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**Contracts Clause, Supreme Court, Appellate Division Third  
Department: B.O.C.E.S. for Sole Supervisory District of Rockland  
County v. State of New York**

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*U.S. CONST. art. I, § 10, cl. 1:*

*No State shall . . . pass any . . . [l]aw impairing the Obligation of Contracts.*

*N.Y. CONST. art. V, § 7:*

Membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

## **SUPREME COURT, APPELLATE DIVISION**

### **THIRD DEPARTMENT**

**B.O.C.E.S for Sole Supervisory District  
of Rockland County**

**v.**

**State of New York<sup>1</sup>  
(decided November 13, 1997)**

In a consolidated action, plaintiffs, various municipal corporations, challenged the constitutionality of Retirement and Social Security Law § 803 [hereinafter "Section 803"].<sup>2</sup>

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<sup>1</sup> 236 A.D.2d 84, 664 N.Y.S.2d 149 (3d Dep't 1997).

<sup>2</sup> *Id.* at 83, 664 N.Y.S.2d at 151. N.Y. RETIRE & SOC. SEC. LAW § 803 (b) (McKinney 1997). The retroactive membership section provides in pertinent part:

Retroactive membership shall be granted to a member of a public retirement system. . . provided that:

(1) the member filed a written request for retroactive membership in a public retirement system with the member's current retirement system within three years of the effective date of this article. . .

(2) membership shall only be granted retroactively back to the date from which the member has served continuously in a position or positions which would have entitled the member to join the public retirement system. . .

Plaintiffs alleged a violation of their due process and equal protection rights under the Fourteenth Amendment of the United States Constitution.<sup>3</sup> Moreover, plaintiffs alleged different

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(3) the employer who employed such member at the time he or she was first eligible to join a public retirement system files with the retirement system an affidavit stating that the relief sought is appropriate because the member did not (i) expressly decline membership in a form filed with the employer (ii) participate in a procedure explaining the option to join the system in which a form, booklet or other written material is read from, explained or distributed, such form, booklet or written material can be produced and documentation or a notation to the effect that he or she participated exists; or (iii) participate in a procedure that a reasonable person would recognize as an explanation or request requiring a formal decision by him or her to join a public retirement system . . . .

*Id.*

<sup>3</sup> *BOCES*, 236 A.D.2d at 152, 664 N.Y.S.2d at 151. See U.S. CONST. amend. XIV. The Due Process Clause states in pertinent part: "No State shall...deprive any person of life, liberty, or property, without the due process of law." *Id.* The Equal Protection Clause states in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* See *BOCES v. New York*, 171 Misc. 2d 585, 654 N.Y.S.2d 954 (Sup. Ct. Albany County 1996). Plaintiffs argued that § 803

[D]eprives the various school districts, towns and taxpayers of property without substantive due process. Prior to 1986, there had been no legislative enactment which required public employers to give notice to part-time employees of their options to join a public retirement system. Section 803, they argue, now requires plaintiffs to allow employees retroactive membership in the retirement systems in situations where '[employees] were deprived of notice of the right to enroll in the systems at a time when they served as temporary or part-time employees and when such notice was neither required nor routinely given to employees in that category.'

*Id.* at 591, 654 N.Y.S.2d at 958-59. Appellants argued that the lack of notice connected with the burden of paying all enhanced benefits was a decision by the government that was arbitrary and capricious. *Id.* at 592, 654 N.Y.S.2d at 959. The court noted "[a]s long as the Legislature selects means which are reasonably calculated to serve a proper governmental purpose, the requirements of due process are

violations under the New York State Constitution.<sup>4</sup> Both plaintiffs and defendant moved for summary judgment.<sup>5</sup> The Supreme Court, Albany County, granted defendant's cross-motion and dismissed the action.<sup>6</sup> Plaintiffs appealed.<sup>7</sup>

Section 803 permits a current participant of a New York State public retirement system to acquire retroactive membership to the date he or she had first become eligible for entrance into the system.<sup>8</sup> A participant is entitled to file for retroactive membership if he or she was not advised of his option to join.<sup>9</sup> In order to file for retroactive membership, a public service employee must meet certain criteria.<sup>10</sup> For participants who have served the State since the 1970's and satisfied the other statutory requirements, it means improved retirement benefits. Such benefits may include a modification in tier, the return of all employee contributions, and/or additional service credit.<sup>11</sup> Under the earlier statutory scheme, "[t]he entire cost of retroactive membership [would be] paid by the employer who employed such member at the time he or she was first eligible to join a public

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satisfied." *Id.* at 592, 654 N.Y.S.2d at 959 (citing *Wegman's Food Markets, Inc. v. New York*, 76 A.D.2d 95, 429 N.Y.S.2d 964 (4th Dep't 1980)).

<sup>4</sup> Plaintiffs argued that § 803 violated various provisions of the New York Constitution. N.Y. CONST. art. V, § 7. The Contracts Clause of the New York State Constitution provides that: "After July first, nineteen hundred forty, membership in any person or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." *Id.* N.Y. CONST. art. VIII, § 1. The gift or loan of property or credit of local subdivisions states in pertinent part: "No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association" *Id.* N.Y. CONST. art. VIII, § 2. This article states: "[n]o county, city, town, village or school district shall contract any indebtedness" *Id.*

<sup>5</sup> *BOCES*, 236 A.D.2d at 87, 664 N.Y.S.2d at 151.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* See *supra* note 2.

<sup>11</sup> *Id.* at 87, 664 N.Y.S.2d at 151.

retirement system.”<sup>12</sup> However, during the pendency of the appeal, the New York State Legislature recognized the financial hardship that existed by placing the *entire* burden on the first employer and therefore amended the statute in 1995.<sup>13</sup> This correction to the provision provided a formula whereby “only the cost related to the original salary is paid by the first employer.”<sup>14</sup> Moreover, under the original statutory scheme, the legislature established a time frame which “limited the socialization of retroactive membership costs to those cases where employer affidavits were filed prior to the statute’s cut-off date of June 1, 1995.”<sup>15</sup> Nevertheless, the cut-off date restriction required first employers to pay “the entire cost of post-June 1, 1995 claims.”<sup>16</sup> Once again, the legislature amended the statute by removing the cut-off date.<sup>17</sup> By the legislature amending the statute during the appeal, to include spreading out the costs of retroactive membership to all participating employers in the system, the federal and state constitutional challenges of equal protection and due process were rendered moot.<sup>18</sup>

On appeal, plaintiffs claim that: (1) the Retirement and Social Security Law Section 803 is unconstitutional under the Contracts Clause of the New York State Constitution, Article V, section 7;<sup>19</sup> (2) the benefits payable under Section 803 are unconstitutional gifts to private individuals in violation of the New York State Constitution, Article VIII, section 1;<sup>20</sup> and (3)

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<sup>12</sup> *Id.* See N.Y. RETIRE & SOC. SEC. LAW § 803(e)(1). Prior to the amendment, the statute stated: “[t]he entire cost of retroactive membership . . . shall be paid by the employer who employed such member at the time he or she was first eligible to join the public retirement system.” *Id.* The 1995 amendment provides: “[t]his act [amending this section] shall take effect immediately . . . but shall only apply to costs resulting from employer affidavits pursuant to paragraph 3 . . . .” *Id.*

<sup>13</sup> *BOCES*, 236 A.D.2d at 87, 664 N.Y.S.2d at 151.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 87, 664 N.Y.S.2d at 151-52.

<sup>19</sup> N.Y. CONST. art. V, § 7.

<sup>20</sup> N.Y. CONST. art. VIII, § 1.

payments made by a first employer which benefit another employer are unconstitutional under the New York State Constitution, Article VII, section 2.<sup>21</sup>

The *BOCES* court examined the first claim and determined that it lacked merit.<sup>22</sup> The court concluded that the language of the New York Constitution, Article V, section 7, recognizes membership in a retirement scheme as a contractual relationship and prohibits benefits from being diminished or impaired.<sup>23</sup> *BOCES* argued that the legislative action by the state impaired the obligation of contracts by giving compensation to employees that the schools had not contracted to give.<sup>24</sup> The court however rejected this argument and expressed that the New York State Constitution permits for contractual relationships to be altered so long as benefits are not diminished.<sup>25</sup> However, the section in question did not impair or diminish any member's benefits, "[r]ather, it augments benefits for eligible members."<sup>26</sup>

The *BOCES* court rejected appellant's second argument that the payments to eligible members under section 803 are unconstitutional gifts.<sup>27</sup> Section I of Article VIII prohibits a county, city, town, village or school district from giving money or property to an individual. The *BOCES* court noted that this particular section does not apply to the case at bar.<sup>28</sup> The Appellate Division, Third Department, expressed that section 803 only "extends retroactive membership and presents the possibility of increased pension benefits to current public employees who have been in continuous public service and always eligible to join the retirement system but . . . were not informed of that right."<sup>29</sup> Therefore, the court concluded that section 803 is a remedial statute that gives members a benefit if the members were entitled

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<sup>21</sup> N.Y. CONST. art. VIII, § 2.

<sup>22</sup> *BOCES*, 236 A.D.2d at 87, 664 N.Y.S.2d at 152.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 88, 664 N.Y.S.2d at 152.

<sup>28</sup> *BOCES*, 236 A.D.2d at 88, 664 N.Y.S.2d at 152.

<sup>29</sup> *Id.*

to the benefits.<sup>30</sup> Thus, the state is not making unconstitutional gifts.<sup>31</sup>

In arguing that members were not entitled to these benefits, appellants relied on the Court of Appeals case, *Mahon v. Board of Education of City of New York*.<sup>32</sup> However, reliance on this 1902 case was misplaced.<sup>33</sup> In *Mahon*, an act was passed which enabled teachers, who retired prior to the establishment of the pension system, to receive payments to which they had not contracted for.<sup>34</sup> The retroactive statute was held unconstitutional because it was a mere gratuity.<sup>35</sup> The Court of Appeals expressed that “[e]xtra compensation is compensation over and above that fixed by contract or by law when the services were rendered.”<sup>36</sup> The *BOCES* court noted that in *Mahon* the employees had already left public employment, and stated that section 803 applies to members who have been in continuous service.<sup>37</sup>

Plaintiffs further argued that payments made by first employers that benefit another public employer are unconstitutional because in certain instances, a school district will make contributions for employees who are no longer working for that school district, but are currently employed by other school districts.<sup>38</sup> Furthermore, such contributions violate the New York State Constitution Article VIII, § 2 because such contributions do not serve the town or school district in any way.<sup>39</sup> Disagreeing with plaintiffs’ contentions, the *BOCES* court cited *Cherey v. City of Long Beach*,<sup>40</sup> which held that this section of the Constitution “applies only to indebtedness voluntarily assumed and payable at a

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> 171 N.Y. 263, 63 N.E. 1107 (1902).

<sup>33</sup> *BOCES*, 236 A.D.2d at 88, 664 N.Y.S.2d at 152.

<sup>34</sup> *Mahon*, 171 N.Y. at 265, 63 N.E. at 1108.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 266-67, 63 N.E. at 1107-08.

<sup>37</sup> *BOCES*, 236 A.D.2d at 88, 664 N.Y.S.2d at 152.

<sup>38</sup> *BOCES v. New York*, 171 Misc. 2d 585, 591, 654 N.Y.S.2d 954, 958 (Sup. Ct. Albany County 1996).

<sup>39</sup> *Id.*

<sup>40</sup> 282 N.Y. 382, 26 N.E.2d 945 (1940).

stipulated time in the future in accordance with stipulated terms.”<sup>41</sup> The *BOCES* court added that section 803 allows the public employer to pay the cost over a period of time, and “the indebtedness is not voluntarily assumed; it is imposed on first employers, like a judgment, for a past breach of duty.”<sup>42</sup>

In conclusion, the Appellate Division, Third Department, held that section 803 does not violate the Equal Protection and Due Process Clauses of the Federal nor the New York State Constitutions because the amendment by the legislature rendered the constitutional challenges moot.<sup>43</sup> The court also determined that the ameliorative statute does not violate any alleged provisions of the New York State Constitution.<sup>44</sup> In essence, the court in its opinion deferred to the New York Legislature so that the legislature may redress a wrong done by an employer.<sup>45</sup> Even though it is not clear that an employer actually injured a part-time employee because before 1986 “there had been no legislative enactment which required public employers to give notice to part-time employees of their option to join a public retirement system.”<sup>46</sup>

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<sup>41</sup> *BOCES*, 236 A.D.2d at 88, 664 N.Y.S.2d at 152 (citing *Cheray*, 282 N.Y. at 389, 26 N.E.2d at 948).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 87, 664 N.Y.S.2d at 151-52.

<sup>44</sup> *Id.* at 87-88, 664 N.Y.S.2d at 151-52.

<sup>45</sup> *BOCES v. New York*, 171 Misc. 2d 585, 589, 654 N.Y.S.2d 954, 957. The court noted “[a]cts of legislature are entitled to a strong presumption of constitutionality.” *Id.* (citing *Schulz v. New York*, 84 N.Y.2d 231, 639 N.E.2d 1140, 616 N.Y.S.2d 343 (1994)).

<sup>46</sup> *Id.* at 591, 654 N.Y.S.2d at 958.



