
IN THE MISSOURI SUPREME COURT

Appeal No. SC88813

ROBERT H. SIHNHOLD

Appellant

vs.

MISSOURI STATE EMPLOYEES' RETIREMENT SYSTEM

Respondent

On Appeal from the Circuit Court of Cole County, Missouri
Cause No. 06AC-CC00220

REPLY OF APPELLANT
ROBERT SIHNHOLD

ROGER G. BROWN & ASSOCIATES
Roger G. Brown, #29055
jclaw@rogerbrownlaw.com
216 E. McCarty Street
Jefferson City, Missouri 65101
Phone: 573-634-8501
Fax: 573-634-7679

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ARGUMENT

I. MOSERS’ assertion that the Circuit Court held that the 1999 amendment to RSMo 287.815 did not apply to plaintiff is incorrect.

MOSERS asserts that the Circuit Court held that the 1999 amendment to section 287.815 “does not apply to Plaintiff.” Def. Brf. at 1, 2. In fact, the Circuit Court held to the contrary: it concluded that “the statute by its terms unambiguously authorizes plaintiff to receive retirement benefits at age 62.” Appendix, A-1, specifically, P.A-2. The sole reason for the Circuit Court’s granting of MOSERS’ Motion for Summary Judgment was its belief that section 287.815 violates the Missouri constitution.

In arguing that section 287.815 does not apply to Judge Sihnhold, MOSERS seeks to create a conflict between sections 287.815 and RSMo 287.845--which requires MOSERS to calculate an ALJ’s annuity under the law in effect at the time he terminated his employment--where none exists. Under the law in effect at the time Judge Sihnhold terminated his employment he would have begun to receive his retirement benefits at age 65. MOSERS argues that the starting date for the receipt of retirement benefits is a factor in the calculation of an annuity, and that therefore section 287.845 requires that Judge Sihnhold can not receive retirement benefits

until he reaches age 65, notwithstanding the mandate of section 287.815 that he receive those benefits at age 62. Def. Brf. at 3.

In fact, however, the conflict MOSERS seeks to create does not exist because the starting date for the receipt of retirement benefits is not a factor in the formula calculating an annuity. RSMo 104.374 sets forth that formula: it is “one and six-tenths of the average compensation of the member multiplied by the number of years of creditable service of the member.” While the percentage of the average compensation used in this formula may have changed over the years, the starting date for the receipt of retirement benefits is not a factor in the formula, and MOSERS cites no authority when it asserts that it is. Def. Brf. at 3. Contrary to MOSERS’ assertion, therefore, the Circuit Court’s judgment can not be affirmed without reaching the constitutional issue.

II. The change in the pension eligibility age from 65 to 62 effectuated by RSMo 287.815 does not result in the grant of “extra compensation” to Judge Sihnhold within the meaning of Article III, Section 39(3) of the Missouri Constitution.

MOSERS argues that RSMo 287.815, which authorizes ALJs to begin receiving their pensions at age 62 rather than 65, violates the state

constitutional prohibition on grants of “extra compensation” to public officials when applied to Judge Sihnhold, who was no longer an ALJ when the statute was enacted. Def. Brf. at 4-9. MOSERS bases its argument on two 1975 decisions of this Court which held that certain benefits authorized by other Missouri statutes as applied to other retirees in other circumstances constituted extra compensation within the meaning of Section 39(3). State ex rel. Cleaveland v. Bond, 518 S.W.2d 649 (Mo. banc 1975); Police Retirement System v. Kansas City, 529 S.W.2d 388 (Mo. banc 1975). Cleaveland and Police Retirement System do not compel the conclusion that RSMo as applied to Judge Sihnhold constitutes “extra compensation” for two reasons. First, the facts and circumstances of those cases are very different from the facts and circumstances of this case. Second, because the retirement benefits administered by MOSERS are trust funds rather than general revenue, as MOSERS itself has emphasized in Pulitzer Pub. Co. v. Missouri State Employees’ Retirement System, 927 S.W.2d 477 (W.D. Mo. 1996), those benefits do not constitute “extra compensation” within the meaning of Section 39(3). Significantly, neither the Cleaveland Court nor the Police Retirement System Court was presented with the question whether the prohibition on “extra compensation” applied to trust funds as well as to general revenue funds.

A. *Cleaveland and Police Retirement System* involved fundamentally different circumstances than does this case

1. *Cleaveland*

Cleaveland involved a statute granting pensions to judges who had already retired and who were entitled to no pension benefits at the time they retired. The court held that such a grant was “extra compensation” within the meaning of Section 39(3), relying exclusively on cases striking down the granting of pensions to those who had not been receiving pensions. 518 S.W.2d at 652-53. Neither Cleaveland nor any case it relied on concerned a statute, like the statute in this case, that enabled an individual already entitled to a pension to begin receiving it earlier than he would have received it under the law in effect when he retired.

Importantly, the policy reason underlying the court’s decision in Cleaveland does not apply in this case. The court there found that granting Judge Cleaveland a pension after he had retired could produce no public benefit because he had already completed his state service. Id. at 653-54. Here, in contrast, RSMo 287.815 creates a dual public benefit. On the one hand, reducing the pension eligibility age from 65 to 62 enables currently-serving ALJs who have served for at least 12 years to retire at 62 and thus make available positions for other individuals interested in public service.

At the same time, enabling former ALJ's who had served for at least 12 years to begin receiving their pensions at 62 rather than 65 signals to talented individuals considering public service that if they do enter public service it may be possible for them to ultimately receive greater benefits than those existing at the time they retire. The existence of such a possibility is neither compensation nor a gratuity, but rather a reasonable and appropriate measure encouraging public-spirited people to enter state service and to serve the public interest, rather than to seek employment elsewhere in order to obtain much greater financial benefits than the state could possibly provide.

2. Police Retirement System

In Police Retirement System the court struck down cost of living adjustments the legislature had authorized for officers who had already retired on the grounds that “the pensions or annuities previously granted and being paid were cast in terms of dollars, not purchasing power...” 529 S.W.2d at 393. To allow cost of living adjustments, therefore, the court reasoned, “would mean that similar claims for adjustments in previously awarded contracts could and would be asserted on the basis that inflation authorized increases in contract price to compensate for inflationary factors.” Id.

That issue is not present here. RSMo 287.815 does not authorize cost of living adjustments. The Police Retirement System holding therefore does not compel the conclusion that RSMO 287.815 would provide Judge Sihnhold with “extra compensation” within the meaning of section 39(3).

B. Because the source of the benefits authorized by RSMo 287.815 is a trust fund rather than general revenue, such benefits do not constitute “extra compensation” within the meaning of Article III, Section 39(3) of the Missouri Constitution.

This Court has never been faced with the question whether the constitutional prohibition on “extra compensation” applies to funds held in trust as well as general revenue funds. In McClead v. Pima County, 174 Ariz. 348 (App. 1992), the Arizona Court of Appeals was faced with that question. There, the court reviewed the various state court decisions construing state prohibitions on “extra compensation.” The court found that in most of the decisions invalidating post-retirement pension increases either the increases were funded from general revenues, or the opinion “failed to consider the nature and origins of the subject monies.” 174 Ariz. at 357.

McClead involved a challenge to several statutes that increased retirement benefits for state employees who had already retired. The court upheld those statutes because, as in this case, the challenged benefits “were not paid from funds belonging to the state.” Id. at 351. The court explained:

Through the statutory scheme establishing and defining the plan, the legislature separated the plan funds from the general revenues of the state. ASRPS monies are kept in a “system depository separate and apart from all public monies or funds of this state, which shall be administered by the system exclusively for the purposes of this article.” In addition, ASRPS monies must be used solely for the benefit of plan and system members.

Id. at 353. (citations omitted)

The plan funds at issue in this case are also separate and apart from the public monies of the state, and are used solely for the benefit of the members of the plan. Significantly, MOSERS itself emphasized this very point in 1996, in Pulitzer Pub. Co. v. Missouri State Employees’ Retirement System, 927 S.W.2d 477 (Mo. App. W.D. 1996). There, MOSERS sought to prevent the St. Louis Post-Dispatch from gaining access to the amounts of the pensions being received by former governors and legislative leaders.

The Sunshine Law required MOSERS to make “salaries” public; the courts had held that “salaries” included severance payments; and the Post-Dispatch argued that pension benefits are no different than severance payments and that therefore “salaries” should be interpreted to also include pensions. 927 S.W.2d at 481.

MOSERS, however, argued that pension benefits and severance pay were different, since severance pay came from the “public coffers” but pension benefits were paid out of trust funds. *Id.* at 481-82. MOSERS pointed out that when funds are contributed to MOSERS, they are “dedicated to and held in trust for the members and for the purposes set out and no other,” and thus that “pension benefits paid to members are not paid from public funds, but rather from trust funds which are the property of the members of the system.” *Id.* at 482. Pension benefits, therefore, according to MOSERS, were substantially different from “other forms of remuneration paid to state personnel directly from public funds.” *Id.*

Because the policy underlying the Sunshine Law was one of promoting openness in government, and because the Sunshine Law specifically provided that exceptions to disclosure be strictly construed, the court rejected the distinction MOSERS urged it to make for purposes of the Sunshine Act. However, the court said that it would “have no hesitation” in

adopting the distinction MOSERS urged the court to adopt “in virtually any other factual setting.” Id.

The factual setting in this case is uniquely appropriate for adopting that distinction for two reasons. First, MOSERS itself has emphasized that pension benefits are not paid from public funds, but rather from trust funds which are the property of the members of the system. Id. at 481-82. Second, for most of the period between the time of the enactment of RSMo 287.815 in 1999 and Judge Sihnhold’s retirement in 2005, MOSERS apparently believed that this distinction should be recognized: as the Circuit Court found, between July 2000 and March 2005 MOSERS on several occasions told Judge Sihnhold that he would begin receiving his retirement benefits when he turned 62. Appendix, A-1, specifically P. A-2. Only on June 17, 2005—nine days before Judge Sihnhold would turn 62—did MOSERS tell him that its previous advice was mistaken and that he could not receive his retirement benefits until he turned 65. Id.

In short, under the circumstances of this case this Court should recognize the distinction urged by MOSERS and noted with approval by the court in Pulitzer and adopted by the court in McClead, and should hold that benefits funded by a trust that is the property of members of a Retirement

System is not extra compensation within the meaning of Article III, Section 39(3) of the Missouri Constitution.

III. Whether the receipt by Judge Sihnhold of his monthly pension at age 62 rather than age 65 would constitute “extra” compensation can not be determined on this record

Assuming arguendo that Section 39(3) does apply to trust funds, whether Judge Sihnhold’s receipt of his pension at age 62 rather than 65 would constitute “extra” compensation can not be determined on this record. That is because there may already be enough money in the MOSERS trust fund to enable Judge Sihnhold (as well as any other similarly situated individual) to receive his pension at 62 rather than 65 without affecting the actuarial soundness of the fund, and without requiring any additional funding of MOSERS from any source. It is possible, for example, that MOSERS has over-reserved: i.e., MOSERS may have more in assets than is necessary to fund its reasonably expected future obligations. It is also possible that the returns MOSERS has been earning on its investments have been so substantial—particularly considering the effects of compounding—that Judge Sihnhold (and any other similarly situated individual) could begin receiving pension benefits at age 62 without adversely affecting the fund. It

may even be the case that MOSERS could reduce the funds it must obtain in the future without adversely affecting its financial condition. Thus, if this Court does not reverse the trial court's judgment and order the trial court to enter judgment for plaintiff, in order to determine whether Judge Sihnhold's receipt of his pension at age 62 would constitute "extra" compensation this Court should direct the trial court to determine whether or not MOSERS can fulfill its statutory responsibilities without obtaining extra funds if Judge Sihnhold were to receive his pension at age 62.

CONCLUSION

WHEREFORE, Appellant Judge Sihnhold prays, based on arguments in both the Appellant Brief and Reply Brief, that this Court remand this cause back to the trial court with instructions to vacate the trial court's judgment in favor of the Respondent and to enter a full and final judgment in favor of Judge Sihnhold. In the alternative, Judge Sihnhold prays that this Court remand this cause back to the trial court with instructions to conduct a hearing in order to determine the solvency of MOSERS retirement trusts.

Respectfully submitted,

ROGER G. BROWN & ASSOCIATES

By _____

Roger G. Brown (#29055)
216 E. McCarty Street
Jefferson City, Missouri 65101
Telephone: 573-634-8501
Telecopy: 573-634-7679

**ATTORNEY FOR APPELLANT
ROBERT SIHNHOLD**

IN THE MISSOURI SUPREME COURT

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RETIREMENT SYSTEM)	
)	
Respondent)	

CERTIFICATE OF COMPLIANCE PURSUANT TO RULES 84.06(c)
AND 84.06(g)

COMES NOW counsel for Appellant Sihnhold and for his Certificate of Compliance, state as follows:

1. The undersigned do hereby certify that Appellant Sihnhold's Reply filed herein complies with the word limitations contained in Supreme Court Rule 84.06(b) and contains 2,570 words of double spaced, proportional typeface, using Times New Roman 14-point.

2. Microsoft Word for Windows was used to prepare Appellant Sihnhold's Brief.

3. The undersigned do hereby certify that the accompanying floppy disk containing a copy of the foregoing brief, required to be filed by Supreme Court Rule 84.06(g), has been scanned for viruses and is virus-free.

ROGER G. BROWN & ASSOCIATES

By_____

Roger G. Brown (#29055)
216 E. McCarty Street
Jefferson City, Missouri 65101
Telephone: 573-634-8501
Telecopy: 573-634-7679

**ATTORNEY FOR APPELLANT
ROBERT SIHNHOLD**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 19th day of February, 2008 two (2) copies of Appellant Sihnhold's Reply and one copy of the accompanying disk, were mailed, postage prepaid, to Allen Allred and Jeffrey Fink, Thompson Coburn, LLP, One US Bank Plaza, St. Louis, Missouri 63101.

Respectfully submitted,

ROGER G. BROWN & ASSOCIATES

By _____

Roger G. Brown (#29055)
216 E. McCarty Street
Jefferson City, Missouri 65101
Telephone – (573) 634-8501
Telecopy – (573) 634-7679

**ATTORNEY FOR APPELLANT
ROBERT SIHNHOLD**

APPENDIX

Judgment

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