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# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-000124-MR
&
NO. 2006-CA-000191-MR

NORMAN W. JOHNSON; CHARLES V. ROBINSON; AND JOHN L. GUMM — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 00-CI-03636

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — APPELLEE/CROSS-APPELLANT

OPINION
REVERSING AND REMANDING AS TO THE DIRECT APPEAL
AND
AFFIRMING AS TO THE CROSS-APPEAL

** ** ** ** **

BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

KELLER, JUDGE: This matter is before the Court on the appeal of Norman Johnson, Charles V. Robinson, and John L. Gumm (Appellants) from the Fayette Circuit Court's ruling that Lexington-Fayette Urban County Government's[1] (LFUCG) Ordinance 366-

[1] We note that, during some of the time in question, there was no unified Lexington-Fayette Urban County Government. However, the existence of the unified government is not an issue in this matter. Therefore, we will refer to the governmental entity as LFUCG regardless of the time

2000 is constitutional and on the cross-appeal by LFUCG from the circuit court's ruling that Ordinance No. 217-99 required LFUCG to provide health insurance benefits to Appellants. We reverse and remand as to the direct appeal and affirm as to the cross-appeal.

FACTS

The basic facts in this matter are not in dispute. LFUCG provided health insurance to its employees through a group plan (the Plan). When an employee retired, he or she was given the option of continuing to participate in the Plan. Prior to 1999, if a retired employee continued to participate in the Plan, that employee was responsible for paying 100% of the premium. A retired employee could opt out of the Plan; however, the opt out provision was irrevocable and, once out, a retired employee could not re-join the Plan.

Appellant, John Gumm, is 82 years of age. He worked for the LFUCG Fire Department from 1950 until his retirement in 1980. Following his retirement, Gumm continued his group health insurance with the Plan until 1988, when he qualified for Medicare and opted out of the Plan.

Appellant, Charles Robinson, is 82 years of age. He worked for the LFUCG Fire Department from 1953 until his retirement in 1991. When he retired, Robinson declined to continue his group health insurance and opted out of the Plan.

Appellant, Norman Johnson, is 60 years of age. He worked for the LFUCG Fire Department from 1969 until his retirement in 1983 following a heart attack. Johnson

frame.

continued his group health insurance until 1988 when he opted out of the Plan. At some point in the 1990s, Johnson sought to re-join the Plan and was advised that he could not do so.

In 1998, LFUCG began to explore the possibility of paying the health insurance premiums for retired employees. To that end, LFUCG formed an Ad Hoc Committee (the Committee) to study possible options and to make recommendations regarding the implementation of a plan to pay said premiums. The Committee held a number of meetings and ultimately recommended that LFUCG undertake payment of health insurance premiums for retirees who had continued in the Plan (the continuous retirees). However, the Committee recommended that LFUCG exclude retirees who had opted out of the Plan (the opt out retirees).

After obtaining the Committee's report, LFUCG adopted Ordinance No. 217-99, which reads as follows:

> AN ORDINANCE CREATING SECTIONS 6-69.6 AND 23-36.5 OF THE CODE OF ORDINANCES TO PROVIDE FOR THE PAYMENT OF PREMIUMS FOR GROUP HEALTH INSURANCE SINGLE PLAN COVERAGE FOR MEMBERS OF THE CITY EMPLOYEES [sic] PENSION FUND AND THE POLICEMEN'S AND FIREFIGHTERS' RETIREMENT FUND OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT WHO RETIRED PRIOR TO JULY 1, 1999, AT THE RATE OF FIFTY PERCENT (50%) FOR THE PERIOD FROM JULY 1, 1999 TO JUNE 30, 2000 AND UP TO ONE HUNDRED PERCENT (100%) FOR THE PERIOD FROM JULY 1, 2000 TO JUNE 30, 2001 AND THEREAFTER, AND TO MAKE SUCH COVERAGE AVAILABLE TO THE SPOUSE, DEPENDENTS, AND DISABLED CHILDREN OF A QUALIFIED PARTICIPATING RETIREE IF THE

PREMIUM FOR SUCH COVERAGE IS PAID BY THE RETIREE.

BE IT ORDAINED BY THE COUNCIL OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT:

Section 1 - That Section 6-69.6 of the Code of Ordinances be and hereby is created to read as follows:

(a) All members of the City Employees Pension Fund who retired prior to July 1, 1999, shall be eligible to participate in a group health insurance plan (providing hospital and medical or health maintenance organization health care coverage) approved by the urban county council for such retirees (the "plan").

(b) The urban county government shall provide, on behalf of all members of the City Employees [sic] Pension 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, the following benefits: (1) for the period from July 1, 1999 through June 30, 2000, a sum equal to fifty percent (50%) of the urban county government's contribution to the health insurance component of the benefit pool for current urban county government employees (the "contribution"); and (2) for the period from July 1, 2000 through June 30, 2001 and thereafter, a sum equal to the single premium for the plan coverage selected by the retiree, but not more than one hundred percent (100%) of the contribution.

(c) No benefits shall be available under this section to retired members of the City Employees [sic] Pension 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.

(d) All payments shall be made to the approved provider of the group health insurance plan, not to the retiree, and the retiree shall not be entitled to receive any portion of the government contribution remaining after payment is made to the approved provider.

(e) Group rates under the group health insurance plan approved by the urban county council under subsection (a) shall be made available to the spouse, dependents, and disabled children, regardless of the disabled child's age, of a qualified and participating retiree, if the premium for the spouse, dependent, or disabled child is paid by payroll deduction or similar method.

Section 2 - That section 23-36.5 of the Code of Ordinances be and hereby is created to read as follows:

(a) All members of the Policemen's and Firefighters' Retirement Fund of the Lexington-Fayette Urban County Government, operated pursuant to KRS 67A.360, et seq., who retired prior to July 1, 1999, shall be eligible to participate in a group health insurance plan (providing hospital and medical or health maintenance organization health care coverage) approved by the urban county council for such retirees (the "plan").

(b) The urban county government shall provide, on behalf of 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, the following benefits: (1) for the period from July

1, 1999 through June 30, 2000, a sum equal to fifty percent (50%) of the urban county government's contribution to the health insurance component of the benefit pool for current urban county government employees (the "contribution"); and (2) for the period from July 1, 2000 through June 30, 2001 and thereafter, a sum equal to the single premium for the plan coverage selected by the retiree, but not more than one hundred percent (100%) of the contribution.

(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.

(d) All payments shall be made to the approved provider of the group health insurance plan, not to the retiree, and the retiree shall not be entitled to receive any portion of the government contribution remaining after payment is made to the approved provider.

(e) Group rates under the group health insurance plan approved by the urban county council under subsection (a) shall be made available to the spouse, dependents, and disabled children, regardless of the disabled child's age, of a qualified and participating retiree, if the premium for the spouse, dependent, or disabled child is paid by payroll deduction or similar method.

Section 3 - That this ordinance shall be effective on July 1, 1999.

Sometime after the adoption of Ordinance 217-99, the Appellants contacted personnel at LFUCG and sought to re-join the Plan. Personnel at LFUCG advised the Appellants that they could not re-join the Plan because they had opted out. The Appellants then filed suit on October 6, 2000, seeking injunctive and declaratory relief.

On December 5, 2000, LFUCG enacted Ordinance No. 366-2000, which reads, in pertinent part, as follows:

> AN ORDINANCE CLARIFYING AND AMENDING SECTIONS 6-69.6 AND 23-36.5 OF THE CODE OF ORDINANCES TO PROVIDE FOR THE PAYMENT OF PREMIUMS FOR GROUP HEALTH INSURANCE SINGLE PLAN COVERAGE FOR MEMBERS OF THE CITY EMPLOYEES [sic] PENSION FUND AND THE POLICEMEN'S AND FIREFIGHTERS' RETIREMENT FUND OF THE LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT WHO RETIRED PRIOR TO JULY 1, 1999, AND WHO DID NOT TERMINATE THEIR PARTICIPATION IN THE GROUP HEALTH INSURANCE PLAN PROVIDED BY THE URBAN COUNTY GOVERNMENT BEFORE THAT DATE, AT THE RATE OF FIFTY PERCENT (50%) FOR THE PERIOD FROM JULY 1, 1999 TO JUNE 30, 2000 AND UP TO ONE HUNDRED PERCENT (100%) FOR THE PERIOD FROM JULY 1, 2000 TO JUNE 30, 2001 AND THEREAFTER, AND TO MAKE SUCH COVERAGE AVAILABLE TO THE SPOUSE, DEPENDENTS, AND DISABLED CHILDREN OF A QUALIFIED PARTICIPATING RETIREE IF THE PREMIUM FOR SUCH COVERAGE IS PAID BY THE RETIREE, EFFECTIVE JULY 1, 1999.
>
> WHEREAS, the purpose of this ordinance is to clarify the intent of the Council in passing Ordinance 217-99 and is not intended to change in any way the manner in which the ordinance has been interpreted and applied; and
>
> WHEREAS, the intent of the Council in passing Ordnance No. 217-99 was that health care insurance plan

premium benefits be made available only to those members of the City Employees [sic] Pension Fund and the Policemen's and Firefighters' Retirement Fund who retired prior to July 1, 1999 and who maintained their participation in the group health insurance plan at their own expense up to date; and

WHEREAS, the purposes of establishing, clarifying, and maintaining that distinction are (1) to avoid creating an incentive and opportunity for persons to terminate their health care coverage during times of good health, and reinstate their health care coverage during times of high risk or poor health, to the detriment of other participants; (2) to maintain the underwriting risk undertaken by the health care insurance plan at a more constant and predictable level by limiting the availability of coverage to those persons who have maintained it consistently since their retirement; and, (3) to maintain the ability to provide an appropriate level of benefits for those persons who have maintained their participation at their own expense.

. . .

Section 1 - That section 6-69.6 of the Code of Ordinances be and hereby is amended read as follows:

> (a) All members of the City Employees [sic] Pension Fund who retired prior to July 1, 1999, and who did not terminate their participation in the group health insurance plan provided by the urban county government before that date, shall continue to be eligible to participate in a group health insurance plan (providing hospitalization and medical or health maintenance organization health care coverage) approved by the urban county council for such returnees [sic] (the "plan").
>
> (b) The urban county government shall provide, on behalf of all members of the City Employees [sic] Pension 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 immediately prior to July 1, 1999, the following benefits: (1) for the period from July 1, 1999 through June 30, 2000, a sum equal to fifty percent (50%) of the urban county government's contribution to the health insurance component of the benefit pool for current urban county government employees (the "contribution"); and (2) for the period from July 1, 2000 through June 30, 2001 and thereafter, a sum equal to the single premium for the plan coverage selected by the retiree, but not more than one hundred percent (100%) of the contribution.

(c) No benefits shall be available under this section to retired members of the City Employees [sic] Pension Fund who were not, immediately prior to July 1, 1999, participants in the group health insurance plan coverage provided to urban county government employees and retirees.

. . .

Section 2 - That section 23-36.5 of the Code of Ordinances be and hereby is amended to read as follows:

(a) All members of the Policemen's and Firefighters' Retirement Fund of the Lexington-Fayette Urban County Government, operated pursuant to KRS 67A.360, et seq., who retired prior to July 1, 1999, and who did not terminate their participation in the group health insurance plan provided by the urban county government before that date, shall continue to be eligible to participate in a group health insurance plan (providing hospital and medical or health maintenance organization health care coverage) approved by the urban county council for such retirees (the "plan").

> (b) The urban county government shall provide, on behalf of 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 immediately prior to July 1, 1999, the following benefits: (1) for the period from July 1, 1999 through June 30, 2000, a sum equal to fifty percent (50%) of the urban county government's contribution to the health insurance component of the benefit pool for current urban county government employees (the "contribution"); and (2) for the period from July 1, 2000 through June 30, 2001 and thereafter, a sum equal to the single premium for the plan coverage selected by the retiree, but not more than one hundred percent (100%) of the contribution.
>
> (c) No benefits shall be available under this section to retired members of the Policemen's and Firefighters' Retirement Fund who were not, immediately prior to July 1, 1999, participants in the group health insurance plan coverage provided to urban county government employees and retirees.[2] (Emphasis added.)

The Appellants then filed an Amended Complaint, asserting that Ordinance No. 366-2000 violated Sections 2 and 3 of the Kentucky Constitution and the 14th Amendment to the United States Constitution.

During the course of litigation, the Appellants moved for injunctive relief and summary judgment. Both motions were initially denied. Following a change in circuit court judges, the Appellants renewed their motion for summary judgment and sought a ruling that Ordinance No. 217-99 provided health insurance benefits to the opt

[2] The remainder of Ordinance No. 366-2000 is the same as No. Ordinance 217-99.

out retirees as well as to the continuous retirees and that Ordinance No. 366-2000 was unconstitutional.

On June 1, 2004, the circuit court entered an order holding that Ordinance No. 217-99 provided health insurance benefits to the opt out retirees. However, the circuit court stated that the record needed to be more fully developed before it could rule on the constitutionality of Ordinance No. 366-2000. Pursuant to the circuit court's instructions, the parties took additional proof, which is summarized below.

Allen Craig, an actuary retained by LFUCG, testified that he reviewed minutes of the Ad Hoc committee meetings and other documents related to those meetings. Craig testified that there were three primary reasons for treating the two groups of retirees differently. The first is the higher cost of retirees to the Plan. According to Craig, because of the increased age of retirees and associated increased health care needs, for every $1.00 of premium paid by a retiree, the Plan pays $1.68 in benefits. Craig admitted that he did not have any specific information about the health of the opt out retirees or the age of the opt out retirees compared to the health and age of the continuous retirees. Craig testified that such information would be helpful in determining the cost impact of adding the opt out retirees to the Plan. However, he stated that, generally speaking, once a person reaches 40 to 45 years of age, he or she changes from a net payor into a health insurance plan to a net consumer of benefits.

The second reason Craig identified for treating the two groups differently was adverse selection. Adverse selection occurs when healthy individuals opt out of a

health plan, leaving that plan top heavy with unhealthy individuals. Adverse selection also occurs when unhealthy individuals join a health plan, again skewing the plan's membership toward the unhealthy. In either event, the cost of such health plans increases. In order to prevent this adverse selection, health insurance plans usually provide that, once a member opts out, he or she cannot re-join the plan. This prevents individuals from discontinuing health insurance when healthy and obtaining it when unhealthy. Such adverse selection would not necessarily apply if the opportunity to re-join a plan was only offered on a one-time basis.

The third reason Craig identified for treating the two groups differently is common business practice. Craig testified that he did not know of any plans that would permit someone who opted out to re-join the plan. However, Craig also testified that he was not aware of any situations where an employer changed from paying no premium benefits for retirees to paying those benefits after retirees had opted out of a health plan. In fact, Craig noted that it is rare for employers to enhance or increase retiree health benefits.

Additionally, Craig testified that he did not know why retirees opted out of the Plan. He assumed that they did so because they did not need coverage at the time of the opt out. However, Craig admitted that he did not know whether the opt out retirees had obtained coverage through a different carrier.

Finally, although Craig did not provide his opinions to the Committee or to the LFUCG, he testified that the issues discussed by the Committee were the types of

issues his clients would discuss when considering whether to offer the benefits in Ordinance Nos. 217-99 and 366-2000.

Scott Blakely is a Sergeant with the LFUCG Police Department who served on the Committee and voted to permit the opt out retirees to re-join the Plan. Blakely testified that the Committee members discussed whether to permit the opt out retirees to re-join the Plan and whether doing so would be lawful. The Committee members generally discussed that permitting the opt out retirees to re-join the Plan would increase the cost of the Plan. However, the Committee members did not have available any specific statistics regarding the impact the opt out retirees would have on the Plan. Furthermore, Blakely testified that the Committee members did not have any information indicating that opt out retirees would cost the Plan any more or less than continuous retirees of the same or similar age.

Albert Mitchell is a retired LFUCG firefighter and served on the Committee. Mitchell continued his membership in the Plan after his retirement. Mitchell testified that the continuous retirees paid premiums that were invested to help cover later expenses as they aged. However, Mitchell admitted that, at some point, continuous retirees changed from being net contributors to the Plan to being net consumers of the Plan's benefits.

Mitchell testified that he did not believe that the opt out retirees should be permitted to re-join the Plan because of the additional cost involved. However, Mitchell

admitted that the Committee members did not have any specific information indicating that opt out retirees would be any more costly to the Plan than the continuous retirees.

Mitchell also testified that he believed that the opt out retirees opted out in order to participate in a better health plan; however, he admitted that the Committee members did not have any specific information regarding whether the opt out retirees had alternative health insurance or the type of insurance they might have.

Dr. David Stevens served as chairman of the Committee. Stevens opposed permitting the opt out retirees to re-join the Plan because doing so would have increased the cost of the Plan. Stevens noted that an opt out retiree who had not had health insurance would likely have greater health problems and be more costly for the Plan. However, Stevens admitted that the Committee members had no information regarding how many of the opt out retirees had health insurance.

Stevens testified that, based on their age, the opt out retirees would be more costly to the Plan. Furthermore, Stevens testified that he did not believe it would be fair to permit the opt out retirees to re-join the Plan because they had not continuously contributed to the Plan. However, Stevens stated that he did not know whether the opt out retirees had been net contributors or net consumers of the Plan at the time they opted out.

Donna Counts was Commissioner of Finance for the LFUCG and served on the Committee. Counts testified that she voted against permitting the opt out retirees to re-join the Plan for several reasons: 1) the opt out was irrevocable; 2) permitting the opt

out retirees to re-join the Plan would have an adverse impact on all members of the Plan; 3) the opt out retirees had not continuously contributed to the Plan; and 4) other businesses did not permit retirees to re-join a health plan after they had opted out of that health plan.

Counts admitted that the Committee members did not know whether the opt out retirees had alternative health coverage. Furthermore, Counts admitted that the Committee members did not have any information about when a participant in the Plan changed from being a net contributor to a net consumer of services. Finally, Counts testified that she did not remember if the Committee received any expert testimony regarding the impact permitting the opt out retirees to re-join the Plan would have.

Walter Skiba was director of human resources for LFUCG at the time in question. Skiba provided information and guidance to and served on the Committee. Skiba testified that, prior to 1999, retired city employees, policemen, and firefighters paid 100% of the premium for continuing in the Plan. If a retiree chose to remain in the Plan, premium payments were deducted from the retiree's benefit checks. Once a retiree opted out of the Plan, he or she was not permitted to re-join the Plan. Skiba noted that the Plan is a self-insured fund. Because the opt out retirees had not paid premiums, the Plan would not have accumulated funds from which to pay claims. However, Skiba testified that, for every $1.00 in premium paid by a retiree, that retiree consumes $1.68 in benefits.

Skiba testified that factors to be considered with regard to permitting the opt out retirees to re-join the Plan included their health status and whether the opt out retirees

had other health insurance during the opt out period. Skiba testified that the cost for those who had not been insured would be greater than for those who had been continuously insured. However, he noted that the Committee members did not have any specific information regarding the insured status of the opt out retirees. Furthermore, Skiba testified that if an opt out retiree were continuously insured through an alternative plan, there were no statistics indicating that a retiree's health or claims experience would be any different from that of a continuous retiree.

Finally, Skiba testified, as did other members, that the Committee members did not have any specific information regarding the cost difference to the Plan for opt out retirees versus continuous retirees or of the claims experience for the opt out retirees.

ORDINANCE NO. 217-99 (LFUCG'S CROSS-APPEAL)

On June 1, 2004, the circuit court entered an order on the Appellants' motion for summary judgment finding that Ordinance No. 217-99 was clear on its face, that it provided that the opt out retirees were covered by the Plan, and that LFUCG was responsible for paying premiums associated with that coverage. It is from this order that LFUCG perfected its cross-appeal, which we shall review prior to addressing the Appellants' direct appeal.

LFUCG argues that Ordinance No. 217-99 either clearly excludes the opt out retirees from the Plan or is so ambiguous that the circuit court should have referred to the legislative history or deferred to LFUCG in order to interpret the meaning of the

ordinance. We agree with the circuit court and, therefore, affirm as to the circuit court's order regarding Ordinance No. 217-99.

Construction and interpretation of statutes is a matter of law; therefore, the standard of review is *de novo*. *Lexington-Fayette Urban County Health v. Lloyd*, 115 S.W.3d 343, 347 (Ky.App. 2003). When interpreting a statute, we must "ascertain and give effect to the intention of the Legislature and that intention must be determined from the language of the statute itself if possible". *Id.* at 347, *citing Moore v. Alsmiller*, 289 Ky. 682, 686-87, 160 S.W.2d 10, 12 (1942). "We have a duty to accord to words of statute their literal meaning unless to do so would lead to an absurd or wholly unreasonable conclusion." *McElroy v. Taylor*, 977 S.W.2d 929, 931 (Ky. 1998), *citing Bailey v. Reeves,* 662 S.W.2d 832 (Ky. 1984). When reviewing a statute, we must give "significance and effect . . . to every part of [an] Act." *Id.* at 931, *citing George v. Scent*, 346 S.W.2d 784, 789 (Ky. 1961). However, where the language of a statute is plain and unambiguous, we should not resort to the legislative record in order to interpret the statute. *City of Vanceburg v. Plummer*, 122 S.W.2d 772, 775 (Ky. 1938).

The first issue we must address is whether the language in Ordinance No. 217-99 is unclear. If it is, then we can and should look to the legislative history. If it is not, then we must apply the Ordinance according to its terms.

The salient portions of Ordinance No. 217-99 Section 2 read as follows:

> (a) All members of the Policemen's and Firefighters' Retirement Fund . . . who retired prior to July 1, 1999, shall be eligible to participate in a group health insurance plan . . . approved by the urban county council for such retirees . . . .

> (b) The urban county government shall provide, on behalf of 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, the following benefits . . . .
>
> (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.

Reviewing the above language, we hold that there is no ambiguity. Section 2(a) of Ordinance No. 217-99 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. Section 2(b) clearly states that the urban county government shall provide premium benefits to all members of the Fund who participated in the Plan prior to July 1, 1999. Section 2(c) excludes any members of the Fund who were not participants in the Plan prior to July 1, 1999. This language is clear and unambiguous.

LFUCG argues that interpreting Ordinance No. 217-99 as providing benefits to the opt out retirees "would render Section 2(c) meaningless and superfluous." However, section 2(c) is superfluous regardless of the interpretation of the Ordinance. 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 any benefits. That is the same requirement necessary to qualify for the benefits offered by the Ordinance -

eligibility to participate in the Plan and payment of premiums by LFUCG. Section 2(c) does not impose any greater or lesser restrictions on eligibility for benefits than either Sections 2(a) or 2(b), and interpreting the Ordinance in some way other than based on its plain language will not make Section 2(c) any less superfluous or more meaningful.

LFUCG also argues that we should defer to LFUCG's interpretation of the Ordinance. However, the deference recommended by LFUCG is only required if there is some question regarding the meaning of the Ordinance. *City of Louisville v. Board of Education*, 17 S.W.2d 210, 212 (Ky. 1929). Based on our holding that there is no question regarding the meaning of the Ordinance, LFUCG's interpretation of the Ordinance is not due any particular deference.

Based on the above, we hold that the circuit court correctly interpreted Ordinance No. 217-99. Because there is no ambiguity in Ordinance No. 217-99, there is no need to examine the legislative history with regard to interpretation of that Ordinance.

ORDINANCE NO. 366-2000 (APPELLANTS' DIRECT APPEAL)

Having determined that Ordinance No. 217-99 provided for coverage under the Plan and for payment of premiums for the opt out retirees, the circuit court then ruled that LFUCG could, by way of Ordinance No. 366-2000, constitutionally exclude those retirees. In doing so, the circuit court noted that entitlement to health care benefits is not a fundamental right. Therefore, LFUCG needed only to show some rational basis for excluding the opt out retirees. The circuit court noted the three reasons given by Craig. In addition, the circuit court noted the testimony of Mitchell, which stated that the

additional health care benefits were merely meant to be an "enhancement" to the option chosen by the continuous retirees. In doing so, the circuit court stated that it was rational for LFUCG to rely on the choices made by the opt out retirees when making plans for the future. It is from this ruling that the Appellants perfected their direct appeal.

The Appellants challenge the constitutionality of Ordinance No. 366-2000 on the grounds that LFUCG had no reasonable basis in fact and no substantial and justifiable reason for excluding the opt out retirees from the benefits offered under the Ordinance. In doing so, the Appellants state that LFUCG cited four reasons for treating the opt out retirees differently than the continuous retirees: (1) higher utilization by retirees; (2) perceived risk of adverse selection; (3) perceived lack of fairness; and (4) industry standards.

LFUCG cites three reasons from the preamble of Ordinance No. 366-2000 to support its decision to exclude the opt out retirees:

> (1) to avoid creating an incentive and opportunity for persons to terminate their health care coverage during times of good health, and reinstate their health care coverage during times of high risk or poor health, to the detriment of other participants;
>
> (2) to maintain the underwriting risk undertaken by the health care insurance plan at a more constant and predictable level by limiting the availability of coverage to those persons who have maintained it consistently since their retirement; and,
>
> (3) to maintain the ability to provide an appropriate level of benefits for those persons who have maintained their participation at their own expense.

LFUCG also cites to statements contained in the committee's meeting minutes and reports, as well as documents from outside sources. All of LFUCG's reasons, whether put forth by it or by the Appellants, synthesize to three primary ones – the increased cost associated with retiree health care, the unknown risk presented by the opt out retirees, and the perceived inequity to the continuous retirees.

We believe that the circuit court's order regarding the constitutionality of Ordinance No. 366-2000 would be correct if LFUCG had not adopted Ordinance No. 217-99 permitting the opt out retirees to re-join the Plan. However, 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. Therefore, the rational basis analysis must proceed from there. With that as our starting point, we hold that LFUCG has not provided a rational basis for removing the opt out retirees from the coverage and premium benefits provided by Ordinance No. 217-99. Therefore, we must hold that Ordinance No. 366-2000 is unconstitutional, and that the circuit court erred in ruling otherwise.

Whether a statute is constitutional is a question of law. *Kohler v. Benckart*, 252 S.W.2d 854 (Ky. 1952). Therefore, our review is *de novo.*

It is well settled that, under the 14th Amendment to the United States Constitution and Sections 1, 2, and 3 of the Kentucky Constitution, all persons similarly situated should be treated alike. If there is no fundamental right at stake, a legislature may discriminate among similarly situated persons, but only if there is a rational basis for doing so. However, "arbitrary and irrational discrimination violates the Equal Protection

Clause even under the rational-basis standard of review." *Elk Horn Coal Corp. v. Cheyenne Resources, Inc*., 163 S.W.3d 408, 414 (Ky. 2005) *citing Lindsey v. Normet*, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972). *See also Moore v. Ward*, 377 S.W.2d 881 (Ky. 1964). Kentucky courts are "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." *Elk Horn,* 163 S.W.3d at 417-18, *citing Commonwealth v. Wasson*, 842 S.W.2d 847, 492 (Ky. 1992).

In *Elk Horn*, the Supreme Court of Kentucky noted:

> [T]he 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. Moreover, the equal protection provisions of the Kentucky Constitution are enhanced by Section [sic] 59 and 60. Section 59 prohibits, *inter alia*, the General Assembly from enacting special legislation . . . . Section 60 reiterates the prohibition against special legislation . . . . 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 justifiable reason" for discriminatory legislation in areas of social and economic policy."

*Elk Horn,* 163 S.W.3d at 418-19.

As noted by the Supreme Court in *Tabler v. Wallace*, 704 S.W.2d 179, 186 (Ky. 1986), "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" in order to support otherwise discriminatory legislation. In passing on the constitutionality of a statute, the "question is not what influenced legislation, but whether emergent law is reasonably within the scope of legitimate public purpose." *Moore v. Ward*, 377 S.W.2d 881, 883 (Ky. 1964).

A statute is presumed to be constitutional and the person challenging the constitutionality of a statute bears the burden of proving otherwise. *Commonwealth v. Howard*, 969 S.W.2d 700, 703 (Ky. 1998). Therefore, in the present case, the Appellants bear the burden of proving that LFUCG had no rational basis for excluding the opt out retirees from the benefits provided by Ordinance No. 36-2000.

In the present case, we agree that LFUCG certainly has a legitimate governmental interest in controlling the cost of the Plan to itself and to participants of the Plan. Furthermore, it cannot be denied that, because of their age, retirees are net consumers of the Plan's benefits. However, 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. This, LFUCG has failed to do. 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 Committee 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.

The opt out retirees do present an unknown risk, since the Plan administrators do not have any information regarding their health care experience. However, LFUCG undertook that risk when it provided benefits to all retirees in Ordinance No. 217-99. There is no rational basis for LFUCG, after undertaking that risk, to then withdraw coverage from the opt out retirees.

As noted by LFUCG, the Appellants did not contribute to the Plan for a significant number of years. However, all of the evidence indicates that Appellants Robinson and Gumm would have been net consumers of benefits during the years they were not in the Plan. Therefore, any premiums they would have paid to the plan would have been more than offset by the medical expenses they incurred. Based on his age, only Appellant Johnson would have been a net payor to the Plan when he retired. However, as previously noted, once LFUCG extended benefits to all retirees by Ordinance No. 217-99, it could not arbitrarily withdraw those benefits from the opt out retirees. LFUCG extended health care benefits to the opt out retirees in Ordinance No. 217-99 knowing that the opt out retirees had not paid premiums. Having extended them, LFUCG cannot rationally support the withdrawal of those benefits based on facts known when the benefits were extended. Therefore, LFUCG cannot use the lack of a history of premium payments as a reason to then withdraw benefits that have already been extended.

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.

REMEDY

The Appellants argue that in lieu of admitting the opt out retirees to the Plan, LFUCG should be ordered to pay the amount of the premium benefit directly to the Appellants. However, we note that Ordinance No. 217-99 specifically states that all payments shall be made directly to the approved provider of the Plan, not to the retiree. On remand, th circuit court shall fashion the appropriate remedy.

CONCLUSION

For the above reasons, we affirm the portion of the circuit court's ruling as to Ordinance No. 217-99. However, we reverse the portion of the ruling as to Ordinance No. 366-2000 and remand this matter to the circuit court for further proceedings consistent with this opinion.

ALL CONCUR.

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