

# Blitz Bardgett & Deutsch, L.C.

Attorneys at Law

308 East High Street, Suite 301  
Jefferson City, Missouri 65101-3237

Telephone (573) 634-2500

Facsimile (573) 634-3358

E-Mail [atty@blitzbardgett.com](mailto:atty@blitzbardgett.com)

120 South Central, Suite 1650

St. Louis, Missouri 63105-1742

Telephone (314) 863-1500

Facsimile (314) 863-1877

THOMAS W. RYNARD  
E-mail: [trynard@blitzbardgett.com](mailto:trynard@blitzbardgett.com)

November 24, 2009

Mr. Thomas F. Simon, Clerk  
Missouri Supreme Court  
Supreme Court Building  
P. O. Box 150  
Jefferson City, MO 65102-0150

**FILED**  
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Thomas F. Simon  
CLERK, SUPREME COURT

Re: Missouri Prosecuting Attorneys and Circuit Attorneys Retirement System v. Barton County, et al., Case No. SC89896

Dear Mr. Simon:

At the request of the Court, the Attorney General has filed an amicus curiae brief on the issue of whether the term “compensation” in article VI, section 11, of the Missouri Constitution encompasses a public pension. Pursuant to the Court’s order, Respondents are filing their response to the Attorney General’s position by this letter brief. The Attorney General has argued that “compensation” includes the pension payments Barton County is being required to make to PACARS. As shown below, the Attorney General’s construction of the term is incorrect. The history behind adoption of the 1986 amendment, a consideration of the constitution as a whole, the long-standing characterization of pensions as a gratuity or bounty, and the very nature of pensions indicates that “compensation” does not include pensions.

As an initial matter, and to make clear that Respondents have not abandoned any position advanced in their brief by their argument here, the 1986 amendment to article VI, section 11, of the Missouri constitution did not repeal or amend by implication the Hancock Amendment as it related to county officials nor did it supersede *Boone County Court v. State*, 631 S.W.2d 321 (Mo. banc 1982). See Brief of Respondents at 22-23. Article VI, section 11, is easily harmonized with the Hancock Amendment when it is considered that the drafters of the amendment chose the word “authorize” as opposed to “mandated” or “required.” *Id.* However, as shown below, the pension benefits mandated by section 56.807 are not “compensation” under article VI, section 11, notwithstanding whatever effect that provision has on the Hancock Amendment.

“The fundamental purpose of constitutional construction is to give effect to the intent of the voters who adopted the Amendment.” *Keller v. Marion County Ambulance Dist.*, 820 S.W.2d 301, 302 (Mo. banc 1992). The context in which the language is found and the context which gave rise to it may be determinative. *Id.* It is appropriate to look at the situation when the provision was framed in order to ascertain the state of the law prior to adoption of the amendment, the perceived mischief under that law, and the remedy to be afforded by the amendment. *State ex rel. O’Connor v. Riedel*, 46 S.W.2d 131, 133-34 (Mo. banc 1932). *See also Lovins v. City of St. Louis*, 84 S.W.2d 127, 128 (Mo. banc 1935).

As the Attorney General concedes in his amicus brief, the amendment to article VI, section 11, of the Missouri Constitution was a reaction to the Court’s decision in *Boone County Court v. State*, 631 S.W.2d 321 (Mo. banc 1982). Brief of Amicus at 6. In *Boone County Court*, the State legislature increased the salaries of county collectors of second class counties but did not provide for state funding for this mandate. The legislation increasing the collectors’ compensation was challenged on the basis of the proscription against unfunded mandates of the Hancock Amendment, Mo. Const. art. X, § 21. An argument was made and rejected that article VI, section 11, as it existed then, was a separate basis for the Legislature to set the compensation of county collectors. 631 S.W.2d at 326. The Court held, “[t]he previously unlimited authority for the state to set the salaries of county officers pursuant to art. VI, section 11, must be read in harmony with the Hancock Amendment.” *Id.* The Legislature could not increase the compensation paid county collectors without also providing for payment of that increase by State appropriation. *Id.*

Assuming *arguendo* that the term “authorize” in article VI, section 11, was intended to be interpreted as meaning “mandate” or “require,” the perceived mischief which the people sought to address in adopting the amendment to article VI, section 11, was the limitation placed on the ability of the Legislature to require increases in remuneration for public officers by *Boone County Court’s* interpretation of the Hancock Amendment. As it relates to the Hancock Amendment, the amendment remedied this mischief by adding the underlined language below to article VI, section 11:

1. Except in counties which frame, adopt and amend a charter for their own government, the compensation of all county officers shall either be prescribed by law or be established by each county pursuant to law adopted by the general assembly. A law which would authorize an increase in the compensation of county officers shall not be construed as requiring a new

activity or service or an increase in the level of any activity or service within the meaning of this constitution. Every such officer shall file a sworn statement in detail, of fees collected and salaries paid to his necessary deputies or assistants, as provided by law.

2. Upon approval of this amendment by the voters of Missouri the compensation of county officials, or their duly appointed successor, elected at the general election in 1984 or 1986 may be increased during that term in accordance with any law adopted by the general assembly or, in counties which have adopted a charter for their own government, in accordance with such charter, notwithstanding the provisions of section 13 of article VII of the Constitution of Missouri.

Mo. Const. art. VI, §11 (emphasis added). (The amendment also added subparagraph 2 to the provision and the language, “or be established by each county pursuant to law adopted by the general assembly” as found in subparagraph 1. As the Attorney General points out, this additional change to subparagraph 1 was a response to the decision in *Baumli v. Howard County*, 660 S.W.2d 702 (Mo. banc 1983).)

When the people were presented with the amendment to article 6, section 11, the only “mischief” before them was the limitation on the ability of the Legislature to impose the burden of salary increases for county officials on the counties and it was this “mischief” only which they sought to remedy with their amendment. There was never any intent on their part or that of the drafters of the amendment for the term “compensation” to be stretched beyond salaries or fee-based remuneration as the Attorney General and PACARS are proposing.

The conclusion that participation in a public pension program is not “compensation” under article VI, section 11, is further buttressed by the axiom of constitutional construction that the document must be read as a whole and other parts considered as they may throw light on the part under consideration. *State ex rel. Moore v. Toberman*, 250 S.W.2d 701, 705 (Mo. banc 1952). In considering other parts, it should not be interpreted in a manner that would render another part meaningless. *Id.*

Within the constitution, public retirement systems have always been treated separately from provisions affecting the compensation of public officials. Thus, article VI, section 25, provides “that the general assembly may authorize any county, city or other political subdivision to provide for the retirement or pensioning of its officers and employees,” and makes other provision for public pensions. Mo. Const. art. VI, §25.

This language, which was adopted in 1966, *see Kansas City v. Brouse*, 468 S.W.2d 15 (Mo. banc 1971), would be rendered superfluous as it applies to counties if pension benefits are considered “compensation” under article VI, section 11. Mo. Const. art. VI, §11 (pre-1986 amendment). Similarly, while the chapter on public officers refers to “compensation of state, county and municipal officers” in one section, Mo. Const. art. VII, section 13, it treats public pensions separately and refers to what a public employee would receive under such a program as “the amount and type of retirement benefits to be paid by a retirement plan covering elected or appointed public officials or both[.]” Mo. Const. art. VII, §14. These benefits are not characterized as “compensation.”

The term “compensation,” as used in the constitution, refers to direct remuneration for services, i.e., wages and salary, whether that remuneration is in the form of a paycheck or the retention of a portion of fees collected by the public official in the course of his or her duties. It does not encompass retirement benefits. This was made evident over 100 years ago in the treatment of this very same issue. Thus, in *State ex rel. Heaven v. Ziegenhein*, 144 Mo. 283, 45 S.W. 1099 (1898), the Court was faced with the specific argument that the retirement benefits provided for were simply “a portion of the compensation for the services rendered before retirement; that the act provides, in advance, that the pay of the men upon the force shall consist of the salaries to be drawn during the time they hold their places, and half of the same after they are put upon the retired list.” 45 S.W. at 1100. The Court rejected this argument, as follows:

The act, however, is in all essential features simply a “pension law,” and is properly so called. It cannot be treated merely as providing compensation for services rendered before retirement, and as part of the salary thereof. A salary, payable from time to time during active service, is received by each police officer, and the amount is fixed according to rank. The man who serves 20 years is entitled to no less during that period than he whose tenure is shorter. The policeman who remains on the force for 20 years less 5 days, and the one who retains his office for the full term, are paid during active service precisely the same sum, if they are of like rank. This must be deemed proper compensation for the time actually devoted to the public service. Nothing is withheld from the person who may serve 20 years, to be paid to him after he may be placed on the “retired list”; and, after such retirement, he is no longer subject to police duty, and cannot be earning a salary.

*Id.* The pension was not compensation to the police officer in that case.

When the true attributes of a public pension system and pension benefits are considered, it also becomes obvious that the system and the benefits are not “compensation.” Historically, the courts of this state have treated pensions as gratuities. *Fraternal Order of Police Lodge No. 2 v. City of St. Joseph*, 8 S.W.3d 257, 264 (Mo. App. 1999). *See also Police Retirement System v. Kansas City*, 529 S.W.2d 388, 391-92 (Mo. 1975) (Missouri case law establishes pensions as gratuities but court recognizes there is other authority outside the state that public pensions may be deferred compensation for services previously performed). As other jurisdictions have pointed out, the public pension is a bounty or a reward for conscientious, honorable service rendered in the past. *Hozer v. State*, 230 A.2d 508, 510 (Super. Ct. N.J. 1967). The purpose of the pension is not to compensate the individual for active service as rendered but to “secure good behavior and the maintenance of reasonable standards of discipline during service.” *Id.* The pension is a reward for the service rendered in the past. It is retroactive in nature and neither prospective nor coterminous with the services provided. It is in fact, not even absolute as services are rendered but “is uncertain as to amount and maturity and may never be realized because of intervening events before the retirement date is reached.” *First Bank of Commerce v. Labor and Indus. Relations Comm’n*, 612 S.W.2d 39, 45 (Mo. App. 1981). Not only is a pension subject to vesting, (i.e., entitlement to pension benefits is dependent on meeting established contingencies and conditions,) and to amendment to the pension plan and/or benefits, but an individual may also be divested of any rights to pension benefits. *See, e.g., Hozer*, 230 A.2d at 510-11 (continued honorable service is *sine qua non* for receipt of pension). Further, as *State ex rel. Heaven* shows, the amount of the pension benefit is not dependent on the remuneration paid the public employee as services are rendered but on the position held at the time of retirement. 45 S.W. at 1100. The retirement benefits provided presently under LAGERS, the local government retirement system program, also illustrates this point: the amount of pension benefit is determined from a final average salary that is based on the highest salary paid the employee for a limited period of service. §§70.600(12) & 70.655, RSMo.

In essence, a pension lacks the attributes of compensation or remuneration for services rendered. Even though an individual may perform public duties, there is no right to the payment of the pension benefit unless the individual satisfies all conditions and contingencies arising after performance of the services that lead to vesting. Payment even after vesting is still subject to meeting established conditions (e.g., reaching a particular age) and the individual may be divested of the right to payment that is unrelated to the services previously performed. Finally, the amount of benefits is not tied to the value of the duty performed as it is rendered. Instead, it is tied to some artificial measure established under the pension plan. A pension is, as the cases state, a bounty or

a reward. There is nothing to indicate that the people in adopting article VI, section 11, intended for the term “compensation” to refer to retirement benefits. Indeed, all indications – the history behind adoption of the 1986 amendment, a consideration of the constitution as a whole, the long-standing characterization of pensions as a gratuity or bounty, and the very nature of pensions – indicates otherwise.

The dictionary definitions the Attorney General offers in its amicus brief likewise support the determination that “compensation” as intended in article VI, section 11, does not encompass retirement benefits, those definitions referring to the direct connection between the payment and the services rendered, i.e., wages or salary. Brief of Amicus at 10, citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 463 (1993); BLACK’S LAW DICTIONARY 277 (7<sup>th</sup> ed. 1999). Attempting to label a public pension as “deferred compensation” also does not bring the public pension or its benefits within the term “compensation” of article VI, section 11. As the definition offered by the Attorney General shows, the term does not refer to wages or salary or remuneration for services as they are rendered. Brief of Amicus at 10, citing BLACK’S LAW DICTIONARY 277 (7<sup>th</sup> ed. 1999). Indeed, as an earlier version of Black’s Law Dictionary shows, the inclusion of the term “deferred compensation” within the entry for compensation is likely only for organizational purposes, not because it is within a clearly understood sub-component of the word, “compensation,” particularly as it relates to public pensions. *See* Compensation, BLACK’S LAW DICTIONARY 354 (rev. 4<sup>th</sup> ed. 1968) (“Compensation is not synonymous with ‘pension’ which is ordinarily a gratuity from the government or some of its subordinate agencies in recognition of, but not in payment for, past services”). Determining the intent of the voters in the constitutional terms they adopt should not be left to vagaries of the editorial policies of dictionary publishers.

The Attorney General’s reference to the use of the term “compensation” in other provisions of the constitution also draws the wrong conclusions. As the Attorney General points out, article VI, sections 12 & 13, were addressed at problems with the manner in which some county officials were paid (“compensated”) by fees rather than a salary. Thus, in section 12, “All public officers in the city of St. Louis and all state and county officers in counties having 100,000 or more inhabitants . . . shall be compensated for their services by salaries only.” Mo. Const. art. VI, §12. A similar limitation on compensation of other public officials to “salaries” is found in section 13. What the Attorney General fails to perceive in its argument is that the plain and explicit language of sections 12 and 13 would disqualify all officers from the city of St. Louis and in counties with populations in excess of 100,000, as well as a number of other officials state-wide, from being part of any pension program if “compensation” included pensions. Such an absurd result was clearly not intended.

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November 24, 2009  
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Similarly, with respect to article III, section 39(3) the Attorney General's argument misses the point that the section is not limited solely to "extra compensation" but encompasses fees or allowances, as well. Mo. Const. art. III, §39(3). As cases on pensions make clear, "a pension is an allowance." *First Bank of Commerce v. Labor and Indus. Relations Comm'n*, 612 S.W.2d 39, 45 (Mo. App. 1981); *Fraternal Order of Police Lodge # 2 v. City of St. Joseph*, 8 S.W.3d 257, 264 (Mo. App. 1999). Contrary to the assertion that article III, section 39(3), supports treating a pension as "compensation" under article VI, section 11, it should be clear that the section recognizes the opposite construction by including the reference to allowances.

Finally, the Attorney General points to article 13, section 3, adopted in 1994, but concludes that the amendment is of little relevance to the instant case. Brief of Amicus at 19-20. That section, which established the Citizens Commission on Compensation for Elected Officials contains a definition of "compensation" which is limited to salary rates and mileage and per diem allowances. Mo. Const. art. XIII, §3. The Attorney General posits that the drafters and the people could not have looked into the future to foresee this definition when they voted on the 1986 amendment to article VI, section 11. Brief of Amicus at 19. However, that argument misses the point. Understanding that the term "compensation" of public officials as long applied in the language of the constitution had a limitation to remuneration in the way of salary, the drafters defined the term so that it included mileage and per diem allowances, as well. And, again as with article VI, sections 12 and 13, the effect of defining "compensation" as the Attorney General proposes would be to render unlawful any pension for those covered by article XIII, section 3: all elected state officials, members of the general assembly and judges.

The term "compensation" in article VI, section 11, has never included pensions and article VI, section 11, cannot independently justify the failure of the Legislature to comply with the Hancock Amendment with respect to funding of the retirement of the county prosecutors. The effect here is not that prosecutors will be denied a retirement. It is only a question of who will pay for the PACARS program. Under the Hancock Amendment, and as had been the case for a number of years, the funding for this activity needs to come from the State.

Sincerely,



Thomas W. Rynard

cc: J. Kent Lowry, James R. Layton

IN THE SUPREME COURT OF MISSOURI

FILE

MISSOURI PROSECUTING ATTORNEYS  
AND CIRCUIT ATTORNEYS RETIREMENT  
SYSTEM,

Appellant,

v.

BARTON COUNTY, et al.,

Respondents.

NOV 24 2009

Thomas F. Sirrine  
CLERK, SUPREME COURT

Case No. SC89896

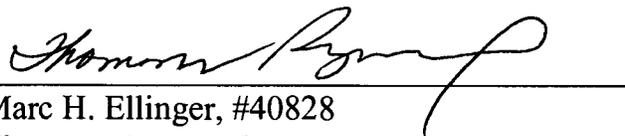
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Letter Brief of Respondents was sent via U.S. Mail, postage prepaid, to J. Kent Lowry and Jeffrey T. McPherson, Armstrong Teasdale LLP, 3405 West Truman Boulevard, Suite 210, Jefferson City, Missouri 65109-5713, and James R. Layton, Solicitor General, Office of the Attorney General, P. O. Box 899, Jefferson City, Missouri, 65102-0899, on this 24<sup>th</sup> day of November, 2009.

Respectfully submitted,

BLITZ, BARDGETT & DEUTSCH, L.C.

By:



Marc H. Ellinger, #40828  
Thomas W. Rynard, #34562  
308 East High Street, Suite 301  
Jefferson City, MO 65101  
Telephone No.: (573) 634-2500  
Facsimile No.: (573) 634-3358  
E-mail: [mellinger@blitzbardgett.com](mailto:mellinger@blitzbardgett.com)  
E-mail: [trynard@blitzbardgett.com](mailto:trynard@blitzbardgett.com)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing Certificate of Service was sent via U.S. Mail, postage prepaid, to the following parties of record on this 24<sup>th</sup> day of November, 2009:

J. Kent Lowry  
Jeffrey T. McPherson  
ARMSTRONG TEASDALE LLP  
3405 West Truman Boulevard, Suite 210  
Jefferson City, Missouri 65109-5713

James R. Layton  
Solicitor General  
Office of the Attorney General  
P. O. Box 899  
Jefferson City, MO 65102-0899



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Thomas W. Rynard