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IN THE
SUPREME COURT OF ILLINOIS

LORI G. LEVIN on behalf of herself and others similarly situated, Plaintiff-Appellee, v. RETIREMENT BOARD OF THE COUNTY EMPLOYEES' AND OFFICERS' ANNUITY AND BENEFIT FUND OF COOK COUNTY, Defendant-Appellant.	Appeal from the Appellate Court of Illinois, First Judicial District No. 18-1167 There heard on appeal from the Circuit Court of Cook County, Illinois County Department, Chancery Division Circuit Court No. 2016-CH-06885 Hon. Kathleen M. Pantle

BRIEF OF APPELLEE LORI G. LEVIN

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

INTRODUCTION

The Appellate Court's ruling below correctly applied the plain language of the applicable Pension Code statute entitling "any annuitant of the Fund who chooses to participate" in any of the County's healthcare plans to do so, 40 ILCS 5/9-239(b), and should not be disturbed.

ARGUMENT

I. The Appellate Court Correctly Held the Board's "Last Employer" Rule Invalid

A. The "Last Employer" Limitation Conflicts with Section 9-239

Section 9-239 of the Illinois Pension Code defines "Annuitants," permits the Fund to create a healthcare plan, and permits any annuitant to participate:

> [T]the Fund may pay, on behalf of each of the Fund's annuitants who chooses to participate in any of the county's health care plans, all or any portion of the total health care premium (including coverage for other family members) due from each such annuitant.

40 ILCS 5/9-239.

It is undisputed that (i) Ms. Levin is an annuitant who chooses to participate in the Fund's retiree health plan; (ii) nothing in the statute limits healthcare participation to annuitants whose last employment was with the county; and (iii) the Fund has elected to pay a portion of annuitants' healthcare premium as authorized by statute. However, the Fund is not providing the subsidy to "each of the Fund's annuitants who choose to participate" because Ms. Levin is an annuitant who chooses to participate and has been denied the right to participate. Thus, she has been denied a benefit conferred by Section 9-239 of the Pension Code. The language of that section is susceptible only to an interpretation that the Board may sponsor a healthcare subsidy, and that each annuitant who chooses can participate. Section 9-239's language does not support the Board's new

assertion that it has somehow been granted a "purely discretionary basis," (Br. 13) for determining which annuitants to subsidize.

B. The "Last Employer" Rule Exceeds the Board's Authority and Would Not Bind Ms. Levin Anyway

The Board's last-employer requirement does not fall within the scope of the Board's enabling statute, and it conflicts on its face with the statute. The requirement exceeds the Board's scope of authority because the Pension Code does not grant the Board power to determine eligibility – let alone exclude from coverage annuitants expressly made eligible under the statute. And the requirement conflicts with the Pension Code because the statute states that "each" annuitant is eligible to participate, and the Board's rule means that some annuitants such as Ms. Levin may not participate.

"An administrative agency possesses no inherent or common law powers, and any authority that the agency claims must find its source within the provisions of the statute by which the agency was created." *Ill. Dep't of Revenue v. Ill. Civil Serv. Comm'n*, 357 Ill. App. 3d 352, 363 (1st Dist. 2005). If an agency promulgates rules that are beyond the scope of the legislative grant of authority or that conflict with the statute, the rules are invalid. *R.L. Polk & Co. v. Ryan*, 296 Ill. App. 3d 132, 141 (4th Dist. 1998). "Similarly, to the extent that any administrative rule is in conflict with the statutory language under which the rule is adopted, it too is invalid." *Aurora East Public School Dist. v. Cronin*, 92 Ill. App. 3d 1010, 1014 (2d Dist. 1981).

Here, the last-employer requirement impermissibly expands the scope of the authority granted to the Board. In Article 9 of the Pension Code, the legislature created the eligibility requirements for participating in the Fund's retiree health plan. Clearly there is no requirement in the statute that annuitants must have last worked for the county

to be eligible to participate. Rather, the plain language of the statute states only that "each" annuitant who choose to participate is eligible. It does not say that "some" annuitants are eligible. The Board's 2009 handbook adoption of the last-employer requirement ignores this legislative framework and seeks to impose an eligibility requirement that simply does not exist in the Pension Code. But the Pension Code does not delegate to the Board the power to add additional eligibility requirements; the Code sets the eligibility requirements for annuitants itself. *See, e.g.*, 40 ILCS 5/9-219 (titled "Computation of Service"). That is, not only does the statute not allow the Board to exclude annuitants from participation – it does not even allow the Board to determine eligibility in the first place.

Additionally, the Board's last-employer requirement directly conflicts with the Pension Code. The legislature has defined "Annuitants," and has stated that annuitants who choose to participate in the Fund's health plan are eligible to participate. Under the plain language of the statute, Ms. Levin – undisputedly an annuitant who chooses to participate – is eligible to participate. But under the new requirement imposed by the Board, she is not eligible to participate. An administrative agency may not "abrogate the[] statutory protections" bestowed by the legislature. *Popejoy v. Zagel*, 115 Ill.App.3d 9, 12 (4th Dist. 1983). Here, the rights set forth by the legislature allow annuitants who choose to participate in the Fund's health plan to do so. By adding its own, additional eligibility requirement, the Board unlawfully abrogated that right.

Finally, the Board does not dispute that the only evidence of its purported last-employer restriction is its June 4, 2009 adoption of the handbook containing the limitation. Nor does it explain how this purported restriction could be constitutionally

applied to diminish the rights of any annuitant who joined the pension system prior to June 4, 2009. Indeed, the Board does not bother addressing the long line of cases holding that benefits cannot be diminished retroactively. *See Heaton v. Quinn*, 2015 IL 118585 at ¶ 46; *Matthews*, 2016 IL 117638 at ¶ 59; *Underwood v. City of Chicago*, 2017 IL App (1st) 162356, ¶ 25. The reason is simple: a provision added to a "handbook" in 2009 cannot diminish the constitutionally protected rights of annuitants at all – and certainly not for an annuitant who joined the pension system in 1981 and retired from the County in 2003.

C. Appellee's Right to Participate in the Health Plan is Protected by the Illinois Constitution

As an annuitant, Ms. Levin is entitled by statute to participate in the healthcare plan. Nothing in the statute limits healthcare participation to annuitants whose last employment was with the county. Moreover, annuitants' statutory rights to participate are protected by the 1970 Illinois Constitution's so-called "Pension Protection Clause," against being diminished or impaired:

> Membership in any pension or retirement system of the State, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.

Ill. Const. Art. XIII, Sec. 5. Annuitants thus have a protected statutory right to participate in the Fund's retiree health plan, which the Board has no power to further restrict. By refusing to allow Ms. Levin to participate in the healthcare plan, the Board is unconstitutionally diminishing and impairing her statutory rights which flow from her membership in the Fund.

Even if the "last employer" limitation had been validly adopted, it cannot be applied against those annuitants hired before its adoption. There is no uncertainty in the law that benefits are protected from one's hire date. *See, e.g., Buddell v. Board of Trustees*, 118 Ill. 2d 99, 104-05 (1987) ("There can be no doubt, however, that upon the effective date of article XIII, section 5, of our 1970 Constitution, the rights conferred upon the plaintiff by the Pension Code became contractual in nature and cannot be altered, modified or released except in accordance with usual contract principles.").

Thus, for any annuitant whose participation (dating from their first hire date) preceded the June 4, 2009, adoption of the Handbook containing the purported "last employer" restriction, it simply cannot be validly applied against any annuitant whose county employment began prior to June 4, 2009. Since the Board's sole basis for denying Ms. Levin insurance is a provision added to the Handbook in 2009 – some six years *after* Ms. Levin left county service – that modification is contractually unenforceable; Ms. Levin's rights were established when she joined the pension system, and as set forth by statute in 1991. There is no dispute that Ms. Levin is a member of the county pension system; indeed, she is a fully vested "Annuitant" under the Illinois Pension Code, 40 ILCS 5/9-239, and she was an annuitant before the limitation was inserted into the Handbook by the Board. As such her entitlement to the benefits vested as they were, prior to the Board's purported amendment.

II. The Board's New Arguments are Without Merit

A. There is no Conflict with *Underwood*

The Appellate Court held that the Pension Code clearly spells out the statutory conditions for eligibility and that Ms. Levin met those conditions:

> It is clear from the plain language of subsection (b) that the statute has only two requirements for participation: (1) an individual must be an 'annuitant' and (2) an individual must 'choose[] to participate.' The Fund does not dispute that Levin qualifies as an annuitant within the meaning of subsection (a). Moreover, in her letter dated September 22, 2016, she elected to participate.

Levin at ¶ 20. Contrary to the Board's criticism of the Appellate Court's "reliance on the pension protection clause," Br. at 7, the Appellate Court did not ascribe any right of Ms. Levin's to the constitution: "We base our determination on the plain language of section 9-239 as well as the Illinois Constitution, which provides that 'membership in any pension or retirement system of the State *** shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired.'" *Levin* at ¶ 20.

Nor does the Opinion below conflict with *Underwood v. City of Chicago*, which states that "recipients get what the statute or contract that grants the right expressly says they get." 2017 IL App (1st) 162356, ¶ 39. In this case, the statute plainly states that eligible annuitants are granted the right to participate, and that right is protected by the constitution. In an ill-fated attempt to fit this case within a narrow aspect of the *Underwood* decision, the Board claims that Ms. Levin's right to participate "always came with a qualifier – i.e. such annuitant had to meet the eligibility requirements to participate in such retiree healthcare plan." Br. at 9. But there is no such "qualifier" in the Pension Code, and the Board's additional condition was not added until decades after Ms. Levin joined the pension system and six years after she retired from County service. The statute states only that to be eligible one must be an annuitant and choose to participate. That right to participate expressly provided by statute and is protected by the Illinois Constitution, as reaffirmed by *Kanerva v. Weems*, 2014 IL 115811, and its progeny.

B. Section 9-239 did not Create a Discretionary Right to Determine Eligibility

The Board repeatedly attempts to rewrite the Pension Code to escape the "plain language," *Levin* at ¶ 20, that the Appellate Court used to determine Ms. Levin was eligible to participate. Astoundingly, the Board first suggests that the Pension Code does not address health insurance – except for the part of the Pension Code that does address health insurance. Br. at 10 ("Other than the sole reference to a Group Health Benefit in section 9-239, there is no provision that allows participation in health insurance plans or provides related healthcare benefits in Article 9."). Without explaining how it may be significant that only one section of the statute deals with retiree healthcare, the Board next suggests that the "appropriate reading" of Section 9-239 is that it creates a "threshold level; i.e. only persons who are annuitants might be eligible to receive healthcare benefits." Br. at 10. But the Board does not bother explaining to this Court why this new interpretation is the "appropriate" way to read the statute. The Board cannot choose the annuitants for whom it wants to provide a plan. Under the terms of the statute, the Fund provides healthcare subsidies to each annuitant who chooses to participate. Ms. Levin is an annuitant who chooses to participate, and there is nothing in the Pension Code that permits the Board to add further conditions and deny her this right.

Rather than confront the express language of the Pension Code, the Board nonsensically contends that the fact that the General Assembly did not expressly preclude the Board from adding its own eligibility requirements means it has authority to do so. Br. at 10. The law is exactly the opposite: "An administrative agency possesses no inherent or common law powers and any authority that the agency claims must find its source within the provisions of the statue by which the agency was created." *Ill. Dep't of*

Revenue, 357 Ill.App.3d at 365. While it is undisputed that the Board has no inherent power to do anything not authorized by statute, the Board nevertheless claims it is allowed to do anything not expressly barred by statute. And while the statute does not expressly disallow the rule enacted by the Board, it is axiomatic that rules "beyond the scope of the legislative grant of authority or that conflict with the statute…are invalid." *Ill. Dep't of Revenue,* 357 Ill.App.3d at 364. The Board's "last-employer" requirement both exceeds the scope of authority and conflicts with the statute. The result is the same as if the Board's regulation were expressly barred by statute. Moreover, "[t]he fact that no statute precludes an agency from taking a particular action does not mean that the authority to do so has been given by the legislature." *Ill. Bell Tel. Co. v. Ill. Commerce Com.*, 203 Ill.App.3d 424, 438 (2d Dist. 1990).

In yet another attempt to bolster its strained interpretation of Section 239, the Board cherry-picks a few sentences from the law governing a completely different retirement system, the State Employees Group Insurance Act of 1971, which at one point uses the word "shall."

> The program of health benefits shall provide for protection against the financial costs of health care expenses incurred in and out of hospital including basic hospital-surgical-medical coverages. The program may include, but shall not be limited to, such supplemental coverages as out-patient diagnostic X-ray and laboratory expenses, prescription drugs, dental services, hearing evaluations, hearing aids, the dispensing and fitting of hearing aids, and similar group benefits as are now or may become available.

5 ILCS 375/6. But the "shall" in the state version only refers obliquely to "protection against the financial costs of health care expenses," and then states that the system "may" provide various services at its discretion. *Id*. This is no more concrete than the county version stating that the Fund "may" pay a

discretionary portion of county employees' healthcare costs. More importantly, the law governing the state system sets forth eligibility requirements (*See* 5 ILCS 375/3 (defining "annuitant," "employee" and "retired employee") just as the Pension Code defines eligibility for annuitants in section 239. But unlike the Board, the State has not tried to administratively alter the eligibility requirements that were set by the General Assembly.

C. The Section 9-239(e) "Not a Pension Benefit" Clause is Invalid

For the first time in nearly three years of litigation, the Board in its petition cites section 9-239's invalid savings clause. Br. at 11, 13 (citing 40 ILCS 5/9-239(e) ("The group coverage plan and benefits described in this Section are not and shall not be construed to be pension or retirement benefits for purposes of Section 5 of Article XIII of the Illinois Constitution of 1970.")). Tellingly, the Board never invoked this subsection in its arguments in its administrative proceedings, before the circuit court or before the Appellate Court. This throwaway argument raised for the first time here is clearly waived. But in any event, the provision is invalid. The Illinois Supreme Court has held that subsidized health care *is* a benefit under the state constitution and that the General Assembly "may not rewrite the pension protection clause to include restrictions and limitations that the drafters did not express and the citizens of Illinois did not approve." *Kanerva v. Weems*, 2014 IL 115811, ¶¶ 40-41.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Appellate Court, hold that the "last employer" rule is invalid and can no longer be enforced, and remand with instructions to proceed for Ms. Levin and the putative class.

Dated: December 10, 2019

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 10 pages.

Dated: December 10, 2019

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NOTICE OF FILING

PLEASE TAKE NOTICE that on December 10, 2019, I caused to be filed with the Clerk of the Supreme Court of Illinois, **BRIEF OF PLAINTIFF-APPELLEE LORI G. LEVIN**, copies of which are attached hereto and served upon you by operation of the Court's eFileIL electronic filing system.

Respectfully submitted,

/s/ Christopher M. Hack
Attorney for Appellant

CERTIFICATE OF FILING AND SERVICE

On December 10, 2019 I electronically filed the foregoing **BRIEF OF PLAINTIFF-APPELLEE LORI G. LEVIN** with the Clerk of the Supreme Court of Illinois by using the Odyssey eFileIL system.

I served each party by emailing the Motion directly to its attorneys (as indicated below) on December 10, 2019:

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure (735 ILCS 5/1-109), I certify that to the best of my knowledge, information, and belief the statements in the Certificate of Filing and Service are true and correct.

/s/ Christopher M. Hack
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