

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
NO. 06-CI-574**

THOMAS CLYDE BOWLING,)	
)	
RALPH BAZE,)	
)	
and)	
)	
BRIAN KEITH MOORE,)	Plaintiffs
)	
v.)	
)	
KENTUCKY DEPARTMENT)	
OF CORRECTIONS,)	Defendant
)	
)	

MOTION FOR SUMMARY JUDGMENT

Plaintiffs T.C. Bowling, Ralph Baze and Brian Keith Moore hereby move for summary judgment pursuant to CR 56.01. Plaintiffs move for summary judgment because defendant did not adhere to the proper procedures for promulgating an administrative regulation. In determining the procedures to be followed for lethal injection, the Department of Corrections implemented KRS 431.220, which provides only that lethal injection shall be Kentucky’s method of execution. Defendants do not dispute that they did not adhere to the Kentucky Administrative Procedures Act (APA) and failed to subject the procedures to public notice and hearing. As legislation may not be adopted in secret, implementation of legislation may not be secret. Defendants did not publish the procedure, and it was never subjected to notice and comment. Therefore the procedure is invalid and cannot be used until the Department of Corrections undertakes rulemaking with public notice and comment.

Summary judgment should be granted because there are no material issues of fact and because the procedure is an administrative regulation that implements a statute and thus should have been subjected to public notice and comment.

CR 56.01 states that a party may “move with or without supporting affidavits for a summary judgment in his favor.” Summary judgment is judgment as a matter of law, which is appropriate when the case is void of material issues of fact.¹ In this case, there are no contested issues of fact. Defendants concede that they did not promulgate a rule for notice and hearing under the statutes pertaining to administrative regulations.

The only remaining question is one of law: whether the procedure implementing KRS 431.220 is an “administrative regulation” within the meaning of Chapter 13A. Since the procedure implements a statute, it falls directly under the definition of an administrative regulation. Moreover, this procedure does not fall under any of the exceptions for rulemaking. Though the statute being implemented does not by its own language call for a rule, the APA already specifies that a procedure implementing a statute is a regulation and should be published and subjected to notice and comment. Finally, the public has an interest in ensuring that this statute is implemented appropriately and in a fair manner. Adherence to proper administrative procedures will guarantee that government is open and that the public receives the opportunity to participate in the process.

A. The procedure in question implements a statute and thus is an administrative regulation under KRS 13A.100.

Summary judgment is appropriate because under KRS 13A.100, the lethal injection procedure is an administrative regulation that should have been published in the Administrative Register and subjected to public comment and hearing. KRS 13A.100 states that an administrative body shall prescribe by administrative regulation, “[e]ach statement of general

¹ See *Cornette v. Com.*, 899 S.W.2d 502, 505 (Ky. App. 1995); *Martin v. Utica Mut. Ins. Co.*, 697 S.W.2d 951, 952 (Ky. App. 1985).

applicability, policy, *procedure*, memorandum, or other form of action that implements; interprets; prescribes law or policy; describes the organization, procedure, or practice requirements of any administrative body; affects private rights or procedures available to the public.”²

The procedure in question implements a statute, KRS 431.220, which provides only that “every death sentence shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death.”³ The procedure, which is not and has never been made public, lays out specifically which drugs shall be used and what steps are to be followed to implement this statute. Thus these procedures fall directly under KRS 13A.100. The statute that provides that execution shall be by lethal injection does not delegate unfettered discretion to the Department of Corrections to carry out 431.220 in secret, with no public knowledge or participation.

B. The procedure does not affect the internal management of the Department of Corrections but does affect the public and thus does not fall under the exception in KRS 13A.010.

KRS § 13A.010 further defines “administrative regulation,” and explicitly defines which statements are not included in the definition.⁴ Defendants claim that the procedures fall under subsection (a), because they are statements that concern only the “internal management” of an administrative body, and do not affect “private rights or procedures available to the public.” While there is a dearth of caselaw on the subject in Kentucky, other states have found that policies must deal strictly with administrative agency staff in order to qualify as “internal management.”

² KRS 13A.100(1) (emphasis added)

³ KRS 431.220(1)(a).

⁴ KRS 13A.010(2). Subsection (b) excepts declaratory rulings, (c) excepts interdepartmental memoranda, (d) excepts rules dealing with highways, and (e) excepts rules regarding postsecondary education.

For example, the Michigan Supreme Court found that the Department of Mental Health's standard form contract for group homes providing residential services for disabled adults constituted a "rule" which is required to be promulgated pursuant to the Michigan APA.⁵ Like Kentucky, Michigan provides an exception to rulemaking requirements for statements that "do not affect the rights...of the public." The court found that because the provisions of the standard form health contract announced DMH standards and policies and implemented and applied the Mental Health Code, it should have been subject to notice and hearing.⁶

In Nebraska, a Department of Corrections employee was terminated pursuant to a disciplinary regulation for falling asleep. Even though the rule was a disciplinary regulation for employees, the Nebraska Supreme Court found that the policy prescribed a penalty, and thus was a "rule or regulation" under the APA.⁷ The Nebraska statute provides the same exceptions as Kentucky. Even though the policy was an internal disciplinary rule, the court found that it still had to be promulgated as a rule.⁸

The Michigan rule implemented a statute and announced an agency's policies and so required public notice and comment. The Nebraska rule dealt with internal disciplinary procedures, but since it prescribed a penalty, it did not fall under the exception for rules of "internal management". In short, "[t]he mere fact that a rule relates to agency personnel is not always sufficient to remove it from rulemaking procedures.... The agency carries the burden of justifying its avoidance of notice and comment procedures by showing that the effect of the rule is within the personnel or management classes and is solely internal, with no effect on the

⁵ M.C.L. § 24.207(g), (j).

⁶ *AFSCME v. Dep't of Mental Health*, 550 N.W.2d 190, 193 (Mich. 1996).

⁷ Neb.Rev.St. §§ 84-901(2).

⁸ *McAllister v. Nebraska Dept. of Correctional Services*, 573 N.W.2d 143, 147 (Neb. 1998).

public."⁹ Thus, the Department of Corrections should bear the burden of proving that a rule does not affect the public: a burden which it has not met.

The procedures affect the public in several ways. The procedures that implement KRS 431.220 prescribe the manner by which a condemned prisoner will be executed. Just as every individual is subject to the criminal laws of the Commonwealth, even if they are never prosecuted under them, every member of the public is potentially subject to these injection procedures. Thus every individual in Kentucky has an interest in ensuring that the procedures are fair and provide for the most humane death possible. Additionally, even though most members of the public will never face execution, each person is still affected by the procedures because executions are carried out in the name of the public at large. Thus, the general public, whether personally facing execution or not, has an interest in the manner Kentucky chooses to employ. Individual members of the public who are interested are entitled to the notice and comment that the APA provides before procedures like these are adopted.

Moreover, individual members of the public may have special expertise or opinions to express at a public hearing on proposed procedures. Doctors and other medical professionals, for example, who cannot participate in an execution, may have valuable opinions that should be heard by the Department of Corrections. Interested individuals have the right to contribute their own knowledge, opinions or proposed alternatives at a public hearing. Obtaining more information from a wide variety of contributors -- to improve the quality of the end result and to ensure that these procedures are as humane as they can be -- is in the interest of every individual. Judge Roger Crittenden, in this very Court, in his findings of fact after a hearing in an action challenging the constitutionality of the lethal injections procedures, discussed the adoption of

⁹ J. O'Reilly, *Administrative Rulemaking* § 3.06 at 47-48 (1983).

Kentucky's procedures.¹⁰ He found that in 1998, when Kentucky first drafted these procedures, "Those persons assigned the initial task of drafting the Commonwealth of Kentucky's first lethal injection protocol were provided with little to no guidance on drafting a lethal injection protocol."¹¹ Additionally, Judge Crittenden noted that in developing the procedures, "the Commonwealth of Kentucky, Department of Corrections, did not conduct any independent scientific or medical studies or consult any medical professionals concerning the drugs and dosage amounts to be injected into the condemned."¹² In summary, those who developed the lethal injection procedures "were apparently given the task without the benefit of scientific aid or policy oversight."¹³ The current procedures are not public and were developed with no public input. Members of the public, including members of the medical profession, may have valuable opinions to add on this issue of great public importance and that APA requires that they be given the opportunity to participate in the discussion.

Those who drafted the current procedures did so with little guidance and absolutely no public input. The elected representatives in the legislature have selected lethal injection as the method and, Judge Crittenden noted, "the duty of implementing these decisions has been delegated to the personnel who operate the institution where the death chamber is located." But he recognized that "the ultimate responsibility lies with the citizens."¹⁴ It is the people who have chosen to impose capital punishment in certain cases, and it is the people who serve on the juries who recommend the sentences. Thus, as Judge Crittenden stated, "The citizens of this Commonwealth are entitled to know the method and manner for implementing their public

¹⁰ *Baze v. Rees, et al*, No. 04-CI-01094 (Franklin Cir. Ct. July 8, 2005) (findings of fact and conclusions of law). (attached as Exhibit 1)

¹¹ Plaintiffs acknowledge that this previous action dealt with a completely different question than the one currently at issue, but maintain that Judge Crittenden's findings, which are quoted at some length in this motion, are nonetheless relevant.

¹² *Id.* at 6.

¹³ *Id.* at 12.

¹⁴ *Id.*

policy.”¹⁵ Judge Crittenden is exactly right. The citizens of Kentucky *are* entitled to know the method and manner for implementing public policy because the APA specifically allows them to be informed of the method of implementation of statutes and to comment on it. The ultimate responsibility for executions rests with the public and they are entitled to know the manner in which the sentences are carried out.

Security measures taken by the institution are not a reason to classify the procedures as a matter of internal management. The statute says nothing about security and internal security measures are an internal matter. However, the actual procedures for lethal injection, which are a matter of public importance, can be separated from security measures.¹⁶ Judge Crittenden concluded with the observation that “there seems to be little reason why the Department of Corrections cannot publish a lethal injection protocol that does not compromise the security of the institution or the personnel involved.”¹⁷ The lethal injection procedures do not relate only to the “internal management” of the Department of Corrections but affect the public in many ways. The Department cannot avoid making a rule public by simply claiming that it pertains only to internal management or to security, without further explanation.

The public has a specific interest in knowing how an execution will be carried out, and also has a strong interest in open government. Judge Crittenden, in a separate order in the previous suit, recognized this: “The public interest is best served when the Commonwealth presents and explains its position on the manner and means. Thereafter, the citizens of Kentucky

¹⁵ *Id.* at 13.

¹⁶ Other states, including Georgia, Maryland, South Carolina and California, have lethal injection protocols that do not contain the security measures taken by the institution where the procedure is performed.

¹⁷ *Id.* at 13.

The gravity of the question in this case, that of the method of execution, reinforces the need to guard against arbitrary action. But that is not the only consideration. While the public has an interest in the end result of the promulgation of a rule, they also have an interest in having the proper procedures followed and having the process of rulemaking be public, as required by the APA. The Department of Corrections has the power to implement a statute, but not the power to do so secretly. In reviewing the decisions made by agencies, the role of the courts is not just to evaluate the decision made by an agency, but to ensure that the proper procedures are followed. And here, the Department of Corrections has failed to follow KRS 13A.100(1).

C. The legislature has already required every rule that implements a statute to be promulgated as an administrative regulation.

The General Assembly does not need to expressly require within each statute that the methods used to carry out that statute shall be promulgated by regulation. The General Assembly has already specified that “[e]ach statement of general applicability, policy, procedure, memorandum, or other form of action that implements; interprets; prescribes law or policy....or affects private rights or procedures available to the public” shall be prescribed by administrative regulation.¹⁹ KRS 13A.100 explicitly states that any procedure that implements a statute shall be promulgated as an administrative regulation. To require each specific statute to be implemented to again say that regulations shall be promulgated would make that part of KRS 13A.100 redundant. The Kentucky lethal injection procedure implements a statute and does not fall under any of the enumerated exceptions. Thus, it must be subject to public notice and comment.

¹⁸ *Baze v. Rees*, No. 04-CI-1094 (Franklin Cir. Ct. Nov. 23, 2004) (order granting temporary injunction). (attached as Exhibit 2)

¹⁹ KRS 13A.100(1).

D. Adherence to administrative procedures promotes open governance, increases opportunity for public participation and ensures adequate judicial review.

Administrative procedures are integral to fair and open governance. Proper procedures improve both the quality of agency rules and the opportunity for public notice and participation. First, public notice and comment improve the quality of agency rulemaking by ensuring that the agency regulations will be tested by exposure to diverse public comment.²⁰ Second, proper rulemaking processes require an agency to fairly apprise all interested parties of all the significant issues involved, so that they can participate in the process.²¹ The notice and hearing procedures further guarantee that the public in general is given an opportunity to participate, to provide information, including data, views, and arguments, as well as to suggest alternatives.²²

Adherence to statutory administrative procedures is no less important in state law than in the federal context. Indeed, adherence to administrative procedure requirements is of special importance to Kentucky, where the Constitution guarantees a judicial remedy.²³ Notice and comment is important in this context because it provides a well-developed record that enhances the quality of judicial review.²⁴ The Kentucky Supreme Court has recognized that “from time immemorial courts have been reviewing administrative decisions.”²⁵ Moreover, where questions of law are involved, the review of the courts cannot be restricted.²⁶ In other words, Kentucky courts have the inherent power to scrutinize the acts of administrative agencies and tribunals, particularly regarding questions of law. For this review to be meaningful, administrative bodies must follow the statutory procedures for rulemaking, in order to create a reviewable record of their decision.

²⁰ *Sprint Corp. v. FCC.*, 315 F.3d 369, 373 (D.C. Cir. 2003).

²¹ *Fertilizer Institute v. Browner*, 163 F.3d 774, 779-80 (3d Cir. 1998).

²² *Safari Aviation Inc. v. Garvey*, 300 F.3d 1144, 1150-51 (9th Cir. 2002).

²³ Ky. Const. § 14.

²⁴ *Sprint Corp.*, 315 F.3d at 373.

²⁵ *Kendall v. Beiling*, 175 S.W.2d 489, 491 (1943).

²⁶ *Id.*

The Constitution of Kentucky makes it clear that power is vested in the people and that the Commonwealth's power is derivative. Section 4 provides that "[a]ll power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety, happiness and the protection of property," and goes on to provide that the people have an inalienable right to alter or abolish their government. The public has a right to participate in governance and the APA ensures that the public retains that right, even when power is delegated to administrative agencies. Agencies cannot subvert the public's right to information and participation, just as the legislature cannot make laws in secret.

Moreover, § 2 of the Kentucky Constitution prohibits all arbitrary action by the government. Implementing a statute without going through the process prescribed by law is arbitrary, particularly when the resulting final procedure remains secret. As applied to administrative agencies, § 2 assures Kentucky citizens of fundamentally fair and unbiased procedures.²⁷ However, when agency actions and procedures are secret, citizens cannot know if fairness and due process are satisfied. Secret action must be presumptively arbitrary, because it can never be judged and evaluated. The General Assembly is not allowed to pass laws in secret, and when an administrative agency implements a statute in private, the result is the same. Even emergency regulations, though they have special processes, must be public.²⁸ Bypassing the requirements of notice and comment, when they are required, is essentially governance in secret, which is abhorrent to a system which values the power of the people over all else.

Adoption of rules and regulations outside the requirements specified by statute, without notice and comment, creates no reviewable record, allows decisions to be based on unknown

²⁷ *Commonwealth Natural Resources Cabinet v. Kentec Coal Co., Inc.* 177 S.W.3d 718, 724 (Ky. 2005); *Kentucky Cent. Life Ins. Co. v. Stephens*, 897 S.W.2d 583, 591 (Ky. 1995) (the "state, in exercise of its police power, may not unreasonably invade and violate private rights guaranteed under Federal or State Constitutions.")

²⁸ See KRS § 13A.190(2).

considerations, denies the public the opportunity for participation and allows affected individuals no notice. Executive agencies are given the power to implement statutes, but they must do so according to established, public procedures.

REQUEST FOR RELIEF

The procedure implementing KRS 431.220 must be promulgated as a rule, following the appropriate notice and comment periods. That has not been done. Therefore, T.C. Bowling, Ralph Baze and Brian Keith Moore respectfully request that this court declare the procedure implementing KRS 431.220 invalid and enjoin further use of that procedure unless and until the Department of Corrections properly promulgates a rule implementing the statute.

RESPECTFULLY SUBMITTED,

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June 21, 2006

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing

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to be served via first class mail, postage prepaid on the following individuals:

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June 21, 2006