

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-001604-MR

BILL ALWARD; PATSY CONWAY; JOHN S.  
CRAFTON; KAREN M. CURTIS; JAMES O.  
GAINES; JOHN A. PERRY; BETTY RIPATO;  
AND ROGER PITCHFORD

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE DANIEL J. VENTERS, JUDGE  
ACTION NO. 99-CI-00301

COMMONWEALTH OF KENTUCKY, EXECUTIVE  
BRANCH ETHICS COMMISSION

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, EMBERTON AND COMBS, JUDGES.

BARBER, JUDGE: This appeal arises from the Franklin Circuit Court's order of dismissal of a Complaint for Declaration of Rights and Declaratory Judgment, and a Motion for Protective Order filed by appellants, who are Property Valuation Administrators (PVA's) in several Kentucky counties. Finding no error, we affirm.

The appellants challenge the validity of Advisory Opinion 98-11 issued by the appellee, Executive Branch Ethics Commission (Commission), on February 26, 1998, regarding the

interpretation of KRS 11A.020. The Advisory Opinion pertained to the outside employment of PVA's as licensed real estate agents while holding office. The Commission stated that it believed that a conflict of interest would exist if any PVA were involved in the valuation of property, as required by their office, and at the same time attempted to sell property privately for financial gain.

On April 21, 1998, the Commission followed the Advisory Opinion with a memo from the executive director advising all PVA's to hold their real estate license in escrow while serving in office.

On September 3, 1998 the Commission voted to institute preliminary investigations of those PVA's who still held an active real estate license. On February 24, 1999 the Commission issued subpoenas to certain PVA's respective real estate agencies in furtherance of the investigation.

On March 9, 1999 appellants filed for a declaratory judgment in Franklin Circuit Court alleging that the PVA's were not in violation of KRS 11A.020 and requesting that the court declare Advisory Opinion 98-11 invalid. On March 23, 1999 the appellants also filed a motion for protective order asking the court to prohibit any further investigation by the Commission until the conclusion of litigation. This motion was followed three days later with a supplemental motion for protective order.

On June 15, 1999 the circuit court denied the PVA's motion for protective order and on June 17, 1999 dismissed the motion for declaratory judgment based on the PVA's failure to

exhaust their administrative remedies, and because no actual controversy existed which to adjudicate. Specifically, the court stated that Advisory Opinion 98-11 was not tantamount to an administrative regulation because it does not try to interpret KRS 11A.020. Therefore, there was no actual controversy present and the matter was not ripe for judicial review.

We agree with the circuit court's determination that no actual controversy exists. The relief requested would in affect be a decision based upon a hypothetical question. Our Court has consistently held that such a request is improper. Bischoff v. City of Newport, Ky. App., 733 S.W.2d 762 (1987).

We are also mindful of appellants' argument concerning exhaustion of administrative remedies. The manner in which the Commission implements Advisory Opinion 98-11 at first blush seems to fall within the exception to the general rule of exhaustion of administrative remedies set out in Harrison's Sanitarium v. Commonwealth of Kentucky, Ky., 417 S.W.2d 137 (1967). Upon close review, the appellants cannot meet the second prong in the test set out in Harrison's, supra, that is that completion of the administrative remedy would be an exercise in futility.

Based upon the foregoing, we affirm the judgment of the circuit court dismissing the appellants' petition.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANT:

Stephen G. Amato  
Lexington, Kentucky

BRIEF AND ORAL ARGUMENT FOR  
APPELLEE:

Donna Dutton  
Frankfort, Kentucky