IN THE SUPREME COURT OF MISSOURI

GILBERT L. ALDERSON, et. al.	)	
	)	
	)	
v.	)	Appeal No. SC89370
	)	
	)	
STATE OF MISSOURI, et. al.	)	

APPEAL FROM THE CIRCUIT COURT OF THE 19TH JUDICIAL CIRCUIT OF MISSOURI, COLE COUNTY, MISSOURI
HONORABLE RICHARD G. CALLAHAN, PRESIDING

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

Appellants' Gilbert L. Alderson, Joseph J. Polette, and Theodore R. Allen, Jr., are the Juvenile Officer, Chief Deputy Juvenile Officer, and chief attorney for the 23rd Judicial Circuit of Missouri, composed of the single county of Jefferson, which does not have a charter form of government. As such, Appellants' are appointed by the Circuit Court of the 23rd Judicial Circuit, serve at the pleasure of the court, and all of Appellants' work and responsibilities are directed and controlled by the circuit court. Appellants are totally compensated by Jefferson County, with the exception of Juvenile Officer Alderson who receives a part of his salary from the state due to his appointment before July 1, 1999, pursuant to Section 211.393, RSMo, and the remainder from the county, and receive other county-paid benefits, including LAGERS retirement.

Appellants' brought suit for a declaratory judgment that the provisions of Sections 50.1000, 50.1010, and 211.393, RSMo, denying them County Employment Retirement Fund (CERF) membership and benefits based on their appointment by the circuit court violate the equal protection clauses of the United States and Missouri Constitutions, the separation of powers doctrine of Article II, Section 1 of the Missouri Constitution, and the

prohibition against enactment of special laws found in Article III, Section 40 of the Missouri Constitution.

Appellants' Motion for Summary Judgment was denied by the trial court, and CERF's Motion for Summary Judgment sustained. Since the basis for appeal involves the constitutional validity of Sections 50.1000, Section 50.1010, and 211.393, RSMo, exclusive appellate jurisdiction in this case is in the Supreme Court of Missouri under Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

Appellant Alderson is the Juvenile Officer for the Twenty-Third Judicial Circuit of Missouri, which is Jefferson County, appointed in 1986 by the Circuit Court, and receives salary in part from the State of Missouri and in part from Jefferson County, Missouri, pursuant to Section 211.393, RSMo. Appellants Polette and Allen are respectively the Chief Deputy Juvenile Officer and attorney for the Twenty-Third Judicial Circuit, also appointed by authority of the Circuit Court, and are paid exclusively from Jefferson County funds appropriated as part of the judicial budget of the Twenty-Third Circuit. (L.F. 89-90).

Appellants brought this action for a declaratory judgment to determine whether they were and are unlawfully and unconstitutionally excluded from membership in the County Employee's Retirement Fund (CERF), originally by administrative action of the CERF board and subsequently by administrative rule adopted by the CERF board and statutory amendments to the enabling CERF legislation found in Chapter 50, RSMo, and to Section 211.393, RSMo. (L.F. 6). This exclusion is because of Appellants' status as juvenile office personnel appointed by and under the control of the circuit court of a single county judicial circuit located in a county without a charter form of government, although Appellants are compensated by the county

and considered county employees for all benefit purposes except CERF under Section 211.393, RSMo. This action does not involve any juvenile office personnel appointed by a circuit court in a multi-county judicial circuit because they are now state employees under Section 211.393. 2., RSMo. Nor does this case involve juvenile office personnel in any single county judicial circuit located in a county with a charter form of government, as CERF never covered counties with a charter form of government. Section 50.1000 (5), RSMo. Appellants originally named the State of Missouri, the Governor, and the Attorney General as defendants due to the constitutional challenge to statutes alleged, in addition to CERF and its board members. (L.F. 6). On December 19, 2006, the Attorney General moved that the State, the Governor, and the Attorney General be dismissed as parties to the case, acknowledging that notice of the constitutional challenge had been given. (L.F. 28). The State, the Attorney General, and the Governor were dismissed as parties on January 8, 2007. (L.F. 31).

Effective August 28, 1994, the General Assembly created the County Employee's Retirement Fund. Section 50.1010, RSMo. (1994). The act now provides that penalties collected under §137.280 and 137.345, RSMo, (for late filing of personal property declarations), are to be deposited in the County Employees' Retirement Fund (CERF). Each CERF-eligible county

is also now required to contribute to the fund an amount equal to four percent of each employee's compensation each payroll period, for employees hired or rehired after February 2002. Section 50.1020, RSMo. (Cum. Supp. 2007)

Originally, Section 50.1000 (8), RSMo (1994), made eligible for retirement benefits:

> any county elective or appointive officer or employee whose position requires the actual performance of duties during not less than one thousand hours per year, except county prosecuting attorneys covered under sections 56.800 to 56.840, RSMo, circuit clerks and deputy circuit clerks covered under the Missouri state retirement system and county sheriffs covered under sections 57.949 to 57.997, RSMo.

Section 50.1000(5), RSMo, defined "county" to exclude any city not within a county [St. Louis City] and counties of the first classification with a charter form of government.

Following creation of the County Employee's Retirement Fund in 1994, Appellants Alderson, Allen, and Polette were enrolled in the CERF program at the invitation of Jefferson County, and executed the necessary enrollment documents. (L.F. 43, 47-48, 53). In July 1995, Appellant

Alderson, as Juvenile Officer and administrative head of the Juvenile Office of the Twenty-Third Circuit, received notice by letter that CERF no longer recognized juvenile office employees as "county employees" eligible for CERF participation. (L.F. 74).

After the July 1995 determination by the CERF board that juvenile office personnel were not county employees for the purpose of their inclusion in CERF, the CERF board adopted 16 CSR 50-2.010(1) (L), effective May 30, 1996. That rule defined "employee" to exclude from CERF eligibility "individuals who receive some pay from a county but who are subject to the hiring, supervision, promotion or termination by an independent administrative body (such as the circuit court) . . ."

Adding another layer excluding county-paid single county judicial circuit juvenile court appointees from CERF, Section 50.1000 (8), RSMo, was amended in 1998 to define an employee eligible for CERF as:

> any county elective or appointive officer or employee *who is hired and fired by the county and whose work and responsibilities are directed and controlled by the county and who is compensated directly from county funds* whose position requires the actual performance of duties during not less than one thousand hours per year, except county prosecuting

attorneys covered pursuant to sections 56.800 to 56.840, RSMo, circuit clerks and deputy circuit clerks covered under the Missouri state retirement system and county sheriffs covered pursuant to sections 57.949 to 57.997, RSMo, in each county of the state, except for any city not within a county and any county of the first classification having a charter form of government. (Amending language italicized). Section 50.1000 (8), RSMo. (2000).

Section 50.1000 (8), RSMo, was further amended in 2001, and now provides that CERF includes:

any county elective or appointive officer or employee who is hired and fired by the county *or by the circuit court located in a county of the first classification without a charter form of government which is not participating in LAGERS, whose work and responsibilities are directed and controlled by the county or circuit court located in a county of the first classification without a charter form of government which is not participating in LAGERS* . . . (amendment italicized). Section 50.1000 (8), RSMo (Cum. Supp. 2007).

This provision covered only personnel appointed by the Circuit Court of Boone County. It does not affect juvenile court personnel in Boone County, as they have been state employees under Section 211.393, RSMo since July 1, 1999, because Boone County is not in a judicial circuit composed of a single county.[1]

At the same time of this last amendment to §50.1000 (8), the General Assembly amended §50.1010, RSMo, to add the following language:

> Notwithstanding any provision of sections 50.1000 to 50.1200 to the contrary, an individual who is in a job classification that the retirement system finds not eligible for coverage under the retirement system as of September 1, 2001, shall not be considered an employee for purposes of coverage in the

[1] In *Boone County v. County Employee's Retirement Fund*, 26 S.W.3d 257 (Mo. App. W.D. 2000), examples of such personnel were identified as a court security officer/marshal, a secretary for the court administrator, and a court services officer, who were subject to hiring and firing by the court administrator and whose work and job responsibilities were supervised and directed by the court administrator, presumably under the ultimate authority of the circuit court.

retirement system, unless adequate additional funds are provided for the costs associated with such coverage.

Effective July 1, 1999, the General Assembly amended Section 211.393, RSMo, to provide that all juvenile court appointees in judicial circuits composed of more than one county became state employees. Also effective that same date, juvenile court appointees in judicial circuits composed of a single county were statutorily defined as county employees. Section 211.393. 2. (1) (a) now provides that Juvenile Officers employed in a single county judicial circuit on or before July 1, 1999, are "county employees on that portion of their salary provided by the county at a rate determined pursuant to section 50. 640, RSMo." (The judicial budget provisions). Subdivision (b) of this section also provided that this class of Juvenile Officers (*i.e*. the appointed chief of the juvenile office) "may participate as members in a county retirement plan on that portion of their salary provided by the county [exceptions omitted]." Appellant Alderson is in this situation.

Section 211.393. 2. (3) (a) and (b), RSMo, effective July 1, 1999, also now provides that all other juvenile court employees who are employed in a single county circuit on or after July 1, 1999, are county employees and shall "in accordance with their status as county employees, receive other county-

provided benefits including retirement benefits from the applicable county retirement plan . . . " Appellants Allen and Polette are in this situation.

But, subsection 1, subdivision (1) of Section 211.393, RSMo, also as enacted effective July 1, 1999, specifically defines county retirement plan "not to include the county employee's retirement system as provided in sections 50.1000 to 50.1200, RSMo." Further, subsection 5 of Section 393, RSMo, as effective July 1, 1999, provides that [n]o juvenile court employee employed by any single or multicounty circuit shall be eligible to participate in the county employees' retirement system fund pursuant to sections 50.1000 to 50.1200, RSMo." Thus, Appellant Alderson for the part of his salary derived from county funds, and Appellants Allen and Polette are denied CERF membership due to this provision, although the General Assembly has recognized by statute their status as county employees for all other purposes, except hiring, firing, and supervision of duties which remain with the circuit court.

On October 13, 2006, Appellants Alderson, Allen, and Polette (along with Susan Nuckols, who died while this case was pending), filed a petition for a declaratory judgment in the Circuit Court of Cole County, Missouri. (L.F. 6). In that petition, Appellants sought a judgment declaring that the provisions of Section 50.1000, RSMo, Section 50.1010, RSMo, Section

211.393, RSMo, and 16 CSR 50-2.010(1)(L) that excluded them from CERF membership because of their appointment by the circuit court violated the equal protection clauses of Amendment XIV of the United States Constitution and Article I, Section 2 of the Missouri Constitution, violated the separation of powers guaranteed by Article II, Section 1 of the Missouri Constitution, and violated the special laws prohibition of Article III, Section 40 of the Missouri Constitution. Appellants also sought a declaratory judgment that they were and are "county" employees upon proper analysis of case law as it existed prior to the statutory amendments that specifically excluded Appellants from CERF membership.

Both Appellants, as Plaintiffs in the trial court, and Respondent CERF filed motions for summary judgment. (L.F. 32, 55). On May 1, 2008, the trial court denied Appellants' motion for summary judgment and granted summary judgment for Respondents. (L.F. 89). In its ruling, the trial court held that the provisions of Sections 50.1000 and 211.393, RSMo that excluded Appellants from CERF membership did not violate equal protection, were not special laws, and did not infringe upon the authority of the judiciary as Appellants' appointing authority in violation of separation of powers. Given its findings in this regard, the trial court did not rule upon Appellants' claim that they were and are county employees upon proper

analysis of case law, as it existed prior to the statutory amendments that specifically excluded Appellants from CERF membership. The trial court also ruled that Respondents' pleaded affirmative defense of laches was moot, since it found the statutes at issue constitutional.

This Appeal followed.

POINTS RELIED ON

I.

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT FOR RESPONDENTS BECAUSE SECTION 50.1000 (8), RSMO, SECTION 50.1010, RSMO, SECTION 211.393. 1. (1) AND 5, RSMO, AND 16 CSR 50-2.010(1)(L) THAT EXCLUDE APPELLANTS AS JUVENILE OFFICE PERSONNEL OTHERWISE DEEMED COUNTY EMPLOYEES FROM CERF MEMBERSHIP DUE ONLY TO THEIR APPOINTMENT BY THE CIRCUIT COURT VIOLATE EQUAL PROTECTION OF THE LAWS GUARANTEED BY AMENDMENT XIV OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION IN THAT THE CLASSIFICATIONS CONTAINED IN THOSE STATUTES AND ADMINISTRATIVE RULE ARE ARBITRARY AND DO NOT RATIONALLY RELATE TO ANY LEGITIMATE STATE INTEREST.

Constitutional Provisions Relied On:

U.S. CONST., amend. XIV, § 1

MO. CONST., art. I, § 2

Cases Relied On

Barbour County Commission v. Employees of the Barbour County Sheriff's Department, 566 So.2d 493 (Ala. 1990).

Ranschburg v. Toan, 709 F.2d 1207 (8th Cir. 1983).

Sommer v. Bihr, 631 F. Supp 1388 (U.S. D.C. W.D. Mo. 1986).

II.

THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND BY ENTERING SUMMARY JUDGMENT FOR RESPONDENTS BECAUSE 16 CSR 50-2.010 (1) (L), SECTION 211.393 1. (1), RSMO, SECTION 211.393. 5, RSMO, AND SECTION 50.1000 (8), RSMO, VIOLATE THE SEPARATION OF POWERS GUARANTEED IN ARTICLE II, SECTION 1 OF THE MISSOURI CONSTITUTION, BECAUSE THE REGULATION AND STATUTES DENY APPELLANTS CERF MEMBERSHIP SOLELY BECAUSE AN ARM OF THE JUDICIAL BRANCH OF GOVERNMENT, THE CIRCUIT COURT, IS THE APPOINTING AND SUPERVISING AUTHORITY FOR APPELLANTS.

Constitutional Provisions Relied On:

MO. CONST., art. II, § 1

Cases Relied On:

Smith v. Thirty-Seventh Judicial Circuit, 847 S.W.2d 755 (Mo. banc 1993).

State ex. rel. Weinstein v. St.Louis County, 451 S.W.2d 99 (Mo. banc 1970).

III.

THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND BY ENTERING SUMMARY JUDGMENT FOR RESPONDENT CERF IN THAT 16 CSR 50-2.010 (1) (L), SECTION 211.393. 1. (1), RSMO, SECTION 211.393. 5, RSMO, SECTION 50.1000 (8), RSMO, AND SECTION 50.1010, RSMO, THAT OPERATE INDIVIDUALLY AND COLLECTIVELY TO DENY APPELLANTS ELIGIBILITY FOR CERF MEMBERSHIP BECAUSE APPELLANTS ARE HIRED, FIRED, AND SUPERVISED BY THE JUDICIARY ALTHOUGH PAID BY THE COUNTY ARE SPECIAL LAWS PROHIBITED BY ARTICLE III, SECTION 40 OF THE MISSOURI CONSTITUTION IN THAT SAID LAWS DO NOT APPLY TO ALL EMPLOYEES OF THE CLASS OF COUNTY EMPLOYEES WITHOUT A SUBSTANTIAL JUSTIFICATION FOR THIS DISTINCTION.

Constitutional Provision Relied On:

MO. CONST., art. III, § 40.

Cases Relied On:

Jefferson County Fire Protection District Association v. Blunt, 205 S.W.3d 866 (Mo. banc 2007).

City of Springfield v. Spring Spectrum, 203 S.W.3d 177 (Mo. banc 2006).

State ex. rel. Public Defender Commission v. County Court of Green County, 667 S.W.2d 409 (Mo. banc 1984).

State v. Cella, 32 S.W.3d 114 (Mo. banc 2000).

IV.

THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND BY GRANTING SUMMARY JUDGMENT FOR RESPONDENTS IN THAT THE COURT SHOULD HAVE RULED THE STATUTES THAT PRECLUDE APPELLANTS FROM CERF MEMBERSHIP UNCONSTITUTIONAL AS ARGUED ABOVE AND THEREAFTER RULED THAT APPELLANTS' 1995 EXCLUSION FROM CERF BY CERF BOARD OF DIRECTORS' ACTION BASED ON INTERPRETATION OF CASE LAW WAS IN ERROR BECAUSE EXISTING CASE LAW WAS THAT JUVENILE OFFICE PERSONNEL APPOINTED BY THE CIRCUIT COURT WERE COUNTY EMPLOYEES FOR THE PURPOSE OF PAY AND BENEFITS.

Cases Relied On:

Hastings v. Jasper County, 282 S.W.700 (Mo. 1926).

Smith v. Thirty-Seventh Judicial Circuit, 847 S.W.2d 755 (Mo. banc 1993).

State ex. rel. Weinstein v. St.Louis County, 421 S.W.2d 249 (Mo. banc 1967).

V.

THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND BY GRANTING SUMMARY JUDGMENT FOR RESPONDENTS IN THAT THE COURT SHOULD HAVE RULED THE STATUTES THAT PRECLUDE APPELLANTS FROM CERF MEMBERSHIP UNCONSTITUTIONAL AS ARGUED ABOVE , THEREAFTER RULED THAT APPELLANTS' 1995 EXCLUSION FROM CERF BY CERF BOARD OF DIRECTORS' ACTION BASED ON INTERPRETATION OF CASE LAW WAS IN ERROR BECAUSE EXISTING CASE LAW WAS THAT JUVENILE OFFICE PERSONNEL APPOINTED BY THE CIRCUIT COURT WERE COUNTY EMPLOYEES FOR THE PURPOSE OF PAY AND BENEFITS, AND BEFORE SO DOING, RULED THAT APPELLANTS' CLAIMS WERE NOT BARRED BY LACHES.

Cases Relied On:

Metropolitan Sewer District v. Zykan, 495 S.W.2d 643 (Mo. 1973).

Port Perry Marketing Corp. v. Jenneman, 982 S.W.2d 789 (Mo. App. E.D., 1998).

STANDARD OF REVIEW ON SUMMARY JUDGMENT

This appeal is from a summary judgment entered for Respondent CERF and from a denial of a motion for summary judgment made by Appellants Alderson, Allen, and Polette. Under Supreme Court Rule 74.04, summary judgment may be entered when there is no genuine dispute as to the material facts of a lawsuit, and the facts as admitted or established show a legal right to judgment for the party claiming that summary judgment is merited. A trial court's summary judgment is reviewed *de novo* on appeal. *ITT Commercial Financial Corp. v. Mid-Am Marine*, 854 S.W.2d 371, 376 (Mo. banc 1993).

Since all of the points on appeal are from a summary judgment for Respondent CERF, and the denial of Appellants' motion for summary judgment, this standard of review applies to all of the points of error, and will not be repeated under each point.

ARGUMENT

I.

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING SUMMARY JUDGMENT FOR RESPONDENT BECAUSE SECTION 50.1000 (8), RSMO, SECTION 50.1010, RSMO, SECTION 211.393. 1. (1) AND 5, RSMO, AND 16 CSR 50-2.010(1)(L) THAT EXCLUDE APPELLANTS AS JUVENILE OFFICE PERSONNEL OTHERWISE DEEMED COUNTY EMPLOYEES FROM CERF MEMBERSHIP DUE ONLY TO THEIR APPOINTMENT BY THE CIRCUIT COURT VIOLATE EQUAL PROTECTION OF THE LAWS GUARANTEED BY AMENDMENT XIV OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION IN THAT THE CLASSIFICATIONS CONTAINED IN THOSE STATUTES AND ADMINISTRATIVE RULE ARE ARBITRARY AND DO NOT RATIONALLY RELATE TO ANY LEGITIMATE STATE INTEREST.

STANDARD OF REVIEW

In determining whether a statutory or regulatory classification violates the equal protection of the laws guaranteed by Amendment XIV of the United States Constitution and Article I, Section 2 of the Missouri Constitution, the first issue on appellate review is whether

the classification targets a suspect class of individuals or infringes upon a fundamental right protected by the Constitution. *Missourians for Tax Justice Educ. Project v. Holden,* 959 S.W.2d 100, 103 (Mo. banc 1997). There is no existing authority that the classifications here do. Accordingly, the standard of appellate review is whether the classifications excluding Appellants from CERF membership found in Section 50.1000, RSMo, Section 211.393, RSMo, and 16 CSR 50-2.010 (1) (L) are "rationally related to a legitimate state interest." *Id*. The analysis is two-fold: the legislative end must be legitimate; the means to that end reasonable. As this Court has pointed out, "it is arbitrary discrimination violating the Equal Protection Clause of the 14th Amendment to make exclusions not based on differences reasonably related to the purposes of the Act." *Pettit v. Field*, 341 S.W.2d 106, 109 (Mo. 1960). The statutes and regulation at issue fail this test.

INTENT OF ORIGINAL CERF STATUTE

The trial court found that the General Assembly's purpose in creating the County Employee Retirement Fund in 1994 was to "provide retirement benefits for employees of counties other than first class charter counties and the City of St. Louis." (L.F. 92). The court also found that at the time CERF

was formed, "more than 50 counties offered no retirement benefits to their workers." (*Id*.) Respondent has agreed that this was the original purpose of CERF. (L.F. 67).

With this legislative intent, the original definition of "county employee" eligible for inclusion in CERF was "any county elective or appointive officer or employee whose position requires the actual performance of duties during not less than one thousand hours per year. . ." Section 50.1000 (8), RSMo (1994). The act did exclude from eligibility for CERF membership elected prosecuting attorneys covered under the Prosecuting Attorneys and Circuit Attorneys Retirement Fund, elected county sheriffs covered under the Sheriff's Retirement Fund, and circuit clerks and deputy circuit clerks covered under MOSERS. There was no further definition of employee in the original 1994 version of Section 50.1000. (8), RSMo, and no legislative history of the meaning of the term. Further, CERF specifically provided for county employees who were members of CERF to also be members of the Local Area Government Employees Retirement System (LAGERS). Section 50.1160, RSMo (2000). There was no legislative intent to restrict county employees to one retirement system only. Thus, the trial court's finding that there is no right to any retirement system, much less two - while accurate - is irrelevant to the

issue at hand: whether the statutes and regulations here violate equal protection. (L.F. 7). This is not *Massey v. McGrath*, 965 S.W.2d 678 (8th Cir. 1992), in which the court held that it was not irrational for the University of Missouri to decline to allow participation in two retirement systems.

As previously noted, the General Assembly did not define "employee" in the original version of Section 50.1000. (8), RSMo (1994), and there is no known legislative history of the original meaning of the term. Jefferson County enrolled Appellants in CERF, and other counties likewise enrolled judicially appointed juvenile office personnel in the program. (L.F. 20). Although it may be suggested that this enrollment was done in error by Jefferson County and officials of other counties, it is well-settled that statutory language should be given its plain and ordinary meaning, as clear and plain to a person of ordinary intelligence. *State v. Daniels*, 103 S.W.3rd 822, 826 (Mo. App. 2003). Read from this standard, the county personnel who enrolled Appellants and others similarly situated did not act improvidently. For a county clerk to add to a county retirement plan all persons on the county payroll, as were Appellants in 1994, seems only to follow common sense.

Moreover, at the time CERF was created, there was a body of case law, presumably known to the General Assembly, which held that juvenile office personnel such as Appellants were county employees for the purpose of pay and benefits, although appointed by the circuit court. In *Hastings v. Jasper County*, 282 S.W. 700 (Mo. 1926), this Court considered whether a person then termed a "probation officer" appointed by the circuit court acting as the juvenile court, was a "county officer" under statutes that determined what his salary should be, based on county population. This Court held that the probation officer was a "county officer" because his duties were wholly performed within the limits of the county, for the benefit of the people of the county, and because his salary was paid from county funds. Citing *Hastings*, this Court held in *State ex. rel. Weinstein v. St. Louis County*, 421 S.W.2d 249, 255 (Mo. banc 1967), that "personnel appointed for the assistance of the juvenile court . . . are employees of the county," although appointed by the circuit court and under the control of the circuit court. Lastly, in *Smith v. Thirty-Seventh Judicial Circuit*, 847 S.W.2d 755 (Mo. banc 1993), this Court held that a chief deputy juvenile officer was an employee of the circuit court for the purpose of supervision and control, and that the officer could be deemed either a state or county employee for the purpose of worker's compensation coverage, depending upon which entity

the court chose to pay for that coverage. In his concurring opinion, Judge Price wrote that the "control test is not always determinative" in finding or not the existence of an employer-employee relationship, that the term employee may have different meanings in different connections, and that this is particularly true when the employer is a judicial circuit because the judiciary had no means to compensate its appointees, although it had the authority to appoint and control them as an equal branch of government. *Id*. at 760. Upon his further analysis, Judge Price stated his opinion that the deputy juvenile officer in *Smith* was a county employee, because his compensation came from the county.

From this analysis, the plain language of original Section 50.1000 (8), RSMo (1994), making eligible for CERF membership "any county elective or appointive officer or employee . . ." expressed no intent to change the historical status that juvenile office personnel had enjoyed as county employees for the purpose of pay and benefits. Only subsequent events, and amendments to legislation, expressed that intent, and the nature of the events illustrate that the legislative amendments were irrational to any legitimate legislative purpose, and were done arbitrarily.

AMENDMENTS TO CERF STATUTE AND JUVENILE PERSONNEL STATUTES

On May 30, 1996, CERF adopted 16 CSR 50-2.010(1)(L), which defined "employee" to exclude from CERF eligibility "individuals who receive some pay from a county but who are subject to the hiring, supervision, promotion or termination by an independent administrative body (such as the circuit court) . . ." Following this, a sequence of statutory amendments began in 1998, when Section 50.1000 (8), RSMo, was amended to make eligible for CERF only "any county elective or appointive officer or employee *who is hired and fired by the county and whose work and responsibilities are directed and controlled by the county and who is compensated directly from county funds* . . .". Section 50.1000 (8), RSMo (2000). (amending language italicized). The sequence continued in 2001, when the section was amended to make eligible for CERF membership only "any county elective or appointive officer or employee who is hired and fired by the county *or by the circuit court located in a county of the first classification without a charter form of government which is not participating in LAGERS, whose work and responsibilities are directed and controlled by the county or circuit court located in a county of the first classification without a charter form of government which is not*

participating in LAGERS . . ." Section 50.1000 (8), RSMo. (Cum. Supp. 2007). (amendments italicized).

In conjunction with this last amendment to Section 50.1000 (8), RSMo, the General Assembly also amended Section 50.1010 to bar from CERF membership any person in a job classification that CERF determines was not eligible for CERF membership as of September1, 2001, unless that group, or some entity acting on its behalf, secured additional funding for CERF. Section 50.1010, RSMo. (Cum. Supp. 2007). This "bring your own money" provision would bar Appellants from CERF membership in addition to the more specific exclusion based on Appellants' appointments by the circuit as juvenile office personnel.

Additionally, the General Assembly amended Section 211.393, RSMo, effective July 1, 1999, to exclude county-paid, judicially appointed juvenile office personnel in single-county judicial circuits located in a county without a charter form of government, from CERF eligibility. Effective on that date, juvenile court appointees in judicial circuits composed of a single county were statutorily defined as county employees. Section 211.393. 2. (1) (a) now provides that Juvenile Officers employed in a single county judicial circuit on or before July 1, 1999, are "county employees on that portion of their

salary provided by the county at a rate determined pursuant to section 50. 640, RSMo." (the judicial budget provisions). Subdivision (b) of this section also provided that this class of Juvenile Officers (*i.e.* the appointed chief of the juvenile office) "may participate as members in a county retirement plan on that portion of their salary provided by the county [exceptions omitted]." Appellant Alderson is in this situation.

Section 211.393. 2. (3) (a) and (b), RSMo, effective July 1, 1999, also now provides that all other juvenile court employees who are employed in a single county circuit on or after July 1, 1999, are county employees and shall "in accordance with their status as county employees, receive other county-provided benefits including retirement benefits from the applicable county retirement plan . . . " Appellants Allen and Polette are in this situation.

But, subsection 1, subdivision (1) of Section 211.393, RSMo, also as enacted effective July 1, 1999, specifically defines county retirement plan "not to include the county employee's retirement system as provided in sections 50.1000 to 50.1200, RSMo." Further, subsection 5 of Section 393, RSMo, as effective July 1, 1999, provides that [n]o juvenile court employee employed by any single or multicounty circuit shall be eligible to participate in the county employees' retirement system fund pursuant to sections 50.1000 to 50.1200, RSMo." Thus, Appellant Alderson for the part of his

salary derived from county funds, and Appellants Allen and Polette are denied CERF membership due to this provision, although the General Assembly has recognized by statute their status as county employees for all other purposes, except hiring, firing, and supervision of duties which remain with the circuit court.

The trial court found that when CERF began in 1994, "the actuary for CERF assumed that the growth in county government employees would be relatively modest" and upon this assumption, that the original funding formula, which was not tied to the number of CERF members, would be sufficient to provide for the pension benefits contemplated by the program. (L.F. 92). Contrary to this actuarial assumption, CERF membership has been "explosive." (L.F. 93). This history then - post legislative enactment discovery of actuarial miscalculation and projected inability to fund the pension benefits originally intended - led to the exclusion from CERF of judicially appointed, county paid, juvenile office personnel in non-charter single county judicial circuits such as Appellants, rather than any considered legislative purpose to cover only persons who are hired, fired and supervised by a county elected or appointed official as the trial court found, even if that purpose could be deemed to have a rational basis to a legitimate legislative purpose. (L.F. 97).

In *Ranschburg v. Toan*, 709 F.2d 1207 (8th Cir. 1983), the Missouri General Assembly had by statute authorized the payment of funds for heating assistance to disabled and elderly persons who received social security disability benefits, supplemental security benefits, veterans benefits, state blind pensions, and state aid to blind persons, but did not provide those benefits to a person who participated in the Missouri Medical Assistance program, which also covered individuals defined as disabled under the social security or supplemental security income disability determination standards. The state argued that it had the right to supplement its welfare programs as it chose. In rejecting this argument, the 8th Circuit held that states "do not have unbridled discretion. They must still explain why they chose to favor one group of recipients over another" and that it was "untenable to suggest that a state's decision to favor one group of recipients over another by itself qualifies as a legitimate state interest. An intent to discriminate is not a legitimate state interest." *Id*. at 1211. The trial court's finding in this case fails to satisfy this test. The trial court held that restricting CERF membership to those who were hired, fired and ultimately controlled by a county official was "intuitively rational." This is identical to the position held untenable in *Ranschburg*; it merely describes the discrimination or classification, but does not give the reason for it that

rational basis analysis requires. In other words, the selection cannot be justified by the selection; there must be a reason for the selection rationally related to the legislative end intended, in this case the provision of retirement benefits to county employees, among whose number have historically been counted juvenile office personnel appointed by the circuit court but paid by the county.

In *Sommer v. Bihr*, 631 F. Supp. 1388 (U.S. D.C. W.D. Mo. 1986), the federal court dealt with a Missouri statute which involved retirement benefits afforded certain teachers. The teachers in that case were employed by the state departments of correction and mental health. By statute, they were required to contribute toward the Teacher Retirement System, and were denied retirement benefits under the Missouri State Employee's Retirement System (MOSERS), which was fully funded by the state and did not require employee contribution. The court held that the classification of this group of state employees and differential treatment in retirement plans violated equal protection in that it was unrelated to any legitimate purpose and was irrational. In essence, the court held that state employees, who it found did similar jobs, could not be treated differently; one group of such employees could not receive fully funded retirement benefits while another had to contribute toward such benefits. The same should hold true for all county

employees to have access to CERF, regardless of the identity of the judicial branch as the appointing authority.

In this case, the equal protection violation is more egregious. In *Sommer*, each of the employee groups had access to a retirement system; one group of employees had to contribute out of pocket toward it; the other did not. Here, Appellants are totally denied access to a retirement system provided other county employees solely because they were appointed by the judiciary. The identity of the appointing authority has no articulated rational basis to the legitimate legislative purpose of providing retirement benefits to county employees, among whom have historically been included juvenile office personnel appointed by the circuit court but afforded pay and benefits by the county.

In *Barbour County Commission v. Employees of the Barbour County Sheriff's Department*, 566 So. 2d 493 (Ala. 1990), the Alabama Supreme Court considered an equal protection challenge to a county commission decision that made eligible for retirement benefits certain county employees, while denying those benefits to other county employees, specifically those within the county sheriff's department, tax assessor's office, tax collector's office, and juvenile office. The court held that such classification violated the equal protection clause of Amendment XIV of the United States

Constitution. The court reasoned that "if a classification is to withstand an equal protection analysis, it must be reasonable, not arbitrary, and must rest upon such ground of difference having a fair and substantial relation to the object of the legislation, so that all persons in a similar situation would be treated essentially the same," citing *Stanton v. Stanton*, 421 U.S. 7 (1975). The Barbour County court noted that there was:

> no logical and reasonable distinction between work performed by secretaries and clerks in the Tax Assessor's, Tax Collector's and Juvenile Probation Office who are not covered and secretaries and clerks who work in the Engineer's and County Commission office who are covered.

It may be suggested that *Barbour County* is distinguishable because of the opinion's reference to all of the personnel at issue being hired and controlled by the County Commission, but this distinction does not rob the decision of its applicability here. Unlike in Alabama, there is no unified county appointing authority in Missouri; the county does not exist as a hiring, firing, and supervisory entity. There are county employees eligible for CERF membership who are hired and under the supervision of the County Commission, and also who are hired and under the supervision of other county office holders who are independent of the County Commission,

such as the Recorder of Deeds and the Assessor. Further, although the trial court found that the fact that Appellants are not controlled by an elected county office holder was a rational basis for the classifications in the statutes at issue here that deny Appellant's membership in CERF, the General Assembly by its 2001 amendment of Section 50.1000 (8), RSMo, abdicated this rationale for the classification, if indeed the General Assembly ever had that rationale.

INCLUSION OF SOME JUDICIAL PERSONNEL IN CERF

Only certain judicial appointees are now denied CERF coverage. Now, pursuant to the 2001 amendment to Section 50.1000 (8), RSMo, judicial appointees who are paid by the county are included in CERF if they are hired and fired by the circuit court in a county of the first classification without a charter form of government which is not participating in LAGERS. This act by the General Assembly negates any possible argument that the work done by a judicially appointed attorney paid by the county is so different from work done by personnel appointed by the county commission, *e.g.*, the county counselor, as to create a rational basis for the unequal treatment. The same would hold true for clerical, supervisory, and other personnel appointed by the circuit court who serve within the juvenile office. No argument has been made that the nature of work done by

Appellants differentiates them from attorneys and administrative personnel who work for other office holders.

Further, the 2001 inclusion of some judicial appointees who are paid by the county - but not others - eviscerates the trial court's finding and any argument that the General Assembly's purpose in creating CERF was to provide retirement benefits to appointees of county elected officeholders only, even if that purpose could be deemed rational. Judicial appointees who are paid by a county which does not participate in LAGERS (Boone County) are members of CERF, although they are not appointed by a county elected office holder; judicial appointees who are paid by a county which does participate in LAGERS are not so favored. Section 50.1000 (8), RSMo. (Cum. Supp. 2007). This sequence of legislative events demonstrates the arbitrary and hodge-podge approach to providing retirement benefits found to violate equal protection in *Sommer v. Bihr*, 631 F. Supp. at 1391.

Finally, the trial court's summary judgment relied extensively on its belief that granting the relief Appellants seek would wreak financial havoc on CERF, adding as many as 1,500 new members to it. (L.F. 93). If that number were added, purportedly existing CERF retirees' benefits would have to be reduced by as much as 14 percent. (L.F. 94). The trial court's reliance was misplaced and based on speculation by CERF Executive

Director Maxwell and extrapolation of that speculation by CERF actuary Munzenmaier. (L.F. 61, 62). There is no uncontroverted evidence that by granting the relief Appellants seek, the trial court or this Court would set a precedent that "all juvenile court employees not currently enrolled in MOSERS, and other employees hired and fired by the circuit court, but paid with county funds, and likely still other employees hired and fired by other than the county but paid with county funds" would be added to CERF and that this group would total 1,500. (L.F. 93-94).This case involves three named persons who are employed in the juvenile office of the circuit court of the Twenty-Third Judicial Circuit; who are appointed by the circuit court and answer only to the circuit court; but whose pay and benefits come from Jefferson County, with the exception that Appellant Alderson is paid partially by the state due to his appointment as Juvenile Officer before July 1, 1999. (L.F. 1-3). Mr. Alderson's successor will be fully paid by the county under Section 211.393. 2. (2), RSMo. Any precedent that might arise from the relief Appellants seek would be confined to persons similarly situated to Appellants. As the trial court found, the fiscal note for Senate Bill 850, introduced in 2006, estimated that 425 persons would be added to CERF if juvenile court personnel in single county judicial circuits located in a county without a charter form of government (Clay, Cole, Greene, Jasper, Jefferson,

and Platte) were eligible for CERF membership. (L.F. 94). That other persons may use precedent set by this Court to seek admission to CERF, if this Court finds that the statutes at issue violate equal protection, is no reason to deny Appellants relief. And, even if CERF would have to enroll all juvenile court employees not enrolled in MOSERS and other employees hired and fired by the circuit court, perhaps it is time that precedent is set that personnel hired by the circuit court to fulfill the duties of the court, although paid by the county, may not be treated differently for pay and benefits merely because they are appointed by the court which is dependent on funding provided by another branch of government. This will be further addressed in Point II.

Nor does the projection that benefits for existing members of CERF would have to be reduced if this Court grants the relief Appellants seek justify this Court's denial of that relief. Present law does not guarantee any particular benefit amount for any CERF beneficiary. Section 50.1010, RSMo, provides for apportionment of benefits (reduction) if insufficient funds are generated to provide the benefits in accord with CERF's statutory formula for any reason, *e.g.*, lack of predicted performance of investments, or, as the trial court alluded, the unexpected amount of growth in county employee numbers and perhaps future unexpected growth in the number of

county employees in job classifications that CERF now recognizes as eligible for inclusion in the program. (L.F. 93).

In sum, the trial court's judgment for CERF should be reversed in that, contrary to the judgment, the provisions of Sections 50.1000 (8), RSMo, 50.1010, RSMo, 211.393. 2. (3) (a) and (b), RSMo, and 211.393. 5. RSMo, as well as 16 CSR 50-2.010(1)(L), deny Appellants equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Missouri Constitution. As shown above, the statutes and regulation have no rational relationship to a legitimate state interest and are arbitrary. The statutes and regulation should be declared void *ab initio* under the principle that "an unconstitutional law is no law and confers no rights." *State ex. rel. Cardinal Glennon Memorial Hospital for Children v. Gaertner*, 583 S.W.2d 107 (Mo. banc 1979). Further, summary judgment should be entered for Appellants on this issue as there is no genuine dispute as to the material facts of this matter, and Appellants have shown their legal right to judgment based on the admitted and established facts.

II.

THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND BY ENTERING SUMMARY JUDGMENT FOR

RESPONDENTS BECAUSE 16 CSR 50-2.010 (1) (L), SECTION 211.393 1. (1), RSMO, SECTION 211.393. 5, RSMO, AND SECTION 50.1000 (8), RSMO, VIOLATE THE SEPARATION OF POWERS GUARANTEED IN ARTICLE II, SECTION 1 OF THE MISSOURI CONSTITUTION, BECAUSE THE REGULATION AND STATUTES DENY APPELLANTS CERF MEMBERSHIP SOLELY BECAUSE AN ARM OF THE JUDICIAL BRANCH OF GOVERNMENT, THE CIRCUIT COURT, IS THE APPOINTING AND SUPERVISING AUTHORITY FOR APPELLANTS.

Appellants' exclusion from the CERF program pursuant to 16 CSR 50-2.010(1)(L), the current version of Section 211.393, RSMo, and the current version of Section 50.1000 (8), RSMo, violates the principle of separation of powers of Article II, Section 1 of the Constitution of Missouri. That principle states simply that

> the powers of government shall be divided into three distinct departments - the legislative, executive and judicial - each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others. .

The General Assembly has assigned to the circuit court the Juvenile Officer, deputy juvenile officers, and support staff in order that the circuit

court may carry out the duties that the General Assembly has assigned to the judicial branch in Chapter 211, RSMo. Section 211.351, RSMo. (2000). Without doubt, circuit court control of juvenile office personnel is of constitutional significance. In *State ex. rel. Weinstein v. St. Louis County*, 451 S.W.2d 99 (Mo. banc 1970), (often called *Weinstein II*) the Supreme Court considered whether the Circuit Court of St. Louis County or the St. Louis County Council, had the authority to select and control personnel within the administrative and detention departments of the Juvenile Office, determine the number of such personnel, and fix the compensation of such personnel. The Supreme Court noted that "[t]hese questions involve the fundamental nature and function of the judicial department of government and of the powers which it possesses to carry out such functions," under Article II, Section 1 of the Constitution. *Id*. at 101. The Court held that "within the inherent power of the courts is the authority to do all things that are reasonably necessary for the administration of justice." *Id.* The Court further held that the judicial branch had the authority to appoint a staff and that the power to appoint necessarily carried with it the right to have staff paid salaries commensurate with the assigned responsibilities and that protection against encroachment by one branch of government upon the prerogatives of another was the prime responsibility of the courts.

After acknowledging in these terms the constitutional sanctity of judicial independence to appoint, control, and pay its staff, *Weinstein II* held that the St. Louis County Circuit Court, and not the St. Louis County Council, had the authority to select and control personnel within the administrative and detention departments of the Juvenile Office, determine the number of such personnel, and fix their compensation.[2] In part, that is, the *Weinstein II* court held that the judiciary had authority to set the salaries of its appointed personnel. The issue here is whether the administrative board of CERF and the General Assembly can do by the back door what they cannot do by the front. Can they affect the ability of the judicial branch of government, specifically the Juvenile Division that appointed Appellants, to secure the personnel it needs and must obtain in competition with other

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[2] *Weinstein II* was decided before the creation of the Judicial Finance Commission in 1982. Section 477.600, RSMo. Under current Section 50.640, RSMo, the circuit court may order its budget, including salary amounts for its appointees and the cost of additional personnel, but these figures are subject either to agreement by the county governing body or appeal by the county governing body to the Judicial Finance Commission. The circuit court's authority to set salaries for its appointees, or add additional personnel is thus limited.

offices within the county and affix their salary and benefits, when by administrative rule and legislation, such judicial appointees are denied a benefit afforded all other county employees due solely to their status as judicial appointees? To illustrate this point, an attorney appointed by the Juvenile Division of the Twenty-Third Judicial Circuit receives the salary set by the Circuit Court as part of the judicial budget established between the Circuit Court and the County Commission, and also receives certain retirement benefits afforded all other Jefferson County employees, *i.e.*, LAGERS. If that attorney transferred to the Prosecuting Attorney's office, he or she would do essentially the same work, but would receive LAGERS and also CERF benefits. The disadvantage to the Juvenile Division of the Circuit Court in competing for legal staff, in comparison to the Prosecuting Attorney's office, is readily apparent. Plaintiffs Alderson and Polette, both with college degrees and significant experience in administration of personnel and budgets, also have skills similar to those required of administrative personnel within other county departments who receive both LAGERS and CERF, but are themselves denied CERF eligibility solely because of their appointment by the judicial branch.

Contrary to the trial court's reasoning, (L.F. 100), the circuit court does not have unfettered authority to set salaries for the persons the court

appoints to serve the court within the juvenile office. The court cannot simply increase the salaries for Appellants and other juvenile office personnel to compensate for their exclusion from eligibility for CERF benefits.

Under Section 211.381, RSMo, the General Assembly set minimum salaries for Juvenile Officers and deputy juvenile officers (but not for juvenile office support staff), and provided for annual salary adjustments in accordance with Section 476.405, RSMo. But, under Section 211.394, RSMo, the circuit court is allowed to order salary compensation for juvenile office personnel above these minimum amounts only if the governing body of the city or county providing such additional compensation agrees, presumably pursuant to the circuit court budget provisions of Sections 50.640 and 50.641, RSMo, and the possibility of county governing body appeal of amounts the circuit court sets for salaries for its appointees to the Judicial Finance Commission under Section 476.600, RSMo.

Further, even if the circuit court could unilaterally set salaries for juvenile office personnel at a level to compensate them for their ineligibility for CERF membership, the juvenile office personnel such as Appellants would still be in an unequal position compared to county employees who are CERF members. The greater salaries would be taxable income. CERF is a

defined pension plan, with access to investment planning that the juvenile office employee would not have without cost. CERF provides for the employee to defer compensation. Section 50.1300, RSMo. CERF provides for the CERF board to match employee contributions to the CERF deferred compensation plan. Section 50.1230, RSMo.

In sum, it appears as if the General Assembly is attempting to have its cake and eat it too. In 1995, the General Assembly divided the juvenile court system in Missouri into two parts: one based on state compensation of personnel in multi-county judicial circuit juvenile offices; another based as before on county compensation of juvenile office personnel in the single county judicial circuits. Section 211.393, RSMo. (Cum. Supp. 2007). Since the judicial branch of government cannot raise its own funds to pay its appointees, *Smith v. Thirty-Seventh Judicial Circuit*, 847 S.W.2d 755, 760 (Mo. banc 1993) (Price, J., concurring), those appointees must be placed in a unit of government that has control of the purse for the purpose of pay and benefits. The General Assembly may elect to place appointees of the judicial branch into one unit of government or the other for this purpose, and has elected to place appointees of the circuit court in judicial circuits composed of a single county of the first classification in the county unit of government. Having made that election, the General Assembly cannot, Appellants

submit, treat those appointees differently from workers appointed by other departments of that unit of government without infringing on separation of powers. One doubts if this discussion would even be occurring if the General Assembly had made juvenile office personnel appointed by the circuit court in multi-county judicial circuits state employees, but for MOSERS eligibility, and thereby deprived those judicial appointees of the retirement benefit afforded all other state employees.

III.

THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND BY ENTERING SUMMARY JUDGMENT FOR RESPONDENTS CERF IN THAT 16 CSR 50-2.010 (1) (L), SECTION 211.393. 1. (1), RSMO, SECTION 211.393. 5, RSMO, SECTION 50.1000 (8), RSMO, AND SECTION 50.1010, RSMO, THAT OPERATE INDIVIDUALLY AND COLLECTIVELY TO DENY APPELLANTS ELIGIBILITY FOR CERF MEMBERSHIP BECAUSE APPELLANTS ARE HIRED, FIRED, AND SUPERVISED BY THE JUDICIARY ALTHOUGH PAID BY THE COUNTY ARE SPECIAL LAWS IN THAT SAID LAWS DO NOT APPLY TO ALL EMPLOYEES OF THE CLASS OF COUNTY EMPLOYEES WITHOUT A SUBSTANTIAL JUSTIFICATION FOR THIS DISTINCTION.

The statutes here at issue, Sections 211.393, RSMo, 50.1000 (8) and 50.1010, RSMo, violate Article III, §40 (30) of the Constitution of the State

of Missouri in that said statutes are special rather than general laws. Historically, special laws were those that benefited individuals rather than the general public. *Jefferson County Fire Protection District Association v. Blunt*, 205 S.W.3d 866, 868 (Mo. banc 2007). Whether a law is general or special is to be decided by a court without regard to any legislative assertion on the subject. *Id.* at 869. This Court has further recognized that general laws are those that relate to persons or things as a class, and that any statute that relates to particular persons or things of, or within a class, is a special law. *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 184 (Mo. banc 2006). Such a law - one that applies to a fixed subclass within a class - is constitutionally invalid unless substantial justification is shown for utilization of a special rather than a general law. *Id*. at 182. As further held in *Jefferson County Fire Protection Association*, 205 S.W.3d at 869, a law that is based on close-ended characteristics, such as historical facts, geography, or constitutional status, is facially invalid, is presumed to be unconstitutional, and the party seeking to defend its validity must show a substantial justification for its special nature.

The statutory sections at issue are facially special laws. They exclude from coverage in the CERF program a subclass of county employees, based on their legislative and historical status as circuit court appointees.

Section 211.393. 2 (1) (a), which pertains to Plaintiff Alderson's situation, now provides that the appointed juvenile officers employed in single county judicial circuits [without a charter form of government since CERF never covered any charter county] on or before July 1, 1999, are "county employees on that portion of their salary provided by the county." Subdivision (b) of this section provides that said appointed chief juvenile officers "may participate in a county retirement plan on that portion of their salary provided by the county . . ."

Section 211.393. 2. (3) (a) and (b), RSMo, effective July 1, 1999, now provides that all other juvenile court employees who are employed in a single county judicial circuit on or after July 1, 1999, shall be county employees and shall "in accordance with their status as county employees, receive other county-provided benefits including retirement benefits from the applicable county retirement plan . . . " Appellants Allen and Polette are in this situation.

But, subsection 1, subdivision (1) of Section 211.393, RSMo, as enacted effective July 1, 1999, specifically defines "[c]ounty retirement plan" "not to include the county employee's retirement system as provided in sections 50.1000 to 50.1200, RSMo." Thus, Plaintiff Alderson (for the part of his salary derived from county funds), and Appellants Allen and Polette

are denied CERF eligibility due to this provision, although the General Assembly has recognized by statute their historical status as county employees for all other purposes, except hiring, firing, and supervision of duties. In essence, then, Section 211.393 recognizes that juvenile office personnel in single county judicial circuits are within the general class of county employees, but then creates a subclass of those employees located in single county judicial circuits without a charter form of government based on their historical and constitutional status as appointees of the judicial branch, to deny them the CERF benefit provided all other county employees. This is analogous to the situation held unconstitutional in *State ex. rel. Public Defender Commission v. County Court of Greene County*, 667 S.W.2d 409 (Mo. banc 1984), in which by explicit statute, Greene County was exempted from the public defender system. It is also analogous to the situation in *State v. Cella*, 32 S.W.3d 114 (Mo banc 2000), in which the Supreme Court upheld Section 565.084, RSMo. In upholding that statute prohibiting tampering with a judicial officer, the court emphasized that it covered all judicial officers, and stated that a "law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis." *Id*. at 118. Conversely, a statute would be special if it does not apply to all of a given class, in this situation all county employees.

Similarly, the definition of employee found in current section 50.1000 (8), RSMo, creates a prohibited subclass of county employee and is therefore invalid as a special law. As originally enacted in 1994, Section 50.1000 (8), RSMo, made eligible for CERF coverage:

> any county elective or appointive officer whose position requires the actual performance of duties during not less than one thousand hours per year, except prosecuting attorneys covered under sections 56.800 to 56.840, RSMo, circuit clerks and deputy circuit clerks covered under the Missouri state retirement system and county sheriff's covered under sections 57.949 to 57.949, RSMo.

This original language did not exclude juvenile office personnel - who were paid by the county but appointed by the circuit court - from CERF eligibility. Indeed, Appellants Alderson, Polette, and Allen were enrolled in the program. Only later action, first by the CERF board, by decision in July 1995 and by later enactment of 16 CSR 50-2.010(1) (L), and then by the legislature, removed juvenile office personnel from CERF coverage, solely because of their appointment by the circuit court.

Section 50.1000 (8), RSMo, was amended in 1998 to define an employee eligible for CERF as:

> any county elective or appointive officer or employee *who is hired and fired by the county and whose work and responsibilities are directed and controlled by the county and who is compensated directly from county funds*. . . (Amending language italicized).

Section 50.1000 (8), RSMo, was again amended in 2001, to now provide that CERF includes:

> any county elective or appointive officer or employee who is hired and fired by the county *or by the circuit court located in a county of the first classification without a charter form of government which is not participating in LAGERS, whose work and responsibilities are directed and controlled by the county or circuit court located in a county of the first classification without a charter form of government which is not participating in LAGERS* . . . (amendment emphasized).

Moreover, also in 2001, Section 50.1010, RSMo, was amended to provide that:

Notwithstanding any provision of sections 50.1000 to 50.1200 to the contrary, an individual who is in a job classification that the retirement system finds not eligible for coverage under the retirement system as of September 1, 2001, shall not be considered an employee for purposes of coverage in the retirement system, unless adequate additional funds are provided for the costs associated with such coverage.

(amending language italicized).

Not to belabor the point, but this series of amendments to Sections 50.1000 and 50.1010, RSMo, dramatizes the denial of equal protection and violation of separation of powers discussed at length above. Moreover, the statutory inclusion of some personnel who are paid by a county but appointed and under the control of the circuit court, exemplifies that Section 50.1000 has been amended to become a constitutionally invalid special law. The 1998 amendment to Section 50.1000 excluded from CERF coverage one subclass of county employees, all those appointed by the circuit court. The 2001 amendment excluded from CERF coverage a subclass of that subclass: those who were appointed by the court but who are paid by a county which participates in the LAGERS retirement program. And, Section 50.1010 is further a special law in that its 2001 amendment has now closed the class

forever to new applicants for CERF coverage in job classifications unrecognized by CERF unless they or someone acting on their behalf, unlike the persons presently covered, create and bring into the program new sources of funding.

IV.

THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND BY GRANTING SUMMARY JUDGMENT FOR RESPONDENTS IN THAT THE COURT SHOULD HAVE RULED THE STATUTES THAT PRECLUDE APPELLANTS FROM CERF MEMBERSHIP UNCONSTITUTIONAL AS ARGUED ABOVE AND THEREAFTER RULED THAT APPELLANTS' 1995 EXCLUSION FROM CERF BY CERF BOARD OF DIRECTORS' ACTION BASED ON INTERPRETATION OF CASE LAW WAS IN ERROR BECAUSE EXISTING CASE LAW WAS THAT JUVENILE OFFICE PERSONNEL APPOINTED BY THE CIRCUIT COURT WERE COUNTY EMPLOYEES FOR THE PURPOSE OF PAY AND BENEFITS.

Prior to the enactment of the statutes, the constitutionality of which was challenged in Points I, II, and III, Appellants were excluded from eligibility from CERF membership by vote of the CERF board, documented by letter to Plaintiff Alderson dated July 11, 1995. (L.F. 19). The CERF board determined that juvenile office appointees were not county employees

based upon its belief that the status of employee was determined exclusively by the fact that juvenile office appointees are subject to hiring, supervision, and termination by the circuit court, and not by the county commission or any county office holder. This belief is not supported by analysis of case law in the area of determining who bears the responsibility -or more accurately, responsibilities - for persons appointed by the circuit court to work in the juvenile office under supervision of the circuit court, but whose salary and other benefits are paid from county funds. Since the trial court ruled that the regulation and statutes challenged were constitutional, it did not reach Appellant's argument that the CERF decision of July 11, 1995, was in error based on analysis of existing case law. Since jurisdiction of this entire case is now before this Court due to the constitutional challenges to statutes raised above, this Court has jurisdiction to consider and dispose of this issue if it rules that the statutes and regulations at issue are unconstitutional. *Estate of Wright*, 950 S.W.2d 2d 530 (Mo. App. W.D. 1997). And, since this issue involves solely interpretation of case law and not any factual issue, the issue may be determined by this Court in the first instance. *Cf. Cox Health Systems v. Division of Worker's Compensation*, 190 S.W.3d 623, 626 (Mo. App. W.D. 2006) (matters of law are reviewed *de novo* on appeal).

In *Hastings v. Jasper County*, 282 S.W. 700 (Mo. 1926), this Court considered whether a person then termed a "probation officer" appointed by the circuit court acting as a juvenile court judge, was a "county officer" under statutes that determined what his salary should be, based on county population. The Court held that the probation officer - who appears analogous to today's juvenile officer - was a "county officer" because his duties were wholly performed within the limits of the county, for the benefit of the people of that county, and because his salary was paid out of county funds. *Id*. at 701. This is similar to the case at issue; appointment by the circuit court did not prevent the person in question being deemed a county employee for the purpose of salary, which is a form of benefit, as are the retirement benefits at issue here.

Citing *Hastings*, this Court held in *State ex. rel. Weinstein v. St. Louis County*, 421 S.W.2d 249, 255 (Mo. banc 1967) (*Weinstein I*), that "personnel provided for the assistance of the juvenile court are not judicial officers within the meaning of Art. VI, § 18 (e), *but are employees of the county*." (Emphasis added). The Court also recognized that such employees were not under the control of the county, but were subject to the control of the circuit court, and stated that "courts have the inherent power and authority to incur and order paid all expenses as are (reasonably) necessary for the holding of

court and the administration of the duties of courts of justice", *citing State ex. rel. Gentry v. Becker*, 351 Mo. 769, 174 S.W.2d 181, 183 (1943). *Id.*

In *Smith v. Thirty-Seventh Judicial Circuit*, 847 S.W.2d 755 (Mo. banc 1993), this Court again dealt with whether an appointee of the circuit court, assigned as a deputy juvenile officer, was an employee of the county. The specific issue was to identify the employer, for worker's compensation purposes, of a chief deputy juvenile officer. The majority recognized that Smith was an employee of the judicial circuit, due to the circuit's power to hire, supervise, and terminate him. The majority further held that Smith could be deemed a state employee under the §105.800, RSMo, definition of state employee for worker compensation purposes if the circuit court elected to so cover him; he could also be covered under county-provided worker's compensation insurance or by judicial circuit purchased worker's compensation insurance as part of the funds appropriated by the county to the judicial budget. Ultimately, this Court held that Smith could be and was designated a county employee for worker's compensation purposes. Judge Price, in his concurring opinion, provides greater assistance to determining whether a juvenile court appointee is a county employee, analyzing the issue beyond the mere issue of who has the right to control the employee. He wrote that the "control test is *not* always determinative" in finding or not the

existence of an employer-employee relationship, that the term employee may have different meanings in different connections, and that this is "especially true when the putative ‘employer’ is a judicial circuit." *Id*. at 759-760. (Emphasis in original). Judge Price wrote that "persons who work for the circuit courts have been deemed to be ‘employed’ by different entities for different purposes" *Id*. at 760. When the issue presented to the reviewing court concerns the conditions of employment or duties of circuit court personnel (matters that implicate the court's control over its own internal workings), those persons are considered to be judicial employees because such is "essential to the preservation of the judicial department's autonomy." *Id*. But, "when the underlying controversy requires a determination of the *status* of a class of circuit court personnel in relation to a given issue, our courts have looked to the legislative intent evidenced in the underlying statutory scheme." *Id*. (Emphasis in original). With this analysis, Judge Price wrote that when the legislature intended that a given group of judicially appointed personnel were to be considered state employees, it had focused on the source of payment, not the power of control. For example, §483.083.4, RSMo, provided that circuit clerks and deputy circuit clerks paid by the state were considered state employees; deputy circuit clerks paid by the county were not. Judge Price also found

support for this analysis in prior cases. In *Cates v. Webster*, 727 S.W.2d 901 (Mo. banc 1987), a bailiff appointed by the circuit court was held not to be a state employee for purposes of coverage by the State Legal Defense Fund, because the legislature, contrary to its usual practice when defining who is a state employee, had not provided that he was to be paid by the state. In *Hawkins v. Missouri State Employee's Retirement System*, 487 S.W.2d 580 (Mo. App. 1972), the court found support for defining a court reporter as a state employee for purposes of the Missouri State Employees' Retirement System because the reporter was paid by the state. With this lengthy analysis, Judge Price, joined by Judges Limbaugh and Robertson, opined that the deputy juvenile officer in *Smith* was a county employee for the purpose of worker's compensation benefits because he was paid by the county.

Taken as a whole, this Court's *Hastings*, *Weinstein I*, and *Smith* decisions established that when pay and benefits are at issue, juvenile office personnel such as Appellants were always considered county employees prior to the 1995 amendment to Section 211.393, RSMo, following which the state assumed financial responsibility for juvenile office personnel in multi-county judicial circuits. As previously argued, the General Assembly may elect to place appointees of the judicial branch into one unit of

government or the other for the purpose of pay and benefits, and has elected to place appointees of the circuit court in judicial circuits composed of a single county of the first classification in the county unit of government. Accordingly, Appellants were county employees for the purpose of pay and benefits by case law decision prior to the 1995 amendments to Section 211.393, RSMo, and remained county employees for the purpose of pay and benefits following those amendments. CERF cannot now continue to exclude Appellants from CERF eligibility based on its belief that the status of employee is determined exclusively by the fact that juvenile office appointees are subject to hiring, supervision, and termination by the circuit court, and not by the county commission or any county office holder, as embodied in its July 11, 1995 letter to Appellant Alderson. (L.F. 19).

V.

THE TRIAL COURT ERRED BY DENYING APPELLANTS' MOTION FOR SUMMARY JUDGMENT AND BY GRANTING SUMMARY JUDGMENT FOR RESPONDENTS IN THAT THE COURT SHOULD HAVE RULED THE STATUTES THAT PRECLUDE APPELLANTS FROM CERF MEMBERSHIP UNCONSTITUTIONAL AS ARGUED ABOVE , THEREAFTER RULED THAT APPELLANTS' 1995 EXCLUSION FROM CERF BY CERF BOARD OF DIRECTORS' ACTION BASED ON INTERPRETATION OF CASE LAW WAS IN ERROR BECAUSE EXISTING CASE

LAW WAS THAT JUVENILE OFFICE PERSONNEL APPOINTED BY THE CIRCUIT COURT WERE COUNTY EMPLOYEES FOR THE PURPOSE OF PAY AND BENEFITS, AND BEFORE SO DOING, RULED THAT APPELLANTS' CLAIMS WERE NOT BARRED BY LACHES.

CERF claims that Appellants' claim is barred by laches. (L.F. 25). They allege that "the over ten year delay in bringing this lawsuit would, if [Appellants] are successful in gaining CERF benefits, greatly prejudice [CERF and CERF fund] in that the moneys in the CERF fund are insufficient for existing benefits to be paid to current members of the CERF fund in addition to [Appellants] and all other similarly situated parties." (L.F. 26). The trial court did not rule upon this affirmative defense because it ruled that the administrative regulation and statutes that exclude Appellants from CERF membership are constitutional, rendering any affirmative defense moot. (L.F. 102). As argued in the preceding points, the trial court erred in its ruling on the merits of the case. Since jurisdiction of this entire case is now before this Court due to the constitutional challenges to statutes raised above, this Court has jurisdiction to consider and dispose of this issue. *Estate of Wright*, 950 S.W.2d 2d 530 (Mo. App. W.D. 1997). And, since this case is before this Court on appeal from a judgment entered on competing motions for summary judgment in which the facts are agreed, this Court may

determine whether laches would bar Appellants' suit as a matter of law. *Cf. ITT Commercial Financial Corp. v. Mid-Am Marine*, 854 S.W.2d 371, 376 (Mo. banc. 1993). (Summary judgment reviewed *de novo* on appeal).

Laches is the neglect for an unreasonable and unexplained length of time under circumstances permitting diligence, to do what in law should have been done. Laches is not a doctrine favored in equity, and defendants bear the burden of proof in asserting it. Laches is to be employed only where enforcement of the right asserted would work an injustice, and never to defeat justice. Mere delay in asserting a right does not constitute laches. The delay must be to the disadvantage and prejudice of the defendants. Where a defendant has not been misled to his harm in a legal sense by the delay, and the situation is not materially changed, laches does not apply. And, defendants bear the burden of proving all of these factors. *Metropolitan Sewer Dist. v. Zykan*, 495 S.W.2d 643, 656 (Mo. 1973). In *Port Perry Marketing Corp. v. Jenneman*, 982 S.W.2d 789, 792 (Mo. App. E.D. 1998), Judge Teitelman wrote that "the prejudice and disadvantage which supports laches is generally of two kinds: (1) the loss of evidence which would support the Respondents' position and (2) a change in position in a way that would not have occurred but for the delay."

CERF is not prejudiced or disadvantaged in either of these ways. Appellants' cause of action is based on several distinct acts, which occurred at different times. The cause is based on the acts of the General Assembly in denying Appellants eligibility for CERF membership by amendments to Section 50.1000 (8), RSMo that occurred in 1998 and 2001; and by amendment to Section 211.393, RSMo, that became effective in 1995, the constitutionality of which has been argued above. Appellants' cause of action also stems from CERF's adoption of 16 CSR 50--2.010 in May 1996, and before that date, by act of the CERF board in July 1995. (L.F. 19). The issues in this case are legal only in nature: whether 16 CSR 50-2.010 and the statutes at issue are constitutional, and if they are not, whether the CERF board's July 11, 1995, exclusion of Appellants from CERF eligibility is supported by analysis of case law. The evidence is this case thus consists of the statutes and regulation at issue, the case law, and the record of the trial court, not the testimony of missing witnesses or other evidence that may have been misplaced.

Second, CERF can hardly claim surprise that this issue has been raised at this time. Judicially appointed, county-paid personnel have sought inclusion in CERF in prior litigation, although not on the basis of the constitutional and other issues raised here. *Boone County v. County*

Employee's Retirement Fund, 26 S.W.3d 257 (Mo. App. W.D. 2000). Following the decision in *Boone County*, the personnel who sought inclusion in CERF obtained that inclusion by the 2001 amendment to Section 50.1000 (8) that added to CERF persons appointed by the circuit court located in a county of the first classification without a charter form of government which is not participating in LAGERS. And, as pointed out by the trial court, Senate Bill 850, introduced in 2006, would have added to CERF membership judicially appointed, county paid juvenile office personnel in judicial circuits composed of a single county without a charter form of government. Senate Bill 850, if passed, would have included Appellants.

Third, Appellants' cause of action is not unique to Appellants, nor would barring Appellants claim based on laches safeguard CERF from the dilemma it has posed as a reason to invoke laches, even if it were arguable that the delay in filing this suit until 2006 was unreasonable. If Appellants were barred from presenting this case on its merits, the issues of whether the statues and regulation here pass constitutional muster, and whether case law supported the CERF board's July 1995 exclusion of county paid judicial appointees from CERF, could be raised by others. Any person in Appellants' situation - county paid judicial appointees in juvenile offices located in single county judicial circuits without a charter form of government - who

were appointed by the circuit court at some time after Appellants, or after the passage of the statutes at issue, could raise the issue. At some point, CERF will have to address the issues raised on the merits in this case, and if this Court rules that county paid judicial appointees assigned to the juvenile office in single county judicial circuits without a charter form of government are illegally excluded from CERF eligibility, confront the financial problem that CERF alleges would result from that exclusion.

Moreover, the harm to Appellants did not begin and end in July 1995 or for that matter with the passage of any of the statutes or regulation whose validity has been challenged in these pages. Appellants' exclusion from CERF eligibility is a continuing harm; it has continued each day since July 1995 and will continue to do so until the issues in this case are resolved. *Cf. Davis v. Laclede Gas Co*., 603 S.W.2d 554, 556 (Mo. banc 1980). In *Laclede Gas*, this Court held that a statute of limitations could not bar a suit from proceeding where the aggrieved party suffered an ongoing and continuing harm. The same reasoning applies in this case.

In sum, CERF's affirmative defense of laches should be rejected.

CONCLUSION

For the reasons set forth, Appellants pray that the summary judgment entered for Respondent CERF be reversed, and judgment entered for Appellants:

a. That the provisions of Sections 50.1000 (8), 50.1010, and 211.393 1. (1), and 5, RSMo, that exclude Plaintiffs from the provisions of the County Employee's Retirement Fund violate Amendment XIV of the Constitution of the United States, Article I, Sections 2 and 10 of the Constitution of the State of Missouri, Article II, Section 1, of the Constitution of the State of Missouri; and Article III, Section 40 of the Constitution of the State of Missouri, were and are void *ab initio*, and that the State of Missouri, the County Employee's Retirement Fund, and any entity formed by the State be enjoined from further enforcement of said sections.

b. That the language of 16 CSR 50-2.010 (1) (L), which excludes Appellants from CERF membership based on their appointment by the circuit court, violates Amendment XIV of the Constitution of the United States and Article I, Sections 2 and 10 of the Constitution of the State of Missouri, and also Article II, Section I of the Constitution of the State of Missouri, and is and was void *ab initio*, and that the State of Missouri, the

County Employee's Retirement Fund, and any entity formed by the State be enjoined from enforcement of said regulation.

c. That Appellants Gilbert L. Alderson, Joseph Polette, and Theodore R. Allen, Jr., upon the voiding of the aforesaid statutes and regulations, were and are deemed county employees for the purposes of inclusion in the CERF program, effective as and from the inception of the program, and that the exclusion of them from the program on and after July 11, 1995, was wrong and unlawful upon proper construction of existing case law from this Court, which had held that juvenile office personnel who were hired, fired, and under the supervision of the circuit court although paid by the county, were county employees for the purpose of pay and all benefits.

d. That Respondent's affirmative defense of laches be rejected.

e. That upon so finding, that the Court order that Appellants be

enrolled in the County Employee's Retirement Fund with all benefits appertaining thereto, with full credit for past service to the date of inception of CERF.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Appellants' Brief, together with a diskette containing the same, were mailed by first class mail to Mr. Edward F. Downey, Attorney for Respondent, Suite 101, 221 Bolivar St., Jefferson City, MO 65102, in accordance with Supreme Court Rule 84.06 (g), on this _____ day of August 2008.

_____
Theodore R. Allen, Jr. MBE 26771

CERTIFICATE OF COMPLIANCE

The undersigned certifies on this _____ day of August 2008, that this Brief includes the information required by MO. R. CIV. P. 55.03, and complies with the limitations contained in MO. R. CIV. P 84.06 (b), and further that the diskette containing this Brief has been scanned for viruses and is virus free. The number of words in this Brief according to the word count tool of Microsoft Word is 12,931.

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Theodore R. Allen, Jr. MBE 26771