SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

PRESENT

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

In the Matter of **WILLIAM KELLY, ELEANOR FAUSER** and **DOROTHY AIELLO,**

Petitioners,

For a Judgment Pursuant to Article 78 of the CPLR

- against -

INCORPORATED VILLAGE OF ASHAROKEN,

Respondents.

INDEX NO. 2008-39391

MOTION SEQ NO: 001 - CASEDISP
ORIG MOTION DATE: 11/18/08

MOTION SEQ NO: 002 - MG
ORIG MOTION DATE: 11/18/08

FINAL SUBMIT DATE: 01/06/10

UPON the following papers numbered 1 to 15 read on these Motions:

- Petitioners' Order to Show Cause [001] (Papers 1-5);
- Respondent's Cross-Motion [002] (Papers 6-9);
- Petitioners' Reply (Papers 10-13);
- Respondent's Reply (Papers 14-15);

it is,

ORDERED that the application of Petitioner is hereby denied in all respects; and the application of Respondent is hereby granted in all respects.

Petitioners move this Court [001] for an Order and Judgment, in accordance with the Order to Show Cause and Petition they have initiated herein:

1. Staying, annulling and vacating Respondent's Resolution terminating terminating their coverage and participation in the New York Health Insurance Plan (the "Plan") and declaring that resolution null and void;
2. Permanently enjoining Respondent from passing any resolutions or taking any steps to terminate Petitioners' participation or enrollment in the Plan;
3. Requiring Respondent to allow Petitioners to continue their health insurance coverage under the applicable Civil Service Regulations;
4. Awarding costs and disbursements of this proceeding.

Respondent moves this Court [002] for an Order Dismissing the Petition in its entirety, with prejudice.

On April 2, 1962, Respondent adopted a resolution whereby it elected to participate in the New York State Health Insurance Plan ("Plan") as a participating employer. The resolution included officers and employees and expressly excluded retired officers and employees.

On October 1, 1979, Respondent authorized an inquiry into the question of whether its elected and appointed

officials who were not employees could participate in the Plan. On November 5, 1979, then Village Attorney Jonathan Heidelberger advised Respondent at its monthly meeting that said appointees and elected officials were eligible to join the State Hospitalization Insurance plan at no cost Respondent . Respondent has never acted upon that opinion, and has not authorized by resolution the participation of Village appointees and elected officials in the Plan.

In July 2008, a new Village administration came into office and determined that the practices of Petitioner KELLY's administration permitted certain selected officials, as well as certain no-salaried, non-employee, non-working appointees, to participate in the Plan through the Village.

On September 8, 2008, Respondent passed Resolution 2008-29 setting forth that individuals no longer holding elective office were not eligible to participate in the Plan through Respondent , and that their health coverage would be terminated upon notice, entitling these individuals with to continue coverage for a period of eighteen (18) months (COBRA-like coverage), provided they reimbursed Respondent the full cost thereof.

The Village Board meeting of October 6, 2008 was noticed and recessed to Sunday, October 12, 2008, at which time Respondent passed Resolution 2008-30, intended to establish a policy regarding the participation of former elected officials and/or their dependants, for health coverage.

The Resolution established that Respondent shall not permit participation in the Plan by former elected officials and/or their dependents, provided that any such person participating in the Plan, upon his or her resignation, retirement or termination from service as an elected official, shall be entitled to continue such participation for up to eighteen months, as provided by COBRA, or its New York State equivalent, under the condition that said participant continues to pay all costs associated with such coverage.

Petitioner KELLY is the former Mayor of Respondent, who served in that unpaid position for 26 years, until July 7, 2008. KELLY was 68 years old when he withdrew from active service with the Village. During his tenure as a Mayor, KELLY was participating in the Plan through Respondent . His participation in the Plan was permitted by his own accord and without authorization by any Village Board.

In a letter to KELLY's attorney, dated September 30, 2008, Respondent advised that KELLY's service as a Mayor for over twenty years was insufficient to provide him continued coverage in retirement, and that he was not eligible to enroll in the Plan unless Respondent elected to permit him to enroll. Respondent stated that as an elected official, KELLY was eligible to participate without any election by Respondent and that the only time Respondent has the right of election is at retirement. Respondent also stated that KELLY does not fit the definition of a "post retiree" because of his age.

In a letter dated October 24, 2008, Respondent advised KELLY that it was discontinuing his health insurance coverage under the Plan. Respondent explained that it has not had a policy for such coverage of former elected officials or their dependents. Respondent further stated that in early October of 2008 it had adopted by resolution a formal policy concerning elected or retired officials, which provided that Respondent would not offer such continued coverage.

The letter also stated that since KELLY was covered by such insurance at the time of his retirement, he was entitled to continue such participation for up to eighteen months, as provided by COBRA, or its New York

equivalent, provided that he continues to pay all costs associated with such coverage. At the end of eighteen months, or sooner if KELLY chooses to discontinue his participation, his health insurance coverage under the Plan will be terminated.

Petitioner AIELLO worked for Respondent as a clerk for 26 years before leaving in July 2008, after not being re-appointed by the new administration. AIELLO was a paid employee of Respondent and worked over 20 hours per week. AIELLO enrolled in the Plan in 1982. Her participation in the Plan was permitted by Mayor KELLY and without authorization by any Village Board.

In a letter dated October 24, 2008, Respondent advised AIELLO that it was discontinuing her health insurance coverage under the Plan. Respondent explained that, pursuant a recently adopted formal resolution, it will not provide health care coverage to retired employees who are not parties to a collective bargaining agreement. Respondent further stated that since AIELLO was enrolled in the Plan at the time of her retirement, she and her dependents will be entitled to continue such enrollment up to eighteen months, as provided by COBRA, or its New York State equivalent, provided that AIELLO reimburses Respondent for all costs associated with her coverage for such period. At the end of eighteen months, or soon if AIELLO chooses to discontinue her participation, her health insurance coverage under the Plan will be terminated.

Petitioner Eleanor FAUSER is the surviving spouse of former Trustee and Deputy Mayor of Respondent, Peter Fauser, who served as Deputy Mayor from 1982 until his demise in August of 2005. At the time of FAUSER's passing, he was an elected official and both he and his spouse were participating in the Plan through Respondent . Upon her husband's passing, FAUSER elected to continue to participate in the Plan at her own expense. She had been making quarterly payments required under the Plan to cover the cost of her premiums.

In a letter to FAUSER's attorney, dated September 30, 2008, Respondent stated that FAUSER should be eligible as a surviving dependent under the coverage that was afforded her husband, provided she notifies Respondent in writing of her intent to continue the coverage. Respondent had no evidence of such notice.

Thereafter Petitioners instituted the instant Article 78 Proceeding.

The Civil Service Regulations sited by Petitioners set forth minimum eligibility requirements, not a vested right to participation. Those rights can only be granted by a specific resolution of Respondent . Civil Service Regulation 73.2(a)(3)(iv) establishes minimum eligibility requirements, but states that an employer may establish a greater service requirement, and may elect not to provide continuance of coverage, to wit:

> "...provided further that an employer may establish a service requirement greater than five years for purposes of determining eligibility for retirement for any employee hired after April 1, 1975 and *may elect not to provide continuance of coverage for any employee hired on or after April 1, 1977."* (emphasis added)

Petitioners were hired on or after April 1, 1977 and Respondent has elected not to provide such continued coverage. The Civil Service Regulations are replete with references to a municipality electing to provide coverage and electing to permit participation. Civil Service Regulation Section 73.1(b) provides for participating employers "which elects...to include its employees and/or retired employees in the plan".

Section 73.1(c)(1)(ii) goes on to state "...that the determination of eligibility, under the plan for such official or member and employer contributions, if any, shall be permissive for any participating employer". Section 73.2(3)(vii) states "...a participating employer that elects to permit enrollment for such officials...". In all cases, the employer must elect to permit employees' participation.

Furthermore, New York State Civil Service Law Section 163.4 states:

> "4 Any public authority, public benefit corporation, school district, special district, district corporation, municipal corporation, or other agency, subdivision or quasi-public organization of the state, whose employees and retired employees are authorized to be included in the plan as provided by subdivision two, may elect to participate in such plan. *Any such election shall be exercised by the adoption of a resolution by its governing body* and, in the case of any municipal corporation where a resolution of its governing body is required by law to be approved by any other body or officer, such resolution shall also be approved by such other body or officer. *Any such election may be made with respect to inclusion in the plan of both its employees and its retired employees at the same time, or may be made only with respect to its employees alone and at another time with respect to its retired employees.* Any such authority, corporation, district, agency, subdivision or organization making such election shall become a participating employer under such plan, subject to and in accordance with the regulations of the president relating thereto." (emphasis added)

The requirement of a resolution is statutory. New York State Civil Service Law specifically requires a resolution for participation in the Plan for both current and retired officers and employees. In 1962, the original resolution adopted by Respondent, shows that "retired officers and employees" as well as applicable Article ("XI") of the Civil Service Law was stricken from the resolution. Respondent never adopted any resolution permitting retired employees or officials to participate in the Plan.

The issue of whether or not a resolution is required to grant health care benefits is not one of first impression before this Court. Respondent can only award compensation and benefits by Resolution of the Board of Trustees (see: ***Kapell v. Village of Greenport***, 2008 NY Slip Op 31072U, Supreme Court, Suffolk County).

Certain types of legislative acts, including those fixing salaries and compensation, are not presumed to create a contract, the presumption being that such an act merely declares a policy to be pursued until the legislative body ordains otherwise; and that such an act will be treated as a contract when the language and circumstances manifest a legislative intent to create private rights of a contractual nature (see: ***Handy v County of Schoharie***, 244 AD2d 842 [3 Dept 1997] *citing* ***Cook v City of Binghamton***, 48 NY2d 330), where the County Board of Supervisors rescinded a resolution of the prior Board entitling retired members of said Board health insurance coverage at the expense of the County. It is within the discretion of the Town to terminate post-retirement health insurance benefits, and therefore said action is neither arbitrary nor capricious (see: ***Weatherwax v Town of Stony Point***, 97 AD2d 840 [2 Dept 1983]). A municipal resolution is generally a unilateral action that is temporary in nature, and there does not create any vested contractual rights (see ***Aeneas McDonald Police Benevolent Association v City of Geneva***, 92 NY2d 326 [1998] *citing* ***Matter of Jewett v Luau-Nyack Corp***, 31 NY2d 198), where the Court determined that retirees who were members of a bargaining unit were no longer entitled to the contractual health insurance benefits of active members, as they were no longer covered by the contract.

It is within the absolute discretion of Respondent to terminate post-retirement health insurance benefits. Even if Petitioners had a legitimate claim to health insurance coverage in retirement, Respondent can subsequently rescind that policy (see: ***Kapell v. Village of Greenport***, 63 AD3d 940 [2 Dept 2009]). The policy of Respondent whether or not to provide health insurance benefits can only be established by resolution of the Board of Trustees. It is clear from the resolutions of 1962 and 2008 that the intent of Respondent was, and is, not to provide such benefits to retired officers or employees. A government agency possesses significant discretionary authority in bestowing and/or continuing a governmental benefit (see: ***Kapell,*** *supra, citing* ***Dworkin v. NYS Department of Environmental Conservation,*** 229 AD2d 42 (3 Dept 1997)

Petitioners have the burden of proving the allegations of their petition in a CPLR Article 78 proceeding (see: ***Stanton v Town of Islip Dept. of Planning and Development,*** 37 AD3d 473 [2 Dept 2007]). In a proceeding pursuant to CPLR Article 78 to review the determination of a municipality, it is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion (see: ***Drier v LaValle,*** 29 AD3d 790 [2 Dept]; ***Violet Realty, Inc v City of Buffalo Planning Board,*** 20 AD3d 901 [4 Dept 2005); ***Brucia v Planning Board of the Town of Huntington,*** 157 AD2d 657 [2 Dept 1990]). A court may not substitute its own judgment for that of the board, even if such a contrary determination is itself supported by the record (see: ***Capital Real Estate Inc v Town Board of Town of Charlton,*** 23 AD3d 858 [3 Dept 2005]). The reviewing court in a proceeding pursuant to CPLR Article 78 may not substitute its judgment for that of the local Village Board unless it clearly appears to be arbitrary, capricious, or contrary to the law (see: ***Hannafey v Board of Trustees of Village of Malverne,*** 294 AD2d 395 [2 Dept 2002]).

The justification for the resolution excluding the costly coverage of post retirement health benefits and the resolutions rescinding any costly post-retirement health benefits, namely to preserve taxpayer monies and to eliminate a burdensome fiscal obligation, is eminently reasonable and not arbitrary or capricious (see: ***Conway v Kerr,*** 51 AD2d 758 [2 Dept 1976]). The actions of the Respondent were within the power of the Village Board, were neither arbitrary nor capricious, and were consistent with good and proper judgment in the protection of the interests of the municipality.

The actions of Respondent in terminating the health benefits for Petitioners and others were legitimate functions of the Board of Trustees. Neither prior Boards nor the Civil Service Regulations can in any manner limit or impair the discretionary authority of future legislative bodies in an arrear relating to governmental or legislative functions. Respondent can validly rescind the costly post-retirement health benefits afforded to Petitioners by any prior administration, let alone those benefits afforded to the Petitioners by their own accord.

In light of the above, Respondent has demonstrated that Petitioners did not have a contract, nor a property interest in the health insurance benefits at issue, and, therefore, the Petition herein must be dismissed and Respondent's Motion to dismiss must be granted.

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the above referenced application of Petitioners [001] is hereby denied in all respects, and it is further

ORDERED, that the above referenced application of Respondent [002] is hereby granted in all respects; and it is further

ORDERED, that the Petitioner herein is hereby dismissed and this action is hereby disposed; and it is further

ORDERED, that Respondent's counsel is hereby directed to serve a copy of this Order, with Notice of Entry, on all other parties, the Calendar Clerk of this Court and the Suffolk County Clerk, within 20 days of the date of entry of this Order by the Suffolk County Clerk; and it is further.

ORDERED, that this Court hereby retains jurisdiction over this proceeding, for all purposes.

Dated: Riverhead, New York
March 12, 2010

HON. JEFFREY ARLEN SPINNER, JSC

✓ FINAL DISPOSITION	**NON-FINAL DISPOSITION**
✓ SCAN	DO NOT SCAN

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