COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
48TH JUDICIAL CIRCUIT
DIVISION I
CIVIL ACTION NO. 12-CI-00109

JOSEPH M. FISCHER, *et al.* PLAINTIFFS

v.

ALISON LUNDERGAN GRIMES, in her official capacity as Kentucky Secretary of State, *et al.* DEFENDANTS

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

At the hearing on January 30, 2012, Secretary Grimes (and the other Defendants) took no position on the facial challenge to the constitutionality of House Bill 1 ("HB 1"). Yet absent an order enjoining her, this is a law the Secretary will presumably pursue on January 31, 2012 regardless of the repercussions -- constitutional or otherwise. Instead, Defendants focus on the "process" of obtaining injunctive relief, arguing despite the Verified Complaint that Plaintiffs have not provided the necessary proof required to obtain a temporary injunction under Ky. R. Civ. Proc. 65.04. *See* Initial Response to Plaintiffs' Motion and Memorandum in Support of Temporary Injunction ("Response") at 3 ("Plaintiffs have utterly failed to provide competent and cognizable evidence to support their claims.").

This grandiloquent declaration is without force. Under the plain language of Ky. R. Civ. Proc. 65.04, a Verified Complaint is *all* the evidence that is necessary for this Court to issue an injunction. CR 65.04 states that temporary injunctive relief may be granted if it is clearly shown "by verified complaint, affidavit, or other evidence" that the movant's rights are or will be violated and the movant will suffer irreparable injury. A verified complaint alone was sufficient to support temporary injunctive relief in *Maupin v. Stansbury*, 575 S.W.2d 695, 697, 700-01 (Ky.

App. 1978) (noting that only the verified complaint was before the trial court in granting the injunction and holding that the verified complaint "amply supports the trial court's grant of a temporary injunction"). *Maupin*, of course, is the seminal case on temporary injunctions under CR 65.04. The Verified Complaint filed in this action is ample evidentiary support for the relief sought by the plaintiffs, a temporary injunction.

If Defendants believe that the averments in the Verified Complaint are "flawed", or somehow insufficient to support the relief requested, it requires more than comments from their counsel to overcome the evidentiary showing provided by the Verified Complaint. The Defendants must support their assessment of the facts now before the Court with rebuttal affidavits or other competent evidence.

Second, in addition to the Verified Complaint and the un-rebutted averments within it, the Court need only use as evidence the text of HB 1, which is now the law in the Commonwealth. Plaintiffs attached HB 1 as Exhibit 1 of their Verified Complaint, as laws and legislative enactments are routinely considered by and reviewed by courts. *See Bd. of Trs. of Judicial Form Ret. Sys. v. Attorney General*, 132 S.W.3d 770, 785 (Ky. 2003) (considering fact that original, proposed version of bill was withdrawn and reviewing language of withdrawn bill to discern legislative intent); *Shewmaker v. Commonwealth*, 30 S.W.3d 807, 809-10 (Ky. Ct. App. 2000) (reviewing legislative history and past amendments and stating that "legislative intent . . . requires an examination of available information bearing on the purpose to be accomplished by the legislation in question"); *see also McGlone v. McGlone*, 613 S.W.2d 419, 420 (Ky. 1981) ("We customarily take judicial notice of Acts of Congress as well as legislation in sister states, so that had this Act of Congress not been furnished in movant's brief, we would nevertheless have obtained it for the purpose of a proper resolution of this matter.").

Defendants do not dispute that HB 1 says what it says. Defendants do not dispute that HB 1 was signed by the Governor on January 20, 2012 and became law immediately.

Nor do Defendants dispute that the law enacted when HB 1 was signed by the Governor divided twenty-eight counties to create 100 House of Representatives districts. Neither the Defendants nor the Intervening Defendant took issue with the averment of the Verified Complaint setting forth this fact, other than to declare that some averments in the complaint are somehow "factually incorrect." Defendants and the Intervening Defendant did not challenge the averment that HB 1 divided twenty-eight counties because they cannot challenge it and will ultimately have to stipulate to it. This is a facial and fatal constitutional defect.

To the same extent, Defendants and the Intervening Defendant do not challenge the averment in the Verified Complaint that District 24 created by HB 1 contains a population deviation of greater than 5%, specifically, 5.38%. It is simply a fact. And as with the unconstitutional division of more counties than the minimum, the inclusion of a population deviation of greater than 5% represents a facial and fatal constitutional defect.

Under *Fischer v. State Board of Elections*, 879 S.W.2d 475 (Ky. 1994) (*"Fischer II"*), Section 33 of the Kentucky Constitution[1] stands for the proposition that to survive a facial challenge under Section 33, legislative redistricting must divide the "fewest possible number of counties" while maintaining a maximum variation of plus-or-minus 5% from the ideal population

[1] Section 33 of the Kentucky Constitution ("Section 33") provides:

> The first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight Senatorial Districts, and **one hundred Representative Districts, as nearly equal in population as may be without dividing any county, except where a county may include more than one district,** which districts shall constitute the Senatorial and Representative Districts for ten years. Not more than two counties shall be joined together to form a Representative District: Provided, In doing so **the principle requiring every district to be as nearly equal in population as may be shall not be violated.** At the expiration of that time, the General Assembly shall then, and every ten years thereafter, redistrict the State according to this rule, and for the purposes expressed in this section. If, in making said districts, inequality of population should be unavoidable, any advantage resulting therefrom shall be given to districts having the largest territory. **No part of a county shall be added to another county to make a district, and the counties forming a district shall be contiguous.** (Emphasis added).

of a legislative district. *Fischer II,* 879, S.W. 2d at 479. Three years later, the Supreme Court "reiterated that this was the central holding of *Fischer II.*" *Jensen v. State Board of Elections*, Ky., 959 S.W.2d 771, 774 (1997). This is the controlling law in Kentucky, and as the Attorney General has made clear, the fewest possible number of counties can be determined with "mathematical precision", and once determined, it "cannot fluctuate". OAG 96-1, January 8, 1996 at *3 (attached as Exhibit 1 to this Reply).

Therefore, as a matter of law, there is more than sufficient evidence for the Court to find that a constitutional violation has occurred, resulting in irreparable harm to Plaintiffs and all other citizens of the Commonwealth if elections are held under such unconstitutional districts. For all the focus on "process", Defendants could not quite bring themselves to assert that for the Secretary of State to certify candidates and the Board of Elections to conduct elections with districts that are wholly and facially unconstitutional would not amount to irreparable harm, or that it does not represent a substantial question. And given that the deadline is only hours away, the injury is surely immediate. In fact, it is altogether unclear what additional evidence Defendants think might be needed on the Section 33 facial challenge to the constitutionality of the House districts created by HB 1.

Third, Defendants argue that the Court cannot rely on Exhibits 2 and 3 to the Verified Complaint as evidence in support of a temporary injunction because their "source is a matter of sheer speculation," and they are of "indeterminable origin." *See* Response at 3. Exhibit 2 of the Verified Complaint is copy of a map showing HB 1's districts and twenty-eight county splits – six more than the minimum amount required by law. Exhibit 3 of the Verified Complaint is a copy of a chart detailing HB 1's deviations from the ideal district population. Both of these exhibits come directly from the Kentucky Legislative Research Committee's ("LRC") website.

See http://www.lrc.ky.gov/record/12RS/HB1/HCS1RM.pdf (Exhibit2 to Verified Complaint) and http://www.lrc.ky.gov/record/12RS/HB1/HCS1RS.pdf (Exhibit 3 to Verified Complaint). The LRC is "an independent agency in the legislative branch of state government, which is exempt from control by the executive branch and from reorganization by the Governor." *See* KRS § 7.090. According to the LRC's website, it was "established in 1948 as a fact-finding and service body for the Legislature," and is "a 16 member panel that consists of the Democratic and Republican leaders from the House of Representatives and the Senate." *See* http://www.lrc.ky.gov/org_adm/lrc/aboutlrc.htm. The Kentucky Supreme Court and Court of Appeals have cited to the LRC's website as authority. *See Fox v. Grayson*, 317 S.W.3d 1, 18 n.83 (Ky. 2010); *Tunstull v. Donahue*, 2010 Ky. App. Unpub. LEXIS 700, at *4 n.2, 2009-CA-002102-MR (Ky. App. Sept. 3, 2010) (unpublished) (attached as Exhibit 2 to this Reply). In *Fox*, the Supreme Court also cited a print newsletter published by the LRC and stated that while the newsletter was not provided to the court by the parties, the court may "properly *sua sponte* consider documents available to the general public." 317 S.W.3d at 18, n.82 (citing *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. Ct. App. 2004) ("A court may properly take judicial notice of public records and government documents, including public records and government documents available from reliable sources on the internet.")). Therefore under KRE 201,[2] judicial notice of these exhibits is clearly warranted. So, despite Defendants' contention to the contrary, these exhibits, and the data and facts elicited from them, are fully competent evidence and provide all that the Court needs as evidence in support of the requested temporary injunction.

There is simply no other evidence that needs to be considered, presented or verified in order for the Court to enter a temporary injunction under CR 65.04. It is Defendants who have

[2] KRE 201 provides that judicial notice shall be taken when the court is supplied the necessary information and the fact to be noticed is not "subject to reasonable dispute in that it is . . . (2) [c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." KRE 201 (b) and (d).

failed to offer the Court any evidence to support their rhetoric, and who face an evidentiary issue due to the complete absence of rebuttal evidence in their opposition. For this reason alone, Plaintiff's Motion for Temporary Injunction should be granted without further delay.

Finally, at the hearing on January 30, 2012, counsel for the Plaintiffs suggested that the General Assembly was likely to delay the deadline for candidates filing for congressional offices, a deadline that is otherwise coincident with the filing deadline administered by the Secretary for House and Senate candidates to file. As expected, on the afternoon of January 30, 2012, the Generally Assembly passed the Conference Committee Report on House Bill 2. *See* Conference Committee Report (attached as Exhibit 3 to this Reply). This extended the 4:00 p.m. January 31, 2012 filing deadline for candidates for congressional offices until February 7, 2011. As well, the passage gave the Secretary the authority to establish new deadlines for those that follow from the initial filing deadline. This act of the General Assembly shows that equities weigh in favor of the Court granting Plaintiff's Motion for Temporary Injunction, as all of the other deadlines set out in KRS § 118 (certification, drawing for ballot position, etc.) can just as easily be extended without any meaningful disruption of the process. This act shows that delaying tomorrow's deadline for up to one week will impose no additional hardship on the Defendants and will certainly not disrupt the orderly process of the Secretary's office, or the conduct of the upcoming elections. On the contrary, failure to enjoin the deadline will effect the deprivation of constitutional rights that the Plaintiffs aver in their Verified Complaint. Consequently, the Defendants' response to the motion offers no basis on which to deny the relief requested.

FULTZ MADDOX HOVIOUS & DICKENS PLC
Victor B. Maddox
John David Dyche
Jennifer Metzger Stinnett

Jason M. Nemes

101 S. Fifth Street, 27th Floor
Louisville, Kentucky 40202-3116
(502) 588-2000

Attorneys for Plaintiffs

CERTICATE OF SERVICE

I certify that a copy of this Reply In Further Support of Plaintiffs' Motion For Temporary Injunction was served by electronic mail and U.S. Mail on January 30, 2012 upon David Tachau, Dustin B. Meek, Jonathan T. Salomon, and Katherine E. McKune, TACHAU MEEK PLC, 3600 National City Tower, 101 S. Fifth Street, Louisville, KY 40202-3120 and Anita M. Britton, BRITTON OSBORNE JOHNSON PLLC, 200 W. Vine St., Suite 800, Lexington, KY 40507, and on Scott White, 133 W. Short Street, Lexington, KY, 40507, and on Pierce Whites, Office of the Speaker of the House, 702 Capitol Avenue, Capitol Annex Room 303, Frankfort, KY, 40601.

Counsel for Plaintiffs

1996 Ky. Op. Atty. Gen. 2-1 (Ky.A.G.), Ky. OAG 96-1 (Ky.A.G.), 1996 WL 73927 (Ky.A.G.)

Office of the Attorney General

Commonwealth of Kentucky
OAG 96-1
January 8, 1996

Subject: **Legislative redistricting**

Syllabus: **House Bill 1, a proposed House redistricting plan filed in the 1996 regular session of the General Assembly, is constitutional.**

OAGs cited: **OAG 94-47**
Statutes construed: **KRS 15.025**
***1** John Will Stacy
the Honorable House Member from Morgan County (District 71)

The Office of the Attorney General is asked by the requestor whether House Bill 1, a proposed House reapportionment plan filed in the 1996 regular session of the General Assembly, is constitutional under § 33 of the Constitution of Kentucky. The Attorney General provides this opinion on a public question of law submitted by a member of the legislature. KRS 15.025(2).

When the Attorney General considers the constitutionality of legislation, then that legislation is considered unconstitutional only if the case against it is compelling. The Attorney General indulges every presumption in favor of a statute's validity. **OAG** 94-47. That policy exists in order to alleviate the confusion that necessarily follows when the Attorney General questions the constitutionality of a statute that retains the full force of law until a court holds otherwise. We have relaxed that rule in this opinion because of the unusual circumstances presented by this request. The issue before us is of great and immediate public importance. As this opinion is written House Bill 1 has not been signed into law, so that the General Assembly will be guided by our opinion. Our duty under KRS 15.025 can best be carried out by using the same standard of review a court would use rather than by relying on the strong presumption of constitutionality that the Attorney General normally invokes.

The requirements of § 33 of the Constitution of Kentucky

Section 33 of the Constitution of Kentucky provides:

The first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight Senatorial Districts, and one hundred Representative Districts, as nearly equal in population as may be without dividing any county, except where a county may include more than one district, which districts shall constitute the Senatorial and Representative Districts for ten years. Not more than two counties shall be joined together to form a Representative District: Provided, in doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated. At the expiration of that time, the General Assembly shall then, and every ten years thereafter, redistrict the State according to this rule, and for the purposes expressed in this section. If, in making said districts, inequality of populations should be unavoidable, and advantage resulting therefrom shall be given to districts having the largest territory. No part of a county shall be added to another county to make a district, and the counties forming a district shall be contiguous.

On its face, the requirements of § 33 are:

***2** 1. Every ten years, the General Assembly shall redistrict one hundred representative districts and 38 senatorial districts.

2. Counties forming a district shall be contiguous.

3. The districts shall be as nearly equal in population as may be without dividing any county.

4. No more than two counties may be joined to form a representative district.

5. Any advantage resulting from inequality of populations shall be given to districts having the largest territory.

EXHIBIT
1

6. No part of a county shall be added to another county to make a district.

In addition to these requirements, the equal protection clause of the Constitution of the United States presumes that a state redistricting plan is constitutional if the population among districts does not vary by more than 5% (±) from the size of an ideal district. *Gaffney v Cummings*, 412 US 735, 37 L Ed 2d 298, 97 S Ct 1828 (1973). An ideal district is one in which the population exactly equals the total population of the state divided by the number of districts.

The first two rules of § 33 are the only provisions of that section which must be rigidly followed. See, *Fischer v State Board of Elections*, infra, at 476, n. 4. Regardless of the number of counties and distribution of the state's population, the legislature must, every ten years, redistrict one hundred representative districts and 38 senatorial districts so that the counties forming the districts are contiguous. The remaining four rules, however, compete with the federal constitutional presumption that population variation among districts not exceed 5%. If district lines may not cross county boundaries, as rule 6 commands, then the federal constitution can be obeyed only if the population of every county falls within 5% of the size of an ideal district, or some multiple thereof. This is not possible under the census data to be used by the General Assembly in its present redistricting effort.

The tension between federal and state constitutions can be resolved only through judicial interpretation. The Kentucky Supreme Court has recently supplied that interpretation in *Fischer v State Board of Elections*, Ky., 879 SW 2d 475 (1994).

The Fischer v State Board of Elections case
Because population equality and county integrity are competing concepts, it would appear, prima facie, that the conflict between them can be resolved only by giving one priority over the other. That is the assumption the General Assembly made in 1991 in its effort to redistrict the legislature. See, *Ragland v Anderson*, 125 Ky 141, 100 SW 865 (1907); and, *Stiglitz v Schardien*, 239 Ky 799, 40 SW 2d 315 (1931). The Supreme Court in these holdings on earlier redistricting plans placed summary emphasis on population equality amongst legislative districts. *Fischer*, 879 SW 2d at 477.

The Supreme Court reviewed the 1991 plan in *Fischer v State Board of Elections* and declared it unconstitutional. The court reasoned that there are no fundamental impediments to a full accommodation of these dual mandates, and that population equality and county integrity are of equal importance. The General Assembly, the court finally said, "can formulate a plan which reduces to the minimum the number of counties which must be divided between legislative districts.... The mandate of Section 33 is to make full use of the maximum constitutional population variation as set forth herein and divide the fewest possible number of counties." *Id* at 479.

***3** We believe § 33, as so interpreted by the Supreme Court, requires that legislative districts be redrawn by dividing the smallest possible number of counties while keeping population variation within ±5% of an ideal district. As a practical matter, the literal language of § 33 must be disregarded in favor of this judicial interpretation of its meaning. Given the requirements of redistricting in light of *Fischer*, there can be no other position than that the fourth and fifth rules expressed in section 33–that no more than two counties be joined to form a representative district and that any advantage resulting from inequality of populations be given to districts having the largest territory–are subsumed within the broader rule on county division and population variation. Therefore, whatever section 33 might say, the current redistricting proposal is constitutional under *Fischer* if it divides the fewest number of counties while maintaining population variation within 5% of an ideal district.
On its surface, this rule seems to hinge the validity of any particular plan on mere mathematical ingenuity. If various plans are proposed, all of which satisfy the population requirement, the one dividing the fewest number of counties is the only proper one. For instance, if a plan divided twenty-five counties, and later a more astute mind devises a plan that divides only twenty-four counties, then twenty-four suddenly becomes the constitutional standard. Such a rule would create substantial uncertainty about the validity of any particular plan. It would be constitutional only if no one subsequently manages to lower the number of divided counties. The potential for chaos and irresolution is plain in such a context.

Fortunately, as we will demonstrate in the next section, the smallest number of divided counties can be derived with mathematical precision. Once that figure is determined, it cannot change. Therefore, the Supreme Court in *Fischer* did indeed articulate a definite, workable standard that does not fluctuate.

Before we conclude our discussion of the *Fischer* case, we must comment on Footnote 5, where the court stated:

We recognize that the division of some counties is probable and have interpreted section 33 to permit such division to achieve population requirements. However, we can scarcely conceive of a circumstance in which a county or part thereof which lacks sufficient population to constitute a district would be subjected to multiple divisions.

If Footnote 5 were construed as the court's holding, the stability of the constitutional standard vanishes. This is contrary to sound principles of constitutional law. A society such as ours must be able to rely upon stable and just principles in order to operate. *Fischer* provides such stability by setting a standard that no more nor less than twenty-two counties be divided. In October 1995, the Attorney General's Office noted that Footnote 5 conflicted with the Supreme Court's mandate to split the fewest possible counties in the context of its opinion that an earlier redistricting proposal was unconstitutional because it failed to meet the ±5% rule. In light of that letter and the Supreme Court's *mandate* of splitting the fewest number of counties to insure overall county integrity, we resolve the conflict by determining that Footnote 5 is *not* an additional constitutional requirement.

The methodology of redistricting

***4** With the requirements of *Fischer* plain, we move from constitutional law to mathematics. There is no mystery to the process of redistricting. The first step is to determine the size of an ideal district. Because Kentucky's 1990 census population was 3,685,296, and because there are 100 representative districts, the size of an ideal district is 3,685,296 ÷ 100 or 36,853.

The second step is to compute the percentage of the state's population contained in each county. This ranges from a low of .06% for Robertson County to a high of 18.04% for Jefferson County.

The third step is to determine the smallest possible number of divided counties. (By "divided county" we mean a county containing a district boundary that does not follow the county boundary.) Any county with more than 1.05% of the state's population must be a divided county, so that it must contain at least two districts within its boundaries. There are twenty counties that contain more than 1.05% of the state's population.

These twenty counties, which *must* be divided, are distributed geographically throughout the state. This means that portions of the divided counties are available to add to other counties that are not by themselves large enough to form a district. For example, Meade County, with a population factor of .66%, is not large enough to form a district. But, since it borders Hardin County, which has a population factor of 2.42% and which must be divided, a portion of Hardin County comprising .34% of the state's population can be combined with Meade County to form a district. Thus, it is not necessary to split Meade County. If this exercise is repeated with the remaining counties, it is evident that there are two counties, Bell and Calloway, that do not border a divided county and do not border a county that could be added whole to form a district. Calloway County, for example, has a population factor of .83%. It is possible to form a district without dividing Calloway County only if (a) an adjoining county has a population factor between .12% and .22%, or (b) an adjoining county has a population factor exceeding 1.05% and must be divided anyway. Neither situation applies. The population factors of counties adjoining Calloway County are .91%, .74%, and .28%. It is a topographical certainty that Calloway County, or a county adjoining it, must be divided. The same is true of Bell County. Thus, as a matter of pure mathematics, the smallest possible number of divided counties is twenty-two: twenty counties that must be divided because of their size, and two counties that must be divided because they cannot be joined with another whole county. This is the standard in light of the *Fischer* mandate. 879 SW 2d at 479.

From this point, redistricting is a matter for the legislature to employ its constitutional duty in drawing the districts. This it has done in House Bill 1. The Supreme Court requires that the fewest possible number of counties be divided, and that number is twenty-two. Therefore, if House Bill 1 or any other plan divides twenty-two counties while maintaining each district within ±5% of the size of an ideal district, the plan is constitutional.

Conclusion

***5** The Legislative Research Commission has provided the Office of the Attorney General with a map of the redistricting plan proposed in House Bill 1 along with the text of the bill. The plan complies with the dual requirements of § 33 as construed in *Fischer v State Board of Elections:* it divides the minimum number of counties, and the population of each district is within 5% of the ideal. Therefore, the plan is constitutional.

It is indeed the duty of the Supreme Court of this Commonwealth to review the acts of the legislature. *Ragland v Anderson,* supra. This the court did in *Fischer.* In light of *Fischer,* the General Assembly has undertaken its decennial constitutional duty to apportion the House districts with the 1990 census data. It is the opinion of the Office of the Attorney General that the House's effort as embodied in House Bill 1 is constitutional under § 33 of the Constitution of the Commonwealth of Kentucky.

Albert B. Chandler III
Attorney General

End of Document

2010 WL 3447649
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

Lorenzo **TUNSTULL**, Appellant
v.
J. David **DONAHUE** and Joseph Woods, Appellees.

No. 2009-CA-002102-MR. | Sept. 3, 2010.

West KeySummary

1 **Constitutional Law**
Discipline and Classification
Prisons
Contents and Adequacy of Notice, Petition, or Other Pleading

Prison adjustment officer's enhancement of prisoner's initial charge of smuggling contraband to charge of possession or promotion of dangerous contraband violated prisoner's right to due process. The prisoner had confessed to a lesser charge that carried an entirely different category of penalties. The officer had amended the charge without following prison procedure on the enhancement of charges, including investigative follow-up and notice to the prisoner. U.S.C.A. Const.Amend. 14; 501 KAR 6:020.

Appeal from Oldham Circuit Court, Action No. 09-CI-00781; Karen A. Conrad, Judge.

Attorneys and Law Firms

Lorenzo **Tunstull**, LaGrange, KY, for appellant.

Stafford Easterling, Frankfort, KY, for appellees.

Before COMBS, KELLER, and LAMBERT, Judges.

Opinion

OPINION

COMBS, Judge.

*1 Lorenzo **Tunstull**1 appeals an order of the Oldham Circuit Court dismissing his petition for a declaration of rights. Following our review, we affirm in part, reverse in part, and remand.

On March 11, 2009, a correction officer at the Kentucky State Reformatory discovered a cell phone charger in **Tunstull's** cell. **Tunstull** was charged with a Category IV-5 violation of smuggling contraband. The minimum penalty for a Category IV-5 violation is restriction of privileges for no more than six months; the maximum penalty is loss of up to sixty days of good-time credit and the imposition of a maximum of forty-five days of disciplinary segregation.

On March 14, 2009, **Tunstull** signed a disciplinary report confessing his guilt. The adjustment hearing to determine his punishment was held on March 24, 2009. At the hearing, the adjustment officer enhanced the charge to a Category VI-4 violation for possession or promoting dangerous contraband. Offenses in this category are punished by a minimum of fifteen days of disciplinary segregation; the maximum penalty is loss of up to one hundred eighty days of good-time credit and up to ninety days of disciplinary segregation. **Tunstull** received ninety days of disciplinary segregation and ninety days of loss of good-time credit.

Tunstull appealed to the warden; the appeal was denied. He then filed a petition for declaration of rights in Oldham Circuit Court, which was dismissed. This appeal follows.

Tunstull first argues that the amendment of the offense with which he was charged was arbitrary. We agree.

There is no doubt that prison disciplinary proceedings lack the due process guarantees and rights that characterize other proceedings. The United States Supreme Court has declared that "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Therefore, **some** right to due process short of the full panoply remains. In Kentucky, prison discipline proceedings that result in a

EXHIBIT 2

loss of good-time credit are governed by the due process requirements that a prisoner receive:

> 1) advance written notice of the disciplinary charges; 2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and 3) a written statement by the fact finder of the evidence relied on and the reasons for the disciplinary action.

Webb v. Sharp, 223 S.W.3d 113, 117-18 (Ky.2007) (*quoting Superintendent, Massachusetts Correctional Inst., Walpole v. Hill,* 472 U.S. 445, 454, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985) (*citing Wolff,* 418 U.S. at 563-67)). Our standard of review is "highly deferential" to the trial court. *Smith v. O'Dea,* 939 S.W.2d 353, 357 (Ky.App.1977).

Kentucky Revised Statute[s] (KRS) 197.020(1)(a)2 authorizes the Department of Corrections to "promulgate administrative regulations ... for the government of the prisoners in their deportment and conduct[.]" Kentucky Administrative Regulations (KAR) have incorporated the Department of Corrections Policies and Procedures (CPP). 501 KAR 6:020. CPP 15.6 addresses adjustment procedures and programs.

***2** CPP 15.6(II)(B)(1)(f) directly sets forth the procedure for the prison administration to follow if it believes that the initial charges were inappropriate and should be amended:

> **Prior** to the hearing, if it appears that the charge is not proper, the Chairperson or Adjustment Officer may send the disciplinary report back to an investigator for a more appropriate charge. If during the hearing, the Adjustment Committee or Adjustment Officer determines that the charge is inappropriate, the report may be returned to the investigator but the committee or Adjustment Officer shall not participate in a subsequent re-hearing. This procedure is in addition to amending the charge within the same category or a lower category; whichever is more appropriate.

After the charge against **Tunstull** was amended, it was not submitted to an investigator for a follow-up. Although it is not completely clear from the record, the briefs appear to indicate that the charge was amended **during** the hearing. **Tunstull** was offered a period of twenty-four hours to consult with a legal aide, a right which he waived. However, the offer of a legal aide applies to CPP 15.6(II)(B)(1)(b)(1), which addresses amending a charge to one within the same category or a lower category.

Tunstull had pled guilty to a lesser charge that carried an entirely different category of penalties. He ultimately received an enhanced amended charge carrying a penalty that was double the maximum penalty for his original charge. He did not receive adequate notice in compliance with the admittedly limited due process standards dictated by the Supreme Court in *Wolff.* The Department of Corrections wholly failed to act in compliance with its own procedures. Therefore, the trial court clearly erred in dismissing **Tunstull's** petition, which stated a legitimate claim within the confines of his restricted due process rights. Accordingly, we reverse the dismissal of his petition.

Because this issue disposes of **Tunstull's** other arguments seeking reversal, we will refrain from discussing those contentions except for his claim that he was prejudiced by having to pay his filing fees in both circuit court and in this court.

KRS 453.190 allows poor persons to file legal actions without paying filing fees and costs, defining that status at § (2) as follows:

> A "poor person" means a person who is unable to pay the costs and fees of the proceeding in which he is involved without depriving himself or his dependents of the necessities of life, including food, shelter, or clothing.

By definition an inmate does not meet the definition of a poor person because in prison he is provided with food, shelter, and clothing. Therefore, the General Assembly enacted KRS 454.410 in order to determine when inmates are eligible for fees to be waived, providing that the court may order inmates to pay partial fees.

Under KRS 454.410, an inmate must provide the court with an affidavit and his prison account balance for the preceding six months. The court has the discretion to determine what fees the inmate should pay after scrutinizing the inmate's ability to pay. We will not disturb the court's findings unless it committed clear error. *Edwards v. Van De Rostyne,* 245 S.W.3d 797, 799 (Ky.App.2008). In this case, the record shows that at the time that **Tunstull** applied to proceed *in forma pauperis,* his inmate account contained $411. The court ordered him to pay fees of $171. Because **Tunstull** had the ability to pay the expenses, the court did not err. Therefore, we affirm the trial court on this issue.

***3** Having determined that **Tunstull** was denied due process, we reverse as to that issue and remand. Having found that the trial court did not err in ordering him to pay filing fees, we affirm as to that issue.

LAMBERT, Judge, concurs.

KELLER, Judge, concurs by separate opinion.

KELLER, Judge, concurring:

I write separately because the majority opinion fails to take into consideration CPP 15.6(II)(B)(1)(b)(2) which provides that:

> nothing in this policy shall prohibit a charge from being amended to conform to the evidence presented. Amendment options before the committee or adjustment officer include amending to a lower category violation; amending the violation within the same category; or, dismissing the charged violation.

There is nothing in this section that permits the adjustment officer to amend the charge to a higher category.

CPP 15.6(II)(B)(1)(f) does permit the adjustment officer to make a determination regarding the appropriateness of a charge. Once that determination is made, the adjustment officer may refer the matter for additional investigation or, presumably, continue with the hearing. However, while that section implies that an adjustment officer may increase the category of a charge, it does not state that it enlarges the available amendment options set forth in CPP 15 .6(II)(B)(1)(b)(2). Furthermore, CPP 15.6(II)(B)(1)(f) states that the procedure therein, i.e., referral for additional investigation, is in addition to provisions regarding amending a charge within the same or a lower category. Therefore, it appears that CPP 15.6(II)(B)(1)(f) applies only to amendments within the same or a lower category. It does not empower the adjustment officer to amend to a higher category.

Because the adjustment officer herein amended **Tunstull's** charge to a higher category, he violated the procedures set forth in CPP 15 .6. Therefore, I agree that this matter should be reversed and remanded on that basis.

Finally, I note that the language in CPP 15.6 regarding amendment of charges is, to say the least, confusing. It would behoove the DOC to review its policy in this regard and clarify whether, and when, an adjustment officer, adjustment committee, or unit hearing officer may amend a charge to a higher category.

Footnotes

1 In his briefs and throughout the record, **Tunstull's** name is also spelled "Tunstall." We will use the spelling that appears the most frequently.

2 This statute has been amended by the 2010 Assembly (Senate Bill 47). The amendment does not affect the subsection pertinent to this case. Senate Bill 47 can be viewed at the Legislative Research Commission website: http://www.lrc.ky.gov/record/1ORS/SB47.htm. Last viewed on May 27, 2010.

End of Document

CONFERENCE COMMITTEE REPORT

The Conference Committee on **HB 2** has met as provided in the Rules of the House and Senate and hereby reports the following to be adopted:

____ GA __X__ SCS ____ HCS

For the above-referenced bill, with these amendments (if applicable):

Committee (list by chamber and number): ____;

Floor (list by chamber and number): ____; and

The following Conference Committee action:

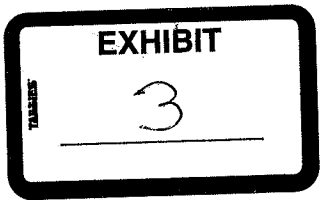
Beginning on page 1, line 3, and continuing through page 64, line 24, delete all text in its entirety and insert in lieu thereof the following:

"➔Section 1. (1) Notwithstanding any other provision of law, effective for the 2012 primary and for no other election, the filing deadline for congressional candidates under KRS 118.165 and 118.125 shall be February 7, 2012. All nomination papers shall be filed no later than 4 p.m. local time when filed on the last date on which the papers may be filed.

(2) Notwithstanding any other provision of law, effective for the 2012 primary and for no other election, the time of the drawing for ballot positions for congressional candidates under KRS 118.225 shall be suspended and shall be held at a time determined by the Secretary of State following the February 7, 2012, filing deadline for congressional candidates.

(3) Notwithstanding any other provision of law, effective for the 2012 primary and for no other election, the time of the certification of congressional candidates under KRS 118.215 shall be suspended and congressional candidates shall be certified at a time determined by the Secretary of State following the February 7, 2012, filing deadline for congressional candidates.

(4) Any other necessary election deadlines for the 2012 primary and for no other election, excluding the date of the primary under KRS 118.025, shall be established by the Secretary of



State.

➔Section 2. Whereas it is necessary for the 2012 filing deadline for congressional races pertaining to the 2012 primary to be extended and for other applicable election deadlines to be determined by the Secretary of State pending the passage of congressional redistricting legislation by the General Assembly, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming a law."; and

Amend the title to read as follows: "AN ACT relating to extending the filing deadline for congressional candidates and declaring an emergency.".

Senate Members	House Members
Damon Thayer	**Mike Cherry**
Tom Jensen	**Rocky Adkins**
Robert Stivers	**Larry Clark**
Johnny Ray Turner	**Greg Stumbo**
	Robert Damron
	Bob Deweese

The above-named members, in separate votes by house, all concur in the provisions of this report.

DATE

For Clerk's Use:

Adopted: _____

Repassage Vote: _____