

COMMONWEALTH OF KENTUCKY  
BULLITT CIRCUIT COURT  
DIVISION ONE  
CASE NO: 11-CI-00348

BULLITT FISCAL COURT,  
BULLITT COUNTY, KENTUCKY, ET AL PETITIONERS

VS. ORDER

BULLITT COUNTY BOARD OF HEALTH RESPONDENT

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This matter comes before the Court on Motion for Declaration of Rights filed by Bullitt Fiscal Court, Bullitt County, Kentucky; City of Mt. Washington, Kentucky; City of Shepherdsville, Kentucky; City of Hillview, Kentucky; City of Lebanon Junction, Kentucky; City of Pioneer Village, Kentucky; City of Hebron Estates, Kentucky; City of Hunter's Hollow, Kentucky; and City of Fox Chase, Kentucky. The Petitioners are the county and city governments for Bullitt County and the municipalities located within Bullitt County.

The Respondent is an administrative agency created by the Kentucky State Legislature. Petitioners seek a Declaration of Rights with respect to Regulation 10-01 adopted by the Bullitt County Board of Health which is named "A Regulation Related To The Protection Of Public Health And Welfare By Regulating Smoking In Public Places And Places Of Employment" hereafter referred to as "Regulation 10-01". The Petitioners move the Court to declare Regulation 10-01 void and unlawful and seek to have the Respondent permanently enjoined from implementing or enforcing Regulation 10-01.

The issue presented has nothing to do with any determination of the negative consequences of smoking. The issue before this court is strictly limited to a determination of the authority of the Respondent to enact a smoking ban as set forth in Regulation 10-01. This court is called on to determine if the Respondent has exceeded its legislatively granted power and authority in the adoption of Regulation 10-01.

The Respondent maintains that Regulation 10-01 is authorized pursuant to the authority vested in Bullitt County Board of Health pursuant KRS 212.230(1)(c) which provides that a District Board of Health shall:

Adopt, except as otherwise provided by law, administrative regulations not in conflict with the administrative regulations of the Cabinet for Health and Family Services necessary to protect the health of the people or to effectuate the purposes of this chapter or any other law relating to public health; **KRS 212.230(1)(c)**

Both parties to this lawsuit are divisions of government which are created pursuant to the Kentucky Revised Statutes. The Petitioner, Bullitt Fiscal Court, Bullitt County, Kentucky is granted its primary powers through the Kentucky Revised Statutes as set forth in KRS 61.083. The remaining Petitioners are Cities who are granted their primary powers for public purposes via KRS 82.082. The grants of authority to the Petitioner pursuant to the Kentucky Revised Statutes are made for the purpose of providing for a lawful government of the people of this Commonwealth.

The elected officials of the legislative bodies who are Petitioners are elected to pursue the government of the people at the city and county levels in Bullitt County. Various powers and acts of legislation are exercised through the actions of the Petitioners in the form of local ordinances which

carry the effect of law. In addition to the legislative mandates established through the elected representatives of the people at the local level, the government of our democracy is also controlled at the state level by the Kentucky State Legislature. Actions of the United States Congress, the Kentucky State Legislature, the County Fiscal Court and the respective City Councils create the government of the people and by the people on which our democracy is based.

The Respondent is a creature of a different nature. The Respondent is an administrative agency created by the state legislature and vested with certain powers and duties pursuant to KRS 212.230, KRS 212.240, KRS 212.245 and other specific legislative mandates. It is well established law within this Commonwealth that an administrative agency's jurisdiction and powers are strictly limited to those granted by legislative action. Custard Insurance Adjusters, Inc. v. Aldridge, 57 S.W. 3d 284 (Ky., 2001). The authority of an administrative agency is limited to direct implementation of the functions assigned to that agency by statute. Flying J Travel Plaza v. Com., Transp. Cabinet Dept. of Highways, 928 S.W. 2d 344 (Ky., 1996).

The Respondent argues that the regulation of smoking is necessary for the protection of the health of the people and that Regulation 10-01 is adopted pursuant to the specific authority and powers conveyed to Respondent by KRS 212.330(1)(c). However, KRS 212.230(1)(c) clearly provides that the Board of Health may adopt "administrative regulations" which are not in conflict with administrative regulations of the Cabinet for Health and Family Services necessary to protect the health or to affect the purposes of the chapter or "**any other law**" relating to public health. The

same limitation with respect to carrying out provisions of law is contained in KRS 212.230(h), which also references that the functions of Respondent are those which are necessary to carry out provisions of “law” and regulations “adopted pursuant thereto”.

In interpreting KRS 212.230, the Court must ascertain the statute’s plain meaning. In doing so, the Court believes that the phrase “necessary to protect the health of the people or to effectuate the purposes of this chapter or any other law relating to public health” directly modifies the phrase “administrative regulation of the Cabinet for Health and Family Services” and does not provide carte blanche for the Board of Health to adopt any regulations it deem fit relating to public health. Instead, that statute directly limits the Board and states that it may only adopt regulations which do not conflict with health related administrative regulations enacted by the Cabinet and local government.

In adoption of Regulation 10-01 the Respondent heavily relies upon the authority to regulate matters relating to public health which was granted to the Jefferson and Louisville County Board of Health in Louisville & Jefferson County Bd. Of Health v. Haunz, 451 S.W. 2d 407 (Ky. App., 1970). The Respondent argues that the Court of Appeals expressly addressed arguments that the County Board of Health could legislate under the Kentucky Constitution Sections 27 and 28. However, in Haunz the Kentucky Court of Appeals specifically found the sanitary regulations in questions to be within the framework of the legislative grant of authority to the local board of health. Those regulations related to a sanitary code affecting habitability of

buildings and not to a prohibition against smoking in a public place or workplace.

The Respondent also relies on Lexington Fayette County Food & Beverage Association v. Lexington-Fayette Urban County Government, 131 S.W. 3d 745 (Ky., 2004) for their position that regulation of smoking is a matter of public health that they can regulate. The Respondents argue that regulation of public health is an appropriate function of government and asserts that Lexington Fayette County Food & Beverage Association v. Lexington-Fayette Urban County Government supports that proposition. However, in that decision the Kentucky Supreme Court recognized the legitimate power to regulate smoking as a governmental function when it was enforced pursuant to a law enacted by the County Government

Petitioners argue that there is no express grant of authority to allow the Respondent to undertake the creation of a mandatory prohibition against smoking in public places in Bullitt County. The Kentucky State Legislature has enacted certain legislative guidelines with respect to smoking prohibitions which are listed in KRS 61.165. These guidelines specifically provide for the adoption of policies relating to smoking in state owned and state operated office buildings, workplaces and facilities.

Also contained within the grant of authority relating to smoking prohibitions, the Kentucky State Legislature has conveyed to counties, municipalities, and special districts certain rights as set forth in KRS 61.165(3). That statutory section allows for counties and municipalities to adopt policies for smoking in their buildings and workplaces. That grant of authority for the special district (i.e. Bullitt County Board of Health) is limited

to office buildings, workplaces and facilities that are “owned by, operated by, or under the jurisdiction of that government .....” This statute does not convey to the Bullitt County Board of Health the ability to enact regulations which would constitute prohibition of smoking in other areas.

In short, the Respondent can cite this Court to no specific grant of authority for the broad regulation of smoking as set forth in Regulation 10-01. In support of its authority to regulate smoking, Counsel for the Respondent argued to the Court during oral arguments that there is no broader field of police power than that of public health. She also cites Lexington Fayette County Food & Beverage Association v. Lexington-Fayette Urban County Government for the proposition that regulation 10-01 is well within the province of the Board of Health as a local governmental entity.

However, the authority of the Board of Health is strictly limited to the grant of authority which is conveyed by the Kentucky State Legislature. The power of an administrative agency to create administrative regulations is a function that is, by its very nature, limited. In resolving any limitations with respect to the function of an administrative agency, any doubt concerning the existence of the power is to be resolved against the agency. Courtney v. Island Creek Coal Company, 474 F. 2d 468 (1973). Absent a clearly mandated grant of power and authority this court must resolve any doubt concerning the agency's power and authority against the agency.

The primary issue presented in this litigation is to what degree may an administrative agency enact and enforce rules. KRS 212.230 makes a specific grant of authority, but it must by its very nature be a grant to develop

subordinate rules. The authority to create law is limited and granted only to legislative bodies by statute or constitution:

Sections 27 and 28 of our Constitution forbid the delegation of legislative power to administrative boards or agencies, which are a part of the executive branch of state government. In Goodpaster, Director of Insurance, v. Southern Ins. Agency, Inc., 293 Ky. 420, at page 423, 169 S.W.2d 1, at page 3, we stated:

'Without doubt, the Legislature may authorize a board or administrative officer, such as appellee, in charge of some governmental affairs, to make police regulations, but it cannot abdicate its own police power on any subject and confer such power on an officer or a board to his or its uncontrolled discretion.'

In the recent case of Veail et al. v. Louisville & Jefferson County Metropolitan Sewer Dist. et al., 303 Ky. 248, 197 S.W.2d 413, we recognized that legislative power could not be delegated to a Sewer District, and administrative agency. See also Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446.

It is true that a state legislature may authorize boards and other agencies to exercise an administrative discretion in the application of laws enacted by it. As stated in Craig, et al. v. O'Rear, et al., 199 Ky. 553, at page 560, 251 S.W. 828, at page 831:

'Therefore when we say that the Legislature may not delegate its powers, we mean that it may not delegate the exercise of its discretion as to what the law shall be, but not that it may not confer discretion in the administration of the law itself.'

An administrative body may, of course, properly promulgate subordinate rules. But in this case the action of the Board constituted the exercise of legislative power in enacting the paramount rule. The Board actually pioneered in creating a liability not sanctioned by the lawmaking authority of the state, city or county. It invaded a new field of compulsory contribution where the ground had

not been broken by a legislative body. It had no general authority of any kind to impose on any person or institution the obligation of financing the cost of its inspection services. In the absence of such authority the Board's discretion would be without limit, except as to reasonableness. It is, therefore, evident that the broad power to promulgate the rule here involved, subject to no legislative standard or guide, could not be delegated to the Board under fundamental constitutional limitations. Henry v. Parrish, 307 Ky. 559, 211 S.W. 2d 418, 421 (1948).

The Kentucky Supreme Court, then the Kentucky Court of Appeals, was addressing an issue relating to a permit fee by the Louisville and Jefferson County Board of Health in Henry v. Parrish. As in the case of Henry v. Parrish, the action of the Bullitt County Board of Health's attempt in Regulation 10-01 is an effort to exercise legislative power to enact a paramount rule. Without any legislative direction or authority to ban, the Board of Health has undertaken a legislative power.

This Court does not believe it necessary to declare unconstitutional the powers and duties of the Bullitt County Board of Health granted by KRS 212.230(1)(c). The Court finds that the legislative authority granted in powers and duties by that statute are limited to those which are "not in conflict with the administrative regulations **of the Cabinet for Health and Family Services** necessary to protect the health of the people or to effectuate the purposes of this chapter or any other law relating to public health" (emphasis added). The court finds that the Respondent has no authority to enact Regulation 10-01 through that statute. Simply put, no legislative body within Bullitt County has enacted any law to prohibit the



conduct which Respondent seeks to regulate in Regulation 10-01, and that is a function not granted to Respondent as an administrative agency.

Determining the content of the law has long been held to be an exclusive function of legislative bodies:

In all cases the Legislature selects the subject, and indicates the public policy with respect thereto. The subject is thereby brought within governmental control. Its free indulgence is deemed harmful. To so determine is the exclusive prerogative of the legislation. The selection of the persons, places, and times, and the regulations of the conditions upon which it is to be exercised, are matters of executive detail, which may be, and which are always, delegated to the ministerial body. State Racing Commission v. Latonia Agricultural Ass'n, 136 Ky. 173, 123 S.W. 681, 686 (Ky. 1909).

Section 4 of Regulation 10-01 prohibits smoking in enclosed places within Bullitt County. At the time of the hearing of this matter, the Respondent reversed its previous position and acknowledged that it did not have the power and authority to regulate smoking within the buildings and governmental workplaces of the Petitioners. However, Section 4 goes farther and seeks to regulate businesses patronized by the public, including, but not limited to, banks, laundry mats, professional offices, galleries, libraries, museums, retail service establishments, bars, bingo facilities, childcare and adult daycare facilities, convention facilities, healthcare facilities, hotels and motels, lobbies, hallways, and other common areas in apartment buildings, condominiums, trailer parks, retirement facilities, nursing homes, and other multiple unit residential facilities, restaurants, retail stores, services lines, sports arenas, theaters and other facilities used primarily for exhibiting motion pictures as well as other areas.

Regulation 10-01 also prohibits smoking in enclosed places of employment, enclosed private clubs, and certain outdoor public places. The Respondent is unable to provide to the Court any grant of authority to allow regulation of the conduct on those premises. The case law cited by the Respondent which allows for regulation of smoking conduct in those types of facilities involves actions which were taken by governmental legislative bodies.

In addition, Regulation 10-01 seeks to impose taxation on the owners of the properties mentioned as prohibited areas. It seeks to require those individuals to purchase "no smoking" signs and to pay the labor to allow them to be posted at entrances. It further requires them to remove ashtrays at their expense. There is no grant of authority by any legislative agency which would allow the Respondents to impose this cost upon private businesses. This conduct by an administrative agency has previously been addressed by the Kentucky Supreme Court and denied:

..... in this case the action of the Board constituted the exercise of legislative power in enacting the paramount rule. The Board actually pioneered in creating a liability not sanctioned by the lawmaking authority of the state, city or county. It invaded a new field of compulsory contribution where the ground had not been broken by a legislative body. It had no general authority of any kind to impose on any person or institution the obligation of financing the cost of its inspection services. In the absence of such authority the Board's discretion would be without limit, except as to reasonableness. It is therefore, evident that the broad power to promulgate the rule here involved subject to no legislative standard or guide, could not be delegated to the board under fundamental constitutional limitations. Henry v. Parrish, 307 Ky. 559, 564-565, 211 S.W. 2d 418 (Ky., 1948)

In addition to enforcement by Health Department Personnel, Section 12 of Regulation 10-01 creates an obligation on behalf of the owner, manager, operator and employee to prohibit or stop smoking. It also creates an obligation on that person to solicit involvement by local law enforcement. This is law enforcement which would be provided by the police agencies operated by the Petitioners. As such, the regulation impermissibly seeks to dictate to Petitioners what their police agencies will do while working and further attempts to mandate that the Petitioners finance the cost of enforcement of Regulation 10-01.

In addition to attempting to force Petitioners to have their police enforce the regulation, the Respondent goes further to require the clerks of the Petitioners to provide notice of the regulations to applicants for a business license and Paragraph C of Section 13 provides for the suspension or revocation of "any permit or license" issued to the person for the premises on which the violation occurs. Again, there is no grant of legislative authority for this function and Respondents have no authority to require Petitioner to finance this aspect of enforcement for Regulation 10-01.

The elected officials who compose the Petitioner's various legislative bodies have been selected by the people to govern matters relating to their respective cities and county. To accept the position of the Respondent that there is authority for a board of health to legislate any matter relating to public health without any additional legislative mandate would allow them to abrogate the fundamental basis of our government which is government by the people. Those individuals elected to legislative positions should create

law and administrative agencies should promulgate subordinate rules. This Court does not believe the Kentucky State Legislature intended to grant the Respondent Board of Health the authority to regulate **“any matter relating to public health”** without some paramount law or direction for a legislative body. If that were the case, the grant of authority in KRS 212.230 would simply read that a board of health may “adopt, except as otherwise provided by law, administrative regulations relating to any matter relating to public health.” That is not the reading of that statute nor this court believe it is the law in this Commonwealth.

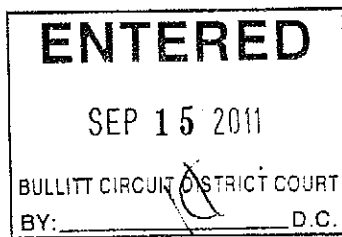
The Bullitt County Board of Health has undertaken to create a paramount rule in prohibiting smoking in public places and workplaces which has not been sanctioned by the lawmaking authority of Bullitt County or the City Petitioners. The people of Bullitt County are entitled to be governed by their elected representatives and should not be subjected to additional laws enacted by an administrative agency without an express grant of authority. To accept the Respondent’s position that is has authority to regulate any matter relating to public health would allow the Respondent to adopt regulations prohibiting the consumption of candy because it is bad for a person’s teeth, to prohibit consumption of deep fried foods, and to limit the consumption of red meat. To follow the Respondent’s analysis would say that all of this could be justified because of “health” issues. That analysis would also allow the Board of Health to regulate the time of night a person has to go to bed based upon the fact that lack of sleep influences a person’s health. This court does not believe that type of “Big Brother” conduct was


anticipated by the Kentucky State Legislature in its grant of power and authority to boards of health.

It is long settled in Kentucky law that where there is any fair or reasonable doubt concerning the existence of a particular power sought to be invoked by an administrative agency that doubt is to be resolved against the Board. Board of Education of City of Newport v. Scott, 189 Ky. 225, 224 S.W. 680 (Ky., 1920).

For the reasons set forth herein it is hereby ORDERED and ADJUDGED that the Bullitt County Board of Health Regulation 10-01 is VOID AND UNLAWFUL and the Bullitt County Board of Health is permanently enjoined from implementing or enforcing Regulation 10-01.

This is a final and appealable Judgment and there is no just cause for delay in its entry.



  
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RODNEY BURRESS, JUDGE  
BULLITT CIRCUIT COURT  
DIVISION ONE  
  
9-15-11  
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DATE