

JUDGE NEIL H. COHEN
CIRCUIT COURT OF COOK COUNTY
CHANCERY DIVISION
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FACSIMILE TRANSMITTAL SHEET

DATE:	March 1, 2018	FROM:	Chambers of Judge Neil H. Cohen
TO:	Ryan Hagetty	FAX NUMBER:	312-263-1520
RE:	15-CH-14869 Biedron et al. v. Park Employees	NUMBER OF PAGES (INCLUDING COVER PAGE)	8

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**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

DAVID BIEDRON, et al.,)	
)	
Plaintiffs,)	
)	
v.)	15 CH 14869
)	
PARK EMPLOYEES' AND)	
RETIREMENT BOARD EMPLOYEES')	
ANNUITY AND BENEFIT FUND, et al.,)	
)	
Defendants.)	

MEMORANDUM AND ORDER

Plaintiffs/Counter-Defendants David Biedron, Heather Kelly and the Service Employees International Union, Local 73 ("Union") have filed a Motion for Summary Judgment pursuant to 735 ILCS 5/2-1005.

Intervenor/Counter-Plaintiff the Chicago Park District ("District") has also filed a Motion for Summary Judgment pursuant to 735 ILCS 5/2-1005.

I. Background

On November 7, 2013, the General Assembly enacted Public Act 098-0622 amending the Illinois Pension Code by changing sections 1-160, 12-130, 12-133.1, 12-133.2, 12-140, 12-149, and 12-150 and adding sections 12-150.5, 12-155.5 and 12-195. The legislation's effective date was January 1, 2014.

On October 8, 2015, Plaintiffs filed a Complaint for Declaratory, Injunctive and Other Relief ("Complaint") against Defendants the Park Employees' and Retirement Board Employees' Annuity and Benefit Fund ("CPD Fund") and the Retirement Board of the Park Employees' and Retirement Board Employees' Annuity and Benefit Fund ("the Board").

The Complaint alleges that the changes made to the Pension Code by Public Act 098-0622 diminish and impair the benefits of participation in the Fund in violation of §5, Art. XIII of the Illinois Constitution of 1970 ("the Pension Clause"). Specifically, Plaintiffs allege that Public Act 098-0622 impermissibly diminishes pension benefits by: (1) increasing the age at which certain employees are eligible to receive their retirement annuity (§12-130); (2) changing the formula used to calculate automatic annual increases for both current and future retirees (§12-133.1(b)); (3) eliminates automatic annual increase in 2015, 2017 and 2019 (§12-133.1(b)); and (4) reduces duty disability benefits by one percent in 2015, 2017 and 2019 (§12-140).

Count I of the Complaint seeks a declaration that Public Act 098-0622 constitutes a violation of the Pension Clause and is void. Count I further seeks to permanently enjoin the enforcement of Public Act 098-0622, an order requiring the Board to restore the pension benefits diminished by the enforcement of Public Act 098-0622 and an award of attorney's fees pursuant to 740 ILCS 23/5(c)(2).

The District intervened as a Defendant and filed a Counterclaim for Declaratory Judgment. The Counterclaim concedes that the amendments challenged by Plaintiffs are unconstitutional under the Pension Clause. However, the District seeks a declaration that the provisions of the Public Act not challenged by Plaintiffs are severable from the unconstitutional provisions.

II. Cross-Motions for Summary Judgment

Plaintiffs and the District have filed cross-motions for summary judgment. "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Continental Casualty Co. v. Law Offices of Melvin James Kaplan, 345 Ill. App. 3d 34, 37 (1st Dist. 2003). "When . . . parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law." Id.

A. The Unconstitutionality of the Challenged Provisions

Article XIII, §5 of the Illinois Constitution of 1970 ("the Pension Clause") provides that: "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. 1970, art. XIII, §5.

The Illinois Supreme Court has unequivocally held that "'if something qualifies as a benefit of the enforceable contractual relationship resulting from membership in one of the State's pension or retirement systems, it cannot be diminished or impaired.'" In re Pension Reform Litigation (Heaton v. Quinn), 2015 IL 118585, ¶45, quoting, Kanerva v. Weems, 2014 IL 115811, ¶38. This court agrees with the parties that the amendments to the Pension Code challenged by Plaintiffs diminish or impair pension benefits in violation of the Pension Clause.

There is no dispute between the parties, and the court agrees, that the challenged amendments to the Pension Code enacted by Public Act 098-0622 are unconstitutional under the Pension Code and, therefore, are void.

B. The Severability of the Remaining Provisions of Public Act 098-0622

The parties disagree as to whether the remaining provisions of Public Act 098-0622 are severable from the unconstitutional provisions. "The issue of severability involves a question of statutory construction, which primarily involves ascertaining and giving effect to the intent of the legislature. In determining whether a statutory provision containing an unconstitutional portion

may be severed from the rest of a statute, [a court] looks first at the statute's own specific severability provision, if it has one." Heaton, 2015 IL 118585, ¶91.

Public Act 098-0622 contains the following severability provision:

Section 97. Inseverability and severability. The changes made by this amendatory Act are inseverable, except that Section 12-195 of the Illinois Pension Code is severable under Section 1.31 of the Statute on Statutes.

Public Act 098-0622, §97. This provision plainly and unambiguously provides that every section of the Act is inseverable except for §12-195. Therefore, given the unconstitutionality of the challenged provisions of the Act, the remaining provisions of the Act, with the exception of §12-195, are not severable.

The District argues that this court should ignore the legislature's clearly stated intent that only §12-195 is severable and find that the sections of the Act not challenged by Plaintiffs may be enforced. Section 12-195, however, is not ambiguous and must be enforced as written. The District's contention that this court should ignore the legislature's clear and unequivocal intent is contrary to Illinois law and must be rejected.

Plaintiffs argue that this court should find that §12-195 is also inseverable. "The presumption of severability reflected in an express severability clause will be overcome, and the entire statute will be held unconstitutional, if the legislature would not have passed the law without the provisions deemed invalid. To determine whether the legislature would not have passed the law without the invalid parts, the courts consider whether the legislative purpose in passing the act is significantly undercut or altered by the elimination of those invalid sections. Even in cases where the valid sections of an act are complete and capable of being executed, the entire act will be declared void if, after striking the invalid provisions, the part that remains does not reflect the legislature's purpose in enacting the law." Heaton, 2015 IL 118585, ¶95.

Section 12-195 provides as follows:

Application and expiration of new benefit increases.

(a) As used in this Section, "new benefit increase" means an increase in the amount of any benefit provided under this Article, or an expansion of the conditions of eligibility for any benefit under this Article, that results from an amendment to this Code that takes effect after the effective date of this amendatory Act of the 98th General Assembly.

(b) Notwithstanding any other provision of this Code, or any subsequent amendment to this Code, every new benefit increase is subject to this Section and shall be deemed to be granted only in conformance with and contingent upon compliance with the provisions of this Section.

(c) The Public Act enacting a new benefit increase must identify and provide for payment to the Fund of additional funding at least sufficient to fund the resulting annual increase in cost to the Fund as it accrues.

Every new benefit increase is contingent upon the General Assembly providing the additional funding required under subsection (c). * * * A new benefit increase created by a Public Act that does not include the additional funding required under this subsection (c) is null and void. If the State Actuary determines that the additional funding . . . is or has become inadequate, it may so certify to the Governor and State Comptroller and, in the absence of corrective action by the General Assembly, the new benefit increase shall expire at the end of the fiscal year in which the certification is made.

Public Act 098-0622, §12-195.

The legislative history of Public Act 098-0622 is clear that its purpose was to establish a comprehensive scheme to reform the Fund and enable it to achieve long-term financial stability. (District's MSJ, Ex. B). It is clear from the Act itself and the legislative history that the provisions of the Act were intended to work together to achieve this purpose. Section 12-195, the sole remaining provision of the Act, cannot by itself accomplish the General Assembly's purpose in enacting Public Act 098-0622. The invalidation of every provision of the Act except §12-195 severely undercuts the General Assembly's purpose in enacting Public Act 098-0622 and, therefore, §12-195 is also inseverable.

Based on Public Act 098-0622's severability provision and Illinois case law, the unchallenged sections of Public Act 098-0622 are not severable and the entire Act must be declared void. Plaintiffs are entitled to a declaration that Public Act 098-0622 is unconstitutional and unenforceable in its entirety under the Pension Clause.

C. Plaintiffs' Request for Attorney's Fees

In their Complaint, Plaintiffs request an award of attorney's fees and costs pursuant to Section 5 of the Illinois Civil Rights Act of 2003, 740 ILCS 23/5 ("Civil Rights Act). Section 5 of the Act provides as follows:

Sec. 5. Discrimination prohibited.

(a) No unit of State, county, or local government in Illinois shall:

(1) exclude a person from participation in, deny a person the benefits of, or subject a person to discrimination under any program or activity on the grounds of that person's race, color, national origin, or gender; or

(2) utilize criteria or methods of administration that have the effect of subjecting individuals to discrimination because of their race, color, national origin, or gender.

(b) Any party aggrieved by conduct that violates subsection (a) may bring a civil

lawsuit, in a federal district court or State circuit court, against the offending unit of government. Any State claim brought in federal district court shall be a supplemental claim to a federal claim. This lawsuit must be brought not later than 2 years after the violation of subsection (a). If the court finds that a violation of paragraph (1) or (2) of subsection (a) has occurred, the court may award to the plaintiff actual damages. The court, as it deems appropriate, may grant as relief any permanent or preliminary negative or mandatory injunction, temporary restraining order, or other order.

(c) Upon motion, a court shall award reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses, to a plaintiff who is a prevailing party in any action brought:

(1) pursuant to subsection (b); or

(2) to enforce a right arising under the Illinois Constitution. . . .

740 ILCS 23/5.

“[T]he primary objective of this court in construing the meaning of a statute is to ascertain and give effect to the intention of the legislature.” In re Detention of Lieberman, 201 Ill. 2d 300, 307 (2002). “All other rules of statutory construction are subordinate to this cardinal principle. Id.

“When the language of a statute is clear and unambiguous, a court must give effect to the plain and ordinary meaning of the language without resort to other tools of statutory construction.” Raintree Homes, Inc. v. Village of Long Grove, 209 Ill. 2d 248, 255 (2004). “One of the fundamental principles of statutory construction is to view all provisions of an enactment as a whole. Words and phrases should not be construed in isolation, but must be interpreted in light of other relevant provisions of the statute.” Id. at 255-56, quoting, Michigan Ave. Nat’l Bank v. County of Cook, 191 Ill. 2d 493, 504 (2000). A court must construe a statute “so that each word, clause or sentence is given reasonable meaning and not deemed superfluous.” Id. at 256.

Plaintiffs argue that §5(c) of the Civil Rights Act allows for the recovery of attorney’s fees and costs for any prevailing party in an action to enforce rights arising under the Illinois Constitution regardless of whether the action asserted a discrimination claim. This position was soundly rejected in Thomann v. Department of State Police, 2016 IL App (4th) 150936.

In Thomann, the plaintiffs filed suit against the Department of State Police asserting that the Concealed Carry Board’s procedures for evaluating objections to concealed carry applications violated the plaintiff’s due process rights. Id. at ¶3. The plaintiffs were partially successful in their suit and sought the award of attorney’s fees and costs under §5(c) of the Civil Rights Act. Id. at ¶11.

The appellate court found that the plaintiffs were not entitled to attorney’s fees and costs under §5(c) because viewing §5 of the Civil Rights Act in its entirety, §5(c) was intended to

apply only to those plaintiffs prevailing on discrimination claims involving one or more of the identified suspect classes. Id. at ¶¶28-29.

The plaintiffs in Thomann, like Plaintiffs here, argued that Grey v. Hasbrook, 2015 IL App (1st) 130267, had implicitly held that a plaintiff could recover attorney's fees for any successful claim arising under the Illinois Constitution. Id. at ¶32. The Thomann court rejected this assertion correctly noting that it was undisputed in Grey that the plaintiffs, transgender individuals seeking to change their birth certificates, had the right to sue under §5(a) of the Civil Rights Act. Id.; Grey, 2015 IL App (1st) 130267 at ¶¶1-3, ¶18. The only issue before the Grey court was whether the State had waived sovereign immunity with regard to the attorney's fees. Id.

Thomann is clear that Plaintiffs are not entitled to recover attorney's fees and costs under §5(c). Plaintiffs have failed to cite to any applicable authority to the contrary.

D. Discovery on Damages and Post-Judgment Interest

Because Public Act 098-0622 is unconstitutional and therefore void *ab initio*, People v. Blair, 2013 IL 114122, ¶28, the members of the Fund are entitled to be compensated for any harm caused during the period the changes enacted by Public Act 098-0622 were in effect. People v. Gersch, 135 Ill. 2d 384, 390, 397-98.

On October 19, 2016, the court entered an Agreed Order providing that the three percent annual increase in retirement annuities would be reinstated and that the Fund would make a lump sum retroactive back payment to cover any increases which had been eliminated by Public Act 098-0622. Therefore, Plaintiffs are not seeking any damages with regard to the annual increases.

However, Plaintiffs contend that any CPD employees who became eligible for a duty disability pension after the effective date of Public Act 098-0622 are entitled to back pay. Plaintiffs further argue that all CPD employees are entitled to recover the additional employee pension contributions taken from their salaries. Plaintiffs assert that limited discovery will be necessary to determine the amounts due to CPD employees.

The court agrees that limited discovery is necessary to determine the amount of damages. The court will not enter any judgment as to damages until such discovery is conducted.

Because damages have yet to be determined, and the court is not entering any judgment on damages at this time, it is premature to consider the parties' arguments regarding post-judgment interest.

III. Conclusion

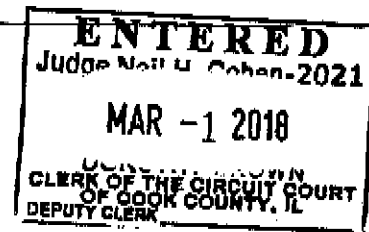
Plaintiffs' Motion for Summary Judgment is granted in part. The court declares that Public Act 098-0622 is unconstitutional under the Pension Clause and void *ab initio* in its entirety.

The parties are granted leave to conduct discovery on damages due to CPD employees arising from the application of the provisions of Public Act 098-0622.

The District's Motion for Summary Judgment is denied.

The status date of March 9, 2018 at 9:30 a.m. stands.

Enter: _____



Judge Neil H. Cohen