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

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| **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., )** | ) | |
| **Defendants-Appellants.** | ) | |

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

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

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## STATEMENT OF FACTS

Appellant Firemen=s Retirement System (AFRS@) disputes the assertion made in Respondents= Statement of Facts that, AThe Board of Aldermen and the City have also, by this Ordinance, changed the rate of sick leave accrual for City firefighters, (L.F. 66-67),@ (p. 12 of Respondents= Brief) implying that Ordinance 64923 somehow purports to change the amount of sick leave for which an active duty firefighter may be compensated. This assertion was not stipulated to by the parties, and is not supported by the Supplemental Joint Stipulation of Facts ( L.F. pages 66-67). Ordinance 64923 only impacts sick leave accrual for the purposes of calculation of a firefighter=s eligibility for, and amount of, retirement benefits. It does not affect, or purport to affect, the amount of sick time for which a firefighter may be paid during the term of his employment by the City. The supplemental stipulation sets forth only amounts to be paid out of the retirement system, not pursuant to the ordinance adopting the compensation plan.

## POINTS RELIED ON

### I

**I. The Trial Court=s judgment may not be upheld, as argued by Respondent, on the basis that Ordinance 64923 affects compensation, so that the ordinance was invalid because it was not recommended by the Civil Service Commission prior to being enacted into law, because (A) Ordinance 64923 only impacts the accrual of sick leave for purposes of calculating eligibility for and the amount of retirement benefits, (B) accrual of sick leave solely for purposes of calculation of retirement benefits does not constitute or affect compensation, as that term is used in the City Charter, in that a clear distinction exists in the Charter between compensation and benefits available through a retirement system, and (C) Abernathy v. City of St. Louis, 313 S.W. 2d 717 (Mo. 1958) is not controlling precedent under the doctrine of stare decisis.**

**Abernathy v. City of St. Louis, 313 S.W. 2d 717 (Mo. 1958)**

**Hyde Park Housing Partnership v. Director of Revenue, 850 S.W.2d 82, 84 (Mo. banc 1993)**

**State ex. rel Bixby et. al. v. City of St. Louis, et. al., 145 S.W. 2d 801 (Mo. 1912)**

**State v. Weinstein, 395 S.W.2d 525, 527 (Mo.App., E.D.1965)**

## POINTS RELIED ON

## II

**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, in that the Supreme Court=s decision in Firemen=s Retirement System of St. Louis, et. al. v. City of St. Louis, 789 S.W. 2d 484 (Mo. 1990) indicates that the Commission=s failure to act for decades was a relevant factor to consider in that case, and should weigh heavily on the outcome of this case, since the Commission=s brief makes clear that the Commission is trying to unravel the Firemen=s Retirement System and take away rights and benefits that were in place even prior to the enactment of Ordinance 64923.**

**Firemen=s Retirement System of St. Louis, et. al. v. City of St. Louis, 789 S.W. 2d 484 (Mo. 1990)**

## ARGUMENT

## STANDARD OF REVIEW

Appellate review of a factually stipulated case is governed by the standard of review set forth in Murphy v. Carron, 536 S.W. 2d 30, 32 (Mo. 1976) (en banc). A[T]he Appellate Court must sustain the decree or judgment of the Trial Court >unless there is no substantial evidence to support it, unless it is against the weight of the evidence, *unless it erroneously declares the law, or unless it erroneously applies the law.*=@ Hancock v. Secretary of State 885 S.W. 2d 42, 46 (Mo. Ct. App. 1994) (emphasis added). All of the issues in this case concern either the Trial Court=s declaration of the law or the Trial Court=s application of the law. There were not any facts in dispute.

This Court is not required to defer to Athe trial court=s judgment where resolution of the controversy is a question of law.@ Millers Mutual Insurance Association of Illinois v. Shell Oil Company, 959 S.W.2d 864, 866-67 (Mo. Ct. App. 1997). Because the questions presented here are purely legal issues, this Court need not defer to the Trial Court=s determination of those issues, so that the standard of review here is essentially de novo. Millers Mutual, supra; c.f. Petet v. State of Missouri, Department of Social Services, Division of Family Services, 32 S.W. 2d 818, 822 (Mo. Ct. App. 2000) (holding that this Court reviews questions of law de novo).

**I. The Trial Court=s judgment may not be upheld, as argued by Respondent, on the basis that Ordinance 64923 affects compensation, so that the ordinance was invalid because it was not recommended by the Civil Service Commission prior to being enacted into law, because (A) Ordinance 64923 only impacts the accrual of sick leave for purposes of calculating eligibility for and the amount of retirement benefits, (B) accrual of sick leave solely for purposes of calculation of retirement benefits does not constitute or affect compensation, as that term is used in the City Charter, in that a clear distinction exists in the Charter between compensation and benefits available through a retirement system, and (C) Abernathy is not controlling precedent under the doctrine of stare decisis.**

In the very first point of its brief, Respondent, Civil Service Commission of the City of St. Louis (ACSC@), argues that because Ordinance 64923 contains provisions relating to sick leave accrual it Aaffects the comprehensive compensation plan of the Firefighters@ (Respondent=s Brief, p. 19), so that CSC recommendation was required by Article XVIII, '4(a) of the Charter before adoption of Ordinance 64923. Respondent CSC argues that this is an alternative ground (to that relied upon by the trial court) for sustaining the trial court decision.

Respondent=s argument is disingenuous. It ignores both: (a) the fact that the provisions of Ordinance 64923 relate solely to how sick leave accrual is to be calculated and applied to determine eligibility for, and the amount of retirement benefits (and not to amount of sick leave benefits available to a firefighter during employment), and (b) that Article XVIII, itself,

expressly distinguishes between compensation and benefits available through a retirement system.

Ordinance 64923, on its face, states (a) that it is amending Ordinance 63591 (L.F. 121-126) by repealing "7 of said Ordinance, Arelating to the crediting of unused sick leave@ and (b) enacting one new section that was Ato be codified as Section 4.18.386 of the Revised Code@ of the City of St. Louis. Ordinance 63591 contained a number of provisions relating to the Firemen=s Retirement System and no provisions relating to any other subject matter. Further, the sole subject matter addressed in Chapter 4.18 of the Revised Code is the Firemen=s Retirement System. Section 7 of Ordinance 63591, like the provisions of Ordinance 64923, related solely to how, and at what rate, accrued sick leave was to be credited toward a firemen=s retirement.

Nothing in either Ordinance 63591 or Ordinance 64923 purports to in any way impact the amount of sick leave that may be earned and used by a firefighter while employed by the City of St. Louis. It is hard to see how an ordinance amending only provisions of the City Code relating to the retirement system could have any effect on the compensation of firefighters, which is governed by the ordinance provisions relating to the classified service, codified in Chapter 4.10 of the City=s Revised Code.

As argued on pages 32-4 of Appellant=s initial brief, Ordinance 64923 relates only to how sick leave is to be calculated for purposes of calculating eligibility for retirement and contributions to the DROP program (i.e., calculation of retirement benefits based upon sick leave) and not to the amount of sick leave that a firefighter may utilize during his employment.

Essentially, the Ordinance mandates two separate calculations of sick leave be made for City firefighters, one for purposes of determining eligibility for sick pay compensation during employment, and the other solely for purposes of calculating eligibility for and amount of retirement benefits.

It is somewhat unclear whether the CSC is arguing that even if the provisions of Ordinance 64923 relate solely to calculation of sick leave for retirement purposes that it nonetheless affects compensation because sick leave, even if its impact is solely on retirement issues, relates to comprehensive compensation. If this was true, it would logically follow that every issue relating to calculation of, and eligibility for, retirement benefits, is a compensation issue. Yet, the scheme of Article XVIII makes clear that the framers of the Charter viewed compensation and retirement to be totally separate issues. Not one section of that Article include compensation and retirement in the same paragraph. Instead, in every section that addresses both compensation and retirement, the two topics are set forth in separate paragraphs [e.g., '4, paragraphs (a) and (b); '7(b), sub-paragraphs (1) and (2); and '3, paragraphs (b) and (r)].

AIt is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute.@ Hyde Park Housing Partnership v. Director of Revenue, 850 S.W.2d 82, 84 (Mo. banc 1993). This same rule applies to interpretation of Charter provisions. Thus, because the framers of the Charter saw fit to explicitly distinguish between compensation and retirement benefits in Article XVIII, it

necessarily follows that matters affecting only the retirement benefits of an employee cannot possibly constitute compensation for purposes of '4(a) of Article XVIII.

Furthermore, Respondent CSC makes the absurd argument in its brief that the requirement for CSC recommendation of ordinance provisions affecting retirement benefits is clearly implied by the language of Article XVIII, despite the fact that '4(b) makes no reference to CSC recommendation being required before the Board of Aldermen and Mayor may enact ordinances touching on the subject of retirement benefits.

In making this argument, Respondent ignores:

> (t)he primary rule of statutory construction (which) is to ascertain the intent of the lawmakers by construing words used in the statute in their plain and ordinary meaning. Jones v. Director of Revenue, 832 S.W.2d 516, 517 (Mo. banc 1992). Where the language is clear and unambiguous, there is no room for construction. Id.

Hyde Park Housing Partnership v. Director of Revenue, supra at 84. The plain and ordinary meaning of the language used in '4(b) of Article XVIII clearly gives the Board of Aldermen and Mayor the authority to enact ordinances relating to retirement benefits for City employees without need for CSC approval (as contrasted to '4(a) which requires CSC recommendation before the Board of Aldermen and Mayor may enact ordinances relating to employee compensation). Thus, there is simply nothing to interpret, and no need to apply any principle of statutory construction.

Even assuming, arguendo, that the language of '4(b) relating to passage of ordinances concerning pension benefits is somehow ambiguous, so as to give rise to the applicability of

the rules of statutory construction, application of the doctrine of *expressio unius est exclusio alterius* requires the conclusion that because '4(a) expressly requires recommendation by the CSC before compensation ordinances may be enacted, and because '4(b) does not contain similar language, no such recommendation is required before ordinances relating to retirement benefits may be adopted (This point is more fully explained at pp. 28-9 of Appellant=s initial brief).

The CSC tries to ignore this rather obvious conclusion by claiming that the other provisions of Article XVIII make clear that the requirement of CSC recommendation should be inserted into '4(b) by implication. However, contrary to the CSC=s argument, the language of '3 and '7 of Article XVIII does not require implication of a requirement of CSC recommendation of pension-related ordinance provisions. The fact that '7(b) gives the CSC the power, and imposes the duty on it, Ato recommend to the Mayor and Aldermen...a plan for a system for retirement...if and when permissible under the constitution and laws of the State of Missouri@ gives the CSC no more than an advisory role.[1] Section 3(r) of Article XVIII merely requires the CSC to adopt rules relating to its advisory role regarding establishment of a retirement system. These provisions, placed in sections of Article XVIII dealing with the authority of the CSC, are not an affirmative limitation on the power of the Mayor and the Board of Aldermen. If that were true, there would be no reason to place the requirement of CSC

[1] It could even be argued that this advisory role relates only to the initial establishment of retirement systems for City employees, and not to later revisions to ordinances relating to such systems.

recommendation of compensation plans in '4(a), as '(7)(b)(1) gives the CSC the power and duty to make recommendations regarding the compensation plan. Yet, it must be presumed that the framers Adid not insert idle verbiage or superfluous language@ in the Charter. Hyde Park Housing Partnership v. Director of Revenue, supra at 84.

Furthermore, the CSC=s argument ignores the fact that implication of language into a statute or ordinance is highly disfavored by Missouri Courts. Courts are not permitted to add provisions to a statute under the guise of construction if they are not plainly written or necessarily implied. Wilkinson v. Brune, 682 S.W.2d 107, 111 (Mo.App., E.D.1984). "We are not to supply, insert or read words into a statute unless there is an omission plainly indicated and unless the statute is incongruous, unintelligible or leads to absurd results." State v. Weinstein, 395 S.W.2d 525, 527 (Mo.App., E.D.1965).

There is no plainly obvious omission in '4(b), nor is there any incongruity, unintelligible language or an absurd result which would obtain absent implication of additional language in '4(b). Therefore, the Court should not Aread@ the requirement of CSC recommendation into '4(b).

In Section I(c) of Respondents= Brief, concerning whether Abernathy is controlling authority, Respondents cite extensively from the Trial Court=s opinion and vigorously invoke the name of Abernathy. Respondents also attack the arguments of the Firefighters (i.e. Respondents= Brief at 42, fn 3). However, Respondents fail to analyze these Appellants= arguments regarding the most basic issue regarding Abernathy=s applicability in this case, which is the scope and extent of the doctrine of stare decisis.

Respondents ignore the Missouri Supreme Court decision in State ex. rel. Bixby, et. al. v. City of St. Louis, et. al., 145 S.W. 2d 801 (Mo. 1912), which is the law of the State of Missouri on this issue.

> The maxim of stare decisis applies only to decisions on points arising and decided in causes: it has been held not to extend to reasoning, illustrations, and references in opinions. 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 in hand, and the principles announced directed to that, to protract and uselessly encumber his opinion with all the restrictions, limitations, and qualifications which every variety of facts and change of phrase and causes might render necessary. Id. 803-4

As was demonstrated in Appellants= initial Brief (A.B. 27-34), Bixby is the law of Missouri, not just some arcane citation from early in the last century. Very recently, Judge Scalia, who is known to usually afford great deference to prior decisions and the rule of law concluded that A[j]udicial decisions do not stand as binding >precedent= for points that were not raised, not argued, and hence not analyzed.@ Legal Services Corporation v. Valesquez 121 S.Ct. 1043, 1057 (2001). Judge Scalia=s conclusion, like that of the Missouri Supreme Court in Bixby, is based on the historical roots of the doctrine of stare decisis in the English common law. For a detailed discussion of the history of the doctrine of stare decisis, see Bixby at 803, which focuses upon the analysis of stare decisis by the Earl of Halsbury, Lord Chancellor, in the House of Lords case of Quinn v. Leathem (Appeal Cases 1901, l.c.. 506) and its subsequent adoption by courts in this state and country. Koerner v. St. Louis Car Company, 107 S.W. 485; Lucas v. Commissioners, 44 Ind. loc.cit. 541. This Court is free to independently analyze the legal issues presented to it in this case concerning the City Charter and the language of its

pertinent sections. While this Court should certainly be mindful of the Abernathy decision, this Court is not bound by that decision, since the interplay of different Charter sections, different factual and legal issues, and different public policy concerns are in dispute in this case than were presented in Abernathy.

**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, in that the Supreme Court=s decision in Firemen=s Retirement System of St. Louis, et. al. v. City of St. Louis, 789 S.W. 2d 484 (Mo. 1990) indicates that the Commission=s failure to act for decades was a relevant factor to consider in that case, and should weigh heavily on the outcome of this case, since the Commission=s brief makes clear that the Commission is trying to unravel the Firemen=s Retirement System and take away rights and benefits that were in place even prior to the enactment of Ordinance 64923.**

Respondents concede in their brief that waiver occurs when the party affected had a reasonable opportunity to raise the issue and failed to do so in a timely manner (R.B. at 43). If the relevant time frame is only the time from the introduction of the bill until the time the CSC filed suit, waiver may not apply. If, as Appellants argue, the many decades during which the CSC never claimed a right to recommend is the appropriate time frame, then waiver clearly applies.

Though the ultimate legal issues here are somewhat different than in Firemen=s Retirement System v. City of St. Louis, 789 S.W. 2d 484 (Mo. 1990), the Missouri Supreme Court did mention and seemed to consider significant the fact that the City and CSC had never previously asserted, throughout the long history of FRS, that the executive secretary to the board of FRS was subject to civil service. The Missouri Supreme Court in that case refused to accept the CSC=s novel theory, asserted after decades of not asserting such a right to hire under civil service, and ruled for FRS. This Court should do the same in this case.

Respondent CSC also argues that laches is inapplicable because there is Ano harm or detriment@ to any of the firefighters, yet the firefighters with less than twenty (20) years of service have lost all sick leave accrual as far as it relates to pension issues in the DROP program. Such loss is clearly significant and detrimental. Furthermore, Respondents= argument presumes if Ordinance 64923 is held to be invalid, there is no accrual of sick leave by firefighters for pension purposes. However, Ordinance 64923 contains a repeal of '7 of Ordinance 63591 (See Appendix to Appellants= original brief at A-10). If Ordinance 64923 is held invalid, then this repeal provision is also invalid, and Ordinance 63591, '7 is still in

effect. This means that there is still accrual of sick leave that shall be credited to the retiree's pension in accordance with the terms of Ordinance 63591, which was enacted without recommendation in 1995. If Respondent is truly trying to undo prior ordinances such as 63591, thus going beyond Judge Dierker's judgment, which applied only to Ordinance 64923 and was prospective only in its application, then the harm to FRS and the firefighters is virtually unlimited. What the CSC is then seeking is the unraveling, piece by piece, of the Firemen's Retirement System.

## CONCLUSION

The Trial Court erred in declaring St. Louis City Ordinance 64923 invalid and of no force and effect, because Article XVIII, '4(b) of the City Charter contains no language creating a requirement that ordinances be recommended by the CSC. The Trial Court also erred in following Abernathy, which is not binding precedent and which dealt with a substantially different set of issues and the interplay of different Charter provisions. Finally, the Trial Court erred in ignoring the fact that the CSC had not made recommendations regarding firefighters= retirement benefits or the FRS for over fifty years, during which time the system was created by ordinance and many amending or supplementary ordinances were enacted.

For all of the reasons in this Reply Brief, this Appellants= original brief, and in the briefs of co-Appellant Firefighters, the judgment of the Trial Court must be reversed. This Court must declare that Ordinance 64923 is valid and in full force and effect, and that the CSC has no authority to make binding recommendations regarding ordinances pertaining to FRS, or the retirement benefits of firefighters.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that two copies of the foregoing was mailed, U. S. Mail, first class postage prepaid, this 17th day of January, 2002 to:

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