STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

Honorable Raymond A. Cloutier

v.

State of New Hampshire
The New Hampshire Judicial Retirement Plan

Docket No.: 219–2009–CV–00525

**ORDER**

The above-captioned action is before the Court following remand by the New Hampshire Supreme Court in Cloutier v. State, 163 N.H. 445 (2012). The undisputed facts are set forth in the Supreme Court's decision and will not be repeated here. The parties have filed cross-motions for summary judgment on the narrow issue before this Court: "whether the contractual impairment is offset by any compensating benefits under RSA chapter 100-C." 163 N.H. at 457. The Court held a hearing on May 8, 2013. Based on the undisputed facts, parties' arguments and applicable law, the Court finds and rules as follows.

**Standard of Review**

In deciding a motion for summary judgment, "the [C]ourt must consider the evidence in the light most favorable to the party opposing the motion and take all reasonable inferences from the evidence in that party's favor." Barnsley v. Empire Mortgage Ltd. P'ship V., 142 N.H. 721, 723 (1998) (internal quotation marks and citation omitted). "Summary judgment is appropriate when the evidence demonstrates that there is no genuine issue of material fact and that the moving party is entitled to

judgment as a matter of law." Grossman v. Murray, 141 N.H. 265, 269 (1996). "An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law." Dent v. Exeter Hosp. Inc., 155 N.H. 787, 792 (2007) (citation omitted). If "a reasonable basis exists to dispute the facts claimed in the moving party's affidavit . . . summary judgment must be denied." Iannelli v. Burger King Corp., 145 N.H. 190, 193 (2000).

**Analysis**

As noted in the Supreme Court's decision, the appropriate analysis under the Contract Clause is as follows:

> Contract Clause analysis in New Hampshire requires a threshold inquiry as to whether the legislation operates as a substantial impairment of a contractual relationship. This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial. If the legislation substantially impairs the contract, a balancing of the police power and the rights protected by the contract clause[] must be performed, and the law may pass constitutional muster only if it is reasonable and necessary to serve an important public purpose.

163 N.H. at 452 (internal quotations and citations omitted) (brackets in original). Here, the only issue concerns the third component in the Contract Clause analysis: whether the contractual impairment is substantial. Id. at 454–55 (finding there was a contractual relationship and "that RSA chapter 100-C impairs the obligations entered into under the prior retirement statutes"). In doing so, the Court assesses any compensating benefits, which offset the contractual impairment under RSA 100-C.

The State contends "[t]he impairment to Petitioners' contractual benefits under the prior retirement statutes is offset by compensating benefits under RSA chapter 100-C; therefore, there is no substantial impairment of the employment contract . . . ." (St.'s

Mot. ¶ 2, doc. # 60.) The Board asserts the contractual impairment is offset by compensating benefits, when the balancing is conducted "on the basis of all affected judges as a class." (Board's Mot. ¶ 13, doc. #62.) Petitioners object and argue "the purported 'benefits' upon which the State and the Board rely are not offsetting benefits." (Pet'r's Obj. 2, doc. #63.) Petitioners further claim the Court, in assessing offsetting benefits, should consider any enhancements to the judges individually, and not as a class. Id. The Court considers each argument in turn.

I. Substantial Impairment: Individuals v. Class

As an initial matter, the parties dispute whether the contractual impairment should be analyzed on an individual or class basis. Petitioners contend the analysis should be conducted individually. Respondents, citing Singer v. City of Topeka, 607 P.2d 467 (Kan. 1980), assert that the determination should be made as a class.

The New Hampshire Supreme Court has yet to explicitly address this issue. However, in the first case to consider the issue, Abbott v. City of Los Angeles, 50 Cal. 2d 438 (1958), the Supreme Court of California held that "it is advantage or disadvantage to the particular employee whose own contractual pension rights, already earned, are involved which are the criteria by which modifications to pension plans must be measured . . . ." Id. at 449 (emphasis added), *reaffirmed by* Betts v. Bd. of Admin. of Publ. Emp. Ret. System, 21 Cal. 3d 859, 864 (1978). The Court reasoned that "benefits subsequently obtained by other employees cannot operate to offset detriments imposed on those whose pension rights have theretofore accrued." Id. at 453; see also Hammond v. Hoffbeck, 627 P.2d 1052, 1059 (Alaska 1981) (finding "that a

determination of whether vested rights to benefits have been diminished must be made on a case-by-case basis").

Here, the Court is persuaded by the California Supreme Court's analysis in Abbott and will therefore assess substantial impairment on an individual basis. To rule otherwise would run contrary to the overarching contract principle: that an enforceable contract requires bargained-for exchange between two or more parties. Indeed, in Cloutier, the Supreme Court suggested that the parties' expectations at the time of contracting are relevant in assessing contractual impairment. See Cloutier, 163 N.H. at 455 (stating "petitioners had the right to expect upon retirement their pension would reflect subsequent increases in pay granted to those in active service"). These expectations at the time of contracting would be difficult to assess on a class basis.

In addition, the Supreme Court has cited Abbott, as well as California decisional law in Contract Clause cases, with approval. See State Employees' Association of New Hampshire, Inc., v. Belknap County, 122 N.H. 614, 621 (1982) (citing Abbott regarding statute of limitations issue); Cloutier, 163 N.H. at 457 (citing In re Marriage of Alarcon, 196 Cal.Rptr. 887, 892 (Cal. Ct. App. 1983); Kern v. City of Long Beach, 179 P.2d 799 (1947)); see also Jeannont v. New Hampshire Pers. Comm'n, 118 N.H. 597, 601 (1978) (citing Kern, 179 P.2d at 801, 803; Dryden v. Bd. of Pension Comm'rs, 59 P.2d 104, 106 (Cal. 1936)). Accordingly, in determining substantial impairment, the Court considers any offsetting benefits to the individual petitioners.

Respondents nonetheless urge this Court to analyze substantial impairment on a class basis. In support, respondents cite Singer v. City of Topeka, 607 P.2d 467 (Kan. 1980), in which the Kansas Supreme Court concluded:

> We do not adopt the balancing test of Abbott; instead, we hold that, insofar as the rights of active employees in and to pension plans are concerned, the reasonableness of legislative changes is to be measured by the advantage or disadvantage to the affected employees as a group or groups; validity of change is not dependent upon the effect upon each employee.

Id. at 475. The Court finds Singer unpersuasive. The Kansas Supreme Court provided no justification for its departure from Abbott. In any event, for the reasons stated above, the Court determines contractual impairment is more appropriately assessed on an individual basis.

II. Substantial Impairment, Offsetting Benefits

As noted, the Supreme Court instructed this Court to consider on remand "whether the contractual impairment is offset by any compensating benefits under RSA chapter 100-C." Cloutier, 163 N.H. at 457. In doing so, the Court cited several cases from other jurisdictions "approv[ing] the view that, prior to retirement, a plan may be changed only if there is a corresponding change of a beneficial nature to the employee." Id. at 456 (internal citations omitted). Under that view,

> the employee's pension rights 'may be modified prior to retirement, but only for the purpose of keeping the pension system flexible and maintaining its integrity. . . . This view, while it may not be flawless in a purely legalistic sense, gives effect to the reasonable expectations of the employee and at the same time allows the legislature the freedom necessary to improve the pension system and adapt it to changing economic conditions.

Id. (quoting Bakenhus v. City of Seattle, 296 P.2d 536, 540 (Wash. 1956)) (internal brackets omitted).

Here, respondents argue the early retirement provision and the per diem compensation for post-retirement service sufficiently offset the contractual impairment to

petitioners, and thus, there is no substantial impairment. The Court considers each argument in turn.

*A. Early Retirement*

As set forth in the Supreme Court's decision, the previous retirement statutes provided that:

> a judge who retired upon attaining the age of seventy years having served as a judge for at least seven years, or upon attaining the age of sixty-five years having served for at least ten years, was entitled to receive for the rest of his or her life an annual amount equal to seventy-five percent of the currently effective annual salary of the office from which the judge was retired.

Cloutier, 163 N.H. at 449 (citing RSA 502-A:6-a,III (repealed 2003); RSA 490:2,II (repealed 2003); RSA 491:2,II (repealed 2003)). These retirement benefits were "additional compensation for services rendered and to be rendered." Cloutier, 163 N.H. at 449.

By contrast, under RSA 100-C:5,IV (2008), a judge

> who is at least 60 years of age with at least 15 years of service may retire on a service retirement allowance equal to 70 percent of the member's final year's salary. A member who has at least 15 years of service and is at least 60 years of age shall be granted an additional percent over the 70 percent level for each year of continued service over 15 years.

Respondents argue this provision, allowing early retirement at age 60, offsets any contractual impairment to petitioners. The Court disagrees. As abovementioned, the Court assesses substantial impairment on an individual basis. In this case, none of the petitioners[1] are eligible for early retirement under RSA 100-C as they have already retired well beyond the age of sixty. Accordingly, the early retirement provision cannot offset the contractual impairment. Respondents' argument to the contrary lacks merit.

[1] The Court will refer to the six intervenors as petitioners for ease of reference.

*B. Per Diem Compensation*

Respondents also contend the per diem pay for post-retirement service may sufficiently offset any contractual impairment to petitioners. In particular, respondents note that RSA 493-A:1-b (2007) provides:

> Any retired full-time justice of the supreme, superior, district, or probate court who serves after retirement as a senior active status justice or a judicial referee shall be allowed his or her expenses and a per diem compensation determined by the supreme court upon recommendation by the judicial branch administrative council and based on the daily equivalent of the annual salary the retired justice would then be earning pursuant to RSA 491-A:1; provided however, that in any calendar year the total of the service retirement benefits that the retired justice receives pursuant to RSA 100-C:5 plus the compensation provided by this section shall not exceed the annual salary the retired justice would then be earning pursuant to RSA 491-A:1.

As an initial matter, the Court notes that RSA 491-A:1 is not part of the New Retirement Plan, RSA 100-C. In any event, there is no evidence regarding petitioners' potential for post-retirement per diem pay. Given the otherwise substantial impairment to petitioners as set forth in this Court's prior order, the Court finds RSA 491-A:1 fails to offset the contractual impairment to petitioners.

## Conclusion

In sum, the Court finds the two "benefits" cited by respondents do not offset the contractual impairment to petitioners. Therefore, for the reasons stated above and in this Court's prior order, the Court finds petitioners' contracts have been substantially impaired, and therefore, RSA 100-C is unconstitutional as applied to petitioners.

In light of the above, petitioners shall have thirty (30) days from the date of this order to elect to receive their retirement benefits under the previous retirement statutes or RSA 100-C. If petitioners elect to receive such benefits under the previous

retirement scheme, their benefits shall be calculated retroactively from the date of their retirement. Petitioners who elect to receive benefits under the prior retirement statutes shall not be entitled to any credit for the salary contributions made from their paychecks to fund benefits under RSA 100-C while they were full-time members, as judicial salaries were adjusted to compensate for the salary contributions. See Cloutier, 163 N.H. at 445. In addition, to the extent the Board seeks an order from this Court directing the legislature to fund any additional liability, the Court declines to do so for the reasons set forth by the State in its objection to the Board's motion for leave to file a cross claim against the State.

**SO ORDERED.**

6/11/13

Date

Kenneth C. Brown
Presiding Justice