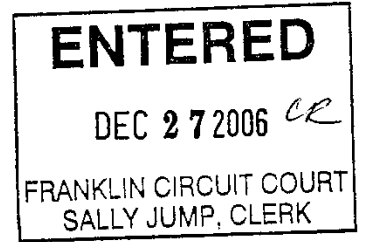


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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 06-CI-00574



THOMAS C. BOWLING,

RALPH BAZE,

And

BRIAN KEITH MOORE

PLAINTIFFS

v.

ORDER

KENTUCKY DEPARTMENT
OF CORRECTIONS

DEFENDANT

**** **** ****

This matter is before the Court on the Defendant's motion to alter, amend or vacate the Order entered November 30, 2006.

On April 26, 2006, Plaintiffs filed a complaint asking this Court to declare that the procedures used to implement KRS 431.220, Execution of Death Sentence, must be promulgated pursuant to the requirements of the Administrative Procedures Act. On May 26, 2006, the Department of Corrections moved to dismiss that complaint. Plaintiffs filed a motion for summary judgment on June 21, 2006. On November 29, 2006, argument was held on these motions. On November 30, 2006, the Court denied Defendant's motion to dismiss and granted Plaintiff's motion for summary judgment. Thus, the Defendant was ordered to promulgate regulations pursuant to the Administrative Procedure Act to implement KRS 431.220. Defendant moved to alter, amend, or vacate the November 30th

Judgment. The Court now grants the Defendant's motion and VACATES the Judgment of November 30, 2006.

Standard of Review

A judgment may be vacated per Kentucky Rule of Civil Procedure 59.05. This rule does not give a standard for its application; however, Kentucky courts apply the standards of Federal Rule of Civil Procedure 59 for altering a judgment. Gullion v. Gullion, 163 S.W.3d 888, 892 (Ky. 2005). The grounds upon which such a motion may be granted are as follows:

First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice. Serious misconduct of counsel may justify relief under this theory. Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

Id. at 893. It is this Court's opinion after further review of the applicable statutes and an attempt to harmonize those statutes that the original Order dated November 30, 2006 contains manifest errors of law.

Discussion

The Department of Corrections, as an administrative agency, may promulgate regulations under the general authority granted to it by KRS 196.035, which states "The secretary shall, *except as otherwise provided in KRS 439.250 to 439.560 and KRS Chapter 13A*, have the power and authority to adopt, amend, or rescind administrative regulations he deems necessary or suitable for the proper administration of the functions of the cabinet, including qualifications for the

receipt of federal funds and for cooperation with other state and federal agencies.”
(emphasis added) This broad, general authority is, by its terms, limited by the provisions of Chapter 13A. KRS 13A.100, entitled Matters Which Shall be Proscribed by Administrative Regulation, reiterates these limitations on administrative power to promulgate regulations: “*Subject to limitations in applicable statutes*, any administrative body which is empowered to promulgate administrative regulations shall, by administrative regulation prescribe, consistent with applicable statutes.” (emphasis added)

KRS 13A.010, the definitions for the chapter, defines an administrative regulation both inclusively and exclusively. KRS 13A.010(2)(a) states as follows:

“Administrative regulation” means each statement of general applicability promulgated by an administrative body that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any administrative body. The term includes an existing administrative regulation, a new administrative regulation, an emergency administrative regulation, an administrative regulation in contemplation of a statute, the amendment or repeal of an existing administrative regulation, but does not include:

(a) Statements concerning *only the internal management of an administrative body* and not affecting private rights or procedures available to the public;

(emphasis added) The definition of regulations does not include “[s]tatements concerning *only the internal management of an administrative body* and not affecting private rights or procedures available to the public.” (emphasis added)

The procedures by which the lethal injection is given are matters of the internal management of the Department of Corrections. These procedures direct Department personnel on matters such as movement of the condemned, security, contacting necessary parties, and more particularly, the combination of drugs and

the method by which they are administered or injected. These internal management procedures serve as an instruction manual, dictating the necessary department preparations as well as required personnel.

Plaintiff asserts that the method by which lethal injection is implemented is not an issue of internal management because all citizens, being generally subject to the laws of the Commonwealth, are potentially subject to execution via that method. This argument regarding general applicability does not demonstrate that the lethal injection procedures are not for internal management. Prison search policies, operation of the inmate canteen and health services, and adjustment procedures and programs are all procedures for managing the operation of the prison system and each would potentially affect any citizen who should run afoul of the law; however, these are not legitimate subjects for administrative regulations.

Chapter 13A also places explicit limits on the authority to promulgate regulations by enumerating specific prohibitions. KRS 13A.120(a) states “[a]n administrative body may promulgate administrative regulations to implement a statute *only* when the act of the General Assembly creating or amending the statute *specifically authorizes* the promulgation of administrative regulations” (emphasis added) This prohibition is repeated in subsection (2)(d): “An administrative body *shall not* promulgate administrative regulations when the administrative body is not authorized by statute to regulate *that particular matter.*” (emphasis added) The broad authority to promulgate regulations which the General Assembly granted to the Department of Corrections in KRS 196.035

is limited by these provisions of Chapter 13A so that the Department may exercise its authority to implement a statute *only* when specifically authorized to do so.

KRS 431.220, titled Execution of Death Sentence, does not authorize the Department of Corrections to promulgate administrative regulations to implement lethal injection. If the General Assembly intended that the Department of Corrections lethal injection procedures be subject to the provisions of the Administrative Procedure Act, then it could have easily required that regulations implementing lethal injection be promulgated. Their failure to include such an implementation requirement is a glaring omission. As an example, the General Assembly did specifically authorize regulations to establish a sex offender treatment program in KRS 197.420(1): “The department shall have the sole authority and *responsibility for establishing by regulation* the design of the specialized program created in KRS 197.400 to 197.420.” (emphasis added) Because the General Assembly did not authorize or require regulations when it clearly could have done so, it cannot be presumed to have intended that the procedures for execution of condemned inmates be formulated as anything other than an internal policy of the Department of Corrections. To interpret KRS 431.220 as containing some implied requirement of administrative regulation would constitute a direct infringement by this Court upon the province of the legislative branch. KRS 431.220 was passed in 1998 (eight years ago) and the General Assembly has never seen fit to amend that statute to require implementing regulations.

The Plaintiffs have gone to great lengths in their various briefs to argue that an administrative regulation is necessary to inform the public of the lethal injection procedure. They contend that mere public discussion is insufficient and the formality of administrative notice and comment is required. This argument has little merit since the procedure and an appropriate forum are both readily available. The current lethal injection procedures are clearly enunciated on page 8 of the Kentucky Supreme Court's November 2006 opinion. While not yet final, this opinion is a public record that is readily available to any citizen.

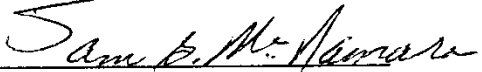
Requiring the Defendant to promulgate a regulation implementing the lethal injection statute would effectively prevent an execution under the statute. If an administrative regulation was required, the Department could not carry out a lethal injection execution until a regulation was properly promulgated. In addition to the required notice and comment period, public hearing, and two legislative oversight hearings, there will doubtlessly be litigation regarding each specific procedure the regulation must contain. The regulatory process opens Pandora's Box to litigation regarding the current drugs administered, what medical equipment is on site, and the training of the execution team. Each future advance of medicine or technology would automatically reopen those questions. The process of promulgating administrative regulations is conceived as a method by which government may act more efficiently; however, here the practical result of requiring administrative regulations is to prevent the Department of Corrections from effectuating the legislative directive to execute condemned inmates by lethal injection. Because Kentucky no longer employs electrocution as an alternative

execution method, the regulatory process would become nothing but a series of collateral attacks precluding capital punishment. Although this Court may be sympathetic with the Plaintiff's position regarding the death penalty, it deems it inappropriate to substitute its opinion for that of the General Assembly or the twelve jurors who imposed the death penalty.

For the foregoing reasons, the Order entered November 30, 2006 in this matter is VACATED. The Plaintiff's motion for Summary Judgment is DENIED and the Defendant's Motion to Dismiss is hereby GRANTED.

This is a Final and Appealable Order and there is no just reason for delay in the entry thereof.

SO ORDERED this 27 day of December 2006.


Honorable Sam G. McNamara
Judge, Franklin Circuit Court

06-CI-00574/lea

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