Matter of Ly v New York City Empls. Retirement Sys.
2018 NY Slip Op 31164(U)
June 8, 2018
Supreme Court, Kings County
Docket Number: 520388/2017
Judge: Debra Silber
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9
______________________________________x

In the Matter of the Application of
MICHAEL LY and JOE LOPEZ, JR.,

Petitioners,

For a Judgment Pursuant to Article 78 of the New York Civil Practice Law and Rules

-against-

NEW YORK CITY EMPLOYEES RETIREMENT SYSTEM,

Respondent.
______________________________________x

DECISION / ORDER and JUDGMENT

Index No. 520388/2017
Motion Seq. No. 1
Date Submitted: 5/3/18
Cal No. 34

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Article 78 petition.

Papers	NYSCEF Doc No.
Notice of Petition, Verified Petition, Affirmation and Exhibits Annexed	1-10
Verified Answer and Exhibits Annexed, Memorandum	15-23
Reply Memorandum	25

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is an article 78 proceeding in which petitioners Michael Ly and Joe Lopez, Jr. challenge their reclassification in the retirement system from Tier 3 CF-20 to modified Tier 3 CF-22 (also know as Tier 6) by respondent New York City Employees Retirement System (NYCERS). Petitioners Michael Ly and Joe Lopez were appointed as Corrections Officers by the New York City Department of Corrections after April 1, 2012, when the modified Tier 3 CF-22 took effect. However, they were both placed in

the Tier 3 CF-20 retirement plan on their appointment dates, based upon their prior participation in NYCERS as civilian employees of the New York City Police Department.[1] Respondent recently notified petitioners, in June and September 2017, respectively, that an error had been made and they were not eligible to be placed in CF-20 (Tier 3) and they were moved to CF-22 (revised Tier 3, effectively Tier 6), retroactive to their date of membership in NYCERS. This, they claim, resulted in a negative change in their pension plan benefits.[2] The petitioners seeks to annul, vacate and set aside respondent's decision to change petitioners' pension plan to CF-22, and to obtain an order directing respondent to reinstate petitioners in the Tier 3 CF-20 pension plan, retroactively.

Petitioners contend that the change of pension plans was arbitrary and capricious, based upon an erroneous interpretation of the amendments to the New York Retirement and Social Security Law (RSSL) and constituted an unconstitutional impairment of petitioners' pension rights. Respondent counters that the change merely corrected an error, and was based upon a clear statutory mandate and that it was not arbitrary or capricious.

In reviewing an administrative determination in an article 78 proceeding, "[t]he

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[1]Ly was a civilian employed by the NYPD starting on September 5, 2010, and was a participant in NYCERS Tier 4. He was appointed to his position as a Corrections Officer in September 2012. Lopez was a civilian employed by the NYPD starting on August 12, 2010 and was also a participant in NYCERS Tier 4. He was appointed to his position as a Corrections Officer on September 26, 2013. Corrections Officers are explicitly excluded from benefits under RSSL article 15/Tier 4 (RSSL 600[a][2][a]). Thus, they could not remain in Tier 4 upon their appointment as correction officers.

[2]CF-20 permits retirement after 20 years at 50% salary, while CF-22 permits retirement after 22 years with 50% of salary, minus 50% of primary social security benefits commencing at age 62. Other claimed negative changes include a longer period of required employee contributions, extra charges for enhanced disability benefits and an inability to take loans against the balance.

courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious'" (*Pell v Bd. of Ed. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty.*, 34 NY2d 222, 231 [1974]). "Deference is generally accorded to an administrative agency's interpretation of statutes it enforces when the interpretation involves some type of specialized knowledge" (*Belmonte v Snashall*, 2 NY3d 560, 565 [2004]). "NYCERS is the expert agency vested by the legislature with the authority to manage the City's complex public employee retirement plans (*see Matter of New York State Superfund Coalition, Inc. v New York State Dept. of Envtl. Conservation*, 18 NY3d 289, 296, 961 NE2d 657, 938 NYS2d 266 [2011]. Courts regularly defer to the governmental agency charged with the responsibility for administration of (a) statute in those cases where interpretation or application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom" (*Matter of Kaslow v City of NY*, 23 NY3d 78, 88 [2014] internal quotation marks and citations omitted).

Specifically, New York RSSL § 501 [Definitions] (25) provides:

> New York city uniformed correction/sanitation *revised plan member* shall mean a member who *becomes subject to the provisions of this article [14]* on or after April first, two thousand twelve, and who is a member of either the uniformed force of the New York City department of correction or the uniformed force of the New York city department of sanitation. (emphasis added)

Notably, RSSL § 501(25) refers to members who become subject to *this article [14]* and not to the RSSL more generally. Further, RSSL § 504-a [20-year retirement program] at (b)(4-a) provides that:

> Notwithstanding any other provision of this subdivision or any other provision of law to the contrary, *no* member of the uniformed force of the New York city department of correction who is a New York city uniformed correction/sanitation

revised plan member shall be a participant in the twenty-year retirement program.

The court finds that petitioners are, by definition, New York City uniformed correction/sanitation *revised plan members,* because the date they first became correction officers and thus subject to article 14 was after April 1, 2012. Regardless of their previous participation in NYCERS Tier 4 (under RSSL Article 15), they were not appointed as corrections officers before April 1, 2012, thus they became subject to article 14 upon their appointments. Furthermore, pursuant to RSSL § 504-a (b)(4-a), as *revised plan members*, petitioners are expressly ineligible for the 20-year plan. Thus, it was an error to have initially put petitioners in the 20-year plan rather than the 22-year plan provided for in RSSL §§ 501 (17) [Definition of "normal retirement age"] and 505. It seems that, since their appointment was shortly after the statute was amended, the NYCERS computer program had not been updated in time to put petitioners into CF-22 when they commenced working as correction officers. The statute was passed on March 16, 2012 and became effective less than two weeks later. (2012 NY Laws Chapter 18). However, the law does not support the maintenance of erroneous pension benefits. For example, in Matter of *Kaslow v City of NY*, 23 NY3d 78 (2014), the petitioner challenged his being moved to Tier 3 CO-20 after he was appointed as a correction officer. The court found that, as the plan was mandated for correction officers appointed after December 19, 1990, petitioner had to be moved into that plan and he was not entitled to count his prior work years toward his twenty years as a correction officer, although his pension benefits would be calculated using those years of service.

While petitioner cites certain phrases in the legislative history that suggest that the legislation might be applicable solely to individuals first becoming members of

NYCERS (not merely new to article 14), that is not how the creation of new pension plans by the legislature have been interpreted for new hires to a job (See Matter of *Kaslow v City of NY*, 23 NY3d 78 [2014]). In any event, the clear mandate of the statute cannot be altered by any inconsistencies in the legislative history (*see Trump-Equitable Fifth Ave. Co. v Gliedman*, 57 NY2d 588, 596–97 [1982] ["even if the legislative history of the statute were as respondent contends our conclusion would in no way be affected since the proposed construction contravenes the mandate and the express language of the statute itself. This court should not ignore the words of a statute, clear on its face, to reach a contrary result through judicial interpretation"]).

Finally, petitioners cannot claim a constitutionally protected interest in pension benefits to which they were never entitled in the first place, simply because they were initially placed in such a plan in error (*see Matter of Galanthay v New York State Teachers' Retirement Sys.*, 50 NY2d 984, 986[1980] ["The doctrine of estoppel will not reach so far as to hold an individual eligible for vested retirement [benefits] where by statute, he clearly does not qualify for such eligibility"] *quoting Matter of Boudreau v Levitt*, 67 AD2d 1053, 1054 [3d Dept 1979], *lv. to app. den.* 47 NY2d 706 [1979]).

Accordingly, it is

ORDERED AND ADJUDGED that the petition is dismissed.

This constitutes the decision, order and judgment of the court.

Dated: June 8, 2018

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court