

LATEST REPORT FROM THE ORGANIZATION OF PUBLIC SERVICE RETIREES

Friends:

Below I give a fairly detailed summary of today's oral argument. I was in the courtroom and also watched the arguments again just now on the recording. If you go to the link below, you will see that the oral arguments are fairly short. We were moved to be the first case on the calendar, so go about fifteen minutes into the recording and you will see the beginning of the oral argument: <https://www.youtube.com/watch?v=X6AYs4MbsmY>

We had a large turnout: the courtroom could only accommodate about 70 retirees and some folks were in a basement room with a screen where they were able to watch the oral arguments, and others were outside in the cold, watching on their smartphones. (The justices noticed the large crowd, and one said, after we left the courtroom, "we've never had such a full house," and another said, "That's true, except when there was a case about the Yankees.") After oral arguments, Jake met us in Madison Square Park to answer questions. He said that it could take anywhere from a week to five months to get a decision.

There were scheduled to be five justices on the panel: from left to right in the video, they are Associate Justice John Higgitt, appointed in 2021; Associate Justice Ellen Gesmer, appointed in 2016, Associate Justice Manzanet-Daniels, appointed in 2009; Associate Justice Martin Shulman, appointed in 2020; and Associated Justice Llinet Rosado, appointed in 2023.

Justice Manzanet recused herself (didn't participate in) our case: we don't know why, but she had heard our other case challenging our being placed in a MA plan (now before the Court of Appeals) and had ruled in our favor. She announced that if there's a tie, another judge will be "vouched in" (brought in to decide the case). Justices Shulman and Rosado did not say anything during oral argument.

The City had Richard Dearing, its top appellate lawyer, who is the Executive Assistant Corporation Counsel for Appeals and Chief of the Corporation Counsel's Appeals Division, make its case, and when he started arguing that the legal doctrine of "promissory estoppel" (that the promises that the City made should prevent it from reneging on the promises) should not apply, he was interrupted almost immediately by Associate Justice Gesmer, who quoted the affidavit for the retirees by former Deputy Mayor Lilliam Barrios-Paoli, in which she said that the promise of Medicare plus a Medicare Supplement was an "essential recruiting and retention tool." Justice Gesmer said that she hadn't seen the City submit anything to refute the affidavit, and asked Dearing whether the City had refuted it. He said that the City had "refuted the premise that the promise was made." Justice Gesmer said that it seemed that the Barrios-Paoli affidavit reflected the City's policy of recruiting and retaining employees, not limited to what was in the SPDs. Dearing said it's a legal question whether there was a clear and unambiguous promise made and that we have to look at the words that were stated. Justice Gesmer persisted, saying that you [the City] could have done discovery but instead asked the court to rule on the injunction request, and she asked again: "where in the record did you refute that [the promise] was an essential recruiting and retention tool?" Dearing said that free health care into retirement was a recruiting tool, but the question is whether the promise was one made under the case law in New York for promissory estoppel and we have to look at the words stated. Justice Gesmer asked yet again: "where did you refute that [the Barrios-Paoli statement]?" Dearing said it has to be a clear and unambiguous promise, that there has to be no other way to understand the promise. He said that nothing in what she said suggested that the plans could

not change. Justice Gesmer asked whether the impetus to do this was to save money, and Dearing said yes, to confront spiraling health care costs. Justice Gesmer said to him: "how to you rebut the statement from the City's Independent Budget Office that putting retirees into an MA plan would not provide the City with budgetary savings?" Dearing said he didn't understand that statement and Justice Gesmer asked him again: "where did you rebut that?" Dearing said that the savings to the City will be \$500-\$600 million. Justice Higgitt asked where the money will go, and Dearing said the "funds are fungible" [which is not actually true: the money would go to the Health Stabilization Fund, not the City treasury]. He said that money not saved will result in a cut in something else, or the City would have to raise new revenue through taxes, and that there's nothing different about this as compared to other budgetary savings. He described cases in which there was a clear life-time promise and contrasted those to our case. He cited the recent Donahue case which addressed vesting of retiree health care benefits through the lens of collective bargaining. Dearing said that the MLC has overwhelmingly supported the move to an MA plan, prompting Justice Gesmer to say: "the MLC doesn't represent retirees, does it?" and Dearing responded: "it represents tens of thousands of employees who will be retired." Justice Gesmer said: "there was no one present in the negotiations who had the current interest of the retirees," and Dearing said the UFT has a retiree chapter. Gesmer asked again: "the MLC members who were present at the negotiations, did it have any members who were retirees?" Dearing said he doesn't know the answer to that question, but that the MLC has helped current employee and retiree health benefits. Justice Higgitt asked whether the SPDs over the years consistently said that the retirees would get Medicare plus the Supplement, and Dearing said "not to my awareness, the SPDs said that the City's plan does not duplicate Medicare." He said there was nothing in the SPD that distinguished between one type of Medicare plan and another, and nothing in the SPDs said that there is one plan that is permanent and immutable. He also said that there have been many changes to the City's health plan offerings over the years and there was "no box drawn around this plan." There had been a practice up until recently of offering a traditional Medicare plan, but there was no promise that it wouldn't change, Dearing said. He said promissory estoppel is disfavored in NY, and it requires a clear and unambiguous promise. Justice Gesmer asked again: "even if that promise was used as a basis for recruiting and retaining employees who earned far less than they would have in the private sector?" Dearing said that the City disputes that the promise was made: there was not a clear and unambiguous promise and there was not reliance on that promise. He again mentioned Donahue, which dealt with a promise made in collective bargaining and the court said that traditional contract principles control. Justice Higgitt asked Dearing, "why didn't you put in any evidence (even from one supervisor) refuting the promises alleged by the retirees? Was there no one who could say that such a promise was not made?" Dearing said that after reviewing the record, we thought that the evidence of that promise was not sufficient. He said that the SPDs don't come close to being a clear and unambiguous promise.

Jake Gardener, the retirees' lawyer, said that there's a simple answer to the question why, in the face of hundreds of affidavits from retirees and former City officials saying that there was a clear and unambiguous promise for 57 years, the City failed to rebut, and it's because no City official would, under the penalty of perjury, say that. Former Deputy Mayor Barrios-Paoli made this clear, as did hundreds of affidavits from retirees. Justice Higgitt asked what the promise was, and Jake said it was that "if you spent your career serving the City, when you became Medicare-eligible and retired, you would get City-funded healthcare in the form of Medicare plus a Medicare Supplement. That's the promise that the retirees here and the hundreds outside who couldn't make it into the courtroom relied upon." He continued: "This is a promise made for 57

years and retirees built their lives on this promise and sacrificed their health and they had the promise of top-notch Medicare. That promise was the same all along.” He said that our position is not that Senior Care is frozen; it’s that Medicare plus a Supplement was promised, and that’s a healthcare paradigm that takes it away from the private, for-profit motive; Medicare Advantage is a dangerous alternative to Medicare. Justice Higgitt told Jake: “we have to stay on point and see whether there was a basis for the promissory estoppel here.” Justice Higgitt asked about whether promissory estoppel is disfavored against governmental entities, and Jake said it comes up when the government has complied with its statutory duties and the courts don’t want to disfavor that. Here, there’s no statute that says that the City must force retirees into Medicare Advantage. And even if there were a statute, it would be like the Brennan case, where the City was estopped from enforcing the state law that people couldn’t move out of the City, because City employees had moved outside the City. Justice Gesmer said that if we take Deputy Mayor Barrios-Paoli’s affidavit at face value, it shows that there was a policy basis, but are there any cases that base promissory estoppel on that? Jake said that would be icing on the cake, as the cases say that if a promise is made, that’s enough, and here, we also have a policy that’s been enforced for six decades from the highest level of government, to say that we may not pay you that much money, but when you retire or become disabled, you will get the best health care. He said it was exactly what Mayor Adams said when he was running for office: “it was a bait and switch.” They were all baited to work for the City, and Mayor Adams, when running for office, said retirees would be “traumatized” if they were moved to an MA plan. Mayor Adams changed his mind, Jake, said, and it had nothing to do with the City budget: he realized that he would have access to a fund with no oversight, to millions of dollars, there is a fund that would be controlled by the Mayor and union leaders, and they sold out retirees who spent their lives sacrificing for the City. The justices had no further questions and Dearing then had two more minutes.

Dearing said he wanted to correct his answer and he said that the money would go to the Health Stabilization Fund, which has funded benefits for employees and retirees, and it is jointly controlled by the City and the MLC, “but it’s not a slush fund,” it provides benefits to employees and retirees. It does not go into the general fund, and Justice Gesmer said she thought that earlier, Dearing had said that the money would go into the general fund, and Dearing said he was correcting his prior answer. Dearing said that his point still held, that whenever there’s a question in the budget of saving money, and you can’t do it, it will mean that healthcare benefits will be cut or the City will raise money in other ways. Dearing again said the Health Stabilization Fund “is not a slush fund” [query why he repeated this again – he doth protest too much!!!]. The reason that the Mayor changed his mind once he took office was that when you have the responsibility of navigating challenging times, and we all know that the cost of healthcare is exploding, the City has engaged in efforts to save money, not on the backs of retirees, but by adjusting active members’ healthcare with the cooperation of the MLC. Justice Higgitt stated: “the Mayor has to use the hand that he was dealt, and if a particular set of policies were in place before he got there, he still may be stuck with those, even if he may want to take measures prospectively, and I hear what you are saying about his need to adjust to changing times and to changing dynamics, but I don’t know if that gets any executive around, or any legislature around, the die that was cast by their predecessors.” Dearing said he would agree with that, but what was absent from “my friend’s argument” was any grappling with the case law on promissory estoppel. In those cases, there were explicit promises of vesting, of life-time benefits, language that was completely absent here; here, there’s an admission that everything else can change, but there is only one thing that can’t be changed; there’s nothing in the case

law or the SPDs that promises this. Dearing then cited the recent Donahue case that dealt with contract law and a collective bargaining agreement, and his time was up.

After listening to the arguments twice, it appears obvious that two justices are with us, at least as of now; we do not know about the other two justices, as they said nothing. Jake was excellent, as usual, and Dearing had no explanation for why he didn't rebut Barrios-Paoli's affidavit or the hundreds of affidavits from other retirees, all of which stated that they had been promised traditional Medicare and had relied to their detriment on that promise.

Regards,

Sue Ellen