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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2002-CA-000738-MR

CHARLES SMITH; AND
EDDIE HARRELL — APPELLANTS

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES L. BOWLING, JR., JUDGE
ACTION NO. 98-CI-00027

HOUSING AUTHORITY OF MIDDLESBOROUGH — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI AND JOHNSON, JUDGES; AND HUDDLESTON, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Charles Smith and Eddie Harrell (hereinafter appellants) have appealed from an order of the Bell Circuit Court entered on February 6, 2002, which dismissed their complaint against the Housing Authority of Middlesborough on the ground that it lacked subject-matter jurisdiction. Having concluded that the Bell Circuit Court has subject-matter jurisdiction, we reverse and remand for further proceedings.

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The appellants were maintenance employees of the Housing Authority of Middlesborough, a public housing authority.[2] As maintenance employees, their employment was governed by a personnel policy which contained the following provision concerning compensation for "on call" work:

> "ON CALL EMPLOYEES. An "On Call" employee is an employee working for the Housing Authority on a regular shift and is then required to be available to meet work requirements which arise outside of the employee's normal duty hours.
>
> "On Call" maintenance employees who are provided a dwelling unit at reduced rent for restriction of time, shall be paid one and one-half times their basic hourly rate for all hours worked in excess of eight.
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> Maintenance employees who are not furnished a dwelling unit at reduced rents, and are required to be available after their normal duty hours, shall be paid for their restriction of time and the equivalent of one hour at one and one-half times the basic hourly rate for each day they are required to be "On Call." In addition, these employees shall be paid at the rate of one and one-half times their basic hourly rate for all hours worked in excess of eight.

While the personnel policy provided that employees would receive pay at one and one-half times their basic hourly pay rate for all hours worked in excess of eight hours a day, the policy also provided that any employee who agreed to have a restriction on his personal time by making himself available for

[2] Jack Standifer, who was also a maintenance employee for the Housing Authority, was initially a party to this action along with the appellants, but he did not join in this appeal.

this overtime work would either be provided a dwelling unit at reduced rent, or be paid a sum equivalent to one and one-half times his basic hourly pay rate for each day he was required to be "on call." The appellants claim that they had an oral contract of employment with the Housing Authority, the terms of which were consistent with those provided in the personnel policy with regard to being "on call".

On January 20, 1998, the appellants filed a complaint in the Bell Circuit Court seeking backpay for the days they claimed to have been "on call" from January 1991 through May 1997. On December 4, 1998, the trial court granted the appellants' motion for summary judgment on the issue of liability. Following a bench trial on the issue of damages, the trial court entered a judgment in favor of the appellants. The Housing Authority then appealed to this Court.[3] On August 25, 2000, in an unpublished opinion, this Court vacated both the trial court's entry of summary judgment on the issue of liability, and the trial court's judgment awarding damages to the appellants. The matter was remanded to the trial court after this Court found that there was a genuine issue of material fact regarding whether the appellants were "on call" or "subject to call" under the agreement.

[3] 1999-CA-000765-MR.

On remand, the trial court scheduled a jury trial for May 15, 2001, but it was continued to January 17, 2002. On the day of the scheduled trial, the Housing Authority filed a motion to dismiss for lack of subject-matter jurisdiction. The Housing Authority argued that under KRS[4] Chapter 337 original jurisdiction for wage and hour claims was vested in the Kentucky Labor Cabinet, not the circuit court. On February 6, 2002, the trial court granted the Housing Authority's motion to dismiss, on the grounds that the appellants' claims were requests for "overtime pay" under KRS Chapter 337 and the appellants were required to file their claims with the Kentucky Labor Cabinet. In dismissing the appellants' complaint, the trial court ruled that their claims against the Housing Authority fell "squarely within KRS Chapter 337, particularly KRS 337.285," and that the appellants' "claims for compensation due [must] be filed with the Labor Cabinet." This appeal followed.

On appeal, the appellants argue that the complaint filed below "does not allege a violation of any of the provisions contained within KRS 337.020 to 337.405," and that the circuit court did in fact have subject-matter jurisdiction to adjudicate their claims. We agree.

We preface our analysis by noting that there have been some major misunderstandings in this case. The circuit court in

[4] Kentucky Revised Statutes.

its order dismissing for lack of subject-matter jurisdiction states that "[n]o matter how the [appellants] couch their claims the claims are essentially requests for overtime pay." This is simply incorrect. The appellants are claiming additional pay for making themselves available to be called in to work pursuant to their contract; they are not claiming "on call" or "overtime pay" pursuant to Chapter 337. The amicus curiae brief filed by the Secretary of the Labor Cabinet further demonstrates the misunderstandings in this case. The Secretary takes the position that the circuit court should be affirmed, but he incorrectly refers to the claims as being by "employees who believe that their employers have violated Kentucky's wage and hour laws[.]" To the contrary, the appellants have alleged a contract violation, not a statutory wage and hour violation. The Secretary even acknowledges in his brief "that all claims for violations of wage and hour laws, absent an express or implied employment contract, must be brought before the Labor Cabinet" [emphasis added]. However, the Secretary fails to recognize that the appellants had an express contract.

In Noel v. Season-Sash, Inc.,[5] this Court held that for Chapter 337 to be constitutional, its application must be limited to "those instances where an employee alleges he is not receiving the benefits mandated by the wage and hour chapter[.]"

[5] Ky.App., 722 S.W.2d 901, 902 (1986).

The Court explained the types of cases in which the Kentucky Labor Cabinet has original jurisdiction:

> To reiterate, the Commissioner of Labor has original jurisdiction, as held in the Early[6] case, only in those wage and hour disputes in which the duty to provide the benefits sought by the claimant derives solely from the statute and not from an agreement between the parties as to the terms and conditions of employment and, of course, in those situations in which the parties agree to have their disputes resolved by the administrative route and who thereby waive their right to seek a judicial remedy [emphasis added].[7]

The Court noted that to rule otherwise would constitute a violation of the Kentucky Constitution.[8]

In the case sub judice, the appellants have alleged that they reached an agreement with the Housing Authority for compensation which provided them with additional pay as consideration for making themselves available to be called in to work. This additional pay went above and beyond the statutorily-mandated wage requirements. Further, this alleged express contract is supported by the written language in the

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[6] Early v. Campbell County Fiscal Court, Ky.App., 690 S.W.2d 398 (1985).

[7] Noel, supra at 903.

[8] Id. at 902-03 (holding that "[t]here is no language in this chapter that hints that the legislature intended for the labor commissioner to hear disputes between employer and employees alleging violations of contracts. Certainly such a statute would not be consistent with and therefore would be repugnant to several sections of our Constitution, specifically Section 109 which provides, '[t]he judicial power of the Commonwealth shall be vested exclusively in one Court of Justice . . . ,' and Section 112(5) which provides that the 'Circuit Court shall have original jurisdiction of all justiciable causes not vested in some other court'").

personnel policy.[9] "The general rule is that where the alleged express contract is oral the evidence to support it must be clear and convincing."[10] The Housing Authority does not dispute the fact that the written language in the personnel policy supports the oral contract claimed by the appellants. Hence, the appellants have properly alleged a claim for additional unpaid compensation pursuant to an oral contract with the Housing Authority which exceeds the statutorily-mandated minimum. Accordingly, as Noel makes clear, this claim properly comes within the subject-matter jurisdiction of the circuit court.

In addition to the constitutional limits that apply to Chapter 337 as discussed in Noel, the rules of statutory interpretation also require us to hold that the circuit court has subject-matter jurisdiction over these claims. It is the duty of the courts to ascertain and give effect to the intent of the Legislature.[11] In determining legislative intent, a court must refer to the language of the statute and it is not at liberty to add or to subtract from the statute or to interpret it at variance with the clear language employed.[12] All statutes

[9] "'When there is an actual promise the contract is said to be express[.]'" Sullivan's Adm'r v. Sullivan, 248 Ky. 744, 748, 59 S.W.2d 999, 1001 (1933)(quoting 6 R.C.L. p. 587).

[10] Corbin's Ex'rs v. Corbin, 302 Ky. 208, 213, 194 S.W.2d 65, 68 (1946).

[11] Hale v. Combs, Ky., 30 S.W.3d 146, 151 (2000).

[12] Id.

should be interpreted so as to give meaning to each provision in accord with the statute as a whole.[13] The interpretation should not be done in such a way as to render any part of the statute meaningless or ineffectual.[14] A court should construe a statute so as to render it constitutional if it can be done without violence to its intent.[15] A statute should not be interpreted so as to bring about an unreasonable result.[16]

We conclude that the only reasonable interpretation of Chapter 337 is the one recognized by this Court in Noel, i.e., that its administrative jurisdictional limitations only apply when the employee's claim involves an unpaid, statutorily-mandated wage. Every employee will have either an express or implied contract for payment of compensation from his employer for the work that he performs. There is no statutory basis or logical reason to interpret Chapter 337 as the trial court has done, so that the application of the exclusive jurisdiction of the administrative procedures in Chapter 337 turns on whether the employee was an employee-at-will. Simply stated, there is no reasonable basis for an interpretation of the statute that

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[13] Destock #14, Inc. v. Logsdon, Ky., 993 S.W.2d 952, 957 (1999).

[14] Stevenson v. Anthem Casualty Insurance Group, Ky., 15 S.W.3d 720, 724 (1999).

[15] Magruder v. Griffith, 274 Ky. 293, 297, 118 S.W.2d 694, 696 (1938).

[16] Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Co., Ky., 983 S.W.2d 493, 500 (1998).

would treat a claim for unpaid compensation which exceeds the statutorily-mandated minimum that is made by an employee who does not have employment termination rights differently from the same claim by an employee who has employment termination rights. The purpose of Chapter 337 is to establish minimum standards for payment for work to protect an employee from being exploited by an employer, regardless of whether the employee has employment termination rights. Employees, such as the appellants, who have contracted with their employers for compensation which exceeds the statutorily-mandated minimums have retained their constitutional right to litigate their unpaid claims in the courts.

Further, considering the broad statutory definition of "wages,"[17] if the Labor Cabinet's jurisdiction is not limited to the statutorily-mandated minimum compensation requirements, then the Cabinet would have to adjudicate employee claims for unpaid wages that would include such compensation as a bonus, employee-purchase discounts, employer-furnished uniforms and employee-travel-expense reimbursement. This plethora of claims could possibly overwhelm the Labor Cabinet and make a mockery of its

[17] KRS 337.010(1)(c) provides: "'Wages' includes any compensation due to an employee by reason of his employment, including salaries, commissions, vested vacation pay, overtime pay, severance or dismissal pay, earned bonuses, and any other similar advantages agreed upon by the employer and the employee or provided to employees as an established policy. The wages shall be payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to the allowances made in this chapter[.]"

enforcement powers on behalf of employees who are being denied their statutorily-mandated minimum compensation.

Accordingly, the order of the Bell Circuit Court dismissing the appellants' complaint is reversed and this matter is remanded for further proceedings consistent with this Opinion.

HUDDLESTON, SENIOR JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

GUIDUGLI, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HUDDLESTON, SENIOR JUDGE, CONCURRING IN RESULT: I agree that this case must be remanded to Bell Circuit Court for further proceedings, but I write separately to explain what I consider to be the dispositive issue.

Both of the other opinions have focused on whether the claims at issue are properly described as disputes over the failure to pay statutorily-mandated overtime or whether the compensation allegedly due is of a contractual nature. The distinction in the nature of the payment is relevant because, so the reasoning goes, the Labor Cabinet has exclusive jurisdiction to determine factual issues if the case is one dealing with statutory overtime, but the circuit court has jurisdiction if this is a contract case. However, I do not consider this distinction relevant because in either case, the Labor Cabinet

lacks jurisdiction under the current version of Kentucky Revised Statutes (KRS) Chapter 337.

Both Early v. Campbell County Fiscal Court,[18] and Noel v. Season-Sash, Inc.,[19] were premised on a version of KRS 337.310 which has since been amended. The statute in effect at the time those two cases were decided provided as follows:

> (1) All questions of fact arising under KRS 337.020 to 337.405 except as provided in this section, shall be decided by the secretary. There shall be no appeal from the decision of the secretary on any question of fact, but there shall be a right of review by the circuit court. Either party may, within twenty (20) days after the rendition of a final order of the secretary, by petition appeal to the circuit court that would have jurisdiction to try an action for breach of contract.
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> (2) The review is limited to determining whether or not:
>
> > (a) The secretary or director acted without or in excess of his powers;
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> > (b) The order or decision was procured by fraud;
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> > (c) The order or decision is not in conformity to the provisions of KRS 337.020 to 337.405; and
> >
> > (d) If findings of fact are in issue, whether they support the order or decision.

[18] Ky. App., 690 S.W.2d 398 (1985).

[19] Ky. App., 722 S.W.2d 901 (1987).

> (3) The circuit court shall enter judgment affirming, modifying, or setting aside the order or decision.[20]

Early recognized the apparent conflict between this version of KRS 337.310(1) and KRS 337.385(1), which provides that unpaid wage claims "may be maintained in any court of competent jurisdiction."[21] This Court reconciled the conflict by holding that KRS 337.310(1) provided exclusive original jurisdiction to the Labor Cabinet, while 337.385(1) provided a right of review by the circuit court.

In 1996, KRS 337.310 was substantially amended.[22] Following amendment, the statute reads as follows:

> All orders or decisions of the secretary issued or made under KRS 337.020 to 337.405 may be appealed, and upon appeal an administrative hearing shall be conducted in accordance with KRS Chapter 13B.[23]

However, nowhere else in Chapter 337 is there a statute which authorizes the secretary to make such "orders or decisions." The only statute in KRS 337 which delegates power to the Labor Cabinet is KRS 337.295, which authorizes the commissioner to issue regulations under KRS 337.275 to 325, 337.345 and 337.385 to 337.405, dealing with the application of those statutes and definitions of terms contained therein. However, there is no

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[20] KRS 337.310 (Michie 1994).

[21] Supra, n.19, at 339.

[22] See Acts of 1996, ch. 318, § 313, effective July 15, 1996.

[23] KRS 337.310 (Michie 2001).

provision of 337.295 which delegates adjudicative power to the Labor Cabinet.

Likewise, KRS Chapter 13B does not confer authority upon the Labor Cabinet in the absence of other statutory delegation. KRS 13B "creates only procedural rights,"[24] and speaks of an agency head exercising the authority delegated to the agency by other statute.[25]

"The subject-matter jurisdiction of an administrative agency is limited solely to that granted by Legislature."[26] "It is fundamental that administrative agencies are creatures of statute and must find within the statute warrant for the exercise of any authority which they claim."[27] The authority of an administrative agency "is limited to a direct implementation of the functions assigned to the agency by [] statute," and "[i]t is our responsibility to ascertain the intention of the legislature from the words used in enacting the statute rather than surmising what may have been intended but was not

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[24] KRS 13B.020(1).

[25] KRS 13B.030(1). See also KRS 13B.140(1) and (2), which govern judicial review of administrative decisions in the absence of a more specific provision in the agency's enabling statute(s).

[26] Auxier v. Commonwealth, Bd. Of Embalmers and Funeral Directors, Ky. App., 553 S.W.2d 286, 288 (1977), citing Johnson v. Correll, Ky., 332 S.W.2d 843 (1960); Department of Conservation v. Sowders, Ky., 244 S.W.2d 464 (1951). See also Custard Insurance Adjusters, Inc. v. Aldridge, Ky., 57 S.W.3d 284, 287 (2001).

[27] Department for Natural Resources v. Stearns Coal and Lumber Co., Ky., 563 S.W.2d 471 (1978), citing 1 Am.Jur.2d. Administrative Law § 70 (1962). See also Kerr v. Kentucky St. Bd. Of Registration, Ky. App., 797 S.W.2d 714, 717 (1990).

expressed."[28] "Any doubts concerning existence or extent of an administrative agency's power should be resolved against the agency."[29]

As mentioned above, there is no statute currently in KRS Chapter 337 which delegates exclusive jurisdiction to adjudicate factual dispute to the Labor Cabinet. And, in fact, there is no statute delegating any adjudicative authority whatsoever. While the Cabinet as amicus relies on KRS 13B, as has been noted that chapter is procedural only and does not serve to delegate substantive jurisdiction to any administrative agency. Likewise, the Cabinet's reliance on its own regulation contained at 803 Kentucky Administrative Regulations (KAR) 1:035 is misplaced, both because the regulation is premised on the pre-1996 version of KRS 337.310(1) and because "an administrative agency cannot, by its rules and regulations, amend, alter, enlarge, or limit the terms of a legislative enactment."[30] Accordingly, 803 KAR 1:035 cannot be said to confer adjudicative authority on the Labor Cabinet where none has been statutorily provided.

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[28] Flying J Travel Plaza v. Commonwealth, Transportation Cabinet, Ky., 928 S.W.2d 344 (1996), citing Kentucky Ass'n of Chiropractors, Inc. v. Jefferson Co. Medical Society, Ky., 549 S.W.2d 817 (1977).

[29] United Sign, Ltd. v. Commonwealth, Transportation Cabinet, Ky. App., 44 S.W.3d 794, 798 (2000).

[30] Curtis v. Belden Electronic Wire & Cable, Ky. App., 760 S.W.2d 97, 99 (1988).

Because of the change in KRS Chapter 337, there is currently no adjudicative jurisdiction delegated to the Labor Cabinet with respect to disputes arising under that chapter. Early and Noel are no longer relevant because they expressly relied on the pre-1996 version of KRS 337.310(1). All factual questions arising under KRS 337 are to be brought in "any court of competent jurisdiction" as contemplated by KRS 337.385(1), which in this instance is Bell Circuit Court.

GUIDUGLI, JUDGE, DISSENTING: Respectfully, I dissent from the majority opinion as I would hold that the appellants' claims arose from a wage and hour dispute as opposed to a contract dispute, and that the Labor Cabinet would retain original jurisdiction to decide the matter. I also dissent from Judge Huddleston's concurring opinion as I believe the Labor Cabinet still maintains the authority to act.

I disagree with the appellants' contention that as the compensation they were claiming did not involve a violation of KRS 337.020 through KRS 337.405, they were not therefore required to proceed under that chapter. KRS 337.010(1)(c) provides the definition of the term "wages" for purposes of the Chapter 337:

> "Wages" include any compensation due to an employee by reason of his employment, including salaries, commissions, vested vacation pay, over-time pay, severance or dismissal pay, earned bonuses, and any other

> similar advantage agreed upon by the employer and the employee or provided to employees as an established policy. (emphasis added.)

I agree with the Housings Authority's contention that the appellants' claims involve wage concerns. 803 KAR 1:065 specifically discusses what constitutes working time as it applies to KRS 337.275 and KRS 337.285, the latter dealing specifically with overtime. The regulation provides a definition for "on-call time," which is an issue to be decided in this action. Here, the appellants argue that they were entitled to more wages for days that they were "on call" as opposed to "subject to call" pursuant to the Housing Authority's personnel policy. The statute and regulations specifically address this issue.

Separate and apart from the over-time issue, I believe that KRS 337.060 provides another basis for bringing the appellants' claims under the wage and hour statute. KRS 337.060(1) provides that "[n]o employer shall withhold from any employee any part of the wage agreed upon." The appellants obviously believed that the Housing Authority was withholding a portion of their respective wages to which they were claiming entitlement.

Lastly, the certified record contains a copy of the Labor Cabinet's investigation and report regarding the 1997 complaint filed by unknown Housing Authority maintenance

employees addressing the same "on-call" issue. At the oral argument held in this matter, counsel for the appellants indicated that he did not know whether his clients were the individuals who filed this complaint, and that in any event he was not surprised that no relief was granted because the Labor Cabinet did not have jurisdiction to hear the claim. While it is true that the identities of the complaining maintenance employees could not be disclosed, the statement regarding the Labor Cabinet's decision is nevertheless misleading as the Labor Cabinet investigator actually made a determination of fact as to whether the individuals were "on call" or "subject to call" pursuant to the personnel policy. Additionally, the Labor Cabinet asserted that it had jurisdiction over this issue as a wage and hour dispute in its *amicus curiae* brief.

Therefore, I would hold that the circuit court did not err in finding that the claims arose under KRS Chapter 337 and that the Labor Cabinet had original jurisdiction.

I also disagree with the majority opinion's holding that the Housing Authority's personnel policy is a contract, making the appellants' claim an exception to the rule that the matter must be brought before the Labor Cabinet.

In Noel v. Season-Sash, Inc., Ky.App., 722 S.W.2d 901 (1986), the employer and employee entered into an employment contract for certain wages and benefits, meaning that any

dispute arising from the employment contract must be brought before the circuit court rather than before the Labor Cabinet. In particular, this Court held that "the Commissioner of Labor has original jurisdiction, as held in the *Early* case, only in those wage and hour disputes in which the duty to provide the benefits sought by the claimant derives solely from the statute and not from an agreement between the parties as to the terms and conditions of employment. . . ." Id. at 903. In order for this exception to apply, the appellants had to establish that a contract existed between themselves and the Housing Authority, and they argued that the personnel policy constituted a contract.

In Nork v. Fetter Printing Company, Ky.App., 738 S.W.2d 824 (1987), this Court addressed whether personnel policies and company handbooks create contracts, and in reviewing Fetter's handbook, found nothing in it that expressly created a contract, and stated that "[i]t contains policy statements which Fetter management admittedly strove to follow, but this is not tantamount to an expression of a contractual agreement where the language is not contractual." Id. at 825. The opinion went on to state, "[p]olicy and procedure manuals are to be commended. They can, when followed, remove an element of arbitrariness from employment relationships and thereby improve the entire atmosphere of the workplace. A contract they

do not necessarily make. . . .” Id. at 827. Although I recognize that Nork dealt with wrongful discharge and when employment is “at will”, I believe that the principles addressed in Nork apply in the present appeal. Based upon Nork, I do not believe that the Housing Authority’s personnel policy rose to the level of a contract. Therefore, I would hold that the Noel decision as it relates to contract disputes is inapplicable here and that the circuit court was correct in finding that the personnel policy did not constitute a contract under Kentucky law.

For these reasons, I respectfully dissent and would therefore affirm the circuit court’s judgment.

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