

SUPREME COURT OF NEW JERSEY
Docket No. 74,612

Berg et al., plaintiffs,
Respondents/cross-respondents,

Consolidated Civil Action

And

Charles Ouslander, Plaintiff,
Petitioner/Cross-respondent,

On Certification and Cross-
certification to the Superior
Court of New Jersey,
Appellate Division.

And

NJEA, et al.,
Plaintiffs-intervenors,
Respondents/cross-respondents,

Sat below:

v.

Hon. Susan L. Reisner, P.J.A.D.
Hon. Carmen H. Alvarez, J.A.D.
Hon. Harry G. Carroll, J.A.D.

Hon. Christopher J. Christie, et al.,
Defendants-Respondents/cross-petitioners.

SUPPLEMENTAL BRIEF ON BEHALF OF
PLAINTIFFS-RESPONDENTS/CROSS-RESPONDENTS

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PRELIMINARY STATEMENT

Plaintiffs incorporate their arguments in the Appellate Division, but believe that this case is limited to two issues as the result of this Court's opinion in Burgos v. State, 222 N.J. 175 (2015). Those issues are: 1) whether public pension adjustments for cost of living (COLAs) are contract rights, and 2) whether COLAs must be paid along with the base pension. This Court has ruled that as a matter of state constitutional law, the future of the funds depends yearly on the action of the other two branches. Given the recent line item veto of a proposed appropriation that itself was below actuarial projections, defendants' claims that COLAs must be eliminated to save the pension funds is hollow. Their claim that they merely "froze" COLAs is disingenuous. Their conduct shows no intent to solve the problem. The appropriations for "unfreezing" them are very likely never going to happen.

Burgos removed from consideration whether the right to receive retirement benefits is forfeitable (it is not), and whether they should be paid (they should). Since the other two branches cannot bind themselves constitutionally to future payments, the assumption must be the other branches may never agree on an appropriation and the funds' increase (or decrease) will depend entirely on investment returns.

But as long as the funds exist, "that those men and women [who earned pensions] must be paid their pension benefits when due is not in question in this matter." Burgos v. State, supra, 222 N.J. at 182. The State conceded that it was not walking away from its obligation to pay retirees their benefits. Id., fn.11 at 218 (2015). Both the Court and the State acknowledged that "benefits" were payable. "Benefits" include COLAs.

New Jersey jurisprudence has recognized that pensions are sacrosanct, advertng to equitable principles rarely used against government action. Skulski v. Nolan, 68 N.J. 179, 200 (1975); Gruber v. Mayor, et al., 39 N.J. 1, 13 (1962). Since the lower court found COLAs are contractual, and since this Court found that "pension benefits" are obligations, equity simply supports the conclusion and thus simply supports plaintiffs' position. Where there is a contract, there need be no search for an implied contract or equitable estoppel.

Defendants argue that pensions must not be paid in full because COLAs jeopardize future solvency. Given the Court's holding in Burgos, the future health of the pensions based on present projections is immaterial. Government funding, if any, will be on an annual basis. But, no one has argued that the pension funds are insolvent. They are and will remain

so for an indeterminate time, with COLAs. Berg v. Christie, 436 N.J. Super. 220, 246 (App. Div. 2014).

The Appellate Division found that plaintiffs complied with the contract claims law and filed their notice of contract claim. Id. at 243. This Court recognized that a breach of contract action might exist for failure to pay. Burgos, supra, 220 N.J. at 191. So, the only issue here is whether COLAs are part of retirement "benefits programs."

With N.J.S.A. 43:3C-9.5(a) in 1997, the Legislature rendered moot defendants' recital of the history of COLAs. (Db21 to Db26). It promulgated a statutory scheme creating a non-forfeitable right in "retirement benefits". The phrase "means the benefits program, for any employee for whom the right [to receive benefits] has attached." N.J.S.A. 43:3C-9.5(a). In the same section, "post-retirement medical benefits" were explicitly excluded. There are only three components to retirement benefits: base pensions, COLAs and medical benefits. The Legislature excluded the last from the guarantee; it could have done so to COLAs but did not. This Court and the Appellate Division have recognized a contractual right to pensions, and pensions include COLAs.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

Plaintiffs-respondents rely on the STATEMENTS OF PROCEDURAL HISTORY contained in the already filed briefs.

COUNTERSTATEMENT OF FACTS

Plaintiffs rely on the STATEMENT OF FACTS in their Appellate Division brief. However, plaintiffs ask the Court to take judicial notice of the fact that the Legislature recently appropriated, but the Governor line item vetoed, pension contributions for the present fiscal year. N.J.R.E. 201(b)(1).

LEGAL ARGUMENT

POINT ONE

PLAINTIFFS HAVE A NON-FORFEITABLE RIGHT TO COLAs

(In response to Defendants' Points I to IV)

Defendants completely ignore that the key to this case is the plain language of N.J.S.A. 43:3C-9.5(a). As noted above, in creating a non-forfeitable right, the Legislature never used the word "pension" or the phrase "cost of living adjustment." Rather, it used "retirement benefits" as part of the "benefits program" a retiree received. Plaintiffs emphasize the Appellate Division holding, that the Legislature did not break out COLAs. Berg v. Christie, supra, 436 N.J. Super. at 258. Defendants argue that extrinsic aids are unnecessary to interpreting the statute.

Db39. However, their entire position relies on sponsors' statements, actuarial projections, out-of-state precedent and all sorts of extrinsic aids. The plain language of the statute defeats their attempt.

They cite N.J.E.A. v. State, 412 N.J. Super. 192, 216 (App. Div.) certif. denied 202 N.J. 347 (2010) along with other cases for the proposition that there must be a clear legislative expression to ascertain the existence of a contractual right. They argue contradictory positions, at one point claiming that the indispensable quality of base

pensions is that they are earned and deferred (Db47 to DB 52), but then they claim that the method of funding is irrelevant. (Compare Db47 to Db52 with Db52 to Db55).

Nothing they cite evades the fact that the Legislature used the phrase "benefits program" rather than "pension" in creating the non-forfeitable right. For 14 years no one disputed or suggested that COLAs were due qualified retirees. (Db 52 to Db55). The various Pension Adjustment acts that defendants cite all increased COLAs. Indeed, what those statutes show is an evolution to meld the funding of pensions with their adjustments. Hence, as of 2011, the historical end result is an economic unity - a pension that is the "retirement benefits program" to which a retired public employee is entitled, which has included a COLA in one form or another for years.

Defendants assert that all Chapter 78 does is to freeze adjustments until appropriations cause the funds to reach certain levels. (Db27 to Db28). Given the fact that defendant Christie recently vetoed the pension appropriation the Legislature initially proposed, that argument carries little weight. As long as political expediency requires limitations on appropriations, there is no hope of reaching the statutory levels required for reinstatement. Rather, the 1997 statute must be judged on its own.

It is clear that by using the phrasing it did, the Legislature did intend unequivocally to include COLAs within the non-forfeitable rights provisions of the 1997 law. Accordingly, the lengthy contentions to avoid the plain language of the statute in Points I and II are strained attempts to give an erroneous reading to the statute.

Along those lines, N.J.S.A. 43:3C-9.5(a) states that the "benefits program . . . cannot be reduced." That is, components cannot be taken out of the system. No other interpretation makes sense, because in a year when the COLA calculation does not warrant an increase, there will be no COLA. Defendants so argue, and plaintiffs do not dispute this. Now, while inflation is low, the pain is not grievous. Should national monetary policy change, and should inflation increase, that will change.

Defendants argue that the COLA is not earned but is a matter of largesse. Db 47 to Db 52. To reach this conclusion, defendants cite a host of out-of-state cases. What they ignore is that by whatever formula a New Jersey pension is calculated, payment includes as a base employee contributions plus returns thereon, even if the government does not make its contributions. So those cases are of no significance. It is late in the day to suggest that COLAs are a discretionary grant and not an earned form of deferred

compensation. The employee's contribution was certainly not available for investment elsewhere.

Defendants also argue that the method of funding COLAs is not evidence of their inclusion in pensions per se. On this we agree. While the Legislature has eliminated the COLA, it never reduced the employee contribution to the pension.

Defendants' final argument in Point III C is that a negative COLA is a possibility. That is inaccurate. It is possible that COLAs may theoretically decrease: plaintiffs have acknowledged that possibility. However, the COLA as a component of a retirement benefits program is unaffected. It is simply a reflection of economic reality, which is all L. 1997, c. 113 accomplished and which L. 2011, c.78 undid. After living in an economic fantasyland for years, defendants generically (i.e., governors and legislatures) want to force that on plaintiffs as part of a gloom and doom reality. As this brief is written, the stock market is approaching 18,000 again for the first time in years. No one can predict the future, and dueling actuaries are not legislators.

Defendants' Point III C argues that the method of funding COLAs is irrelevant to a determination of non-forfeitable rights. That is completely erroneous. They

argue that the change in funding was to ease the strain on contributing employers (Db52 to Db55). This contention assumes an ongoing obligation to pay, otherwise there would be no "strain." That is, if the employer had no obligation to pay a COLA along with a pension, it would not need to fund it. Pre-funding eases future problems **but only if there is an obligation.** In arguing to the contrary, defendants actually prove plaintiffs' case.

Plaintiffs never argued that ERISA applied to public employment, and out-of-state cases are of no importance because the statutory schemes, language and historical relationships differ.

Accordingly, the first four points of defendants' brief, while extensive, are erroneous on the law. Defendants acknowledge that plaintiffs have a non-forfeitable right in pensions. They seek only to validate Chapter 78's "freeze."

Defendants' argument ignores the basic point to which plaintiffs adverted in the Preliminary Statement, adopted by the Appellate Division. In 1997, when the Legislature conferred non-forfeitable rights on public employees, it used the phrase "retirement benefits," but excluded medical benefits.

All that are left are base pensions and adjustments. Furthermore, as the appellate panel noted, the 1997 statute

further clearly established the right as contractual and the Legislative promise not to diminish it. Berg v. Christie, supra, 436 N.J. Super. at 402 citing N.J.S.A. 43C-9.5(e). That same subsection provided that the rights reserved to the State could not be limited, except to the subsections just cited. So, the statutory underpinning of defendants' arguments about the statute is based on a misreading. The State excluded pension rights from diminution. Accordingly, the statute does indeed evince a clear, unequivocal intent to keep pensions safe from the vagaries of politics.

Along those lines the claim that COLAs were not reduced but frozen is difficult to comprehend. If the cost of living goes up, and it has, albeit at rates nowhere near the stagflation of the 1970s, for example, it is unrealistic to claim that income levels are not affected. To expect a 2011 retiree's pension to remain at that level in an environment where the Consumer Price Index rises is simply saying "Let them eat cake," or perhaps more appropriately, let them starve.

POINT TWO

(In response to POINTS V to VII).

Burgos HAS ALREADY DISPOSED OF DEFENDANTS' CLAIMS
ON THE DEBT LIMITATION AND APPROPRIATIONS CLAUSE
ISSUES

Plaintiffs have never argued that they have a right to COLA appropriations, so defendants' Points V and VI are immaterial. Defendants claim that to "preserve base pensions for current employees, the State would be compelled to appropriate money to cover COLAs." (Db67). There is no way anyone can know if that is true. Frankly, given Burgos, that can never happen, because a court would have to order the Legislature to make the appropriation. Anyone who accepts public employment does so at the risk that the pensions will be insolvent at some point in any event. Burgos held that the State Constitution requires the issues to be dealt with on a yearly basis. Paying COLAs may or may not hasten the process. There are any number of methods that the public fisc can be protected, but they are political, from forcing shared services to legalizing and taxing marijuana to legalizing forms of gambling that pass federal muster or, raising existing taxes.

Defendants ask this Court to find that some unforeseeable future is more important than having the government honor the promises it made in 1997 and on which

thousands of retirees relied. A ruling as to whether the "impairment" serves an important public purpose calls for a prediction of future solvency on a constitutional level when the case can be decided on purely contractual and statutory levels. It also would require a judge to make a political decision: whether the current well-being of retirees is more or less important than the projected availability of funds in the future. Given the apparent unreliability of defendants' current predictions of state income, the choice is purely political and for the other two branches on a yearly basis.

The appellate remand to the trial court was based on a conclusion that a mixed question of fact and law remained. It did so by applying impairment of contracts analysis to ascertain the validity of the statutory purpose in a landscape where statutes contemplated an a multi-year commitment. Burgos makes clear that there is a constitutional bar to judicially ordered pension funding that violates the debt limitations and appropriations clauses. It also acknowledged contractual rights in pensions. That being the case, the question here is one of breach, and of that there can be no doubt. A remand is necessary to determine the amount due plaintiffs and a final judgment fixing same.

CONCLUSION

For the foregoing reasons, plaintiffs-respondents respectfully request the Court to remand the matter to the trial court for calculation of the amount due, compelling payment of COLAs missed to date and entry of judgment compelling payment in accordance with L. 1997, c. 113.

Respectfully submitted,



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Cross-repondents

Dated: November 12, 2015

