SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE LOVE** **PART** **63M**

Justice

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STEVEN BREITMAN,

Petitioner,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY EMPLOYEES' RETIREMENT SYSTEM

Respondent.

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INDEX NO. 154937/2021

MOTION DATE 11/01/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, and after oral argument, the Petition is decided as follows:

Petitioner, Steven Breitman ("Petitioner" or "Breitman"), filed the instant Article 78 Petition on May 20, 2021, (1) seeking a declaration that Respondent, The New York City Employees Retirement System's ("Respondent" or "NYCERS") decision to apply a social security offset to Breitman's pension benefits violates RSSL 511(f) and the New York State Constitution, Article V, Section 7; (2) enjoining NYCERS from applying a social security offset to Petitioner's pension benefits and (3) ordering NYCERS to recalculate Petitioner's pension benefits without applying a social security offset.

Breitman became a Tier 3 general member of NYCERS on February 26, 1987, when DOC hired him as a correction officer. As Breitman approached age 62, he began preparing to retire under the normal service retirement provisions of RSSL 504(a). NYCERS provided Breitman a retirement estimate letter dated February 20, 2020, advising Breitman that his retirement allowances shall be reduced by fifty percent of the primary social security at age sixty-two.

Breitman objected to NYCERS' decision to subject his retirement benefit to a social security offset. In response, NYCERS sent Breitman a letter dated March 9, 2020, stating:

> Last year, the New York City Office of the Actuary and the New York City Law Department interpreted RSSL 504(a) to require all correction officers who retire for service under the general Tier 3 provisions to be "reduced by fifty percent of the primary Social Security benefit" as provided in RSSL 511. This determination and interpretation of RSSL 504(a) was a prospective change and is applicable to all Correction Force members who are retiring as general Tier 3 members and filing applications after July 2, 2019. Because your service retirement application will be filed after July 2, 2019, if you retire as a general tier 3 member, you are subject to this offset."

In accordance with DOC's terminal leave policy, DOC placed Breitman on terminal leave on May 4, 2020, in advance of his anticipated May 4, 2021 retirement date under RSSL 504(a). On or about April 6, 2021, Breitman submitted his application to NYCERS to be retired under RSSL 504(a). On May 4, 2021, Breitman's retirement under RSSL 504(a) took effect. Breitman's pension under RSSL 504(a) without a social security offset, is approximately $76,303 per year. With a social security offset it is estimated to be $62,404 per year, a difference of approximately $13,899 per year.

When challenging an administrative agency's application of an unambiguous statute, Article 78 of the CPLR grants a litigant limited right to challenge such application. The aggrieved party may only challenge the governmental conduct as specifically set forth in CPLR § 7803 (*Matter of Featherstone v. Franco*, 95 N.Y.2d 550, 554 [2000]). Unless the agency failed to perform a duty enjoined upon it by law CPLR § 7803(1), acted in excess of its jurisdiction, CPLR § 7803(2), in violation of lawful procedure, arbitrarily, or in abuse of its discretion, CPLR § 7803(3), the Court has no alternative but to confirm the agency's decision. (*Featherstone*, 95 N.Y.2d at 554; *Matter of Pell v. Bd. of Educ*, 34 N.Y.2d 222, 231 [1974]). The Court must uphold

an administrative agency's interpretation of the statutes and regulations it administers if that interpretation is reasonable and does not run contrary to the clear wording of a statutory provision. See, e.g., *Adirondack Wild Friends of the Forest Preserve v. N.Y. State Adirondack Park Agency*, 34 N.Y.3d 184, 194 (2019) "It is well-settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld." (*N.Y. State Ass'n of Life Underwriters v. N.Y. State Banking Dep't,* 83 N.Y.2d 353, 359–360 [1994]). Courts consistently hold that New York City pension funds have a statutory obligation to follow the law as written, so as to preserve the integrity of the public retirement system See *Matter of Creveling v. Teachers' Ret. Bd*., 255 N.Y. 364, 373 (1931). NYCERS' interpretation and application of the New York Retirement and Social Security Law is entitled to extreme deference. See, *Matter of Kaslow v. City of N.Y*., 23 N.Y.3d 78, 88 (2014) ("NYCERS is the expert agency vested by the legislature with the authority to manage the City's complex public employee retirement plans").

Pursuant to Retirement and Social Security Law ("RSSL") § 504(a), "The service retirement benefit for general members at normal retirement age with twenty or more years of credited service shall be a pension equal to one-fiftieth of final average salary times years of credited service, not in excess of thirty years, less fifty percent of the primary social security retirement benefit as provided in section five hundred eleven of this article."

Pursuant to RSSL § 511(a), "A member's service retirement or disability benefit shall be reduced by fifty percent of the primary social security retirement or disability benefit, as the case may be, commencing at (i) age sixty-two, with respect to service retirement benefits which commence at or before such age, or disability benefits paid to a disability retiree who is not eligible for or receiving primary social security disability benefits, or (ii) on the date on which such

member first becomes eligible to receive primary social security disability benefits, with respect to disability benefits paid to a disability retiree who is eligible for primary social security disability benefits, or (iii) on the date such member separates from service, if later than age sixty-two."

However, pursuant to RSSL § 511(f), "This section shall not apply to general members in the uniformed correction force of the New York city department of correction or to uniformed personnel in institutions under the jurisdiction of the department of corrections and community supervision and security hospital treatment assistants, as those terms are defined in subdivision i of section eighty-nine of this chapter…"

As such, the clear language of RSSL § 511(f) exempts all New York City department of correction officers from the social security offset provisions generally applicable to RSSL §§ 504 and 511. The Court notes that although irrelevant as to whether NYCERS's interpretation of the RSSL is legally sufficient, NYCERS previous interpretation of RSSL § 511(f), over the course of thirty years, would not have subjected Petitioner to a social security offset. While municipal agencies are entitled to correct errors or change their interpretation of statutes, NYCERS has failed to do so here.

Respondents contend that they reasonably interpreted RSSL § 504 and § 511 when they applied a Social Security offset to Petitioner's proposed retirement benefit under RSSL § 504(a), arguing that "because the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself." *Matter of Marian T. (Lauren R.)*, 36 N.Y.3d 44, 49 (2020) (quoting Majewski v. *Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583 [1998]). "When the statutory language at issue is but one component in a larger statutory scheme, it must be analyzed in context and in a manner that harmonizes the related

provisions and renders them compatible." Id. (quoting *Matter of Mestecky v. City of N.Y.*, 30 N.Y.3d 243, 243 [2017]).

Respondents cite the legislative history of the relevant statutory provisions in support of their argument. In 1981, the New York State Legislature ("Legislature") created a 25-year early service retirement benefit for members for members of the New York State Correction force which included a Social Security offset, See Chapter 1017, L. 1981. In 1982, the Legislature enacted legislation making members of the New York City Correction force eligible for that 25-year early service retirement benefit, and the Legislature maintained the Social Security offset, See Ch. 726, L. 1982. In 1987, RSSL § 511 was amended by adding a new subdivision f, which states: "This section shall not apply to uniformed personnel in institutions under the jurisdiction of the department of correctional services, as defined by subdivision i of section eighty-nine of this chapter." In 1989, RSSL § 511(f) was amended again to include members of the New York City Correction force: "This section shall not apply to general members in the uniformed force of the New York City department of correction or to uniformed personnel in institutions under the jurisdiction of the department of correctional services, as defined in subdivision i of section eighty-nine of this chapter." Ch. 174, L. 1989, Chapter 845 and Chapter 174 also eliminated the Social Security offset from the 25-year early service retirement provision for State and City Tier 3 correction officers.

Respondents specifically argue that despite adding the above language to RSSL § 511, "the Legislature preserved the language in RSSL § 504(a) which unequivocally maintained the Social Security offset for general members at normal retirement age. These enactments did not eliminate the Social Security offset from the Tier 3 general member service retirement provisions – i.e., RSSL § 504(a)." Respondents further argue that "If the Legislature had intended to make the Social

Security offset provision in RSSL § 504(a) inapplicable to general members retiring at normal retirement age, it could have easily done so by amending the text of § 504(a) directly to remove the language requiring a Social Security offset."

Contrary to Respondents argument, there is no support in the relevant statutes for Respondents interpretation and its entire argument is arbitrary and capricious. Had the Legislature amended the text of § 504(a) to remove the language requiring a Social Security offset, it would have eliminated the Social Security offset for all general members of Tier three. Respondents are attempting to create an ambiguity in the statutes where none exists. The amendments to RSSL § 504(d) eliminated the Social Security offset as it relates to the 25-year early service retirement benefit and the amendments to RSSL § 511(f) eliminated same from all general members in the uniformed correction force of the New York city department of correction or to uniformed personnel in institutions under the jurisdiction of the department of corrections and community supervision and security hospital treatment assistants. Any arguments to the contrary conflict with the statutory text. As such, it is hereby

ORDERED and DECLARED that The New York City Employees Retirement System's application of a social security offset to Petitioner's pension benefits violates RSSL 511(f); and it is further

ORDERED that The New York City Employees Retirement System is enjoined from applying a social security offset to Petitioner's pension benefits; and it is further

ORDERED that The New York City Employees Retirement System shall recalculate Petitioner's pension benefits without applying a social security offset.

12/9/2021
DATE

LAURENCE LOVE, J.S.C.