

RENDERED: FEBRUARY 17, 2012; 10:00 A.M.  
TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2010-CA-000693-MR

AND

NO. 2010-CA-000730-MR

KENTUCKY STATE BOARD OF  
LICENSURE FOR PROFESSIONAL  
ENGINEERS AND LAND  
SURVEYORS

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT  
v. HONORABLE THOMAS D. WINGATE, JUDGE  
ACTION NO. 09-CI-00231

JOSEPH B. CURD, JR.

APPELLEE/CROSS-APPELLANT

OPINION  
AFFIRMING IN PART, REVERSING IN PART,  
AND REMANDING

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BEFORE: TAYLOR, CHIEF JUDGE, CAPERTON AND WINE,<sup>1</sup> JUDGES.

CAPERTON, JUDGE: The Appellant and Cross-Appellee, Kentucky State Board of Licensure for Professional Engineers and Land Surveyors (the Board),

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<sup>1</sup> Judge Thomas B. Wine concurred in this opinion prior to his retirement effective January 6, 2012. Release of the opinion was delayed by administrative handling.

successfully brought a disciplinary action against the Appellee and Cross-Appellant, Joseph B. Curd, a licensed land surveyor, for his testimony as an expert witness in which he allegedly violated several statutes and regulations governing licensed professional land surveyors in Kentucky. Thereafter, the Franklin Circuit Court, sitting in its appellate capacity, subsequently declared Kentucky Revised Statutes (KRS) 322.180(2) and (12), and 201 Kentucky Administrative Regulations (KAR) 18:142 Sections 2, 3, and 9, unconstitutionally vague as applied. It is from this determination of unconstitutionality that the Board now appeals to this Court. Having reviewed the record, the arguments of the parties, and the applicable law, we reverse and remand for additional proceedings consistent with this opinion.

Curd is a professional land surveyor who testified as an expert witness in the case of *Denney v. Southwood*,<sup>2</sup> which was a quiet title action between two adjacent property owners. In that case, Curd testified both through deposition on September 10, 2003, and again at trial on October 2, 2003. In reciting his qualifications to be an expert witness, Curd testified that he has been licensed by the Board since 1985 and that he was an investigator for the Board from 1994 until 2003. According to the Board, Curd testified that he was, at the time of his testimony, an investigator for the Board. The Board disputes that statement, saying that Curd had been an investigator for the Board in the past but was not employed by the Board at the time of his testimony.<sup>3</sup> Curd also testified that he has written

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<sup>2</sup> Wayne Circuit Court Civil Action No. 01-CI-00201.

<sup>3</sup> Apparently, the Board had failed to renew Curd's contract as an investigator some three months earlier. Curd asserts that the Board did not clearly inform him that his contract would not be renewed, that they had been late in renewing his contract in the past, and that they never asked

professional articles and taught continuing education seminars that were approved by the Board.

The Southwoods had a deed to a 110-acre tract which lay north of property owned by the Denneys, and east of a 9½-acre tract, also owned by the Denneys. The deed described the west boundary of the tract to be the line of Mark Matthews (which is now the property of the Denneys), and the south boundary to be the Eadesville Highway. A plat that was prepared when the tract was first created indicates the same boundaries.

The Southwoods maintained that their property extended west to encompass the Matthews tract (now Denney), and south across the highway to encompass about twelve acres of the Denney description. The Southwoods' deed description did have distance and direction calls that might carry the property line across the highway, but the Board asserts that this was so only if certain monumentation in the deed was ignored. The Denneys filed a suit to quiet title against the Southwoods to establish their boundary lines. In doing so, they employed surveyor James West as their expert witness. The Southwoods employed Curd as their expert and were seeking to defend what they believed to be their boundary line, as well as claiming disputed land on the basis of adverse possession.

While testifying below, Curd maintained that the line of Southwood encompassed the Matthews/Denney tract, and twelve acres across and south of the

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him to return his Board identification or badge.

Eadesville Highway. Curd also drew the lines of the Southwood description on a topography map and included therein the Matthews tract as well as the twelve acres south of the Eadesville Highway. The Board asserted that in placing the lines of the Southwood tract on the topography map, and in his testimony, Curd ignored the monuments that properly defined the West and South boundaries of the Southwood tract. Further, the Board alleges that in his testimony, Curd repeatedly stated that West, the Denneys' surveyor, did not do any research to support his survey.<sup>4</sup>

The Wayne Circuit Court entered a judgment for the Denneys, in which it made a specific finding of fact that West had complied with the profession's research requirements for his survey. The first findings of fact, conclusions of law, and judgment issued by the court on November 24, 2003, denied the Denneys' claim to quiet title to the property but did not determine that the Southwoods were owners of the property either. Following that decision, cross-motions to alter, amend, or vacate were filed by the parties. Thereafter, a new judge was appointed, and the Southwoods made a motion for recusal, which was denied. Subsequently, on February 27, 2004, the new judge issued an opinion finding that the Denneys were owners of the disputed property. The Southwoods appealed the final judgment, and the Court of Appeals affirmed the decision of the trial court.

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<sup>4</sup> According to the Board, Curd based these remarks upon the first part of a statement made by West in a deposition, without adequately representing the true situation that was evident from the balance of West's explanation in that deposition.

The Board then filed a disciplinary action against Curd, alleging that Curd, in testifying both during the deposition and at trial, testified dishonestly, misleadingly, and incompletely. It alleged that Curd ignored or suppressed material facts, or, alternately, failed to put himself in a position of acquiring all relevant information prior to testifying. Specifically, the Board asserted that Curd's questioning as to the adequacy of West's research was inappropriate. Secondly, it claimed that Curd's testimony concerning a "deed plot," which was overlaid on a topography map showing the deed plot lines extending beyond a highway, was misleading. The Board alleged that this testimony violated KRS

322.180(2) and (12),<sup>5</sup> as well as the Code of Professional Practice and Conduct, at

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<sup>5</sup> KRS 322.180 sets out grounds for disciplinary action, including suspension, for any land surveyor who has:

(2) Engaged in gross negligence, incompetence, or misconduct in the practice of engineering or land surveying . . . .

. . . .

(12) Engaged in conduct likely to deceive or defraud the public . . . .

Following a three-day trial before a hearing officer supplied by the Attorney General, the hearing officer filed his findings of fact, conclusions of law, and recommended order. That order, which consisted of sixty-four specific findings of fact and fifty-seven conclusions of law, recommended a six-month suspension for Curd. The Board subsequently adopted the final order in its entirety, and imposed the recommended six-month penalty, which was ultimately stayed by the circuit court pending appeal. Curd then appealed to the Franklin Circuit Court, which found the statutes and regulations that Curd allegedly violated to be unconstitutionally vague as applied to Curd. It also found that Curd's argument that the Board was without jurisdiction to discipline Curd for his expert testimony was unpersuasive. Finally, the court declined to rule on Curd's

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<sup>6</sup> 201 KAR 19:142 Section 2 states that: "The engineer or land surveyor shall conduct his or her practice in order to protect the public health, safety, and welfare."

<sup>7</sup> 201 KAR 18:142 Section 3 states that: "A licensee shall issue all professional communications and work products in an objective and truthful manner."

- (1) A licensee shall be objective and truthful in all professional reports, statements or testimony and shall include all material facts.
- (2) If serving as an expert or technical witness before any tribunal, a licensee shall express an opinion only if it is founded on adequate knowledge of the facts in issue, on the basis of technical competence in the subject matter, and upon honest conviction of the accuracy and propriety of that testimony, and shall act with objectivity and impartiality. A licensee shall not ignore or suppress a material fact."

<sup>8</sup> 201 KAR 18:142 Section 9 states that: "The professional engineer or professional land surveyor shall avoid conduct likely to discredit or reflect unfavorably upon the dignity or honor of his or her profession."

substantial evidence contention because it had determined that the Board's statutes and regulations were constitutionally unenforceable as applied to Curd.

It is from that opinion and order that both the Board and Curd now appeal to this Court. On appeal, the Board disputes the circuit court's determination that the statutes and regulations were unconstitutionally vague as applied, and also contends that the court failed to consider certain preservation issues. Curd has cross-appealed, based upon the court's determination that the Board had the authority to discipline its licensee because of his opinion as an expert during trial, and for the court's determination that it should not rule on a question of substantial evidence because it had determined the statutes and regulations to be unconstitutional as applied. We address these issues in turn.

As its first basis for appeal, the Board argues that the circuit court erred in determining that the statutes and regulations at issue were unconstitutionally vague as applied. In so arguing, the Board directs this Court's attention to the holding in *Posey v. Commonwealth*, 185 S.W.3d 170 (Ky. 2006), regarding the presumption of constitutionality which should be given to statutes and regulations.<sup>9</sup> The court below found *Posey* inapplicable to the matter *sub*

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<sup>9</sup> In *Posey*, the court stated:

When considering the constitutionality of a statute, this Court draws all fair and reasonable inferences in favor of the statute's validity. *Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company*, 983 S.W.2d 493, 499 (Ky.1998). “[T]he violation of the Constitution must be clear, complete and unmistakable in order to find the law unconstitutional.” *Id.*; see also *Walters v. Bindner*, 435 S.W.2d 464, 467 (Ky.1968) (“It is the rule that all presumptions and intendments are in favor of the constitutionality of statutes and, even in cases of reasonable doubt

*judice*, because it did not involve a void for vagueness challenge. The Board states that this is a distinction without significance, and that *Posey* summarized the extensive and longstanding position of Kentucky courts concerning constitutional challenges to statutes.<sup>10</sup>

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of their constitutionality, they should be upheld and the doubt resolved in favor of the voice of the people as expressed through their legislative department of government.”) ... Indeed, the legislature's power to pass laws, especially laws in the interest of public safety and welfare, is an essential attribute of government. *Manning v. Sims*, 308 Ky. 587, 213 S.W.2d 577, 592 (Ky.1948) (“When the power of the Legislature to enact a law is called in question, the court should proceed with the greatest possible caution and should never declare an act invalid until after every doubt has been resolved in its favor”) (quotation and citation omitted). Thus, we must always accord great deference to the legislature's exercise of these so-called “police powers,” unless to do so would “clearly offend [] the limitations and prohibitions of the constitution.” *Id.*, see also, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996) (“States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756, 105 S.Ct. 2380, 2398, 85 L.Ed.2d 728 (1985)).

*Posey v. Commonwealth*, 185 S.W.3d 170 at 175-76.

<sup>10</sup> In so arguing, the Board relies upon the holding of this Court in *Gurnee v. Lexington-Fayette Urban County Government*, 6 S.W.3d 852 (Ky. App. 1999), which it describes as a vagueness case articulating a similar approach to *Posey* concerning the presumption of the constitutionality of statutes. Therein, current and former police officers filed suit against urban-county government for failing to make adequate contributions to the police and firefighters' pension fund.

This Court held that a grammatical flaw in the statute governing the urban-county government's obligation to contribute to the police and firefighters' pension fund, purporting to require contribution “equal to the sum” of its four subsections, which could not, in fact, all be added together, did not make the statute “so ambiguous, vague and indefinite” as to be unconstitutional, considering that urban-county government managed to comply with the statute's directives for more than twenty years without event. In so finding, this Court noted that “In deciding whether an act of the General Assembly is unconstitutional [courts] necessarily begin with the strong presumption in favor of constitutionality and should so hold if possible.” *Gurnee* at 856, citing *Brooks v. Island Creek Coal Company*, 678 S.W.2d 791, 792 (Ky. App.



Moreover, the Board asserts that in issuing its opinion and order, the circuit court failed to evaluate the statute and regulation at issue under the appropriate standards for vagueness, and failed to consider any of the findings of fact made by the hearing officer,<sup>11</sup> nor to give those findings proper deference. The Board asserts that Curd's testimony was dishonest, and as such, was deceptive and fraudulent to the public, and would thus constitute, in the minds of reasonable persons, gross negligence, incompetence, or misconduct in the practice of land surveying. It argues that if the statutes and regulations at issue were examined as a whole from the standpoint of a licensed land surveyor who wanted to conform his

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1984).

<sup>11</sup> These findings included that Curd had previously been an investigator for the Board but that he was no longer so employed at the time of trial, and that by testifying dishonestly and incorrectly at trial to the contrary, he had violated KRS 322.180(2) and (12), and 201 KAR 18:142. Concerning Curd's testimony about West, the hearing officer found that Curd's testimony was result-driven and not objective, and that Curd knew or should have known that West's ultimate conclusions as to placement of the boundary lines were correct; that surveyors are permitted to rely on records supplied by others under 201 KAR 18:150; that Curd's statements that West did not perform research were false and not made upon an honest conviction; that Curd's attempts to discredit West's proper conclusions were intended to mislead a public court, and were not founded on adequate knowledge of the facts in issue; that Curd's conduct reflected unfavorably upon the dignity or honor of the surveying profession; that Curd should have known the Eadesville Highway was a controlling monument and boundary line based upon his possession of relevant deeds and plats; and that Curd did not comply with his duty to be truthful, objective, and not suppress material facts, and was in violation of KRS 322.180(2) and (12) and 201 KAR 18:142 Sections 3 and 9 by doing so.

Concerning Curd's testimony about the Southwood boundary, the hearing officer found that Curd attempted to cause the court to believe he had performed most of the parts of the survey and then presented the deed-plotted top map as inferentially representing his opinion as to where the boundary was located based upon his completed work; that Curd was not being truthful and objective when he failed to advise the court of the material fact that the Southwoods' boundary line could not have been south of the Eadesville Highway or west of the Matthews tract under the minimum standards of surveying practice; that Curd's failure to so advise was purposely intended to deceive the court as to the location of the boundary under applicable minimum standards of surveying practice; that Curd did not conduct his practice in order to protect public and professional interests served by minimum standards of surveying practice; that Curd's representation of the boundary line was not founded on adequate knowledge of the facts at issue; and various other findings of a similar nature.

behavior to the law, the surveyor would certainly know that testifying dishonestly as an expert witness would fall within the conduct prohibited by the statutes.

Particularly, the Board argues, that because Curd was previously employed as a Board investigator and since he had taught numerous continuing education classes for the profession, it is inconceivable that Curd would not have understood that he could be disciplined for dishonest and incompetent testimony, which were findings specifically made by the hearing officer. Thus, the Board asserts that the circuit court erred in finding the statute and regulations at issue to be void for vagueness.

In response, Curd argues that he could not, with reasonable certainty, have anticipated that he might be disciplined for his testimony as an expert witness in the Wayne Circuit Court case under the statute and regulations at issue. He argues that it would be impossible for a person of reasonable intelligence to determine which opinions he or she could express in a court of law that would violate, or not violate, the provisions at issue. He also argues that in ruling upon the allegations against him, the hearing officer and the Board lumped several regulations and statutes together, making it impossible to determine the weight given to each. Curd thus asserts that the trial court correctly determined that the statutes and regulations at issue were unconstitutionally vague as applied. Curd also disputes the Board's characterization of his testimony as "dishonest," stating that reasonable experts could have disagreed on whether West conducted research necessary for a survey of the Southwood property, as well as the positioning of calls and measurements on a topography map.

In reviewing this issue, we are in agreement with the Board's assertion that courts should be reasonably lenient in evaluating a claim of vagueness when a statute is not concerned with criminal conduct or first amendment considerations. *See Grayned v. City of Rockford*, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). Likewise, in *Doe v. Staples*, 706 F.2d 985 (6<sup>th</sup> Cir. 1983), the 6<sup>th</sup> Circuit Court stated:

When a statute is not concerned with criminal conduct or first amendment considerations, the court must be fairly lenient in evaluating a claim of vagueness. *Exxon Corp. v. Busbee*, 644 F.2d 1030 (5<sup>th</sup> Cir. 1981), *cert. denied*, 454 U.S. 340, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981). As the court in *Exxon* stated:

[T]o constitute a deprivation of due process, it must be "so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co.*, 267 U.S. [233] at 239, 45 S.Ct. [295] at 297 [69 L.Ed. 589] (1925). To paraphrase, uncertainty in this statute is not enough for it to be unconstitutionally vague; rather, it must be substantially incomprehensible.

644 F.2d at 1033. Whether a statute is unconstitutionally vague must be assessed in the context of the particular conduct to which it is being applied. *United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963).

*Doe v. Staples*, 706 F.2d 985 at 988.<sup>12</sup> Furthermore, we note that in *State Board for Elementary and Secondary Education v. Howard*, 834 S.W.2d 657, 662 (Ky. 1992), our Kentucky Supreme Court stated:

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<sup>12</sup> See also *Gurnee v. Lexington-Fayette Urban County Government*, 6 S.W.3d 852 at 856, in which this Court held that, "The fact that a statute is nonsensical if read literally, or is susceptible to more than one interpretation, does not require a holding that the statute is unconstitutional if, as the circuit court determined, those who are affected by the statute can reasonably understand what the statute requires of them."

In reviewing the standard for vagueness, this Court and the United States Supreme Court have followed two general principles underlying the concept of vagueness. First, a statute is impermissibly vague if it does not place someone to whom it applies on actual notice as to what conduct is prohibited; and second, a statute is impermissibly vague if it is written in a manner that encourages arbitrary and discriminatory enforcement.

Further, we note that when considering the vagueness challenge to administrative regulations, the regulation must be considered in its entirety and not piecemeal. *See Alliance for Kentucky's Future, Inc., v. Environmental and Public Protection Cabinet*, 310 S.W.3d 681, 689 (Ky. App. 2008). On the basis of the foregoing law, it is clear that the court below had the duty to examine the entire statute and regulation at issue and to determine whether or not Curd, in his capacity as a professional land surveyor using ordinary common sense, could reasonably understand what the statute and regulation required of him. Moreover, the specific question *sub judice* is not whether the statutes or regulations themselves are unconstitutional, but whether they were unconstitutional as applied to Curd's particular testimony.

The Board found that Curd violated KRS 322.180(2) and (12), which provide that the Board may suspend a license when the licensee has:

(2) Engaged in gross negligence, incompetence, or misconduct in the practice of engineering or land surveying; [and/or]

. . . .

(12) Engaged in conduct likely to deceive or defraud the public.

Further, the regulations Curd was charged with violating during the course of his expert testimony were set forth in 201 KAR 18:142, which provides, in pertinent part:

Section 2: The engineer or land surveyor shall conduct his or her practice in order to protect the public health, safety, and welfare.

Section 3: A licensee shall issue all professional communications and work products in an objective and truthful manner.

(1) A licensee shall be objective and truthful in all professional reports, statements or testimony and shall include all material facts.

(2) If serving as an expert or technical witness before any tribunal, a licensee shall express an opinion only if it is founded on adequate knowledge of the facts in issue, on the basis of technical competence in the subject matter, and upon honest conviction of the accuracy and propriety of that testimony, and shall act with objectivity and impartiality. A licensee shall not ignore or suppress a material fact.

. . . .

(4) A licensee shall not maliciously injure the professional reputation, prospect, practice, or employment of another licensee.

Section 9: The professional engineer or professional land surveyor shall avoid conduct likely to discredit or reflect unfavorably upon the dignity or honor of his or her profession.

Having reviewed the statutes and regulations at issue, we are compelled to agree with the circuit court's conclusion that they are

unconstitutionally vague as applied to Curd's testimony below, with the exception of only one provision: namely, 201 KAR 18:142 Section 3. That provision clearly provides that testimony shall be both objective and truthful and that the expert in question only provide testimony about which he or she has an honest conviction as to the propriety thereof. Insofar as the distinction between being truthful and untruthful is concerned, it appears clear to this court that any reasonable professional land surveyor in Curd's situation could reasonably have understood what was required of him based upon the use of ordinary common sense. One's testimony is either truthful or untruthful, and the latter is clearly in violation of the mandates of 201 KAR 18:142 Section 3. We find nothing vague about the application of that provision to Curd's testimony below. Accordingly, the only question to be answered is whether Curd's testimony was, in fact, in violation of same.

A review of the opinion issued by the hearing officer reveals that Curd's testimony was repeatedly characterized as dishonest. Indeed, the opinion and order issued by the hearing officer contained sixty-four specific findings of fact and fifty-seven conclusions of law. Ultimately, the honesty or dishonesty of Curd's testimony was a question of fact for the hearing officer to determine, being in the best position to judge the credibility, demeanor, and veracity of the witnesses before him or her. Indeed, we have repeatedly held that only the hearing officer and the Board are empowered to make findings of fact. *See Board of Trustees, Kentucky Retirement Systems v. Grant*, 257 S.W.3d 591, 595 (Ky. App. 2008).

Further, KRS 13B.150(2) clearly provides that when reviewing an administrative agency's decision, "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Thus, the judicial standard of review of an agency's decision is largely deferential, and as long as there is substantial evidence in the record to support the agency's decision, the court must defer to the agency, even if there is conflicting evidence. 500

*Associates, Inc. v. Natural Resources and Environmental Protection Cabinet*, 204 S.W.3d 121, 131-132 (Ky. App. 2006).

Thus, we find the conclusions made by the circuit court that, "Mr. Curd provided plausible reasons for why he chose the 'forks of the drain' as a monument, why the Board's past conduct led him to believe that he was still a licensed investigator for the Board, and likewise, made credible explanations regarding his comment about the work done by James West; his taped statement more than twelve (12) months following the trial; and, his alleged inconsistent testimony about whether he had physically visited the site,"<sup>13</sup> to be determinations that were not within the realm of the circuit court's review in this matter. Those findings were essentially substitutions of the circuit court's judgment, as to the weight and credibility of the evidence, for that of the hearing officer. Believing the hearing officer's findings to have been based upon substantial evidence of record, we do not find such a reassessment of the evidence to be merited in this instance.

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<sup>13</sup> See March 16, 2010, Opinion and Order of the Franklin Circuit Court, p. 7.

Accordingly, the only question appropriately before the circuit court was whether the hearing officer correctly applied the law to the facts; that is, whether the laws used to discipline Curd for his allegedly dishonest testimony were void for vagueness as applied to him. In making that determination, the circuit court was required to accept the hearing officer's findings that Curd's testimony was, in fact, dishonest, negligent, and/or based upon a less than thorough understanding of the facts at issue. It was for the circuit court to determine whether Curd, in reading the statutes and regulations at issue, would have understood, as a professional land surveyor using ordinary common sense, that testimony of such a nature was prohibited. It was not for the circuit court to revisit the content and veracity of Curd's testimony itself.

Having reviewed the statutes and regulations in their entirety, we believe that Curd, as a professional land surveyor, could reasonably have understood what was required of him based upon the use of ordinary common sense. Certainly, a professional land surveyor, using ordinary common sense, should have understood that the statutes and regulations at issue required honest, competent, and thorough testimony based upon an adequate understanding of the facts at issue. The hearing officer - the individual in the best position to make a determination as to the veracity of Curd's testimony - concluded that his testimony was, quite simply, not honest, or, at the very least negligently given, on the basis of incompetent knowledge of the facts of the case.



The hearing officer's findings appear in all respects to be based upon a thorough review of the evidence and testimony provided. We find that the statutory and regulatory requirements that experts testify truthfully and competently to be specific and not vague. Curd, in his capacity as a professional land surveyor, could reasonably have been expected to understand that giving testimony other than that which was honest would expose him to professional discipline.

Having so found, we believe that reversal of the circuit court's determination that 201 KAR 18:142 Section 3 was vague as applied to Curd is appropriate. We nevertheless briefly note our agreement with the court's determination that the remainder of the provisions at issue are indeed vague as applied to Curd's testimony below. These provisions repeatedly utilize words such as "gross negligence," "incompetence," and "misconduct," but do not elaborate in any detail as to what sorts of behavior might fall into the realm of the conduct intended to be prohibited. Likewise, although the provisions urge engineers to act in a manner which will "protect the public health, safety, and welfare," it gives no guidance as to how this is to be accomplished, or what sort of testimony would be in violation of this goal. Further, while the provisions require that, "The professional engineer or professional land surveyor shall avoid conduct likely to discredit or reflect unfavorably upon the dignity or honor of his or her profession," it is apparently left to the expert in question to ascertain, perhaps to his or her own peril, whether the testimony the expert intends to give during trial would be in

violation of that provision or not. And last, though of importance, is the fact that an expert in court responds to questions and, at his discretion, may or may not go beyond answering the question to offer additional explanation of his answer. It is for the opposing counsel to ask questions on cross-examination, which further define the responses given by an expert witness.

Repeatedly, in its brief to this Court, the Board itself reaffirmed the vagueness of the regulations at issue, insofar as it was unable to point to specific conduct prohibited by the regulations, and instead merely urged that Curd, as a professional land surveyor, should have been able to “readily understand” what the regulations required through the use of his own “common sense.” This court finds it a rather onerous burden to place upon expert witnesses given the lack of guidance and specificity in the statutes themselves. Indeed, this Court can readily understand how the application of these provisions, as exemplified by the proceedings below, might have a chilling effect on expert testimony in general. Accordingly, we are in agreement with the circuit court, but for 201 KAR 18:142 Section 3, that the provisions at issue were unconstitutionally vague as applied to Curd’s testimony below.

Having so stated, we nevertheless recognize that, certainly, it is in the interest of the legislature, the judiciary, and the general public that land surveyors testify honestly and competently in judicial proceedings. We believe that, of the statutes presented for our review, only 201 KAR 18:142 Section 3 effectively accomplishes this goal insofar as it is the only provision to clearly and explicitly

outline behavior (namely, honest or dishonest testimony) which reasonable persons would understand to be in clear violation of the statutory requirements. As stated, the remaining statutes and regulations at issue, although perhaps intending to further these goals, are, in the opinion of this Court, vague in their application to the testimony below. Accordingly, although we agree with the circuit court that several of the provisions at issue are, in fact, unconstitutionally vague, and affirm its determination as to those provisions, we disagree with the circuit court's determination that 201 KAR 18:142 Section 3 was void for vagueness as applied to Curd and, therefore, are compelled to reverse.

We now turn to the Board's second argument on appeal, namely its reliance upon *Louisville/Jefferson County Metro Government v. TDC Group, LLC*, 283 S.W.3d 657 (Ky. 2009), in arguing that the Franklin Circuit Court failed to dispose of all other nonconstitutional issues prior to addressing the constitutionality of the statutes and regulations at issue. Specifically, it asserts that the court failed to address the outstanding issue of what matters had been preserved for appeal by Curd in his appeal of the Board's final order to the circuit court. Additionally, it notes that in issuing its opinion and order, the circuit court stated that, since it had decided the matter on constitutional grounds, "any discussion of substantial evidence review is unnecessary."

In response, Curd argues that in *D.F. v. Codell*, 127 S.W.3d 571 (Ky. 2003), a court held a statute to be unconstitutional, and then declined to address other issues raised in the case because they were moot. Moreover, Curd contends

that he properly preserved his constitutional challenge through the Fifth Defense found in his Answer filed with the Board, and because the issue was presented to the circuit court in Curd's petition thereto. Furthermore, he argues that if the statutes and regulations as applied to him were in fact void for vagueness, there was no need to determine whether specific findings or conclusions were preserved.<sup>14</sup>

Having reversed the circuit court's determination on the issue of vagueness, we believe a determination of whether other substantive issues were preserved to be necessary. Certainly, on remand, such a determination must be made prior to such time that a ruling can be made on the merits thereof, and we advise accordingly.

As its third basis for appeal, the Board argues that the circuit court, acting in its appellate capacity, erred by considering matters not in the record.<sup>15</sup>

The Board argues that these matters were not raised during the course of the hearing, that no findings were made with regard to those issues, and that they are not preserved for appeal. In response, Curd argues that the circuit court's

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<sup>14</sup> In its reply brief, the Board disagrees with Curd's reliance on *Codell*, stating that in *Louisville/Jefferson County Metro Government v. TDC Group, LLC*, one of the litigants therein attempted to rely on the *Codell* case for the proposition cited by Curd. The Board notes that the Court did not agree, pointing out that the other issues ignored by the Court in the *Codell* case "involved other constitutional challenges to the statutory scheme in question." *Id.* at 660.

<sup>15</sup> Specifically, the Board takes issue with the following statements made by the circuit court judge: "The Board certainly enjoys an inherent right to disagree with Mr. Curd's methods, but it is simply not proper to selectively police expert testimony." (Opinion and Order, p. 7); "Mere disagreement over the proper technique for plotting in an adverse possession claim is not enough." (Opinion and Order, p. 8); and "In fact, general acceptance within the land surveying community is no longer a prerequisite for the admission of Mr. Curd's testimony, and certainly cannot provide the basis for administrative discipline." (Opinion and Order, p. 8).

comments were included to explain the reasoning of the court, and were, at most, dicta. Upon review of the record, we are in agreement with the Board that these issues were not raised by the parties and were not preserved. Accordingly, we find that the court's opinions on those issues were in fact, as Curd characterizes them, dicta, and are not persuasive or binding upon the parties.

Finally, the Board argues that the circuit court erred in adding a requirement of "extraordinary circumstances" to the holding of *Maggard v. Commonwealth, Board of Examiners of Psychology*, 282 S.W.3d 301 (Ky. 2008). The Board notes that *Maggard* clearly allows for a regulatory board to discipline a licensed professional for testimony as an expert witness at trial. However, the Board takes issue with the court's statement on page eight of its opinion and order that, "the Board should not be second-guessing the determination of the Court (as to expert testimony) absent truly extraordinary circumstances." The Board asserts, correctly, that *Maggard* makes no such limitation. Curd agrees, arguing simply that the court's comments concerning "extraordinary circumstances" were merely included to explain its reasoning and were dicta. Having reviewed *Maggard*, we are in agreement with the parties that it does not include an "extraordinary circumstances" limitation. Accordingly, we believe the court's statement to the contrary to have been error.

As his first basis for cross-appeal, Curd argues that the Board was without jurisdiction to discipline a licensee for his expert testimony in a court of law. In support of that argument, Curd makes three assertions: (1) that his

testimony was within the exclusive jurisdiction of the circuit court; (2) that the Board was without jurisdiction to discipline him as a result of the doctrine of witness immunity; and (3) that Curd may not be disciplined for the failure of attorneys or the court to ask the proper questions. We address these arguments in turn.

First, Curd asserts that in accordance with the separation of powers doctrine as set forth in Sections 27,<sup>16</sup> 28,<sup>17</sup> 109,<sup>18</sup> and 116<sup>19</sup> of the Kentucky Constitution, his testimony was within the exclusive jurisdiction of the trial court which originally heard this matter and that, accordingly, the Board was without jurisdiction to discipline him. Curd asserts that allowing an administrative board or agency to later discipline a licensee for his or her expert testimony during the course of a trial effectively gives the agency control over the testimony, thereby allowing the agency to interject itself into the judicial process and interfere with the judicial power of the court. Curd argues that allowing an administrative board

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<sup>16</sup> Section 27 of the Kentucky Constitution states: “The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.”

<sup>17</sup> Section 28 of the Kentucky Constitution states: “No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.”

<sup>18</sup> Section 109 of the Kentucky Constitution states in part: “The judicial power of the Commonwealth shall be vested exclusively in one court of justice . . . .”

<sup>19</sup> Section 116 of the Kentucky Constitution states: “The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice. The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.”

to discipline a licensee because it differs with his or her expert opinion testimony given during a circuit court trial would have a “chilling effect” on future expert testimony. While Curd acknowledges that an administrative board has the authority to require through regulation that a licensee tell the truth, he asserts that it cannot dictate the content of the expert opinion of a licensee. Curd asserts that by disciplining him for his testimony, the Board is effectively retrying the case through the use of the administrative disciplinary process and substituting its judgment for that of the trial court.

In response, the Board argues that the Kentucky Legislature established the Board and empowered it with the discretionary authority to oversee a regulatory scheme which provides both for initial licensing of land surveyors in Kentucky, as well as continued oversight of those so licensed. Thus, the Board argues that because its role is legislatively mandated, it is not a violation of separation of powers for it to act in the manner authorized by the legislature.

Having reviewed the arguments of the parties and applicable law, we are in agreement with the circuit court and the Board that the legislature had the authority and power to establish the Board and to vest it with the discretionary authority to oversee a regulatory scheme governing the licensing and oversight of land surveyors in Kentucky. We do not find it to be a violation of the separation of powers doctrine for the Board to act in accordance with that grant of authority, and we decline to reverse on this basis.<sup>20</sup>

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<sup>20</sup> In so holding, we are in agreement with the Board that Curd’s reliance upon *American Beauty Homes Corp. v. Louisville and Jefferson Co. Planning and Zoning Commission*, 379 S.W.2d 450

As his second basis for asserting that the Board had no jurisdiction to discipline him professionally, Curd argues that the doctrine of witness immunity bars it from doing so. Curd notes that witnesses in a civil trial are generally immune from suit, and argues that witness immunity should also be followed in disciplinary proceedings. In support of that argument, Curd asserts that if not given witness immunity, experts testifying at trial might be hesitant to make a full disclosure of information or opinion if they thought they might be disciplined for said testimony, and that the failure to grant expert witness immunity in cases such as his would have a chilling effect on the administration of justice. He thus argues that because the honest and open opinion of an expert is needed by the court, the doctrine of witness immunity should apply.

In response, the Board argues that the issue of witness testimony was not noted in Curd's exceptions to the Board and that, therefore, the issue was not preserved for appeal to the Franklin Circuit Court. Curd agrees that witness immunity was not independently listed as part of the exceptions before the Board, but states that it did appear in his brief before the Franklin Circuit Court and, accordingly, he considers it part of the issue concerning discipline of an expert witness. Beyond arguing that this issue is not properly before our Court, the Board asserts, in reliance upon *Maggard v. Commonwealth, Bd. of Examiners of*

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(Ky. 1964), is misplaced. In *American Beauty*, the Court held that the separation of powers doctrine would not allow the legislature to delegate its responsibility for zoning determinations to the judiciary. It did not address a scenario, such as that *sub judice*, in which the legislature created an administrative body to oversee its own regulatory scheme. Accordingly, we find it inapposite to the facts *sub judice*.



*Psychology*,<sup>21</sup> that Curd was not entitled to absolute immunity because he was neither court-appointed, nor an integral part of the judicial process in the case.

Having reviewed the record and applicable law, we are in agreement with the circuit court, which held that *Maggard* is applicable to the facts *sub judice*. Although Curd is correct that the witness in *Maggard* provided an evaluation containing his opinions as opposed to providing them via live testimony, we agree with the circuit court that this is a distinction without a difference. In *Maggard*, the disciplinary action concerned a clinical evaluation prepared in anticipation of litigation. *Sub judice*, Curd prepared a deed plot in anticipation of litigation, concerning which he testified before the court. *Sub judice*, as in *Maggard*, the Board did not seek civil damages against Curd for his testimony. Rather, it sought disciplinary action pursuant to applicable statutes. We hold that Curd, like *Maggard*, is not entitled to immunity from an administrative disciplinary proceeding.

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<sup>21</sup> In *Maggard*, the issue was whether a licensed psychologist could be disciplined by the Board of Psychology for his testimony as an expert witness in a civil trial. The court held:

We likewise reject Maggard's argument that he was entitled to absolute immunity because he was participating in a civil judicial proceeding. Maggard was neither court-appointed nor an integral part of the judicial process in the case. Moreover, the immunity granted to a witness in a judicial proceeding is immunity from liability for civil damages. Here, Maggard is seeking immunity from an administrative disciplinary proceeding, not from civil damages. We agree with the lower courts that Maggard is not entitled to immunity from an administrative disciplinary proceeding.

*Maggard v. Commonwealth, Bd. of Examiners of Psychology*, 282 S.W.3d at 303.

Curd asserts that the circuit court and Board err in relying on *Maggard* because Maggard was not a witness in court proceedings, but, instead, prepared an evaluation document for trial which was later the subject of the Board's action.

As his third basis for asserting that the Board was without jurisdiction to discipline him professionally, Curd argues that he cannot be disciplined for the failure of the attorneys or the court to ask the proper questions. Curd argues that although the Board found that he failed to advise the court of material facts during the course of his testimony, he was simply answering the questions asked by the court and attorneys. Curd states that he was not responsible for the introduction of evidence at trial, and that he was not required to offer testimony that was not requested by the attorneys or the court. Curd thus asserts that the Board erroneously disciplined him for failing to offer testimony and evidence which it believed should have been introduced, and which was beyond the scope of his role as an expert witness during trial.

In response, the Board argues that this issue was not addressed in the hearing officer's findings of fact and conclusions of law, nor was it raised in any of Curd's exceptions to the Board. Additionally, the Board notes that this issue was not addressed by the Franklin Circuit Court in its opinion and order, nor did Curd disclose this issue on his prehearing statement. Accordingly, the Board asserts that this issue was not preserved for our appeal. Alternatively, the Board argues that Curd had ample opportunity to discuss the material facts concerning the boundary lines and pertinent monumentation, and that Curd was actively dishonest in misrepresenting same.

Having reviewed the record, we are in agreement with the Board that this issue was not preserved for our review. Accordingly, we decline to address it

for the first time herein. *See* Kentucky Rules of Civil Procedure (CR) 76.03(8),<sup>22</sup> *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 56 (Ky. 2003).<sup>23</sup>

As his second basis for cross-appeal, Curd argues that the findings of fact, conclusions of law, and order of the Board were arbitrary, and were not supported by substantial evidence. In support of that argument, Curd asserts that: (1) the Board's order finding that he violated statutes and regulations with his boundary testimony was arbitrary and not based on substantial evidence; (2) the Board's order finding that Curd's testimony concerning surveyor James West violated the applicable statutes and regulations was arbitrary and not supported by substantial evidence; (3) the Board's order finding that Curd's testimony concerning his status as an investigator for the Board violated the applicable statutes and regulations was arbitrary and without substantial evidence; (4) that Curd testified that he was at the site where the survey was conducted, contrary to the finding of the Board that he had testified inconsistently on that matter; and (5) the six-month suspension imposed on Curd was arbitrary and excessive.

In addressing the substantial evidence arguments raised by Curd, we note that the circuit court determined that as it had ruled that all pertinent statutes and regulations were unconstitutionally vague as applied to Curd, this issue did not

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<sup>22</sup> CR 76.03(8) provides that, "A party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." *See also American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 549 (Ky. 2008), holding that, "[T]he significance of this rule [CR 76.03(8)] is that the Court of Appeals will not consider arguments to reverse a judgment that have not been raised in the prehearing statement or on timely motion."

<sup>23</sup> While we offer no opinion on this argument, we do note that it may have merit.

need to be addressed further. Accordingly, the court determined that, “any discussion of substantial evidence review is unnecessary.”<sup>24</sup> Nevertheless, Curd now appeals this issue to our Court. Because the court below declined to rule on these issues of substantial evidence, we decline to address them for the first time herein. *See* CR 76.03(8); *Phelps v. Louisville Water Co.*, 103 S.W.3d 46 at 56.

While Curd and the Board both seem to argue that the circuit court found in the Board’s favor on the issue of substantial evidence, we do not find any indication that this was so and decline to speculate as to what the court would have found had it addressed these issues on the merits. Accordingly, having found that reversal is appropriate on the issue of vagueness, we hereby remand to the circuit court for an opportunity to address these issues on the merits, and we so hold.

Wherefore, for the foregoing reasons, we hereby reverse the March 16, 2010, Opinion and Order of the Franklin Circuit Court’s determination that 201 KAR 18:142 Section 3 is unconstitutionally vague as applied to Curd, affirm the court below as to the issue raised on cross-appeal concerning the authority of the Board to institute disciplinary action against Curd, and remand for any and all additional proceedings not inconsistent with this opinion, including any determinations on questions of substantial evidence and issues to be addressed on the merits.

WINE, JUDGE, CONCURS.

TAYLOR, CHIEF JUDGE, CONCURS IN RESULT ONLY.

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<sup>24</sup> *See* Circuit Court Opinion and Order, p. 9.

BRIEFS AND ORAL ARGUMENT  
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