

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-003109-MR

BRERETON C. JONES, GOVERNOR  
OF COMMONWEALTH OF KENTUCKY;  
CLAUDE M. VAUGHAN,  
STATE BUDGET DIRECTOR;  
FRANCES JONES MILLS, TREASURER  
OF COMMONWEALTH OF KENTUCKY;  
LOWELL CLARK, COMMISSIONER  
DEPARTMENT OF PERSONNEL;  
W. PATRICK MOLLOY, SECRETARY  
OF FINANCE AND ADMINISTRATIVE CABINET;  
DEPARTMENT OF CORRECTIONS,  
JUSTICE CABINET, COMMONWEALTH  
OF KENTUCKY; AND  
COMMONWEALTH OF KENTUCKY

APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
ACTION NO. 94-CI-00858

CATHY WISE;  
JOHN REVELS;  
TIMOTHY BARTHOLOMEW;  
JON BORIE;  
GARY BEACH;  
RUTH STAPLES;  
WILLIAM RICH;  
PATRICK QUINLAN;  
GEORGIA McDANIEL;  
CONNIE TAYLOR;  
CAROL BROWNING;  
JAMES MASSIE;  
GENE CLIFFORD;  
BOB MASDEN;  
TAMARA WHITT;  
KATIE EVERS; AND  
LEN GARDENOUR

APPELLEES

OPINION  
AFFIRMING IN PART - REVERSING IN PART  
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BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Appellants appeal from several orders of the Franklin Circuit Court which declared certain provisions of the 1990 Budget Bill unconstitutional and awarded damages in the form of back pay to the Appellees, all of whom are employed by the Department of Corrections as probation and parole officers. We affirm in part and reverse in part.

In 1988, the Kentucky General Assembly enacted KRS 196.076, known as the Probation and Parole Officers Salary Improvement Program, which is commonly referred to as the Career Ladder Statute. Under the terms of the statute, probation and parole officers are entitled to a salary increase of 5% after five years of service and 10% after ten years of service.<sup>1</sup> The statute further provided:

Salary improvements under this section shall be in addition to all other increments or other salary increases authorized by law but shall only be paid if the probation and parole officer has attained a favorable work-performance rating for four (4) of the previous five (5) years.

KRS 196.076(5).<sup>2</sup> The Career Ladder Statute went into effect on July 1, 1990.

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<sup>1</sup>Most recently, the statute has been amended to allow an additional increase for those officers with fifteen years of service.

<sup>2</sup>At the time of the original enactment, this was KRS 196.076(4).

In the Biennial Appropriations Act passed by the 1990 General Assembly (the Budget Bill), the State Employee Salary Equity Fund (the Equity Fund) was established. As provided by the Budget Bill:

An equivalent annual salary increase shall be awarded for each permanent full-time employee in the job classes in the budget memorandum according to the following schedule effective September 1 in each fiscal year: (1) employees in grade two (2) through nine (9) - \$1,000 per eligible employee on September 1, 1990, and an additional \$500 per eligible employee on September 1, 1991[.] . . . These funds shall be in addition to the annual salary increment provided in this Act.

. . .

Salary equity funds shall not be in addition to the appropriation provided to specified budget units for salary upgrades for any employees in the operating budget. To the extent specified salary upgrades result in a lesser amount than that to which the employees job class is entitled under this provision, salary equity funds may be used to supplement the upgrade moneys for such employees within the above fixed award amounts.

1990 Budget Bill (Acts 1990, Chapter 514, Section 20). As probation and parole officers are classified as Grade 9 employees, they would have been entitled to the increase as outlined in the Equity Fund.

The Budget Memorandum for the 1990 Budget Bill shed further light on how salaries of the probation and parole officers would be determined according to the Career Ladder Statute and the Equity Fund. Under the Memorandum:

It is the intent of the Kentucky General Assembly that the salary adjustments for probation and parole officers shall be the greater of the Probation and Parole Career Ladder Program pursuant to KRS Chapters 196 and 439, or the salary equity plan as provided in Part III of the 1990-92 Biennial Appropriations Act, as enacted by the 1990 Kentucky General Assembly. It is further the intent of the Kentucky General Assembly that funds provided for the Probation and Parole Career Ladder Program shall be used to supplement the necessary costs of providing these salary adjustments for probation and parole officers.

Final Enacted Budget Memorandum for Fiscal Biennium 1990-1992, p. 89.

The Appellees are seventeen probation and parole officers who would have been eligible for an increase in salary under the Career Ladder Statute. However, in accordance with the provisions of the Equity Fund, their individual salaries were increased based in the greater of the Career Ladder increase or the Equity Fund increase. In February 1993, it appears that either all or at least some of the Appellees filed grievances with the Department of Corrections alleging entitlement to both pay increases.<sup>3</sup>

Apparently in conjunction with the Appellees' grievances, W. Patrick Mulloy, Secretary of the Finance and Administration Cabinet (Secretary Mulloy) issued an interpretation of the Equity Fund provisions after the Appellees appealed their grievance decisions to the state Personnel Board.<sup>4</sup> Secretary Mulloy upheld the Department of Corrections' interpretation of the Equity Fund provisions on the ground that it was in accordance with the intent of the General Assembly as expressed in the Budget Memorandum. Secretary Mulloy further found the Appellees' claims to be moot because the Equity Fund provisions "expired as of June 30, 1992, the end of the fiscal

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<sup>3</sup>We are somewhat hampered in our review by the fact that the record on appeal does not contain any record of the proceedings brought before the Department of Corrections.

<sup>4</sup>Pursuant to KRS 48.500, the Finance and Administration Cabinet is given the authority to render an interpretation of the meaning of items contained in a budget bill which affect the Executive Branch when the General Assembly is not in session.

biennium for which it had been enacted, and no salary relief is now available under the program, whether it might otherwise have been available during that biennium." After the issuance of Secretary Mulloy's opinion, the Appellees withdrew their administrative appeals.

On June 9, 1994, the Appellees filed a petition for declaration of rights with the Franklin Circuit Court. In a nutshell, the Appellees sought a declaration that the provisions of the Equity Fund were unconstitutional to the extent a conflict existed with the Career Ladder Statute. Appellees also sought a declaration that they were entitled to the full amount of their salary increases under both the Career Ladder Statute and the Equity Fund provisions and an order compelling the Appellants to pay the Appellees all past due amounts which they would have received had they received both increases.

The trial court entered an order on August 27, 1996, addressing the Appellants' motion to dismiss or alternatively for summary judgment as to the issue of liability. First, the trial court found that the Equity Fund provisions of the Budget Bill acting to repeal the provisions of the Career Ladder Statute contrary to law. Specifically, the trial court held:

[U]nder KRS 446.145, a bill proposing to amend or to repeal an existing statute must specifically delineate the proposed changes and, if it purports to change the entire section, must list the statute by number. Section 51 further mandates that statutes only cover one subject, which should be determinable by the title. As outlined above, the constitutional section also requires that the bill republish at length the changed statute. As Justice Vance notes in his dissent in Commonwealth ex rel Armstrong v. Collins, Ky., 709 S.W.2d 437, 449 (1986), the "provisions relating to title and the provisions relating to republication in full of amended statutes preserve the

significant purpose of preventing confusion in the minds of legislators as to the effect of proposed legislation."

These specific and important procedures were not followed in the instant case. Yet, section 5 of the Budget Bill specifically states that the bill is meant to "repeal" "[a]ll statutory continuing appropriations in existence at the time this Act takes effect . . . (except those provided for in a list of excluded provisions)." The General Assembly may have intended to repeal its previous statute by the enactment of the 1990 Budget Bill and thereby eliminate the "Career Ladder" salary increments as provided for in KRS 196.076(4); however, the General Assembly did not go about effectuating these changes in the proper manner. Hence, the unconstitutional and unlawful provisions of the Budget Bill should be stricken as being null and void.

The trial court further found that the General Assembly's action in passing the provisions of the Equity Fund in the Budget Bill was contrary to KRS 446.085, which provided:

(1) Nothing in a budget bill adopted by the general assembly shall be construed to effect a repeal or amendment in the Kentucky Revised Statutes, and if any repeal or amendment appears to be effect in any of the Kentucky Revised Statutes, it shall be disregarded, shall be null and void, and the law as it existed prior to the effective date of the budget bill shall be given full force and effect.

(2) Notwithstanding the provisions of subsection (1) of this section the general assembly may provide in a budget bill for the suspension or modification of the operation of a statute if the general assembly finds that the financial condition of state government requires such suspension or modification. Such suspension or modification shall not extend beyond the duration of the budget bill.<sup>5</sup>

The trial court found:

In subsection 5 of the Budget Bill, the General Assembly clearly stated that the Bill is intended to "repeal" all other existing appropriations statutes, excepting a laundry list of exempted statutes. HB 799, p. 176. This clear enunciation of the Bill's purpose thereby eliminates the notion that the legislature is merely suspending or modifying the existing statutes. As the Petitioners correctly point out, this repealing of existing statutes is clearly a violation of statutory procedure.

As is indicated by subsection 2 of KRS 446.085, supra, the General Assembly is

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<sup>5</sup>This statute has since been repealed (footnote added)

entitled to repeal or amend certain statutes when there exists an economic emergency that justifies such extreme measures. However, as Petitioners note, no apparent economic emergency existed in this situation. Therefore, the provisions of the Budget Bill which decline to allow both salary increases to the Petitioners is a violation of existing statutory authority. (emphasis in original)

Based on its rulings, the trial court granted the Appellees' motion for partial summary judgment.

At some point in time after entry of the trial court's order, the Appellants raised the defense of sovereign immunity to the Appellees' claims for monetary relief. The Appellants did not, and do not here, claim that the trial court was without power to determine the validity of the statutes at issue, but argued that having declared the disputed provisions of the Budget Bill unconstitutional, the trial court could not award monetary damages. In an order entered August 21, 1997, the trial court held that:

the issue regarding sovereign immunity is not applicable. This is not a tort action but an action in the nature of a contract. The Commonwealth is liable for any past salaries that are due pursuant to this action.

On August 3, 1997, the trial court entered an order setting forth the amount of damages owed to each individual Appellee. The order further provided the method of calculation to be used to determine the amount of back pay owed to each Appellee after December 31, 1996. Finally, on October 20, 1997, the trial court entered its final order, stating that the Appellees "shall take judgment against the [Appellants] in the amounts as more fully set out in this Court's most recent Order as to the damages. The [Appellees] as further awarded salary

adjustment as also set out in this Court's previous order. This appeal followed.<sup>6</sup>

The Appellants contend that the trial court erred in finding that the provision of the Equity Fund repealed the Career Ladder Statute contrary to law and that the General Assembly failed to comply with KRS 446.085 in passing the Equity Fund provisions. We disagree.

Under the terms of KRS 446.085, the General Assembly clearly chose to disallow itself the power to "repeal or amend, through the devise of a budget bill, any other existing law appearing in the Kentucky Revised Statutes." Commonwealth ex rel Armstrong v. Collins, Ky., 709 S.W.2d 437, 440 (1986). While the General Assembly retained its power to use a budget bill to suspend or modify an existing statute, it further chose to limit this power only when "the financial condition of state government so requires." Armstrong, 709 S.W.2d at 440.

A review of the Budget Bill at issue shows that the General Assembly failed to comply with KRS 446.085. First, there is no indication that there was any kind of fiscal emergency within the state which would allow the suspension or modification of the Career Ladder Statute. Even if there was, a further

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<sup>6</sup>On June 2, 1999, this Court entered an order granting the plaintiffs in the case of Bobby Timbrook v. Paul Patton, Franklin Circuit Court Civil Action No. 97-CI-941, permission to file an amicus curiae brief. It appears that the 143 plaintiffs in the Timbrook case are also parole officers who were eligible to receive pay increases under the Career Ladder Statute and the Equity Fund provisions in 1990-1992. It appears that the Timbrook case was filed in 1997 after the Department of Corrections refused to pay the lost wages and benefits awarded to the Wise plaintiffs in the present action.



review of the Budget Bill shows that the General Assembly clearly intended to repeal the Career Ladder Statute as merely modifying it or suspending it until the expiration of the Budget Bill. As the Appellees point out, the Budget Bill also provided:

All statutory continuing appropriations in existence at the time this Act takes affect are discontinued and repealed by this Act except as provided by Chapters 12, 42, 56, 96A, 133, 152, 177, 341, and 441 of the Kentucky Revised Statutes. All statutes and portions of statutes in conflict with any of the provisions of this Section, to the extent of such conflict, are hereby repealed, unless otherwise provided by this Act.

Acts 1990, Chapter 514, Part III, Section 5 (emphasis added).

We also agree with the trial court's finding that the Equity Fund provisions acted to repeal the Career Ladder Statute are contrary to Section 51 of the Kentucky Constitution. As the trial court pointed out, neither the title requirements nor the publication requirements of Section 51 were followed. The trial court was correct in invalidating the Equity Fund provisions.

The Appellants also contend that the Appellees' claims are time barred. The Appellants maintain that because the Equity Fund provisions expired when the Budget Bill expired on June 30, 1992, the Appellees failed to bring their claim in a timely manner. In support of their argument, the Appellants rely on KRS 45.229(1), which provides:

No state officer or budget unit shall, after the close of any fiscal year, incur, or vote, order, or approve the incurring of, any obligation or expenditure under any appropriation for that fiscal year, and no expenditure shall be made from or charged to any appropriation for any fiscal year that has expired at the time the obligation of the expenditure was incurred.

The Appellants also claim that the Appellees' claims are moot as a result of the expiration of the Budget Bill.

We disagree with the Appellant's argument that KRS 45.229(1) provides the applicable statute of limitations in this case. There is absolutely nothing in the language of that statute to indicate that the General Assembly intended it to act as a statute of limitations which would require actions challenging portions of a budget bill to be brought before its expiration date. We agree with the Appellees that the provisions of KRS 45.229(1) are meant to regulate the actions of state officers as opposed to those who bring suit against them.

The question then becomes what statute of limitations, if any, applies to this case. A review of the various statutes of limitations contained in KRS Chapter 413 shows that none directly applies to a declaratory judgment action brought to determine the constitutionality of a statute.

As a general rule, a statute of limitations applicable to ordinary actions at law and suits in equity applies to actions for declaratory relief. Thus, the blanket provision found in statutes of limitations fixing the time of institution of all other actions for which no specific limitations has been prescribed by the other sections of the statute has been applied to actions for declaratory relief.

22A AmJur 2d Declaratory Judgements, Section 184, p. 828 (19\_\_\_\_).

KRS 413.160 provides a ten-year statute of limitations for all actions for relief which are not covered by other statutes of limitations. We agree with the argument of the Timbrook plaintiffs in their amicus brief that the ten-year

statute of limitations of KRS 413.160 controls and that the Appellees' action was timely.

Finally, the Appellants argue that the Appellees' claims for monetary relief in their declaratory judgment action are barred by the doctrine of sovereign immunity. We feel that this issue is the main crux of this case. Having agreed with the Appellees that the challenged provisions of the Budget Bill are, in fact, unconstitutional, we nevertheless agree with the Appellants that the Appellees' claims for monetary relief are precluded by the doctrine of sovereign immunity.

In Foley Construction Company v. Ward, Ky., 375 S.W.2d 392 (1963), Foley sought damages from the state in the amount of \$1,197,046.33 for breach of contract, plus \$1,000 which it claimed was due and owing under the contract between Foley and the state. In holding that the doctrine of sovereign immunity precluded recovery of the amount due and owing under the contract as well as the amount sought for breach of contract, the Court stated:

In view of the constitutional provision [regarding sovereign immunity], the sound public policy in support of it, and the long adherence by this Court to the principle of sovereign immunity, the plea on behalf of [the state] was a proper defense to the action, including the demand for \$1,000. While much of the discussion herein has been directed towards actions for damages, what has been said is equally applicable to actions on a contract. The demand for the final \$1,000 due under the contract falls in this category.

Foley, 375 S.W.2d at 396. Foley specifically overruled Watkins Consulting Engineering v. Department of Highways, Ky., 290 S.W.2d 28 (1963), on which the Appellees rely in support of their

argument. Thus, based on the language in Foley, the trial court erred in awarding damages to the Appellees.

We agree with the position taken in the amicus brief that sovereign immunity does not apply when a party seeks to "compel state officers or agencies to perform a duty imposed upon them by law or to refrain from doing something that the law directs them not to do." City of Louisville v. Martin, Ky., 144 S.W.2d 1034, 1036 (1940). However, there is no law, statutory or otherwise, which would allow the action to continue if a party is trying to seek payment of money from a state officer or agency on the grounds of duty. Whether this exception to the doctrine of sovereign immunity extends this far is a question which is better left to the Kentucky Supreme Court.

Having considered the parties' arguments on appeal, the orders of the Franklin Circuit Court are reversed to the extent that they award damages to the Appellees. The balance of the orders are otherwise affirmed.

EMBERTON, JUDGE, CONCURS IN RESULT ONLY.

COMBS, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I respectfully dissent from the majority opinion and would affirm the trial court as to the entirety of its judgment. It is almost an absurdity – not to mention an injustice – to conclude as a matter of law that the state violated its statutory duty and then to hold as a matter of policy that the state shall not be held accountable in money damages for its unconstitutional behavior.

I agree with the well-articulated argument of the *amicus* brief in this case that the doctrine of sovereign immunity is subject to exception in cases involving ministerial duty; I would not hesitate to apply that exception in this case to uphold the award of damages. "Nobody has a more sacred obligation to obey the law than those who make the law." (Jean Anouilh, Antigone.) The violation of law that occurred by way of ministerial dereliction of duty cannot be remedied except by the award of money damages to those injured by that breach of duty. Sovereign immunity is not – and should not be – a bar to recovery in this case.

BRIEF AND ORAL ARGUMENT FOR  
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