COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2375 **Cir. Ct. No. 2014CV8688**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

MILWAUKEE POLICE ASSOCIATION AND MICHAEL CRIVELLO,

PLAINTIFFS-APPELLANTS,

MILWAUKEE PROFESSIONAL FIRE FIGHTERS ASSOCIATION, LOCAL 215 AND DAVID R. SEAGER, JR.,

INTERVENORS-PLAINTIFFS-CO-APPELLANTS,

V.

CITY OF MILWAUKEE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed.*

Before Kloppenburg, P.J, Sherman, and Blanchard, JJ.

¶1 PER CURIAM. The Milwaukee Police Association and its President, Michael Crivello, and the Milwaukee Professional Firefighters Association, Local 215, and its President, David Seager, Jr., (collectively, "the Unions"), appeal a circuit court order granting summary judgment to the City of Milwaukee and denying the Police Association's motion for summary judgment.[1] The Unions argue that the court erred in dismissing their complaints. More specifically, the Unions argue that, in amending a City Charter ordinance affecting the "Annuity and Pension Board of the City of Milwaukee Employes' Retirement System" ("the pension board"), the City violated the rights of retirement system members to maintain the existing size, composition, and manner of election of the pension board. Based on controlling precedent, ***Stoker v. Milwaukee County***, 2014 WI 130, 359 Wis. 2d 347, 857 N.W.2d 102, we conclude that the City was entitled to amend the size, composition, and manner of election of the pension board on a prospective basis, as it did here, and therefore the circuit court properly dismissed the Unions' complaints. Accordingly, we affirm.

BACKGROUND

¶2 In the Laws of 1937, chapter 396, section 7, the state legislature assigned responsibility for the operation of the Milwaukee Employes' Retirement System ("the retirement system") to the pension board. We will call this the 1937 law. The 1937 law also detailed the membership of the pension board and how members were to be elected (three members appointed by the chairman of the

[1] Only the Police Association moved for summary judgment. For the sake of simplicity, except when we refer to the Police Association or Local 215 individually, we refer to the appellants collectively as "the Unions." While they have filed separate briefs, the arguments of the Unions heavily overlap and do not appear to conflict on any point.

City's Common Council, three employee members elected by the retirement system's members, and the City Comptroller as an *ex officio* member). Laws of 1937, ch. 396, § 7(2). When the 1937 law was enacted, Milwaukee police officers and firefighters were not covered by the retirement system and were not subject to the jurisdiction of the pension board.

¶3 The Laws of 1947, chapter 441, section 31 granted all first class cities (such as the City of Milwaukee) the authority to amend the 1937 law, so long as the cities do not modify the "annuities, benefits or other rights" of any persons who are members of the retirement system. Laws of 1947, ch. 441, § 31(1). The 1947 law gave employees "a vested right" to the "annuities and other benefits" offered by the retirement system that "shall not be diminished or impaired by subsequent legislation or by any other means" without members' consent. Ch. 441, § 30(2)(a). The 1947 law also mandated that City police and firefighters hired on or after July 30, 1947, become members of the retirement system. Ch. 441, §§ 32, 33.

¶4 The City codified the pertinent part of the 1947 law, chapter 441, section 31, in its home rule charter ordinance. We will refer to the home rule charter ordinance as "the City's home rule provision" to avoid potential confusion between references to that provision and other charter ordinances and home rule provisions discussed in this opinion. The City's home rule provision reads as follows:

> For the purpose of giving to cities of the first class the largest measure of self-government with respect to pension, annuity and retirement systems compatible with the [Wisconsin] constitution and general law, it is hereby declared to be the legislative policy that all future amendments and alterations to this act are matters of local affair and government and shall not be construed as an enactment of statewide concern. Cities of the first class are

> hereby *empowered to amend or alter* the provisions of this act in the manner prescribed by s. 66.0101, Wis. Stats., *provided that no such amendment or alteration shall modify the annuities, benefits or other rights of any persons who are members of the system prior to the effective date of such amendment or alteration*.

Milwaukee Charter Ordinance § 36-14 (emphasis added).

¶5 This dispute arose in 2013, with action by the City. The City amended section 36-15-2 of the charter ordinance, which dictated the membership of the pension board, to change the size and composition of the pension board and the manner of election of its active employee-members. Prior to the 2013 amendment, the pension board, which had been changed from its original size and composition due to a 1972 amendment, was made up of eight members: three actively employed city employees elected to the pension board by city employees; one retiree member elected by retirees; three appointed by the President of the Common Council; and the City's elected Comptroller, *ex officio*. The 2013 amendment added three mayoral appointments in addition to the eight existing seats. It also required that a representative from the fire department and a representative from the police department hold each of two of the positions held by those actively employed by the City, and that an actively-employed city employee from a non-public safety department hold the last remaining seat in that category. Additionally, the amendment provided that only active firefighters can vote for the person to fill the fire department's seat, that only active police officers can vote for the person to fill the police department's seat, and that only active general (*i.e.*, non-public safety) city employees can vote for the person to fill the general city employee's seat.

¶6 The Police Association commenced this action in circuit court, seeking a declaratory judgment and an injunction, alleging that the 2013

amendment violates the vested rights of retirement system members in the size and composition of the pension board and their vested rights to elect members to the pension board without being limited to voting only for members in their same employment classification, as established by the session laws and charter ordinances referenced above. Local 215 was allowed to intervene.

¶7 The circuit court granted summary judgment in favor of the City, and denied summary judgment to the Police Association, after concluding that the pertinent session laws and the charter do not provide members of the retirement system with "a specific right to the makeup of the [pension] board" and that the 2013 amendment modifying "the makeup of the [pension] board does not affect any of the rights of the members." The Unions appeal.

ANALYSIS

¶8 To repeat, the Unions argue that, in amending the charter ordinance affecting the membership of the pension board, the City violated the vested rights of retirement system members to maintain the existing size, composition, and manner of election of the pension board, as established in the session laws and charter ordinances cited above, and, therefore the City is not entitled to summary judgment, and the Unions are entitled to summary judgment.

¶9 We review summary judgments de novo, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Given the issue we resolve on appeal, we need not recite any aspect of the familiar summary judgment methodology used by the circuit court and this court. *See* ***id.*** The Unions ask us to construe legislative enactments (the state session laws and ordinances cited above) and apply them to a set of undisputed facts. We review issues of statutory construction de novo as

well. ***Deutsches Land, Inc. v. City of Glendale***, 225 Wis. 2d 70, 79-80, 591 N.W.2d 583 (1999).

¶10 Our supreme court recently faced issues similar to those presented here in ***Stoker***, 359 Wis. 2d 347. For reasons discussed below, we conclude that ***Stoker*** is dispositive here.

¶11 The court in ***Stoker*** reviewed a county ordinance in light of Wisconsin session laws that established the county retirement system and corresponding benefit funds and that empowered the county with the power to make changes to those benefit funds as long as the changes did not "operate to diminish or impair the annuities, benefits or other rights of any person who is a member of [such benefit fund] prior to the effective date of any such change." ***Stoker***, 359 Wis. 2d 347, ¶¶5-11 (quoting Laws of 1965, ch. 405, § 1).

¶12 The pertinent facts in ***Stoker*** are as follows. "Milwaukee County calculates pension payments for its retired employees by multiplying a retiree's final average salary by a certain percentage known as a multiplier, and the resulting number is then multiplied by the retiree's total years of county service." ***Id.***, ¶2. When Stoker joined the county's retirement system, a 1.5% pension multiplier was in place. ***Id.*** The county later passed an ordinance that increased the multiplier to 2% for service after 1992, and then subsequently passed another ordinance reducing the multiplier to 1.6% for service after 2011. ***Id.***, ¶¶10-11. Stoker sued Milwaukee County, claiming that she had a vested right in a multiplier of 2% and therefore the ordinance reducing the multiplier was invalid, because the county had no authority to diminish her asserted vested right to the 2% pension multiplier. ***Id.***, ¶3.

¶13 The court explained that, by definition, a right or benefit may be altered on a prospective basis before it vests. ***Stoker***, 359 Wis. 2d 347, ¶24. Thus, the question in ***Stoker*** was when a pension multiplier vests for employees. The court concluded that employees' rights to the pension multiplier vest only as service is rendered. ***Id.***, ¶4. Therefore, under its home rule provision, Milwaukee County had authority to change the pension multiplier *on a prospective basis* to future service credits not yet earned. ***Id.***, ¶¶4, 47.

¶14 Before we discuss the application of ***Stoker*** to the circumstances here, we pause briefly to explain why we reject the argument made by the Police Association that ***Stoker*** should not apply here because it involved county action and the Unions here challenge the City's action. First, the court in ***Stoker*** interpreted (1) session laws with language nearly identical to those applicable here, and (2) Milwaukee County's home rule provision, which is nearly identical to the City's.[2] The Unions do not dispute the point. Second, this court has

[2] Laws of 1965, chapter 405, which the court interpreted in ***Stoker v. Milwaukee County***, 2014 WI 130, 359 Wis. 2d 347, 857 N.W.2d 102, states in pertinent part:

> (1) For the purpose of best protecting the employes subject to this act by granting supervisory authority over each benefit fund created hereunder to the governmental unit most involved therewith, it is declared to be the legislative policy that the future operation of each such benefit fund is a matter of local affair and government and shall not be construed to be a matter of state-wide concern. Each county which is required to establish and maintain a benefit fund pursuant to this act is *hereby empowered by county ordinance, to make any changes* in such benefit fund which hereafter may be deemed necessary or desirable for the continued operation of such benefit fund, *but no such change shall operate to diminish or impair the annuities, benefits or other rights of any person who is a member of such benefit fund prior to the effective date of any such change*.

(Emphasis added.)

previously applied the general rule that cases involving a specific level of government are not confined in application to cases involving the same level of government if the statutes or ordinances at issue are similar. ***Bilda v. Milwaukee County***, 2006 WI App 159, ¶34 n.12, 295 Wis. 2d 673, 722 N.W.2d 116 ("***Bilda II***") (interpreting county ordinance regarding payment of retirement system administrative expenses). The Unions also do not dispute this point. Third, the ***Stoker*** court relied on an earlier case involving the *City's* authority to modify unvested benefits to support its conclusion that the *county* could modify any unvested rights or benefits. *See* ***Stoker***, 359 Wis. 2d 347, ¶28-29 (citing ***Loth v. City of Milwaukee***, 2008 WI 129, 315 Wis. 2d 35, 758 N.W.2d 766.) For these reasons, we conclude that the ***Stoker*** rule applies equally to cases involving city ordinances as it does to substantially similar county ordinances.

¶15 We now return to our discussion of the ***Stoker*** rule and its potential application in this context, as opposed to the multiplier context. To repeat, ***Stoker*** stands for the broad proposition that local governments may make prospective alterations or amendments affecting the rights or benefits of retirement system members before those rights or benefits vest. *See* ***Stoker***, 359 Wis. 2d 347, ¶4.

¶16 Therefore, the question is whether the Unions have a vested right in the size, composition, and manner of election of the pension board as it existed prior to the 2013 amendment. The Unions argue that retirement system members have a vested right in the size, composition, and manner of election of the pension board as it existed before the amendment, while the City argues that even if the members "enjoyed any privileges as to these items," they certainly are not vested rights and "***Stoker*** confirms that those privileges, 'by definition, can be taken away.'" We conclude that the members did not have a vested right in these

matters at any time, and, therefore, the City had the ability to make the 2013 changes to those matters.

¶17 We pause here to observe that the City persuasively raises an issue that logically precedes the question of *vested* rights, namely, whether the members of the retirement system have any right whatsoever, vested or unvested, regarding potential amendments to the pension board's size, composition, and manner of elections. We agree with the City. Nothing in the 1937 law, the 1947 law, or the charter ordinances suggests that the retirement system members have a say in the manner of election of the pension board members or in any particular makeup of the pension board. Similarly, the Unions do not point to any relevant case law indicating that the retirement system members have any rights in these administrative matters. To the contrary, this court has concluded that retirement "system participants do not have a right to dictate how, within the requirements and limitations imposed by law, the system is administered and funded on a day-to-day or year-to-year basis." ***Bilda v. County of Milwaukee***, 2006 WI App 57, ¶¶14-15, 292 Wis. 2d 212, 713 N.W.2d 661 ("***Bilda I***"); *see also* ***Wisconsin Prof'l Police Ass'n, Inc. v. Lightbourn***, 2001 WI 59, ¶179, 243 Wis. 2d 512, 627 N.W.2d 807 (participating employees have a right to have their benefit commitments fulfilled but do not have a "right to determine exactly how employers fulfill their benefit commitments."). There could be no reasonable argument here that the changes at issue affect "benefit commitments." The amendment exclusively affects the management and administration of the retirement system, not the City's ability to fulfill particular benefit commitments. The Unions provide us with no reason to think that the members have any rights of any kind on these topics.

¶18 Moreover, even if we were to assume the existence of some sort of rights, the Unions fail to persuade us that any such rights are vested and therefore we conclude that the City can unilaterally make these amendments on a prospective basis. The Unions argue that, because the 1937 law and the City's charter ordinance both state that the pension board "shall" consist of a certain number of people, this indicates that matters related to the pension board's makeup are vested rights protected by the Charter. As the Unions point out, the general rule is that the term "'[s]hall' is presumed mandatory when it appears in a statute." ***Karow v. Milwaukee Cty. Civil Serv. Comm'n***, 82 Wis. 2d 565, 570, 263 N.W.2d 214 (1978). This argument falls short, because as we now explain the Unions are unable to point us to any authority for the proposition that, even if the mandatory language dictates the pension board's makeup at a particular time, the makeup of the pension board cannot be altered on a prospective basis.

¶19 Although "shall" mandates a specific makeup of the pension board at a particular time, the inclusion of "shall" in the 1937 law and the pertinent City's charter ordinance does not preclude amendments to the language that serve to change the composition of the pension board prospectively. *See* ***Madison Teachers, Inc., v. Walker***, 2014 WI 99, ¶126, 358 Wis. 2d 1, 851 N.W.2d 337 (quoted source omitted) (explaining that, based on the need of the legislature for "'flexibility to address changing needs[,]'" Wisconsin courts have long held that "'one legislature may not enact a statute which has implications of control over the final deliberations or actions of future legislatures.'"). Thus, despite the use of the word "shall" in the original legislation and the ordinance invoked here, the Unions have failed to provide us with any reason to conclude that the legislature cannot make amendments that alter the makeup of the pension board. As to the City's ability to alter the composition through ordinances, the City observes that the

makeup of the pension board was altered by ordinance from its original makeup prior to the 2013 amendment. Moreover, the Unions are not able to provide any statutory or case law authority supporting their position that the use of the term "shall" in the pertinent laws here was intended to preclude amendments to the language that serve to change the composition of the pension board prospectively.

¶20 In addition, citing ***Stoker***'s mandate to interpret statutes to avoid absurd or unreasonable results, the City makes a persuasive argument that the results here would be unreasonable and absurd if we were to accept the Unions' argument that retirement system members have a vested, and thus unchangeable, right in the size and composition of the pension board and the manner of election of the pension board's members, because this would appear to lead to the creation of multiple pension boards with great potential for confusion and conflict. *See* ***Stoker***, 359 Wis. 2d 347, ¶¶23-24 (statutes must be interpreted "to avoid unreasonable or absurd results"). The City's argument proceeds as follows. Even if the Unions were correct that *current* members have this vested right, the City would still have the authority over composition of the pension board as to *new* employees. In that circumstance, the City would have to create multiple pension boards for different groups of employees. If the City were forced to create multiple boards to exercise this authority, it would create an unreasonable and absurd result. Neither the Police Association nor Local 215 respond to this argument.

¶21 In sum, based on ***Stoker***, we conclude that the City is entitled to amend, on a prospective basis, matters related to the size, composition, and manner of election of the pension board, because the members of the retirement system do not have any rights in those matters.

CONCLUSION

¶22 For the foregoing reasons, we conclude that the circuit court properly granted the City's motion for summary judgment, denied the Police Association's summary judgment motion, and dismissed the Unions' complaints in their entirety.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2015-16).