

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI**

In re TIMOTHY FITCH,)
)
 Plaintiff/Relator,)
)
) 21-WRIT-14
 v.) CASE NO. 22SL-CC00733
)
 ST. LOUIS COUNTY, MISSOURI,)
 et. al.,)
)
 Defendants/Respondents.)

FILED
6/30/2022
JOAN M. GILMER
CIRCUIT CLERK
ST. LOUIS COUNTY

**ORDER & JUDGMENT GRANTING
PERMANENT WRIT OF MANDAMUS**

Relator Timothy Fitch (“Chief Fitch”) brought an action in mandamus pursuant to Missouri Rule of Civil Procedure 94 and Mo. Rev. Stat. §536.150¹ to force Respondents to comply with local pension ordinances that mandate payment of his pension benefits while serving on the St. Louis County Council. A preliminary order in mandamus was issued on March 7, 2022, directing Respondents to respond to the petition in mandamus. The matter of a permanent writ of mandamus was called and heard on June 16, 2022.

Background Facts

The parties do not dispute the relevant facts submitted via affidavit by Chief Fitch. Chief Fitch was employed by the St. Louis County Police Department from 1983 to 2014. While employed, Chief Fitch was a participant (i.e. accrued credited service) in the Commissioned Officer Retirement Plan established by Section 204 of the St. Louis County Ordinances. Chief Fitch began receiving pension benefits (“Police Pension”) when he retired on February 1, 2014. He received full benefits in 2014, 2015, 2016, 2017, and 2018. On January 1, 2019, Chief Fitch began a four-year term on the St. Louis County Council – a position for which he was elected. Shortly after Chief Fitch was

¹ Actions for judicial review of a noncontested case may be brought in the form of a writ of mandamus. Mo. Rev. Stat. §536.150. The instant matter presents a noncontested case because the decision to suspend Chief Fitch’s Police Pension benefits was not subject to administrative review. Mo. Rev. Stat. § 536.150(1).

sworn into his office, Respondents stopped making Police Pension payments to Chief Fitch. The parties agree that upon receipt of notice that Respondents would discontinue his Police Pension, Chief Fitch repeatedly communicated to Respondents that he was entitled to his Police Pension and that he should not be participating in any new pension plan as a member of the County Council.

Standard for Mandamus

Mandamus is a writ which lies “to compel the undoing of a thing wrongfully and improperly done, when such wrongfully and improperly done thing precludes or prevents rights to which one is under the law entitled.” *Mahon v. Scearce*, 228 S.W.2d 384 (Mo. App. 1950) (compelling local agency to accept applicant for employment who met statutory standards). An original writ of mandamus is available pursuant to Missouri Rule of Civil Procedure 94 when an interested party proves “a clear, unequivocal, specific right to a thing claimed” and “the ministerial duty sought to be coerced is definite, arising under conditions admitted or proved and imposed by law.” *State ex rel. Young v. Wood*, 254 S.W.3d 871, 872 (Mo. 2008).

When considering an action in mandamus, Missouri counties “have or can exercise only such powers as are conferred by express or implied provisions of law; their charters being a grant and not a limitation of power, subject to strict construction, with doubtful powers resolved against the [government].” *Taylor et al. v. Dimmitt, Mayor, et al.*, 78 S.W.2d 841, 843 (Mo. 1934). A ministerial act is clerical in nature, requiring a public officer “to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed.” *State ex rel. Hill v. Baldridge*, 186 S.W.3d 258, 259–60 (Mo. 2006); *State ex rd. Kessler v. Shay*, 820 S.W.2d 311, 314 (Mo.App. 1991). “Public officers are required to perform ministerial duties without any request or demand, and the entire public has a right to that performance.” *State ex rel. Twenty Second Jud. Circuit v. Jones*, 823 S.W.2d 471, 475 (Mo. banc 1992). When public officers refuse to execute such tasks, a writ of mandamus is appropriate to compel performance. *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157, 166 (Mo. 2006).

“Whether a petitioner’s right to mandamus is clearly established and presently existing is determined by examining the statute or ordinance under which petitioner claims the right.” *State ex rel. Scherschel v. City of Kansas City*, 470 S.W.3d 391, 397 (Mo. App. 2015) (granting writ of mandamus based on interpretation of city ordinances). When legislative intent cannot be determined from the plain, clear and unambiguous meaning of the statutory language, rules of construction should be applied to resolve any ambiguity where mandamus is sought. *United Pharmacal Co. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 910 (Mo. banc 2006); *Hardt v. Vitae Found., Inc.*, 302 S.W.3d 133, 138 (Mo. App. W.D. 2009) (holding that “[w]here the language of a statute is clear and unambiguous, there is no room for construction”); *Twentieth Judicial Circuit v. Board of Comm. Of the County of Franklin*, 597 S.W.3d 761 (Mo. App. E.D. 2020) (relying on the principles of statutory construction to support permanent order in mandamus). The construction of statutes is not to be hyper-technical, but instead is to be reasonable and logical. *Donaldson v. Crawford*, 230 S.W.3d 340, 342 (Mo. banc 2007); *State v. Schleiermacher*, 924 S.W.2d 269 (Mo. banc 1996) (Words in a statute that have more than one meaning are to be given a reasonable reading rather than an absurd or strained reading); *Citizens Bank and Trust Co. v. Director of Revenue*, 639 S.W.2d 833, 835 (Mo. banc 1982). (“[w]hen the same or similar words are used in different places within the same legislative act and relate to the same or similar subject matter, then the statutes are *in pari materia* and should be construed to achieve a harmonious interpretation of the statutes.”); *see also Twentieth Judicial Circuit*, 597 S.W.3d 761 (relying on the principal of statutory construction *in pari materia* to grant permanent order in mandamus). Ambiguities, if they exist, should be construed in favor of the retiree, or pensioner. *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132 (Mo. 2009); *Williams v. Board of Trustees of Public School Retirement System of Missouri*, 500 S.W. 31 (Mo. App. 1973) (“It is a general and well recognized rule that pension provisions shall be liberally construed in favor of the applicant.”).

Order in Mandamus

The appropriateness of mandamus does not depend on the existence of a well-drafted St. Louis County ordinance. Rather, mandamus is appropriate where, as here, Chapter 204 of the St. Louis County Ordinances and the St. Louis County Charter do not give Respondents discretion to refuse to pay Chief Fitch his vested Police Pension. Rather, the plain meaning of the ordinances and charter, and every principle of statutory construction, mandate that Chief Fitch has an unequivocal right to receive his Police Pension while serving as a member of the County Council.

According to the St. Louis County pension ordinances, “Any participant whose employment is terminated or who retires and is eligible for benefits under the retirement plan in which he was last a participant *shall* receive the respective benefits, if any, for which he may be eligible from each retirement plan.” S.L.C.O. §204.090(3) (O. No. 26939, 12-5-17). The term “shall” is used in laws, regulations, or directives to express what is mandatory. *Edwards v. City of Ellisville*, 426 S.W.3d 644 (Mo. App. 2013), citing *Allen v. Pub. Water Supply Dist. No. 5 of Jefferson Cnty.*, 7 S.W.3d 537, 540 (Mo. App. E.D. 1999). Providing Chief Fitch his retirement benefits from his Police Pension is not a matter for Respondents’ discretion. It is mandatory according to the plain language of §204.090(3) and failure to do so is a breach of a ministerial duty for which mandamus is the appropriate remedy.

Respondents offer two reasons for their suspension of Chief Fitch’s Police Pension benefits during his service on the County Council, both of which are not persuasive to the Court. First, they assert that S.L.C.O. § 204.090(4) required them to suspend his benefits. Section 204.090(4) provides that those who are currently accruing time toward a pension plan are not allowed to receive benefits from the plan. That section does not apply to Chief Fitch because in order to accrue time in either pension plan, a person must meet all of the following requirements: (1) the person must be a current County “employee,” (2) the person must not be a member of a board or commission, and (3) the person must be employed by the County to work at least 30 hours per week and for more than nine (9) months in a year. S.L.C.O. 204.060(1) (O. No. 20245, 11-30-00). Any person who does not meet *all of these requirements* “shall

be excluded from participation in either retirement plan.” *Id*; see also S.L.C.O. 204.010 (O. No. 20245, 11-30-2000) (creating two County retirement plans, one for employees in the civilian service and one for commissioned officers, neither of which apply to the members of the County Council).

Chief Fitch does not meet *all* (or even any) of the participation requirements of §204.060(1) and therefore must be excluded from current participation (i.e. accrual of credited service). Plainly stated, Chief Fitch is not an employee of St. Louis County. Indeed, there is ample charter language which provides that County Councilmembers hold a “term of office” rather than “employment.” St. Louis County Charter (“Charter”) Articles II and V. Respondents themselves have confirmed that members of the County Council are “elected officials” and not “employees” subject to the human resources policies applicable to County employees. Moreover, no County ordinances refer to members of the County Council as “employees.” The ordinances and charter repeatedly refer to “office *or* employment” and “officials *and* employees,” implying that individuals covered by the local laws are in one category or the other. Charter Section 2.170; S.L.C.O. §§101.065, 101.070; *Council Plaza Redevelopment Corp. v. Duffy*, 439 S.W.2d 346 (Mo. banc 1969) (finding that a disjunctive ‘or’ in its ordinary sense generally corresponds to the word “either.”). Indeed, County Councilmembers are referred to as having an “office” in the same section where “employment” is defined according to the traditional test for an employee/employer found in case law. Charter Section 2.170, citing 8 CSR 10-4.150. The County Council is, effectively, a “board or commission,” and all members of which “shall be excluded” from earning credited service in a County pension plan under §204.060(1). Further, as to hours served, County ordinances and the charter only require that members of the County Council attend nine (9) meetings per year, and even less if certain exceptions are invoked. S.L.C.O. §102.030 (O. No. 26984, 1-24-18); Charter §2.140(4). The parties do not dispute that Chief Fitch does not devote 30 or more hours per week to his position on the County Council. They do not dispute that he works full-time for a private company, and that his full-time employment is consistent with the ordinances. By contrast, certain elected salaried employees, like the

County Executive, Prosecuting Attorney and Assessor, are required to devote their “entire time” or “all of their time” to their duties. Charter §§3.010, 5.010, 6.050.

Moreover, no ordinance or charter provision provides a pension for County Councilmembers. Indeed, S.L.C.O. 102.150 (O. No. 22557, 11-15-05) provides, “Each member of the County Council shall receive as total compensation an annual salary of twenty thousand dollars (\$20,000.00) to be paid out of the County Treasury, chargeable to the general revenue fund.” It does not state a Councilmember’s “total compensation” includes a pension (or any other benefit – i.e. health insurance - which all full time employees receive). *See also* Charter §2.140 (provides for salaries only, not a pension). Pursuant to §§204.060(1) and 102.150, Respondents lack any discretion to even permit, much less require, Chief Fitch to participate in the pension as a member of the County Council. Thus, §204.090(4) is not relevant to Chief Fitch and has no impact on his Police Pension benefits.

Second, Respondents assert that Chief Fitch is barred from receiving his Police Pension pursuant to S.L.C.O. §204.290 (O. No. 26939, 12-5-17). This ordinance suspends benefits owed only to “salaried County employees” unless they “return to County employment for *not more than one thousand forty (1,040) hours per year as an intermittent employee.*” Section 204.290 is inapplicable to Chief Fitch because he was not re-employed by the County as a “salaried County employee” when he was sworn in as a member of the County Council. *See supra.* Moreover, §204.290 does not include any elected officials even though other County ordinances reference them. According to the doctrine of *expression unius est exclusion alterius* (the express mention of one thing implies exclusion of the other), the Court cannot apply §204.290 to elected officials because they are deemed intentionally excluded by the legislative body that enacted the ordinance. *Smith v. Missouri Local Government Employees Retirement System*, 235 S.W.3d 578 (Mo. App. 2007). Even if Chief Fitch’s election to the County Council could be considered “re-employment,” Respondents do not refute that Chief Fitch’s position involves, at most, a part-time commitment and that Chief Fitch does not devote more than 1,040 hours per year to his service on the County Council. Thus, §204.290

does not apply to Chief Fitch and has no impact on Chief Fitch's vested Police Pension that Respondents are required to provide to him. §204.090(3).

It is clear that the intended purpose of both §§204.090 and 204.290 is to prevent a person from earning a full-time salary while accruing time in the same County pension plan and receiving pension benefits for prior County service all at the same time. Section 204.290(2) references a "return to covered employment," §204.290(3) refers to the amount of retirement benefits "accrued after his return to County employment," and §204.290(4) carves out an exception: "This section shall not apply to retired participants who *return to County employment for not more than one thousand forty (1,040) hours per year* as an intermittent employee." This is akin to the language of §204.090(4) that exempts from participation, or "covered employment," any employee who works less than 30 hours per week or less than 9 months. The 1,040 number in §204.290(4) simply provides clarity. Thus, §204.290 achieves a similar result as §204.090(4). Under both ordinances, Chief Fitch's Police Pension remains unaffected. To conclude otherwise would produce an illogical result not intended by the legislative purpose of the St. Louis County pension code. *City of St. Louis v. Triangle Fuel Company*, 193 S.W.2d 914 (Mo. App. 1946) (words and phrases should not be interpreted in a way that thwarts and defeats the legislative purpose of a statute). Ambiguities, if they exist, should be construed in favor of the retiree, or pensioner. *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132 (Mo.2009); *Williams v. Board of Trustees of Public School Retirement System of Missouri*, 500 S.W. 31 (Mo. App. 1973) ("It is a general and well recognized rule that pension provisions shall be liberally construed in favor of the applicant.").

This Court issues a permanent writ of mandamus directing Respondents to comply with S.L.C.O. §204.425 (O. No. 14380, 2-8-90) which requires a lump sum payment of the Police Pension benefits to which Chief Fitch is entitled, consistent with this opinion. This Court also directs Respondents to re-classify Chief Fitch as eligible to continue to receive the Police Pension he earned for his employment as a commissioned officer from 1983-2014 throughout the remainder of his service on the County Council.

With regard to Realtor's request for pre-judgment interest on said benefits, this Court declines to award pre-judgment interest under the totality of the circumstances.

This Court further finds that, based upon the above, circumstances may exist to warrant payment by Respondents of some or all Relator's reasonable attorney's fees and costs. Counsel for Relator shall file an application for Relator's attorney's fees and costs by July 15, 2022, setting forth monetary rates charged by counsel and a list of dates and hours worked to bring this action. Respondents, if they so choose, may file a Response to Realtor's Application by July 29, 2022. A hearing will be held on the issue of fees and costs on August 3, 2022, at 3:30 p.m.

SO ORDERED:


Judge
Div. 37

June 30, 2022

THE HONORABLE JEFFREY P. MEDLER

DATE