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

STATE OF NEW YORK

COURT OF APPEALS

No. APL – 2018-00163

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, LAFFERTY, 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,

Petitioners-Respondents,

- *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,

Respondent - Appellant.

BRIEF OF RESPONDENTS

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PRELIMINARY STATEMENT

New York Retirement and Social Security Law § 431, which became effective on June 17, 1971, was enacted by the Legislature to exclude from the calculation of final average salary certain payments made with the purpose of artificially inflating pension benefits. Relevant to the matter before the Court is RSSL § 431(3) which excludes "additional compensation paid in anticipation of retirement."

The New York State and Local Employees' Retirement System (ERS) excluded from calculation pension benefits as "payments made in anticipation of eventual retirement" salary increases received by the eleven Respondents from their employer the Port Authority of New York and New Jersey (Port Authority), made to delay their retirement. In the case of six of the Respondents the exclusion was applied retroactively to benefits already being received. These payments were made in biweekly paychecks for varying periods of up to ten (10) years. In doing so, the ERS applied a standard which is not part of RSSL § 431 or any other relevant statute. Before any consideration of "substantial evidence" can or should be made, it must first be the case that the proper legal standard be employed. This is unappreciated by the Appellant, and is the fatal flaw in this appeal.

This was not overlooked by the Appellate Division, Third Department in annulling the Final Determination of the Comptroller. Employing the actual

language of the statute applied consistently with the Legislative intent and controlling precedent, it properly found that substantial evidence was not present in the record to justify exclusion pursuant to RSSL § 431(3) of certain compensation received by Respondents in calculation of pension benefits. In fact, the analysis of this matter by the Appellate Division is the only one which is valid. Thus, this appeal does not present an issue of conflicting views between the administrative agency and the Appellate Division on substantial evidence, but of a failure by the Comptroller to employ the proper standard, and the correction of this error.

Article V, § 7 of the New York State Constitution prohibits the State from any action which would "diminish or impair" the rights and entitlements of Retirement System members. *Kranker v. Levitt,* 30N.Y.2d 574 (1972). Retroactive application of statutes such as RSSL § 431 to existing members of the Retirement System, is therefore prohibited. *Kleinfeldt v. New York City Employees' Retirement System*, 36 N.Y.2d 95 (1975).

The decision of the Appellate Division, Third Department annulling the Comptroller's determination must be affirmed.

QUESTIONS PRESENTED

Question No. 1: Did the Appellate Division, Third Department correctly annul the determination of the New York State and Local Employees Retirement System excluding from calculation of pension benefits pay raises received by the

Respondents to delay their retirement which determination relied on an improper legal standard not part of RSSL §431?

Answer: Yes. In excluding certain salary received by Respondents from calculation of pension benefits, the Appellant applied a standard not found in RSSL § 431, and the Appellate Division, Third Department applying the proper legal standard, correctly found no substantial evidence to support the exclusion.

Question No. 2: Is a raise paid by an employer to retain an employee and delay their retirement, which is not a lump sum payment or payment for time not worked properly included in calculation of pension benefits?

Answer: Yes. RSSL § 431 provides no basis for exclusion of such payments and courts construing that statute have routinely held such payments are properly included in calculation of final average salary. *Van Haneghan v. New York State Teachers' Retirement System*, 6 A.D.3d 1019 (3d Dept. 2004), *Curra v. New York State Teachers' Retirement System*, 30 A.D.3d 666 (3d Dept. 2006).

Question No. 3: Does retroactive application of RSSL § 431 to the six Respondents who were members of the ERS prior to the effective date of that statute violate Art. V, § 7 of the New York State Constitution which establishes that rights of membership shall not be diminished or impaired?

Answer: Yes. Art. V, § 7 of the New York State Constitution, and this Court's construction of that provision, forbids retroactive application of new

statutes, policies, or procedures which would effect the rights of existing members. See, *Kranker v. Levitt*, 30 N.Y.2d 574 (1972); *Kleinfeldt v. New York City Employees' Retirement System*, 36 N.Y.2d 95 (1975).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. STATEMENT OF FACTS

(i) Introduction

In the wake of the catastrophic events of the terrorist attacks of September 11, 2001, the Port Authority of New York and New Jersey ("Port Authority" or "Agency"), whose offices were housed in the World Trade Center, found itself in critical need of the skills and experience possessed by the Respondents, a group of eleven long-time employees, to ensure that the international, interstate and intrastate facilities of transportation and commerce operated and managed by that Agency continued to provide these vital services. As a result, the Port Authority offered this group raises to delay and discourage their retirement. Years later, after some had retired and others applied for pension benefits, the ERS arbitrarily excluded these raises from benefit calculation on the ground that they were given "in anticipation of eventual retirement," a standard without basis in law. The proceedings which ensued are the basis of this appeal.

(ii) Port Authority Employees

Each of the Respondents, longtime employees of the Port Authority of New York and New Jersey and members of the ERS, held critical executive and managerial positions in that Agency. At the time, John Spencer was Deputy Chief Engineer for the Port Authority (R54),[1] 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

[1] All citations are to the Record on Appeal unless otherwise indicated. ("R_____").

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).

(iii) The Events Of 9/11 And Their Impact On The Port Authority

The Port Authority operates vital transportation systems connecting the New York/New Jersey region to the rest of the world, including the operation of Kennedy, LaGuardia, Newark, Stewart and Teterboro Airports, the New York/New Jersey bridge and tunnel system, bus and marine terminals, the PATH system, and owns the World Trade Center site (R47-48; 306-307; 309-310). The events of September 11, 2001 (hereafter "9/11") created emergency circumstances which jeopardized the continued successful operations of the Port Authority and the financial health of the region (R50-53; 87-94).

During the mid-1990s, the Port Authority underwent organizational downsizing, which reduced personnel by 2,000 people. This resulted in a lack of experienced people prepared to succeed to management and executive functions following the events of 9/11 impacting the institutional needs of the Port Authority with respect to leadership and management personnel (R62-64). 9/11 caused the destruction of its headquarters at the World Trade Center, the loss of virtually all of its records, and the death of over 70 employees, including its Executive Director.

The impact of these events on the Agency's operational capabilities and institutional needs extended well into late 2006 (R91-94).

(iv) Executive Employee Retention Program – December 2002

On July 15, 2002, the Board of Commissioners of the Port Authority approved the Agency's participation in the 2002 Retirement Incentive Program passed by the New York State Legislature and affording certain benefits to induce employees to retire (R94; 227-238; R177). At the time that program was implemented, each of the eleven Respondents was eligible to retire (R40-41, 53-54), but were exempted from eligibility by the Port Authority (R43-44; R68-69; 227-238). Given the unique skills of each and the exigent circumstances created by 9/11, the Respondents' continued employment was integral to the Port Authority's continued successful operation (R65; 50-53). Each had prior experience dealing with the aftermath of terrorism as a result of their 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).

In December 2002 the Port Authority implemented the Employee Retention Program ("Program") 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. Its aim was to retain the Respondents as employees beyond December 2002, as their

virtually irreplaceable services were needed to address many critical issues and challenges. These included 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, redevelopment of the World Trade Center site, expeditious restoration of PATH commuter service, and 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 Program paid each a raise based on longevity of service with the Port Authority ranging from 4.5% to 13% of their salary (R69; 79-80; 97; 227-228; 197).

Each 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 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).

The Program raises were not offered in exchange for or in anticipation of the retirement of any of the Respondents (R69; 97), intended to artificially inflate or fraudulently manipulate their final average salary (R 69-70), and were included in bi-weekly payroll checks paid over months and years, not in a separate check or a lump sum (R165-166; 291).

After signing the Continued Port Authority Employment Agreement, each Respondent remained employed for various additional periods, ranging from nine months to ten years, and received the associated pay raise throughout the remainder of that employment (R201; 217-220; 221-222; 223-224).

(v) The ERS Excluded Program Raises From Calculation of Pension Benefits

Respondents Spencer (9/03), Bohlen (8/04), Green (10/04) Cracchiolo (1/06), Jackson (3/06), McClafferty (9/06), Lombardi (10/10), and Blanco (11/10) retired from the Port Authority at various times and applied for retirement benefits (R201). A Retirement System Examiner has the responsibility of reviewing an applicant's file, determining which compensation is properly included in calculation of final average salary (FAS), and performing such calculation (R114). Part of their job is to know and identify which payments received by an applicant are pensionable and which are not (R89-90; 110-112). Based on such a review each was awarded retirement allowance benefits which included Program pay

raises in their calculation. Respondents selected their pension option relying on the inclusion of this compensation (R115-116).

In 2012, Butcher (4/12), LaCapra (7/12) and Hofrichter (7/12) submitted applications for retirement (R201). These applications were similarly reviewed but in letters of Final Determination signed by Neil Manning, Director, Benefit Calculations & Disbursement Services Bureau, the Program raise was excluded from calculation of FAS. The stated basis was the raises were paid "in anticipation of eventual retirement" (R226) (emphasis supplied). In or about 2012, the ERS also reviewed the pensions being received by Spencer, Bohlen, Green, Cracchiolo, Jackson, McClafferty, Lombardi, and Blanco. In letters of final determination again signed by Neil Manning, these retired Respondents were told that compensation paid as part of the Program was not includable for purposes of calculating FAS for the same reasons and they would be required to disgorge the amounts received over the course of their respective retirements (R225).

B. PROCEDURAL HISTORY AND POSTURE

(i) Section 74 Hearing

Each Respondent timely requested a hearing pursuant to RSSL § 74. It was agreed that because each case involved the identical legal issue, the eleven matters would be consolidated and a single hearing was conducted on June 28, 2016.

At the hearing Neil Manning testified under oath that despite signing the letters to each he had not made the determinations. However, Robert Coughlin, then counsel to the ERS, testified under oath that Manning's testimony was not accurate (R151-152). Mr. Manning also testified he made no independent determination concerning the propriety of including the Program pay raise in the calculation of FAS (R117), could not identify any document which stated payments made "in anticipation of eventual retirement" were to be excluded (R120-121), did not know if payments made to retain individuals in employment were includable in the calculation of FAS (R125), and could offer no basis for why pay raises included in the biweekly salary of the applicants were not includable in the calculation of FAS (R128-131).

Mr. Manning could identify no written ERS policy, protocol or regulation in existence prior to enactment of RSSL § 431, directing that payments to delay retirement or made "in anticipation of eventual retirement" were excluded from calculation of FAS. The only "proof" he offered was a general awareness of such a policy even though he did not begin working for the ERS until 1980 (R108; 117-127).

Despite finding that each of the Respondents was "essential to the continued successful operation of the Port Authority" (R324), that each was given a raise to delay retirement given their critical importance in a time of extraordinary need, and

that all continued employment for extended periods as long as ten years, the Hearing Officer Decision held the Program raises should be excluded from the calculation of final average salary, because they were "payments made in anticipation of eventual retirement" (R329). The Decision ignored the clear dictates of Article 5, § 7 of the New York State Constitution, and Court of Appeals precedent, and invoked a standard which is not contained in RSSL § 431 or any other rule or regulation. By letter dated March 9, 2017, the ERS adopted the Decision as its Final Determination.

(ii) Article 78

Given the plain error of the Final Determination, the Respondents commenced an Article 78 proceeding in the New York State Supreme Court for the County of Albany. The Appellant raised no objections in point of law and by Order dated August 4, 2017, the matter was transferred directly to the Appellate Division, Third Department, for consideration of the merits (R4).

(iii) The Appellate Division, Third Department Vacated The ERS Determination

In reviewing the Final Determination, the Appellate Division, Third Department recognized as a fundamental and fatal flaw ERS reliance on a standard not recognized at law, nor part of RSSL § 431, noting that "[t]he term 'eventual' is not part of the statutory standard..." (R349). Applying the correct legal standard as set forth in RSSL § 431(3), the Appellate Division found "no substantial

evidence" existed in the record to exclude the payments as they were "certainly neither a lump-sum payment on the eve of retirement [or] a disproportionate salary increase designed to artificially inflate a pension benefit." (R349). As this disposed of the matter for all Respondents, the Appellate Division did not reach the constitutional issue of Article V, § 7.

Two justices dissented from the majority, but in doing so failed to recognize the basis for that opinion, and analyzed the record not using the actual statutory language of RSSL § 431, but the ERS' arbitrary standard. Indeed, the dissent sidestepped the issue that the ERS had deviated from the statutory language of RSSL § 431, relegating it to a footnote simply calling the majority's reliance on the fact that the Appellant used a standard not set forth in the statute as "misplaced." No legal analysis or explanation for such characterization was given (R353). Inasmuch as the dissent did not analyze the record on the proper legal standard, it is impersuasive and fails to undermine the majority opinion.

Although the majority had not reached the issue, the dissenters also wrote that a retroactive application of RSSL § 431 would not violate Article V, § 7 of the New York State Constitution. This analysis ignored existing precedent and, without evidence, maintained RSSL § 431 was "merely a codification of an existing policy" (R354) a position contradicted by the Legislature's very enactment of the statute, the legislative history, and prior rulings of this Court. (*See,*

Kleinfeldt v New York City Employees' Retirement System, 36 N.Y.2d 95 [1975])

Based on the dissenting opinions, the ERS appealed.

POINT I

THE COMPTROLLER'S DETERMINATION IMPROPERLY APPLIED A LEGAL STANDARD NOT CONTAINED IN RSSL § 431 AND WAS PROPERLY VACATED BY THE APPELLATE DIVISION

Contrary to the argument advanced by the Appellant, the legal issue presented is not one of conflicting evidentiary assessments between the ERS and the Appellate Court, or misapplication of the "substantial evidence standard." Instead, the Appellate Division, Third Department vacated the Appellant's determination based on its recognition that the determination was based on a legal standard which does not exist in RSSL § 431(3) the claimed statutory basis for denial. Applying the statute as written and the controlling precedent, the Appellate Division, Third Department properly found the determination that the Program raises were not pensionable was not supported by substantial evidence. It is the only analysis of the record performed based on RSSL § 431(3).

A. THE ERS CANNOT ALTER THE LANGUAGE OF STATUTES THUS CREATING NEW STANDARDS

The Appellant's brief fails to address the gravamen of the Appellate Division decision which is that while RSSL § 431(3) provides for exclusion of payments "made in anticipation of retirement," the Appellant's determination was

based on a different standard, not part of that statute, "payments made in anticipation of eventual retirement." Indeed the Appellant fails to address this issue passing it over as a matter of insignificance playing no role in this appeal. The dissenters in the Appellate Division similarly sidestepped the issue, relegating this critical point to a footnote without legal analysis. However, in doing so, well established principles of statutory construction are disregarded. The issue is fatal to the Appellant's position and this appeal.

It is not subject to reasonable debate that "[a] statute must be read and given effect as it is written by the legislature..." *Lawrence Constr. Corp. v. State*, 293 N.Y. 634, 639 (1944); *People v. Olah*, 300 N.Y. 96, 602 (1949); NY Stat. § 94. Neither a court construing them nor agencies applying them may cavalierly add or delete words from a statute, and later contend that such addition or deletion is inconsequential. Doing so when the legislature "have expressed themselves in plain and clear words" is error. *Burch v. Newbury*, 6 SELD. 374 (1852)

Once acknowledged, it is apparent this matter does not involve the Appellate Division replacing its judgment for that of the ERS, but rather, the Appellate Division performing for the first time an analysis applying the facts of record to the statute as written. In so doing, it found the ERS determination excluding these payments from calculation of pension benefits not to be supported by substantial evidence.

The Appellate Division did not "reject a determination where the evidence is conflicting and room for choice exists." *Marine Holdings, LLC v. New York City Commission on Human Rights*, 31 N.Y.3d 1045, 1047 (2018). Instead, it recognized the Appellant's reliance on a non-existent legal standard in analyzing the record leading to an erroneous conclusion. Logic counsels, and the Appellate Division properly concluded, that there cannot be substantial evidence supporting a legal standard which does not exist. As the Appellate Division pointed out:

> "...it is telling that both the Retirement System and the Hearing Officer...characterized the payments as having been made in anticipation of eventual retirement. (emphasis added). The term "eventual" is not part of the statutory standard..."

(R349). Thereafter, applying the correct statutory language the Appellate Division correctly found there was not substantial evidence in the record to support exclusion of the payments from calculating benefits under RSSL § 431(3).

B. THE APPELLATE DIVISION APPLIED RSSL § 431(3) TO THE RECORD AND PROPERLY FOUND NO SUBSTANTIAL EVIDENCE TO SUPPORT PROGRAM RAISE EXCLUSION

(i) Introduction – The Language and Purpose of RSSL § 431

On June 17, 1971, N.Y. RSSL § 431 went into effect, excluding certain categories of compensation from calculation of final average salary. Upon its enactment, the following payments could not be included in calculation of retirement benefits after April 1, 1972:

(1) Lump sum payments for deferred compensation, sick leave, accumulated vacation or other credits for time not worked;

(2) Any form of termination pay;

(3) Any additional compensation paid in anticipation of retirement;

(4) That portion of compensation earned during any 12 months included in such salary-based period which exceeds that of the preceding 12 months by more than 20 per centum.

N.Y. RSSL § 431 (Emphasis added). In its Budget Report on Bills, the Senate Committee on Rules explained the purpose of the statute:

> [t]he pension amendment relating to the salary base would eliminate some of the major abuses resulting when 'final average salary' is unduly raised in order to increase pensions. (New York City Transit System employees, for example, work many hours overtime in their last year before retirement to substantially increase retirement benefits; termination pay is being negotiated as a means of raising final average salary in some jurisdictions.) Inasmuch as lifetime retirement benefits are designed to provide an income related to actual earnings during employment, it is important to exclude unusually large payments from the base used to compute such benefits. (Committee on Rules, Senate, Harold Rubin, Examiner, No. 7989-A, p.3 (June 16, 1971).)

(Emphasis supplied). Thus, the legislative intent was to curb abuses related to the artificial inflation of final average salary in periods immediately prior to retirement, in effect, a check against fraud. It was not intended for situations

where the employer had a legitimate reason to delay retirement and increased salary to do so.

(ii) The Respondents Received Pay Raises To Delay Their Retirement

The hearing record adopted by the Final Determination established clearly that because of (a) exigencies caused by the events of 9/11, (b) a lack of succession planning owing to prior staffing decreases, (c) the systemic needs of the Port Authority, and (d) the unique and critically important skills and experience of the Respondents, the Port Authority, in an effort to prevent or delay or discourage retirement of these individuals, created the Employee Retention Program (R324). It was the intent of the Port Authority not to incentivize retirement, but to persuade employees to continue working (R67; 227-237; 195). These facts were established at the hearing, recited by the Hearing Officer, and adopted by the Comptroller in his Final Determination (R324). Consequently, the contention by the ERS that the payments were made "in anticipation of eventual retirement" not only deviates from and impermissibly expands the language and scope of RSSL § 431, it contradicts the facts, is arbitrary, flies in the face of common sense and is supported by no evidence at all. The evidence submitted on the subject was unequivocal and the ERS, which presented no case, offered nothing to rebut it.

In correspondence dated April 13, 2012 to the ERS from Port Authority Executive Director Patrick Foye, he explained the program as follows:

3. Retention Program (Longevity I): This targeted retention program was authorized in 2002 to retain certain key executives following the terrorist attacks of 9/11.

(R218) (emphasis supplied). Each of the Respondents signed a "Continued Port Authority Employment" contract, which stated unambiguously:

> ". . . your retirement at this time under Part A of the 2002 Retirement Inventive Program of the New York State and Local Employees Retirement System (NYSLERS) would not be consistent with the present needs of the Port Authority and that you will not be eligible for the New York State retirement incentive if you choose to retire during December 2002.
>
> 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 has authorized me to develop a program designed to provide a limited number of staff members with a 'parity' benefit."

(R227-237) (emphasis supplied).

In apparent disregard of this clear statement, Deputy Comptroller Thomas Nitido nevertheless maintained, in a letter to Mr. Foye, that the payments were excludable because "the additional compensation was paid in anticipation of their eventual retirement." He maintained this despite earlier in the very same sentence calling the payments a "retention bonus,"[2] which takes the matter out of any RSSL

[2] The characterization of the salary increase as a retention bonus is also inaccurate and misleading, as this was not a lump sum payment or payment made for time not worked, but rather a raise paid in the biweekly paychecks of these individuals for the balance of their employment.

§ 431 proscription (R221). *See, e.g., Van Haneghan v. New York State Teachers' Retirement System*, 6 A.D.3d 1019 (3d Dept. 2004); *Curra v. New York State Teachers' Retirement System*, 30 A.D.3d 666 (3d Dept. 2006).

The testimony at the hearing was just as clear:

- The Port Authority was facing exigent circumstances as a result of the terrorist attack of 9/11 and its aftermath (R324-326; 50-53; 66; 87-94).
- The continued employment of the Appellants was critical to the Port Authority given their unique knowledge, experience and skills (R324; 65; 50-53).
- The Employee Retention Program and pay raises were paid to prevent, not facilitate, retirement (R325; 69).
- The Employee Retention Program was not implemented with the purpose to artificially inflate or manipulate final average salary (R69-70).
- The payments were not paid in a lump sum, by separate check, or made for time not worked (vacation or sick time), and were included in their bi-weekly payroll checks as part of compensation (R325; 132; 165-166; 217-220; 223-224; 291).

Significantly, eight of the eleven Respondents had retired between 2003 and 2012, and their benefits were established following review by a Retirement System Examiner, which included the payments in calculation of final average salary (R110-116). At the hearing, Mr. Manning, himself a Retirement Program Administrator 4 (R108), admitted that earnings for time worked and payments for longevity based on years of service were properly included in final average salary (R118-119). It was only in 2012, when the remaining Respondents – Messrs.

Butcher, LaCapra and Hofrichter – submitted retirement applications that the ERS revisited the Employee Retention Program and disqualified the payments (R221-222).

During the hearing, questioning by counsel to the ERS suggested that exclusion of Retention Program payments from benefit calculation was appropriate because (a) the eleven were exempted by the agency from participation in the Retirement Incentive Program, and (b) some of the eleven were not considering retirement at the time. Thus, an increase in salary was unnecessary. However, such reasoning, even if assumed true, has no relevance to whether these wages may be included in calculation of final average salary. The Hearing Officer Decision adopted in the Final Determination, mistakenly focused on this rather than the purpose in affording these salary increases, which as the legislative history and case law establish, is the relevant inquiry.

The intention of the individuals is irrelevant. There is no question each was eligible to retire and, moreover, had very marketable skill sets, making them attractive to the higher-paying private sector (R324-326). Indeed, each could have, at any time, chosen to retire. The Port Authority had a real need and a legitimate reason to be sure that did not happen (R324). The proper question, and the only one relevant to this outcome is: Did the employer have a legitimate reason for paying the additional compensation to keep the individuals employed? On this

issue there can be no dispute. This was not a ruse or scheme to artificially inflate or manipulate final average salary with the sole purpose of increasing pensions. There were no lump sum payments, no retroactive salary adjustments at the time of retirement, or other similar activity whose aim could only be to improperly inflate FAS. Therefore, it follows there was no substantial evidence to justify exclusion.

Contrary to the assertion of Appellant – and the Hearing Officer – the fact that certain materials prepared by the Port Authority in connection with the implementation of the Program included an example illustrating the impact of the salary increase on the pensions of the Respondents who continued to work for a certain length of time does not by any means indicate that the salary increase is barred under Section 431 from being included in calculating FAS. (R 23) As noted by Appellant and the Hearing Officer, certain materials included information regarding the approximate impact on Respondents' pensions in the event any of them chose to continue employment with the Port Authority for a three-year period. (R199) This was simply an illustration to help guide the eligible employees, and Port Authority officials, in evaluating their respective decisions regarding the implementation of the Program.

The example based on three years of continued employment did not establish criteria for eligibility or administration of the Program. No employee who chose to participate in the Program was required to work for a three-year

period. (R227-237) In fact, three Respondents worked for significantly less than three years (Spencer, Bohlen, Green); three worked for slightly more than three years (Cracchiolo, Jackson, McClafferty); and five worked for far longer than the three-year period mentioned in the materials – some for almost ten additional years (Lombardi, Blanco, Butcher, LaCapra, Hofrichter). Critically, the salary increase was not limited to a three-year period. As noted previously, several Respondents received the salary increase in their bi-weekly salary payments for nearly a ten-year period. Neither Appellants, the Hearing Officer, nor the Appellate Division dissent could point to a single precedent in which a New York court has ruled that salary increases paid to NYSLRS members as part of their regular bi-weekly paychecks for a length of time remotely approaching such ten-year period was barred by Section 431 from inclusion in calculating a member's FAS. There is no such precedent.

(iii) Courts Have Long Held That Such Retention Payments Are Pensionable and Not Proscribed by RSSL § 431

Case law in this area, directly on point, demonstrates the clear error of excluding the subject payments from final average salary.

The Court of Appeals examined the legislative intent in *Weingarten v. Bd. of Trustees of the New York City Teachers' Retirement System,* 98 N.Y.2d 575 (2002). The issue in *Weingarten* was "whether certain hourly compensation – known as 'per session' compensation – earned by teachers in New York City

public schools can be added to their base annual salaries for the purpose of calculating their retirement benefits." *Id.* at 578. The Court concluded that they could be. *Id.* The Court found that the enactment of § 431 was intended to curb the practice of "including certain one-time or lump-sum items of compensation, such as sick leave payments, termination pay and credits for unused vacation, to enhance final salary prior to retirement." *Id.* at 582. Per session compensation, the Court reasoned, was unlike compensation paid in anticipation of retirement because that category of payment is "generally associated with service termination." *Id.* at 583 (emphasis supplied). Since per session compensation is not listed as a category, the Court determined that the Legislature must not have intended to specifically exclude this type of compensation. *Id.* Similarly, in this matter, the payments were not made in anticipation of retirement because they were not associated with service termination.

Cases on all fours with the current matter have held that payments virtually identical to those here are not excludable pursuant to RSSL § 431(3). The Court need look no further than the cases of *Van Haneghan v. New York State Teachers' Retirement Sys,* 6 A.D.3d 1019 (3d Dept. 2004) and *Curra v. New York State Teachers' Retirement System,* 30 A.D.3d 666 (3d Dept. 2006), to find that the Employee Retention Program raises are includable in calculation of final average salary.

In *Van Haneghan v. New York State Teachers' Retirement System,* the Appellate Division, Third Department found determination by the Teachers' Retirement System to exclude retirement deferral compensation to be arbitrary and capricious. Succinctly stated, Van Haneghan indicated that she was going to retire at the end of the 1998-99 school year in order to take advantage of a retirement incentive contained in the collective bargaining agreement, which covered the terms and conditions of her employment. The District did not want her to retire, and even though the retirement incentive that she was seeking to obtain expired at the end of the 1999 school year, the District "made a deal" with her union and Van Haneghan that if she remained employed for an additional year they would pay her the incentive, even though it was not available to anyone else. The Teachers' Retirement System excluded this payment from its calculation of her retirement benefit, but the Appellate Division rejected the exclusion because:

> It cannot be said that the offer was made to induce her to resign. Instead, it was Petitioner's attempt to resign that lead to the agreement between the District and the Association to permit Petitioner to defer her retirement for a year while a suitable replacement was sought.

Van Haneghan, 6 A.D.3d at 1022. The present matter is stronger than that of the petitioner in *Van Haneghan*, because, unlike the payment received there, the Employee Retention Program was a salary increase (a raise), included in the

Appellants' bi-weekly payroll checks, and, in some cases, were made for almost ten years, as opposed to the one-year period in *Van Haneghan.*

Likewise, in *Matter of Curra v. New York State Teachers' Retirement System,* 30 A.D.3d 666 (3d Dept. 2006), the Appellate Division, Third Department upheld the annulment of the Teachers' Retirement System's determination excluding a salary increase. In analyzing the substance of the transaction, the Appellate Division found that "the payment was genuinely made to delay petitioner's retirement and represents the value of his service to the school district during the relevant period of time." *Id.* (emphasis supplied). The lower court's decision in *Matter of Curra,* issued by the Hon. George B. Ceresia, provides additional factual detail. 18 Misc. 3d 1144(A) (Albany Co. Sup. Ct. 2005). Judge Ceresia noted that:

> Petitioner indicates that during this same period of time [during which Petitioner submitted his notice to retire] the School District's central administration was in 'considerable turmoil'. Due to a number of staff changes petitioner was the only central office administrator with any significant experience. It is undisputed that, as a consequence, the School District requested petitioner to postpone his retirement. *Id.* at *1.

He further declared that:

> the Court is of the view that the record reflects that overriding purpose and intent of the Supplemental Agreement was not to induce the petitioner to retire (a decision which he had already made) but rather to delay

his retirement for the benefit of the School District. *Id.* at *4.

Clearly, the Port Authority was in "considerable turmoil" in the wake of 9/11, which made the skill sets of the Respondents critical to satisfy the Port Authority's and the region's ongoing needs. Each was asked to forego the right to retire and a pay raise was instituted to encourage them to stay. There can be no doubt the program was "genuinely made to delay" their retirement. This matter is indistinguishable from *Curra* and commands the same result.

Finally, in *Matter of Hughes v. McCall,* 245 A.D.2d 904 (3d Dept. 1997), the Appellate Division annulled the determination of the New York State Police and Fire Retirement System that certain overtime pay the Petitioner received in his final two years of employment was compensation paid in anticipation of retirement. Instead, the Court found that a Troy City firefighter's overtime salary paid during his final two years was not in anticipation of retirement. *Id.* at 904. In analyzing the substance of the transaction and payments, the Court noted that the firefighter did not receive preferential treatment, but that his overtime was accumulated based on seniority. *Id.* Furthermore, the Court noted that the firefighter's expertise with hazardous materials required his presence at fire scenes where such substances were involved. *Id.* The Court noted that RSSL § 431 "refers only to compensation that is paid specifically in anticipation of retirement." *Id.* at 905 (emphasis supplied). The overtime compensation was not "due to

manipulation to increase his final average salary," nor accorded to him "other than in consideration of his seniority status." *Id.* The Court went on to emphasize that it was not following the Comptroller's determination because the "overtime was assigned to petitioner out of necessity." *Id.* (emphasis supplied).

Matter of Thompson v. New York State Teacher's Retirement System, 78 A.D.3d 1456 (3d Dept. 2010), cited by Appellant, does nothing to change the outcome here. In fact, close analysis not only proves the case does not justify exclusion of salary in the matter before the Court, but instead supports the Respondents' position. In *Thompson,* the employer took a one-time bonus contained in the Collective Bargaining Agreement, a payment clearly excluded under RSSL § 431, and manipulated the situation in an effort to convert it into includable income by spreading the payment out over several years. There was no corresponding additional cost or benefit realized by the employer. This was simply an effort to artificially inflate final average salary by taking an otherwise excludable lump sum payment and re-characterizing it as salary. This is obviously not the circumstance before the Court.

Based on the foregoing precedent, it is clear the payments at issue here -- some received over ten years of additional employment -- were not made in anticipation of retirement as per RSSL § 431, or as that statute has been interpreted by the courts. The Port Authority of New York and New Jersey determined that a

raise to the Respondents to keep them in its employ was a necessity (R227-237). The benefit was not limited to three final average salary years. *Cf. Matter of Tooley,* 252 A.D.2d 794, 795 (3d Dept. 1998). There was no guarantee that the employee would remain employed after December 31, 2002 (R227-237). *Cf. Matter of Bascom,* 221 A.D.2d 879 (3d Dept. 1995). The raises were intended to retain critically needed key employees. *Cf. Matter of Green*, 103 A.D.2d 878; *Matter of Davies*, 259 A.D.2d 853. They were not paid in anticipation of retirement, but specifically to delay retirement. *See, Matter of Van Haneghan*, 6 A.D.3d at 1022; *Matter of Curra*, 30 A.D.3d at 666.

C. THE APPELLATE DIVISION PROPERLY FOUND NO SUBSTANTIAL EVIDENCE TO SUPPORT EXCLUSION

Applying the correct statutory standard and the foregoing case law, the Appellate Division, Third Department found the Appellant's determination was not supported by substantial evidence (R349). It did not select evidence over competing evidence relied on by the Appellant. Instead, with the proper standard, it was determined no evidence existed "of such quality and quantity as to generate conviction in and persuade a fair and detailed fact finder" that it could be reasonably determined these payments were excludable as payments "made in anticipation of retirement." *300 Gramatan Ave. Assoc. v. State Division of Human Rights*, 45 N.Y.2d 176, 181 (1978).

POINT II

RETROACTIVE APPLICATION OF RSSL § 431(3) VIOLATES ART. V § 7 OF THE NEW YORK STATE CONSTITUTION

A. INTRODUCTION

It is undisputed that six of the eleven Respondents became members of the ERS prior to the effective date of RSSL § 431, which was June 17, 1971: John Spencer (6/1/71), Bruce Bohlen (10/17/66), Jeffrey Green (6/12/66), Anthony Cracchiolo (6/16/70), Francis Lombardi (6/14/71), and Louis LaCapra (6/10/63) (R201). Exclusion of Program raises from the calculation of these members' final average salary based on any construction of RSSL § 431 therefore violates Article V, § 7 of the New York State Constitution.

B. THE NEW YORK STATE CONSTITUTION PROHIBITS RETROACTIVE APPLICATION OF RSSL § 431

For nearly 80 years, Article V, § 7 of the New York State Constitution has protected retirement system members' pension rights from the winds of political change or the caprice of the Comptroller. That provision provides:

> After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

This constitutional protection extends to efforts to exclude compensation from final average salary. *Kranker v. Levitt,* 30 N.Y.2d 574 (1972) (retroactive

application of RSSL § 431 to eliminate inclusion of cash payments for accumulated vacation credits held unconstitutional); *Weber v. Levitt,* 34 N.Y.2d 797, 799-800 (1983) (unconstitutional to prohibit inclusion of termination pay).

In *Kleinfeldt v. New York City Employees' Retirement System,* 36 N.Y.2d 95 (1975), the Court of Appeals addressed whether RSSL § 431 and its limitations diminished or impaired benefits in violation of Article V, § 7. Affirming the Supreme Court and the Appellate Division, the Court held unequivocally, "the statutory limitation [imposed by § 431] may not be applied to those who became members before June 17, 1971." *Id.* at 98 (emphasis supplied). This statement is unequivocal but was disregarded by the Appellate Division's dissent, and is completely ignored in the Appellant's brief. It also contradicts the unsupported contention that RSSL § 431(3) simply codified pre-existing policy. (R354)

Indeed, prior to enactment of RSSL § 431, the Court of Appeals held that efforts such as those at issue are violative of members' constitutional rights. Specifically, in *Birnbaum v. New York State Teachers' Retirement System,* 5 N.Y.2d 1 (1958), another case conspicuously uncited by Appellant or by the Appellate Division, Third Department dissenters, the Court addressed whether the Teachers Retirement System could enact new mortality tables that effectively reduced annuities paid to members of the system. The members contended the new actuarial tables breached the contractual obligation imposed by Article V, § 7

as to those who were already members when the new tables were put in effect. Reversing the Appellate Division, the Court of Appeals agreed and held that any such change in benefits with a retroactive effect violated Article V, § 7, and was therefore unconstitutional. It held the Constitution:

> prohibits official action during a public employment membership in a retirement system which adversely affects the amount of the retirement benefits payable to the members on retirement under laws and conditions existing at the time of his entrance into retirement system membership.

Birnbaum v. New York State Teachers Retirement System, 5 N.Y.2d 1, 11 (1958).

There is no statutory or regulatory basis whereby the ERS may legally limit the rights of these six individuals to inclusion of the Program raises in their final average salary. In his opening statement at the hearing counsel for the ERS represented that the proof would show this compensation was excluded for these six Petitioners "based on long-standing policy and procedure that existed prior to the enactment of Section 431" (R34). Beyond counsel saying so in his remarks, no proof of any such policy was offered at the hearing. Indeed, enactment of RSSL § 431 and the holding in *Kleinfeldt* contradicts such an assertion.

Neil Manning, who signed the initial letters of determination, could not identify the existence of any such policy (R120-121). The approval by Retirement Systems Examiners of benefits for the eight Appellants who retired between 2003 and 2012, which included the retention incentive pay raises in calculation of Final

Average Salary, belies the existence of any such an ERS policy, published or otherwise (R110-116). Moreover, nowhere is the standard of "payments in anticipation of eventual retirement" found prior to the determinations in this matter.

Remarkably, and contrary to both the record and logic, Appellant argues disregarding the Constitution and case law, that the ERS is free to exclude those pay raises because there is no evidence in the record to show that the Retirement System had any pre-Section 431 policy or practice of including similar payments in its calculation of final average salaries (R328). This is flawed for a number of reasons.

First, it assumes a conclusion not reasonably supported by the proof, that the pay increase at issue, included in biweekly payroll checks paid to individuals for extended periods from nine months to ten years, were made "in anticipation of retirement." Taken to its logical conclusion, by that measure every payment made by an employer is "in anticipation of eventual retirement," and everything could be excluded.

Second, the proof of a pre RSSL § 431 policy including such payments in calculating FAS is established by the very enactment of RSSL § 431 in 1971, which thereafter expressly excluded payments made "in anticipation of retirement." Had such payments not been included as a matter of course before the

enactment of RSSL § 431, it begs the question why the statute to affirmatively exclude them was required at all. It also contradicts the Court's reasoning in *Kleinfeldt*.

While the Appellant maintains it is up to the applicant to prove existence of an ERS policy, this position is erroneous, as the applicant in a § 74 hearing is entitled to no discovery. Therefore, requiring an applicant to prove or disprove the existence of an unwritten, uncodified "policy or practice" which would be in the sole and exclusive knowledge and control of the administrative agency imposes a burden of proof which is impossible to satisfy, turning the notion of due process on its head. In such a situation, the ERS can defeat a claim and nullify constitutional protections simply by having some individual say, as it did here, there was a "past practice" in existence at a time before he or she was even employed at the ERS (R 126), which is not memorialized, known or knowable to the public. It is submitted that is the very definition of arbitrary and capricious.

The Appellant also claims "the Comptroller cited several administrative cases showing that exclusion of such payments had always been the Comptroller's policy" (Respondents' Brief, p. 31). However, a review reveals Hearing Officer decisions from 1977 and 1981, written well after enactment of RSSL § 431, concerning compensation received after its enactment and citing that statute as the basis for the exclusion. Each matter involves payments made to manipulate final

average salary in anticipation of the applicant's imminent retirement: (i) a retroactive pay increase; (ii) a significant salary increase in the month prior to retirement; and (iii) an extraordinary increase in the final year of employment. They offer no evidence of any "policy or practice" in existence prior to RSSL § 431.

The cases relied on by Appellant do nothing to alter this analysis. *Matter of Moore v. Levitt*, 74 A.D.2d 971 (3d Dept. 1980), is distinguishable and inapposite. There a lump sum payment was made at the time of an individual's retirement for alleged overtime. It was not the policy of the employer, the Power Authority of the State of New York, to authorize overtime. The applicant was general counsel and had never sought or received overtime compensation during his 16 years of employment, only doing so at retirement, clearly with the intent to artificially inflate final average salary. It is clear that *Matter of Moore*, by its facts, has no bearing on this case.

Matter of Hessel v. New York City Employees Retirement System, 33 N.Y.2d 381 (1974), involved a specific provision of the New York City Employees Retirement System set forth in the Administrative Code of the City of New York (*see,* B3-42.0, subd. A, para. 7) which is inapplicable to the Port Authority, that specifically excluded from inclusion in calculating benefits the lump sum payment at issue. In addition, there had been a solicited opinion from the Corporation

Counsel concerning the issue. These facts make the case distinguishable and irrelevant to the matter before the Court.

The Appellant has offered nothing to permit exclusion of the increase in wages paid to the six applicants, who joined the system prior to June 1971 to prevent their separation from the Port Authority, from calculation of benefits. In fact, Article V, § 7 of the New York State Constitution mandates their inclusion.

CONCLUSION

The decision of the Appellate Division, Third Department must be affirmed.

Dated: Albany, New York
April 1, 2019

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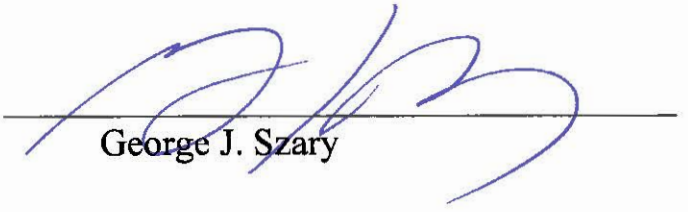
AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), George J. Szary, an attorney in the law firm of DeGraff, Foy & Kunz, LLP, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 8,173 words, which complies with the limitations stated in § 500.13(c)(1).



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