

RENDERED: SEPTEMBER 8, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-000430-MR

HARDIN COUNTY, KENTUCKY
d/b/a HARDIN MEMORIAL HOSPITAL;
GRAYSON COUNTY HOSPITAL FOUNDATION, INC.
d/b/a TWIN LAKES REGIONAL MEDICAL CENTER;
and FLAGET HEALTHCARE, INC.
d/b/a FLAGET MEMORIAL HOSPITAL

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 13-CI-01013

THE VISITATION BIRTH AND FAMILY WELLNESS
CENTER, INC.;
COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND FAMILY SERVICES;
and AUDREY TAYSE HAYNES, IN HER OFFICIAL CAPACITY
AS SECRETARY OF THE CABINET FOR HEALTH
AND FAMILY SERVICES

APPELLEES

OPINION
REVERSING

** ** * ** * ** *

BEFORE: ACREE, COMBS, AND JONES, JUDGES.

JONES, JUDGE: This is an appeal of an Opinion and Order of the Franklin Circuit Court reversing an Order of the Cabinet for Health Services, which disapproved a Certificate of Need application to establish an alternative birth center in Elizabethtown, Hardin County, Kentucky. After careful review we reverse the Order of the Franklin Circuit Court and reinstate the Order of the Cabinet disapproving the Certificate of Need.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellee, The Visitation Birth and Family Wellness Center, Inc. (the “Center”), is a Kentucky Corporation which filed a certificate of need (“CON”) application with the Kentucky Cabinet for Health Services (the “Cabinet”) on September 26, 2012, to establish a free-standing alternative birth center in Elizabethtown, Hardin County, Kentucky. The proposed Center would be the only alternative birth center in the Commonwealth. Alternative birth centers, as defined in 902 KAR¹ 20:150, Section 2, are:

establishments with permanent facilities which provide prenatal care to low risk childbearing women. An alternative birth center provides a homelike environment for pregnancy and childbirth including prenatal, labor, delivery, and postpartum care related to medically uncomplicated pregnancies.

The CON application filed by the Center requested non-substantive review status pursuant to KRS² 216B.095(3)(f). The Cabinet granted the Center’s application for non-substantive review status, pursuant to 900 KAR 6:075, Section

¹ Kentucky Administrative Regulations.

² Kentucky Revised Statutes.

2(3)(a), as there is not a component in the State Health Plan (“SHP”) for alternative birth centers. When an application is granted non-substantive review status, “there shall be a presumption that the facility or service is needed and an application granted non-substantive review status by the Office of Health Policy shall not be reviewed for consistency with the State Health Plan.” 900 KAR 6:075, Section 2(7). This presumption of need may be “rebutted by clear and convincing evidence by an affected party.” 900 KAR 6:075, Section 2(7)(b). If an affected party rebuts the need presumption by clear and convincing evidence, then the Cabinet “shall disapprove” the application. *Id.*

KRS 216B.095(1) allows an “affected person” to request a hearing on a CON application. The term “affected persons” is defined to include “health facilities located in the health service area in which the project is proposed to be located which provide services similar to the services of the facility under review[.]” KRS 216B.015(3).

Appellants, Hardin County, Kentucky d/b/a Hardin Memorial Hospital (“Hardin Memorial”), Flaget Healthcare, Inc. d/b/a Flaget Memorial Hospital (“Flaget”), and Grayson County Hospital Foundation, Inc. d/b/a Twin Lakes Regional Medical Center (“Twin Lakes”), are hospitals located in Hardin, Nelson, and Grayson counties in the Lincoln Trail Area Development District (“ADD”), *i.e.* the “primary service area,” which was proposed by the Center.³

³ The application was based on a primary service area of sixteen counties closest to Hardin County, supported by a secondary service area of eight counties.

Appellants made a timely request for a hearing on the Center's CON application. Appellants claimed to be "affected persons" pursuant to KRS 216B.015(3), and therefore, entitled to challenge the Center's application in an administrative hearing. The Center did not dispute that Appellants were affected persons with standing at any time while this matter was pending before the Cabinet. The Cabinet conducted a hearing on the Center's application in February and March of 2013.

Prior to the administrative hearing, the Center filed a motion to determine the scope of the hearing as well as to clarify which parties had the burden and order of proof. The Administrative Law Judge ("ALJ") determined that Appellants had the burden of proof and were required to rebut the presumption of need by clear and convincing evidence.

A. Testimony from Appellants

Hardin Memorial provides an array of healthcare services, including labor and delivery services. Nurse midwives have been on Hardin's staff for approximately twenty years. If a Hardin patient designates a nurse midwife as the caregiver, the plan is for the nurse midwife to perform the delivery. In 2012, Hardin midwives performed approximately 122 deliveries. Hardin's Director of Medical and Surgical Services, Patricia L. Burroughs, described the BirthPlace facility at Hardin as follows:

. . . a lot is geared toward that mother's desires and wishes and her birth plan. If she wants to be monitored continuously, if she wants to get up and walk, ambulate

during the labor, sit in a chair, sit on a birthing ball, we accommodate that. Some moms get in the shower.

As far as the services at delivery, again, that's coaching and supporting the physician or midwife and the patient and what their collaborative agreement has been as to what their process is going to be. We do have birthing beds which allow multiple positions to be used for that mom to assist her with the birth.

Hardin also has rocking chairs for patients at its BirthPlace facility.

Burroughs testified that Hardin allows natural births, does not require every patient to have an IV and does not require every patient to be placed on a continuous electronic fetal monitor. One-to-one nursing care is provided for women in labor and delivery at Hardin. Hardin performs deliveries where mothers are in positions they have chosen themselves such as squatting positions, sideline positions and knee/chest positions. Hardin has a "kangaroo care" program where newborn babies have skin-to-skin contact with their mothers following birth and 14 rooms with cribs where newborns can remain with their mothers at all times. Following birth, Hardin monitors mother and baby. Hardin offers education classes for expectant mothers and their families, covering topics such as labor preparation, baby care and breastfeeding.

Next, Twin Lakes obstetricians described the birthing experience there as follows:

. . . labor, delivery and recovery rooms offer a home-like atmosphere and the staff provides highly individualized care using a mother-baby care model. Twin Lakes provides a compassionate and comfortable environment

for each delivery and creates a family-centered experience.

Flaget also performs deliveries and has practicing obstetricians at its hospital in Bardstown, Kentucky.

B. Testimony from the Center

The Center would be approximately 2.9 miles from Hardin Memorial and would include three birthing suites. The Center's proposed Clinical Director, Mary Akers, described labor and delivery at an alternative birth center.

Like other alternative birth centers across the United States, an expectant mother's experience is often said to be different from that offered in the traditional hospital setting. During labor and birth, the mother is cared for by both a nurse-midwife and a registered nurse. The nurse-midwife remains with the mother throughout labor, regularly assessing the progression of the labor. As alternative birth centers offer low intervention births, women are provided various means of reducing pain during the birthing process including use of birthing tubs, birthing showers, birthing chairs, birthing balls, as well as other methods. Post-natal services are then provided for both mother and child for up to twenty-eight days after birth.

C. Expert Witness Testimony

The Center's expert witness, Roger Cochran, testified that the Center's proposed service area covers 24 counties in central Kentucky, with 16

counties constituting the “primary service area,” and the “secondary service area” comprised of 8 counties. The Center anticipates that patients from its primary service area would spend, on average, 42 minutes traveling to the Center, and patients from the secondary service area would spend, on average, over an hour traveling to the Center. More than 80% of the Center’s estimated patients would travel from locations that are 40 miles away. Cochran projected that most patients would likely come from Jefferson County.

Cochran created a need model forecasting that the Center would perform 100 births in its first year of operation and 207 births in its second year. His model assumes: (1) 90% and 75% of mothers, in, respectively, the Center’s primary and secondary service areas that would have otherwise birthed at home, will instead birth at the center; and (2) that by 2014, the rate of home births for every county in Kentucky will be 1.2488%. The Center’s CON application assumes the Center will capture all the patient volumes projected in Cochran’s need model.

Kentucky’s 2009 home birth rate was 0.9%. Cochran predicted that rate would grow to 1.2488% by 2014. To make this prediction, Cochran prepared linear forecasts of Kentucky home birth rates from 2010 to 2014 using data from 2004 through 2009. He conceded that his 2014 home birth rate prediction was a “high forecast.” He further conceded that his projected use rate for the Center, *i.e.* 1.09% of all births in the service area, was about three-and-a-half times the national birthing center use rate of 0.3%.

Appellants' expert, Richard Baehr, testified that the obstetrics service area for hospitals tends to be smaller than the service area for other services because laboring women need to have quick access to a physician. Most obstetrics programs draw 75%-80% of their patients from three counties or less. Hardin Memorial, Flaget, and Twin Lakes draw over 75% of their obstetrics patients from three counties. Baehr explained:

And fifty miles in any direction or seventy miles in any direction is simply not the type of service area you tend to see for any kind of obstetrics practice.

To expect that the largest contributor to an obstetrics program . . . will be a county that's forty-five to fifty miles away [i.e., Jefferson], that they're going to contribute more than half of the total patient population, I just think that's entirely unrealistic.

Baehr, who has over 35 years of healthcare planning experience, concluded that there was no rational basis for the Center's proposed service area. With respect to Jefferson County in particular, Baehr noted that about 97% of Jefferson County mothers deliver in Jefferson County. Baehr stated that the obstetrics utilization levels for the four hospitals in the ADD where the Center would be located were "relatively low" and that deliveries there have decreased by about 10% from 2007 to 2011. Occupancy of obstetrics beds in the Lincoln Trail ADD decreased from 50.6% to 44.1% between 2007 and 2011. Between the time the Center filed its CON application and the time Baehr testified, new data showed that the number of births in the Center's proposed service area had declined. Birth volume in the ADD where Jefferson County is located, from which the Center

claims over half of its patients will come, has also declined. The Kentucky State Data Center projects that the population of women of child-bearing age in the Lincoln Trail ADD will grow by 4% from 2010 to 2020 (by comparison, the national population is growing at a rate of 10%). This growth rate will not cause a substantial increase in the occupancy of obstetrics beds in the Lincoln Trail ADD.

Baehr also identified several flaws in Cochran's assertion that conversion of home births is a reliable way of forecasting demand for deliveries at the Center. First, some home births are the result of a conscientious exercise of religious beliefs or values, as opposed to the lack of the alternative birth center. Second, the choice of home birth may be inadvertent, such as a sudden, unexpected time of birth. Third, the home birth may be driven by the mother's financial constraints, not the lack of an alternative birth center.

Baehr noted that alternative birth centers generally have affluent patients, but that approximately 50% of the Lincoln Trail ADD mothers are on the Medicaid program. However the Center will not accept Medicaid and Cochran's model did not account for Medicaid. Cochran testified that "Medicaid is not a payor that would sustain this program in Kentucky." Nationally, 23.8% of birthing center patients use Medicaid as their method of payment. Akers testified that patients at the Center would be charged two fees, a \$3,600 facility fee, plus a professional fee in the range of \$2,400 to \$3,000.

Finally, Baehr reviewed National Vital Statistics data which showed that, even in states with a lot of birthing centers, there is no evidence that 90% of

out-of-hospital births occur at freestanding birth centers. Baehr explained that Cochran's use of a 1.2488% home birth rate for Jefferson County in 2014 was especially problematic because the Jefferson County home birth rate in 2009 was only .43%. In Jefferson County, there were only forty-five home births total in 2009. The model estimated that Jefferson County would have one-hundred thirty-three home births in 2014, which is triple the number from five years earlier. Cochran's home birth rate was also inconsistent with national statistics showing that 0.3% of all U.S. births in 2010 occurred in birth centers. Baehr explained that the idea that the Center in Kentucky would have close to four times the national average and be one of the leaders in the county in terms of use rate for this service does not seem realistic. On the other hand, Baehr stated, if consistent with the national average, .3% of the projected 2014 births in the Center's proposed service area occurred at the Center, the Center could expect only 52 deliveries, which is about a quarter of the births Cochran is projecting.

In his expert opinion, Baehr concluded that there is no need for the Center in its proposed service area and that Cochran's assumptions were not reasonable or credible.

On July 26, 2013, the ALJ issued Findings of Fact, Conclusions of Law and Order disapproving the Center's CON application. The ALJ determined:

While Kentucky currently does not have a birthing center, it has not been proven that there is an unmet need for one. The [Center's] premise that the majority of its patients will be those who currently home birth has not been proven. Nor has [the Center] been able to regain a

finding of need, after the rebuttal of the presumption by the Affected Parties. There is no reliable scientific evidence in the record to support the [Center's] contention that home births in Jefferson County will triple over the next five years, and that 90% of those births will be delivered in a freestanding birthing center located over an hour away from the patients' homes.

The ALJ found that Baehr's testimony refuted the presumption of need afforded to the Center because it showed that Cochran's projections based on a five-year period, with no reference to other historical data, cannot support a reasonable projection of the number of births likely to occur in the 2009-2014 period. The Order continued, finding that there has been no credible testimony or evidence to support the Applicant's projection that the number of births in Jefferson County will triple by the year 2014. The Order pointed out:

As Jefferson County residents deliver home births in numbers smaller than the statewide average, there is no reasonable supposition that the number of patients projected by the Center will originate in Jefferson County. Akers admitted that only two-to-five of her current clientele live in Jefferson County. To presume that a number twenty-plus times that amount will seek out midwife services in a facility an hour away, within the first two years of opening, is not reasonable, nor supported by evidence in the record.

The Order observed that Jefferson County women currently have available to them options for using a birth plan developed by a mother and a midwife. The Order stated that Cochran's need model was not realistic and did not have any substantive and objective data for support. And, absent those unreliable rates, the ALJ found that no need had been shown, and thus did not exist.

The order concluded:

. . . that the Affected Parties have rebutted the presumption of need for the requested service, as contemplated by 900 KAR 6:075, Section 2(7), by clear and convincing evidence, which has not been overcome by [the Center]. Therefore, the application for a Certificate of Need for an alternative birthing center must be disapproved[.]

The Center then appealed the Findings and Conclusions of the Cabinet to the Franklin Circuit Court.

On February 23, 2015, the Franklin Circuit Court issued an Opinion and Order overturning the Cabinet’s decision. The court held that Appellants were not “affected parties” for purposes of KRS 216B.015(3) because “traditional health care providers, by definition, are separate and distinct from ‘alternative birth centers.’” As a result, the circuit court determined that the Appellants lacked standing to challenge the Cabinet’s initial determination that the Center qualified for a CON under the non-substantive review regulation.

Further, the Franklin Circuit Court held that the Center’s application was properly granted non-substantive review status and that Appellants failed to rebut the presumption of need for an alternative birth center. The Court stated:

This Court is persuaded by the Petitioner’s interpretation of KAR 20:150, under which it argues alternative birth centers are to operate in addition to (i.e., as an alternative to) the traditional, hospital-based delivery services currently offered within the state so that women may choose how they wish to give birth. Expanding the options for giving birth by granting the Petitioner’s CON Application appears to further the purpose of the CON program by improving access to a variety of healthcare

options without significantly impacting the cost of providing that care for the state.

The circuit court determined that Appellants failed to prove that the services provided by the Center were already provided in the service area, and therefore the court found that Appellants did not rebut the presumption of need. Accordingly, the circuit court held that the Center's CON application was improperly denied, stating:

This Court has already stated that it is persuaded by Petitioner's argument that the traditional, hospital-based labor and delivery services provided by HMH, Flaget, and Twin Lakes are not like the alternative birth services that its proposed center would provide. As a result, this Court finds that the Respondent did not rebut by clear and convincing evidence the presumption of need granted to Petitioner's CON Application based on its non-substantive review status.

This appeal followed.

II. STANDARD OF REVIEW

Judicial review of an administrative decision is limited to a determination of whether the agency acted within the constraints of its statutory powers, whether the agency's procedures afforded procedural due process, and whether the agency's decision is supported by substantial evidence of the record. *Bowling v. Nat'l. Res. & Env'tl. Prot. Cabinet*, 891 S.W.2d 406, 410 (Ky. App. 1995).

II. ANALYSIS

A. “Affected Party” Status and Standing

First, the parties dispute whether Appellants, as opponents of the Center’s CON Application, are “affected persons.” Affected persons have the right to request a hearing on CON applications granted non-substantive review statuses. KRS 216B.095(1). “Affected persons” includes health facilities located in the health service area in which the project is proposed to be located, which provide services similar to the services of the facility under review. Only an “affected person” may request an administrative hearing on a CON application which has been granted non-substantive review status. *See* KRS 216B.095(1) (“Any affected person . . . may request a hearing by filing a request with the cabinet within ten (10) days of the notice to conduct a non-substantive review.”). If the party requesting the hearing is not an “affected person,” the Cabinet lacks jurisdiction to conduct a hearing on a CON application granted non-substantive review.

Appellants assert that a determination that a party is an affected person is tantamount to a determination that the party has standing. *See Humana of Kentucky, Inc. v. NKC Hosp., Inc.*, 751 S.W.2d 369, 372 (Ky. 1988) (“[s]tanding arises . . . from being an affected person [.]”). Thus, Appellants argue that as standing is not jurisdictional, the issue of standing is a defense that may be waived. *See Harrison v. Leach*, 323 S.W.3d 702, 705 (Ky. 2010). We agree.

Under KRS 216B.040(2)(b), the Cabinet has subject matter jurisdiction to conduct hearings in respect to CON applications, as it did here. As the court found in *Harrison v. Leach*, 323 S.W.3d 702, 709 (Ky. 2010), the

concepts of standing and subject-matter jurisdiction are distinct. Since a lack of standing does not deprive a trial court of subject-matter jurisdiction, a party's failure to timely raise his or her opponent's lack of standing may be construed as waiver. *Id.* Thus, because standing may be waived, an appellate court, which in this case was the circuit court, errs by injecting standing into a case on its own motion. *Id.*

Issues not raised in a proceeding before an administrative agency are waived on appeal. *See Trans. Cabinet v. Roof*, 913 S.W.2d 322, 325 (Ky. 1996). The Cabinet concluded that Appellants were affected persons. The Center never disputed Appellants' status as affected persons or otherwise contested their standing while this matter was before the Cabinet. It was not until the Center appealed the Cabinet's determination to the Franklin Circuit Court that the Center disputed Appellants' status as affected persons. However, we conclude that the Center waived this issue by failing to raise it at the administrative level. Therefore, it was improper for the Franklin Circuit Court to raise the standing issue for the first time on appeal. The Franklin Circuit Court's consideration of the affected party/standing issue after the Center waived it is contrary to our case law. *Harrison*, 323 S.W.3d at 703 ("Because the issue of standing is distinct from the issue of subject-matter jurisdiction and, thus, can be waived, we hold that an appellate court cannot, on its own motion, resolve an appeal based upon a lack of standing before the trial court."). Accordingly, we reverse the Franklin Circuit

Court to the extent that it considered Appellants' standing after the Center waived the issue.

B. *Substantial Evidence.*

Next, Appellants argue that the Cabinet's determination that it rebutted the Center's presumption of need was supported by substantial evidence and that the Franklin Circuit Court erred when it concluded that Appellants failed to rebut the presumption of need. We agree.

The CON application filed by the Center requested non-substantive review status pursuant to KRS 216B.095(3)(f). The Cabinet properly granted the Center's application non-substantive review status, pursuant to 900 KAR 6:075, Section 2(3)(a), as there is not a component in the State Health Plan ("SHP") for alternative birth centers. When an application is granted non-substantive review status, "there shall be a presumption that the facility or service is needed and an application granted non-substantive review status by the Office of Health Policy shall not be reviewed for consistency with the State Health Plan." 900 KAR 6:075, Section 2(7). This presumption of need may be "rebutted by clear and convincing evidence by an affected party." 900 KAR 6:075, Section 2(7)(b). If an affected party rebuts the need presumption by clear and convincing evidence, then the Cabinet "shall disapprove" the application. *Id.*

In order to rebut the presumption of need, Appellants were required to demonstrate "by clear and convincing evidence that there is not a need for an

alternative birth center in the service area at issue.” *See Baptist Convalescent v. Boonespring Transitional Care Ctr., LLC*, 405 S.W.3d 498, 504 (Ky. App. 2012). Clear and convincing evidence “require[s] the party with the burden of proof to produce evidence more persuasive than a mere preponderance, but proof which need not rise to the level of beyond a reasonable doubt.” *Hardin v. Savageau*, 906 S.W.2d 356, 357-58 (Ky. 1995).

The issue was whether the presumption of the need for the Center in the proposed service area was rebutted by clear and convincing evidence. After careful review of the record, we conclude that Appellants rebutted the Center’s presumption of need by offering clear and convincing evidence the Center was not needed in the proposed area for several reasons. To this end, we note that the question is not whether we (or the Franklin Circuit Court) would have reached the same result as the Cabinet. The question is whether a review of the record indicates that substantial evidence exists in the record to support the Cabinet’s decision. After a careful review of the record, we conclude that such evidence does exist.

The evidence showed that 97% of Jefferson County mothers – the County the Center projects will be the source of most of its deliveries – do not leave Jefferson County to deliver babies and, in 2009, Jefferson County mothers only used midwives to assist with home deliveries two times. Moreover, the number of births in both Jefferson County and the proposed service area have actually been decreasing. Further, the growth rate of women who are child-bearing

age in Lincoln Trail ADD (the Center's proposed primary service area) will be 4% from 2010 to 2020, which is 6% less than the national rate of 10%. Importantly, nearly half of the Mothers in the Lincoln Trail ADD are Medicaid beneficiaries and the Center testified that it "does not propose to accept Medicaid."

Appellants provided substantial evidence to refute the presumption of need afforded to the Center. Appellants' expert witness, Richard Baehr, testified in detail about the Center's unrealistic projections, and that based upon his expert analysis, there is no need for the proposed project in the service area. He testified that Jefferson County residents historically are not likely to travel out of the county for obstetric care. The Center did not provide any credible testimony or evidence to support the claim that Jefferson County residence would travel to Elizabethtown to give birth at the Center, especially at the levels projected by the Center.

Further, there was no credible testimony to support the Center's projection that the number of births in Jefferson County would triple by 2014. The testimony of Richard Baehr revealed that there is no supporting data or other documentation that would make the Center's projections viable or reasonable. The Center's own expert witness admitted that Mary Akers determined the percentages of home births from each county that would be converted to births at the Center and that there was no data presented to support this presumption.

While one can disagree with Richard Baehr's testimony, it was not error for the Cabinet to rely on it. Further, the Cabinet found that Appellants proved that women in Kentucky who seek the services of midwives or seek an

alternative birthing experience are well-served by the existing hospitals in the proposed service area.

After Appellants rebutted the presumption of need, the Cabinet properly found that the Center was not able to regain a finding of need. The Center did not offer any reliable evidence on the record to support its projections of need. The Center's calculations were incomplete and based upon limited data. Many of the Center's projections were not supported by any data.

The Center's unrealistic projections and expectations underscored the actual lack of need for these services in the proposed service area. As the Cabinet noted:

While 900 KAR 6:075, Section 2(7) grants a presumption of need to those applications given nonsubstantive review status, this presumption of need is based upon the premise that the information contained in the application is factual and supported by hard data. To presume otherwise, would render the statute meaningless, as any party could fabricate application data and receive a certificate of need. Therefore, if an affected person is able to refute the facts contained within the application, this also contributes to counter the presumption of need that has been granted to the applicant.

In conclusion, we cannot conclude that the Cabinet abused its discretion. It evaluated the evidence of record before it and its ultimate conclusion is supported by the record.

IV. CONCLUSION

For these reasons, the February 23, 2015 Order of the Franklin Circuit Court is reversed with directions to enter a new Order reinstating the July 26, 2013 Order of the Cabinet for Health and Family Services.

ACREE, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTS BY SEPARATE OPINION: I cannot agree that substantial evidence existed in the record to overcome the presumption of need. Both sides offered evidence, but both sets of evidence were speculative at best and were based on opinion evidence as to “projections” rather than hard facts. Neither side presented evidence that could rise to the level of “clear and convincing.”

Appellees, however, enjoyed the presumption of need. Since Appellants failed to produce evidence of a clear and convincing nature, the presumption of need should stand un rebutted.

I am persuaded that the Cabinet improperly shifted the burden of proof to the Appellees and that in doing so, it erred in denying the Certificate of Need. As to the standing issue, that error was harmless in light of the error on the part of the Cabinet in mis-allocating the burden of proof as dictated by 900 KAR 6:075, Section 2 (7)(b). Therefore, I would affirm the well-reasoned opinion of the Franklin Circuit Court.

BRIEF AND ORAL ARGUMENT
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