Bransten v State of New York
2015 NY Slip Op 30422(U)
March 25, 2015
Supreme Court, New York County
Docket Number: 159160/2012
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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EILEEN BRANSTEN, Justice of the Supreme Court of the State of New York, PHYLLIS ORLIKOFF FLUG, Justice of the Supreme Court of the State of New York, MARTIN J. SCHULMAN, Justice of the Supreme Court of the State of New York, F. DANA WINSLOW, Justice of the Supreme Court of the State of New York, BETTY OWEN STINSON, Justice of the Supreme Court of the State of New York, MICHAEL J. BRENNAN, Justice of the Supreme Court of the State of New York, ARTHUR M. SCHACK, Justice of the Supreme Court of the State of New York, BARRY SALMAN, Justice of the Supreme Court of the State of New York, JOHN BARONE, Justice of the Supreme Court of the State of New York, ARTHUR G. PITTS, Justice of the Supreme Court of the State of New York, THOMAS D. RAFFAELE, Justice of the Supreme Court of the State of New York, PAUL A. VICTOR, retired Justice of the Supreme Court of the State of New York, JOSEPH GIAMBOI, retired Justice of the Supreme Court of the State of New York, THE ASSOCIATION OF JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, THE SUPREME COURT JUSTICES ASSOCIATION OF THE CITY OF NEW YORK, INC. and JOHN AND MARY DOES 1–2000, current and retired Judges and Justices of the Unified Court System of the State of New York,

Plaintiffs,

-against-

THE STATE OF NEW YORK,

Defendant.

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Index No. 159160/2012
Motion Seq. #002

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiffs, comprising the Justices of the Supreme Court of the State of New York and current and retired members of the New York State Judiciary, move for summary judgement declaring that the decision by defendant, State of New York ("defendant") to reduce the State's

contribution to the Justices' health insurance benefits pursuant to L. 2011, c. 491, § 2 and the amended Civil Service Law § 167.8 ("Section 167.8"), violates the Compensation Clause of the New York State Constitution (N.Y. Const. art. VI, §25[a] (the "Compensation Clause").

In turn, defendant cross moves for summary judgment dismissing the complaint, arguing that contrary to plaintiffs' claim, Section 167.8 is not unconstitutional as applied to the Judges and Justices (hereinafter, "judges") of the Unified Court System.

Factual Background

In an effort to address the budget crisis facing the State of New York, in 2011 the Legislature negotiated agreements with certain public-sector unions pursuant to which the State agreed to refrain from laying off thousands of State unionized employees, in exchange for a reduction in the percentage of the State's contribution toward employees' health insurance premiums.[1]

Thereafter, in August 2011, the Legislature amended Section 167.8 to allow the Civil Service Department to extend the terms of the union agreement to cover unrepresented State employees and retirees.

Consequently, on September 30, 2011, plaintiffs were notified of the State's plan to reduce its contribution to their health insurance plans, which would require them to pay more per year for their health insurance premiums. The State's contribution rate change took effect on October 1, 2011, resulting in a 6% increase in plaintiffs' contribution to the cost of their health insurance (such as co-payments, deductibles, and prescription drug costs). The premium

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[1] According to the Complaint, this provision includes retirement benefits afforded to retired Judges and Justices.

State's contributions were reduced from 90% to 80% for active employees, and from 90% to 88% for retired employees, thus requiring the employees to pay the difference with their salaries.

contribution rate for retired Justices increased by 2%, and the rate for those Justices retiring on or after January 1, 2012 increased by 6% percent.[2]

Plaintiffs then commenced this action, and sought a preliminary injunction to enjoin defendant from imposing upon plaintiffs the higher premium contribution rates, co-payments, and deductibles for health insurance.[3] Plaintiffs asserted that since "compensation" includes health benefits, the value of their compensation had been diminished by defendant's actions, in violation of the Compensation Clause, which guarantees that plaintiffs' compensation shall not be diminished during their term in office.[4]

In response, defendant moved to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (a)(7) arguing that: (1) under caselaw, laws that indirectly reduced the take home pay of judges in a non-discriminatory manner that did not single out judges did not violate the Compensation Clause; (2) the Commission of Judicial Compensation previously considered "non-salary" benefits such as health insurance in its study, and the Judicial salary increase which went into affect six months after the change in contributions cured any violation of the Compensation Clause; and (3) the express language of the Compensation Clause rendered it inapplicable to *retired* justices and judges.

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[2] At the same time, the co-payment for Judges, Justices, and unrepresented Unified Court System employees, and retirees was eliminated for certain preventative care services, and the co-payment for certain prescription drugs was reduced by 50%.

[3] Plaintiffs seek a judgment declaring that "L 2011, c. 491, § 2 and the amended Civil Service Law § 167.8 are unconstitutional as applied to the Judges and Justices of the Unified Court System because these statutes diminish the compensation of all such Judges and Justices and, by so doing, unconstitutionally and adversely impact the public and independence of the Judiciary . . . ."

[4] According to the Complaint, this provision includes retirement benefits afforded to retired Judges and Justices.

In opposition, plaintiffs argued that courts have held that health benefits comprise part of judicial compensation. Defendant's reduction of its contribution to plaintiffs' health care insurance directly increased the cost of plaintiffs' health insurance, and such legislative action has been held by courts in other jurisdictions as a direct reduction in judicial compensation. Further, Section 167.8 did not equally affect all residents of New York State or all State employees. The increased contributions were not borne by all New York State residents, but imposed upon solely New York State employees and retired employees. Defendant's reduction was discriminatory and singled out judges, in that plaintiffs did not receive the same benefits that represented State employees received. Since plaintiffs were unrepresented and ineligible for collective bargaining, they had been discriminated against within their class of State employees. The amendment imposed a new financial obligation on plaintiffs, but bore no relation to the purpose of the amendment, which was to avoid the layoffs of State employees.

This Court denied dismissal of the Complaint, essentially holding that the Complaint stated a cause of action that was not defeated by documentary evidence. The Court reasoned that although the amendment did not single out judges:

> . . . the Compensation Clause singly protects judges from overly broad laws that have the direct effect of diminishing their compensation. Here, the diminishment has a unique impact upon the judiciary . . . by virtue of the fact that it diminishes the compensation the judiciary is guaranteed to receive. . . [C]ontributions to health insurance benefits which are deducted from a judge's paycheck is directly related to the amount of salary paid to a judge. . . .(p. 13).
>
> . . .while the terms of the agreement giving rise to plaintiffs' increase in contributions were negotiated between the State and the union, *plaintiffs are unrepresented, and not eligible for collective bargaining* . . . . (p. 13)
>
> . . . defendant negotiated its reduction in contributions in order to avoid the layoffs of thousands of State employees, *none of which include judges or justices,* because Judges and Justices are not subject to "layoffs." Thus, the increased cost of health insurance borne by plaintiffs bears no relation to the purpose of the State's reduction in its contributions. . . . (p. 16)
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> (Emphasis in original)

Defendant appealed[5] and the First Department upheld this Court's decision, holding that

> it is settled law that employees' compensation includes all things of value received from their employers, including wages, bonuses, and benefits. This Court has recognized that judicial "compensation" under the Compensation Clause includes both "the pay scale and benefits" . . . and the Second Department has expressly found that health insurance benefits are a component of a judge's compensation . . . .
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> As applied to New York judges, the amended Section 167.8 subjects them to discriminatory treatment also in violation of the state Compensation Clause. In its implementation, the amended statute affects judges differently from virtually all other State employees, who either consented to the State's reduced contribution in exchange for immunity from layoffs or were otherwise compensated by the State's promise of job security. Unlike other State employees, judges were forced to make increased contributions to their health care insurance premiums, without receiving any benefits in exchange. The judiciary had no power to negotiate with the State with respect to the decrease in compensation, and received no benefit from the no-layoffs promise, because their terms of office were either statutorily or constitutionally mandated. Thus, Section 167.8 uniquely discriminates against judges because it imposes a financial burden on them for which they received no compensatory benefit.
> (P. 57).

The parties proceeded with discovery and these motions for summary judgment ensued.

In support of summary judgment on their Complaint, plaintiffs reiterate their previous arguments in defending the Complaint against dismissal, and argue that the undisputed factual record warrants a declaration that the reductions are void *ab initio,* and an injunction enjoining further enforcement as to judges and justices active and retired. Relying on the decisions of this Court and the First Department, plaintiffs point out that it has been already concluded that (1) the Compensation Clause protects against the diminution of compensation, which includes health care benefits provided to judges and justices, and any such diminution is unconstitutional *per se*; and (2) the diminution was discriminatory, as applied, even if characterized as "indirect," as it

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[5] As pointed out by the First Department, "On appeal, defendant does not argue that reducing its contribution to insurance premiums did not directly diminish judges' compensation. Instead, the State first argues that its contribution to judges' health insurance premiums are not 'compensation' within the meaning of the Compensation Clause. . . . (P. 56).

does not affect all state employees equally (Court's Decision, p. 16; Appellate Decision, pp. 59-60).

Plaintiffs point out that the State's New York State Health Insurance Plan ("NYSHIP") records, sister-court caselaw, common practice by the New York Public Employment Relations Board ("ERB"), and interpretations of Congressional authority demonstrate that health care premiums are part of plaintiffs' compensation, and any reduction thereof is a direct reduction in judicial "compensation."

Plaintiffs also contend that the amendment has a discriminatory impact on judges. The decrease in the state's contribution does not apply to all state citizens, and moreover, the diminution does not affect all state employees equally. Defendant's amendment imposes a new financial obligation upon plaintiffs, which nearly every other state employee chose to bear through the bargaining process. Plaintiffs received no benefit in exchange for their increased health care premiums. And, defendants assert no sound justification that outweighs the objectives of the Compensation Clause. As judges comprise only 1% of the active state employees, the dollar amount at issue is hardly material in remedying the state budget. And, the Commission recognized the State's ability to pay judges' salaries in determining its recommended salary increases.

In opposition, and in support of dismissal of the Complaint, defendant argues that 12,000 state employees, comprising "managerial" or "confidential" ("M/C") personnel in State agencies (*i.e.*, Assistant Attorneys Generals) and the Legislature, and certain court personnel (*i.e.*, Law Secretaries), are similarly situated to plaintiffs in two respects. These 12,000 constitute more than 6% of the State workforce. First, like plaintiffs, insurance premiums for M/Cs were increased as a result of the amendment, and second, also like plaintiffs, M/Cs are not members of

a union and lacked any power to negotiate for any benefit in exchange of the premium changes. Also, defendant points out that plaintiffs' assertion, at oral argument before the First Department, that M/Cs received a lump sum payment under Part B of § 3(3) of chapter 491 of the Laws of 2011 is untrue. Chapter 491 requires the director of the budget to deliver notice to the comptroller that such lump sum payments may be made prior to payment, and the director has declined to make the lump sum payment. And, in November 2011, the director of the budget issued a bulletin announcing that the State would withhold part of M/C employees' paychecks from December 2011 to April 2013 pursuant its deficit reduction plan and would not begin to repay the amounts withheld until April 2015. In any event, any such payment by the State could not be viewed as an "exchange" for the reduction in employer health premium contribution rates; M/Cs are excluded from collective bargaining, and like judges, had no power to negotiate. And, the Legislature did not mandate any change in employer health premium contribution rates, but instead, left such changes to the discretion of the President of the Civil Service Commission and the Director of the Division of the Budget. Further, the purported lump sum payment specified in section 3(3) of Part B of Chapter 491 of the Law of 2011 was left to the discretion of the Director of the Division of the Budget. Such discretion was exercised to reduce health premium contribution rates for all non-unionized employees, and to not make lump sum payments to M/C employees.

Under caselaw, statutes that merely increase a judge's costs do not violate the Compensation Clause unless they also discriminate against judges. The evidence demonstrates that 12,000 M/C state employees were treated identically to plaintiffs. Since the statute does not mention judges or establish criteria that apply exclusively to judges, the statute is constitutional.

And, the statute does not reduce premium contributions, but gives the Civil Service

Commission, with approval of the Director of the Division of the Budget, the discretion to do so. Since plaintiffs do not challenge the constitutionality of the regulations implementing the statute, plaintiffs' motion should be denied. In any event, the regulations do not discriminate against judges, but distinguish between employees who belong to a union that have yet to ratify a new collective bargaining agreement and all of other state employees. 98% of all state employees enrolled in NYSHIP fall in the latter category, which includes union employees who ratified the agreement and non-union employees. Therefore, there are a vast number of non-judge employees also affected by the reduction in premium contributions.

And, the statute need not apply to all New York citizens to be found constitutional.

Furthermore, the First Department's conclusion that Section 167.8 uniquely discriminates against judges because it imposes a financial burden on them for which they receive no compensatory benefit is not law of the case. The First Department incorrectly relied on the assumption that the State had not contested that reduction of its contribution to judges' insurance premiums directly diminished judges' compensation. Contrary to the First Department's statement otherwise, defendant did, in fact, argue that reducing its contribution to judges' insurance premiums did not directly diminish judges' compensation. Further, the doctrine of the law of the case does not apply where a summary judgment motion, applying a different scope of review with evidentiary material not previously part of the record, follows a motion to dismiss.[6]

In reply, plaintiffs contend that the First Department decision is controlling precedent as to the legal standard to be applied, and the purported new fact concerning the 12,000 M/Cs does not alter the legal standard articulated by the First Department. Whether the First Department

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[6] Defendant does not ask the Court to revisit the issue of whether employees' compensation includes health benefits, subject to the State's right of further appellate review.

incorrectly assumed that defendant abandoned a certain argument is not subject to this Court's review. And, as defendant concedes (for purposes of this motion), the statute directly reduced a component of judicial compensation, and thus, is *per se* unconstitutional. Irrespective of whether the M/C employees were treated the same as judges, the State's decrease in its premium contributions was not uniformly applied to all state employees, who could negotiate for or decline the state's reduction in premium contributions. Further, M/C employees were also promised additional compensation, an offer not made to judges. And, to the extent the Court finds that the statute may not constitutionally be applied to judges, any implementing regulations adopted under the statute are likewise invalid. While plaintiffs' claim encompasses any regulations adopted under the statute, if the Court deems necessary, plaintiffs seek leave to amend the complaint to include a challenge to any such regulation.

Discussion

It is well established that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 607 [1st Dept 2012] *citing Alvarez v Prospect Hosp.,* 68 NY2d 320 [1986] and *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212[b]; *Madeline D'Anthony Enterprises, Inc.*, 101 AD3d at 607). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82 [1978]; *Carroll v Radoniqi,* 105 AD3d 493 [1st Dept 2013]).

As a threshold matter, the Court notes that the law of the case doctrine does not apply so as to relieve this Court from assessing whether plaintiffs established their entitlement to judgment as a matter of law. "The law of the case doctrine declares that a court of coordinate jurisdiction should not disregard an earlier decision on the same question in the same case" (*State v Barclays Bank of New York, N.A.*, 151 AD2d 19, 546 NYS2d 479 [3d Dept 1989]). The "doctrine of law of the case is inapplicable 'where . . . a summary judgment motion follows a motion to dismiss' . . ., since the scope of review on the two motions differs; the motion to dismiss examines the sufficiency of the pleadings, whereas summary judgment examines the sufficiency of the evidence underlying the pleadings" (*Friedman v Connecticut General Life Ins. Co.*, 30 AD3d 349, 818 NYS2d 201 [1st Dept 2006], *citing Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry*, 128 AD2d 467, 469 [1987] and *Riddick v City of New York*, 4 AD3d 242, 245 [2004]; *see also*, *Moses v Savedoff*, 96 AD3d 466, 947 NYS2d 419 [1st Dept 2012]). The two motions are distinctly different.

However, to the degree the First Department resolved controverted questions of law in determining whether plaintiffs' complaint stated a claim, this Court cannot undermine such determination of law (*see Bolm v Triumph Corp.*, 71 AD2d 429, 422 NYS2d 969 [4th Dept 1979] *citing* 10 Carmody-Wait 2d, NY Prac, §70:453; Siegel, New York Practice, § 448) ("decisions of the Appellate Division made in a case, whether correct or incorrect, are the law of the case until modified or reversed by a higher court")). This court cannot disregard the Appellate Division's pronouncement of the law concerning the Compensation Clause (Article VI, §25) and its reach (*see Gutman v A to Z Holding Corp.*, 38 Misc 3d 1211(A), 966 NYS2d 346 (Table) [Supreme Court, Kings County 2012] *citing Schmitt v City of New York*, 50 AD3d 1010, 1010 [2d Dept 2008] ("This court is prohibited from issuing an order which has the effect of "undermining" an

order of the Appellate Division")).[7]

Thus, to the degree the parties submit additional evidence on this motion, the Court addresses whether such evidence demonstrates that Section 167.8 violates the Compensation Clause as a matter of law, whether an issue of fact exists so as defeat summary judgment, and, as defendant claims, whether the complaint should be dismissed because Section 167.8 does not violate the Compensation Clause.

Applying the summary judgment standard, plaintiffs established their entitlement to judgment as a matter of law.

It is uncontested that Article VI, §25, the Compensation Clause, addresses the compensation of the plaintiffs and certain other judicial classifications, whose salaries are specified in Judiciary Law article 7-B (§ 220 *et seq.*). Particularly, Article VI, §25 [a] thereof provides that

> "The compensation of a judge . . . or of a retired judge or justice shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed. . . ."

As this Court and the First Department previously indicated, "compensation" in the context of one's employment includes wages *and benefits*, including health insurance benefits (*see, Roe v Bd. of Trustees of Village of Bellport*, 65 AD3d 1211, 886 NYS2d 707 [2d Dept 2009] (including as "compensation," "wages *and benefits*" in the context of the protection afforded by the New York State Constitution's separation of powers clause prohibiting a legislative body from reducing the compensation of a judge or justice serving in a constitutional

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[7] It is noted that as to defendant's claim that the First Department incorrectly assumed that defendant had not contested that reduction of its contribution to judges' insurance premiums directly diminished judges' compensation, the First Department subsequently noted that it could, nonetheless, address issues of law, and later found, on the merits after discussion of various caselaw, that the reduction of defendant's contribution "diminishes compensation."

court, and remitting the matter for a declaration that a Village resolution "terminating the plaintiff's paid health care benefits is null and void as to the plaintiff during his current term in [judicial] office"); *see also, Syracuse Teachers Ass'n v Board of Ed.*, Syracuse City School Dist., Syracuse, 42 AD2d 73, 75, 345 NYS2d 239 [4th Dept 1973], *affd.* 35 NY2d 743, 361 NYS2d 912, 320 NE2d 646 [1974] ["compensation may take the form both of cash wages and 'fringe benefits'"]; *Aeneas McDonald Police Benev Ass'n, Inc. v City of Geneva*, 92 NY2d 326, 703 NE2d 745 [1998] (stating, in the context of mandatory arbitration, that "[h]ealth benefits for current employees can be a form of compensation . . . " and that "health benefits are a form of compensation and a term of employment"); *Walek v Walek*, 193 Misc2d 241, 749 NYS2d 383 [Supreme Court, Erie County 2002] (finding, in the context of determining assets subject to equitable distribution, that the health care benefits component of defendant's retirement plan "represent compensation for past employment services rendered by defendant"); *Kahmann v Reno,* 928 F Supp 1209 [NDNY 1996] (considering, in the context of gross backpay, "wages, bonuses, vacation pay, *and all other elements of reimbursement and fringe benefits such as pension and health insurance,*" as "forms of compensation"); *District of Columbia v Greater Washington Bd. of Trade*, 506 US 125, 113 SCt 580 [Dist. Col. 1992] (noting, in the context of workers' compensation benefits, the corresponding reduction in one's weekly wage as a result of the health insurance benefits one receives)).

As this Court stated previously, the case, *DePascale v State of New Jersey* (211 NJ 40, 47 A3d 690 [2012]), also supports this conclusion. In *DePascale,* the plaintiff, also a judge, challenged on constitutional grounds the State of New Jersey's enactment of the Pension and Health Care Benefits Act ("Chapter 78"), that required all state employees, including judges, to contribute more towards their state-administered health benefits program. The constitutional

provision at issue, similar to the one herein, provided, in Article VI, Section 6, Paragraph 6 of the New Jersey Constitution, that justices and judges "shall receive for their services such salaries as may be provided by law, which shall not be diminished during the term of their appointment" (the "No–Diminution Clause"). Notably, notwithstanding the phrase "salaries" found in New Jersey's No–Diminution Clause, the New Jersey Supreme Court held that Chapter 78 violated the New Jersey Constitution by diminishing the salaries of justices and judges during the terms of their appointments. After pointing out that "[n]o court of last resort—including the United States Supreme Court—has upheld the constitutionality of legislation of this kind," the Court explained that even though Chapter 78 did not discriminate between justices and judges and other public employees, "*the State Constitution did*" (*id.* at 43). "However artfully the State describes the effect of Chapter 78—as either a direct or indirect diminution in salary—it remains, regardless of the wordplay, an unconstitutional diminution." (*id.* at 44).

Defendant failed to raise an issue of fact as on this issue, or establish that Section 167.8 does not violate the Compensation Clause as applied to judges. The undisputed facts demonstrate that the defendant's reduction in its contribution results in an increase of judges' contribution to their health insurance benefits, which directly diminishes their compensation. As such plaintiffs' motion for summary judgment is granted and defendant's motion for summary judgment dismissing the complaint is denied.

Furthermore plaintiffs established their entitlement to summary judgment as a matter of law on the issue of whether the statute is unconstitutional as applied to judges.

The amendment on its face does not single out judges. However, the Compensation Clause singly protects judges from overly broad laws that have the direct *effect* of diminishing their compensation. Here, the diminishment has a unique impact upon the judiciary, given that it

diminishes the compensation the judiciary is guaranteed to receive. Moreover, the evidence now indicates that judges comprise the only category of state employees that have not received any benefit from a negotiated union agreement (or, as in the case of M/Cs, received any promise of potential lump sum payments). Defendant asserts that the director of the budget determined to withhold part of M/C employees' paychecks pursuant its deficit reduction plan and that the repayment of such amounts would not begin until April 2015, and that such M/Cs, like judges, were not part of a bargaining unit. However, unlike judges, such M/Cs were promised a lump sum payment due to the downward change in the state's contribution. While defendant disputes that M/Cs received such a lump-sum, it is uncontested that M/Cs were made a promise that was not likewise made to judges. Notably, Chief Budget Examiner of the New York State Division of the Budget, Robert Brondi, attests that Part B, §3(3) of Chapter 491 of the laws of 2011 (which applies to M/C employees, authorized two lump sum payments (Affidavit, ¶3). Even though the law allows the director of the budget to withhold such payments under certain circumstances, the potential benefit, which is unavailable to judges, exists nonetheless. Thus, the evidence further demonstrates that the statute has the *effect* of diminishing the judges' compensation.

This conclusion is not contradicted by the United States Supreme Court decision in *U.S. v Hatter* (532 US 577, 121 S.Ct. 1782 [2001]).

As this Court noted before, in *Hatter*, the Court addressed whether two federal legislative rules violated the federal Compensation Clause: the Medicare tax and special retroactivity-related Social Security rules (the "Social Security tax").

The Medicare tax, *initially* required American workers (whom Social Security covered), *except for federal employees*, to pay an additional tax as "hospital insurance." Congress,

believing that federal workers should bear their equitable share of the costs of the benefits they also received, then amended the Medicare tax to extend to all currently employed federal employees and newly hired federal employees, and as such, required all federal judges to contribute a percentage of their salaries to Medicare. The Social Security law, on the other hand, was amended such that 96% of the then-currently employed federal employees were given the option to choose not to participate in Social Security, thereby avoiding any increased financial obligation. However, the remaining 4% were required to participate in Social Security while freeing them of any added financial obligation provided they previously participated in other contributory retirement programs. Thus, of those who could not previously participate in other contributory retirement programs, *i.e.*, federal judges, their financial obligations and payroll deductions were increased.

After holding that the federal Compensation Clause did not "forbid Congress to enact a law imposing a nondiscriminatory tax (including an increase in rates or a change in conditions) upon judges, whether those judges were appointed before or after the tax law in question was enacted or took effect," the Medicare tax was held to be constitutional" (*id.* at 571-572).

However, four aspects of the Social Security tax caused the Supreme Court to find that it discriminated against federal judges "in a manner that the Clause forbids" (*id.* at 572). Based on the class of federal employees to which the Social Security tax applied, the fact that it imposed a new financial obligation upon sitting judges but did not impose a new financial obligation upon any other group of federal employees, that the tax imposed a substantial cost on federal judges with little or no expectation of substantial benefit, and the unsound nature of the government's justification, the Social Security law violated the Compensation Clause.

The State's withdrawal of its contributions which comprise compensation, which is

essentially what Section 167.8 as applied to judges accomplishes, stands upon different footing than a nondiscriminatory, generally applied tax imposed *against* the compensation of *all citizens* by the government in its status as a sovereign *(see Robinson v Sullivan*, 905 F 2d 1199 [8th Cir 1990] ("the duty to pay taxes, shared by all citizens, does not diminish judges' compensation *within the meaning of the Compensation Clause*. Likewise, social security retirement insurance benefits are earned and paid as part of a general social welfare plan and not specifically as judicial compensation") (emphasis added).

While the terms of the agreement giving rise to plaintiffs' increase in contributions were negotiated between the State and the union, *plaintiffs are unrepresented, and not eligible for collective bargaining*, and were, like the judges affected by the Social Security tax in *Hatter, left without a choice and required to contribute*. That the Legislature did not single out judges for special treatment in order to influence them is thus irrelevant (*see Hatter*, 532 US at 577).

Further, although the increased contributions required by Section 167.8 applies to judges and other state employees, like M/Cs, who are not members of unions, again, the record indicates that such M/Cs obtained a potential benefit of a lump sum payment. Such benefit does not exist for judges.

These undisputed facts warrant summary judgment in plaintiffs' favor, and dismissal of the complaint is denied on this ground as well.

Finally, defendant's claim that plaintiffs did not specifically challenge the regulations implementing Section 167.8 does not warrant a different result, or require that plaintiffs amend their complaint. The Court's finding that Section 167.8 is unconstitutional as applied to judges, necessarily embodies the regulations adopted thereunder (*see e.g., Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 121 AD3d 21, 988 NYS2d 5 [1st Dept 2014] (an

administrative agency "may not act or promulgate rules in contravention of its enabling statute or charter")).

Conclusion

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for summary judgment on its complaint is granted to the extent that it is hereby

ORDERED, ADJUDGED and DECLARED that L. 2011, c. 491, § 2 and the amended Civil Service Law § 167.8, including the regulations adopted thereunder, are unconstitutional as applied to the Judges and Justices of the Unified Court System because these statutes diminish compensation of all such Judges and Justices;[8] and it is further

ORDERED that defendant's cross motion for summary judgment dismissing the plaintiffs' Complaint is denied; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all plaintiffs within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 25, 2015

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

[8] The remaining portion of plaintiffs' request for relief which seeks to include a finding that these statutes "unconstitutionally and adversely impact the public and the independence of the Judiciary as established in Article VI, Section 25(a) of the New York Constitution," has not been addressed by this Court.