SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, CIVIL TERM, PART 6
HON. JAMES G. STARKEY

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In the Matter of the Application of
JULIUS R. RUGGIERE and JOSEPH R. BEILOUNY,

Petitioners,

DECISION

-against-

INDEX NO.: 12134/2007

MICHAEL BLOOMBERG- MAYOR- CITY OF NEW YORK, ROBERT NORTH- CHIEF ACTUARY- CITY OF NEW YORK, ASSISTANT DIRECTOR- LEGAL DIVISION- N.Y.C.E.R.S., WILLIAM C. THOMPSON- COMPTROLLER- CITY OF NEW YORK, DIANE ALESSANDRO- EXECUTIVE DIRECTOR - N.Y.C.E.R.S.,

Dated: October 16, 2007.

Respondents.

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APPEARANCES OF COUNSEL

For the Plaintiff(s):
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For the Defendant(s):
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Caption: Ruggiere & Beilouny v. Bloomberg, et al. Index No.: 12134/2007

PROCEDURAL BACKGROUND

By Order to Show Cause dated May 23, 2007, Pro Se Petitioners Julius R. Ruggiere and Joseph R. Beilouny seek, *inter alia*, a declaration that Respondents violated § 13-194 of the Administrative Code of the City of New York by improper disbursement of the Variable Supplement Fund (hereinafter "VSF") to "ineligible" retirees of the New York City Employees Retirement System (hereinafter "N.Y.C.E.R.S.").

Initially, the court rejects petitioners' assertion that respondents' "grounds should be dismissed based on their failure to cross move for summary judgment on all of its claims." CPLR 7804 neither expressly prohibits nor authorizes a summary judgment motion. It does, however, permit respondents the option of either serving a verified answer or moving to dismiss the petition based on CPLR § 3211 affirmative defenses. *Alexander, Practice Commentaries,* CPLR § 7804:7. Specifically, respondents are under no obligation to cross move on its objections to be entitled to dismissal of the petition. See *NY City Council v. Bloomberg*, 6 N.Y.3D 380, 813 N.Y.S.2D 3, 846 N.E.2D 433 (2006); Matter of Battaglia v. Schuler, 60 A.D.2d 759, 400 N.Y.S.2d 951 (4th Dept. 1977).

Petitioners do not dispute that there were insufficient funds in the VSF to allow a payment to be made in 2006. Instead, they argue that money for the payment of 2006 supplements was not available because respondents improperly paid "ineligible"[1] correction

[1] The VSF was created to supplement service retirement benefits of New York City correction officers and is governed by the Administrative Code. See Administrative Code § 13-194(2). The legislature has explicitly declared that the VSF shall not be construed as a pension or retirement allowance, and that it shall not create or constitute a contract with any beneficiary or correction officer. See Administrative Code § 13-194(4)(e)(2).

Pursuant to Administrative Code § 13-194(3), the VSF is administered by a Board of Trustees consisting of the representative of the Mayor, the Comptroller, the Commissioner of Finance, a representative of the Correction Officers' Benevolent Association and a representative of the Correction Captains. See Administrative Code § 13-194(3). The Actuary, appointed by the NYCERS Board of Trustees, is the technical advisor of the VSF, and is required to value the assets of the VSF on October 31 of each year, to determine whether sufficient funds are contained in the VSF to disburse to all beneficiaries as designated under § 13-194(4).
See Administrative Code § 13-194(3)(d).

In years prior to 2019, payment of VSF benefits are not guaranteed and are not an obligation of the City. See Administrative Code §§ 13-194(3)(f), 13-194(3)(g) and 13-194(3)(j). Pursuant to Administrative Code § 13-194(3), the Actuary must estimate the value of variable supplement payments which would be payable to beneficiaries for the calendar year, and compare it to the value of the assets in the VSF as of October 31 of that calendar year. If the value of assets in the VSF is equal or greater than the value of the payable benefits, as determined by the Actuary, beneficiaries are paid variable supplement benefits. See Administrative Code § 13-194(3)(e).

The VSF is funded by "transferable earnings," which is defined in the Administrative Code § 13-195(1)(c) and cross referenced with the definitions contained in § 13-232(a)(12) of the New York City Police Variable Supplements Fund. "Transferable earnings" are calculated by comparing NYCERS earnings from assets invested in stocks with hypothetical bond earnings which would have been generated, in general, if the same amount of assets had been invested at a yield equal to 115% of U. S. Treasury Note yields. See Administrative Code § 13-195(1)(c).

Comparison of the earnings of NYCERS stock investments with the hypothetical bond investment reveals the "earnings differential," which is defined in § 13-232(a)(4) of the Administrative Code. If the stock earnings exceed the hypothetical bond earnings the "earnings differential" is positive. If the hypothetical bond earnings exceed the stock earnings the "earnings differential" is negative. Once the "earnings differential" is calculated, the current years' "earnings differential" is combined with the "earnings differential" for all prior years, to reach the "cumulative earnings differential for the base fiscal year," which also may be positive or negative. See Administrative Code § 13-232(a) (11).

If the "cumulative earnings differential for the base fiscal year" is positive, the Actuary subtracts the total amount of "transferable earnings" made in all previous years. If that reveals a positive number "transferable earnings" are created. See Administrative Code §§ 13-195(1)(c) and 13-232(a)(12). The Actuary then determines the portion of the "transferable earnings" attributable to correction officers by comparing the total salaries of all correction officers members as of June 30 with that of all the total salaries of all NYCERS members as of June 30. The "transferable earnings" are multiplied by the fraction equal to the percentage of NYCERS assets attributable to correction officers. See Administrative Code §§ 13-195(1)(e) and 13-195(1)(f). The resulting amount, which is also referred to as a "SKIM," is the amount that can be used to fund the payments of the VSF.

As of June 30, 2006, the "cumulative earnings differential for the base fiscal year" was a negative value. In a November 1, 2006 Memorandum annexed to the opposition papers, the Actuary explained that as of June 30, 2003, NYCERS assets developed a cumulative deficiency for "SKIM" purposes of approximately $13.4 billion due to stock market conditions. The Actuary estimated that the current deficiency had been reduced to approximately $8.7 billion as of June 30, 2005, and that using certain economic assumptions the earliest year in which a "SKIM" would develop would be Fiscal Year 2012. Accordingly, pursuant to Administrative Code §§ 13-195(1)(c) and 13-232(a)(12), as a result of the deficiency, no "transferable earnings" or "SKIM" was created to fund the VSF for Fiscal Year 2006.

Pursuant to Administrative Code § 13-194(3), in a letter dated November 30, 2006, the Actuary

officers in prior years.[2]

The parties appeared in Part 6 of this Court for oral argument on July 25, 2007, and decision was reserved.

FACTUAL BACKGROUND

In support of their request for relief, petitioners argue that in making the VSF payments to retirees, respondents improperly merged the eligibility requirements to retire with the eligibility requirements to receive VSF payments. Specifically, petitioners urge that respondents improperly treated retirees who had purchased "non-correction"[3] time as eligible to receive VSF payments, thereby eliminating a claimed "continuous" service requirement. Accordingly, respondents improperly paid approximately 150 ineligible employees a total of $8,775,000 from October 31, 2000 to October 31, 2005. These improper payments allegedly created a deficit of $4.5 million in the VSF, which prevented payment of $11,500 to each "eligible" retiree in 2006.

In opposition, respondents generally discuss the creation of the correction officers' VSF,

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estimated the value of variable supplement payments which would be payable to beneficiaries for the Calendar Year 2006, and compared it to the value of the assets in the VSF as of October 31, 2006. The letter explained that the assets in the VSF would be insufficient to pay eligible beneficiaries and that therefore no variable supplement benefits would be payable in Calendar Year 2006. Specifically, the total value of the VSF as of October 31, 2006 was $32,530,555. However the value of the VSF as of October 31, 2006 was less than the estimated December 2006 benefit payments of $37,023,656, and therefore no VSF payments were made for Calendar Year 2006.

The gist of petitioners argument is that had the prior years SKIM disbursements been made to only retired corrections officers with 20 or more years of actual correction officer service, as opposed to broader civil service, the SKIM amount for 2006 would not have resulted in a deficit.

[2] Petitioners claim that these retirees were ineligible for VSF payments because they did not have 20 years of service as correction officers, but were allowed to "purchase" time served in other capacities.

[3] Petitioners are retired New York City Department of Corrections officers with twenty or more years of corrections service. "Non-correction" time refers to allowable service time for pension benefits not attributable to actual service time as a corrections officer.

the procedure by which the actuary for N.Y.C.E.R.S. determines if the there is sufficient money in the VSF to allow the beneficiaries to be paid, and the requirements for eligibility for payment. Respondents then argue that based upon the law, the petition fails to state a cause of action. Specifically, respondents dispute the contention that only correction officers with 20 or 25 years of continuous "allowable correction service," as opposed to "credited service" are eligible and further urge that the claim is not supported by the language of the Administrative Code and should be dismissed. Respondents also urge that they properly calculated that there were insufficient funds to pay scheduled benefits pursuant to New York City Administrative Code § 13-194 (3) in 2006; that respondents properly determined that beneficiaries of the VSF include any person who receives a retirement allowance by reason of being retired on or after July 1, 1999, for service as a correction officer with immediate payability of a retirement allowance under a 20 or 25 year correction officer retirement plan pursuant to New York City Administrative Code § 13-194 (1) (c) and that respondents' actions in calculating the funds in the VSF were proper in all respects and in accordance with applicable standards and case law.

LAW AND APPLICATION

It is well settled that the court cannot interfere with an administrative determination unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious. See *Hughes v. Doherty*, 5 N.Y.3d 100, 105, 800 N.Y.S.2d 85, 833 N.E.2d 288 (2005); *DeFoe Corp. v. New York City DOT*, 87 N.Y.2d 754, 642 N.Y.S.2d 588, 665 N.E.2d 158 (1996); *Pell v. Board of Education*, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974).

The correction officers' VSF was created to supplement retirement benefits of New York

City correction officers and is governed by New York City Administrative Code § 13-194 (2). As is relevant herein, § 13-194 (1) (c) defines a beneficiary as:

> "[a]ny person who receives a retirement allowance by reason of having retired, on or after July first, nineteen hundred ninety-nine for service as a correction officer with immediate payability of a retirement allowance, and with credit for (1) twenty or more years of service, if such correction officer retires as a participant in and pursuant to the provisions of a twenty-year uniformed correction plan (as defined in paragraph (e) of this subdivision), or (2) twenty-five or more years of service, if such correction officer retires as a participant in and pursuant to the provisions of a retirement plan other than a twenty-year uniformed correction plan, provided, however, that nothing contained in this paragraph shall be construed as modifying any eligibility requirement for service retirement in any service retirement plan."

New York City Administrative Code § 194 (1) (e) defines a twenty-year uniformed correction plan as a "service retirement plan in which any correction officer who has twenty or more years of service is eligible to retire for service at any age with immediate payability of a retirement allowance."

Relevant to the issues raised here is *Matter of McGarrigle v. City of New York,* 23 A.D.3d 196, 803 N.Y.S.2d 529 (1st Dept. 2005), *app dism'd,* 6 N.Y.3d 806 (2006), *lv. denied* 7 N.Y.3d 701, 818 N.Y.S.2d 191, 850 N.E.2d 1166 (2006). There, petitioner McGarrigle retired with twenty years of "credited service;" nine months consisted of military service with the federal government, as permitted by Retirement and Social Security Law § 513 (c). He commenced the proceeding when N.Y.C.E.R.S.:

> "determined that McGarrigle was not entitled to have the five-and ten-year longevity adjustments included in his final average salary for purposes of computing his pension. According to respondents,

> McGarrigle is not entitled to have those longevity adjustments included because the collective bargaining agreement between petitioner Correction Officers' Benevolent Association (COBA) and the City states, 'The adjustment after the 5th and 10th years of service shall not be computed as salary for pension purposes until after completing 20 years of service.' Respondents contend that 'service,' which is not defined in the agreement, means service in the title of correction officer. It is undisputed that McGarrigle does not have twenty years of service in the title of correction officer. Accordingly, respondents argue before this Court, as they did below, that because the Office of Labor Relations has consistently interpreted this twenty-year requirement to mean twenty years of actual service as a correction officer, NYCERS properly excluded McGarrigle's five-and ten-year longevity adjustments from the calculation of his pension payment." (*id. at* 197).

The court concluded that N.Y.C.E.R.S. had erred by excluding the employee's five-and 10-year longevity adjustments from the calculation of McGarrigle's pension payments, and therefore affirmed the trial court's ruling annulling respondents' pension calculation with a direction for respondents to recalculate the pension payments based on McGarrigle's "credited service." In order to do so, the court defined the term "service", which was not defined in the collective bargaining agreement, to mean "credited service."

From the foregoing it is concluded that respondents properly interpreted the controlling law in paying all persons who retired on a twenty-year uniformed correction plan, without regard to the agency in which a retiree acquired some years of service.

Accordingly, having properly interpreted and applied New York City Administrative Code §§ 194 (1) (c) and (e), defendants' determination to make a VSF payment to any retiree retired on a twenty year uniformed correction plan is not arbitrary, capricious, contrary to law or based upon an error of fact or law.

CONCLUSION

In light of the above, the motion is denied and Petitioners' Article 78 proceeding is hereby dismissed. This constitutes the decision and order of the court.

Respondents are directed to settle order on notice in accordance with this decision.

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J.S.C.