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

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT

APPELLANT

vs.

Appeal from the Fayette Circuit Court
Action No. 00-CI-03636 and
Court of Appeals Nos.
2006-CA-000124 and 2006-CA-000191

NORMAN W. JOHNSON; CHARLES V. ROBINSON; and JOHN L. GUMM

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Certificate Required by CR 76.12(6)

The undersigned does hereby certify that, on this 11th day of August, 2008, copies of this brief were served upon the following by U.S. Mail, first class postage prepaid: Leslye M. Bowman, Director of Litigation, and Logan Askew, Commissioner of Law, Lexington-Fayette Urban County Government, Department of Law, P.O. Box 34028, Lexington, KY 40588-4028; Hon. Kimberly Nell Bunnell, Judge, Fayette Circuit Court, 120 North Limestone, Lexington, KY 40507-1151; and Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, KY 40601.

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INTRODUCTION

The central issues in this appeal are the interpretation and constitutionality of two ordinances enacted by the Lexington Fayette Urban County Government (LFUCG) – the first in 1999 and the second in 2000. The Plaintiffs/Appellees are three retired firefighters who challenge, on state equal protection grounds, the constitutionality of the 2000 ordinance, which excluded them from a new retirement benefit extended to them by the 1999 Ordinance.

Under the 1999 Ordinance, LFUCG began paying the monthly health insurance premiums for all police and firefighter retirees who had previously been participants in LFUCG's group health insurance plan. When these Plaintiffs sought the new benefit, LFUCG enacted the 2000 Ordinance, which excluded from coverage all retirees who had been participants in the group plan at one time, but who had later opted out. For these three Plaintiffs, the 2000 Ordinance effectively rescinded the new retirement benefit provided by the 1999 Ordinance.

LFUCG has offered four reasons, including "fairness," for its rescission of benefits from this group of retirees. None of the stated rationales are based in fact and, as found by the Court of Appeals, none serve as a constitutionally permissible basis for excluding this group of retirees from a valuable benefit extended to others.

STATEMENT CONCERNING ORAL ARGUMENT

Because of the important issues of state constitutional law presented in this case, the Plaintiffs/Appellees believe that oral argument will be of assistance to the Court.

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1. 1999 Ordinance (LFUCG Ordinance No. 217-99)

2. 2000 Ordinance (LFUCG Ordinance No. 266-2000)

3. R. 844, Exhibit A to Plaintiff's Summary Judgment Response Memorandum (Jun 28, 2005)

COUNTERSTATEMENT OF THE CASE

A. SUMMARY OF THE LEGAL PROCEEDINGS

The Plaintiffs/Appellees are three retired firefighters who were employed by the Lexington-Fayette County Urban Government ("LFUCG") and who continue to be members of the Policemen's and Firefighters' Retirement Fund. While active duty firefighters, the Plaintiffs were participants in LFUCG's group health insurance plan, at which time LFUCG payed the cost of single coverage for the Plaintiffs and other active duty firefighters. At the time these Plaintiffs retired from duty, LFUCG permitted retirees to remain in the group health plan but required them to pay 100% of the premium for their coverage. In other words, at the time of these Plaintiffs' retirement, LFUCG made no contribution towards the health care coverage of retirees.

The Plaintiffs had no reason to suspect that LFUCG policy on retiree health insurance would ever change. At some point after retirement, each of these three Plaintiffs elected to drop out of the LFUCG pool and meet their health coverage needs elsewhere, rather than pay the full cost of LFUCG pool coverage. As indicated in the chart attached as Appendix Exhibit 3, more than 140 other retired firefighters and police officers made a similar decision. [R. 833, Exhibit A to Plaintiffs' Summary Judgment Memo (Jun 28, 2005).]

On August 19, 1999, LFUCG enacted an ordinance extending payments for health care coverage to "all members of the Policeman's and Firefighters' Retirement Fund who retired prior to July 1, 1999 and who were participants in the group health insurance plan coverage provided to urban county government employees and retirees prior to July 1, 1999." Ordinance 217-99 ("1999 Ordinance"), Section 2 (b) [Appendix Exhibit 1 hereto]. When these Plaintiffs sought the benefits created by the 1999 Ordinance, LFUCG took the position that they were ineligible despite the fact that they met all three requirements set out in the 1999 Ordinance – i.e. they were (a) members of

the Retirement Fund who (b) had retired prior to July 1, 1999, and who (c) had been participants in the group plan prior to July 1, 1999 (both as active duty firefighters and as retirees). LFUCG's stated reason for excluding these Plaintiffs was that they were not participants in the LFUCG health insurance pool on June 30, 1999.

In October 2000, the Plaintiffs filed this action, stating that, under the 1999 Ordinance, they were entitled to the same benefits as other retirees. [R. 1, Complaint (Oct 06, 2000).] In response to the Plaintiffs' lawsuit, LFUCG amended the 1999 Ordinance, effective December 5, 2000, in a purported effort to "clarify" that retirees who were not in the LFUCG pool on June 30, 1999, were not eligible for paid health coverage. Ordinance 266-2000 ("2000 Ordinance") [Appendix Exhibit 2 hereto]. The Plaintiffs amended their Complaint and added claims that the 2000 Ordinance was unconstitutional because (a) it violated their equal protections rights under the Kentucky Constitution and (b) it impaired their contractual rights that vested with enactment of the 1999 Ordinance. [R. 29, Amended Complaint (Jan 19, 2001).]

The core issues in this case are the legal effect and constitutionality of the 1999 and 2000 ordinances. On June 1, 2004, after transfer of the case to Division Five of the Fayette Circuit Court, Circuit Judge Mary Noble granted Partial Summary Judgment in favor of the Plaintiffs as to the 1999 Ordinance, stating as follows:

> With regard to the 1999 Ordinance (217-99), the Court concludes that the plain language of the ordinance unambiguously extends health insurance benefits to these Plaintiffs, subject to the terms, conditions and qualifications of the Plan. It is undisputed that Plaintiffs were members of the Policemen's and Firefighters' Retirement Fund and that they retired prior to July 1, 1999. With passage of the ordinance, Plaintiffs thus became "eligible to participate in [LFUCG's] group health insurance plan." Since, prior to their retirement, Plaintiffs had been participants in the group health

> insurance plan provided to LFUCG employees, they were entitled to payment of premiums to the same extent as other retirees.
>
> The Plaintiffs' motion for summary judgment is thus granted with regard to their rights under the 1999 Ordinance for the period from July 1, 1999, until December 5, 2000, the date the 2000 Ordinance was passed by the Urban County Council. The issue of the Plaintiffs' damages for this period is discussed below.

[R. 280, Findings of Fact, Conclusions of Law and Order (June 1, 2004) pgs 5-6 (emphasis added).][1]

In the June 2004 Order, the Circuit Court found that the legal effect of the 2000 ordinance was "a more complicated matter:"

> The Court concludes that, just as the plain meaning of the language in the 1999 Ordinance unambiguously includes these Plaintiffs, the plain meaning of the language in the 2000 Ordinance unambiguously excludes them. Although the 2000 Ordinance was not drafted as artfully as it might have been, the language evinces a clear intent to exclude any retiree who, like the Plaintiffs, has terminated his participation in the group health insurance plan – for whatever reason.

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[1] The case was originally assigned to Division Two of the Fayette Circuit Court. On January 8, 2003, Circuit Judge Gary Payne denied an earlier summary judgment motion from the Plaintiffs. [R. 163-164, Order (Jan 08, 2003).] Judge Payne's two-paragraph Order contains no legal analysis of either the 1999 or 2000 Ordinances. The only conclusions of law stated in the Order are the minimum ones required by Civil Rule 56: "Plaintiffs have failed to establish that there is no genuine issue as to any material fact, and have failed to establish that they are entitled to judgment as a matter of law, and are therefore not entitled to summary judgment pursuant to CR 56." [Id.]

Shortly after entry of the January 2003 Order, Judge Payne was called to military service and the case was reassigned to Division Three. [R. 165, Order to Transfer (Jan 24, 2003).] Subsequently, Judge Rebecca Overstreet recused herself *sua sponte* and the matter was reassigned to Division Five. [R. 191, Order to Assign Special Judge (Jul 25, 2004).] Once this matter found a permanent home in Division Five, the Plaintiffs filed a second motion for summary judgment. With no guidance from Judge Payne as to his reasoning for the January 2003 Order, Judge Noble appropriately undertook a *de novo* examination of the issues presented, including the legal interpretation to be given to the 1999 Ordinance.

[R. 280, Order (Jun 01, 2004) pg 6.] The Circuit Court rejected the Plaintiffs' claim that the 2000 Ordinance impaired contractual rights that vested with them with passage of the 1999 Ordinance. [*Id.*] However, the Circuit Court "defer[red] any ruling on the Plaintiffs' second [equal protection] argument until the record is more complete regarding the basis for LFUCG's decision to exclude from coverage those retirees who had terminated their participation in the group health insurance plan." [*Id.*] The Circuit Court directed the parties to complete discovery and "to provide evidence on the issue of what information LFUCG relied upon when it enacted the 2000 Ordinance." [*Id.*, pg. 8.]

After the completion of discovery, the parties filed new summary judgment motions. On December 15, 2005, the Circuit Court dismissed the Plaintiffs' equal protections claims and granted Summary Judgment to LFUCG on the constitutionality of the 2000 Ordinance. The Circuit Court stated that "[a]s long as the legislative body has a legitimate interest – a rational basis – it may act in ways that treat members of the same class differently without violating equal protection mandates." [R. 964, Order (Dec 15, 2005), pg 2, citing *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307 (1993).] The Circuit Court reaffirmed its prior Order regarding the 1999 Ordinance and awarded the Plaintiffs damages for the period between the two ordinances. [*Id.*, pg 3.]

Both sides appealed. The Plaintiffs appealed the Circuit Court's dismissal of their claim challenging the constitutionality of the 2000 Ordinance. LFUCG filed a cross-appeal contesting the Circuit Court's interpretation of the 1999 Ordinance. In a unanimous unpublished opinion, the Court of Appeals affirmed the Circuit Court's ruling as to the 1999 Ordinance, but reversed the Circuit Court's ruling as to the constitutionality of the 2000 Ordinance.

Regarding the language of the 1999 Ordinance, the Court of Appeals agreed with the Circuit Court that "there is no ambiguity." [Opinion (Mar 30, 2007), pg 18.] "[The 1999 Ordinance] clearly makes all members of the Policemen's and Firefighters' Retirement Fund (the Fund) who retired before July 1, 1999, eligible to participate in a group health insurance plan." [*Id.*] In so holding, the Court of Appeals relied on the traditional tenets of statutory construction set forth by this Court.[2]

On the issue of the 2000 Ordinance, the Court of Appeals began its analysis with a presumption that the ordinance was constitutional, and placed the burden on the Plaintiffs to prove otherwise. [Opinion, pg 23.] The Court of Appeals acknowledged "that LFUCG certainly has a legitimate governmental interest in controlling the cost of the Plan;" recognized "that, because of their age, retirees are net consumers of the Plan's benefits;" and stated that the Circuit Court's order would be the correct decision "if LFUCG had not adopted Ordinance No. 217-99 permitting the opt out retirees to re-join the Plan." [Opinion, pgs 21, 23.]

For the Court of Appeals, the extension of benefits in the 1999 Ordinance changed the applicable analysis. "[O]nce the opt out retirees were permitted to re-join the Plan, LFUCG needed to put forth a rational basis for removing them from the Plan." [Opinion, pg 21.] As stated later in the opinion, "in order for LFUCG to remove the opt out retirees from the Plan once they have been admitted, LFUCG must show that there is some reasonable basis for treating the opt out retirees differently from continuous retirees." [Opinion, pg 23.]

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[2] *See, Moore v. Alsmiller*, 289 Ky. 682, 686-87, 160 S.W.2d 10, 12 (1942); *McElroy v. Taylor*, 977 S.W.2d 929, 931 (Ky. 1998); *Bailey v. Reeves*, 662 S.W.2d 832 (Ky. 1984); *George v. Scent*, 346 S.W.2d 784, 789 (Ky. 1961); *City of Vanceburg v. Plummer*, 122 S.W.2d 772, 775 (Ky. 1938).

The Court of Appeals then considered the rationales and the evidence proffered by LFUCG to support its withdrawal of benefits from these Plaintiffs. [See Opinion, pgs 23-24.] In the final analysis, the Court of Appeals concluded that "LFUCG has not provided a rational basis for removing the opt out retirees from the coverage and premium benefits provided by [the 1999 Ordinance." [Opinion, pg 21.] As explained by the Court of Appeals,

> LFUCG has offered no evidence that the opt out retirees will be any more of a drain on the Plan than the continuous retirees are. In fact, participants in the [Ad Hoc Committee on Health Insurance Coverage for Retired Police Officers and Fire Fighters] testified that they had no reason to believe that the health experience of the opt out retirees was any different than the health experience of the continuous retirees.

[Opinion, pgs 23-24.] The Court of Appeals concluded its analysis by stating, "For the above reasons, we hold that Ordinance No. 366-2000 unconstitutionally discriminates between the opt out and continuous retirees because LFUCG had no rational basis for making that distinction once it had extended health care benefits to all retirees." [Opinion, pg 25.]

B. SUMMARY OF THE EVIDENCE

Five of LFUCG's key decision makers gave their depositions in this matter: (1) Walter F. Skiba, Jr., Director of Human Resources for LFUCG from 1994 to 2004; (2) Donna Cantrell Counts, LFUCG's Commissioner of Finance; and three members of the "Ad Hoc Committee on Health Insurance Coverage for Retired Police Officers and Fire Fighters:" (3) David Stevens, MD (chair of the Ad Hoc Committee); (4) Albert S. Mitchell; and (5) Police Sergeant Scott Blakely. In addition, the Plaintiffs took the deposition of the actuarial expert identified by LFUCG

is the course of discovery: Alan J. Craig, FSA, MAA.[3] The testimony of each of the witnesses is discussed in detail in Part C, below. What follows is a summary of the evidence presented.

The evidence indicates that, in 1998, the Urban County Council's Finance Committee appointed an "Ad Hoc Committee on Health Insurance Coverage for Retired Police Officers and Fire Fighters." The mission of the Ad Hoc Committee was to study the question of retiree coverage and make recommendations to the Urban County Council. After a series of five meetings held between May 12 and October 20, 1998, a majority of Ad Hoc Committee members voted to recommend extending paid health care benefits only to those police and fire retirees who had remained continuous participants in the LFUCG health plan after their retirement.

Significantly, the Urban County Council initially rejected the recommendation of the Ad Hoc Committee. As found by both the Circuit Court and the Court of Appeals, with enactment of the 1999 Ordinance, the Council extended the new benefit to all retirees who had been past participants in the insurance pool, not just retirees who had been continuous participants. Only later, with enactment of the 2000 Ordinance, did the Council decide to exclude "opt-out" retirees, as recommended two years earlier by the Ad Hoc Committee. When asked by the Plaintiffs to provide justifications for the exclusion of opt-out retirees contained in the 2000 Ordinance, LFUCG cited the 1998 deliberations and recommendations of the Ad Hoc Committee.

The Ad Hoc Committee's 1998 recommendations were based on concerns about the financial impact of permitting retirees who had opted out of the LFUCG group insurance plan to opt

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[3] LFUCG only consulted Alan Craig after this litigation was commenced. LFUCG did not consult any actuarial expert prior to enactment of the 1999 or 2000 Ordinances.

back in. The concerns of the Ad Hoc Committee and other LFUCG decision makers fell into four categories:

1. Data concerning the higher utilization of health care services by retirees as compared to active-duty employees;

2. The perceived potential for "adverse selection" on the part of retirees choosing to enter or leave the LFUCG plan – i.e. the potential that only those retirees who were sick or who had failed to care for their health would choose to opt back in to the LFUCG plan;

3. The perceived "unfairness" of permitting retirees to opt back in, when, in their younger retirement years, they had stopped "contributing" to the plan when they opted out;

4. Information that other health plans did not allow participants back into a health insurance plan once they opted out.

However, as found by the Court of Appeals, the evidence in this case demonstrates that none of these four concerns had a sufficient basis in fact to justify exclusion of these Plaintiffs from the benefits provided to other fire and police retirees.

With regard to Rationale 1 (higher utilization by retirees), LFUCG possessed data showing that, in the aggregate, the health care costs for retirees are higher than the costs for younger active-duty employees – both nationally and within the LFUCG health insurance pool. However, LFUCG had no information indicating that the health care costs for "opt out" retirees had been or could be expected to be any different than the costs for those retirees who had remained in the plan. There was no greater justification for excluding this group of retirees than for excluding any other group of retirees.

With regard to Rationale 2 (perceived risk of adverse selection), LFUCG did not obtain the information that even its own expert testified was necessary to make an informed decision

about the potential for "adverse selection." LFUCG had no information about the health status of the opt-out group compared to the general pool of retirees and, more important, no information about the existing health care coverage maintained by the opt-out group. Moreover, all LFUCG witnesses conceded that extending to all retirees the monetary payments authorized by the 1999 and 2000 Ordinances, without permitting them to opt back in to the insurance pool, would not have exposed the Plan to any risk of adverse selection.

LFUCG's third rationale (perceived lack of fairness) was particularly ill-founded. There was a perception among LFUCG decision makers that the opt-out retirees would be taking unfair advantage of the LFUCG health care plan – and would therefore be placing an unfair burden on the plan – if they were permitted to opt out upon retirement, only to opt back in when they were older and therefore more likely to have higher health care costs. However, none of the LFUCG decision makers sought out any information to corroborate their perception of unfairness. One question they failed to ask was whether, at the time these retirees opted out, were they in fact still making net contributions to the plan, or had they already crossed over into an age group that used more dollars in services than the dollars being contributed in their premiums. Contrary to the fears of decision makers, the evidence indicates that, at the time LFUCG's police officers and firefighters were eligible for full retirement, their years of being net contributors to the LFUCG health plan were already behind them.

On the issue of "fairness," LFUCG's witnesses also acknowledged that, when these retirees opted to leave the LFUCG Plan, they had no reason to believe that, years in the future, LFUCG would extend a new benefit to retirees in the form of premium payments. The 1999

Ordinance was a significant new circumstance of which these Plaintiffs had no notice at the time they retired.[4]

Rationale 4 (industry practice) was cited by several decision makers as a justification for denying benefits to retirees who had previously opted out. Committee members who had experience with other health care plans testified that those plans did not allow a retiree to re-join the plan after having left it. However, none of the examples cited by Committee members related to a scenario such as this one, in which the employer in question had unexpectedly decided to offer a valuable new benefit (payment of monthly premiums) to retirees.

In sum, none of the four rationales offered by LFUCG decision makers stands up to scrutiny. It is not surprising that LFUCG's own legal counsel had grave doubts about the legality of excluding retirees who had previously opted out. [R. 622, Skiba Depo Exhibit 12.] As stated by LFUCG Corporate Counsel Theresa Holmes in a letter to the Kentucky Attorney General, "it is our concern that this determination could violate the equal protection afforded by Sections 1, 2 and 3 of the Kentucky Constitution." [*Id.*]

C. TESTIMONY OF LFUCG WITNESSES

During their depositions, each of the LFUCG witnesses was given every opportunity to articulate every conceivable basis for the classifications in the 2000 Ordinance – and specifically for LFUCG's decision to rescind the benefits that LFUCG had granted to these Plaintiffs in August

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[4] Only one of the three Plaintiffs (Charles Robinson) was notified by LFUCG at the time he opted out that, absent changed circumstances, he would be deemed to have waived his right to coverage in the LFUCG pool. [R. 935, et seq., Robinson Depo (Jun 06, 2003), pg 22.] At the time the other two Plaintiffs opted out (Norman Johnson and Charles Robinson), neither of them was notified and neither was aware that LFUCG might try to prohibit them from re-joining. [R. 935, et seq., Johnson Depo (Jun 06, 2003), pg 32; Gumm Depo (Jun 06, 2003), pgs 18-19.] LFUCG never produced a written policy stating that retirees who opted out would be prohibited from re-joining.

1999, while continuing to provide them to other police and fire fighter retirees. The evidentiary record produced by LFUCG contains hundreds of pages of documents, including minutes of committee meetings, reports from consultants, etc. LFUCG's principal decision makers and its expert witness provided more than 350 pages of deposition testimony in an effort to explain and justify the actions taken by LFUCG in this case.

(1) Rationale 1 - Data on Higher Health Care Costs for Retirees In General.

(a) Walter Skiba. In his testimony about the health care costs of retirees, Director of Human Resources Walter Skiba cited reports stating that, in the aggregate, the health care costs of retirees are greater than those for younger active-duty employees. [R. 622, Skiba Depo, pp. 54-64.] When asked about statements recorded in the minutes of the fifth meeting of the Ad Hoc Committee, Mr. Skiba stated as follows:

> Q. And I take it the gist of some of your statements in this paragraph are: We've got to be careful about how many retirees we let into this plan, because for every retiree we let in, we are going to be paying out $1.68 for every dollar they pay in. Is that fair to say?
>
> A. Mathematically correct.

[R. 622, Skiba Depo, p. 108, Depo Exhibit 9.] However, Skiba confirmed that the data he relied upon in advising the Ad Hoc Committee did not indicate that there was any difference in health care costs between retirees who had been continuous members in a single plan and the costs of retirees seeking entrance into a plan. [*Id.* pp. 55, 57, 59, 63-64.]

(b) David Stevens and Albert Mitchell. Committee Members David Stevens and Albert Mitchell also cited the higher health care costs of retirees in general as one of the reasons that

they opposed extending benefits to those retirees who had previously opted out. [R. 588, Stevens Depo, p. 14; R. 576, Mitchell Depo, p. 16.] Both confirmed that they had no evidence indicating that the health care costs of the excluded retirees were any greater than the retirees already in the Plan. [R. 588, Stevens Depo, p. 19; R. 576, Mitchell Depo, p. 16.]

(c) Alan Craig. LFUCG's expert witness cited the higher cost of health care for retirees as one justification for excluding those retirees who had previously opted out of the LFUCG Plan. But even Mr. Craig acknowledged that the high cost of retiree health care was not, by itself, a sufficient justification for singling out one group of retirees as compared to another group with a similar risk profile. [R. 533, Craig Depo, p. 24.] Craig stated that, in order to get a clear picture of the comparative potential for increased health care costs between any two groups of retirees, he would want to know the comparative ages of the two groups. [R. 533, Craig Depo, p. 27.] Mr. Craig and LFUCG had no information about the comparative health or ages of the retirees who had remained in the LFUCG Plan and those retirees who had opted out. [*Id.*]

(2) Rationale 2 - Perceived Risk of "Adverse Selection."

(a) Walter Skiba. On the issue of adverse selection, Skiba testified that, statistically speaking, the health care costs for a new health plan participant with no previous coverage will be greater than for one who has had continuous coverage. [R. 622, Skiba Depo, p. 58.] However, Skiba also testified that, in this case, a retiree's decision to opt out of the LFUCG plan upon retirement was in no way an indicator that s/he had gone without coverage since retirement; nor was it an indicator that the retiree's health status was any worse than the health status of those retirees who had remained in the plan. [R. 622, Skiba Depo, pp 23-26, 106.] LFUCG and the Ad Hoc Committee did not obtain any information about the insurance status or the health status of the

retirees who opted out of the Plan. [R. 622, Skiba Depo, pp. 28-32, 58, 109-110.] Indeed, Mr. Skiba did not know whether excluding those retirees who had previously opted out resulted in lowering or raising the health care costs for the Plan:

> Q: To the extent that there were retirees in the excluded group that might have had a better health and claims experience than the average member of the whole pool, isn't it true that by excluding them the Urban County Government was actually raising the per cost -- the per person cost of the medical care it was purchasing?
>
> A: If your assumptions were correct, then, theoretically that would be correct.

[R. 622, Skiba Depo, pp 79-80.]

Despite the fact that LFUCG had no evidence indicating that any of the opt-out retirees had gone without health insurance coverage during the opt-out period, Mr. Skiba persisted in his belief that including them they would drive up the costs the Plan. [R. 622, Skiba Depo, pp. 91-92.]

Skiba also addressed the concerns that he and other LFUCG decision makers had expressed about "the adverse impact to a plan by allowing people to come and go as the circumstances best suit them," what some witnesses referred to as a "revolving door." [R. 622, Skiba Depo, p. 70.] In his statements before the Ad Hoc Committee, Mr. Skiba strongly opposed any scenario in which retirees would be allowed to "go in and out on an annual basis." [R. 622, Skiba Depo, p. 99.] However, Skiba acknowledged that the potential for adverse impact was significantly less from a one-time window of opportunity to rejoin the plan than from a scenario in which retirees would be able to exit or enter the plan on an annual basis. [R. 622, Skiba Depo, p. 71.]

Dr. Stevens proposed just such a one-time opportunity at the fifth and last meeting of the Ad Hoc Committee:

> **Dr. Stevens** - Well we don't have to set it up to come in and out if they want. Do we? We could have a one time thirty day window here. You could enroll 203 retirees. You can enroll during this thirty days and from then on its irrevocable.

[R. 622, Skiba Depo Exhibit 9 (Meeting Minutes), p. 6 of 34]

Significantly, Skiba confirmed that, if LFUCG were to simply extend to retirees who opted out the same monetary payments that it extended to other retirees, such a policy would have no adverse impact whatsoever on the health experience in the insurance pool. [R. 622, Skiba Depo, pp. 76-78.] Indeed, one of the options considered by the Ad Hoc Committee was to provide a monetary payment to retirees that they could use to defray the cost of their own coverage. [R. 622, Skiba Depo, pp. 80-81, Depo Exhibit 6.] [5]

(b) Donna Cantrell Counts. LFUCG Finance Commissioner Donna Counts confirmed that neither the Ad Hoc Committee nor the Urban County Council received any testimony from any expert on the issue of adverse selection. [R. 605, Counts Depo, p. 45.] She also confirmed that, when deciding whether to offer paid health insurance coverage to retirees who had previously opted out of the LFUCG Plan, LFUCG made no effort to determine whether the "opt-out" retirees

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[5] Skiba testified that there was prior precedent for providing a dollar payment for health care coverage in lieu of participation in LFUCG's health care plan. As stated by Skiba, in the past, LFUCG has offered active employees – including fire fighters and police offers – the choice of participating in the LFUCG health plan or being paid a "benefit pool of dollars" to purchase health insurance elsewhere. [R. 622, Skiba Depo, pp 12-13.] Later in his deposition, Mr. Skiba gave another example – if an active employee has health coverage elsewhere, s/he may elect to have LFUCG's health insurance contribution paid into his/her retirement account. [R. 622, Skiba Depo, pp. 125-127.]

had procured coverage elsewhere. [R. 605, Counts Depo, p. 8.] "It was not an analysis that was requested, so I never considered it one way or the other." [*Id.*]

Like Mr. Skiba, Ms. Counts strongly opposed a "revolving door" in which retirees would be able to opt out and opt back into the LFUCG Plan at any time of their choosing, and expressed that view at committee meetings. [R. 605, Counts Depo, pp. 26-27.] Ms. Counts agreed with Mr. Skiba that offering the opt-out retirees a monthly payment in lieu of coverage in the Plan would have "no impact at all on the health experience or claims experience of the health insurance pool." [R. 605, Counts Depo, pp. 31-32.]

(c) David Stevens, M.D. Dr. Stevens, Chair of the Ad Hoc Committee, testified that his understanding was that many of the retirees who had opted out of the LFUCG Plan had obtained health coverage elsewhere, either through a spouse, new employment or Medicare. [R. 588, Stevens Depo, p. 16.] Nevertheless, Dr. Stevens testified that, based on comments made by Walter Skiba, a majority of the Ad Hoc Committee was convinced that "admitting those people in might have an adverse effect on the pool." [R. 588, Stevens Depo, pp. 18-19.] But the Ad Hoc Committee received no testimony from any expert on the issue of adverse selection. [R. 588, Stevens Depo, p. 19.] When asked whether, "[o]ther than statements from Mr. Skiba, did you have any evidence indicating that admitting people who had coverage back into the pool would have an adverse impact on the pool," Dr. Stevens answer was "No." [R. 588, Stevens Depo, p. 19.]

(d) Scott Blakely. Police Sergeant Scott Blakely was the one member of the Ad Hoc Committee who felt strongly that LFUCG should offer to pay the premiums for all retired fire fighters and police officers, not just those who had remained in the Plan. But even Sgt. Blakely was not advocating that retirees be allowed to opt out and come back in at will. "I thought the best thing

to do was offer a one-time opportunity for everyone to get back in if they wanted in at that time." [R. 561, Blakely Depo, pp. 35-36.]

(e) Alan Craig. At his deposition, LFUCG's expert discussed adverse selection at great length. Alan Craig agreed that "the one thing you want to avoid is a revolving door where people can freely choose when to come in and when to get out." [R. 533, Craig Depo, p. 32.] In order to minimize the risk of adverse selection, Mr. Craig stated that it is important for employers to "limit the frequency of choice." [*Id.*] To that end, when employers open a plan to new entrants, it is usually a one-time election. [*Id.*, p. 33.] Mr. Craig agreed that the risks of adverse selection in a situation where a retiree is offered a one-time opportunity to re-enter a plan are "very different" than in a "revolving door" plan. [R. 533, Craig Depo, pp. 50-51.] When the retiree is limited to a one-time opportunity to rejoin the plan, the employer has taken steps to mitigate adverse selection. [R. 533, Craig Depo, p. 51.]

Mr. Craig stated that he, like Mr. Skiba, had no information indicating that the retirees who dropped out went without coverage. [R. 533, Craig Depo, p. 42.] Indeed, one of the primary reasons that retirees might have dropped out was that they did have coverage elsewhere. [*Id.*, pp. 41-42.] Nor did Mr. Craig have any information as to whether the retirees who opted out had coverage that was more generous or less generous than the LFUCG Plan. [*Id.*, p. 42.]

Significantly, Mr. Craig testified that retirees who were in good health and who had good existing coverage would still have a strong incentive to re-join the LFUCG Plan after August 1999, since their premium would be paid by LFUCG. [R. 533, Craig Depo, pp. 44-45.]

Mr. Craig agreed that he and LFUCG had none of the data necessary to make an informed decision about whether there was a significant risk of adverse selection in admitting this group of retirees into the LFUCG plan:

> Q. But, once again, we have no information in this case as to whether this particular group of retirees had above average risk or below average risk?
>
> A. No.
>
> Q. You don't really know their age, which is a key determinant for expected costs?
>
> A. We do know they are retired, and we do know that in order to be retired they had to have 20 years of service. So we certainly know that they are not age 35.
>
> Q. Right, but they could be age 40?
>
> A. Possibly, I suppose they could be.
>
> Q. And we also don't know whether they might be coming from a plan that provided the same or better coverage than the Urban County Government plan. Correct?
>
> A. We do not know that.
>
> Q. And that's another key factor, as you testified, in making this adverse selection analysis?
>
> A. Yes, I think that's fair.

[R. 533, Craig Depo, pp. 45-46.]

Finally, Mr. Craig agreed that offering the retirees who opted out a monetary payment equal to the payments received by Plan participants would have no adverse selection impact. [R. 533, Craig Depo, pp. 54-55.]

(3) **Rational 3 - Unfairness**

(a) Walter Skiba. Mr. Skiba testified that in order to be eligible for full retirement, a fire fighter or police officer is required to put in 27 ½ years of service or attain the age of 46. [R. 622, Skiba Depo, p. 18.] Skiba also testified about that, during a participant's "good years," the participant is making net contributions to the plan, whereas during the participant's "bad years," the cost of coverage exceeds the premium being paid. [R. 622, Skiba Depo pp. 42-43, 47.] He stated that, in a self-insured plan, the premiums paid during a participant's good years are contributing to the assets that will be used for his/her care during the "bad years." [R. 622, Skiba Depo, pp. 46-50.] Skiba confirmed that age is the single most significant predictor of the costs of a particular participant's health care. [*Id.* pp. 48-49, 51.]

Skiba confirmed that there were a number of legitimate reasons why a retiree might opt out of the LFUCG plan upon retirement. [R. 622, Skiba Depo, pp. 22 *et seq.*] A retiree might find that paying 100% of the premium for LFUCG was too expensive. Or a retiree might be able to find other less expensive insurance through spousal coverage or membership in another group.

Mr. Skiba also confirmed that fire fighter and police retirees who had opted out of the LFUCG Plan in the past were "no less worthy" of receiving the new benefit than those who had remained in the Plan. [R. 622, Skiba Depo, pp 73-74.] Although the minutes of the Ad Hoc Committee indicate that some members had concerns about whether it was legal to allow retirees to re-join the plan, Skiba testified that he was aware of no state or federal law that would have prohibited LFUCG from offering a one-time opportunity to those who had previously opted out. [*Id.*, p. 74.]

(b) Donna Cantrell Counts. Ms. Counts testified that proposals for payment of the health insurance premiums for LFUCG retirees began being openly discussed in January 1998, with introduction of a bill in the Kentucky House of Representatives. [R. 605, Counts Depo, pp. 11-12.] She agreed that fire fighters and police officers who reached retirement age prior to 1998 had no reason to believe that, at some point years in the future, LFUCG might start paying the health insurance premiums of those retirees who stayed in the LFUCG Plan. [*Id.*] She also testified that the fire fighters and police officers who opted out of the LFUCG Plan upon their retirement had given any no less service to the community than the retirees who had remained in the Plan. [*Id.* p. 17.]

One of the main reasons Ms. Counts opposed inclusion of these retirees in the new benefit was her feeling that, by opting out of the Plan, they had stopped "contributing" to the Plan and should not now be allowed to return at an older age. [R. 605, Counts Depo, pp. 19.] "If they have continued and paid into the insurance plan from the time they are an employee throughout their retirement period, they have been contributing to the total fund." [*Id.*] Although Ms. Counts conceded that the retirees in question had contributed to the Plan during their 27½ years of active service, she insisted that "subsequent to that they did not – so whether that was five years or 20 years, there's a significant contribution that was not made to help support the entire insurance fund." [*Id.*] However, Ms. Counts could cite no evidence that the retirees who opted out were still net contributors to the Plan at the time they chose to opt out – "I have no statistics to support that." [R. 605, Counts Depo, pp. 20-21.] Ms. Counts repeated that neither she nor the Ad Hoc Committee had any information about whether this group of retirees were in fact "helping the plan or hurting the plan" at the time they opted out. [*Id.* pp. 22-23.] Nevertheless, she continued to insist that, when

these retirees chose to opt out upon their retirement, they had stopped "contributing" to the plan. [*Id.* p. 23.]

(c) David Stevens. Like Ms. Counts, Dr. Stevens felt it was "unfair" to let the opt-out retirees back into the LFUCG Plan "because they hadn't participated in the plan through the years and contributed their premiums." [R. 588, Stevens Depo, p. 35.] But also like Ms. Counts, Dr. Stevens had seen no data to back up his perception that the opt-out retirees were still "contributing" to the plan at the time they opted out. [R. 588, Stevens Depo, p. 38.]

(d) Albert Mitchell. Ad Hoc Committee member Al Mitchell also held the opinion that retirees who had opted out of the health insurance plan had deprived the plan of their premium payments and therefore should not be permitted re-entrance to the Plan at a later date:

> Q. What was your understanding as to why Mr. Skiba or others were recommending that those who had opted out not be included in this new benefit?
>
> A. Because of the benefit -- well, the people who had stayed in had been investing in the program all these years, and that their money had been basically invested by insurance companies to cover them. Because when you are not using the plan as much, you made more money, and as you get older, you use it more.

[R. 576, Mitchell Depo, p. 12.] However, Al Mitchell had no more evidentiary support for this contention than Ms. Count or Dr. Stevens. When asked whether he had reviewed any data indicating whether those retirees who had opted out did so at a time when they were net contributors or net recipients of resources, Mr. Mitchell answered "No." [R. 576, Mitchell Depo, pp. 14-15.]

(e) Scott Blakely. Police Sergeant Scott Blakey was the only member of the Ad Hoc Committee who supported offering the new benefit to all police and fire fighter retirees,

regardless of whether they had previously opted out of the LFUCG Plan. [R. 561, Blakely Depo, p. 12.] He testified that, in addition to Al Mitchell, the committee member most opposed to the idea was Barbara Holbrook. [*Id.*, p. 18-19.] Ms. Holbrook was on the committee as a representative of retirees in the City Employees Pension Fund. [*Id.* at 19.] According the Sgt. Blakely, Ms. Holbrook felt strongly that it simply was not "fair" to allow retirees who had opted out of the Plan in the past to opt back in. [*Id.*]

On the issue of fairness, Sgt. Blakely took the opposite position of Al Mitchell and Barbara Holbrook. In his view, fairness dictated that the new benefit be extended to all retirees, not just those who had remained in the Plan. Blakely testified that, back when these retirees made their decision to opt out of the LFUCG Plan because of the cost, having LFUCG pay their premium "wasn't an option for them at that point." [R. 561, Blakely Depo, p. 32.] One thing Sgt. Blakely wanted to avoid was any legal claim by retirees stating that they had not been given the opportunity to get back in and receive this new benefit. [R. 561, Blakely Depo, p. 35.]

(f) Alan Craig. As noted above, several of LFUCG's key decision makers (including Donna Counts, David Stevens, and Al Mitchell) opposed inclusion of those retirees who had opted out because they were convinced that, by opting out, the retirees had deprived the Plan of "contributions" that could have been "invested" to cover future claims. Mr. Craig's expert testimony demonstrated that these convictions were completely ill-founded. The chart attached as Appendix Exhibit 3 indicates that those retirees who opted out of LFUCG coverage did so at an average age of 48.4 years. [R. 833, Exhibit A to Plaintiffs' Summary Judgment Memorandum (Jun 28, 2005).] Mr. Craig testified that, generally speaking, health plan participants cross the threshold from being net contributors to a health plan's resources to being net utilizers of a plan's resources "something

in the range of age 40 to 45." [R. 533, Craig Depo, p. 28.] Significantly, Mr. Craig did not cite the issue of fairness as one of the appropriate justifications for exclusion of the retirees in this case. He did not mention it in his written opinion and he did not make any claim during his deposition that the retirees who had opted out should now be excluded because they were not "contributing" to the assets of the Plan during the years after their retirement.

Mr. Craig also testified that he understood the rationale of those retirees who said they should be allowed a one-time opportunity to re-join the LFUCG plan because, at the time they opted out, they had no idea that the rules of the game would change and that LFUCG would some day start paying the cost of retiree health insurance premiums. [R. 533, Craig Depo, pp. 49-50.]

(4) Rationale 4 - Business Practice

(a) Walter Skiba. Mr. Skiba testified that he and three other LFUCG decision makers, including Donna Cantrell Counts, David Stevens and Council Member Fred Brown, expressed the view that other health care plans – including those of the County Employees Retirement System, the University of Kentucky, and private business – had policies in place prohibiting retirees who had withdrawn from a health care plan from re-entering the plan at a later date. [R. 622, Skiba Depo, pp. 36, 65-68.] As stated in a memorandum by Skiba, "I have researched hundreds of plans and no one allows for retirees to come and go as they choose." [R. 622, Skiba Depo, p. 70, Dep Exhibit 5.] However, Skiba acknowledged that he was not aware of another situation in which a health plan that had previously made no contributions to retiree premiums changed policy and offered to pay 100% of retiree premiums for individual coverage. [R. 622, Skiba Depo pp. 66-68.] Skiba agreed that none of the comments from LFUCG decision makers about other health plans addressed the unique situation of "offering retirees who had opted out a one-time

window to get back in, in light of the fact that Urban County Government was offering a brand new benefit." [*Id.*, p. 68.]

(b) Alan Craig. LFUCG's expert also cited industry practice as one of the justifications for excluding these retirees in this case. He stated in his written opinion that "[a]mong employers who offer retiree medical coverage, it is a common practice to prohibit re-enrollment once coverage has been dropped." [R. 533, Craig Depo Exhibit 2, p. 2.] But Mr. Craig admitted that he had no experience with situations in which an employer had switched from offering benefits at the retirees' cost to a plan paid for by the employer:

> Q. Is it fair to say you really can't say what a common employer practice would be in that situation?
>
> A. In that exact situation, since I've said that I have not participated in that exact situation, the answer to that is, yes.

[R. 533, Craig Depo, p. 49.]

D. AD HOC COMMITTEE MEMBERS UNAWARE OF LEGAL CONCERNS RAISED BY LFUCG DEPARTMENT OF LAW

The Ad Hoc Committee held its fifth and final meeting on October 20, 1998, and issued its report to the Budget and Finance Committee shortly thereafter. [R. 622, Skiba Depo, Exhibits 9-10.] On November 16, 1998, LFUCG Corporate Counsel Theresa L. Holmes sent a letter to the Kentucky Attorney General outlining the history of the retiree benefits issue, including the failed attempt to enact a statute in the 1998 General Assembly. Ms. Holmes requested a legal opinion as to three aspects of the new benefit that the Urban County Council sought to extend to retirees. One of her concerns was the exclusion of retirees who had previously opted out of the LFUCG Plan. Ms. Holmes stated as follows in her letter to the Attorney General:

> Under current policy, retiring employees may elect to participate in LFUCG's health insurance plans by paying their own premiums. Many members have opted out of the LFUCG's insurance pool because they have been able to find coverage from another source, usually their spouse's insurance. The Urban County Council voted not to pay insurance premiums to those who had opted out of the LFUCG pool.
>
> The Urban County Council supported its determination by citing cost and administrative difficulties. It is our concern that this determination could violate the equal protection afforded by Sections 1, 2, and 3 of the Kentucky Constitution. There are no easily ascertainable "distinctive and natural reasons inducing and supporting the classification" of former employees who opted out of LFUCG's insurance pool and those who did not. *Commonwealth of Kentucky, Revenue Cabinet v. Cope*, Ky., 875 S.W.2d 87, 89 (1994). Also, the stated responses may not provide a rational basis to support the distinction. *See, Kentucky Harlan Coal Company v. Hines*, Ky., 872 S.W.2d 446 (1994); *Tabler v. Wallace*, Ky., 704 S.W.2d 179 (1985). This action is similar to the decisions criticized in OAG 92-108 and 84-203.

[R. 622, Skiba Depo Exhibit 12, p. 3 (emphasis added).] The Attorney General's office responded on June 10, 1999, noting that the issue of retiree benefits for LFUCG police officers and fire fighters was considered in the 1998 General Assembly. The opinion offered by the Attorney General's Office was simply that "[w]e concur that a legislative solution is the appropriate action to pursue." [R. 499, Plaintiffs Summary Judgment Memo, Exhibit 1 (May 17, 2005)]

At the time the Ad Hoc Committee was meeting, its members were completely unaware that LFUCG's corporate counsel had questions about the constitutionality of excluding retirees who had previously opted out of the health insurance plan. Walter Skiba testified as follows:

> Q. Turning back to Exhibit 12 [Ms. Holmes' request for an AG opinion] and those two paragraphs on Page 3 of Exhibit 12. Is it fair to say that the Ad Hoc Committee was not informed, in the detail set forth in these two paragraphs, that the Department of Law had constitutional concerns about the

specific issue of providing benefits only to those retirees who had stayed in the pool?

A. To the best of my knowledge, that's a correct statement.

[R. 622, Skiba Depo, p. 117.] Ad Hoc Committee Chairman Dr. David Stevens testified that, if he had known of the Legal Department's concerns, it would at least have influenced his thinking on the issue. [R. 588, Stevens Depo, pp. 30-31.] Like Dr. Stevens, Sgt. Blakely would have liked to have known – and would have liked committee members to have known – about the law department's concerns. [R. 561, Blakely Depo, p. 39.]

E. URBAN COUNTY COUNCIL REJECTS RECOMMENDATIONS OF AD HOC COMMITTEE

As noted above, when the Ad Hoc Committee concluded its deliberations in October 1998, it voted to recommend extending benefits only to those retirees who had remained continuous participants in the LFUCG insurance plan. Albert Mitchell's motion before the Ad Hoc Committee proposed recommending to the Budget and Finance Committee that benefits be provided to those retirees who "have opted to maintain the health benefit that is provided by the Lexington Fayette Urban County Government." [R 136-142, Ad Hoc Committee Report (Oct 22, 1998), pgs 2-3 of 4 (emphasis added).] Upon receipt of that recommendation, the Budget and Finance Committee passed a motion (with one dissent and one abstention) recommending "that pending resolution of legal issues and analysis of available funds for FY-2000 and 2001, that the UCG provide health insurance at the single-benefit level to all the Police and Fire and City Employees Pension Fund (current and future) retirees who have continued their coverage under the government's health insurance plan." [R 142-145, Budget and Finance Committee Minutes (Oct 26 1998), pg 3 (emphasis added).] The Urban County Council voted 12-0-1 at a Work Session on November 10, 1998, to

approve the recommendation of the Budget Committee: "that pending resolution of legal issues and analysis of available funds for FY-2000 and 2001, that the UCG provide health insurance at the single-benefit level to all Police and Fire and City Employees Pension Fund (current and future) retirees who have continued their coverage under the government's health insurance plan." [R. 146, Work Session Summary Report (Nov 10, 1998), pg 2 (emphasis added).]

However, more than nine months later, when the Council finally passed an ordinance creating the new benefits, it rejected the language proposed in October and November 1998. The 1999 Ordinance does not contain language limiting benefits to those retirees "who have continued their coverage" or "who have opted to maintain coverage." The Council rejected these two formulations, either of which it could easily have chosen, and opted instead to provide benefits to all retirees who had been plan participants "prior to July 1, 1999" with no other qualifying language.

ARGUMENT

A. AS FOUND BY BOTH LOWER COURTS, THE TEXT OF THE 1999 ORDINANCE IS UNAMBIGUOUS AND, BY ITS CLEAR LANGUAGE, EXTENDS PAID HEALTH CARE BENEFITS TO THESE PLAINTIFFS

With regard to ordinances, as with statutes, it is not the unstated intentions of the legislative body that the Court must look to – it is the language of the ordinance itself that must be construed. *See Mertens v. Hewitt Associates*, 508 U.S. 248, 261 (1993) (notions of a statute's purpose are inadequate to overcome the words of its text regarding the specific issue under consideration). When an ordinance is "not ambiguous and is susceptible of only one construction, the court is not at liberty to add anything to the idea expressed." *City of Louisville v. Board of Education*, 17 S.W.2d 210 (Ky. 1929). "Where the language of a statute is doubtful or ambiguous,

resort may be had to the journals or to the legislative records showing the legislative history of the act in question in order to ascertain the intention of the Legislature, but this rule does not apply where the language of the statute is plain and unambiguous." *City of Vanceburg v. Plummer*, 122 S.W.2d 772 (Ky. 1938). In this case, the Circuit Court and Court of Appeals were correct to find that the language of the 1999 Ordinance is not doubtful or ambiguous and that, therefore, it "must be given such plain and unambiguous meaning." *Rex Coal Company v. Campbell*, 281 S.W. 1039 (Ky. 1926).

As found by both lower courts, the language of the 1999 Ordinance could hardly be more clear. Section 2(a) extends eligibility to participate in the LFUCG health care plan to "All members of the Policemen's and Firefighters' Retirement Fund of the Lexington Fayette Urban County Government . . . who retired prior to July 1, 1999 . . ." [Ordinance No. 217-99, Section 2(a), pg 2 (emphasis added).] Section 2(b) states that "[t]he urban county government shall provide" the new monetary benefits created by the Ordinance to "all members of the Policemen's and Firefighters' Retirement Fund who retired prior to July 1, 1999, and who were participants in the group health insurance plan coverage provided to urban county government employees and retirees prior to July 1, 1999. . ." [Ordinance No. 217-99, Section 2(b), pg 2 (emphasis added).] Section 2(c) excepts from coverage only those "retired members of the Policemen's and Firefighters Retirement Fund, who were not, prior to July 1, 1999, participants in the group health insurance plan coverage provided to urban county government employees and retirees." [Ordinance No. 217-99, Section 2(c), pg 3 (emphasis added).]

In its briefs to the Court of Appeals, LFUCG argued that the 1999 Ordinance is ambiguous because the phrase "who were participants . . . prior to July 1, 1999" states neither "at

any time prior to July 1, 1999" nor "immediately before July 1, 1999." [LFUCG Cross Appellant's Brief (Court of Appeals), pg 37.] It is true that the 1999 Ordinance contains no language qualifying the phrase "prior to July 1, 1999" in any of the instances in which that phrase is used. However, with no qualifying language, the only interpretation that can reasonably be given to the term "prior to July 1, 1999" is at any time prior to July 1, 1999. Certainly, that is the only reasonable interpretation to be given to the phrase "who retired prior to July 1, 1999." Even LFUCG does not claim that the benefits were offered only to those who retired "immediately before July 1, 1999," or who retired "on June 30, 1999." The Court has "a duty to accord to words of a statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion." *Bailey v. Reeves*, 662 S.W.2d 832, 834 (Ky. 1984), *citing Department of Revenue v. Greyhound Corp.*, Ky., 321 S.W.2d 60 (Ky. 1959). In this case, the phrase "prior to July 1, 1999" cannot be given a different meaning when preceded by the phrase "were participants in the group health insurance plan" than when preceded by the word "retired." If the Plaintiffs retired "prior to July 1, 1999," and were members of the Plan "prior to July 1, 1999," they meet the stated eligibility criteria.

In its Brief to this Court, LFUCG argues that the two lower court opinions ignore the following language contained in Section 2(c) of the 1999 Ordinance:

> (c) No benefits shall be available under this section to retired members of the Policemen's and Firefighters' Retirement Fund who were not, prior to July 1, 1999, participants in the group health insurance plan coverage provided to urban county government employees and retirees.

[Ordinance No. 217-99, Section 2(c), pg 3.] LFUCG argues that this language has no meaning unless it excludes these Plaintiffs. Once again, LFUCG is incorrect. The plain meaning of the language in Section 2(c) is that the only retirees to be excluded from benefits are those who, at no

time prior to July 1, 1999, had been participants in the LFUCG group coverage. As stated by the Court of Appeals, "Section 2(c) simply reiterates the requirement that a person must have been a participant in the plan at some point before July 1, 1999, in order to qualify for benefits." [Court of Appeals Opinion, pg 10.].

LFUCG argues, in the alternative, that the language contained in Section 2(c) makes the 1999 Ordinance "inherently ambiguous" – an argument rejected by both lower courts. According to LFUCG, it was clear, back in August 1999, that the Council did not really mean "prior to July 1, 1999," and that it really meant to extend benefits only to those who were plan participants on June 30, 1999 – or, as LFUCG stated less clearly in its 2000 Ordinance, "immediately prior to July 1, 1999." This assertion should be rejected on its face because the Council merely had to use the words "on June 30, 1999" or "immediately prior to July 1, 1999" instead of "prior to July 1, 1999," if it desired that particular meaning. The phrases are easily distinguishable, and it must be presumed that the Council meant what it said in the 1999 Ordinance. "A legislature making no exceptions to the positive terms of a statute is presumed to have intended to make none." *Bailey, supra, citing Commonwealth v. Boarman*, 610 S.W.2d 922 (Ky. App. 1980).

An ordinance, like a statute, "must be tested on the basis of what is said rather than what might have been said." *Estes v. Commonwealth*, 952 S.W.2d 701, 703 (Ky. 1997), *quoting, Musselman v. Commonwealth*, 705 S.W.2d 476, 478 (Ky. 1986); *see also, Kipling v. City of White Plains*, 80 S.W.3d 776, 785 (Ky. App. 2001). "It is our responsibility to ascertain the intention of the legislature from the words used in enacting the statute rather than surmising what may have been intended but was not expressed." *Flying J Travel Plaza v. Transportation Cabinet Dep't of Highways*, 928 S.W.2d 344, 347 (Ky. 1996), citing *Kentucky Assoc. of Chiropractors Inc. v.*

Jefferson County Medical Soc., 549 S.W.2d 817, 821 (Ky. 1977). As the Kentucky Supreme Court has stated on more than one occasion:

> Where a statute on its face is intelligible, the courts are not at liberty to supply words or make additions which amount, as sometimes stated, to providing *casus omissus*, or cure an omission, however just or desirable it might be to supply an omitted provision. It makes no difference that it appears the omission was mere oversight.

Commonwealth v. Allen, 980 S.W.2d 278, 280-281 (Ky. 1998); *quoting Hatchett v. City of Glasgow*, 340 S.W.2d 248, 251 (Ky. 1960) (emphasis added). "Resort must be had first to the words, which are decisive if they are clear." *Gateway Constr. Co. v. Wallbaum*, 356 S.W.2d 247, 249 (Ky. 1962).

Assuming, solely for the sake of argument, that it would be appropriate for the Court to consider extrinsic evidence of the Urban County Council's intent, LFUCG's arguments must still fail. LFUCG argues that actions taken by the Urban County Council and its committees in October and November 1998 demonstrate that the Council's true intent in August 1999 was to exclude retirees who at any time had opted out of LFUCG group coverage. But LFUCG has not explained why, in August 1999, the Urban County Council rejected the exclusion language recommended by both the Ad Hoc Committee and the Finance and Budget Committee in October 1998.[6] Instead, the Urban County Council chose to extend benefits to all retirees who were plan participants "prior to July 1, 1999," with no further qualification.[7]

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[6] See, Counterstatement of the Case, *supra*, Section E (Urban County Council Rejects Recommendations of Ad Hoc Committee).

[7] The Preamble to 1999 Ordinance provides further evidence that, in August 1999, the Council's intent was to extend the new benefit to all retirees:

> AN ORDINANCE . . . TO PROVIDE FOR THE PAYMENT OF PREMIUMS FOR GROUP HEALTH INSURANCE SINGLE PLAN COVERAGE FOR MEMBERS OF . . . THE POLICEMEN'S AND FIREFIGHTERS' RETIREMENT FUND OF

The reasons for the Council's August 1999 rejection of the language proposed in October 1998 are not apparent from the record in this case. Perhaps the "resolution of certain issues" (legal and budgetary) sought by the Council in its minutes from November 1998 caused it to change its mind on the eligibility criteria to be applied. [R 142-145, Budget and Finance Committee Minutes (Oct 26 1998), pg 3.] Perhaps contacts from affected citizens caused Council members to reexamine the issue. Perhaps Council members just had more time to think about the ethical and legal implications of denying benefits to one group of hazardous-duty retirees while granting them to others. But, whatever the reason, the language of the 1999 Ordinance is clear. The final language selected by the Urban County Council states that benefits shall be provided to all members of the Police and Firefighters' Retirement Fund who retired prior to July 1, 1999 and who were participants in the LFUCG health plan prior to July 1, 1999, without qualification.

In sum, the Circuit Court and Court of Appeals were correct to find that the plain language of the 1999 Ordinance unambiguously extends health insurance benefits to these Plaintiffs. The Circuit Court properly granted the Plaintiffs' motion for summary judgment with regard to the 1999 Ordinance and properly awarded the Plaintiffs monetary damages in the amount of the premium subsidies paid by LFUCG to other retirees for the period beginning July 1, 1999, until December 5, 2000 – the effective date of the 2000 Ordinance.

THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT <u>WHO RETIRED PRIOR TO JULY 1, 1999</u> . . ."

[Ordinance 217-99, pg 1 (emphasis added).]

B. UNDER THE KENTUCKY CONSTITUTION, LFUCG MUST HAVE A "REASONABLE BASIS IN FACT" OR A "SUBSTANTIAL AND JUSTIFIABLE REASON" FOR EXCLUDING THESE PLAINTIFFS FROM THE BENEFITS PROVIDED TO OTHER RETIREES

The central issue on appeal concerning the 2000 Ordinance is whether it was permissible under the equal protection provisions of the Kentucky Constitution for LFUCG to exclude these Plaintiffs from the benefits provided to other retired police officers and firefighters. In upholding the constitutionality of the 2000 Ordinance, the Circuit Court cited only one case – a U.S. Supreme Court decision applying the Fourteenth Amendment's most deferential "rational basis" standard of review:

> 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 (1993).

[R. 964, Order (Dec 15, 2005), pg 2.] The Circuit Court declined to apply Kentucky constitutional standards and declined to examine whether LFUCG had a substantial and justifiable reason, based in fact, for excluding these Plaintiffs from the benefits offered to other retirees.

LFUCG is incorrect when it states that the equal protection standards for legislative classification under the state constitution are the same as those under the Fourteenth Amendment to the federal constitution and that "a single standard can be applied to both the state and federal constitutions." [LFUCG Brief for Appellant, pg 13.] As recently as 2005, in *Elk Horn Coal Corp. v. Cheyenne Res., Inc.*, 163 S.W.3d 408 (Ky. 2005), this Court reaffirmed its prior decisions holding that the guarantees of individual rights embodied in the Kentucky Constitution are more extensive than those provided for in the Fourteenth Amendment to the United States Constitution:

This Court, however, 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, meaning the minimum guarantee of individual rights under the United States Constitution as interpreted by the United States Supreme Court."[8] The Kentucky Constitution's equal protection provisions, Sections 1, 2, and 3, are much more detailed and specific than the *Equal Protection Clause of the United States Constitution.*[9] Moreover, the equal protection provisions of the Kentucky Constitution are enhanced by Section 59 and 60[10] . . . . As we stated in *Perkins v. Northeastern Log Homes*:[11]

> Many [states] have general protection against "arbitrary power" as we have in *Kentucky Constitution § 2*, and guarantees of "equal" rights and protection against "grant" of "separate ... privileges" as we have in *Kentucky Constitution § 3*. But few have additional protection against local and special legislation as we have in *Kentucky Constitution § 59*. So far as we can determine, none has anything like the combination of broad constitutional protection of individual rights against legislative interference vouchsafed by our 1891 Kentucky Constitution.[12]

Because of this additional protection, we have elected at times to apply a guarantee of individual rights in equal protection cases that is higher than the minimum guaranteed by the Federal Constitution. Instead of requiring a "rational basis," we have construed our Constitution as requiring a "reasonable basis" or a "substantial and

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[8] Quoting *Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992) (citing *Oregon v. Hass*, 420 U.S. 714, 719 (1975)).

[9] Citing *Tabler v. Wallace*, 704 S.W.2d 179, 183 (Ky. 1986).

[10] Citing *Wasson*, 842 S.W.2d at 500.

[11] 808 S.W.2d 809 (Ky. 1991).

[12] Quoting from *Perkins*, 808 S.W.2d at 818.

justifiable reason"[13] for discriminatory legislation in areas of social and economic policy.

Elk Horn Coal, 163 S.W.3d at 417-419 (emphasis added).

As stated in *Elk Horn Coal*, *Wasson*, and *Perkins*, the equal protection provisions of Sections 1, 2, and 3 of the Kentucky Constitution are "enhanced" by Sections 59 and 60.[14] This Court has held that the prohibitions against special legislation found in Sections 59 and 60 apply not only to enactments of the Kentucky General Assembly, but also to ordinances passed by local governments. *Preston v. Johnson County Fiscal Court*, 27 S.W.3d 790, 795 (Ky. 2000); *Hyde v. Haunost*, 530 S.W.2d 374, 375-376 (Ky. 1975); *Newman v. Lee*, 471 S.W.2d 293, 295 (Ky. 1971); *Commonwealth v. Beasy*, 386 S.W.2d 444, 447 (Ky. 1965); *Board of Council v. Renfro*, 22 Ky. L. Rptr. 806, 58 S.W. 795 (Ky. 1900).

The constitutional principles reaffirmed in *Elk Horn Coal* are not new. Seventy years ago, in *Fischer v. Grieb*, 113 S.W.2d 1139 (Ky. 1938), the High Court held that, under the Kentucky

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[13] Citing *Tabler v. Wallace*, 704 S.W.2d at 186-187.

[14] Section 1 of the Kentucky Constitution provides: "All men are, by nature, free and equal, and have certain inherent and inalienable rights...."

Section 2 provides: "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

Section 3 provides: "All men, when they form a social compact, are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services...."

Section 59 provides: "In all . . . cases where a general law can be made applicable, no special law shall be enacted."

Section 60 provides: "No law shall be enacted granting powers or privileges in any case where the granting of such powers or privileges shall have been provided for by a general law."

Constitution, government may not make classifications and exclude one group from the benefits enjoyed by another "without reasonable basis in fact." *Fischer*, 113 S.W.2d at 1140. More recently, in *Combs v. Huff*, 858 S.W.2d 160 (Ky. 1993), the Court stated that the "reasonable basis in fact" standard is "deeply embedded" in Kentucky equal protection analysis. *Combs*, 858 S.W.2d at 164.[15]

In *Tabler v. Wallace*, 704 S.W.2d 179, 183 (Ky. 1986), this Court explicitly rejected the notion, advanced by LFUCG in this case, that any conceivable state of facts will provide a constitutionally sufficient basis for a legislative classification:

> The fundamental question is whether the General Assembly had a reasonable basis for this legislation. . . . Defense counsels' arguments throughout have been to the effect that any reason however imaginative that could have existed requires us to uphold otherwise discriminatory legislation. On the contrary, there must be a substantial and justifiable reason apparent from legislative history, from the statute's title, preamble or subject matter, or from some other authoritative source. . . .
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> * * * * *
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> Where to draw the line as to what constitutes a "reasonable basis" for otherwise discriminatory legislation is a difficult matter. We do not do so here beyond stating that imaginative reasons that could exist, without anything of a positive nature to suggest that they did exist, do not suffice.

Tabler, 704 S.W.2d at 185-187 (emphasis added).

Another case in which this Court applied the heightened standard of state constitutional review is the very case relied upon by LFUCG, *Commonwealth v. Howard*, 969

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[15] Other cases in which the "reasonable basis in fact" standard has been utilized include *Graham v. Mills*, 694 S.W.2d 698, 701 (Ky. 1985); *Graybeal v. McNevin*, 439 S.W.2d 323, 326 (Ky. 1969); *Elrod v. Willis*, 305 Ky. 225, 231 (Ky. 1947); *Markendorf v. Friedman*, 280 Ky. 484, 488-89 (Ky. 1939); *Commonwealth v. Griffen*, 268 Ky. 830, 836 (Ky. 1937); and *Shaw v. Fox*, 246 Ky. 342, 349 (Ky. 1932).

S.W.2d 700 (Ky. 1998).[16] The Court in *Howard* cited *Tabler v. Wallace, supra*, with approval, stating that "[w]e have previously held that legislative classifications will be upheld if there is a substantial and justifiable reason apparent from the legislative history, from the statute's title, preamble or subject matter or from some other authoritative source." *Howard*, 969 S.W.2d at 705 (Emphasis added, quotation marks omitted).

The issue in *Howard* was the constitutionality of a juvenile DWI statute setting a lower blood alcohol level for drivers under the age of 21. Contrary to the implications in LFUCG's Brief, the Kentucky Supreme Court did not limit its inquiry exclusively to relevant U.S. Supreme Court decisions. Rather, it conducted its own independent evaluation of the legislative interests supporting the distinction between drivers under and over the age of 21, and found that there was a "substantial and justifiable reason" for the classification as required by the Kentucky Constitution. *Howard*, 969 S.W.2d at 704-705.

As reiterated in *Elk Horn Coal*, in areas of social and economic policy, this Court has construed the Kentucky Constitution as requiring a "reasonable basis in fact" or a "substantial and justifiable reason" for discriminatory legislation. "[N]o class of persons can be discriminated against under the Kentucky Constitution. All are entitled to equal treatment, unless there is a substantial governmental interest . . . for different treatment." *Wasson*, 842 S.W.2d at 500.

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[16] *See also, Commonwealth Revenue Cabinet v. Cope*, 875 S.W.2d 87, 89 (Ky. 1994); and *Waggoner v. Waggoner*, 846 S.W.2d 704, 707 (Ky. 1992).

C. LFUCG HAD NO "REASONABLE BASIS IN FACT" AND NO "SUBSTANTIAL AND JUSTIFIABLE REASON" FOR EXCLUDING THESE PLAINTIFFS FROM THE BENEFITS PROVIDED TO OTHER RETIREES UNDER THE 1999 AND 2000 ORDINANCES

During discovery in this action, LFUCG and its decision makers had every opportunity to articulate every conceivable basis for the classifications in the 2000 Ordinance – and specifically for LFUCG's decision to rescind the benefits that LFUCG had granted to these Plaintiffs in August 1999, while continuing to provide them to other police and fire fighter retirees. As found by the Court of Appeals, however, none of the rationales offered by LFUCG had a reasonable basis in fact sufficient to exclude these retirees from the paid coverage offered to other retirees under the 1999 and 2000 ordinances.

The first rationale – the high cost of coverage for retirees in general – might have been a basis for offering a lesser benefit to all retirees, but it provided no justification for excluding this group of retirees. As witness after witness testified, LFUCG had no reason to believe that the health care costs for the excluded group would be any higher than for other retirees. To the extent that Rationale 1 was one of the justifications for LFUCG's actions in this case, it was simply a means to reduce the number of older participants in the plan and constituted little more than a proxy for age discrimination.

The second rationale was the fear of the potential for adverse selection. Witnesses testified that their primary concern was a "revolving door" through which retirees could enter the plan when they became sick, exit the plan when they became healthy, and re-enter the plan when they became sick again. But this was never a serious option. The proposals put forward by Dr.

Stevens and Sgt. Blakely were for a one-time opportunity for retirees to re-enter the plan so that they could enjoy the same benefits of paid coverage that other retirees would enjoy. As LFUCG's expert testified, such a one-time option significantly mitigated any risk of adverse selection.

A second worry relating to adverse selection concerned retirees who might have gone without health insurance altogether, and thus neglected their medical needs. But, once again, LFUCG had no evidence to support the notion that the opt-out retirees had gone without coverage. To the contrary, committee members believed that the reason these retirees opted out was precisely because they had better coverage elsewhere. LFUCG's expert testified that there was no risk of adverse selection from retirees who had equivalent or better coverage elsewhere.

In short, all of LFUCG's concerns about the potential for adverse selection were unsubstantiated assumptions – particularly when viewed in the context, not of a revolving door, but of a one-time opportunity for retirees to re-enter the Plan. As stated by LFUCG's own expert (Alan Craig), LFUCG had collected none of the data necessary to make an informed decision about whether there was a significant risk of adverse selection in admitting this group of retirees into the LFUCG plan.

The third rationale articulated by LFUCG witnesses (fairness) is the most troubling because it appeared to be the primary motivating factor in the minds of decision makers, while having the least basis in fact. Finance Commissioner Donna Counts and Ad Hoc Committee Chair David Stevens persisted in believing that, when retirees opted out, they had deprived the Plan of "contributions" that could have been "invested" to cover future claims. But Alan Craig testified that by age 40 to 45, health plan participants have generally crossed over from being net contributors to

plan assets to being net utilizers of health care services. Thus, even Mr. Craig did not cite the "fairness" rationale as a justification for denying these retirees re-entry into the Plan.[17]

The fourth and final rationale cited by LFUCG witnesses was the industry practice of not allowing retirees to re-enter a health insurance plan once they had opted out. But LFUCG expert Alan Craig had no knowledge of any other instances in which an employer had offered to pay for retiree health benefits that had previously been paid for exclusively by the retiree – and therefore had no knowledge of what the industry practice in such a scenario would be.

In sum, none of the four stated rationales offered by LFUCG were based in fact, and none served as a constitutionally permissible basis for excluding this group of retirees from a valuable benefit offered to others.

LFUCG now argues to this Court that it is not bound by any of this evidence or by any of its prior representations – and that LFUCG is free to articulate new justifications for the 2000 Ordinance that none of its officials even purported to rely on. "In defending the ordinances, LFUCG is not limited to . . . the statements of deponents, or the reasons set forth in the legislative history." [LFUCG Appellee's Brief, pg 10.] Beginning with its briefs to the Court of Appeals, LFUCG offered one new rationale (preservation of the status quo) and a substantially revised "fairness" justification. But, as discussed below, the new justifications suffer from the same defects as LFUCG's original rationales – they are based on assumptions that are demonstrably false, unsubstantiated and/or self-contradictory. LFUCG's stated reasons for the classifications in the 2000

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[17] On the issue of fairness, all of LFUCG's witnesses agreed that there was nothing about the service records of the retired firefighters and police officers who were excluded that made them less deserving of the benefits offered in the 1999 and 2000 ordinances.

Ordinance can be described using the same language that the Kentucky Supreme Court used when it invalidated the classifications at issue in *Tabler v. Wallace, supra*:

> A number of different reasons have been suggested by the defendants and those filing amicus curiae briefs on their behalf for creating a separate classification for these groups. But these are offered only as possible reasons that could have existed, not as reasons that did in fact exist. The justifications offered are largely self-contradictory.

704 S.W.2d at 185. As stated in *Tabler*, "reasons that could exist, without anything of a positive nature to suggest that they did exist, do not suffice." 704 S.W.2d at 187.

1. "Recognizing Status Quo"

In the Court of Appeals, LFUCG argued that offering paid benefits to some retirees, but excluding those who at some prior time opted out of LFUCG group coverage, "is a distinction that maintains the status quo." [LFUCG Appellee's Brief (Court of Appeals), pg 16.] Assuming for the sake of argument that preserving the status quo is a constitutionally permissible reason for denying valuable benefits to one group of hazardous duty police and fire retirees, while continuing to provide them to other police and fire retirees, there are still a number of problems with LFUCG's new contention. First and foremost, the status quo at the time the 2000 Ordinance was passed was the provision of benefits to all retirees who had been participants in the plan prior to July 1, 1999, as provided in the 1999 Ordinance. Far from maintaining the status quo, the 2000 Ordinance disturbed the status quo by rescinding benefits previously granted to these Plaintiffs and eliminating a class of retirees previously entitled to benefits under the 1999 Ordinance.

Second, even when compared to the status quo prior to July 1, 1999, the 2000 Ordinance did not just "enhance" an existing status quo benefit. The essence of the new benefit provided by the 1999 and 2000 ordinances is monetary in nature. The insurance coverage of those

retirees who received the new benefit remained unaltered by the two ordinances. What changed was the fact that retirees started receiving a monetary payment to offset the cost of their existing health care coverage. While the status quo ante (prior to July 1, 1999) was unchanged with regard to who retained coverage under the LFUCG health insurance plan, there was a substantial and undeniable change in the status quo for those retirees who received the new monetary benefit. Simply put, money was awarded to one group of retirees, but not another. Only for retirees denied the new monetary benefit was the status quo "maintained."

2. LFUCG's Ever-Changing "Fairness / Equity" Rationale

Fairness and equity have always been cited by LFUCG as one of the principle reasons it offered benefits only to those retirees who had remained in the group health plan. But the precise nature of the equitable concerns that LFUCG says it is seeking to advance has repeatedly changed. LFUCG's most recent spin on fairness and equity is no more based in fact than its prior claims.

For understandable reasons, LFUCG has abandoned both of its prior "equity" justifications in its argument to this Court. LFUCG no longer argues that the retirees who opted out deprived the Plan of resources that could have been invested to fund future claims, because it realizes that there is no factual basis for such a claim. LFUCG no longer argues that the retirees who opted out have no equitable claim to LFUCG coverage because they have equivalent or better coverage elsewhere, in apparent realization that the "better coverage elsewhere" rationale is inconsistent with the fear expressed by decision makers that the opt-out retirees had "no coverage elsewhere."

LFUCG's current equity rationale is retooled and scaled back – and does not even purport to be based on fact. LFUCG simply argues that it was rational for its decision makers to "believe" that the retirees who stayed in the LFUCG Plan had a greater "equitable claim" to the

monetary benefits offered for the first time in 1999. But LFUCG's assertion that "it is a reasonable proposition that those who paid in their premium dollars at least contributed to the Plan, and those who opted out did not" [LFUCG Brief for Appellant (Jun 09 2008), pg 21] is not supported by the record. To the contrary, the retirees who opted out effectively contributed more to the Plan than those who stayed since, had they remained in the Plan after their retirement age, their utilization of health care services would have exceeded their premium payments. Like the prior versions of LFUCG equitable rationale, the current rendition is based on false assumptions that are contradicted by the facts.

3. Monetary Nature of the Benefit

What the Plaintiffs seek first and foremost is the same health care coverage on the same terms that were offered to other retirees with enactment of the 1999 and 2000 Ordinances. However, if LFUCG is unwilling to offer coverage under the group health plan, the Plaintiffs feel that they are at least entitled to the same monetary benefits as their fellow retirees. As noted above, the new benefit provided by the 1999 and 2000 ordinances is, in essence, a monetary one. The health care coverage of those retirees who received the new benefit remained unaltered by the two ordinances. What changed was the fact that retirees started receiving a monetary payment to offset the cost of their existing health care coverage:

Period	Monthly Payment	Total
FY 1999-2000	$ 236.00	$ 2,832.00
FY 2000-2001	$ 269.00	$ 3,228.00
FY 2001-2002	$ 288.00	$ 3,456.00
FY 2002-2003	$ 337.00	$ 4,044.00
FY 2003-2004	$ 337.00	$ 4,044.00

Period	Monthly Payment	Total
Jul through Dec 2004 (6 mos)[18]	$ 274.00	$ 1,644.00
Total Jul 1999 - Dec 2004		**$ 19,248.00**

[R.833, LFUCG Answer to Interrogatory No. 6, Exhibit B to Plaintiff's SJ Response Memo (Jun 28 2005).] Even if the Supreme Court concludes that is was constitutionally permissible for LFUCG to exclude the opt-out retirees from group coverage under the health insurance plan, the Court must still analyze whether it was permissible for LFUCG to single out these retirees and deny them the monetary payments given to other retirees. Whatever the merits of LFUCG's arguments regarding coverage, LFUCG has not identified a single equitable or other consideration that provides sufficient justification for depriving these retirees of the same monetary benefits provided to others.

D. EVEN UNDER THE FOURTEENTH AMENDMENT, GOVERNMENT MAY NOT BASE CLASSIFICATIONS ON FALSE OR CONTRADICTORY PREMISES

Both the Circuit Court and LFUCG rely on Fourteenth Amendment jurisprudence from the U.S. Supreme Court. But, even under the federal "rational basis" analysis, a government classification must have some basis in fact. The rational basis standard utilized by the U.S. Supreme Court in Fourteenth Amendment cases "is not a toothless one." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). As stated in *Heller v. Doe,* 509 U.S. 312 (1993), "even the standard of rationality as we so often have defined it must find some footing in the realities of the subject addressed by the legislation." 509 U.S. at 321. LFUCG has failed to cite any federal decision in which a classification was upheld once it was found to be based on false or contradictory premises. In this

[18] The contribution amount for Calendar Year 2005 was not available at the time that LFUCG responded to the Plaintiffs' Interrogatories.

case, LFUCG decision makers believed that when these retirees opted out, they had deprived the health insurance pool of "contributions" that could have been "invested" to cover future claims. That belief has been proven to be false. To paraphrase *Heller*, the premise that the opt-outs cost the pool money has been proven to have no footing in the realities of the subject addressed by the 2000 Ordinance.

LFUCG relies on the U.S. Supreme Court's decision in *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980). The issue in *Fritz* was a statute phasing out "windfall retirement benefits" for railroad retirees who, because of their employment history, were eligible for both railroad retirement benefits and Social Security retirement benefits ("dual benefits"). Under the Railroad Retirement Act of 1974, current employees with at least 25 years of railroad service as of December 31, 1974 would receive the full windfall benefit upon retirement. 49 U.S. at 171-72. Current employees with more than ten years, but less than 25 years, of railroad service would receive the full windfall benefit upon retirement only if they met one of two conditions: (a) they had performed some railroad service during calendar year 1974; or (b) they had a "current connection" with the railroad industry as of December 31, 1974, or upon their later date of retirement. *Id.* Current employees with between 10 and 25 years of railroad service, but who failed to meet either of the two conditions, would receive a lesser windfall benefit. *Id.* Current employees who had less than ten years of railroad service as of December 31, 1974, would receive no windfall benefit whatsoever. *Id.*

The equal protection issue in *Fritz* concerned the group of current employees who had more than ten, but less than 25, years of railroad service. 499 U.S. at 173-74. The plaintiffs argued that it was unconstitutional to provide certain members of this group with a lesser windfall benefit

simply because they lacked a "current connection" with the railroad industry. *Id.* The Supreme Court disagreed. "[I]t is not unconstitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out benefits." 449 U.S. at 177. The Court also held that providing lesser benefits to ten-year employees with no current connection to the railroad industry was reasonable because persons still employed in the railroad industry "had a greater equitable claim to those benefits." 449 U.S. at 178. "Congress could assume that those who had a current connection with the railroad industry when the Act was passed in 1974, or who returned to the industry before their retirement, were more likely than those who had left the industry prior to 1974 and who never returned, to be among the class of persons who pursue careers in the railroad industry, the class for whom the Railroad Retirement Act was designed." *Id.*

LFUCG argues that these same principles are applicable to its decision in this case. However, unlike the plaintiffs in *Fritz*, the retirees who stayed in the LFUCG health plan have no greater equitable claim to the new benefits provided in the 1999 and 2000 ordinances than those who opted out. Both groups of police and firefighters dedicated their careers to public service, risking life and limb in hazardous-duty positions in order to protect the safety of the community. There is no evidence that the opt-out group contributed fewer years of service or otherwise had a lesser "connection" to the service for which the new benefit was provided. Indeed, as argued above, from a strict financial perspective, the retirees who opted out have been less of a burden on the LFUCG plan than those who remained, and therefore have an arguably stronger "equitable claim" to the new benefits.

Moreover, there was no contention in *Fritz* that, in choosing to limit the windfall benefits to certain railroad employees, Congress had relied on factual assumptions that were

contradictory or turned out to be patently false. In this case, two of LFUCG's stated rationales – that the opt-out retirees had better coverage elsewhere and that they had no coverage elsewhere, were contradictory. Moreover, one of the prime motivations for denying benefits to the opt-out retirees was resentment over the fact that they had purportedly chosen to deprive the system of their "contributions" during the opt-out period – a contention that has been proven to be patently false. The abiding resentment expressed by LFUCG decision makers (including Finance Commissioner Donna Counts and Ad Hoc Committee Chairman David Stevens) towards the retirees who opted out casts doubt on the legitimacy of the decision to exclude them. As noted in Justice Stevens' concurring opinion upholding the statute in *Fritz*, "if the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." 449 U.S. at 181 (Stevens, J., concurring).

E. THE COURT OF APPEALS' OPINION DOES NOT "INVENT A NEW RULE" OF CONSTITUTIONAL JURISPRUDENCE, DOES NOT REPRESENT AN UNWARRANTED JUDICIAL INVASION OF THE LEGISLATIVE PROCESS, AND DOES NOT WRONGLY SHIFT THE BURDEN FROM THOSE CHALLENGING THE CONSTITUTIONALITY OF LEGISLATION TO THE LEGISLATIVE BODY

LFUCG argues that the Court of Appeals committed a number of grievous errors when it found that the classifications established by the 2000 Ordinance were unconstitutional. LFUCG contends that the Court of Appeals' opinion invented a new rule of constitutional jurisprudence, constituted an improper invasion of the legislative process, and wrongly shifted the burden from the Plaintiffs, who are challenging the constitutionality of the 2000 Ordinance, to the legislative body that enacted the ordinance. LFUCG is particularly critical of the Court of Appeals'

finding that, "once the opt out retirees were permitted to re-join the Plan, LFUCG needed to put forth a rational basis for removing them from the Plan." [Opinion, pg 21.]

The Court of Appeals was correct to state that, once LFUCG had decided (in August 1999) to include these Plaintiffs in the group of retirees to whom it extended the new benefit, it was required to articulate a rational basis for removing them from coverage one year later. With passage of the 1999 Ordinance, the fact that certain retirees had previously opted out for a period after their retirement no longer had a bearing on whether they were current participants entitled to benefits. The Court of Appeals indicated that, if LFUCG had passed the 2000 Ordinance in 1999, its arguments that the opt-out retirees should be excluded in order preserve the status quo regarding participation in the Plan, or because it was not deemed prudent to provide benefits to a group of retirees not currently participating, would have had more credence. But, as the Court of Appeals correctly found, when LFUCG chose to extend benefits to all retirees in 1999, it lost those justifications. Far from maintaining the status quo, the 2000 Ordinance disrupted the status quo by rescinding benefits previously granted to these Plaintiffs and eliminating a class of retirees previously entitled to benefits under the 1999 Ordinance. With the 2000 Ordinance, LFUCG was not restricting access to the Plan from retirees who were no longer participants – it was taking away benefits from retirees who had already been granted the right to participate.

What LFUCG refuses to acknowledge is that, in order for a legislative classification to have a reasonable or rational basis, the classification must have a reasonable or rational relationship to the legislative purpose in question. In this case, as noted by the Court of Appeals, LFUCG had no basis whatsoever for believing that the retirees who were excluded from receiving health insurance benefits would, in the future, impose any greater cost on the health plan than the

retirees who were permitted to retain benefits. Nor did LFUCG have any basis for believing that, in the past, the retirees who had opted out had cost the plan more resources than the retirees who stayed in. In short, there was no reasonable or rational basis for LFUCG to select these retirees as the ones to be barred from coverage in order to save costs. LFUCG's selection of these retirees was "arbitrary and irrational discrimination" prohibited by the constitutional guarantee of equal protection, even under a rational basis standard. *Elk Horn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.2d 408, 414 (Ky. 2005).

LFUCG argues that the Court of Appeals has shifted the burden away from those who challenge the constitutionality of a legislative enactment and placed it on legislative body. On the record in this case, such a contention can only be seen as preposterous. The Plaintiffs bore an extraordinarily heavy burden in this case – to establish that none of LFUCG's stated rationales for the 2000 Ordinance had a rational basis in fact. The Plaintiffs only prevailed because, after extensive discovery and a series of meticulous depositions, they were able to establish that, despite five meetings over a period of several months, none of LFUCG's decision makers seriously questioned their assumptions or bothered to investigate the actual facts. "LFUCG has offered no evidence that the opt out retirees will be any more of a drain on the Plan than the continuous retirees are." [Opinion, pg 23.]

LFUCG claims that it should be permitted to correct its prior actions or substantively change its mind "based on the facts." But, when LFUCG enacted the 2000 Ordinance, it was not acting based on facts. To the contrary, the documentary evidence and deposition testimony discussed above shows that LFUCG decision makers were acting based on assumptions that were false, unproven, and even contradictory.

LFUCG contends that, under the Court of Appeals' decision, a legislature that chooses to treat two different groups similarly at one point in time is forever prohibited from treating the groups differently in the future, even if the distinctions between the groups are "ongoing." That is not the Court of Appeals' holding in this case. Under the rational basis standard, government is permitted to treat different groups differently, as long as the factors that distinguish the groups bear some rational or reasonable relationship to a legitimate legislative purpose. In this case, there was no rational basis for believing that one group of retirees who had opted out of the group health plan for a period of time in the past, but who had since been re-admitted, posed any more financial risk to the Plan than those retirees who had remained continuous participants. "LFUCG must show that there is some reasonable basis for treating the opt out retirees differently from continuous retirees. This, LFUCG failed to do." [Opinion, pg. 23.]

The Court of Appeals decision is not "undoubtedly far-reaching," as LFUCG contends. The Court of Appeals did nothing more than apply long-established principles from this Court's equal protection decisions to a particular – and highly unusual – fact situation. What is notable in this case is not the legal reasoning of the Court of Appeals, but rather the remarkable evidentiary record demonstrating that LFUCG had absolutely no rational or reasonable basis for taking valuable health insurance benefits from one group of retirees, while permitting other retirees to retain them. If the Court of Appeals had failed to find a constitutional violation in this case, that would have been precedent-setting. A ruling upholding LFUCG's actions in this case would have undermined the Supreme Court's jurisprudence dating back to *Fischer v. Grieb*, 113 S.W.2d 1139 (Ky. 1938), and so recently reaffirmed in *Elk Horn Coal.*

CONCLUSION

For the foregoing reasons, the Plaintiffs-Appellees, Norman W. Johnson, Charles V. Robinson, and John L. Gumm, respectfully request that the Supreme Court affirm the opinion of the Court of Appeals and remand this matter to the Fayette Circuit Court for the purpose of fashioning an appropriate remedy.

Respectfully submitted,

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