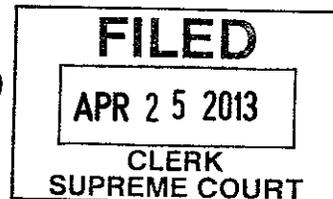


SUPREME COURT OF KENTUCKY  
No. 2012-SC-000169-D  
(2010-CA-000693 & 2010-CA-000730)



KENTUCKY STATE BOARD OF  
LICENSURE FOR PROFESSIONAL  
ENGINEERS AND LAND SURVEYORS

APPELLANT

V.

FRANKLIN CIRCUIT COURT  
2009-CI-00231

JOSEPH B. CURD, JR.

APPELLEE

REPLY BRIEF FOR APPELLANT

Submitted by:

A large, stylized handwritten signature in black ink, appearing to read "Jonathan Doran Buckley".

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CERTIFICATE OF SERVICE

I hereby certify that on this the 25th day of April, 2013, ten copies of the foregoing was hand delivered to:

The Clerk of the Supreme Court of Kentucky, The Capitol, Frankfort, Ky 40601;  
with a true copy of the foregoing being hand delivered to:  
The Clerk, Court of Appeals, 360 Democrat Dr, Frankfort, KY 40601; and  
sent by First Class U.S. Mail to:  
Hon. Thomas D. Wingate, Judge, Franklin Circuit Court, Division II, Franklin  
County Judicial Bldg., 669 Chamberlain Ave., Frankfort, KY 40601; and  
Hon. Robert v. Bullock, Bullock and Coffman, LLP, 101 St. Clair St, Frankfort, KY  
40601, Counsel for Appellee.

A large, stylized handwritten signature in black ink, appearing to read "Jonathan Doran Buckley".

Jonathan Doran Buckley

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## APPELLANT'S REPLY BRIEF

### ARGUMENT

**I. The Court of Appeals failed to apply its articulated standard of review to the actual facts of the case *sub judice*.**

**A. In the review of the constitutionality of a statute for vagueness as applied, it is necessary to apply the standard of review against the actual findings of the trier of fact.**

In considering whether or not a statute or regulation is *unconstitutionally vague as applied* (as opposed to unconstitutionally vague on its face) it is necessary that the facts of the case be considered; those facts are the starting point for the application of the standard of review.

The facts of the case *sub judice* are the findings of the Hearing Officer which were adopted without alteration by the Board in its Final Order. Many of those findings are referenced verbatim in this Appellant's initial brief at pages 8 thru 10 thereof. A reading of those findings and conclusions clearly show the Hearing Officer determined that Mr. Curd testified dishonestly as an expert witness in violation of the specific prohibition set out in 201 KAR 18:142 Section 3.

Mr. Curd, in his Response Argument, does not rely on the actual findings of the Hearing Officer. While Mr. Curd maintains that he offered his honest opinion in testifying as an expert witness, there is no finding of fact that Mr. Curd

testified honestly, or that in testifying as an expert witness, he gave his honest opinion.

Additionally, contrary to the assertion of Mr. Curd, there is also no evidence or finding of fact that the Board in any way interfered with the underlying Wayne County boundary dispute action or with the Wayne Circuit Judge's exclusive authority to control testimonial or evidentiary matters in that proceeding.

Yet, Mr. Curd would have this Court rely on those non-findings and ignore the actual findings in his request to set aside the Final Order of the Board in this disciplinary administrative action; such an approach would be contrary to the well established role of the Courts of Justice when sitting in their appellate capacity in review of administrative determinations.

**B. The role of the Courts of Justice when sitting in appellate review of an administrative action is one of limited review, and not one of reinterpretation or reconsideration of the merits of the claim, or a review *de novo* of the matter.**

The role of the Courts of Justice in administrative law is one that is both limited and clearly defined by both case law and the provisions of KRS Chapter 13B.

The scope of review of an agency's decision either by this court or by a circuit court is very limited. *Aubrey v. Office of the Attorney General*, Ky.App., 994 S.W.2d 516, 518 (1998). The focus of a court's inquiry as to agency action is ultimately concerned with the question of arbitrariness. See, *Hougham v. Lexington-Fayette Urban County Government*, Ky.App., 29 S.W.3d 370, 373 (1999).

[T]he Courts do not have the authority to review the agency decisions *de novo*. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, Ky., 379 S.W.2d 450, 458 (1964). Judicial review of the administrative action

is confined to a determination of whether the action taken was arbitrary. *City of Louisville v. McDonald*, Ky., 470 S.W.2d 173, 178 (1971). So long as the agency's decision is supported by substantial evidence of probative value, it is not arbitrary and must be accepted as binding by the appellate court. *Starks v. Kentucky Health Facilities*, Ky.App., 684 S.W.2d 5 (1984).

*Aubrey v. Office of the Attorney General*, Ky.App., 994 S.W.2d 516, 518 (1998).

*Lexington-Fayette Urban County Human Rights Com'n v. Wal-Mart Stores, Inc.* 111 S.W.3d 886, 890 (Ky.App.,2003)

And:

Arbitrariness is the focus of the court's review of an administrative decision. *American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 456 (Ky.1964). This landmark case outlines the parameters for judicial review of an administrative agency. It provides that the judicial review is not a *de novo* review of factual determinations made by an administrative agency but rather a review by the court of whether there was substantial evidence to support the agency's conclusion, whether the parties were afforded due process, and whether the agency acted with its established authority. *Id.*

*Alliance for Kentucky's Future, Inc. v. Environmental and Public Protection Cabinet* 310 S.W.3d 681, 686 (Ky.App.,2008)

And:

The circuit court's role as an appellate court is to review the administrative decision, not to reinterpret or to reconsider the merits of the claim,<sup>FN16</sup> nor to substitute its judgment for that of the agency as to the weight of the evidence.<sup>FN17</sup> (footnote citations omitted)

*500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet* 204 S.W.3d 121, 131 (Ky.App.,2006)

And:

An administrative agency, such as the Cabinet, is "afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it" [citation omitted].<sup>FN22</sup>

"[A]lthough a reviewing court may arrive at a different conclusion than the trier of fact in its consideration of the evidence in the record, this does not necessarily deprive the agency's decision of support by substantial evidence" [citation omitted].<sup>FN23</sup> Further, even if this Court would have come to a different conclusion if it heard the case *de novo*, it must affirm the administrative agency's decision if supported by substantial evidence.<sup>FN24</sup> "[I]t is the exclusive province of the administrative trier of fact to pass upon the credibility of witnesses, and the weight of the evidence" [citation omitted].<sup>FN25</sup> Indeed, an administrative agency's trier of facts may hear all the evidence " 'and choose the evidence that he believes' " [citation omitted].<sup>FN26</sup> " 'If the findings of fact are supported by substantial evidence of probative value, then they must be accepted as binding and it must then be determined whether or not the administrative agency has applied the correct rule of law to the facts so found' " [citations omitted].<sup>FN27</sup> (*footnote citations omitted*)

*Ibid.*, at 132

The Court of Appeals in the case *sub judice*, agreed with this representation of the role of the Courts of Justice in administrative matters. In the Appellate Court's Opinion at page 14, the Court stated:

A review of the opinion issued by the hearing officer reveals that Curd's testimony was repeatedly characterized as dishonest. Indeed, the opinion and order issued by the hearing officer contained sixty-four specific findings of fact and fifty-seven conclusions of law. Ultimately, the honesty or dishonesty of Curd's testimony was a question of fact for the hearing officer to determine, being in the best position to judge the credibility, demeanor, and veracity of the witnesses before him or her. Indeed, we have repeatedly held that only the hearing office and the board are empowered to make findings of fact. See *Board of Trustees, Kentucky Retirement Systems v. Grant*, 257 S.W.3d 591, 595 (Ky.App.2008). Further, KRS 13B.150(2) clearly provides that when reviewing an administrative agency's decision, "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Thus, the judicial standard of review of an agency's decision is largely deferential, and as long as there is substantial evidence in the record to support the agency's decision, the court must defer to the agency, even if there is conflicting evidence. *500 Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 131-132 (Ky. App. 2006).

(See Opinion at Tab 1 to Appellant's initial brief, at pages 14-15)

Mr. Curd's attempt to have this Court review the agency's determination *de novo* based on his mischaracterization of the underlying facts of the case should be rejected. As set out in this Appellant's initial brief, by applying the standard of review articulated by the Court of Appeals to the facts as actually found by the Hearing Officer, and by employing accepted rules of construction, the constitutionality of the parts of the statute and regulation in issue would be evident.

**II. The Board's disciplinary action against Mr. Curd was not an unconstitutional infringement on the role of the judiciary.**

**A. The disciplinary action against Mr. Curd for his expert witness testimony did not encroach on the authority of the trial judge in the underlying boundary dispute action.**

Mr. Curd advocates in his Response is that the discipline by the Board of a licensee for his dishonest testimony as an expert witness is somehow an infringement of the role of the trial judge in the underlying boundary dispute action, and is therefore a violation of the Separation of Powers doctrine.

There is absolutely no evidence and accordingly, no finding by the Hearing Officer, that the Board had any involvement with the Wayne Circuit Court case. The trial judge in that boundary dispute action had absolute discretion to control his courtroom and those appearing before him as attorneys, parties, or witnesses. That court reached its determination and the appeal of that decision to the Court of Appeals was concluded before this matter was ever considered.

The disciplinary action by Appellant Board against Mr. Curd in no way interfered with that court action, or with the authority of the trial judge in that matter.

While a trial judge in any action certainly controls the admissibility and presentation of evidence by any witness, that trial judge is not responsible for the content, honesty, or credibility of any such evidence or testimony. The witness is solely responsible for the content, honesty, and credibility of his or her testimony.

A licensee testifying as an expert witness is free to choose what his or her testimony will be, but the oversight board may legitimately discipline the license of that individual if that testimony is dishonest or incompetent with regard to the accepted standards of the regulated profession or vocation in which he or she is licensed.

It is difficult to understand how the regulatory requirement of honesty and competency in testifying as an expert witness would somehow be adverse to the interests of the judicial branch. If a trial is a search for truth, then the profession's requirement of truthful testimony from any regulated licensee would seem to coincide with the interests of the Courts of Justice.

Mr. Curd's citation on page 16 of his Response Brief, to the case of *Chambers v. Stengel*, 37 S.W.3d 741 (Ky.2001), and specifically, to the cases set out in the excerpted portion of that decision, all relate to the General Assembly's attempts to legislate specific aspects of legal practice, procedure, admission or discipline of attorneys, all of which would be in conflict with the judicial branch's specific constitutional authority to manage its own affairs.

The Board's authority to discipline one of its licensees for dishonesty in testimony previously given in a court proceeding, does not interfere with any issue regarding attorneys, court rules, evidentiary rules, or court conduct or procedure, and certainly can be accommodated by the judicial branch through comity since as noted above, honest testimony by any witness is clearly in the best interests of the courts, and the citizens of Kentucky.

As found by both the Circuit Court and the Court of Appeals in the case at bar, the application of the recent Kentucky Supreme Court case of *Maggard v. Com., Bd. of Examiners of Psychology*, 282 S.W.3d 301(Ky., 2008) is appropriate to the resolution of this issue. It is not any violation of the Separation of Powers doctrine for the Board to bring a disciplinary action against any licensee who violates 201 KAR 18:142 Section 3.

**B. The Board disciplinary action against Mr. Curd did not in any way constitute a second-guessing of the Wayne Circuit Court.**

Lastly, contrary to any assertion by Mr. Curd or the Franklin Circuit Court that this Board was second guessing the determination of the Wayne Circuit Court, the Board's action against Mr. Curd was in concordance with the decision of the Wayne Circuit Court which found in Conclusion of Law #3 that:

The Defendants claim to own a 110 acre tract for which a specific deed description exists in their deed located at Deed Book 236, Page. 639. The Defendants have submitted through Joe Kurd a platted boundary of this property on a Topographical Map. Mr. Kurd did not conduct a survey on the ground of this description. Mr. Kurd uses only the calls and distances to establish the boundary of the 110 acre tract on the south side of Kentucky Highway 789. This ignores the specific description set forth in Defendant's deed stating that the beginning call starts from a point on Kentucky Highway 789. It also ignores the monuments, both natural and artificial, set forth in the deed and gives preference to

the course and distance over said monumentation. The monuments ignored are the Ridge Road, the Matthews line and Kentucky Highway 789. The Court concludes that the specific description set forth in the Defendant's deed controls over their general description being the description set forth as Lot No. 1 of the R.S. Ramsey Auction Plat. Therefore, the Court finds that the Defendants own a tract of property described as a 110 acre tract with the specific calls as set forth in their deed and not the general description of the property as stated above. The Court specifically concludes that the Matthews property listed also as "No. 1" on the R.S. Ramsey Auction Plat is not included in the Plaintiff's 110 acre description for the reason that the specific description calls for the Matthews line as a boundary and as the Matthews line is readily ascertainable, the 110 acre description cannot include the Matthews property as it does not go beyond the Matthews line. See *Handy v. Standard Oil Company, Ky.* 486 S.W.2d 302 (1971)

*Denny v. Southwood*, Wayne Circuit Court Civil Action No. 01-CI-00201, TH, Exhibit 12, pgs. 12-13.

Additionally, the Wayne Circuit Court in that Opinion also made a specific finding of fact that:

The Court finds that the surveyor Mr. Jim West, complied with 201 KAR 18:150 by relying on records supplied to him by Plaintiff's attorney even though he did not personally get said records from the Office of the Wayne County Clerk.

*Ibid.*, at top of page 7.

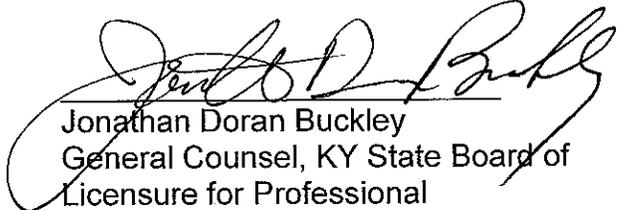
The Board's disciplinary action against Mr. Curd mirrored the determinations of the Wayne Circuit Court, and Mr. Curd's participation therein. Clearly, it is not the Board that is second guessing the actions of the Wayne Circuit Court, but Mr. Curd.

### **CONCLUSION**

Based on the foregoing, and the Brief for Appellant already filed in this action, the Board respectfully requests that the portion of the Opinion of the Court of Appeals that found the four sections of the statute and regulation

unconstitutionally vague as applied to the facts of this case, be reversed, and the original Final Order of Appellant Board be affirmed and reinstated.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jonathan Doran Buckley", written over a horizontal line.

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