

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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HUGH A. COX, JR.,

Plaintiff-Appellant,

v

BEVERLY HILLS RETIREMENT SYSTEM,  
GEORGE MAJOROS and ROBERT BENTON,

Defendants-Appellees.

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UNPUBLISHED

December 15, 1998

No. 205566

Oakland Circuit Court

LC No. 96-520804 CK

Before: Doctoroff, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendants' motion for summary disposition and denying plaintiff's motion for summary disposition. We affirm.

Plaintiff retired from the Village of Beverly Hills Department of Public Safety on August 1, 1995, after twenty-seven years of service. As part of his final paycheck, he received \$7,710.63 designated as "vacation pay," but which represented a lump-sum payment in consideration of the unused vacation time he had accumulated over his years of service. When calculating plaintiff's final average salary in order to determine his pension benefits, defendants did not include the lump-sum payment as part of plaintiff's final average salary. Plaintiff argues on appeal that defendants' exclusion of that lump-sum payment was contrary to the plain language of the Village of Beverly Hills Code.

The interpretation of a local ordinance is a question of law that this Court also reviews de novo. *Burt Twp v DNR*, 227 Mich App 252, 255; 576 NW2d 170 (1997). The rules governing statutory construction also apply to ordinances. *Gora v City of Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). The goal of statutory interpretation is to determine and give effect to the intent of the Legislature. *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1995); *People v Pitts*, 216 Mich App 229, 232; 548 NW2d 688 (1996). The first criterion in determining intent is the specific language of the statute. *Id.* If the language is clear and unambiguous, judicial construction is not permitted. *Id.* However, if reasonable minds can differ as to the meaning of a statute, judicial construction is appropriate. *People v Armstrong*, 212 Mich App 121, 123; 536 NW2d 789 (1995).

Under § 3.08(o) of the Village of Beverly Hills Code, plaintiff was entitled to a straight life pension calculated by multiplying a percentage of his “final average salary” by his number of years of credited service. Section 3.08(a) defines “final average salary” as:

The average of the highest annual compensation paid a member of the village during any period of two (2) consecutive years of his credited service contained within his five (5) years of credited service immediately preceding termination of his last employment by the Village as a Public Safety Officer. If he has less than two (2) years of credited service his final average salary shall be the average of his annual compensations received during his total years of credited service.

Section 3.08(a) defines “compensation” as:

The salary and wages paid a member for personal services rendered to this Village of Beverly Hills, including longevity pay, vacation pay, holiday pay, cost-of-living, (COLA,) sick leave pay, while absent from work and items of deferred compensation as provided by Board Rule. Compensation does not include overtime pay, allowances for clothing, cleaning, equipment, travel and similar items, reimbursement of expenses incurred, bonuses, termination or severance pay, payment in consideration of unused sick leave, the value of any fringe benefit, salary, wages and any other items which are the basis of benefits under another retirement program, or items of a similar nature, as provided by Board Rule.

Plaintiff contends that because “vacation pay” is listed as a form of compensation and “payment in consideration of unused vacation time” is not listed as an exclusion to that category, the plain language of the code requires that accrued vacation pay be included in the calculation of his final average salary. In the alternative, plaintiff argues that the lump-sum payment for his accrued vacation time is an “item[] of deferred compensation,” which also is listed as a form of compensation that is taken into account when calculating a final average salary. We disagree.

Although this Court has recognized the maxim “expressio unius est exclusio alterius,” which means that the express mention of one thing in a statute implies the exclusion of other similar things, *Saginaw General Hosp v City of Saginaw*, 208 Mich App 595, 601; 528 NW2d 805 (1995), this Court has also stated that the maxim is only a tool and cannot control if its application would defeat the drafters’ intent. *Feld v Robert & Charles Beauty Salon*, 174 Mich App 309, 313; 435 NW2d 474 (1989), rev’d on other grounds 435 Mich 352; 459 NW2d 279 (1990); *Treasury Dep’t v Psychological Resources, Inc*, 147 Mich App 140, 144; 383 NW2d 144 (1985). We find that the phrase in § 3.08, “or items of a similar nature,” listed with the exclusions to the definition of “compensation,” indicates that the drafters of the Beverly Hills Village Code did not intend for payment such as that for unused vacation time to be included in calculating the final average salary of a retiring employee. Such payments are not of the same “nature” as *annual* compensation for services rendered, and inclusion of those payments in a determination of a retiring employee’s final salary would not be in keeping with the concept of averaging income over a certain number of years preceding retirement, as stated in § 3.08(o). See *Stover v Retirement Bd of the City of St Clair Shores Firemen & Police Pension System*, 78 Mich App 409, 412-413; 260 NW2d 112 (1977), *Lansing Firefighters Ass’n v*

*Bd of Trustees of the City of Lansing Policemen's & Firemen's Local 421 Retirement System*, 90 Mich App 441; 282 NW2d 346 (1979), and *Gentile v City of Detroit*, 139 Mich App 608, 620; 362 NW2d 848 (1984). For these same reasons, we do not find that a lump-sum payment in consideration of unused vacation time is “deferred compensation” under § 3.08.

Although plaintiff acknowledges that defendants’ exclusion of the lump-sum payment from the calculation of a retiring employee’s final average salary has been consistent, beginning with the first retiree, he argues that defendants’ prior interpretation of the Village of Beverly Hills Code carries no weight because it is clearly wrong. However, this Court has stated that “[a] long standing, consistent interpretation of a statute by those charged with its execution is entitled to considerable weight and ought not to be overruled without cogent reasons.” *Michigan ex rel Oakland Co Prosecutor v Dep’t of Corrections*, 199 Mich App 681, 691-692; 503 NW2d 465 (1993). Given that defendants’ interpretation of § 3.08 is reasonable under the plain language of that section, we find no cogent reason for overruling it. Therefore, defendants were entitled to judgment as a matter of law and the trial court properly granted their motion for summary disposition.

Plaintiff also argues that defendants’ interpretation of § 3.08 violates Const 1963, art 9, § 24, which provides that pension benefits and retirement systems of the state and its political subdivisions are contractual obligations that may not be impaired or diminished. Because the trial court did not address this issue, it is not preserved for appellate review. *Herald Co, Inc v Ann Arbor Public Schools*, 224 Mich App 266, 278; 568 NW2d 411 (1997). However, this Court will not punish a party for an omission of the trial court. *Carson Fischer Potts and Hyman v Hyman*, 220 Mich App 116, 119; 559 NW2d 54 (1996). Also, this Court may review an issue not addressed by the trial court if it involves a question of law and the facts necessary for its resolution have been presented. *Id.*

Because we find that, under the plain language of § 3.08, defendants were not required to include plaintiff’s lump-sum payment in consideration of unused vacation time in his final average salary, plaintiff’s pension benefits have not been impaired or diminished. On the contrary, defendants calculated plaintiff’s final average salary in a manner consistent with their interpretation of § 3.08 from the inception of the Village of Beverly Hills Retirement System. Thus, for the duration of his pension, plaintiff will receive all the benefits to which he is entitled under § 3.08.

Affirmed.

/s/ Martin M. Doctoroff  
/s/ David H. Sawyer  
/s/ E. Thomas Fitzgerald