SC92159

IN THE SUPREME COURT OF MISSOURI

CITY OF ST. LOUIS, et al.,

Respondents,

v.

STATE OF MISSOURI,

Appellant.

Appeal from the Cole County, Missouri Circuit Court
The Honorable Judge Jon Edward Beetem

APPELLANT'S REPLY BRIEF

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Reply Point I.

Plaintiffs assert that the circuit court's judgment on Count I rested on a premise that "the State's admitted attempt to supersede an employment qualification" in the City's charter infringed upon rights reserved to charter cities. (Pls' 2nd Br. at 10). The State denied that the statute set or regulated an employment qualification. Vol. V LF 481-82 (Rsp. to Req. for Admiss. No. 17). The circuit court concluded that concepts of home rule and local control "would be mere illusions if the State of Missouri could dictate local employment qualifications such as the City's residency requirement." Vol. VII, LF 671. This Court will not read words into a constitutional provision whose language is clear. *Robin Wright-Jones v. Jamilah Nasheed*, SC 92621 at 5 (June 19, 2012). Article VI, Section 22 speaks of powers and duties, not qualifications.

Moreover, St. Louis City residency is not an essential requirement for any particular job. The charter exempts part-time and temporary employees. It includes additional exemptions for all employees in the initial working test period or the first 120 days on the job. Vol. I LF 34.

Plaintiffs' reference to *Mahon v. Scearce*, 228 S.W.2d 384 (Mo. App. 1950), is misplaced. Sixty years ago the City appears to have required city residence at the time candidates applied for fire department jobs. *Mahon* at 386. The applicant in *Mahon* met that requirement.

Plaintiffs propounded a set of requests for admission to the State, some of which contained legal conclusions concerning provisions of the City's charter. The State's responses to many requests for admissions that used the term "qualification" are

immaterial. In reviewing the circuit court's conclusions of law this Court is not bound by the State's responses to requests for admission with respect to legal questions. *State ex rel. Missouri Parks Ass'n v. Missouri Dept. of Natural Resources*, 316 S.W.3d 375, 390 n. 13 (Mo. App. W.D. 2010); *see also In re Marriage of Zimmerman*, 29 S.W.3d 863, 868 (Mo. App. S.D. 2000).

a. The statute's effect on the charter's residency requirement does not violate Article VI, Section 22

Plaintiffs concede that provisions in the City's charter may not conflict with the Missouri Constitution or state statutes. (Pls' 2nd Br. at 12). The City's exercise of home rule powers is subject to both constitutional and statutory limitations. *City of Springfield v. Belt*, 307 S.W.3d 649, 653 n. 10 (Mo. banc 2010); *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 211 (Mo. banc 1986). The home rule themes in cases cited by Plaintiffs do not support their position that Senate Bill 739 violates Article VI, Section 22. The reference to "qualifications" in *State ex rel. St. Louis Fire Fighters Ass'n Local No. 73 v. Stemmler*, 479 S.W.2d 456, 460 (Mo. banc 1972) is contained in a quotation from a mandamus action to compel payment of salary, *State ex rel. Rothrum v. Darby*, 137 S.W.2d 532 (Mo. 1940), that had nothing to do with anyone's job qualifications. *Stemmler* did not itself involve any firefighter's employment qualifications or eligibility, nor did *State ex rel. Burke v. Cervantes*, 423 S.W.2d 791, 793 (Mo. 1968) address "employment decisions."

SB 739 does not govern the City's "manner of selection of city officials and employees." It neither requires nor prevents the City from instituting or continuing to

employ any particular hiring or promotional process. The City remains free to use criminal background or credit checks, written or on-line application processes, written or practical tests, interview processes of its own design, seniority or merit systems, or physical fitness examinations for any applicant or current employee of the fire department. The statute does not assign hiring or promotional decisions to any official or employee.

Plaintiffs' contention that the Civil Service Commission's duty to consider residency waiver requests will be eliminated by SB 739 (Pls' 2nd Br. at 14) is wrong. Eligible fire department employees will not need to obtain waivers in order to reside outside the City[1], however, the statute does not prevent the Civil Service Commission from considering the waiver request of any employee who remains subject to the residency requirement. SB 739 does not limit or fix the Commission's ability to consider any waiver request.

b. SB 739 is within the scope of the State's police powers.

Plaintiffs misread the police power arguments in the State's brief. Contrary to Plaintiffs' assertion at page 18 of their second brief, the State's argument that the legislature's police powers allow it to adopt policies of general state-wide application that apply to charter cities was raised in response to Plaintiffs' motion for summary judgment

[1] For the last eight years, at least, the Civil Service Commission has not received a request for a waiver or exemption from the residency requirement from any fire department employee. Vol. I, LF 76.

on Count I (Vol. IV LF 302b), and in its cross-motion for summary judgment (Vol. IV LF 310-11), as well as Appellant's Brief. The State's brief also noted that policies of general, state-wide application may affect the working conditions of some charter city employees. (App.'s Br. at 17).

Plaintiffs rely on *Cervantes*, 423 S.W.2d at 793, in an effort to cast doubt on the general public interest in fire protection services. In the sentence following the language Plaintiffs quote (Pls' 2nd Br. at 19), this Court noted the majority of cases holding "that legislation concerning municipal fire departments is a matter of state-wide concern and that a general statute on the subject applies to home-rule municipalities." *Cervantes* at 793; *see also* Section 320.202.1(1), (5) RSMo (State Division of Fire Safety to provide firefighter certification and training). *Cervantes* then focused on the constitutional prohibition of adding to charter city officials' duties. *Id.* at 794. SB 739 does not require any public official or employee to assume additional duties.

City of St. Louis v. Grimes, 630 S.W.2d 82 (Mo. banc 1982) does not support Plaintiffs' contention that a balancing test applies to legislation on matters of statewide concern that impacts charter cities. Although this Court stated that it balanced the State's right to promote the public welfare with the City's "right" to be free from outside interference, it concluded that the Workers' Compensation Law did not violate the City's asserted right. *Id.* at 85. This Court also determined that requiring the City of St. Louis to provide "compensation" under the Workers' Compensation Law did not violate Article VI, Section 22. *Grimes* at 85.

II. Reply Point II

Plaintiffs argue that the legislature could have included more City employees (Pls' 2nd Br. at 26) or a broader class of firefighters (Pls' 2nd Br. at 25, 27) within the statutory classification or that it could have enacted legislation to improve the quality of education available through particular schools. But under the rational basis test, this Court does not determine "whether the legislature 'should have' done something different or whether there is a better means to accomplish the same goal, and certainly not whether the chosen means is the best method." *Linton v. Missouri Veterinary Med. Bd.*, 988 S.W.2d 513, 516 (Mo. banc 1999). Moreover, the legislature "is free to regulate one step at a time" addressing "phases of a problem which presently seem most acute…" *Id.* A statutory classification is not arbitrary merely because it is underinclusive. *City of St. Louis v. Liberman*, 547 S.W.2d 452, 458 (Mo. banc 1977).

The legislature could reasonably have concluded that fire department employees are differently situated from other municipal and local government employees. Cities, towns, and villages, "whether contiguous or not," may maintain joint fire departments. Section 71.400 RSMo. Any city in Missouri with a fire department "may contract to furnish fire protection to *any other incorporated city or cities in this state…"* Section 71.370 RSMo (emphasis added). The City of St. Louis fire department has three fire stations at Lambert International Airport. Vol. VII LF 624. In contrast with other municipal employees, the duties of fire department employees may regularly require them to work outside their employers' corporate limits. In the context of these statutory provisions, the legislature could have reasonably concluded that additional protection was

warranted for experienced fire department employees.

"A legislative choice 'is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *United C.O.D. v. State,*150 S.W.3d 311, 313 (Mo. banc 2004), *quoting FCC Beach Communications*, *Inc.*, 508 U.S. 307, 315 (1993). Accordingly, the State "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. 312, 319-20 (1993).

The legislature was not required to explicitly state the purpose of SB 739, *see Lonergan v. May*, 53 S.W.3d 122, 127 (Mo. App. W.D. 2001), or the rationale underlying the statutory classification. *Heller*, 509 U.S. at 319. The summary description of SB 739 on the Truly Agreed and Finally Passed section of the Senate's website is not evidence of the legislature's intent. Further, this Court "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *Ocello v. Koster*, 354 S.W.3d 187, 202 (Mo. banc 2011). The sole issue is whether SB 739 is conceivably or debatably rational. As a matter of law, it is.

a. SB 739 is rationally related to the State's interest in the availability of a quality public education.

In Section II.a of their brief Plaintiffs again mischaracterize the State's arguments. In opposing the State's motion for summary judgment, Plaintiffs pointed to the existence of educational options such as Section 167.131 RSMo, which requires less than fully accredited school districts to provide transportation and pay tuition to attend school "in another district of the same or an adjoining county." Vol. IV LF 351. Plaintiffs admit

that the constitutionality of that statute is currently in question.

Plaintiffs speculate that families served by Section 167.131 RSMo may choose to leave the City. (Pls' 2nd Br. at 27). Plaintiffs' conjecture adds nothing to the discussion. The State is not required to show that every child in a less than fully accredited school district is consigned to that public school system to sustain the rationality of SB 739. The existence of educational alternatives that may have worked for some families did not preclude the legislature from creating an additional option. *See Missouri Prosecuting Attorneys & Circuit Attorneys Retirement Sys. v. Pemiscot County*, 256 S.W.3d 98, 102 (Mo. banc 2008).

A statute's rationale need not rest upon a "generally accepted principle" (see Pls' 2nd Br. at 27) to satisfy equal protection. Indeed, even where

> It could be that the assumptions underlying these rationales are erroneous… the very fact that they are "arguable" is sufficient, on rational-basis review, to "immunize the legislative choice from constitutional challenge. *Heller v. Doe*, 509 U.S. at 333 (internal quotations omitted).

The legislature could rationally conclude that a statute allowing more children to reside within the school district they attend would be beneficial. (See App.'s Br. at 22-23).

Despite the fact that parents are not obligated to enroll children under age seven in school, Section 167.031 RSMo, Plaintiffs contend that the minimum seven year job tenure element of SB 739 is "arbitrary in the education context." The legislature presumably acted with full awareness of the compulsory attendance statute. *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 259 S.W.3d 23, 31 (Mo. App. W.D. 2008) (internal

quotations omitted). Thus, the legislature could reasonably conclude that allowing fire department employees to move outside a less than fully accredited school district after seven years of employment was an appropriate means of furthering the state's interest in providing access to quality public education.

b. Allowing fire department employees to live outside their district is not irrational.

Plaintiffs question the wisdom or social desirability of the legislature's policy choice because SB 739 would allow a high percentage of the City's fire department employees to move up to an hour away. The wisdom or social desirability underlying SB 739 was for the legislature to decide. *Missouri Prosecuting Attorneys & Circuit Attorneys Retirement Sys.*, 256 S.W.2d at 102.

Plaintiffs contend that allowing experienced firefighters to live up to one hour from work is irrational because it would increase emergency response time for off duty employees. This Court may take judicial notice of the approximate distance between the City of St. Louis fire department locations in the record (Vol. VII LF 616, 619-24) and cities adjacent to St. Louis. *Maxwell v. City of Hayti*, 985 S.W.2d 920, 922 (Mo. App. S.D. 1999). The City of St. Louis' 2011 Fire Department Registration (Vol. VII LF 616, 619-24) shows that many of its fire stations are located less than two to three miles from the city limits. Three fire stations are located at Lambert International Airport, a significant distance from the St. Louis City limits. Vol. VII LF 624.

This Court may also take judicial notice that the City of St. Louis encompasses 61 square miles. *See* 2011-2012 Official Manual of the State of Missouri, p. 545; *Hollon v.*

Dir. of Revenue, 277 S.W.3d 734, 736 n.1 (Mo. App. W.D. 2008) (court may take judicial notice of geographical facts including the official state highway map). Some fire department employees who reside in St. Louis may live farther away from their assigned fire stations than residents of cities such as University City, Richmond Heights, Maplewood, and Shrewsbury, Maryland Heights, or portions of Jefferson County. It is conceivable that fire department employees could relocate to homes outside the City of St. Louis that are actually closer to their workplaces. Even if some eligible fire department employees moved farther from their workplaces, those who choose to move will not necessarily relocate one hour's drive from work.

Notably, the City has never asserted that its fire stations are understaffed. According to its website the St. Louis Fire Department's minimum staffing levels allow it to respond to any block in the City within four minutes of dispatch. Vol. IV LF 631. To the extent an emergency scenario may require additional resources the City may rely on existing mutual aid agreements and enter into any additional mutual aid agreements it deems necessary. *See* Section 321.622.2 RSMo; Vol. IV LF 305 (referencing mutual aid partners in the St. Louis metropolitan area and St. Louis Area Regional Response System). Finally, the State notes that the St. Louis Metropolitan Police Department allows its employees to move outside the City after seven years of employment. Vol. X LF 967-68.

Plaintiffs also suggest that SB 739 is irrational because the City of St. Louis currently has a low turnover rate in its fire department. This argument ignores the potential statewide impact of the statute. Other fire departments may have higher

turnover and greater recruitment difficulties. The fact that most of the 45 employees who left the City of St. Louis fire department for non-retirement reasons left during the first five years of employment supports the rationality of encouraging retention of experienced fire department employees. Vol. IV LF 304. Further, showing that one or more facts on which a statutory classification appears to be based is incorrect will not invalidate a statute on equal protection grounds. *Vance v. Bradley*, 440 U.S. 93, 111 (1979). Plaintiffs' contention that SB 739 is irrational lacks merit.

Conclusion

For these reasons the State asks this Court to reverse the circuit court's judgments on Counts I (Article VI, Section 22) and III (equal protection).

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and served, on June 26, 2012, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule 84.06 and that the brief contains 3,192 words.

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