

**COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 16-CI-552**

**GENERAL DRIVERS, WAREHOUSEMEN
& HELPERS, LOCAL UNION NO. 89, ET AL.,**

PETITIONERS,

v.

AFFIDAVIT OF J. BROOKEN SMITH

MATTHEW G. BEVIN, GOVERNOR, ET AL.,

RESPONDENTS.

*** **

I, J. Brooken Smith, having first been duly sworn, state as follows:

1. I am over the age of twenty-one (21), am of sound mind, have personal knowledge of the facts stated in the Affidavit, all of which are true, and am otherwise competent to make this Affidavit.

2. I am the Chief of Staff for the Kentucky Labor Cabinet (the "Cabinet"), a position which I have held since January 29, 2016. In this position, I assist Labor Cabinet Secretary Derrick K. Ramsey (the "Secretary") in effectuating Cabinet policies and priorities, and advise the Secretary in matters of public policy and personnel, including advice related to the nearly twenty (20) boards, commissions, or councils attached to, or associated with, the Cabinet or the Secretary.

3. In the weeks immediately following my start date with the Cabinet, I, along with the Cabinet's General Counsel, at the direction of the Secretary, began a review of the authority, responsibilities, composition, and membership of the boards and commissions administratively attached to the Cabinet, including the Workers' Compensation Nominating Commission ("Commission I"). The purpose of this review, which consisted of reading provisions of the Kentucky Revised Statutes and Executive Orders, speaking with Cabinet employees about the



nature of each board and commission, and searching public sources for background information on individuals appointed to serve on those boards and commissions, was to provide the Secretary with detailed information on those boards and commissions and to assist the Secretary with any recommendations related to those boards and commissions he might make to Governor Matt Bevin.

4. Based on my review and understanding of Kentucky law, Commission I was designed to serve as an initial repository and filter for candidates who wish to be appointed as administrative law judges (“ALJs”), members of the Workers’ Compensation Board, and the Commissioner of the Department of Workers’ Claims (“DWC”). It is my belief that this group was supposed to conduct independent assessments of applicants for these positions and to submit competent, well-qualified nominees to the Governor for review and consideration without the influence of politics or popular fluctuations. During this time, Commission I consisted of the following members: Charles E. McCoy, McKinnley Morgan, Sherri B. Keller, Charles J. Baird, Robert W. Carlisle, Brockton L. Edwards, and William G. “Grover” Arnett.

5. Party politics, however, were inextricably intertwined with Commission I’s membership. One member, for example, donated approximately \$16,000 to the Kentucky Democratic Party and statewide Democratic candidates in 2015, while another member donated \$1,000 to the Democratic candidate for Governor in September 2015 only to turn around after Governor Bevin was elected on November 3, 2015, and donate \$1,000 to his campaign and \$2,500 to his inaugural committee in December 2015. Others donated significant sums to either the Kentucky Democratic Party or to statewide Democratic candidates in 2014 and 2015.

6. Additionally, I found that multiple members had become entrenched in Commission I. At least one member, for example, had served on Commission I for more than

twenty (20) years, while another member had served on Commission I for at least a decade without a break in service. Two other members of Commission I were also serving at least a third term on Commission I, continuously or otherwise, at that time. In searching the background of the members, I learned that one member's law firm went so far as to advertise on its website that a representative of the firm had held onto a seat on Commission I for nearly twenty (20) years. Another member was appointed to Commission I to effectively replace a representative of his firm whose term had expired.

7. In addition to these revelations, I became aware that at least one member of Commission I was advertising his reappointment to Commission I on the front page of his website, while simultaneously promoting his success in the area of workers' compensation. Though not expressly stated, this advertisement gave the impression that the member was somehow equating his membership on Commission I to his success in legal practice.

8. Consistent with the review process, on or about March 4, 2016, I, along with the Secretary and a representative of Governor Bevin's Office, met with Grover Arnett, who, at that time, was the most recent Chairman of Commission I. The purpose of this meeting was to discuss the role of Commission I in the process of nominating ALJs. During that meeting, Mr. Arnett announced that he had the support of enough members to be re-elected as Chairman and went so far as to state to the Secretary his desire to "carry your water" during the nomination process for ALJs.

9. As provided for in KRS 342.213(4), on or about March 14, 2016, DWC Commissioner Dwight Lovan (the "Commissioner"), certified, via letter to Mr. Arnett, the need to fill the seats held by four (4) ALJs, Steve Bolton, Tom Polites, Jane Rice Williams, and Otto D. Wolff, IV, whose terms were scheduled to expire on July 14, 2016. A copy of the

Commissioner's letter is enclosed with this Affidavit as **Exhibit A**. Pursuant to KRS 342.213(5)(a), Commission I was required to report to Governor Bevin its recommendation whether to retain those four (4) ALJs no later than thirty (30) days after it received the Commissioner's letter, or April 13, 2016.

10. On or about Monday, April 11, 2016, Commission I met for the purpose of considering the retention of the four (4) ALJs listed in paragraph 9 above. I attended that meeting. After Mr. Arnett was re-elected Chairman and a brief discussion, Commission I determined that because Governor Bevin had recently come into office they would recommend that all four (4) sitting ALJs be retained and defer to him whether to reappoint those four (4) ALJs. There was no detailed, in-depth discussion about the work performance of any of the ALJs. There was no consultation with Chief Administrative Law Judge Robert Swisher, Workers' Compensation Board Chairman Michael Alvey, or the Commissioner about the performance of these ALJs, as required under KRS 342.213(5)(a). Commission I spent the remainder of the meeting talking about when next to meet in the event the Kentucky Senate declined to confirm any of the eight (8) ALJs appointed by former Governor Steve Beshear and Governor Bevin in the fall and winter of 2015. Around this time, I also learned from the Commissioner that the DWC had prepared certain information for Commission I's use regarding the performance of the four (4) ALJs whose terms were set to expire on July 14, 2016. According to the Commissioner, Commission I did not request to see or review that information.

11. On April 11, 2016, Commission I Chairman Arnett sent a letter to Governor Bevin informing him of Commission I's recommendation that he reappoint the four (4) incumbent ALJs whose terms were scheduled to expire on July 14, 2016. A copy of that letter is

enclosed with this Affidavit as **Exhibit B**. Pursuant to KRS 342.213(5)(b), Governor Bevin had until May 11, 2016, by when he was to either accept or reject Commission I's recommendation.

12. Four (4) days after Commission I met to discuss the retention of the four (4) ALJs whose terms were set to expire on July 14, 2016, the Kentucky Senate, on Friday, April 15, 2016, declined to confirm three (3) of those ALJs, Udell B. Levy, J. Gregory Allen, and R. Scott Borders. When the Senate adjourned *sine die* around midnight that evening, the terms of those ALJs expired, creating an immediate vacancy in each of their seats.

13. Shortly after the Kentucky Senate declined to confirm the three (3) ALJs listed in paragraph 12 above, I was informed by the Commissioner that Commission I planned to meet on or about Monday, May 16, 2016. No notice was ever sent to inform the public of that meeting.

14. On or about April 19, 2016, in a public speech, Governor Bevin called for an end to "pay-to-play" method of governing here in Kentucky. In particular, Governor Bevin signaled the need for a shift in the culture and the way business is done in Frankfort.

15. On or about April 29, 2016, the DWC sent out a notice that Commission I would be accepting applications for ALJs. A copy of this notice is attached to this Affidavit as **Exhibit C**. In particular, the notice stated that "[p]ursuant to KRS 342.230(3), the term for the Administrative Law Judge positions expires effective December 31, 2019, or later." The notice was written in this way in the event that Governor Bevin rejected one (1) or more of the ALJs nominated by Commission I on April 11, 2016, whose next terms would otherwise expire on July 14, 2020.

16. Per that notice, Commission I sought only a résumé and a cover letter containing an email address from any applicant interested in becoming an ALJ. Commission I did not seek any additional information, such as writing samples or responses to questionnaires.

17. Given the information found in my review, coupled with Governor Bevin's public statements, I, along with the Cabinet's General Counsel, recommended to the Secretary that he recommend to Governor Bevin the replacement of Commission I's members. In response, the Secretary directed me, along with the Cabinet's General Counsel, to begin the process of searching for, interviewing, and vetting potential candidates to be appointed to Commission I. After working with representatives of Governor Bevin's Office, however, a consensus was reached between that office, myself, the Secretary, and the Cabinet's General Counsel that the structure of Commission I needed to be revamped through the reorganization process in order to permanently reduce the impact of party politics on Commission I and eliminate the concentration of Commission I's seats in the hands of a few individuals.

18. On May 9, 2016, Governor Bevin issued Executive Order 2016-256, which abolished Commission I and created a new commission ("Commission II"), consisting of the following members:

- (a) Seven (7) members appointed by the Governor.
 - (i) One (1) member from the state at-large;
 - (ii) Two (2) members who are attorneys experienced in the area of workers' compensation, one (1) of whom customarily represents claimants, and one (1) of whom customarily represents employers.
 - (iii) Two (2) members of the political party having the largest number of registered voters and two (2) members of the political party having the second largest number of registered voters.

Specifically, Governor Bevin's Executive Order reduced, but did not eliminate, the impact of political parties on the membership of the commission by removing a seat reserved for the party

having the largest number of registered voters and reconstituting it as an “at-large” seat. As a result, given the virtual parity between the two (2) largest parties during the past several state and federal elections, the two (2) largest political parties in Kentucky had *equal* influence on Commission II.

19. Additionally, Governor Bevin’s Executive Order creates four (4) staggered classes, requiring the Governor to make appointments, or reappointments, every year. This is contrary to the assertions of the Petitioners in the above-styled action that the terms of the members appointed to Commission II are not staggered.

20. There are substantive differences between KRS 342.213 and Governor Bevin’s Executive Order. Unlike the language of KRS 342.213, Governor Bevin’s Executive Order also creates a limit whereby no individual can be appointed to serve more than two (2) full terms on the commission, whether consecutively or otherwise. This was done in direct response to the fact that a number of Commission I’s members had been appointed to serve upwards of three (3) or four (4) times to the commission in the near-thirty (30) years of its existence.

21. Governor Bevin’s Executive Order also reaffirmed the Commission’s obligation to consult with the Chief Administrative Law Judge, the Chairman of the Workers’ Compensation Board, and the Commissioner as stated in KRS 342.213(5)(a). This was done to reinforce the General Assembly’s wish that the commission consult with relevant parties about the performance of ALJs and the specific needs of the workers’ compensation system.

22. Moreover, Governor Bevin’s Executive Order reinforces the Governor’s ability to remove members at any time pursuant to KRS 63.080(1). This was done to ensure that a Governor could remove a member of the commission for failing to perform the duties of the

position or when a commission member was found to be using the position to advance his or her personal interests.

23. Pursuant to his Executive Order, Governor Bevin appointed the following individuals to Commission II: Mark Flores, Megan E. Mersch, Joshua W. Davis, Jordan Tong, Victoria E. Boggs, Louis D. Kelly, and Runan S. Pendergrast. Mr. Flores, a Democrat, was appointed as the “at-large” member of Commission II. Ms. Mersch, a Republican, is experienced in handling workers’ compensation cases for claimants and was appointed as the claimant-side workers’ compensation attorney member of Commission II. Mr. Davis, a Republican, is experienced in handling workers’ compensation cases for employers and was appointed as the employer-side workers’ compensation attorney member of Commission II. Ms. Boggs and Ms. Pendergrast, both Democrats, were appointed as the members of the political party having the most registered voters. Mr. Tong and Mr. Kelly, both Republicans, were appointed as the members of the political party having the second most registered voters.

24. As Mr. Flores is a Democrat, the membership of Commission II could have nevertheless fulfilled the membership requirements of Commission I as written in KRS 342.213(2). Importantly, none of the individuals appointed by Governor Bevin had a record of making major donations to political candidates—Republican or Democratic.

25. Two (2) days after Governor Bevin issued his Executive Order, on May 11, 2016, Governor Bevin issued Executive Order 2016-261 reappointing Jane Rice Williams to an ALJ position. That same day, Governor Bevin sent a letter to the Commissioner informing the Commissioner that he had rejected Commission I’s recommendation to retain Steve Bolton, Tom Polites, and Otto D. Wolff, IV. A copy of that letter is attached to this Affidavit as **Exhibit D**.

26. Two (2) days later, on May 13, 2016, the new members of Commission II met for the purpose of taking care of initial business, including the election of a Chairman. I attended that meeting. As part of that meeting, I observed the new members of Commission II agree that additional information beyond merely a résumé and cover letter would be required of candidates who wished to become ALJs. I also observed the new members of Commission II engaging with Chief Administrative Law Judge Robert Swisher, Workers' Compensation Board Chairman Michael Alvey, and the Commissioner as to their expectations and desires for new ALJs.

27. On May 23, 2016, Commission II met again for the purpose of considering applicants for the vacant and soon-to-be vacant ALJ positions. I attended the open portion of that meeting, which was also attended by Chief Administrative Law Judge Robert Swisher, Workers' Compensation Board Chairman Michael Alvey, and the Commissioner. I understand that Commission II spent approximately four and-a-half (4½) hours considering ALJ candidates, but did not come to any final resolution or take a vote per the direction of the Franklin Circuit Court. It is my understanding that if the Court does not enter a temporary injunction, Commission II will be in a position to move expeditiously to conduct formal votes and transmit its nominations to Governor Bevin. Governor Bevin will then be in a position to fill all currently vacant ALJ positions and those that will become vacant on July 14, 2016.

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J. Brooken Smith

Constance R Fugate
Notary Public, State at Large

10

EXHIBIT A



Matthew G. Bevin
Governor

Jenean M. Hampton
Lieutenant Governor

KENTUCKY LABOR CABINET
Department of Workers' Claims

657 Chamberlin Avenue
Frankfort, KY 40601
Telephone: (502) 564-5550
Fax: (502) 564-5934
www.labor.ky.gov/workersclaims

Derrick K. Ramsey
Secretary

Dwight T. Lovan
Commissioner

March 14, 2016

Workers' Compensation Nominating Commission

RE: Department of Workers' Claims
Administrative Law Judges

Dear Chairman Arnett:

On July 13, 2016, the terms of the following four Administrative Law Judges (ALJs) expire:

Steven G. Bolton
Thomas Polites
Jane Rice Williams
Otto D. Wolff, IV

I anticipate all will seek to be recommended for retention as an ALJ. I will seek confirmation from them in writing.

KRS 342.213(4) provides that the Commissioner of the Department of Workers' Claims shall no later than 120 days prior to the expiration of the term of an administrative law judge, "monitor the workload of the administrative law judges and, whenever a vacancy occurs, determine whether filling the position is necessary to expeditious resolution of claims brought under this chapter."

My examination of the current workload of the ALJs reveals the need to fill these positions. This action will satisfy the expectations set forth in Chapter 342 of the Kentucky Revised Statutes. It is imperative that the number of ALJs be sufficient for the prompt administration of justice to injured workers and their employers.



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Workers' Comp Nominating Commission
March 14, 2016
Page 2

By maintaining a manageable docket for the ALJs, late opinions are an extreme rarity, but changes in Kentucky law by Court Decision have created challenging dockets. Accordingly, I hereby certify the necessity for the filling of each of these four positions, all for terms expiring July 13, 2020.

KRS 342.213(5)(a) provides that the Nominating Commission shall initially meet and recommend whether to retain the sitting ALJs and, if so, submit those individuals for consideration for retention. In the event the Nominating Commission does not recommend retention or the Governor rejects one or more of those recommended for retention, the Nominating Commission shall again meet and submit three names for each vacant position. The Nominating Commission is required by statute to meet within 30 days of this notification. Please contact me for the scheduling of this meeting.

Very truly yours,

A handwritten signature in black ink, appearing to read 'D. Lovan', with a long horizontal line extending to the right.

Dwight T. Lovan
Commissioner

Copy to: Governor Matthew G. Bevin
Labor Secretary Derrick K. Ramsey
Chief ALJ Robert L. Swisher
ALJ Steven G. Bolton
ALJ Thomas Polites
ALJ Jane Rice Williams
ALJ Otto D. Wolff, IV

EXHIBIT B



Matthew G. Bevin
Governor

Jenean M. Hampton
Lieutenant Governor

KENTUCKY LABOR CABINET
Department of Workers' Claims

657 Chamberlin Avenue
Frankfort, KY 40601
Telephone: (502) 564-5550
Fax: (502) 564-5934
www.labor.ky.gov/workersclaims

Derrick K. Ramsey
Secretary

Dwight T. Lovan
Commissioner

4/11/2016

Governor Matthew G. Bevin
State Capitol Building, Suite 100
Frankfort, Kentucky 40601

RE: Workers' Compensation Nominating Commission Recommendation

Dear Governor Bevin:

The Workers' Compensation Nominating Commission met on Monday, April 11, 2016, for the purpose of considering retention of four Administrative Law Judges whose terms expire July 14, 2016.

The Nominating Commission recommends the following persons for reappointment:

Steven G. Bolton
Thomas Polites
Jane Rice Williams
Otto D. Wolff, IV

Pursuant to KRS 342.213(2)(d), the Workers' Compensation Nominating Commission also re-elected William Grover Arnett as Chairman.

The members of the Workers' Compensation Nominating Commission request that they be advised of any further actions which may be necessary with respect to these appointments.

Very truly yours,

William Grover Arnett, Chairman
Workers' Compensation Nominating Commission



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cc: Labor Secretary Derrick K. Ramsey
J. Brooken Smith, Labor Cabinet Chief of Staff
Brett Gaspard, Director Board of Commissions
Dwight T. Lovan, Commissioner, Department of Workers' Claims

WCNC Members:

William Grover Arnett
Charles J. Baird
Sherri P. Brown-Keller
Robert W. Carlisle
Brockton L. Edwards
Charles E. McCoy
McKinnley Morgan

EXHIBIT C

**Workers' Compensation Board Member
Administrative Law Judge
Kentucky Department of Workers' Claims**

The Workers' Compensation Nominating Commission is now accepting applications to make nominations for the position of Administrative Law Judge of the Kentucky Department of Workers' Claims. Pursuant to KRS 342.230(3), the term for the Administrative Law Judge positions expires effective December 31, 2019, or later. These are full-time positions, subject to appointment by the Governor of Kentucky and confirmation by the Kentucky State Senate. Appointees shall not hold any other public office or maintain any private practice.

Pursuant to KRS 342.230(3), applicants for the Administrative Law Judge position must be licensed attorneys and must have five (5) years' experience in the Commonwealth in the practice of workers' compensation law or a related field, and extensive knowledge of workers' compensation law. The salary to be paid to an Administrative Law Judge is the same as a Kentucky Circuit Court Judge.

Interested applicants are required to send a packet which consists of his or her résumé and a cover letter containing an e-mail address to the following:

**Attn: Derrick Hill
Nominating Commission Clerk
Department of Workers' Claims
657 Chamberlin Avenue
Frankfort, Kentucky 40601**

Applications must be received at the Frankfort office of the Department of Workers' Claims on or before 12:00 noon on Friday, May 13, 2016. Any and all applications received after that time will not be considered. Questions may be directed to Mr. Hill at derrick.hill@ky.gov.

Those serving on the Workers' Compensation Nominating Commission are:

William Grover Arnett, Chairman
Salyersville, KY

Charles J. Baird
Pikeville, KY

Sherri P. Brown-Keller
Nicholasville, KY

Robert W. Carlisle
Villa Hills, KY

Brockton L. Edwards
Louisville, KY

Charles E. McCoy
Owenton, KY

McKinnley Morgan
London, KY

Applicants and employees in this classification may be required to submit to a drug-screening test and background check. The Commonwealth of Kentucky does not discriminate on the basis of race, color, religion, national origin, sex, age, disability, sexual orientation, gender identity, ancestry, or veteran status in the admission or access to, or participation or employment in, its programs or services.

EQUAL OPPORTUNITY EMPLOYER M/F/D

EXHIBIT D



COMMONWEALTH OF KENTUCKY
OFFICE OF THE GOVERNOR

MATTHEW G. BEVIN
GOVERNOR

700 CAPITOL AVENUE
SUITE 100
FRANKFORT, KY 40601
(502) 564-2611
FAX: (502) 564-2517

May 11, 2016

Dwight T. Lovan, Executive Director
Office of Workers' Claims
657 Chamberlin Avenue
Frankfort, Kentucky 40601

Dear Mr. Lovan:

I have considered the Nominating Commission's recommendation of April 11, 2016 for retention of sitting Administrative Law Judges pursuant to KRS 342.213(5)(a). In accordance with the KRS 342.213(5)(b), I reject the recommendation for retention of the following Administrative Law Judges:

Steven G. Bolton
Thomas G. Polites
Otto D. Wolff

Further, in accordance with this provision of the statute, "...the Workers' Compensation Nominating Commission shall, within thirty (30) days, reconvene and present a list of names of three (3) nominees for each position for which a recommendation for retention has been rejected..."

Thank you for your attention to this matter.

Sincerely,

A handwritten signature of Governor Matthew G. Bevin in black ink.

Governor Matthew G. Bevin

Cc: Workers' Compensation Nominating Commission