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.

REPLY BRIEF FOR APPELLANT

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Dated: April 23, 2019

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

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PRELIMINARY STATEMENT

As we explained in our opening brief, substantial evidence supports the Comptroller's determination that the so-called "longevity payments" paid to petitioners by their employer constituted additional compensation paid in anticipation of retirement. Under Retirement and Social Security Law § 431(3), these payments therefore must be excluded from a retiree's base salary for purposes of calculating retirement benefits.

In arguing to the contrary, petitioners raise three arguments warranting a response. First, attempting to avoid the deferential substantial evidence standard of review, petitioners claim that the Comptroller applied an incorrect legal standard, because at certain points in his decision the hearing officer described the longevity payments as having been made in anticipation of "eventual retirement," rather than simply "retirement." Petitioners, however, have failed to demonstrate that this extraneous verbiage altered the meaning of the applicable legal standard. It did not.

Second, petitioners argue that under the "correct" legal standard, the determination is not supported by substantial evidence. Reduced to its essentials, petitioners' arguments at most show that the evidence in the record could have supported a determination in their favor. Under settled law, such a showing is insufficient to annul an administrative agency's determination.

Finally, petitioners argue that R.S.S.L. § 431(3) may not be retroactively applied to the petitioners who joined the Retirement System prior to the statute's enactment. Their argument falters under this Court's precedents governing the retroactive application of such statutory exclusions.

ARGUMENT

POINT I

THE COMPTROLLER APPLIED THE CORRECT LEGAL STANDARD

Petitioners argue (Br. at 14-18) that the Comptroller applied an incorrect legal standard because the hearing officer referred to the longevity payments as having been made in anticipation of "eventual" retirement rather than in "anticipation of retirement." However, like the

majority below, petitioners have failed to explain how the use of the word "eventual" changed the Comptroller's legal analysis under the governing statute in any meaningful way.

The distinction petitioners draw is meaningless. Section 431(3) imposes no temporal limitation on how far in advance of retirement a payment must be made to constitute a payment in anticipation of retirement. Consequently, it does not matter whether the payment at issue was made in the context of "imminent" or "eventual" retirement. In either event, the statute requires the Comptroller to exclude such payment from the computation of benefits. The addition of the qualifier "eventual" thus did not change the meaning of the statutory standard, and provides no basis to vacate the Comptroller's application of that standard here.

Viewed in context, the hearing officer's decision stated and applied the correct statutory standard. The hearing officer referred to the statutory standard ten times in his decision (15, 20, 21, 22). On one of those occasions, he reproduced section 431 in its entirety (20-21). Although on three occasions he referred to "eventual" retirement, one of them was a quotation of a statement by an employee of the Retirement

System (15), while the other two were made in the context of analyzing whether the retroactive application of section 431(3) was constitutional (21-22). Petitioners overlook all of the times that the hearing officer correctly referred to the statutory standard.

Should this Court agree with petitioners that the Comptroller applied an incorrect legal standard, however, the proper remedy would not be to order respondents to recalculate petitioners' retirement benefits with the inclusion of the disputed payments. Rather, the proper remedy would be to remit the matter to the Comptroller for a new determination applying the correct legal standard. *See, e.g., Matter of Johnson v. McCall*, 281 A.D.2d 730, 731 (3d Dep't 2001); *Matter of Trifaro v. Town of Colonie*, 31 A.D.3d 821, 823 (3d Dep't 2006).

POINT II

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

In arguing that the Comptroller's determination was not supported by substantial evidence, petitioners focus exclusively on the evidence that would have supported a determination that the payments at issue were

not made in anticipation of retirement. But as this Court has observed, there is often evidence in an administrative record that would support both sides of an issue. *Matter of Marine Holding, LLC v. New York City Commn. On Human Rights,* 31 N.Y.3d 1045, 1047 (2018). Ignoring this admonition, the majority below improperly weighed the evidence rather than determining whether the evidence could rationally support the Comptroller's findings.

In this case, there was ample evidence to support the conclusion that these payments were made in anticipation of retirement. The payments were designed to replicate the pension benefits of a retirement incentive to which petitioners were not eligible and, despite being characterized as "retention" payments, petitioners were only required to remain on the job for less than a month in order to receive them. That alone is sufficient to sustain the Comptroller's finding that the payments were additional compensation in anticipation of retirement. Petitioner's responding brief overlooks entirely the record evidence demonstrating the close connection between the origin and design of the "longevity payments" and the 2002 retirement incentive program.

Citing *Weingarten v. Board of Trustees of the New York City Teachers' Retirement System,* 98 N.Y.2d 575 (2002), petitioners argue (Br. at 23-24) that the Legislature did not intend the compensation at issue to be excluded from the calculation of final average salary, but this reliance is misplaced. In *Weingarten,* New York City teachers were earning additional compensation beyond their base annual pay by voluntarily engaging in "per session" employment, which was paid on an hourly or session basis. The retirement system refused to include the compensation earned from per session employment in the calculation of retirement benefits on the ground that it was not included within the definition of "annual salary" and therefore not pensionable. This Court disagreed, holding in part that, since per session employment was not among the categories of excluded items in section 431, the Legislature intended such compensation to be pensionable. 98 N.Y.2d at 583-584.

Here, in contrast, the Comptroller concluded that the payments at issue came within the identified items in section 431. Although this Court said in *Weingarten* that compensation paid "in anticipation of retirement" under section 431 is "generally associated" with the termination of employment, 98 N.Y.2d at 583, the Court did not suggest

that was always the case. And section 431(3) on its face is not limited to payments made immediately prior to termination or retirement. The Comptroller has the duty make sure that no payments made in anticipation of retirement are included in the calculation of pensions, regardless of when they are made. Here, the payments were made to reproduce the pension benefits of a retirement incentive to which petitioners were not entitled; consequently, they fall within the terms and intent of section 431(3).

The three Appellate Division cases cited by petitioner are similarly inapt. In *Matter of Van Haneghan v. New York State Teachers' Retirement System,* 6 A.D.3d 1019 (3d Dep't 2004), the petitioner school administrator had announced her intent to retire and take advantage of a contractual retirement incentive. Her employer asked her to remain on the job for another year because they were having difficulty finding a replacement. When she reiterated her desire to take advantage of the retirement incentive, the petitioner obtained the oral agreement of the head of her bargaining unit to allow her to remain eligible for the incentive for another year, deferring the payment to which she was otherwise entitled, if she would stay for another year.

Under these circumstances, the Third Department held that it was arbitrary and capricious for the Comptroller to exclude the deferred retirement incentive from the calculation of the petitioner's final salary simply because the payments had not been made in the otherwise permissible context of a written collective bargaining agreement. The oral agreement deferring the payment was clearly intended to alter the petitioner's rights under the collective bargaining agreement. 6 A.D.3d at 1020-1022.

The situation here differs from *Van Haneghan* in two important respects. First, the regulation at issue in *Van Haneghan* provided that "termination pay," defined as "any payment received in anticipation of the termination of a member's employment," would be included in the calculation of final average salary when it constituted compensation earned as a teacher. 21 N.Y.C.R.R. § 5003.2(b). Thus, the question in *Van Haneghan* was not whether the payments were compensation paid in anticipation of retirement, but whether they were compensation at all.

Second, unlike in *Van Haneghan,* petitioners in this proceeding had not accepted a retirement incentive; in fact, they were specifically excluded from it. Petitioners had not announced an intent to retire or

leave service, and indeed, some disclaimed any such intent (23, 103). Thus, there was not the same need here to incentivize petitioners to stay. Moreover, the agreements that they signed dated December 9, 2002, paying them as much as three years in benefits, only required them to remain with the Port Authority for approximately three more weeks, until the end of December 2012 (229-337).

Similarly inapposite is *Matter of Curra v. New York State Teachers' Retirement System,* 30 A.D.3d 666 (3d Dep't 2006). There the petitioner informed his employer in February 2002 that he intended to retire on June 1, 2002, and to use all of his accumulated vacation days prior to retirement, making his last day of work approximately March 1, 2002. The school district wanted the petitioner to stay on until August 2, 2002, to ensure a smooth transition. As a result, the parties entered into a supplemental employment agreement, whereby the petitioner agreed to forego his vacation days, stay on for the requested extension, and take on additional responsibilities in the interim, while the school district agreed to compensate him for his unused vacation days and increase his salary by 3½ percent. *Id.* at 666.

The Third Department held that the determination that petitioner was not entitled to the inclusion of these payments in his final average salary was arbitrary and capricious. Rather than artificially inflating the petitioner's salary, the payment was genuinely made to delay his retirement and represented the value of his services during the relevant time period. *Id.* at 666-667. By contrast, here the payments were calibrated to replicate the impact of a pension benefit for which the petitioners were ineligible, rather than to reflect the value of any services rendered (229-237).

Finally, in *Matter of Hughes v. McCall,* 245 A.D.2d 904 (3d Dep't 1997), the Third Department annulled a determination of the Comptroller excluding certain overtime payments received by a firefighter, where there was no evidence that the overtime had been made in an effort to manipulate his final average salary. By contrast, in this case, the documentation and structure of the payments provided substantial evidence that the payments were made to manipulate petitioners' final average salary.

POINT III

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

As noted in our opening brief at pages 30-31, applying section 431 to the petitioners who became members of the Retirement System prior to the enactment of section 431 does not violate Article V, § 7 of the New York Constitution. Petitioners failed to demonstrate that, prior to the enactment of section 431, there was a policy in place that consistently included such compensation in the calculation of benefits. *See Matter of Kranker v. Levitt*, 30 N.Y.2d 574, 575 (1972).

Petitioner's reliance (Br. at 31-32) on this Court's decisions in *Kleinfeldt v. New York City Employees' Retirement System*, 36 N.Y.2d 95 (1975), and *Birnbaum v. New York City Teachers' Retirement System,* 5 N.Y.2d 1 (1958), is misplaced. In both cases, this Court was dealing with policies under which the payments at issue were pensionable until the relevant amendment to section 431 excluded them.

Thus, in *Kleinfeldt*, the plaintiff had received an annual salary increase in excess of 20% over his prior year's salary in accordance with a collective bargaining agreement. Before 1971, salary raises were fully included in the calculation of pension benefits regardless of the percentage raise. To combat rising costs, in 1971, the Legislature passed subsection 4 of R.S.S.L. § 431, which capped pensionable raises at 20% increase over the prior year's salary, anything over that increase being excluded from the calculation. 36 N.Y.2d at 99. This Court held that this provision could not be retroactively applied to the plaintiff where he had a long settled expectation that his full salary would count towards his pension benefit. *Id.* at 98-99.

Likewise in *Birnbaum,* the respondent adopted a new mortality table that reduced the payments the teachers would have received under the mortality table in effect when they joined the retirement system. This Court held that the new mortality table improperly diminished the teachers' retirement benefits in contravention on Article V, § 7 of the Constitution. 5 N.Y.2d at 1. Thus, in *Birnbaum*, the petitioners met their burden of proving that the relevant retirement system had altered an existing policy or practice to their detriment.

The petitioners who joined the Retirement System before 1971 failed to make any equivalent showing of a policy whereby, prior to the enactment of section 431(3), the System would include as pensionable any payments that were intended to replicate the effect of retirement incentive programs for which they were otherwise ineligible. Accordingly, their argument that section 431 cannot be retroactively applied to them is without merit.

CONCLUSION

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

Dated: Albany, New York
April 23, 2019

Respectfully submitted,

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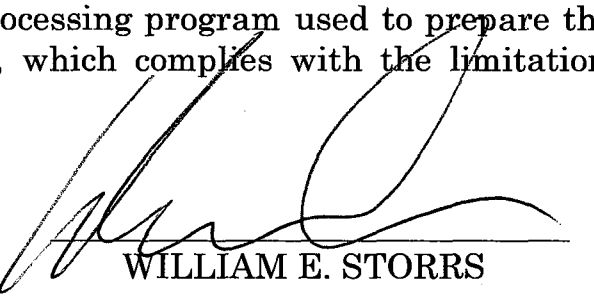
AFFIRMATION OF COMPLIANCE

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 **2,250** words, which complies with the limitations stated in § 500.13(c)(1).



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