Docket No. 125141

IN THE
SUPREME COURT OF ILLINOIS

LORI G. LEVIN,	)	
	)	Appeal from the Appellate Court of
Plaintiff-Appellee,	)	Illinois, First Judicial District
	)	
v.	)	No. 18-1167
	)	There Heard on Appeal From The
THE RETIREMENT BOARD OF	)	Circuit Court of Cook County,
THE COUNTY EMPLOYEES' AND	)	Illinois
OFFICERS' ANNUITY AND	)	County Department, Chancery
BENEFIT FUND OF COOK	)	Division
COUNTY,	)	No. 2016 CH 14789
	)	
Defendant-Appellant.	)	The Hon. Kathleen M. Pantle, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT THE RETIREMENT BOARD OF THE COUNTY EMPLOYEES' AND OFFICERS' ANNUITY AND BENEFIT FUND OF COOK COUNTY

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INTRODUCTION

Plaintiff-Appellee Lori Levin's ("Levin") request for participation in the retiree healthcare plan administered by the County Employees' and Officers' Annuity and Benefit Fund of Cook County (the "Fund") was properly denied by Defendant-Appellant, the Retirement Board ("Board") of the Fund, because it is undisputed by the parties that Levin failed to meet the Fund's eligibility requirements to participate in the healthcare plan. Section 9-239 of the Illinois Pension Code [40 ILCS 5/9-239] fails to provide Levin with the unconditional right to participate in the retiree healthcare plan administered by the Fund. As such, the Fund's eligibility requirement to participate in such plan cannot reduce a "benefit" that Levin is entitled to in violation of the Pension Protection Clause of the Illinois Constitution [Ill. Const. 1970, art. XIII, 5].

The brief filed by Levin repeats the same three arguments she has asserted throughout the proceedings of this case: (i) that the eligibility rules to participate in the retiree healthcare plan administered by the Fund conflict with the language of Section 9-239 of the Illinois Pension Code; (ii) that the eligibility rules exceed the Board's authority; and (iii) that Levin's right to participate in the retiree healthcare program administered by the Fund is protected by the Illinois Constitution.

ARGUMENT

A. THE FUND'S ELIGIBILITY RULES DO NOT CONFLICT WITH SECTION 9-239 OF THE ILLINOIS PENSION CODE BECAUSE SECTION 9-239 DOES NOT GRANT PARTICIPANTS WITH AN UNCONDITIONAL RIGHT TO PARTICIPATE IN A RETIREE HEALTHCARE PLAN ADMINISTERED BY THE FUND.

It is undisputed that Levin fails to meet the eligibility requirements to participate in the Fund's retiree healthcare plan. Notwithstanding this defect, Levin cites to Section 9-239 of the Illinois Pension Code for the assertion that she has a protected right to participate

in the retiree healthcare plan administered by the Fund. Specifically, Levin alleges that Section 9-239 permits the Fund to create a healthcare plan and permits any annuitant to participate. As an "annuitant", Levin contends she is entitled to participate in the retiree healthcare plan administered by the Fund under the authority of Section 9-239 and there is nothing in the Pension Code that permits the Board to deny her this right.

Levin is incorrect in stating that Section 9-239 contains language that "permits the Fund to create a healthcare plan". Section 9-239 is wholly devoid of any statutory obligation of the Fund to provide retiree healthcare coverage for annuitants. The legislative history of Section 9-239 of the Illinois Pension Code dates back to January 24, 1990, at which time Article 9 was amended to require the Fund to pay 50% of the total healthcare premium, up to set limits, for a time-limited period of January 1, 1990 through December 31, 1993 for each annuitant who elected coverage under ***any of the County's healthcare plans***. *See* Illinois Public Act 86-1025 (emphasis added). Effective November 19, 1991, Article 9 of the Illinois Pension Code was further amended to allow the Fund to pay all or any portion of the total healthcare premium on behalf of retirees who choose to participate in ***any of the County's healthcare plans***. *See* Illinois Public Act 87-794; 40 ILCS 5/9-239 (emphasis added).

During both the implementation of Public Act 86-1025 and the subsequent revisions found in Public Act 87-794, Cook County, one of Levin's former employers, was the entity responsible for administering a retiree healthcare program for Fund annuitants. As the entity responsible for administering the retiree healthcare plan, Cook County was responsible for selecting an insurance carrier, negotiating rates, establishing eligibility requirements and determining coverage options for eligible retirees. The language of

Section 9-239 never restricted Cook County's ability to implement eligibility rules or regulations covering eligible retirees that participated in its retiree healthcare plan[1]. It defies logic that a statute that originally imposed no restrictions on an entity's administration of a healthcare plan would transform, through no action of the legislature, into an express limitation on the Fund's ability to impose reasonable eligibility rules in its administration of a retiree healthcare plan for its annuitants. Again, the language of Section 9-239 is silent with respect to the *administration* of healthcare coverage and related items such as coverage options, insurance carriers, rates, and eligibility requirements. Section 9-239 simply provides the Fund with the authority to subsidize a portion of an annuitant's healthcare premium. Importantly, this language is unambiguous and, is not even mandatory, with respect to the Fund's payment of a subsidy for retiree healthcare ("the Fund ***may*** pay"). The Fund's consistent implementation of a reasonable eligibility rule for participation in the retiree healthcare plan administered by the Fund simply cannot conflict with the express language of Section 9-239 of the Illinois Pension Code.

B. THE BOARD'S "RULE-MAKING" AUTHORITY PURSUANT TO SECTION 9-202 OF THE ILLINOIS PENSION CODE EXTENDS TO THE ADMINISTRATION OF THE RETIREE HEALTHCARE PROGRAM AND THE ELIGIBILITY RULE DOES NOT EXCEED ITS AUTHORITY.

The Board agrees that the caselaw cited by Levin states that the authority of an administrative agency to adopt rules and rules is defined by the statute creating that agency and that such rules and regulations adopted by the agency must be in accord with the standards and policies set forth in the statute. *Gunia v. Cook County Sheriff's Merit Board*, 211 Ill. App. 3d 761, 769 (1st Dist. 1991). Levin alleges that Section 9-239 limits the ability

[1] Levin has never established that Cook County did not have a similar eligibility requirement regarding its retiree healthcare plan that would have prevented her and other similarly situated annuitants from participating in the healthcare plan.

of the Board to implement its eligibility rules impacting Levin because the legislature already provided eligibility requirements for the Fund's retiree plan in Section 9-239. However, as noted, Section 9-239 is silent with respect to the Fund's administration of a retiree healthcare plan.

Because Section 9-239 is silent with respect to the Fund's administration of a retiree healthcare plan, it was necessary for the Board to implement rules and regulations necessary for the administration of a retiree healthcare plan when the Fund began administering a retiree healthcare plan in 1992. The Board has the authority pursuant to Section 9-202 of the Illinois Pension Code "to make rules and regulations necessary for the administration of the Fund." 40 ILCS 5/9-202. This grant of rule-making authority is general and overarching in its scope and is not limited to specific benefits that are provided under Article 9 of the Illinois Pension Code. In contrast, the Illinois General Assembly has limited the rule-making authority allowed to other pensions funds or retirement systems created by other articles of the Illinois Pension Code.[2] Had the Illinois General Assembly intended to limit the Fund's ability to promulgate rules and regulations to only specific benefits or administrative items it would have done so. Instead, the Illinois General Assembly grants the Fund broad authority to promulgate rules and regulations necessary for the general administration of the Fund.

Levin argues that Section 9-239 provides the Fund with specific language to "permit the Fund to create a healthcare plan" while simultaneously asserting that the Fund

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[2] *See* Section 16-121 and Section 16-125 governing the Illinois Teachers' Retirement System, "[t]he actual compensation received by a teacher during any school year and recognized by the system in accordance ***with rules of the board***." and "***[u]nder rules of the board***, and on the basis of verified service, the board shall furnish the member a statement of the accumulated service…).

has no authority to promulgate rules or regulations with respect to creating and administering that plan. Levin cannot dispute the fact, however, that it is necessary for the Fund to make certain decisions with respect to healthcare coverage options and requirements for its retiree healthcare program in order for the Fund to administer a retiree healthcare plan. Since assuming the responsibility for administering a retiree healthcare plan in 1992, the Fund has performed various necessary duties including the selection of an insurance carrier and coverage options for annuitants and beneficiaries, setting eligibility requirements, negotiating rates, and providing information to retirees regarding the healthcare plan. As part of those administrative functions, the Fund has consistently applied a rule requiring that an annuitant's last employer must be either Cook County or the Cook County Forest Preserve in order for the annuitant to be eligible to participate in the retiree healthcare program. Again, Section 9-239 is wholly silent with respect to the Fund's administration of a healthcare plan. As such, Levin cannot argue that the Fund's administration of a retiree healthcare plan is constrained by any specific provision in Article 9 of the Illinois Pension Code. The absence of such language necessitates the Fund utilizing its general rule-making authority pursuant to Section 9-202 of the Pension Code to promulgate rules and regulations relating to its administration of a retiree healthcare program.

Levin also alleges that the Board's eligibility rule to participate in the retiree healthcare plan administered by the Fund retroactively diminishes her benefits. Again, Levin does not dispute the fact that she cannot meet the eligibility requirements to participate in the Fund's retiree healthcare plan since Cook County was not her last employer. Instead, she asserts that the eligibility requirements were never legally adopted

by the Board and are invalid because it reduces the benefits she had dating back to her hire date with Cook County. However, when Levin began working for Cook County in 1980, the Fund did not administer a retiree healthcare plan under Section 9-239 or any other provision of the Illinois Pension Code. So with respect to Levin's argument that she has an unfettered right to participate in a retiree healthcare plan based on her contractual rights in place at the date of her hire, such argument is properly directed toward Cook County, one of her former employers and the entity responsible for providing a retiree healthcare plan prior to 1992. Interestingly, Levin does not assert that her purported right to participate in a retiree healthcare program was effectively "diminished" when Cook County notified the Fund in 1992 that it would no longer be administering a retiree healthcare program. However, the coverage available to her in 1980, the date she began her membership in the Fund, is no longer available to annuitants because Cook County ceased providing such coverage.

Since the inception of the retiree healthcare plan administered by the Fund, the Fund has consistently applied a rule requiring that an annuitant's last employer must be either Cook County or the Cook County Forest Preserve in order for the annuitant to be eligible to participate in the retiree healthcare program administered by the Fund. In *Kanerva*, the Court held that the General Assembly was precluded from diminishing or impairing the provision of healthcare insurance premiums whose rights were governed by the version of the Group Insurance that was in effect prior to the enactment of Public Act 97-695. *Kanerva v. Weems*, 2014 IL 115811, ¶ 57, 13 N.E.3d 1228, 1244. In this case, however, Levin has failed to prove that there was any version of the retiree healthcare plan administered by the Fund that would have provided Levin with access notwithstanding the

eligibility requirements.

C. THE BOARD'S DENIAL OF LEVIN'S REQUEST TO PARTICIPATE IN A RETIREE HEALTHCARE PLAN ADMINISTERED BY THE FUND IS NOT A VIOLATION OF THE PENSION PROTECTION CLAUSE OF THE ILLINOIS CONSTITUTION.

Levin argues that the Board's denial of her request to participate in the retiree healthcare plan administered by the Fund is a violation of the Pension Protection Clause of the Illinois Constitution. Ill. Const. 1970, art. XIII, 5. She does not – and cannot – identify any contract or statute promising annuitant healthcare coverage in the Fund's retiree healthcare plan. In alleging that Section 9-239 purportedly provides a "statutory annuitant right of healthcare participation", Levin is asserting an abstract right to healthcare coverage. Notwithstanding the fact that Section 9-239 is completely devoid of any obligation of the Fund to provide annuitants with a retiree healthcare plan, she is essentially asserting that because the Board voted to administer a retiree healthcare plan in 1992, she is entitled to participate in such plan and that right cannot be "diminished or impaired" under the Pension Protection Clause of the Illinois Constitution. The "contractual relationship" cited by Levin and protected by the Pension Protection Clause is governed by the actual terms of the contract or Pension Code at the time she became a member of the Fund. *In re Marriage of Winter*, 387 Ill. App.3d 21, 34, 899 N.E. 2d 1080 (2008); *Di Falco v. Board of Trustees of the Firemen's Pension Fund of the Wood Dale Fire Protection District No. One*, 122 Ill. 2d 22, 26, 521 N.E. 2d 923 (1988); *Kerner v State Employees' Retirement System*, 72 Ill. 2d 507, 514, 382 N.E. 2d 243 (1978); *Matthews v. Chicago Transit Authority*, 2016 IL 117638, ¶59, 51 N.E. 3d 753, 771.

In this case, Levin has failed to provide any evidence with respect to a "contractual relationship" between the Fund and Levin requiring the Fund to permit her to participate

in the retiree healthcare plan administered by the Fund. Nor has she proven that such right ever existed pursuant to the Illinois Pension Code or any other governing document involving the retiree healthcare plan administered by the Fund. Section 9-239 relied upon by Levin only provides the Fund with the permissive authority to subsidize healthcare premiums. The legislature simply did not provide Fund annuitants with an unconditional right in Section 9-239 or anywhere else in Article 9 to participate in a retiree healthcare plan administered by the Fund.

The Pension Code imposes on the Board a fiduciary duty to act in the interest of members of the Fund. 40 ILCS 5/1-109. This Court has made it clear that this fiduciary duty is owed to *all* participants in a pension fund and not just to any single participant. *Marconi v. The Chicago Heights Police Pension Fund*, 225 Ill. 2d 497, 544 (2007). Allowing Levin to participate in the Fund's retiree healthcare program notwithstanding her failure to meet the eligibility requirements is in direct conflict with the Board's fiduciary duty to all participants.

CONCLUSION

For these reasons, the Retirement Board of the County Employees' and Officers' Annuity and Benefit Fund of Cook County respectfully request that this Court reverse the judgment of the Appellate Court of Illinois, First District.

Respectfully submitted,

THE RETIREMENT BOARD OF THE COUNTY EMPLOYEES' AND OFFICERS' ANNUITY AND BENEFIT FUND OF COOK COUNTY AND EX OFFICIO FOR THE FOREST PRESERVE DISTRICT EMPLOYEES' ANNUITY AND BENEFIT FUND OF COOK COUNTY

By: /s/Sarah A. Boeckman
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CERTIFICATE OF COMPLIANCE

I certify that this foregoing Reply Brief of Defendant-Appellant The Retirement Board of the County Employees' and Officers' Annuity and Benefit Fund of Cook County conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this Reply Brief of Defendant-Appellant, 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 appended to the Reply Brief under Rule 342(a) is 9 pages.

By:/s/Sarah A. Boeckman

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LORI G. LEVIN, Plaintiff-Appellee, v. THE 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 No. 2016 CH 14789 The Hon. Kathleen M. Pantle, Presiding

NOTICE OF FILING

TO: See Attached Proof of Service.

PLEASE TAKE NOTICE that on December 24, 2019, we caused to be filed with the Supreme Court of Illinois, the Reply Brief of Defendant-Appellant The Retirement Board of the County Employees' and Officers' Annuity and Benefit Fund of Cook County, a copy of which is attached hereto and served upon you by operation of the Court's Odyssey eFileIL system.

Respectfully submitted,

RETIREMENT BOARD OF THE COOK COUNTY EMPLOYEES' AND OFFICERS' ANNUITY AND BENEFIT FUND OF COOK COUNTY

By: /s/Sarah A. Boeckman
One of Its Attorneys

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CERTIFICATE OF FILING AND SERVICE

On December 24, 2019, I electronically filed the foregoing **REPLY BRIEF OF DEFENDANT-APPELLANT THE RETIREMENT BOARD OF THE COUNTY EMPLOYEES' AND OFFICERS' ANNUITY AND BENEFIT FUND OF COOK COUNTY** (the "Reply Brief") with the Clerk of the Supreme Court of Illinois by using the Odyssey eFileIL system.

I served each party by emailing the Reply Brief directly to its attorneys (as indicated below) on December 24, 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 Proof of Filing and Service are true and Correct.

By:/s/Sarah A. Boeckman