

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 18-CI-379
and
CIVIL ACTION NO. 18-CI-414

COMMONWEALTH OF KENTUCKY

ex rel. ANDY BESHEAR, ATTORNEY GENERAL, *et al.*

PLAINTIFFS

v.

ORDER

MATTHEW G. BEVIN, in his official capacity

as Governor of the Commonwealth of Kentucky, *et al.*

DEFENDANTS

This action is before the Court on the Governor's Motion to Alter, Amend, or Vacate this Court's June 20, 2018 Opinion & Order. The parties appeared before the Court on July 11, 2018 for oral argument in this matter. Attorney General Beshear argued on behalf of the Commonwealth and Hon. Steve Pitt argued on behalf of the Governor. Having heard the argument of counsel and being otherwise sufficiently advised, the Court hereby **DENIES** the Motion to Alter, Amend, or Vacate, for the reasons set forth below.

BACKGROUND

In this Court's June 20, 2018 Opinion & Order, the Court held that Senate Bill ("SB") 151, which proposed various changes to the state's retirement systems, violated both the three-readings requirement and majority-vote requirement of Section 46 of the Kentucky Constitution. Because the Court determined that the bill failed to comply with constitutional requirements for enactment, the Court declined to address whether the legislative procedure employed in passing SB 151 violated Section 2's prohibition against arbitrary action. The Court also declined to address the parties' substantive arguments, namely, that SB 151 violated the "inviolable contract" of KRS

Chapter 61 and Sections 13 (Takings Clause) and 19 (Contracts Clause) of the Kentucky Constitution.

The Governor now urges the Court to amend its ruling. Specifically, the Governor asks this Court to determine (1) whether SB 151 violates the inviolable contract between the Commonwealth and its employees and (2) whether the provisions of SB 151 that the Court invalidated under Section 46's majority-vote requirement are severable from the remaining portions of the bill. For the reasons set forth below, the Court declines to amend its June 20, 2018 Opinion & Order.

ANALYSIS

I. The Court Will Not Provide an Advisory Opinion on the Validity of the Bill's Substance.

This Court's June 20, 2018 judgment declined to address the merits of Plaintiffs' assertion that the bill violated the inviolable contract between the Commonwealth and its employees and the Contracts Clause of Section 19. The Governor now argues that the Court is duty-bound to address these issues and "decide the constitutionality of Senate Bill 151 *once and for all*." Gov's Mem. 2. However, the Court held that SB 151 failed to comply with constitutional requirements for passage and is therefore void; as such, the substantive arguments no longer presented a live controversy for this Court to decide. *See Commonwealth v. Terrell*, 464 S.W.3d 495, 498 (Ky. 2015) (quoting *Commonwealth v. Hughes*, 873 S.W.2d 828, 830 (Ky. 1994)) (explaining that a case or issue may "become[] moot as a result of a change in circumstances which vitiates the underlying vitality of the action"); *Spanish Cove Sanitation, Inc. v. Louisville-Jefferson Cnty. Metropolitan Sewer Dist.*, 72 S.W.3d 918, 921 (Ky. 2002) ("For 85 years, it has been the law in Kentucky that any statute passed in contravention of the Constitution is void *ab initio*, and any action taken thereunder is a

nullity.”). Because the bill was never properly enacted, the legal issues regarding the inviolable contract are not ripe for review. Thus, the Governor essentially seeks an advisory opinion on the validity of the bill’s substance before the bill has been validly enacted. To the extent the Governor seeks a ruling on whether SB 151 violates the inviolable contract, the controversy is moot. To the extent that he seeks guidance for future legislatures on the scope of the inviolable contract, the controversy is not ripe.

The Court is bound by this state’s longstanding prohibition against issuing advisory opinions. For example, the Kentucky Supreme Court has repeatedly held that “[o]ur courts do not function to give advisory opinions, even on important public issues, unless there is an actual case or controversy.” *Philpot v. Patton*, 837 S.W.2d 491, 493 (Ky. 1992); *see also In re Constitutionality of House Bill No. 222*, 90 S.W.2d 692, 693 (Ky. 1936) (noting that the power to render advisory opinions conflicts with the Kentucky Constitution). In the present case, the Court found SB 151 to be void *ab initio* due to its procedural deficiencies. When the Court determined that the bill was never validly enacted, the issues related to the bill’s substance became moot. In other words, those issues no longer presented an actual case or controversy for the Court to decide.

Simply put, the Governor’s motion is designed to obtain a ruling on the merits of a bill that was not validly enacted. As he explains, “If the General Assembly decides to remedy any alleged procedural defect in the near term, it deserves guidance about the merits of Senate Bill 151.” Gov.’s Mem. 3. However, to the extent the Governor seeks guidance on the legal parameters of the inviolable contract, it would be sheer speculation for this Court to assume that the legislature would re-enact the provisions of SB 151. In that sense, the issue over whether SB 151 violates the inviolable contract of KRS Chapter 61 or the Contracts Clause of the Kentucky Constitution is not ripe for adjudication. As Judge Minton explained, writing for the Court of Appeals, “[q]uestions

that may never arise or are purely advisory or hypothetical do not establish a justiciable controversy. Because an unripe claim is not justiciable, the circuit court has no subject matter jurisdiction over it.” *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005) (citations omitted). The contract-related claims in this complaint are not ripe for adjudication until the legislature has passed a bill that complies with all constitutional requirements for enactment under Section 46 of the Kentucky Constitution. That manifestly has not happened yet, and the Court declines the invitation to offer its legal opinion about the merits of a pension proposal that may—or may not—be enacted.

In addition, the Court notes that it also declined to decide whether SB 151 violates Sections 2 (prohibiting arbitrary action) and 13 (prohibiting taking of property without just compensation). Interestingly, the Governor makes no reference to these substantive issues and asks only that the Court consider the inviolable contract and Contracts Clause issues. Regardless, for the reasons set forth above, the Court will not provide an advisory opinion on the validity of the bill’s substance.

II. The Unconstitutional Provisions of SB 151 Cannot Be Severed from the Remaining Portions of the Bill.

In its Opinion & Order, the Court cited to specific provisions of the bill that qualified as appropriations; in other words, these provisions “set[] apart . . . a particular sum of money for a specific purpose.” *Davis v. Steward*, 248 S.W. 531, 532 (Ky. 1923) (defining appropriation). For example, on pages 25–27 of its Opinion and Order, the Court cited to Sections 12, 20, 47, 57, and 63. After reviewing these various provisions, the Court concluded that SB 151 “not only authorizes, but commands that these funds be used for a specific purpose.” Opinion & Order 26. As a result, it was properly characterized as an appropriations bill and required a majority vote of all House members under Section 46.

The Governor now argues that “the Court should decide whether the aspects of Senate Bill 151 collected on pages 25–27 of its decision are severable from the larger bill.”¹ In support of this argument, the Governor cites to KRS 446.090. That statute provides that “[i]t shall be considered that it is the intent of the General Assembly, in enacting any statute, that if any part of the statute be held unconstitutional the remaining parts shall remain in force.” Thus, the Governor argues, it was the General Assembly’s intent that any unconstitutional provisions of SB 151 be severed.

However, it is important to note that KRS 446.090 provides certain exceptions to severability. The statute states, in full,

It shall be considered that it is the intent of the General Assembly, in enacting any statute, that if any part of the statute be held unconstitutional the remaining parts shall remain in force, *unless the statute provides otherwise, or unless the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part, or unless the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the intent of the General Assembly.*

KRS 446.090 (emphasis added). Thus, in seeking severance of the unconstitutional portions, the Governor is essentially asking that this Court determine whether the remaining parts of SB 151 are “essentially and inseparably connected with and dependent upon the unconstitutional part[s]” or whether they are “incomplete and incapable of being executed” without inclusion of the unconstitutional provisions.

The Kentucky Supreme Court applied KRS 446.090 in *Kentucky Milk Marketing and Antimonopoly Commission v. Kroger Company*, 691 S.W.2d 893 (Ky. 1985) and found severance

¹ When a statute is passed in an unconstitutional manner, it is void *ab initio*, and severability is therefore impossible. See *Spanish Cove Sanitation, Inc.*, 72 S.W.3d at 291. However, as the Governor explains in his supporting memorandum, his argument presupposes that the Supreme Court reverses the Court’s ruling on the three-readings requirement of Section 46, which invalidates the bill as a whole, and upholds the Court’s ruling on Section 46’s majority-vote requirement, which the Governor argues applies only to the appropriations sections of the bill.

inappropriate. In that case, the Court found the Milk Marketing Act, which prohibited retailers from selling milk below cost, to be unconstitutional. When asked to sever those unconstitutional provisions, the Court declined, explaining that “[t]he entire Act, from its definition section to its penalty section, has the purpose of enforcing the provisions of KRS 260.705,” which related to the selling of milk and milk products. *Id.* at 901. The Court therefore concluded “that all parts of the statute are essentially and inseparably connected, and not severable.” *Id.*; *see also McGuffey v. Hall*, 557 S.W.2d 401, 416 (Ky. 1977) (declining to sever where invalid portions were “so essential to that section as a whole that the remainder of the section could not stand without them”); *but cf. Louisville/Jefferson Cnty. Metro Govt. v. Metro Louisville Hospitality Coalition, Inc.*, 297 S.W.3d 42, 47 (Ky. App. 2009) (severing unconstitutional exemption in Smoke Free Law because the dissected law would continue to serve the purpose of promoting the public’s health).

The Court finds the reasoning of *Kentucky Milk Marketing* controlling in the present case. As noted by the Court in its opinion, the sections referenced on pages 25–27 represent only a sampling of the various appropriations made by SB 151. *See* Opinion & Order 26 n.12 (“These are only a few examples of appropriations under SB 151.”). The bill includes numerous other similar provisions related to funding the state’s retirement systems and how such benefits are distributed, including—but not limited to—the following:

- Section 9: amends KRS 21.402, which in turn explains how to determine the amount of interest credit that will be added to a member’s account if that member contributed to the hybrid cash balance plan.
- Section 14: amends KRS 61.510, which defines various terms under KRS Chapter 61, including “level dollar amortization method.” This is “a method of determining the annual amortization payment on the unfunded actuarial accrued liability that is

set as an equal dollar amount over the remaining amortization period” or, in simpler terms, a method of paying down the state’s unfunded liabilities by setting payments at a specific dollar amount (as opposed to the present method of calculating a *percentage*). Section 14 also defines “accumulated employer contribution” as “the employer contribution deposited to the members’ account and any investment returns on such amounts.”

- Section 15: amends KRS 78.510, which defines various terms under KRS Chapter 78. This section adds the term “accumulated employer contribution,” the “employer contribution deposited to the member’s account and any investment returns on such amounts.”
- Section 16: amends KRS 61.546 to add that members that began participating in the Kentucky Employees Retirement System (“KERS”) or the State Police Retirement System (“SPRS”) prior to September 1, 2008 who retire on or after July 1, 2023 cannot use accumulated unused sick leave service credits to determine whether they are eligible to receive a retirement allowance.
- Section 17: amends KRS 78.616, which similarly limits the ability of County Employee Retirement Systems (“CERS”) members to use accumulated unused sick leave service credits to calculate retirement allowances.
- Section 18: amends KRS 61.565, which mandates that employers participating in SPRS, CERS, or KERS contribute annually to the respective retirement system. They “shall contribute an amount determined by the actuarial valuation completed in accordance with KRS 61.670 and specified by this section.” The amendment also adds, “Employer contributions for each respective retirement system shall be

equal to the sum of the ‘normal cost contribution’ and the ‘actuarially accrued liability contribution.’”

- Section 19: amends KRS 61.597, which provides that certain members of KERS or CERS who hold nonhazardous positions “shall receive the retirement benefits provided by this section in lieu of the retirement benefits provided under KRS 61.559 and 61.595. The retirement benefit referred to in this section is the “hybrid cash balance plan.”
- Section 43: adds a new section of KRS 161.220 to 161.716. These additions provide that members who begin participating in the Teachers’ Retirement System (“TRS”) on or after January 1, 2019 shall be placed into the hybrid cash balance plan. That section then explains how retirement benefits are calculated under this plan, including the member’s contributions, the employer’s pay credits, and regular interest. For example, the hybrid cash balance plan provides retirement benefits based on the member’s accumulated account balance, which includes employer pay credits of either eight percent (8%) of the employee’s compensation (for non-university employees) or 4% of the employee’s compensation (for university employees).
- Section 45: amends KRS 161.220, which defines various terms for KRS 161.220 to 161.716 and 161.990. This section adds, among other terms, the phrase “accumulated employer credit,” “the employer pay credit deposited to the member’s account and regular interest credited on such amounts.” This section also defines “accumulated account balance” for members who began participating in the system prior to January 1, 2019 as the member’s accumulated contributions,

while the accumulated account balance for members who began participating after that date is “the combined sum of the members’ accumulated contributions and the member’s accumulated employer credit.”

- Section 52: amends KRS 161.507 to explain that “[m]embers participating in the hybrid cash balance plan as provided by Section 43 of this Act who make the regular member contribution required by this paragraph, shall receive employer credits for the period of service purchased.”
- Section 77: amends KRS 161.661 to explain that members of the hybrid cash balance plan “shall also be credited with employer credits and interest credits for each year of service earned.”

The many provisions of SB 151 that directly specify the amount of state tax dollars that must be set aside to fund the retirement system, in the form of employer contributions, are central to the bill. So too with the bill’s specific allocation of tax dollars to fund health insurance for retired employees. The major policy change in the bill—ending the defined benefit pension system for teachers and shifting newly hired teachers into a hybrid cash balance fund—could not operate or be implemented without a specific directive for the allocation of state tax dollars to fund the employer’s share of the cash-hybrid retirement benefit. Likewise, the “level dollar funding” method of retiring the current unfunded liability in these funds would be meaningless without the bill’s requirement for specific annual contributions to the retirement of this deficit. In other words, the entire bill is dependent upon the legislature’s allocation of specific amounts of tax dollars to the specific purposes of funding these retirement systems, both the defined benefit system for current teachers and other public employees and the hybrid cash balance system for future hires.

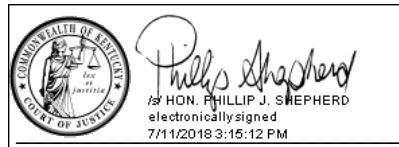
Without those specific authorizations for allocations of tax dollars for these purposes, the bill could not be implemented.

Upon reviewing these provisions and the remaining portions of SB 151, the Court finds that the bill's purpose—as a whole—was to change the way in which our state's retirement systems are funded and the manner in which those funds were distributed to public employees. Accordingly, if the unconstitutionally-enacted appropriations provisions are severed, “the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part.” KRS 446.090. In other words, the General Assembly intended to make these specific changes to the funding of the state's retirement systems. Without those provisions, “the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the intent of the General Assembly.” *Id.* Severance is therefore inappropriate in this case, and the Court declines the Governor's invitation to amend its June 20, 2018 Opinion & Order in that manner.

CONCLUSION

For the reasons set forth above, the Court hereby **DENIES** the Governor's Motion to Alter, Amend, or Vacate the Court's June 20, 2018 Opinion & Order.

IT IS SO ORDERED this 11th day of July, 2018.



The image shows a rectangular box containing an electronic signature. On the left is the official seal of the Commonwealth of Kentucky, featuring a figure holding scales and a sword, with the text 'COMMONWEALTH OF KENTUCKY' and '1792' around it. To the right of the seal is a handwritten signature in cursive that reads 'Phillip J. Shepherd'. Below the signature, the text reads: 'HON. PHILLIP J. SHEPHERD', 'electronically signed', and '7/11/2018 3:15:12 PM'.

PHILLIP J. SHEPHERD, JUDGE
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