

**PUBLISHED OPINIONS
KENTUCKY SUPREME COURT
MARCH 2014**

I. ADMINISTRATIVE LAW

- A. Randy White, et al. v. Clifton Boards-Bey**
[2012-SC-000481-DG](#) March 20, 2014

Opinion of the Court by Justice Cunningham. All sitting. All concur. After being found guilty of committing a prison disciplinary infraction, the prisoner filed a Petition for Declaration of Rights. The prisoner first alleged that his right to procedural due process was violated when the investigating officer refused to interview requested witnesses in violation of the Kentucky Department of Corrections Policy and Procedures 15.6(C)(4)(B)(2)(c). The Kentucky Supreme Court held that the investigating officer's failure to comply with the Department of Corrections' internal policies did not constitute a per se denial of the prisoner's due process rights. Since the prisoner was already aware of the substance of the prospective witnesses' statements, the mere fact that they were not interviewed by the investigating officer did not stifle his procedural due process rights. The prisoner also argued that he was not afforded due process during the Adjustment Committee hearing. At the commencement of the hearing, the presiding Adjustment Committee Officer erroneously advised the prisoner of his "Miranda rights". The prisoner thereafter invoked his right to remain silent, believing that his silence could not be held against him. The Kentucky Supreme Court found that the Adjustment Committee Officer's actions infringed upon the prisoner's procedural due process right to call witnesses and present evidence in his own defense. The case was remanded back to the trial court with directions that it order a new disciplinary hearing during which the Adjustment Committee Officer must advise the prisoner of his rights in accordance with *Wolff v. McDonald*, 418 U.S. 539 (1974), not *Miranda v. Arizona*, 384 U.S. 436 (1966).

- B. Jose Ramirez v. Tracy Nietzel, in her Official Capacity as Adjustment Officer at the Northpoint Training Center; and the Kentucky Department of Corrections**
[2012-SC-000131-DG](#) March 20, 2014

Opinion of the Court by Chief Justice Minton. All sitting. All concur. Ramirez, an inmate at Northpoint Training Center, was found guilty of committing physical action against another inmate resulting in death or serious physical injury. As a result, Ramirez was assessed a penalty of 180 days' solitary confinement, forfeiture of two years' non-restorable good-time credit, and restitution in the amount of \$556.17. On appeal, Ramirez argued his Due Process rights were violated when Nietzel denied his attempt to call the assault victim as a witness and his request to have the security footage of the incident reviewed. The Court agreed with Ramirez. Specifically, the Court held that when an inmate is denied a witness at a hearing, the AO must provide a reason for the denial. The record

may either be provided contemporaneously with the hearing or on appeal. Further, the Court held the reason must be stated in sufficient detail to support a finding that the denial was logically related to preventing undue hazards to institutional safety or correctional goals. It is permissible, according to the Court, to provide the reason in camera or under seal and it need not be disclosed to the prisoner. With regard to the security footage, the Court held an AO must review surveillance footage, or similar documentary evidence, if requested by the prisoner in a disciplinary proceeding. The Court emphasized the AO may review the evidence in camera if there are concerns about institutional safety or other obstacles to the proper operation of the penal institution. Finally, the Court held if the AO refuses to allow the prisoner to view the evidence, the AO must provide a reason for the decision, much like with denying witness testimony.

II. ARBITRATION

A. **JPMorgan Chase Bank, N.A. (Successor by merger to Bank One, N.A.) v. Bluegrass Powerboats; and James D. Taylor** **2011-SC-000668-DG March 20, 2014**

Opinion of the Court by Justice Noble. Minton, C.J.; Cunningham, Keller, and Venters, JJ., concur. Abramson, J., concurs in result only without separate opinion. Scott, J., not sitting.

Appellant, Taylor, sued Chase Bank, Appellee, after a check for the purchase of Appellant's business was initially credited to his account, and then subsequently returned for insufficient funds. Appellant's account was debited the amount of the check, and as a result Appellant's account was overdrawn.

Chase argued that the suit was subject to an arbitration agreement. The trial court agreed after a hearing on the existence of an arbitration agreement and ordered the case to arbitration. In arbitration, Taylor's claim was dismissed. Then, in light of this Court's ruling in *Ally Cat, LLC v. Chauvin*, Taylor moved the trial court to set aside its previous order compelling arbitration because there had never been any proof of the arbitration agreement. 274 S.W.3d 451 (Ky. 2009). At the same time, Chase filed a motion to confirm the arbitrator's award. The trial court found that its previous ruling had been in error and denied Chase's motion to confirm the arbitrator's award. Chase then took an immediate interlocutory appeal of the order denying its motion to confirm the arbitration order and argued that the trial court was bound to confirm the arbitrator's decision and could not set aside the earlier order compelling arbitration. The Court of Appeals disagreed and affirmed the trial court.

The issue addressed by the Court was whether a trial court has the authority to set aside an earlier order compelling arbitration, and thus void the arbitration, or instead must be compelled to confirm the arbitration order. The Court held that the trial court did not err in finding that there was no arbitration agreement, and that the trial court had the power to correct its prior ruling, albeit late in the case, and there was effectively no pertinent arbitration to review. The Court did not

reach any other issues on appeal about the arbitration process, such as whether a dismissal for timeliness is an “award” for purposes of confirmation or vacation of an award. The Court of Appeals’ decision affirming the trial court was affirmed.

III. CORPORATIONS

**A. Rick Pannell v. Ann Shannon; and Elegant Interiors, LLC
2011-SC-000587-DG **March 20, 2014****

Opinion of the Court by Justice Noble. All sitting. All concur. Ann Shannon organized Elegant Interiors, LLC in 2000 under the Kentucky Limited Liability Company Act and was the company’s sole member. In 2004, Elegant Interiors, LLC entered into a lease for commercial space with Rick Pannell. In 2005, Elegant Interiors, LLC failed to pay necessary fees and file its annual report with the Secretary of State and, as a result, the company was administratively dissolved. In 2006, the parties negotiated new leasing terms, signed a release of the old lease, and entered into a new lease. This lease was signed by Ann Shannon and Rick Pannell, and did not mention the Elegant Interiors, LLC. Rent payments were not made, and Pannell sued both the LLC and Shannon individually. Shannon then had the LLC reinstated as allowed by KRS 278.295, and the previous dissolution certificate was canceled. At the trial level, the court held that the LLC was liable, not Shannon individually. The Court of Appeals affirmed the trial court’s decision.

The Court’s opinion addressed two broad issues: (1) whether Shannon signed the release and lease in her individual capacity and thereby made herself personally liable; and (2) whether the administrative dissolution of the LLC and Shannon’s signing the lease during the period of dissolution, regardless of whether she signed in her company-member or individual capacity, made her personally liable.

The Court held that Shannon did not sign the new lease or release in her individual capacity, and that Shannon, as a member of the limited liability company, cannot be held personally liable solely by reason of her member status for actions taken during a period of administrative dissolution because the company was reinstated. In its analysis, the Court also concluded that Shannon was not liable as an agent of the limited liability company. The Court concluded that the trial court properly granted summary judgment in favor of Shannon, and thus the Court of Appeals’ decision affirming it was correct.

IV. CRIMINAL LAW

**A. Robert Carl Foley v. Commonwealth of Kentucky
2013-SC-000215-MR **March 20, 2014****

Opinion of the Court by Justice Venters. All sitting. All concur. Criminal; post-conviction relief/60.02. Appellant sought a new trial based upon “newly discovered evidence” which consisted of a report by a forensic firearms expert who concluded that the new information supported Appellant’s version of the

underlying homicides and therefore established his innocence. Held: the expert forensic report was not “newly discovered evidence” because “newly discovered evidence” must be based upon underlying facts that were not previously known and could not with reasonable diligence have been discovered, and that an opinion consisting simply of a reexamination and reinterpretation of previously known facts, as here, cannot be regarded as “newly discovered evidence.” And so CR 60.02 standard for post-conviction relief based upon newly discovered evidence was not met.

**B. Darryl Galloway v. Commonwealth of Kentucky
2012-SC-000701-MR March 20, 2014**

Opinion of the Court by Justice Keller. All sitting. Minton, C.J.; Abramson, and Noble, JJ., concur. Scott, J., concurs by separate opinion, in which Cunningham and Venters, JJ., join. Galloway beat and repeatedly raped his girlfriend. He then threatened her and convinced her to tell the police that she had been robbed and beaten and raped by the robber before he took her to the emergency room. A jury convicted Galloway of two counts of rape in the first degree, sodomy in the first degree, and assault in the fourth degree, third offense.

On appeal, Galloway argued that the trial court should have granted a directed verdict on the sodomy charge because the victim's jaw had been broken thus preventing him from completing the act. The Supreme Court held that the trial court had not erred, noting that the lips and teeth are part of the mouth and penetration of the mouth is not necessary to complete the act.

Galloway also argued that the trial court should have granted a directed verdict on the assault charge. To be guilty of assault in the fourth degree, third offense, there must be evidence of two prior assault convictions involving family members or of an unmarried couple that occurred within the preceding five years. The Commonwealth produced evidence that Galloway had two prior convictions for "assault fourth degree, domestic violence." However, it did not present any evidence regarding the identity of the victims and what relationship, if any, they had to Galloway. Absent that evidence, the trial court should have granted a directed verdict as to the assault fourth degree, third offense charge.

Galloway also argued that the trial court should have suppressed a statement he gave to the police. The Court, finding that Galloway had not made a motion to suppress at the trial court level, declined to address this issue.

Finally, Galloway argued that a detective should not have been permitted to testify that slashes in a mattress had been made by a knife. The Court noted that the detective did not give that opinion on direct examination but in response to a question on cross-examination. The defendant cannot elicit a response and then complain that it was not the one he wanted.

In his concurring opinion, Justice Scott noted that the prior domestic violence charges were couched in terms of the Uniform Offense Reporting code. There is

no definition for that code tying it to the statutory definition of domestic violence. Therefore, the Court could not tell if the prior charges were, in fact, domestic violence as defined by statute.

**C. Donald Southworth v. Commonwealth of Kentucky
2012-SC-000179-MR March 20, 2014**

Opinion of the Court by Justice Noble. All sitting. Minton, C.J.; Abramson, Keller and Venters, JJ., concur. Scott, J., concurs in part and dissents in part by separate opinion, in which Cunningham, J., joins.

Southworth was convicted of murdering his wife and was sentenced to life in prison. On appeal, Appellant raised numerous errors. Importantly, the Court held that while Southworth was not entitled to a directed verdict of acquittal, and therefore may be retried, the admission of the other-acts evidence was in error, prejudiced Southworth, and necessitated the reversal of his conviction.

In reaching its decision, the Court addressed the inference upon inference principle, and held that some inferences upon inferences are allowed as long as an inference is grounded in common sense and experience, in reason and logic, and in the evidence at trial. Further, the Court held the evidence involving semen in Umi's body only demonstrated obvious knowledge and that for the evidence to be relevant and admissible proof of the method used to put the semen in Umi's body must be shown. The dissent held the proof was admissible to show that Southworth "had the unique capacity to stage a sexual assault."

V. MUNICIPAL CORPORATIONS

**A. City of Lebanon, Kentucky v. Elinor B. Goodin, et al.
2011-SC-000468-DG March 20, 2014**

Opinion of the Court by Chief Justice Minton. All sitting. Abramson, Cunningham, Keller, Noble and Venters, JJ., concur. Scott, J., dissents by separate opinion. The City of Lebanon took action to annex approximately 415 acres adjacent to its northeastern boundary. Property owners within the territory challenged the validity of the act, alleging they were arbitrarily and unconstitutionally denied their statutory right to challenge the annexation. The residents also challenged the City's compliance with KRS 81A.420 or KRS 81A.410, the statutes governing nonconsensual annexation, arguing the territory was not "adjacent or contiguous" as the statutes required. Initially, the Court held "adjacent" and "contiguous" are not interchangeable. "Adjacent" and "contiguous" allow cities to annex territory that is either nearby, e.g. perhaps separated by roadway or river, or touching the boundary of the city. The Court emphasized that this holding did not unleash cities to annex territory far away from the city boundary, but rather applies when there is a barrier of some sort separating the annexation property from the existing city boundaries. Additionally, the Court held there was no requirement, under Kentucky law, that annexation territory has "natural or regular" boundaries. According to the Court,

as long as the property is suitable for annexation under KRS 81A.410, the shape is largely irrelevant. The Court also noted that attempting to review the motive of the City in performing the annexation was largely inappropriate. Finally, the Court held the City did not violate Section 2 of the Kentucky Constitution by arbitrarily acting. Because annexation is an exclusively legislative and political act, the Court held only limited judicial review was appropriate. As a result, the Court held the City's decision to annex was rationally related to its power to act, therefore was not arbitrary.

VI. ATTORNEY DISCIPLINE

A. Kentucky Bar Association v. Nancy Oliver Roberts 2012-SC-000266-KB March 20, 2014

Opinion and Order by Dennis Repenning, Special Justice. Abramson, Cunningham, Noble, Scott, Venters, JJ., Dennis Repenning, SJ., and J. Christopher Hopgood, SJ., sitting. Cunningham, Scott, Venters, JJ., Dennis Repenning, SJ., and J. Christopher Hopgood, SJ, concur. Noble, J., concurs in part and dissents in part by separate opinion in which Abramson, J., joins. Minton, C.J., and Keller, J., not sitting. Nine charges were brought against Roberts by the Kentucky Bar Association. A trial commissioner found her guilty of all nine counts and recommended a one-year suspension. The Board of Governors took de novo review and recommended that Roberts be found guilty of two of the nine counts and suspended for 30 days. Both Roberts and the Office of Bar Counsel sought review with the Court under SCR 3.370, with Roberts requesting that all alleged ethical violations be dismissed and the KBA asking that the trial commissioner's disciplinary recommendation be adopted instead of the Board's recommendation. A majority of the Court agreed that Roberts was guilty of two ethical violations and suspended her from the practice of law for 61 days.

B. Geoffrey Miller v. Kentucky Bar Association 2013-SC-000104-KB March 20, 2014

Opinion of the Court. All sitting. All concur. Miller was arrested for DUI, possession of an open alcoholic beverage in a vehicle and leaving the scene of an accident. He was released on his own recognizance but failed to appear for his arraignment. In April 2013, the Supreme Court determined that Miller's failure to appear at his arraignment constituted a violation of SCR 3.130-3.4(c), which prohibits an attorney from knowingly disobeying an obligation under the rules of a tribunal. Miller was suspended from the practice of law for 30 days, probated for a period of three years, on the condition that he participate in the Kentucky Lawyer Assistance Program. The Office of Bar Counsel received a monitoring report from KYLAP indicating that Miller had a "significant relapse" and was not in compliance with his KYLAP Supervision Agreement. Accordingly, Bar Counsel petitioned the Court to issue a show cause order. In December 2013, Miller was provided 30 days to show cause, if any, why the Court should not revoke his probation and impose the full 30-day suspension from the practice of

law. Miller failed to respond. Accordingly, the Court imposed the remainder of the probated sentence.

**C. Kentucky Bar Association v. Thomas John Leksan
2013-SC-000710-KB March 20, 2014**

Opinion of the Court. All sitting. All concur. In June 2013, the Ohio Supreme Court adopted a report of the Ohio Board of Commissioners on Grievances and Discipline finding Leksan guilty of numerous serious ethical violations relating to his gross mishandling and misappropriation of client funds. The Ohio Board considered a number of mitigating factors in recommending discipline, including the fact that Leksan sought help for impairment before the misconduct was discovered, his restoration of most of the misappropriated funds before the misconduct was discovered, his reputation and cooperation during the disciplinary process, as well as the fact that he closed his office and is “winding down” his practice. The Ohio Supreme Court suspended Leksan indefinitely, and further ordered that Leksan must meet several requirements should he seek reinstatement. At the request of the KBA, the Court issued an order requiring Leksan to show cause why he should not be indefinitely suspended from the practice of law, as consistent with the order of indefinite suspension from the Ohio Supreme Court. Leksan did not respond to the show cause order. Accordingly, the Court held that identical reciprocal discipline should be imposed under SCR 3.435 and suspended Leksan from the practice of law in the Commonwealth until he demonstrates that his suspension from the Ohio Supreme Court has been lifted.

**D. Kentucky Bar Association v. Gary Lynn Goble
2013-SC-000719-KB March 20, 2014**

Opinion of the Court. All sitting. Cunningham, Keller, Noble, Scott and Venters, JJ., concur. Minton, C.J., dissents by separate opinion, in which Abramson, J., joins. Goble, who was not practicing law but operating the family pharmacy business at the time, failed to make required deposits into employee 401k accounts and issued payroll checks to employees when he knew there were not sufficient funds in the account. He entered guilty pleas to the criminal charges that arose from his actions and admitted full responsibility for his ethical violations. The Board of the KBA recommended that Goble's license be suspended for five years. The majority agreed with the Board because Goble was not practicing law at the time of his violations; the amount of money at issue, although not insignificant, was not so great as to mandate permanent disbarment; Goble had made restitution; and Goble had no prior disciplinary complaints.

In his dissent, the Chief Justice stated that the weight of the case law favored permanent disbarment. He also indicated that whether an attorney is acting as an attorney when he mishandles funds entrusted to him should have no bearing on the appropriate punishment. Taking these factors into consideration, the Chief Justice would have permanently disbarred Goble.

E. Richard K. Rose v. Kentucky Bar Association
[2014-SC-000057-KB](#) March 20, 2014

Opinion of the Court. All sitting. All concur. Rose moved the Court to issue a public reprimand for his admitted violations of SCR 3.130-1.1, SCR 3.130-1.5, SCR 3.130-3.4(c), and SCR 3.130-1.15(a). The KBA did not object to the proposed discipline. The Court granted Rose's motion, finding that a public reprimand was the appropriate discipline for his misconduct.