Legislative Authority to Adjust Judicial Benefits Under the New Jersey Constitution

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1. Susan A. Feeney, N.J. Bar Association Backs Judge Suing State Over Pension, Health Benefits, NJ.com: http://blog.nj.com/njv_guest_blog/2011/08/nj_bar_association_backs_judge.html

2. DePascale v. State, 2011 N.J. Super. Unpub. LEXIS 2626 (N.J. Super. Ct. Law Div. Oct. 17, 2011).

3. Sam Favate, NJ Supreme Court Takes on Judicial Benefits Case, Christie Fumes, Wall Street Journal Law Blog: http://blogs.wsj.com/law/2011/11/11/nj-supreme-court-takes-on-judicial-benefits-case-christie-fumes/

4. MaryAnn Spoto, Judge Nixes Christie Request to Have N.J. Judges Contribute More Toward Pensions and Benefits, NJ.com: http://www.nj.com/news/index.ssf/2011/10/judge_nixes_christie_request_t.html

5. Editorial, Courts Should Toss Judge's Lawsuit over Health, Pension Benefits, NJ.com, Aug. 8, 2011: http://blog.nj.com/njv_editorial_page/2011/08/courts_should_toss_judges_laws.html

6. Brief of *Amicus Curiae* New Jersey State Bar Association, DePascale v. State (Jan. 17, 2012): http://www.njsba.com/images/content/1/0/1003869.pdf

Legislative Authority to Adjust Judicial Benefits Under the New Jersey Constitution

Thomas M. Johnson, Jr.

Last summer, Governor Chris Christie and the New Jersey Legislature enacted bipartisan reform of the state's underfunded employee pension and health care systems. The Pension and Health Care Benefits Act requires all state employees, including judges, to contribute a higher percentage of wages to public benefit plans in which they participate. Soon after the Act passed, Superior Court Judge Paul DePascale sued the state, arguing that the Act violates Article VI of the New Jersey Constitution, which provides that the "salaries" of judges in active service "shall not be diminished during the term of their appointment."[1]

A trial court agreed with Judge DePascale, holding that it violated the Constitution to increase a sitting judge's mandatory contributions to benefits without an offsetting increase in wages. In particular, the court reasoned that the overriding purpose of Article VI was to promote judicial independence, and that "the drafters [of the Constitution] intended to give the judges complete protection and every possible safeguard" against legislative interference.[2] Following that decision, the state supreme court took the unusual step of accepting the case for immediate review (or "direct certification"), bypassing the state's intermediate court of appeals. The court will likely hear arguments early this year.

This paper reviews the text, structure, and history of the 1947 New Jersey Constitution, as well as case law addressing the nature of public employee benefits in that state. A review of the relevant textual and historical evidence suggests that the drafters may not have intended to extend constitutional protection to judicial benefits. The evidence suggests instead that the drafters entrusted the Legislature with discretion to adjust benefits as necessary to respond to prevailing economic conditions. The New Jersey Supreme Court should weigh this evidence carefully against the reasons provided by the trial court for invalidating the law as applied to judges.

The trial court in *DePascale* based its decision in part on the "clear and unambiguous" meaning of the word "salaries" in Article VI.[3] The court reasoned that the term "salary" was at times used in statements by the drafters of the Constitution and in subsequent New Jersey statutes interchangeably with the broader term "compensation," which all parties agreed would cover health and pension benefits.[4] The court further claimed that the "precise issue in this case, whether 'salary' as applied to judges includes pension and health benefits, is one of first impression in New Jersey," but found persuasive a recent state appellate decision holding that a statute protecting the "salary" of municipal employees was broad enough to cover sick, vacation, and personal days.[5]

Competing authorities, however, cast doubt on this definition of "salary." It is debatable whether the meaning of the term, as applied to judicial pensions, truly is an issue of first impression. As early as 1936, the New Jersey Supreme Court held that "a pension is neither 'wages, earnings, salary or profits,' within the common acceptation and usage of those terms."[6] In 1954, the New Jersey Attorney General issued an opinion letter likewise concluding that "describing a pension[] as salary or compensation[] is unusual, and does not conform with normal statutory language on the subject."[7] The Attorney General relied in part on language in the original 1948 Judicial Retirement Statute, "which specifically describes the benefits being received . . . as a pension, and not as a salary or compensation."[8] Five years later, a state appellate court, in applying the Veterans' Pension Act to a county judge, relied on the Attorney General's letter and agreed that the terms "salary" and "pension" were distinct: "Does the reference to 'salaries' in [the statute] in and of itself include pensions? We conclude it does not."[9]

The Constitution itself also suggests that salary, pensions, and health benefits are distinct concepts. Separate and apart from the provision protecting judicial "salaries," the Constitution also provides that "[p]rovisions for the *pensioning* of the Justices of the Supreme Court and the Judges of the Superior Court shall be made by law."[10] Furthermore, in 1992, a

constitutional amendment required the state to pay certain costs associated with administration of the courts, including the "salaries, health benefits and pension payments" of certain judicial employees.[11] If the term "salaries" included both health care and pension benefits, the drafters of this amendment would not have needed to specifically list both "health benefits" and "pension payments." But they did, and this strongly suggests that the term "salaries" itself should be read to exclude those benefits.

The best textual argument for Judge DePascale's position is not that the term "salary" extends to health and pension benefits, but that as a practical matter, a judge's salary is "diminished" when the state increases mandatory contributions to any public program, without also increasing wages or the level of benefits received. On this view, Article VI protects not only the gross income established by statute, but also the amount of a judge's take-home pay.

The problem with this argument is that it may prove too much. All parties agree, for example, that the state could constitutionally reduce a judge's net income by enacting or increasing generally applicable taxes.[12] Judge DePascale's burden, then, is to explain why increased contributions to health and pension benefits, applicable to all state employees, should be prohibited, when generally applicable taxes are not.

There are historical reasons why the drafters likely did not view an increase in mandatory contributions to benefits as an unconstitutional "dimin[ution]" of salaries. Since the Progressive Era, when New Jersey first experimented with public pension plans, its courts have adhered to the principle that state employees have no vested or contractual right to the benefits of public office.[13] This was a conscious break from the English tradition, in which public offices and their emoluments were "incorporeal hereditaments" that could be passed down through generations and enforced in courts.[14]

In particular, the New Jersey Supreme Court repeatedly reaffirmed in the decades prior to the 1947 Constitutional Convention that "compulsory deductions from the salary of governmental employes by the authority of the government for the support of a pension fund creates no contractual or vested right between such employes and the government, and neither such employes nor those claiming under them have any rights except their claims be based upon and within the statute governing the fund."[15] This rule was established to guarantee that a pension plan served its purpose as "an inducement to conscientious, efficient and honorable service."[16] To ensure honorable service until retirement, an employee's pension benefits—or any return at all on mandatory contributions paid into a plan—would not accrue or "vest" until the pensioner met the eligibility criteria for the pension and retired, and the payments became due.[17]

The drafters of the Constitution were well aware of this legal landscape. Indeed, they specifically considered a proposal, based on the New York Constitution, that provided that "[b]enefits payable by virtue of membership in any state pension or retirement system shall constitute a contractual relationship and shall not be diminished or impaired."[18] This proposal was rejected, however, as an unwarranted intrusion on the powers of the Legislature. As delegate Amos Dixon, a member of the Judiciary Committee, explained:

> The fallacy of putting such matters as . . . pension in our Constitution has been very apparent and has been carefully avoided by this Convention, which has . . . refused to incorporate in [its] proposal for a new Constitution certain proposals to freeze into this Constitution the matter of pension rights of teachers, policemen and firemen. These are legislative matters and should be left to the legislators . . . .[19]

Thus, by rejecting the provision imported from New York, the delegates preserved the established rule in New Jersey that public benefits are a matter of legislative grace, not vested right, and subject to change until the payments provided by statute become due. For this reason, authorities cited in *DePascale* from other states that have held that judicial benefits enjoy constitutional protection are arguably inapposite. Those states, and in particular Alaska and Delaware, recognize contractual rights in public benefits.[20] New Jersey, by contrast, does not.

The court in *DePascale* further reasoned that "perhaps the best indication of drafter's intent is the 1947 Constitutional Convention proceedings."[21] The court then pointed to several statements by drafters

identifying the "independence . . . of the judicial branch" as a core purpose underlying Article VI.[22] To be sure, several provisions in the Article—prohibiting dual office-holding, granting life tenure to judges upon reappointment after an initial seven-year term, and of course protecting judicial "salaries"—promote judicial independence. But the court did not identify any authority for whether the drafters intended the goal of judicial independence to extend to constitutional protection for a judge's pension and health benefits.

There is substantial historical evidence that the drafters did not intend to go that far. For example, the drafters debated at length proposals to provide judges with a constitutional right to a pension equivalent to full salary, two-thirds salary, or half-salary in retirement.[23] The model for this approach was Louisiana, whose Constitution provided that judges could retire at age seventy at two-thirds pay.[24] But ultimately, the delegates rejected the invitation to enshrine judicial pension rights in the Constitution.

This decision was undoubtedly rooted in part in the drafters' experience of the collective sacrifices required to overcome years of depression and war. The Chairman of the Judiciary Committee, Nathan Jacobs, pointed to the need for the Legislature to respond quickly to economic emergencies:

> Some of us may well believe in full pensions as a matter of legislative authority. I see no place whatever for it in the Constitution, and it relates again to the principle of flexibility. Could you go back to your people in depression days and justify a constitutional obligation to pay judges $18,000 a year on pension? Think about it! A constitutional requirement is for all time, until further constitutional change. Depressions do not change it; emergencies do not change it; things that you fail to foresee now do not change it. It's there.[25]

Delegate Dixon, also on the Judiciary Committee, concurred that "[t]he matter of pensions should certainly be left to the Legislature and not frozen in the Constitution," and expressed confidence that "with a proper proposal, our Legislature is going to give the judges a fair hearing and a fair deal."[26]

The Judiciary Committee ultimately recommended language, which was adopted in the Constitution and remains there today, stating that "[p]rovisions for the pensioning of the Justices of the Supreme Court and the Judges of the Superior Court shall be made by law."[27] The same article provides that the Governor, under certain circumstances, may retire an incapacitated judge or justice "on pension as may be provided by law."[28] The words "shall be made by law" or "provided by law" reflect the drafters' view that the Legislature, rather than the courts, should retain the discretion to structure and modify judicial pensions.

This resolution was not without controversy. One New Jersey attorney who participated in the debates over ratification and supported mandatory judicial pensions lamented that the delegates were "placing a little too much faith in our future Legislatures by leaving to them the matter of judicial pension," because a judge could "in his old age be exposed to the whims of the then-existing Legislature as to what his pension will be."[29] But while these points of view received a full and fair hearing, the delegates appear to have rejected these concerns in favor of providing the Legislature with flexibility to adjust judicial pensions as necessary to respond to changing economic circumstances.

Another argument one could raise against the Act rests in constitutional structure and public policy. Adjustments to benefits, no less than reductions in base salary, could be used by the political branches as a form of retribution against judges for unpopular decisions. Indeed, in part to avoid any conflict between coequal branches of government, all previous laws increasing judicial contributions to benefits were accompanied by corresponding increases in wages.[30] This is at minimum a salutary practice that avoids even the appearance of political interference with the judiciary. Thus, under this view, any ambiguity in constitutional language should be resolved against the validity of the Act, to promote separation of powers and judicial independence.

There are practical and legal problems, however, with this argument. On a practical level, it is unlikely that the Legislature would attempt to discriminate against judges by enacting a statute that places an equal burden on all state employees. Thus, the concerns with judicial independence that might

apply to a law that specially targeted judges are not present here. With respect to the law, separation of powers may not be best served by permitting judges to revisit the considered judgment of the Legislature in cases involving benefit plans in which the judges are themselves participants. To the contrary, it could intrude on historically legislative prerogatives to read the word "salary" broadly to permit members of the judiciary to resolve the political issues inherent in public benefit plans while acting as judges in their own case.

In New Jersey, acts of the Legislature are presumed constitutional, because the courts "do not sit . . . as a superlegislature," but rather "accept the legislative judgment as to the wisdom of [a] statute."[31] In particular, due to the "the vicissitudes of public policy and the shifting goals that are implicated in the pension laws," the New Jersey Supreme Court has emphasized that "pension entitlement is in the legislative domain and . . . the subject is one which can be most appropriately addressed by the Legislature itself."[32]

The "shifting goals" implicated in pension laws include determining the proper mix of incentives to encourage employees to perform in good behavior until retirement; ensuring that the plan remains solvent for present and future beneficiaries; and weighing competing demands on the public treasury. Similar questions pervade the choice of the appropriate health benefits to offer state employees and the best way to pay for those benefits. Judges are ill-suited to make these types of calibrated policy judgments, particularly when they are beneficiaries of the plans at issue.

The textual and historical evidence marshaled above suggests instead that the drafters of the state Constitution placed the purse strings of judicial compensation in two separate hands: Judges can protect their gross wages from reduction, while the Legislature retains exclusive authority over the structure and funding of other benefits. This is not the only possible balance one might strike in weighing the need for legislative flexibility against the need for judicial independence. But it is an approach suggested by the New Jersey Constitution. The state supreme court should carefully consider the unique history underlying Article VI's judicial compensation provisions as it prepares to review the trial court's decision in *DePascale*.

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Endnotes

1 N.J. Const. art. VI, § 6.

2 DePascale v. State, No. MER-L-1893-11, 2011 N.J. Super. Unpub. LEXIS 2626 (Law Div. Oct. 17, 2011).

3 *Id.* at *28-29.

4 *Id.* at *23-28.

5 *Id.* at *32 (citing Hyland v. Twp. of Lebanon, 419 N.J. Super. 375 (App. Div. 2011)).

6 Passaic Nat'l Bank & Trust Co. v. Eelman, 116 N.J.L. 279, 281 (1936).

7 1954 N.J. Att'y Gen. Op. Letter 17, at 42 (Sept. 2, 1954).

8 *Id.*

9 County of Bergen v. McConnell, 58 N.J. Super. 495, 499 (App. Div. 1959).

10 N.J. Const. art. VI, § 3 (emphasis added).

11 N.J. Const. art. VI, § 8.

12 *See* United States v. Hatter, 532 U.S. 557 (2001).

13 *See* Stuhr v. Curran, 44 N.J.L. 181, 188 (Ct. E. & A. 1882).

14 Laba v. Bd. of Educ., 23 N.J. 364, 391 (1957).

15 Bennett v. Lee, 104 N.J.L. 453, 457 (1928); *see also Eelman*, 116 N.J.L. at 284; *Plunkett*, 113 N.J.L. at 233-34; Bader v. Crone, 116 N.J.L. 329, 331-332 (1936); Salley v. Firemen's & Policemen's Pension Fund Comm'n, 124 N.J.L. 79, 83 (1940); Turner v. Passaic Pension Comm'n, 112 N.J.L. 476, 481 (1932).

16 Ballurio v. Castellini, 29 N.J. Super. 383, 389 (App. Div. 1954).

17 *See, e.g.*, *Eelman*, 116 N.J.L. at 284; *Plunkett*, 113 N.J.L. at 234.

18 3 *State of New Jersey Constitutional Convention of 1947*, at 393.

19 1 *State of New Jersey Constitutional Convention of 1947*, at 490.

20 Stiftel v. Carper, 378 A.2d 124, 130 (Del. Ch. 1977) ("[W]e hold that vested contractual rights exist under the State Pension Law and in the State Pension Fund . . . .") (quoting Delaware Supreme Court); Hudson v. Johnstone, 660 P.2d 1180, 1185

(Ala. 1983) ("Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship.") (quoting Alaska Constitution).

21 *DePascale*, N.J. Super. Unpub. LEXIS 2626, at *21.

22 *See id.*

23 *See, e.g.*, 4 *State of New Jersey Constitutional Convention of 1947*, at 600 ("All members of the Court of Appeals and of the Supreme Court shall retire at or prior to the age of 75 years. Any justice or judge, having tenure, who retires at or after the age of 70 years is to receive a pension in an amount to be fixed by law, but not less than two-thirds of salary.") (recommendation of the Special Committee of Essex County Bar Association Concerning Constitutional Revision of the Judicial Article).

24 4 *State of New Jersey Constitutional Convention of 1947*, at 644.

25 1 *State of New Jersey Constitutional Convention of 1947*, at 475.

26 1 *State of New Jersey Constitutional Convention of 1947*, at 490.

27 N.J. Const. art. VI, § 3.

28 *Id.* art. VI, § 5.

29 4 *State of New Jersey Constitutional Convention of 1947*, at 547 (statement of attorney Joseph A. Davis).

30 *DePascale*, 2011 N.J. Super. Unpub. LEXIS 2626, at *24-25.

31 Burton v. Sills, 53 N.J. 86, 95 (1968).

32 Uricoli v. Bd. of Trs., Police & Firemen's Ret. Sys., 91 N.J. 62, 78 (1982).

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