

COMMONWEALTH OF PENNSYLVANIA

TELWELL, INC.	:	BEFORE THE BOARD OF CLAIMS
	:	
VS.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
PUBLIC SCHOOL EMPLOYEES'	:	
RETIREMENT SYSTEM and GRANDBRIDGE	:	
REAL ESTATE CAPITAL, LLC	:	DOCKET NO. 4030

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**OPINION**

On or about August 12, 2011, Plaintiff Telwell, Inc. ("Telwell") commenced a lawsuit in the Court of Common Pleas of Philadelphia County asserting breach of contract and tort claims against Defendants Public School Employees' Retirement System ("PSERS") and Grandbridge Real Estate Capital, LLC ("Grandbridge"). The Defendants filed preliminary objections asserting, among other things, that the court lacked jurisdiction over the Defendants and the subject matter. On November 7, 2011, the court sustained those preliminary objections and ordered the breach of contract claim transferred to the Board of Claims while dismissing the remaining counts pursuant to the gist-of-the-action doctrine.

On December 27, 2012, the matter was transferred to the Board, and Telwell filed its "Restated Claim for Breach of Contract/Duty of Good Faith" ("Restated Claim"). In its Restated Claim, Telwell avers that Defendants owe it approximately \$500,000 resulting from an overcharge of interest it paid on a loan. In support of its claim, Telwell avers, inter alia, that in 2003 it borrowed \$2,600,000 from PSERS to refinance a Telwell property in Philadelphia. Prior to the closing of the loan, the parties executed a Permanent Loan Commitment ("Commitment") setting forth the terms of the loan, including the interest rate to be paid. At settlement Telwell signed a note which also stated the interest rate and terms of payment ("Note"). During the

period of the loan, the Defendant Grandbridge collected the payments from Telwell and serviced the loan. Telwell further alleges that, in June 2011, when Telwell pre-paid the remaining balance of the loan, it became aware that the Commitment and the Note recited different interest rate terms. Telwell asserts it has been overcharged by Defendants and the parties now dispute which document governs the interest rate that Telwell was required to pay on the loan. Telwell's Restated Claim alleges a cause of action for breach of contract.

In their Answer and New Matter to the Restated Claim, Defendants assert that the Commitment governs the loan terms and deny they breached any contract or caused Telwell any damages. Defendants' did not, however, include any assertion that the Board lacked subject matter jurisdiction over the claims in this case. The parties thereafter engaged in discovery.

On May 17, 2013, Plaintiff Telwell filed a motion for summary judgment on the issue of liability, and Defendants filed an answer in opposition to that motion. In their responses to the motion, Defendants raised several issues which they assert preclude summary judgment, including the Board's lack of subject matter jurisdiction. Defendants specifically reference Section 102(f.1) of the Procurement Code in their jurisdictional challenge. (D. Br. in Opp. to Sum Judg. p. 4). Defendant Grandbridge also filed a motion for summary judgment. While considering the respective summary judgment motions, the Board noted the challenge to its subject matter jurisdiction raised by Defendants and determined that it must be resolved before proceeding further with this case.

On June 21, 2013, the Board afforded the parties the opportunity to fully present their positions on this issue, asking each to file a brief on whether or not the Board has subject matter jurisdiction over this claim in light of the language used in 62 Pa. C.S. §§ 102(f.1) and 1724(a). On July 11, 2013, the Defendants' filed a "Brief Regarding Sovereign Immunity and This Board's

Lack of Subject Matter Jurisdiction". On August 5, 2013, Plaintiff filed a "Reply Memorandum of Law Regarding Sovereign Immunity".

### **Arguments**

The issue before us is whether the Board has subject matter jurisdiction over this claim which arises from a loan made by PSERS, a Commonwealth agency, to Telwell. The parties have also included arguments in their briefs related to sovereign immunity and in personam jurisdiction. However, because we believe it to be dispositive, the only issue we address is whether Section 102(f.1) in conjunction with Section 1724(a) of the Procurement Code precludes the Board from asserting subject matter jurisdiction over this action.

In their brief, Defendants acknowledge that Section 1724(a) of the Procurement Code provides the Board with exclusive jurisdiction over claims arising from contracts entered into by Commonwealth agencies. 62 Pa. C.S. § 1724(a). However, they argue that Section 102 of the Code specifically sets forth the applicability of the Procurement Code with respect to Commonwealth agencies and that Section 102(f.1), entitled "Application to Loans," expressly states that Part 1 of the Procurement Code (which includes Section 1724(a)) does not apply to loans.

Section 1724(a) provides, in relevant part:

- (a) Exclusive jurisdiction.-The board shall have exclusive jurisdiction to arbitrate claims arising from all of the following:
  - (1) A contract entered into by a Commonwealth agency in accordance with this part and filed with the board in accordance with section 1712.1 (relating to contract controversies). . .

62 Pa. C.S. § 1724(a)(1).

Section 102(f.1) provides:

(f.1) Application to Loans. - This part does not apply to loans. For the purposes of this part, a loan is the disbursement of funds by the Commonwealth to any person where the principal amount disbursed is required to be repaid to the Commonwealth, with or without interest, under an agreement.

62 Pa. C.S. § 102(f.1).

Reading the foregoing provisions together, Defendants conclude that because the Board's enabling provisions, including Section 1724(a), are now part of the Procurement Code and because Section 102(f.1) explicitly states that the Procurement Code "does not apply to loans," the Board is without jurisdiction to hear this case. They ask we dismiss Telwell's Restated Claim on this basis.

Telwell responds, in essence, that Section 102(f.1) is irrelevant to the case at hand. It readily acknowledges that its action is not based on a Procurement Code contract, but argues adamantly that the Board still has, and must retain, jurisdiction over claims against Commonwealth agencies arising from non-Procurement Code contracts as well. For direct support of this proposition, Telwell cites to Hanover Ins. Co. v. State Workers' Ins. Fund, 35 A.3d 849 (Pa. Cmwlth. 2012), where the Commonwealth Court ruled that the Board had jurisdiction over a claim based on a non-Procurement Code contract. Id. at 856.

Telwell reinforces its assertion of Board jurisdiction by reference to the Supreme Court's recent decision in Scientific Games Int'l v. Dep't of Revenue, 66 A.3d 740 (Pa. 2013) which, it argues, confirms that the Board has expansive jurisdiction to decide Commonwealth contract disputes. Id. at 756. It also cites earlier appellate court opinions in Employers Ins. of Wausau v. Dep't of Transp., 865 A.2d 825 (Pa. 2005) and Department of Health v. Data-Quest, Inc., 972 A.2d 74 (Pa. Cmwlth. 2009) which emphasize the "broad jurisdiction" of the Board. See Wausau, 865 A.2d at 832-33; Data-Quest, 972 A.2d at 79. Telwell concludes that these cases

mean the Board still has jurisdiction over contracts made by Commonwealth agencies outside the Procurement Code, so Section 102(f.1) (which excludes loans from Procurement Code coverage) does not eliminate Board jurisdiction over this claim. (P. Brief, p. 9).

Telwell also posits that the Legislature designed the Board to be a place to provide redress for all claimants who contract with the Commonwealth. To support this point, Telwell recites a portion of the Commonwealth Court's recent opinion in Hanover where it states:

Moreover, in Data-Quest we also observed that statutory provisions that decrease the jurisdiction of a court of record must be strictly construed, 1 Pa. C.S. Sec. 1928(b)(7), and we cited the well-settled principle that when the legislature seeks to depart from salutary public policy principles, it must express its intention to do so explicitly.

Hanover, 35 A.3d at 854 citing Data-Quest, 972 A.2d at 79.

Relying on this premise, Telwell concludes that, if the Legislature wanted to depart from the Board's broad jurisdiction over all claims arising from contracts with the Commonwealth (as was the case prior to Act 142 of 2002), the Legislature had to do so explicitly in its 2002 amendments to the Procurement Code. (P. Brief, p. 8).

Finally, Telwell argues that, should the Defendants' position prevail (i.e. that the Board's jurisdiction is now strictly limited to claims on Procurement Code contracts), and we rule that the Board lacks jurisdiction here, this would mean that there is no judicial remedy for any entity that borrows from, or loans money to, the Commonwealth.<sup>1</sup> Telwell describes this as a "doomsday scenario" with a result that "the Commonwealth's credit rating would crumble, its bond market would disappear and the budget would be a shambles." Accordingly, Telwell argues that Defendants' narrow interpretation of the Board's current jurisdictional provisions would create a result that is "absurd, impossible of execution or unreasonable" and asserts that the Legislature

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<sup>1</sup>As Telwell correctly points out, if the contract claim does not fall within the Board's jurisdiction, there is no exception to sovereign immunity and, therefore, no possibility for redress against the Commonwealth. See Scientific Games Int'l, 66 A.3d at 756.

could not have intended this consequence. (P. Brief, p. 10). Telwell here cites to Section 1922 of the Rules of Statutory Construction, entitled "Presumptions in ascertaining legislative intent" which provides, in relevant part:

In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:

(1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable...

1 Pa. C.S. § 1922.

For all the foregoing reasons, Telwell urges the Board to find that it has subject matter jurisdiction over this claim.

### **Discussion**

None of the parties have identified, and the Board is not aware of, any prior case in which Section 102(f.1) of the Procurement Code has been cited as a bar to the Board's subject matter jurisdiction. Subject matter jurisdiction is defined as the competency of a court to hear a general class or type of case. See In re Melograne, 812 A.2d 1164, 1166-1167 (Pa. 2002). When a tribunal lacks subject matter jurisdiction, it has no authority to decide the case and no actions by the parties or agreements between the parties can provide such authority. Id. Whether a court has subject matter jurisdiction over an action is a fundamental issue of law which may be raised at any time in the course of the proceedings by any party, as well as by a reviewing court sua sponte. Mazur v. Trinity Area School District, 961 A.2d 96, 101 (Pa. 2008).

For more than 200 years prior to Act 142 of 2002 ("Act 142"), the Board's jurisdiction encompassed all claims arising from a contract entered into with the Commonwealth; afforded all who entered into such contracts relief from the imposition of sovereign immunity; and provided a fair forum in which both parties could seek to resolve their contractual disputes. In so

doing, the Board's enabling provisions provided assurance to all who entered into such commercial and economic relationships with the Commonwealth that their contracts were not wholly one-sided, illusory and/or subject to the whim of whatever official managed the Commonwealth entity involved, but were instead to be relied upon and governed by the rule of law. Hanover Ins. Co., 35 A.3d at 854; Data-Quest, 972 A.2d at 78-79; Miller v. Dep't of Environmental Resources, 578 A.2d 550, 552 (Pa. Cmwlth. 1990); Lowry v. Com., 76 A.2d 363, 365 (Pa. 1950). This relief from sovereign immunity on such contracts also served the ultimate interest of the Commonwealth by removing a "substantial disincentive for private individuals to pursue government contracts." See Scientific Games, 66 A.3d at 755.

At the end of 2002, Act 142 was passed and signed. On its face, Act 142 modernized and codified the Board's enabling provisions by moving them into Title 62 of Pennsylvania's Consolidated Statutes. It also explicitly relieved the Board of jurisdiction over claims for medical assistance reimbursement made by providers against the Department of Public Welfare ("DPW") since DPW had its own procedures and appeal board to address such claims. See 62 Pa. C.S. §§ 1721-1726. Act 142 was passed with no discussion or indication that it would substantially change the scope of sovereign immunity affecting contracts with the Commonwealth.<sup>2</sup>

The Board's enabling provisions now reside at 62 Pa. C.S. §§ 1721-1726. Section 1724 of the Commonwealth Procurement Code currently sets forth the primary jurisdiction of the Board with respect to claims arising from Commonwealth contracts. It states, in relevant part, as follows:

**(a) Exclusive jurisdiction.-** The board shall have exclusive jurisdiction to arbitrate claims arising from all of the following:

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<sup>2</sup> See discussion, infra, at pp. 9-10.

(1) A contract *entered into by a Commonwealth agency in accordance with this part and filed with the board in accordance with section 1712.1* (relating to contract controversies).

62 Pa. C.S. § 1724(a)(1) (emphasis added).

The language of this new provision, coupled with various other pre-existing sections of the Procurement Code (notably Sections 102 and 103 addressing, respectively, the scope of the Procurement Code and general definitions for same) now, arguably, limit the Board's jurisdiction to claims arising only from Procurement Code contracts (i.e. to claims arising from contracts "entered into by a Commonwealth agency in accordance with this part" and "filed with the board in accordance with section 1712.1"). See 62 Pa. C.S. §§ 101 through 2311.

As a result of the foregoing, the Board, since 2002, has been presented with a constant series of jurisdictional challenges and has struggled repeatedly to reconcile its newly codified jurisdictional provisions with its long-standing history and public purpose. More recently, the Commonwealth Court has begun to wrestle with the scope of the Board's current jurisdiction, as evidenced, inter alia, by its opinions in Data-Quest and Hanover. In March of this year, the Pennsylvania Supreme Court, in Scientific Games, confirmed the exclusive nature of the Board's jurisdiction but declined to address whether or not our current jurisdiction is limited to Procurement Code contracts. Moreover, while noting that Hanover (a 4-3 decision by the Commonwealth Court) remains the "prevailing law" on this topic, the Supreme Court clearly left this issue open for final resolution on another day. Scientific Games, 66 A.3d at 752-753.

Telwell now comes to the Board asserting that we should find the Board's jurisdiction to be unchanged by Act 142 and to remain fully as broad as before codification of its enabling provisions into the Procurement Code. It, of course, cites to Hanover to support its position. However, it also advances strong new arguments that eliminating Board jurisdiction over non-

Procurement Code contracts could not have been the Legislature's intent because, inter alia, to do so would create the unreasonable and absurd result of crippling the market for Commonwealth investments, including the Commonwealth's bonds (by eliminating the sole exception to sovereign immunity and any forum in which to enforce contractual obligations for those who borrow from, or lend to, the Commonwealth). (P. Brief, p. 10)

Although we find ourselves in agreement with several of Telwell's points, we are unable to agree entirely with its conclusions. To begin this discussion, we note that the polestar and pre-eminent purpose of all statutory interpretation is to effectuate the intent of the General Assembly. 1 Pa.C.S. § 1921(a). See e.g. Griffiths v. WCAB (Seven Stars Farm, Inc.), 943 A.2d 242, 255-56 (Pa. 2008) (applying many of the salient principles of statutory construction to effectuate the intent and remedial nature of the act at issue). We further acknowledge that there is significant evidence that the General Assembly did not intend to materially alter the Board's long-standing jurisdiction but, at most, only to modify it in the two minor ways it explicitly and clearly stated (i.e. by eliminating Board jurisdiction over medical assistance claims and by allowing nonmonetary relief in another forum to the extent otherwise provided by law).<sup>3</sup> See 62 Pa. C.S. § 1724(c) and (d).

Our belief that the General Assembly did not intend to materially alter the Board's jurisdiction (and the long-standing waiver of sovereign immunity on contract actions that mirrors

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<sup>3</sup>At the time of Act 142's passage, there was considerable controversy around the issue of whether or not the Board was the appropriate forum in which to resolve claims made against the Department of Public Welfare by medical assistance providers. See, e.g., Dep't of Pub. Welfare v. Presbyterian Med. Ctr. of Oakmont, 877 A.2d 419 (Pa. 2005). Act 142 addressed this issue prospectively by eliminating Board jurisdiction over the claims and requiring DPW to improve its payment appeals process. See Act 142 at Sections 12.2, 20.1 and 22 (Ex. A). Act 142 at Section 13 also eliminated §§ 1741-1743 of the Procurement Code as it stood in 1998. 62 Pa.C.S. §§ 1741-1743 (1998)(Exs. A & J). Arguably the new language at 62 Pa.C.S. 1724(d), also supplied by Act 142, serves to replace these deleted sections and resolve the potential conflict between these deleted sections and the Board's exclusive jurisdiction over claims based on executed contracts. Compare 72 P.S. § 4651-4 (1978) to 62 Pa.C.S. § 1743 (1998) (remedies after execution of contract).

this jurisdiction) begins from our agreement with Telwell that an interpretation of the Board's current jurisdiction which strictly limits it to Procurement Code contracts could potentially threaten to disrupt several significant commercial and economic relationships enjoyed by the Commonwealth outside the Procurement Code arena. One need only look at the types of economic relationships governed by contract, but specifically excluded from Procurement Code coverage in Section 102, to identify some of the more significant ones (e.g. contracts entered into with counties, municipalities or regional authorities; contracts made by the General Assembly or the Judiciary; investment contracts made by the State Treasurer or other state agencies including loans of the type made here, etc.). We also agree with Telwell that it would seem absurd and unreasonable even to cast doubt on the validity of such contractual relationships, and that this could not have been the intent of the General Assembly when it adopted Act 142 of 2002.

Our agreement with Telwell that the General Assembly did not intend to materially alter the Board's jurisdiction and the status of sovereign immunity on Commonwealth contracts is also supported by a review of the circumstances of Act 142's passage. Specifically, Act 142 began as House Bill 2674 (hereinafter the "Bill").<sup>4</sup> In the House, the language codifying the

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<sup>4</sup> A summary of House Bill 2674's legislative history, relevant portions of the Bill's versions at printers numbers 3936, 4657 and 4710 and excerpts from House and Senate journals are available as indicated below:

A summary of House Bill 2674's legislative history is *available at*:

[http://www.legis.state.pa.us/cfdocs/billinfo/bill\\_history.cfm?year=2001&sind=0&body=H&type=B&bn=2674](http://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?year=2001&sind=0&body=H&type=B&bn=2674)

House Bill 2674's Printer's No. 3936, 2002 Gen. Assem., Reg. Sess. (Pa. 2002), *available at*:

<http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2001&sessInd=0&billBody=H&billTyp=B&billNbr=2674&pn=3936>

House Bill 2674's Printer's No. 4657, 2002 Gen. Assem., Reg. Sess. (Pa. 2002), *available at*:

<http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2001&sessInd=0&billBody=H&billTyp=B&billNbr=2674&pn=4657>

House Bill 2674's Printer's No. 4710, 2002 Gen. Assem., Reg. Sess. (Pa. 2002), *available at*:

<http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2001&sessInd=0&billBody=H&billTyp=B&billNbr=2674&pn=4710>

Excerpt from PA Senate Legislative Journal of November 27, 2002, *available at*

<http://www.legis.state.pa.us/WU01/LI/SJ/2002/0/sj20021127.pdf>

Excerpt from PA Gen. Assem. Legislative Journal of November 27, 2002, *available at*

<http://www.legis.state.pa.us/WU01/LI/HJ/2002/0/20021127.pdf>

Board's enabling provisions into Title 62 was present in the Bill (Printer's No. 3936) for all its considerations. However, upon referral to the Senate, all language respecting the Board was eliminated by the Senate's State Government Committee and was not present in the Bill (Printer's No. 4657) for First Consideration by the Senate on November 20, 2002. On November 21, 2002, the Senate re-referred the Bill to the Senate Appropriations Committee. On November 26, 2002, one day before the Senate was to conclude its 2002 Legislative Session, the Bill (Printer's No. 4710) was reported out of the Appropriations Committee with the Board language and received Second Consideration that same day. It was then passed by the Senate on Third Consideration on the next day (i.e. the Senate's last day of session prior to the sine die conclusion of the 2002 Legislative Session) with absolutely no discussion whatsoever. Following Senate approval of the Bill (Printer's No. 4710) on its last day of the 2002 Legislative Session, the Bill (Printer's No. 4710) was returned to the House where it was passed with some limited discussion of Board provisions on the House's last day of the 2002 Legislative Session. However, in this last minute rush of legislation at the close of the 2002 Legislative Session, there was no discussion whatsoever in either body regarding alteration or modification of sovereign immunity coverage respecting Commonwealth contract actions.

If this failure to discuss anything at all about a change to the Commonwealth's 200 year old public policy of waiving sovereign immunity with regard to all its contracts is not enough to throw doubt on the General Assembly's collective intent to eliminate the Board's jurisdiction (and waiver of sovereign immunity) for non-Procurement Code contracts, we further note that the "title" of the Bill, as acted upon finally by the Senate (Bill at Printers No. 4710), was decidedly flawed and misleading on its face. Contrary to the fact that this last version of the Bill contained provisions repealing the existing Board of Claims Act and replacing all its enabling

provisions, the title actually indicated by lineout (“for the Board of Claims”) that it did not address any Board of Claims provisions. It also failed to indicate that any changes were being made to the 200 year old waiver of sovereign immunity for claims based on Commonwealth contracts. See Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 404-10 (Pa. 2005) (In addition to the single subject requirement, Article III, Section 3, of the Pennsylvania Constitution also mandates that the subject of the bill must be clearly expressed in its title: No bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriation bill or a bill codifying or compiling the law or a part thereof); City of Philadelphia v. Commonwealth, 838 A.2d 566, 590-93 (Pa. 2003)(bills making substantive legal changes not considered codifying or compiling laws subject to exception from Article III, Section 3 requirements); Scudder v. Smith, 200 A. 601, 604 (Pa. 1938) (“The purpose of the constitutional requirements relating to the enactment of laws was to put the members of the Assembly and others interested on notice, by the title of the measure submitted, so they might vote on it with circumspection.”); See also Harvey v. Ridley Tp., 38 A.2d 13 (Pa. 1944)(portion of bill omitted from title found unconstitutional).

We believe the circumstances set forth above provide strong indication that the General Assembly did not intend to materially change the Board’s function, the scope of sovereign immunity or the long-established public policy served by the Board. Moreover, while it is not our place here to decide the constitutional implications of this flawed title,<sup>5</sup> we are nonetheless bound to read the provisions of Act 142 in a way so as to avoid constitutional defects respecting

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<sup>5</sup>It does not appear that the Board has authority to determine constitutional issues respecting the validity of its current enabling statute or Act 142’s repeal of the Board of Claims Act of 1937. See Dep’t of General Services v. The Board of Claims, et al., 881 A.2d 14, 19-21 (Pa. Cmwlth. 2005); See also Ruszin et al. v. Cmwlth. of Pa., Dep’t of Labor & Industry, et al., 675 A.2d 366, 370-371 (Pa. Cmwlth. 1996).

the effectiveness of Act 142's repeal of the Board's previous jurisdictional provisions and re-enactment of these enabling provisions in the Procurement Code. See e.g. Boettger v. Loverro, 502 A.2d 1310, 1313 (Pa. Super. 1985). This, we believe, requires us to read our new enabling provisions as broadly as possible, so as to avoid material changes to Board jurisdiction and/or to the scope of sovereign immunity for Commonwealth contracts.

Given the timeframe, the changes made between First compared to the Second and Third Considerations in the Senate, and the misleading nature of the Bill's "title" respecting its effect on changes to Board jurisdiction and the scope of sovereign immunity, we find it highly unlikely that the legislators voting on the twenty-nine page Bill knew they were eliminating a large portion of the 200 year old exemption from sovereign immunity for Commonwealth contracts by reason of the phrasing "in accordance with" in Section 1724 or the effect of the general provisions of Sections 102 and 103 on the Board's long-standing jurisdictional authority. To the contrary, we believe the foregoing circumstances provide significant reason to believe that the General Assembly did not intend to materially change 200 years of established public policy on such a significant issue as the scope of contractual sovereign immunity with no meaningful discussion of this action whatsoever. Accordingly, up to this point in our analysis, we agree with Telwell that the Pennsylvania General Assembly did not intend to materially reduce the Board's jurisdiction over claims arising from Commonwealth contracts and that we must construe our current jurisdictional provisions as broadly as possible.

Although the ultimate principle of statutory interpretation remains to effectuate the intent of the General Assembly, we are, of course, aware of the penultimate companion principle, i.e. "when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(a) and (b). It is with this

in mind that our analysis of the Board's remaining jurisdiction begins to diverge from Telwell's. More specifically, we believe that some of the language changes made in the codification of the Board's enabling provisions do not require a reading that makes significant material changes to the Board's jurisdiction while certain other portions of the Board's new enabling provisions do make material changes.

As alluded to earlier, one of the primary arguments made for reducing the Board's jurisdiction stems from a reading of 62 Pa.C.S. § 1724 that emphasizes the phrases, "in accordance with this part" and "in accordance with § 1712.1." Proponents of reduced Board jurisdiction read these phrases to say that the contracts under the Board's jurisdiction must be made "under the authority of" this part (i.e. the Procurement Code) and that claims on same must be made "in strict compliance" with 62 Pa.C.S. § 1712.1. Although the Board understands this reading, and has itself been seduced on occasion by its initial appeal, we would point out that the literal meaning of the word "accordance" does not require this narrow a reading.

Directly put, Webster's New World College Dictionary defines the word "accordance" to mean "agreement", "harmony" or "conformity."<sup>6</sup> Accordingly, the literal meaning of the operative phrasing "in accordance with" does not necessarily mean "under the authority of" or "in strict compliance with" but requires only that contracts subject to Board jurisdiction be made in harmony with the Procurement Code and filed in harmony with Section 1712.1. Therefore, we believe this new phrasing still allows for jurisdiction over non-Procurement Code contracts since non-Procurement Code contracts need not be made under the Procurement Code in order to be "in harmony" with same, and claims filed "in harmony" with Section 1712.1 need to provide

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<sup>6</sup> Webster's New World College Dictionary (4<sup>th</sup> ed. 2008). See also Griffiths v. WCAB, 943 A.2d at 255 (supporting use of standard dictionary definitions for general terms).

an opportunity for a meaningful administrative review by the contracting Commonwealth entity within the time frame outlined by Section 1712.1 before a claim is filed with the Board, but need not be filed “under the authority of” Section 1712.1 to be “in harmony” with this section.

Recent support for this broad a reading of Section 1724(a) is found, among other places, in Scientific Games where the Pennsylvania Supreme Court states at the very beginning of its discussion:

As noted, we are presented with issues of statutory construction, as to which our task is to determine the intent of the Legislature. The language of the statute at issue (here, the Procurement Code) is the primary guide. See 1 Pa.C.S. § 1921 (a), (b). Where ambiguities exist, we may resort to principles of construction, including, among other considerations, evaluation of the occasion and necessity for the statute under review, the object to be attained, and the consequences of the particular interpretation. See id. § 1921(c)(1), (4), (6).

Scientific Games, 66 A.3d at 753. (emphasis added)

Because the phrasing “in accordance with” now utilized in Section 1724(a), can be read as “in harmony with” as well as “under authority of” we find that the multiple principles of statutory construction discussed above require us to interpret the language of Section 1724(a) so as to acknowledge the Board’s historical purpose, serve the public interest and avoid the potential for disruption to existing Commonwealth business and commercial interests should the validity of its non-Procurement Code contractual relations be called into doubt.<sup>7</sup> For the foregoing reasons, we find that a literal but expansive reading of Section 1724(a) as suggested above and similar to that adopted by the Commonwealth Court in Hanover and Data-Quest is required pursuant to sound principles of statutory construction.

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<sup>7</sup>A broad reading of the Board’s jurisdiction (to encompass non-Procurement Code contracts as well) ultimately serves the best interest of the Commonwealth by providing parties contracting with a Commonwealth agency assurance that it may rely upon the agency to fulfill its obligations as well, avoiding the economic disruption that may result from public knowledge of a contrary holding. This latter point is, unfortunately, often disregarded by those narrowly focused on defending a singular claim against a Commonwealth entity brought before the Board.

Although we do not find the phrasing “in accordance with” contained in Section 1724(a) to require a reading that reduces the Board’s long-standing jurisdiction over all Commonwealth contract claims, there is additional language in our new enabling provisions which does. Specifically, we can find no ambiguity nor room for an interpretation more favorable to Telwell in the language of Section 102. This section explicitly states, inter alia, that Part I of the Procurement Code (which part now includes all of the Board’s enabling provisions) is not applicable to certain activities of the Commonwealth, including loans (which are defined as a “disbursement of funds by the Commonwealth to any person where the principal amount disbursed is required to be repaid to the Commonwealth, with or without interest”) 62 Pa.C.S. § 102(f.1). See also Dep’t of Auditor General v. State Employees’ Ret. Sys., 836 A.2d 1053, 1060 (Pa. Cmwlth. 2003) (the Commonwealth’s “investment of funds under any contract is excluded from the scope of the Procurement Code”).<sup>8</sup> Accordingly, because we cannot reach the constitutional issues raised by the manner of Act 142’s passage and can find no alternative construction of our enabling provisions which would allow the Board to assert jurisdiction over the claim here at issue, we must dismiss this action for lack of subject matter jurisdiction.

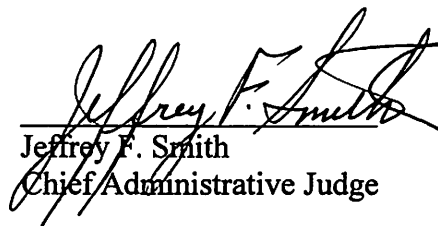
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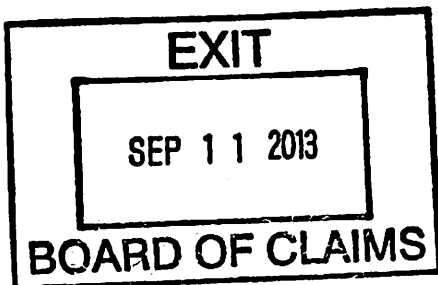
<sup>8</sup>Our holding here is strictly limited to loans made by the Commonwealth (i.e. where the Commonwealth is the lender) as is the language of Section 102(f.1). Issues regarding the enforceability of Commonwealth bonds raised in Telwell’s “doomsday” scenario have not yet, to our knowledge, been presented to the Board.

**ORDER**

**AND NOW**, this 11<sup>th</sup> day of September, 2013, upon consideration of the pleadings in this matter, the Defendants' "Brief Regarding Issues of Sovereign Immunity and this Board's Lack of Jurisdiction" and Plaintiff's "Reply Memorandum of Law Regarding Sovereign Immunity," **IT IS ORDERED** that the action is **DISMISSED** with prejudice for lack of subject matter jurisdiction pursuant to 62 Pa. C.S. §102(f.1).

BOARD OF CLAIMS

  
Jeffrey F. Smith  
Chief Administrative Judge



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