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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000002-MR

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 03-CI-04961

TOMMY PUCKETT; MARIO RUSSO; DAVID HUME; BRIAN WALLACE; MARK LONG; POLICEMEN'S & FIREFIGHTERS' BOARD OF TRUSTEES; TERESA ANN ISAAC; DONNA COUNTS; MICHAEL ALLEN; REBECCA LANGSTON; ROBERT HENDRICKS; ANTHANY BEATTY; TOMMY PUCKETT; JONES HIATT; MIKE TRACY; JEFFREY M. WRIGHT; RON COY; AND GRANBY SMITH, EACH IN HIS OR HER OFFICIAL CAPACITY AS A MEMBER OF THE POLICEMEN'S & FIREFIGHTERS' BOARD OF TRUSTEES — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

STUMBO, JUDGE: Lexington-Fayette Urban County Government ("LFUCG") appeals from a decision of the Fayette Circuit Court granting summary judgment in favor of

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

plaintiff-appellees Tommy Puckett, et al., and dismissing as to third-party defendants-appellees Policemen's & Firefighters' Board of Trustees, et al. LFUCG contends that the circuit court improperly failed to conclude that LFUCG complied with the requirements of KRS 67A.520 in making contributions to the Policemen's & Firefighters' Retirement Fund. For the reasons stated below, we affirm the order on appeal.

Appellees Tommy Puckett, et al. ("the Fund members") are employees of Appellant LFUCG. Appellees are also members of the LFUCG Policemen's & Firefighters' Retirement Fund ("the Fund") which administers retirement benefits to its members.

On December 3, 2003, Appellees filed an action in Fayette Circuit Court against LFUCG, alleging that LFUCG failed to contribute to the fund at the rate provided for by KRS 67A.520. They maintained that the Fund's Board of Trustees ("the Board") rather than LFUCG was statutorily entitled to fix the rate of LFUCG's contribution. The complaint was filed after LFUCG allegedly failed to make contributions at the rate set by the Board. Thereafter, LFUCG filed a third-party complaint joining as defendants the Board and its individual members in their capacity as Board members.

The matter proceeded in Fayette Circuit Court, whereupon the Fund members moved for summary judgment against LFUCG on June 29, 2006. Shortly thereafter, the Board filed a motion to dismiss, and LFUCG filed a cross-motion for summary judgment against the Fund members. On September 15, 2006, the court heard arguments on the motions. On December 21, 2006, the circuit court rendered an opinion

and order granting the motion of the Fund members for summary judgment and the Board's motion to dismiss, and denying LFUCG's motion for summary judgment. As a basis for the opinion and order, the circuit court interpreted *Gurnee v. Lexington-Fayette Urban County Government*, 6 S.W.3d 852 (Ky. App. 1999) as holding that the Board rather than LFUCG possessed the statutory authority under KRS Chapter 67A to fix the rate of LFUCG's contribution to the Fund. This appeal followed.

LFUCG now argues that the Fayette Circuit Court erred in determining that KRS Chapter 67A operates to vest with the Board the authority to fix the rate of LFUCG's contribution to the Fund. Specifically, it maintains that it retains the authority to fix the rate under KRS 67A.520(2), which operates as "checks and balances" on the Board's equal authority to participate in rate-setting under KRS 67A.520(1). By interpreting KRS 67A.520(2) to vest with the Board the sole authority to fix the contribution rate, LFUCG argues that the circuit court improperly disregarded the statutory scheme and removed LFUCG's authority to be an equal partner in the decision-making process. LFUCG also contends that even if the Board were the proper entity to set the rate percent under KRS 67A.520(2), the rates set by the Board are not in conformity with the Kentucky statutes. In sum, LFUCG contends that the circuit court improperly added language to KRS 67A.520(2) granting authority to the Board which is not found in the statutory language, and it seeks an order reversing the circuit court's opinion and order and remanding the matter for entry of summary judgment in favor of LFUCG. In response, the Fund members, the Board, and the Board members maintain

that the circuit court properly interpreted KRS 67A.520 in light of *Gurnee* by finding that the Board has the sole authority to fix the rate under both KRS 67A.520(1) and (2).

We have closely examined the record, the arguments and the law, and find no error with the circuit court's order granting summary judgment in favor of plaintiff-appellees Tommy Puckett, et al., and dismissing as to third-party defendants-appellees Policemen's & Firefighters' Board of Trustees, et al. KRS 67A.520 states that,

> [T]he government shall make current contributions to the fund on an actuarially funded basis, toward the annuities and benefits herein provided. These contributions shall be equal to the sum of the following:
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> (1) An annual amount resulting from the application of a rate percent of salaries of active members determined by the entry age normal cost funding method. Such rate percent shall be fixed by the board every two (2) years, within six (6) months after the actuarial study required by subsection (6) of KRS 67A.560 (actuarial survey of the fund), and shall be in effect for a period of at least two (2) years.
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> (2) An amount resulting from the application of a rate percent of the salaries of active members which will provide each year regular interest on the remaining liability for prior service.
>
> (3) In any event, the total contribution of the government shall be at least seventeen percent (17%) of the salaries of the active members participating in the fund.
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> (4) In addition to other remedies provided by law, any member of the fund or any annuitant may obtain in the Circuit Court of any county in which the government is located an injunction or mandamus requiring the government to comply herewith.

A panel of this Court recognized in *Gurnee*, *supra*, the grammatical flaw in KRS 67A.520 purporting to require the calculation of a sum from four sections, when the four sections are not capable of being added together. We stated,

> [C]learly, there is a grammatical flaw in the statute in that it provides that the urban-county government shall make a contribution to the fund which is "equal to the sum" of its four subsections. It is readily apparent that the four subsections are not capable of being added together. However, it is equally apparent that the drafters intended for the government to pay an amount which equals the sum of subsections (1) and (2), or ("[i]n any event") the minimum contribution contained in subsection (3). Since Subsection (4) provides specific non-monetary remedies to members of the fund, it is not capable of being added to the preceding subsections of the statute.
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> The fact that a statute is nonsensical if read literally, or is susceptible to more than one interpretation, does not require a holding that the statute is unconstitutional if, as the circuit court determined, those who are affected by the statute can reasonably understand what the statute requires of them. Although LFUCG contends that it was required to "guess" at the statute's meaning, it nevertheless argues that it managed to comply with the statute's directives for over twenty years without event. Accordingly, we agree with the circuit court and hold that the statute does not offend the void for vagueness doctrine.

Ultimately, we determined that the Legislature intended for the sum of sections (1) and (2) to determine the rate, so long as it was at least seventeen percent of the salaries of the active members participating in the fund as set forth in section (3). In the matter at bar, the Fayette Circuit Court noted that the *Gurnee* opinion recognized that the appellants could convince the Board to increase the rate should

the need ever arise. This was the circuit court's primary basis for concluding that the Board, rather than LFUCG, established the rate. "If the appellants are not satisfied that the minimum funding is sufficient to insure the integrity of their fund, their remedy is to either convince the Board of Trustees to set a higher rate, or to ask the Legislature to increase the minimum rate as it has already done twice in the past." *Gurnee*, at 857. We also stated that, "[I]t is obvious to this Court that the Legislature anticipated that the Board of Trustees might fail to set a rate to be paid by the urban-county government, or that the rate established might be insufficient to adequately insure the fund's soundness. For this reason, subsection (3) of the statute provides for a minimum rate or percent of salaries that LFUCG must contribute to the fund." *Id*. (Emphasis added).

This language recognizes that the authority to set the rate rests with the Board rather than LFUCG. Alternatively - and at a minimum - it establishes a rational basis for the circuit court's conclusion in the matter at bar that the Board has the authority to set the rate under both KRS 67A.520(1) and (2). Furthermore, KRS 67A.520(1) *expressly states* that the Board sets the rate. "Such rate percent shall be fixed by the board . . . ." *Id*. The Legislature's failure - intentional or not - to address the rate responsibility under section (2), does nothing to support LFUCG's claim that it, rather than the Board, is vested with the rate-setting authority under section (2). If anything, such a failure arguably leads to the opposite result.

Similarly, we are not persuaded by LFUCG's argument that the circuit court added language to KRS 67A.520(2) by construing it to grant rate setting authority to the Board. KRS 67A.520(2) is silent on the issue, as it does not expressly grant such authority either to the Board or to LFUCG. Rather, resolution of the issue turns on reasonably construing KRS 67A.520(2) in the context of the entire statute. "When a statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917); *Bailey v. Reeves*, 662 S.W.2d 832 (Ky. 1984). When the statute's language admits of more than one reasonable interpretation, however, courts attempt to understand the legislative intent by considering . . . the statutory context . . . ." *Brown v. Commonwealth*, 40 S.W.3d 873, 875-876 (Ky. App. 1999). KRS 67A.520(1) expressly grants rate setting authority to the Board, and because the remainder of the statute is otherwise silent on the issue, the circuit court was not clearly erroneous in concluding that the Board, rather than LFUCG, possessed the authority to set the rate under KRS 67A.520(2).

Lastly, LFUCG argues that "the calculations in the 2002 and 2004 valuations upon which the Board relied in setting the rates under KRS 67A.520(1) are not based upon 'prior service' as defined by KRS 67A.360(7)." It maintains that because the Board's rate-setting activity is based upon actuary reports that are materially inconsistent with Kentucky statutes, the circuit court erred in accepting those rates.

This issue was not addressed in the opinion and order on appeal, which LFUCG acknowledges. As a general rule, we are precluded from ruling upon issues not addressed by the circuit court unless a request for specific findings on the issue was made. *Abuzant v. Shelter Insurance Company*, 977 S.W.2d 259 (Ky. App. 1998). However, because the matter was disposed of by way of summary judgment, suffice to say that we cannot conclude from the record that this issue raises a genuine issue of material fact sufficient to overcome the Fund members' motion for summary judgment.

For the foregoing reasons, we affirm the opinion and order of the Fayette Circuit Court.

ALL CONCUR.

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