

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
CASE No. 2016-CA-1762

ROBERT F. GROSSL, ET AL

APPELLANTS

vs.

APPEAL FROM SCOTT CIRCUIT COURT
CIVIL ACTION NO. 13-CI-00227

SCOTT COUNTY FISCAL COURT

APPELLEE

* * * * *

BRIEF FOR APPELLANTS

* * * * *

SUBMITTED BY:

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of this Brief for Appellants was mailed postage prepaid, this 8th day of May 2017, to the following: Hon. Jean C. Logue, Madison County Courthouse, 101 N. Main St., Richmond, KY 40475; and D. Barry Stilz, Kinkead & Stilz, 300 E. Main St., Suite 800, Lexington, KY 40507. It is certified that the record has been returned to the Scott Circuit Court.



Counsel for Appellants

INTRODUCTION

This is an appeal from the granting of a motion to dismiss pursuant to CR

12.

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully submit that oral argument should be held in this case, because it raises a question of first impression: must a Fiscal Court allow and honor pay raises granted deputy Jailers by a Jailer where the pay raises are consistent with the Jailer's payroll budget approved previously by the Fiscal Court?

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STATEMENT OF THE CASE

The plaintiff-appellants are deputy Jailers employed at the Scott County Detention Center in Georgetown. The Scott County Jailer, in view of the plaintiffs' increased job responsibilities and/or promotions, determined to increase their hourly wage rate. The Jailer submitted the pay raises in accordance with the administrative and payroll procedures established by the Scott County Fiscal Court. The pay raises were consistent with the Jailer's payroll budget previously approved by the Fiscal Court. Nevertheless, the Fiscal Court refused unlawfully to honor the plaintiffs' pay raises and essentially vetoed or nullified the Jailer's decision to increase the plaintiffs' pay. Appellants seek recovery of their earned and unpaid wages.

This case presents an issue of first impression in Kentucky: must a Fiscal Court allow and honor pay raises granted deputy Jailers by a county Jailer where the pay raises are consistent with the Jailer's payroll budget approved previously by the Fiscal Court?

From an affirmative answer to this question follows appellants' claims for unpaid wages under the Kentucky wage and hour law, KRS Chapter 337.

Statement of Facts

The plaintiff-appellants, Robert F. Grossl, Adam T. Zornes, Anne Northcutt, Richard LeDoux, Jr., Joe Stamper, and Fred Thomas Williamson, were, at times pertinent to this case, employed as deputy Jailers in Scott County. (Complaint ¶¶ 3-8, RA 5-6).¹

¹ The prefix "RA" indicates a cite to the Record on Appeal certified by the circuit court clerk.

In each of the Fiscal Years 2011 - 2013 the Fiscal Court approved a line item in the Jailer's budget authorizing expenditures for staff wages and/or salaries in specific gross and cumulative sums: \$1,051,225 for 2011; \$1,051,225 for 2012; and \$850,000 for 2013. (Complaint ¶¶ 15-17; RA 8).

At various and different times during Fiscal Years 2011-2013, the Scott County Jailer authorized various and different pay increases for the plaintiffs, the amount turning on the particular plaintiff's situation, the nature of their promotion, increased responsibilities and other factors of the sort thought reasonably to support increase of an employee's hourly wage rate. (Complaint ¶¶ 18, 22, 26, 30, 34, 38, 42, 46; RA 9-13).

The Scott County Jailer submitted the necessary payroll papers for processing of these raises by the Fiscal Court. (Complaint ¶¶ 19, 23, 27, 31, 35, 39, 43, 47; RA 9-13).

All of the raises were consistent with the expenditures for staff wages and salaries in the budget line item approved by the Fiscal Court for the particular fiscal year. (Complaint ¶¶ 20, 24, 28, 32, 36, 40, 44, 48; RA 9-13). In other words, none of the raises would have caused the jail's payroll expenditures to exceed the amount previously authorized by the defendant Fiscal Court. (*Id.*).

The defendant Fiscal Court has refused to honor the raises for the Plaintiffs authorized by the Scott County Jailer and has refused to pay them the wages they have earned. (Complaint ¶¶ 21, 25, 29, 33, 37, 41, 45, 49; RA 9-13).

The defendant Fiscal Court is an "employer" of appellants under KRS 337.010(1)(c). (Complaint ¶14; RA 7).

The Fiscal Court did not answer the complaint, instead filing a motion to dismiss. (RA 17). The Scott Circuit Court entered a summary order sustaining the motion and dismissing the complaint. (Order Granting Motion to Dismiss; RA 105). This appeal follows.

ARGUMENT

POINT 1

The Fiscal Court Is Bound By The Jailer's Decisions to Grant Plaintiffs Raises and Must Pay Plaintiffs The Increased Wages, Since Those Expenditures Were Within The Amounts Approved Previously By The Fiscal Court

The threshold issue for the Court is whether the Scott County Jailer may determine to increase a Deputy Jailer's pay rate, and the Fiscal Court must honor that decision *if* the pay raise in question is consistent with the Jailer's payroll budget as approved previously by the Fiscal Court. The ultimate and affirmative answer to this question is provided in two statutes, KRS 64.530 and KRS 441.225. To reach this conclusion the Court must also and first review the statutory inter-relationship of a county Jailer and Fiscal Court.

As a preliminary matter, the Court is presented with pure legal issues. As the case comes before the Court following a circuit court ruling on a motion to dismiss, it must accept as true the complaint's factual allegations and to construe it in the manner most favorable to the plaintiffs. *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987), *citing Ewell v. Central City*, 340 S.W.2d 479 (Ky. 1960). The Court's ultimate analysis is as follows:

The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this

decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief? The court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim. In making this decision, the circuit court is not required to make any factual determination; rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?

James v. Wilson, 95 S.W.3d 875, 883-84 (Ky. App. 2002).

The statutes that govern the relationship between a Fiscal Court and Jailer are key to this case. These statutes give a Fiscal Court power to set a Jailer's general payroll budget for deputies and assistants. Once that is done, however, the Jailer has authority to determine "the individual compensation of each deputy and assistant."

The statutes direct as follows with regard to the annual development and adoption of a county budget including its jail and jail operations:

(1) by April 1 of each year a proposed jail budget including a line item for payroll and other expenditures for the upcoming fiscal year prepared by the County judge/executive, jailer and treasurer must be submitted to the Fiscal Court. KRS 441.215.

(2) by not later than May 1 a proposed county budget, which includes the jail and all other county operations, must be submitted by the county judge/executive to the Fiscal Court. KRS 68.240(1).

(3) up to and not later than June 1 the Fiscal Court has to investigate and consider the proposed county budget including the jail before sending the budget for review by the state local finance officer. KRS 68.240(6).

(4) the state local finance officer must then review the proposed county budget in accordance with KRS 68.250.

(5) the Fiscal Court must act to adopt a county budget including the jail by not later than July 1. KRS 68.260.

This case regards the powers of the Fiscal Court and the Jailer *after* the Fiscal Court determines a budget line item for the Jailer's deputies and other staff. For instance, if it were assumed that the Fiscal Court approved the Jailer's payroll budget in the amount of \$500,000 for the year, this case requires the Court to decide whether the Fiscal Court or the Jailer has power to determine how much of this budgeted amount a Deputy Jailer may be paid. Two statutes, KRS 64.530 and KRS 441.225, provide the answer.

A harmonized reading of KRS 64.530(3) and (4) speaks most directly to the Jailer's authority to determine how much each of his deputy Jailers are to be paid within the framework of the jail's payroll budget. KRS 64.530(4) expressly incorporates "the provisions of subsection (3)" as applicable to the Jailer and deputy Jailers. The most pertinent of subsection (3)'s provisions is the following:

(3) ... The fiscal court shall fix annually the reasonable maximum amount, including fringe benefits, which the officer may expend for deputies and assistants, and allow the officer to determine ... the individual compensation of each deputy and assistant. ...

KRS 64.530(4) also states that the Fiscal Court may review or adjust, upon written request of the Jailer, the "monthly compensation" paid deputy Jailers cumulatively, provided it does so not later than the first Monday in May.

KRS 441.225 also addresses the Jailer's authority to make expenditures from the approved budget and the limits of the Fiscal Court's continuing oversight. KRS 441.225 provides as follows:

(1) Except for capital improvements, utilities and building insurance and except as provided in subsection (2) of this section, the jailer shall have authority to authorize expenditures from the jail budget. Such expenditures shall only be made in accordance with the line item jail budget duly adopted or amended by the fiscal court and the established county procurement code or purchase order procedure of the county. Payment for purchases for the jail shall be subject to fiscal court approval prior to payment. ***The fiscal court shall not withhold approval of payment for jail expenditures which are within the jail budget and not unlawful.*** (emphasis supplied).

(2) The jailer shall submit, in accordance with county payroll procedures, time reports for all full-time and part-time jail personnel and employees to the county treasurer or other designated payroll official. The county treasurer shall review and pay such claims in accordance with policies and procedures for the payment of other county employees.

KRS 441.225.

KRS 64.530(3) and (4) directly support appellants' position. These statutes both acknowledge the Fiscal Court's authority to set the Jailer's general payroll budget, while reserving expressly for the Jailer authority "to determine ... the individual compensation of each [deputy Jailer]." Furthermore, not only do the statutes grant the Jailer authority to determine the individual compensation of each deputy Jailer, they require the Fiscal Court to accept the Jailer's exercise of this authority, stating the Fiscal Court "shall allow" its exercise.

KRS 441.225 provides further support for the appellants' position. This statute empowers the Jailer (with exceptions not applicable here) "to authorize expenditures from the jail budget." Similar to KRS 64.530(3) and (4), KRS 441.225 prohibits the Fiscal Court from withholding "approval of payment for jail expenditures which are within the jail budget and not unlawful." Accordingly, KRS 64.530(3), (4) and KRS 441.225 recognize the Fiscal Court's authority to

establish the Jailer's payroll budget, while also granting expressly to the Jailer authority to determine the individual compensation of each deputy Jailer and requiring the Fiscal Court to accept the Jailer's determination, provided, of course, it is consistent with the payroll budget.

The Fiscal Court argued to the court below that KRS 64.530(4) empowers it to veto any determination by the Jailer regarding any individual deputy Jailer. (Supplemental Memorandum in Support of Defendant's Motion to Dismiss; RA 49-62). This argument, however, misreads the statute.

The Fiscal Court misreads KRS 64.530 in at least two ways. First, KRS 64.530(4), as noted above, refers to the Fiscal Court's authority to review and adjust the "monthly compensation" payable to the Jailer's deputies or assistants. This speaks to the cumulative "monthly compensation" payable to all the deputy Jailers and other employees at the jail. But the issue presented here is whether the Jailer may determine to increase the individual compensation payable to each of the plaintiffs; moreover, the increase for each is not a monthly increase but an increase of each individual plaintiff's hourly wage rate. (Complaint ¶¶ 18, 22, 26, 30, 34, 38, 42, 46; RA 9-13). There has been no assertion by the Fiscal Court that any of the individual appellants' raises would entail or require any review or adjustment to the cumulative "monthly compensation" payable to all the deputy Jailers. More to the point, the appellants have pleaded specifically that each pay raise proposed for each of them was consistent with the previously approved payroll budget. (Complaint ¶¶ 20, 24, 28, 32, 36, 40, 44, 48; RA 9-13). This fact precludes any necessity for review or adjustment by the Fiscal Court of the "monthly compensation" payable to all the deputy Jailers.

Second, KRS 64.530(4) expressly incorporates “the provisions of [KRS 64.530](3)” which include, among other things, the command that the Fiscal Court “shall ... allow the [Jailer] to determine ... the individual compensation of each [deputy Jailer]” consistent, of course, with the payroll budget approved previously by the Fiscal Court. A statute cannot both prohibit and permit the same act by the same actor. The Fiscal Court’s argument that KRS 64.530(4) misreads and reads out of the subsection the language incorporating subsection (3)’s provisions requiring it to accept the Jailer’s determination to increase a deputy Jailer’s “individual compensation.”

Two canons of statutory construction also support the appellants’ argument regarding the proper construction and application of KRS 64.530(3) and (4). The first is the rule of statutory construction commanding that “where there is both a specific statute and a general statute applicable to the same subject the specific statute controls.” *Meyers v. Chapman Printing Co.*, 840 S.W.2d 814, 819 (Ky. 1992); *Travelers Indem. Co. v. Reker*, 100 S.W.3d 756, 763 (Ky. 2003). Here, the statutory language speaking specifically to the determination of a deputy Jailer’s individual compensation grants the power to the Jailer, while commanding the Fiscal Court, which “shall allow” the Jailer to exercise the authority.²

The second statutory construction canon supporting appellants’ position is that when confronted with apparently conflicting statutes, a court is required to interpret the statutes in harmony if possible. “Where there is an apparent conflict

² As “used in the statutory laws of this state, unless the context otherwise requires, the word ‘shall’ is mandatory.” *Commonwealth v. Fint*, 940 S.W.2d 896, 897 (Ky. 1997).

between statutes or sections thereof, it is the duty of the court to try to harmonize the interpretation of the law so as to give effect to both sections or statutes if possible.” *Ledford v. Faulkner*, 661 S.W.2d 475, 476 (Ky. 1983). If KRS 64.530(4) were construed as urged by the Fiscal Court’s argument, it would conflict with itself and with the preceding subsection, KRS 64.530(3), which requires the Fiscal Court to allow and accept the Jailer to determine the individual compensation of deputy Jailers consistent with the approved payroll budget. A statute cannot be read properly to both prohibit and authorize the same act by the same actor. Statutes, of course, are to be read to avoid absurd or unreasonable results. “We have long held ‘that a statute must not be interpreted so as to bring about an absurd or unreasonable result.’” *Cromwell Louisville Assocs. v. Com.*, 323 S.W.3d 1, 5 (Ky. 2010), quoting *George v. Alcoholic Beverage Control Bd.*, 421 S.W.2d 569, 571 (Ky.1967). Such an unreasonable result is avoided when the adjustment and review discussed in KRS 64.530(4) is read to apply to the cumulative “monthly compensation” paid to all deputy Jailers not the Jailer’s determination of the individual compensation for one deputy Jailer.

The Fiscal Court also cited to the court below *Funk v. Milliken*, 317 S.W.2d 499 (Ky. 1958), in support of its argument. *Milliken* did hold that a Fiscal Court has authority under KRS 64.530 to establish a budget sum from which a Jailer may compensate his or her deputies. 317 S.W.2d at 513. Appellants do not contest this point and have discussed above the statutory scheme that establishes this authority for the Fiscal Court. However, *Milliken*, does not reach the issue at hand.

The Fiscal Court also cited an Attorney General opinion, OAG 83-49, which does opine that “[t]he actual authorizing of specific expenditures such as paying of salaries for the jailer and his deputies, though within budget levels, requires a distinct and separate action on the part of the fiscal court.” But the Attorney General’s opinion cannot be read to support affirming the court below for at least three reasons.

First, whether or not a distinct and separate action of a ministerial nature is required by the Fiscal Court is not the point. Action is required of the Fiscal Court by the statutory commands: KRS 64.530(3) and (4) direct that the Fiscal Court “shall allow” the Jailer to determine the individual compensation of individual deputy Jailers within budget payroll parameters, and KRS 441.225 specifies that “the fiscal court shall not withhold approval of payment for jail expenditures which are within the jail budget and not unlawful.” To comply with these statutory directives the Fiscal Court must act to approve and implement the Jailer’s decisions to increase a deputy Jailer’s individual compensation. Furthermore, the Attorney General does not opine that the Fiscal Court may reject the Jailer’s determination.

Second, even if the Attorney General had reached the issue at hand, courts are not bound by Attorney General opinions. *Woodward, Hobson & Fulton, L.L.P. v. Revenue Cabinet*, 69 S.W.3d 476, 480 (Ky. App.2002). Third, OAG 83-49 was issued February 7, 1983, and precedes enactment of KRS 441.225, which occurred in 1984 and became effective July 13, 1984. This Court could infer that KRS 441.225 is a legislative response to OAG 83-49, since it specifies that “the fiscal court shall not withhold approval.”

The applicable statutes establish a scheme in which the Fiscal Court has power to establish the Jailer's payroll budget. The Jailer, however, has the authority within the parameters of that payroll budget to determine the compensation for individual deputy Jailers including the pay raises that the appellants here have earned. The statutes require the Fiscal Court to allow the Jailer to exercise that power and to accept it when the Jailer does, provided, as a continuing caveat, the payroll remains within the budget. The appellants' claim is premised on these points derived from a proper construction and application of the controlling statutes.

Point 2

The Fiscal Court May be Liable to Appellants for the Wages Appellants Have Earned but Not Been Paid by the Fiscal Court

It matters not at all whether the Jailer can determine that any of the appellants have earned and deserved a pay raise if, nevertheless, the Fiscal Court does not have to pay them their earned wages and there is no means for them to collect the unpaid wages. Accordingly, appellants bring a claim for unpaid wages pursuant to KRS 337.385. This claim is properly pleaded for the following reasons.

KRS 337.385 permits a claim for unpaid wages by an employee against their "employer." The Fiscal Court did not contest in the court below that it was appellants' "employer" for purposes of KRS Chapter 337. (Defendant's Motion to Dismiss at 3; RA 19). Instead, the Fiscal Court argued that it could not be liable under the wage and hour law to appellants for any unpaid wages, because

it had not agreed to pay appellants any of the compensation the Jailer had determined they should receive. (*Id.*; RA 17-21).

“Wages” under KRS Chapter 337 “includes any compensation due to an employee by reason of his or her employment, including salaries, commissions, vested vacation pay, overtime pay, severance or dismissal pay, earned bonuses, and any other similar advantages agreed upon by the employer and the employee[.]” KRS 337.010(1)(c)1. The Fiscal Court’s contention was that it had not “agreed” to pay any of the appellants any of the higher hourly wage rates and, therefore, could not be liable for any unpaid wages to them. (RA 17-21).

This argument by the Fiscal Court turns on the initial, threshold issue of whether the Jailer has authority to determine to increase the hourly compensation rate of an individual deputy Jailer and, if so, must that determination be allowed, accepted, and acted upon by the Fiscal Court. As discussed in Point 1 of this Brief, the applicable statutes grant that authority to the Jailer and require its proper exercise be allowed, accepted, and acted upon by the Fiscal Court.

Put in the context of KRS Chapter 337, the Jailer has the authority to agree to pay appellants increased compensation and the Fiscal Court is bound by that agreement. If it were concluded that some independent agreement by the Fiscal Court to increase any of the appellants’ individual compensation were required under KRS Chapter 337, it would nullify the statutory commands discussed above in KRS 64.530(3), (4) and KRS 441.225. This result would be contrary to the canon that statutes should be construed to give effect and utility to all. *Allen v. McClendon*, 967 S.W.2d 1, 3 (Ky. 1998); *Ledford v. Faulkner*, *supra*.

The appellants "employer" having made a binding agreement to pay each of them at an increased hourly rate, each of them having earned those wages, the Fiscal Court having refused to pay them, the appellants, accordingly, may now state properly a claim for unpaid wages against the Fiscal Court pursuant to KRS 337.385(1).

Conclusion

A Fiscal Court has authority to establish a Jailer's payroll budget for his deputy Jailers. Within the parameters of that payroll budget the Jailer may determine the individual compensation of each deputy Jailer. The Fiscal Court shall allow, accept and act upon this power when exercised consistent with the payroll budget by the Jailer. When the Jailer agrees to pay a deputy Jailer at an increased hourly rate, the Fiscal Court is bound by this agreement and must act upon it. The Jailer agreed to increase the compensation by raising the hourly wage rate of each of the appellants. These raises were consistent with the Jailer's payroll budget. The appellants have earned the wages, but the Fiscal Court has refused unlawfully to pay them. Therefore, the appellants may pursue properly their claims for unpaid wages against the Fiscal Court. Accordingly, this Court should reverse the court below, and remand this case for further proceedings.

Respectfully submitted,



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APPENDIX

Item

Tab No. R.A. Pg. #

Order Granting Motion to Dismiss
October 25, 2016

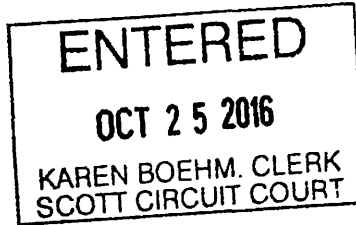
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COMMONWEALTH OF KENTUCKY
SCOTT CIRCUIT COURT
DIVISION 2
CIVIL ACTION NO. 13-CI-00227

ROBERT F. GROSSL, et. al.

V.

SCOTT COUNTY FISCAL COURT



PLAINTIFFS


DEFENDANT

ORDER GRANTING MOTION TO DISMISS

The Motion to Dismiss of the Defendant, Scott County Fiscal Court, having been filed, the Plaintiffs having responded, the Court having heard arguments of counsel, and the Court being otherwise sufficiently advised, IT IS HEREBY ORDERED that the Defendant's Motion to Dismiss is GRANTED as follows:

1. That the Plaintiffs' allegations fail as a matter of law to state a claim under the Wage and Hour Act;
2. That the matter herein is dismissed as to the Defendant for all claims asserted by the Plaintiffs in their Complaint; and
3. That this Order is FINAL and APPEALABLE.

Dated this 25 day of October, 2016.



JUDGE, SCOTT CIRCUIT COURT

