

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000744-MR

DON A. WIMBERLY, CHAIR,  
EXECUTIVE BRANCH ETHICS COMMISSION

APPELLANT

v. APPEAL FROM ALLEN CIRCUIT COURT  
HONORABLE WILLIAM R. HARRIS, JUDGE  
ACTION NO. 98-CI-00249

SUZANNE PARDUE

APPELLEE

OPINION  
REVERSING AND REMANDING  
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BEFORE: EMBERTON, and TACKETT, Judges; and MARY COREY, Special Judge.<sup>1</sup>

TACKETT, JUDGE: Don A. Wimberly, on behalf of the Executive Branch Ethics Commission, appeals from an opinion of the Allen Circuit Court reversing an order of the Ethics Commission finding Suzanne Pardue committed two violations of the Executive Branch Code of Ethics, Kentucky Revised Statute (KRS) Chapter 11A. After carefully reviewing the record, the applicable law and the arguments of counsel, we reverse and remand.

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<sup>1</sup>Senior Status Judge Mary Corey sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

Based on information received from some staff members at the Department for Social Services Office of the Cabinet for Families and Children in Allen County, the Executive Branch Ethics Commission began a preliminary investigation in August 1997, of possible violations of the Executive Branch Ethics Code by Pardue. See KRS 11A.080(1). At that time, as supervisor in the Family Services Office in Allen County, Pardue was the highest ranking employee in that particular district office. As part of her duties, Pardue authorized payment for the care and partial support of foster children under the auspices of the Cabinet.

Following the investigation, in December 1997, the Ethics Commission decided to issue an Initiating Order against Pardue, which set forth a four count allegation of violations of the Ethics Code as contained in KRS 11A.020(1). They were as follows: (1) Pardue improperly solicited funds from businesses that also conducted business with the Cabinet; (2) she improperly authorized reimbursements to foster parents for Christmas gifts for foster children; (3) she improperly influenced or directed the use of the services of her son-in-law, Dr. Tom Carter, for dental treatment of foster children; and (4) she improperly used her office to conduct work for a private nonprofit charitable children's relief fund for which Pardue served as president.

A hearing officer conducted a three-day evidentiary hearing on April 28-30, 1998, which included testimony from twenty-three witnesses including Pardue, as well as numerous documentary exhibits. On August 17, 1998, the hearing officer

issued a detailed twenty-one page recommended order containing findings of fact, conclusions of law, and a recommended penalty. Based on the factual findings, the hearing officer concluded that Pardue had violated KRS 11A.020 (1) with respect to count one, but that there was insufficient evidence of the violations alleged in counts two, three and four. Given the range of penalties available under KRS 11A.100(3)(a) through (e), he recommended a penalty consisting of a public reprimand and a civil penalty of \$200. Both parties appealed to the Executive Branch Ethics Commission and filed exceptions to the hearing officer's recommended order.

On October 27, 1998, the Ethics Commission issued its final order which contained findings of fact and conclusions of law. It adopted the hearing officer's findings, concurred with his recommendations as to counts one, two and four, but disagreed as to count three. In a somewhat abbreviated order, the Ethics Commission held that there was clear and convincing evidence that Pardue knowingly solicited businesses for monetary contributions for Christmas gifts for foster children both in 1995 and 1996 in violation of KRS 11A.020(1)(d). The Ethics Commission also found that Pardue violated KRS 11A.020(1)(a), (c), and (d) by authorizing and approving payments to her son-in-law, Dr. Tom Carter, for dental services he rendered to foster children based on the fact that the Allen County case workers knew that Dr. Carter was Pardue's son-in-law and despite the availability of other dentists who accepted Medicaid patients. Pardue then filed

a petition with the circuit court appealing the final order of the Ethics Commission. See KRS 13B.140.

In her appeal before the Allen Circuit Court, Pardue challenged the factual findings of the hearing officer and the factual findings and legal conclusions of the Ethics Commission. Following the submission of briefs by the parties, the circuit court entered an opinion reversing the Ethics Commission. The circuit court found that the Ethics Commission's findings of fact adopted from the hearing officer were indeed supported by substantial evidence. However, the circuit court held that the factual findings did not support the conclusion that Pardue had violated KRS 11A.020 as a matter of law. With respect to count one the circuit court stated:

For reasons which the Court cannot discern, the Commission perceives some evil in what strikes the Court as a noble attempt by Pardue to try to better the lives of foster children by raising some extra money in the community to help these unfortunate children have a more meaningful Christmas experience. Neither the language of KRS 11A.020(1) nor the statement of public policy set forth in [KRS] 11A.005 cause the Court to believe that the legislative intent of the subject statute is to discourage employees of the Commonwealth from engaging in such acts of human kindness.

As for the Ethics Commission's conclusion that Pardue violated the Ethics Code by approving payments to Dr. Carter for dental services, the circuit court said:

Once again, looking at the language of KRS 11A.020(1) and the statement of public policy in KRS 11A.005, and looking at the facts as found by the Commission, the Court concludes as a matter of law that the facts do not demonstrate that Pardue acted or failed to act in such a way as to create a

substantial conflict between her personal or private interests and her duties in the public interest, nor did she use or attempt to use any means to influence the Cabinet in derogation of the state at large, nor did she use her official position to obtain financial gain for herself or for Dr. Carter, nor to secure or create any privilege, exemption, advantage, or treatment for herself or anyone else.

Finally, the circuit court held that the Ethics Commission's conclusion that Pardue violated all or any of the provisions of KRS 11A.020(1) was erroneous as a matter of law. This appeal followed.

Generally, a circuit court exercising its appellate jurisdiction with reference to a decision by an administrative agency is limited in its review to determining whether the agency's action was arbitrary. American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450, 456 (1964); Burch v. Taylor Drug Store, Inc., Ky. App., 965 S.W.2d 830, 835 (1998). More specifically, both this court and the circuit court must apply the arbitrariness standard to disciplinary decisions by the Executive Branch Ethics Commission. See Flint v. Executive Branch Ethics Commission, Ky. App., 981 S.W.2d 132 (1998). In determining whether an agency's action was arbitrary, the reviewing court looks at three factors: (1) whether the agency acted within its statutory powers; (2) whether the parties affected by the agency order received procedural due process; and (3) whether the agency's action was supported by substantial evidence. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972); Board of Adjustments, Bourbon County v. Brown, Ky. App., 969

S.W.2d 214, 216 (1998). Furthermore, the factual findings of an administrative agency are binding on a reviewing court if they are supported by substantial evidence of probative value in the record and therefore are not clearly erroneous. Urella v. Kentucky Board of Medical Licensure, Ky., 939 S.W.2d 869, 873 (1997); Mollette v. Kentucky Personnel Board, Ky. App., 997 S.W.2d 492, 496 (1999). Where an agency's factual findings are supported by substantial evidence, the court's review is then limited to determining whether the agency applied the correct rule of law. Burch, 965 S.W.2d at 834. While review of the agency's factual findings are very narrow, courts are authorized to review issues of law on a de novo basis. Aubrey v. Office of Attorney General, Ky. App., 994 S.W.2d 516, 519 (1998); Epsilon Trading Co. v. Revenue Cabinet, Ky. App., 775 S.W.2d 937, 940 (1989). A reviewing court may correct legal errors of an administrative agency and is not required to accept the legal conclusions of the administrative body. Reis v. Campbell County Board of Education, Ky., 938 S.W.2d 880, 885-86 (1996); Kentucky Board of Nursing v. Ward, Ky. App., 890 S.W.2d 641, 642 (1994). An erroneous decision involving an incorrect application of the law is necessarily arbitrary. Board of Adjustments, Bourbon County, 969 S.W.2d at 216; Ward, 890 S.W.2d at 642.

Generally, interpretation of a statute is a question of law rather than an issue of fact. Floyd County Board of Education v. Ratliff, Ky., 955 S.W.2d 921, 925 (1997); Kenton County Fiscal Court v. Elfers, Ky. App., 981 S.W.2d 553, 556 (1998). "A reviewing court is not required to adopt the

decisions of the trial court as to a matter of law, but must interpret the statute according to the plain meaning of the act and in accordance with the legislative intent." Ratliff, 955 S.W.2d at 925. A statute should be construed in light of the mischief to be corrected and the end to be obtained. Springer v. Commonwealth, Ky., 998 S.W.2d 439, 448 (1999); Commonwealth v. Kash, Ky. App., 967 S.W.2d 37, 43 (1997). The policy and purpose of a statute must be considered in determining the meaning of the words used in the statute. Kentucky Industrial Utility Customers, Inc., Ky., 983 S.W.2d 493, 500 (1998); Democratic Party of Kentucky v. Graham, Ky., 976 S.W.2d 423, 429 (1998). However, under the rule of contemporaneous construction, interpretation of an ambiguous statute or a regulation by officers of an agency continued for a long period of time is entitled to significant or controlling weight. Hagan v. Farris, Ky., 807 S.W.2d 488, 490 (1991); Miller v. Franklin County, 302 Ky. 652, 195 S.W.2d 315 (1946). On the other hand, courts give only limited deference to informal agency interpretations that have been arrived at without rulemaking or an adversarial proceeding. White v. Check Holders, Inc., Ky., 996 S.W.2d 496, 498 (1999) (citing Delta Air Lines v. Commonwealth, Ky., 689 S.W.2d 14, 20 (1985)).

The issue in this appeal involves primarily statutory interpretation or construction. The Ethics Commission adopted the factual findings of the hearing officer and the circuit court found the factual findings were supported by substantial evidence. Pardue has not challenged the administrative findings

of fact nor the circuit court's decision on that issue in this appeal. The Ethics Commission and the circuit court differ significantly in their interpretation of KRS 11A.020(1) and the application of the facts to that statute.

KRS 11A.020(1) provides as follows:

- (1) No public servant, by himself or through others, shall knowingly:
  - (a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;
  - (b) Use or attempt to use any means to influence a public agency in derogation of the state at large;
  - (c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or
  - (d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

In this case, the Ethics Commission found that Pardue violated KRS 11A.020(1) by soliciting funds for Christmas gifts for foster children from entities that did business with the Cabinet for Families and Children, and by first directing, and then authorizing, and approving payment of state funds to her son-in-law, Dr. Tom Carter, for dental services he preformed on foster children. In reversing the Ethics Commission, the circuit court held that Pardue had not violated the Ethics Code because her solicitation activity constituted "acts of human kindness," and that she did not obtain financial gain or favorable treatment



for herself or Dr. Carter with respect to the payments for dental treatment. The Commission argues that the circuit court misconstrued KRS 11A.020(1). It contends that Pardue's activity was in "derogation of the public interest at large" under KRS 11A.020(1)(d) as expressed in KRS 11A.005, which provides as follows:

- (1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:
  - (a) A public servant be independent and impartial;
  - (b) Government policy and decisions be made through the established process of government;
  - (c) A public servant not use public office to obtain private benefits; and
  - (d) The public has confidence in the integrity of its government and public servants.
- (2) The principles of ethical behavior for public servants shall recognize that:
  - (a) Those who hold positions of public trust, and members of their families, also have certain business and financial interests;
  - (b) Those in government service are often involved in policy decisions that pose a potential conflict with some personal financial interest; and
  - (c) Standards of ethical conduct for the executive branch of state government are needed to determine

those conflicts of interest which are substantial and material or which, by the nature of the conflict of interest, tend to bring servants into disrepute.

The circuit court acknowledged the views expressed in KRS 11A.005 but did not believe the legislature intended to prohibit the type of activities engaged in by Pardue.

It is undisputed that the object of Pardue's activities, the welfare of foster children, is a worthwhile and salutary cause. Nevertheless, the Ethics Code serves to prevent apparent, as well as, actual conflicts of interest regardless of the motives involved. See KRS 11A.005(2)(c). The General Assembly expressed the public policy of the state concerning the ethical behavior of public employees in KRS 11.005(1) stating they shall be "independent and impartial" and the public must have confidence in their integrity. Standards of ethical behavior are necessary to determine conflicts of interest that "tend to bring public servants into disrepute." We believe the hearing officer accurately identified how Pardue's solicitation activities conflicted with the public interest as expressed in KRS 11A.005.

Solicitation of entities doing business with the government by the government for money is antithetical to the public interest. Such solicitation undermines the arms length separation required to make the government truly independent and impartial. It inserts into the established process of government policy and decision making a one-sided and secret concern unrelated to the regular and authorized functioning of government. It undermines public confidence in the government by engendering fear in those who did give, and an expectation of special treatment or consideration in those who did give. . . . The undersigned . . . concludes that solicitation such as Pardue engaged in

is "in derogation of the public interest."  
This conclusion is not changed by the good  
intent or noble motive behind the  
solicitation, or even its conformity with  
government's ultimate ends.

In a series of Advisory Opinions beginning as early as 1993, the Ethics Commission has stated that solicitation by state employees of entities doing business with the state violates KRS 11A.005. See, e.g., Advisory Opinions 93-45, 94-21, 94-50, 94-34, 94-37, 96-21. The Ethics Commission is statutorily authorized to issue advisory opinions on the requirements of the Ethics Code. KRS 11A.110(1). While perhaps not entitled to controlling weight, we believe these opinions are entitled to some deference in construing the Ethics Code. In addition, it was alleged that the accounting procedures used with the Christmas funds were wholly inadequate resulting in several thousand dollars being unaccounted for by Pardue. Clearly, the solicitation of entities doing business with state government creates a potential for abuse and conflicts of interest.

Similarly, the Ethics Commission argues that Pardue's authorization of payments to her son-in-law, Dr. Carter, created "financial gain" for members of her family in violation of KRS 11A.020(1)(c). The record indicates that while Pardue did not actively require other employees to utilize Dr. Carter's services, she approved and influenced her subordinates to take foster children to him even though it was contrary to general policy to use physicians and dentists who accepted medicaid payment. Some of the employees testified that they were reluctant to question this practice given Pardue's supervisory

position. We believe this situation created a substantial conflict of interest and the potential for abuse. The record supports the Ethics Commission's conclusion that Pardue violated KRS 11A.020(1)(a), (c), and (d) by using her influence in a matter involving a substantial conflict that resulted in financial gain for her family and advantages in derogation of the public interest.

As the varying opinions illustrate, this is a difficult case especially given the noble cause of helping those in foster care. Nevertheless, we believe the circuit court's focus on those issues, rather than the policy expressed in KRS 11A.005 caused it to misinterpret KRS 11A.020(1). Accordingly, we hold that the circuit court erred in reversing the final order of the Executive Branch Ethics Commission.

For the foregoing reasons, we reverse the opinion of the Allen Circuit Court and remand the case for further proceedings consistent with this opinion.

ALL CONCUR.

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