COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2010-SC-00322-TG

MADISON COUNTY FISCAL COURT; CITY OF CYNTHIANA; CITY OF DANVILLE; CITY OF FLORENCE; CITY OF GEORGETOWN; CITY OF GLASGOW; CITY OF NICHOLASVILLE; CITY OF PARIS; CITY OF RICHMOND; CITY OF SOMERSET; AND CITY OF WINCHESTER — APPELLANTS

v. APPEAL FROM FRANKLIN CIRCUIT COURT; NO. 09-CI-01940
HON. THOMAS D. WINGATE, JUDGE

KENTUCKY LABOR CABINET, J.R. GRAY, in his official capacity as Secretary of the Kentucky Labor Cabinet; MICHAEL L. DIXON, in his official capacity as Commissioner of the Department of Workplace Standards of the Kentucky Labor Cabinet; MARJORIE ARNOLD, in her official capacity as Program Manager (Eastern), Wage and Hours of the Kentucky Labor Cabinet; JERALD ADKINS, in his official capacity as Program Manager (Western), Wage and Hours of the Kentucky Labor Cabinet; and UNNAMED COMPLAINANTS, individually — APPELLEES

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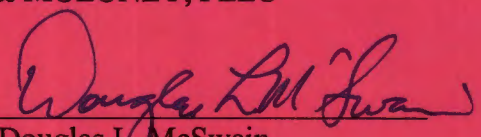
By: 
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INTRODUCTION

This is a declaratory judgment action in which twelve local government employers claim that immunity or lack of jurisdiction bars the administrative actions by Appellees to collect additional back overtime wages on behalf of firefighters relating to state training and education incentive funds. Appellants are appealing an April 23, 2010 final and appealable order by Franklin Circuit Judge Thomas D. Wingate denying Appellants' immunity and jurisdictional claims in their Motion for Summary Judgment and granting Appellees Motion for Partial Summary Judgment. The Court subsequently granted Appellants' Motion to Transfer the appeal from the Court of Appeals.

STATEMENT CONCERNING ORAL ARGUMENT

Appellants request an oral argument pursuant to CR 76.12(4)(c)(ii). There are significant and complicated questions of law involved in this matter. Appellants believe oral argument will assist the Court in deciding the issues before it.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

A. HISTORY OF CREATION AND IMPLEMENTATION OF THE STATE PROFESSIONAL FIREFIGHTERS FOUNDATION PROGRAM FUND.

The Labor Cabinet is pursuing all of the Appellants administratively for back wage overtime liability allegedly due on state funds distributed to firefighters. Unlike most local government employees, firefighters received a "salary supplement" from the state "in addition to [their] regular salary" from their local government employers. KRS 95A.250 (1980) [Record on Appeal "ROA" 654]; 95A.260(1) (1980) [ROA p. 654]. Appellants' brief herein refers to these separate, state-supplied supplemental funds as either "incentive funds" or "incentive supplement" because they originate from the state and were intended by the state to incent firefighters to increase and maintain their training and education as "professional firefighters." KRS 95A.200.

The administrative actions pursued by the Labor Cabinet against Appellants only concern overtime liability allegedly due on the state incentive funds; no overtime liability on compensation originating from Appellants in their capacities as local government employers of the firefighters is at issue. *Madison County Fiscal Court, et al. v. Kentucky Labor Cabinet, et al.*, No. 09-CI-1940, at p. 5 n. 4 (Franklin Circuit Court, Opinion and Order issued April 23, 2010) [ROA p. 883] [Opinion and Order is attached to the Appendix as Tab 1]. Firefighters who obtained all of the training and education hours necessary to qualify for the incentive funds were fully compensated by Appellants for all of the time spent during such training. If firefighters successfully fulfilled the state's training regimen, the firefighters received the incentive funds on top of, and in addition to, their regular compensation received from Appellants as employers, including on top of their regular compensation received for participating in the training itself.

Appellants claim in this lawsuit that they cannot be compelled to pay additional overtime liability on the state incentive funds because the state created, implemented, and required the incentive supplement to function in a unique fashion under KRS Chapter 95A, and they simply carried out that state function. In the trial court below, the Labor Cabinet did not contest Appellants' factual history underlying the incentive supplement program. Indeed, Franklin Circuit Judge Thomas D. Wingate adopted, almost verbatim, the "facts" portion of Appellants' Memo in Support of Summary Judgment, finding Appellants' historical account "to be both exhaustive and accurate." *Id.* at 2 n. 2 [ROA p. 880]. Appellants reproduce below the uncontested facts as adopted and modified by Judge Wingate. Internal citations have been updated to correspond with the Record on Appeal. A thorough review of the historical facts of the state incentive program is necessary to understand and resolve the issues in this appeal.

> In 1980, statutes were enacted under KRS Chapter 95A establishing the Professional Firefighters Foundation Program Fund ("the Fund"). The intent of the General Assembly in establishing the Fund as stated in KRS 95A.200 is:
>
> > to assure that fire protection in the Commonwealth is continually strengthened, upgraded and attractive to highly qualified men and women who choose firefighting as a profession; and to retain qualified and experienced firefighters for the purpose of providing maximum protection and safety to the citizens of, and visitors to, this Commonwealth; and to offer a state monetary supplement for local firefighters while upgrading the educational and training standards of such firefighters.
>
> The Fund consists of "appropriations from the general fund of the Commonwealth of Kentucky," and the Fund can only be appropriated by the General Assembly in accordance with KRS Chapter 95A.200 to 95A.300.[1] KRS 95A.220.

[1] All citations to KRS Chapter 95A.200 – .300 in Judge's Wingate's Opinion are to the current version of the statutes, but the cited statutes are unchanged in relevant part from their 1980 versions. See ROA pp. 653-55 for the 1980 version of KRS Chapter 95A.

The Fire Commission[2] controls all aspects of the Fund. It administers the Fund, determines which firefighters may receive monies from the Fund, issues rules and regulations with regard to the Fund, and may withhold and terminate payments from the Fund if a local government does not follow KRS 95A.200 to 95A.300 and the rules and regulations of the Fire Commission. KRS 95A.240. The statutes mandate exactly how much, when, and how the state training incentive money is to be distributed to the firefighters. KRS 95A.250(1)(a) and (2)(a). The statutes further mandate precisely how the funds are to be used. KRS 95A.260. The statute provides in pertinent part:

> Funds made available to local governments shall be received, held, and expended in accordance with the provisions of KRS 95A.200 to 95A.300, any rules and regulations issued by the commission, and the following specific restrictions: (a) Funds provided shall be used only as a supplemental distribution to firefighters, . . .; (d) Funds shall not be used to supplement existing salaries or as a substitute for normal salary increases periodically due to firefighters.

KRS 95A.260. Even if a firefighter has met the training obligations, the local government may not pay the firefighter any state training incentive funds until the Fire Commission certifies that the firefighter has met the training obligations. *See, e.g.,* Ex. 1 [ROA p. 158; ROA p. 756]. The statutes and regulations are extraordinarily specific on how state training incentive funds are to be handled, and the Fire Commission enforces those specific requirements through audits. *See, e.g.*, KRS 95A.250(2)(a); Ex. 2 [ROA pp. 159-64]; 739 KAR 2:020 sec. 3(3) and sec. 5.

Local governments are "eligible to share in the distribution of funds from the fund" if they meet seven requirements. KRS 95A.230. One of the requirements is to comply with "all rules and regulations, appropriate to the size and location of the local fire department or fire prevention district, issued by the [fire] commission to facilitate the administration of the fund and further the provisions of KRS 95A.200 to 95A.300." KRS 95A.230. The Fire Commission determines "which local governments are eligible to share in the fund." KRS 95A.240. In fact, the Finance and Administration Cabinet does not issue checks unless the Fire Commission certifies that local governments "have complied with the provisions of KRS 95A.200 to 95A.300." KRS 95A.270. From 1980 until 1990 (when it was deleted from the regulation because it repeats

[2] "Fire Commission" is short for Commission on Fire Protection Personnel Standards and Education. KRS 95A.020. The General Assembly designated the Fire Commission to administer the incentive Fund program. KRS 95A.240.

KRS 95A.270 (Ex. 3, March 1, 1990 Memo [ROA pp. 165-68; ROA pp. 726-29]; Ex. 4, proposed amendments to 815 KAR 45:035 filed 12/14/89 [ROA pp. 169-84; ROA pp. 730-45], the regulation stated that the State Treasurer shall issue checks only to those local governments "which have complied with the provisions of KRS Chapter 95A **and this regulation**." (emphasis added) Ex. 5, 815 KAR 45:035 sec. 5 (Nov. 6, 1980) [ROA p. 186; ROA pp. 660]; Ex. 4 [ROA p. 169-84; ROA pp. 730-45]. Thus, if a local government received state funds under this program, the Fire Commission certified to the State that the local governments complied with all requirements under KRS 95A and the regulations. *See also*, KRS 95A.230(7).

Two of those requirements are to make application for funds and enter into contracts with the Fire Commission. From 1980 to the present the Fire Commission requires that for new participation in the Fund, local governments have to make application to the Fire Commission. Ex. 5, at sec. 3(2) [ROA p. 186; ROA pp. 660]; 739 KAR 2:020 sec. 3(1) (current). From 1980 to 1993, the Fire Commission also required an annual renewal application after initial application. Ex. 5 at sec. 3(2) [ROA p. 186; ROA p. 660]; Ex. 6, 815 KAR 45:035 sec. 3(1) (Feb. 4, 1993) [ROA pp. 188-90; ROA pp. 662-64]; *see also,* Ex. 1 [ROA p. 158; ROA p. 756].

From 1980 to at least 1988, the application forms included Form KPF-1b, which was an "Agreement" the local government had to sign upon application. *See e.g.,* Collective Ex. 7, Form KPF-1b (5/15/80) [ROA p. 191; ROA p. 676], Form KPF-1b (9-1-82) [ROA p. 192; ROA p. 688] and "Instructions for Forms KPF-1, 1A and 1B" [ROA p. 193]. Amongst other requirements, the Agreement required local governments to agree that "All provisions of KRS 95A and subsequent administrative regulations shall be adhered to." Ex. 7, Form KPF-1b [ROA pp. 191-92; ROA pp. 676 and 688]. Additionally, from 1980 to the present, the first page of the application, Form KPF-1, requires certification:

> that the information contained herein is true and correct to the best of my knowledge. In addition, if this application is approved, I accept and will comply with provisions of KRS 95A, the general conditions contained herein, and such further rules, regulations and policies as may be reasonably prescribed by the Commission on Fire Protection Personnel Standards and Education.

See Collective Ex. 8, Form KPF-1(5-15-80) [ROA p. 194], Form KPF-1 (Rev. 7/24/80) [ROA p. 195], Form KPF-1 (Rev. 1-25-82) [ROA p. 196], Form KPF-1 (Rev. 9/1/82) [ROA p. 197], Form KPF-1 (REV.1-25-89) [ROA p. 198], Form KPF-1 (REV. 1-18-90) [ROA p. 199], and KPF-1 (REVISED 11/11/04) [ROA p. 200].

In addition to applications, local governments participating in the program are required to submit quarterly reports to the Fire Commission on the disposition of state funds. KRS 95A.280. The quarterly reports, from the beginning of the program (when the initial contracts and renewal applications were required) to the present, require the following certification of the local government official: "I certify that the information in this report is correct, based on the Local Unit's Official accounting system and records, consistently applied and maintained, and that expenditures shown have been for the purpose of, and in accordance with, applicable terms and conditions." *See* Collective Ex. 9, Form KPF-3 (7-1-82) [ROA p. 201], KPF-3 (03/27/06 Revised) [ROA p. 202].

Over the years, the Fire Commission has issued many directives on how exactly state incentive funds are to be handled. The local governments are bound by the statutes, regulations and terms of the contracts to follow the directives and the regulations. For example, on June 1, 1981 the Fire Commission adopted a policy "that no incentive payment will be made other than on regular base pay, scheduled overtime including longevity, effective this date." Ex. 10 [ROA p. 203; ROA 665] [emphasis in part original and in part added].

From at least 1984 to 2008, the Fire Commission obtained opinions from the Cabinet as to how incentive funds were to be handled for overtime purposes and then directed the local governments on those matters. The Fire Commission inquired directly to the Labor Cabinet and directed the local governments to comply with the Labor Cabinet's directives. Collective Ex. 11, 3/7/84 Letter to Fire Commission from Labor Cabinet [ROA pp. 204-05; ROA pp. 724-25]; 7/2/98 Memo to All Paid Fire Departments/All Fiscal Officers from Fire Commission with Enclosure 7/1/98 letter to Fire Commission from Labor Cabinet [ROA pp. 206-09; ROA pp. 774-77]; 5/28/99 Memo to All Paid Fire Departments/All Fiscal Officers from Fire Commission with Enclosure 7/1/98 letter to Fire Commission from Labor Cabinet [ROA pp. 210-12; ROA pp. 778-80]; 6/1/00 Memo to All Paid Fire Departments/All Fiscal Officers from Fire Commission with Enclosure 5/26/00 letter to Fire Commission from Labor Cabinet [ROA pp. 213-15; ROA pp. 781-83]; 7/17/00 Memo to All Paid Fire Departments and All Fiscal Officers from Fire Commission with Enclosure 7/14/00 letter to Fire Commission from Labor Cabinet [ROA pp. 216-18; ROA pp. 784-86]; 12/19/08 Memo to All Fire Chiefs from Fire Commission with Enclosure 12/17/08 letter to Fire Commission from Labor Cabinet [ROA pp. 219-21].[3] Each one of

[3] For convenience, subsequent citations will refer to all of these documents as "Overtime Memo" and will use only the later date to identify both the Fire Commission memo to

> the directives until December 2008 instructed that overtime [on the incentive monies][4] was not to be paid for scheduled overtime hours.
>
> Firefighters work a schedule of 24 hours on and 48 hours off, resulting in "scheduled" overtime hours worked in every week. KRS 95.500(3); KRS 95.505; KRS 95.715. Some weeks they are scheduled to work 48 hours, resulting in 8 hours of scheduled overtime. Other weeks they are scheduled to work 72 hours, resulting in 32 hours of scheduled overtime. Because of the nature of their work, they may also work "unscheduled" overtime hours beyond their regular schedule of 24 hours on and 48 hours off, in order to respond to emergencies. The instructions from the Fire Commission were to pay overtime [on the incentive monies][5] only on unscheduled overtime but not on scheduled overtime. Collective Ex. 11 [ROA pp. 204-21; ROA pp. 724-25; ROA pp. 774-86].
>
> The Local Governments followed these directives from the Fire Commission. The Cabinet is now investigating the Local Governments based upon their allegedly violating KRS 337.285 with respect to state training incentive funds because the Local Governments followed directives from the Fire Commission and the Labor Cabinet.

Madison County, No. 09-CI-1940, at pp. 2-5 [ROA at pp. 880-83].

B. HISTORY OF ALLOCATION AND CALCULATION OF OVERTIME ON STATE INCENTIVE FUNDS.

The overtime instructions previously devised by the Labor Cabinet and approved and communicated by the Fire Commission to local governments specifically explained how overtime liability on the incentive funds was to be allocated and calculated. First, the overtime instructions allocated ***unscheduled overtime*** liability to local governments but not ***scheduled overtime*** liability. *See, e.g.*, 7/2/98 Overtime Memo [ROA pp. 774-

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local governments and the enclosed Labor Cabinet overtime instructions. The Overtime Memos are collectively attached to the Appendix as Tab 2.

[4] Judge Wingate added the bracketed text to clarify that the directive from the state to pay only unscheduled overtime referred to the state incentive funds. Judge Wingate noted that Appellants paid all overtime liability due on the compensation originating from local governments as employers of the firefighters. *Madison County*, No. 09-CI-1940, at p. 5 n. 4 [ROA p. 883].

[5] *See* note 4, *supra*.

77]. The distinction between unscheduled and scheduled overtime appeared in the Fire Commission's first implementing regulations. 815 KAR 45:035 sec. 1(11) [ROA pp. 659]. Under KRS 95A.250 (1980) [ROA p. 654], the incentive supplement was to be an "addition" to "regular salary," and consistent with this statutory language, the Fire Commission structured the supplement to fit on top of all other "regular" compensation firefighters receive from local governments for straight-time (*i.e.*, 40-hour workweek) ***and*** regularly scheduled overtime (either 8 hours in 48-hour workweeks or 32 hours in 72-hour workweeks). 815 KAR 45:035 sec. 1(12) & sec. 3 (1980) [ROA pp. 659-60].

The Fire Commission instructed local governments participating in the training incentive Fund program exactly how to "add" the state-supplied supplement to firefighters' regularly received compensation from local governments. The Fire Commission's instructions tracked its implementing regulations. Local governments were directed to pay increased overtime ***only for unscheduled overtime*** hours because the supplement amount was deemed to already include compensation for all straight-time (regular hours) and scheduled overtime hours. *See, e.g.,* 7/2/98 Overtime Memo ("As we discussed, additional overtime pay is due on the incentive payments for any unscheduled overtime hours. The yearly incentive is intended to compensate for all regular hours and all scheduled overtime. If a firefighter works his normal schedule of twenty-four hours on and forty-eight hours off, no additional overtime pay is due on the incentive pay.")(emphasis in original) [ROA pp. 774-75].

Second, the overtime instructions included equations to calculate the amount of unscheduled overtime liability. Overtime is generally determined on an hourly rate basis for employer-provided wages to non-exempt employees. *See* 803 KAR 1:060 sec 6.

Thus, the Labor Cabinet provided the Fire Commission with equations to convert the statutorily fixed incentive amount into an hourly rate. The conversion equations assumed the supplement was apportioned across all straight-time and scheduled overtime compensation and divided the incentive amount by a "divisor" made up of the number of straight-time hours plus one and one-half the number of scheduled overtime hours.

As a result of this methodology, all firefighters who successfully qualified for the training incentive received an exact "addition" to their "regular salary" (*i.e.*, regular compensation) equal to the fixed supplement amount. Thus, both exempt and non-exempt firefighters, employed anywhere in the state, were all "incented" financially, on an equal basis, to participate in the state training program.[6] The state-supplied supplement was designed to be ***all*** of the supplemental compensation firefighters were to receive by virtue of their participation in the incentive program, and local governments were induced to permit firefighters to participate in the program, in part, because there would be no additional costs to local governments, overtime or otherwise, unless firefighters worked more than regularly scheduled hours (*i.e.*, unscheduled hours).

The Fire Commission accepted the Labor Cabinet's conversion calculation methodology on the incentive funds because the conversion equations fulfilled the Commission's interpretation of the legislature's intent to provide all firefighters, whether

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[6] Exempt firefighters are "salaried" and ordinarily receive no overtime compensation for hours worked over 40 in a week. Non-exempt firefighters, of course, normally receive overtime compensation on all employer-supplied compensation. If the incentive supplement is applied in any fashion other than as the Fire Commission instructed, it results in non-exempt firefighters receiving ***more*** total remuneration for having participated in the state training and education program than exempt firefighters could ever receive. The Fire Commission's methodology did not permit such disparity, but rather designed the supplement to be an equal incentive for all firefighters to participate in state training, regardless whether any particular firefighter was exempt or non-exempt.

non-exempt (*e.g.*, line firemen) or exempt (*e.g.*, fire chiefs), the same fixed amount "addition" to their "regular salary." The Labor Cabinet updated the Fire Commission on the hourly rate conversion equations when the legislature enacted increases in the incentive amount, but the methodology was always the same: the divisor equaled the number of straight-time hours plus one and one-half the number of regularly scheduled overtime hours. With each update, the Fire Commission communicated these conversion equations to local governments as the "[p]roper method for overtime calculation on incentive pay." *See, e.g.,* 7/2/98 to 6/1/00 Overtime Memos [ROA pp. 774-86].

The mathematical calculations underlying the overtime conversion methodology is explained in full below. These calculations are complicated. Appellants apologize for their complicated nature, but provide same as necessary background even though their "properness" is not really the issue in this appeal. Whether "proper" or not, the state created and implemented the incentive Fund program, and the state alone designed the incentive supplement to encompass all "supplemental" remuneration to which firefighters were entitled for straight-time and scheduled overtime based on the incentive funds. Appellants merely carried out the Fire Commission's interpretation of that design, and disbursed the incentive supplement to firefighters according to the Fire Commission's instructions, which deemed the overtime conversion equations provided by the Labor Cabinet to be "proper." Because the state cannot be held liable for how it created and implemented the incentive Fund program, Appellants cannot be liable for having carried out the program as designed and instructed as "proper." Appellants now explain, albeit complicated, exactly how the overtime calculation methodology worked for years and how it changed as a result of *Labor Cabinet* v. *Hasken*, 265 S.W.3d 215 (Ky. App. 2007).

(1) The overtime calculation methodology followed pre-*Hasken*.

Since the year 2000, the incentive amount has been fixed at $3,100 annually,[7] or $59.62 per week [$3,100 ÷ 52 = $59.62]. Therefore, in 48-hour workweeks, the hourly rate conversion equation is: $59.62 ÷ [40 + (1.5 x 8)] = $59.62 ÷ [40 + (12)] = $59.62 ÷ 52 = $1.1465. *See* 6/1/00 Overtime Memo [ROA pp. 781-83]. The $1.1465 hourly rate, as a result of the 52 divisor, apportions the $59.62 weekly supplement amount across compensation for 40 straight-time hours [$1.1465 x 40 = $45.86] plus 8 scheduled overtime hours [($1.1465 x 1.5) x 8 = $13.76]. The divisor has to be 52 to convert the $59.62 weekly supplement into an hourly rate equal to all straight-time and scheduled overtime compensation. Because the $1.1465 hourly rate is not apportioned to unscheduled overtime hours, the supplement increases the unscheduled overtime liability of local governments by $1.7198 per hour [$1.1465 x 1.5]. *Id.* The $1.7198 overtime rate resulting from the state supplement is on top of the normal overtime wages paid to firefighters by local governments.[8]

In 72-hour workweeks, the hourly rate conversion equation is: $59.62 ÷ [40 + (1.5 x 32)] = $59.62 ÷ [40 + (48)] = $59.62 ÷ 88 = $0.6775. *Id.* Thus, the 72-hour workweek equation produces an hourly rate of $0.6775 based on a divisor of 88. The $59.62 weekly

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[7] Prior to 2000, the incentive supplement amount was less, starting out in 1982 at a fixed $2,500 annually and increasing periodically thereafter to $3,100. *See* note 15, *infra.*

[8] For example, a non-exempt firefighter earning a base rate of $10 per hour from the local government will receive $15 per hour for all overtime hours [1.5 x $10]. In 48-hour workweeks, the firefighter receives an additional $1.1465 per hour from the state as a result of the $59.62 weekly supplement amount. This supplement amount includes a one and one-half overtime compensation rate of $1.7198 [1.5 x $1.1465] for ***scheduled*** overtime hours. However, because the state supplement does not include any ***unscheduled*** overtime compensation, the local government must pay the full one and a half overtime rate on $1.7198 stemming from the supplement on top of the firefighter's normal $15 overtime rate for unscheduled overtime hours worked.

supplement amount accordingly equals $27.10 for straight-time hours [$0.6775 x 40 = $27.10] plus $32.52 for 32 scheduled overtime hours [($0.6775 x 1.5) x 32 = $32.52]. Furthermore, the supplement increases the unscheduled overtime liability of local governments by $1.0163 per hour [$0.6775 x 1.5] on top of the normal overtime wages paid to firefighters by local governments. *Id.*

In addition to these weekly-based equations, the Labor Cabinet devised an alternative annual-based hourly rate conversion equation. *See* 7/17/00 Overtime Memo [ROA pp. 784-86]. Firefighters work in the aggregate approximately 2,912 straight-time and scheduled overtime hours per year. The 24-hour on/48-hour off work schedule of firefighters causes a three-week cycle of consecutive 48-hour workweeks followed by one 72-hour workweek for an average 56-hour workweek. The 56-hour average workweek equals 2,080 annual straight-time hours [40 x 52 weeks per year = 2,080] and 832 annual scheduled overtime hours [16 x 52 weeks per year = 832]. Based on these yearly averages, the annual hourly rate conversion equation is: $3,100 ÷ [2,080 + (1.5 x 832)] = $3,100 ÷ [2,080 + 1,248] = $3,100 ÷ 3,328 = $0.9315. *Id.* Thus, the annual-based equation produces an hourly rate of $0.9315 based on a divisor of 3,328. The $3,100 annual supplement amount accordingly equals $1,937.52 for 2,080 straight-time hours [$0.9315 x 2,080 = $1937.52] plus $1,162.51 for 832 scheduled overtime hours [($0.9315 x 1.5) x 832 = $1162.51]. In addition, the supplement increases the unscheduled overtime liability of local governments by $1.3973 per hour [$0.9315 x 1.5] on top of the normal overtime wages paid to firefighters by local governments. *Id.*

For approximately twenty-five years, local governments followed either the weekly or annual overtime calculation methodologies devised by the Labor Cabinet and

deemed "proper," and instructed to be followed, by the Fire Commission. In fact, the annual-based hourly rate conversion equation dates back to at least 1984. *See* 7/17/00 Overtime Memo [ROA p. 786]. The Labor Cabinet, however, jettisoned this longstanding overtime methodology as a result of *Hasken*.

(2) The overtime calculation methodology gleaned by the Labor Cabinet from *Hasken* and followed post-*Hasken*.

Before delving into the Labor Cabinet's post-*Hasken* overtime calculation methodology, Appellants must first address the *Hasken* decision. The *Hasken* case arose from administrative complaints filed with the Labor Cabinet against the City of Louisville. *See Kurtsinger v. City of Louisville*, Labor Cabinet Administrative Action No. 01- LABC-0419, at p. 5 ¶ 4(a) (Findings of Fact, Conclusions of Law, and Recommended Order issued May 29, 2002) (hereinafter "H.O.'s Recom. Ord.") [ROA p. 818].[9] The complaints involved numerous elements of pay for firefighters, including the state incentive supplement. *Id.* at p. 5 ¶ 2 [ROA p. 818]. At issue in the complaints was whether Louisville was calculating and paying overtime on each of the various elements of pay to non-exempt firefighters in accordance with KRS Chapter 337 and the terms of Louisville's collective bargaining agreement ("CBA") with its firefighters. *Id.* at pp. 5, 8 & 12-14 ¶¶ 2, 5-7 & ¶¶5-14 [ROA pp. 818, 821, 825-827]. The CBA specifically addressed the various other elements of pay, but did not address the state incentive supplement. *See Michael J. Kurtsinger, et al. & Michael Hasken, et al. v. City of*

[9] There was a "Kurtsinger" complaint which was heard in administrative hearings along with a "Hasken" complaint, and in the later reported decision from the Court of Appeals, the case is styled with "Hasken" as the first-named party. *See Hasken,* 265 S.W.3d at 215. For ease of reference, therefore, the Louisville firefighter case is referred to herein as the *Hasken* case in accord with the first name that appears in the published decision. A copy of the Hearing Officer's Recommended Order and a copy of the decision on review by the Jefferson Circuit Court are attached to the Appendix as Tabs 3 and 4.

Louisville, Nos. 01-CI-000983, 02-CI-0079291, 02-CI-007323, at p. 18 (Jefferson Circuit Court, Opinion and Order issued Sept. 10, 2004)(hereafter "Jeff. Cir. Ct. Opin. & Ord.") ("State Incentive Pay is the only one of the five pay elements at issue ... which does not find its origins in an agreement") [ROA p. 855]; *Hasken*, 265 S.W.3d at 220 (noting that the state incentive pay was divided into installments "by statute instead of by contract").

During the administrative hearing, the Labor Cabinet's annual-based overtime conversion methodology, which used the 3,328 divisor, was mentioned to the Hearing Officer, but the Cabinet offered no "legal basis for this enforcement policy." H.O.'s Recom. Ord. at p. 10 ¶ 10 [ROA p. 823]. Indeed, the Cabinet investigator took the initial position in "tentative findings" that a different annual divisor of 2,912 should be used instead of 3,328. *See* Jeff. Cir. Ct. Opin. & Ord., pp. 5-6 [ROA pp. 842-43]. Moreover, the City of Louisville withdrew any objection to the "tentative findings" and thereby conceded, without litigating, whether any justification existed for the methodology it had been following. *See id.* at p. 6 [ROA p. 843]. Thus, neither the Labor Cabinet nor Louisville made any effort to show the state incentive Fund program's historical context; the legislature's intent in crafting the supplement to be an "addition" to and on top of "regular salary"; the Fire Commission's statutorily granted role in structuring and overseeing the incentive program via agreements with local governments; or the Fire Commission's original implementing regulations that construed the supplement to include both straight-time and scheduled overtime compensation. Because the Labor Cabinet never introduced any of these, and because Louisville failed to "presen[t] evidence to the contrary" as to the parties' intent under the CBA, the Hearing Officer not surprisingly rejected the 3,328 annual divisor. H.O. Recom. Ord., at pp. 10-11 ¶¶ 10 &

12 [ROA pp. 823-24]; *see also id.* at p. 17 ¶ 21 ("The Agency Respondent failed to put forth any basis to justify its enforcement practice.") [ROA p. 830].

Based on the average number of straight-time and scheduled overtime hours worked each year by firefighters, the Labor Cabinet in its Final Order in *Hasken* took the position that the divisor should track firefighters' regularly scheduled weekly hours of 48 or 72 (which annualized approximates 2,912), and that this figure was the mathematical divisor to use in converting all elements of pay into an hourly rate for overtime liability. Jeff. Cir. Ct. Opin. & Ord., at p. 8 [ROA p. 845]; *see also id.* at p. 6 (explaining 48/72 annualized to 2,912) [ROA p. 843]; *Hasken*, 265 S.W.3d at 218. The Hearing Officer, however, had earlier rejected the 2,912 divisor based on the terms of the CBA, which required overtime for all hours worked in excess of 40 per week, and found that the parties had intended the other elements of pay to cover only 40 hours per week.[10] H.O. Recom. Ord., at p. 14 ¶ 14 [ROA p. 827]. Therefore, the Hearing Officer applied a 2,080 divisor to calculate overtime liability. *Id.*

On review of the Labor Cabinet's Final Order, both the Jefferson Circuit Court and the Court of Appeals upheld the Hearing Officer's analysis and determinations:

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[10] In the *Hasken* case, the state incentive supplement was initially analyzed in the procedural context of an administrative hearing through the factual and legal lens of the CBA and KRS Chapter 337. Thus, in subsequent court review, the supplement was subjected to restricted judicial review as to whether "substantial evidence" supported the administrative fact findings and whether the legal conclusions were "arbitrary" or "capricious." Given this procedural, factual, and legal context of *Hasken*, its precedential value is limited, especially since no party attempted to delve into the historical context, design, and meaning of the provisions of KRS 95A.200 *et seq.*. Franklin Circuit Court Judge Wingate recognized these distinctions when he opined: "The Court neither affirms nor denies that [*Hasken*] is dispositive as to whether state training incentive funds are to be considered wages under KRS Chapter 337. Because the decision took place within the context of a collective bargaining agreement, it may be distinguishable. Moreover, this Court has the benefit of Legislative guidance that was not available to the *Hasken's* Court." *Madison County*, No. 09-CI-1940, at p. 10 n. 12 [ROA at p. 888].

> [T]he Hearing officer...examined the CBA and the parties' prior practices. We believe this is a valid and accurate source to determine the parties' intent. This led the Hearing Officer, the circuit court, and now this Court, to the reasonable conclusion that the parties intended to use the additional elements of pay as compensation for a regular forty-hour work week.

Hasken, 265 S.W.3d at 221-22. The Court of Appeals' decision, in evaluating whether to apply a 2,912 or 2,080 divisor, never even mentioned the 3,328 divisor specifically developed and historically applied to the incentive supplement. *See* 265 S.W.3d at 215.

After *Hasken* became final, following denial of discretionary review in October 2008, the Labor Cabinet began vigorously pursuing local governments across the entire Commonwealth for the payment of back overtime wages stemming from the incentive supplement. The Labor Cabinet's interpretation and application of *Hasken* has been categorical: all local governments must pay back-overtime as if the incentive supplement had been added ***solely*** to straight-time compensation – *i.e.*, applied ***only*** to the first 40 hours of a firefighter's workweek, or 2,080 hours annually. This post-*Hasken* overtime methodology has two effects. First, the Cabinet is using 2,080 annual straight-time hours as the exclusive "divisor" to convert the $3,100 annual incentive supplement into an hourly rate. Compared to the former 3,328 annual divisor (or the 52 and 88 weekly-based divisors), the new 2,080 annual divisor (or its 40-hour weekly equivalent) increases the supplement's hourly rate and thereby also increases how much unscheduled overtime liability local governments owe on the supplement. Second, attributing the supplement only to straight-time compensation effectively requires local governments to pay scheduled overtime liability (in addition to unscheduled overtime) on the supplement.

This dual effect – increasing the supplement's overtime rate and imposing scheduled overtime liability on local governments on the incentive funds – causes

enormous, uncontemplated overtime liability for Appellants. The post-*Hasken* methodology adds $1.49 onto each firefighter's straight-time hourly compensation [$3,100 ÷ 2,080 = $1.49], which equals an extra $2.24 per scheduled ***and*** unscheduled overtime hour [$1.49 x 1.5 = $2.24]. *See* 12/19/09 Overtime Memo [ROA p. 220]. Under the pre-*Hasken* overtime methodology, local governments only had to pay unscheduled overtime on the incentive supplement at rates ranging from $1.0163 to $1.7198 depending upon whether it was a 48 or 72 hour workweek. The extra scheduled overtime liability and the higher overtime rate (for unscheduled overtime) produces staggering back overtime liability when considering the amount of overtime hours regularly worked by firefighters, the number of firefighters employed, and the length of the statute of limitations for overtime liability (5 years).

Indeed, as of the hearing date on summary judgment in the court below, the Labor Cabinet demanded the following sums in back overtime from the following Appellants:

$308,370.18 from City of Florence [ROA pp. 362-367];

$275,670.88 from the City of Glasgow [ROA pp. 372-377];

$335,938.41 from the City of Somerset [ROA pp. 382-387];

$177,018.79 from the City of Danville [ROA pp. 492-497];

$377,946.32 from the City of Georgetown [ROA pp. 603-605];

$169,926.58 from Madison County [ROA pp. 606-607]; and

$433,107.89 from the City of Richmond [ROA pp. 608-611].

This totals over $2,000,000, and the Labor Cabinet, on that date, had not yet issued tentative findings against the rest of the Appellants. Also, Appellants' exposure on the above

amounts must be "grossed up" by approximately one-third to account for the retirement contributions that Appellants owe on any back overtime wages paid to firefighters.[11]

The Labor Cabinet's post-*Hasken* pursuit of Appellants for increased overtime liability on the incentive supplement has upset long settled expectations and undermined the intent of the legislature. In setting up the incentive Fund program in KRS Chapter 95A, the legislature's clear intent was to "offer" and "fund" a monetary supplement for firefighters at minimal expense to local governments. *See, e.g.,* KRS 95A.200 (1980) [ROA p. 653]; KRS 95A.220 (1980) [ROA p. 653]. Indeed, the statutory structure of the program even reveals that local governments were to be held harmless from having to pay additional retirement contributions on the state-supplied incentive funds. KRS 95A.250; *see also* KRS 95A.250 (1988) [ROA p. 259]. This "carrot" of minimal expense induced local governments to allow their firefighters to participate in the program and thereby fulfill the state's desire to have a better trained, "professional" firefighting force.

Yet, the overtime methodology now being enforced post-*Hasken* has been estimated to cost local governments up to $2,522 per firefighter just to distribute the state's $3,100 incentive supplement to each firefighter. *See* 2/11/09 Senate State and Local Government Committee Meeting on SB 46, at p. 7 [ROA p. 289]. What was formerly a "carrot" for local governments morphed into a huge, budget-busting "stick." In March of 2009, the General Assembly recognized this untoward turn of events in the wake of *Hasken* and its potential to cause a mass exodus of local governments from continuing participation in the program; as a result, it enacted Senate Bill 46, on an

[11] The state reimburses local governments for the required employer's pension contribution on the fixed supplement amount. KRS 95A.250; *see also* KRS 95A.250 (1988) [ROA p. 259]. However, it is unclear whether the state will reimburse local governments for pension contributions on the increased overtime costs of the supplement.

emergency effectiveness basis, to rectify the interplay between KRS Chapters 95A and 337, and effectively reverse *Hasken's* interpretation of the impact of the state incentive supplement on firefighter overtime. *Compare* SB 46's amendments to KRS 95A.250(2) (2009) & KRS 337.010(1)(c)(2) (2009) *with* the pre-*Hasken* version of those same statutes. Consistent with the incentive Fund program's original intent, interpretation, and implementation, the purpose behind this recent statutory enactment was to restore the historical minimal cost "carrot" to local governments to induce them to continue in the program by preventing them from having to pay increased scheduled overtime as a result of the state-supplied and state-controlled supplement.[12]

Although the statutory amendments eliminated prospective overtime liability for local governments, Appellants filed this lawsuit to prevent the Labor Cabinet from pursuing administrative actions against them to collect back overtime wages on behalf of firefighters due to Appellants' immunity or due to the Labor Cabinet's lack of jurisdiction to use a post-*Hasken* methodology that contravenes KRS Chapter 95A. Appellants' lawsuit presents issues of first impression and is not controlled by the

[12] Since the state, through the General Assembly, controls and fixes the amount of the incentive supplement (currently $3,100, *see also* note 7, *supra*), an additional untoward effect of the Labor Cabinet's post-*Hasken* enforcement was that local governments lost control of how much overtime liability their annual budgets might have to absorb. State law provides for the 24-on/48-off work schedule for firefighters; so, local governments annually have to plan in their budgets for scheduled overtime liability. However, after *Hasken*, the Cabinet would only apply the incentive supplement toward straight-time and not scheduled overtime, thereby depriving local governments from controlling a component of their planned overtime liability – *i.e.*, control over a portion of their firefighters' base rates of pay upon which overtime is calculated. If the General Assembly were to increase the supplement again (as it has done several times in the past), local governments could not properly budget for their scheduled overtime liability. An inability to properly budget for liabilities is intolerable and would have caused many local governments to exit the incentive Fund program if the General Assembly had not, in SB 46, legislatively fixed this post-*Hasken* potential for budget-busting nightmare.

decision in *Hasken*. *Hasken* never considered whether local governments could have immunity for carrying out the state firefighter incentive Fund program as it was devised by the General Assembly and implemented by the Fire Commission, and *Hasken* never considered whether KRS Chapter 95A must govern over KRS Chapter 337 in any determination of overtime liability based on the incentive supplement.

C. THE PROCEDURAL HISTORY OF THIS LAWSUIT.

The Labor Cabinet brought administrative actions against all of the Appellants following *Hasken*, and at this time, the proceedings vary from the investigatory stage to post-hearing briefing. In all of the actions, the Labor Cabinet is pursing Appellants for back overtime wages on behalf of the firefighters. For the Labor Cabinet to "collect" back overtime wages on an "employee's behalf," state law requires the Cabinet to obtain an "assignment of such wage claim in trust for the assigning employee." KRS 337.385(2); *Parts Depot, Inc. v. Beiswenger*, 170 S.W.3d 354, 361-62 (Ky. 2005). As a result of the assignment process required by KRS 337.385(2), the Labor Cabinet-assignee effectively "stands in the shoes" of the firefighters-assignors and is subject to the same defenses that can be asserted by Appellants against the firefighters. *Whayne Supply Co. v. Morgan Const. Co.*, 440 S.W.2d 779, 782-83 (Ky. 1969).

In November 2009, Appellants filed this separate declaratory judgment action in Franklin Circuit Court to enjoin the Labor Cabinet based on alternative forms of immunity or lack of jurisdiction. The immunity and jurisdictional issues are questions of law not dependent upon disputed facts. Appellants accordingly filed this action directly in circuit court instead of litigating the legal issues administratively because the outcome of the legal issues may render continuation of the administrative process futile or

arbitrary. *Bd. of Trustees of Ky. Ret. Sys. v. Bd. of Claims*, 251 S.W.3d 334, 339 (Ky. App. 2008)(citing *Ky. Ret. Sys. v. Lewis*, 163 S.W.3d 1, 3 (Ky. 2005) and *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456 (Ky. 2004)).

The parties briefed and argued the immunity and jurisdictional issues before the trial court on summary judgment. On April 23, 2010, Judge Wingate entered his Opinion and Order denying Appellants' Motion for Summary Judgment and granting Appellees' Motion for Partial Summary Judgment. The Order was final and appealable. Appellants timely appealed his ruling to the Court of Appeals, and moved to transfer to this Court, which was granted. The Franklin Circuit Court's ruling should now be reversed.

ARGUMENT

ISSUES RAISED FOR REVIEW; SUMMARY OF THE ARGUMENT

Appellants' brief raises four issues for review. The first is whether the ten city-Appellants are entitled to sovereign immunity as political subdivisions of the state. The city-Appellants demonstrate that Kentucky's constitutional "home rule" amendment elevates cities to "political subdivision" status with counties, and therefore, cities should enjoy sovereign immunity commensurate with counties. Cities have not enjoyed immunity since *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964) and its progeny, including *Gas Service Co., Inc. v. City of London*, 687 S.W.2d 144 (Ky. 1985), but a near majority of the Court has expressed a willingness to consider limitations on, or even to overrule, the *Haney* decision. *See Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790, 817 (Ky. 2009)(Minton, C.J., concurring in result only and joined by Cunningham and Schroder, J.J.). The Court should reanalyze *Haney* and discontinue denying cities from sharing in state sovereign immunity or its

derivative governmental immunity. The trial court's Opinion noted this issue, and Appellants present it for review. *Madison County*, No. 09-CI-1940, at p. 7 n. 9 [ROA p. 885].

The second issue raised for review is whether Appellants are entitled to governmental immunity as state "agents." This "agent" or agency immunity issue was raised in Appellants' Petition [ROA pp. 12-13], Amended Petition [ROA pp. 74-76], and Memo in Support of Summary Judgment [ROA pp. 142-49], and was the focus of the trial court's Opinion [ROA pp. 884-91]. Appellants functioned as state "agents" in their capacity of carrying out the state incentive Fund program under the statutory, regulatory, and contractual regime of KRS Chapter 95A. The allocation and calculation of overtime on the incentive funds was dictated by how the state structured and implemented the program. Appellants accordingly paid overtime on the incentive funds as directed and required by the state. Under these circumstances, suing Appellants for additional overtime liability is tantamount to suing the state for how it created, implemented, and regulated the incentive Fund program. Appellants are not at fault and should not be liable for additional overtime on the incentive funds. This agency immunity issue represents Appellants' primary immunity argument; however, Appellants' brief argues this primary issue second because the first issue is broader and joined only by the ten city-Appellants while the second issue applies a narrower immunity based on agency.

The third issue raised for review is whether Appellants are alternatively entitled to qualified official immunity as state agents. This issue was raised in Appellants' Petition [ROA pp. 13-14], Amended Petition [ROA p. 76], and Memo in Support of Summary Judgment [ROA p. 149 n. 2]. Appellants had discretion whether to participate in the incentive Fund program and whether to incur overtime liability on the incentive funds.

Moreover, Appellants paid overtime on the incentive funds in good faith because the amount of Appellants' overtime liability was not clearly established. Appellants also paid overtime in the manner authorized by the Fire Commission. Accordingly, Appellants satisfy all of the elements for qualified official immunity.

The fourth and final issue raised for review is whether jurisdictional limitations bar the Labor Cabinet from applying the overtime law of KRS Chapter 337 inconsistently with how overtime liability on the incentive funds was required to be allocated and calculated under KRS Chapter 95A. This jurisdictional issue was raised in Appellants' Petition [ROA pp. 14-16], Amended Petition [ROA pp. 76-78], and Memo in Support of Summary Judgment [ROA pp. 149-156] and was addressed in the trial court's Opinion [ROA pp. 891-892]. Appellants show that the more specific and later enacted provisions of KRS Chapter 95A govern over the more general provisions of KRS Chapter 337 when determining overtime liability on the incentive funds.

All of the immunity and jurisdictional issues raised in this appeal are questions of law subject to *de novo* review. *Appalachian Reg'l Healthcare, Inc. v. Coleman,* 239 S.W.3d 49, 53-54 (Ky. 2007); *Rowan County v. Sloas,* 201 S.W.3d 469, 475 (Ky. 2006).

A. THE COMMONWEALTH'S SOVEREIGN IMMUNITY SHOULD EXTEND TO THOSE APPELLANTS WHO ARE CITIES AS "POLITICAL SUBDIVISIONS" OF THE STATE.

Sovereign immunity for the Commonwealth "has long been the rule in Kentucky." *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91, 94 (Ky. 2009). The Commonwealth's sovereign immunity should extend to ten of the Appellants, which are cities, despite the obsolete concept that cities do not enjoy such immunity. In *Haney* and *City of London*, this Court severely curtailed, if not effectively

abolished, municipal immunity. *Yanero v. Davis*, 65 S.W.3d 510, 519 (Ky. 2001). The result of *Haney* and its progeny, however, has been "inequality" between counties and cities. *See City of London*, 687 S.W.2d at 151 (Wintersheimer, J., concurring); *see also Caneyville*, 286 S.W.3d at 817 (Minton, C.J., concurring in result only). Both counties and cities carry out many of the same types of governmental functions on a local level, yet counties receive sovereign immunity while cities do not.

County sovereign immunity has been "justified" because counties "are local governments authorized and recognized as such by the Constitution." *Yanero*, 65 S.W.3d at 526 (citing Ky. Const. §§ 63, 144). Based on this "constitutional foundation," counties are deemed to be "political subdivisions" of the state. *Id.* at 526. In contrast to counties, *Haney* and *City of London* found "no constitutional basis for municipal immunity." *City of London*, 687 S.W.2d at 146. The people of the Commonwealth, however, amended the state Constitution following *Haney* and *City of London* rendering those decisions and the distinctions between counties and cities obsolete.

In November 1994, the voters ratified Section 156b, which extends constitutionally recognized "home rule" to cities. "Home rule" embodies the principle of local self-governance. Section 156b accordingly elevates cities to "political subdivision" status along with counties because cities are now "local governments authorized and recognized as such by the Constitution." In fact, city and county "home rule" operate consistently because the powers of both are strictly limited to whatever authority has been conferred upon them by the state legislature. *E.g., Hogge v. Rowan Co. Fiscal Court,* 313 Ky. 387, 231 S.W.2d 8 (Ky. 1950); *see also, C & H Entertainment Inc. v. Jefferson Co. Fiscal Court*, 169 F.3d 1023, 1025 (6th Cir. 1999) ("Under Kentucky law,

the fiscal court of a county possesses only such powers as are conferred upon it by statute."); Note by Larry C. Deener, "County Government – Home Rule – The General Assembly Must Grant Governmental Powers to Fiscal Courts 'With the Precision of a Rifle Shot and not with the Casualness of a Shotgun Blast'—*Fiscal Court v. City of Louisville,* 559 S.W.2d 478 (Ky. 1977)," 5 No. Ky. L. Rev. 107, 115 (1978) ("Since there are no general constitutional powers of counties and cities, any powers these [political] subdivisions possess must be given them by the General Assembly"). As a result of the "home rule" constitutional amendments in 1994, any previous distinctions between counties and cities are outmoded. Thus, cities deserve to enjoy the Commonwealth's sovereign immunity commensurate with counties.

Finally, extending sovereign immunity to cities based on Kentucky's constitutional "home rule" amendment would not be unique to the Commonwealth. Other jurisdictions similarly extend some form of constitutional or common law immunity to "home rule" cities. *See, e.g., City of Galveston v. State of Texas,* 217 S.W.3d 466, 469 (Tex. 2007)("Political subdivisions in Texas have long enjoyed immunity...when performing governmental functions.... While that immunity can be waived, we have consistently deferred to the Legislature to do so [and] mandated that no statute should be construed to waive immunity absent 'clear and unambiguous language.' ... This high standard is especially true for home-rule cities.... Such cities derive their powers from the Texas Constitution [and t]hey have 'all the powers of the state not inconsistent with the Constitution, the general laws, or the city's charter.'"); *see also Gardner v. McDowell,* 451 P.2d 501, 504-505 (Kan. 1969)(In refusing to abrogate immunity because of home-rule, it was held: "'The state is the fountainhead of govern-

mental immunity. The immunity of subordinate branches of the government stems from the state. As long as a subordinate branch...performs governmental and political functions set up and imposed by the state, then such branch partakes of the immunity which inheres in state sovereignty.'... The Home Rule Amendment does not change [or abrogate] the doctrine of governmental immunity of cities...in...Kansas."); *District of Columbia v. Owens-Corning Fiberglas Corp., et al.*, 572 A.2d 394, 402-404 (D.C. Ct. App. 1990)(D.C. municipal government granted municipal/governmental immunity, in part, because of home-rule powers granted by Congress) (Copies of cases attached as Tabs 5 to 7).

B. THE DOCTRINE OF GOVERNMENTAL IMMUNITY SHOULD EXTEND TO ALL OF THE APPELLANTS BASED UPON THEIR AGENCY RELATIONSIHP WITH THE STATE.

In addition to the ten city-Appellants who assert sovereign immunity, all of the Appellants claim to be state "agents" and assert governmental immunity. The agent or agency immunity analysis has five steps: (1) the General Assembly, through the Board of Claims Act, has expressed its intent to preserve the immunity of the Commonwealth and its "agents" to the fullest extent of the law; (2) the Appellants, in their function and capacity of carrying out the state incentive Fund program under the direction and control of the Fire Commission, are state "agents"; (3) the application of immunity to Appellants when acting in their function and capacity as state "agents" is constitutional; (4) the agent immunity of Appellants precludes additional overtime liability relating to state incentive funds because Appellants paid overtime as required and directed by the state pursuant to KRS Chapter 95A; and (5) the Labor Cabinet's post-*Hasken* overtime methodology increases the overtime liability of Appellants and is therefore barred by immunity.

(1) The General Assembly, through the Board of Claims Act, has expressed its intent to preserve the immunity of the Commonwealth and its "agents" to the fullest extent of the law.

Sovereign immunity is an "inherent attribute of the state." *Yanero*, 65 S.W.3d at 523. Only the General Assembly has constitutional "power to decide when and how sovereign immunity may be waived." *Dept. of Highways v. Sexton*, 256 S.W.3d 29, 32 (Ky. 2008). In the Board of Claims Act, the General Assembly declared "its intention to retain the inherent immunities of the Commonwealth...except where specifically waived by...statute." *Grayson County Bd. of Educ. v. Casey*, 157 S.W.3d 201, 204-05 (Ky. 2005). The Act preserves the immunity of the Commonwealth and its "agents":

> It is further the intention of the General Assembly to otherwise expressly preserve the sovereign immunity of the Commonwealth, any of its cabinets, departments, bureaus or agencies or any of its officers, ***agents*** or employees while acting in the scope of their employment by the Commonwealth or any of its cabinets, departments, bureaus or agencies in all other situations except where sovereign immunity is specifically and expressly waived as set forth by statute.

KRS 44.072 (emphasis added). The General Assembly further reinforces its intent to preserve the immunity of state "agents" throughout KRS 44.073(11)-(13). KRS 44.072 and 44.073 illustrate the General Assembly's clear intent to preserve the immunity of the Commonwealth and its "agents" to the broadest extent permissible under law.

(2) The Appellants acted as state "agents" in their function and capacity of carrying out the state incentive Fund program under the direction and control of the Fire Commission.

In carrying out the state incentive Fund program, Appellants functioned as state "agents" consistent with the Board of Claims Act. The analysis in *Williams v. Kentucky Dep't of Educ.*, 113 S.W.3d 145 (Ky. 2003), provides a proper framework for discerning when local entities may be deemed state "agents" under the Board of Claims Act.

In *Williams*, the state Department of Education ("DOE") was sued in the Board of Claims based on the negligence of a local school board and its employees. The Court ruled that the DOE could be held vicariously liable for the negligence of its "agents" under KRS 44.072 and 44.073, and the Court further determined that local school boards were "agents" of the DOE. In evaluating whether an agency relationship existed, the Court examined the "structure of the statutory scheme" between the DOE and local school boards. The Court found:

> From the language and structure of this statutory scheme, we conclude that the legislative intent was to vest the overall management, operation, and control of the common schools in the DOE, with the local boards of education functioning as agents of the DOE created for the purpose of implementing the DOE's policies and directives at the local level.... Thus viewed, the statutory relationship between the DOE and the local board was more akin to that of principal-agent than to that of co-agents.

Id. at 153-54. The principal-agent relationship in *Williams* mirrors the relationship between the Fire Commission and Appellants.

The Fire Commission similarly "micromanages" the state incentive Fund program. Pursuant to state law, the Fire Commission administers the incentive program; determines what education and training firefighters must obtain to qualify for receipt of the incentive funds; issues rules, regulations, and directives to local governments and to firefighters pertaining to the program; and withholds or terminates payments if a local government does not follow its directions. KRS 95A.240. In addition to these regulatory requirements and oversight, the Fire Commission has historically required contractual agreements, applications, and certifications from local governments, all in the nature of contract. *See, e.g.*, Form KPF-1b Agreements [ROA pp. 676 and 688]; Form KPF-1 Applications [ROA pp. 194-200]; Form KPF 3 Quarterly Reports and Certifications

[ROA p. 201-02]. Therefore, Appellants function in a wholly subordinate relationship to the Fire Commission governed not only by statute but also by contract.

Furthermore, the Fire Commission controls the state incentive funds from beginning to end. Before the state treasury issues any incentive funds, the Fire Commission must certify that local governments "have complied with the provisions of KRS 95A.200 to 95A.300." KRS 95A.270. Local governments in turn have to certify that they are in compliance. *See* Form KPF-1 Renewal Applications [ROA pp. 690-709]; Form KPF-3 Quarterly Reports [ROA pp. 710-23]. When local governments receive the funds, the statutes and regulations mandate exactly how much, when, and how the monies are to be disbursed to firefighters. KRS 95A.250(1)(a) and (2)(a). The incentive supplement passes through local governments, but it retains its state-fund character all the way into the hands of the firefighters with the state-fund origin required to be noted upon distribution to firefighters. *See, e.g.,* 739 KAR 2:020 sec. 4(3); ("The local unit shall provide each firefighter with a check stub or separate receipt upon which the gross amount of incentive funds paid to the firefighter shall be identified."); *see also* 815 KAR 45:035 sec. 8(2) (1980) [ROA p. 661]. The statutes and regulations in KRS Chapter 95A mandate precisely how the state incentive funds are to be used. KRS 95A.260. Moreover, they are extraordinarily specific on how these funds are to be handled, and the Fire Commission enforces these requirements through audits. *See, e.g.*, 815 KAR 45:035 sec. 4 & sec. 10 (1980) [ROA pp. 660-61]; *see also* 739 KAR 2:020 sec. 3 & sec. 5.

Based on these undisputed facts, the trial court observed that "the Commonwealth intended to retain significant, if not absolute, control over the payment of the state incentive funds at issue." *Madison County*, No. 09-CI-1940, at p. 9 [ROA p. 887]. The

circumstances of this case compel a conclusion similar to *Williams*: when reviewing the "structure of th[e] statutory scheme" between the Fire Commission and local governments, it is clear that the "legislative intent was to vest the overall management, operation, and control" of the state incentive Fund program in the Fire Commission with local governments "functioning as agents" of the Fire Commission to carry out the state incentive program "at the local level." *Williams*, 113 S.W.3d at 153-54. Consistent with *Williams* and general principles of agency law, Appellants were state "agents" while carrying out the state incentive fund program under the direction and control of the Fire Commission. *See, e.g.*, Restatement (3d) of Agency §1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.").

(3) The application of immunity to Appellants when acting in their function and capacity as state "agents" is constitutional.

The General Assembly in the Board of Claims Act declared its intent to preserve the immunity of the Commonwealth and its "agents" to the fullest extent of the law, and Appellants functioned as state "agents" consistent with the Act, but whether immunity extends to them is subject to constitutional and jurisprudential limits set by this Court. *Kentucky Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327, 329 (Ky. 1990). Under the Court's jurisprudence, the Commonwealth enjoys sovereign immunity while its "agencies" and "agents" receive governmental immunity. *Yanero*, 65 S.W.3d at 519. *Caneyville* explains: "Governmental immunity is...a policy-derived offshoot of sovereign immunity and is premised upon protecting government entities from civil liability.... The

constitutional and policy justifications for the doctrine are rooted in notions of separation of power, the principle being that courts should not be in the position to impose civil liability on government entities engaged in official functions, as this would disrupt the business of the government governing." *Caneyville*, 286 S.W.3d at 801.

In describing the outer constitutional limit of sovereign immunity, the Court, in *Berns*, established an integral state government function standard. *Berns*, 801 S.W.2d at 332. To apply the standard, *Berns* formulated a two-factor test based upon whether the agency was (1) under the direction and control of central state government and (2) supported by state funds. *Id.* at 331. *Berns'* two-factor test has evolved over time, and was applied most recently in *Caneyville* and *Comair, Inc. v. Lex.-Fay. Urban Co. Airport Corp.*, 295 S.W.3d 91 (Ky. 2009). *Caneyville* borrowed the factorial considerations used by federal courts under the Eleventh Amendment to the United States Constitution, which also embodies a sovereign immunity principle. *Caneyville*, 286 S.W.3d at 803-05. *Comair* examined the agency's "parent entity" in conjunction with applying the integral state government function standard. *Comair*, 295 S.W.3d at 99.

Although the tests and factors have varied, the integral state government function standard has survived and emerges from this Court's post-*Berns* jurisprudence as the definitive outer constitutional limit of immunity. *Id.* ("The more important aspect of *Berns* is the focus on whether the entity exercises a governmental function, which that decision explains means a "function integral to state government."); *Caneyville*, 286 S.W.3d at 802 ("The real thrust of [*Berns*] is whether the entity carries out an integral state function."); *see also, Breathitt Co. Bd. of Education v. Prater,* 292 S.W.3d 883, 887 (Ky. 2009)("[G]overnmental immunity shields state agencies from liability from damages

only for those acts which constitute [integral] governmental functions."). In this case, under any set of factors, Appellants meet the integral state government function standard in their function and capacity as agents carrying out the state incentive Fund program.

First, the incentive Fund program is fully controlled and funded by the state, which meets the original two-factor test from *Berns*. Through the statutory provisions of, and regulations and contracts under KRS Chapter 95A, the state engaged Appellants to participate in the state incentive program, and Appellants agreed to do so, thereby subjugating themselves, for purposes of the program, to the complete direction and control of the Fire Commission. Appellants have previously detailed the Fire Commission's extensive control over the incentive program and Appellants' subordinate agency relationship with the state in carrying out the program locally. The level of state control cannot be disputed. Judge Wingate found the state exercises "significant, if not absolute, control" over the program. *Madison County*, No. 09-CI-1940, at p. 9 [ROA p. 887]. In addition, the incentive program involves only state funds. Local governments receive these state funds from the Fire Commission, but must pass along every dollar of them to firefighters. In fact, the incentive supplement retains its state-fund character all the way into the hands of the firefighters. 739 KAR 2:020 sec. 4(3).

Second, when applying *Comair's* clarification of the two-factor test from *Berns*, the state emerges clearly as "parent[al] entity" of the incentive Fund program due to its state creation and control. Indeed, *Comair's* "parent entity" concept directly carries over into the principal-agent immunity analysis. In *Haney v. Monsky*, 311 S.W.3d 235 (Ky. 2010), this Court quoted from *Comair*: "'an entity's immunity status depends to some extent on the immunity status of the parent entity.'" *Id.* at 239 n. 5 (quoting *Comair*, 295

S.W.3d at 99). *Monsky* further noted: "An agent 'derives its immunity status through' the principal." *Id.* (quoting *Autry v. Western Kentucky University*, 219 S.W.3d 713, 719 (Ky. 2007)). Under the circumstances of this case, Appellants have demonstrated they are state "agents" based on *Williams* and general principles of agency law. Appellants accordingly derive immunity from the state when carrying out the incentive Fund program at the local level for and on behalf of their "principal," the Fire Commission.

Third, extending immunity to Appellants is consistent with the Court's broader factorial analysis applied in *Caneyville*. In that case, the Court recognized that firefighters "engage in an essential governmental function in providing for the safety and well-being of [the state's] citizens." *Caneyville*, 286 S.W.3d at 805. *Caneyville* accordingly held that fire departments "must be considered an agent of the sovereign." *Id.* *Caneyville* distilled the immunity analysis into three parts: "whether the entity being sued is the sovereign, its agency, or one who goes about the business of conducting the sovereign's work." *Id.* at 802. Appellants were "conducting the sovereign's work" and thus are entitled to immunity within the framework of *Caneyville*. When the General Assembly established the incentive Fund program, it declared its intent: to upgrade and strengthen "fire protection" and to provide "maximum protection and safety to the citizens" of the state. KRS 95A.200. Thus, the purpose behind the program aligns with *Caneyville* and the "essential governmental function" of firefighting. In their agency function and capacity of carrying out the firefighter training incentive Fund program for the state, Appellants are similarly entitled to the state's immunity under the Constitution.

The application of immunity to cities or other subordinate political entities of the state (such as Appellants), when acting as state "agents," can be traced back over 100

years. *See, e.g., Taylor v. City of Owensboro*, 98 Ky. 271, 32 S.W. 948, 949 (1895); *Twyman's Adm'r v. Bd. of Councilmen of Frankfort*, 117 Ky. 518, 78 S.W. 446, 447 (1904); *Smith's Adm'r v. Comm'r of Sewerage of Louisville*, 146 Ky. 562, 143 S.W. 3, 5 (Ky. 1912). Kentucky's highest court, in 1904, succinctly explained:

> ***So far as municipal corporations of any class, and however incorporated,***[13] ***exercise powers conferred upon them for . . . essentially public-purposes pertaining to the administration of general laws, made to enforce the general policy of the state—they should be deemed agencies of the state, and not subject to be sued*** for any act or omission occurring while in the exercise of such power, unless by statute the action be given. In reference to such matters ***they should stand as does the sovereignty*** whose agency they are—subject to be sued only when the state, by statute, declares that they may be.

Twyman's, 117 Ky. 518, 78 S.W. at 446-47 (emphasis added). *Twyman's* rationale is still valid. When *Haney v. City of Lexington,* 386 S.W.2d at 740-42, and its progeny, abrogated "municipal immunity," it was not intended to deny all forms of immunity to municipalities (or other subordinate entities to the state) if they carry out specific governmental functions required by the state. Indeed, *Haney's* abrogation was limited to "liability [for] ordinary torts," and not for the "exercise of legislative or judicial or quasi-legislative or quasi-judicial functions." 386 S.W.2d at 742. Thus, it is not contrary to *Haney* to recognize that sovereign or governmental immunity extends to Appellants as state "agencies" or "agents" when acting in a capacity of carrying out integral state government functions. In fact, *Caneyville* necessarily stands for this principle by extending immunity to the Caneyville Volunteer Fire Department, a municipal entity (or

[13] The phrase "however incorporated" would include all ten city-Appellants and the non-city Appellants, Madison County Fiscal Court and Central Campbell County Fire District.

perhaps another form of subordinate entity of the state)[14] that acts as a state agency carrying out the integral state function of fire protection. 286 S.W.3d at 802-05.

In addition to public agencies, the Court has extended a similar kind of agent immunity to private actors bound to carry out functions for the Commonwealth imposed by contract. Governmental contractors have long been held immune in Kentucky when they enter into contract with the state and appropriately follow the state's requirements in their contracts. *See, e.g., City of Louisville v. Padgett*, 457 S.W.2d 485, 488 & 490 (Ky. 1970); *Gilbert v. Murray Paving Co., Inc.*, 147 S.W.3d 736, 740-741 (Ky.App. 2003); *Hunt-Forbes Const. Co. v. Robinson*, 12 S.W.2d 303, 304 (Ky. 1928); *Edge v. Hook*, 303 S.W.2d 310, 311 (Ky. 1957); *Johnson, et al. v. Kentucky-Virginia Stone Co.*, 286 Ky. 1, 149 S.W.2d 496, 498 (Ky. 1941); *Bd. of Councilmen of City of Frankfort v. State Highway Comm'n*, 236 Ky. 253, 32 S.W.2d 1008, 1010 (Ky. 1931); *see also Fisher v. Elmo Greer & Sons, LLC,* 2009 WL 3161400 *6 - *8 (E.D. Ky. 2009) (applying Kentucky contractor cases) (Copy of case attached to Tab 8).

Furthermore, this agent immunity concept is not unique to Kentucky law, but is recognized in many jurisdictions as well as in federal courts. *See, e.g., Estate of Brown v. Mathy Construction Co.,* 756 N.W.2d 417, 420-21 (Wis. Ct. App. 2008)("governmental immunity extends 'to private parties who act under directives from state agencies'"); *Stoll v. Noel,* 694 So.2d 701, 703 (Fla. 1997) (contracting medical personnel can be immune agents of the state); *Toth v. England*, 809 N.E.2d 702, 709 (Ill. Ct. App. 2004)

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[14] Justice Abramson's concurrence in *Caneyville* noted that the legal status of the Caneyville Volunteer Fire Department "ha[d] been unchallenged," but was "more appropriately characterized as [an] agen[t] of the county." 286 S.W.3d at 817. "Viewed in that light or through the 'agent of the Commonwealth' status accorded it in KRS 75.070[,] it has sovereign immunity." *Id.*

(contracted agency's employee entitled to immunity); *Ex parte Tuscaloosa County*, 796 So.2d 1100, 1103-04 (Ala. 2000) (entity ordinarily not granted immunity but carrying out functions for the state may share in state's sovereign immunity) (Copies of cases attached to Tabs 9 to 12).

Under federal law, states enjoy Eleventh Amendment immunity and such immunity extends to state-created agencies or entities that satisfy the federal factorial test discussed in *Caneyville*, 286 S.W.3d at 803-04, citing *Blackburn v. Floyd Co. Bd. of Educ. By and Through Adams,* 749 F. Supp. 159, 161-62 (E.D. Ky. 1990) and quoting *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 302 (6th Cir. 1984). Municipal and county subdivisions of a state do not ordinarily receive Eleventh Amendment immunity, but they enjoy immunity when they carry out specific state-mandated or state-controlled functions. In that limited capacity, they are deemed "arms of the state" and entitled to share in the state's Eleventh Amendment immunity. *See, e.g., McMillian v. Monroe Co., Alabama,* 520 U.S. 781, 784-793 (1997); *Brotherton v. Cleveland*, 173 F.3d. 552, 566 (6th Cir. 1999)(quoting *Bethesda Lutheran Homes & Servs., Inc. v. Leean,* 154 F.3d 716, 718 (7th Cir. 1998)("When the municipality is acting under compulsion of state...law, it is the policy contained in...[state] statute..., rather than anything devised or adopted by the municipality, that is responsible for the injury," thus entitling the municipality to invoke Eleventh Amendment immunity))).

For the reasons stated, Appellants are state "agents" constitutionally entitled to immunity when carrying out the state firefighter training and education incentive Fund program under the direction and control of the Fire Commission. This agency immunity is well established in Kentucky law as well as in other state and federal jurisdictions.

(4) The agent immunity of Appellants precludes additional overtime liability relating to state incentive funds because Appellants paid overtime as required and directed by the state pursuant to KRS Chapter 95A.

The trial court below declined to extend agent immunity to Appellants because it determined that overtime liability under KRS Chapter 337 is "separate and independent" of Appellants' agency relationship with the state pursuant to KRS Chapter 95A. Respectfully, the trial court erred. Overtime liability on the incentive supplement was dictated by the supplement's statutory and regulatory structure in KRS Chapter 95A. When the supplement was created, the Fire Commission construed it to be inclusive of scheduled overtime. The Fire Commission's interpretation had the effect of allocating unscheduled overtime liability on incentive funds to local governments. Appellants accordingly distributed the incentive supplement, treating it as inclusive of scheduled overtime compensation on the incentive, and paid unscheduled overtime liability thereon consistent with the supplement's design and state's instructions. Under these circumstances, suing Appellants for additional overtime liability is tantamount to suing the state over how it created, construed, and implemented the incentive supplement. Appellants were state "agents" in carrying out the incentive Fund program and are entitled to immunity from additional overtime liability. The history of the incentive supplement's inclusion of scheduled overtime is explained below.

In 1980, when the General Assembly created the incentive supplement, firefighters were entitled to receive 15% of their "total annual compensation . . . in addition to [their] regular salary." KRS 95A.250 (1980) [ROA p. 654]. The exact supplement amount was unclear because the General Assembly failed to define either "total annual compensation" or "regular salary." The statutory terms could have

conceivably referred to base pay exclusive of overtime, or base pay and all regularly scheduled overtime, or base pay and all scheduled and unscheduled overtime. The Fire Commission filled in the gap by defining "total annual compensation" to mean "base pay, including longevity, ***plus scheduled overtime***." 815 KAR 45:035 sec. 1(12) (1980) [ROA p. 659]. Thus, the incentive supplement was deemed by the state to be more than a mere increase in "base pay"; it was contemporaneously construed to correspond to "base pay" ***and*** "scheduled overtime" compensation.

The Fire Commission interpreted and implemented the incentive supplement in KRS 95A.250 consistent with the statute's language. The legislature intended the supplement to be "in addition to . . . regular salary." KRS 95A.250 (1980) [ROA p. 654]. In the context of firefighters under KRS Chapter 95A, their "regular salary" includes "scheduled overtime" compensation. The incentive supplement was available specifically to members of fire departments or fire districts organized under KRS Chapters 95 and 75. KRS 95A.210(4) (1980) [ROA p. 653]. KRS Chapter 95 defines "salary" for such fire department members as "***any*** compensation received for services." KRS 95.010(1)(h) & (2)(i) (emphasis added). And the definition of "salary" in KRS Chapter 75 is virtually identical to KRS Chapter 95. KRS 75.100(8). Therefore, the term "salary," when applied to fire department members under KRS Chapters 95 and 75, and when modified by the term "regular" in KRS 95A.250, contemplates ***any*** regularly received compensation. Because of the 24-on/48-off work schedule of firefighters, non-exempt firefighters regularly receive scheduled overtime compensation and it must, therefore, be deemed part of their "regular salary" for purposes of KRS Chapter 95A.

Furthermore, the statutory term "regular salary" never changed from 1980, when the incentive supplement was created, until 2009. In 1982, the General Assembly fixed the incentive amount at $2,500[15] and deleted the "fifteen percent (15%) of each firefighter's total annual compensation" from the statute, but the supplement continued to be "in addition to . . . regular salary."[16] KRS 95A.250 (1982) [ROA p. 667]. The likely purpose behind the 1982 statutory amendment was to cap the state's exposure for payment of firefighter incentive funds; however, the amendments did not explicitly or implicitly change what the incentive funds were intended to cover nor what they "supplemented." Rather, the incentive supplement continued to be "in addition to . . . regular salary," which for non-exempt firefighters, includes their "scheduled overtime" compensation. The General Assembly never changed the statutory term, "regular salary," within the text of KRS 95A.250, until the most recent statutory amendments in Senate Bill 46, enacted in March 2009 on an emergency basis, in the wake of and response to *Labor Cabinet v. Hasken*, 265 S.W.3d 215 (Ky. App. 2007).

The Fire Commission's interpretation of the incentive supplement effectively determined how overtime liability was to be allocated and calculated. Because the Fire Commission construed the supplement to be inclusive of scheduled overtime, scheduled overtime liability was understood to be allocated to and compensated by the state. Therefore, all scheduled overtime liability on the supplement should have been satisfied

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[15] As mentioned in note 7, *supra*, the amount of the incentive supplement has changed over the years. In 1982, it was fixed at a flat $2500 and was increased in 1998, 1999 and 2000 when it reached the level of $3100 and has remained there to date.

[16] The term "total annual compensation" was not deleted from the regulations until 1990. According to the regulatory impact analysis [ROA pp. 172 and 184], the 1990 regulatory changes were not intended to have any fiscal impact and were never noticed to local governments as having any fiscal impact as required by KRS 13A.250.

when local governments distributed the incentive funds to firefighters. Unscheduled overtime liability was not expressly incorporated into the supplement. As a result, KRS Chapter 95A necessarily allocated all unscheduled overtime liability to local governments. In accordance with this distinction between scheduled and unscheduled overtime, the Fire Commission expressly instructed local governments to pay only unscheduled overtime on the incentive funds.

In addition, the hourly rate used to calculate the amount of unscheduled overtime liability was also the result of the Fire Commission's interpretation and implementation of the incentive supplement. Under general principles of wage and hour law, for any employer-originated compensation to non-exempt employees, overtime should be calculated on an hourly rate basis. *See* 803 KAR 1:060 sec 6. Because the incentive funds originated from the state (rather than from local governments) and the amount of the incentive was fixed by state law, the Labor Cabinet devised equations to convert the fixed incentive supplement amount into an hourly rate. The Labor Cabinet formulated its hourly rate equations to correspond to straight-time and scheduled overtime compensation because the Fire Commission had construed both types of pay to be subsumed within the supplement.[17] The Fire Commission communicated the Labor Cabinet's hourly rate equations to local governments in memoranda deeming the formulas to be "proper" for calculating their overtime on the incentive funds. *See* 6/1/00 Overtime Memo [ROA pp. 781-83]; 7/17/00 Overtime Memo [ROA pp. 784-86].

Thus, both aspects of the pre-*Hasken* overtime methodology – the allocation of unscheduled overtime to local governments and the hourly rate used to calculate their

[17] The consistent methodology divided the fixed supplement amount by the number of straight-time hours plus one and one-half the number of scheduled overtime hours.

unscheduled overtime – directly link back to the Fire Commission's contemporaneous construction of the incentive supplement as inclusive of scheduled overtime. Through the overtime methodology, which was used from 1984 into the 2000's, the Fire Commission's interpretation of the incentive supplement acquired longstanding application and is entitled to "controlling weight." *Revenue Cabinet v. Lazarus, Inc.*, 49 S.W.3d 172, 174 (Ky. 2001)("Practical construction of an ambiguous law by administrative officers continued without interruption for a very long period is entitled to controlling weight."); *White v. Check Holders, Inc.*, 996 S.W.2d 496, 498 (Ky. 1999)("It is a general rule that a construction of a law or regulation by officers of an agency continued without interruption for a long period of time is entitled to controlling weight."); *Hagan v. Farris*, 807 S.W.2d 488, 490 (Ky. 1991)(same).

Under Kentucky law, it is an "elementary rule of statutory construction" to give such "controlling weight" to a "longstanding interpretation" of an ambiguous statute by the agency charged with its administration. *Davidson v. Am. Freightways, Inc.*, 25 S.W.3d 94, 98 (Ky. 2000). In this case, KRS 95A.250 was ambiguous because it was unclear what amount of overtime, if any, was included in the state incentive amount. The Fire Commission, which was authorized by KRS 95A.240 to issue rules and regulations to administer the incentive Fund program, resolved the ambiguity by defining the incentive amount to be on top of compensation for scheduled overtime. 815 KAR 45:035 sec. 1(12) & sec. 3 (1980) [ROA pp. 659-60]. The agency's resolution was not arbitrary or clearly erroneous, but consistent with the statutory term "regular salary." *See Camera Ctr., Inc. v. Revenue Cabinet*, 34 S.W.3d 39, 44 (Ky. 2000). As such, the Fire

Commission's practical construction of KRS 95A.250 is entitled to controlling weight because it was longstanding and well established.

In addition to statutory construction principles, Appellants were bound by contractual agreements with the Fire Commission to carry out the incentive program as directed. *See* Form KPF-1 Applications and Renewal Applications [ROA pp. 195-202; 674-75; 686-87; 690-709]; Form KPF-1b Agreement [ROA pp. 191-92; 676; 688]; Form KPF-3 Quarterly Reports [ROA pp. 201-02; 689; 710-23]. Both the Form KPF-1 Applications and Form KPF-3 Quarterly Reports required the local governments to execute binding certifications. Kentucky law requires courts "to give great weight to the interpretation which the parties have placed upon an ambiguous contract." *Billips v. Hughes*, 259 S.W.2d 6, 7 (Ky. 1953). The statutory terms governing Appellants' agreement with the Fire Commission did not specifically address overtime liability, but the Fire Commission's implementing regulations and the long course of conduct between the Fire Commission and local governments (as well as the firefighters) show that all of the parties understood the supplement to be inclusive of scheduled overtime. Therefore, general contract principles also show that overtime liability was part of the incentive supplement's implementation and application under KRS Chapter 95A.

The trial court completely overlooked how the Fire Commission had interpreted the incentive supplement and how that interpretation dictated the allocation and calculation of overtime liability. Indeed, the Fire Commission's interpretation and implementation of KRS 95A.250 was mandatory on local governments. The state incentive funds had to be "received, held, and expended in accordance with the provisions of [KRS Chapter 95A and] any rules and regulations issued by the [Fire]

Commission." KRS 95A.260. In this case, the Fire Commission validly construed the supplement to be "received, held, and expended" toward scheduled overtime. Considering the incentive supplement's administrative implementation and well established contractual understandings, the trial court's "separate and independent" analysis is incorrect and should be reversed. The record shows that overtime liability on the incentive funds cannot be separated or divorced from how the incentive supplement was interpreted, implemented, and applied by the state and local governments.

(5) The post-*Hasken* overtime methodology increases the overtime liability of Appellants and is therefore barred by immunity.

Based on *Hasken*, the Labor Cabinet attributes the incentive supplement only to straight-time hours. As a result, the Labor Cabinet is requiring Appellants to pay overtime on the incentive funds for ***all*** overtime hours, both scheduled and unscheduled, and is using a smaller 2,080 divisor, equal to the annual number of straight-time hours, to convert the $3,100 incentive supplement into a higher hourly overtime rate. The Labor Cabinet's post-*Hasken* overtime methodology contravenes the intent of KRS Chapter 95A because it substantially increases the overtime liability of local governments. The General Assembly set up the incentive Fund program intending the state to "offer" and "fund" a monetary supplement for firefighters; yet, the statutory scheme contemplated minimal, if any, expense to local governments. This legislative intent was clearly revealed by the March 2009 statutory amendments that reversed the outcome of *Hasken* by expressly limiting the overtime liability of local governments. The Labor Cabinet's post-*Hasken* effort to collect back overtime for firefighters is incompatible with the longstanding administrative interpretation and implementation of KRS Chapter 95A. The Fire Commission construed the supplement to be inclusive of scheduled overtime (in

addition to straight-time hours) while the Labor Cabinet applies the supplement only to straight-time compensation and ***not*** inclusive of ***any*** scheduled overtime compensation.

Appellants' agency immunity accordingly precludes additional overtime liability stemming from the supplement, both from a reallocation of scheduled overtime liability to local governments and from any increase in their unscheduled overtime liability through a higher hourly rate. Based on the terms of KRS Chapter 95A, Appellants were legally required to treat the "supplement" as an "addition to . . . regular salary" and as compensation to firefighters for all of their straight-time and scheduled overtime hours of work. As a result of this required statutory allocation, Appellants are not liable for anymore scheduled overtime compensation. In addition, the Fire Commission's interpretation of the supplement requires the hourly rate used to determine Appellants' unscheduled overtime liability to be calculated by equating the supplement both to straight-time and scheduled overtime compensation. Appellants' principal, the Fire Commission, repeatedly instructed local governments over many years that this was the "proper method for calculating overtime." *See* 07/02/98 to 07/17/00 Overtime Memos [ROA pp. 206-18; ROA pp. 774-86]. The General Assembly and the Fire Commission cannot be sued for how the incentive "supplement" was designed and applied by law under KRS Chapter 95A. Neither should Appellants, who merely carried out the incentive Fund program as directed by the state, and acted as state "agents," thereby entitling them to immunity from wage collection actions based on a different allocation of scheduled overtime liability and a different calculation of the unscheduled overtime rate.

Furthermore, the Court is not bound by *Hasken*, as relied on by the Labor Cabinet on behalf of firefighters, and that decision has no application to Appellants' agent immunity claim. *Hasken* viewed overtime liability on the incentive supplement only through the lens of the requirements of KRS Chapter 337. The statutory, regulatory, and contractual basis for the pre-*Hasken* overtime methodology was never introduced or evaluated at the hearing. Without the benefit of this, the Hearing Officer and subsequent reviewing courts, not surprisingly, rejected how overtime liability on the state incentive supplement had been allocated and compensated. H.O. Recom. Ord., at p. 10 ¶ 10 [ROA pp. 823]; *see also id.* at p. 17 ¶ 21 [ROA p. 830].

Hasken, with its limited administrative record and procedural posture, should not foreclose Appellants from showing how the supplement has always been construed and implemented by the Fire Commission, how the Fire Commission's interpretation of the supplement necessarily impacted overtime liability notwithstanding *Hasken's* implications which upset long-settled expectations gained through numerous years of consistent application, and how Appellants distributed the incentive funds and paid their portion of unscheduled overtime liability in accordance with the supplement's interpretation and implementation. The record and issues in this case are distinct from *Hasken*. Whether Appellants are state "agents" entitled to immunity for carrying out the incentive program as directed by the state is an issue of first impression for this Court.

Moreover, the issue of whether Appellants should enjoy immunity under the circumstances of this case is a matter of vital public importance. Appellants are blameless; they were participants in a state created and controlled incentive Fund program and they carried out their obligations under the program as directed and required

by the state. Local governments have no incentive to ever enter into similar kinds of partnerships with the state if the state cannot be relied upon, and if local governments are made to bear all of the risk and liability for the state's mistakes in structuring such partnerships. These equitable and policy considerations bolster the legal analysis. For these reasons, Appellants must be deemed "agents" of the state entitled to governmental immunity to prevent the Labor Cabinet from seeking additional overtime liability against them based on their distribution of the state training incentive supplement.

C. THE DOCTRINE OF QUALIFIED OFFICIAL IMMUNITY SHIELDS APPELLANTS FROM THE LABOR CABINET'S PURSUIT OF OVERTIME LIABILITY ON THE INCENTIVE SUPPLEMENT.

Appellants alternatively claim qualified official immunity. Qualified official immunity applies to acts or functions that are: (1) discretionary (2) performed in good faith, and (3) within the scope of authority. *Yanero*, 65 S.W.3d at 522. In this case, whether Appellants participated in the incentive Fund program; distributed the incentive funds to firefighters; and incurred overtime liability, were all discretionary. Further, it cannot be disputed that Appellants paid overtime to firefighters on the incentive funds in good faith and as authorized by the Fire Commission. Appellants tried to fulfill their overtime obligations, but their overtime obligations and calculation thereof, were not clear because of the ambiguous interplay and tension between KRS Chapters 337 and 95A. Therefore, Appellants meet the requirements of qualified official immunity.

Qualified official immunity generally applies to individuals, but this form of immunity has been previously extended to non-immune entities when acting as an "agent" of the state. In *Yanero*, the Court extended qualified official immunity to the Kentucky High School Athletics Association ("KHSAA") because it was "an agent of the

Kentucky Board of Education and, in that capacity, functions the same as if the Board had designated an individual . . . to manage interscholastic athletics." *Yanero*, 65 S.W.3d at 530. The KHSAA itself could not be considered a state agency because "many of its member schools are private or parochial institutions," but it was an "agent" of an immune state agency, the Kentucky Board of Education. *Id.* Based on *Yanero*, the *Autry* Court similarly extended qualified official immunity to a corporation because it was an "agent" of Western Kentucky University "for purposes of holding title to . . . dormitory properties and obtaining funding to refurbish them." *Autry* v. *W. Ky. Univ.*, 219 S.W.3d 713, 719 (Ky. 2007).

Both *Yanero* and *Autry* set clear precedent for extending qualified official immunity to non-immune entities when acting as an "agent" of the state. Appellants have shown that they are "agents" of a state agency, the Fire Commission, and "in that capacity," Appellants should similarly enjoy qualified official immunity. The law as to payment of overtime on the incentive supplement was unquestionably ***un***clear, and thus, not "clearly established." Therefore, the Appellants' good faith in following the Labor Cabinet's and Fire Commission's instructions as to how to "proper[ly] calculat[e]" the supplement's "addition to . . . regular salary" and to square the incentive with the overtime requirements of KRS Chapter 337 should entitle Appellants to qualified official immunity. *See, e.g.,* 07/02/98 to 07/17/00 Overtime Memos [ROA pp. 206-18; ROA pp. 774-86].

D. ALTERNATIVELY, THE LABOR CABINET LACKS JURISDICTION TO PURSUE APPELLANTS FOR UNPAID OVERTIME ON THE INCENTIVE SUPPLEMENT UNDER KRS CHAPTER 337 IN CONTRAVENTION OF THE FIRE COMMISSION'S CONTEMPORANEOUS CONSTRUCTION OF KRS CHAPTER 95A.

The final argument is jurisdictional. For the reasons stated below, the overtime requirements of KRS Chapter 337 cannot be used to upset the Appellants' overtime liability allocated and calculated pursuant to KRS Chapter 95A for the simple reason that Chapter 95A is the more "specific" and later enacted statute.

In this case, the state incentive supplement has always been an "addition" to "regular salary," and consistent with the statutory term "regular salary," the Fire Commission validly construed the incentive supplement to be inclusive of both straight-time and scheduled overtime. As a result of the Fire Commission's interpretation of the incentive supplement in KRS 95A.250, scheduled overtime liability was deemed to be compensated by the supplement itself, but unscheduled overtime liability was not funded by the supplement and was effectively allocated to local governments. From the early 1980's into the 2000's, local governments accordingly received directions to pay overtime for unscheduled overtime hours only. In addition, the hourly rate used to compute Appellants' unscheduled overtime liability was predicated on and was equal to all of straight-time and scheduled overtime compensation subsumed within the incentive supplement. Thus, both the allocation of unscheduled overtime liability to local governments and the hourly rated used to determine the amount of that liability was dictated by how the supplement was construed and implemented by the Fire Commission.

The Fire Commission's interpretation of the incentive supplement was clearly the basis for the overtime instructions received and followed by Appellants over many years, but the validity of the overtime methodology has never been litigated in light of KRS Chapter 95A or its administrative implementation. The legal analysis of the incentive supplement in *Hasken* occurred in the context of the overtime requirements of KRS

Chapter 337 as applied to the terms of a CBA and the prior practices between the City of Louisville and its firefighters. Without having the supplement's historical context before it, the Court of Appeals held that the incentive supplement only applied to compensation for straight-time hours. *Hasken*, 265 S.W.3d at 221-22. The Court of Appeals' decision should be limited to its unique facts and posture and should not block Appellants from showing that Appellants paid overtime on the incentive funds as required and directed by the state pursuant to KRS Chapter 95A.

In fact, the overtime analysis pertaining to the incentive supplement should be strictly filtered through KRS Chapter 95A. The pre-*Hasken* overtime methodology based on Chapter 95A limits the overtime liability of local governments in accordance with the intent of the legislature. This limitation can be seen by the way in which the March 2009 amendments, in Senate Bill 46, addressed the interconnectedness between Chapters 95A and 337. The Senate Bill recognizes the incompatibility between the *Hasken* overtime methodology (which applies only Chapter 337 law) and the original intent of Chapter 95A. The Bill harmonizes this incompatibility by amending portions of ***both*** Chapters. Given this statutory incompatibility, the provisions of Chapter 95A, as contemporaneously interpreted and implemented by the Fire Commission, must govern over Chapter 337 in the Labor Cabinet's pursuit of back overtime wages from Appellants. KRS Chapter 95A is the more specific law and was later enacted. *See Meyers v. Chapman Printing Co., Inc.,* 840 S.W.2d 814, 819 (Ky.1992)("The applicable rule of statutory construction is where there is both a specific statute and a general statute seemingly applicable to the same subject. . .the specific statute controls."); *Land v. Newsome*, 614 S.W.2d 948, 949 (Ky. 1981)("[W]hen two statutes deal with the same

subject matter, one in a broad, general way and the other specifically, the specific statute prevails."); *Commonwealth v. Phon*, 17 S.W.3d 106, 107 (Ky. 2000)(same); *Withers v. University of Kentucky*, 939 S.W.2d 340, 345 (Ky. 1997)(same); *DeStock No. 14, Inc. v. Logsdon*, 993 S.W.2d 952, 958-59 (Ky. 1999)("[I]f two statutes involving the same subject matter are in irreconcilable conflict, the later statute controls.")(citing *Butcher v. Adams,* 310 Ky. 205, 220 S.W.2d 398 (1949)).

Therefore, to the extent that the Court limits *Hasken* to its unique facts and posture and recognizes the validity of the pre-*Hasken* methodology based on KRS Chapter 95A, its implementing regulations and contemporaneous construction, the Labor Cabinet's pending administrative actions against Appellants must be barred because the Labor Cabinet is pursuing back overtime wages for firefighters in accordance with a formula devised from the Cabinet's interpretation of *Hasken*, a formula that applies ***only*** KRS Chapter 337 law ***instead of*** KRS Chapter 95A. The Labor Cabinet has no jurisdiction to attempt to apply a completely different legal regime, including the overtime requirements of KRS Chapter 337, in contravention to the way the incentive supplement was structured and carried out under KRS Chapter 95A.

In sum, the law of KRS Chapter 95 controls as to what the supplement was designed to cover – *i.e.*, both straight-time and scheduled overtime compensation. KRS Chapter 95A represents the "specific" and KRS Chapter 337 the "general," and in circumstances such as this, the specific statute controls. *See Meyers*, 840 S.W.2d at 819; *Newsome*, 614 S.W.2d at 949; *Phon*, 17 S.W.3d at 107; *Withers*, 939 S.W.2d at 345. Furthermore, KRS Chapter 95A was later enacted. *See Logsdon*, 993 S.W.2d at 958-59. Despite the trial court's passing observation that Chapter 337 "predates" Chapter 95A,

such "predating" does not insulate 337 from the effect of the later-enacted regime of 95A. *See Madison County*, No. 09-CI-1940, at p. 11 [ROA at pp. 889]. For all of these reasons, the longstanding, pre-*Hasken* overtime methodology must be validated because the overtime requirements of Chapter 337 cannot be applied consistently with Chapter 95A. Furthermore, the Labor Cabinet lacks jurisdiction to pursue Appellants for overtime liability on the incentive funds based on any law other than Chapter 95A.

CONCLUSION

Based on all of the reasons stated, the Court should reverse the Opinion and Order below and hold that immunity or lack of jurisdiction bars the administrative actions brought against Appellants by Appellees to collect additional back overtime wages.

Respectfully submitted,

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