

**IN THE MISSOURI COURT OF APPEALS
FOR THE EASTERN DISTRICT**

CIVIL SERVICE COMMISSION)	
OF THE CITY OF ST. LOUIS, et. al.,)	
)	
Plaintiffs- Respondents,)	Appeal No.: ED80093
)	
vs.)	Circuit Court Cause No.: 004-02357
)	
THE CITY OF ST. LOUIS, et al.,)	
)	
and)	
)	
FIREMEN=S RETIREMENT)	
SYSTEM OF ST. LOUIS, et. al.,)	
)	
Appellants.)	

**BRIEF OF APPELLANTS
FIREMEN=S RETIREMENT SYSTEM OF ST. LOUIS, et al.**

**Appeal from the Circuit Court of St. Louis City, State of Missouri
Honorable Robert H. Dierker, Jr., Circuit Judge Division 3**

DANNA MCKITRICK, P.C.
DANIEL G. TOBBEN, #24219
DAVID R. BOHM, #35166
150 North Meramec, Fourth Floor
St. Louis, MO 63105-3907
(314) 726-1000/(314) 725-6592 fax
ATTORNEYS FOR APPELLANTS
FIREMEN=S RETIREMENT SYSTEM OF ST.
LOUIS, et. al.

TABLE OF CONTENTS

	Page
Table of Authorities.....	3
Jurisdictional Statement.....	6
Statement of Facts.....	7
Points Relied On.....	14
Argument.....	17
Conclusion.....	39
Appendix.....	40
Ordinance #64923.....	A1
Ordinance #61414	A4
Ordinance #63591	A5
Certificate of Service.....	41

TABLE OF AUTHORITIES

Page

<u>A & L Holding Company v. Southern Pacific Bank</u> , 34 SW3d 415, 417 (Mo. Ct. App. 2000).....	20
<u>Abernathy v. City of St. Louis</u> , 313 SW2d 717 (Mo 1958).....	14, 17, 20, 27, 28, 29, 30, 33, 34, 36, 38, 39
<u>City of Springfield v. Clouse</u> , 206 SW2d 539, 545 (1947).....	16, 38
<u>Firemen's Retirement System of St. Louis, et.al., v. City of St. Louis</u> , 789 SW2d 484 (Mo. 1990).....	16, 22, 25, 35, 36, 37
<u>Hickey v. Board of Education of City of St. Louis</u> , 256 S.W.2d 775, 777 (Mo. 1953).....	32
<u>Kansas City v. Brouse</u> , 468 S.W.2d 15, 18 (Mo. banc 1971).....	32
<u>Kirby v. Nolte</u> , 173 SW 2d 391 (Mo banc 1943).....	20, 27, 28
<u>Kovacs v. Kovacs</u> , 869 SW2d 789, 795 (Mo. App. 1994).....	30
<u>Legal Services Corporation v. Valasquez</u> , 121 SCt 1043 (2001).....	15, 30
<u>Matthews v. City of Jennings</u> , 978 SW2d 12,15 (Mo. Ct. App. 1998).....	28
<u>Petet v. State of Missouri, Department of Social Services, Division of Family Services</u> , 32 SW3d 818, 822 (Mo. Ct. App. 2000).....	20
<u>State v. Harney</u> , 51 SW3d 519, 532 (Mo App 2001).....	21, 23, 28
<u>State ex rel Baumruk v. Belt</u> , 964 SW2d 443 (Mo 1998).....	15, 21, 23, 28
<u>State ex. rel. Bixby et. al. v. City of St. Louis, et. al</u> , 145 SW2d 801 (Mo 1912).....	14, 29, 30

<u>State of Missouri, ex. rel. Highway Commission of Missouri v. Goodson,</u>	
281 SW2d 858, 860 (Mo 1955).....	30
<u>State ex rel St. Louis Firefighters v. Stemmler, 479 SW2d 456 (Mo 1972).....</u>	23
<u>State ex rel. Winkley v. Welsch, 131 SW2d 364 (Mo App 1939).....</u>	29
<u>United Services Automobile Association Casualty Insurance Company v. Sorrels,</u>	
910 SW2d 774, 777 (Mo. Ct. App. 1995).....	20
Mo. Const. Article VI, ' 25.....	8, 25, 32
Mo. Const. Article VI, ' 31.....	8
Mo. Const. Article 47.....	31, 32
Mo. Const. Article 48(a).....	32
Chapter 84 VAMS.....	24
' 87.120 RSMo.....	8, 25, 26, 32
' 87.371 RSMo.....	10
Article IV of the Charter of the City of St. Louis.....	8, 21
Article VII of the Charter of the City of St. Louis.....	8
Article XVIII of the Charter of the City of St. Louis.....	7, 19, 31, 32, 33
Article XVIII, ' 1(e) of the Charter of the City of St. Louis.....	31
Article XVIII, ' 4 of the Charter of the City of St. Louis.....	18, 21, 23, 27, 28
Article XVIII, ' 4(a) of the Charter of the City of St. Louis.....	21, 22, 23, 24, 26, 27, 31, 33, 34
Article XVIII, ' 4(b) of the Charter of the City of St. Louis.....	14, 16, 17, 21, 22, 23, 24, 25, 26, 27, 28, 31, 32, 33, 34, 37, 38, 39

Article XVIII, ' 4(c) of the Charter of the City of St. Louis.....22, 23, 26, 27, 28

Article XVIII, ' 7 of the Charter of the City of St. Louis.....9, 19, 24, 28

Article XVIII, ' 7(b) of the Charter of the City of St. Louis.....14, 17, 23, 25, 26, 28

Article XVIII, ' 31 of the Charter of the City of St. Louis.....24

Chapter 4.18 of the City Code of the City of St. Louis.....8, 10, 23, 25, 37

' 4.18.015 of the City Code of the City of St. Louis.....37

' 4.18.065 of the City Code of the City of St. Louis.....37

' 4.18.320 of the City Code of the City of St. Louis.....37

' 4.18.386 of the City Code of the City of St. Louis.....10

St. Louis City Ordinance #64923.....6, 7, 11, 12, 14, 17, 18, 21, 33, 36, 38, 39

JURISDICTIONAL STATEMENT

This action is one involving the question of whether the Civil Service Commission has the right to recommend (i.e. prior approval) regarding ordinances pertaining to the Firemen's Retirement System of St. Louis, specifically Ordinance 64923, which describes how sick leave earned by firefighters is to be

credited to their years of service and how cash payments to an eligible firefighter's deferred retirement account are to be computed and made. This is not a case within the exclusive jurisdiction of the Supreme Court under Article Five of the Missouri Constitution. Therefore, jurisdiction lies with the Missouri Court of Appeals, Eastern District.

STATEMENT OF FACTS

The Firemen's Retirement System of St. Louis, Defendant/Intervenors below, appeal from the judgment of the Circuit Court of the City of St. Louis, declaring St. Louis City Ordinance #64923 to be

illegal, void, and unenforceable as having been adopted without a recommendation of the Civil Service Commission.¹

This case was submitted to the trial Court upon stipulated facts and affidavits. The parties have stipulated to the following facts:

1. Plaintiff/Respondent Civil Service Commission (ACommission@) is a commission created pursuant to Article XVIII of the Charter of the City of St. Louis (the ASt. Louis Charter@) for the administration of the civil service rules and regulations of the City of St. Louis. (L.F. 60).
2. Plaintiffs/Respondents Nina Murphy, John H. Clark, and Kay V. Leonard are members of the Commission and bring this action in their official capacity on behalf of

¹. However, the judgment operates prospectively only and A...the judgment shall not be construed as requiring any reduction in benefits of any member of the Firemen's Retirement System who has retired prior to the date of this judgment or any reimbursement to the System of benefits previously paid, nor as requiring any reduction in accumulated sick leave credited as of the date of this judgment to any account of any member of the system eligible to retire prior to the date of this judgment, upon actual retirement, so that the members of the Firemen's Retirement System shall remain *in statu quo* as of the date of this judgment...@Judgment, L.F. 276-7). This aspect of the judgment was not appealed by Respondents, Civil Service Commission, et. al.

the Commission and in their individual capacity as residents and taxpayers of the City of St. Louis.

(L.F. 60).

3. Defendants Members of the Board of Aldermen of the City of St. Louis (**ABoard of Aldermen@**) (who did not appeal the Trial Court's ruling) are residents of the City of St. Louis and are the members of the Board of Aldermen, which is created pursuant to Article IV of the St. Louis Charter and constitutes the legislative branch of the City's government. (L.F. 60-61).
4. Defendant Mayor Clarence Harmon (**AMayor@**) (who did not appeal the trial Court's ruling) was at the time of submission the Mayor and a resident of the City of St. Louis, and pursuant to Article VII of the St. Louis Charter is the Chief Executive Officer of the City of St. Louis. (L.F. 61).
5. Defendant City of St. Louis (the **ACity@**) (which did not appeal the trial Court's ruling) is a municipal corporation established pursuant to Mo. Const. Art. VI '31 and other laws. (L.F. 61).
6. Appellant the Firemen's Retirement System of St. Louis (**AFRS@**), Defendant/Intervenor below, was created by the City of St. Louis under authority of '87.120 RSMo and

Article VI, ' 25 of the Missouri constitution, by enacting Chapter 4.18 of the City Code. The general administration and the responsibility for operation of FRS is vested in the Board of Trustees of FRS. The Board of Trustees of FRS consists of eight members: the City Fire Chief and the Comptroller or Deputy Comptroller of the City, both *ex officio*; two members appointed by the mayor, three members elected by the members of FRS; and one member elected by the retired firefighters from their own number. (L.F. 61).

7. Appellants Len Wiesenhan, Larry Reinecke, Bruce Williams, Fred Guy, Sherman George, Darlene Green, George Hairston and Gayle Malone Defendant-Intervenors below, are the Trustees of FRS (AFRS Trustees®). Each of the FRS Trustees is a resident of the City of St. Louis. (L.F. 61).
8. Appellant St. Louis Firefighters Association Local 73 (ALocal 73") is a labor organization which is the certified exclusive representative of all firefighters and captains in the Fire Department of the City of St. Louis. (L.F. 61).
9. Appellants Keith Allen Hasty, Dennis Roemerman, James W. Wolfslau and Charles J. Zoeller (hereinafter

referred to as the **AIndividual Firefighters@**) are firefighters or fire captains employed by the Fire Department of the City of St. Louis and are members of the FRS. Each of the Individual Firefighters is a resident of the City of St. Louis. (L.F. 62).

10. Jurisdiction and venue are proper in the Circuit Court for the City of St. Louis. (L.F. 62).
11. Article XVIII, '7 of the St. Louis Charter sets forth the powers and duties of the Commission. (L.F. 62).
12. During the 1998-1999 legislative session the Missouri Legislature adopted certain amendments to legislation dealing with the St. Louis City Firemen=s Retirement System (the **AFiremen=s Retirement System@**). This legislation, which was known as Senate Bill 308 became effective on August 28, 1999, and amends '87.371 RSMo. (L.F. 62).
13. In the summer of 1999, Board Bill 110, which provides for changes to Chapter 4.18 of the City Code governing the Firemen=s Retirement System, was introduced in the Board of Aldermen. (L.F. 62).
14. Specifically, Board Bill 110 was designed to amend '4.18.386 entitled **AAccumulated Sick Leave,@** to mirror

- the language of '87.371 of the Firemen's Retirement Act, as amended effective August 28, 1999. (L.F. 62).
15. By correspondence dated August 9, 1999, the Civil Service Commission advised Mayor Clarence Harmon, President of the Board of Aldermen Francis Slay, and the members of the Board of Aldermen that Board Bill 110 had neither been considered nor recommended by the Civil Service Commission for passage by the Mayor or the Board of Aldermen. (L.F. 62-63).
 16. During the Spring 2000 legislative session, the Board of Aldermen approved Board Bill 110. (L.F.63).
 17. The Civil Service Commission had not recommended Board Bill 110 at the time the Board of Aldermen first approved the Bill. (L.F. 62).
 18. By correspondence dated March 22, 2000, the Civil Service Commission advised Mayor Clarence Harmon that it was the Civil Service Commission's position that Board Bill 110 had been improperly approved by the Board of Alderman because the Bill had not been recommended by the Civil Service Commission. (L.F. 62).
 19. On March 31, 2000, Mayor Clarence Harmon vetoed Board Bill 110. (L.F. 63).

20. On April 17, 2000, the Board of Aldermen adopted Board Bill 110 by overriding the Mayor's veto. Board Bill 110 became effective on April 17, 2000, and is now known as Ordinance 64923. (L.F. 63).
21. By Ordinance 64923, the Board of Aldermen and the City have changed certain aspects of the terms of the City firefighters' retirement system. (L.F. 63).²
22. The Board of Aldermen did not obtain the Commission's recommendation prior to adoption of Ordinance 64923, as required by the St. Louis Charter. (L.F. 63).
23. Implementation of the amendment as provided for in Board Bill 110/Ordinance 64923 would, according to the actuaries for the Firemen's Retirement System, result in an estimated net increase in retirement system liabilities in excess of eight million dollars (\$8,000,000.00), resulting in a total estimated annual cost of One Million, five thousand dollars

² Previously Ordinances 61414 (1989) and 63591 (1995) had been enacted regarding the same subject matters without recommendation by the Civil Service Commission, and without complaint or legal challenge. (L.F. 120-1). These two prior ordinances, as well as Ordinance 64923, the subject of the present dispute are attached to this brief in the appendix.

(\$1,005,000.00) to the City of St. Louis. (L.F. 63-64).

24. The parties stipulated that the Court may take judicial notice of all applicable ordinances of the City of St. Louis, and may consider the Charter of the City of St. Louis and the laws and constitution of the State of Missouri. (L.F. 64).

25. Between April 18, 2000 and February 20, 2001, 15 firefighters, each of whom was an employee of the City of St. Louis in the classified service, have been granted service retirements from FRS and are or will be receiving benefits from FRS under Ordinance 64923.

Each of the 15 firefighters applied their sick leave, in the amount of the value listed, so their Deferred Retirement Account (ADROP®) with FRS, which affected the funds each of them received after retirement. (L.F. 66).

26. As of March 10, 2001 there are 132 firefighters in the City of St. Louis Fire Department, all of whom are employees of the City of St. Louis in the classified service and members of the FRS, who have at least 20 years of

service with the Fire Department and are presently eligible for service retirement benefits from FRS and have accumulated sick leave. If each of the 132 firefighters were to retire and apply their sick leave to their DROP account with FRS, the funds each of them would receive after retirement would be affected. (L.F. 66-67).

27. There are no other instances where the Civil Service Commission has recommended ordinances regarding FRS or firefighters' retirement benefits. (Affidavits of Vicky Grass, Len Wiesehan and Bruce Williams, L.F. 131-133).

POINTS RELIED ON

I. The Trial Court erred in declaring Ordinance 64923 invalid due to the Civil Service Commission's (ACommission®) failure to recommend the ordinance, because the Commission does not have a right to recommend (i.e. right of prior approval) regarding ordinances relating to the Firemen's Retirement System of St. Louis (FRS) in that:

A. Article XVIII, '4(b) of the City Charter, concerning enactment of ordinances regarding retirement plans, does not mention recommendation by the Commission, much less grant such authority to the Commission; and

B. The subsequent language of Article XVIII, '7(b) of the City Charter confers at most an advisory role regarding retirement plans, not a mandatory right of recommendation, and;

C. The case of Abernathy v. City of St. Louis, 313 SW2d 717 (Mo 1958) is not controlling authority in this case, because Abernathy dealt with the forty (40) hour work week and compensation for overtime and did not deal with retirement systems under Article XVIII, '4(b) of the City Charter or concern FRS, which exists pursuant to ordinances enacted in conformance with constitutionally authorized enabling legislation.

Article XVIII, '4(b), St. Louis City Charter

State ex. rel. Bixby et. al. v. City of St. Louis, et. al, 145

SW2d 801 (Mo 1912)

Legal Services Corporation v. Valasquez, 121 Sct 1043 (2001)

State ex rel Baumruk v. Belt, 964 SW2d 443 (Mo 1998)

POINTS RELIED ON

II. The Trial Court erred in declaring Ordinance 64923 invalid and void because the Commission has never previously asserted a right to recommend regarding ordinances relating to FRS, and this failure to act is relevant and constitutes laches, in that the Supreme Court=s decision in Firemen=s Retirement System of St. Louis, et.al., v. City of St. Louis, 789 SW2d 484 (Mo. 1990) indicates that the Commission=s failure to act is a relevant factor and further holds that the City Ahas explicitly divested itself of significant control of the pension fund (FRS) and its trustees® (*Id.* at 486), and this is especially pertinent since the Trial Court recognized that the prior failure of the Commission to act was relevant regarding the remedy, and made this order and judgment prospective only in its application, so as to avoid harming hundreds or thousands of firefighters and their beneficiaries, who justifiably relied on the City=s practices, but where the Trial Court failed to consider this failure of the Commission to act in analyzing the validity of the Ordinance.

Firemen=s Retirement System of St. Louis, et.al., v. City of St. Louis, 789 SW2d 484 (Mo. 1990)
City of Springfield v. Clouse, 206 SW2d 539, 545 (1947)

Article XVIII, '4(b), St. Louis City Charter

ARGUMENT

I. The Trial Court erred in declaring Ordinance 64923 invalid due to the Civil Service Commission's (ACommission®) failure to recommend the ordinance, because the Commission does not have a right to recommend (i.e. right of prior approval) regarding ordinances relating to the Firemen's Retirement System of St. Louis (FRS) in that:

A. Article XVIII, '4(b) of the City Charter, concerning enactment of ordinances regarding retirement plans, does not mention recommendation by the Commission, much less grant such authority to the Commission; and

B. The subsequent language of Article XVIII, '7(b) of the City Charter confers at most an advisory role regarding retirement plans, not a mandatory right of recommendation, and;

C. The case of Abernathy v. City of St. Louis, 313 SW2d 717 (Mo 1958) is not controlling authority in this case, because Abernathy dealt with the forty (40) hour work week and compensation for overtime and did not deal with retirement systems under Article XVIII, '4(b) of the City Charter or concern FRS, which exists pursuant to ordinances enacted in

conformance with constitutionally authorized enabling legislation.

INTRODUCTION

Ordinance 64923 was enacted into law pursuant to enabling legislation adopted in 1999 by the General Assembly, which is the legislatively prescribed method for amending ordinances pertaining to the Firemen's Retirement System of St. Louis (FRS), and which was consistent with past practices. Ordinance 62923 deals with retirement issues and retirement benefit calculations by FRS; specifically it prescribes how sick leave earned by firefighters is to be credited to their years of service and how cash payments to an eligible firefighter's deferred retirement account (DROP) are to be computed and made. (Judgment, L.F. 267).

Prior to the legislative process leading to the enactment of this ordinance, the Civil Service Commission had never asserted a right to recommend (i.e. right of prior approval) regarding ordinances pertaining to FRS or firefighters' retirement benefits.

The authority for enactment of this ordinance lies in Article XVIII, '4 of the City Charter, which provides:

The mayor and aldermen shall provide, by ordinance:

- (a) Compensation plan. For adoption of a comprehensive compensation plan for the fixing of rates of pay of all employees in the classified service, and amendments thereto, on recommendation of the civil service commission, and for its application and interpretation. Every appropriation and expenditure for personal services in any position in the classified service thereafter shall be made in accordance with the compensation plan so adopted and not otherwise;
- (b) Retirement system. For a contributory retirement system on a sound actuarial basis, if and when permissible under the Constitution and Laws of the State of Missouri, to provide for retirement of employees in the classified service who have become unable to render satisfactory service by reason of physical or mental incapacity;
- (c) Hours of duty and holidays. For regulating hours of duty, holidays, attendance, and absence in the classified service.
- (Emphasis added).

The basis for the Commission's assertion of a right to recommend is grounded in Article XVIII, '7 of the City Charter which provides:

- The Commission shall have power, and it shall be its duty:
- (a) Administration. To prescribe, and to amend from time to time as such action is deemed to be desirable, rules for the administration and enforcement of the provisions of this article,

and of any ordinance adopted in pursuance thereof, and not

inconsistent therewith:

(b) Ordinances. **To recommend to the mayor and aldermen in**

accordance with this article, ordinances to provide for:

(1) a compensation plan providing properly related scales of pay

for all grades of positions, and rules for its interpretation and

application:

(2) **a plan for a system for retirement of superannuated and**

otherwise incapacitated employees, if and when permissible

under the Constitution and Laws of the State of Missouri;

(3) regulation of hours of duty, holidays, attendance, and absence;

(4) such other matters within the scope of this article as require

action by the mayor and aldermen;

(5) such changes in any such matters from time to time as may be

deemed and warranted. (Emphasis added).

When analyzing the significance and interaction of these two sections of Article XVIII, the Trial Court stated:

Were the Court writing on a blank slate, the Court would agree with defendants that the language of the Charter

does not support plaintiffs' claim. The phrase **Non recommendation**

of the Civil Service Commission^o would appear to apply **only to**

ordinances enacting a **comprehensive compensation plan^o** as set

forth in '4(a). Cf. *Kirby v. Nolte*, 173 SW 2d 391 (Mo. banc 1943). The subsequent language of '7(b) can

be read solely as imposing an advisory role on the Commission

in the matters enumerated therein, including retirement systems.
(L.F. 271-2)

However, the Trial Court felt constrained by the decision or dicta in Abernathy v. City of St. Louis, 313 SW2d 717 (Mo 1958).

This brief will demonstrate that the above cited quote from the judgment is the correct analysis of the issues presented and will further demonstrate that Abernathy does not compel a different, incorrect result.

Standard of Review

Since the matter was submitted on stipulated facts and the Trial Court did not hear testimony or make findings of fact, all issues presented in this brief are questions of law and this Court reviews the case and the law de novo. Petet v. State of Missouri, Department of Social Services, Division of Family Services, 32 SW3d 818, 822 (Mo. Ct. App. 2000); United Services Automobile Association Casualty Insurance Company v. Sorrels, 910 SW2d 774, 777 (Mo. Ct. App. 1995); A & L Holding Company v. Southern Pacific Bank, 34 SW3d 415, 417 (Mo. Ct. App. 2000).

A. Article XVIII, '4(b) of the City Charter, concerning enactment of ordinances regarding retirement plans, does not mention recommendation by the Commission, much less grant such authority to the Commission;

It should initially be noted that Article XVIII, '4 deals with the enactment of ordinances and concerns the authority of the aldermen (legislative powers) and the mayor (executive powers) concerning enactment of ordinances.

'4(a), relating to compensation (i.e. pay rates), specifically provides for adoption of a plan of compensation **A**on recommendation of the civil service commission.@ '4(b) relating to retirement systems does not provide for recommendation by the Civil Service Commission. City Ordinance 64923 relates to and concerns retirement systems, the subject matter of '4(b), and does not address compensation as set forth in '4(a). In the memoranda of law filed in the trial court, the Commission made elaborate and strained arguments attempting to **A**shoe horn@ retirement system issues into the **A**comprehensive compensation plan@ language of '4(a), thus attempting to bring the ordinances relating to retirement issues into the purview of matters requiring Commission recommendation. This is a very strained argument and goes against the normal rules of construction of statutes and ordinances. See numerous cases regarding

construction of ordinances and related argument later in this brief, pages 27 - 29. If the language is clear, there is no need to apply rules of construction, since they are only used to resolve ambiguity. Baumruk v. Belt, 964 SW2d 443, 446 (Mo 1998); State v. Harney, 51 SW3d 519, 532 (Mo App 2001).

As noted by the City Counselor in the memoranda of law filed on behalf of the City, the Mayor, and the Board of Aldermen:

Had it been the intent of the drafters of the Charter that the Commission must join in recommending any ordinance dealing with employee retirement, they could have easily done so by mirroring the language of Art. XVIII, '4(a) or included language such as that found in Art. IV, '25. [No ordinances to be adopted regarding payment of money without recommendation by board of estimate and apportionment.] But they did not. This Court should not infer such a requirement.@ (L.F. 91-2)

'4(b) regarding retirement systems does not require recommendation. Rather, the qualification language in '4(b) addresses a very different limitation, Aif and when permissible under the Constitution and laws of the State of Missouri.@ This reference to the enabling legislation scheme which applies to FRS has significance. To change the ordinances governing FRS, legislation must be enacted at the state level to even make

possible (enable) comparable city ordinances. Also the focus of '4(b) is on the retirement systems, which must be contributory. It is the mechanism for paying employees their retirement benefits, and involves the elaborate working of a retirement system, not just the calculation of the wages of employees under '4(a) or their hours of duty, attendance, and holidays under '4(c). FRS is independent of the City, even though created by the City, and the City has Aexplicitly divested itself of significant control of the pension fund and its trustees@ Firemens= Retirement System of St. Louis, et. al., v. City of St. Louis, 789 SW2d 484, 486 (Mo 1990). The Supreme Court also noted in that case that the City Code Chapter 4.18, establishing and governing FRS, Amakes no reference to the City's Civil Service Commission@ Id. at 486.

Retirement benefits are not compensation for purposes of Article XVIII, '4 and FRS, as a system and as the payor of benefits is subject to the requirement of enabling legislation for ordinances affecting it, which is not true of either pay rates or hours of duty and holidays under Article XVIII, '4(a) and (c).

Under the plain language of Article XVIII, '4(b), the Civil Service Commission has no right to recommend ordinances

involving FRS and the judgment must be reversed. Baumruk and State v. Harney, Supra.

B. The subsequent language of Article XVIII, '7(b) confers at most an advisory role regarding retirement plans, not a mandatory right of recommendation.

The Commission heavily relies on Article XVIII, '7(b)(2), which provides in pertinent part:

AThe Commission shall have power, and it shall be its duty....
(b) to recommend to the mayor and aldermen in accordance with this article, ordinances to provide for....(2) a plan for a system for retirement of superannuated and otherwise incapacitated employees, if and when permissible under the Constitution and Laws of the State of Missouri.@

Given the language of Article XVIII, '4(b) set forth and analyzed in point A above, A(t)he subsequent language of '7(b) can be read solely as imposing an advisory role on the Commission in the matters enumerated therein, including retirement systems@ (Judgment, L.F. 285-6). This would conform with the everyday usage of the word Arecommend.@

Nothing in Article XVIII, '7 requires recommendation by the Commission in order to have a valid and enforceable ordinance, while Article XVIII, '4(b) clearly grants the Mayor and the Board

of Aldermen authority to enact such retirement ordinances, with no mention of recommendation.

Also the Civil Service Commission does not control or have a right to recommend the salary, much less the retirement benefits, of all city employees. The salaries of police officers as well as their retirement benefits and retirement system are controlled by state statutes. Chapter 84 V.A.M.S.; State ex rel St. Louis Firefighters v. Stemmler, 479 SW2d 456 (Mo 1972). Also there is a comparability requirement concerning the salaries of police officers and firefighters of equivalent and corresponding rank. This is contained in Article XVIII, '31 of the City Charter, and was the result of the voters of St. Louis approving the charter provision at an election on September 15, 1970. When the Commission refused to follow Article XVIII, '31, suit was filed, and the Supreme Court upheld Article XVIII, '31 of the City Charter. Stemmler, supra. Thus, even as to compensation issues, the Commission cannot set the salary of a firefighter at a different rate than that of a police officer of comparable rank.

While '4(a) of Article XVIII contains a recommendation provision, which FRS concedes is applicable to salary issues, that power is not absolute even as to salary for all the reasons set out above. Thus, '7(b)(2) read in light of '4(b) relates at

most to an advisory role for the Commission in matters affecting retirement benefits and FRS, since '4(b) relating to retirement systems makes no reference to a right to recommend. Furthermore, the Commission has never in the history of FRS asserted a right to recommend (i.e. prior approval) regarding firefighters' retirement benefits or the operation of FRS. The Trial Court recognized the significance of this failure of the Civil Service Commission to have previously asserted a right of prior approval in that portion of Judge Dierker's Order protecting the accrued benefits of vested firefighters with at least twenty years of service, a ruling which has not been challenged by the Commission on appeal.

The failure of the Commission to claim employees of FRS were under civil service from the inception of FRS in 1949 was mentioned and seemed significant to the Supreme Court in Firemen's Retirement System v. City of St. Louis, supra at 486, in ruling against the City and in favor of FRS, in a case which included a constitutionally based challenge by the City regarding FRS's existence as a separate entity.

It is also logical, based on history and policy, to conclude that the Commission has no right to recommend regarding ordinances pertaining to FRS. On salary issues there is no requirement for enabling legislation, but on retirement issues

affecting firefighters and affecting FRS, enabling legislation is required. '87.120 et. seq., RSMo, enacted pursuant to Article VI, '25 of the Missouri Constitution, authorizes cities to provide by ordinance for the pensioning of firemen. The City created FRS under the authority of '87.120, et. seq. by enacting Chapter 4.18 of the City Code. Id. at 486.

Thus when amendments are sought affecting FRS, there must be legislation enacted at the state level as well as the enactment of a City ordinance (i.e. the Aif and when permissible under the Constitution and Laws of the State of Missouri@ requirement of Article XVIII, '4(b) of the City Charter.) Thus the procedure for enactment of ordinances under '4(b) is different than for '4(a) or '4(c) of Article XVIII. Also '7(b)(2) contains the Aif and when permissible@ language, the same words as used in '4(b), whereas the remainder of points under '7(b) do not contain such language, which refers to the system of enabling legislation applicable to FRS.

For all of these reasons Article XVIII, '7(b) does not confer upon the Commission a right of prior approval concerning ordinances regarding FRS, enacted under the authority of Article XVIII, '4(b) and pursuant to enabling legislation.

C. The case of Abernathy v. City of St. Louis, 313 SW2d 717 (Mo 1958) is not controlling authority in this case, because Abernathy dealt with the forty (40) hour work week and compensation for overtime and did not deal with retirement systems under Article XVIII, '4(b) of the City Charter or concern FRS, which exists pursuant to ordinances enacted in conformance with constitutionally authorized enabling legislation.

Article XVIII, '4 contains three subparts: (a) relating to compensation, which requires recommendation of the Commission; (b) relating to retirement systems, which contains no recommendation language, and (c) relating to hours of duty and holidays, which also contains no recommendation language.

In Abernathy the Supreme Court addressed an ordinance, passed without recommendation by the Commission, establishing the forty (40) hour work week and providing for overtime compensation for hours worked in excess of forty per week. Thus

Abernathy dealt with the interaction of '4(a) and '4(c) in the context of the necessity of recommendation by the Commission.

The Supreme Court had previously held in Kirby v. Nolte, 173 SW2d 391 (Mo banc 1943), that a compensation ordinance was void unless it received recommendation by the Commission prior to enactment. Paying additional wages or salary for overtime clearly has a direct connection to compensation under '4(a) and it is therefore not surprising, given the language of '4(a) and the Court's prior decision in Kirby, that the Supreme Court held the ordinance in Abernathy invalid for failure to have prior recommendation of the Commission.

In this present case, the issue before this Court concerns either a purely retirement issue or an issue which involves the interaction of '4(b) and '4(c), neither of which require recommendation. The Trial Court explicitly stated that if it were analyzing this issue based on the Charter provisions (i.e. Writing on a blank slate) it would not find there to be a recommendation requirement (L.F. 271-2). This is a shorthand way of saying that if the rules of construction are applied, the appellants would have prevailed before Judge Dierker and should prevail in this honorable Court.

The rules of statutory construction are applied when construing municipal ordinances. The Court first looks at the

text of the ordinances and considers the plain meaning of the language. Matthews v. City of Jennings, 978 SW2d 12, 15 (Mo. Ct. App. 1998). Generally, if the language is clear, application of the rules of construction is not required. The rules of construction are used only to resolve ambiguity. Baumruk v. Belt, 964 SW2d 443, 446 (Mo 1998). If the language is clear, there is no room for construction. State v. Harney, 51 SW3d 519, 532 (Mo. Ct. App. 2001). The recommendation language which appears in '4(a) does not appear in '4(b) and '4(c) and the Aif and when permissible language appears in '4(b) and '7(b)(2) but not in the other sections of Article XVIII, '4 and '7. The doctrine of *Aexpressio unius est exclusio alterius* means that Awhen an ordinance... enumerates or prescribes the particular thing upon which it is to operate, it is to be construed as excluding from its effect and operation all those things not expressly mentioned.@ State ex rel. Winkley v. Welsch, 131 SW2d 364 (Mo App 1939).

The Trial Court, however, felt bound by Abernathy because of the way the Supreme Court had read and construed '4 and '7.

This conclusion is ultimately based on the placement of the ellipses in the language from Abernathy, 313 SW2d 718-9, quoted in the Judgment (L.F. 272).

As set forth above, the issues within '4 are quite different in this case than they were in Abernathy. The issue regarding Abernathy's effect, based on the doctrine of stare decisis, therefore comes down to whether this Court is bound by the placement of ellipses and Abernathy's method of construing the Charter provisions. There is no identity of issues and therefore no application of stare decisis, where the issue in Abernathy relating to overtime compensation seems correctly decided, but where the retirement issues presented here would not require recommendation by the Commission based on the clear language of '4(b) of the Charter.

A number of Missouri cases indicate that the language and decision in Abernathy are not binding on this Court, and were not binding or controlling as to the Trial Court. At most, the language from Abernathy is non-binding dicta. The Missouri Supreme Court set forth the applicable analysis as early as 1912: The maximum stare decisis applies only to decisions on points arising and decided in causes: it has been held not to extend to reasoning, illustrations, references and opinions. State, ex. rel. Bixby et.al., v. City of St. Louis, et. al., 145 SW 801, 803 (Mo 1912). If this were not so, the writer of the opinion would be under the necessity in each case, though his mind is concentrated on the case at hand and the principles

announced directed to that, to protract uselessly encumber his opinion with all the restrictions, limitations, and qualifications which every other variety of facts and change of phase in causes might render necessary.@ Id. at 804.

Bixby is still good law, and has been followed both by the Missouri Supreme Court and Appellate Courts. A case is only authority for what it actually decides. State of Missouri, ex. rel. Highway Commission of Missouri v. Goodson, 281 SW2d 858, 860 (Mo 1955) and Kovacs v. Kovacs, 869 SW2d 789, 795 (Mo. App. 1994). In a very recent dissent Justice Scalia recently enunciated the same doctrine Ajudicial decisions do not stand as binding >precedent= for points that were not raised, not argued, and hence not analyzed.@ Legal Services Corporation v. Valasquez, 121 Sct 1043 (2001), citing numerous other U.S. Supreme Court decisions Id. at 1057.

Appellants expect that the Commission, in an effort to bring this case within the umbrella of Abernathy, will contend that the rate of sick leave accrual and its effect on a firefighter=s creditable service for retirement purposes and upon a retiring firefighters DROP benefits is part of a comprehensive compensation plan and therefore falls within '4(a) or is closely enough related to salary and wages to be governed and controlled by Abernathy.

The Trial Court did not accept the Commission's argument concerning retirement benefits and retirement plans being part of **compensation** (L.F. 271, 273; but the Court must mean **'4(a)** not **'4(b)** in line 3 of L.F. 273). Compensation is defined in Article XVIII, '1(e) of the City Charter and does not include retirement benefits or a retirement system. '4(b) is separated from '4(a); and as demonstrated previously '4(b) does not contain **recommendation** language, but does contain the **if any when permissible** language. The arguments of the Commission based on a Black's Law Dictionary definition of **compensation** (L.F. 79) are without merit and this does not afford the Commission with an alternate means of prevailing in this litigation.

A review of the history of Article XVIII, and various state Constitutional and statutory provisions, makes clear that the benefits provided by FRS would not have been considered to be a form of compensation by the framers of the provisions of Article XVIII of the City Charter. This is because, at the time Article XVIII was adopted by the City voters in 1941, municipalities and other political subdivisions were generally prohibited from providing pensions for their employees. Article 47 of the Missouri Constitution of 1875 (which remained in effect until

the Constitution of 1945 was adopted) provided, in relevant part, that:

The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of, or to any individual...

This provision was held to prohibit cities and other political subdivisions from providing pensions to their employees. A(T)he public policy of the state, as expressed in the (1875) constitution, prohibited any retirement benefits for municipal officers or employees.@ Kansas City v. Brouse, 468 SW2d 15, 18 (Mo. banc 1971).

In fact, the 1875 Constitution was amended to add two exceptions to the general prohibition against retirement systems: (1) Article 4, '47(a), which permitted creation of pension systems for teachers (see Hickey v. Board of Education of City of St. Louis, 256 S.W.2d 775, 777 (Mo. 1953) which notes that Athis exception@ was known by the Apopular name, >teacher=s pension=@); and (2) '48(a) which permitted creation of pension systems for police officers.

Thus, at the time that the contested provisions of Article XVIII were adopted by the voters of the City of St. Louis, the framers would have known that pension benefits could not be

provided to City employees, including firefighters, because such benefits were prohibited by the state Constitution. This is why '4(b) of Article XVIII, authorizing the Mayor and Board of Aldermen to provide by ordinance for retirement systems, includes the words Aif and when permissible under the Constitution and Laws of the State of Missouri...@ It was not until adoption of Article VI, '25 of the Constitution of 1945 that the General Assembly was given the power to authorize the City of St. Louis to offer pensions to its employees, including firefighters. And it was not until passage of what is now '87.120 RSMo in 1949, that the General Assembly actually enacted enabling legislation to permit the City to create FRS.

Clearly then, at the time that Article XVIII was adopted, the framers of the Charter would not have thought that the term Acompensation@ included retirement or pension benefits, and thus such benefits should not be considered to constitute compensation as such term is used in '4(a) of Article XVIII.

Appellant FRS believes the issues regarding the interpretation of '4(b) are clear. If, however, this Court agrees that Abernathy is distinguishable from the present facts, but still views the issues as close, Appellant FRS respectfully refers the Court to argument advanced by the City Counselor=s office before the Trial Court:

Turning to the ordinance at issue before the Court, the provision of Ordinance 64923 that provides that all of a firefighter's accrued and unused sick leave may be credited toward his or her creditable service is not part of the compensation of employees, it is part of the criteria prescribed for eligibility for benefits under the firemen's retirement system.

The second aspect of the ordinance is trickier. At first blush, it would seem that a firefighter's sick leave accrual rate is a matter of compensation rather than a retirement system matter.

Under the challenged ordinance, a firefighter's sick leave according to the manner in which it was calculated as of June 1, 1999

(e.g. 5 hours biweekly). The Civil Service Commission contends that

it should be calculated in the manner provided in the City's existing

pay plan (e.g. 3 hours biweekly). But if it is not really an either/or

proposition as the other parties before the Court would assume.

The two competing views can be reconciled thus avoiding the

necessity of invalidating either one.

The City suggests that, although it may entail some additional

record-keeping, it is possible to honor both the Civil Service

Commission's role as a necessary player in the compensation

area while upholding the validity of the sick leave accrual

provision of Ordinance 64923. This may be accomplished

by simply calculating a firefighter's biweekly sick leave

accrual balance differently for civil service purposes than for

pension accrual purposes. Hence, an employee may for civil service purposes, i.e., for purposes of receiving pay for periods of illness, be entitled to accrue and use sick leave at the rate of 3 hours biweekly, for example. However for pension purposes, that same employee may accrue sick leave for purposes of calculating eligibility for a pension at the rate of 5 hours biweekly, for example.

Furthermore, under the argument of the Commission and based on the Trial Court's decision it is the whole system of retirement (FRS), which is at issue and which will be bound by the recommendation requirement. Article XVIII, '4(b) specifically concerns Aa plan for a system of retirement.@ A retirement system, which is very complex with many operational rules provided for by ordinance, is absolutely not Acompensation@ with the meaning of '4(a) and this is another reason why Abernathy is not controlling and is quite distinguishable from the present case.

II. The Trial Court erred in declaring Ordinance 64923 invalid and void because the Commission has never previously asserted a right to recommend regarding ordinances relating to FRS, and this failure to act is relevant and constitutes laches, in that the Supreme Court's decision in Firemen's Retirement System of St. Louis, et.al., v. City of St. Louis, 789 SW2d 484 (Mo. 1990) indicates that the Commission's failure to act is a relevant factor and further holds that the City has explicitly divested itself of significant control of the pension fund (FRS) and its trustees[®] (*Id.* at 486), and this is especially pertinent since the Trial Court recognized that the prior failure of the Commission to act was relevant regarding the remedy, and made this order and judgment prospective only in its application, so as to avoid harming hundreds or thousands of firefighters and their beneficiaries, who justifiably relied on the City's practices, but where the Trial Court failed to consider this failure of the Commission to act in analyzing the validity of the Ordinance.

The Commission had never, prior to the ordinance in dispute, asserted a right to recommend regarding ordinances involving FRS. The City had previously attempted to have the enabling legislation creating FRS declared unconstitutional, as part of its efforts to seek to control hiring of the executive

secretary of the Board and a clerk typist. The Supreme Court in Firemen's Retirement System rejected the constitutional challenge and upheld the right and power of the FRS trustees to hire its employees without Commission interference. In that opinion, the Supreme Court noted that **A**From the inception of FRS in 1949, the Trustees hired employees without involvement of the civil service system.@ Id. at 486.

In this case Judge Dierker wrote: **A**But for Abernathy's explicit holding, the Court could accept that the past practice of the Civil Service Commission, supported by opinions of the City Counselor, would be entitled to some weight in construing Art. XVIII, if ambiguous.@ (L.F. 288).

Appellant FRS believes it has demonstrated that Abernathy is not controlling in this case, but rather is distinguishable on numerous grounds. Also, despite the Trial Court's belief that Abernathy was controlling, in the remedy section of the judgment, the Court acknowledged a grave concern that others might attack the validity of the entire retirement system and trammel the justifiable expectations of retired firefighters, present firefighters, and their beneficiaries. The judgment therefore invalidates Ordinance 64923 only, and only for the future. This aspect of the judgment has not been appealed by the Commission.

If, however, Abernathy is not controlling, as the Trial Court erroneously believed, then the failure of the Commission to raise this issue for over 50 years is significant, and is a further basis for the proper holding that Ordinance 64923 is valid, and that the Commission has no authority to issue binding recommendations with respect to ordinances affecting FRS.

In Firemen's Retirement System, the Supreme Court evaluated the relative positions of the Trustees of FRS and the Commission:

Chapter 4.18 read in its entirety gives emphasis to the plain language of '4.18.065 of the City Code. The City has explicitly divested itself of significant control of the pension fund and its trustees. Chapter 4.18 directs FRS to conduct all of its business and invest all of its funds, cash, securities, and properties in its own name. St. Louis MO., Rev. Code '4.18.015. FRS is managed solely by the Board of Trustees. St. Louis, Mo. Rev. Code ''4.18.015 and 4.18.225. Acting in their fiduciary capacity for the benefit of the firefighters and their families, the Trustees maintain exclusive control over the various funds of FRS, including the general reserve fund and the expense fund. St. Louis, Mo. Rev. Code ''4.18.285 and 4.18.315. It is the Trustees, not the City, who certify each year the amount the City

is required to appropriate for the following year: ~~A~~The amount

so certified shall be appropriated by the City and transferred to

the Retirement System for the ensuing year. @ St. Louis, Mo.

Rev. Code '4.18.320. Firemen=s Retirement System, supra at 486.

(Emphasis added).

When balanced against the comprehensive powers given to

Trustees in Chapter 4.18 of the City Code, however, the City=s

argument fails. The Trustee=s function nearly autonomously in

their fiduciary capacities. *Id.* at 487.

Here, enabling legislation was passed by the General Assembly, signed by the governor, and then an ordinance was duly passed by the Board of Aldermen, after overriding a mayoral veto. FRS has incurred monetary obligations to firefighters, City moneys have been budgeted to fund such benefits, and firefighters have retired or planned their retirements based on such benefits. The claimed right to recommend asserted by three appointed commissioners, in their role as taxpayers, to override the decisions of so many elected officials seems mind boggling, given that Article XVIII, '4(b) contains no ~~A~~recommendation@ language.

A legislative body may not abdicate or delegate its legislative powers and any attempt at delegation is void. City of Springfield v. Clouse, 206 SW2d 539, 545 (1947). If the

Trial Court granted to the Commission a right to recommend, when one does not exist under Article XVIII, '4(b), the legislative powers of both the Board of Aldermen (ordinances) and the General Assembly (enabling legislation) will have been diminished or abdicated. Thus the effort of the Trial Court to conform its decision to Abernathy may have the unintended consequence of extreme judicial activism (i.e. implying language which is not present to override the expressed desires and intentions of two legislative bodies).

The failure of the Commission to ever previously assert a right to recommend, given the existence of FRS for over 50 years with a correspondingly lengthy history of legislation and ordinances, is a further reason for reversal of the judgment and for this Court's declaration that Ordinance 64923 is valid as enacted and is in full force and effect.

CONCLUSION

The Trial Court erred in declaring St. Louis City Ordinance 64923 invalid and of no force and effect, because Article XVIII, '4(b) contains no language creating a requirement that ordinances be recommended by the Civil Service Commission. The Trial Court also erred in following Abernathy, which is not binding precedent and which dealt with a substantially different set of issues. The Trial Court also erred in ignoring the admitted fact that the Commission had not made recommendations regarding retirement issues or regarding ordinances affecting FRS for over 50 years, during which time numerous ordinances had been enacted. For all the reasons set forth in this brief, the judgment of the Trial Court must be reversed, and this Honorable Court must declare that Ordinance 64923 is valid and in full force and effect, and that the commission has no authority to make binding recommendations regarding ordinances pertaining to FRS or pertaining to the benefits of Firefighters.

Respectfully Submitted,

BY:

DANIEL G. TOBBEN, #24219
DAVID R. BOHM, #35166
DANNA MCKITRICK, P.C.
150 North Meramec, Fourth Floor
St. Louis, MO 63105-3907
(314) 726-1000/(314) 725-6592 fax

ATTORNEYS FOR APPELLANTS
FIREMEN-S RETIREMENT SYSTEM OF ST.
LOUIS, et. al.

APPENDIX

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing was mailed, U. S. Mail, first class postage prepaid, this ____ day of ____, 2001 to:

Richard Perkins, Esq.
Diekemper, Hammond, Shinnars,
Turcotte & Larrew, P.C.
7720 Carondelet Avenue, Suite 200
St. Louis, Missouri 63105

John Fox Arnold
Jim Hetlage
Lashley Baer
714 Locust Street
St. Louis MO 63101

Mr. Edward Hanlon
Deputy City Counselor
Room 314 City Hall
St. Louis MO 63103

Jerry Murphy
Murphy & Wasinger, L.C.
Magna Place, Suite 550
1401 S. Brentwood Blvd.
St. Louis MO 63144