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## Gift or Loan of State Money, Court of Appeals Gagliardo v. Dinkins

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N.Y. CONST. art. VII, § 11:

*[N]o debt shall be hereafter contracted by or in behalf of the state unless such debt shall be authorized by law . . . . No such law shall take effect until it shall, at a general election, have been submitted to the people, and have received a majority of all votes cast for and against it at such election . . . .*

N.Y. CONST. art. VII, § 8, cl. 1:

*The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to or in aid of any individual, or public or private corporation or association, or private undertaking . . . .*

N.Y. CONST. art. X, § 5:

*Neither the state nor any political subdivision thereof shall at any time be liable for the payment of any obligations issued by . . . a public corporation heretofore or hereafter created, nor may the legislature accept, authorize acceptance of or impose such liability upon the state or any political subdivision thereof.*

N.Y. CONST. art. VII, § 4(c):

*Except as otherwise provided in this constitution, no county, city, town, village or school district described in this section shall be allowed to contract indebtedness for any purpose or in any manner . . . .*

## COURT OF APPEALS

Gagliardo v. Dinkins<sup>1</sup>  
(decided Oct. 22, 1996)

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1. 89 N.Y.2d 62, 74 N.E.2d 298, 651 N.Y.S.2d 368 (1996).

Plaintiffs Gagliardo and Ranieri were, respectively, retired New York City Housing and Transit police officers who were statutorily ineligible to receive benefits from a variable supplements fund [hereinafter "VSF"] because they had worked for less than the requisite twenty year period.<sup>2</sup> The plaintiffs filed separate suits seeking to enjoin VSF payments to other retirees, alleging that the benefit scheme, to the extent that it utilized the VSF fund, was unconstitutional.<sup>3</sup> It was argued that the transfer of excess funds from the New York City Employees' Retirement System [hereinafter "NYCERS"] to the VSF, and the subsequent transfer of a percentage of the VSF assets to the city, compromised the integrity of NYCERS in violation of the Pension Impairment Clause of the New York State Constitution.<sup>4</sup> It was further alleged that the transfer of VSF assets, both to the eligible retirees and to the city, was an unconstitutional gift of public funds.<sup>5</sup> Finally, the provision requiring twenty or more years of service in order to be eligible for VSF benefits was challenged as violative of the Equal Protection Clause of the

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2. *Id.* at 68, 74 N.E.2d at 299, 651 N.Y.S.2d at 369. *See* New York City Administrative Code § 13-191[1] [c]; § 13-191[1] [e] (1994). This section provides that, in order to benefit from the VSF, one must have retired with "credit for twenty or more years of service toward the minimum period." The minimum period is the shortest period of credited service that the officer may perform and still receive immediate payments upon retirement. *Id.*

3. *Gagliardo v. Dinkins*, 89 N.Y.2d 62, 70-71, 74 N.E.2d 298, 300- 01, 651 N.Y.S.2d 368, 370.

4. *Id.* at 71, 74 N.E.2d at 301, 651 N.Y.S.2d at 371. *See* N.Y. CONST. art. 5, § 7. This section provides: "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." *Id.*

5. *Gagliardo*, 89 N.Y.2d at 74, 74 N.E.2d at 303, 651 N.Y.S.2d at 373. *See* N.Y. CONST. art. 8, § 1. This section provides in pertinent part: "No county, 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, or private undertaking . . . ."

Fourteenth Amendment of the Federal Constitution<sup>6</sup> because it discriminated against officers who had retired because of age or disability.<sup>7</sup>

The New York State Court of Appeals denied all relief,<sup>8</sup> finding that removal of the excess NYCERS funds was wholly permissive and discretionary.<sup>9</sup> The NYCERS accounts had never been imperiled because only funds that exceeded those guaranteed to retirees could be transferred.<sup>10</sup> The court also held that the transfers were not gifts because they were carried out as the result of a collective bargaining process wherein consideration was received.<sup>11</sup> Lastly, the court held that the eligibility requirement of twenty years of service was not unconstitutional because it did not place a disproportionate burden upon disabled retirees.<sup>12</sup>

A VSF was first created in 1970 as the result of collective bargaining between the City of New York and its police union.<sup>13</sup> The applicable legislation authorized the trustees of NYCERS funds, in their discretion, to invest a portion of these assets in common stock as opposed to fixed income debt securities.<sup>14</sup> Net income, which was defined as that which exceeded the amount that would have been collected had the money instead been invested in the bonds, would then be subject to transfer to the VSF for distribution to service retirees.<sup>15</sup> Although the supplemental fund might incur losses if the amount of income that would have been generated by the securities was greater, this scheme was a means by which to provide eligible retirees

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6. U.S. CONST. amend. 14, § 1. The Fourteenth Amendment provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

7. *Gagliardo*, 89 N.Y.2d at 71-72, 74 N.E.2d at 302, 651 N.Y.S.2d at 372.

8. *Id.*, 74 N.E.2d at 301-02, 651 N.Y.S.2d at 371-72.

9. *Id.* at 74, 74 N.E.2d at 303, 651 N.Y.S.2d at 373.

10. *Id.*

11. *Id.* at 74-75, 74 N.E.2d at 303, 651 N.Y.S.2d at 373.

12. *Id.* at 76, 74 N.E.2d at 304, 651 N.Y.S.2d at 374.

13. *Id.* at 68, 74 N.E.2d at 300, 651 N.Y.S.2d at 370.

14. *Id.*

15. *Id.* at 68-69, 74 N.E.2d at 300, 651 N.Y.S.2d at 370.

with additional money without compromising the funds needed to pay the basic pension benefits guaranteed to the retired officers.<sup>16</sup> In 1987, collective bargaining negotiations led to an agreement that this type of system would be created to benefit eligible retirees of the New York City Housing and Transit Police Departments as well.<sup>17</sup>

The following year, the VSF's of the New York City Police Department were converted to mandatory benefit plans wherein fixed payments to eligible retirees were guaranteed and would increase steadily until the year 2007.<sup>18</sup> These benefits were guaranteed by the City regardless of how well the NYCERS investments performed.<sup>19</sup> The statute further authorized the transfer of \$75 million dollars from the police officers' VSF to the City of New York.<sup>20</sup>

In 1992 and 1993, eligible Transit and Housing Police retirees were also granted defined benefit payments.<sup>21</sup> However, these payments were not guaranteed, but rather were dependent upon the performance of the NYCERS investments.<sup>22</sup> The City of New York would guarantee the payments through the year 2007 in exchange for a one-time transfer of 15% of the VSF funds, but *only* if the City Actuary would certify that the VSF in fact contained sufficient assets with which to make the benefit payments.<sup>23</sup> The Actuary determined that adequate funds existed in both the Housing and Transit VSF's and 15% of the latter's assets were then transferred to the City of New York.<sup>24</sup> With regard to the Housing VSF, the previous agreement was

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16. *Id.* at 69, 674 N.E.2d at 300, 651 N.Y.S.2d at 370.

17. *Id.* See New York City Administrative Code § 13-191 (added by 1987 N.Y. Laws ch. 846).

18. *Id.* at 70, 674 N.E.2d at 300, 651 N.Y.S.2d at 370. See 1988 N.Y. Laws ch. 247.

19. *Id.*, 674 N.E.2d at 301, 651 N.Y.S.2d at 371.

20. *Id.*, 674 N.E.2d at 301, 651 N.Y.S.2d at 371.

21. *Id.* See New York City Administrative Code § 13-191; § 13-192; § 13-193.

22. *Gagliardo*, 89 N.Y.2d at 70, 674 N.E.2d at 301, 651 N.Y.S.2d at 371.

23. *Id.* (emphasis added).

24. *Id.* at 70-71, 674 N.E.2d at 301, 651 N.Y.S.2d at 371.

supplanted and the city guaranteed the benefit payments in exchange for a one-time transfer of \$2,770,000.<sup>25</sup>

The Ranieri and Gagliardo plaintiffs filed their respective suits in 1992 and 1993.<sup>26</sup> The trial court dismissed both claims, which the Appellate Division consolidated on appeal, subsequently affirming the summary judgments in favor of the defendant.<sup>27</sup> The Ranieri plaintiffs asserted that the legislative directive to transfer NYCERS funds to the Transit VSF, and the subsequent transfer of 15% of the latter's assets to the city, compromised the integrity of the pension system and deprived its trustees of their rightful discretion in violation of the New York State Constitution.<sup>28</sup> They further alleged that the VSF payments to eligible retirees constituted an unconstitutional gift of public funds.<sup>29</sup> The Gagliardo plaintiffs argued that the transfer of Housing VSF funds to the City was an unconstitutional impairment of the NYCERS assets.<sup>30</sup> Further, they alleged that the twenty- year service requirement for eligibility discriminated against older or disabled persons in violation of the Equal Protection Clause of Federal Constitution,<sup>31</sup> the Americans with Disabilities Act,<sup>32</sup> and the New York State Human Rights Law.<sup>33</sup>

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25. *Id.* at 71, 674 N.E.2d at 301, 651 N.Y.S.2d at 371.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* The Gagliardo plaintiffs included this argument in their brief, however, the court refused to consider it because they had failed to raise the issue in a timely manner. *Id.* at 74 n.13, 674 N.E.2d at 303 n.13, 651 N.Y.S.2d at 373 n.13.

30. *Id.* at 71, 674 N.E.2d at 302, 651 N.Y.S.2d at 372.

31. *Id.* at 72, 89 N.E.2d at 302, 651 N.Y.S.2d at 372.

32. *Id.* See 42 U.S.C. § 12101(a)(7); § 12101(b)(1). The Act states that persons with disabilities are a "discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society." *Id.* It means to serve as a "clear and comprehensive national mandate" for the eradication of discrimination against disabled persons. *Id.*

33. *Id.* See N.Y. Exec. Law § 296[1][a]. This section provides in pertinent part: "It shall be an unlawful discriminatory practice . . . for an employer . . . because of the age, race, creed, color, national origin, sex, or disability. . . of

The court was unpersuaded by the plaintiffs' argument that the transfer of assets from the NYCERS fund to the VSF violated the Pension Impairment Clause of the New York State Constitution. The Court held that no pension benefits were "diminished or impaired" pursuant to the Clause because this system involved wholly discretionary distribution of funds that necessarily exceeded those needed to make the guaranteed payments to all retirees. The court deemed the case of *Poggi v. City of New York*<sup>34</sup> controlling, relying heavily upon its reasoning.<sup>35</sup> In *Poggi*, superior officers of the New York City Police Department sued to enjoin payments to the VSF on the grounds that these payments violated the Pension Impairment Clause.<sup>36</sup> The plaintiffs objected to the method of allocating VSF payments according to the respective contributions of the superior officers and the patrolmen to the NYCERS funds, which resulted in the patrolmen's receiving a greater portion of the VSF benefits.<sup>37</sup> The court held that the superior officers had no claim because their pension payments, as guaranteed in the NYCERS contract, had never been affected by the wholly independent existence of the VSF and its payments, which were not themselves pension benefits.<sup>38</sup> Further, the manner in which VSF funds were to be distributed among the retirees was appropriately within the discretion of the New York State Comptroller.<sup>39</sup>

The plaintiffs in *Gagliardo* relied upon *Sgaglione v. Civil Service Employees Association*,<sup>40</sup> decided prior to *Poggi*, and the more recent case of *McDermott v. Regan*.<sup>41</sup> In *Sgaglione*, the New York State Comptroller was compelled by the New York

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any individual . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment." *Id.*

34. 109 A.D.2d 265, 491 N.Y.S.2d 331 (1st Dep't 1985), *aff'd*, 67 N.Y.2d 794, 492 N.E.2d 397, 501 N.Y.S.2d 324 (1986).

35. *Gagliardo*, 89 N.Y.2d at 68, 674 N.E.2d at 299-300, 651 N.Y.S.2d at 369-70.

36. *Poggi*, 109 A.D.2d at 266, 491 N.Y.S.2d at 332-33.

37. *Id.*, 491 N.Y.S.2d at 333.

38. *Id.*

39. *Id.*

40. 37 N.Y.2d 507, 337 N.E.2d 592, 375 N.Y.S.2d 79 (1975).

41. 82 N.Y.2d 354, 624 N.E.2d 985, 604 N.Y.S.2d 890 (1993).

State Financial Emergency Act for the City of New York<sup>42</sup> to invest \$125,000,000 from the police, firefighter, and other state retirement systems in certain specified bonds.<sup>43</sup> The New York State Court of Appeals deemed the legislation violative of the Pension Impairment Clause because the comptroller had been divested of his discretion and the retirement system funds had been imperiled.<sup>44</sup> Similarly, in *McDermott*, a “radical” legislatively mandated change in the method of funding the public retirement system, which would deplete millions of dollars of accrued assets as the result of reduced contributions to the fund, was also held to violate the Clause because of its destabilizing effect on the system.<sup>45</sup> The *Gagliardo* court distinguished both of these cases from the instant situation, where, according to the court, the retirement system was not compromised and the proper discretion of the trustee was maintained.<sup>46</sup>

The court also rejected the plaintiffs’ claim that the transfer of a portion of the VSF assets to the City in exchange for the latter’s guarantee of subsequent fixed VSF payments impaired the NYCERS fund benefits in violation of the Pension Impairment Clause.<sup>47</sup> Because the *Gagliardo* plaintiffs were concededly ineligible for VSF payments and, further, because the court had already determined that their guaranteed pension benefits had not been jeopardized, the plaintiffs were held to lack standing to challenge this action.<sup>48</sup> In order to overcome this objection, the plaintiffs argued that the original transfer of surplus funds from the NYCERS into the VSF, combined with the subsequent transfer of a portion of these funds to the city, constituted an illegal scheme to divert pension funds.<sup>49</sup> The court rejected this

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42. 1975 N.Y. Laws ch. 868-70.

43. *Sgaglione*, 37 N.Y.2d at 511, 337 N.E.2d at 594, 375 N.Y.S.2d at 82.

44. *Id.* at 513-14, 337 N.E.2d at 596, 375 N.Y.S.2d at 84-85.

45. *McDermott*, 82 N.Y.2d at 361, 624 N.E.2d at 988-89, 604 N.Y.S.2d at 893-94.

46. *Gagliardo*, 89 N.Y.2d at 73, 74 N.E.2d at 302-03, 651 N.Y.S.2d at 372-73.

47. *Id.* at 76-77, 74 N.E.2d at 304-05, 651 N.Y.S.2d at 374-75.

48. *Id.* at 76, 74 N.E.2d at 305, 651 N.Y.S.2d at 375.

49. *Id.*



argument, stating that the two legislative acts were entirely separate and independent.<sup>50</sup> The court reiterated the fact that the pension obligations remained unaffected by the legislation.<sup>51</sup>

The *Gagliardo* court also rejected the plaintiffs' argument that the VSF payments were an unconstitutional gift of public funds.<sup>52</sup> The plaintiffs relied upon the VSF legislation itself in this regard, which states that the supplemental payments are not themselves pension or retirement system benefits.<sup>53</sup> Further, Civil Service Law section 201(4) provides that "any benefits provided by or to be provided by a public retirement system, or payments to an insurer to provide an income for retirees, or payments to retirees or their beneficiaries [are not] terms and conditions of employment."<sup>54</sup> However, the court noted that the provision of the New York State Constitution that prohibits gifts of public funds is not necessarily subject to the definitions employed in these statutes.<sup>55</sup>

As noted by the court, the VSF payment system was created as a result of collective bargaining negotiations.<sup>56</sup> Payments are provided in exchange for services performed by the beneficiaries at some previous point in time.<sup>57</sup> Further, the additional income serves the desired function of attracting and retaining better qualified individuals and providing an incentive to delay retirement.<sup>58</sup> Thus, the court held that the VSF payments did not constitute a gift in that they were provided in exchange for consideration.<sup>59</sup>

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50. *Id.*

51. *Id.*

52. *Id.* at 74, 674 N.E.2d at 303, 651 N.Y.S.2d at 373.

53. *Id.*

54. *Id.* See N.Y. CIV SERV. LAW § 201[4] (McKinney 1983).

55. *Id.* at 75, 674 N.E.2d at 304, 651 N.Y.S.2d at 374.

56. *Id.* at 75, 674 N.E.2d at 303, 651 N.Y.S.2d at 373.

57. *Id.*

58. *Id.* at 75-76, 674 N.E.2d at 303, 651 N.Y.S.2d at 373.

59. *Id.* at 75, 674 N.E.2d at 303, 651 N.Y.S.2d at 373. See, e.g., *Antonopoulou v. Beame*, 32 N.Y.2d 126, 296 N.E.2d 247, 343 N.Y.S.2d 125 (1973) (holding that back pay awarded to a teacher who had been retroactively reinstated after a maternity leave was not a "gift" of public funds because the

The plaintiffs were also unsuccessful with respect to their claim that the twenty-year eligibility requirement discriminated against officers who retired because of a disability.<sup>60</sup> In order to invoke the Americans with Disabilities Act, the plaintiffs must demonstrate that they are "otherwise qualified for participation in the benefit program . . . ."<sup>61</sup> According to the court, these individuals are not otherwise eligible to receive VSF payments because they have not served for the requisite twenty years.<sup>62</sup> The court in fact found no disproportionate burden placed upon disabled retirees, noting that the operative criterion is years of service as opposed to disabled status, and denied all relevant claims.<sup>63</sup> The court observed that this group has its own separate and distinct benefit system that took into account its special needs and circumstances.<sup>64</sup>

The plaintiffs were unsuccessful with regard to all of their constitutional claims. The court refused to depart from established precedent and interpret the applicable provisions of the New York State Constitution and the terms therein as broadly as would be required to grant the plaintiffs relief. Similarly, the court found no improper discriminatory scheme that would invoke federal constitutional protection.

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award, as the result of a grievance procedure, was made pursuant to a collective bargaining agreement.)

60. *Id.* at 76, 674 N.E.2d at 304, 651 N.Y.S.2d at 374.

61. *Id.* at 75, 674 N.E.2d at 304, 651 N.Y.S.2d at 374. *See* 42 U.S.C. § 12131(2). This section provides:

The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

*Id.*

62. *Id.* at 76, 674 N.E.2d at 304, 651 N.Y.S.2d at 374.

63. *Id.*

64. *Id.*

