



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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Memorandum

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To: Greg Pritchett, Water Transportation Advisory Board Chair

From: Michael West, Assistant Attorney General

Date: May 11, 2012

Re: Research Items Requested

The following research should be considered informational only. As I am the attorney for the Water Transportation Advisory Board only, I am not the attorney for any specific Riverport Authority. Therefore, to the extent that this research implicates the operation of your Riverport Authority, it should not be relied upon. You should rely upon advice given only by that Riverport Authority's independent counsel.

Question: What is the extent of liability a riverport can face in a negligence action if a train derailment occurs on its property?

A public riverport may be liable up to \$200,000 or \$350,000 if the Commonwealth's Board of Claims determines that it was negligent.

A riverport is a public and governmental agency. KRS 65.510-650; *E.M. Bailey Distributing Company, Inc. v. Conagra, Inc.*, 676 S.W.2d 770 (Ky. 1984).

"It is an inherent attribute of a sovereign state that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity." *Yanero v. Davis*, 65 S.W.3d 510, 517 (Ky. 2001).

In the instance that negligence is alleged against a riverport, the Commonwealth has waived sovereign immunity with prescribed limitations. KRS 44.070. One may recover for the negligence of a state actor up to an amount of \$200,000 for a single claim or up to \$350,000 for multiple claims arising from the same act of negligence. Damages for mental distress and pain and suffering are not recoverable. Any recovery through the Board of Claims shall be reduced by the amounts paid out for workers' compensation, Social Security, or medical, disability or life insurance payments.



An important distinction to be made is that, while the riverport itself enjoys sovereign immunity, and claims against it are heard by the Board of Claims which operates with prescribed limitations, employees of the riverport are not always cloaked with the same immunity. *Commonwealth v. Harris*, 59 S.W.3d 896 (Ky. 2001). An employee is immune from liability for a negligent act only to the extent that he was acting in his official capacity and the act alleged to have been negligently performed was a discretionary one. If the allegation is that an employee acted negligently in the performance of a ministerial act, then that employee could be sued in Circuit Court and could be found liable for that negligence. Whether a particular act is discretionary or ministerial will depend on the facts of the case.

Question: If a Riverport Authority uses grant funds to purchase equipment and that equipment is used for a period of time, does the Riverport Authority have an obligation to pay the grant-making agency the proceeds of any sale of the equipment?

Maybe. In the administration of grants administered by the Water Transportation Advisory Board, the Board, via the Transportation Cabinet, should adopt regulations which specify appropriate procedures for the disposition of equipment and supplies either unused or which retain value.

Some grant programs require a grantee to reimburse the grantor upon sale of equipment purchased with grant proceeds. See FEMA Disaster Assistance Policy 9525.12.¹ FEMA imposes an obligation on grantees to reimburse FEMA its share of the proceeds if the equipment being sold has a fair market value of greater than \$5,000.

The following are some considerations that should be written into the regulation:

1. How long has the grantee owned the equipment?
2. What is the fair market value of the equipment?
3. Is the fair market value for one piece of equipment or multiple pieces?
4. How quickly can the item be sold?
5. Who determines the fair market value?
6. What documentation is required if a piece of equipment is sold and the grantor is not reimbursed? Appraisal?
7. Does the Board or the Transportation Cabinet wish to reserve the right to inspect equipment purchased if it doubts the representations of the grantee with regard to value?
8. How does such a scheme relate to leased equipment?
9. What type of documentation is necessary to establish that leased equipment is being leased at a reasonable rate?

¹ http://www.fema.gov/government/grant/pa/9525_12.shtml