

IN THE SUPREME COURT OF MISSOURI

MISSOURI PROSECUTING)	
ATTORNEYS AND CIRCUIT)	
ATTORNEYS RETIREMENT SYSTEM,)	
)	
Plaintiff/Appellant,)	
)	No. SC89896
vs.)	
)	
BARTON COUNTY, et al.)	
)	
Defendants/Respondents.)	

Reply Brief of Appellant

Appeal from the Circuit Court of Barton County
The Honorable Kevin L. Selby

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ARGUMENT

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN ENTERING JUDGMENT IN FAVOR OF THE DEFENDANTS BECAUSE THE STIPULATED FACTS SHOW THAT PACARS IS ENTITLED TO RECEIVE THE REQUESTED PAYMENTS FROM BARTON COUNTY IN THAT (A) THE PLAIN LANGUAGE OF SECTION 56.807, RSMO, MANDATES THE PAYMENTS AND (B) SECTION 56.807, RSMO, IS ENFORCEABLE AND DOES NOT VIOLATE ARTICLE X, SECTION 21 OF THE MISSOURI CONSTITUTION BECAUSE THE REQUIRED PAYMENTS ARE AUTHORIZED BY ARTICLE VI, SECTION 11, OF THE MISSOURI CONSTITUTION, PROVIDING THAT 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 THE MISSOURI CONSTITUTION.

This is a simple case. There is no Hancock Amendment violation because payments to PACARS mandated by section 56.807, RSMo, are for compensation of a county officer and thus squarely within the scope of Article VI, Section 11 of the state constitution. The Court should reverse the judgment of the circuit court and remand for issuance of a writ of mandamus.

Barton County's brief stresses at length that, as a general matter, the Hancock Amendment forbids unfunded mandates. This statement is true enough, as far as it goes. But the question in this case is not what the Hancock Amendment requires in general.

The issue is whether a specific statute -- section 56.807 -- violates Section 21 of the Hancock Amendment. The reasonable reading of the three relevant provisions (the Hancock Amendment, section 56.807, and Article VI, Section 11) requires reversal of the judgment of the trial court.

Barton County's arguments seek to induce the Court to ignore bedrock principles of constitutional review. A statute has a presumption of constitutionality. *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984). The party challenging the constitutionality of a statute bears the burden of proving the statute unconstitutional. *State ex rel. Zobel v. Burrell*, 167 S.W.3d 688, 692 (Mo. banc 2005). The party alleging unconstitutionality must overcome the presumption of constitutionality by showing that the statute *clearly* and *undoubtedly* violates some constitutional provision and palpably affronts fundamental law embodied in the constitution. *Id.* The Court resolves all doubt in favor of the act's validity, and in so doing makes every reasonable intendment to sustain the constitutionality of the statute. *Westin*, 664 S.W.2d at 5.

Thus, on de novo review, the issue is whether Barton County met its burden to prove that section 56.807 violates the Hancock Amendment. The County did not meet this burden, and the judgment of the trial court should be reversed.

I. Article VI, Section 11 reverses the *Boone County* decision.

Barton County relies heavily on *Boone County Court v. State*, 631 S.W.2d 321 (Mo. banc 1982), for the proposition that section 56.807, RSMo, violates the Hancock Amendment to the extent that it requires counties to contribute to PACARS. It is true

that, in 1982, the Court held in *Boone County* that a statutorily mandated increase in salary for county collectors was a violation of Article X, Section 21. 631 S.W.2d at 326.

However, after the Court's decision in *Boone County*, the Missouri Constitution was amended. In 1986, the voters approved an amendment to Article VI, Section 11 of the Missouri Constitution. As amended, Section 11 states in relevant part: "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."

The first rule in construing a constitutional amendment is to give effect to its intent and purpose. *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. banc 1983). The evident intent and purpose of the 1986 amendment to Section 11 was to reverse *Boone County* and permit the enactment of laws increasing the compensation level for county officers without violating the Hancock Amendment's restrictions. *See Associated General Contractors v. Department of Labor & Indus. Relations*, 898 S.W.2d 587, 594 n.6 (Mo. App. 1995).

This conclusion is compelled by the plain language of the two relevant constitutional provisions. Other than Section 11, the only provision of the Missouri Constitution that uses the terms "new activity or service or an increase in the level of any activity or service" is the Hancock Amendment. Thus, when Section 11 says that "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,” it can only mean within the meaning of the Hancock Amendment.

Barton County declares that PACARS is arguing that the Hancock Amendment has been repealed by implication through the amendment of Section 11: “There is no direct authority that ‘compensation’ in Article VI, Section 11 includes retirement benefits, so even if this Court finds Article VI, Section 11 applicable Plaintiff’s argument that the 1986 amendment supplants the Hancock Amendment fails.” Respondent’s Brief at 21. But Section 11 did not repeal the Hancock Amendment by implication. Rather, directly and in clear terms, Section 11 specifies that increases in compensation not within the scope of the Hancock Amendment. Pension and retirement plans are indisputably a form of compensation. *See Sihnhold v. Missouri State Employees’ Retirement Sys.*, 248 S.W.3d 596 (Mo. banc 2008); *Kuchta v. Kuchta*, 636 S.W.2d 663, 665 (Mo. banc 1982); *Lynch v. Lynch*, 665 S.W.2d 20, 24 (Mo. App. 1983). No implication is required.

These provisions are not in conflict, but if they were, Section 11 would prevail. The County’s cited case of *Thompson v. Hunter*, 119 S.W.2d 95, 100 (Mo. banc 2003), makes this requirement clear. In construing the Missouri Constitution, the Court’s task is to reconcile provisions that may seem to be in conflict. *Id.* When two constitutional provisions are found to be in conflict, the later in time prevails, as it is the most recent expression of the will of the people. *Id.* As the more recently adopted provision, Section 11 should apply when determining what is considered a new activity or service.

In its brief, Barton County mentions Section 16 of the Hancock Amendment (“The state is prohibited from requiring any new or expanded activities by counties and other

political subdivisions without full state financing, or from shifting the tax burden to counties or other political subdivisions.”). At no point in its answer to the PACARS petition did the County mention Article X, Section 16 as an affirmative defense. LF at 12-13. Pursuant to Rule 55.08, a party must set forth all applicable affirmative defenses in its answer. To the extent that the County claims that section 56.807 violates Section 16, that argument must fail. As with Section 21 of the Hancock Amendment, Section 11 applies equally to Section 16 and prevents any Hancock Amendment violation.

II. *Laclede County* does not support the trial court’s judgment.

The other case on which Barton County relies most heavily is *Laclede County v. Douglass*, 43 S.W.3d 826 (Mo. banc 2001). Barton County cites the *Laclede County* case for the proposition that Section 11 only applies to officials elected in 1984 or 1986: “Instead, the application of the amendment is limited to county officers elected in 1984 or 1986. Article VI, section 11, of the Missouri Constitution is therefore inapplicable in this case as PACARS did not even commence operation until 1989.” Respondent’s Brief at 20 (citations omitted). This is nonsense.

In *Laclede County*, the Court addressed a midterm increase in compensation for county commissioners who were elected in 1996. Article VII, Section 13 of the Missouri Constitution forbids midterm pay increases for county officials: “The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended.” The bulk of the *Laclede County* case is an examination of whether any exception to Article VII, Section 13 would allow the pay increase at issue. 43 S.W.3d at 826-828.

At the conclusion of the *Laclede County* case, the Court rejected an argument based on portions of Article VI, Section 11 that are not at issue in this case:

The provisions of article VI, section 11, of the Missouri Constitution are likewise inapplicable. That section states, in pertinent part:

1. . . . 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.

* * *

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.

When the subsections are read together, as intended, their application is limited to county officers elected in 1984 or 1986, and to any increase in compensation provided by law to those officers during their terms.

Laclede County, 43 S.W.3d at 828.

Thus, the *Laclede County* case says that, in the context of a midterm pay increase, Section 11 applies only to officials elected in 1984 or 1986. *Laclede County* does not purport to declare that *every* provision of Section 11 is applicable only to such officials. The terms of Section 11 belie this contention. Here is the entire text of 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.

It would be absurd to suggest that all of the provisions of subsection 1 of Section 11 are applicable only to officials elected in 1984 or 1986. Why would the constitution provide that the compensation of “all county officers” must be either prescribed by law or established pursuant to law adopted by the general assembly, but only for officials elected in 1984 or 1986? Why would the constitution provide that every county officer must file a sworn statement of fees collected and salaries paid, but only for officials elected in 1984 or 1986? Similarly, by its terms, the provision that increases in the compensation of county officers do not violate the Hancock Amendment is of general application and not limited to officials elected in 1984 or 1986.

III. Compliance with section 56.807 is not optional.

The County asks the Court to declare that participation in PACARS is optional. This argument ignores: (1) the definition of “County” in section 56.805, RSMo, as “the city of St. Louis and each county in the state”; (2) the language in section 56.807, RSMo, mandating that “each county treasurer *shall* pay to the system the following amounts to be drawn from the general revenues of the county”; and (3) the mandatory requirement in section 56.811, RSMo, that “each person employed as an elected or appointed prosecuting attorney . . . *shall* become a member of the system.” (emphasis added).

The statutes refute the County’s contention that it is permitted to opt out of PACARS. By specifying that each county treasurer shall pay into the system, the General Assembly made county participation mandatory. *See Neske v. City of St. Louis*, 218 S.W.3d 417, 425 (Mo. banc 2007) (use of the word “shall” in pension statute signified city’s contribution was mandatory). The primary rule of statutory construction

is to consider the legislature's intent based on the plain and ordinary meaning of the words used in the statute and to give each word, clause, sentence, or section meaning. *Id.* at 424. The Court should also consider the whole act and its purpose and seek to avoid unjust or absurd results. *Id.* Defendants are asking the Court to consider an absurd and unjust result. The statutes plainly require each county in the state to participate in PACARS.

The Court should not read into the statutes language that is not there. If the legislature had intended to provide counties with the option not to participate in PACARS, it would have included language in the statutes to say so. The legislature did not.

The County states that public pensions are discretionary, citing *Fraternal Order of Police Lodge #2 v. City of St. Joseph*, 8 S.W.3d 257 (Mo. App. 1999). *Fraternal Order* involved the interpretation of a retirement system established by city ordinance, not a statutorily created retirement system. *Id.* Furthermore, the City of St. Joseph did not suspend all participation in the policemen retirement system, but merely modified its method of calculating benefits. *Id.* As this Court has made clear, statutes requiring local governments to fund pension systems are mandatory and enforceable. *See Neske*, 218 S.W.3d at 425.

Article VI, Section 25 of the Missouri Constitution does not compel a different result. Section 25 provides:

No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, . . . except that the general assembly may authorize any county, city or other political corporation or subdivision to provide for the retirement or pensioning of its officers and employees and the surviving spouses and children of deceased officers and employees and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement

Section 25 explicitly grants authority to the General Assembly to enact legislation for counties to provide the retirement of its officers, which is exactly what the legislature did with PACARS. Section 25 does not restrict the legislature's ability to mandate participation in a retirement system. The County seeks to have the Court read into Section 25 a prohibition that simply is not there. A statute has a presumption of constitutionality. The party alleging unconstitutionality must overcome the presumption of constitutionality by showing that the statute *clearly* and *undoubtedly* violates some constitutional provision and palpably affronts fundamental law embodied in the constitution. *State ex rel. Zobel v. Burrell*, 167 S.W.3d at 692. The Court resolves all doubt in favor of the act's validity, and in so doing makes every reasonable intendment to sustain the constitutionality of the statute. *Westin*, 664 S.W.2d at 5. Nothing in sections 56.800 through 56.840, RSMo violates the requirements of Section 25.

Barton County purports to rely on *State ex rel. Heaven v. Ziegenhein*, 45 S.W. 1099 (Mo. 1898), a century-old case addressing a former version of the constitution.

This case does not support the contention that Barton County has discretion to opt out of PACARS. In *Ziegenhein*, the Court found that under the Missouri Constitution, as it then existed, a city could not grant public money to a retired employee. 45 S.W. at 1100. At that time, the public policy of the state, as expressed in the constitution, prohibited *any* retirement benefits for municipal officers or employees. *See Kansas City v. Brouse*, 468 S.W.2d 15, 18 (Mo. banc 1971). This ancient case has nothing to say about pension statutes enacted after constitutional amendments.

The County also cites *State ex rel Bd. of Control of St. Louis Sch. and Museum of Fine Arts v. City of St. Louis*, 115 S.W. 534 (Mo. 1908), interpreting the 1875 Missouri Constitution and finding that a tax donation to the private corporation of Washington University was unconstitutional. The Court noted, however, that this restriction of authority did not apply to the legislature's ability to provide by law for the pensioning of certain individuals.

CONCLUSION

By the plain terms of Section 11, a state statute may properly call upon counties to increase the compensation of county officers without causing a Hancock violation. Mo. Const. art. VI, § 11. The judgment of the trial court should be reversed, and the cause should be remanded for issuance of a writ of mandamus directing Barton County to make payments to PACARS consistent with the requirements of section 56.807.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 3,120, exclusive of the cover, signature block, appendix, and certificates of service and compliance.

The undersigned further certifies that the discs filed with the brief and served on the other parties were scanned for viruses and found virus-free through the Norton anti-virus program.
