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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001133-MR

JAMES R. ANGEL, M.D. — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 14-CI-00439

ROBERT STIVERS, II, IN HIS OFFICIAL CAPACITY AS SENATE PRESIDENT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: James R. Angel, M.D., appeals from a Franklin Circuit Court opinion and order dismissing his complaint against Robert Stivers, II, in his official capacity as Senate President. Angel claims that Stivers prevented the Senate from voting on his reappointment to the Kentucky Department of Fish and Wildlife

Resources Commission, thereby violating Kentucky Revised Statutes (KRS) 11.160(1).

The Department of Fish and Wildlife Resources Commission consists of nine members appointed by the Governor for a term of four years. *See* KRS 150.022(1) and (2). Dr. Angel was first appointed to the Commission in 1989, and then reappointed in 2005 and 2009. In 2013, Governor Steve Beshear again nominated Angel for appointment to the Commission.[1] On March 17, 2014, Senate Resolution 273, confirming his appointment to the Commission, was introduced in the Senate. On March 19, 2014, it was assigned to the Senate Natural Resources and Energy Committee. However, the resolution was never submitted to the Senate for confirmation, and no other action was taken on the resolution prior to *sine die* adjournment of the 2014 session of the General Assembly which occurred on April 15, 2014. Dr. Angel contends that the Senate President intentionally caused the resolution to languish in response to pressure from the League of Kentucky Sportsmen. The League allegedly disapproved of Angel's support for the replacement of former Fish and Wildlife Commissioner Dr. Jonathan Gassett.

Angel sought a writ of mandamus and injunctive relief in Franklin Circuit Court, naming Senator Stivers in his official capacity. After a hearing, the circuit court dismissed Angel's complaint and this appeal followed.

The Governor is required by statute to appoint members to the Department of Fish and Wildlife Resources Commission, subject to confirmation

[1] KRS 150.022 was amended in 2010 to provide that a commission member may be reappointed only once. The statute was not applied retroactively to Dr. Angel.

by the Senate. KRS 150.022(2). When a statute specifically requires Senate confirmation of an appointment by the Governor, KRS 11.160(1) provides that the appointment shall be handled in the following manner:

> (a) All names of persons nominated when the General Assembly is not in session **shall be submitted for confirmation** no later than the next regular session of the General Assembly. The Governor who makes the appointment, or other appointing authority, shall deliver the name of the nominee to the clerk of the Senate upon appointment or no later than the fifteenth legislative day of the next regular session of the General Assembly. The Governor may submit a nominee for confirmation at any special session that occurs between the date of initial appointment and the next regular session of the General Assembly. If the Governor desires to submit the name of a nominee for confirmation at a special session of the General Assembly, he shall place confirmation of the nominee on the call for special session.
>
> (b) All names of persons nominated to positions during a regular session of the General Assembly **shall be submitted for confirmation** at that regular session.

KRS 11.160(1) (emphasis supplied).

Angel contends that the phrase "shall be submitted for confirmation" is mandatory and requires executive appointments to the Commission to be submitted for an up-or-down vote by the entire Senate, and that the intent of the statute is not to allow one person, in this case Senator Stivers, to thwart the process by refusing to allow the nominee's name to be submitted for confirmation.

We agree with Stivers, however, that subsections (a) and (b) are intended to establish deadlines for the submission of appointments for confirmation to the Senate, not to control the process in the Senate once the

submissions are made. This interpretation is confirmed by subsection (g) of the statute, which sets forth the result when the Senate declines to consider a nominee:

> If the Governor who makes the appointment, or other appointing authority, fails to submit the name of the nominee or **if the Senate declines to consider a nominee, the position shall become vacant as of sine die adjournment of the applicable special or regular session of the General Assembly at which the appointment was to be confirmed**. If the Senate declines to confirm the nominee, the position shall become vacant upon the date the Senate declined to confirm.

KRS 11.160(1)(g) (emphasis supplied). Thus, subsection (g) expressly contemplates a situation in which the Senate declines to consider a nominee.

Angel claims, however, that the statue is internally inconsistent because the mandate to submit an appointment for Senate confirmation, which he contends is contained in subsections (a) and (b), is inconsistent with the discretion to decline even to consider the appointment found in subsection (g). We disagree because "[w]e presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes." *Norton Hospitals, Inc. v. Peyton*, 381 S.W.3d 286, 292 (Ky. 2012). "When presented with a statutory conflict whereby one interpretation would render a portion of a statute meaningless and the other would harmonize and give effect to both provisions, rules of statutory construction require the interpretation that harmonizes the statutes and prevents a part of a statute from becoming meaningless or ineffectual." *Brooks v. Commonwealth,* 217 S.W.3d

219, 223 (Ky. 2007). The mandatory language of subsections (a) and (b) imposes deadlines for the submission of appointments to the Senate; it does not mandate any further action by the Senate. Subsection (g) plainly sets forth the result when the Senate declines to consider a nominee, which is what occurred in this case.

Angel argues that this interpretation of the statute results in the extension of comity to an inappropriate application of the Senate's Rules of Procedure. "Comity, by definition, means the judicial adoption of a rule unconstitutionally enacted by the legislature not as a matter of obligation but out of deference and respect." *Taylor v. Commonwealth*, 175 S.W.3d 68, 77 (Ky. 2005). (internal citations omitted). Angel contends that the Senate rule, which enabled Stivers to hold back his nomination, is being allowed to trump the provisions of KRS 11.160 and the Kentucky Constitution. He further argues that if the Rules of the Senate allow its President to prevent a confirmatory vote of the full Senate on an executive appointment, then the Senate has delegated unlawful discretion to its President. Angel relies on *Kraus v. Kentucky State Senate*, 872 S.W.2d 433 (Ky. 1993), in which the appellant claimed that KRS 342.230(3) was unconstitutional because it granted the Senate the authority to consent to Administrative Law Judge appointments made by the Workers' Compensation Board. The Supreme Court disagreed, explaining that

> [s]ince the enactment of the 1891 Constitution, the General Assembly has understood that the Senate had the constitutional authority to consent to the appointment of inferior state officers. K.R.S. 3750 was enacted in 1893 and provided in part:

> Unless otherwise provided, all persons appointed to an office by the Governor, whether to fill a vacancy, or as an original appointment, shall hold office subject to the advice and consent of the Senate, **which body shall take appropriate action upon such appointments at its first session held thereafter.**

Kraus, 872 S.W.2d at 437 (emphasis supplied).

Angel argues that the body of the Senate was never provided the opportunity to take appropriate action on his nomination. But, the Senate Rule is not inconsistent with the statute nor is it unconstitutional. As we have noted, KRS 11160(g) expressly recognizes that the Senate may on occasion decline to consider a nominee.

"The essential purpose of the separation of powers is to allow for independent functioning of each coequal branch of government within its assigned sphere of responsibility, free from risk of control, interference, or intimidation by other branches." *Fletcher v. Commonwealth*, 163 S.W.3d 852, 862 (Ky. 2005) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 760–61, 102 S.Ct. 2690, 2707, 73 L.Ed.2d 349 (1982)). Section 27 of the Constitution of Kentucky provides:

> The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.

Section 28 provides:

> No person or collection of persons being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Section 39 provides: "Each House of the General Assembly may determine the rules of its proceedings . . . ."

We are mindful that "Section 28's 'unusually forceful command,' has no counterpart in the United States Constitution." *Fletcher* 860-61. We are reluctant to invade the province of the Legislature, especially because the Senate Rules provide a remedy for precisely the situation Angel characterizes as the President acting as a "one-man veto" of executive appointments. Under Senate Rule 48, any member may file a petition with the Clerk of the Senate alleging that a bill has been held for an unreasonable time in committee. The Rule states as follows:

> Whenever a committee fails or refuses to report a bill submitted to it, any member may, upon filing with the Clerk a written petition to determine if the committee has held the bill for an unreasonable time, call the petition for consideration on the next succeeding legislative day after its filing. If a majority of the members elected to the Senate concur that the bill has been held an unreasonable time by voting to approve the petition, the bill shall be considered as though it had been regularly reported and shall be given its first reading and thereafter treated as any other bill which had been reported from a committee.

Thus, the members of the Senate are provided with a means of recourse if they believe that a bill is being held for an excessive amount of time.

Consequently, because Angel's nomination was not delayed by Stivers in a manner that was contrary to the provisions of KRS 11.160(1) or violative of our Constitution, Angel was not entitled to injunctive relief. The Franklin Circuit Court opinion and order granting Stivers's motion to dismiss is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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