To Be Argued By: Jennifer C. Zegarelli
Time Requested: 15 Minutes

CTQ 2020-00008

Court of Appeals
State of New York

Danny Donohue, as Pres. of the Civil Serv. Empl. Assoc., Inc., Local 1000, AFSCME, AFL-CIO, Civil Service Employees Association, Local 1000 AFSCME, AFL-CIO, Milo Barlow, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Thomas Jefferson, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Cornelius Kennedy, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Judy Richards, on behalf of herself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Henry Wagoner, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units,

Appellants,

v.

Andrew M. Cuomo, in his official capacity as Governor of the State of New York, Patricia A. Hite, individually and in her official capacity as Acting Commissioner, New York State Civil Service Department, Caroline W. Ahl, in her official capacity as Commissioner of the New York State Civil Service Commission, J. Dennis Hanrahan, in his official capacity as Commissioner of the New York State Civil Service Commission, Robert L. Megna, individually and in his official capacity as Director of the New York State Division of the Budget, Thomas P. DiNapoli, in his official capacity as Comptroller of the State of New York, Janet DiFiore, in her official capacity as Chief Judge of the New York State Unified Court System,

Respondents,

The State of New York, New York State Civil Service Department, New York State and Local Retirement System, New York State Unified Court System,

Defendants.

ON APPEAL FROM THE QUESTIONS CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN DOCKET NO. 18-3193

REPLY BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Appellants Danny Donohue, as President of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, et al. (hereinafter "Appellants") respectfully submit this reply memorandum of law in further support of their position concerning the two certified questions accepted by this Court for review from the Second Circuit Court of Appeals. As set forth below, as well as in Appellants' main brief filed on February 16, 2021, the State's arguments fail to recognize the unique factual circumstances of this case when interpreting the language of these collective bargaining agreements (hereinafter "CBAs"). Specifically, the provisions of these CBAs provide proof, or at a minimum raise a question of fact, that the parties intended for health insurance contribution rates to remain fixed upon the retirement of a bargaining unit employee and to survive the expiration of the collective bargaining agreements. Contrary to the State's assertions, these provisions do not create, as set forth by *M&G Polymers USA, LLC v. Tackett*, 574 US 427 [2015], and *CNH Industrial N.V. v. Reese*, 138 S.Ct. 761 [2018], lifetime vesting in silence. Just as the State admits that the CBAs create an obligation to provide for a lifetime of health insurance for those employees with 10 years of service, so too does such obligation extend to a fixed contribution rate in retirement based upon Article 9, the health insurance article, of the CBAs that remained virtually unchanged for almost thirty years. A review of §§9.13 (setting forth contribution rates of 90% and 75%),

9.23 (concerning contribution rates for surviving dependents of deceased retirees), 9.24(a) (specifying that retirees may retain NYSHIP coverage in retirement), 9.24(b) (permitting retirees to use sick-leave credit to defray premium costs), and 9.25 (allowing for the indefinite delay or suspension of coverage or sick-leave credits) of Article 9 indicate that retirees' premium contribution rates vested.

STATEMENT OF FACTS

Appellants refer the Court to its original submission, filed on February 16, 2021, for a recitation of the facts of this matter.

ARGUMENT

APPELLANTS HAVE ADEQUATELY DEMONSTRATED THAT THE COLLECTIVE BARGAINING AGREEMENTS' HEALTH INSURANCE PROVISIONS CREATE SUFFICIENT AMBIGUITY TO REASONABLY INTERPRET THE LANGUAGE TO PROVIDE VESTING FOR A FIXED CONTRIBUTION RATE.

The State ignores the nature of collective bargaining in New York State, especially with respect to retiree benefits like health insurance. As set forth herein and in Appellants' original filing to this Court, the cited health insurance provisions in the parties' CBAs provide sufficient ambiguity on the question of vesting for the presentation and review of extrinsic evidence. By focusing on the durational clause and the integration clause of the parties' CBA, the State fails to recognize the significance of retiree benefits and its distinction from benefits to be afforded to active employees.

A. The Various Clauses of Article 9 Provide Sufficient Evidence of Vesting.

The State's reliance upon *Allied Chemical & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 US 157, 181 n. 20 [1971] and *Steele v. Louisville & N.R. Co.,* 323 US 192, 203 [1944], for the proposition that if the 90%/75% provision in § 9.14 of the 2011-2016 CBA was vested for retirees then it was vested for active employees, is erroneous. (State Brief, p. 44).[1] First, CSEA is not the bargaining

[1] Citations to the State's brief, filed on May 24, 2021, are referenced herein as "State Brief, p. ____."

agent for former employees who have already retired, and therefore under *Allied Chemical,* CSEA is prohibited from negotiating a provision that will diminish a vested right for retirees. Second, *Allied Chemical* concerned mid-contract negotiations, whereas here the CBAs expired on April 1, 2011, and remained in effect until successor agreements were negotiated pursuant to what is known as the Triborough Amendment. N.Y. Civil Service Law § 209-a(1)(e). Accordingly, every member that retired between April 2, 2011, until a successor agreement was reached was entitled to the vested right to the 90%/10% provision in § 9.13 under the 2007 to 2011 CBA. (RA 697.)[2] The § 9.14 of the 2011-2016 CBA remained and the second paragraph in the clause illustrated that the percentage contribution for "employees" based upon grade was effective October 1, 2011.[3] There is no language indicating that the parties agreed to change the percentage contribution rate for future retirees. The fact that the dependent survivors have remained at a 90%/75% contribution percentage is further evidence of this. The State does not cite to the record for its explanation that it "exercised its discretion to continue the 90/75 contribution rates

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[2] Citations to Respondents' Appendix are referenced herein as "RA _____." Citations to Appellants' Appendix are referenced herein as "A _____."

[3] Respondents cite to Respondents' Appendix p. 1094, which is language contained in a collective bargaining agreement for a different matter, is not contained within the record on appeal for the instant matter, and should not be considered. Further, whether or not security supervisors were the same grade level is not contained within the record on appeal for the instant matter and Appellants are not able to respond to that asserted fact or argument being made by Respondents, and that assertion should not be considered. Notwithstanding that, the fact that Respondents are providing an alternative explanation illustrates ambiguity rather than silence in the CSEA language.

for dependent survivors to provide economic assistance for this *small, economically vulnerable population.*" (State Brief, p. 49). Indeed, that is because the record is devoid of any evidence as to the number or percentage of dependent survivors receiving benefits or whether or not they are economically vulnerable, and economic vulnerability is not one of the criteria for coverage. (RA 702). To accept the State's argument on this point takes us back to one-income households where the female spouse who was a homemaker typically survived her husband. In reality, the retiree could have worked for the State primarily for the health insurance and earned a lower salary than his or her spouse, while the surviving spouse worked in the private sector earning a more lucrative salary and may have other pension benefits. If the spouse with the lucrative salary predeceased the retiree, it would be the retiree that ends up in a more vulnerable position. In this scenario, if the retiree predeceased the spouse, the spouse would continue with State health insurance benefits and the lucrative salary or pension of their own. However, as previously stated, the spouse's income or income vulnerability is not a criteria to be eligible for the State's health insurance plan.

The State's reliance upon *Bouboulis v. Transport Workers Union,* 442 F3d 55, 62-63 [2d Cir. 2006] for the proposition that the explicit language in the dependent survivor clause does not create an ambiguity is misplaced, since that concerns an ERISA benefits plan that was administered by a union and specific letters that were

sent to participants, their surviving spouses, and dependents, and does not concern collectively negotiated language contained in a collective bargaining agreement that is a creature of New York contract law.

The Court in *Fletcher v. Honeywell Int'l, Inc.,* 892 F3d 217, 225 [6th Cir. 2018] again concerns an ERISA benefits plan. Further, the Sixth Circuit explained in detail its series of opinions that were recently reversed regarding vesting of retiree health insurance benefits. While accepting *Honeywell's* argument that limiting a lifetime obligation to only surviving spouses and dependents would limit its expenses and protect "the most vulnerable population in its care," it agreed with the District Court that it was "highly unusual" and that "[t]he average person would find it very strange if her spouse and dependents were to receive lifetime healthcare benefits only after she has died, while prior to her death neither she nor her family is entitled to any benefits." *Honeywell Int'l, Inc.,* 892 F3d at 225. It is not clear whether the record in *Fletcher v. Honeywell* supports that argument, but the record in the instant matter is devoid of any such facts and it is an unreasonable interpretation under New York law to automatically assume that the surviving spouse is in a more vulnerable position.

Further, the State's reliance upon *Steele v. Louisville, supra,* is misplaced, since it stands for the proposition that a union has a duty of fair representation to all of the members it represents, and CSEA no longer represents retirees and thus has no

duty of fair representation to retired individuals, and may only bargain for retirees on the consent of the employer and the retiree when it concerns vested benefits, such as here. *Steele v. Louisville, supra.*

B. The Express Integration Clauses of the CBAs Are Irrelevant to Retiree Benefits.

As an attempt to bypass the introduction of extrinsic evidence, the State improperly argues that the integration clauses of the parties' CBAs do not provide a basis for the introduction of extrinsic evidence. Integration clauses provide that "the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract." Black's Law Dictionary [11th ed. 2019]. In the context of retiree health insurance, and other vested rights, integration clauses are not pertinent and are, in fact, irrelevant. The State inappropriately references various Court of Appeals' decisions that not only involve real estate contracts and not collective bargaining agreements, but also do not pertain to vested benefits. (State Brief, pp. 52-53).

With citation to New York state caselaw and federal caselaw involving the vesting of rights, the Second Circuit specifically sought certification of these underlying questions to this Court. Given the history of collective bargaining agreements and the line of New York caselaw concerning vesting previously cited to by Appellants, it is irrelevant to even consider the integration clauses of the at-issue

CBAs when interpreting whether the labor contracts may provide for a fixed contribution rate for health insurance costs for certain retirees.

Furthermore, Appellants are not seeking to "add a new, material obligation to the integrated contracts," as stated by the State, but rather, are enforcing an existing vested right to fixed contribution rates. (State Brief, p. 53). While the State plainly claims that the parties could have easily included a provision, stating that "the contribution rates in the CBA cannot be changed after retirement," it misses the point with respect to retiree benefits and collective bargaining. New York caselaw has clearly established that a collective bargaining contract need not explicitly use terms of vesting when the parties are creating rights which will not expire.

C. Appellants' Extrinsic Evidence Can Be and Should Be Considered by the Court.

Appellants have clearly established that the CBAs in question are not silent on the issue of whether their language creates a vested right in retired employees to have the State's rates of contribution to health insurance premiums remain unchanged during their lifetimes. As sufficient ambiguity exists concerning the question of vesting, the Court can consider Appellants' extrinsic evidence in reviewing this matter. This Court has previously concluded that, when parties have "advanced two plausible interpretations of the operative provision" concerning the scope of the vested right to coverage, "it [is] appropriate for the Court to consider extrinsic evidence outside the four corners of the contracts." *Kolbe v. Tibbetts*, 22 NY3d 344,

355 [2013]; *citing to W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162 [1990]; *see also*, *Donohue v. Cuomo*, 980 F3d 53, 69 [2d Cir. 2020]. Contrary to the State's arguments, the Appellants are not relying on extrinsic evidence to create an ambiguity. (State Brief, p. 54).

1. Past Practice

The State erroneously cites to the HMO option as a basis for challenging the past practice of providing contribution rates at 90% and 75% for retiree health insurance premiums. The alternative Health Maintenance Organization ("HMO") option for health insurance coverage is provided for in separate and apart provisions of the CBAs, compared to the Empire Plan. In fact, §9.12 of the CBAs identifies the HMO alternative plan as allowing "[e]ligible employees in the State Health Insurance Plan [to] elect to participate in a federally qualified or state certified Health Maintenance Organization." (RA 697). Not only are Appellants' claims concerning the Empire Plan, under NYSHIP, and not the HMO coverage, but the premiums for the HMO coverage are specifically addressed in §9.13 of the CBAs. Under §9.13(b), it states that

> The State agrees to continue to provide alternative Health Maintenance Organization (HMO) coverage and agrees to pay 90 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage toward the hospital/medical/mental health and substance abuse components of each HMO, however, not to exceed 100 percent of its dollar contribution for those components under the Empire Plan." (RA 697).

The CBA's health insurance provisions separately identify the HMO option and the Empire Plan. Here, Appellants' claims concern NYSHIP coverage, which will have a corollary effect on the HMO alternative up to 100% of the dollar contribution under the Empire Plan. (RA 697). Therefore, the State incorrectly references the HMO option for the proposition that contribution rates previously deviated from the 90%/75% agreement.

Furthermore, Appellants disagree with the State's contention that the 90%/75% contribution rates remained in effect "because those contribution rates continued to be mandated by statute." (State Brief, p. 56). The parties' negotiations are what determine the language of the statute, namely Civil Service Law §167. In fact, the Governor's Memorandum in Support of Chapter 14 of the Laws of 1983, amending Civil Service Law §167(1), stated that the purpose of the statute was to "effectuate provisions of various memoranda of understanding executed pursuant to the collectively-negotiated agreements between the State and the employee organizations . . . dealing with health insurance." (RA 870).

2. The State's Proposals

As set forth in Appellants' original filing, the State's proposals during the collective bargaining negotiations in 1991, 2003, and 2007 provide additional extrinsic evidence to support their claim of vesting. (*See*, Appellants' Brief, pp. 34-35). In the context of collective bargaining where proposals are made to determine

terms of employment and associated benefits, it is hardly rational to claim, as the State does, that it sought "consensus" when it submitted such proposals to CSEA and, in doing so, "they did not delineate the extent of the State's power." (State Brief, p. 56). Certainly, if the State thought that it could unilaterally change the contribution rates for retirees, like it did in 2011, it would not have presented proposals to CSEA seeking to change such benefits in 1991, 2003 and 2007.

3. The Knowledge of CSEA's Chief Negotiator

Appellants have properly relied on the affidavit of CSEA's chief negotiator for its collective bargaining negotiations with the State as a form of extrinsic evidence. This Court has held that "[a]dmissible evidence may include 'affidavits by persons having knowledge of the facts [and] reciting the material facts." *Viviane Etienne Med'l Care, P.C. v. Country-Wide Ins. Co.*, 25 NY3d 498 [2015]; *citing to*, *GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]. Not only does Ross Hanna have personal knowledge of the negotiations between the State and CSEA, but he was also actively involved in such collective bargaining negotiations for approximately 29 years. (*See*, Appellants' Brief, pp. 15-16; A 263 - A 264). Certainly, Mr. Hanna's "understanding" of the parties' CBAs is not based on "uncommunicated subjective intent," but, rather, is personal knowledge gained from decades of direct participation in the collective bargaining negotiations between the

parties. (State Brief, p. 56). Nowhere has the State pointed to or referenced any individual with such first-hand knowledge of the negotiations of these labor agreements as that of Mr. Hanna.

4. The MOU

The 1982 MOU entered into between the State and CSEA is consistent with the language of the CBAs, calling for the parties to meet and confer through the Joint Committee on Health Benefits. (RA 1051). Contrary to the State's argument that the 1982 MOU was extinguished by the integration clauses in the CBAs, the 1982 MOU was a side agreement entered into between CSEA and the State and was made in accordance with the parties' long-standing practice of executing memorandums of understanding. The MOU specifically states that its provisions "supersede and replace any provisions of Article 9 of the respective Agreements for the ASU, ISU and OSU [labor contracts] which are affected by the provisions herein." (RA 1051). Moreover, the 1982 MOU is significant in demonstrating that the parties met and negotiated the contribution rates for health insurance premiums and set those rates at 90% and 75%.

While Appellants agree with the State that the consideration of extrinsic evidence should only be made after it is determined that sufficient ambiguity exists in the CBAs on the question of vesting, Appellants do not concur that this Court is restricted from reviewing the extrinsic evidence in this matter. The parties, along

with those in the 10 other companion cases, have litigated this case for approximately 10 years, during which time discovery has been conducted, including the exchange of thousands of pages of documents and over 30 depositions. As with the question of vesting, the extrinsic evidence in this case has been and continues to be an important component of this matter, especially given the nature of collective bargaining in New York State for public sector employees. It is within the confines of this Court to not only review the CBAs to determine whether sufficient ambiguity exists, but to also review the underlying extrinsic evidence.

D. Retiree Health Insurance Is a Form of Deferred Compensation

Like a pension earned by an employee upon a certain number of years of service, retiree health insurance under the CBAs is a benefit earned by employees upon their retirement. In this matter, retiree health insurance is earned by those employees who have remained in State service for 10 years, and such benefit is delayed, or deferred, until retirement, hence the meaning of the term vesting. When discussing deferred compensation, the State is mistaken to claim that "the value of retiree health insurance contributions are dependent on how long a particular retiree or the retiree's qualifying survivors receive those contributions." (State Brief, p. 62). It is totally irrelevant to value retiree health insurance contributions based upon a monetary amount, when the question presented concerns whether the parties agreed to vest certain retirees with a fixed health insurance contribution rate. Similar to a

defined benefit pension plan where the longer the retiree lives the greater the benefit he or she receives, it is meaningless whether a retiree lives one day after retirement, and thus receives virtually no benefit to the negotiated retiree health insurance coverage, or lives 30 years after retirement and receives substantial health insurance coverage in retirement. When reviewing retiree health insurance and the question of whether an inference should be extended for retirees, this Court should view retiree health insurance as a form of deferred compensation.

CONCLUSION

For the reasons stated above and in Appellants' original filing in this matter, Appellants respectfully request that the Court answer the Second Circuit's certified questions by holding that the CBAs are not silent on the issue of vesting and, rather, do contain sufficient ambiguity as to warrant the review of extrinsic evidence.

Dated: June 25, 2021
Albany, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 1250.8(J), the foregoing brief was prepared on a computer. A proportionally spaced typeface was used as follows:

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STATE OF NEW YORK
COURT OF APPEALS

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Defendants.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

Michelle Van Kampen, being duly sworn, deposes and says: I am employed by the Civil Service Employees Association, Legal Department, I am not a party to this action, and I am over 18 years of age. On the **25th day of June, 2021,** I served a true copy of the Reply Brief on behalf of Appellants by mailing three (3) copies of the same in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U. S. Postal Service within the State of New York, addressed to the last known address of the addressee as indicated below:

Frederick A. Brodie, Esq.
Office of the Attorney General
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The Capitol
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Michelle VanKampen
Michelle Van Kampen

Sworn to before me this
25th day of June, 2021.

ERIC E. WILKE
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02WI6142317
Qualified in Saratoga County
Commission Expires March 13, 2023

Notary Public -- State of New York

PL/20-0857/JCZ/mv/Affid.Service