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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001310-MR

WILLIAM M. LANDRUM, III,
SECRETARY OF THE KENTUCKY FINANCE
AND ADMINISTRATION CABINET

APPELLANT

v. APPEAL FROM WOODFORD CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 16-CI-00293

FRANK LASSITER

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: ACREE, JONES AND THOMPSON, JUDGES.

THOMPSON, JUDGE: William M. Landrum, III, Secretary of the Kentucky Finance and Administration Cabinet (Secretary) appeals from an order of the Woodford Circuit Court ruling that the Secretary did not have power to issue an administrative subpoena *duces tecum* to Frank Lassiter as part of an investigation

into the award of no-bid contracts to SAS Institute, Inc. (SAS) during former Governor Beshear's administration. We conclude that the Secretary had the power to issue the subpoena and reverse and remand for the circuit court to determine whether Lassiter should be compelled to comply.

This is a discovery dispute that arises out of Beshear's Finance and Administration Cabinet's award of six contracts worth more than \$10.7 million to SAS. Because the issue presented is limited to the subpoena power of the Secretary, we avoid reciting more facts than necessary to reach its resolution.

From 2008 until July 2011, Lassiter was the executive director of the Office of Administrative Technology Services within the Cabinet for Health and Family Services. After his departure from state government in 2012, Lassiter became a consultant for SAS. During the relevant time frame, Lassiter's wife served in the Beshear administration's executive cabinet, first as State Budget Director and then as Secretary of the Executive Cabinet.

In 2012 through 2015, a series of contracts were awarded to SAS by the Finance and Administration Cabinet. The first contract was for SAS to provide anti-fraud protection to Kentucky's health benefit exchange. Under the five subsequent contracts, SAS contracted to provide anti-fraud protection to other state agencies. The last contract was entered into on December 7, 2015, near the end of

the Beshear administration, for SAS to provide one year of fraud prevention services to the state for \$3,079,000.

Shortly after taking office, Governor Matt Bevin ordered the Finance and Administration Cabinet to investigate whether the six contracts awarded to SAS complied with the Kentucky Model Procurement Code (KMPC), embodied in KRS¹ Chapter 45A, and the Finance and Administration Cabinet's practices and procedures. As part of that investigation, in October 2016, the Secretary served an administrative subpoena *duces tecum* commanding Lassiter "to appear before [the Secretary] or his designee ... to testify on behalf of the Office of Inspector General's investigation into the procurement and award of no-bid contracts to [SAS]."

Lassiter refused to comply with the subpoena on the basis that the Secretary lacked power to issue the subpoena to compel his testimony or the production of documents when investigating possible violations of KRS Chapter 45A. Additionally, he argued that the Secretary had no authority to compel testimony or the production of documents from a person not in the employ of Kentucky state government. The Secretary filed a motion in the Woodford Circuit Court to compel Lassiter's compliance arguing that its subpoena power arises from KRS 45.142. The circuit court denied the motion concluding that the Secretary has

¹ Kentucky Revised Statutes

no authority to issue a subpoena when investigating a possible violation of the KRS Chapter 45A. This appeal followed.

Our decision depends on the scope of the Secretary’s investigative subpoena power under KRS 45.142. Matters of statutory construction are reviewed *de novo* without giving deference to the circuit court’s determination. *Cumberland Valley Contractors, Inc. v. Bell Cty. Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007).

The judiciary’s role when construing a statute “is neither a populist exercise nor an elitist endeavor; it is a judicial obligation, an undertaking guided by time-worn principles, with the polestar being legislative intent.” *Jefferson Cty. Bd. of Educ. v. Fell*, 391 S.W.3d 713, 727 (Ky. 2012). In discerning that intent, “[t]he most logical and effective manner by which to determine the intent of the legislature is simply to analyze the plain meaning of the statutory language[.]” *Stephenson v. Woodward*, 182 S.W.3d 162, 169-70 (Ky. 2005). While we may not add words to a statute, *Hatchett v. City of Glasgow*, 340 S.W.2d 248, 251 (Ky. 1960), no single statute is to be read in isolation. “We 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.” *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011).

The Secretary is “the chief financial officer of the state and the adviser of the Governor and the General Assembly in financial matters, and shall at all times protect the financial interests of the state.” KRS 42.012. As the chief financial officer, the Secretary is required to “investigate any alleged mismanagement of any of the affairs of the state by any officer, employee, or governing body responsible within [his] respective [branch] of government for the carrying out of any state function or the management of state funds[.]” KRS 45.131. The investigative powers of the Secretary are found in KRS 45.142, which provides in part:

For the purpose of enforcing the provisions of this chapter and those sections of KRS Chapters 41, 45, and 48 relating to the state budget and financial administration, the secretary of the Finance and Administration Cabinet ... for [his] respective [branch] of government ... shall have free access during business hours to all books, reports, papers, and accounts in the office or under the care or control of any budget unit of [his] respective [branch] of government, and may administer oaths, certify to official acts, issue subpoenas, compel the attendance of witnesses and the production of testimony touching any subject properly under investigation by [him], and may compel the production of books, papers, and accounts.

The Secretary’s duties under KRS 45.131 and the investigatory powers conferred under KRS 45.142 are derived from the concept of public accountability. “[W]hen public funds are involved[,] there is an inherent necessity for public accountability.” *Strong v. Chandler*, 70 S.W.3d 405, 411 (Ky. 2002).

Although there is no presupposition that public officials, employees, or agencies engaged in misconduct or impropriety, or failed to follow statutory procedures, *Pendleton Bros. Vending, Inc. v. Com. Fin. & Admin. Cabinet*, 758 S.W.2d 24, 30 (Ky. 1988), the KMPC embodies the concept of public accountability by providing objective criteria applicable in the procurement and award of state contracts and for enforcement for those standards. While the KMPC conferred standing upon a class of disappointed bidders who previously lacked standing, *Commonwealth v. Yamaha Motor Mfg. Corp.*, 237 S.W.3d 203, 205 (Ky. 2007), foremost “its primary function is to benefit the citizens, as is the real purpose of government itself and the laws pertinent thereto.” *Ohio River Conversions, Inc. v. City of Owensboro*, 663 S.W.2d 759, 760 (Ky.App. 1984). The KMPC elevated “state purchasing to a higher level of conduct.” *Pendleton Bros.*, 758 S.W.2d at 27.

Despite the Secretary’s duties as the chief financial official of the state, the purpose of KMPC and the concept of public accountability by those who expend public funds, Lassiter argues the Secretary’s subpoena power does not extend to investigations into whether state contracts were awarded contrary to the KMPC’s provisions. His argument is based on the absence of KRS Chapter 45A from the statutory language in KRS 45.142 granting the subpoena power to the Secretary.

The legislative grant of the subpoena power to administrative agencies is not an anomaly in state or federal law. In *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43, 70 S.Ct. 357, 364, 94 L.Ed. 401 (1950), the Court described such power as one of “original inquiry” explaining that:

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

Here, the investigative duty falls upon the Secretary to determine whether state funds have been mismanaged within the executive branch. KRS 45.131 is broadly worded without words of limitation as to *how* it is alleged state funds were mismanaged. By the legislature’s inclusion of KRS Chapter 45 in KRS 45.142, it expressly gave the Secretary “power of original inquiry.” While we cannot add words to a statute, there is no reason for the legislature to include words that would be mere surplusage. Because the Secretary has the duty under KRS

45.131 to investigate mismanagement of public funds, there was no need for the legislature to use words including KRS Chapter 45A within the subpoena power granted in KRS 45.142.

Lassiter argues that even if the Secretary could lawfully issue a subpoena to investigate possible violations of KRS Chapter 45A, a subpoena could not be issued to Lassiter who is no longer a state employee in the executive branch. Lassiter buttresses his reading of KRS 45.142 by the penalty provision of KRS 45.990(1), which states that prosecution for the willful failure or refusal to comply with KRS 45.142 is limited to “[a]ny officer, agent, or employee of any budget unit[.]” We agree with the Secretary that Lassiter’s reading of KRS 45.142 is at odds with the statutory language and the legislative intent.

Lassiter’s argument ignores that pursuant to KRS 45.142, the Secretary has two distinct investigative tools available when mismanagement of state funds is alleged. First, the Secretary is to be given “free access during business hours to books, reports, papers and accounts in his office or under the care or control of any budget unit of [the executive branch][.]” Notably, his free access is only during business hours and the books, papers, and accounts must be physically located in his office or under the care or control of any budget unit of the executive branch. By its plain language and logical application, the free access

given to inspect is limited to current employees. However, the Secretary possesses a second investigatory tool, the subpoena power.

After providing that the Secretary has free access to inspect as described above, the statute continues. By the use of the word “and” the legislature conferred an additional and separate investigative tool--the power “to issue subpoenas, compel the attendance of witnesses and the production of testimony touching any subject properly under investigation by [him], and . . . compel the production of books, papers, and accounts.” KRS 45.142. This power is not limited by time, place, or person. In contrast to the penalty provision contained in KRS 45.990(1), and its limitation on who may be prosecuted for refusing to provide free access to the Secretary to documents, KRS 45.142 states that the Secretary may seek compliance through a court order against *any* person.

It states:

If any person fails to comply with the order of, or to obey a subpoena issued by them or their designated agents, or refuses to testify as a witness to any matters regarding which he may be lawfully interrogated, the judge having jurisdiction of the person to whom the order or subpoena was issued may, on their application compel obedience by proceedings for contempt as in the case of disobedience of a subpoena or order issued from such court or a refusal to testify therein, and may adjudge such person guilty of contempt of court and punish him as provided by law in other contempt cases.

If the legislature intended to limit the Secretary's subpoena power to only officers, employees or the governing body, it could have easily inserted that language when conferring the subpoena power and the power to seek contempt for noncompliance. It did not. Instead, when conferring the subpoena power, it chose to use the all-inclusive term "any person."

Moreover, Lassiter's desired construction offends the rules of statutory construction that we must "presume that the General Assembly... intended for all of [KRS 45.142's] parts to have meaning[.]" *Shawnee Telecom Res., Inc.*, 354 S.W.3d at 551. If as Lassiter suggests the subpoena power contained in the second portion of KRS 45.142 is merely an extension of the inspection power as opposed to being separate and distinct, it would be redundant as there would be no reason to compel the production of books and records to which the Secretary has free access.

We hold that the Secretary's subpoena power under KRS 45.142 extends investigations to all mismanagement of state funds within the executive branch, including the procurement and award of state contracts and that a subpoena *ducus tecum* may be properly issued to persons and entities outside of state government. However, the Secretary has no independent power to enforce those subpoenas.

The enforcement of the Secretary's subpoena is a judicial decision made when either a motion to quash the subpoena or motion to compel compliance is filed in the circuit court having jurisdiction over the person to whom the subpoena is issued. KRS 45.142. While administrative subpoenas are, "at best, constructive searches," *In re Gimbel*, 77 F.3d 593, 596 (2d. Cir. 1996), the enforcement of such subpoenas depends on a judicial determination that "(1) the subpoena is within the statutory authority of the agency; (2) the information sought is reasonably relevant to the inquiry; and (3) the demand is not unreasonably broad or burdensome." *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 166 (3d Cir. 1986). A subpoena that is issued "for an improper purpose, such as harassment" will not be enforced. *Id.* at 166-67.

A similar provision within Kentucky's Blue Sky Law was considered in *Dolomite Energy, LLC v. Commonwealth of Kentucky Office of Fin. Institutions*, 269 S.W.3d 883 (Ky.App. 2008), where the appellants challenged the power of the Commonwealth of Kentucky Office of Financial Institutions, Division of Securities (Commonwealth), to issue a subpoena *duces tecum*. While the Court noted the broad investigatory powers of the Commonwealth in the enforcement of Blue Sky Laws, it also noted that the courts are the "gatekeepers" against any arbitrary, capricious or otherwise unreasonable demands in an administrative subpoena *duces tecum*. *Id.* at 887. In accord with the federal view, the Kentucky

Supreme Court held that the trial court must satisfy itself as to the basis for the subpoena, the subpoena must be within the authority of the agency, must not be too indefinite and the information sought must be reasonably relevant. *Id.* at 886-87.

We conclude the Woodford Circuit Court erroneously ruled that the Secretary did not have the power to issue a subpoena to Lassiter. By the power conferred by the legislature, he could do so. However, whether Lassiter may be compelled to comply with that subpoena is a matter yet to be addressed by the circuit court. The case is reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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