

October 14, 2010

BY FedEx

Board of Trustees
Missouri Department of Transportation and Highway
Patrol Employee's Retirement System
c/o Keith Thornburg
General Counsel
1913 Williams Street
Jefferson City, MO 65102-1930

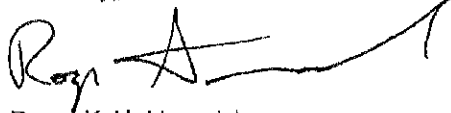
Dear Mr. Thornburg:

I have enclosed the following items in connection with Mr. Kelly Glossip's request that the Board review under Rule 1-3, the Executive Director's decision dated August 17, 2010, which denied Mr. Glossip's application for survivor benefits in connection with the death of Dennis Engelhard:

1. Request for Review
2. Stipulations with Exhibits attached
3. Affidavit of Kelly D. Glossip
4. Affidavit of the Venerable Mark D. Sluss
5. Affidavit of James Belvins
6. Affidavit of Roger Heidenreich

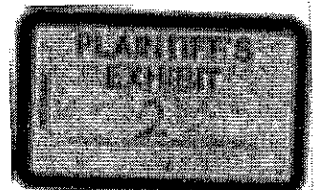
Please let me know if the Board desires any further information.

Sincerely,



Roger K. Heidenreich

Enclosures



MISSOURI DEPARTMENT OF TRANSPORTATION AND
HIGHWAY PATROL EMPLOYEES' RETIREMENT SYSTEM
BOARD OF TRUSTEES

IN THE MATTER OF
SURVIVOR APPLICATION --
DENNIS ENGELHARD, DECEASED

Appeal No. 2010-1

REQUEST FOR REVIEW

Pursuant to Rule 1-3 of the procedural rules of the Missouri Department of Transportation and Highway Patrol Employees' Retirement System ("MPERS"), Appellant KELLY GLOSSIP requests review of the Executive Director's decision dated August 17, 2010, which denied his application for survivor benefits in connection with the death of Dennis Engelhard, and alleges as follows:

FACTUAL BACKGROUND

1. From 2000 through 2009, Dennis Engelhard was employed as a state trooper for the Missouri State Highway Patrol ("MSHP"). Joint Stip. ¶ 1.
2. As detailed in Mr. Glossip's affidavit submitted in support of this request for review, Mr. Engelhard and Mr. Glossip met in April 1995 and lived together in an intimate, loving, and committed relationship for nearly 15 years, until Mr. Engelhard's death on December 25, 2009. Glossip Aff. ¶ 4. Messrs. Engelhard and Glossip exchanged rings in 1997 and held themselves out to their families and their community as a couple in a committed, marital relationship. Glossip Aff. ¶ 6. Mr. Engelhard and Mr. Glossip intertwined their lives together emotionally, spiritually, and financially, and cared for each other in sickness and in health. Glossip Aff. ¶¶ 6-13.

3. As set forth in the affidavits of James Blevins and the Venerable Mark D. Sluss, the loving committed relationship between Messrs. Engelhard and Glossip was, in all relevant respects, the functional equivalent of a spousal relationship.

4. Messrs. Engelhard and Glossip would have entered into a civil marriage if it were legal to do so in Missouri. Glossip Aff. ¶ 4. After Iowa legalized same-sex marriage, Messrs. Engelhard and Glossip considered getting married in Iowa but decided to wait until their marriage would be legally recognized in Missouri. *Id.*

5. On December 25, 2009, Mr. Engelhard was killed in the line of duty when he was struck by a vehicle while responding to an accident on I-44, east of Eureka, Missouri. Joint Stip. ¶ 1.

6. After Mr. Engelhard's death, Mr. Glossip attended a ceremony in Jefferson City commemorating the police officers who were killed in the line of duty during 2009, and; as Mr. Engelhard's surviving partner, Mr. Glossip placed a flower in a memorial wreath. Glossip Aff. ¶ 14. Mr. Glossip also attended a ceremony in Washington, D.C. on May 15, 2010, commemorating the loss of police officers nationwide and was recognized with a medallion as Mr. Engelhard's surviving partner. *Id.*

PROCEDURAL HISTORY

7. R.S. Mo. § 104.140.3 provides survivor benefits to the surviving spouse of MSHP employees who are killed in the line of duty. Pursuant to R.S. Mo. § 104.140.3, if the employee's death "was a natural and proximate result of a personal injury or disease arising out of and in the course of the member's actual performance of duty as an employee," then the surviving spouse shall be awarded an annuity payment equal to fifty percent of the employee's average salary.

8. On August 5, 2010, Mr. Glossip submitted an application for survivor benefits provided by R.S. Mo. § 104.140.3. Joint Stip. ¶ 2.

9. On August 12, 2010, Mr. Glossip supplemented his application with a copy of Mr. Engelhard's death certificate. *Id.*

10. On August 17, 2010, MPERS denied Mr. Glossip's application. Joint Stip. ¶ 3. As the sole bases for its decision, MPERS relied on R.S.Mo. §§ 104.012, 451.022. Joint Stip. ¶ 8.

11. R.S.Mo. § 104.012 provides: "For the purposes of public retirement systems administered pursuant to this chapter, any reference to the term 'spouse' only recognizes marriage between a man and a woman."

12. R.S.Mo. § 451.022 provides, *inter alia*: "A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted."

13. Rule 1-3(1) of the MPERS procedural rules provides that an applicant may appeal a denial of benefits by filing a request for review within 60 days of the Executive Director's written decision.

14. The parties have agreed and stipulated that the survivor application in this matter was denied by the Executive Director pursuant to Missouri statutes and that the only issue presented concerns whether particular provisions of Missouri law are valid. Joint Stip. ¶ 7. The parties present this matter to the Board of Trustees in an abundance of caution to avoid procedural delay should a reviewing court later deem this matter to require a decision of the Board of Trustees as a prerequisite to juridical appeal. *Id.*

**REASONS WHY THE EXECUTIVE DIRECTOR'S
DECISION SHOULD BE REVERSED**

15. In all relevant respects, Mr. Engelhard is similarly situated to other state troopers who work for the State with the understanding that their life partners will be protected at the time of their death. Likewise, Mr. Glossip is similarly situated to the spouses of state troopers who have died in the line of duty. Messrs. Glossip and Engelhard are, therefore, similarly situated to heterosexual couples who are able to obtain the survivor benefits provided by R.S. Mo. § 104.140.3. If Messrs. Glossip and Engelhard had been a heterosexual couple, they would have been able to marry and thereby obtain the survivor benefits provided by R.S. Mo. § 104.140.3. Their exclusion from survivor benefits only because they are unable to marry violates the Missouri Constitution as shown below.

16. Without contesting that Messrs. Glossip and Engelhard shared the functional equivalent of a spousal relationship, MPERS concluded that R.S.Mo. §§ 104.012, 451.022 categorically prohibit Mr. Glossip from receiving the survivor benefits that R.S. Mo. § 104.140.3 provides to same-sex couples. Joint Stip. ¶ 8.

17. This categorical exclusion of same-sex couples violates the Missouri Constitution's guarantee of equal protection and substantive due process. In a case involving similar spousal benefits, the federal district court for the district of Arizona recently explained that a State unconstitutionally discriminates against gay men and lesbians when it conditions valuable employee benefits on marriage while at the same time excluding same-sex couples from the ability to marry:

While [such a policy] is not discriminatory on its face, as applied [it] unquestionably imposes different treatment on the basis of sexual orientation, and makes benefits available on terms that are a legal impossibility for gay and lesbian couples. As a result, [such a policy] denies lesbian and gay State

employees in a qualifying domestic partnership a valuable form of compensation on the basis of sexual orientation.

Collins v. Brewer, No. 2:09-cv-02402 (JWS), 2010 WL 2926131, at *4 (D. Ariz. July 23, 2010) (internal quotation marks and footnote omitted). For the same reasons that the court in *Collins* held that Arizona's exclusion of same-sex couples violated the federal Constitution, MPERS' exclusion of same-sex couples from the survivor benefits provided by R.S. Mo. § 104.140.3 violates the Missouri State constitution. Indeed, the Missouri Supreme Court has interpreted the Missouri constitution's guarantee of equal protection and substantive due process to provide *greater* protection than afforded by the federal Constitution. *State ex rel. J.D.S. v. Edwards*, 574 S.W.2d 405, 409 (Mo. banc 1978) (holding that Missouri Constitution due process and equal protection clauses provide more protection than United States Constitution where United States Supreme Court precedent "dilute[s] these important rights").

18. The Missouri Constitution provides that "all persons have a natural right to life, liberty, the pursuit of happiness" and that "all persons are created equal and are entitled to equal rights and opportunity under the law." Mo. Const. Art. I, § 2. In determining whether a statute violates these provisions, Missouri courts employ a two-step process. "The first step is to determine whether the statute implicates a suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *Weinschenk v. State*, 203 S.W.3d 201, 210 (Mo. banc 2006); *accord In re Marriage of Woodson*, 92 S.W.3d 780 (Mo. banc 2003). "The second step is to apply the appropriate level of scrutiny to the challenged statute." *Weinschenk*, 203 S.W.3d at 211.

19. For several reasons, MPERS' categorical exclusion of same-sex couples from the survivor benefits provided by R.S. Mo. § 104.140.3 should be subjected to heightened scrutiny. The exclusion of same-sex couples discriminates on the basis of sexual orientation, which should

be recognized as a suspect class under the Missouri constitution. *See In re Marriage Cases*, 183 P.3d 384, 441-44 (Cal. 2008) (recognizing sexual orientation as suspect classification under California constitution); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 431-76 (Conn. 2008) (recognizing sexual orientation as quasi-suspect classification under Connecticut constitution); *Varnum v. Brien*, 763 N.W.2d 862, 885-96 (Iowa 2009) (recognizing sexual orientation as quasi-suspect classification under Iowa constitution). Such an exclusion also discriminates on the basis of a person's sex or gender, which has repeatedly been recognized as a suspect classification. *See In re Marriage of Kohring*, 999 S.W.2d 228, 232 (Mo. 1999) (recognizing gender as suspect classification); *Baehr v. Lewin*, 852 P.2d 44, 60 (Haw. 1993) (holding that discrimination against same-sex couples discriminates on the basis of gender).

20. Moreover, the categorical exclusion of same-sex couples from the survivor benefits provided by R.S. Mo. § 104.140.3 penalizes the exercise of those couples' fundamental rights to intimate association and pursuit of happiness, which are protected by principles of substantive due process. *See Cook v. Gates*, 528 F.3d 42, 52-56 (1st Cir. 2008) (holding that substantive due process requires heightened scrutiny of burdens on same-sex couples' intimate association); *Witt v. Dep't of Air Force*, 527 F.3d 806, 813-19 (9th Cir. 2008) (same); *cf. Hoff v. Berg*, 595 N.W.2d 285, 290 (N.D. 1999) (holding that right to pursuit of happiness includes "the right to enjoy the domestic relations and the privileges of the family and the home").

21. MPERS' categorical exclusion of same-sex couples from the survivor benefits provided by R.S. Mo. § 104.140.3 is unconstitutional under any standard of scrutiny. To survive strict scrutiny, the State must show that the exclusion of same-sex couples is narrowly tailored to serve a compelling interest. *Weinschenk*, 203 S.W.3d at 216. Similarly, to survive intermediate scrutiny, the State must show that the exclusion is substantially related to an important

governmental interest. *Wengler v. Druggists Mut. Ins. Co.*, 583 S.W.2d 162,164-65 (Mo. banc 1979). And even if under rational-basis review -- the lowest standard of scrutiny -- a "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Carney v. Hanson Oil Co.*, 690 S.W.2d 404, 407 (Mo. 1985). In this case, the State cannot show that excluding same-sex couples from survivor benefits is rationally related to any legitimate state interest, and certainly cannot show that the exclusion satisfies intermediate or strict scrutiny.

22. First, excluding same-sex couples is not rationally related to state interests in cost-savings or administrative convenience. St. Louis County, the City of St. Louis, the St. Louis Board of Police Commissioners, and the City of Kansas City all provide comprehensive domestic partnership benefits to same-sex employees. See Heidenreich Aff. ¶¶ 3-6, Exs. A-D.¹ The experience of these governmental organizations indicates that providing benefits to same-sex domestic partners imposes minimal administrative burdens or additional costs. In order to qualify for benefits in these jurisdictions, domestic partners simply submit an affidavit of domestic partnership; none of these governmental organizations could identify any documents related to fraud in connection with applications for domestic partnership benefits. At the same time, offering domestic partnership benefits brings many benefits to governmental employers, including enhanced market competition, diversity, and employee morale.

¹ These governmental organizations have produced large volumes of documents in response to public-records requests filed on behalf of Mr. Glossip. Letters responding to the document requests have been attached to the affidavit of Roger Heidenreich. Heidenreich Aff., Exs. A-D. The complete set of documents produced in response to the public-records requests is too voluminous to attach to Mr. Heidenreich's affidavit. However, Appellant will make those documents available to Respondent and the Board for inspection upon request.

23. In this case, there is no evidence that providing benefits to same-sex couples would be burdensome or costly for MPERS to administer. *See Dahl Aff.* ¶¶ 4-6. And even if such evidence existed, the State cannot conserve resources through arbitrary or irrelevant distinctions among citizens. *Collins*, 2010 WL 2926131 at *5-*6; *ACLU v. State*, 122 P.3d 781, 791-92 (Alaska 2005).

24. Second, excluding same-sex couples from survivor benefits does not encourage heterosexual couples to marry or to procreate. *See Collins*, 2010 WL 2926131, at *7 (“It is only by denying benefits to heterosexual domestic partners that marriage might be promoted. However, denying benefits to heterosexual partners (who can marry in order to obtain benefits) does not require denial of those benefits to homosexual partners (who cannot marry).”)

25. Third, to the extent that the State seeks to deny benefits to same-sex couples in order to express moral disapproval of same-sex relationships, such moral disapproval is not a legitimate state interest that can justify the discriminatory treatment of same-sex couples. *See Romer v. Evans*, 517 U.S. 620, 633 (1996).

26. Finally, the categorical exclusion of same-sex couples from the survivor benefits provided by R.S. Mo § 104.140.3 is an unconstitutional “special law,” which is prohibited by the Missouri constitution. Mo. Const. Art. III, § 40 provides that “[t]he general assembly shall not pass any local or special law: ... where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without any regard to any legislative assertion on that subject.”

27. First, this statute is a special law on its face because the classification is based on an immutable characteristic. As such, it is presumed to be unconstitutional and the State must show a substantial justification for the classification. *Jefferson Cnty. Fire Prot. Dist. Ass'n v.*

Blunt, 205 S.W.3d 866, 870 (2006) (party defending the facially special statute must demonstrate substantial justification for its use).

28. Second, even if the statute is not facially special, it is unreasonable, arbitrary and without a rational relationship to a legislative purpose. *Alderson v. State*, 273 S.W.3d 533, 538 (Mo. 2009). For the reasons set forth above, there is no justification for excluding committed same-sex couples from the survivor benefits provided to heterosexual couples by R.S. Mo. § 104.140.3 and the exclusion of same-sex couple from survivor benefits is an unconstitutional special law.

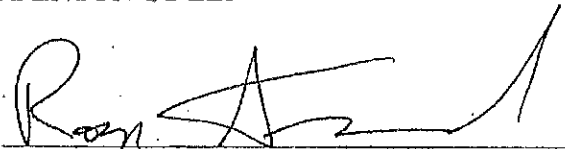
Conclusion

For all these reasons, MPERS should grant this Request for Review, reverse the Executive Director's decision dated August 17, 2010, and grant Mr. Glossip's application for survivor benefits provided by R.S. Mo. § 104.140.3.

Respectfully submitted,

SNR DENTON US LLP

By:



Roger K. Heidenreich
One Metropolitan Square, # 3000
St. Louis, MO 63102
(314) 259-5805
Facsimile (314) 259-5959

Attorney for Appellant Mr. Kelly Glossip