Nos. 122793 & 122822

In the Supreme Court of Illinois

Rochelle Carmichael; Zeidre Foster; Oscar Hall; Anthony Lopez; John Mahoney; Joseph Notaro; Michael Senese; David Torres; The Chicago Teachers Union, Local 1, American Federation of Teachers, AFL-CIO; Local 1001, Laborers' International Union of North America, AFL-CIO; and Local 9, International Brotherhood of Electrical Workers, AFL-CIO,

Plaintiffs-Appellees/Appellants,

v.

Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago; Retirement Board of the Laborers' & Retirement Board Employees' Annuity & Benefit Fund of Chicago; Municipal Employees' Annuity & Benefit Fund of Chicago; Retirement Board of the Municipal Employees' Annuity & Benefit Fund of Chicago; Public School Teachers' Pension & Retirement Fund of Chicago; and Board of Trustees of the Public School Teachers' Pension & Retirement Fund of Chicago,

Defendants-Appellees,

And

State of Illinois ex rel. Lisa Madigan, Attorney General of the State of Illinois,

Intervenor-Defendant-Appellant/Appellee.

Direct Appeal from the Circuit Court of Cook County, Illinois
County Department, Chancery Division, Case No. 12 CH 37712
Hon. Celia G. Gamrath, Mary L. Mikva, Judges Presiding

BRIEF OF DEFENDANT-APPELLEE LABORERS' & RETIREMENT BOARD EMPLOYEES ANNUITY AND BENEFIT FUND OF CHICAGO

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

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NATURE OF THE CASE

Plaintiffs filed this lawsuit alleging that various provisions of Illinois Public Act 97-0651 (the "Act") violated the Pension Protection Clause of the Illinois Constitution, Article XIII, § 5, as well as other provisions of the Illinois Constitution. Pub. Act 97-0651 (eff. Jan. 5, 2012) (amending 40 ILCS 5/8-226, 11-215); Ill. Const., art. XIII, § 5. The Act changed certain annuity and eligibility requirements in Article 11 of the Pension Code for members of the Laborers' & Retirement Board Employees Annuity & Benefit Fund of Chicago the ("LABF") and in Article 8 of the Pension Code for members of the Municipal Employees' Annuity and Benefit Fund of Chicago (the "MEABF"). 40 ILCS 5/arts. 8, 11. In particular, the Act limited the ability of members of those pension funds to take leaves of absence from their employment with the City of Chicago (the "City") or the Board of Education of the City of Chicago (the "CBOE") to work full time for a union, at salaries set by the respective unions, and clarified that only the salaries such members had earned while working for the City, as opposed to their union salaries, could be used to calculate the amount of their annuities.

The LABF Board does not "interpret" Article 11 and instead administers Article 11 based on its plain statutory language. *Id.* art. 11. With regard to the constitutionality of the Act, the LABF has accepted the Circuit Court's guidance to date and likewise will administer its pension fund based on the language of Article 11 and where appropriate in the manner

directed by this Court in the order it will enter in this case. Therefore, in this appeal, the LABF takes no position on the merits of the constitutionality of the Act raised by the Attorney General and the Plaintiffs in their briefs.

The Circuit Court held that the provision of the Act requiring use of City salaries to calculate annuities was a constitutional clarification of existing law. Plaintiffs alleged that the LABF's enforcement of this clarification would be a breach of contract and that the LABF should be estopped from enforcing this clarification. The Circuit Court dismissed Plaintiffs' common law breach of contract and estoppel claims. Plaintiffs have appealed the dismissal of these claims as to the LABF and the MEABF.

However, if this Court affirms the Circuit Court's ruling that the portion of the Act that requires annuities for members on a union leave of absence to be based on salaries earned while working for the City was a legislative clarification, this Court should also affirm the dismissal of Counts XIII and XIV of Plaintiffs' supplemental complaint. In Counts XIII and XIV, the Plaintiffs allege that even if requiring City salaries rather than union salaries to be used to calculate annuities for members who took union leave was a legislative clarification, the LABF Board should nonetheless calculate annuities based on union salaries under implied contract and estoppel theories. Plaintiffs thus seek to place the LABF Board in the untenable position of not following Article 11, subjecting it to possible breach of fiduciary claims from the vast majority of members who do not benefit from

union leaves of absence. More generally, allowing common law contractual or estoppel limits on the LABF Board's ability to follow Article 11 would place the Board and LABF members in a state of uncertainty as to what their respective rights and obligations are. Thus, even if this Court reverses the Circuit Court's ruling as to whether City or union salaries should be used to calculate annuities, this Court should affirm the dismissal of Counts XIII and XIV as moot.

ISSUE PRESENTED FOR REVIEW

Whether the Circuit Court of Cook County correctly dismissed Plaintiffs' claims for a declaratory judgment that the LABF's use of the City salary to calculate annuity payments for members who took a union leave of absence from their City jobs would constitute breach of contract and estoppel, where the LABF Trustees are required to administer the fund in the manner prescribed by the General Assembly in Article 11 of the Pension Code and claims for breach of implied contract and estoppel are not favored against governmental entities.

JURISDICTION

The LABF agrees with the Plaintiffs' jurisdictional statement.

STATEMENT OF FACTS RELATED TO ISSUE ON APPEAL

The LABF generally accepts the facts as set forth by the Plaintiffs, and adds only the following facts relevant specifically to the LABF:

A. The LABF

The General Assembly created the LABF in Article 11 of the Illinois Pension Code. 40 ILCS 5/art. 11. The Board of Trustees of the LABF is charged by statute with the fiduciary duty to administer and maintain the employee benefit fund for the exclusive benefit of its members pursuant to Article 11 of the Illinois Pension Code. *Id.* §§ 1-109, 11-101. The LABF Trustees' fiduciary duties include, among other things, to act:

> "(a) for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the pension fund and (b) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims."

Id. 1-109.

B. The LABF Plaintiffs

Three individual plaintiffs in this action are participants in the LABF: (1) Oscar Hall ("Mr. Hall"); (2) Michael Senese ("Mr. Senese"); and (3) David Torres ("Mr. Torres"). In 2005, Mr. Hall took a leave of absence from the City of Chicago ("City") and worked for Local 1001 from 2005 through 2011. (Compl. ¶ 9). Mr. Hall retired from his position with the City in 2009 and began receiving an annuity from the LABF at that time. (Compl. ¶ 9). Mr. Senese worked for the City for 17 years, and then took a leave of absence beginning August 2012 to work for Local 1001 but has since returned to work for the City. (Compl. ¶ 10). Mr. Senese, who is approximately 46 years of

age, is not currently eligible to retire. Mr. Torres worked for the City for 24 years, and then took a leave of absence beginning in 2008 to work for Local 1001, where he continues to work. (Compl. ¶ 11). Mr. Torres is eligible to apply but has not applied for an annuity. In addition to the three LABF Plaintiffs, Local 1001 is a plaintiff as to several counts alleged against the LABF.

ARGUMENT

A. Standard of Review

The standard of review of the Circuit Court's ruling granting the LABF's motion for summary judgment as to Counts XIII and XIV of Plaintiff's supplemental complaint is *de novo*. *Jones v. Mun. Emps. Annuity & Benefit Fund of Chi.*, 2016 IL 119618, ¶ 26.

B. Count XIV, Alleging Equitable Estoppel, Fails as a Matter of Law

In Section VI of their Brief, pp. 61-62, Plaintiffs assert that in light of "the unique reliance and harm interest in this case," this Court should reverse the Circuit's ruling dismissing with prejudice Plaintiffs' estoppel claim, alleged in Count XIV. To the contrary, this Court should affirm the Circuit Court's ruling dismissing Count XIV.

Plaintiffs face a high bar to succeed on an estoppel cause of action against a government body, which they fail to clear here. Moreover, this Court should not allow common law theories of recovery to override the General Assembly's explicit direction to the LABF Trustees to administer the

pension fund as prescribed in Article 11, as doing so would create uncertainty for the LABF's Trustees and members.

Plaintiffs allege that the LABF should be equitably estopped from retroactively applying the clarification of the "highest average annual salary" because: (1) "[f]or about 20 years before P.A. 97-0651, the Municipal Fund Defendants and Laborers' Fund Defendants offered and granted participants annuities calculated using the salary paid to the participants by a local labor organization on a union leave of absence;" (2) "[t]he individual plaintiffs and [] Local 1001 reasonably relied on that 20 year interpretation and practice by the [] [LABF] Defendant[] to their detriment, by among other things, making contributions to the respective funds based on union salaries and planning for retirement with the expectation of receiving pensions based on union salaries." (Supp. Compl. ¶¶ 90-91). These grounds, however, fail as a matter of law to establish equitable estoppel.

"Illinois courts have consistently held that the doctrine of equitable estoppel will not be applied to governmental entities absent extraordinary and compelling circumstances." *Matthews v. Chi. Transit Auth.*, 2016 IL 117638, ¶ 94 (citing *Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 35). No such extraordinary circumstances are present in this case.

Importantly, "no estoppel can arise from the act of a municipal corporation or its officers done in violation of or without authority of law" because "allowing unauthorized acts of a governmental employee to bind a

municipality to equitable estoppel would render the municipality helpless to correct errors and force the municipality to permit violations to remain in perpetuity." 18 Ill. L. and Prac. *Estoppel* § 47, Westlaw (database updated May 2018). "Although promissory estoppel is distinct from equitable estoppel and applies in different circumstances, similar considerations apply when these doctrines are asserted against public bodies." *Matthews*, 2016 IL 117638, ¶ 94.

This Court's recent *Matthews* decision dooms Plaintiffs' estoppel claim. In *Matthews*, current and retired former employees of the Chicago Transit Authority ("CTA") brought a putative class action against the CTA and its retirement plan following changes to the retiree health care benefits. *Id.* ¶¶ 1-2. This Court noted that plaintiffs argued that the CTA "made numerous unambiguous promises," including that "class members would receive fully-paid retiree health care benefits," that "those benefits would be identical to those enjoyed by current CTA employees," that "the class members' retiree health care benefits would be changed only by a method prescribed in a [collective bargaining agreement]," and "that the class members' retiree health benefits would not be changed without consideration received by the class members in exchange." *Id.* ¶ 96.

Nevertheless, the *Matthews* plaintiffs, just as the Plaintiffs here, could "not point to any specific statement—either written or verbal—in which the CTA promised to continue to provide health care benefits to retirees" and

instead relied on the assertion that "the CTA began providing fully-paid retiree health benefits in 1980, and continued those benefits until 2009" and that "[f]rom 1980 to July 2009, the CTA acted consistent with the well-established understanding that it had an obligation under the collective bargaining agreements to pay for and provide retiree health care benefits." *Id.* ¶ 97.

The *Matthews* court, however, concluded that such grounds were "insufficient" as a matter of law, to support a claim for promissory estoppel against the CTA." *Id.* The court explained that:

> A municipal corporation cannot be held liable under a contract implied in fact where there has been a failure to comply with a statute or ordinance prescribing the method by which an officer or agent can bind such corporation by contract. [Citations]. Stated differently, a municipal corporation cannot be obligated under a contract implied in fact that is *ultra vires*, contrary to statutes, or contrary to public policy.

Id. ¶ 98.

Similarly here, this same principle should apply, since similar considerations apply when either promissory or equitable estoppel claims are asserted against public bodies. *Id.* ¶ 94. Even though the LABF is not a municipality, it is a creature of statute and in part uses taxpayer funds to pay annuities and benefits. *See* 40 ILCS 5/11-169 (describing property tax levy used to pay City contributions to LABF). As the *Matthews* plaintiffs did, Plaintiffs here allege a course of action by the LABF without regard to whether that course of action was authorized by Article 11. Plaintiffs'

attempt to require the LABF, through equitable estoppel, to actions that would be inconsistent with those prescribed by the General Assembly in Article 11 thus fails.

If the Act is a legislative clarification, any alleged LABF practice to calculate a member's highest average annual salary based on union salaries, despite the LABF Board's prior good faith actions, would be contrary to the General's Assembly's express intent. *Valfer v. Evanston Nw. Healthcare*, 2016 IL 119220, ¶ 22 ("The best signal of legislative intent is the language employed in the statute, which must be given its plain and ordinary meaning."). Thus the LABF would be duty bound to apply Article 11 in that manner. 40 ILCS 5/11-101; *see also Ryan v. Bd. of Trs. of Gen. Assembly Ret. Sys.*, 236 Ill. 2d 315, 319 (2010) (In construing forfeiture provision of General Assembly Retirement System pension code, this court stated, "Where the statutory language is clear and unambiguous, we will enforce it as written and will not read into it exceptions, conditions, or limitations that the legislature did not express." (citing *In re Christopher K.*, 217 Ill.2d 348, 364 (2005)).

Moreover, just as in *Matthews*, Plaintiffs here have never been able to articulate a specific statement—either written or verbal—in which the LABF promised to continue paying pensions based on union salaries irrespective of what legislative clarifications the General Assembly might adopt. *Matthews*, 2016 IL 117638, ¶ 97. Plaintiffs have cited no precedent where a court has

estopped a governmental entity from following clear statutory language. Consequently, if this Court finds that the Circuit Court's ruling that only City salaries should be used to calculate annuities for members who took union leaves of absence, this Court should affirm the Circuit Court's dismissal of Count XIV.

C. There is No Factual or Legal Basis for Count XIII's Purported Breach of Contract Cause of Action.

Plaintiffs in Count XIII allege that if the LABF applies the legislative clarification the Circuit Court found, it would breach an implied contract. Plaintiffs implied contract theory is essentially a rehash of their estoppel argument. Pls.' Br. 65-66. They seek a declaration that the LABF offered members the right to pensions calculated based on union salaries, that the members accepted this offer by contributing amounts based on their union salaries and that if the LABF does not calculate annuities based on the union salaries, it would breach this implied contract. *Id.* This claim too fails as a matter of law.

Similarly to their allegations in Count XIV, in Count XIII Plaintiffs allege that "[f]or about 20 years before P.A. 97-0651, [] [LABF] offered and granted participants annuities calculated using the salary paid to the participant by a local labor organization on a union leave of absence" and the "individual plaintiffs and [] Local 1001 accepted and provided for that offer by making all of the required contributions to the respective funds based on the salary paid to the applicable participant by the local labor organization

employer." (Compl. ¶¶ 81-82). Plaintiffs argue that calculating salaries based on City rather than union salaries would breach this implied contract and they seek a declaration to this effect. Plaintiffs' argument is without merit.

The Circuit Court previously dismissed this claim with prejudice on September 29, 2014. If this Court affirms the Circuit Court's ruling that this portion of the Act was a "clarification" of existing law, then this clarification must be applied retroactively. *See Int'l Union of Operating Eng'rs Local 965 v. Ill. Labor Relations Bd., State Panel*, 2015 IL App (4th) 140352, ¶¶ 25-30 (acknowledging the retroactive application of clarifications); *In re T.T.*, 322 Ill. App. 3d 462, 464 (1st Dist. 2001) ("If an amendment only clarifies existing law, courts should apply it to pending cases."). This precedent dooms Plaintiffs' breach of contract cause of action, because if this portion of this Court's ruling is affirmed, the LABF, again in a role that does not "interpret" Article 11 of the Pension Code, would have no choice but to apply the language used and clarified by the General Assembly. Further, as Plaintiffs argue elsewhere in their brief, the contractual relationship protected by the Pension Protection Clause of the Illinois Constitution is based on the statutory language in effect at the time an individual becomes a member of a pension fund. *In re Pension Reform Litig.*, 2015 IL 118585, ¶ 46. Thus, should the LABF in the future calculate an annuity consistent with a ruling upholding the "final average salary" clarification of the Act, it would not be

"retroactively" applying a "new interpretation" of the Pension Code. Rather, the LABF would be applying Article 11 in a manner that the General Assembly has determined was always correct, even if the LABF Board has at all times conscientiously applied what it viewed as the plain language of Article 11 differently. Thus, members would not have a contractual right to any interpretation of Article 11 other than that enacted and clarified by the General Assembly. Plaintiffs are suggesting that the LABF has the authority to ignore the language of Article 11, as enacted by the General Assembly and interpreted by this Court. There is nothing in Article 11 that grants the LABF such authority and no authority or precedent supports Plaintiffs' position.

Plaintiffs are correct that if the Circuit Court's ruling is affirmed, union members may have contributed more based on their union salaries than they would have based on City salaries, although there is no evidence in the record as to whether this would apply to all LABF members who took union leave, or how much such an "over contribution" might be. However, the LABF has the ability to refund contributions, and even though the Act did not specifically include a mechanism for refunding such over contributions, the LABF Board has the authority to make rules to cover obvious gaps in Article 11 to remedy any such legislative oversight. *See* 40 ILCS 5/11-198 (The LABF Board has the power to "[t]o make rules and regulations necessary for the administration of the fund.")

Plaintiffs ignore the statutory contractual relationship between the LABF and its members and instead try to allege what amounts to an implied contract. However, "implied contracts are not recognized in cases involving municipalities." *McMahon v. City of Chi.*, 339 Ill. App. 3d 41, 48 (1st Dist. 2003) ("[A] contract cannot be implied if the statutory method for executing a municipal contract has not been followed."). Further, "[i]mplied contracts with municipalities that are *ultra vires*, contrary to statutes, are unenforceable." *Id.*; *see also Lindahl v. City of Des Plaines*, 210 Ill. App. 3d 281, 290 (1st Dist. 1991); *S. Suburban Safeway Lines, Inc. v. Reg'l Transp. Auth.*, 166 Ill. App. 3d 361, 366-67 (1st Dist. 1988). "A contract which is *ultra vires*, or beyond the power of the municipality to make, cannot be enforced against the municipality, and the municipality cannot be estopped to dispute the validity of the contract." 9 Ill. L. and Prac. *Cities, Villages, Etc.* § 442, Westlaw (database updated May 2018); *see also Branigar v. Vill. of Riverdale*, 396 Ill. 534, 542 (1947).

While, as discussed above, the LABF is not a municipality, it is a statutory creation and uses, in part, taxpayer funds. Accordingly, the principles that underlie the disapproval of implied contracts with municipalities should apply equally to the LABF and Illinois pension funds generally. It would be *ultra vires* for the LABF trustees to calculate annuities in a manner inconsistent with the General Assembly's legislative clarification. *Cf. Matthews*, ¶ 101 (rejecting plaintiff Williams' promissory

estoppel claim that sought to enforce an alleged implied in fact contractual obligation that was not consistent with the 2004 collective bargaining agreement.)

The authority of the LABF Board derives exclusively from statute. If this Court affirms that that the portion of the Act that requires use of City rather than union salaries to calculate annuities was a legislative clarification, then the Circuit Court's ruling dismissing Count XIII with prejudice should be affirmed.[1]

CONCLUSION

For all the above reasons, the LABF prays that if this Court affirms the Circuit Court's ruling that City rather than union salaries should be used to calculate annuities for members who took a union leave of absence from their City jobs, it should also affirm the dismissal with prejudice of Counts XIII and XIV of Plaintiffs' supplemental complaint, and if this Court reverses the Circuit Court ruling, it should dismiss Counts XIII and XIV as moot.

[1] Even if this Court affirms the Circuit Court's ruling concerning use of City rather than union salaries, this would not affect Mr. Hall's annuity. The Circuit Court ruled that the vote to award Mr. Hall an annuity was a final administrative decision that cannot at this time be re-opened and the LABF did not appeal this ruling.

Dated: June 5, 2018

Respectfully Submitted
LABORERS & RETIREMENT BOARD EMPLOYEES' ANNUITY & BENEFIT FUND OF CHICAGO, Defendant

/s/ Cary E. Donham
By: One of Its Attorneys

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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 16 pages.

Dated: June 5, 2018

Respectfully submitted,

The Laborers' and Retirement Board Employees' Annuity and Benefit Fund of Chicago

By: /s/ Cary E. Donham
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DEFENDANT-APPELLEE'S NOTICE OF FILING

TO: See Attached Proof of Service

PLEASE TAKE NOTICE that on this 5th day of June, 2018, the undersigned electronically filed with the Clerk of the Supreme Court of Illinois the attached ***Brief of Defendant-Appellee Laborers' & Retirement Board Employees Annuity & Benefit Fund of Chicago*** a copy of which is hereby served on you. Upon receipt of acknowledgment that said document has been accepted for filing, we will submit the original and required number of copies (12) bearing the electronic file stamp within five (5) days.

Respectfully submitted,

Laborers' & Retirement Board Employees' Annuity and Benefit Fund of Chicago

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

I, Cary Donham, an attorney, hereby certifies and affirms that I caused the foregoing ***Defendant-Appellee's Notice of Filing,*** and ***Brief*** to be electronically filed with the Clerk of the Illinois Supreme Court by using the Odyssey eFileIL system. To the best of my knowledge, counsel of record for the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system. On June 5, 2018, I also caused to be served this Brief on each of them by e-mail to their e-mail address of record, listed below.

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Dated: June 5, 2018

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