No. APL-2018-00163

To be argued by:
WILLIAM E. STORRS
10 minutes requested

State of New York
Court of Appeals

In the Matter of the Application of

BRUCE BOHLEN, LOUIS J. LACAPRA,

Petitioners-Respondents,

v.

THOMAS P. DINAPOLI, IN HIS CAPACITIES AS THE COMPTROLLER OF THE STATE OF NEW YORK AND THE ADMINISTRATIVE HEAD OF THE NEW YORK STATE AND LOCAL EMPLOYEES' RETIREMENT SYSTEM,

Respondent-Appellant,

For a Judgment Pursuant to Article 78
of the Civil Practice Law & Rules.

BRIEF FOR APPELLANT

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Dated: February 13, 2019

Supreme Court, Albany County, Index No. 4153-17
Third Department No. 525823

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PRELIMINARY STATEMENT

To prevent artificial inflation of the final average salaries of members of the New York State and Local Employees' Retirement System, Retirement and Social Security Law § 431(3) requires that "additional compensation paid in anticipation of retirement" be excluded from a retiree's base salary for purposes of calculating his or her retirement benefits. In this case, the Comptroller excluded from the computation of petitioners' final average salaries certain so-called "longevity payments," on the ground that these payments were, in fact, additional compensation paid in anticipation of retirement, essentially because they were structured to provide petitioners with the financial equivalent of a statutory incentive to retire early for which they were ineligible.

Petitioners challenged the Comptroller's determination in this C.P.L.R. article 78 proceeding. Supreme Court transferred the proceeding to the Appellate Division, Third Department, where a divided court annulled the determination. Rejecting the evidence that the Comptroller had credited, the majority stated that the payments were "more appropriately" characterized as payments

genuinely made to delay petitioners' retirements. The dissenting justices, on the other hand, would have confirmed the determination. Although there was evidence in the record that could support a contrary conclusion, the dissenting justices concluded that substantial evidence supported the Comptroller's determination that the longevity payments constituted additional compensation paid in anticipation of retirement. Respondents have appealed as of right based on the two-Justice dissent.

The dissenting justices correctly applied the governing principles in this substantial evidence case, whereas the majority substituted its judgment for that of the Comptroller and improperly rejected the rational inferences the Comptroller drew from the record evidence. The record left room for choice, and that choice belonged to the Comptroller. Nor is there any constitutional impediment to the application of section 431(3) to the petitioners who joined the Retirement System before the enactment of that statute in 1971. Accordingly, the Appellate Division's judgment should be reversed and the petition dismissed.

QUESTION PRESENTED

1. Does substantial evidence support the Comptroller's determination that certain "longevity payments" made to petitioners by their employer should be excluded from the calculation of petitioners' final average salaries under Retirement and Social Security Law § 431(3) on the ground that that the payments were made in anticipation of retirement?

2. Is the application of section 431(3) to the petitioners who joined the Retirement System before the 1971 enactment of section 431(3) consistent with article V, § 7 of the New York State Constitution, which prohibits the diminishment or impairment of vested retirement benefits?

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal, based on the two-Justice dissent, under C.P.L.R. § 5601(a). This proceeding originated in Supreme Court, and the Appellate Division's judgment finally determines the proceeding. The Appellate Division's judgment granted the petition, annulled the Comptroller's determination, and remitted the matter to

respondents for further administrative proceedings not inconsistent with the court's decision. Two Justices dissented on a question of law, namely, whether the Comptroller's determination was supported by substantial evidence, and would have dismissed the petition. *See Mittl v. Div. of Human Rights*, 100 N.Y.2d 326, 331 (2003) ("The issue of whether substantial evidence supports an agency determination is solely a question of law").

The remittal does not render the Appellate Division's judgment non-final. The further proceedings on remittal would consist of the ministerial task of re-calculating petitioners' retirement benefits with the inclusion of the previously excluded compensation. No action involving the exercise of discretion would take place. Consequently, the Third Department's judgment is final and reviewable by this Court. *See Matter of LaRocca v. New York City Department of Transportation,* 59 N.Y.2d 683, 685 fn (1983); *Matter of Bank of Manhattan Company v. Murphy,* 293 N.Y. 515, 520 (1944).

STATUTORY BACKGROUND

Under the Retirement and Social Security Law, pension benefits for members of the New York State and Local Employees' Retirement System (Retirement System) are generally calculated based on their service time and the average of their annual base salaries for their last three years of service before retirement. R.S.S.L. § 2(9)(a). The salary included in this calculation is often referred to as "pensionable." Under R.S.S.L. § 431(3), however, for any retirement plan to which the State or a participating public employer contributes, the salary base for the computation of retirement benefits shall in no event include "any additional compensation paid in anticipation of retirement" earned or received on or after April 1, 1972.

In 2002, the New York State Legislature enacted a temporary bill to encourage certain public employees to retire early. L. 2002, ch. 69. Chapter 69 gave employers participating in the Retirement System the option to adopt retirement incentives and avoid layoffs of public employees at a time of fiscal need. Part A of chapter 69 provided generally that eligible employees who voluntarily chose to

retire no later than December 31, 2002, would receive, as an incentive, an additional one month of credited service in the Retirement System for each year of service up to a maximum retirement service credit of three years. Part B provided that anyone employed since February 1, 2002, who was at least 55 years of age and had at least 25 years of credited service could retire during an "open period" without an early retirement reduction of benefit.

Eligible employees of participating employers, however, were not automatically entitled to this retirement incentive. Employers were permitted to determine who could participate in the incentive program, depending on a number of factors. For example, a participating employer could "exempt" certain employees from the program where, among other things, health and safety would be jeopardized, a negative fiscal impact would result, or when certain employees were deemed necessary to maintain the integrity of the employer's operations.

STATEMENT OF THE CASE

A. The Port Authority's Compensation Adjustment Program

Petitioners (or the decedents whom certain of the petitioners now represent) were all key executive employees of the Port Authority of New York and New Jersey, a participating employer in the Retirement System. In July 2002, the Board of Commissioners of the Port Authority, on the recommendation of its Executive Director, approved its participation in the 2002 retirement incentive program (187-189, 195-196). In conjunction with this recommendation, petitioner LaCapra, the Port Authority's chief administrative officer (61), recommended to the Executive Director that the Port Authority adopt "a compensation adjustment program to achieve the equivalent level of pension benefit for those key staff members who formally forego the option to retire under the incentive program" (193-194).

The Executive Director adopted this recommendation, noting that the cost of this program would be "well within the cost savings" of the retirement incentive program (195-196). Petitioners are the

eleven individuals who were offered this compensation adjustment program in return for "foregoing" the retirement incentive (196).

By agreements dated December 9, 2002, that were presented to and executed by each petitioner, the Port Authority advised petitioners that in fact they were *not* eligible for participation in the retirement incentive program, on the ground that they were key employees deemed necessary to maintain the integrity of the operations of the Port Authority (229-237).[1] But consistent with LaCapra's recommendation to achieve a pension benefit equivalent to the incentive program, in consideration of the petitioners remaining in Port Authority service for just another three weeks, until December 31, 2002, and to prevent them from being "unfairly treated," the Port Authority authorized its Executive Director to develop a program designed to provide a limited number of staff

[1] Given that the petitioners appear to have been the senior administrative staff of the Port Authority (Petitioner's' App. Div. Br. at 9-10), it is questionable whether their positions would have constituted "eligible titles" for Part A of the retirement incentive even if the Port Authority had not denied their participation. L. 2002, Ch. 69, Part A, § 1(g).

members with a "parity" benefit. The "parity" benefit consisted of a "longevity allowance," payable bi-weekly (229-237).

Despite its label, the so-called longevity allowance was not a reward for past service, but an attempt to give petitioners a pension benefit equivalent to what they would have obtained had they participated in the retirement incentive program. The allowance was calculated not based on an eligible staff member's length of service with the Port Authority, but rather on the staff member's salary. The Port Authority advised the petitioners that, if they remained employed for an additional three years, their respective pension calculations (exclusive of amounts reflecting additional service credits or salary increases) would be roughly equivalent to what they would have received had they been eligible to retire with the retirement incentive at the present time (229-237).

In other words, the Port Authority attempted to achieve pension parity with the retirement incentive program not by giving petitioners service credit as under the program—which it could not lawfully do—but by boosting their salaries by an amount that would generate an equivalent pension benefit after three years of service.

Each of the petitioners accepted this offer (229-237). The petitioners all remained employees of the Port Authority beyond December 31, 2002. Eight of them retired before the end of 2010 and were awarded retirement benefits based on a final average salary that included the longevity payments. As of 2002, all of the petitioners were eligible for full service retirement, without the benefit of the retirement incentive (65-66, 78-79).

B. The Initial Determination and Hearing

In 2012 and 2013, petitioners each received a determination letter from the Retirement System informing them that the payments they received as employees of the Port Authority under the compensation adjustment program constituted "compensation paid in anticipation of eventual retirement" and that, therefore, the payments should have been or would be excluded from the calculation of their final average salary (202, 332-340).[2] Thereafter,

[2] The petitioners who had already retired were advised that the Retirement System would not take any action to reduce their current retirement benefit or recover previous overpayments until the conclusion of the hearing process (332, 336, 337, 338).

each petitioner made a timely request for a hearing and redetermination (202-203). By stipulation, petitioners' cases were consolidated and the petitioners agreed to be bound by the ultimate determination in the matter of the hearing of petitioner Bohlen (202-216).

At the hearing, petitioner Lombardi (the only petitioner to testify), stated that he was "shocked" to learn of the 2002 retirement incentive program (102). He was surprised that anyone in leadership or otherwise employed by the Port Authority could take the incentive and leave at that particular point in time (102). He had no intention of leaving—he had resolved to do as much as he could to assist the Port Authority following the events of September 11, 2001—and did not apply to be eligible for the retirement incentive. Nonetheless, he accepted the "longevity payments" offered by the Port Authority because "the money was there, why not take it" (103).

Lombardi's assistant, Mr. Spencer, left shortly after executing the 2002 agreement, but did not discuss whether he would have applied for the retirement incentive with Lombardi (103). Similarly,

Lombardi did not know if any of the other petitioners had intended to apply for the retirement incentive (104).

In petitioner Blanco's December 18, 2012 letter to the Retirement System, admitted in evidence at the hearing, Blanco stated that it was "quite clear" that the longevity payments were not made as part of a retention agreement that would have required him to stay for a specified period of time in the future (199). He noted that he had been denied the right to participate in the retirement incentive program, and that the longevity payments were intended to make him whole for the "lost incentive benefit" (199).

C. The Hearing Officer's Decision and the Final Determination

The hearing officer, Hon. Edward O. Spain, recommended that petitioners' applications for reconsideration of the exclusion of the so-called "longevity" payments from the calculation of their final average salaries be denied.

After making findings of fact, the hearing officer first rejected petitioner's argument that R.S.S.L. § 431 did not apply to those

petitioners who had joined the Retirement System prior to the effective date of the statute (22). The hearing officer concluded that, under existing precedent, section 431(3) applied to all of the petitioners because there was no evidence that, prior to the enactment of section 431 (3), the Retirement System had a policy or practice of including similar payments made in anticipation of retirement in its calculation of final average salaries (21). The hearing officer also noted that the Retirement System had provided evidence that the enactment of section 431(3) was, in fact, a codification of its existing policy of excluding such payments from the computation of retirement benefits, as well as judicial precedent applying section 431(3), (21).[3]

The hearing officer next concluded that the excluded payments were made to achieve the financial equivalent of the retirement incentive rather than as a reward for longevity or an incentive to delay retirement. The hearing officer noted that the

[3] Copies of the administrative determinations referenced by the hearing officer, which were attached to the Retirement System's post-hearing memorandum of law, are attached to this brief for the Court's convenience.

petitioners had neither relinquished nor foregone the retirement incentive, because it had never been offered to them in the first place (23). There was also no evidence in the record suggesting that any of them had announced a retirement date or evinced any intention to retire in the near future (23). Accordingly, under existing precedent, the hearing officer concluded that the "longevity" payments were intended to offset the loss of the retirement incentive and the Retirement System's decision to exclude them from its pension calculations was justified and reasonable (24).

Finally, the hearing officer concluded that the Retirement System was not estopped from correcting the record and, where necessary, recouping any benefits mistakenly paid to the eight petitioners whose retirement benefits were initially calculated as including the excluded payments in their final average salaries (24).

The hearing officer's determination was adopted by the Comptroller (14).

D. A Divided Appellate Division Annuls the Comptroller's Determination

Petitioners commenced this article 78 proceeding to challenge the Comptroller's determination. Petitioners claimed that the determination was not supported by substantial evidence and that the application of section 431(3) to the petitioners who joined the Retirement System prior to the statute's enactment was a violation of Article V, § 7 of the State Constitution. Because the petition raised a substantial evidence issue, Supreme Court transferred it for initial disposition to the Appellate Division, Third Department, which annulled the determination over a two-judge dissent. *See Matter of Bohlen v. DiNapoli*, 164 A.D.3d 1038 (3d Dep't 2018) (*reproduced at* 346-355).

The Third Department majority, without citing or discussing the applicable standard of review, found that the payments to petitioners were "more appropriately characterized as payments made to delay petitioners' retirements, not to artificially inflate their final average salary in anticipation of retirement" (349). The majority viewed the primary purpose of the memorandum agreements entered into between petitioners and the Port

Authority as twofold: "to retain key employees following the September 11, 2001 terrorist attack and to adequately compensate petitioners for their dedication and commitment to remain in their vital positions" (349).

The majority seized on the fact that the Retirement System referred to the payments as having been made in anticipation of "eventual" retirement (rather than simply "retirement"). Noting that the payments were neither lump-sum payments made on the eve of retirement nor disproportionate salary increases designed to artificially inflate a pension benefit, the majority found that the use of the word "eventual" by Retirement System was not part of the statutory standard and implicitly recognized that there was no actual retirement date anticipated in the memorandum agreements (349). Accordingly, the Third Department concluded that the Comptroller's determination to exclude the payments from the computation of petitioners' pension benefits was not supported by substantial evidence (349). The majority accordingly did not reach petitioners' contention that application of section 431(3) to the

petitioners who joined the Retirement System prior to enactment of the statute was unconstitutional.

The dissenting justices would have confirmed the Comptroller's determination. The dissent reasoned that under the settled substantial evidence standard of review, the court must uphold the agency's determination even if other evidence in the record could support a contrary result (351). Contrary to the majority's opinion, the dissent found the evidence sufficient to support the Comptroller's finding that the primary purpose of the longevity payments was to make up for the lost enhancement to petitioners' final average salaries which they would have received had they been eligible for the retirement incentive (351). The so-called longevity payments, the dissent observed, were structured to provide a pension benefit equivalent to what petitioners would have received if they had been eligible for the retirement incentive (352).

The dissenters observed that because petitioners were ineligible for the retirement incentive, they did not forego anything in exchange for the longevity payments beyond agreeing to remain employed by the Port Authority through December 21, 2002, which

was merely weeks after they had signed the letter agreements (352). Moreover, the record did not indicate that, but for the offered longevity allowance payments, any of the petitioners had intended to retire in December 2002 (352).

The dissent further concluded that the Comptroller's use of the word "eventual" in describing petitioners' retirement did not alter the result, because this word choice did not alter the intended effect of the longevity payments (353). The dissenters also rejected the contention of the six petitioners who became members of the Retirement System prior to the effective date of R.S.S.L. § 431, that application of the statute to them violated article V, § 7 of the State Constitution.

ARGUMENT

POINT I

SUBSTANTIAL EVIDENCE SUPPORTS THE COMPTROLLER'S DETERMINATION TO EXCLUDE THE SO-CALLED "LONGEVITY PAYMENTS" FROM THE CALCULATION OF PETITIONERS' FINAL AVERAGE SALARIES

Contrary to the conclusion reached by the Appellate Division majority, the administrative record amply supports the

Comptroller's determination that the so-called "longevity payments" petitioners received should be excluded under Retirement and Social Security Law § 431(3) from petitioners' base salaries for purposes of calculating their retirement benefits. In reaching his determination, the Comptroller rationally looked behind the label attached to these payments. After considering the purpose and circumstances of the payments, the Comptroller found that they amounted to "additional compensation paid in anticipation of retirement" within the meaning of section 431(3), because the payments were structured to replicate benefits that petitioners would have received upon retirement had they been eligible for the 2002 statutory retirement incentive.

In reaching the opposite conclusion, the Appellate Division majority ignored the substantial evidence standard. In so doing, it improperly reweighed the evidence and substituted its judgment for that of the Comptroller.

It is well established that "retirement benefits are to be computed on the basis of an employee's regular salary and not on any kind of termination pay or other form of additional

compensation paid in anticipation of retirement." *Matter of Davies v. New York State and Local Police and Fireman Retirement System*, 259 A.D.2d 912, 913 (3d Dep't), *lv. denied*, 93 N.Y.2d 810 (1999) (quoting *Matter of Tooley v. McCall*, 252 A.D.2d 794, 794-95 [3d Dep't 1998]); R.S.S.L. § 431. The purpose of statutes limiting the income that may be used in calculating final average salary is to "prevent artificial inflation of final average salary by payments made in anticipation of retirement." *Matter of Holbert v. New York State Teachers' Retirement System*, 43 A.D.3d 530, 532 (3d Dep't 2007) (quoting *Matter of Moraghan v. NYS Teachers' Retirement System*, 237 A.D.2d 703, 704 [3d Dep't 1997]) (applying Education Law § 501[11][b]); *Matter of Hohensee v. Regan,* 138 A.D.2d 812, 814 (3d Dep't 1988) (R.S.S.L. § 431 reflects a "legislative intention to guard against Retirement System members manipulating their pay to inflate their final average salaries").

In determining what constitutes average regular compensation within the meaning of section 431, the Court must look to the substance of the transaction and not to the label the parties may have given it. *Matter of Franks v. DiNapoli,* 53 A.D.3d

897, 898 (3d Dep't 2008); *see also Matter of Holbert*, 43 A.D.3d at 532. Respondents are responsible for administering and interpreting the provisions of the statutes governing retirement benefits and their determinations must be upheld if supported by substantial evidence. *Matter of Kelly v. DiNapoli,* 30 N.Y.3d 674, 684 (2018).

As this Court recently observed, "[q]uite often there is substantial evidence on both sides of an issue disputed before an administrative agency, and the substantial evidence test demands only that a given inference is reasonable and plausible, not necessarily the most probable." *Matter of Marine Holdings, LLC v. New York City Commn. on Human Rights,* 31 N.Y.3d 1045, 1047 (2018). In performing substantial evidence review, courts should "not weigh the evidence or reject a determination where the evidence is conflicting and room for choice exists." *Id.* Instead, the judicial function ends if the court concludes that a rational basis exists for the conclusion adopted by the agency. *Id.* "The question, thus, is not whether the reviewing court finds the proof convincing, but whether the agency could do so." *Id.*; *accord Matter of Kelly v.*

DiNapoli, 30 N.Y.3d at 684; *Matter of Haug v. State University of New York at Potsdam,* 32 N.Y.3d 1044, 1046 (2018).

The Appellate Division majority ignored this deferential standard of review in annulling the Comptroller's determination. Despite this Court's admonition not to reweigh the evidence, *Matter of Marine Holdings, LLC,* 31 N.Y.3d at 1047, the Appellate Division majority did just that, concluding that the longevity payments received by the petitioners were "more appropriately characterized as payments made to delay petitioners' retirements, not to artificially inflate their final average salary in anticipation of retirement" (349). Instead of crediting the Comptroller's reasonable and plausible interpretation of the evidence, the majority below improperly substituted its judgment for that of the Comptroller and effectively determined the issue before it de novo. *See Mittl v. Div. of Human Rights*, 100 N.Y.2d 326, 331 (2003) ("The Appellate Division correctly articulated, but then misapplied, the relevant standards").

The evidence supports the Comptroller's finding that the longevity payments were actually payments in anticipation of

retirement. In reaching this conclusion, the Comptroller drew from several critical pieces of evidence, including the documentation surrounding the Port Authority's adoption of the retirement incentive (187-189, 194-196), the agreements providing longevity payments to the senior staff that were ineligible to take part in the incentive program (229-237), as well as the testimony and other statements of petitioners (102-104, 199).

Although this Court has not previously construed Retirement and Social Security Law § 431(3), there is a substantial body of Appellate Division precedent construing this and related pension statutes. For instance, in *Matter of Franks v. DiNapoli,* a police chief's contract dramatically increased longevity payments compared to prior contracts, but in such a way so as to avoid the limitations on salary increases for benefits purposes under section 431(4), and provided that these increased payments would revert to the amount in the prior contract if the police chief did not retire. 53 A.D.3d at 897. This evidence, the Appellate Division held, supported the Comptroller's determination that the police chief's longevity payments were properly excluded from the calculation of

the petitioner's final average salary, notwithstanding the police chief's testimony that the large increase in longevity payments was negotiated in an exchange for a waiver of overtime rights. *Id*. at 598.

A similar situation was presented in *Matter of Thompson v. New York State Teachers' Retirement Service,* 78 A.D.3d 1456 (3d Dep't 2010). There, the petitioner school principal was working under a collective bargaining agreement that provided him with 3.5% annual pay increases through the 2005-2006 school year. The collective bargaining agreement also offered a retirement incentive whereby an administrator who retired immediately after becoming eligible to do so without penalty would receive a lump-sum payment of $20,750. The petitioner in *Thompson* would have qualified for the retirement incentive in the 2004-2005 year, but did not take it and later indicated that he had not then had a timetable for potential retirement. However, the school district and the petitioner's bargaining unit executed a memorandum of understanding that granted large annual raises for the 2005-2006 and 2006-2007 years

to petitioner and another administrator also nearing retirement age. 78 A.D.3d at 1456-1457.

In upholding Board's determination excluding the exceptional salary increases, the Third Department observed that the 2005 memorandum of understanding indicated that it was intended to provide administrators with an incentive to continue working beyond retirement eligibility and that the school business administrator readily admitted that the raises were intended to "partially offset the loss of the retirement incentive" and induce the petitioner to continue working. The Appellate Division thus held that the Board rationally concluded that the disproportionate increases in the petitioner's salary were made in anticipation of retirement. 78 A.D.3d at 11457.

This case is remarkably similar to *Franks* and *Thompson*. Petitioners were given additional compensation so that their pensions would equal what they would have been had they been eligible for a retirement incentive. There is no dispute that the Port Authority concluded that petitioners were ineligible for the statutory retirement incentive (229-237). Nonetheless, and in the

context of approving the retirement incentive for other employees, the Port Authority—at the suggestion of one of the petitioners—adopted a compensation program applicable only to petitioners, in order to precisely mimic the financial effect of the retirement incentive (194-196, 229-237).

While labeled "longevity payments" under a program ostensibly intended to encourage key employees to remain with the agency, the payments were based not on longevity but rather on each individual's salary (229-237). Moreover, the agreements executed by the employees only required them to stay with the Port Authority for a matter of weeks while ultimately providing them with a raise in their pension benefit (via a salary increase) that was the equivalent of up to three years of additional retirement service credit (229-237). Further, the record does not indicate that any of the petitioners had evinced an intention to retire or seek other employment, and one of the petitioners specifically disputed the characterization of the payments as retention payments, stating that the payments had been intended to make him whole for loss of the opportunity to participate in the retirement incentive

(104, 199). This evidence supports the Comptroller's determination that the longevity payments to petitioners were actually additional compensation paid in anticipation of retirement and therefore not pensionable in accordance with section 431(3). In these circumstances, the conclusion of the Third Department majority that it was "more appropriate" to construe the evidence in a manner favorable to petitioners constitutes an impermissible reweighing of the evidence.

Similarly meritless was the majority's claim (349) that the hearing officer's reference to the excluded payments as having been made in anticipation of "eventual" retirement was somehow significant to a determination of whether the payments were payments in anticipation of retirement within the meaning of section 431(3). Contrary to the court's implication, the payments need not have been made in the context of an impending retirement date to be excludable under section 431(3). The plain language of the statute simply says that "any additional compensation paid in anticipation of retirement" may not be included in the salary base

for the computation of retirement benefits, without any temporal limitation or qualification.

The lack of any temporal limitation in section 431(3) is important. The Legislature could have limited section 431(3)'s restriction on payments to those in anticipation of "imminent" retirement or in anticipation of retirement *and* within three years of actual retirement, but did not do so. Where the Legislature has intended to limit pensionable income in the years immediately prior to retirement, it said so explicitly.

For example, in R.S.S.L. §§ 302(9)(d) and 443(f), the Legislature provided that a participating employer in the New York State Police and Fire Retirement System may elect to provide that "final average salary" may be the regular compensation earned during the last twelve months of actual service immediately preceding the date of actual retirement, rather than the general rule of using the average annual compensation during the last or any three consecutive years of member service, as provided in R.S.S.L. § 303(9)(a) and (b). In such circumstances, however, if the compensation earned in that final twelve-month period exceeds

that of the previous twelve months by more than twenty per centum, the amount in excess of twenty per centum is excluded from the calculation of final average salary. As the Legislature has placed no temporal limitation on the duty of the Comptroller to exclude from calculation of retirement benefits moneys that he reasonably determines were paid in anticipation of retirement, the majority's criticism bears no weight.

Accordingly, even if the Port Authority's "longevity payments" were made with a view toward boosting future pension benefits upon retirements envisioned for a distant date, such payments were still made "in anticipation of retirement," and the Comptroller rationally excluded them from the computation of benefits. Thus, this Court should reverse the Third Department's decision and confirm the determination.

POINT II

APPLICATION OF SECTION 431(3) TO THE PETITIONERS WHO JOINED THE RETIREMENT SYSTEM BEFORE THE STATUTE'S ENACTMENT DOES NOT VIOLATE ARTICLE V, § 7 OF THE NEW YORK STATE CONSTITUTION

Finally, there is no merit to petitioners' argument that section 431(3) may not be applied to the eight petitioners who joined the Retirement System prior to the enactment of section 431 in 1971. Although Article V, § 7 of the State Constitution provides that Retirement System benefits may not be diminished or impaired, application of section 431(3) does not impair any vested benefit belonging to petitioners.

Under well-settled law, the retroactive application of a statutory exclusion such as section 431(3) impairs the vested rights of members only when, prior to the enactment of the section, the Retirement System had a policy or practice that consistently included the item at issue in the computation of benefits. *Matter of Kranker v. Levitt,* 30 N.Y.2d 574, 575 (1972). But where the Retirement System did not have such a policy in place prior to the enactment of the statutory exclusion, the retroactive application of the statutory exclusion is constitutional. *See Matter of Hessel v.*

New York City Employees' Retirement System, 33 N.Y.2d 381, 385 (1974); *Matter of Weber v. Levitt,* 34 N.Y.2d 797, 800 (1974); *Matter of Moore v. Levitt,* 74 A.D.2d 971 (3d Dep't 1980).

Applying this settled law here, section 431(3) could be retroactively applied to the petitioners who joined the Retirement System before 1971, when that statute was enacted. As the dissent below correctly noted, petitioners failed to show a prior practice by the Comptroller of including payments made in anticipation of retirement in the calculation of final average salary. To the contrary, the Comptroller cited several administrative cases showing that the exclusion of such payments had always been the Comptroller's policy.

CONCLUSION

This Court should reverse the Third Department's judgment, confirm the Comptroller's determination, and dismiss the petition.

Dated: Albany, New York
February 13, 2019

Respectfully submitted,

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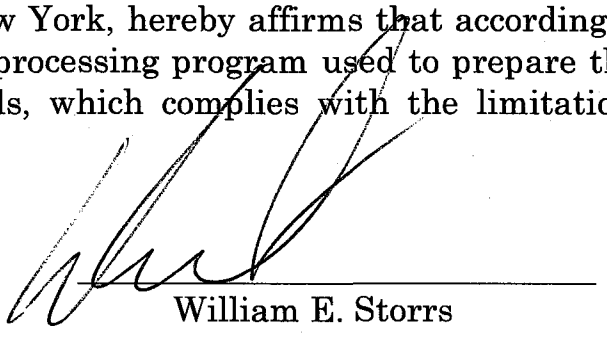
AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), William E. Storrs, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 5,160 words, which complies with the limitations stated in § 500.13(c)(1).



William E. Storrs

ADDENDUM

ADDENDUM

NEW YORK STATE POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM

In the Matter of the Application

of

[redacted]

Reg. No. [redacted]
H. C. No. 80-106

Pursuant to section 374 of the Retirement and Social Security Law for a hearing and redetermination to determine the application for the recalculation of his final average salary.

A hearing having been held in the above-entitled matter on July 17, 1980 at the World Trade Center in New York, New York with the HONORABLE DANIEL GUTMAN presiding as Hearing Officer, and the applicant, [redacted], having appeared personally and by REYNOLD A. MAURO, ESQ., his counsel, and the NEW YORK STATE POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM having appeared by THOMAS O. PANDICK, ESQ., its Counsel, by MICHAEL W. FRIEDMAN, ESQ., of counsel, and the proofs having been read and all the evidence taken and introduced having been read and considered,

NOW, after due deliberation, the State Comptroller finds and decides as follows:

FINDINGS OF FACT

1. The applicant, [redacted], was a member of the New York State Policemen's and Firemen's Retirement System and as such retired from service on September 11, 1979.

2. Prior to the effective date of his retirement, the applicant entered into an agreement with his employer, the City of New Rochelle, for retroactive salary increases pursuant to the following schedule:

September 11, 1978	-	$28,705
February 1, 1979	-	$29,818
July 1, 1979	-	$30,940
September 11, 1979	-	$20,626

The applicant requested that such payments be included in the calculation of his final average salary.

3. The Comptroller denied that request on the grounds that the payments were in the form of additional compensation paid in "anticipation of retirement."

4. The applicant filed a timely request for a hearing and redetermination of his application.

5. It is argued by the applicant that the increased salary payments were negotiated as "an inducement to retire" in order that the employer might save considerable funds by encouraging a number of older policemen to retire through the payment of additional compensation. The impact of such salary increases, if included in the final average salary calculation, would be an inflation of the applicant's retirement allowance since the basic salary for similar positions during the same period under the general contract was approximately $22,000 to $24,000.

6. Section 431 of the Retirement and Social Security Law provides that final average salary shall not include payments of additional compensation made "in anticipation of retirement." This section was a codification of the Comptroller's long standing administrative practice, to exclude such sums from final average salary calculations (Moore v. Levitt, 425 N.Y.S. 2d 881).

CONCLUSIONS OF LAW

1. The increased salary payments negotiated and received by the applicant were made in anticipation of retirement and cannot be included in the calculation of the applicant's final average salary.

On the basis of the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY DETERMINED AND DIRECTED that the application filed by [redacted] for a recalculation of his final average salary be and the same is hereby DENIED.

Dated at Carmel, New York, this 2nd day of February, 1981.

EDWARD V. REGAN
State Comptroller

BY Daniel Gutman
Daniel Gutman
Hearing Officer

of 5)

NEW YORK STATE POLICEMEN'S AND FIREMEN'S RETIREMENT SYSTEM

In the Matter of the Application

-of-

[redacted]

Reg. No. [redacted]
H. C. No. 80-106

DECISION

Pursuant to Section 74 of the Retirement and Social Security Law for a hearing and redetermination to determine the application for the recalculation of his final average salary.

On September 11, 1979, the applicant's retirement as a Lieutenant in the New Rochelle Police Department became effective.

Approximately one month prior to his retirement, the applicant entered into an agreement with the City of New Rochelle, his employer, substantially increasing his salary, and consequently augmenting his retirement allowance.

The State Comptroller refused to credit the said salary increase in calculating the applicant's final average salary for the purpose of determining his retirement allowance, on the ground that the increase in salary was in contravention of Section 431 of the Retirement and Social Security Law.

Section 431 provides that the salary base for the computation of benefits shall in no event include "any additional compensation paid in anticipation of retirement..."

No factual dispute is presented. The issue is whether

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payments made to the applicant during his last year of employment, the period during which the increases were retroactively in effect, were in anticipation of retirement and thus excludable from the calculation of his final average salary.

The applicant argues that the increased salary payments were negotiated as an "inducement to retire." It is claimed that the employer could save considerable funds by encouraging a number of older policemen to retire. Be that as it may, and however laudable the intent may have been, the direct impact of the increases was to greatly inflate the applicant's final average salary, thus inflating his retirement allowance. The result is precisely what the statute seeks to prevent. Section 431 is clear, and free from any ambiguity. It provides for no exception such as the applicant asserts. His argument in support of his interpretation of the statute is not persuasive.

Accordingly, the request of [redacted] for a recalculation of his final average salary and retirement allowance is disapproved and denied.

Dated - New York
January 19, 1981

Daniel Gutman
Hearing Officer

NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application

of

[redacted]

Reg. No. [redacted]
H. O. No. 1836

Pursuant to section 74 of the Retirement and Social Security Law for a hearing and redetermination of her application for recomputation of retirement allowance.

A hearing having been held in the above-entitled matter on March 2, 1977 at the State Office Building, 270 Broadway, New York, New York with the HONORABLE DANIEL GUTMAN presiding as Hearing Officer, and the applicant [redacted], having appeared in person, pro se, and the NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM having appeared by CALVIN M. BERGER, ESQ., its Counsel, by LEE M. SMITH, ESQ., of counsel, and the proofs having been read and all the evidence taken and introduced having been considered,

NOW, after due deliberation, the State Comptroller finds and decides as follows:

FINDINGS OF FACT

1. The applicant became a member of the New York State Employees' Retirement System by filing an application with the Comptroller on September 20, 1954.

2. The applicant filed for service retirement from the New York State Employees' Retirement System by filing an application with the Comptroller on August 23, 1975 which became effective on September 22, 1975.

3. In the computation of the applicant's final average salary for retirement allowance purposes, the Comptroller excluded $3,668.40 of monies paid to the applicant in the 1974-75 school year by her employer, the Roslyn, New York School District.

4. These monies were excluded from the applicant's final average salary because the Comptroller determined that such monies constituted "additional compensation paid in anticipation of retirement" within the meaning of section 431(3) of the Retirement and Social Security Law.

5. It has always been the Comptroller's administrative practice to exclude monies deemed to be "additional compensation paid in anticipation of retirement" from a Retirement System member's final average salary for retirement allowance computation purposes.

6. The Comptroller's determination that the $3,668.40 in monies paid to the applicant by her employer in the 1974-75 school year constitute "additional compensation paid in anticipation of retirement" is a reasonable one and it is supported by the evidence.

CONCLUSIONS OF LAW

1. The $3,668.40 in monies paid to the applicant in 1974-75 school year constitute "additional compensation paid in anticipation of retirement" within the meaning of section 431(3) of the Retirement and Social Security Law and as such these monies must be excluded from the computation of a member's final average salary for retirement allowance purposes.

Based on the foregoing Findings of Fact and Conclusions of Law,

of 6)

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IT IS HEREBY DETERMINED AND DIRECTED that the application of [redacted] for a redetermination of her retirement allowance is hereby DENIED.

Dated this 26 day of October, 1977, in Carmel, New York.

ARTHUR LEVITT
State Comptroller

BY Daniel Gutman
Daniel Gutman
Hearing Officer

of 6)

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N. Y. State Employees' Retirement System

NEW YORK STATE EMPLOYEES' RETIREMENT SYSTEM

In the Matter of the Application

of

[redacted]

Reg. No. [redacted]
H. C. No. 1836

Decision

Pursuant to Section 74 of the Retirement and Social Security Law for a hearing and redetermination of her application for recomputation of retirement allowance.

On August 23, 1975, the applicant, who was employed as a Secretary by the Board of Education of the Roslyn Public Schools, filed an application for service retirement effective September 22, 1975. (System's Exhibit 3).

By letter from the State Comptroller dated April 30, 1975, (System's Exhibit 4) the applicant was advised as to the amount of her monthly retirement allowance.

A letter dated January 5, 1976 (System's Exhibit 6), from the Assistant Superintendant of Roslyn Public Schools, to Mr. Matthew T. Remmert, the Director of Retirement Benefits of the New York State Employee's Retirement System, contained an itemization of the salary payments received by the applicant in the 1974-75 school year, which was her final year prior to retirement. Included, and at issue in this proceeding, is the item, "Supplemental payment $668.40."

By letter dated April 14, 1976, (System's Exhibit 7), Mr. Remmert advised Mrs. [redacted] that the aforesaid amount of $668.40 "may not be included in the computation of your final average salary."

The applicant then made a timely request for a hearing and re-determination and this hearing was held in accordance therewith.

The System's position, as more fully enunciated in an affidavit of March 11, 1977, by Mr. Remmert, is that the payment of $3668.40 is considered "additional compensation paid in anticipation of retirement" and is not includable in the computation of final average salary for retirement allowance purposes. The said affidavit was submitted with the applicant's consent as stated in her letter dated March 24, 1977. In accordance therewith, it is received in evidence, (System's Exhibit 8), in lieu of a personal appearance by Mr. Remmert.

The applicant's position is set forth in detail in a statement which was received in evidence. (Applicant's Exhibit A.) There is also in evidence a copy of a handbook outlining the duties of an elementary school secretary. (Applicant's Exhibit B.) Mrs. Lombardi contends that the amount at issue, ($3668.40) was paid to her for her services in preparing the said handbook, as an assigned duty, rendered on her own time, after working hours, and in accordance with the provisions contained in the contract negotiated by the bargaining unit, is not excludable in computing final average salary.

The comprehensive statements contained in Mr. Remmert's affidavit and in Mrs. [redacted]'s submissions, state their respective positions fully.

After reviewing all th evidence, it is my considered opinion that the System's position is a reasonable one. It is not arbitrary nor capricious in any sense, but is based upon well-founded practice. It must also be noted that the terms of an agreement (see attachments included in Applicant's Exhibit A) effecting the school system and

its employees in this applicant's category, are not binding on the Retirement System.

The ruling which has been made by the System in this matter, is obviously in accordance with established administrative practice, intended to preserve the soundness and maintain the integrity of the Retirement System.

Accordingly, the application of [redacted] for recomputation of her retirement allowance is disapproved and denied.

Dated: Carmel, New York
April 11, 1977

Hearing Officer

[redacted]

To be argued by: George J. Szary, Esq.
Time requested: 10 minutes

New York Supreme Court

Appellate Division, Third Department

Index No. 4153-17

In the Matter of the Application of

BRUCE D. BOHLEN, LOUIS J. LaCAPRA, FRANCIS J. LOMBARDI, ANTHONY G. CRACCHIOLO, AARON P. BLANCO, JOHN F. SPENCER, EDWARD L. JACKSON, JEFFREY S. GREEN, CHARLES F. McCLAFFERTY, FRIMA FOX HOFRICHTER, as beneficiary of the Retirement Benefit of LAWRENCE S. HOFRICHTER, deceased, KRISTEN PECK BUTCHER, as beneficiary of the Retirement Benefit of ERNESTO L. BUTCHER, deceased,

Plaintiffs-Appellants,

- against -

THOMAS P. DINAPOLI, in his capacities as the COMPTROLLER OF THE STATE OF NEW YORK and the administrative head of the NEW YORK STATE AND LOCAL EMPLOYEES' RETIREMENT SYSTEM, the OFFICE OF THE COMPTROLLER OF THE STATE OF NEW YORK, the NEW YORK STATE AND LOCAL EMPLOYEES' RETIREMENT SYSTEM, and COLLEEN C. GARDNER, in her capacity as EXECUTIVE DEPUTY COMPTROLLER OF THE STATE OF NEW YORK,

Defendants-Respondents.

BRIEF OF PLAINTIFFS-APPELLANTS

PORT AUTHORITY OF NEW YORK
AND NEW JERSEY, LAW DEPARTMENT
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Attorneys for Plaintiffs-Appellants

The continued employment with the Port Authority of the eleven Appellants was integral to the Agency's continued successful operation given the unique skills of each and the exigent circumstances created by 9/11 (R65; 50-53). Each had prior experience dealing with the aftermath of terrorism as a result of their Port Authority employment during the World Trade Center bombings of 1993 (R50; 100-101; 201; 238). Moreover, each possessed experience and skills which made them highly marketable in the higher-paying private sector (R79).

At the time, John Spencer was Deputy Chief Engineer for the Port Authority Engineering Department (R54), Bruce Bohlen was Treasurer for the Port Authority (R54), Jeffrey Green was General Counsel to the Port Authority and PATH (R56), Anthony Cracchiolo was Director of Priority Capital Programs for the Port Authority, and had served as a Port Authority engineer, as Program Director for World Trade Center development, and as Program Director for Airport Access (R56; 238), Edward Jackson was Director of the Financial Services Department for the Port Authority (R56-57), Charles McClafferty was Chief Financial Officer for the Port Authority (R58), Francis Lombardi was Chief Engineer for the Port Authority (R58), Aaron Paul Blanco, who had been Comptroller of the Port Authority, was Director of Regional and Economic Development, and was responsible for economic development and business continuity funding (R59), Ernesto Butcher was the Chief Operating Officer for the Port Authority (R60), Louis LaCapra was Chief Administrative Officer for the Port Authority (R61), and Lawrence Hofrichter was Chief of the Finance Division of the Law Department for the Port Authority and, in that role, he provided key support to the General Counsel, in particular concerning human resources matters, as well as

affording institutional memory to fill gaps created by the significant data loss caused by 9/11 (R62).

To avoid the loss of those identified as "key staff eligible for and highly likely to participate" in retirement or move to the private sector, in December 2002 the Port Authority implemented the Employee Retention Program. The program was aimed at retaining the eleven Appellants as employees beyond December 2002, as the Agency needed to address a number of critical issues and challenges, including the continuing recovery from the effects of the 9/11 terrorist attacks, maintaining the Port Authority's financial condition and access to the financial markets for its bond offerings, the redevelopment of the World Trade Center site, and the negotiation of the extension of the lease with the City of New York, pursuant to which the Port Authority operated John F. Kennedy International and LaGuardia airports (R47-65; 67; 70-72; 91-94; 101-102; 196). The Employee Retention Program paid each of them additional compensation, ranging from 4.5% to 13% of their salary, based on longevity of service with the Port Authority (R69; 79-80; 97; 227-228; 197).

Each of the Appellants signed a Continued Port Authority Employment Agreement which specifically provided:

> "Given concerns raised by the Board about the loss of key staff, and in consideration of your not retiring during December 2002 and to prevent you from being unfairly treated, the Board authorized me to develop a program designed to provide a limited number of staff members with a 'parity' benefit."

(R227-228) (emphasis supplied). The Port Authority denominated the Employee Retention Program "Longevity I" and explained it to the New York State Comptroller as a "targeted retention program [which] was authorized in 2002 to retain certain key executives following the terrorist attacks of 9/11" (R218).