How a (Sewer) Bill Becomes a (Pension) Law: Kentucky Legislative History in Difficult Times (July 2018)

Kurt X. Metzmeier
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In the April Bar Briefs, I wrote about researching federal legislation in difficult times where the classic “how-a-bill-becomes-a-law” method fails to capture the secretive, makeshift law-making of a politically fractured legislature. Recently this malady spread to the Kentucky General Assembly, which has struggled with conflicts engendered by a divisive governor, a legislative leadership with growing pains as a relatively new majority Republican body, and a membership facing upcoming 2018 elections in an unsettled political environment.

This was reflected dramatically in the battle over funding and reforming the state pension system for state workers and teachers—both articulate, well-organized and politically active constituencies with members spread throughout House districts in all 120 counties. (There are actually eight pension funds in Kentucky, the two largest being the Kentucky Teachers Retirement System (KTRS), representing teachers and the Kentucky Employees Retirement System—Non Hazardous, (KERS), representing most state workers but excluding police and firefighters.) For simplicity, I will focus only on those two plans below.

From his election in 2015, Governor Matt Bevin has proclaimed his desire to “fix” the pension system, which ranks among the worst funded in the country due to years of underfunding by the state legislature (and perhaps due to poor management of its reserves). For example, while the legislature has fully funded its own pension system, the KTRS has been only 54 percent funded and the KERS has only 44 percent of the funds it will need. The blame is largely bipartisan, having occurred over years when the Senate was controlled by Republicans, the House by Democrats, and the governor’s mansion occupied by Democrats (Paul Patton and Steven Beshear) and Republican Ernie Fletcher. Some critics argue that lack of funding was largely a byproduct of the political class’s refusal to reform a state tax system that takes in less revenue than Kentuckians want spent on education, roads and health care.

Rather than merely plan to properly fund the pension fund at promised levels, Bevin expressed an interest in redesigning the current combined-benefit system by converting it to a “401k-like” pension for new employees and by reducing some benefits to retirees and current employees. Commentators pointed out that this would be a complex conversion because teachers are not eligible for social security benefits, so any new system involving them would have to meet the requirements of a “social-security replacement” plan. Moreover, simultaneously maintaining defined-benefits plans for current workers and 401k-like plans for new employees could cost more annually during a transition period rather than properly funding the current system.

In September 2017 consultants hired by Bevin released a report on pensions that foreshadowed a drastically altered system which alarmed teachers and state workers. Bevin’s final plan was announced that October. Its thrust was to put new and current employees hired after 2014 into a 401k-style plan, transition current workers into the plan after they reached 27 years of service (capping but preserving the defined pension), and impose a three percent tax on salaries to fund a retirement healthcare fund. In addition, the plan changed the way that teachers calculated their retirement date and eliminated cost-of-living adjustments (COLAs) for retirees.

Teachers and state workers cried foul, claiming the plan violated the “inviolable contract” with them by changing benefits promised to them when they were hired and that they had paid into during their years of employment. The inviolable contract doctrine is enshrined in statute law as Chapter 161 of the KRS and bolstered by the contract clause of the state and federal constitutions. (The state contract-clause has played a lively role in Kentucky’s history from the 1820s debt-relief controversy which split the state high court into “new” and “old” courts—which I discuss in my book Writing the Legal Record: Law Reporters in Nineteenth-Century Kentucky—to the struggle to free Eastern Kentucky landowners from the unfair terms of “broad form deeds” that allowed companies to destroy their houses to strip-mine the coal underneath them.) Attorney General Andy Beshear declared the plan unconstitutional, promising legal action if it passed.

While Bevin had begun the year by promising a special-session of the legislature to fix the pension system, 2017 ended without action (except for the establishment of a website touting the governor’s plan). The inaction was partially due to a summer sexual harassment scandal that toppled House Speaker Jeff Hoover. Bevin pushed hard to push out Hoover, who he also thought was too soft on pension-reform, but that left hard feelings in the GOP caucus. The 2018 regular session of the legislature opened early January without a leadership-sponsored pension-bill and Bevin’s plan seemingly dead on arrival.

Finally, on February 21, the legislative leadership released their bill. It proposed a hybrid, part defined-pension, part 401k-style plan for newly hired teachers and state workers, and scaled back some benefits for current and retired employees—but not nearly as much as Bevin’s plan had. Teachers were still angry because the plan cut benefits and retiree COLAs and because they believed the hybrid plan would hurt recruitment of future teachers. They began intense lobbying of legislators—to which the governor responded by accusing them of being “sellish” and “acting thuggish.”

On February 28, Beshear issued a letter to state lawmakers advising that the bill violated the inviolable contract in several provisions by reducing COLAs, adding a 1 percent tax on teacher salaries for retirement healthcare, changing rules calculating service (eliminating unused sick-days from the formula) and altering the final compensation rate for some retirees.

Teachers rallied in the capital on March 9, chanting “A Pension Is a Promise” while Senate leaders tried to find votes to move the bill on the floor. Later that day the leadership decided to send the bill back to committee. Teachers cheered and Bevin fumed. During the last week of March, with only a few days left in the session, the press declared that “the pension bill is stalled in the face of vigorous opposition from teachers.”

Then, at 2 p.m. on March 29, the House Committee on State and Local Government hijacked a wastewater bill, gutted it, and inserted a new pension plan. Because the sewer bill had already passed the Senate and had two readings, the House was able to take it up immediately. News of the surprise move spread through school houses around the state, outraging teachers. By the time that the House quickly passed the pension-bill mostly unread, teachers were streaming into the capitol.
The new law did not reduce retiree COLAs, but it required current teachers to work to 65 before retirement and limited the use of unused sick days to calculate pension to those days accrued before 2018. A death benefit for some current teachers was also eliminated. New teachers and state workers would be placed into a hybrid plan that would not be protected by the inviolable contract—meaning that the legislature could change or take away their benefits at any time. Since they remain ineligible for social security, new teachers in Kentucky would face no firm expectation of a certain retirement.

After Bevin signed the bill into law into April 10, Beshear filed suit in Franklin Circuit Court next day, claiming that the bill violated the inviolable contract and that its unusual legislative path violated the legislative clauses of the Kentucky Constitution.

The pension bill was not the only legislation that was enacted in such an unusual manner in 2018. A new tax reform bill that adds several new sales taxes and changes to the state income tax was passed with almost as much secrecy, as was the biennial budget. The haste in the drafting of these bills required “clean up legislation” to be passed on the last day of the session to fix some of the errors.

Legislation like the pension bill present legal researchers with a challenge as they try to interpret large, complex and quickly devised laws that may have vaguely worded provisions or sections that clash with existing law. For example, assume for a moment that a researcher would collect documents of the governor’s plan from pension.ky.gov, the attorney-general’s opinion on that plan, OAG 17-031, the legislative history of the stalled pension bill, SB-1 (including the text of the filed bill and committee substitute), the attorney-general’s letter to legislature of February 28, 2018, the video recorded debates of the House and Senate on KET (www.ket.org/legislature) and the final law, the sewer-to-pension bill, SB 151.

Any of these documents could shed light on individual provisions on the law and together they reveal a public debate driving the private moves. Because of this, it is impossible to ignore press coverage. I have covered this topic before (Bar Briefs, June 2016) but since then the UofL Library has acquired access to full Courier-Journal database, available to walk-in patrons of any UofL library. And, before they disappear into archives, newspaper and broadcast news stories on the pension are widely available on the Internet.

In Kentucky difficult laws matter because frequently the most important laws have the most circuitous and secretive paths to the governor’s desk. Probing the history of these texts tests the skills of the legal researcher, requiring them to look beyond traditional legislative history. But when a client’s retirement or taxes are on the line, they expect the effort.

Kurt X. Metzmeier is the associate director of the law library and professor of legal bibliography at the University of Louisville Brandeis School of Law. He is the author of Writing the Legal Record. Law Reporters in Nineteenth-Century Kentucky: a group biography of Kentucky’s earliest law reporters, who were leading members of antebellum Kentucky’s legal and political worlds.

As the Senate passed the revised bill that Thursday evening, reports of a statewide “sick-out” circulated and school boards began to announce school closings for the next day in 29 districts all over the state, including Jefferson County. On Friday, hundreds filled Frankfort in protest; thousands more rallied on Monday, promising to “remember in November.”

When researching difficult legislation like the 2018 pension, tax, and budget bills, a researcher still needs to start with the traditional legislative history but must also be prepared to conduct non-traditional research into extra-legislative resources.

To track the “how-a-bill-becomes-a-law” background, use the Legislative Research Commission website, www.lrc.ky.gov. (See Listening to the Law: Finding the Legislative History of Recent Kentucky Statutes Online in the November 2016 Bar Briefs, available online at the LBA website, www.loubar.org). Savvy researchers will not only track the bill that became law but also failed legislation on the same topic whose provisions may have made it into the final law. The legislative record should be filled out by related material released by the governor, the attorney-general, consultants and nongovernment organizations, and press coverage.

Applying this method to the pension bill, a researcher would collect documents of the governor’s plan from pension.ky.gov, the attorney-general’s opinion on that plan, OAG 17-031, the legislative history of the stalled pension bill, SB-1 (including the text of the filed bill and committee substitute), the attorney-general’s letter to legislature of February 28, 2018, the video recorded debates of the House and Senate on KET (www.ket.org/legislature) and the final law, the sewer-to-pension bill, SB 151.

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