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Labor Law—Municipal Pensions—Vesting of Rights.—Yeazell v. Copins

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the union against non-strikers.[19] The moratorium statute established no similar direct prohibition on the right of the non-striking collection agents.

The *Hancock* decision must rest upon the operational effect of the moratorium statute on "free collective bargaining." The anticipated effect is a "dialectically plausible" frustration of the national labor policy. However, in finding a repugnance to that policy based on a speculative and potential effect on free collective bargaining, the *Hancock* court extends the reach of federal pre-emption under the NLRA. The thrust of the decision is to eliminate any area of "peripheral concern" from state regulation where free collective bargaining may be affected.

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Labor Law—Municipal Pensions—Vesting of Rights.—*Yeazell v. Copins.*[1]—Appellant Kenneth Yeazell became a member of the police department of the city of Tucson, Arizona, in 1941. At that time, the Police Pension Act of 1937[2] was in effect, which provided, *inter alia*, that a pension amounting to fifty per cent of the average monthly earning for the single year immediately preceding retirement be paid to any policeman who had been in the service of the city for twenty years or more.[3] The act included a compulsory pensioner contribution of two per cent of each paycheck to the pension fund, out of which payments were to be made.[4] In 1952 the act was amended,[5] increasing the employees' compulsory contribution to five per cent and providing that the pension payment would be calculated on the average month's pay for the *five* years immediately preceding retirement.[6]

Upon Yeazell's retirement and application for pension in 1962, the appellee Police Pension Board fixed his monthly cash benefit payment in accordance with the provisions of the 1952 amended act. His awarded benefits were $7.21 per month less than they would have been if computed by the terms of the original act of 1937.[7]

Yeazell then brought a class action for a declaratory judgment that the amendment was unconstitutional and void as applied to himself and others

[19] Allen-Bradley Co. v. NLRB, 286 F.2d 442 (7th Cir. 1961); NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953).

[1] 402 P.2d 541 (Ariz. 1965).

[2] Ariz. Code Ann. §§ 16-1801 to -1822 (1939).

[3] Ariz. Code Ann. § 16-1808(b) (1939) provides:

> Any member of the police department who has served such department twenty (20) years in the aggregate may, upon application, be retired, and shall be paid, during his lifetime, a monthly pension equal to one-half of the compensation received by him for a period of not less than one (1) year prior to the date of application for retirement. . . .

[4] Ariz. Code Ann. § 16-1807 (1939). That section further provided that if a contributor terminated his employment before the twenty years elapsed, he would be entitled to a refund of his contributions with 3½% interest.

[5] Ariz. Rev. Stat. Ann. §§ 9-911 to -934 (1952).

[6] Ariz. Rev. Stat. Ann. §§ 9-923, -925(A) (1952).

[7] Supra note 1, at 542.

similarly situated, and demanded that his pension benefits be computed by the terms of the 1937 act. The lower court entered judgment for the defendant Police Pension Board. The Supreme Court of Arizona reversed. HELD: A public employee has a right to rely upon the terms of legislative enactments in effect at the time he enters municipal service, and subsequent legislation cannot in any way impair or modify these pension rights. These rights vest upon commencement of service as a part of the contract of employment, and any attempted change of that statute must be prohibited as an attempted unilateral modification of a firm and binding executory contract.

The court dismissed on state constitutional grounds the common law and majority jurisdictions' view of the pension as a gratuity[8] and reasoned that a contractual obligation was necessarily the foundation for a pension payment authorized by the legislature. The dissenting opinion, although recognizing a vested right in the retired employee to promised pension benefits, rejected the idea that his claim was to a sum certain and maintained that the claim was to a *reasonable benefit* prescribed by the pension statute in effect *at the time of retirement*. The dissent argued for the implicitly reserved right of a legislature to modify pension benefits when such modification is necessary to preserve the integrity and actuarial soundness of the fund.

The states are unevenly divided between two mutually exclusive theories as to the nature of municipal pensions. The majority jurisdictions hold the common law view that the pensions are mere gratuities of the sovereign, conferring no rights and establishing no duties,[9] while the minority jurisdictions treat the pension benefit as a matter of right, founded upon contractual obligation.[10] The extent to which these rights may be considered vested rights of the pensioner and therefore immune to subsequent modification by the legislature, however, varies among these latter states.

The Pension as a Gratuity. The common law and the majority of jurisdictions consider the pension a gratuity, a manifestation of the generosity of the state, a creature of legislative will and of public policy, which gives rise to no rights in the pensioner and is terminable at the will of the grantor by modification or total abrogation[11]—at least up to the time that the payments are awarded and actually become due and owing.[12]

Pensions had their beginning in this country as an afterthought of the Continental Congress in the nature of rewards to soldiers and seamen of the Revolutionary War.[13] Recently, however, pensions have become more com-

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[8] The Arizona Constitution forbids gratuities. Ariz. Const. art. 9, § 7 (1956): "Neither the State, nor any county, city, town, municipality, or other subdivision of the State shall ever . . . make any donation . . . to any individual, association, or corporation. . . ."

[9] The cases collected in 52 A.L.R.2d 443-81 demonstrate that the gratuity theory of pensions with no vested rights is clearly the majority opinion in the United States.

[10] See, e.g., Dryden v. Board of Pension Comm'rs, 6 Cal. 2d 575, 59 P.2d 104 (1936); Bakenhus v. City of Seattle, 48 Wash. 2d 695, 296 P.2d 536 (1956).

[11] Dodge v. Board of Educ., 302 U.S. 74 (1937).

[12] Retirement Bd. of Allegheny County v. McGovern, 316 Pa. 161, 174 Atl. 400 (1934); Price v. Folsom, 168 F. Supp. 392, 398 (D.N.J. 1958).

[13] United States v. Hall, 98 U.S. 343, 346-48 (1878). See generally 40 Am. Jur. Pensions § 1 (1942).

prehensive, and compulsory contribution by the potential pensioner to the fund has become the rule. By most modern statutes all municipal employees are required to become members of the existing pension system prescribed for their department.[14]

There seem to be two major objections to the gratuity theory of pensions and its corollary of an unprotected pensioner. The first is the fact of compulsory contribution to the fund by the employee. A long line of cases, however, avoids this objection on varying grounds.[15] The second objection arises from a prohibition of gratuitous payments by the state which is frequently found in state constitutions.[16] This objection is employed by the California courts as a basis for their argument that pension rights are vested. These California courts have clearly become the major proponent for the non-gratuitous theory of pensions, treating them as a matter of right.[17]

The Pension as a Matter of Right. Among the jurisdictions that treat the pension as a vested right of the employee, significant variations are found as to the nature, time of vesting, and the extent of that vested right.

The nature of the right is perhaps best termed contractual.[18] The jurisdictions which hold for vested pension rights seem to base these rights upon the contract of employment with the pension considered part of the employee's compensation, i.e., part of the consideration of that contract.[19] One court

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[14] See Ill. Rev. Stat. ch. 108½, § 5-169 (1964); N.J. Stat. Ann. § 43:10-34 (1962); Annot., 52 A.L.R.2d 430, 442 (1957)

[15] Pennie v. Reis, 132 U.S. 464 (1889), the parent case for the view that pension rights rest upon legislative will, held that employees' payroll deductions for a pension system were not in fact employee contributions, but merely public money transferred from one public fund, payroll, to another, pension. That Court found controlling the fact that the money was never reduced to the actual possession and control of the employee and reasoned, hence, that it was never really his.

Anderson v. United States, 205 F.2d 326 (9th Cir. 1953) reiterated the policy that governmental pensions

> . . . are not made a matter of right, or any less a gratuity, by virtue of the fact that the payments are financed by payroll deductions, the rationale being that the sums 'deducted' are never in fact paid . . . the employees, but are retained . . . as general public funds in which the employees can have no right.

Id. at 328.

Although social security retirement benefits are not the immediate subject of this note, it is interesting to consider the language of Price v. Folsom, supra note 12:

> It is a general rule that pension . . . payments . . . are a gratuitous allowance by the particular governmental body creating them. . . . [A] beneficiary . . . does not acquire a vested right to any payments therefrom . . . whether the payments to the fund are voluntary or compulsory.

The Social Security Act reserves the right to amend or repeal payments to recipients of old age insurance in 49 Stat. 648 (1935), 42 U.S.C. § 1304 (1964). For construction of this section see Nestor v. Folsom, 169 F. Supp. 922, 934 (D.D.C. 1959).

[16] O'Dea v. Cook, 176 Cal. 659, 661, 169 Pac. 366, 367 (1917). This case is cited by the present court as manifesting the antigratuity theory which it finds controlling. Supra note 1, at 543-44.

[17] Annot., 52 A.L.R.2d 444 (1957).

[18] Anderson, Vested Rights in Public Retirement Benefits in Pennsylvania, 34 Temp. L.Q. 255, 259 (1961).

[19] O'Dea v. Cook, supra note 16, at 661-62, 169 Pac. at 367 states:

> But where, as here, services are rendered under such a pension statute, the pen-

termed the pension "a product of mutual promises between the pensioning authorities and the pensioner,"[20] and at least one state, by constitutional amendment, makes membership in a pension system a contractual relationship.[21] The Supreme Court of Georgia puts great emphasis on the element of employee compulsory contribution as establishing the pension as a matter of right.[22]

Although the point in time at which the right vests is generally not treated independently in the cases, it may be useful to note the variations among the jurisdictions. Most gratuity jurisdictions hold that a right to a municipal pension never vests, even after it has been awarded.[23] The contractual theory states hold, as a bare minimum, that the rights become completely vested upon completion of the prescribed conditions precedent in the statute,[24] e.g., twenty years' service and a minimum age of fifty. It has been held that the pensioner's rights vest after *partial* completion of the conditions[25] and even that the right to a pension becomes vested immediately upon acceptance of employment by the applicant.[26]

Given a vested right to pension benefits, is the right so vested as to be absolutely immune to any legislative modification, no matter how necessary or desirable? Prior to *Yeazell*, even the contractual jurisdictions were in general agreement that it was not. In California the "vested" right is subject to subsequent legislative modification.[27] A similar philosophy is stated in other contractual theory jurisdictions.[28]

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sion provisions become a part of the contemplated compensation for those services, and so in a sense a part of the contract of employment itself.

Bakenhus v. City of Seattle, supra note 10.

[20] Hickey v. Pittsburg Pension Bd., 378 Pa. 300, 305, 106 A.2d 233, 235 (1954).

[21] N.Y. Const. art. V, § 7 (1960) 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.

[22] Bender v. Anglin, 207 Ga. 108, 109, 60 S.E.2d 756, 759 (1950) states:

It would be an unjustified distortion of this general rule [pension as a gratuity] to apply it in cases where the laws providing for retirement . . . compensation are construed to require the recipients of such benefits to make valuable contributions as consideration for the benefits to be received.

[23] Kinney v. Contributory Retirement Appeal Bd., 330 Mass. 302, 304-05, 113 N.E.2d 59, 61 (1953)

[24] 3 McQuillin, Municipal Corporations § 12.144, at 608 (3d ed. 1963).

[25] Hickey v. Pittsburg Pension Bd., 378 Pa. 300, 106 A.2d 233 (1954). There the pensioner had met the term requirement but not the minimum age requirement, and his rights were held vested and no modification was allowed.

[26] O'Dea v. Cook, 176 Cal. 659, 169 Pac. 366 (1917). This holding is identical with the principal case only with regard to the time of vesting of the pension right. As will be demonstrated below, the extent of the right so vested is strikingly dissimilar.

[27] Kern v. City of Long Beach, 29 Cal. 2d 848, 179 P.2d 799 (1947) is typical:

. . . an employee may acquire a vested contractual right to a pension but . . . this right is not rigidly fixed by the specific terms of the legislation in effect during any particular period in which he serves. The statutory language is subject to the implied qualification that the governing body may make modifications and changes in the system. The employee does not have a right to any fixed or definite benefits, but only to a substantial or reasonable pension.

Id. at 855, 179 P.2d at 803. See also Allen v. City of Long Beach, 45 Cal. 2d 128, 287 P.2d 765 (1955); Abbott v. City of Los Angeles, 50 Cal. 2d 438, 326 P.2d 484 (1958).

The Supreme Court of Arizona in the instant case seems to have gone further than any other court in the United States in contractually defining and protecting the rights of the pensioner. In the process, it has necessarily and completely eliminated the possibility of legislative modification of the terms of the pension system prescribed by statute as it affects currently employed pension members. It holds any such change unconstitutional as affecting vested rights of the pensioner. This prohibition of modification is absolute, regardless of the exigencies of the situation or the actuarial soundness of the fund itself.

The position of the court is an extreme one. It emphatically espouses the contractual theory of pensions. (This, of course, in itself, is not extreme, but is merely the minority view.) It holds that the pension rights vest immediately upon acceptance of employment. (And this fact is not *singularly* extreme, as it has been pointed out above that the California courts hold a similar view.)[29] However, the court does reach a unique extreme when it holds that the right thus vested is to the exact benefit fixed by the statute in effect at the time the employee begins service. No other court in the country has so completely eliminated the possibility of necessary legislative revision of statutory pension benefits.

The court arrives at the necessity of a contractual relationship between the municipality and the pensioner by means of a constitutional argument: Given the existence of a state constitutional prohibition of gratuitous payments of any kind by the state,[30] and given the existence of a functioning pension system which is the result of a legislative act, the court presupposes the constitutionality of the pension system. It concludes that payments of pension benefits *must* be based upon constitutional grounds, or in other words, non-gratuitous grounds. From this reasoning the further conclusion is reached that the basis of this obligation is the contract of employment, a "firm and binding"[31] contract.

In reaching its conclusion, the court expressly overruled two of its previous decisions concerning the same 1952 amendment to the act[32] and criticized those decisions, because they failed to recognize the "firm and binding contract" but spoke rather of the relationship in terms of "quasi-contract" and "contingent interest." By those terms, said the court, "appellant was relegated to a second-class status."[33] The court, as noted by the dissent,

[28] Bakenhus v. City of Seattle, supra note 10, at 701, 296 P.2d at 540, states a similar philosophy:

> [By] the rule which we adopt here, the employee who accepts a job to which a pension plan is applicable contracts for a substantial pension and is entitled to receive the same when he has fulfilled the prescribed conditions. His pension rights may be modified prior to retirement, but only for the purpose of keeping the pension system flexible and maintaining its integrity.

See also Dailey v. City of Seattle, 54 Wash. 2d 733, 344 P.2d 718 (1959).

[29] See note 26 supra.

[30] Ariz. Const. art. 9, § 7 (1956).

[31] Supra note 1, at 544.

[32] Robinson v. Police Pension Bd., 85 Ariz. 384, 339 P.2d 739 (1959); Police Pension Bd. v. Denney, 84 Ariz. 394, 330 P.2d 1 (1958).

[33] Supra note 1, at 544. Police Pension Bd. v. Denney, supra note 32, had held: While it is difficult to accurately describe . . . the relationship thus created be-

rejected the use of those terms and chose the term "contract" instead, as a means of giving fixed significance to the pensioner's status. By the very adoption of this term, however, the court has become entrapped in the extreme position of creating immutably vested pension rights.

The court holds that the common law prohibition against unilateral modification of an executory contract is applicable, and further states that "controversies as to those rights should be settled consistent with the law applicable to contracts."[34] But it is clear that although the court is quick to recognize the common law rules of contract *modification*, it is not so cognizant of the rules of contract *formation* in adopting its contractual basis of pension rights. Its approach raises the problem dealt with in *Wisconsin & Mich. Ry. v. Powers*,[35] which involved a railroad's claim of exemption from a railroad tax on the ground that it had built in an area in which railroads were statutorily exempted. The exempting legislation was subsequently repealed and the railroad was required to pay the tax. Portions of the opinion by Mr. Justice Holmes seem relevant to the present situation:

> No doubt the State expected to encourage railroad building, and the railroad builders expected the encouragement, but the two things are not set against each other in terms of bargain . . . . The broad ground in a case like this is that, *in view of the subject matter*, the legislature is not making promises, but framing a scheme of public . . . improvement. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions, *but it does not address them*, and therefore *it makes no promise to them*. It simply indicates a course of conduct to be pursued, until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in . . . a statute, . . . (Emphasis added.)[36]

This query may be put to the instant court's contract theory: What of the common law requirement of contractual intent? Granted that the legislature intended that some benefits be paid to the loyal worker upon termination of his employment, and granted that the employee seriously considered the pension benefit an important part of his decision to commence and continue municipal service; nevertheless, can it reasonably be maintained that the State of Arizona, by the Police Pension Act of 1937, purported to make a binding and irrevocable contract with each employee to serve while the statute should be in effect? It is submitted that such a contention is a good deal removed from what was in the reasonable contemplation of the parties at the time the police department applicant began service. It is further

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tween plaintiff and the City, it would appear to be in the realm of a quasi-contract with certain rights being given to the officer that must be respected. Subject though to reasonable modification and changes in the law by the legislature. Id. at 398, 330 P.2d at 3.

[34] Supra note 1, at 544.

[35] 191 U.S. 379 (1903).

[36] Id. at 387

maintained that this forced argument for the existence of a contract basis for vested pension rights has led to a distorted and extreme picture of the extent of that right.

In considering the extent of the vested pension right, the Arizona court is professing to follow the case law of the minority jurisdictions, which hold for limited vesting of pension rights, and permit modification prior to completion of the specified conditions, if that modification is "reasonable" and "non-arbitrary."[37] However, it is instead holding for *unqualified* rights, an extreme position which cannot be justified by reliance upon the cited cases. Actually, as the dissent points out, if this court had based its decision on the cited cases and examined the changes made by the 1952 amendment, it would probably have been compelled to find the amendment valid. An examination of those changes shows that they are both reasonable and necessary.[38]

This court, in attempting to circumvent the state constitutional prohibition against gratuities, and in searching for a more definite-sounding approach than "quasi-contract," seems to have chosen the contract approach as a "stark alternative,"[39] and by that choice has been driven to some inevitable and regrettable consequences. Perhaps the court, in making what should properly be termed a policy decision, for some reason found it necessary to justify that decision in contract law. It is submitted that the jurisdictions which were first to reject the gratuity theory of pensions used the contract approach analogously to describe their non-gratuitous approach as a theory of rights. The Arizona court has stretched the analogy too far.

A major consequence of this decision is that a municipality will now have to underwrite the actuarial soundness of its pension system if it is one prescribed by statute. This decision unrealistically holds the community pension authority to the standard of a major insurance company. To perform such a function adequately it would need a staff of statisticians and a battery of mathematical computers. The probabilities of municipal growth, employee requirements, future wage scales and a multitude of other intricate actuarial factors would be added to the already substantial problems of municipal management.

The court has apparently failed to recognize the primary purpose of any pension system: to promote the general welfare of *all* the members of the pension system and to prevent economic insecurity to their families. This is done by providing old age retirement benefits as part of a *mutually cooperative effort*. Unless a reservation is implied in the pension statute of the power to reasonably modify the specific terms of that statute in order to maintain a sound fund, the purpose of the fund becomes frustrated, and the primary goal of providing benefits for all becomes reduced to providing benefits for some at the expense of the entire membership. This court refuses to recognize a principle which would allow the pensioner a vested property interest in the fund, protected from confiscation, which nevertheless may be varied a few dollars either way if the circumstances so necessitate.

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[37] See cases cited supra notes 26 & 27. See also McQuillin, supra note 24, at 606-07.

[38] Supra note 1, at 548.

[39] Spina v. Consolidated Police Pension Fund Comm'n, 41 N.J. 391, 403, 197 A.2d 169, 175 (1964).

Judge McQuillin cites cases on the construction of pension statutes which disfavor a strained and unreasonable construction[40] and urge that the construction should protect *both* the municipality and the employee.[41]

> . . . the courts will consider the obvious purposes and objects sought to be attained and will construe the language used, . . . to the end of giving it vitality and efficiency in the accomplishment of such purposes and objects. [Citations omitted.] Pension acts should be so construed as to avoid an inequitable result . . . favoring one member over another.[42]

Pension planning is a long-range proposition. It seems unrealistic to expect social legislation of the type here in question to be effective and, at the same time, changeless and self-sustaining, over a period exceeding two decades. Such an expectation seems unmindful of the rapid advances in the social and economic order on which that legislation is founded. It seems strange and strained to require actuarial precision from policy legislation.

DAVID A. MILLS

Labor Law—Unemployment Compensation—Work-Share Contracts.—***Department of Labor & Indus., Bureau of Employment Security v. Unemployment Compensation Bd. of Review.***[1]—Claimant Lybarger, a chain machine operator for Talon, Inc., was represented by Local 591 of the International Ladies Garment Workers Union. The union employed a normal seniority system until 1961, when economic conditions required that Talon reduce its labor force. Instead of permanently releasing some chain machine operators, union and employer agreed, through the collective bargaining process, upon a "work-share"[2] plan under which the available work would be apportioned among all of the operators. The workers with seniority (seniors) would perform all the work until they earned $5,000, at which time the remaining workers (juniors) would replace them.[3] Lybarger had grossed $5,000 by October 1, 1961, when, pursuant to the plan, he was laid off despite his expressed desire to keep working. He then applied for unemployment

[40] McQuillin, supra note 24, § 12.143, at 596, citing Nelson v. City of Sioux Falls, 72 S.D. 73, 30 N.W.2d 1 (1947).

[41] Id. at 597, citing People v. Swedeberg, 351 Ill. App. 121, 113 N.E.2d 849 (1953).

[42] Ibid.

[1] 211 A.2d 463 (Pa. 1965)

[2] Theodore, Layoff, Recall, and Work-Sharing Procedures, 80 Monthly Lab. Rev. 329, 334 (1957).

[3] The contract provision read:

> Employees with sufficient seniority to remain at work shall be kept as operators until the pay period when their gross earnings received from the company since January amount to five thousand dollars ($5,000), plus-or-minus fifty ($50) dollars. Such operators will then go on lay-off for the remainder of the year or until all younger operators have been recalled, and additional ones are required in seniority order.

Supra note 1, at 464.