COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2007-SC-0000294-DG

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
ACTION NO. 2000-CI-3636 AND
COURT OF APPEALS NOS.
2006-CA-000124 AND 2006-CA-000191

NORMAN JOHNSON,
CHARLES V. ROBINSON, AND JOHN L. GUMM

APPELLEES

REPLY BRIEF OF APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that true copies of this brief were mailed, first-class, postage prepaid, on this 26 day of August, 2008, to Everett Hoffman, Esquire, Priddy Cutler Miller & Meade, PLLC, 800 Republic Building, 429 West Muhammad Ali Boulevard, Louisville, KY 40202-2346; John Frith Stewart, Esquire, Stewart, Roelandt, Stoess, Craigmyule & Emery, PLLC, 6506 West Highway 22, P. O. Box 307, Crestwood, KY 40014; Judge Kimberly Bunnell, Ninth Division, Fayette Circuit Court, Fayette County Courthouse, 120 North Limestone Street, Lexington, Kentucky 40507; and Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

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STATEMENT OF POINTS AND AUTHORITIES

REPLY BRIEF FOR THE APPELLANT

Appellant Lexington-Fayette Urban County Government ("LFUCG") submits herewith its Reply Brief to show that reversal of the Court of Appeals' decision is necessary in order to uphold the inherent right of legislative bodies to clarify,

REPLY BRIEF FOR THE APPELLANT

Appellant Lexington-Fayette Urban County Government ("LFUCG") submits herewith its Reply Brief to show that reversal of the Court of Appeals' decision is necessary in order to uphold the inherent right of legislative bodies to clarify, amend or revoke prior legislative enactments.

ARGUMENT

I. CONTRARY TO APPELLEES' CONTENTION THAT THE COURT OF APPEALS DID NOT INVENT A NEW RULE OF EQUAL PROTECTION JURISPRUDENCE IN ORDER TO DECLARE THE 2000 ORDINANCE UNCONSTITUTIONAL, A CAREFUL READING OF THE COURT'S OPINION REVEALS THAT IT DID JUST THAT.

Initially, the Court of Appeals synthesizes LFUCG's reasons for not permitting the opt out retirees to rejoin the Plan: "the increased cost associated with retiree health care, the unknown risk presented by the opt out retirees, and the perceived inequity to the continuous retirees." Opinion, p. 21. The Court of Appeals then states "that the circuit court's order regarding the constitutionality of Ordinance No. 366-2000 would be correct if LFUCG had not adopted Ordinance No. 217-99 permitting the opt out retirees to re-join the Plan." *Id.*

The foregoing statement clearly demonstrates that LFUCG's reasons for not permitting the opt out retirees to rejoin the Plan provided a rational basis for excluding them when the Urban County Council ("UCC") adopted Ordinance No. 217-99. Nevertheless, the Court of Appeals then holds that once the opt out retirees were permitted by virtue of the Court's construction of the 1999 Ordinance to rejoin the Plan, ". . . LFUCG needed to put forth a rational basis for

removing them from the Plan." *Id.* This holding is tantamount to saying that the legitimate reasons for excluding the opt out retirees in 1999 no longer provided a rational basis in 2000. Rather, it becomes clear that the Court of Appeals is requiring the UCC to advance different reasons to provide a rational basis to exclude the opt out retirees when it passed Ordinance No. 366-2000.

It is unclear why reasons which were valid as a rational basis for excluding the opt out retirees in the first place were no longer valid when the UCC passed the second Ordinance, which made it clear that the UCC had intended to exclude the opt out retirees in the first instance. The Court of Appeals simply rules that once the opt out retirees were granted the benefits as a result of the language used in the first Ordinance, the UCC had to have a new and different "rational basis for removing them from the Plan." *Id.*

This ruling enunciates an entirely new concept in equal protection jurisprudence. A legislative body is not permitted to adopt a classification that would have met the rational basis test if the legislative body had failed to establish the classification in its first effort to legislate in the area. In other words, as applied to this case, since the opt out retirees were not classified and treated differently when the health insurance benefit was originally granted to all retirees, the UCC could not use the same reasons which justified excluding the opt out retirees when it initially attempted to legislate in the area of retiree health insurance benefits. By holding that equal protection requires the legislative body to put forth a new and different rational basis for removing the

opt out retirees in subsequent legislation, the Court of Appeals is imposing a burden on the legislative body which is difficult, if not impossible, to carry.

II. THE COURT OF APPEALS ERRED IN SHIFTING THE EQUAL PROTECTION BURDEN FROM APPELLEES TO THE UCC TO ADVANCE A RATIONAL BASIS THAT WAS UNKNOWN TO THE UCC AT THE TIME IT PASSED THE 1999 ORDINANCE.

The Court of Appeals determined that while "[t]he opt out retirees do present an unknown risk . . . LFUCG undertook that risk when it provided benefits to all retirees in Ordinance No. 217-99." *Id.* at 24. Furthermore, the Court claims that: "[h]aving extended them, LFUCG cannot rationally support the withdrawal of those benefits based on facts known when the benefits were extended." *Id.* What the Court of Appeals is actually saying is that the UCC had to get it right the first time or lose its legislative ability to correct what it had inadvertently granted to the opt out retirees by virtue of the *ex post facto* judicial construction of the 1999 Ordinance.

The lower appellate court has held that the UCC had to show, in order to remove the opt out retirees, that it had new and different reasons, not known to the UCC when it passed the 1999 Ordinance. This ruling clearly shifts the burden from those challenging the 2000 Ordinance and places the burden squarely on the legislative body to demonstrate that its legislation does not violate equal protection mandates. A shifting of the burden from the challengers to the legislature was explicitly rejected by the United States Supreme Court in *Mathews v. Lucas*, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976).

The *Matthews* Court was considering whether Congress, in amending the Social Security Act, could adopt certain rules for determining dependency of illegitimate children which resulted in granting surviving child benefits to some illegitimate children without regard to their actual dependency at the time of the deceased parent's death. On the other hand, application of the rules adopted by Congress disqualified some illegitimate children who could show that they were actually dependent on a parent at the time of death. The Court upheld the statutory classifications or rules because it was obvious that Congress' purpose in adopting the statutory presumptions of dependency was to serve administrative convenience. *Id.* at 509. After recognizing the Congressional purpose of achieving possible savings in terms of administrative expense, Justice Blackmun then made the following statements which are pertinent to the case now before this Court:

> [T]he materiality of the relation between the statutory classifications and the likelihood of dependency they assertedly reflect need not be "'scientifically substantiated'". .... Nor, in any case, do we believe that Congress is required in this realm of less than strictest scrutiny to weigh the burdens of administrative inquiry solely in terms of dollars ultimately "spent," ignoring the relative amounts devoted to administrative rather than welfare uses.

Id. at 510 (citations omitted).

The Appellees argue that the rational basis standard utilized by the United States Supreme Court in Fourteenth Amendment cases ". . . is not a toothless one", citing *Mathews,* but the Appellees fail to mention the remainder of Justice

Blackmun's sentence which qualifies his "not a toothless one" statement by pointing out that "the burden remains upon" the challengers and not the legislative body "to demonstrate the insubstantiality of that relation." *Id.* at 510; Appellees' Brief, p. 43. Justice Blackmun was referring to the relation between the statutory classifications and the likelihood of dependency they assertedly reflect.

III. NEITHER THE COURT OF APPEALS NOR THE APPELLEES HAVE CITED ANY AUTHORITY FOR REQUIRING THE UCC TO PUT FORTH A RATIONAL BASIS OTHER THAN THE REASONS WHICH EXISTED WHEN THE UCC ADOPTED ORDINANCE NO. 217-99.

In its Opinion, the Court of Appeals discusses, at length, this Court's decision in *Elk Horn Coal Corp. v Cheyenne Resources, Inc.,* 163 S.W.3d 408 (Ky. 2005). The lower appellate court seems particularly impressed with this Court's statement that the Supreme Court of Kentucky is "not bound by decisions of the United States Supreme Court when deciding whether a state statute impermissibly infringes upon individual rights guaranteed in the State Constitution so long as state constitutional protection does not fall below the federal floor. . . ." *Id.* at 417-418.

As a consequence, while this Court has construed the Kentucky Constitution as requiring a "reasonable basis" or "substantial and justifiable reason," instead of a "rational basis," the Court of Appeals fails to state why it should invoke Kentucky's heightened standard in deciding the case at bar. The *Elk Horn* Court observed that "cases applying the heightened standard are limited to the particular facts of those cases." *Id.* at 419. Without saying why

the heightened standard should apply to the particular facts of this case, the Court of Appeals apparently regards the *Elk Horn Coal* case as an invitation to impose on the UCC, and presumably all legislative bodies in Kentucky, a novel requirement that prohibits taking benefits away from a certain class of individuals unless the UCC can adduce a new "substantial and justifiable reason" for doing so. In addition, the Court of Appeals would require a showing that the different "substantial and justifiable reason" was not known at the time when the UCC passed the original ordinance in 1999. There is nothing in the *Elk Horn Coal* decision which would justify the imposition of such a rule on legislative bodies in Kentucky.

Furthermore, the case of *Fischer v. Grieb*, 272 Ky. 166, 113 S.W.2d 1139 (1938) cited by Appellees does not contain any language which could be said to support the invention of the rule announced in this case by the Court of Appeals. The Appellees have also failed to explain why *Fischer* should have any application to the circumstances herein. As a result, no authority has been cited in support of the Court of Appeals' holding that removal of beneficiaries from eligibility to participate in a taxpayer funded health insurance plan cannot be accomplished without there being a new and different set of reasons to support their removal.

Finally, it is worth noting that in a case where both the Circuit Court and Court of Appeals found that the basic facts were not in dispute, the Counterstatement of the Case takes up over half of the Brief for the Appellees.

In fact, the "Testimony of LFUCG Witnesses" encompasses a total of 13 pages of the Appellees' Brief. Naturally, the section discussing LFUCG testimony is artfully drafted to put that testimony in as poor a light as possible. Due to the restraints on the length of this Reply Brief, the Appellant cannot attempt to set the record straight by engaging in a line by line review of the evidence and testimony. Suffice it to say that an evaluation of the testimony given by the LFUCG witnesses as interpreted by the Appellees will be of no assistance to this Court in deciding whether the Court of Appeals has correctly ruled on the inability of the UCC to pass a subsequent law which unambiguously states the UCC's original intention to exclude the opt out retirees from re-enrolling in the Plan. In the Final Order entered herein on December 15, 2005, Circuit Judge Mary C. Noble observed:

> On the whole, it appears from the record that the Council acted to protect a governmental interest. Certainly, its review of the legalities and effort to explain its reasons reflect that it acted in good faith, and not with a discriminatory motive. The discussions reveal that a primary concern was cost and program efficiency.
>
> Participating in a group insurance plan is not a fundamental right, but is rather a legitimately regulated privilege. Government must balance its duty to govern wisely with the individual retiree's right to equal protection under the law. If a governmental decision reflects a rational governmental basis, it is not discriminatory. The courts are not to judge "the wisdom, fairness or logic of the legislative choices," only whether there is a legitimate governmental interest. F.C.C. v. Beach Communications, Inc., 508 U.S. 307, 113 S.Ct. 2096, 12 L.Ed.2d 211 (1993).

(R.964-967).

Judge Noble's Findings of Fact, Conclusions of Law and Order entered herein on June 1, 2004 specifically reject Appellees' claim that the 1999 Ordinance irrevocably conferred on them a right to taxpayer funded health insurance benefits:

> The Court disagrees with the Plaintiffs that the 1999 Ordinance conferred upon them a right to health insurance benefits that could never be revoked by LFUCG. The Court finds that the extension of health insurance benefits to fire fighters who had already retired was, in essence, a gratuity that was offered in recognition of the retirees' past service. There was no additional consideration provided by these Plaintiffs in exchange for extension of these benefits, and therefore no right (contractual, "vested," or otherwise) to future benefits. The Court cannot find that, having extended these benefits to retirees in 1999, LFUCG is obligated to provide them in perpetuity.

(R. 280-289).

CONCLUSION

On the issue of whether the 1999 Ordinance has internal ambiguity when read as a whole, with each provision given meaning and significance, this Court should hold that there is sufficient doubt as to its meaning to require an examination and review of its legislative history. Having looked to the well-documented legislative history, the Court should then reverse and direct the Fayette Circuit Court to dismiss the Appellees' claims.

In the alternative, if the Court does not find any doubt as to the meaning of the 1999 Ordinance, it should reject the unwarranted rule advanced by the

Court of Appeals and affirm the final Order of the Fayette Circuit Court that the 2000 Ordinance was a constitutional exercise of the UCC's legislative ability to enact legislation changing the 1999 Ordinance.

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