COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 05-CI-00459

COMMONWEALTH OF KENTUCKY,
OFFICE OF THE ATTORNEY GENERAL
Ex rel. Gregory D. Stumbo in his official
capacity as Attorney General of the
Commonwealth of Kentucky PLAINTIFF

v. **DEFENDANT TREASURER JONATHAN MILLER'S REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

BOARD OF DIRECTORS FOR THE
COMMONWEALTH POSTSECONDARY
EDUCATION PREPAID TUITION TRUST
FUND, et al. DEFENDANTS

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Defendant Kentucky State Treasurer Jonathan Miller (the "Treasurer"), in his official capacity as a board member of the Commonwealth Postsecondary Education Prepaid Tuition Trust Fund ("KAPT"), hereby submits his reply to the Finance and Administration Cabinet's ("Finance") Response to Plaintiff's motion for summary judgment, to be considered along with the arguments already advanced in Plaintiff's Motion for Summary Judgment and response to Finance's motion for summary judgment, adopted by the Treasurer.

In its Response, Finance misconstrues the phrase "any unfunded liability" as it appears in KRS 393.015; it ignores the statute's modifying language; and, without authority, it disingenuously claims that "any unfunded liability" actually means "current, actual deficit." Finance thereby asks this Court to disregard the statutory scheme of KAPT and to ascribe a new, specialized meaning to a phrase with a commonly recognized meaning.

Additionally, for the first time, Finance appears to raise an argument that the KAPT Board's act of interpreting the phrase "any unfunded liability" in KRS 393.015 violates the non-

delegation doctrine. The General Assembly, however, plainly delegated to the KAPT Board the authority to determine when any unfunded liability exists, enabling the board to transfer funds out of the abandoned property fund into the KAPT Fund in its discretion within the statutory framework established for KAPT. The KAPT Board's act of transferring $13.7 million out of the abandoned property fund into the KAPT fund--accomplished with the consent and assistance of Finance--was a reasonable exercise of the authority delegated to the KAPT Board by the General Assembly.

I. THE KAPT BOARD PROCEEDED IN ACCORDANCE WITH THE KAPT STATUTES WHEN, WITH FINANCE'S ASSISTANCE, IT TRANSFERRED $13.7 MILLION TO THE KAPT FUND.

The primary argument in Finance's Response -- not previously advanced in its motion for summary judgment -- is that the KAPT Board wrongly construed the phrase "any unfunded liability" in KRS 393.015, and thus improperly transferred $13.7 million from the abandoned property fund to the KAPT Fund. KRS 393.015 provides: "Transfers from the abandoned property fund are authorized to meet *any unfunded liability* determined by the [KAPT] board." (Emphasis added). Finance mistakenly argues that "any unfunded liability" should be read to mean "actual, current deficit." (Response, p. 2) This interpretation of the phrase, however, is contrary to the statutory scheme of KAPT existing in December 2004, as well as the commonly accepted definition of the term "unfunded liability." Moreover, Finance's interpretation of "unfunded liability" reads out of KRS 395.015 the terms modifying the phrase.

Finance attempts to read KRS 393.015 in isolation with KRS 164A.701(1), in order to discern the General Assembly's intended meaning of "unfunded liability." KRS 164A.701(1) simply reads, "The fund shall consist of payments received from the prepaid tuition contracts under KRS 164A.700 and 164A.709. Income earned from the investment of the fund shall

remain in the fund and be credited to it." Finance states that this statute, "says nothing about transfers to the KAPT Fund from the Abandoned Property Fund." (Response, p. 3) Finance immediately leaps to the convenient conclusion, without further support in law, that the language of KRS 164A.701(1) illustrates that the General Assembly intended for the abandoned property fund to be used only if the sources cited in KRS 164.701(1) "run out." *Id.*

Finance's argument that "unfunded liability" means "current, actual deficit" ignores the plain meaning of the statute. According to its argument, "unfunded liability" means "current, actual deficit" because KRS 164A.701(1) does not state that the KAPT Fund shall also consist of abandoned property funds transferred under KRS 393.015. If Finance's rationale is correct, the KAPT Fund could *never* consist of abandoned property funds. That result would be wholly at odds with the purpose of KRS 393.015, the escheat statute allowing abandoned property funds to be transferred to the KAPT Fund, which was enacted in 2000 in conjunction with the KAPT legislative package. By way of KRS 393.015, the General Assembly intended for abandoned property funds to secure the investments of purchasers of prepaid tuition under KAPT. (See Attorney General's Motion for Summary Judgment, p. 11-13) As an indication of this intent, KRS 164A.707(9) stated that "each prepaid tuition contract is subject to, and shall incorporate by reference, all operating procedures and policies adopted by the board, [and] the statutes governing prepaid tuition contracts in KRS 164A.700 to 164A.709 *and 393.015*." (Emphasis added)

In order to discern the meaning of "unfunded liability," the aforementioned statutes cannot be viewed in isolation. KRS 164A.704, enacted as part of the same KAPT legislative package as KRS 164A.701(1), requires that the KAPT board

> obtain appropriate actuarial assistance to establish, maintain, and certify a fund sufficient to defray the obligation of the fund, annually evaluate or cause to be evaluated, the actuarial soundness of the fund, and determine prior to each academic year the amount of prepaid tuition plan and for each educational institution for specific academic years, the corresponding value.

KRS 164A.704(4). The General Assembly, by this provision, intended for the KAPT board to obtain an annual actuarial analysis to "*evaluate. . .the actuarial soundness of the fund*" and also for the board to utilize actuarial assistance to "*establish, maintain, and certify a fund sufficient to defray the obligation of the fund*." KRS 393.015, also enacted in conjunction with the KAPT legislative package, states that "transfers from the abandoned property fund to the trust fund are authorized in order to meet *any* unfunded liability *as determined by the board*." (Emphasis added)

When interpreting a statute, the court must look to the statute as a whole, as well as to its object and policy. *Democratic Party of Kentucky v. Graham*, Ky., 976 S.W.2d 423, 429 (1998). If "unfunded liability" were intended to mean only "current, actual deficit," as claimed by Finance, then the directive of KRS 164A.704(7) to the KAPT Board would be of little value.[1] Also, in KRS 393.015, the phrase "as determined by the board," which modifies "unfunded liability," would have no purpose, since the board could only transfer funds if there were a present deficit. As a general rule of statutory construction, "statutes should be construed in such a way that they do not become meaningless or ineffectual." *Commonwealth v. Phon*, Ky., 17 S.W.3d 106 (2000). Furthermore, KRS 393.015, on its face, authorizes transfers for "<u>any</u>"

[1]It is axiomatic that the function of an actuary is to evaluate the likelihood of future events and to develop ways to reduce the impact of undesirable future events. The General Assembly would not mandate that the KAPT Board obtain annual actuarial analysis to assist in administering the fund if the General Assembly did not also intend for the KAPT Board to act on the actuary's report.

unfunded liability – a broad term which includes current or future – in contrast to Finance's limited "actual" or "current" unfunded liability.

KRS 393.015 and KRS 164A.704(7) must be read in conjunction with one another. The Kentucky legislature prudently required the KAPT board to assess via actuarial analysis the stability of the KAPT Fund in KRS 164A.704(7), and also provided the unclaimed property fund as security for the KAPT contracts when there was an unfunded liability "as determined by the board." KRS 393.015. In order to adopt Plaintiff's argument that "unfunded liability" means "current, actual deficit," one must conclude that the Legislature required an annual actuarial assessment and provided the abandoned property as a financial backstop, but that nevertheless, the KAPT Board was *not* allowed to utilize actuarial assessments and recommendations in determining whether "any unfunded liability" exists. Finance's proposed new definition makes little sense in this context. The KAPT Board would be reduced to mere bean counting, a far cry from the well-defined oversight responsibility granted by the statute as a whole.

Additionally, outside of KRS 393.015, "unfunded liability" is a broad, commonly used phrase, which cannot be reconciled to Finance's proposed new meaning. The phrase appears frequently in the context of retirement funds, as evidenced by its appearance in KRS 161.420 and KRS 161.569. In the pension context, unfunded liability is recognized as "the amount required to provide retirement benefits for employees covered by the system based on their service prior to the current year." *Dombrowski v. City of Philadelphia*, 245 A.2d 238, 240 (Pa. 1968) (copy attached to the original only). This definition is consistent with the definition of "unfunded liability" advanced by the director of Kentucky Retirement Systems -- "the difference between

the actuarial assets and actuarial liabilities." (See Exhibit A, p. 6) In other words, the phrase is not limited to "current, actual deficit" as Finance would have the Court believe.

While the phrase appears several times throughout the Kentucky Revised Statutes,[2] it is *never* defined as suggested by Finance, further illustrating that "unfunded liability" has a simple meaning that is well understood.[3] It is significant that all of these references in the Kentucky statutes to "unfunded liability" occur in contexts where payments must be made at some future date. In these types of situations, it is prudent to determine whether there are sufficient funds today to pay obligations that will certainly accrue at a later date, and not simply to determine what expenses can be paid today. Knowing that the phrase had this usage prior to enactment of KAPT, the legislature could have opted for different terminology, but did not, opting instead for the common usage already employed in Kentucy statutes.

Commonly used words should be accorded their plain meaning. As stated by one court, "where there is no specific statutory definition, [courts] must construe words of the statute within their common usage." *Alliant Health System v. Kentucky Unemployment Ins. Com'n*, Ky. App., 912 S.W.2d 452, 454 (1995). If the General Assembly intended to use "unfunded liability" in a different manner, it would have defined the phrase statutorily. Moreover, if this Court

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[2]The phrase "unfunded liability" is used in KRS 65.156 (in the context of local government pension plan requirements, 1982); KRS 66.051 (in the context of local government bonds, 1996); KRS 161.420 (in the context of teachers' retirement, 1974); KRS 161.569 (in the context of teachers' retirement, 1994); KRS 342.120 (in the context of workers' compensation, 1948); and KRS 342.122 (in the context of workers' compensation, 1946); as well as KRS 393.015 (2000).

[3]For example, as evidenced by Exhibit A, Kentucky Retirement Systems subscribes to the common view of the term. This common definition is consistent with the requirement in KRS 164A.704(7) that the KAPT Board obtain annual actuarial analyses to evaluate the "actuarial soundness of the fund" and utilize actuarial assistance to "establish, maintain, and certify a fund sufficient to defray the obligation of the fund."

interpreted "unfunded liability" to mean "current, actual deficit," as suggested by Finance, then the Court would essentially be narrowing the definition of the term as in appears in every Kentucky statute.

II. THE KAPT BOARD DID NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE BY EXERCISING THE DISCRETION CONSTITUTIONALLY GRANTED BY THE GENERAL ASSEMBLY IN KRS 393.015, WHICH ALLOWS THE BOARD TO DETERMINE WHEN AN UNFUNDED LIABILITY EXISTS.

Finance injects into its Response a new argument regarding the nondelegation doctrine, which it has failed to raise in any pleading to date. (Response, p. 5) While Finance's argument on this point is brief and unclear, the argument appears to be that the KAPT Board's act of interpreting the definition of "any unfunded liability" in KRS 393.015 violates the separation of powers doctrine.

For this proposition, Finance incorrectly cites *Board of Trustees of the Judicial Form Retirement System v. Attorney General of the Com.*, Ky., 132 S.W.3d 770, 782 (2004).

In *Board of Trustees*, the Supreme Court assessed the validity of HB 389(4), which amended a provision of the Judicial Retirement Act. The amendment related to the accrual of benefits, and was intended to increase legislative retirement benefits, which were administered by the Board of Trustees of the Judicial Form Retirement System ("JFRS"). In relevant part, the Court first addressed the issue of whether the amendment was unintelligible and thus void for vagueness, and second whether, by virtue of its vagueness, the amendment constituted an unconstitutional delegation of legislative power to the executive branch. *Board of Trustees* ultimately held that HB 389(4) was an unconstitutional delegation of power to the Board of JFRS because it was unintelligible and because there were no "standards controlling the exercise

of administration discretion." *Id.* at 785. Specifically, the Court labeled the statute "so unintelligible as to defy comprehension by those charged with its implementation." *Id.*

Finance suggests that the KAPT Board did not have the power to interpret the meaning of KRS 393.015. The General Assembly, however, delegated to the KAPT Board, in KRS 393.015, the authority to make transfers from the abandoned property fund to the KAPT fund "to meet *any* unfunded liability *as determined by the board*." (Emphasis added) The language "as determined by the board" signifies that the General Assembly gave the KAPT Board the necessary discretion to determine whether any unfunded liability exists.

Legislatures can constitutionally delegate authority to administrative bodies. When delegating power, a legislature "must declare the policy of the law and fix the principles which are to control in a given case; but an administrative officer or body may be invested with the power to ascertain facts and conditions by which the policy and principles apply." *Commonwealth ex. re. Meredith v. Johnson*, Ky., 166 S.W.2d 409, 412 (1942). "Generally speaking, a delegation of discretion is not unlawful if sufficient standards controlling the exercise of discretion are found in the act . . . such as procedural safeguards and the right of the delegating authority to withdraw the delegation." *Legislative Research Commission v. Brown*, Ky., 664 S.W.2d 907, 915 (1984) (internal citations omitted).

Board of Trustees involved legislation that was completely incomprehensible to the Court, as well as the entity charged with implementing it, and thus was found to be unconstitutional. By contrast, the statutory structure of KAPT is a model of clarity and provides more than sufficient standards by which the KAPT Board is to carry out its obligation under KRS 393.015. First, KRS 393.015 authorizes the KAPT Board to make transfers from the

abandoned property fund only if there is an unfunded liability -- employing the common use of that phrase -- of the KAPT Fund. Further, the discretion granted the KAPT Board to make transfers from the abandoned property fund is guided by the directive of KRS 164A.704(7), which requires the KAPT Board to act based on required annual reports by an independent actuary. KAPT is required to obtain "appropriate actuarial assistance to establish, maintain, and certify a fund sufficient to defray the obligation of the fund" and to "annually evaluate or cause to be evaluated . . . the actuarial soundness of the fund." KRS 164A.704(7). This protective measure effectively lessens the possibility of arbitrary transfers under KRS 393.015. Of course, any arbitrary actions of the KAPT Board would be subject to judicial review.

In *Preston v. Clements*, Ky., 232 S.W.2d 85 (1950), a taxpayer challenged the constitutionality of a legislative enactment ("Act") which allowed the State Property and Buildings Commission to issue and sale bonds for the erection of the Capitol Annex. The taxpayer challenged the Act for giving the Commission "absolute and arbitrary power" over property owned by the State and equal power to acquire and control property. In holding the Act constitutional, the Court pointed to phrases in the Act such as "find to be necessary," "fair and reasonable," and "found by the Commission" as language providing an adequate standard by which the Commission was to govern its actions. *Id.* at 88. Furthermore, as stated by the Court in *Preston*, "an act is not unconstitutional merely because there may be an anticipated unfaithful and invalid administration of it." *Id.* The KAPT statutes provide more guidance to the Board than that found in *Preston*.

As a practical matter, in the case at hand, the KAPT Board acted only after receiving the actuary's report and obtaining an opinion from the Attorney General. Then, acting on the KAPT

Board's unanimous vote, Finance itself acted to effectuate the transfer of abandoned property funds to the KAPT Funds. This orderly and open process was consistent with the applicable statutes and in the interest of KAPT contract holders.

CONCLUSION

The General Assembly constitutionally delegated to the KAPT Board the authority to determine when an unfunded liability exists in the KAPT Fund, as well as the authority to remedy the shortfall with transfers from the abandoned property fund. The KAPT Board, which included Finance's representative, followed the mandate of KRS 164A.704 when it obtained an actuarial analysis in 2004, and properly exercised the discretion granted in KRS 393.015 when it followed the actuary's suggestion and transferred $13.7 million from the abandoned property fund into the KAPT fund. In doing so, the KAPT Board did not wrongly interpret the term "unfunded liability," which has both a common meaning and is reinforced by the language "any" and "as determined by the board" in KRS 393.015. For these reasons, the arguments advanced in Finance's Response to Plaintiff's Motion for Summary Judgment are without merit, and Plaintiff is entitled to summary judgment.

Respectfully submitted,

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