

IN THE SUPREME COURT OF MISSOURI

No. SC88954

**ST. LOUIS POLICE OFFICERS' ASSOCIATION,
GARY PHELPS and WILLIAM GOODEN,**

Appellants

vs.

**DEPARTMENT OF POLICE COMMISSIONERS OF THE CITY OF ST.
LOUIS,
CHRIS GOODSON, JOANN F. MORROW, MICHAEL J. QUINN,
JULIUS K. HUNTER and FRANCIS G. SLAY,**

Respondents

**On Appeal from the Circuit Court of the City of St. Louis
State of Missouri
Twenty-Second Judicial Circuit
The Honorable Julian L. Bush**

APPELLANTS' SUBSTITUTE REPLY BRIEF

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STATEMENT OF FACTS

The Department contends that “Plaintiffs’ Statement of Facts is neither fair, concise nor without argument.” Respondents’ Substitute Brief, p. 7. Retirees shall respond briefly to that assertion.

Monica Green, the Department’s benefits manager, plainly admitted at the preliminary injunction hearing that she had testified in her deposition that the coverage for the New Base Plan was not adequate. P. I. Tr., p. 54.

Further, the Department describes the testimony of Stephen Zoll, one of the Department’s expert witnesses, as not being conjectural. Respondents’ Substitute Brief, p. 9. Mr. Zoll testified, however, that he believed benefits plans existed “out there” that were as “skinny” in their benefits as the New Base Plan, but he could not identify any. Tr. 218. Also, he responded to a series of questions by the Trial Court. Tr. 219-24. Mr. Zoll’s responses suggest that the advent of such “skinny” health benefits plans may materialize in the future, but do not exist now. *Id.* For example, when queried about whether it is common to have a plan with a \$2,250.00 annual deductible, Mr. Zoll explained: “the only way I can reference is they are becoming more and more prevalent in the market. Everybody wants to talk about them. Whether they adopt them or not --- that’s like HMO’s were maybe 10 or 15 years ago. That’s this new way to save the health care system....That’s a lot of smoke right now.” Tr. 219-20.

The Department cites facts in the record concerning various prescription drug and co-pay benefits in the New Base Plan. Respondents’ Substitute Brief, pp. 8-9.

One of its expert witnesses, the City of St. Louis' Personnel Director, testified, however, as to the greater weight to be given to other benefits components: ["W]hether it's 10 percent, 30 percent, whatever, I think you would call it a coinsurance plan.... You know, how much could this conceivably cost me depending on what my experiences are? So, you know, the deductible is very important, the maximum out-of-pocket is extremely important, and then you know, the percentage really determines how fast you get there." Supp. Tr., p. 108.

Respondents suggest that the Department's development of the New Base Plan was intended to ensure equity to the Retirees. Respondents' Substitute Brief, p. 10. The testimony of Mayor Nocchiero actually suggests the equity with which he was concerned was the cost to the Department of the Retirees' health benefits plan: "I told her to go back and tell [Blue Cross Blue Shield] to bring a plan to us that had an equitable nature in the amount of dollars we spent between active and retirees." Tr. 132-33.

POINT RELIED ON

I.

THE TRIAL COURT ERRED IN HOLDING THAT THE DEPARTMENT'S ACTIONS IN DRAMATICALLY REDUCING THE HEALTH INSURANCE BENEFITS THAT IT IS REQUIRED TO PROVIDE TO RETIREES DID NOT CONSTITUTE A VIOLATION OF RETIREES' SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE DUE PROCESS CLAUSES OF ART. I, SECTION 10 OF THE MISSOURI CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, BECAUSE THE DEPARTMENT'S CAVALIER CONDUCT IN CREATING THE NEW BASE PLAN CONSTITUTED "TRULY IRRATIONAL" STATE ACTION IN VIOLATION OF R.S.Mo. §84.160.8(3).

City of Joplin v. Joplin Water Works Co., 386 S.W. 2d 369 (Mo. 1965)

Melton v. Country Mut. Ins. Co., 75 S.W. 3d 321 (Mo. App. E.D. 2002)

St. Louis Police Officers Ass'n v. Department of Police Comm'rs, 846 S.W.2d 732

(Mo. App. E.D. 1992)

ARGUMENT

I.

THE TRIAL COURT ERRED IN HOLDING THAT THE DEPARTMENT'S ACTIONS IN DRAMATICALLY REDUCING THE HEALTH INSURANCE BENEFITS THAT IT IS REQUIRED TO PROVIDE TO RETIREES DID NOT CONSTITUTE A VIOLATION OF RETIREES' SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE DUE PROCESS CLAUSES OF ART. I, SECTION 10 OF THE MISSOURI CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION, BECAUSE THE DEPARTMENT'S CAVALIER CONDUCT IN CREATING THE NEW BASE PLAN CONSTITUTED "TRULY IRRATIONAL" STATE ACTION IN VIOLATION OF R.S.Mo. §84.160.8(3).

The Department contends the New Base Plan is not "illusory". Respondent's Substitute Brief, p. 26. It cites certain features of this plan that undoubtedly *exist*, as in the sense they are real, not imagined, So, Respondents are correct that the New Base Plan is not an illusion; it actually exists.

The reality of the New Base Plan, ironically, is exactly what makes it a living nightmare for the Retirees. Moreover, the fact that it is not "illusory" does not provide any guidance as to whether its benefits possibly could satisfy the Department's statutory obligation to provide "health...insurance coverage for [its] retired officers...." §84.160.8(3), R.S. Mo.

The Department's rote recitation of the mantra that the plan is real, not illusory, just cannot substitute for a meaningful test for determining whether the Department has discharged its statutory responsibility. For example, if the New Base Plan were to have a \$50,000 individual annual deductible, the plan would be "real" and not "illusory", but would it comport with the law? Surely not.

Melton v. Country Mut. Ins. Co., 75 S.W. 3d 321, 327 (Mo. App. E.D. 2002) does not, contrary to the Department's contention,¹ support using illusoriness as a standard. *Melton* simply rejected an insured's argument that certain terms in her policy created an ambiguity, rendering one of its provisions non-existent, or "illusory". The court found the language of the policy to be "unambiguous." *Id.* at 327. The Court did not purport to use the standard of illusoriness as a test for determining compliance with a vague statutory requirement.

The Department also relies upon the case of *St. Louis Police Officers Association v. Department of Police Commissioners*, 846 S.W.2d 732 (Mo. App. E.D. 1992), in support of its argument that the Retiree Health Insurance Statute does not require it to provide any particular level of insurance coverage and that it is within the broad discretion of the Department to make such a determination. However, the Department's focus on the language in that opinion that discusses its broad discretion ignores the other half of the Court's reasoning. In *St. Louis Police Officers Association*, much as in this case, the Court considered what is meant by §84.160's requirement that the Department provide "salary continuation" benefits for certain

¹ Respondents' Substitute Brief, p. 27.

employees who are injured in the course of their employment. *Id.* at 733. The association, in that case, contended that this term required the Department to continue a temporarily disabled employee’s salary at a one-hundred percent level. *Id.*

Conversely, the Department contended that the statute’s silence as to what level of “salary continuation” benefits it required justified the Department’s decision to reduce the amount paid to such an employee from one-hundred percent to two-thirds. *Id.*

The Court, in analyzing the meaning of the undefined and ambiguous term “salary continuation” first looked to the dictionary. *Id.* at 737-738. However, its analysis did not end there. It then considered the insurance market for such benefits and what sort of “salary continuation” benefits employers commonly offer. In so doing, the Court reasoned that “insurance policies [available in the market] provide for, and employers generally pay, two-thirds salary during periods of temporary disability...” *Id.* at 738. Only after engaging in its analysis of what is common in the insurance market and among employers did the Court consider the silence of the statute and the Department’s discretion. With the benefit of this analysis of what is usual in the real world, the Court concluded that the Department is not required to provide full salary under the provision requiring “salary continuation” benefits.

In this case, the Department asks the Court to effectively ignore the Court’s analysis in the *St. Louis Police Officers Association* case except for the portion that acknowledges the Department’s discretion under the statute. However, *St. Louis Police Officers Association* does not warrant the conclusion that the Department possesses unfettered discretion to determine the level of benefits called for by the

statute. The Department's initial position in the *St. Louis Police Officers Association* case was that it could provide "salary continuation" benefits in the flat amount of \$20.00 per day. The Department argued, much as it has in this case, that its broad discretion permitted such an interpretation. The Court in that case flatly rejected this argument.

Likewise, the Court should reject the Department's position in this case. The Department's assertion that the statute contains no standards and, therefore, the levels of benefits mandated thereby should be governed only by the Department's discretion finds no support in the law and should be rejected.

Just as in *St. Louis Police Officers Association*, it is appropriate and necessary for a court to determine what is normal in the marketplace (*i.e.*, commercially reasonable) in determining whether the benefits afforded by the Department satisfies the Retiree Health Insurance Statute. Applying such a standard, the evidence in the record overwhelmingly established that the New Base Plan was so poor in its quality as to be unprecedented.

As Retirees explained in their opening Substitute Brief, the legislature occasionally crafts statutes that are not models of clarity. Appellants' Substitute Brief, pp 24-30. When disputes arise under such ambiguous statutes, courts have "adopted...construction[s]" that give the statutes sensible meaning. *City of Joplin v. Joplin Water Works Co.*, 386 S.W. 2d 369, 374 (Mo. 1965). The Department neglects to respond in its Substitute Brief to the law cited by the Retirees concerning a Court's obligation to give meaning to vague statutes; that silence is pregnant, because this

principle marks the only path out of the wilderness the General Assembly created by failing to provide any criteria or guidance in the text of the Retiree Health Insurance Statute.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Trial Court and remand this case to the Trial Court for further disposition consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

**The undersigned certifies that one (1) true and correct copy of the
foregoing brief, and a diskette containing the foregoing brief, were sent, via U.S.
Mail, postage pre-paid, this _____ day of March, 2008 to: Patricia Hageman,
City Counselor, 314 City Hall, St. Louis, MO 63103.**

CERTIFICATE OF COMPLIANCE

I, Elkin L. Kistner, certify that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on Microsoft Word 2003 on which it was prepared, contains 1,706 words, exclusive of the cover, the Certificate of Service, this Certificate of Compliance, and the signature block.

The undersigned further certifies that the version of this brief filed on computer diskette pursuant to Local Rule 363 complies with Missouri Supreme Court Rule 84.06(h) because it has been scanned for viruses and it is virus-free.

Respectfully submitted,

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