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

BRIEF OF APPELLEES

DAVID O'BRIEN SUETHOLZ
MELISSA JAN WILLIAMSON
DAVID N. SHATTUCK
OFFICE OF GENERAL COUNSEL
KENTUCKY LABOR CABINET
1047 U.S. HWY. 127 SOUTH
FRANKFORT, KY 40601
PHONE: 502-564-3070
FAX: 502-564-5484

ATTORNEYS FOR APPELLEES

STATEMENT CONCERNING ORAL ARGUMENT

In its Order transferring this Appeal, the Court indicated that this case would be set for oral argument after briefing. Appellees agree that oral argument may be useful to the Court in deciding the issues presented in this appeal.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

The Appellees (hereafter referred to as "Appellees" or "the Cabinet") accept the Appellants' statement of the case concerning the historical facts [Br. 1-6], and the pre and post-Hasken overtime wage calculations. Appellees, object, however, to those portions of Appellants' statement that are argumentative. (E.g., "[T]he 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 . . . .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.'") [Br. at 9]. We reject virtually all of the statements on pages 13-15 and 17-19 in their entirety for the reasons set forth in the Argument section of this Brief.

We set forth the following matters which Appellees consider essential to a fair and adequate statement of the case:

Labor Cabinet v. Hasken, 265 S.W.3d 215 (Ky. App. 2007) commenced in May 2000 when a Louisville firefighter filed a complaint with the Labor Cabinet concerning the calculation of overtime pay on various additional elements of pay, one of which was scheduled overtime from the state incentive fund (also referred to at times as "educational incentive") established by KRS 95A. The Cabinet issued Tentative Findings of Fact rejecting the firefighters' claims. [ROA 817, 842-43]. An administrative hearing was held, at which the firefighters argued that the proper divisor for calculating this overtime pursuant to KRS 337.285 was 2,080 hours. The City and the Cabinet argued that the proper divisor was either 3,328 or, alternatively, 2,912. [ROA 827; Hearing Officer's

Report, Paragraph 13, p. 14]. The Hearing Officer sided with the firefighters, concluding that the pertinent "statutes and regulations compel a finding that overtime must be based upon a 40 hour week." [Id, Paragraph 12]. The Hearing Officer concluded:

> Based upon the factual finding that the parties intended additional elements of pay to cover the 40 hour work week identified within the parties' Collective Bargaining Agreement, it is found as a matter of law that the divisor to be used to convert state incentive pay, salary supplement, and the July bonus, to an hourly rate for purposes of calculating overtime is 2,080.

[Id, Paragraph 14]. On exceptions, the Cabinet Secretary rejected the Hearing Officer's determination. Instead, the Cabinet sided with the City of Louisville, and ruled that, based on 48/72 hour workweek, 2,912 was the proper divisor. [ROA 839, 845].

The firefighters sought judicial review in the Jefferson Circuit Court. In an opinion issued in September 2004, the Court found that the Hearing Officer's recommendation "reflects a proper application of the applicable statutes and regulations. By contrast, the Final Order of the Secretary is premised on an erroneous interpretation of the regulation and, in any event, is not supported by substantial evidence of record." [ROA 859; Circuit Court Opinion, p. 22]. The Court noted that "State Incentive pay is the only one of the five pay elements at issue before this Court which does not find its origins in an agreement between the City and the firefighters." Relying on a regulation defining "professional firefighters" as persons "described in KRS 95A.210(4) who work a minimum of 2,080 per year," the Court held: "Thus the State Incentive Pay is paid to firefighters who work 2,080 hours per year and have the requisite training. Given the unequivocal language of the statute and regulation, *it cannot be seriously disputed* that

State Incentive Pay is paid for a forty (40) hour work week which translates into 2,080 hours annually." [ROA 855-56; Circuit Court Opinion, pp. 18-19 (Emphasis added)].

The Cabinet and the City appealed, but the Court of Appeals affirmed. In its decision, the Court wrote:

> To make this determination, the Hearing Officer properly 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.

265 S.W.3d at 221. Both the City and the Cabinet moved for discretionary review; the Court, however, declined to review the decision.

All of this background is to demonstrate that the Cabinet and the local governments were in agreement concerning the calculation of overtime on the State Incentive Pay until the Court's decision in Hasken. Following Hasken, the Cabinet received complaints on behalf of firefighters in numerous Kentucky localities. The Cabinet has taken the position that the formula set forth in Hasken is the law of the Commonwealth. Many local governments have reached settlements with their firefighters, in the approximate amount indicated:

Employer	Wages paid
Anchorage	$ 250,000.00
Bluegrass/Lexington Airport	145,000.00
Bourbon County	84,000.00
Bowling Green	1,000,000.00
Frankfort	525,000.00
Henderson	330,000.00
Louisville Airport	270,000.00
Louisville Firefighters	30,000,000.00
Scott County	272,000.00

Shelbyville	212,000.00
Union Emergency	45,000.00

[Response to Motion to Transfer Appeal, p. 3-4].

These Appellants filed suit in Franklin Circuit Court, insisting that they enjoy immunity from the Cabinet's administrative proceedings. On motion for summary judgment, the Circuit Court rejected their contentions that they enjoy immunity as agents of the State Fire Commission. The Court explained: "[T]he two-step analysis for this court is simply this: whether the Commonwealth established an agency relationship with local governments to distribute state training incentive funds; and if so, whether that relationship extends sovereign immunity to those local governments." [ROA 887-89; Order, p. 9-10 (footnote omitted)].

The Court explained that "the local governments were negotiating with the Fire Commission, not for the Fire Commission. [ROA, 888; Order, p. 10 n.13 (Court's emphasis)]. The Court concluded: "[I]t is solely the duty/work of the local governments to pay correct overtime wages to their employees. The fact that they sought direction from the Fire Commission and the Cabinet itself does not necessarily absolve them of this liability." [ROA 891; Order, p. 13 (Court's emphasis; footnote omitted)]. The Court reasoned: "Specifically, the Court deems that the contract/statutory obligation to pay their firefighters in accordance with the provisions of KRS Chapter 337 is separate and independent from the 'agency'/contract with the Fire Commission." [ROA 892; Order, p. 14, n. 17]. "Accordingly, the Court finds that regardless of whether an agency relationship existed [footnote omitted], the local governments are not entitled to sovereign immunity." [ROA 888-89; Order, p. 10-11].

The Court also rejected contentions that the Labor Cabinet lacks jurisdiction over local governments when acting in a state agency capacity, and that the Cabinet lacks jurisdiction with respect to state training funds. The Court noted that "much of this argument actually goes to the merits of the case and whether state training incentive funds should be considered wages under KRS Chapter 337 . . . . As mentioned throughout this Opinion, the court cannot and will not pass on that issue at this time." [ROA 891; Order, p. 13 n.15]. These arguments, the Court concluded, are "inconsistent with history prior to, and subsequent to, the adoption of KRS Chapter 95A . . . . [T]he local governments which participate in the state training incentive fund have consistently paid an increased premium for 'unscheduled' overtime without objection." [ROA 891-92; Order, p. 13-14]. Accordingly, the Court denied the local governments' summary judgment motion in its entirety. [The Circuit Court's Opinion is included in the Appendix at tab 1].

The local governments appealed and moved to transfer to this Court. In their CR 76.03(3) pre-hearing statement, Appellants abandoned all arguments raised in the trial court save their central one: that they are entitled "to sovereign immunity as agents of the Commonwealth/Fire Commission."

The local governments asked the Court of Appeals to stay the Cabinet's administrative proceedings against them pending this appeal. The Cabinet opposed the motion, arguing *inter alia*, that Appellants' claim of immunity presumed that the state Fire Commission itself enjoyed immunity; yet, sovereign immunity does not apply in suits between state agencies. Denying the motion to stay, the Court of Appeals agreed: "In light of the stated history of the doctrine and the statutory enactments providing for

waiver of sovereign immunity in certain defined situations we are convinced that the Cabinet's argument is well-taken." [Court of Appeals Order Denying Stay, p. 4; the Court of Appeals' Order is included in the Appendix at tab 2].

Before this Court, the Cabinet moved to dismiss on grounds that the Complaint in essence was an action for indemnity against the Cabinet, from which it enjoys sovereign immunity. The Appellants filed a lengthy response, arguing *inter alia* that the arguments raised in the motion "clearly are substantive in nature and should be addressed in the normal course of briefing." [Response to Motion to Dismiss, p. 7]. On October 6, 2010, this Court ordered that the motion "is passed to the consideration of the merits of this appeal. The parties may more fully address any issue raised in the motion to dismiss in their respective briefs."

By Order dated January 5, 2011, the Court allowed the filing of two *Amicus Curiae* briefs, one, a joint brief submitted by the cities of Ashland, Hazard and Paducah, and another submitted by the Kentucky League of Cities.

ARGUMENT

Appellants' claim that they enjoy immunity as agents of the Fire Commission must fail, for as the Court of Appeals has ruled, the Fire Commission itself is not immune from the Cabinet's action. Remarkably, in their Brief to this Court, Appellants make no mention whatsoever of the Court of Appeals' ruling that sovereign immunity does not apply to suits between state agencies. In any event, examination of the record reveals that the Labor Cabinet enjoys sovereign immunity from the Appellants' claims. Accordingly, this Court should affirm the judgment of the Circuit Court with directions to dismiss the Complaint.

The Circuit Court correctly determined that the local governments are not agents of the Fire Commission. Further, this Court should affirm the judgment of the Circuit Court if any alternative basis is presented to support that judgment. E.g., Newman v. Newman, 451 S.W.2d 417, 420 (Ky. 1970). Alternative grounds that support the judgment include (a) the grounds set forth in the motion to dismiss, (b) the rationale adopted by the Court of Appeals, and (c) waiver of immunity with respect to actions brought pursuant to KRS Chapter 337. These arguments are explored below, after which the arguments raised by Appellants will be addressed.

I. THE CABINET ENJOYS SOVEREIGN IMMUNITY FROM THIS PROCEEDING.

The Cabinet moved to dismiss this appeal on grounds that it enjoys immunity from claims for implied indemnification. Appellants countered that the Cabinet has conflated indemnification with immunity. This Court ordered that the motion be "passed to the consideration of the merits of this appeal. The parties may more fully address any issue raised in the motion to dismiss in their respective briefs." [Order, October 6, 2010]. Curiously, Appellants declined the Court's invitation.

The Cabinet is merely attempting to identify the true nature of the relief Appellants seek in light of the decision in Hasken. Since the Cabinet contends that the firefighters must be paid in accordance with Hasken, the issue, in our view, is who pays these wages, the Commonwealth (by way of indemnification) or the local governments. To date, over a dozen local governments have shouldered their responsibility to pay their firefighters.

A. KENTUCKY FIREFIGHTERS MUST BE PAID IN ACCORDANCE WITH HASKEN.

In the trial court and this Court Appellants have attempted to distinguish Hasken: "the overtime issue turned on the local CBA instead of the historical context and regulations behind the state supplement in KRS Chapter 95A." [Response to motion to dismiss appeal, p. 4; Brief "Br." at 12-14]. The trial court noted: "Because the decision took place within the context of a collective bargaining agreement, it may be distinguishable." [ROA 888; Order, p. 10 n.12]. The Court of Appeals wrote:

> To make this determination, the Hearing Officer properly 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.

265 S.W.2d at 221-22.

With all due respect to the Court of Appeals, however, the Jefferson Circuit Court could not have been clearer: "State Incentive Pay is the only one of the five pay elements at issue before this Court which does not find its origins in an agreement between the City and the firefighters." [Br. 12-13]. "Given the unequivocal language of the statute and regulation, *it cannot be seriously disputed* that State Incentive Pay is paid for a forty (40) hour work week which translates into 2,080 hours annually." [ROA 855-56; Opinion, pp. 18-19]. Therefore, while provisions in a Collective Bargaining Agreement ("CBA") that differ from those in Hasken might make Hasken distinguishable, in the absence of any CBA or other agreement, the Court's holding—that State Incentive Pay is

wages, and that 2,080 hours is the proper divisor—applies to all local governments in this Commonwealth.

The Franklin Circuit Court also noted: "Moreover, this Court has the benefit of Legislative guidance that was not available to the *Haskins* [sic] Court. Finally, it does not appear that the issue of equitable estoppel was argued before the *Haskins* Court." [ROA 888; Order, p.10 n.12]. The local governments had argued that the Legislature's change in the law in 2009 in response to the Hasken case constitutes persuasive evidence that State Incentive Pay was never intended to be wages. [ROA 479-80; ROA 804].

This assertion, which Appellants repeat here [Br. 17-18, 42, 48], is remarkable, and the local governments cite no authority to support it. In Higgins v. Smith, 308 U.S. 473 (1940), the Court rejected the argument that the intent of Congress could be discerned from legislation passed two years later.

> Respondent [argues] that the passage of [a section] of the Revenue Act of 1934 which explicitly forbids any deduction for losses determined by sales to corporations controlled by the taxpayer is convincing proof that the law was formerly otherwise. This does not follow. At most it is evidence that a later Congress construed the 1932 Act to recognize separable taxable identities between the taxpayer and his wholly owned corporation.

308 U.S. at 479-80. The suggestion that the intention of the 1980 General Assembly may be ascertained by legislation enacted some *thirty years later* underscores the desperate lengths to which the local governments must go in an attempt to avoid the effect of Hasken.

Appellants also suggest that Hasken should not govern because the Court did not consider evidence "as to the parties' intent under the CBA." [Br. 13]. This is a red

herring. The Jefferson Circuit Court rejected the City of Louisville's contention "that the intent of the parties 'is not relevant or controlling'" [ROA 852], and concluded: "Careful reading of the entire administrative record reveals substantial evidence supporting the Hearing Officer's conclusion that the parties' intent was that the pay elements would be received for a forty (40) hour work week." [ROA 855]; Hasken, 265 S.W.3d at 221-22. So absent convincing proof that the parties intended otherwise, State Incentive Pay is "wages," and 2,080 is the proper divisor for calculating all overtime on that pay.

Appellants (and Ashland, Hazard and Paducah in their *amicus* brief) insist that the outcome in Hasken would somehow be altered if only the Cabinet and City had emphasized Chapter 95A's "historical context; the legislature's intent in crafting the supplement to be an 'addition' to and on top of 'regular salary' . . . ." [Br. 13]. Implicit in this assertion is the assumption that the Hearing Officer and Jefferson Circuit Court reached their conclusions as if Chapter 95A did not exist. This appeal could test that hypothesis: if the Court rejects the contention set forth in Appellants' Argument "D" [Br. 46-50], then it seems certain that the outcome in Hasken would remain the same regardless of how much emphasis the Cabinet placed on the historical context of Chapter 95A. In any event, the record shows that the Cabinet and City argued forcefully that the parties' intent is irrelevant given "the unique characteristics of the State Incentive Pay." [Cabinet's response to City's motion for discretionary review in Hasken, 2005-CA-001949-MR, p. 8].

Finally, Appellants further argue that "the Hearing Officer rejected the 3,328 annual divisor because the Labor Cabinet and the City of Louisville provided no legal basis for it." [Br. 13; Amicus Brief at 10 (see ROA 823; Hearing Officer Report, Par. 10,

p. 10)]. This assertion is disingenuous for several reasons. First, the 3,328 divisor is derived from the 2,912 and 2,080 divisors [ROA 784-86] as is made clear by the Tentative Findings of Fact. [ROA 817, Tentative Findings, p. 4 (A copy of the Tentative Findings is included in the Appendix at Tab 3); see also ROA 784-86]. Second, it wasn't a case of the Cabinet and City not defending the divisor; rather, the Hearing Officer made it abundantly plain that he based his decision on "statutes and regulations [which] compel a finding that overtime must be paid based upon a 40 hour work week," coupled with the finding that "the parties intended additional elements of pay to cover the 40 hour work week identified within the parties' Collective Bargaining Agreement." [ROA 827; Report, Para. 12, 14, p. 14). Likewise, the Circuit Court affirmed because "[g]iven the unequivocal language of the statute and regulation, *it cannot be seriously disputed* that State incentive pay is paid for a forty (40) hour week which translates into 2,080 hours annually." [ROA 856, Circuit Court Opinion, p. 19]. Further, it is clear that the Jefferson Circuit Court did not apply a deferential standard of review [Cities' Amicus Br. at 10]; it essentially reviewed the record *de novo*. [ROA 853; Circuit Court Opinion, p. 16]. Accordingly, the propriety of applying the 3,328 divisor was squarely before the Hearing Officer and the Jefferson Circuit Court. Both concluded that application of that divisor could not be reconciled with the parties' intent and the law, and therefore rejected it.

As if grasping at one last straw, the cities of Ashland, Hazard and Paducah argue that the 3,328 divisor is supported by 803 KAR 1:060 Section 8(5). [Amicus Br. 7-10]. These cities maintain that State Incentive Pay includes "an overtime premium." Seizing language from two federal court of appeals decisions, they argue: "Pursuant to 803 KAR

1:060 Section 8(5), the overtime premium included within the incentive is creditable and offsets the overtime liability of the local governments for the 832 scheduled overtime hours." [Br. at 9 (footnote omitted]." These decisions, however, rely on U.S. Supreme Court decisions and federal regulations on which the Sixth Circuit based its decision in Sharpe v. Cureton, 319 F.3d 259 (6th Cir. 2003) concerning Knoxville firefighters. The City of Louisville cited Sharpe in its appeal in Hasken [see Brief for Appellant City of Louisville, No. 2005-CA-001971, pp. 17-18]; the Hasken Court, of course, upheld the 2,080 divisor, implicitly rejecting the notion that State Incentive Pay includes a "premium" within the meaning of the cited regulation.

In summary, the local governments have offered various reasons why the Court in Hasken adopted the wrong divisor. We have shown that none of those reasons withstands scrutiny. Accordingly, the divisor announced in Hasken applies to all Kentucky firefighters, unless a local government can offer persuasive evidence, say, from a CBA, that clearly indicates the parties intended otherwise. In the absence of such evidence, the Hasken divisor must be applied to all Kentucky firefighters.

B. THE RELIEF APPELLANTS SEEK IS THEREFORE IN THE NATURE OF INDEMNIFICATION.

The Circuit Court saw through the Appellants' attempt to characterize the relationship as an agency so as to invoke the doctrine of sovereign immunity. The parties' relationship could perhaps be more accurately characterized this way: the Labor Cabinet, through the Fire Commission, impliedly promised local governments that no overtime violations would occur so long as they complied with the "proper method" of calculating overtime. [ROA 888; Circuit Court Opinion at 10 n.12]. The Hasken case has forced Labor to change positions, to the detriment of the Appellants. This suit

against the Labor Cabinet, therefore, is an action for indemnity for Cabinet's breach of that implied promise. ["An implied contract of indemnity arises in favor of a person who without any fault on his part is exposed to liability and compelled to pay damages on account of the negligence or tortuous act of another . . . " Johnson v. Ruby Lumber Co., 278 S.W.2d 71 (Ky. 1955)].

As we explained in our motion to dismiss, City of Louisville v. Padgett, 457 S.W.2d 485 (Ky. 1970), a decision Appellants insisted should control the outcome here [ROA 810-11; ROA 890; Circuit Court Opinion at 12], underscores that this case is all about indemnification, not immunity. Marsha Padgett was a passenger in a car that crashed as a result of water ponding on a portion of interstate under construction. She sued Adams, the driver, as well as the City, Ruby Construction, and the Sewer District, alleging negligence in the construction and maintenance of the drainage system. The trial court granted Ruby's motion for a directed verdict at the close of plaintiff's case. The jury returned a joint verdict against Adams and the City.

The City appealed, advancing three arguments, one of which was that it was entitled to judgment as a matter of law for indemnity on its cross-claim against Ruby Construction. Ruby argued, and the Court agreed, that it was not negligent because it constructed an embankment "strictly in conformity with the verbal specifications of the Department of Highways." 457 S.W.2d at 488. "Ruby only did what it was instructed to do by the highway department officials. Therefore, the trial court was correct in directing a verdict in favor of Ruby." Id at 490.

In response to the motion to dismiss, Appellants argued: "Ruby was exempted from liability in Padgett based on immunity principles—not indemnity." (Response at

10). This assertion is simply wrong. Nowhere in the decision is the word "immunity" even mentioned, and the publisher's "headnote" summarizing the Court's holding is captioned "indemnity", not immunity. To characterize the Court's holding in terms of "immunity principles" underscores just how far Appellants have had to grasp in an attempt to pursue the immunity defense.

In Boyle v. United Technologies Corp., 487 U.S. 500 (1988), the Court held that military contractors could not be sued under state law for defects in equipment manufactured according to "reasonably precise specifications" provided by the federal government. The Court based its holding on federal common law; indeed, the majority opinion nowhere mentions the term "sovereign immunity," although the term was used in dissent. The Padgett and Boyle decisions, as well as the trial court's observation that equitable estoppel is the true issue in this case, demonstrate that labels matter. For while Padgett and Boyle have been characterized as involving immunity, the holdings in these cases have nothing to do with immunity.[1] Similarly, the trial court correctly perceived

[1]This is also true with respect to Fisher v. Elmo Greer & Sons, LLC, 2009 WL 3161400 (E.D. Ky. 2009), a case Appellants cite at page 34 and include in their Appendix at tab 8.

that this case, while it may implicate equitable estoppel principles,[2] does not involve immunity.

Appellants cite City of Galveston v. State, 217 S.W.3d 466 (Tex. 2007), in response to the motion to dismiss.[3] That case concerned who should pay for roadway repairs for an alleged negligent installation and maintenance of a city water line. In a 5-4 decision, the Court held that the city enjoyed immunity from the State's action for recoupment of costs incurred in making the repairs. The Court noted at the outset that in its 171 years of existence, Texas had never sued one of its cities for money damages. The Court stressed that "[t]he taxpayers have already paid for the roadway repairs here; the only question is whether Galveston taxpayers rather than Texas taxpayers should bear the cost." 217 S.W.3d at 468. The Court noted that since the State cited no statute authorizing its action, and since "disputes like this one have apparently been settled throughout Texas history by political rather than judicial means, we hold that the party seeking to change the status quo ought to bear the burden of changing the rules." Id.

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[2]In our Response to the Motion to Transfer Appeal, we noted that Appellants' claims were grounded in equitable estoppel (ROA 888; Order, p. 10 n.12), and that transfer should be denied "because the true issue in this case is not ripe for review." (Response, p. 6). On further reflection, however, the Court should consider this issue and hold that the local governments cannot establish equitable estoppel. For as we also maintained in our Response, the Cabinet and Appellants were in agreement concerning the overtime calculations until the Court's decision in Hasken. Since the Cabinet is required to follow Hasken, and changed its position only in response to that decision, any claim of equitable estoppel must fail as a matter of law. (Id; see also Response to Motion for Stay of Administrative Proceedings, 2010-CA-000850, p. 5).

[3]Appellants also cite this decision in their Brief at page 24. A copy of the decision is included in the Appellants' Appendix at tab 5.

The four Justices in dissent stressed that because cities derive their immunity from the state, "it would be illogical to allow a municipality sued by the state to assert its immunity against the very source of that immunity . . . . It is indeed mystifying that the State's immunity could be used to undermine the State's sovereign interests." Id at 479. The majority countered that cities ultimately derive their immunity from the people, and that "the City of Galveston is older than the State itself." Id at 473.

This Court should find the dissenting opinion the more persuasive of the two. In any event, Appellant's reliance on Galveston is misplaced. Appellants have insisted throughout that they derive their immunity as agents of the Fire Commission. That they enjoy inherent immunity from all actions brought by the state [Br. 22-25] is an argument Appellants failed to preserve, as we set forth in Argument VII, *infra*. Although the firefighters have not received their wages, the fact that Hasken requires that they be paid makes this case about indemnification, not immunity. Unlike the Galveston case, a Kentucky statute, KRS 337.285, expressly authorizes actions to recover overtime wages against local governments. And, whereas no statute authorized the Texas action,[4] unprecedented in the state's history, as the Circuit Court noted, the Labor Cabinet has historically enforced KRS Chapter 337 against local governments in appropriate cases. [ROA 891-92; Circuit Court Opinion at 13-14].

As was the case in Galveston, this case is about who pays the overtime wages owed—the local governments or the Commonwealth. Fairly viewed, this action is an

[4]The Court contrasted the case with a 2000 Court of Appeals decision involving "a statute [that] unambiguously rendered cities liable for workers compensation penalties, a circumstance not present here." Id at 471-72. See Section I(C), *infra*.

attempt to shift the financial obligations the Hasken decision has imposed on *local governments* to the Labor Cabinet, *a sovereign.* Cf. St. Matthews Fire Protection District v. Aubrey, 304 S.W.3d 56, (Ky. App. 2009)("the District's declaratiory judgment claim is, for all practical purposes, a claim for damages for past negligent conduct by the defendants rather than a request . . . to aid the parties in conforming their future to the law's requirements."). Accordingly, as urged in our motion to dismiss, the appeal should be dismissed on grounds that the Labor Cabinet enjoys sovereign immunity from the implied indemnification claims of the local governments.

C. IMMUNITY MAY NOT BE ASSERTED AGAINST THE SOVEREIGN THAT AUTHORIZED THE CLAIM.

The Cabinet's immunity defense does not hinge on whether the Court concurs that the issue is one of indemnity. It defies logic to allow a local government to assert immunity against the Commonwealth, particularly when the state enacted a statute authorizing the claim. Accordingly, the Court should hold that immunity may not be asserted against the sovereign that enacted the statute on which a claim is predicated.

We are aware of no Kentucky decision in which a local government was permitted to assert immunity against the Commonwealth. This Court should embrace the view of the four dissenting Justices in Galveston, *supra:* "In this case, where you end up depends on where you start. The Court's starting point is that a city cannot be sued unless the Legislature has unmistakably waived immunity. I agree wholeheartedly when the petition reads *'Citizen v. City'* but in the exceedingly rare case when it reads *'State v. City,'* there is nothing for the Legislature to waive." 217 S.W.2d at 482.

In Texas Workers' Comp. Comm'n v. City of Eagle Pass, 14 S.W.3d 801 (Tex App. 2000), the Commission assessed administrative penalties against the City for

making late benefit payments. The trial court determined that derivative immunity prevented the State from assessing those penalties. The Texas Court of Appeals reversed:

> Under the common law doctrine of immunity, municipalities and other political subdivisions of the State possess limited immunity from actions brought by private third parties. This immunity results from agency principles and the fact that municipalities and political subdivisions are agents of the State. [Citation omitted] . . . . Thus, a political subdivision's derivative immunity acts as a shield against actions brought by private parties but not as a shield against the State, from which the subdivision derives its immunity.

14 S.W.3d at 803.

Alden v. Maine, 527 U.S. 706 (1999) was an action brought by state probation officers for overtime compensation under the Fair Labor Standards Act. The Court, 5-4, held that Maine's sovereign immunity barred the federal action in state court. Justice Souter, joined by three others, authored a lengthy dissent that examined the history of state sovereign immunity. The basis of the dissent: "The State of Maine is not sovereign with respect to the national objectives of the FLSA. It is not the authority that promulgated the FLSA, on which the right of action in this case depends." 527 U.S. at 800 (footnote omitted). "It will not do for the Court to respond that a remedy was never available where the right in question was against a sovereign. A State is not the sovereign when a federal claim is pressed against it . . . ." Id at 812.

Similarly, KRS 337.285, Kentucky's overtime wage statute, provides the basis for the firefighters claims. Since the Commonwealth enacted the statute "on which the right of action in this case depends" the local governments may not, as a matter of law, invoke the immunity they enjoy from private actions against these firefighters. Accordingly, it would stand the law on its head if the local governments were allowed to circumvent the

logic of this rule by asserting derivative immunity as so-called agents of the Fire Commission. Because the Commonwealth enjoys sovereign immunity from this proceeding, the Complaint must be dismissed.

In conclusion, Hasken's holding that State Incentive Pay is wages applies statewide, and, the doctrine of sovereign immunity does not shield Appellants from the costs of complying with Hasken.[5] The doctrine would, however, bar any attempt to shift the cost of compliance to the Labor Cabinet. In any event, the local governments may not invoke immunity against the Commonwealth for the reasons we have stated.

II. SOVEREIGN IMMUNITY DOES NOT EXTEND TO SUITS BETWEEN AGENCIES OF THE SOVEREIGN.

Appellants' contention that they enjoy immunity as agents of the Fire Commission presumes, of course, that the Fire Commission itself is immune from Labor Cabinet actions brought pursuant to KRS Chapter 337. Yet the Fire Commission is not immune, since the doctrine of sovereign immunity was never intended to prevent the sovereign from policing itself. In its Order denying Appellants' motion for a stay pending appeal, the Court of Appeals agreed. Once again, Appellants' Brief completely ignores the ruling of the Court of Appeals.

A. SOVEREIGN IMMUNITY BARS *PRIVATE* SUITS.

At the time the federal Constitution was ratified, sovereign immunity was understood "to preserve the States' traditional immunity from *private* suits." Alden v. Maine, 527 U.S. 706, 724 (1999)(emphasis added). In fact, "[a]t the time of the Constitution's ratification and the ratification of the Eleventh Amendment, it was already

[5]This proposition is explored more fully in Section III(B), *infra*.

well established in England that courts could entertain suits by governmental entities created by the King against the King's officials or other governmental entities created by the King."[6]

In its Order denying Appellants' motion for a stay pending appeal, the Court of Appeals concurred: "In light of the stated history of the doctrine and the statutory enactments providing for waiver of sovereign immunity in certain defined situations, we are convinced that the Cabinet's argument is well-taken." [Order, p. 4]. The Court noted: "Our research has disclosed only a single case directly addressing the application of sovereign immunity protection in an action between state agencies." Id. That case, a 1961 Louisiana Court of Appeals decision,[7] "provides a thorough and compelling analysis to support its conclusion that one state agency cannot assert the defense . . . against a separate agency." Id at 5. The Court quoted the decision at length [Id at 6-7], and stressed that the pertinent provision of Louisiana's constitution is "comparable" to Section 231 of the Kentucky Constitution. Id at 5.

Despite the dearth of published decisions, "[a]llowing one agency to proceed against another is neither unprecedented nor unusual." State v. CNA Insurance Cos., 779

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[6]Brief for Petitioner, Virginia Office for Protection and Advocacy v. Stewart, No. 09-529, p. 45, on Writ of Certiorari to the U.S. Court of Appeals for the Fourth Circuit, on this issue: "Whether the Eleventh Amendment categorically precludes an independent state agency from bringing an action in federal court against state officials for prospective injunctive relief to remedy a violation of federal law under the doctrine of *Ex Parte Young*." *See also* Reply Brief for Petitioner, p. 15. We quote from a Brief reluctantly, doing so here only because the cited quotation is directly on point and because of the dearth of decisions and secondary authority on the issue. We have included the relevant sections of the Brief, the Respondent's Brief, and the Reply Brief in the Appendix, at tabs 4-6, respectively. Oral argument in the case was held on December 1, 2010.

[7]Terrebonne Parish School Bd. v. St. Mary Parish School Bd., 131 So.2d 266 (La. App. 1961).

A.2d 662, 668 (Vt. 2001). In CNA, the Vermont Agency of Natural Resources (ANR) initiated administrative proceedings against the State's Department of Corrections (DOC) arising from environmental contamination at a state prison site containing a wood treatment facility. The State then sued CNA, arguing that the insurer was obligated to defend and indemnify the state because the proceeding is a "suit". The trial court denied coverage under the policy "because both entities are agencies in the executive branch whose commissioners serve at the pleasure of the governor. Under these circumstances, the court held, any judgment by one agency against another would be the result of an action that was essentially controlled by the same person." 779 A.2d at 668. Concluding that "the same person cannot be both plaintiff and defendant at the same time in the same action," the trial court sided with the insurer. Id.

The Vermont Supreme Court reversed. The Court reasoned that ANR's actions "were not motivated by any discretionary desire to intervene, but rather mandated by the legislative scheme for managing hazardous waste." "The intrabranch dispute between ANR and DOC does not violate any notion of separation of powers or transform the proceeding into a collusive first-party claim. Rather, ANR is proceeding against DOC in a traditionally justiciable controversy just as the agency would have against a private party." Id at 669. Similarly, the Labor Cabinet must enforce Chapter 337 against other branches of state government, just as the Environmental Cabinet must enforce its laws against other branches of state government. Nowhere in Kentucky jurisprudence is there any indication that the legislature intended to cloak state agencies with immunity from laws aimed to protect the general public, such as civil rights, wage and hour, occupational safety and environmental laws.

In addition to the persuasive decisions from Vermont and Louisiana, sound policy reasons militate against application of sovereign immunity to inter-agency disputes. The Commonwealth should police itself as vigorously as it does the public. Foreclosing the state from enforcing its laws against its own agencies ultimately fosters disrespect for those laws when enforced against its citizens. Further, the justifications for the doctrine—protecting the public treasury and respecting State dignity[8] simply do not apply in actions between state agencies. Since Appellants do not address this issue in their Brief, this Court should not permit them to do so in their Reply Brief. Rather, Appellants should be deemed to be in agreement with the proposition that sovereign immunity does not apply to suits between state agencies.

B. THESE PROCEEDINGS ARE NOT PRIVATE SUITS.

The local governments argue that because they are brought on behalf of the firefighters, the Cabinet's actions against Appellants are private actions, and that therefore immunity applies. (Response to motion to dismiss at 11-14). However, in these proceedings the Cabinet is, in effect, a trustee. KRS 337.385(2) states in part that the Cabinet "may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim."

Section 280 of the Restatement of Trusts, 2d, says that a trustee can maintain such actions against third parties as he could maintain if he held the trust property free of trust.

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[8] Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743, 747 (2002)("primary function of sovereign immunity is not to protect State treasuries . . . but to afford the States the dignity and respect due sovereign entities."); Foley Construction Company v. Ward, 375 S.W.2d 392, 393 (Ky. 1963)("Immunity from suit is a sovereign right of the state . . . . The reason for exempting a . . . sovereign from damages inflicted in the performance of its governmental functions is . . . to protect public funds and public property.")

Comment (h) states that the trustee "can proceed in the action as though he were the owner of the claim which he is enforcing. If he does describe himself as trustee the description is treated as surplusage. Whatever money or other property is recovered by the trustee ...he holds subject to the trust." Since they were brought by the Cabinet in trust for the firefighters, the claims belong to the Cabinet, and are not private suits.

In addition, "[a] suit which is commenced and prosecuted against a State in the name of the United States by those who are entrusted with the constitutional duty to 'take Care that the Laws be faithfully executed,' U.S. Const., Art. II, Sec. 3, differs in kind from the suit of an individual . . . ." Alden v. Maine, 527 U.S. 706, 755 (1999). Similarly, these actions, brought by the Commonwealth pursuant to the duties the legislature entrusted to it under KRS Chapters 336 and 337 cannot be considered private suits merely because the Cabinet is the plaintiff. KRS 336.050 states that the Cabinet shall, among other things "[i]nvestigate and ascertain the wages of all employees employed in this state," and shall "[u]pon complaint, prosecute *any* violation of any of the provisions of any law which it is his duty to administer or enforce." (Emphasis added). Given the mandate of this statute, a suit brought by the Cabinet pursuant to KRS Chapter 337, including KRS 337.285, "differs in kind from the suit of an individual." Moreover, because the penalty provisions in KRS 337.990 are so modest, the prospect of overtime awards, more so than penalties, enhances the likelihood that employers will pay overtime wages as required by law. Naugle v. Beech Grove City Schools, 865 N.E.2d 1058, 1065-66 (Ind. 2007). Accordingly, even though brought in trust on behalf of individual firefighters, the Cabinet's administrative proceedings against the local governments cannot be considered *private* suits.

C. THE CABINET IS NOT REQUIRED TO OBTAIN WAGE ASSIGNMENTS TO DISCHARGE ITS OBLIGATIONS UNDER KRS CHAPTER 337.

KRS 337.385(2) reads in its entirety:

> At the written request of any employee paid less than the amount to which he is entitled under the provisions of KRS 337.020 to 337.285, the executive director may take an assignment of such wage claim in trust for the assigning employee and may bring any legal action necessary to collect such claim, and the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by the court. The executive director in case of suit shall have power to join various claimants against the same employer in one (1) action.

Appellants argue that these actions are private because KRS 337.385(2) requires the Cabinet to obtain an assignment from an employee in order to bring an administrative action on his or her behalf. [Response to motion to dismiss at 11-14; Br. at 19]. The Labor Cabinet disagrees. First, no Court has held that KRS 337.385(2), which uses the permissive "may", means that the Labor Cabinet must obtain an assignment from each and every potential claimant. Had the legislature intended that result, the statute would plainly have read that the Cabinet shall not bring any legal action without first obtaining wage assignments from each claimant. Cf. Richardson v. Louisville/Jefferson County Metro Government, 260 S.W.3d 777, 781 (Ky. 2008). The decisions Appellants cite (Response at 13 n.5) are not persuasive on this issue. In Smith v. Vest, 265 S.W.3d 246 (Ky. App. 2007), for example, the Court embraced an exception to the rule that "every word in a statute is to be given force and effect," and treated certain words as surplusage in order to "give effect to the legislative intent. The will of the Legislature, not its words, is the law." 265 S.W.3d at 252.

Second, a "statute must be read as a whole and in context with other parts of the law." Richardson, 260 S.W.3d at 779, citing Lewis v. Jackson Energy Co-op Corp., 189 S.W.3d 87, 92 (Ky. 2005). In order to give effect to the entire legislative scheme of Chapters 336 and 337, the word "may" should be construed as permissive. As previously noted, KRS 336.050 constitutes a broad mandate that the Labor Cabinet investigate and prosecute "any violation of any of the provisions of any law which it has the duty to administer or enforce." The rule is well-settled that two statutes that relate to the same subject matter must be construed together and reconciled, if possible, so as to give effect to both. See generally Sumpter v. Burchett, 202 S.W.2d 735 (Ky. 1947). And this rule particularly applies when the two statutes were enacted in the same legislative session, Id; these two statutes were enacted "as part of the 1974 General Assembly's major revision of Kentucky's Wages and Hours Act." Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354, 357 (Ky. 2005).

Requiring the Cabinet to obtain an assignment from each potential claimant is inconsistent with this broad mandate, since on its face this statute requires the Cabinet to pursue all violations it discovers during the investigation of a complaint. The only sensible way to give effect to both statutes is to allow the Cabinet to prosecute *any* and all violations uncovered as a result of its mandatory duty to investigate and ascertain the wages of *all employees*, and to allow the Cabinet to proceed on the basis of the wage assignment of the employee who filed the initial complaint. This is especially true given the mandate that all statutes are to be liberally construed to promote the objects and carry out the intent of the legislature. KRS 446.080(1); Richardson, 260 S.W.3d at 94. KRS Chapter 337, "Kentucky's analogue to the Fair Labor Standards Act," City of Louisville

Division of Fire v. Kaelin, 212 S.W.3d 89, 92 (Ky. 2007), is quintessential remedial legislation:

> The Fair Labor Standards Act was designed 'to extend the frontiers of social progress by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.' Message of the President to Congress, May 24, 1934. Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed . . .

A.H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945). In the words of the Supreme Court of Appeals of West Virginia, "the Wage Payment and Collection Act 'is remedial legislation designed to protect working people and assist them in the collection of compensation wrongly withheld.' Beichler v. West Virginia Univ., 700 S.E.2d 532, 536 (W.Va. 2010)(Citation omitted).

Third, requiring the Cabinet to obtain an assignment from each potential claimant would frustrate the Cabinet's ability to discharge its statutory obligations. Many investigations concern employers with employees so numerous that requiring a wage assignment from each one is impracticable. Further, because those who work for a wage often are mobile, locating them during the investigative stage would prove difficult and taxing on the Cabinet's limited resources.

A wage assignment requirement would facilitate the all too common scenario in which an employer persuades an employee not to execute the document, thereby precluding the Cabinet from proceeding on behalf of that employee. Experience under the FLSA underscores this fact. The Act, which became law in 1938, originally required a claimant to make a written request for the Secretary to initiate legal action. "This limitation has impeded the Secretary in his efforts to enforce the act since many

employees who have not been paid in compliance with the act are hesitant about requesting legal action against their employers." Int'l Ladies' Garment Union v. Donovan, 722 F.2d 795, 808 (D.C. Cir. 1983), *citing* H.R. Report No. 75, 87th Cong, 1st Sess. 28 (1961). Accordingly, the Act was amended in 1961 to allow the Secretary to pursue relief "even absent the consent of the underpaid employees." 722 F.2d at 809. This Amendment, the House Report argued, "would increase the level of compliance with the statute, and would protect complying employers from the unfair competition of the noncomplying employers." Id at 808.

The sheer magnitude of the violations and the scope of the labor code (overtime violations, minimum wage violations, failure to pay wages, prevailing wage violations) must be considered. Congress concluded in 1974 "that the enforcement capability of the Secretary of Labor is not alone sufficient to provide redress in all or even a substantial portion of the situations where compliance is not forthcoming voluntarily." Alden v. Maine, 527 U.S. 706, 810 (1999)(Souter, J., dissenting, citing S. Rep. No. 93-690, p. 27 (1974)). What was true nationally back in 1974 is no less true for Kentucky in the 21st century. Accordingly, sound policy considerations support the Cabinet's interpretation that it is not required to obtain assignments from all potential claimants.

Fourth, the sentence in KRS 337.385(2) that authorizes the Cabinet to collect overtime wages states that "the employer shall be required to pay the costs and such reasonable attorney's fees as may be allowed by *the court*." (Emphasis added). The Cabinet has chosen to proceed against these local governments administratively, not through court actions. Suppose the Cabinet prevailed in an administrative action in which assignments were obtained on behalf of all claimants, and thereafter moved for

costs and attorney fees. Surely the Appellants would oppose such a request on grounds that the statute only applies to *court* proceedings. Likewise, the fact that the Cabinet's actions are not court proceedings compels the conclusion that the statute does not require the Cabinet to obtain an assignment from each potential claimant in order to proceed administratively on his or her behalf.

Finally, Parts Depot, Inc. v. Beiswenger, 170 S.W.3d 354 (Ky. 2005), the decision on which Appellants rely, does not hold that KRS 337.385(2) prohibits administrative proceedings unless wage assignments are obtained on behalf of all potential claimants. Parts Depot holds only that "KRS 337.385, the more specific statute, takes precedence over KRS 337.310, the general statute, whenever an employee, or the [Cabinet] on employee's behalf, chooses to exercise the judicial remedy for recovery of unpaid wages." 170 S.W.3d at 361-62. Significantly, Parts Depot did not originate as an administrative proceeding brought by the Cabinet (although the Cabinet was allowed to file an *amicus curiae* brief in the case). The Court elaborated: "We do not decide today . . . whether the phrase 'any legal action necessary' in KRS 337.385(2) authorizes the [Cabinet] to pursue an administrative adjudication against the employer on behalf of the employee." Id at 359. Finally, the Cabinet's own internal policies notwithstanding (Response to motion to dismiss at 12), there is no suggestion in the record that the Cabinet sought or obtained assignments from all employees who are claimants in these proceedings. The Court should hold that the Cabinet is not required to do so.

In conclusion, Appellants do not dispute our contention that sovereign immunity does not apply when one arm of the Commonwealth sues another. Since the Fire Commission is not immune from an action brought by the Cabinet pursuant to KRS

Chapter 337, Appellants are not immune even if they are deemed agents of the Commission. Appellants' sole response is that because KRS 337.385(2) requires the Cabinet to obtain an assignment from each potential claimant, the Cabinet's administrative proceedings are, in effect, private actions. We have demonstrated that, KRS 337.385(2) notwithstanding, these actions belong to the Cabinet, in trust for the complaining employee. In any event, KRS 337.385(2) does not require that the Cabinet obtain an assignment from each potential claimant before proceeding administratively against an employer for a violation of KRS 337.285. Accordingly, the Circuit Court's decision should be affirmed.

III. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT APPELLANTS ARE NOT AGENTS OF THE FIRE COMMISSION.

The Circuit Court framed the issue as follows: "the two-step analysis for this court is simply this: whether the Commonwealth established an agency relationship with local governments to distribute state training incentive funds; and if so, whether that relationship extends sovereign immunity to those local governments." [ROA 887-89; Order, p. 9-10 (footnote omitted)]. The Court concluded that the relationship cannot be deemed an agency, and even if it could, the agency relationship could not extend immunity to the local governments from the Cabinet's actions. The Court's conclusions are correct.

A. APPELLANTS ARE NOT AGENTS OF THE FIRE COMMISSION.

The Court characterized the relationship between the local governments and the fire commission as contractual, stressing that "the local governments were negotiating with the Fire Commission, not for the Fire Commission. [ROA, 888; Order, p. 10 n.13

(Court's emphasis)]. The Court's conclusion finds ample support in the law. "In any relationship created by contract the parties contemplate a benefit to be realized through the other party's performance. Performing a duty created by contract may well benefit the other party but the performance is that of an agent only if the elements of agency are present." Restatement 3d, *Agency*, Section 1.01, Comment "g".

The most essential element is consent. An agency "requires that an agent-to-be and a principal-to-be consent to their association with each other . . . . In some instances, however, relationships that are less than fully consensual . . . trigger consequences equivalent to those of agency . . . . Many of the legal consequences of agency also apply in situations that resemble agency in form but in which the parties consent is subject to constraints imposed by law or by legal or regulatory institutions . . . . Likewise, the legal consequences resemble those of common-law agency when an 'agent's' powers are specified by operation of law, not by the parties." Id, Comment "d".

The local governments have confused "the legal consequences of agency" with an actual principal-agent relationship with the Fire Commission. Nowhere in the record is there any evidence that the Fire Commission believed it was entering into an agency relationship with the local governments with respect to the State Incentive Funds. The relationship between the parties was created by operation of law, not by mutual assent: in order to receive the funds the local governments were required to comply with the directives of the Fire Commission. The rights and duties of the local governments with respect to the funds are defined by law, not set forth in any agreement with the Fire Commission.

In B & G Enterprises, Ltd. v. United States, 220 F.3d 1318 (Fed. Cir. 2000), Plaintiff contended that federal tobacco vending machine restrictions constituted a regulatory taking in violation of the Fifth Amendment. Plaintiff argued that California, which enacted the restrictions in order to remain eligible to receive federal monies, was an agent of the federal government when it enacted the vending machine restrictions. Citing the definition of "agency" in the Second Restatement, the Court explained: "There is no manifestation by either the federal government or the State of California of an intent to create an agency relationship under the facts of this case." 220 F.3d at 1323. Citing Griggs v. Allegheny County, Pa., 369 U.S. 84, 89 (1962), the Court held that "the federal government's conditioning a state or locality's receipt of federal funds does not make that state or locality an agent of the federal government." In addition, the Court held that conditioning the receipt of funds "cannot be construed as a grant of authority for California to pass legislation *on behalf* of the federal government." Id at 1324 (Court's emphasis). Finally, the Court noted that because California, an independent sovereign, had the inherent authority to enact the vending machine restrictions, "[t]he United States did not delegate to California the authority to enact that law." Id. at 1324.

The instant case cannot be distinguished from the rationale of B & G Enterprises. To borrow Appellants' metaphor [Br. 17], both cases involve a superior government attempting to influence the behavior of a subordinate government via the "carrot" of money. In B & G Enterprises, California could obtain federal monies only by complying with federal vending machine regulations. Similarly, Appellants' obeyed the instructions of the Fire Commission in order to remain eligible to receive the state incentive funds. [Br. 31, 41]. This feature distinguishes this case from the decisions Appellants cite. As

was the case in B & G Enterprises, Appellants can point to no evidence that the Fire Commission intended to create an agency relationship with them. Indeed, nowhere in their Brief do Appellants attempt to explain why the Circuit Court erred in its central conclusion on this issue: "the local governments were negotiating with the Fire Commission, not for the Fire Commission. [ROA, 888; Order, p. 10 n.13 (Court's emphasis)].

Appellants agree [Br. 29] that another "essential element of agency is the principal's right to control the agent's actions." Restatement 3d, *Agency*, Section 1.01, Comment "f'(1). "Actual authority is an agent's power to affect the principal's legal relations in accord with the agent's reasonable understanding, at the time the agent acts, of the principal's manifestations to the agent." Id, Section 2.02, comment "c". The local governments point to no evidence indicating that the Fire Commission authorized them to sue the Labor Cabinet to challenge application of the 2080 divisor as mandated by Hasken. Indeed, there is no indication that the local governments even asked the Fire Commission if it objected to their decision to identify themselves as "agents" of the Commission for purposes of filing this lawsuit. Accordingly, as was the case in B & G Enterprises, the Fire Commission "did not delegate to [the local governments] the authority" to challenge the Cabinet's decision to obey the dictates of Hasken.

B. EVEN IF AN AGENCY EXISTED, APPELLANTS WOULD NOT ENJOY IMMUNITY FROM THE CABINET'S ACTIONS.

The Circuit Court reasoned: "[I]t is solely the duty/work of the local governments to pay correct overtime wages to their employees. The fact that they sought direction from the Fire Commission and the Cabinet itself does not necessarily absolve them of this

liability." [ROA 891; Order, p. 13 (Court's emphasis; footnote omitted)]. The Court added: "Specifically, the Court deems that the contract/statutory obligation to pay their firefighters in accordance with the provisions of KRS Chapter 337 is separate and independent from the 'agency'/contract with the Fire Commission." [ROA 892; Order, p. 14, n. 17].

Put another way, while sovereign immunity protects state treasuries from damage awards, the doctrine was never intended to apply to the costs of complying with state statutes. Cf. Milliken v. Bradley, 433 U.S. 267 (1977)(Eleventh Amendment not violated by requiring state to pay for costs of educational components of court ordered desegregation plan). Indeed, Appellants cite no authority to support the assertion that immunity from damage awards extends to the costs of complying with state laws. Accordingly, even if Appellants were in fact agents of the Fire Commission, they would still not enjoy immunity from the Labor Cabinet's actions based on violations of KRS 337.285. Beichler v. West Virginia Univ., 700 S.E.2d 532, 536 (W.Va. 2010)(holding, on public policy grounds, that sovereign immunity "does not bar the claim of a State employee for unpaid wages asserted under the [wage payment statute]"). A copy of this decision is included in the Appendix at Tab 7.

State sovereign immunity neither derives from nor is limited by the Eleventh Amendment to the federal constitution. Yet because similar concerns--protecting state treasuries and preserving state autonomy--provide the basis for both the doctrine of sovereign immunity and that Amendment, decisions under the Eleventh Amendment are instructive.

> From all of this it may be seen that principles of Eleventh Amendment law attempt to strike a

> balance between the states' sovereign immunity and the supremacy of federal law. [Citation omitted] . . . . The bounds of this workable balance do not mean the Eleventh Amendment is to be read as precluding prospective relief having a future financial effect on a state treasury, even if the amount is substantial. See Milliken v. Bradley, 433 U.S. 267 . . . (1977).

New York City Health & Hospitals Corp.v. Perales, 50 F.3d 129, 135 (2d Cir. 1995).

In the early 1990s, courts uniformly held that the Eleventh Amendment does not prohibit prospective payments to providers who successfully challenged Medicaid reimbursement rates under the Boren Amendment.[9] Accordingly, in Kansas Health Care, the District Court held on December 31, 1990 that Kansas' rates were set too low. Kansas officials sought "clarification as to whether the injunction applies to reimbursement for services rendered after December 31, 1990, or to all payments made after December 31, 1990." 754 F.Supp. at 1517. The Court held that "the eleventh amendment does not preclude the injunction from applying to all reimbursement payments made after the entry of the injunction on December 31, 1990. [Footnote omitted]." Id. Similarly, in Rye Psychiatric Hosp. Center, the Court entered an order on July 2, 1991 declaring New York's reimbursement rates unlawful under the Boren Amendment. 777 F.Supp. at 1144. On motion for injunctive relief to implement this order, the Court held: "The portion of plaintiff's action relating to inadequate payments and improper rate methodologies occurring since July 2, 1991 . . . represents injuries

[9]E.g. New York City Health & Hospitals Corp.v. Perales, 833 F. Supp. 353 (S.D.N.Y. 1993), *rev'd on other grounds*, 50 F.3d 129 (2d Cir. 1995); Rye Psychiatric Hosp. Center, Inc. v. Surles, 777 F.Supp. 1142 (S.D.N.Y. 1991); Kansas Health Care Ass'n, Inc. v. Kansas Dept. of Social & Rehabilitation Services, 754 F.Supp. 1502 (D. Kan. 1990), *rev'd on other grounds*, 958 F.2d 1019 (10th Cir. 1992); Temple Univ. v. White, 732 F. Supp. 1327 (E.D. Pa. 1990), *aff'd*, 942 F.2d 201 (3d Cir. 1991), *cert. denied sub nom.* Snider v. Temple Univ., 502 U.S. 1032 (1992).

arising after the court issued its decision. Relief for these injuries is clearly prospective in nature." Id. at 1147.

The relief the Cabinet seeks on behalf of the firefighters should not be confused with damages.

> Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies "are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled." D. Dobbs, *Handbook on the Law of Remedies*, 135 (1973). Thus, while in many instances an award of money is an award of damages, "[o]ccasionally a money award is also a specie remedy." Id.

Maryland Dep't of Human Resources v. Department of HHS, 763 F.2d 1441, 1446 (D.C. Cir. 1985)(Court's emphasis); *see also* Gribben v. Kirk, 466 S.E.2d 147, 155 (W.Va. 1995)(characterizing wage claim against state as an action "to collect such an 'obvious legal debt'").

These decisions provide compelling support for the contention that sovereign immunity should not shield local governments from the costs of complying with state statutes. The Labor Cabinet's administrative actions against the local governments are mandated by Hasken's interpretation of Kentucky's wage laws, and the relief sought is compliance with the overtime methodology the Court embraced. The Cabinet did not attempt to enforce the Hasken formula until that decision became final.[10] Accordingly,

[10]That the Cabinet audits back five years in calculating the wages due does not make the application of the Hasken formula retroactive. Hasken held that the Cabinet had applied the wrong divisor, hence the firefighters had been underpaid since the inception of the incentive pay program. The Cabinet's administrative actions, brought after Hasken became final, seek wages back five years from the date the Cabinet received a complaint relating to a given employer, in accordance with that decision. 265 S.W.3d at 226.

the Cabinet's administrative actions were brought solely to comply with Hasken and to vindicate the Commonwealth's interest in assuring that local governments fully comply with the wage statutes as judicially interpreted.

In conclusion, Appellants are not agents of the Fire Commission, but even if they were deemed agents, they would not enjoy immunity from the Cabinet's administrative actions. The statutory duty to pay firefighters in accordance with the provision of KRS Chapter 337 is independent from any agency or contract with the Fire Commission. [ROA 892, Order, p. 14 n.17]. Stated another way, no doctrine of immunity should shield local governments from complying with the wage statutes and from judicial interpretations of those laws.[11] Moreover, Appellants have cited no decision in which a Court extended sovereign immunity to shield a defendant from the costs of complying with a state statute. The judgment of the Circuit Court should therefore be affirmed.

[11]The Court should ignore the claim that Appellants will expend "up to $2,522 per firefighter just to distribute the state's $3,100 incentive supplement to each firefighter." [Br. 17]. The source of this assertion is the testimony of J.D. Cheney, a Kentucky League of Cities lobbyist before a Senate Committee. [ROA 289]. Countless decisions have held that the testimony of a single legislator, even a bill's sponsor, is not competent evidence of legislative intent, E.g., Utility Center, Inc. v. City of Fort Wayne, 868 N.E.2d 453, 459 (Ind. 2007); surely, then, the *predictions* of a *lobbyist* concerning the potential consequences of a bill must be ignored. Significantly, Mr. Cheney provided no bases for his guesstimate and was not questioned about it. The ink was barely dry on Hasken (decided August 3, 2007) when the League issued a report, dated August 27, 2007, on which Mr. Cheney's testimony is predicated. This report was presented to this Court in the City's motion for discretionary review in Hasken; hence, the Court was already aware of this claim when it determined that discretionary review should be denied. The pertinent portion of the City's motion is included in the Appendix at Tab 8.

IV. THE LEGISLATURE HAS IMPLIEDLY WAIVED SOVEREIGN IMMUNITY WITH RESPECT TO ACTIONS BROUGHT PURSUANT TO KRS CHAPTER 337.

The General Assembly may waive sovereign immunity, either expressly or by implication from the text of a statute. Withers v. University of Kentucky, 939 S.W.2d 340, 346 (Ky. 1997). The waiver "does not have to be direct." LFUCG v. Smolic, 142 S.W.3d 128, 132 n.2 (Ky. 2004).

KRS Chapter 337 evidences the legislature's clear intent that sovereign immunity be waived with respect to county employees. First, the definitions of "employer" and "employee" include county employers and county employees. KRS 337.010(1)(d) defines "employer" expansively, and does not exempt counties. Likewise, KRS 337.010(e) broadly defines "employee" and lists at least 12 exceptions to the definition; yet, county employees are not excepted from the definition. In addition, KRS 337.010(2)(a) excludes certain state and all federal employees from the definition of "employee". That the legislature excluded these employees, but not all public employees, from the definition constitutes persuasive evidence that it intended the provisions of Chapter 337 to apply to local governments.

KRS 337.285, the overtime statute, evidences the legislature's clear intent that sovereign immunity be waived, independently of the foregoing analysis. The statute mentions counties or county employees twenty-eight (28) times. It contains many exemptions, KRS 337.285(2)(a)-(d), but county employees are not among them. The compensatory time provisions indicate overwhelmingly that the legislature intended to waive sovereign immunity. KRS 337.285(4)-(9) gives county employees a choice of receiving compensatory time in lieu of overtime. Had the legislature not intended to

waive immunity, it would not have needed to delineate a compensatory time exception for county employees. It is precisely because county employers and employees are bound by the overtime provisions that the General Assembly chose to afford county employees a compensatory time option. Perhaps the best evidence of waiver is the legislature's concern that county employers not shirk the duty to pay overtime wages. Accordingly, "[c]ompensatory time shall not be used as a means to avoid statutory overtime compensation." KRS 337.285(9).

In summary, the broad definition of "employer" and "employee", coupled with the repeated references in KRS 337.285 to a county's obligation to pay overtime or compensatory time, evidence an overwhelming intention that sovereign immunity be waived with respect to actions brought pursuant the overtime statute, and this Court should so hold.[12]

In addition, decisions holding that sovereign immunity has been waived with respect to Chapter 344 provide convincing support for the contention that the legislature has waived sovereign immunity with respect to actions brought pursuant to Chapter 337. Ammerman v. Bd. of Educ. of Nicholas Co., 30 S.W.3d 793 (Ky. 2000); Department of Corrections v. Furr, 23 S.W.3d 615 (Ky. 2000). Ammerman was an action brought by teachers alleging breach of contract, various tort claims and sexual harassment in violation of Kentucky's Civil Rights Act. Citing Furr, the Court held that "all of

[12]This very issue is presently on motion for discretionary review in the case of Blankenship v. LFUCG, 2008-CA-002044-MR, in which the Court of Appeals, in a 2-1 decision, affirmed a judgment that LFUCG enjoys sovereign immunity from firefighter claims for overtime violations. We urge the Court to review that decision along with this case and hold that sovereign immunity has been waived with respect to actions brought pursuant to KRS Chapter 337.

Appellants' claims, except the civil rights claims, are barred by the doctrine of sovereign immunity." 30 S.W.3d at 797. Furr, too, was an action alleging violations of the Civil Right Act, and the Court "granted discretionary review on the issue of whether the general Assembly has waived sovereign immunity for claims brought under the Kentucky Civil Rights Act." 30 S.W.3d at 616.

Citing "[o]ne of the purposes" of the Act, the Court noted:

> These words contain a solemn and hard won promise to *all* the people of the Commonwealth. The promise was made by the Commonwealth to its citizens through the General Assembly. What hollow words indeed if the safeguard against discrimination does not include the right to be free from acts of discrimination committed by the Commonwealth itself, or in its name.

Id at 617 (Court's emphasis).

The Court concluded: "To immunize the Commonwealth from application of the Kentucky Civil Rights Act frustrates the act's purpose and intent, deprives many of its citizens of its protections, and renders meaningless its pledge to safeguard *all individuals* from discrimination. Such a construction is neither tenable nor tolerable." Id. (Court's emphasis). The Court added that the Act applied to all employers, and that "the definition of employer includes a 'person,' which is defined to include the state, any of its political or civil subdivisions, or agencies." Id. at 618. "Thus, by overwhelming implication, KRS 344.450 provides a cause of action against the Commonwealth for violations of the Kentucky Civil Rights Act. This is as it should be." Id.

The rationale for the holdings in Furr and Ammerman applies with equal force in this case. Beichler v. West Virginia Univ., 700 S.E.2d 532, 536 (W.Va. 2010). The provisions of Chapter 337, like the Civil Rights Act, are statutory, remedial enactments

that parallel federal laws. The Court should hold that the legislature has implicitly waived sovereign immunity with respect to actions brought pursuant Chapter 337.

V. KRS CHAPTER 95A DOES NOT DIVEST THE CABINET OF JURISDICTION TO ENFORCE KRS 337.285.

More important than what Appellants say is what they do not contend. They do not, and indeed cannot, argue that Chapter 95A impliedly preempts Chapter 337. See Lexington Fayette County Food & Beverage Assn. v. LFUCG, 131 S.W.3d 745 (Ky. 2004)(discussing the doctrine of implied preemption). Instead, they are left with arguing that Chapter 95A is the more specific statute with respect to the State Incentive Funds, and therefore takes precedence over KRS 337.285.

The contention that KRS Chapter 95A divests the Cabinet of jurisdiction in these cases ignores important canons of statutory construction. Had the legislature intended that State Incentive Pay be exempt from the reach of Chapter 337, it would simply have said so when it enacted Chapter 95A. The legislature made comprehensive revisions to Chapter 337 in 1974, and Chapter 95A was enacted only six years later. The legislature is presumed to know of an earlier enacted statute when it passes later enactments. Lewis v. Jackson Energy Co-op Corp., 189 S.W.3d 87, 93 (Ky. 2005). This presumption should be a particularly strong one here, since it was only two years earlier, in 1978, that the legislature broadly expanded the definition of "wages" in KRS 337.010(1)(c): "including salaries . . . earned bonuses, and any other similar advantages . . . provided to employees as established policy." More important, the legislature understood that KRS 337.285 governed compensation matters relating to local government employees; this is particularly true given recent legal opinions construing the overtime statute. See Miller v. LFUCG, 557 S.W.2d 430 (Ky. App. 1977)(presuming that KRS 337.285 requires

urban county government to pay firefighter employees time and one-half for hours in excess of forty each week); see also OAG 79-206; 75-216; 75-607; OAG 74-602. That the legislature adopted no provision exempting the state incentive funds from the overtime compensation requirements set forth in KRS 337.285 indicates the legislature intended state incentive funds to be subject to those requirements.

In Richardson v. Louisville/Jefferson County Metro Government, 260 S.W.3d 777 (Ky. 2008), for example, the Court held that the Claims Against Local Governments Act ("CALGA") applied to an alleged tort committed by a former employee, since the tort was committed while the employee was still working for Metro Government. The Act excluded some classes of employees or conduct, but was silent as to whether it applied to former employees. The Court reasoned that "as evidenced by the explicit exclusion of some members, the General Assembly was fully capable of precluding former employees, had it so intended." 260 S.W.3d at 781. Likewise, at the time KRS Chapter 95A was enacted, KRS 337.285 contained much detail about which employees, employers and compensation were subject to its overtime and compensatory time requirements. Having just revised Chapter 337 six years earlier, the legislature most surely would have exempted State Incentive Funds from the requirements of KRS 337.285 if it truly intended that those funds not be subject to the overtime statute. Yet, as stressed, *supra,* the fact that the General Assembly made statutory changes in 2009 in no way indicates what the legislature intended when it enacted Chapter 95A in 1980; rules of statutory construction must resolve this question, and proper application of the rules favors the interpretation advanced by the Cabinet.

Appellants rely solely on the canon of construction that a later enacted, specific statute prevails over a statute that treats the same subject generally. [Br. 47-49]. To say that Chapter 95A is more specific than Chapter 337 begs the question. Although Chapter 95A is the more specific regarding firefighters, with respect to *the payment of wages*, KRS 337.285 is more specific than KRS 95A.250, which defines "salary." Recall that firefighters are hourly employees [815 KAR 45:035, Section 1(7); Hearing Officer Report, Paragraph 8, ROA 826], not salaried employees, and KRS 337.285 is the more specific statute with respect to hourly wage and payment of overtime on that wage.

Further, as Appellants themselves note [Br. 49], this rule comes into play only if the two statutes are "in irreconcilable conflict." A Court's central duty is to reconcile the statutes and give effect to both, provided the result is consistent with legislative intent. E.g., Spees v. Kentucky Legal Aid, 274 S.W.3d 447, 450 (Ky. 2009). Spees was a case in which two statutes were determined to be "in irreconcilable conflict." One statute, KRS 453.190, provided that indigent persons were exempt from paying court costs; the other, KRS 453.060, mandated that the plaintiff pay the fees of a warning order attorney. The Court concluded: "Both statutes before us involve the payment of costs and fees necessarily incurred in the prosecution or defense of a legal claim. . . . The direct mandate of KRS 453.060 with respect to payments of warning order attorney fees is more specific than the general reference of KRS 453.190 . . . ." 274 S.W.3d at 250.

In this case, Chapter 95A conflicts with Chapter 337 only because Appellants say it does. Chapter 95A creates a program to promote firefighter education and training. Chapter 337 is Kentucky's analogue to federal wage legislation that was enacted as part of the New Deal. (See pp. 25-6, *supra.*). Just because KRS 95A.250 defines "salary"

does not put that statute in irreconcilable conflict with Chapter 337. Cf. Kentucky Off-Track Betting, Inc. v. McBurney, 993 S.W.2d 946 (Ky. 1999).

Finally, the Court should recall that the Hearing Officer in Hasken relied on very specific regulations which, in his judgment, "compel[led] a finding" [ROA 827; Hearing Officer Report, p. 14] that 2,080 was the proper divisor. Likewise, the Circuit Court concluded: "Given the unequivocal language of the statute and regulation, *it cannot be seriously disputed* that State Incentive Pay is paid for a forty (40) hour work week which translates into 2,080 hours annually." [ROA 856; Circuit Court Opinion, p. 19 (Emphasis added)]. It would be ironic, then, if this Court allowed the rule of specificity to defeat a decision grounded in regulations specific to firefighter wages and hours.

The Circuit Court concluded that Appellants' contention "is inconsistent with history prior to, and subsequent to, the adoption of KRS 95A" and that "it appears that all parties have assumed that the local governments were subject to wage and hour violations under KRS Chapter 337 and enforcement by the Cabinet for at least thirty years." [ROA 892; Circuit Court Opinion, p. 13-14]. For this reason and the others set forth, Chapter 95A does not divest the Cabinet of jurisdiction to pursue the administrative actions against Appellants. Accordingly, the judgment of the Circuit Court should be affirmed.

VI. THE DOCTRINES OF GOVERNMENTAL AND QUALIFIED IMMUNITY DO NOT APPLY TO STATUTORY WAGE CLAIM VIOLATIONS.

If the Court is somewhat confused as to whether Appellants are invoking sovereign or governmental immunity, recall that the issue before the Circuit Court was framed squarely as Appellants being agents of the sovereign. [ROA 887-89; Order, p. 9-10 (footnote omitted)]. Indeed, the *only* issue identified in Appellants' CR 76.03(3) pre-

hearing statement is whether the local governments are entitled "to sovereign immunity as agents of the Commonwealth/Fire Commission." To borrow Appellants' phrase, their agency argument has "morphed" in this Court into one of "governmental" immunity [Br. 25] rather than "sovereign" immunity. Regardless, the doctrine of governmental immunity is inapplicable as well.

First, if the Court concurs that the local governments are not agents in the first place, the issue is moot. Second, if sovereign immunity does not shield Appellants from the costs of complying with state labor statutes, then, *a fortiori,* neither should the doctrine of governmental immunity. Third, if the Court concurs that sovereign immunity has been waived with respect to actions brought pursuant to KRS Chapter 337, then governmental immunity similarly should be deemed waived.

The doctrines of governmental and qualified immunity make no sense in the context of statutory wage violations. This no doubt explains why the Supreme Court of Appeals of West Virginia mentioned neither doctrine in its recent decision holding that "sovereign immunity does not bar the claim of a State employee for unpaid wages asserted under the West Virginia Wage Payment and Collection Act." Beichler v. West Virginia Univ., 700 S.E.2d 532, 536 (W.Va. 2010).

"[G]overnmental immunity shields state agencies from liability from *damages* . . . for those acts which constitute [integral] government functions." [Br. 30-31, citing Breathitt Co. Bd. of Education v. Prater, 292 S.W.3d 883, 8887 (Ky. 2009)(emphasis added)]. As stressed in Section III(B), *supra*, damages are awarded as a substitute for a loss; the wages due the firefighters pursuant to Hasken are not damages but rather represent a debt, the satisfaction of which is a specific, not a substitute remedy. Further,

Appellants cite no decisions in which the doctrines of governmental or qualified immunity were applied to a government's decision to not pay wages.

The doctrine of qualified immunity is confined to the realm of negligence. Yanero v. Davis, 65 S.W.3d 510, 521-22 (Ky. 2001). This case does not involve negligence. Nor does it involve a retroactive application of the methodology embraced in Hasken. Rather, an incorrect formula was for years mistakenly applied, and the courts have corrected the error. Hence the local governments' duty to pay their firefighters in accordance with Hasken can hardly be deemed a discretionary act.

The Circuit Court recognized the crucial distinction between failure to comply with statutory overtime requirements, and the type of case in which governmental or qualified immunity might properly be invoked:

> It is of vital importance to understand why the Cabinet alleges the local governments are liable . . . .[T]here is an implied/express contract between the local governments and the firefighters that required the local governments to abide by the provisions of KRS Chapter 337. This liability is separate and independent from any liability for mishandling state training incentive funds. The Cabinet does not contend that the local governments mishandled those funds or otherwise acted inappropriately as an agent of the Commonwealth. Were that the case, the governments may indeed be entitled to immunity.

[ROA 889; Order, p. 11 (Court's emphasis)].

VII. SOVEREIGN IMMUNITY SHOULD NOT IMMUNIZE LOCAL GOVERNMENTS FROM LABOR CABINET PROCEEDINGS.

This argument, Appellants' concede, was not raised in the pleadings or on motion for summary judgment, but rather was "noted" [Br. 21] in the Circuit Court's opinion. Nor was it identified as an issue in Appellants' prehearing statement. Accordingly, it

should be deemed waived. Skaggs v. Assad, By and Through Assad, 712 S.W.2d 947, 950 (Ky. 1986)("It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court."); CR 76.03(8). In any event, whether cities should enjoy the same immunity as counties from private damage awards—the sole issue raised by *amicus* Kentucky League of Cities—is an issue that does not concern the Labor Cabinet. This Court should, however, categorically reject any suggestion that local governments enjoy sovereign or governmental immunity from Labor Cabinet actions brought pursuant to KRS Chapter 337.

CONCLUSION

For all of the reasons set forth in Appellees' motion to dismiss the appeal, as well as the reasons set forth in Argument I herein, this Court should affirm the judgment of the Circuit Court with directions to dismiss the Complaint. In the alternative, this Court should affirm the judgment of the Circuit Court for any or all of the reasons presented herein, and further hold that (a) State Incentive Pay is "wages" pursuant to KRS Chapter 337; (b) KRS Chapter 95A does not divest the Labor Cabinet of jurisdiction to pursue the administrative actions against the Appellants; (c) the doctrine of equitable estoppel does not preclude the Cabinet from pursuing these administrative actions; and (d) KRS 337.385(2) does not require the Cabinet to obtain a wage assignment from an employee in order to bring administrative proceedings on his or her behalf.

Respectfully submitted,

DAVID O'BRIEN SUETHOLZ
MELISSA JAN WILLIAMSON
DAVID N. SHATTUCK
OFFICE OF GENERAL COUNSEL
KENTUCKY LABOR CABINET
1047 U.S. HWY. 127 SOUTH
FRANKFORT, KY 40601
PHONE: 502-564-3070
FAX: 502-564-5484

ATTORNEYS FOR APPELLEES