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TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2008-CA-002044-MR

MARK BLANKENSHIP AND OTHER  
INDIVIDUAL APPELLANTS AS  
DESIGNATED IN THE NOTICE OF APPEAL

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES D. ISHMAEL, JR., JUDGE  
ACTION NO. 05-CI-05024

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON AND WINE, JUDGES.

CLAYTON, JUDGE: This is an action by the Lexington and Fayette County Firefighters seeking overtime wages and related benefits from the Lexington-Fayette Urban County Government (“LFUCG”). The Fayette Circuit Court

dismissed the action on sovereign immunity grounds. For the reasons that follow, we affirm the decision of the trial court.

### FACTUAL BACKGROUND

This action was originally filed in the Fayette Circuit Court in November of 2005. The plaintiffs were 430 currently employed, retired and formerly employed firefighters (“firefighters”) who worked for LFUCG. The firefighters contended that there was an improper calculation of their overtime wages while they worked for LFUCG. As a result, they argued that there was a violation of Kentucky Revised Statutes (KRS) 337.285 as well as a breach of the implied contract found in county ordinances and policies which required they be paid overtime when they worked in excess of forty (40) hours per week. The firefighters also argued that this was a violation of KRS 67A.630 et seq., and asked for liquidated damages in the amount of double the amount originally underpaid as they claimed there was bad faith pursuant to KRS 337.385. After LFUCG’s motion for judgment on the pleading was made, the trial court found that the motion should be granted and the case was dismissed pursuant to the doctrine of sovereign immunity. By order dated October 1, 2008, the circuit court granted the firefighters’ motion for Kentucky Rules of Civil Procedure (CR) 54.02 designation, ruling that the court’s December 20, 2007, opinion and order was final and appealable. The firefighters then brought this appeal.

### STANDARD OF REVIEW

If the question to be answered on appeal concerns the construction and application of statutes or regulations and, therefore, concerns a matter of law, this Court is authorized to review the question on a *de novo* basis. *Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. App. 1998). Since the issues involved in this appeal are questions of law, we will apply the *de novo* standard of review.

## DISCUSSION

The trial court dismissed the action of the firefighters finding that the legislature had not chosen to waive sovereign immunity in these circumstances. “It is an inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity.” *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001). This immunity extends to counties. *Id.* at 526. *See also Lexington-Fayette Urban County Government v. Smolcic*, 142 S.W.3d 128, 132 (Ky. 2004).

KRS 337.285 provides, in relevant part, as follows:

(1) No employer shall employ any of his employees for a work week longer than forty (40) hours, unless such employee receives compensation for his employment in excess of forty (40) hours in a work week at a rate of not less than one and one-half (1-1/2) times the hourly wage rate at which he is employed.

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(5) (a) Upon the request of the county or city employee, and as provided in subsection (4) of this section, compensatory time shall be awarded as follows:

1. A county or city employee who provided work in excess of forty (40) hours in a public safety activity, an emergency response activity, or a seasonal activity as described in 29 C.F.R. [Code of Federal Regulations] sec. 553.24, may accrue not more than four hundred eighty (480) hours of compensatory time; or

2. A county or city employee engaged in other work in excess of forty (40) hours, may accrue not more than two hundred forty (240) hours of compensatory time.

(b) A county or city employee who has accrued four hundred eighty (480) hours of compensatory time off pursuant to paragraph (a)1. of this subsection, or two hundred forty (240) hours of compensatory time off pursuant to paragraph (a)2. of this subsection, shall for additional overtime hours of work, be paid overtime compensation.

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(7) If compensation is paid to a county or city employee for accrued compensatory time off, the compensation shall be paid at the regular rate earned by the county or city employee at the time the county or city employee receives the payment.

(8) Upon a county or city employee's termination of employment, all unused accrued compensatory time shall be paid at a rate of compensation not less than:

(a) The average regular rate received by the county or city employee during the last three (3) years of the county or city employee's employment; or

(b) The final regular rate received by the county or city employee, whichever is higher.

(9) Compensatory time shall not be used as a means to avoid statutory overtime compensation. A county or city

employee shall have the right to use compensatory time earned and shall not be coerced to accept more compensatory time than an employer can realistically and in good faith expect to be able to grant within a reasonable period upon the county or city employee making the request for compensatory time off.

(10) Nothing in subsections (4) to (9) of this section shall be construed to supersede any collective bargaining agreement, memorandum of understanding, or any other agreement between the employer and representative of the county or city employees.

(11) As used in subsections (4) to (9) of this section, “county or city employee” means an employee of any county, city, charter county, consolidated local government, unified local government, or urban-county government, including an employee of a county or city elected official.

(12) In addition to the designation of a work week under subsection (1) of this section, local governments, as defined in KRS 95A.210(3), may designate a work period for professional firefighter employees as defined in KRS 95A.210. The designated work period shall be not less than one (1) work week of seven (7) consecutive days and not more than four (4) work weeks of twenty-eight (28) consecutive days for purposes of complying with the requirements of the Federal Labor Standards Act of 1938, as amended, 29 U.S.C. [United States Code] secs. 201 et seq. This subsection shall not exempt local governments from complying with the overtime requirements set forth in subsection (1) of this section and is intended to:

(a) Clarify the option to designate both a work week for compliance with Kentucky law and a work period for compliance with the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. secs. 201 et seq.; and

(b) Allow for the application of the partial exemption set forth in 29 U.S.C. sec. 207(k) in determining

overtime pay under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. secs. 201 et seq., only.

Firefighters contend that this statute indicates a desire by the General Assembly to waive sovereign immunity. KRS 44.072 provides that it is “the intention of the General Assembly to otherwise expressly preserve the sovereign immunity of the Commonwealth, . . . except where sovereign immunity is specifically and expressly waived as set forth by statute.” Under KRS 67A.060,

(1) Urban-county governments may exercise the constitutional and statutory rights, powers, privileges, immunities and responsibilities of counties and cities of the highest class within the county:

(a) In effect on the date the urban-county government becomes effective;

(b) Which may subsequently be authorized for or imposed upon counties and cities of that class; and

(c) Which may be authorized for or imposed upon urban counties.

(2) Rights, powers, privileges and immunities exercised by urban-county governments pursuant to subsection (1)(a) and (b) of this section shall continue to be authorized for urban-county governments notwithstanding repeal or amendment of the statutes upon which they are based unless expressly repealed or amended for urban-county governments.

While the waiver of sovereign immunity by the General Assembly does not have to be express, *LFUCG*, 142 S.W.3d at 132, fn.2, the implication must be clear.

*Withers v. University of Kentucky*, 939 S.W.2d 340, 346 (Ky. 1997).

Firefighters contend that the General Assembly waived sovereign immunity by implication when it enacted the Kentucky Wage and Hour Act. They contend that the waiver is apparent through the broad net that the statute casts. They also argue that the explicit references to county employees in the language of the statutes are further evidence of the waiver.

In *Withers*, the Kentucky Supreme Court held that:

We will find waiver only where stated “by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.” *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171, 29 S.Ct. 458, 464-65, 53 L.Ed. 742 (1909).

*Id.* at 346. Here, the General Assembly did not specify that it was waiving sovereign immunity when it enacted the wage and hour laws. There is room for doubt and, pursuant to the standard set forth above, we find that the trial court correctly dismissed this action based on sovereign immunity.

The firefighters also contend that the Kentucky Attorney General and Labor Cabinet’s Application of the Kentucky Wage and Hour Law to County Employees is indicative of the waiver of sovereign immunity. LFUCG argues that neither the Attorney General nor the Labor Cabinet has the authority to waive sovereign immunity. Rather, as set forth above, only the General Assembly has that authority.

We agree that neither the Attorney General nor the Labor Cabinet has the authority to waive sovereign immunity. Thus, as set forth above, we agree that

sovereign immunity applies in this action and that the trial court did not err in dismissing the action based on this defense.

Next, the firefighters contend that their “contract” claims are not barred by sovereign immunity. While the General Assembly has waived immunity for “lawfully authorized written contract[s] with the Commonwealth[,]” *Com., v. Whitworth*, 74 S.W.3d 695, 700 (Ky. 2002), LFUCG contends that this only applies to written contracts and not to oral or implied contracts. The latter, it contends, is barred by sovereign immunity.

The firefighters assert that *Whitworth* does not apply to counties. As set forth above, however, counties derive their sovereign immunity due to their relationship with the state. The trial court did not make a finding regarding contracts and sovereign immunity as it found that “[e]ven if this Court were to hold that these claims for Breach of Contract were not governed by sovereign immunity, the Plaintiffs would have to seek any further relief in Franklin Circuit Court and would probably be barred by the applicable Statute of Limitations in any event.” Opinion at p. 6.

In *Illinois Cent. Gulf R. Co. v. Graves County Fiscal Court*, 676 S.W.2d 470, 472 (Ky. App. 1984), this Court pondered the question of sovereign immunity when counties were involved in lawful contracts. It ended, however, by noting that “[w]hether the contract between the parties was a lawful one or whether this claim might be barred by a statute of limitations or by payment to a third party



has not been considered by the trial court, and these matters are not yet ripe for our consideration.”

We believe that the ordinance and policies cited to by the firefighters do not constitute a lawful written contract between the parties. Thus, the LFUCG would have sovereign immunity. We also agree that, had the contracts been found to be lawful written contracts, actions based upon those contracts would have had to have been brought in Franklin Circuit Court within one (1) year as set forth in KRS 45A.245 and 45A.260.

For the foregoing reasons, we affirm the decision of the trial court.

TAYLOR, CHIEF JUDGE, CONCURS IN RESULT ONLY.

WINE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

WINE, JUDGE, DISSENTING. Respectfully, I dissent from the majority opinion that the LFUCG enjoys sovereign immunity under these circumstances.

Simply stated, KRS 337.010(d) and (e) broadly define employer and employee, respectively. Counties as employers and firefighters as employees fall within these pertinent definitions. KRS 337.285, Kentucky’s Wage and Hour Law, specifically exempts several categories of employees not subject to the overtime requirements spelled out within subsection (2)(a-e). Firefighters are not included in those exemptions. In *Miller v. Lexington-Fayette Urban County Government*, 557 S.W.2d 430 (Ky. App. 1977), the firefighters challenged a fifteen-minute unpaid “roll call” that preceded their normal shift. The Court found that,

[t]he ordinance is not in conflict with KRS 337.285 because it became law prior to the effective date of the statute. The state law requires the appellee to pay a minimum hourly wage rate and to pay time and one-half for hours worked in excess of forty each week.

*Id.* at 432. Thus, the appellant firefighters (*Blankenship, et. al*) fall under the protection of KRS 337.285.

Further, I believe that the Fayette Circuit Court erred when it found LFUCG's sovereign immunity was not waived for purposes of the Wage and Hour Law. In *Withers v. University of Kentucky*, 939 S.W.2d 340 (Ky. 1997), the Kentucky Supreme Court held, "[w]e will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" KRS 337.285(4-9) details how county employees may request compensatory time in lieu of overtime pay. Coupled with the previously noted statutory definitions of employer and employee, as well as the list of exemptions as to overtime compensation which does not include firefighters, there is an "overwhelming implication" that sovereign immunity is waived.

For these reasons, I would reverse the December 20, 2007 judgment of the Fayette Circuit Court and remand this case for further proceedings.

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