W.2d at 422. Even though no specific sum of money was set aside, the Court held that the statute was an appropriation because, "[i]n the simplest of terms, an assessment of money is made and ***its expenditure is directed***." *Id.* (Emphasis added).

SB 151 plainly directs the expenditure of money: it requires employers to contribute to the retirement systems based on a specific calculation. (Vol. XII, R. at 1759-60.). The Governor claims these provisions are merely a "recommend[ation]"

because they are regularly "notwithstood" in budget bills that substitute different employer calculations. But this argument in fact *disproves* the Governor's point. Absent budgetary language notwithstanding it, the appropriations mandated by SB 151 must be made. That is why SB 151 represents a "self-executing appropriation": it "mandate[s] appropriations even in the absence of a budget bill." *Fletcher*, 163 S.W.3d at 865. That another law – such as a budget bill – must "notwithstand" this statute simply demonstrates that it is an appropriation.

Confusingly, the Governor claims that *Fletcher* is "beside the point," because the *only* definition of "appropriation" is the one provided by *D & W Auto Supply*. Thus, the Governor contends, *Fletcher* applies to an "appropriation" for purposes of Section 230, while *D & W Auto Supply* only applies to Section 46.

The Governor is wrong, as *Fletcher* explains this issue clearly. Section 230 provides that money may not "be drawn from the State Treasury, except in pursuance of appropriations made by law." KY. CONST. § 230. Appropriations are "made by law" in multiple ways, including: when they are mandated by the Constitution, *Fletcher*, 163 S.W.3d at 866-67; when they are mandated by budget bills; or when they are mandated by self-executing appropriations, meaning "statutes that mandate appropriations even in the absence of a budget bill," *Id.* at 865. When a *statute* mandates a payment – be it in a branch budget bill, a litter control bill (as in *D & W Auto Supply*), or a self-executing appropriation (as in this case) – that statute must comply with the majority vote requirement of Section 46 of the Constitution, which applies to all acts or resolutions "for the appropriation of money." Complying with the majority vote requirement for the statute accomplishes the Framers' purposes of "protect[ing] the Treasury" by ensuring

adequate "deliberation" before any funds are expended. 2 DEBATES OF CONSTITUTIONAL CONVENTION 1655 (1891).[17]

In sum, Section 46 of Kentucky's Constitution requires 51 favorable votes in the House to pass any appropriation. In *Fletcher*, this Court ruled that the very statutes amended by SB 151 are appropriations. SB 151 secured only 49 votes in favor. As such, under *D & W Auto Supply*, this Court must void SB 151 for violating the Kentucky Constitution.

B. The Trial Court Correctly Held that SB 151 Creates a Debt.

The Trial Court also correctly held that SB 151 creates a debt because it imposed additional financial obligations on the Commonwealth. (Vol. XII, R. at 1760-61.) As the Trial Court explained, "A debt is, in its simplest terms, a financial obligation or liability." (*Id.* at 1760 (quoting BLACK'S LAW DICTIONARY (10th ed. 2014), defining "debt" as a "liability on a claim.").) Indeed, in his Brief, the Governor details at great length the ways in which the pension system represents an obligation on the state.

As noted by the Trial Court, SB 151 "continues to impose that financial obligation, though under altered terms." (Vol. XII, R. at 1761.) It not only continues certain of these prior obligations, but, in some cases, imposes new ones, such as the new contribution requirements for the defined contribution plans. (Vol. XIII, R. at 1918-21 (citing SB 151 §§ 9, 14, 15, 16, 17, 18, 19, 43, 45, 52, and 77).) SB 151 therefore creates

[17] The Governor also provides extensive argument on whether the plain meaning of Section 46 would render SB 151 subject to the line-item veto. That question is not at issue here, and bears no relevance to whether SB 151 is void. The Court should not provide an opinion that "would . . . be 'merely hypothetical or an answer which is no more than an advisory opinion.'" *Koenig v. Pub. Prot. Cabinet*, 474 S.W.3d 926, 930 (Ky. App. 2015) (citation omitted).

a debt. Because Section 46 of the Constitution also requires a majority vote for bills "for ... the creation of debt," this Court should affirm and void SB 151 this additional reason.

C. SB 151's Appropriations and Debt Provisions are Not Severable.

The General Assembly's failure to comply with the majority-vote requirement of Section 46 rendered SB 151 unconstitutional in full, as the Trial Court ruled in denying the Governor's motion to alter, amend or vacate the Judgment.[18] (Vol. IX, R. at 1757-61; Vol. XIII, R. at 1922.) The majority-vote requirement mandates that "Any ***act or resolution*** for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all the members elected to each House." KY. CONST. § 46. Under the plain terms of KY. CONST. § 46, the "act" at issue – and not a portion of the act – is unconstitutional because it did not receive the requisite number of votes in the House of Representatives.

Indeed, in *D & W Auto Supply*, this Court did not perform a severability analysis – it held that the entire bill was void for failure to comply with the majority-vote requirement. *See generally D & W Auto Supply*, 602 S.W.2d at 422-23. Under the plain language of Section 46, the severability clause and statute do not apply when an act violates the majority-vote requirement of Section 46. The entire bill is therefore void *ab initio*. *See Spanish Cove Sanitation, Inc. v. Louisville-Jefferson Cnty. Metro. Sewer Dist.*, 72 S.W.3d 918, 921 (Ky. 2002) (declining to perform severability analysis because a bill "passed in contravention of the Constitution [and therefore] is void *ab initio*" because the court cannot "parse out the unconstitutional pieces of something that does not exist").

[18] In another attempt to impugn the integrity of the Trial Court, the Governor asserts that it issued its Opinion and Order denying his motion to alter, amend or vacate the judgment "in roughly the time it took the Governor's counsel to return to their offices in the Capitol." (Gov. Br. at 23.) At that time, the Governor's motion – which argued severability for the first time – had been pending for 12 days.

Even if the plain language of the Constitution did not render the entire bill void, this Court should uphold the Trial Court's holding that the appropriations provisions cannot be severed from the bill. (Vol. XIII, R. at 1922.) Unconstitutional provisions are severable only if they are not "essential [to] and inseparable [from]" the rest of the bill. *Louisville Metro Health Dep't v. Highview Manor Ass'n, LLC*, 319 S.W.3d 380, 384 (Ky. 2010). As the Trial Court held, however, the appropriation provisions go to the heart of SB 151. (Vol. XII, R. at 1922.) Those provisions include the statutory sections establishing new plans for future employees, as well as the reenactment of KRS 61.565, which is the statute that establishes the KERS public pension system. Those provisions, which the legislature unconstitutionally passed, are essential to SB 151. The rest of the bill simply cannot be severed from these unconstitutional appropriations because "the entire bill is dependent upon the legislature's allocation of specific amounts of tax dollars to the specific purposes of funding these retirement systems." (Vol. XIII, R. at 1921.)

The Governor cites one case to support his severability argument, *Kentucky Municipal League v. Commonwealth Dep't of Labor*, 530 S.W.2d 198 (Ky. 1975), but that case is plainly not on point. The constitutional provision at issue in that case – KY. CONST. § 181 – does not by its plain text invalidate entire acts. Section 46 explicitly does so. Further, the statute at issue in *Ky. Municipal League* was held unconstitutional only as applied to municipal employees "engaged in work . . . of purely local concern." *Ky. Mun. League*, 530 S.W.2d at 200. The statute was therefore constitutional as applied to employees "engaged in work of state-wide concern," such as firefighters, and could be applied to such employees without undermining the purpose of the entire statute. *Id.* As the Trial Court found, the unconstitutional provisions of SB 151 are by contrast "so

essential to" the bill that" the remaining sections "could not stand without them." *McGuffey v. Hall*, 557 S.W.2d 401, 416 (Ky. 1977). This Court therefore cannot cure the constitutional defect by severing any part of SB 151.

D. The Trial Court Properly Requested that the Parties Address the Constitutional Defect.

The Governor also argues that this Court should not consider the majority vote requirement of Section 46 because the Trial Court – and not a party – raised the issue in this matter's initial hearing. This argument is as baseless as the Governor's attacks on the Trial Court Judge.[19] Appellees' Complaint pleaded a violation of KY. CONST. § 46. (Vol. I, R. at 8-42.) Having that section brought to the Court's attention, the Trial Court had the authority – and the duty – to raise, request briefing, hear argument, and decide whether SB 151 received the requisite votes required by that section.

As noted above, the Constitution requires the judiciary to "support … the Constitution of this Commonwealth," and our courts are "sworn to see that violations of the constitution by any person, corporation, state agency or branch of government are brought to light and corrected. To countenance an artificial rule of law that silences [a court's] voice[] when confronted with violations of the constitution is not acceptable… ." *D & W Auto Supply*, 602 S.W.2d at 424. In numerous and binding precedent, this Court

[19] In his Brief, the Governor directly attacks the integrity of the judiciary by contending that the Trial Court Judge "views it as part of his constitutional oath to rule against the Governor." (Gov. Br. at 77.) The Governor's statements are not only disrespectful, but are factually and legally unsubstantiated. As Justice John Roach recognized in *Dean v. Bondurant*, "[W]e cannot operate a judicial system, or indeed a society, on the basis of factually unsubstantiated perceptions of the cynical and distrustful." 193 S.W.3d 744, 752 (Ky. 2006) (quoting *MacKenzie v. Super Kids Bargain Stores, Inc.*, 565 So. 2d 1332, 1335 (Fla. 1990)). Uncorroborated conclusions and mere suppositions that attack the integrity of the court are not grounds for any relief. *See Collins v. Wells*, 314 S.W.2d 572 (Ky. 1958); *see also Odom v. Parker*, 2014 WL 1681155 (Ky. App. Apr. 25, 2014) (unpublished) (holding that "[b]ald assertions [attacking the honesty and integrity of the trial court], lacking any evidentiary support and deficient in legal and logical reasoning, carry no weight and form an insufficient basis for relief.") (attached to Appendix as Exhibit A pursuant to CR 76.28(4)(c)).

holds this duty includes raising or even deciding constitutional issues that are not first raised by a party. As stated by the Court in *Mitchell v. Hadl*, 816 S.W.2d 183, 185 (Ky. 1991), "[w]hen the facts reveal a fundamental basis for decision not presented by the parties, it is [a court's] duty to address the issue to avoid a misleading application of the law." *Id.*

Indeed, this Court has ruled that the Court may raise and decide constitutional issues that Justices first raise *sua sponte* during oral argument. *See Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 424 (Ky. 2005). In *Elk Horn Coal Corp.*, this Court ruled a statute was unconstitutional because it violated the separation of powers. 163 S.W.3d at 411, 422. The parties never briefed that issue. Members of the Court instead raised it for the first time during oral argument. *Id.* at 424. Yet the Court ruled that it was "not precluded by any rule or constitutional provision from addressing this issue." *Id.*

In rendering its decision, the Court followed precedent, including *Priestley v. Priestley*, 949 S.W.2d 594, 596 (Ky. 1997), in which the Court ruled that nothing prevents a court from deciding an issue that was not presented by the parties so long as the court confines itself to the record. *Id.* at 424 n. 73.[20]

Here, the Trial Court properly exercised its authority within *Elk Horn Coal Corp.* and other precedent. It raised the question of whether SB 151 was unconstitutional under

[20] The Court also cited to *Mitchell v. Hadl*, *supra*,, and quoted a section of 16 C.J.S. Constitutional Law § 92 (2004), which states: "As a general rule, a court will not inquire into the constitutionality of a statute ... on its own motion, but only those constitutional questions which are duly raised and insisted on, and are adequately argued and briefed will be considered.... ***This is not an inflexible rule, however, and in some instances constitutional questions inherently involved in the determination of the cause may be considered even though they may not have been raised as required by orderly procedure.***" *Id.* (Emphasis added).

KY. CONST. § 46's vote requirement when the parties first appeared before the Trial Court on April 19, 2018, after reviewing the Complaint in which Appellees pleaded a violation of Section 46. (Vol. XII, R. at 1757-61.) It ordered all of the parties to brief the merits of the vote requirement issue. (Vol. II, R. at 195-99.) The parties then, in fact, extensively briefed the issue, in multiple pleadings, and argued the issue before the court on June 7, 2018. (*See* Vol. III, R. at 350-53; Vol IV, R. at 585-90; Vol. IX, R. 1221-27, R. at 1287-93; Vol. XII, R. at 1735.)

At no point did counsel for the Governor formally object to the Trial Court raising this constitutional issue or attempt to prevent the Trial Court from addressing it. In fact, and as the Trial Court noted in its Opinion and Order, the Governor admitted in his briefing below that "the question of whether a bill received a sufficient number of votes is objectively verifiable and judicially administrable – *i.e.*, everyone agrees on what constitutes a vote for or against legislation, and the final vote tally can be simply and indisputably determined." (Vol. XII, R. at 1748.)[21] The parties – including the Governor – expressly consented to the Trial Court addressing this constitutional issue by asking the Court to grant summary judgment on the issue of whether or not SB 151 was void because it did not receive 51 votes as required by KY. CONST. § 46. (Vols. VIII-IX, R. at 1161-1255.) Nothing in the record demonstrates that the Governor formally objected to the Trial Court raising and ordering the parties to address the issue, or that the Governor attempted to prevent the Trial Court from addressing it.

[21] Further, the Governor ignores the plain language of CR 15.02, which provides, in pertinent part: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleading as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."

The Governor improperly cites to *Delahanty v. Commonwealth*, --- S.W.3d ---, 2018 WL 2372794 (Ky. App. May 25, 2018), which is not final because it is currently before this Court on a motion for discretionary review in Case No. 2018-SC-000316. As such, it may not be cited to this Court. While CR 76.28(4)(c) allows the citation of unpublished opinions, "the rule does not extend to opinions that are not final, for clearly there can be no precedential value to a holding that is still being considered." *State Farm Ins. Co. v. Edwards*, 339 S.W.3d 456, 458 n. 2 (Ky. 2011) (citing *Alexander v. Commonwealth*, 220 S.W.3d 704 (Ky. App. 2007)).

Regardless, *Delahanty* is distinguishable from and inapplicable to this case, and does not disturb the decision in *Elk Horn Coal Corp.* In *Delahanty,* "[t]he issue of constitutionality was not essential to the motions before [the trial court], had not been raised by any of the parties, and had no effect on [the trial court's] final disposition of those cases" before the trial court. 2018 WL 2372794, at *10. In this case, the question of constitutionality was central to the Verified Complaint, was extensively briefed, and was argued before the Trial Court.

The Trial Court had the authority and duty to address this constitutional issue under the published precedent of this Court. The Court should affirm the Trial Court's proper ruling.

III. The Court Should Also Void SB 151 Because It Violates KRS 6.350 And KRS 6.955.

The passage of SB 151 further violated KRS 6.350 and KRS 6.955. These statutes – passed by both chambers and signed into law by the Governor – prevent either the House or Senate from voting a pension bill out of a committee without a completed actuarial analysis and a local impact fiscal note, respectively. Here, the House ignored

these statutory requirements and voted SB 151 out of its committee without either an actuarial analysis or a local impact fiscal note. In doing so, individual members of the General Assembly – including the Committee Chair and Speaker Pro Tempore – unlawfully suspended KRS 6.350 and 6.955 in violation of the constitutional mandate of KY. CONST. § 15.

The Trial Court declined to apply KRS 6.350 and 6.955, but encouraged this Court to evaluate its decision. (Vol. XII, R. at 1745-47.) The Trial Court stated that while it felt compelled to follow this Court's "broad holding" in *Board of Trustees v. Attorney General of the Commonwealth*, 132 S.W.3d 770 (Ky. 2003), "… the circumstances of this case may present compelling reasons for the Supreme Court to revisit its ruling on the ability of the General Assembly to 'waive' the statutory requirement of an actuary study." (Vol. XII, R. at 1746-47.)

In *Board of Trustees*, this Court's ruling rested on the assumption that the General Assembly's refusal to follow KRS 6.350 did "*not violate some other provision of the Constitution*." 132 S.W.3d at 777. Here, it does. Specifically, the refusal of the Committee Chairman and Speaker Pro Tempore to follow these statutes unlawfully suspends them in violation of the constitutional mandate of KY. CONST. § 15. No such issue was raised before or analyzed by this Court in *Board of Trustees*. *See* 32 S.W.3d 770.[22]

[22] *Board of Trustees* further relied on an incorrect reading of a Florida case for the proposition that courts will not review a legislature's procedural rule "even when the procedural rule is, as here, codified in statute." *Id.* at 777 (citing *Moffitt v. Willis*, 459 So.2d 1018, 1021-22 (Fla. 1984)). In *Moffitt*, the statute at issue simply provided that each legislative committee "shall abide by the general rules and regulations adopted by its respective house to govern the conduct of meetings by such committee." *Moffitt*, 459 So.2d at 1021. The *Moffitt* court declined to adjudicate a claim that the statute had been violated because to do so would necessarily require the court to determine whether a legislative committee had followed legislative *rules*. *Id.* at 1022 ("It is a legislative prerogative to make, interpret and enforce its own procedural rules . . . . [W]e may not invade the legislature's province of internal procedural rulemaking."). Thus, *Moffitt*

In this case, it is indisputable that there was no compliance with either KRS 6.350 or KRS 6.955, and there was no vote by the General Assembly to suspend them. The circumstances of this case present compelling reasons for this Court to overrule *Board of Trustees* because individual legislators cannot suspend statutes.

A. Individual Members of the General Assembly Cannot Unilaterally Suspend Statutes.

When the General Assembly passed KRS 6.350 into law in 1980, it codified a *law*, not a *legislative rule*. 1980 Ky. Acts, Ch. 246, § 1. Unlike a legislative rule, KRS 6.350 went through public hearings, multiple readings in each chamber, and a vote from both chambers. It was then subject to veto from the governor. Once passed, it became a statute, protected by KY. CONST. § 15.

The plain language of the KRS 6.350(1) makes clear that a pension bill ***shall*** not make it out of committee and to a full chamber ***unless*** it is accompanied by an actuarial analysis. The legislature has consistently amended KRS 6.350 to strengthen its requirements. Indeed, this very General Assembly strengthened KRS 6.350 in 2017, when it *unanimously* added a subsection (c) to KRS 6.350(2) providing that "[a] statement that the cost is negligible or indeterminable shall not be considered in compliance with this section." KRS 6.350(2)(c). That amendment reflects the General Assembly's intent to ensure there would always be a detailed actuarial analysis – not a mere statement – before a pension bill reaches a legislative chamber. Moreover, by enhancing these requirements, this legislature demonstrated its intent to be bound by KRS 6.350. Despite this, two members of the General Assembly unilaterally ignored the

addressed only whether the court would interpret procedural *rules* made by the legislative body – not *statutes* like KRS 6.350.

clear language of KRS 6.350, and ordered votes for SB 151 to move out of committee and onto the House floor.

Section 15 of the Kentucky Constitution – entitled "Laws to be suspended only by the General Assembly" – mandates that "no power to suspend laws shall be exercised unless by the General Assembly or its authority."[23] As the Trial Court aptly recognized, "statutory requirements may be suspended, but only upon action of the legislature." (Vol. XII, R. at 1747.) The Trial Court wrote that under *Legislative Research Comm'n by and through Prater v. Brown*, 664 S.W.2d 907, 913 (Ky. 1984), "a legislature is authorized only to act through passage of legislation." (Vol. XII, R. at 1747.) "Thus, while the legislature can suspend the requirements of KRS 6.350 and KRS 6.955 under Section 15, it arguably should be required to enact legislation to do so." (Vol. XII, R. at 1747.) In sum, the General Assembly must suspend a law either by enacting express legislation that suspends or repeals the law, or which expressly "notwithstands" it. KY. CONST. § 15.

In the past, the General Assembly has followed this legal process in suspending KRS 6.350, including during the 2004 Special Session. *See* 2004 (1st Extra. Sess.) Ky. Acts Ch. 1, sec. 19. As it did on those occasions, to suspend law the General Assembly must pass laws, through majority vote in both chambers, specifically stating that the new law "shall be effective, KRS 6.350 to the contrary notwithstanding." *See id.*

In the instant case, single individuals – Chairman Miller in the Committee and Speaker Pro Tempore Osborne in the House – unilaterally suspended KRS 6.350. As the Trial Court acknowledged "it is uncontested that the legislature did not affirmatively

[23] When Section 15 is drawn into the analysis, the issue does become one of constitutional interpretation and is justiciable. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962); *Fletcher v. Commonwealth*, 163 S.W.3d 852, 860 (Ky. 2005); *Philpot v. Patton*, 837 S.W.2d 491, 494 (Ky. 1992)." (*Id.*)

enact any legislation to suspend KRS 6.350 or KRS 6.955, nor did it include a 'notwithstanding' clause in SB 151 that suspended those requirements." (Vol. XII, R. at 1747.) The Court wrote: "While the legislature may suspend its own *rules* without enacting a law, Section 15 of the Kentucky Constitution appears to prevent the legislature from suspending a *statute* without enacting legislation." (Vol. XII, R. at 1747.)

Board of Trustees failed to analyze or consider KY. CONST. § 15. That provision prevents suspension of statutes by a single member of the General Assembly. As such, this Court should alter its past decision and void SB 151 under KRS 6.350 and KRS 6.955.

B. The Legislature Did Not "Implicitly" Repeal KRS 6.350 and KRS 6.955.

Just as the General Assembly did not suspend KRS 61.350(1) and KRS 6.955 in accordance with KY. CONST. § 15 in passing SB 151, it did not "implicitly" repeal it either. Implicit repeal is based on the "rule of statutory interpretation that whenever, in the statutes on any particular subject, there are apparent conflicts which cannot be reconciled, the *later* statute controls." *Beshear v. Haydon Bridge*, 304 S.W.3d 682, 703 (Ky. 2010). "It is a well-settled rule of statutory construction that the repeal of an existing law by implication is not favored by the court." *Kentucky Off-Track Betting, Inc. v. McBurney*, 993 S.W.2d 946, 949 (Ky. 1999). Instead, courts understand that "where the legislature intended a subsequent act to repeal a former one, it will so express itself so as to leave *no doubt* as to its purpose." *Id.*; s*ee also Galloway v. Fletcher*, 241 S.W.3d 819, 823 (Ky. App. 2007) (emphasis added). Regardless, the doctrine of repeal by implication does not apply in this case.

SB 151 and KRS 6.350 and 6.955 do not share a "particular subject" and are not in conflict. The text of SB 151 does not alter the required statutory process through which legislation covered by KRS 6.350 and 6.955 must be passed. Consequently, there is nothing for the later statute to control. Nor do KRS 6.350 and 6.955 provide for how retirement benefits must be paid, and which benefits fall within the inviolable contract.

The General Assembly could have complied with KRS 6.350 and 6.955, but chose not to do so. Instead, individual legislators chose to ignore KRS 6.350 and 6.955 – a choice that does not and cannot invoke the implicit repeal doctrine. Thus, the circumstances of this case provide compelling reasons for this Court to act on the Trial Court's suggestion and re-visit *Board of Trustees* to find SB 151 void for violation of KRS 6.350(1) and KRS 6.955.

C. The General Assembly Failed to Comply with KRS 6.350 *at All*.

In *Board of Trustees*, the Supreme Court held that the General Assembly had "substantial[ly] compli[ed]" with the actuarial analysis requirement. *Id.* at 778. Here, there was no compliance, much less substantial compliance. Accordingly, this Court should revisit *Board of Trustees*, enforce KRS 6.350, and declare SB 151 void.

It is uncontested that SB 151 was not accompanied by an actuarial analysis when House State Government Committee reported it to the full House. In Committee, House Majority Leader Shell admitted "[w]e ***do not have an actuarial analysis*** on the full plan that is before you today," (Vol. III, R. at 337, 427, 450-51.) (emphasis added). The sponsor of the committee substitute, Representative Carney, even admitted on the House Floor that no actuarial analysis had been attached, stating, "[w]hen I got the [committee] sub[stitute] ready, ***they have not had time to do that***." (Vol. III, R. at 340, 408, 450-51) (emphasis added.). Moreover, Pro Tempore Osborne acknowledged there was no

analysis, and ruled no such analysis was needed. (Vol. III, R. at 339, 402, 450-451.) In short, the sponsor, the House Majority Leader, and the Speaker Pro Tempore all admitted there was no compliance with KRS 6.350.

In addition, KTRS also admits the General Assembly did not even attempt to secure the actuarial analysis until ***after*** the committee meeting. (Vol. IX, R. at 1336) (stating KTRS received a copy of SB 151 more than thirty minutes ***after*** it was voted out of Committee). KTRS then sought an actuarial analysis, but did not receive it until April 13, 2018, two weeks ***after*** the General Assembly passed SB 151 and three days ***after*** the Governor signed it into law. (Vol. IX, R. at 1337.) Clearly, providing an actuarial analysis ***after*** SB 151 became law is not "substantial compliance," with a statute that requires an analysis ***before*** the bill can leave the committee. "Substantial compliance" was therefore impossible for the House.

Nor does the actuarial analysis for SB 1 – a separate bill that was still sitting in a Senate Committee while SB 151 was being considered by that body – satisfy the requirements of KRS 6.350. Despite the fact that Senator Bowen claimed that the actuarial analysis for SB 1 satisfied the requirement for SB 151, Representative Carney's entire presentation before the House emphasized that SB 151 was not SB 1. (Vol. R. 336, 340, 411, 429-30, 437-38, 450-51.) Presiding over the Committee, Chairman Miller agreed, stating "[t]his is not Senate Bill 1." (Vol. III, R. at 336, 429, 450-51.) As evidence of their differences, Representative Carney pointed to SB 151 not cutting teacher's cost of living adjustments ("COLAs"). (Vol. III, R. at 340, 403, 411, 450-51.) This exclusion would alone create an approximately $3 billion difference from the

actuarial analysis performed on SB1. Based on the House testimony that SB 1[24] and SB 151 were different, and the fact that $3 billion creates a substantial difference, an actuarial analysis for SB 1 cannot constitute "substantial compliance." The fact that the General Assembly later posted a hastily compiled "actuarial analysis" to the Legislative Research Commission website ***after*** the passing SB 151 does not help its cause. Rather, it emphasizes that it was aware of KRS 6.350 and its failure to comply with that statute.

D. The General Assembly Utterly Failed to Comply with KRS 6.955.

There can be no argument that the General Assembly failed to comply with KRS 6.955, as no fiscal note has ever been secured. And, again, the General Assembly did not waive, "notwithstand," or repeal by implication KRS 6.955. As a result, the General Assembly was required – but failed – to comply with KRS 6.955 when passing SB 151.

The language of KRS 6.955(1) requires any bill relating to "any aspect of local government" to carry a fiscal note. Undoubtedly, SB 151 relates to local government because it directly impacts state-administered retirement programs – KTRS and CERS – in which local government employees participate. It further requires local governments to make contributions to these retirement plans. *See, e.g.*, SB 151, Section 12(2)(b). It also impacts the benefits of employees of local governments. For this reason, prior pension-altering legislation has included fiscal notes, including the 2013 pension reform. (Vol. III, R. at 361; Vol. IV, R. at 478-484.)

In this case, there is no dispute that neither the House nor the Senate attached a fiscal note. To this day, there ***still*** is no fiscal note attached to SB 151. Neither chamber of the legislature voted to waive the fiscal note requirement, as expressly allowed under

[24] The actuarial analysis for SB 1 is available at http://www.lrc.ky.gov/recorddocuments/note/18RS/SB1/AA.pdf (last visited Aug. 30, 2018).

the statute. Thus, the General Assembly violated KRS 6.955 in passing SB 151, invalidating SB 151.

IV. If This Court Reaches The Inviolable Contract, It Should Void SB 151 Because It Violates The Contract Clause.

The Trial Court correctly concluded that the passage of SB 151 was unconstitutional under Section 46 on three separate grounds, rendering the bill null and void. (Vol. XII, R. at 1753-1761, 1765-66.) Should this Court affirm on any of those grounds, it need not and should not issue an advisory opinion on other issues, including whether SB 151 violates Section 19 of the Kentucky Constitution. (Vol. XIII, R. at 1914-1916.)

However, if the Court reaches that subject, it should declare SB 151 unconstitutional in that it breaches the "inviolable contracts" the Commonwealth guaranteed to hundreds of thousands of Kentucky's public employees. As Appellees demonstrated below, SB 151 substantially impairs the retirement rights and benefits promised under the inviolable contract – and are neither reasonable nor necessary. (Vol. II, R. at 368-378; Vol. IX, R. at 1305-13.) As a result, SB 151 violates the Contracts Clause of Section 19 of the Kentucky Constitution. (Vol. II, R. at 368-378; Vol. IX, R. at 1305-13.)

A. This Court Need not Reach the Inviolable Contract.

Because the Trial Court voided SB 151 under Section 46, it did not determine whether SB 151 violates the "inviolable contract." (Vol. XII, R. at 1753-1761, 1765-66; Vol. XIII, R. at 1914-16.) Like the Trial Court, this Court should "decline[] to address the merits of whether [SB 151] violates the 'inviolable contract' or the constitutional prohibitions against impairing the obligations of contracts." (Vol. XII, R. at 1766.) *See*

Commonwealth v. Terrell, 464 S.W. 3d 495, 498 (Ky. 2015) (issues may "become[] moot as a result of a change in circumstances...") (internal quotation omitted). In the instant case, the Trial Court rightly held that the passage of SB 151 violated Section 46 of the Kentucky Constitution and is therefore "void *ab initio*." (Vol. XII, R. at 1753-1761, 1765-66; Vol. XIII, R. at 1914-16.) Accordingly, this Court, like the Trial Court, should hold "…SB 151 failed to comply with constitutional requirements for passage and is therefore void; as such the substantive arguments no longer present[] a live controversy for the Court to decide." (Vol. XIII, R. at 1914-16.) *See Med. Vision Group, P.S.C. v. Philpot*, 261 S.W. 3d 485, 491 (Ky. 2008) (holding courts are "prohibited from producing mere advisory opinions."); *see also*, *Koenig v. Pub. Prot. Cabinet*, 474 S.W.3d 926, 930 (Ky. App. 2015)

B. SB 151 Violates the Contracts Clause in Section 19 of the Kentucky Constitution.

In his brief, the Governor not only asks the Court to analyze the legality of what he calls the "California rule," (Gov. Br. 27-47), but also to make a policy choice. (Gov. Br. 1-2, 13, 17-18, 24, 27-28, 43, 54, 58, 99.) No "California Rule" exists, nor should this Court attempt to breathe life into this theory.[25] Instead, should this Court reach the issue of whether SB 151 breached the "inviolable contract," it must resolve the question by interpreting and applying the law of this Commonwealth.

Section 19 of the Constitution provides "[n]o ex post facto law, nor any law impairing the obligation of contracts, shall be enacted… ." KY. CONST. § 19. A law violates Section 19 where, as here, (1) there is a contract; (2) the statute at issue

[25] The Governor's apparent source for his so-called "California Rule" is one article from the Iowa Law Review. (Gov. Br. at 28-30.)

substantially impairs that contract; and (3) the impairment of the contract is not "reasonable and necessary to serve an important public purpose." *See generally*, *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 17, 30 (1977); *Maryland State Teachers Ass'n, Inc. v. Hughes*, 594 F. Supp. 1353, 1360 (D. Md. 1984).

The statutory language of KRS 61.692, KRS 78.852, and KRS 161.714 irrefutably create a contract between the Commonwealth and its public servants. (Vol. II, R. at 368-378; Vol. IX, R. at 1305-13.) Those statutes codify the inviolable contracts under which the General Assembly promised Kentucky's teachers, police officers, and other public servants a secure retirement in exchange for their decades of public service. (Vol. II, R. at 368-378; Vol. IX, R. at 1305-13.) Not only did the General Assembly pass these promises into law, it expressly made them "inviolable" under that law. *See* KRS 61.692(1); KRS 78.852(1); KRS 161.714.

Each provision codifying the inviolable contract is clear that the contract is mandatory and may not be reduced or impaired, stating "in consideration of the contributions by the members and in further consideration of benefits received by the [state] [county] from the member's employment," the specified range of statutes "shall constitute … an inviolable contract of the Commonwealth, and the benefits provided [therein] [herein] shall … not be subject to reduction or impairment by alteration, amendment, or repeal." KRS 61.692(1); KRS 78.852(1); KRS 161.714.

SB 151 reduces or impairs the benefits provided in the inviolable contracts by alteration and amendment. (Vol. II, R. at 368-378; Vol. IX, R. at 1305-13.) Thus, SB 151 substantially impairs the rights and benefits of public employees under the plain meanings of each statute upon which employees have calculated and relied during their

decades of service. (Vol. II, R. at 368-378; Vol. IX, R. at 1305-13.) Moreover, none of the reductions or impairments caused by SB 151 are reasonable or necessary, nor has the Governor made any such showing. (Vol. II, R. at 368-378; Vol. IX, R. at 1305-13.) As a result, SB 151 breaches the clear language of the inviolable contracts and violates the Contracts Clause found in Section 19 of the Kentucky Constitution. (Vol. II, R. at 368-378; Vol. IX, R. at 1305-13.)

1. The Commonwealth made an inviolable contract with its public employees.

The General Assembly made an inviolable contract with Kentucky's public employees, guaranteeing them certain retirement benefits in exchange for decades of public service. *See* KRS 21.480, KRS 61.692, KRS 78.852, and KRS 161.714; s*ee also Jones v. Bd. of Trs. of Kentucky Ret. Sys.*, 910 S.W.2d 710, 713 (Ky.1995) (describing pension benefits as contractual); *Baker v. Commonwealth*, No. 2005-CA-001588-MR, 2007 WL 3037718, at *31 (Ky. App. Oct. 19, 2007) (pension rights "are contractual and inviolable") (attached to Appendix as Exhibit B pursuant to CR 76.28(4)(c)). This Court has definitively ruled, "the retirement savings system has created an inviolable contract between [employees and retirees] and the Commonwealth, and … the General Assembly can take no action to reduce the benefits promised to participants." *Jones*, 910 S.W.2d at 713. The Court reasoned, "[a]t the simplest level, [public employees and retirees] have the right to the pension benefits they were promised as a result of their employment, at the level promised by the Commonwealth." *Id.* at 715. The plain language of these statutes establishes that benefits falling within the inviolable contract – such as sick days, guaranteed returns, or uniform allowance – may not be reduced by the General Assembly. (Vol. II, R. at 368-378; Vol. IX, R. at 1305-13.)

Kentucky law is clear and *Jones* is dispositive. Kentucky employees are entitled to the retirement benefits "they were promised" under the law "as a result of their employment," *i.e.*, when they started. Under *Jones*, it is also clear that the "level promised by the Commonwealth" are the benefits promised at the time of employment. Put simply, the "offer" under the inviolable contract are the benefits provided under Kentucky law. The "acceptance" is employment. At that point the contract is formed and "the General Assembly can take no action to reduce the benefits promised to participants." *See Jones*, 910 S.W.2d at 713.[26]

2. SB 151 substantially impairs the inviolable contract.

SB 151 substantially impairs the benefits promised to public employees under the inviolable contracts. (Vol. II, R. at 368-378; Vol. IX, R. at 1305-13.) When it enacted the inviolable contracts into law, the General Assembly included what would constitute "substantial impairment." *See* KRS 16.652; 61.692; 78.852; 161.714 (stating the "rights and benefits provided" in the contract shall "not be subject to reduction or impairment by alteration, amendment or repeal.") Thus, the General Assembly – through law – mandated that any reduction of rights or benefits would constitute substantial impairment. Accordingly, any reduction in benefits is a substantial impairment.

In *Jones*, this Court expressly held that the General Assembly "can take no action to reduce the benefits promised to participants… ." 910 S.W.2d at 713. Indeed, the

[26] Past legislation demonstrates that a public employee is entitled to the benefits available under the inviolable contract when she accepts her employment. In 2013, the General Assembly passed a statute providing that, for members of KERS, SPRS and CERS employed *after* January 1, 2014, the legislature reserved "the right to amend, suspend, or reduce the benefits and rights" provided under the range of statutes establishing the inviolable contract, "except that the amount of benefits the member has accrued at the time of amendment, suspension, or reduction shall not be affected." KRS 61.692(2)(a); KRS 78.852(2)(a). If the General Assembly already had the power to reduce or impair current employees, it would have been unnecessary to pass a statute explicitly authorizing such changes for new employees.

Court noted that, in the context of pension benefits, even a "threat" of a reduction may qualify as "substantial impairment." *Id.* at 713. In *Baker*, the Court of Appeals found a reduction of little over a hundred dollars per month, amounting to a total reduction of $524.40 of retirement benefits for one public servant, was a substantial impairment of the inviolable contract. 2007 WL 3037718, at *31, 39-40 (noting "…the General Assembly of the Commonwealth of Kentucky guaranteed those rights by statute in the form of an inviolable contract, never to be reduced or impaired.").

In the instant case, SB 151 undoubtedly reduces numerous promised benefits and rights under the inviolable contract – and it does so substantially, thus violating the Contracts Clause. *See Hughes*, 594 F. Supp. at 1360 (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978)). SB 151 substantially impairs the inviolable contract by, for example:

- **Barring certain employees from using sick leave service credit for the purpose of determining their retirement eligibility**. *See* 2018 SB 151, Section 16. Not only does this eliminate a prior benefit, (KRS 16.645; KRS 61.546; KRS 78.616), KRS even encouraged employees to save sick leave for this purpose, noting that, for someone retiring at a final salary of $30,000, and who lived for another 25 years, just twelve months' sick leave credit would be worth over $16,500 in retirement benefits. (Vol. IV, R. at 504-506.)

- **Reducing the creditable compensation by 1% for Tier 1 KERS members hired after July 1, 2003**. The average KERS non-hazardous retiree receives an annual pension payment of $21,699, so the 1% reduction is equal to about $217 per year. For a retiree with the average 25-year life expectancy after retirement, the total effect of that reduction is $5,425 –a substantial sum for a retiree on a fixed income. (*See* Vol. IV, R. at 504-506.)

- **Capping the amount of accrued sick leave a teacher may convert toward retirement.** 2018 SB 151, Section 74. Previously, certain teachers could convert up to 300 days of accrued sick leave toward retirement. *See* KRS 161.623; (Vol. III, R. at 370.) Section 74 caps the amount to the amount accrued as of December 31, 2018. The General Assembly admits this amendment will affect approximately four percent (4%) of KTRS

members. (Vol. V., R. at 612-613.) The elimination of the existing 300-day cap means that certain teachers may be required to work an additional year or more before he or she can retire.

- **Eliminating guaranteed returns.** SB 151 eliminates the guaranteed return for Tier I and Tier II members in the existing hybrid cash balance plan, from a guaranteed 4% to 0%. This has the potential to cost participants hundreds if not thousands of dollars per year, and in the case of a recession could cost the member their entire retirement.[27]

- **Eliminating Uniform and Equipment Allowances From Creditable Compensation.** The cost of that change is significant. For certain employees, this could amount to a 5.5% reduction in creditable compensation (Vol. IV, R. at 502-03.) As applied to the average annual benefit payment for such members, that reduction amounts to $1,494.59 per year.

Thus, SB 151's provisions unquestionably reduce the retirement rights and benefits of hundreds of thousands of current public employees, which could amount to losses of hundreds – if not thousands – of dollars for each affected public servant. These permanent changes in each of these provisions certainly exceed the reduction or impairment of an inviolable contract right the Court of Appeals held wrongful in *Baker*. 2007 WL 3037718, at *31, *40 (holding unlawful a reduction of the promised monthly retiree health insurance contribution obligation from $175.50 to $150.08.) Accordingly, SB 151 substantially impairs the inviolable contract.

3. SB 151 is neither reasonable nor necessary.

SB 151 is not reasonable or necessary, nor has the Governor made any such showing. This Court has held that "[o]nly upon determination that the contract between KERS members and the state is substantially impaired by legislative action do we need to decide whether the legislation impairing the contract is reasonable and necessary to serve

[27] *See generally*, Kentucky Retirement Systems Comprehensive Annual Financial Report, at p. 39-40 (Dec. 7, 2017) (setting forth contribution rates for Tier III members).

a legitimate and important public purpose, necessitating a temporary impairment." *Jones*, 910 S.W.2d at 716 (*citing Maryland State Teachers Ass'n,* at 594 F. Supp. at 1361).

The United States Supreme Court has held that a law that substantially impairs a state's contract "may nevertheless be constitutional if it is reasonable and necessary to serve an important public purpose." *U.S. Trust Co.*, 431 U.S. at 25-26 (however, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised.") But the Governor bears the burden of making such a showing. He cannot do so here because SB 151 merely sought to cut costs, *i.e.*, reduce benefits, and openly refused to consider any additional revenue measures to address pension obligations. Accordingly, the Governor has not and cannot demonstrate SB 151 was "reasonable and necessary."

The Governor cannot show SB 151's impairment of contractual rights is reasonable and necessary to accomplish an important public purpose. It is not enough to claim that the Commonwealth needs money because the "need for money is no excuse for repudiating contractual obligations." *Id.* at 26 n. 25 (citing *Lynch v. United States*, 292 U.S. 571, 580 (1934)); *see also See Donohue v. Paterson*, 715 F. Supp. 2d 306, 321 (N.D.N.Y. 2010); *Moro v. State*, 351 P.3d 1, 39 (Ore. 2015). Moreover, if the state policy can be achieved through "alternative means," which could "serve its purposes equally well," the state must follow that course rather than impair the contract. *U.S. Trust Co.*, 431 U.S. at 30. To this end, "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." *Id.* at 30-31.

Here, the Governor fails to demonstrate that funding the retirement systems could not be accomplished through alternative means that do not reduce or impair retirement benefits. Indeed, the Governor has admitted that none of the changes under SB 151 will have an immediate impact on the solvency of the funds. (Vol. IX, R. at. 1207.) Furthermore, SB 151 does not save money for the Kentucky Retirement System, but will add billions of dollars of debt to the state and local retirement systems. (Vol. I, R. at 45-49.) As the Affidavit of Jason Bailey further indicates, SB 151 adds these costs by resetting the 30-year period used to pay off liabilities to start in 2019, instead of 2013, and ability to reset the 30-year period "shows that an urgency to pay off the unfunded liabilities and repeated claims of imminent insolvency in the plans were unfounded." (Vol. I, R. at 45-49.)

Moreover, SB 151 is not reasonable or necessary because funding the retirement systems in full is possible, and will eliminate any shortfall. Like *Donohue*, in passing SB 151, the Kentucky General Assembly improperly saddled the unfunded liability of the retirement systems on the backs – and retirements – of current public employees. 715 F. Supp. 2d 306 at 321. The Governor simply cannot show that alternative funding streams are unavailable because the General Assembly specifically rejected multiple bills that would provide dedicated funding to the retirement systems. *See* 2018 HB 41, 2018 HB 229, 2018 HB 536, 2018 SB 22, and 2018 SB 241 (each providing revenue streams directed, at least in part, to funding state retirement systems). Instead, the Governor has shown the alleged immediate insolvency did not exist. Accordingly, the Governor cannot meet his burden.

SB 151 reduces or impairs the benefits the General Assembly promised to Kentucky's public employees under the inviolable contracts, the impairments are permanent and substantial, and the Governor cannot show they were reasonable or necessary. For the foregoing reasons, the Court should hold that SB 151 violates Kentucky's Contracts Clause set forth in Section 19 of the Constitution.

V. Alternatively, The Court Should Void SB 151 Under Sections 13 And 2 Of The Constitution.

In the alternative, this Court should declare the provisions of SB 151 void as an unconstitutional taking of property and an arbitrary exercise of governmental power in violation of Section 13 and Section 2 of the Kentucky Constitution.

A. SB 151 is an Unlawful Taking, in Violation of Section 13 of the Constitution.

Section 13 provides, in relevant part: "…[n]or shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him." SB 151 takes public employee's property rights in the benefits guaranteed under the inviolable contract without just compensation. Accordingly, this Court should void SB 151.

"Property rights are created and defined by state law." *Weiand v. Bd. of Trustees of the Ky. Ret. Sys.*, 25 S.W.3d 88, 93 (Ky. 2000) (citation omitted). Kentucky law provides – that in exchange for their public service – public employees are guaranteed certain retirement rights and benefits as part of an inviolable contract. *See* KRS Chapters 21, 61, 78, and 161; *see also*, KRS 21.480, KRS 61.692, KRS 78.852, and KRS 161.714. The Court of Appeals has implicitly recognized such contractual rights and benefits are property stating, "[p]ublic school employees are entitled to retirement benefits pursuant to KRS Chapter 161." *See Smith v. Teachers' Ret. Sys. of Ky.*, 515 S.W.3d 672, 674 (Ky.

App. 2017). This Court has further held the "essence" of the contractual pension rights of state employees "is receipt of promised funds." *Jones*, 910 S.W.2d at 715.

SB 151 deprives the Commonwealth's public employees of their property rights without any just compensation. As discussed above, SB 151 deprives public employees of – among other things – their right to use sick leave toward their retirement and retirement eligibility, the right to include certain lump sum payments and uniform allowances toward creditable compensation, reduces the guaranteed annual interest for certain employees that opted into the hybrid cash plan, and ultimately, the agreed-upon formula by which their retirement allowances are calculated. As SB 151 provides no just compensation in exchange, the Court should void SB 151.

B. SB 151 Represents the Arbitrary Exercise of Power, in Violation of Section 2 of the Kentucky Constitution.

By converting a sewer bill into a pension bill and passing it in an unconstitutional manner, the General Assembly subjected the people affected by SB 151 to the exercise of arbitrary power in violation of Section 2 of the Kentucky Constitution. Section 2 provides that "[a]bsolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." This Court has held, "whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary." *Sanitation Dist. No. 1 v. City of Louisville*, 213 S.W.2d 995, 1000 (Ky. 1948).

Here, the General Assembly did not follow the carefully weighed and thoughtfully enacted procedural requirements for the passage of SB 151, including the constitutional requirements of three readings and a majority vote, and the statutory requirements of an actuarial analysis and a fiscal note detailing the bill's impact on local

governments. By failing to follow those procedures, the General Assembly arbitrarily exercised its power in depriving Kentucky's public servants of their contractual and property rights. *See Commonwealth, Transp. Cabinet v. Weinberg*, 150 S.W.3d 75, 77 (Ky. App. 2004) (citation omitted) ("[I]t is axiomatic that failure of a [body] to follow its own rule or regulation generally is per se arbitrary and capricious."). And, unlike *City of Lebanon*, the passage of SB 151 actually "conflict[s] with constitutional principles," in at least three different ways. Such blatant exercise of absolute and arbitrary authority over the lives of public servants and their property rights epitomizes a violation of Section 2. For this reason, the Court should void SB 151.

VI. The Trial Court Correctly Refused To Disqualify The Attorney General.

This Court should affirm the Trial Court's refusal to disqualify the Attorney General. (Vol. II, R. at 242, 299.) There is no violation of the attorney-client relationship for the Attorney General to warn the General Assembly about the potential illegality of its actions because the Attorney General is the people's lawyer. *Commonwealth ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky. 1974).

The Attorney General's "primary obligation is to the Commonwealth, the body politic, not to its officers, departments, commissions, or agencies." *Id.* He has a duty to protect the Constitution, a duty that "surely embraces the power to protect it from attacks in the form of legislation... ." *Id.* at 867-68.

In the two SB 1 letters written by the Attorney General – which were published to the public at the same time they were sent to the General Assembly – he expressly states he is the people's lawyer, explains the law, and demands on behalf of the people of the Commonwealth that the General Assembly not break the law. (Vol. I, R. at 79-90.) This precludes any reasonable belief by the General Assembly that an attorney-client

relationship existed, as no confidential advice was being provided. *See Lovell v. Winchester*, 941 S.W.2d 466, 468 (Ky. 1997). Further, the letters did not relate to the substance of the present action for violations of Kentucky Constitution Section 46, nor do they relate to SB 151, which was still a sewer bill at this time. (Vol. I, R. at 79-90.) Finally, far from requesting the Attorney General's advice, Senator Bowen, the sponsor of SB 1, expressed displeasure with the letters, stating, "…in the 11th hour the attorney general has decided to weigh in on this, and I think that's quite unfortunate."[28]

Under Kentucky Supreme Court precedent, the Attorney General has a duty to challenge the General Assembly or the Governor when they violate the law. In *Beshear v. Bevin*, this Court reasoned that "It is certainly in the 'interest of the people' that there be *no* unconstitutional or illegal government conduct." 498 S.W.3d 355, 362-63 (2016). The Court further stated that "… the words of our predecessor in *Paxton*, by extension, ring just as true here as they did there: 'We think that if the Constitution is threatened by an item of legislation [or act of the Executive], the Attorney General may rise to the defense of the Constitution … .'" *Id.* at 364.

Curiously, the Governor asserts an attorney-client relationship on behalf of the General Assembly. (Gov. Br. at 97-99); (Vol. I, R. at 140-49.) Even if an attorney-client relationship existed between the Attorney General and the General Assembly, the argument still fails because the Governor cannot plausibly claim that the Attorney General provided *him* legal advice in letters addressed directly to Kentucky's legislators, and the law is clear that a non-client litigant does not have standing to disqualify

[28] Deborah Yetter, Feb. 28, 2018, *New Bill illegal, Beshear Says*, available at https://www.courier-journal.com/story/news/politics/2018/02/28/kentucky-pension-reform-illegal-beshear/380932002/ (last visited Aug. 31, 2018).

opposing counsel. *See Goldberg & Simpson, P.S.C. v. Goodman*, No. 2005-CA-001273-MR, 2006 WL 2033997, at *2 (Ky. App. July 21, 2006) (attached in Appendix as Exhibit C pursuant to CR 76.28(4)(c)).[29]

Even if there were an attorney-client relationship that the Governor could assert on behalf of a third party, an attorney serving as a public officer or employee is governed by different conflict of interest rules than those governing private attorneys. Indeed, comments to the Kentucky Rules of Professional Conduct demonstrate that the conflict alleged by the Governor does not exist or is beyond the Rules' scope. Paragraph XIX of the Preamble and Scope provides, in relevant part, "[L]awyers under the supervision of [the state] may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple clients. These Rules do not abrogate any such authority." SCR 3.130, Preamble and Scope, ¶ XIX. Additionally, Comment 9 to Rule 1.13, the Rule relating to organizations, including governmental organizations, as clients, adds: "Defining precisely the identity of the client and prescribing the resulting obligations of [public] lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules." SCR 3.130 (1.13, cmt. 9). The same comment also explicitly states that it does not limit duties of government attorneys as defined by statute, such as KRS 15.020 granting the Attorney General authority to file certain actions, like the instant one.

[29] The only case the Governor cites, *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206 (Cal. 1981), is wholly distinguishable from and inapplicable to this action in that it recognizes that state attorneys general may sue their governors in certain jurisdictions, including Kentucky, and expressly distinguishes *Hancock v. Paxton* by stating that it is not applicable in the context of California law. 624 P.2d at 1209-210. *Deukmejian* ultimately turns on peculiarities that exist in California, but do not exist in Kentucky. *See Superintendent of Insurance v. Attorney General*, 558 A.2d 1197, 1204 (Me. 1989). Moreover, unlike in *Deukmejian*, there was no attorney-client relationship between the Governor or the General Assembly and the Attorney General, or representation of the same, related to SB 1 or SB 151.

Accordingly, the Rules of Professional Conduct recognize that the conflict provisions applicable to private attorneys do not translate in the government realm. This is particularly the case for the Attorney General and the lawyers he oversees tasked with representing state officers, state agencies, *and* the public interest. The Rules do not prohibit the Attorney General from performing his duty to advocate vigorously for the enforcement of Kentucky's Constitution and statutes by bringing an action for the public interest after warning the General Assembly of the potential illegality of its actions.[30]

As the Trial Court accurately stated "It would perversely twist the logic and purpose of the Rules of Professional Conduct to hold that the Attorney General is disqualified from challenging a statute because he rendered a legal opinion prior to adoption of the law that counseled against the actions adopted by the legislature." (Vols. II-III, R. at 298-304.) This Court should uphold the Trial Court's denial.

VII. The Governor Has Waived Standing, Disqualification, And Discovery Arguments.

Below, the Governor raised issues or filed motions on KEA and FOP standing (Vol. IX, R. at 1250-53), judicial disqualification (Vol. X, R. at 1373-76; Vols. X-XI, R. at 1433-1719), and discovery (Vol. II, R. at 305, 320, 328.) The Trial Court and/or the Chief Justice ruled against the Governor on these issues. (Vol. XII, R. at 1735-71; Vol. X, R. at 1368-78; Vol. XII, 1732-1734; Vol. IV, Video R. at 515; Vol IV, R. at 516-517.)

[30] Courts in other states have held no conflict of interest exists where the Attorney General sues unlawful government actors. In *South Carolina ex rel. Condon v. Hodges*, 562 S.E.2d 623, 626 (S.C. 2002), state law required the Attorney General to defend the Governor when so requested, but the Attorney General sued the Governor for diverting funds appropriated to public universities while he was simultaneously representing the Governor in other matters. The Governor alleged there was a conflict of interest. *Id.* The Court ruled there was no conflict of interest because an Attorney General has a dual role in the service of state officers and the people. *Id.* at 627-28. In *Superintendent of Ins. v. Attorney General*, the Attorney General's staff had previously represented a state agency during administrative proceedings. 558 A.2d at 1204. The Attorney General later sued the same agency over decisions from those very proceedings. *Id.* The court held the Attorney General was not disqualified from representing the public interest in the case.

The Governor has waived these issues on appeal by failing to argue them in his brief. (*See* Gov. Br. 1-99.)

Matters not asserted in an Appellant Brief are waived. *Whitaker v. Stephens*, 45 S.W. 2d 1045 (1932) (where parties confined themselves to one issue in briefs, all other issues presented by the pleading were regarded as waived). *See also Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004) (failure to address discovery request in appellant's brief was read by the court as a waiver of this issue.) A party is "not permitted to raise [an] issue for the first time in his reply brief." *Seeger Enterprises, Inc. v. Town & Country Bank & Tr. Co*., 518 S.W.3d 791, 796 (Ky. App. 2017); *see also Catron v. Citizens Union Bank*, 229 S.W. 3d 54, 59 (Ky. App. 2006). When a party attempts to raise an issue it its reply brief for the first time, a court should "consider the issue waived." *Seeger Enterprises, Inc., supra.*

This Court should similarly consider the issues of standing, judicial disqualification, and discovery waived.

VIII. The Governor's Brief Is Replete With Unsupported "Facts."

Finally, it is worth noting that the Governor's Brief is replete with "facts" that are false, are not supported by the record, or are contradicted by his own statements. Without belaboring this point, Appellees set forth just a few examples below.

A. The Record Shows SB 151 Did Not Save the Retirement Systems.

In an effort to "win" this lawsuit, the Governor now claims the fate of the pension system depends on SB 151. However, his previous statements contradict this claim. In announcing his vetoes of the biennium budget bill and the tax bill enacted during the 2018 Regular Session, the Governor stated:

> I want to make something very clear. ***This pension bill that was passed does not solve the problem -- doesn't even come close to solving the problem.*** As was pointed out by some who opposed it, they said, well why should we pass something that only will raise 300 million over the next 20 years if we have a $60 billion problem? True enough. 300 million is one half of one percent, which means 99.5% of the problem is going to be paid for and solved by people that are not in the system.[31]

The day before he signed SB 151 into law, the Governor continued his criticism, stating: "We have not fixed the pension problem. We have not. Do not let anyone delude you into thinking that we have now solved the pension problem. We have not."[32]

Furthermore, as the Appellees demonstrated, SB 151 will not save money for the Kentucky Retirement System, but will add billions of dollars of additional debt to the state and local retirement systems. (*See* Vol. I, R. at 48) ("… it will cost $3.3 billion in debt for the state pension systems and $1.7 billion in debt for the local pension systems over the next 35 years."). SB 151 adds these costs by resetting the 30-year period used to pay off liabilities to start in 2019, instead of 2013, and the ability to reset the 30-year period "shows that an urgency to pay off the unfunded liabilities and repeated claims of imminent insolvency in the plans were unfounded." (*Id.*) As in the Trial Court, the Governor does not contest these statements.

B. The Governor's Background of the Retirement Systems Contradicts History.

In his Brief, the Governor also presents what he claims is a history of the retirement systems in an attempt to paint the inviolable contracts as insignificant. For

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[31] Governor Matt Bevin, Discussing Fiscal Responsibility (available at https://www.facebook.com/GovMattBevin/videos/ 1833319600301258/) (last visited Aug. 31, 2018).

[32] Daniel Desrochers and Jack Brammer, *Bevin signs controversial Kentucky pension bill into law*, Lexington Herald-Leader (Apr. 10, 2018, updated Apr. 11, 2018) (available at https://www.kentucky.com/news/politics-government/article 208518614.html) (last visited Sept. 2, 2018).

example, when discussing KRS, the Governor states that, "From the beginning, it was clear that the *so-called* inviolable contract was not set in stone. Instead, its provisions have ebbed and flowed many times over the years. For instance, in 1976, the General Assembly modified the covered provisions within the inviolable contract, reducing the range of statutes included within it to KRS 61.510 to KRS 61.692." (Gov. Br. at 4.) The Governor claims this change means the General Assembly can cut benefits falling within the inviolable contract. He is wrong.

The statutory sections removed in 1976 *did not confer benefits on members*. Instead, they: (1) covered how the General Assembly would manage and distribute any then-accrued assets if it were to repeal the pension system, KRS 61.695; (2) set forth a punishment for false statements or falsification of records, KRS 61.700; (3) allowed the retirement system to retain some deposits in cash to cover expenses, KRS 61.585; and (4) provided that recovery from disability ended disability retirement payments and provided for reemployment by participating employer, KRS 61.620 (the latter of which is now covered by a different statute). As for the Governor's repeated statement about the General Assembly adding KRS 61.702 to the inviolable contract in 1978, in his own words, that statutory provision *added* benefits, and did not take them away.

As discussed above, Kentucky law establishes that the General Assembly created an inviolable contract with Kentucky's public employees to guarantee them certain retirement *benefits. See* KRS 21.480, KRS 61.692, KRS 78.852, and KRS 161.714. *Jones*, 910 S.W.2d at 713; *Baker*, 2007 WL 3037718, at *31. The changes the Governor references did not remove any such benefits.

The Governor also asserts that the General Assembly's changes to KRS in 2008 and 2013 somehow show the inviolable contract is not inviolable. (Gov. Br. at 6-7.) However, those changes that created Tier II and Tier III were purely prospective. In other words, the changes affected members who were hired *after* the effective date of the legislation. The changes did not nullify the inviolable contract for members already in the system, or make the prospective benefits promised to Tier II and Tier III members subject to change at the will of the legislature.

The contract the General Assembly created for public servants is inviolable.

C. The Governor Grossly Misrepresents JCTA's Reaction to SB 151.

As he did below, the Governor inaccurately portrays that the Jefferson County Teachers Association ("JCTA") "praised" the passing of SB 151. (Gov. Br. at 2) (citing Vol. VIII, R. at 1100-01); (Gov. Br. at 17) (citing Vol. VIII, R. at 1108-09). In attempting to do so, the Governor omits from JCTA's statement exactly what is at issue here. Specifically, JCTA stated:

> ***… we are rightfully outraged not only by the absolutely unnecessary negative changes in SB 151, but also by the reprehensible, undemocratic, non-transparent, and outright illegal manner in this the bill was jammed through the General Assembly in less than a day, … .***

(Vol. VIII, R. at 1098) (emphasis added).

CONCLUSION

SB 151 is government at its worst. The process by which SB 151 was passed violated Section 46 of the Kentucky Constitution. This Court should affirm the decision of the Trial Court and declare SB 151 null and void. In addition, this Court should hold SB 151 unconstitutional and void because it violates Sections 2, 13, and 19 of the Kentucky Constitution and KRS 6.350 and KRS 6.955.

Respectfully Submitted,

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APPENDIX TABLE OF CONTENTS

EXHIBIT A

2014 WL 1681155
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NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Glenn D. ODOM, Appellant
v.
Philip PARKER, Appellee.

No. 2012–CA–001580–MR.
|
April 25, 2014.

Appeal From Lyon Circuit Court, Action No. 12–CI–00105; Clarence A. Woodall III, Judge.

Attorneys and Law Firms

Glenn D. Odom, Eddyville, KY, pro se.

John Marcus Jones, Kentucky Department of Corrections, Frankfort, KY, for Appellee, Philip Parker.

Before COMBS, MAZE, and NICKELL, JUDGES.

OPINION

NICKELL, Judge:

*1 Glenn Odom, *pro se,* has appealed from the Lyon Circuit Court's denial of his petition for a declaration of rights and upholding a prison disciplinary finding of guilt. For the following reasons, we affirm.

Odom is an inmate at the Kentucky State Penitentiary. He was the subject of two disciplinary reports stemming from different instances of inappropriate sexual behavior, each observed by a different female correctional officer. Following hearings before a prison disciplinary committee, Odom was found guilty of the charges against him and assessed forty-five days' disciplinary segregation on each charge to be served consecutively. His appeal to Warden Philip Parker was unsuccessful. Odom subsequently filed his declaration of rights action pursuant to KRS[1] 418.040 in the Lyon Circuit Court to contest the disciplinary actions taken against him. He raised a number of challenges regarding due process and sufficiency of the evidence. In addition to seeking a declaration of rights, Odom requested an order vacating his convictions, a new disciplinary hearing, and monetary damages. The circuit court denied the petition in a four-page order and this appeal followed.

Odom contends the evidence presented was insufficient to support a finding of guilt. He contends footage from recordings of his cell at the time of the alleged infractions revealed his innocence and the committee improperly found guilt in the face of this exonerating evidence. He claims the committee's decision was inappropriately based solely on statements by the attesting correctional officers. Further, Odom contends he was denied due process by the committee's failure to provide a meaningful explanation of the finding of guilt and an overall failure of the proof. Additionally, Odom argues he is entitled to payment for "lost wages and undue stress, punitive damages, nominal damages, and any other just cause a court may find reasonable." Finally, Odom contends the trial court erred in dismissing his action. Having reviewed the record, we discern no error and affirm.

It is the duty of prison officials to determine guilt or innocence in prison disciplinary proceedings. Courts are charged only with review of such decisions and prison officials are afforded broad discretion. This Court must affirm if there is "some evidence" supporting the charge. *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill,* 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985). *See also Smith v. O'Dea,* 939 S.W.2d 353 (Ky.App.1997) (adoption by Kentucky courts of the federal standard). "[T]he relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board." *Hill,* 472 U.S. at 455–56, 105 S.Ct. at 2774 (citations omitted). Even "meager" evidence has been found to meet this burden. *Id.,* 472 U.S. at 457, 105 S.Ct. at 2775. "Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence." *Id.,* 472 U.S. at 455, 105 S.Ct. at 2774.

*2 Prison discipline proceedings are not the equivalent of criminal prosecutions and "the full panoply of rights due a defendant in such proceedings does not apply." *Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S.Ct. 2963, 2975, 41

L.Ed.2d 935 (1974). "Minimal due process is all that is required regarding a person detained in lawful custody." *McMillen v. Kentucky Dept. of Corrections,* 233 S.W.3d 203, 205 (Ky.App.2007). The requirements of due process are satisfied if the "some evidence" standard is met. *Hill,* 472 U . S. at 455, 105 S.Ct. at 2774.

Odom argues he was denied procedural due process because the committee failed to rely on surveillance footage of the incidents. However, he has failed to allege any facts that would demonstrate a due process violation occurred. The committee reviewed the videotapes as Odom requested but obviously found them unpersuasive. Prisons are highly charged environments populated with individuals who have proven a propensity to violate criminal laws and have been incarcerated for doing so. Such environments must be tightly controlled for the protection of prison workers as well as inmates themselves. As stated earlier, prison officials are given broad discretion by this Court, and that discretion extends to determinations of how best to maintain order and safety within the walls of penal institutions. We cannot say the decision of the committee deprived Odom of a protected liberty or property interest. *Williams v. Bass,* 63 F.3d 483, 485 (6th Cir.1995).

Likewise, we are unconvinced Odom has demonstrated a violation of his due process rights by the committee's alleged failure to provide a meaningful explanation of the finding of guilt in its written report following his hearing. Odom is correct that written findings are required in prison disciplinary proceedings as to the facts relied on and the reasons for the disciplinary action. *Wolff,* 418 U.S. at 564, 94 S.Ct. at 2963. However, the findings may be brief, *Gilhaus v. Wilson,* 734 S.W.2d 808, 810 (Ky.App.1987), and a disciplinary committee or adjustment officer may incorporate by reference the findings of the investigating officer contained in his report. *Yates v. Fletcher,* 120 S.W.3d 728 (Ky.App.2003). This was the procedure followed in the instant case. The findings were sufficient and the requirements of minimum due process were satisfied.

Next, Odom contends the evidence presented was insufficient to support a conviction of the charged infractions. However, the evidence submitted at the adjustment hearing was sufficient to satisfy the "some evidence" standard. The committee reviewed the record before it, ultimately adopting the facts set forth by Officers Melissa DeMasseo and Cherie Rose in the disciplinary report forms, and these facts supported the committee's findings of guilt. Given our limited authority to review such cases, we need consider nothing.

Odom further contends he is entitled to monetary compensation in the event he is required to serve his sentence for these infractions. As the trial court correctly noted, KRS 454.405 prohibits inmates from sustaining "a civil action for monetary damages in any state court for mental or emotional injury without a prior showing of physical injury." No allegation or proof of physical injury was proffered, and Odom has made no allegation that the statute should not apply or is in any way infirm. Clearly, Odom was not entitled to monetary damages, and the trial court properly applied the relevant statute in denying his request.

*3 Finally, Odom contends the trial court erred in dismissing his claim. In support of his contention, Odom claims the trial court misinterpreted the holding in *Yates;* he then goes on to make several uncorroborated and offensive assertions attacking the honesty and integrity of the trial court. His attacks appear to be centered on assumptions and supposition and fail to address the core issue and are not rooted in sound logic or an accurate reading of applicable law. Bald assertions, lacking any evidentiary support and deficient in legal and logical reasoning, carry no weight and form an insufficient basis for relief. Our review of the record reveals the trial court recognized and applied the correct standard of review and, in accordance with *Yates,* accurately determined "some evidence" existed to support the disciplinary decision. Therefore, we hold the trial court was correct to dismiss Odom's petition. Although Odom's displeasure with the outcome is understandable, mere unhappiness with a trial court's ruling is insufficient to form a basis for relief. There simply was no error.

Therefore, for the foregoing reasons, the judgment of the Lyon Circuit Court is affirmed.

ALL CONCUR.

All Citations

Not Reported in S.W.3d, 2014 WL 1681155

Footnotes

1 Kentucky Revised Statutes.

End of Document

EXHIBIT B

2007 WL 3037718
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

Court of Appeals of Kentucky.

James M. BAKER, Appellant
v.
COMMONWEALTH of Kentucky, Kentucky Retirement Systems and Board of Trustees of Kentucky Retirement Systems, Appellees.

No. 2005–CA–001588–MR.
|
Oct. 19, 2007.

Appeal from Franklin Circuit Court, Action No. 01–CI–01664; Robert G. Johnson, Judge.

Attorneys and Law Firms

Donald Duff, Frankfort, KY, for appellant.

Brown Sharp, II, Frankfort, KY, for appellees.

Before ACREE and VANMETER, Judges; KNOPF, Senior Judge. [1]

OPINION AND ORDER

ACREE, Judge.

*1 This is an appeal from a judgment of the Franklin Circuit Court affirming a decision by the Board of Trustees of the Kentucky Retirement Systems. The Systems found that James Baker, a state retiree who had returned to state employment, was not entitled as a retiree to payment in full from the Systems of the monthly contribution toward his health insurance premiums, because he was also receiving a similar contribution from his new employer.

At its core, this case pits Baker's right to a specified retirement health care benefit against the Systems' policy ostensibly created to administer those benefits. Its resolution requires us to examine issues of Kentucky administrative law and statutory construction. Some are issues of first impression in Kentucky.

In summary, we find that Baker's right to the claimed retirement health care benefit is statutory and inviolable, that Baker did not waive that right, and that the Systems' policy is void because it violates provisions of Kentucky Revised Statutes (KRS) Chapter 13A. Therefore, we reverse.

FACTS

Baker retired from his employment with the Legislative Research Commission after more than 27 years of service to the state. He immediately re-entered full-time state employment as general counsel to the Kentucky Teacher's Retirement Systems (KTRS). Consequently, Baker simultaneously enjoyed the benefits of his retirement from state government and the benefits of his employment by state government. In common parlance, he was a "double-dipper." [2]

Baker's double set of benefits included eligibility for group health insurance offered both through the Systems and through KTRS. He was also entitled to a separate specific contribution from each of these entities toward payment of his health insurance premium. Each such contribution is referred to in statute as a "state contribution." [3] For each of the years 1991 to 1995, the state contributions to which Baker was entitled were more than sufficient to fully pay the premium for the health insurance coverage option Baker selected.

During these five years, Baker coordinated his available state contributions by means of "cross-referencing" the benefits entitlements. "Cross-referencing" is a practice applicable in group insurance plans to indicate that multiple benefits sources will contribute to the payment of a single insurance premium. Cross-referencing often occurs when a husband and wife both work for the same employer. However, cross-referencing with one's self occurs when one employee is entitled to contributions from two independent sources, as is the case before us.

Prior to 1996, regardless of whether a state employee cross-referenced, he forfeited any amount of state contribution that exceeded the premium for the coverage option he selected. And so it was with Baker. When Baker

cross-referenced prior to 1996, he forfeited the excess of the total of the two contributions beyond the lower cost of his premium. However, an amendment to the group health insurance plan made it possible for each state employee, including Baker, to make full use of the state contribution, including the amount that exceeded the employee's premium. That amendment, effective in 1996, allowed state employees, for the first time, to participate in a medical Flexible Spending Account, or FSA.

*2 Medical FSAs are creatures of federal statute, authorized as part of the Internal Revenue Code, Title 26 United States Code (U.S.C.) § 125. Such accounts provide tax savings to employees whose employers establish cafeteria plans that include a written plan document and an established "flexible spending account." Under this system, each employee estimates his out-of-pocket medical expenses for the upcoming year. Each pay period, by payroll deduction, the employer deducts a *pro rata* portion of this annual estimate from the employee's gross income and deposits the amount into the FSA. When the employee incurs a medical expense not covered by his insurance, he submits a receipt to the FSA administrator who reimburses the employee from the FSA.

Kentucky's legislature authorized FSAs in 1990 when it enacted KRS 18A.227, entitled "Flexible benefits plan for employees and retirees." Its title indicates the legislature's intent that FSAs be available to state retirees. Unfortunately, the legislature's desire was thwarted because the federal law authorizing FSAs requires that "all participants are employees[.]" 26 U.S.C. § 125(d)(1)(a). Baker, however, was both a retiree and an employee. Therefore, he could participate in the state's FSA program.

The possibility of benefiting from the new FSA program caused Baker to more closely consider the manner in which he cross-referenced his two health insurance premium funding sources. During the open enrollment period in November 1995, he contacted an insurance coordinator at the System's offices in Frankfort and asked if there were any policies or procedures affecting the manner in which his two premium payment sources could be coordinated. He also asked the same question of a representative of Plan Source, the state's health insurance purchasing alliance. Both representatives told him they knew of no applicable policies.

Baker then met with the KTRS Payroll Officer, Annie Martin (Martin). Just as with the representatives Baker previously asked, Martin was unaware of any policy affecting how Baker could coordinate his two premium payment sources.

A representative of the Systems would later testify, however, that Martin should have known of a longstanding, unwritten, Personnel Cabinet policy that required a double-dipper's employer to pay its full state contribution, as required by KRS 18A.225(2)(h), before the Systems paid any portion of its state contribution obligation. The Systems would then pay only the balance remaining necessary to fully fund the premium selected, not to exceed the state contribution rate for that year. This unwritten policy was created when the combination of the two state contributions exceeding the cost of the premium was forfeited. The policy was obviously for the benefit of the agencies rather than the retiree since it primarily determined which agency was entitled to retain the forfeited amount. Under this policy, the Systems always retained the unused and forfeited amount. No agency ever considered how adding an FSA program to employee benefits would affect the policy, or *vice versa.*

*3 The legislature imposed upon the Personnel Cabinet the responsibility for developing an FSA program for eligible employees. KRS 18A.227(2). The Cabinet was not prohibited from developing a program that would have excluded excess state contributions as a source for funding an employee's FSA account. But it did not do so. The program the Cabinet developed specifically authorized an employee to direct the excess state contributions, previously forfeited, into his own FSA account. (R. 174, 177).

Unaware of what Martin allegedly should have known, and believing he had informed himself as fully as possible, Baker decided on a health insurance coverage option for himself and his family, for 1996, that cost $245.92 per month. Because he was entitled to $175.50 per month (the state contribution rate for 1996) from each of his premium payment sources for a total of $351.00, he planned to have the difference, $105.08, deposited into his FSA.

All parties understood throughout this case, and this Court does not question, that FSAs cannot be funded from retirement benefits. This led Baker to ensure that the only funding source for his FSA was by payroll deduction

out of the gross pay he received from his employer, KTRS. He accomplished this by carefully completing the required human resources paperwork both at KTRS and the Systems.

The actual insurance application process required Baker to indicate his intent to cross-reference on two separate enrollment forms provided by the health plan administrator, Plan Source. He completed the first form, entitled "Employee Enrollment Application," with Martin's assistance. The forms anticipated the circumstance of spouses cross-referencing with one another and had blanks on the form for that purpose. However, owing apparently to the infrequency with which "cross-referencing with self" occurred, no similar blanks were provided for that purpose. With Martin's assistance, however, Baker indicated his intent to "cross-reference with self," and identified the other payment source as "KERS" (that is, the Kentucky Employees' Retirement System), by writing those words near the blanks provided for spousal cross-referencing.

Consistent with Baker's desire to have the Systems pay his insurance retirement benefit in full first, Payroll Officer Martin made notations in the margin of the form as follows:

245.92	70.42
175.50 KERS	–175.50 KTRS
70.42	–105.08

Nothing in the record contradicts the interpretation given by all parties to these figures. Martin first wrote Baker's monthly premium payment due of $245.92. Then, Martin indicated Baker's intent that the state contribution from the Systems (identified by Martin as "KERS"), in the amount of $175.50, was to be paid in full toward the insurance premium first, leaving a balance due on the premium of $70.42. The next column shows the balance of $70.42 being paid by the KTRS state contribution of $175.50. The excess of the KTRS state contribution was then available to be paid, lawfully, into Baker's FSA. Baker signed the form on November 20, 1995, and Martin signed it the following day. Martin filed copies of this form with KTRS, and sent copies to Plan Source and the Systems.[4]

*4 Baker also completed a second enrollment form, this one with the Systems, entitled "Retiree Enrollment Application." He indicated on this form his intent to "cross-reference with self" and identified KTRS as the other source of premium payment. He signed and dated this form on November 20, 1995, as well. Copies were sent to Plan Source and KTRS.

On December 7, Baker completed a second form provided by KTRS, designed to "[d]etermine if you are eligible for an Employer Contribution toward your Medical Spending Account." The form was created by Flexible Employee Benefits Company, Inc. (FEBCO), the flexible spending account firm chosen by the Personnel Cabinet to administer the FSA program. The form had a line to be completed for the "Cost of Health Insurance Plan." Baker filled in that line with the figure "$70.42," indicating the amount remaining to be paid by KTRS after the Systems paid $175.50 toward the $245.92 premium. The balance, $105.08, was identified on the form as Baker's "monthly employer contribution to the Medical [Flexible] Spending Account."

On December 8, Martin met with a representative of FEBCO to complete the paperwork necessary to ensure that KTRS transmitted $105.08 to FEBCO each month to be deposited in the FSA on Baker's behalf. Despite all of these efforts, this was not how Baker's health insurance premium and FSA were funded.

Beginning in January 1996, the two agencies, KTRS and the Systems, applied Baker's benefits in a completely uncoordinated fashion. KTRS followed Baker's and Martin's allocation figures and paid $70.42 to Plan Source toward the $245.92 premium, followed by a $105.08 payment to FEBCO for Baker's FSA. The Systems, however, did not pay the full $175.50 contribution. Instead, the Systems paid only $70.42 to Plan Source toward Baker's premium and retained $105.08 of Baker's monthly entitlement in its own coffers. When Plan Source combined the payments actually received from KTRS and the Systems, it had only $140.84 per month to pay toward

Baker's $245.92 monthly premium. This left the premium payment short $105.08 each month.

We would be remiss if we did not pause at this juncture and note that this dispute never would have arisen if the Systems had simply paid to Plan Source the $175.50 contribution in full toward Baker's health insurance premium. Whether the Systems considered its payment to have been prior or subsequent to KTRS' payment of $70.42 is irrelevant. The key point here is that none of the Systems' contribution would have funded Baker's FSA. Consequently, there could have been no assertion, despite the Systems' counsel's continued insistence, that retirement funds were used to fund an FSA in violation of 26 U.S.C. § 125. [5] This, unfortunately, did not occur.

Initially, Baker and KTRS were unaware that the Systems was paying Plan Source only $70.42 toward Baker's premium. It was August 1996 before Plan Source finally informed Martin at KTRS that Baker's account was $735.66 [6] in arrears for the months since January of that year. [7]

***5** Martin attempted to solve the problem, at least for subsequent months. Without Baker's consent, she increased the amount KTRS paid toward the premium from $70.42 to $175.50 to cover the Systems' $105 .08 payment shortfall. This fully paid the $245.92 premium. Unfortunately, this also meant that KTRS was paying nothing toward Baker's FSA. Martin, who admitted she was herself confused, informed Baker of these developments and what it meant for him.

Because funding of any federally-regulated FSA program is calculated on an annual basis, the balance of payments to fund Baker's FSA for the rest of 1996 had to be paid by someone. *See also,* KRS 18A.228(4)("Once an option [to fund a flexible spending account] is chosen, it shall not be changed until the end of the period for which election is made...."). Consequently, to use Baker's language, he began "making an additional involuntary payment of $105.08 to FEBCO" from his pay for the five remaining months of 1996 for a total of $525.40. [8] Baker failed to understand why this had happened. His search for an explanation was unavailing.

Baker wrote to the Systems on October 11, 1996, requesting "assistance in resolving a problem which has developed relating to the payment of my health insurance premium." The prompt response came by letter from the System's Deputy Commissioner of Operations who said, in pertinent part:

> The [Systems'] policy for cross-referencing medical insurance premiums is: "The employer contribution toward medical insurance premium shall be applied prior to determination of the amount to be paid by the [Systems'] Insurance Fund." ...
>
> This is a final administrative decision concerning this matter. Accordingly, you are entitled to an administrative hearing, if you desire, in order to contest this decision pursuant to KRS 61.645(16)(a) and 13B.

After an unsuccessful second attempt to resolve the issue without invoking the adjudicatory power of the Systems, Baker did timely request an administrative hearing pursuant to KRS Chapter 13B, and the Systems' adjudicatory authority was engaged.

PROCEDURAL HISTORY

Baker's Petition alleged that the Systems had reduced his retirement benefits, specifically his health insurance premium benefits, contrary to plain legislative mandate that

> ***The premium*** required to provide hospital and medical benefits [to retiree-participants in the Kentucky Group Health Insurance Plan] ***shall be paid in full*** from the insurance fund [9] for all recipients of a retirement allowance from [the Kentucky Employees Retirement System] where such recipient ... had two hundred and forty (240) months or more of service upon retirement [which included Baker].

KRS 61.702(3)(1995)(emphasis supplied), *recodified, using the same language, as* KRS 61.702(3)(a) 5. Furthermore, Baker claimed that this right was part of an inviolable contract of which he was a beneficiary, then cited the Systems to the appropriate authority.

> ***6** It is hereby declared that in consideration of the contributions by the members [of the Kentucky Employees Retirement System] and in further consideration of

> benefits received by the state from the member's employment, ***KRS 61.510 to 61.705 shall,*** except [for legislators and former legislators who commit felonies], ***constitute an inviolable contract*** of the Commonwealth, and the benefits provided therein ***shall ... not be subject to reduction or impairment by alteration, amendment, or repeal.***

KRS 61.692(emphasis supplied); *see also Jones v. Board of Trustees of Kentucky Retirement Systems,* 910 S.W.2d 710, 713 (Ky.1995).

The Systems' Response to Baker's Petition denied his claim. The substance of the denial was that all agencies participating in the Kentucky Group Health Insurance Plan, including the Systems and KTRS, as well as their participating retirees and employees, are required to abide by the Personnel Cabinet's policies and procedures for administering the plan. According to the Systems, among these policies and procedures was the Cabinet's unwritten policy requiring a double-dipper's employer to pay first toward his premium, thereby reducing the Systems' obligation to an amount equal to the remaining balance of the premium.

The Systems claimed that Baker's rights were also subject to the Systems' written policy. This policy was created on December 29, 1995, eleven days after the Systems' receipt of a copy of Baker's Employee Enrollment Application containing Martin's figures for allocating Baker's state contributions. It states in its entirety:

KENTUCKY RETIREMENT
SYSTEMS POLICY ON PAYMENT OF
CROSS–REFERENCE INSURANCE

> The Kentucky Retirement Systems, by authority of KRS 61.645, established the following POLICY effective January 1, 1996, concerning amounts paid from the Insurance Fund on medical insurance cross-referenced with medical insurance obtained through a participating employer:
>
> (1) The employer contribution toward the medical insurance premium shall be applied prior to determination of the amount to be paid by the Insurance Fund.
>
> (2) The Insurance Fund shall pay the remainder of the premium not to exceed the amount that would be paid under KRS 61.702.
>
> Signed: Pamala S. Johnson Adopted: 12–29–95

After a fair period of discovery, a hearing was conducted on September 19, 1997, before Michael Head, an administrative hearing officer from the Office of the Kentucky Attorney General, Division of Administrative Hearings. The Systems was represented by legal counsel, as was Baker. The parties presented their cases in seven and one-half hours of testimony. Post-hearing briefs were filed by both parties.

On February 13, 1998, after nearly five months considering the record, the hearing officer issued a 23–page Findings of Fact, Conclusions of Law and Recommendation (Recommended Order) in favor of Baker. In summary, the hearing officer found that Baker's right to payment by the Systems of the full state contribution toward his health insurance premium was created by statute, KRS 61.702(3)(1995), and constituted an inviolable contract between Baker and the state. KRS 61.692. He also found that Baker did not waive that right, but gave timely notice to the Systems of his demand that the full contribution be paid in accordance with the statute. Finally, the hearing officer concluded as a matter of law that the Systems lacked the authority to affect Baker's right by internal policy, either written or unwritten, or otherwise.

*7 As a remedy, the hearing officer recommended that the Systems pay into Baker's FSA an amount equal to that which it failed to pay for the years 1996 to 1998, and to award all future benefits to Baker without diminishment by the Systems' invalid cross-referencing policy.

The Systems transmitted the hearing officer's recommendation to Baker by unsigned letter dated the same day as the recommendation, February 13, 1998. The language of the letter is somewhat curious, stating that the "Board of Trustees ... *has seen fit* to offer you fifteen (15) days *from your receipt* of this notice to file any exceptions." (emphasis added). We are not sure what the Systems believed the Board had seen fit to do for Baker. First, the Recommended Order was overwhelmingly in Baker's favor. Second, and more significantly, the

legislature, not the Board, had already granted Baker the right to file exceptions. KRS 13B.110(4). By this letter, the Systems only *mis* informed Baker as to his rights.

The statute actually measures the fifteen-day period, not from Baker's *receipt* of the notice, but "from the date the recommended order is *mailed* [.]" KRS 13B.110(4)(emphasis supplied). In other words, the Systems told Baker he had more time to file exceptions than the law allowed. This sounds generous at first blush, but "an administrative agency cannot enlarge statutorily prescribed time frames[.]" *Curtis v. Belden Electronic Wire and Cable, a Div. of Cooper Industries,* 760 S.W.2d 97, 99 (Ky.App.1988). Furthermore, before being overruled in 2004 by *Rapier v. Philpot,* 130 S.W.3d 560 (Ky.2004), missing the deadline for filing such exceptions could result in termination of the claim. *Swatzell v. Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet,* 962 S.W.2d 866, 869 (Ky.1998)(Failure to file exceptions results in termination of claim), *overruled by Rapier* at 564. When the unnamed author at the Systems sent the letter to Baker, *Swatzell* was still good law. Therefore, if Baker had been lulled into inaction by the Systems' letter, he would have been precluded from seeking judicial review of any portion of the Board's final order that did not differ from the recommended order. *Id.*

As the procedural history goes, however, both parties timely filed exceptions. Baker merely took exception to the hearing officer's recommended method of remedy. Not surprisingly, the Systems took exception to the entire recommended order. The Systems' specific exceptions were few but amounted largely to its general demand that "the Board of Trustees of Kentucky Retirement Systems must reject in whole as being clearly erroneous the Hearing Officer's Findings of Fact, Conclusions of Law and Recommendation."

On April 27, 1998, the Systems' Administrative Appeals Committee met to consider the exceptions filed in Baker's case and in two others. Only two members were present. [10] The meeting started at 9:11 AM and ended at 10:05 AM. First, the Committee approved the minutes of the previous meeting, then went into closed session during which it "studied the record of James Baker ... in its entirety." At that time, the record in Baker's case consisted of nearly seven and one-half hours of videotaped testimony, nearly 400 pages of documents, lengthy post-hearing briefs filed by each party, the hearing officer's 23–page recommendation, and the parties' exceptions to that recommendation. The two men decided to reject the hearing officer's recommendation *in toto.*

***8** At the same meeting, the Committee engaged in a "review of the record in its entirety" of two other hearings. In each of these, the hearing officer recommended denying the claims and the Committee of two voted to accept the recommendation. It is likely the Committee spent less time deliberating these cases, and understandably so.

All of this work was accomplished in the span of not quite one hour.

On May 12, 1998, the Systems sent an Order to Baker indicating that the Committee rejected the hearing officer's recommendation in its entirety. Ostensibly acting on behalf of the Board, the Committee Chairman signed, filed and served the decision in the form of a Final Order that the Chairman represented as the Committee's work. Examination of that Committee Order reveals that very little of it can be legitimately claimed as deriving from the Committee's *original* efforts.

The Committee's decision is captioned: "Board of Trustees Report and Order." The introductory paragraph of the Committee Order sets forth the same perfunctory information about the time, place and manner of the hearing as contained in the hearing officer's recommendation. Thereafter, the entire Committee Order is taken, word-for-word, from the Systems' Post–Hearing Brief.

The similarities between the Systems' brief and the Committee Order are not merely coincidental. Not only are the words the same, but the two documents share the identical font and format, paragraph structure, and typographical and grammatical errors. [11] In fairness, we do note that two and one-half sentences of the twenty-five page Committee Order are new, but those sentences are inconsequential to the decision. [12] The Committee Order's "Conclusions of Law" are even sequentially identical to the numbered Arguments from the Systems' Post–Hearing Brief. [13] It takes no more than the most rudimentary knowledge of computer word processing to understand that the Systems' brief and the Committee Order share the same base document, created originally as an electronic file, on the same word processing system.

When Baker received the Committee Order, he appealed it to Franklin Circuit Court. In June 2000, that court affirmed the Committee's decision.

Baker then sought review for the first time in this Court. We issued an opinion vacating and remanding the case because the Board had delegated its power to enter a final order to a committee in violation of KRS 13B.030(1). [14] *See Baker v. Kentucky Retirement Systems,* 50 S.W.3d 770, 773 (Ky.App.2001)(hereafter, *Baker I*). Having decided the case on that narrow issue, we expressed no opinion regarding the merits of the other issues Baker raised.

Nevertheless, we gave the Systems very clear instruction on remand. We pointed out that the "entire Board [of Trustees], collectively, is the agency head responsible for entry of a final order." *Id.* "[A]ll actions taken by the Board shall be taken by affirmative vote of a majority of the trustees present, subject to the requirement that those present constitute a quorum." *Id.* (Footnote citation omitted). We noted that "the final order of the Board need only be signed by the chairperson," but we made it clear that the chairperson's signature alone was sufficient only "so long as the signature reflects the decision of a majority of the Board." *Id.* We "remanded to the Franklin Circuit Court with directions to remand the matter to the Board for entry of a final order consistent with this opinion." *Baker I* became final on September 21, 2001. *Id.*

***9** The record before us now gives virtually no indication that the nine-member Board followed our clear direction. More to the point, nothing in the record indicates "the entire Board, collectively," ever knew about this case. There is simply a three-and-one-half year recordless gap between the Systems' notification to Baker of the Committee Order he appealed in *Baker I,* and the Order signed only by Board of Trustees Chairman, Randy J. Overstreet, on November 15, 2001 (Board Order). There are no indicia in the Board Order or the record suggesting that the Board of Trustees actually participated in its issuance. The Chairman's signature does not indicate that he signed it at the direction of the Board or after Board action by majority vote. There are no minutes of the Board of Trustees indicating a vote on this order. Nor does this order indicate anywhere in its body that it is the decision of the Board of Trustees. We shall presume however, despite the absence of typical hallmarks indicating Board action, that the Board Order was issued with Board approval. *Hutson v. Commonwealth,* 215 S.W.3d 708, 716 (Ky.App.2006)(courts presume public officers perform the duties entrusted to them by law in good faith). If we are mistaken in that presumption, that is a matter to be determined and addressed by the Board of Trustees itself.

The Board Order is captioned identically to the Committee Order reviewed in *Baker I,* that is, "Board of Trustees Report and Order." With the exception of the signature line, it is identical to the Committee Order, which, as we indicated *supra,* is in its body, identical to the Systems' Post–Hearing Brief. The Board order is clearly another spawn of that original electronic word processing file that gave birth likewise to its kindred, the Systems' Post–Hearing Brief and the Committee Order.

Just as he had appealed the Committee Order, Baker appealed this identical Board Order to the Franklin Circuit Court. Again, the circuit court affirmed this order, holding that: (1) the Board's Order complied with the statutory requirements of KRS 13B.120; (2) the Board's decision was supported by substantial evidence and was not arbitrary; and (3) the Systems' policy did not violate KRS Chapter 13A nor did it exceed its authority or impair any benefits to which Baker was entitled.

Baker appeals to this Court for a second time. We have grouped his arguments in the following three categories.

The Board Order is not supported by substantial evidence and its rejection of the hearing officer's findings of fact, conclusions of law and recommendation was arbitrary; [15]

By adopting the Systems' Post–Hearing Brief as its Final Order, the Board failed to comply with KRS 13B.120(1) and undermined the purpose of KRS Chapter 13B; [16]

The Systems' cross-referencing policy is void because it was an internal policy, was not promulgated as a regulation as required by Chapter 13A, and completely lacked statutory or regulatory authority for its issuance. [17]

***10** Only the first of these arguments challenges the weight of the evidence or disputes any facts.

STANDARD OF REVIEW

Substantial Evidence

The Systems urges that we focus our attention on the Board's fact-finding, stating that "Baker's case is subject to the substantial evidence standard of review." (Appellee's Brief, p. 12 fn.16). In general terms, this standard holds that if there is any evidence of substance to support the agency action, the reviewing court must defer to the agency decision because such action could not be arbitrary. *Borkowski v. Commonwealth,* 139 S.W.3d 531, 533 (Ky.App.2004)("If there is any substantial evidence to support the decision of the administrative agency, it cannot be found to be arbitrary and will be sustained." Internal quotation marks omitted .).

This standard is a powerful weapon in any administrative agency's arsenal since it puts review of an agency's decision at least on a par with appellate review of a jury verdict. *Compare, Lewis v. Bledsoe Surface Min. Co.,* 798 S.W.2d 459, 461 (Ky.1990)(reversal not justified unless jury verdict is "palpably or flagrantly against the evidence." Internal quotation marks omitted), *with McManus v. Kentucky Retirement Systems,* 124 S.W.3d 454, 458 (Ky.App.2003)(reversal not justified unless evidence is "so compelling that no reasonable person could have failed to be persuaded by it."); *see also, Kentucky State Racing Commission v. Fuller,* 481 S.W.2d 298, 308–09 (Ky.1972)(comparing role of administrative fact-finder to that of jury; the case should be read with the *caveat* that the members of the State Racing Commission actually sat as the tribunal in this administrative adjudication and did not delegate the fact-finding, including the opportunity to assess witness demeanor, to a hearing officer.).

However, "[s]ubstantial evidence is only important when the award of the board is attacked as being insufficiently grounded upon evidence." *Stovall v. Collett,* 671 S.W.2d 256, 257 (Ky.App.1984). As noted, only one of Baker's arguments challenges the sufficiency of any evidence. And the only finding of fact rejected by the Board was whether the Systems received notice as to how Baker intended to cross-reference the two state contributions. Consequently, we will review that single finding to see if it is supported by substantial evidence.

For Baker's remaining legal arguments, the Systems predictably turns to *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission,* 379 S.W.2d 450 (Ky.1964) as its touchstone. However, in view of the Supreme Court's decision in *Hilltop Basic Resources, Inc. v. County of Boone,* 180 S.W.3d 464 (Ky.2005), and given that KRS Chapter 13B applies to this case, we believe it is time to review and clarify the applicability of the "extraordinarily powerful case" of *American Beauty Homes. Kuprion v. Fitzgerald,* 888 S.W.2d 679, 689 (Ky.1994).

American Beauty Homes

***11** *American Beauty Homes* was a zoning case that has had impact far beyond its original limited scope. The "*root of the trouble* " in *American Beauty Homes* was whether the Legislature could "*impose on the court a nonjudicial administrative function* " by means of KRS 100.057, a statute captioned "Appeal to courts from decision of commission on question of approving adjustments." *American Beauty Homes,* 379 S.W.2d at 453 (emphasis in original). The case was decided at a time when our administrative law was a mass of "uncorrelated legislative attempts to designate specific considerations controlling the scope of judicial review[.]" *Id.* at 457. Some would say that is still the state of affairs in Kentucky administrative law.

The general standard of review drawn from *American Beauty Homes* has become an axiom: "In the final analysis all of these issues may be reduced to the ultimate question of whether the action taken by the administrative agency was arbitrary." *Id.* This self-evident general rule is so all-encompassing that it applies to appellate review of all manner of administrative action, whether it be a review of a zoning determination as in *American Beauty Homes* itself, a worker's compensation claim, a Board of Claims award, or any other appeal from any administrative agency. Nothing in this opinion changes that general rule. However, when attention is given to the specific language of *American Beauty Homes,* we see how limited the case is, in fact.

The court in *American Beauty Homes* clearly and narrowly stated that the decision "concerns the scope of review *under KRS 100.057* [and of] appeals taken *under KRS 100.085.*" *Id.* at 456, 458 (emphasis supplied). The

court focused on the fact that these statutes represent the legislature's delegation of its own legislative power. *American Beauty Homes,* then, establishes the principle that the separation of powers doctrine will not allow any "court to substitute its independent judgment on the facts for that of an administrative agency" which the legislature has "designated to carry out a *legislative* policy by the exercise of *discretionary* judgment in a specialized field [thereby] performing a *nonjudicial* function." *Id.* at 458–59, 458 (emphasis supplied). The case is thus perfectly suited to serve as the standard for reviewing the exercise of "a delegation of *legislative* power to an administrative agency [,] exercised in conformity with a *legislative policy* and in a *discretionary manner in the light of prevailing local conditions.*" *Id.* at 455 (emphasis supplied). That is, to zoning matters. Some of its principles certainly will apply to many agency actions. Yet we must guard against relying on *American Beauty Homes* out of habit or convenience.

We do not present the circumscribed nature of *American Beauty Homes* as a new concept. Almost immediately after the case was rendered, we were warned to resist the judicial reflex of "relying on *American Beauty Homes* without reference to the subsequent opinions by th[e Commonwealth's highest] court that have eroded the holding in *American Beauty Homes.*" *Brady v. Pettit,* 586 S.W .2d 29, 31 (Ky.1979). "The first indication that this court was not wholly committed to *American Beauty Homes* ... came in *Kilburn v. Colwell,* Ky., 396 S.W.2d 803 (1965)," in which the court reviewed a city's termination of a police officer's employment. *Id.* Two years after *Kilburn,* the Supreme Court made it clear that "*American Beauty Homes* is limited to zoning and other administrative acts and held not to be applicable to" an agency's *adjudication* of a public employee's contract of employment. *Brady* at 31, *citing Osborne v. Bullitt County Bd. of Ed.,* 415 S.W.2d 607, 610 (Ky.1967)("We no longer think that the principles enunciated in *American Beauty Homes* should be extended to the problems herein involved."). By 1979, it was inarguable that "*American Beauty Homes* now applies only to zoning matters and matters of like nature." *Brady* at 31.

***12** Then, if resort to *American Beauty Homes* is not the first proper step in our review of an agency's actions, what is? The answer is that before we can apply any standard of review to an any act of any administrative agency, we must decide what function the agency is performing.

"A Mixed Bag of Legislative, Executive, and Judicial Functions"

Just as with the circumscribed nature of *American Beauty Homes,* it is neither a new, nor should it be a surprising, concept that we must first determine the function being performed by an administrative agency before applying a standard of review. In *Bourbon County Bd. of Adjustment v. Currans,* 873 S.W.2d 836 (Ky.App.1994), we indicated that what might be arbitrary action in one context might not be so in another, even within the same agency. This is because Kentucky's various administrative bodies "perform a mixed bag of legislative, executive, and judicial functions[,]" *id.* at 838, and for that reason

> it is most helpful to determine the function performed by the body in order to determine the appropriate standard of review; that is to say, one should look not only at the nature of the body, [footnote omitted] but more particularly to the act performed by it. Was it a legislative, executive, or judicial act? Ultimately, it is the act or function performed and not the nature of the body which dictates the standard of review.

Id.

This first step in the review process is not merely perfunctory. At least three substantive characteristics distinguish a review of an agency's adjudicative acts from a review of its non-adjudicative acts. Each significantly impacts the standard of review.

Distinguishing Review of an Agency's Non–Adjudicative or Legislative Acts from Review of an Agency's Adjudicative Acts

The first distinguishing characteristic is the focus of appellate inquiry. Review of an agency's *non-adjudicative* or *legislative* acts is "concerned primarily with the *product* and not with the motive or method which produced it." *National–Southwire Aluminum Co. v. Big Rivers Elec. Corp.,* 785 S.W.2d 503, 515 (Ky.App.1990)(emphasis

supplied), *quoted with approval in Hilltop Basic Resources, Inc. v. County of Boone,* 180 S.W.3d 464, 469 (Ky.2005). The "product" of such non-adjudicative acts is simply the agency's manifestation of its legislative prerogative in deciding "[g]eneral policy-based controversies [.]" *Hilltop* at 470; *see also City of Louisville v. McDonald,* 470 S.W.2d 173, 177–78 (Ky.1971)("when the local legislative body undertakes ... to enact a generally applicable zoning regulation, the facts to be considered *do not relate as such to a particular individual* [.]" Emphasis supplied.). Therefore, when an agency exercises its *legislative* authority, "[t]he 'right to an impartial tribunal' is nowhere to be found[,]" *Hilltop* at 469, and "the concept of what is 'arbitrary' is much more narrowly constricted[.]" *Trimble Fiscal Court v. Snyder,* 866 S.W.2d 124, 125 (Ky.App.1993). Admittedly then, our review of an agency's non-adjudicative or legislative act is oriented to the result of the act and not to the process.

***13** By contrast, when an agency enters a final order adjudicating an individual's rights, we most certainly do focus on "the motive and method which produced it." *National–Southwire, supra,* at 515. Our Supreme Court recently held that all of Kentucky's "adjudications, whether judicial *or administrative* " are protected by due process guarantees "whereby Kentucky citizens may be assured of fundamentally fair and unbiased *procedures.*" *Commonwealth Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc.,* 177 S.W.3d 718, 724 (Ky.2005)(emphasis supplied). Kentucky thus embraces the concept long ago enunciated by the United States Supreme Court that, in the exercise of its adjudicative authority, an administrative agency is not excused from adhering to the same basic principles of due process we expect of any court.

> The maintenance of proper standards on the part of administrative agencies in the performance of their quasijudicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, *they must accredit themselves by acting in accordance with the cherished* ***judicial tradition*** *embodying the basic concepts of fair play.*

Morgan v. U.S., 304 U.S. 1, 22, 58 S.Ct. 773, 778 (1938)(all emphasis supplied), *cited in Osborne v. Bullitt County Bd. of Ed.,* 415 S.W.2d 607, 611 (Ky.1967). And so, it is essential to distinguish an agency's non-adjudicative acts from its adjudicative acts so that we properly direct our *focus.* The focus of our review of an agency's adjudicative acts is on the *process.*

The second distinguishing characteristic is that, in its exercise of adjudicatory authority, an agency often functions in dual capacities—as an advocate and as the adjudicator. Expressed another way, the agency judges the merits of its own lawyer's case against the other party. This causes concern among many that the agency head cannot engage in the detached and independent adjudication which is expected in our understanding of due process.

A biased decision-maker is constitutionally unacceptable, and our system of justice "has always endeavored to prevent even the probability of unfairness." *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456 (1975) (citation and internal quotation marks omitted). In terms of probability, the odds for bias are greater when the adjudicator heads the agency appearing as a party before it than when that is not the case. *See, e.g., Morongo Band of Mission Indians v. State Water Resources Control Bd.,* 153 Cal.App.4th 202, 214, 62 Cal.Rptr.3d 492, 500 (2007)("Human nature being what it is, the temptation is simply too great for the ... Board members, consciously or unconsciously, to give greater weight to [the Board's attorney's] arguments by virtue of the fact she also acted as their legal advisor[.]").

***14** While Kentucky is among the jurisdictions holding that concepts of due process are flexible enough to countenance the dual roles, *Commonwealth, Cabinet for Human Resources, Dept. of Health Services v. Kanter,* 898 S.W.2d 508, 512–13 (Ky.App.1995), our highest court also long ago recognized that these dual roles do increase the risk of bias. The Court specifically cautioned that the dual nature of an agency's functions demands that reviewing courts guard against a deteriorating vigilance.

> The anomaly in procedure which permits ... an administrative body, to serve in the [mult]iple capacity of [party] and judge makes it vitally necessary that in reviewing administrative decisions courts zealously examine the record with the view to protecting the fundamental rights of the parties, lest the rule against arbitrariness and oppressiveness become a mere shibboleth. [Review] must not be permitted to degenerate into a mock ceremony. The least that the courts can do is to hold high the torch of "fair play" which the highest court of our land has made the guiding light of administrative justice.

Osborne v. Bullitt County Bd. of Ed., 415 S.W.2d 607, 611 (Ky.1967), *citing Morgan v. U.S.*, 304 U.S. 1, 22, 58 S.Ct. 773 (1938).

While we are vigilant, we are also mindful of "a presumption of honesty and integrity in those serving as adjudicators[,]" *Withrow* at 47, and so we reject the notion "that the combination of ... functions *necessarily* creates an unconstitutional risk of bias in administrative adjudication[.]" *Id.* at 46–47 (emphasis supplied), *cited in Board of Ed. of Pulaski County v. Burkett*, 525 S.W.2d 747, 747 (Ky.1975). We tolerate the increased risk of bias as a matter of policy and because *administrative* adjudication expedites resolution of certain controversies. "But neither wisdom of policy nor demands of expediency, nor both, should be allowed to lead the courts away from basic constitutional processes, or sound judicial construction of statutory authority" to which the agency is also bound. *Bloemer v. Turner*, 281 Ky. 832, 137 S.W.2d 387, 390 (1939). Thus, we have rightfully refused to abdicate our responsibility to remain "alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice." *Withrow* at 54; *see also LaGrange City Council v. Hall Bros. Co. of Oldham County, Inc.*, 3 S.W.3d 765, 770–71 (Ky.App.1999). Although, we must admit that there was a time when our judiciary appeared overwhelmed by the power of administrative agencies.

During World War II, after a "trend of ... two or three decades [that] raised serious and difficult questions of delegation of governmental power to administrative agencies[,]" our former Court of Appeals lamented that "[t]he assertion, 'Ours is a government of laws and not of men' became hackneyed in the early days of the Republic, and ... is no longer accepted by all as a truism[.]" *Goodpaster v. Foster*, 296 Ky. 614, 178 S.W.2d 29, 31 (1944). Three decades later, a Kentucky law school professor was still motivated to write:

> ***15** As any lawyer who has practiced before an administrative agency knows, however, ours has become, to a significant degree, "a government of men and not of laws." [footnote omitted] The "men" referred to are those nameless bureaucrats at every level of government whose discretionary domain now includes practically every aspect of American life.

Edward H. Ziegler, Jr., *Legitimizing the Administrative State: The Judicial Development of the Nondelegation Doctrine in Kentucky*, 4 N. KY. L.REV. 87, 90 (1977), *citing generally* C. Horsky, The Washington Lawyer (1952).

Fortunately, we have outgrown that pessimism. "Ours is a government of laws and not of men" remains our credo. We no longer defend this statement as a mere "assertion" embraced only by some as truth. It is the irrefutable foundation upon which our government is set. And we must not consider it otherwise, for "there is danger in a departure from th[is] fundamental doctrine [.]" *Id.* It "is not a fair-weather or timid assurance[,]" but represents "a profound attitude of fairness between man and man, and more particularly between the individual and government[.]" *Joint Anti–Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162, 71 S.Ct. 624, 643 (1951)(Frankfurter, J., concurring). And so, it is essential, when an agency adjudicates the merits of its own case, that we ensure every decision rests upon the firm foundation of the law, and not upon the conscious or unconscious bias of men and women.

The third characteristic distinguishing review of an agency's adjudicative acts from that of its non-adjudicative acts involves the comparative influence of specific constitutional considerations. *Hilltop* recognized that when a court reviews a decision by an administrative agency in its exercise of a *legislative* function, it must

> balance[ ] the need to ensure fair and nonarbitrary treatment ... with

> the equally compelling need to avoid undue infringement upon the legislative or nonjudicial aspects of the process or function of such bodies.

Hilltop at 469–70. In constitutional terms, the Court was balancing Kentucky Constitution § 2, prohibiting government exercise of arbitrary power, with Kentucky Constitution § 28, prohibiting the judiciary from exercising power belonging to the legislative branch. *See also Raney v. Stovall,* 361 S.W.2d 518, 522 (Ky.1962)("[W]hile the courts will jealously guard its [sic] powers and jurisdictions, they will be careful not to infringe upon the powers, prerogatives and jurisdictions of the legislative department." Quotation marks and citation omitted).

Fortunately, "[t]he concept of constitutional due process in administrative hearings is flexible." *Danville–Boyle County Planning and Zoning Com'n v. Prall,* 840 S.W.2d 205, 207 (Ky.1992). This flexibility leaves reviewing courts free to grant only "such procedural protections as the particular situation may demand." *Hilltop* at 568–69, *quoting Kentucky Cent. Life Ins. Co. v. Stephens,* 897 S.W.2d 583, 590 (Ky.1995). Due process flexibility, combined with principles of comity, allowed the Court in *Hilltop* to tip the scales against Ky. Const. § 2, and in favor of Ky. Const. § 28, resulting in the ruling that "[t]he 'right to an impartial tribunal' ..., as it is commonly conceived within the *judicial* context, cannot be guaranteed (nor need it be) in the administrative or *legislative* setting." *Hilltop* at 469 (emphasis supplied).

***16** We should not be surprised that the court in *Hilltop* weighed constitutional considerations in favor of Section 28 which, together with Section 27, embodies the "cardinal principle of our republican form of government and one that is among the most emphatically cherished and guarded principles in our Constitution." *Prater v. Com.,* 82 S.W.3d 898, 901 (Ky.2002) (citations and internal quotation marks omitted).

> Perhaps no state ... has a Constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does our Constitution, which history tells us came from the pen of the great ... Thomas Jefferson[.]

Sibert v. Garrett, 197 Ky. 17, 246 S.W. 455, 457 (1922).

In essence and summary, constitutional considerations require that judicial review of an exercise of legislative authority *delegated* by our General Assembly is substantially the same as our review of an exercise of legislative authority *retained* by our General Assembly. Conversely, appellate review of an agency's exercise of *adjudicative* authority is far less concerned—perhaps not concerned at all—with the "need to avoid undue infringement upon the legislative" branch. *Id.* at 469–70.

In fact, to the extent consideration of the separation of powers doctrine is implicated, the violator—if there is one—is the legislative branch. When the legislature enacts a law directing that a particular claim against the Commonwealth be adjudicated before a particular state agency, it does so under claim of authority found in Ky. Const. § 231. But that constitutional provision only allows the legislature to direct "in what *courts* suits may be brought against the Commonwealth." Ky. Const. § 231 (emphasis supplied); *see also* Ky. Const. § 14 (captioned, "Right of *judicial remedy* for injury ..."; emphasis supplied). It is only by the doctrine of comity that the judicial branch accepts and even embraces such legislation.[18] Consequently, a court reviewing an agency's exercise of adjudicatory authority need not be concerned that it will run afoul of the separation of powers doctrine. *See City of Greenup v. Public Service Com'n,* 182 S.W.3d 535, 539 (Ky.App.2005)("[I]t is a judicial function finally to decide the limits of the statutory power of an administrative agency.").

Therefore, our review of administrative adjudications properly involves only one side of the scales balanced in *Hilltop;* that is, the side holding Ky. Const. § 2 and "the need to ensure fair and nonarbitrary treatment" of the parties. *Hilltop* at 469.

Hilltop, by the clarity with which it defined the parameters of due process in a legislative context, has returned *American Beauty Homes* to *its* proper context. Both cases review "zoning determinations [which] are purely the responsibility and function of the legislative branch of government [.]" *Hilltop,* 180 S.W.3d at 467. *Hilltop* makes it entirely clear that the process due a party affected by

an agency's exercise of an administrative [19] or legislative function is very different from the process she is due when the agency is performing a judicial function. *Id., passim,* at 468–70. Therefore, while *Hilltop* and *American Beauty Homes* are perfectly appropriate as measures of the standard for reviewing zoning determinations, neither case is the best guide to appellate review of an agency's exercise of a judicial function. For that, we have sufficient case law, but equally important with regard to the case before us, we have KRS Chapter 13B.

Review of Administrative Adjudications under KRS Chapter 13B

***17** The concern for fundamentally fair and impartial administrative adjudications was addressed by our legislature just more than a decade ago. The Albert Jones Act of 1994 (codified as KRS Chapter 13B and effective in 1996) created comprehensive and uniform procedural safeguards for "any type of formal adjudicatory proceeding conducted by an agency as required or permitted by statute or regulation to adjudicate the legal rights, duties, privileges, or immunities of a named person." KRS 13B.010(2); *see also* KRS 13B.020(1)("This chapter creates only procedural rights[.]"). The Act is not applicable to all state agencies, but provides for a fair number of exemptions including the conduct of legislative proceedings of the type addressed in *American Beauty Homes* and *Hilltop.* KRS 13B.020(2)(f). None of the exemptions are applicable to this case. Therefore, this statutory standard of review applies.

The Act codified much of Kentucky administrative common law. While our state agencies and even our courts have often foregone citation to the Act and opted instead for reference to case law, and particularly to *American Beauty Homes,* it is most proper to apply KRS 13B.150.

> 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:
>
> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of the statutory authority of the agency;
>
> (c) Without support of substantial evidence on the whole record;
>
> (d) Arbitrary, capricious, or characterized by abuse of discretion;
>
> (e) Based on an ex parte communication which substantially prejudiced the rights of any party and likely affected the outcome of the hearing;
>
> (f) Prejudiced by a failure of the person conducting a proceeding to be disqualified pursuant to KRS 13B.040(2); or
>
> (g) Deficient as otherwise provided by law.

KRS 13B.150(2).

Applying the proper standard of review requires our reflection on this statute, and the judicial interpretations of Chapter 13B, along with the administrative common law that preceded it. We now apply that standard to Baker's arguments.

LACK OF SUBSTANTIAL EVIDENTIARY SUPPORT

Baker first argues that the Board "made factual determinations contrary to the trier of fact" that are not supported by substantial evidence. As noted, there is only one factual issue that the Board resolved in a manner contradictory to the hearing officer. That fact is whether Baker gave notice to the Systems of his expectation that the Systems would comply with KRS 61.702(3)(1995) and coordinate the cross-referencing allocations of his state contributions that he requested. The hearing officer found as fact that he did. The Board found that he did not. We believe the Board's finding to that effect is not supported by substantial evidence.

The Significance of Baker's Notice to the Systems

***18** As is evident from an exchange at the beginning of the hearing, both the Systems and Baker believed this fact to be crucial to their respective cases. Baker's counsel began the hearing by explaining to the hearing officer that, during the discovery phase, he requested that the Systems produce a copy of the "Employee Enrollment

Application" it received from KTRS Payroll Officer Martin. The Systems responded by producing a copy that strangely did not contain Martin's figures in the margin. At the hearing, Baker's counsel requested that the System's counsel produce the original from which that copy was made.

> Hearing Officer: Are you saying that is pertinent to this issue?
>
> Baker's Counsel: Yes, sir.
>
> Hearing Officer: Do you have something that has the original markings on it?
>
> Baker's Counsel: Yes, sir.
>
> Hearing Officer: Okay.
>
> Systems' Counsel: Well, the issue is that that is what we received from [KTRS] with illegible scratchings in the lower right hand corner. That is the notice we received that they were going to take some different action on Mr. Baker's cross-referencing.

The Systems claims Baker's failure to notify it of the manner in which he desired to coordinate his benefits is a complete defense to any alleged right Baker may have to the Systems' payment of the full contribution rate. By his prior course of dealing, claims the Systems, Baker waived the right to an allocation of the state contribution different from that to which he previously acquiesced. To the extent this defense is valid, it is necessary that we determine Baker's prior cross-referencing practices, and then determine whether substantial evidence supports the Board's finding that Baker did not give notice to the Systems.

Baker's Course of Dealing Prior to 1996

We begin by identifying an irrefutable fact of this case: Baker is the beneficiary of an inviolable right to have the Systems insurance fund pay his insurance premium in full. KRS 61.692; KRS 61.701(2); KRS 61.702(3)(1995); *see also, Jones v. Board of Trustees of Kentucky Retirement Systems,* 910 S.W.2d 710, 712 (Ky.1995). From 1991 to 1996, the Systems disregarded this mandate and paid only the balance remaining after Baker's employer, KTRS, paid its full state contribution rate toward the premium. Baker never raised an objection to the System's failure to obey this statute since his goal of combining his contributions to pay his entire premium was being met. For years prior to 1996, he effectively waived the right to compel the Systems to pay his premium in full. At least that is one of the Systems' arguments, and we have no reason to question it.

However, when the state adopted an FSA plan for its employees, Baker became eligible to divert a portion of the KTRS contribution to his FSA. The Systems' obligation to pay Baker's premium "in full" thereby became more significant to Baker. If the Systems complied with the statute and paid his premium in full [20], Baker could direct a portion of the KTRS contribution to his FSA.

***19** But Baker had established a certain "course of dealing"—to use the Systems' language—in previously failing to object to the Systems' payment of only part of the state contribution. To effectuate a change, so the argument goes, he needed to notify the Systems. The only notification Baker gave was the allocation figures written by Martin on the "Employee Enrollment Application" sent to the Systems. The hearing officer considered this document sufficient notice.

The Hearing Officer's Finding of Evidence Tampering

When the hearing officer examined the original application produced at Baker's counsel's urging during the hearing, the hearing officer himself introduced this version of the form into the record as Exhibit 22. The reason is obvious. It is irrefutable, and in fact the Board does not attempt to refute, that someone created this version of the form by cutting and taping together copies of a previous generation of the form, or forms, resulting in a copy on which Martin's figures could not be read. That spliced and taped, and partially unreadable, version of the form was then copied and produced to Baker's counsel during discovery.

The hearing officer made the following findings of fact regarding this document, based on his examination of the evidence and his observation of the witnesses, including their demeanor.

> 37. The hearing officer introduced into the record at the hearing the original copy of the Employee Form sent

by Martin to the Systems which was retained in the Systems' file for Baker. [Hearing Exhibit, "HE", 22]

38. Martin's hand-written figures regarding allocation of premium payments between KTRS and the System[s] (KERS) do not appear at the bottom margin of the copy in the Systems' files. However, the bottom section of Baker's form is taped on. This taped-on bottom section has barely discernible marks in the margin where Martin's hand-writing appeared.

39. Martin said she would never send a copy of Baker's Employee Form to the Systems in this condition. She said she had the ability to make a reduced copy of the legal size form, or to make a full-sized copy, and it would be too much trouble to cut and paste a form together. In fact, Martin brought with her to the hearing Baker's KTRS file which contained a full-sized photocopy of Baker's Employee Form. [Hearing Exhibit] 21. On this photocopy, Martin's figures in the margin are clearly legible.

40. The hearing officer finds that the photocopy of Baker's Employee Form in the Systems' files (HE 22) which was received December 18, 1995, *was altered by someone within the Systems to remove any indication of the payment allocation figures hand-written by Martin.*

Recommended Order, Record (R.) 394–95 (footnotes and citations to the record omitted; emphasis supplied).

In the process of finding as fact that this document "was altered by someone within the Systems," the hearing officer was required to assess the credibility of two witnesses whose testimony directly contradicted one another. One was Martin, whose testimony the hearing officer summarized and we have set forth, *supra.*

***20** The other was the Systems' employee, Lela Hatter. Hatter was allowed to testify first, out of traditional order, because she was not feeling well at the time of the hearing and wanted to go home as soon as she could. Observation of her videotape testimony shows that, in contrast to Martin's relaxed testimony, Hatter appears nervous, uncomfortable and uncertain, particularly when testifying about how she received the form, changing her testimony, then changing it back again. [21]

Hatter testified that she never received any communication from Martin regarding Baker's cross-referencing and that she received the "Employee Enrollment Application" in the spliced and taped and partially unreadable condition in which it was presented at the hearing.

The hearing officer obviously believed that someone at the Systems, if not Hatter, did receive the form in the fully readable condition in which Martin testified she sent it. Relying in part upon the witnesses' demeanors, he found as fact that "the Systems received a copy of Baker's Employee Form with figures showing Baker intended the Systems to pay first." He then concluded as a matter of law that "[t]his is sufficient notice from KTRS, even if not intended as such by Martin, that Baker and KTRS intended the Systems to pay first."

The Board's Finding that Baker Failed to Give the Systems Notice

If the Board had adopted the hearing officer's finding that Baker gave notice to the Systems, it would have been acknowledging that someone under its authority had tampered with the evidence. [22] Notably, the Board did not contradict the hearing officer's finding of evidence tampering itself and, in fact, ignored it. The Board simply stated that Hatter had received Exhibit 22, the tampered document, "with the cut and attached bottom" just as it was presented at the hearing. Then the Board criticized Martin's conduct.

> Martin's conduct was contrary to established Personnel Cabinet cross-reference procedures and contrary to her on [sic] prior course of dealing in the administration of payment of Baker's health insurance premiums.... Ms. Martin had a duty to place Baker on notice that the action he proposed was contrary to cross-reference procedures. Ms. Martin never gave notice to [the Systems] that she was deviating from established cross-reference procedures, nor that she was altering her course of dealing with [the Systems].
>
> (R. 456–57). The Board then concluded that "Baker never gave notice to [the Systems] that he was changing his course of dealing." (R.491).

The Board did not explain why it found Hatter's testimony more credible than Martin's, nor did it give any other

reason for rejecting the hearing officer's conclusions on this issue. The Systems apparently believes no explanation is necessary, simply urging this Court to find that the substantial evidence standard is satisfied because the Board Order and Hatter's testimony are consistent on this point.

***21** If we were to simply review the final order and, upon finding some measure of evidentiary support in the record, affirm on the basis of substantial evidence, we would be failing in our duty. Such a sciolistic approach would suffice only if the rule were that where there is *any* evidence to support a finding, that finding cannot be challenged. This is not the rule and we will not make it so. *Com., Revenue Cabinet v. South Hopkins Coal Co.,* 734 S.W.2d 476, 479 (Ky.App.1987)(" 'Substantial evidence' is not simply some evidence or even a great deal of evidence[.]"); *see also Young v. L.A. Davidson, Inc.,* 463 S.W.2d 924, 926 (Ky.1971)("[M]isuse of the fact-finding power by the board arrogates to that administrative body a policy-making function which it should not have[.]").

Appellate Review of Agency Head's Rejection of Hearing Officer's Recommendation

For his part, Baker urges adoption of a more sophisticated rule of review that he believes applies when the agency head deviates from the recommendation of the hearing officer. *Citizens Bank of Marshfield, Missouri v. FDIC,* 718 F.2d 1440, 1444 (8th Cir.1983)("a slightly different rule applies when the administrative agency *rejects* the findings" of the hearing officer; emphasis supplied); *see also, Brock v. L.E. Myers Co.,* 818 F.2d 1270, 1277 (6th Cir.1987)(administrative agency must explain grounds for rejection of hearing officer's recommendation).

Baker advances the argument that the Board cannot reject a hearing officer's recommendation, including his fact-finding, without first articulating non-arbitrary reasons for doing so. We find merit in this argument.

We believe our statutes and case law require us to recognize that an agency head's failure to articulate its rationale for rejecting the hearing officer's recommendation is a factor in our review. *See, e.g., Kentucky Bd. of Nursing v. Ward,* 890 S.W.2d 641, 643 (Ky.App.1994)("In determining whether the evidence is substantial, the court must take into account whatever in the record fairly detracts from its weight." Internal quotation marks omitted).

Section (1) of KRS 13B.120 requires the Board to "consider the record *including the recommended order* [.]" (Emphasis supplied). Consistent with the chapter, the Board has even adopted a regulation requiring that any "final order of the board shall be based on substantial evidence appearing in *the record as a whole* [.]" 105 KAR 1:215 Section 8. Consequently, the Board is not free to review only the evidence presented and reach its own independent result, utterly disregarding the reasoning, observations and opinions of the hearing officer.

When an agency head adopts the hearing officer's recommendation, it is self-evident that the recommendation received appropriate consideration.

However, when an agency head rejects the hearing officer's recommendation, there is no way for a reviewing court to know whether due consideration was given to reasons and factors supporting that rejection. We believe it is necessary for the agency head to add to the record by articulating non-arbitrary reasons for such rejection. This specific directive is implicit in the language of KRS 13B.120(3), as interpreted by our Supreme Court.

***22** If the Board exercises its lawful prerogative of rejecting the hearing officer's findings of fact, KRS 13B.120(3) explicitly requires the agency head to "include separate statements of findings of fact and conclusions of law." Our Supreme Court interpreted this to mean more than simply identifying what testimony the Board believes conflicted with the hearing officer's fact-finding.

In *Herndon v. Herndon,* 139 S.W.3d 822 (Ky.2004) a unanimous court "took pains to point out that '[i]f the agency head deviates from the recommended order, it must make separate findings of fact and conclusions of law *for any deviation* from the recommended order.' " *Id.* at 825 (emphasis supplied), *quoting Rapier v. Philpot,* 130 S.W.3d 560, 563 (Ky.2004), *citing* KRS 13B.120(3).

Lest the "pains"-taking of our Supreme Court be misinterpreted as a mere repetition of the statutory requirements, the court emphasized a "difference between KRS 13B cases and cases governed by the civil rules." *Id.* That difference is "the breadth of discretion possessed respectively by the agency head [acting on

the recommendation of a hearing officer under KRS 13B.030] or the trial judge [acting on the recommendation of a commissioner under CR 53.06]." *Id.* The Supreme Court indicated there are strictures on an agency head's discretion where, "[*b*]*y contrast,* a trial judge acting on a Commissioner's report pursuant to CR 53.06 has *the broadest possible discretion* with respect to the action that may be taken." *Id.* (emphasis supplied).

The contrasting degree of discretion is not readily revealed by simply comparing the respective rules and statutes. Both CR 53.06 and KRS 13B.120(2) give the respective final decision-maker the power to accept, reject or remand the recommendation. Both CR 52.01 and KRS 13B.120(3) say that the final decision-maker must render written findings of fact and conclusions of law. Yet *Herndon* unmistakably intended to identify a degree of deference owed by an agency head to the hearing officer that does not exist between a trial judge and a commissioner. Such a rule of deference has been adopted in other jurisdictions, primarily to recognize the superior ability of the hearing officer to determine demeanor-based facts. *See, e.g., McEwen v. Tennessee Dept. of Safety,* 173 S.W.3d 815, 824 (Tenn.Ct.App.2005); *Brock v. L.E. Myers Co., High Voltage Div.,* 818 F.2d 1270, 1277 (6th Cir.1987); *see also, Community Clinic, Inc. v. Department of Health and Mental Hygiene,* 922 A.2d 607, 619 (Md.App.2007).

We believe the basis for the deference alluded to in *Herndon* is the agency head's lack of *adjudicatory* experience and expertise relative to that of the hearing officer. A further comparison of the two systems is illustrative.

When we undertake appellate review of a circuit judge's decision that has been aided by a commissioner's report, we appropriately presume that the adjudicatory experience and expertise of the circuit judge is at least equal to that of the commissioner. On the other hand, when we examine the statutes and regulations governing the conduct of administrative hearings, we are struck by the fact that it is the hearing officer, and not the agency head, who is possessed of superior adjudicatory experience and expertise.

***23** While "[c]ourts often advert to the expertness, special competence, specialized knowledge, or experience of the administrative agency" when engaged in a legislative function, *Graybeal v. McNevin,* 439 S.W.2d 323, 326 (Ky.1969) (citation omitted), it is the hearing officer and not the agency head who is the expert in the kind of fact-finding necessary to an agency adjudication. Hearing officers develop this expertise through training and experience that is rarely, if ever, possessed by agency board members. In fact, the legislature specifically exempts board members from the requirement of obtaining any education in adjudicating controversies that come before them. KRS 13B.030(3).

On the other hand, since 1994 the legislature has required that Kentucky's Office of the Attorney General, Division of Administrative Hearings, be responsible for hearing officer training and for "maintaining a pool of hearing officers for assignment to the individual agencies at their request, for the conduct of administrative hearings." KRS 15.111(2)(a), (c). Legislatively mandated training includes both initial training (a minimum of 18 classroom hours) and continuing education (a minimum of 6 classroom hours annually) in a variety of disciplines focusing on administrative law and procedure. KRS 13B.030(3), (4); 40 Kentucky Administrative Regulations (KAR) 5:010. Training includes everything from the substantive statutory law of specific agencies to enhancing the hearing officer's ability to determine witness credibility. On the latter topic alone, courses cover "judging demeanor and forthrightness of witnesses, appearance and body language; [s]exual, racial and cultural bias, and prejudice; and [j]udging common sense of answers, consistency, context and flow." 40 KAR 5:010 Section 3(1)(c).

No doubt the legislature's intent in requiring this level of qualification was to better serve the agency head and the public, but ultimately it was to best serve justice. Without question, it is the hearing officer who provides the agency head with the adjudicatory experience and expertise it would otherwise lack. This is undoubtedly the reason more than sixty (60) government agencies and boards [23] "delegate the fact-finding role to a hearing officer [.]" *Herndon v. Herndon,* 139 S.W.3d 822, 826 (Ky.2004).

We do not intend to suggest that this Board, or any agency head, is prohibited from rejecting a hearing officer's recommendation, including his fact-finding. Upon due consideration of the entire record, an agency head enjoys the prerogative of making factual findings independent of, and even contrary to, those of the hearing officer. KRS 13B.120(2). Despite the politicization of the appointment process, the individuals comprising the various agency

heads are appointed to serve ostensibly because of their particular personal expertise in the field regulated by the agency. The agency head certainly may, and should when appropriate, draw upon that expertise to articulate legitimate bases upon which to reject a hearing officer's recommendation.[24] We simply deem it appropriate and necessary to require the agency head to offer an explanation when it does so.

***24** However, "on matters which the [hearing officer], having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 494 (1951). Where the agency overcomes that reluctance and "rejects the fact-finding of a [hearing officer], on appellate review, courts are entitled to expect, at a minimum, that the agency will provide a rational exposition of how other facts or circumstances justify its course of action." 2 Am.Jur.2d *Administrative Law* § 365.

Upon appellate review, we are required to look at "the whole record," KRS 13B.150(2)(c); *see also* KRS 13B.130(1)-(10). For purposes of our review under Chapter 13B, the hearing officer's recommendation (including his findings of fact) is as much a part of the record as the evidence put before the hearing officer, and we must consider his views in deciding whether the Board Order is supported by substantial evidence. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 493 (1951)("[A]n examiner's [hearing officer's] report is as much a part of the record as the complaint or the testimony."). Similarly, the agency head's rationale for rejecting the hearing officer's recommendation, if one is given, is also part of that whole record we must consider. If no non-arbitrary rationale is given, that too is a factor we must consider.

Expecting the agency head to articulate its rationale for departing from the recommendation does not erode the substantial evidence rule of review. Because we are already required to give due regard to the hearing officer's recommendation, KRS 13B.150(2)(c); KRS 13B.130(7), the agency head's explanation for any departure from it, if not arbitrary, will only serve to strengthen the validity of the final order. To give both the recommendation and the rationale for its rejection "this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is 'substantial.' " *Universal Camera, supra,* at 496–97.

The need for the agency head to articulate its rationale for rejecting demeanor-based findings, such as the one we address here, is especially keen. Other courts have called "the problem of ignoring the 'credibility' findings of the initial hearing officer[,]" *Scarborough v. Cherokee Enterprises,* 816 S.W.2d 876, 877 (Ark.1991), "a special problem of administrative review." *Slusher v. NLRB,* 432 F.3d 715, 727 (7th Cir.2005).

We have concluded that when an agency head rejects any finding or recommendation of a hearing officer pursuant to KRS 13B.120(2), and fails to make its non-arbitrary rationale for such rejection a part of the final order, as in the case *sub judice,* it risks a determination both that the final order is not supported by substantial evidence and that it is arbitrary.

The Board's Finding that Baker Failed to Give Appropriate Notice to the Systems is Not Supported by Substantial Evidence

***25** We have previously said that "[i]n determining whether the evidence is substantial, the court must take into account whatever in the record fairly detracts from its weight." *Kentucky Bd. of Nursing v. Ward,* 890 S.W.2d 641, 643 (Ky.App.1994)(internal quotation marks omitted), *quoting Willbanks v. Secretary of Health & Human Services,* 847 F.2d 301 (6th Cir.1988), *quoting Universal Camera* at 488. In this case, there are at least three factors that detract from the substantiality of the evidence upon which the Board relies in finding that the Systems never received Baker's notification.

First, unlike the hearing officer, the Board was not in a position to observe the demeanor of the witnesses and assess their credibility. Of course, this is always the case when an agency head delegates its fact-finding duty. Consequently, we would expect this to be a factor only in cases in which a demeanor-based finding plays an important role, such as the one before us. As the United States Supreme Court put it, "evidence supporting a conclusion may be less substantial when an impartial, experienced examiner [in our case, the hearing officer,] who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." *Universal Camera* at 469.

The prevailing view on an agency head's deference to demeanor-based factfinding by a hearing officer has been articulated often and variously, but in general conformity with *Ward v. N.L.R.B.,* 462 F.2d 8 (5th Cir.1972).

> The preeminence of the [hearing officer's] conclusions regarding testimonial probity does not amount to an inflexible rule that either the Board or a reviewing court must invariably defer to his decision, thereby effectively nullifying either administrative or judicial review. But when the Board second-guesses the [hearing officer] and gives credence to testimony which he has found—either expressly or by implication—to be inherently untrustworthy, the substantiality of that evidence is tenuous at best.

Ward at 12, *citing N.L.R.B. v. Walton Mnfg. Co.,* 369 U.S. 404, 408, 82 S.Ct. 853, 855, 7 L.Ed.2d 829, 832 (1962); *see also Brock v. L.E. Myers Co., High Voltage Div.,* 818 F.2d 1270, 1277 (6th Cir.1987); *McEwen v. Tennessee Dept. of Safety,* 173 S.W.3d 815, 824 (Tenn.Ct.App.2005)(Where "credibility plays a pivotal role, then the hearing officer's ... credibility determinations are entitled to substantial deference."); *Department of Health and Mental Hygiene v. Shrieves,* 641 A.2d 899, 908–09 (Md.App.1994)(Hearing officer's "findings based on the demeanor of witnesses are entitled to substantial deference and can be rejected by the agency only if it gives strong reasons for doing so[.]"); *Ritland v. Arizona State Bd. Of Medical Examiners,* 140 P.3d 970, 974 (Ariz.App.2006)("Board's decision must reflect its factual support for rejecting [hearing officer's] credibility findings."). This is an appropriate and necessary consideration when any agency head decides to reject findings of fact of the same hearing officer to whom the agency head entrusted its delegation of responsibility for determining facts.

***26** While the first factor focuses on the witnesses' believability, the second focuses on the witnesses' relationship to the Board. To reach the finding of fact at issue in this case—that Baker never sent the Systems proper notice—the Board had to totally discount the apparently disinterested testimony of Martin that the form she sent on Baker's behalf to the Systems was not the tampered document produced during discovery and at the hearing. Further, the Board had to reject the notion that anyone at the agency it headed, and specifically Ms. Hatter, tampered with the document. It had to vest in the testimony of its own agency's employee the entire weight of the issue. In the absence of the Board's rationale for doing so, such obvious cherry-picking of the evidence, contrary to the disinterested finding of the hearing officer, based on the testimony of a disinterested witness, has the strong appearance of arbitrariness. Such an appearance is brought into sharper resolution by the fact that the Board's substituted finding on this point was a literal parroting of this witness's employer's brief.

The third factor has to do with motivation. The Board's finding that it never received notice requires acceptance of the inference that a person other than "someone within the Systems" had a reason to tamper with Baker's form. Martin had no reason to tamper with the form. To do so would have served neither her nor her employer any purpose. In fact, sending a form illegible in any way would have been contrary to her purpose, possibly necessitating that she repeat her effort. We can conceive of no other motivation for any person or entity to tamper with the form than that provided by the hearing officer. More importantly, the Board offers no alternative explanation, rational or otherwise.

We have fully considered the record as a whole and conclude that the Board's finding that Baker did not give notice to the Systems of his allocation of state contributions, to which he was lawfully entitled, is not supported by substantial evidence and is arbitrary.

Nevertheless, Baker's notice to the Systems of his desired coordination of benefits is irrelevant if the Systems' policy is sustainable under KRS Chapter 13A as a matter of law. Before addressing that issue, however, we must turn to Baker's second argument and determine whether the Board's adoption of the System's Brief as its final order was proper under KRS Chapter 13B.

ADOPTION OF THE SYSTEMS' BRIEF AS THE BOARD ORDER

Baker's second argument opens upon an erroneous premise. He claims that Chapter 13B includes "an

administrative hearing procedure that removes total control of in house decision making by a state agency and vests that responsibility in an independent professionally managed quasi judicial authority[.]" While this statement is more accurate with regard to some administrative adjudications than others, Chapter 13B most certainly is not designed to do this. *See, e.g.,* KRS 13B.030(1)("An agency head may not ... delegate the power to issue a final order[.]").

***27** We have noted in the past, with varying degrees of emphasis, as well as in this opinion, that administrative adjudications vary widely in their process. That variety was specifically addressed with regard to the subject of Baker's second argument—an agency head's duty of independent fact-finding—in *Burch v. Taylor Drug Store, Inc.,* 965 S.W.2d 830 (Ky.App.1998).

> [I]n many administrative agencies, there is a single finder of fact who hears and weighs evidence, makes factual findings and applies the facts to the law.... For example, workers' compensation procedure (at least prior to 1996) functions much in the same manner as the courts.... [A]n Administrative Law Judge (ALJ) conducts a hearing, makes findings of fact, conclusions of law and determines the amount of the award, if any. On appeal, the Workers' Compensation Board sits as a true appellate body. *The Board cannot* consider additional evidence, or *second-guess the findings made by the ALJ* ....
>
> However, the approach to fact-finding in unemployment insurance cases is substantially different.... The referee conducts a hearing, receiving testimony from witnesses and reviewing documentary evidence. The referee then issues findings of fact, conclusions of law and final order[. A]n aggrieved party may appeal to the full Commission.
>
> [A]ll appeals to the Commission may be heard upon ... the evidence and exhibits introduced before the referee. Thus, while *the Commission* generally does not hear evidence directly from witnesses, it *has the authority to enter independent findings of fact.* Necessarily, such authority allows the Commission to judge the weight of the evidence and the credibility of witnesses and to disagree with the conclusion reached by the referee.

Burch at 833–34 (emphasis supplied; internal quotation marks and citations omitted). While both workers' compensation and unemployment compensation claims are exempted from Chapter 13B, KRS 13B.020(3)(e) 1.a., (3)(i) 1.a., the fact-finding determination under that chapter very closely reflects the method prescribed for unemployment claims. KRS 13B.120(2), (3) ("agency head may accept ... or it may reject or modify ... the recommended order [and] include separate statements of findings of fact and conclusions of law.").

Baker nevertheless correctly makes the point that KRS 13B.120 places the duty squarely on the agency head to prepare a final order. *See also* KRS 13B.030(1). He argues that the Board breached this duty because "the Board's counsel became the decision maker" when the "Board of Trustees essentially adopted the [Systems'] Post–Hearing Brief as its Report and Order." (Appellants Brief, pp. 14, 16).

We cannot imagine a more complete appropriation of the intellectual work product of another than occurred here when the Board adopted the Systems' brief as its final order. But for the fact that the Systems obviously agreed to have the Board appropriate its work, this case would represent the essence of plagiarism. But does it constitute reversible error? Ultimately, we think not.

***28** The question fairly stated is, "To what extent may an agency head incorporate the work of others, and more particularly, the work of the parties before it, as its final order in a Chapter 13B adjudication?"

Undoubtedly, claimants whose personal rights are being adjudicated by a state agency are entitled to a decision that is the product of independent, deliberative consideration by the members of the agency head. Yet even before adoption of Chapter 13B, we "held that agency decisions may be based on the work of hearing officers." *Robinson v. Kentucky Health Facilities,* 600 S.W.2d 491, 492 (Ky.App.1980). Clearly, the entire concept of utilizing hearing officers under KRS 13B.030(1) anticipates that the agency head conducting independent deliberations and fact-finding will rely on, and routinely appropriate, the work product of another, namely the hearing officer.

Does it make a difference when the work being appropriated was offered by a party to the administrative proceeding? While this aspect of the question is one of first impression in Kentucky, we believe that an agency head's fact-finding under Chapter 13B is sufficiently comparable

to the fact-finding of a trial court under CR 52.01 to justify application of the principles developed in the latter context.

An early consideration of the question in a judicial context is found in *Callahan v. Callahan,* 579 S.W.2d 385 (Ky.App.1979), where we once claimed "[t]he appellate courts of this state have universally condemned the practice of adopting findings of fact prepared by [a party's] counsel ... because of the problems such findings present upon appellate review." *Id.* at 387. However, a few years later, the Supreme Court corrected us.

> We do not condemn this practice (of permitting attorneys to draft findings of fact and conclusions of law) in instances where the court is utilizing the services of the attorney only in order to complete the physical task of drafting the record. However, ... [*o*]*ur concern ... is that the trial court does not abdicate its fact-finding and decision-making responsibility* [.]

Bingham v. Bingham, 628 S.W.2d 628, 629 (Ky.1982)(emphasis supplied); *see also Mansfield v. Voedisch,* 672 S.W.2d 678, 681 (Ky.App.1984). In *Bingham,* the Supreme Court engaged in a "[c]areful scrutiny of the record" and determined that "the court was thoroughly familiar with the proceedings and facts[,] prudently examined the proposed findings and conclusions and made several additions and corrections *to reflect his decision* in the case." *Id.* (emphasis supplied). Consequently, the Supreme Court determined the trial court had not abdicated its role in the case before it.

But *Bingham* did seem to establish a bright line rule for distinguishing between the trial court's impermissible abdication of its fact-finding responsibility and its permissible adoption of persuasive language. Distinguishing *U.S. v. Forness,* 125 F.2d 928 (2nd Cir.1942) from the case before it, the Supreme Court in *Bingham* pointed to the fact that in *Forness* there was a "verbatim or mechanical adoption of proposed findings of fact[.]" *Bingham* at 629. The *Forness* court thus concluded that the trial court did abdicate such responsibility. *See Forness* at 942 ("[W]e lose the benefit of the judge's own consideration [when] the findings proposed by the defendants [a]re mechanically adopted[.]").

***29** Emphasizing the importance of independent fact-finding, *Forness* itself addressed the analogous roles of a trial court and an administrator as fact-finder.

> We stress this matter because of the grave importance of fact-finding. The correct finding ... of the facts ... is fully as important as the application of the correct legal rules to the facts as found. An impeccably "right" legal rule applied to the "wrong" facts yields a decision which is as faulty as one which results from the application of the "wrong" legal rule to the "right" facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are "clearly erroneous". Chief Justice Hughes once remarked, "An unscrupulous administrator might be tempted to say 'Let me find the facts for the people of my country, and I care little who lays down the general principles.' " [citation omitted]. That comment should be extended to include facts found without due care as well as unscrupulous fact-finding; for such lack of due care is less likely to reveal itself than lack of scruples, which, we trust, seldom exists. And Chief Justice Hughes' comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer. The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards.

Forness at 942 (citations omitted). [25]

Very quickly taking our cue from *Bingham's* interpretation of *Forness,* this Court decided *Stafford v. Board of Educ. of Casey County,* 642 S.W.2d 596 (Ky.App.1982). In *Stafford,* the trial court had both parties prepare findings of fact "and then adopted verbatim the set of findings and conclusions which more closely reflected his thoughts[.]" We said,

> Such a practice is not proper, as the trial court should have either made an oral statement as to his findings and conclusions for the benefit of counsel in completing the physical task of drafting the finding of fact and conclusion of law or in some other manner *retained control of the decision making process.* (See, for

> example, *Bingham v. Bingham,* Ky., 628 S.W.2d 628 (1982)....

Stafford at 598 (emphasis supplied). In *Prater v. Cabinet for Human Resources, Com. of Ky.,* 954 S.W.2d 954 (Ky.1997), the Supreme Court again disabused us of an erroneous belief. This time it was our erroneous belief that *Bingham* had given us a bright line rule.

In *Prater,* the appellant counted on the existence of the ostensible bright line rule. He claimed "the trial court failed to make independent findings of fact[.]" *Prater* at 956. As proof he demonstrated that "the trial court adopted the Cabinet's proposed findings of fact without correction or change." *Id.* While the Supreme Court agreed the adoption was verbatim, it did not agree that this is proof of the trial judge's abdication of his fact-finding responsibility, specifically holding that it "is not error for the trial court to adopt findings of fact which were merely drafted by someone else." *Id.*

***30** Given our review of the case law, we believe Kentucky stands with the United States Supreme Court on this issue. Even where a party's work is "adopted verbatim[, t]hose findings, though not the product of the workings of the [trial] judge's mind, are formally his; they are not to be rejected out-of-hand[.]" *U.S. v. El Paso Natural Gas Co.,* 376 U.S. 651, 656, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964), *quoted in Brunson v. Brunson,* 569 S.W.2d 173, 175 (Ky.App.1978); *see Bingham* at 630 ("[I]n the absence of a showing that the trial judge clearly abused his discretion and delegated his decision-making responsibility[, his findings] are not to be easily rejected."). And so it is also with the fact-finding of an agency head.

Findings of fact "drawn with the insight of a disinterested mind *are,* however, more helpful to the appellate court." *Id.* (emphasis supplied). And, of course, it is just as much in the interest of the agency head, with the assistance of the hearing officer to whom it lawfully delegated fact-finding authority, KRS 13B.030(1), to draw its own findings of fact.

And yet, an agency head, in the lawful exercise of its own wisdom and discretion, remains free to jettison the hearing officer's recommendation, and the training and experience in fact-finding that goes with it. KRS 13B.120(2); KRS 13B.030(3), (4). The agency head is also free to replace that recommendation with language from a brief designed for an entirely different purpose, *see Bingham* at 630, and written by an advocate who likely lacks the specialized training required of the hearing officer. *See* 40 KAR 5:010 Section 3(1)(h)(Required hearing officer training in "Decision writing"); 40 KAR 5:010 Section 3(2)(g) ("Findings and evidence"); 40 KAR 5:010 Section 3(2)(h)1.("The recommended order and writing for judicial review"; "The nature, scope and function of findings and conclusions under KRS 13B.110"). Determining what or whose work to appropriate is a decision left to the agency head.

Unlike plagiarism though, where the main risk is being discovered, the greater gamble in appropriating the legal work of another is the potential for embracing inferior work and claiming it as one's own. Determining whether the work appropriated by an agency head is inferior as a matter of law is a decision left to the reviewing judiciary.

Having thus warned even ourselves about the risks of appropriating the work of others, we pass on the following bit of advice to trial judges and agency heads alike. We have offered this advice before, *Brunson, supra,* at 175 fn. 1, having borrowed the words, with attribution, from the United States Supreme Court in *United States v. El Paso Natural Gas Co., supra,* which credited the quote to Judge J. Skelly Wright of the Court of Appeals for the District of Columbia.

> [We] suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.

***31** *Brunson* at 175 fn. 1 (internal quotations and citations omitted).

In summary, we hold that the Board's adoption of substantial portions of the Systems' brief does not, in itself, establish that the agency head abdicated its fact-finding responsibility. Therefore, Baker's argument that

the Board committed reversible error by failing to make its own findings of fact in violation of KRS 13B.120(1) must fail.

THE ILLEGALITY OF THE SYSTEM'S CROSS–REFERENCING POLICY

Even though we found that Baker gave sufficient notice to the Systems, he will not prevail on appeal unless the Systems' cross-referencing policy is unenforceable. Baker's final argument is that this policy lacks underlying authority and violates various provisions of Chapter 13A. To properly address this argument and apply Chapter 13A, we must identify the circumstances about which there is no controversy.

Baker's rights as a retiree were established by the General Assembly in KRS 61.510, *et seq.* and are contractual and inviolable. KRS 61.692; *see also Jones v. Board of Trustees of Kentucky Retirement Systems,* 910 S.W.2d 710, 713 (Ky.1995). Those rights included the Systems' obligation to pay Baker's monthly health insurance premium for 1996 in full, not to exceed the monthly state contribution rate for that year of $175.50. *See* KRS 61.702(3)(1995). The legislature provided that such right shall "not be subject to reduction or impairment by alteration, amendment, or repeal." KRS 61.692.

Equally clear is the fact that the Systems' policy—a policy applicable to all retirees—reduced or impaired Baker's right by withholding $105.08 of its $175.50 monthly state contribution obligation. The Systems claims it was authorized to do so by: (1) an unwritten Personnel Cabinet policy dating back at least as far as 1981; (2) a written Systems policy issued December 29, 1995; and (3) the policy-making authority delegated by the legislature pursuant to KRS 61.645(9)(a), (b), and (g) to the Systems' General Manager, Pamala Johnson.

Because the proper role of an administrative agency is to regulate, the first question we must answer is whether the Systems' policy is an "administrative regulation," and, if it is not, does it qualify as a exception, as defined by KRS 13A.010(2). For the purpose of answering this question, we focus on the Systems' December 29, 1995, written policy.

The Systems' Policy is an Administrative Regulation

Whether administrative action constitutes a "regulation" does not depend on the label the agency attaches to it, such as policy or procedure, but whether it fits the definition of KRS 13A.010(2). KRS 13A.010(2) defines "administrative regulation" [26] expansively as

> ***each statement of general applicability*** promulgated by an administrative body ***that implements, interprets, or prescribes law or policy,*** or describes the organization, procedure, or practice requirements of any administrative body.

***32** KRS 13A.010(2). [27] An administrative regulation is effective only after it is "adopted." KRS 13A.010(3). *See GTE v. Revenue Cabinet, Com. of Ky.*, 889 S.W.2d 788, 792 (Ky.1994)(Agency actions not excepted from the definition of "administrative regulation" and not adopted "constitute a technical violation of KRS 13A.010(2)."). If an administrative regulation is not adopted, it does not have the effect of law. *Commonwealth, Bd. of Examiners of Psychology v. Funk,* 84 S.W.3d 92, 98 (Ky.App.2002)("An administrative agency may promulgate administrative regulations, and such regulations, *if 'duly adopted* and properly filed have the full effect of law.' "; emphasis supplied), *quoting United Sign, Ltd. v. Commonwealth,* 44 S.W.3d 794, 798 (Ky.App.2000).

The legislature, in its wisdom, understood that an administrative agency would be hamstrung if it could only act by promulgating *and adopting* an administrative regulation for every action it needed to take. [28] So that an agency could operate internally, the legislature carved out five specific categories of agency action and excepted them from the definition of administrative regulation. KRS 13A.010(2)(a)-(e). Such agency actions need not be adopted to be effective. Because the last two exceptions have no possible applicability to this case, we will describe only the first three. They are

"Statements concerning only the internal management of an administrative body and not affecting private rights or procedures available to the public" KRS 13A.010(2)(a)

"Intradepartmental memoranda not in conflict with KRS 13A.130" KRS 13A.010(2)(c)

"Declaratory rulings" KRS 13A.010(2)(b)

The Systems' policy does not fall within the first exception for two reasons: (1) it is *not* a "[s]tatement concerning only the internal management of [the] administrative body" and (2) it *did* "affect[ ] private rights" of Baker and all retirees similarly situated. KRS 13A.010(1)(a). A proper example of this category of exception would be a policy stating whether a Systems' employee could listen to music at his or her workstation.

We also conclude that the policy does not fall within the next exception listed: an "[i]ntradepartmental memoranda not in conflict with KRS 13A.130." KRS 13A.010(2)(c). We need go no further than to say that the Systems' policy was intended to apply to all persons who retired from employment with Kentucky state government. By definition, these persons were not "intradepartmental" personnel. Even if the policy applied only intradepartmentally, the policy does not satisfy the second part of the exception (not conflicting with KRS 13A.130(1)) because it modifies or limits a statute—KRS 61 .702(3)(1995), now KRS 61.702(3)(a) 5. A proper example of this category of exception would be the health benefits plan available intradepartmentally to all Systems employees.

The third listed exception, declaratory rulings, requires closer examination. However, we conclude that the Systems' policy was not a "[d]eclaratory ruling." KRS 13A.010(2)(b).[29]

***33** Declaratory rulings, *per se,* have been authorized by the legislature to only one Kentucky agency—the Board of Nursing. KRS 314.105. While Chapter 13A does not provide a definition for the term, the meaning ascribed to it by the legislature in KRS 314.105 is consistent with our understanding of how that term is to be interpreted in KRS 13A.010(2)(b). A "declaratory ruling" is an interpretation by an administrative agency of "the applicability to any person, property, or state of facts of a statute, administrative regulation, decision, order, or other written statement of law or policy within the jurisdiction of the board." KRS 314.105(1); *see also, Baltimore City Bd. of School Com'rs v. City Neighbors,* 929 A.2d 113, 136 (Md.2007)("[T]he declaratory ruling procedure was meant to enable persons concerned with a more narrowly focused issue to obtain binding advice about their particular situation.").

On the other hand, the legislature has authorized Kentucky agencies other than the Board of Nursing to render "advisory opinions" which we perceive to be synonymous with "declaratory rulings." *See, e.g.,* KRS 6.666(4)(Legislative Ethics Commission); KRS 11A.110 (Executive Branch Ethics Commission); KRS 121.120(1)(f)(Kentucky Registry of Election Finance); KRS 216B.040(3)(e)(Cabinet for Health and Family Services); KRS 224.20–515(1)(Small Business Stationary Source Compliance Advisory Panel of the Environmental and Public Protection Cabinet); KRS 311A.040 (Kentucky Board of Emergency Medical Services).

Despite the fact that the legislature has declined to specifically grant the Systems the authority to issue either declaratory rulings or advisory opinions, the Systems claims the policy was authorized by KRS 61.645(9). A description of that authority is appropriate.

A search of Kentucky statutes will not reveal a grant of agency authority more broadly worded than that contained in KRS 61.645(9)(g). The legislature empowered the Board to "*do all things, take all actions,* and promulgate all administrative regulations, *not inconsistent with* the provisions of KRS 61.515 to 61.705." KRS 61.645(9)(g)(emphasis supplied). A strict and literal interpretation of this statute would authorize the Systems to exercise every power that did not undermine its mission. That is different from granting it only so much authority as is necessary to carry out its mission. However, such a strict and literal interpretation would not promote the legislative purpose, and we do not believe the legislature's choice of the double-negative phrase, "not inconsistent with," was intended to grant more power than would have been granted if the more appropriate phrase, "consistent with," had been used. Therefore, for purposes of statutory interpretation, we ascribe the same, more restrictive, meaning to both of these phrases.

Yet the Systems also claims, and its Board held, that the legislature has granted broad policy-making authority to its general manager under KRS 61.645(9)(a) and (b).

> ***34** As chief administrative officer of the Board, Ms. [Pamala] Johnson is in a policy making position as authorized by statute and she is not

> prohibited from issuing an opinion or administrative decision on behalf of the Board.

(Board Order, Conclusions of Law ¶ 4). The specific provisions the Board relies upon state:

> The board of trustees shall appoint or contract for the services of an executive director [who] shall be the chief administrative officer of the board [who is] deemed to be in a policy-making position[.]

KRS 61.645(9)(a) and (b).

The Systems and its Board misunderstand the statute's primary purpose in designating Ms. Johnson's position a "policy-making" position. KRS 61.645(9)(a) and (b) do not constitute a blanket grant to Ms. Johnson of boundless authority to set policy. Designation of Ms. Johnson as a policymaker has more to do with her compensation and liability than with any grant of authority. *See* KRS 61.645(9)(b) and KRS 18A.175; *see, e.g., Cabinet for Families and Children v. Cummings,* 163 S.W.3d 425, 431, 435 (Ky.2005)("Legislature did not intend for policy makers and managers to be individually liable under the [Whistleblower] Act.... Commonwealth or its agencies are per se liable for the acts of a policy maker or manager in violation of the statute."); *compare Heggen v. Lee,* 284 F.3d 675, 683 (6th Cir.2002)(To some degree, even "a 'football coach' is a policymaker"; applying Kentucky law).

"[W]hether a particular official has 'final policymaking authority' is a question of state law[,]" *City of St. Louis v. Praprotnik,* 485 U.S. 112, 123, 108 S.Ct. 915, 924 (1988)(emphasis removed), *citing Pembaur v. City of Cincinnati,* 475 U.S. 469, 483, 106 S.Ct. 1292, 1300 (1986), and this Court is responsible for answering that question. We do not doubt that Ms. Johnson has certain authority. Her "office has all the indicia of a 'policy-making,' government position which vests its holder with discretionary power, considerable responsibility, confidence and supervisory authority." *Garrard County Fiscal Court v. Layton,* 840 S.W.2d 208, 210 (Ky.App.1992). What it does not do, is exempt the office or officeholder from the safeguards we have established to protect citizens such as Baker from the arbitrary exercise of that policy-making authority.

However broad Ms. Johnson's or the Board's power may appear, it is always subject to "Kentucky's strong stance against vague delegations" of power referred to as the "nondelegation doctrine." *Board of Trustees of Judicial Form Retirement System v. Attorney General of the Commonwealth of Kentucky,* 132 S.W.3d 770, 781–82, 784 (Ky.2003)(describing at length the "nondelegation doctrine" in Kentucky). This doctrine compels us to strictly limit an agency's authority to that clearly delegated and no more.

Our common law has long adhered to the doctrine that the powers of administrative agencies "are limited to those conferred expressly by statute or which exist by necessary and fair implication.... But these implications are never extended beyond fair and reasonable inferences." *Blue Boar Cafeteria Co. v. Hackett,* 312 Ky. 288, 227 S.W.2d 199, 201 (Ky.1950). "Powers not conferred are just as plainly prohibited as **those which are expressly forbidden [.]"** *Louisville and Jefferson County Planning Commission v. Schmidt,* 83 S.W.3d 449, 460 fn.14 (Ky.2001), *quoting Allen v. Hollingsworth,* 246 Ky. 812, 56 S.W.2d 530, 532 (1933). Because the legislature did not delegate to the Systems the authority to render declaratory rulings or advisory opinions, it is prohibited from doing so, either through the Board or pursuant to any authority presumed by Ms. Johnson as the Board's chief administrative officer.

***35** Furthermore, the Board has not treated the policy it promulgated as a declaratory ruling or advisory opinion. One important feature of either is that its validity is not to be challenged in a Chapter 13B hearing, but is immediately subject to judicial review. *See* KRS 314.105(5), *supra,* ("A declaratory ruling of the board may be appealed to the Circuit Court[.]"); *and* KRS § 311 A.040(5), *supra,* ("An advisory opinion of the board may be appealed to the Circuit Court[.]"). Inconsistent with immediate judicial review, the Systems required Baker to challenge the policy in a Chapter 13B hearing.

We therefore conclude that the Systems' policy was not a declaratory ruling as that term is used in KRS 13A.010(2)(b).

There is but one conclusion. The Systems' policy constituted an administrative regulation, never adopted, and therefore ineffective. *Vincent v. Conn,* 593 S.W.2d 99, 100, 101 (Ky.App.1979)("[P]olicy of the Bureau

for Social Insurance ... amounts to a regulation[, but] was not promulgated as required by KRS 13.085 [now KRS 13A.100], has no effect, KRS 13.085(1) [now KRS 13A.100(2)], and therefore cannot be used as an independent basis for denying benefits."). The question remains whether the policy, now determined to be an unadopted administrative regulation, is enforceable as law nonetheless.

Administrative Agency Action Subject to Safeguards Against Abuse

Kentucky embraces the concept that the legislature's delegation of power is valid only to the extent it does not run counter to established "safeguards against abuse and injustice." *Butler v. United Cerebral Palsy of Northern Ky., Inc.,* 352 S.W.2d 203, 208 (Ky.1961)(Adopting the "safeguards" approach and rejecting the "standards" approach as "mumbo-jumbo."); *see also, Kentucky Commission on Human Rights v. Barbour,* 587 S.W.2d 849, 850–51 (Ky.App.1979) (*Butler* "placed Kentucky in the forefront of states adopting the 'safeguards' test[.]"). Since *Butler,* our courts have applied the safeguards analysis after the fact to remedy abuses of agency authority.

In 1984, the legislature wisely enacted Chapter 13A to establish *preventive* safeguards[30]. Three statutes in that chapter are of particular relevance here. They are KRS 13A.100, KRS 13A.120 and KRS 13A.130. These statutes, indeed all of the statutes of KRS Chapter 13A, were designed to prevent administrative agencies from abusing their authority. Should any agency fail to abide by these preventive safeguards, it is the judiciary's role to remedy the failure.

KRS 13A.100, KRS 13A.120 and KRS 13A.130, read together and in the context of the definition of "administrative regulation" contained in KRS 13A.010(2), require the adoption of a regulation every time an agency desires to give legal effect to its issuance of any "statement of general applicability" or any "other form of action" that the agency intends to impact any group of individuals other than that agency's own personnel. Any agency's attempt to modify or vitiate, limit or expand, any statute or administrative regulation, or to expand or limit a right guaranteed by any regulation, statute, or the state or federal Constitution using an internal policy such as is before this Court, is void. KRS 13A.100;KRS 13A.120;KRS 13A.130.

The Systems' Policy is Void

***36** The Systems' policy on cross-referencing violates all three of these provisions and "is null, void, and unenforceable." KRS 13A.130(2). *Franklin v. Natural Resources and Environmental Protection Cabinet,* 799 S.W.2d 1, 3 (Ky.1990)(Agency action "modifies and vitiates the statute, rendering the regulation 'null, void and unenforceable' as set out in KRS 13A.120(2)."). Because the Systems failed to adopt this policy as a regulation, it is already suspect. *White v. Checkholders, Inc.,* 996 S.W.2d 496, 498 (Ky.1999)("Court limits the deference shown to informal agency interpretations that have been arrived at without rulemaking or an adversarial proceeding."). However, because it essentially creates new law and usurps the authority of the legislature by limiting KRS 61.702(3)(1995), it is entirely invalid. *Hagan v. Farris,* 807 S .W.2d 488, 490 (Ky.1991)("KRS 13A.130 prohibits an administrative body from modifying an administrative regulation by internal policy or another form of action."); *see also Linkous v. Darch,* 323 S.W.2d 850, 852 (Ky.1959)(Agency "may not by rule or regulation ... limit the terms of a legislative enactment."); *Revenue Cabinet v. Humana, Inc.,* 998 S.W.2d 494, 495–96 (Ky.App.1998)(KRS Chapter 13A "sets limits upon the discretionary interpretive powers of agencies by forbidding certain actions by internal policy or memorandum.").

Not giving up however, the Systems' asserts that the voiding of its policy does not affect the fact that Baker failed to satisfy his burden of proving "the propriety of his scheme for cross-referencing." We believe the language of KRS 61.702(3)(1995) sufficiently does exactly that by requiring the Systems to pay its state contribution "in full." If we doubted that Baker's interpretation was correct and the Systems' wrong, our review of the *legislative* history of "cross-referencing" put that doubt to rest.

Prior to 1998, no mention is made in statute or regulation to cross-referencing. But in that year, the legislature amended a portion of KRS 61.702 to implement the Systems' policy with regard to a retiree who cross-references with his spouse. The amended statute states that where there is:

> cross-referencing of insurance premiums, the employer's contribution for the working member or spouse shall be applied toward the premium, and the Kentucky Retirement Systems insurance fund shall pay the balance, not to exceed the monthly contribution

1998 Ky. Acts ch. 105 (H.B.234) § 20, *codified as* KRS 61.702(3)(a) 4.

In 2002, the legislature solved this problem of "benefits double-dipping" in a completely different way by adding the following language to KRS 18A.225:

> Any employee who is eligible for and elects to participate in the state health insurance program as a retiree, ... shall not be eligible to receive the state health insurance contribution toward health care coverage as a result of any other employment for which there is a public employer contribution.

***37** 2002 Kentucky Laws Ch. 352 (H.B.846) § 1, *codified as* KRS 18A.255(13), *and recodified as* KRS 18A.225(12). This eliminated the problem that the Systems' internal policy sought to address.

In 2004, Kentucky's legislature amended KRS 61.702 again. This time the legislation affected members of the retirement system whose participation began after July 1, 2003. Among other things, it deprives participants of the inviolable nature of the retirees' health insurance benefits.

> The benefits of this subsection provided to a member whose participation begins on or after July 1, 2003, shall not be considered as benefits protected by the inviolable contract provisions of KRS 61.692, 16.652, and 78.852. The General Assembly reserves the right to suspend or reduce the benefits conferred in this subsection if in its judgment the welfare of the Commonwealth so demands.

2004 Ky. Acts ch. 33 (H.B.290) § 5, *codified as* KRS 61.702(8)(d).

The Legislature's incorporation into law of the essence of the Systems' cross-referencing policy, subsequent to the relevant time-period, has no retroactive effect on Baker. KRS 446.080(3)("No statute shall be construed to be retroactive, unless expressly so declared."). It does, however, indicate that the Systems' policy was inconsistent with the law prior to 1998 for "whenever a statute is amended, courts must presume that the Legislature intended to effect a change in the law." *Brown v. Sammons,* 743 S.W.2d 23, 24 (Ky.1988); *see also Butler v. Groce,* 880 S.W.2d 547, 550 (Ky.1994)(Lambert, C.J., dissenting) ("courts must presume that the amendment of a statute was intended to change the law."), *citing Whitley County Bd. of Ed. v. Meadors,* 444 S.W.2d 890, 891 (Ky.1969)("the presumption is that the legislature, by the amendment, intended to change the law.") *and Blackburn v. Maxwell Co.,* 305 S.W.2d 112, 115 (Ky.1957)("We are compelled to assume that the Legislature had a purpose in mind in specifically changing the statute as it did-that the changes were intentional and not fortuitous."). That change in the law reflected a shift in the law from Baker's correct, pre–1998, interpretation to the Systems' then erroneous view of the law as embodied in its void policy. But the change in the law occurred too late to affect Baker's rights in 1995 and 1996.

We summarize the Systems' attempt to implement law by internal policy as follows. First, the Systems lacked statutory authority in 1995 to limit Baker's inviolable contract rights expressed in KRS 61 .702(3)(1995). Second, the policy the Systems promulgated is invalid because it was never "adopted" as an "administrative regulation" as required by KRS 13A.100, and as those terms are defined in KRS 13A.010(2) and (3). If the policy had been adopted, it would have violated KRS 13A.120(2)(i) because it sought to "modify or vitiate a statute [KRS 61.702(3)(1995)] or its intent." Finally, the cross-referencing policy is an "internal policy, memorandum or other form of action" that attempts to modify or limit KRS 61.702(3)(1995), in violation of KRS 13A.130.

DAMAGES

*38 Baker was entitled to the Systems' payment of the state contribution toward his health insurance premium "in full." The Systems failed to make that payment. This led to a shortfall in the payment of Baker's health insurance premium. If KTRS had not unilaterally chosen to stop funding Baker's FSA in order to pay the balance of his premium, Baker would have had to do so. Because KTRS stopped paying into the FSA in order to pay the balance of the premium the Systems failed to pay, Baker was forced to reach into his own pocket to fund the FSA for the remainder of 1996 in the amount of $525.40.

The Systems' counsel described Baker's claim for damages as follows: "Baker is requesting KRS to give him a dollar for dollar reimbursement for money he contributed into a flexible spending account." (R.366). We believe this is a correct assessment of Baker's claim and a correct statement of Baker's measure of damages. We will order the Systems to pay to Baker the sum of $525.40, a sum more representative of principle than of principal.

Baker is not entitled to recover the sum of $735.56 claimed as an arrearage accruing during the first seven months of 1996 when the Systems paid only $70.42 per month toward his premium. According to the record, that sum was never demanded of Baker and he never paid it.

Nor is Baker entitled to be paid anything as compensation for years after 1996. He elected not to participate in the FSA program. Therefore, he cannot be said to have been damaged by having to pay it. Effectively, he waives this claim.

Inapplicability of the Rule of De Minimus Non Curat Lex

The small sum of money in controversy in this case could quite easily have camouflaged its significance. And so we deem it necessary to address the rule of *de minimus non curat lex.*

The rule translates from the Latin as "The law does not concern itself with trifles." BLACK'S LAW DICTIONARY (8th ed.2004), *de minimis non curat lex* (Westlaw through September 2007). But the "trifles" to which the rule refers are not the dollars involved in a case. That understanding of the rule ignores the proper role of the judiciary. The courts are not redistributors of wealth. The courts address injustice and enforce rights, or at least strive to do so. The movement of dollars from party to party is merely a by-product of the judiciary's work. In our application of the rule of *de minimus non curat lex,* the sum of money has never been the primary consideration.

Our review of the rule in Kentucky shows that cases with sums in controversy as paltry as $6.00 have been addressed and reversed. *Wagers v. Sizemore,* 222 Ky. 306, 300 S.W. 918, 919 (1927)($69.59 in today's dollars). Where the rule has not been applied, it is because a legal principle or substantial right was at stake, making the issue anything but "trifling." The only cases with which the law in Kentucky will not concern itself are those where both the amount of money at stake *and* the legal principle involved, if any, are trifling.

*39 In *Clark v. Mason,* 264 Ky 793, 117 S.W.2d 993, 997 (1938), the sum of $16 was at stake on appeal; that would be about $241 dollars today. The case illustrates the correct interpretation of the doctrine in Kentucky.

This general "de minimis" rule is thus announced [that]:

> Where the ***only impropriety*** in the judgment or decree ***is a trifling error in the amount of the recovery*** which might have been corrected in the court below, the appellate court will usually apply the maxim, "de minimis non curat lex," and refuse to reverse the judgment or decree on that account.
>
> ....
>
> The question is necessarily governed by the discretion of the court, and where equity and justice demand it, a judgment will be reversed, even though the amount in controversy is insignificant.

Clark, 117 S.W.2d at 296(emphasis supplied).

Kentucky courts have uniformly refused to apply the rule in cases such as *Wagers, supra,* where substantial rights are at stake. In such cases, "because of their involvement of matters other than that of merely a small amount erroneously adjudged, the *application of the rule is held to be improper* because of its working material prejudice to such substantial rights involved." *Id.* at 297.

In the case *sub judice,* the rights of a former public servant, a retiree from state employment, are at stake. In "consideration of benefits received by the state from" that public servant, no lesser institution than the General Assembly of the Commonwealth of Kentucky granted and guaranteed those rights by statute in the form of an inviolable contract, never to be reduced or impaired. KRS 61.692. Applying the rule of *de minimus non curat lex* would not only disparage that right, it would dishonor the commitment of a co-equal branch of our government. And so it would be improper to apply the rule in this case.

The significance of this case is reflected in the stubbornness with which each party strived to prevail. There was never more money at stake than a few hundred, perhaps a few thousand, dollars. What then would cause Baker, a lawyer, to hire another lawyer to pursue his case for more than a decade? What would cause the Systems, an agency of state government that manages total assets exceeding $15,000,000,000,[31] to utilize such substantial resources resisting Baker's claim to such a small amount of money? A cynic would call it trite, but the answer is obvious. This is a case about rights and principles, power and authority.

We are, in fact, grateful that the sum of money in controversy is minimal, for the issue at stake is great. Our system of government is premised upon the concept that all authority originates with our citizens. When the proper exercise of that authority is displaced by the abuse of power, it is the judiciary's duty to remedy it, no matter how few dollars are involved, for the abuse of power feeds upon itself and will inevitably do greater harm if left unchecked. The rule of *de minimus non curat lex* has its proper place in our jurisprudence. But actual injustice is never a trifling matter, and this is particularly so when the injustice comes at the hands of the government.

CONCLUSION

***40** The Kentucky Retirement Systems, by means of a void internal policy that never had the effect of law, wrongfully reduced James Baker's inviolable contractual right to have the Systems pay the full state contribution rate toward his health insurance resulting in Baker's suffering monetary damages in the amount of $525.40. The Board's rejection of the hearing officer's Recommended Order was not supported by substantial evidence, was arbitrary and was contrary to law. For these reasons, we REVERSE.

IT IS HEREBY ORDERED:

1. That the Order of the Franklin Circuit Court affirming the Board of Trustees' Report and Order is REVERSED and REMANDED with instructions to order the Board to reinstate the Recommended Order of the hearing officer with modifications consistent with this opinion.

2. That the Systems pay to James M. Baker the sum of $525.40.

VANMETER, Judge; KNOPF, Senior Judge, concur in result only.

All Citations

Not Reported in S.W.3d, 2007 WL 3037718

Footnotes

1 Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

2 Ky. OAG 04–001, 2004 WL 220675 (Ky.A.G.). The subject of this Kentucky Attorney General Opinion is the "Constitutionality of a retroactive amendment to KRS 61.637(7)(a), commonly referred to as the 'double-dipping' provision." While the term "double-dipper" has developed a negative connotation, this well-reasoned Opinion of the Attorney General correctly points out that there is nothing unlawful about the practice of double-dipping in the absence of legislative prohibition. The Opinion answered a legislative query whether such a prohibition could be created and made retroactive. In summary, the Attorney General stated that "retrospectively prohibiting the practice of 'double dipping' would necessarily 'impair the obligations' of the 'inviolable contract' of the Commonwealth created by KRS 61.510 to 61.705 [state retirement benefits] in violation of the Contract Clause of the United States Constitution and Section 19 of the Kentucky Constitution. Thus, the General Assembly can only prohibit the practice of 'double dipping' on a prospective basis."

3 The legislature requires each entity participating in the Kentucky Group Health Insurance Plan, including the Systems and KTRS, to pay "an amount at least equal to the state contribution rate[,]" determined as part of the state budget process, for each employee or retiree, as the case may be. KRS 18A.225(2)(h). This is the minimum established by the legislature. A participating agency is not prohibited from paying more than the state contribution rate for each employee or retiree. The Systems was a participating agency which, by statute, was required to pay "[t]he premium in full" for retirees entitled to full benefits. KRS 61.702(3)(1995), *recodified at* KRS 61.702(3)(a) 5.

4 As developed *infra,* the question whether the Systems received a copy of the form that included Martin's calculations is the only fact issue the Board determined in a manner contrary to the fact-finding of the hearing officer.

5 The Systems' attorney called this statute, 26 U.S.C. § 125, "[t]he elementary and uncontested provision of law governing this case." His prime exception to the hearing officer's recommendation was that the hearing officer "demonstrates that he fails to understand the most basic and elementary issue in this case"—"that Kentucky Retirement Systems may not provide a cafeteria plan or flexible spending account to its retirees." However, if the Systems had simply followed Baker's method for cross-referencing and paid $175.50 to Plan Source—not FEBCO—the source of funding for Baker's FSA would not have been the Systems and the federal statute would not have been offended.

6 We rely on Baker's March 31, 1997, Corrected Answers to Interrogatories regarding these claimed damages amounts which are consistent with his testimony during the September 19, 1997, hearing. The figure calculated by the hearing officer ($839.04) appears to be incorrect due to minor errors in transcription and calculation. The actual figure would appear to us to be $735.56, being 7 months of delinquency at $105.08 per month.

7 Plan Source never made demand on Baker to pay this arrearage and Baker, in fact, never paid it. Consequently, it is not an amount recoverable by Baker in damages.

8 This is the only out-of-pocket expense Baker experienced as a result of the Systems' failure to follow his cross-referencing method and pay his premium "in full" within the meaning of KRS 61.702(3)(1995). Baker declined participation in the FSA for years subsequent to 1996.

9 The Kentucky Retirement Systems' insurance fund was established for the purpose of funding the state contribution on behalf of retirees. KRS 61.701. The Systems and its Trustees who comprise the Board oversee the insurance fund in a fiduciary capacity and administer it "solely in the interest of the members and beneficiaries." KRS 61.650(1)(c) 1.

10 Information regarding this meeting is taken from the Minutes of the Administrative Appeals Committee, April 27, 1998. Chairman Larry C. Conner and Bobby H. Henson were the members of the Administrative Appeals Committee in attendance.

11 For example, the word "forward" is misspelled in both documents as "froward." (Compare R.342 and R.449). The word "own" is misspelled "on" in both documents in the phrase "contrary to her on [sic] prior course of dealing". (Compare R.351 and R.457). The phrase "over come" is used in both documents where the word "overcome" is clearly intended. (Compare R.361 and R.466). Similarly, identical errors in grammar appear in both documents, as where the phrase "the coordination of Baker's insurance premiums were accomplished" is used. (Compare R.349 and R.456). As noted, *infra,* after this case was remanded on its first appeal to this Court, the Chairman of the Board of Trustees simply signed a reprinted copy of the Committee Order. Consequently, these identical typographical and grammatical errors can also be found at R.475, R.484, R.493 and R.482, respectively.

12 Those sentences appear as the first sentence of paragraph 1, page 17 (R.463); the second half of the fourth sentence in paragraph 2, page 18 (R.464); and, the last sentence in paragraph 5, page 21 (R.467).

13 The Committee's Conclusions of Law directly correspond with the Systems' Arguments as follows:

Conclusion of Law 1 = Systems' Argument I (first part)
Conclusion of Law 2 = Systems' Argument I (second part)
Conclusion of Law 3 = Systems' Argument II
Conclusion of Law 4 = Systems' Argument III
Conclusion of Law 5 = Systems' Argument IV
Conclusion of Law 6 = Systems' Argument VI
Conclusion of Law 7 = Systems' Argument VII (paragraph 1)
Conclusion of Law 8 = Systems' Argument VII (paragraph 2)
Conclusion of Law 9 = Systems' Argument VII (paragraph 3)
Conclusion of Law 10 = Systems' Argument VII (paragraph 4)

14 In pertinent part, KRS 13B.020(1) says that "[a]n agency head may not ... delegate the power to issue a final order *unless specifically authorized by statute* ...." (emphasis supplied). In 2002, the Systems responded to *Baker I* by seeking such authorization. That year, the Kentucky legislature passed House Bill 309 amending KRS 61.645(16). The amendment

authorized the Systems' Board of Trustees to create an appeals committee and to delegate to it the "authority to act upon the recommendations and reports of the hearing officer on behalf of the board" in cases such as Baker's. 2002 Kentucky Laws Ch. 52 (H.B.309), § 11.

15 Appellant's Brief, Arguments III and IV, pp. 12–14.

16 Appellant's Brief, Argument V, p. 15.

17 Appellant's Brief, Argument I and II, pp. 8–12.

18 Governance effected through a proliferation of federal and state agencies has been referred to as "the modern administrative state." *See Massachusetts v. E.P.A.,* 549 U.S. 497, 127 S.Ct. 1438, 1454 (2007). In Kentucky, we have referred to agencies as the "fourth branch of government." *American Beauty Homes,* 379 S.W .2d at 454 fn.4 ("An administrative agency has been realistically characterized as a *fourth* branch of government." Emphasis in original); *Kentucky Commission on Human Rights v. Fraser,* 625 S.W.2d 852, 857 (Ky.1981)("[T]here has developed in our government a fourth branch known as administrative proceedings[.]"); *see also Legislative Research Com'n By and Through Prather v. Brown,* 664 S.W.2d 907, 916 (Ky.1984)("[T]here are *three* branches of government[. T]he net effect of the words 'independent agency of state government' [in legislation creating the Legislative Research Commission] was to create a fourth branch of government." Emphasis in original); *see also Federal Trade Commission v. Ruberoid Co.,* 343 U.S. 470, 487, 72 S.Ct. 800, 810 (1952)(Administrative agencies "have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking." Jackson, J., dissenting). Whatever its label, it should be clear that it exists because the judiciary has permitted it to exist.

> It is not clear from the Constitution that this transference of governmental power to the agencies is constitutional. Indeed, the text may suggest just the opposite.... The most fundamental challenge to the administrative state focused on whether this delegation of power is permissible. The [United States Supreme] Court's affirmative answer to this question represents one of the most important developments in constitutional history.
>
> ....
>
> The Court's role in the administrative state has been that of both facilitator and skeptic.... Having allowed the establishment of the administrative state, the Court has assumed a role in supervising the agencies. In this role the Court tends to avoid unduly interfering [but, a]s in virtually every other area of the law, the Court tends to equate judicial review with the very idea of the rule of law.

Kermit L. Hall, ed., The Oxford Companion To The Supreme Court of the United States 11, 16 (1992). Administrative agencies and the function they perform have become so entrenched in the makeup of our federal and state governments that to strictly apply constitutional principles to do away with them would place burdens on the three traditional branches of government that they could not feasibly bear.

19 Characterizing non-judicial functions as "administrative" in *Hilltop* is not as "ill-advised" as the use of "quasi-judicial" to describe the same function, *see, Hilltop* at 468 n. 1, since an agency's "administrative functions or acts are distinguished from such as are judicial." *Black's Law Dictionary* 42 (5th ed.1979).

20 Baker does not claim entitlement to any more than the applicable state contribution rate.

21 On appellate review, we must look at "the whole record [,]" KRS 13B.150(2)(c); *see also* KRS 13B.130(1)-(10), just as we should expect the Board did. 105 KAR 1:215 Section 8 ("final order of the board shall be based on substantial evidence appearing in the record as a whole[.]"). This would include at least viewing the videotaped testimony of these two witnesses. Appellate courts often view videotape to observe a person's demeanor where such demeanor has a bearing on the review. *See, e.g., Gabow v. Commonwealth,* 34 S.W.3d 63, 79 (Ky.2000)(Appellate court's viewing of videotape determined defendant's demeanor during confession to be "calm" and not "under the influence of alcohol or drugs."); *Transit Authority of River City (TARC) v. Montgomery,* 836 S.W.2d 413, 416 (Ky.1992)(On claim of judicial misconduct, Appellate court's viewing of videotape determined trial judge's " 'body language' [and] plain physical attitude and tone of voice do not [appear] vituperative[.]"); *Price v. Commonwealth,* 734 S.W.2d 491, 494 (Ky.App.1987)(Appellate court viewing of videotape revealed defendant's demeanor of "despair and shame."). By doing so, we are not substituting our judgment of demeanor for that of the hearing officer or the Board. We observe the videotape only to gain insight into whether the decision under review meets the standard of that review.

22 We do not suggest that any particular Systems employee, including the employees who testified, was necessarily responsible for the tampered condition of the document. We take no more specific position than that the hearing officer determined "someone within the Systems" did so. If the Board chooses to investigate or ignore the conduct of its employees, it is free to do so.

23 The number of state agencies and boards using hearing officers comes from the official website of the Commonwealth of Kentucky, Office of the Attorney General, Division of Administrative Hearings. http:// ag.ky.gov/hearings.htm This information is current as of October 10, 2006.

24 The deference reviewing courts have always given an agency's final order is derivative of this expertise. *See, e.g., Our Lady of the Woods, Inc. v. Com., Kentucky Health Facilities and Health Services Certificate of Need and Licensure Board,* 655 S.W.2d 14, 17 (Ky.App.1982).

> Deference is accorded [an agency's] factual conclusions for a different reason—[the agency is] presumed to have broad experience and expertise in [the area].... Further, it is the [agency] to which [the legislature] has delegated administration of the [statute]. The [agency], therefore, is viewed as particularly capable of drawing inferences from the facts.... Accordingly, ... a [reviewing court] must abide by the [agency's] derivative inferences, if drawn from not discredited testimony, unless those inferences are "irrational," ... "tenuous" or "unwarranted." ... As already noted, however, the [agency], as a reviewing body, has little or no basis for disputing a [hearing officer]'s testimonial inferences.

Department of Health and Mental Hygiene v. Shrieves, 641 A.2d 899, 907 (Md.App.1994), *quoting Penasquitos Village, Inc. v. National Labor Relations Bd.,* 565 F.2d 1074, 1078–79 (9th Cir.1977)(internal citations omitted).

25 Chief Justice Hughes' quotation is taken from his Address before the Federal Bar Association in 1931, quoted in N.Y. Times, February 13, 1931, page 18. *See* James Landis, The Administrative Process (1938) 135, 136. *Cf.* Bell, *Let Me Find the Facts,* 26 A.B.A.J. 552 (1940).

26 Kentucky did not adopt either the 1961 or 1981 version of the Model State Administrative Procedures Act (MSAPA). *See* Model State Admin. Proc. Act, Refs. & Annos., Table of Jurisdictions Where Adopted (1961); Model State Admin. Proc. Act, Refs. & Annos., Table of Jurisdictions Where Adopted (1981). However, the definition of "administrative regulation" contained in KRS 13A.010(2), which is identical to the definition of "regulation" contained in its predecessor statute, KRS 13.080(3)(repealed 1984), is worded nearly identically to the definition for "rule" contained in Section 1(7) of the 1961 MSAPA.

27 The verb "promulgated" in this definition should be distinguished from the technical term "adopted" defined in KRS 13A .010(3)(" 'Adopted' means that an administrative regulation has become effective in accordance with the provisions of this chapter [.]"). "Promulgated" should be given its its "common and everyday meaning [,]" KRS 446.015, which is simply to announce or make known publicly. However, the legislature uses the terms interchangeably in other statutes in the chapter. *See, e.g.,* KRS 13A.100(1) and KRS 13A.120(1). We therefore treat them as synonymous.

28 UCLA School of Law Professor Emeritus Michael Asimow tells us that the trend among the majority of states is to follow federal law and allow agencies to adopt informal statements of policy, referred to as "guidance documents," without the pre-adoption notice-and-comment required of administrative rulemaking. Michael Asimow, *Guidance Documents in the States: Toward a Safe Harbor,* 54 ADMIN. L.REV. 631, 632, 644 (2002). However, "eight states have gone in precisely the opposite direction: their statutes and case law explicitly prohibit the adoption of guidance documents except by complying with [their respective state's] rulemaking procedures. California is the most prominent of these states[,]" *Id.* at 644, but Kentucky is also among them. *Id.* at 651 (citing KRS 13A.010(2) and KRS 13A.130). In those eight states, the agencies recognize that

> [u]sing notice and comment to adopt every piece of paper that interprets law or constrains discretion would be prohibitively expensive in terms of scarce staff resources [and] consume precious months.... Instead, agencies generally adopt these documents, pejoratively known as 'underground regulations,' and hope that nobody will notice (or at least nobody will challenge) them.

Id. at 635.

29 As noted in footnote 24, *supra,* KRS 13A.010(2) is taken from the definition for "rule" contained in § 1(7) of the 1961 version of the MSAPA, which includes these very same exceptions verbatim. However, the legislature apparently chose not to adopt § 8, the section of the MSAPA that would have authorized all state agencies to issue declaratory rulings. It reads as follows:

> Each agency shall provide by rule [administrative regulation] for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.

30 KRS Chapter 13A is the successor chapter to KRS Chapter 13. Chapter 13 was originally enacted in 1952, substantially revised beginning in 1972 to reflect developments in administrative law, and repealed in 1984 when replaced by Chapter 13A.

31 This figure is taken from the Systems' "Comprehensive Financial Report for Fiscal Year Ended June 30, 2006," p. 28, http:// www.kyret.com/cafr/cafr2006.pdf. The actual figure is $15,051,061,000.

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EXHIBIT C

2006 WL 2033997
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

Court of Appeals of Kentucky.

GOLDBERG & SIMPSON, P.S.C.; Steven A. Goodman; and Wayne F. Wilson, Appellants
v.
Philip J. GOODMAN and Julie Goodman, Appellees.

No. 2005–CA–001273–MR.
|
July 21, 2006.

Synopsis
Background: First brother brought action against second brother, lawyer, and law firm which prepared father's will and revocable living trust. Defendants filed third-party negligence complaint against first brother's wife, who was also a lawyer, alleging that first brother would have suffered no damages if she had given him proper legal advice and performed the appropriate legal acts. The Circuit Court, Fayette County, Pamela R. Goodwine, J., granted wife's motion to dismiss, and defendants appealed.

Holdings: The Court of Appeals, Barber, J., held that:

[1] defendants did not have standing to assert existence of attorney-client relationship between first brother and wife, and

[2] wife did not owe duty to defendants in connection with advice to first brother.

Affirmed.

West Headnotes (2)

[1] Attorney and Client
⇦ Determination

Second brother and lawyer and law firm which prepared father's living will and trust did not have standing to assert existence of attorney-client relationship between first brother and his wife, who was also a lawyer, where both first brother and wife denied the existence of such a relationship.

Cases that cite this headnote

[2] Attorney and Client
⇦ Duties and liabilities to adverse parties and to third persons

First brother's wife, who was an attorney, did not owe duty to second brother and law firm and lawyer who prepared father's will and living trust in connection with wife's alleged negligent advice to first brother concerning claims he could assert against father's estate and concerning whether he should have obtained written agreement from father regarding property distribution, and thus second brother, lawyer, and law firm could not prevail on claim against wife that her negligent advice caused first brother's damages, even assuming existence of attorney-client relationship between first brother and wife.

Cases that cite this headnote

Appeal from Fayette Circuit Court, Action No. 05–CI–01229; Pamela R. Goodwine, Judge.

Attorneys and Law Firms

J. Robert Lyons, Jr., Lexington, KY, for appellant.

Katherine K. Yunker, Lexington, KY, for appellee, Julie Goodman.

Theodore E. Cowen, Lexington, KY, for appellee, Phillip G. Goodman.

Before BARBER and MINTON, Judges; KNOPF, Senior Judge. [1]

OPINION

BARBER, Judge.

*1 This appeal arose from the Fayette Circuit Court's dismissal of a third-party complaint filed by Appellants, Goldberg & Simpson, P.S.C .; Steven A. Goodman (Steven); and Wayne F. Wilson (Wilson). The third-party complaint was against Appellee, Julie Goodman (Julie), and claimed she was liable to the Appellants due to her alleged professional failings to her husband, who is an Appellee, Philip J. Goodman (Philip). The alleged failures are discussed later in this opinion. We first examine the facts which gave rise to this current appeal.

Steven and Philip are brothers. Steven is an attorney and a partner of Goldberg & Simpson. Their parents, Lawrence I. Goodman (Lawrence) and Leah Elkowitz Goodman (Leah), are deceased. Leah passed away in 1977 and her estate was probated thereafter. Lawrence remarried in 1981 to Evelyn Kossoff (Evelyn).[2] The couple remained together until Lawrence's death on February 20, 2004. Through Lawrence's will and revocable living trust, Evelyn was to receive nearly all of his estate. Also, Steven and Philip were each to receive the contents of specific safe deposit boxes. Lawrence's will and revocable living trust were prepared by Wilson while employed at Goldberg & Simpson.

Philip disagreed with the distributions and filed a complaint March 16, 2005, against Appellants alleging liability for several reasons. In essence, Philip claims that in 1982, his father, Lawrence, orally agreed to leave him one-half of his entire estate with the exception of his marital home. This agreement was made in exchange for Philip not pursuing legal action related to alleged wrongdoings committed by Lawrence and Steven during the settlement of Leah's estate. Philip argues that Steven convinced their father not to honor the alleged oral agreement. Goldberg & Simpson and Wilson were named in relation to the preparation of the estate planning documents at issue.

In an effort to shield themselves from potential liability, Appellants filed a third-party complaint against Julie on April 8, 2005. Philip and Julie were married at the time of the alleged oral agreement between Philip and Lawrence. Coincidentally, Julie is an attorney.[3] Appellants stated that Julie provided legal advice to Philip about claims he could assert against his father's estate. They also asserted that Julie failed to advise Philip to get a written agreement to leave property by will from his father and to file a timely claim against his father's estate. Appellant claimed Julie's failures and negligence were the direct and proximate results of Philip's damages.

Shortly thereafter, Julie filed a motion to dismiss the third-party complaint. Following a hearing and briefing by both sides, the circuit court dismissed the third-party complaint against Julie on May 16, 2005. It is this dismissal order that Appellants appeal.

Julie filed her motion to dismiss under CR 12.02(f). A dismissal pursuant to CR 12.02(f) for failure to state a claim is proper only if it appears the pleading party could not prove any set of facts in support of his claim that would entitle him to relief. *Wood v. Wyeth–Ayerst Laboratories, Division of American Home Products,* 82 S.W.3d 849, 851 (Ky.2002), (citing *Pari–Mutuel Clerks' Union v. Ky. Jockey Club,* 551 S.W.2d 801, 803 (Ky.1977)). In determining whether a complaint should be dismissed, the issue is a matter of law. *Grand Communities, Ltd. v. Stepner,* 170 S.W.3d 411, 417 (Ky.App.2004), (*citing James v. Wilson,* 95 S.W.3d 875, 884 (Ky.App.2002)). Thus, our review is *de novo.*

*2 We must presume that all the factual allegations in the complaint are true and draw any reasonable inference in favor of the non-movant. *Commonwealth, ex rel., Chandler v. Anthem Insurance Companies, Inc.,* 8 S.W.3d 48, 51 (Ky.App.1999). The issue is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims. *Id.*

Following a review of Appellants' third-party complaint, it is clear that all of their claims are based on Julie's status as an attorney.[4] In essence, Appellants contend that if Julie had given proper legal advice and performed the appropriate legal acts, then Philip would have suffered no damages.

The relationship of attorney-client is a contractual one, either expressed or implied by the conduct of the parties. *Daugherty v. Runner,* 581 S.W.2d 12, 16 (Ky.App.1979). In other words, the attorney-client relationship can arise not only by contract, but also from the conduct

of the parties. *Lovell v. Winchester,* 941 S.W.2d 466, 468 (Ky.1997). Courts have found that the relationship is created as a result of the client's reasonable belief or expectation that the lawyer is undertaking the representation. *Id*. Also, an attorney-client relationship is personal in nature. *American Continental Insurance Co. v. Weber & Rose, P.S.C.,* 997 S.W.2d 12, 13 (Ky.App.1998), (*citing Automobile Club Insurance Co. v. Lainhart,* 609 S.W.2d 692 (Ky.App.1980)). The personal nature permits a legal malpractice action to accrue only to the attorney's client. *Id.* at 14.

An attorney is not ordinarily liable to third persons for his acts committed in representing a client. *Rose v. Davis,* 288 Ky. 674, 157 S.W.2d 284, 285 (Ky.1941). It is only where his acts are fraudulent or tortious and result in injury to third persons that he is liable. *Id.* at 284–285. Similarly, an attorney may be liable for damages caused by his negligence to a person intended to be benefited by his performance irrespective of any lack of privity. *Hill v. Willmott,* 561 S.W.2d 331, 334 (Ky.App.1978), (citing *Donald v. Garry,* 19 Cal.App.3d 769, 97 Cal.Rptr. 191 (Cal.Ct.App.1971)).

We must determine whether an attorney-client relationship existed between Philip and Julie. Philip is not asserting that Julie was his attorney during any period of time at issue. Furthermore, Philip had counsel of record for issues related to each of his parent's estates. Ray Larson represented Philip in issues relating to the execution of Leah's estate and Jack Cunningham was Philip's attorney in relation to the execution of Lawrence's estate according to the record. However, before we make our determination there is another issue that must be resolved.

[1] We are presented with a unique situation in that it is not an alleged client claiming an attorney-client relationship was established, rather a third party is making this assertion. As a result, we must determine whether a third party has standing to establish the existence of such an attorney-client relationship on someone else's behalf. We are unable to find precedent to support such a situation in our Commonwealth. We believe allowing third parties to assert the existence of an attorney-client relationship between two people is inappropriate. This is true particularly when both the individuals in the alleged relationship deny the same. The only person who has standing to claim an attorney-client relationship existed is Philip and he has chosen not to do so at this time. Therefore, we do not believe Julie and Philip established an attorney-client relationship.

***3 [2]** However, if we assume that Philip and Julie did form an attorney-client relationship, third parties are only allowed to sue an attorney retained by another if the attorney's acts are fraudulent or tortious and result in injury to the third person or if the attorney's negligence damaged the third person intended to be benefited by the attorney's performance. Appellants made no claim that Julie's acts with Philip were either fraudulent or tortious. They only assert that Julie was negligent in performing her attorney duties for Philip.

An attorney is liable to a third person for her negligence only if that person was intended to be benefited by her performance. *Hill, supra,* 561 S.W.2d at 334. In other words, the attorney must owe a duty to the third person. [5] The question of duty presents an issue of law. *Murphy v. Second Street Corporation,* 48 S.W.3d 571, 573–574 (Ky.App.2001). Again, our review shall be *de novo.*

Even when viewed in light most favorable to Appellants, none of Julie's acts for Philip were ever intended to benefit the Appellants in any way. The only person intended to benefit from Julie's alleged acts would have been Philip. With no duty owed to Appellants, we cannot find that Appellants could have a valid claim against Julie even presuming she acted as Philip's attorney. Thus, Appellants failed to state a claim upon which judgment could be granted. *See* CR 12.02(f).

While our reasoning differs somewhat from the circuit court, the end result is the same. Therefore, we affirm the circuit court's dismissal of Appellant's third-party complaint pursuant to CR 12.02(f).

ALL CONCUR.

All Citations

Not Reported in S.W.3d, 2006 WL 2033997

Footnotes

1 Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

2 Lawrence's widow, Evelyn K. Goodman, is not a party to either suit. She is also the Executrix of Lawrence's estate.

3 Julie has been licensed to practice law in the Commonwealth since 1980.

4 The following paragraphs from Appellant's 19 paragraph third-party complaint are particularly supportive:

6. The Third–Party Plaintiffs allege, upon information and belief, that the Third–Party Defendant, Julie Goodman, **provided legal advice to the Plaintiff,** Philip J. Goodman, concerning the estates of his mother and father.

8. The Third–Party Plaintiffs state, upon information and belief, that the Third–Party Defendant, Julie Goodman, as Plaintiff's wife and in her capacity as **giving legal advice to Plaintiff,** was aware of Plaintiff's claim against the estate.

9. The Defendants/Third–Party Plaintiffs state, upon information and belief, that the Third–Party Defendant, Julie Goodman, **failed to advise the Plaintiff,** Philip J. Goodman, **that an agreement to leave property by will must be in writing,** and, therefore, if the allegations by Plaintiff, Philip J. Goodman, concerning oral representations by Lawrence I. Goodman are true (which the Defendants/Third–Party Plaintiffs deny), then the Third–Party Defendant, Julie Goodman, **failed to advise the Plaintiff,** Philip J. Goodman, **that a written contract was required** in order to enforce those alleged oral representations **or failed to procure such a written agreement.**

13. As a direct and proximate result of the **failure** of the Third–Party Defendant, Julie Goodman, **to advise the Plaintiff,** Philip J. Goodman, **of the requirement for a written contract** to will property **or to procure such a written agreement,** the Plaintiff, Philip J. Goodman, did not obtain an enforceable contract from Lawrence I. Goodman, to leave said Plaintiff, Philip J. Goodman, one-half of the estate of Lawrence I. Goodman, by will, if the allegations concerning the oral representations of Lawrence I. Goodman in the Complaint are true (which the Defendants/Third–Party Plaintiffs deny).

14. **As a direct and proximate result of this failure** on behalf of the Third–Party Defendant, Julie Goodman, **the damages which Philip J. Goodman claims** as a consequence of his Complaint, if any, **are the direct and proximate result of the failure** of the Third–Party Defendant, Julie Goodman, **to advise the Plaintiff to obtain a written contract** with respect to the alleged oral representations **or to procure such a written agreement.**

15. Defendants/Third–Party Plaintiffs further allege that the Third Party Defendant, Julie Goodman, has **continued to advise Plaintiff, in conjunction with other counsel,** concerning Plaintiff's claims against the estate of Lawrence I. Goodman.

16. The Defendants/Third–Party Plaintiffs state, upon information and belief, that the Third–Party Defendant, Julie Goodman, **failed to advise the Plaintiff,** Philip J. Goodman, **concerning timely filing of a claim** against the estate of Lawrence I. Goodman **or failed to obtain a timely claim** against the estate of Lawrence I. Goodman.

17. The Third–Party Plaintiffs also allege, upon information and belief, that Third–Party Defendant **failed to advise Plaintiff concerning statutes of limitation** which could prevent even a valid claim from being enforceable, against the estate of any other parties.

18. **As a direct and proximate result of this failure and negligence** by the Third–Party Defendant, Julie Goodman, the **damages which Plaintiff claims** as a consequence of his Complaint, if any, **are the direct and proximate result of the failure and negligence of** the Third–Party Defendant, **Julie** Goodman.

19. **As a consequence of these failures and negligence** on the part of the Third–Party Defendant, Julie Goodman, the Defendants/Third–Party Plaintiffs are **entitled to indemnity and/or contribution** for any and all damages which Plaintiff may recover from the Defendant/Third–Party Plaintiffs.

(Emphasis added.)

5 In order to meet the burden of proof in a negligence action, one must establish: (1) a duty on the part of the defendant; (2) a breach of that duty; and (3) consequent injury. *Murphy v. Second Street Corporation,* 48 S.W.3d 571, 573 (Ky.App.2001), (*citing Mullins v. Commonwealth Life Insurance Co.,* 839 S.W.2d 245, 247 (Ky.1992)).

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