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MICHIGAN SUPREME COURT DECISION JEOPARDIZES RETIREE HEALTHCARE BENEFITS

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The Michigan Supreme Court decision in *Kendzierski v Macomb County*, docket no. 156086 (issued May 30, 2019) has gifted unfettered discretion to public employers to unilaterally change and eliminate healthcare benefits for public sector retirees and their families, unless language in a collective bargaining agreement (CBA) establishes that such benefits are vested and unalterable for life.

The Police Officers Association of Michigan (POAM) and its affiliate organizations, Command Officers Association of Michigan (COAM), Technical Professional and Officeworkers Association of Michigan (TPOAM), Firefighters Association of Michigan (FAOM) and Retired Police Officer Association of Michigan (RPOAM), were not parties to the legal proceeding.

POAM has always held the Supreme Court in high regard for the support given in recognition of the difficult and dangerous work of law enforcement. That respect, unfortunately, does not carry forward to the Court's selective reasoning which will cause irreparable harm to our past and present union membership. The Court's action serves to close the door on extrinsic evidence being considered in a fact-finding process to determine the intent of parties as to healthcare benefits and protections continuing after expiration of a collective bargaining agreement (CBA). The decision has denied public employees and law enforcement a fair and equitable process to present proof that the history and practices in the collective bargaining process were absolutely intended to provide retiree healthcare benefits that would continue beyond the expiration of the CBA in effect at the time of retirement.

Kendzierski involved a class action against Macomb County, challenging unilateral changes to retiree health care benefits. The plaintiffs had retired from County employment during the term of various CBAs. Each CBA contained similar language of three-year duration, as well as **three conditions for receipt of retiree healthcare**, including: (1) medical coverage would cease upon the retiree's death unless a surviving spouse option was selected; (2) upon attaining age 65 the retiree had to enroll in Medicare; and (3) coverage would temporarily be suspended in the event the retiree became gainfully employed.

The Circuit Court held that plaintiffs were entitled to lifetime healthcare benefits but that the employer could make reasonable modifications. The Court of Appeals concluded that that plaintiffs were entitled to lifetime healthcare benefits and that the benefits could not be changed without plaintiff's consent. The Supreme Court, however, in a transparently defensive opinion, swore allegiance to portions of U.S. Supreme Court decisions, even though those decisions allowed room for consideration of extrinsic evidence and "did not compel the result the majority reaches." (dissent at p. 12). The Michigan Supreme Court could have declined to follow the U.S. Supreme Court decisions given that *Kendzierski* did not involve Federal Constitutional law considerations, nor application of federal laws. The majority of the Michigan Supreme Court could also have concluded that the U.S. Supreme Court cases were not applicable to a CBA derived through authority of the Michigan Public Employment Relations Act, due to industry standards under public sector labor law in Michigan. Instead, the majority chose to level a devastating blow to public sector employees, including law enforcement, by turning its back on the historic and time-honored continuation of healthcare benefits and protections for retirees.

The well-reasoned dissent of Supreme Court Chief Justice Bridget McCormack in *Kendzierski* clearly sent the majority into a frenzy to defend its "logic" against that of the dissenting Chief Justice. The dissent eviscerates the analysis of the majority stating that it "isn't the most commonsense reading of the language," and that "it is an odd reading." (dissent at pp. 10 and 12). The amount of airtime and space given in the majority opinion in an attempt to debunk the dissent is a telling sign that the majority decision is an end-driven result. The "end" does not justify the "means" in this case, it merely exposes numerous errors in the majority opinion.

United States Supreme Court Decisions

The U.S. Supreme Court in *M&G Polymers USA v Tackett*, 574 US ____ (2015), held that a collective bargaining agreement must be interpreted “according to ordinary principles of contract law.” The Court stated that, “when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life.” The Court concluded that absent express language, when a CBA expires, so does the obligation of an employer to continue retiree healthcare benefits. The following example illustrates the Court’s conclusion in *Tackett*: An individual that retires in year one of a three-year CBA is only guaranteed by the CBA that retiree medical insurance coverage will last for the remaining two years of the CBA. After that point, the Employer is at liberty to unilaterally change or eliminate coverage.

On February 20, 2018 the U. S. Supreme Court issued a *per curiam* decision in *CNH Industrial N.V. v. Reese*, 583 U.S. ____ (2018). The Court held that the Sixth Circuit was not properly applying the Supreme Court’s previous decision in *Tackett*. The *Reese* decision involved a dispute between retirees and their former employer as to whether an expired collective bargaining agreement created a vested right to lifetime healthcare benefits. Language in the *Reese* CBA only specified health care benefits for employees upon retirement. The CBA had a general duration clause expiring in 2004. At the expiration of the CBA, retirees filed a lawsuit seeking a declaration that healthcare benefits vested for life.

While the lawsuit was pending, the U. S. Supreme Court issued the *Tackett* decision. The District Court, based on *Tackett*, issued summary judgment for the Employer, but then reconsidered and issued summary judgment for the retirees. The Sixth Circuit affirmed the decision in relevant part, stating that the CBA was “silent” as to whether health care benefits were vested for life and that a general durational clause “says nothing about the vesting of retiree benefits.” The Sixth Circuit concluded that the CBA was ambiguous as to the duration of health care coverage, thereby allowing extrinsic evidence to be considered as to the intent of the parties. The U.S. Supreme Court concluded that the Sixth Circuit erred by finding an ambiguity, because it impermissibly applied “inferences of lifetime vesting,” which the U.S. Supreme Court in *Tackett* had rejected as not comports with ordinary principles of contract law.

The U.S. Supreme Court reaffirmed its statement in *Tackett* that, “contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.” The Court rejected the argument that receipt of a pension is tied to continued receipt of healthcare benefits, relying on an analysis of the Federal ERISA law, which distinguishes between delayed compensation or reward for past services, like a pension, and medical benefits. In reversing the Sixth Circuit, the Court instructed that future analysis must give emphasis to the duration clause of a CBA and must not presume lifetime vesting from silence. The Court concluded its anonymous decision (*per curiam* decisions are usually unanimous without any Justice being identified as the author of the decision) with a sophomoric caution, stating, “If the parties meant to vest health care benefits for life, they easily could have said so in the text. But they did not.”

Michigan Supreme Court Majority Opinion Errors

It is apparent that the majority opinion, despite its length (which is substantial due to the overwhelming penchant to incorrectly criticize the dissent), has taken the path of least resistance by concluding that the CBA was silent as to the duration of retiree healthcare benefits, therefore, the language was unambiguous and extrinsic evidence of the intent that the benefits vested for life should not have been considered. The majority determined that the CBA had a three-year durational clause, hence the entitlement to retiree healthcare expired at the end of the three-year term. To reach that conclusion the majority determined that there did not exist a patent ambiguity in the CBA because the **three conditions for receipt of retiree healthcare** (discontinue coverage upon death or continue for spouse, Medicare enrollment at age 65, and suspension of coverage upon gainful employment) could be fulfilled during the three-year duration of the CBA.

Error #1:

The majority’s conclusion fails to accept that the **three conditions for receipt of retiree healthcare** in the CBA are equally susceptible to more than a single meaning, hence “ambiguity” exists. Merely because the **three conditions for receipt of retiree healthcare** could be fulfilled during the three-year duration of the CBA disregards the more compelling recognition that the **three conditions for receipt of retiree healthcare** are “almost certain to occur beyond the expiration of that term.” (dissent at p. 13). The dissent accurately stated:

For example, ambiguity can arise “where a CBA links eligibility for a particular right ‘to an event that would almost certainly occur after the expiration of the agreement’ ...[because] such linkage ‘signals the parties’ intent to continue retirement health benefits notwithstanding expiration.”” *Alday v Raytheon Co*, 693 F3d 772, 785 (CA 9, 2012) (brackets omitted), quoting *Queensberry v Volvo Trucks North America Retiree Healthcare Benefit Plan*, 651 F3d 437, 441 (CA 4, 2011). (dissent at p. 7)

Error #2:

Without recognizing the guiding principles of public sector labor law in Michigan under PERA, the majority blindly asserted “the traditional principle [is] that ‘contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.’” (majority at p. 6). Nothing could be further from the truth under Michigan public sector labor law.

PERA imposes the duty to bargain with respect to “wages, hours and other terms and conditions of employment.” *Council 25 and Local 893, AFSCME, AFL-CIO v MERC*, 101 Mich App 91, 300 NW2d 462. Subjects within the definition of “wages, hours and other terms and conditions of employment are considered “mandatory” subjects of bargaining. *Detroit Police Officers Association v City of Detroit*, 391 Mich 44, 214 NW2d 803 (1973), *Detroit v Michigan Council 25 AFSCME*, 118 Mich App 211, 215, 324 NW2d 578 (1982). Healthcare benefits are indisputably mandatory subjects of bargaining.

PERA adheres to post-duration continuation of mandatory subjects of bargaining that have been embodied in a CBA. It is well settled in Michigan that at the expiration of a CBA, all wages, hours, terms and conditions of employment continue in effect until modified through collective bargaining or compulsory arbitration. *Local 1467, IAFF, AFL-CIO v. City of Portage*, 134 Mich. App. 466 (1984). Administrative decisions from the Michigan Employment Relations Commission (MERC) are in accord. *City of Cheyboygan*, 1981 MERC Lab Op 87 (upon expiration of an agreement, mandatory subjects of bargaining prevail and cannot be unilaterally altered without prior good faith bargaining to impasse).

Errors #3 and #4

The majority stated, “Although this Court is not bound to follow the United States Supreme Court’s opinion in *Reese*, we choose to follow it because it is fully consistent with Michigan’s own principles of contract law.” (majority at pp.8-9). That assertion by the majority yields two distinct errors.

First (Error #3), the majority did not follow *Reese* because of the failure to recognize and apply the exception stated in *Reese* that, “The Sixth Circuit did not point to any **explicit terms, implied terms, or industry practice** suggesting that the 1998 agreement vested health care benefits for life.” (*Reese* at p. 6 of the slip opinion). That language, notwithstanding the Court’s other pronouncements regarding contract interpretation principles and general duration clauses, recognizes the possibility of a legal challenge to claim lifetime healthcare benefits, even in the absence of the parties having stated the words “lifetime vesting,” in the CBA. The dissent in *Kendzierski* recognized the significance of the *Reese* Court statement, the majority did not. “Neither *Tackett* nor *Reese*---nor our own jurisprudence---compels the result the majority reaches.” (dissent at p. 12).

If “**explicit terms**” exist, the matter is conclusively resolved. When the analysis focuses on “**implied terms**” and “**industry practice**,” scrutiny, through extrinsic evidence, is required. The majority in *Kendzierski* made no genuine attempt to consider **implied terms** or **industry practice**.

Common sense dictates that an analysis of **implied terms** requires a review of the CBA, as a whole. The majority in *Kendzierski* arrogantly closed the door on that inquiry, stubbornly relying on the duration clause controlling the entitlement to retiree healthcare. The classic idiom, “can’t see the forest for the trees,” applies to the majority opinion. The majority is fixated on a narrow interpretation of the U.S. Supreme Court holding on contract law principles; in doing so it has disregarded all other logical considerations. Public employees, including law enforcement, deserve a more ethical consideration, not blind-eye treatment with devastating results.

The dissent correctly and equitably recognized that the **three conditions to receipt of healthcare benefits** in the CBA establish **implied terms** supporting the right to present extrinsic evidence to show the intent that retiree healthcare would extend beyond the expiration of the

CBA: (1) medical coverage would cease upon the retiree's death unless a surviving spouse option was selected; (2) upon attaining age 65 the retiree had to enroll in Medicare; and (3) coverage would temporarily be suspended in the event the retiree became gainfully employed. In each situation, the dissent correctly concluded that a "commonsense reading of the language" supported the logical conclusion that the "triggering events" set forth in the three provisions "are most certainly to occur beyond the expiration..." (dissent at pp. 10 and 13)

Had the majority undertaken the "**industry practice**" consideration, it would have been forced to question what is meant by that standard of inquiry. It is logical and reasonable to assert that industry practice, at a minimum, should consider that a public sector CBA in Michigan should not be subjected to a rigid "contract" principle analysis. As Justice Harlan in *John Wiley & Sons v Livingston*, 376 U.S. 544 (1963) stated, "...a collective bargaining agreement is not an ordinary contract....it is a generalized code to govern a myriad of cases...which the draftsman cannot wholly anticipate...it calls into being a whole new common law...".

Likewise, the history and practice in the public sector in Michigan of perpetuating language in each three-year duration CBA providing the same retiree healthcare language each time, is a bold and undeniable reflection of the parties' intent to keep the retiree benefit going far longer than the duration of one CBA. But for those whom have their head is in the sand, there should be broad awareness that the history and practice of continuing retiree healthcare year after year, regardless expiration of the particular CBA in existence when the employee retired, is proof positive of the intent of the parties that healthcare benefits would survive the expiration of a CBA. To state otherwise is to espouse fiction which is demeaning and destructive to the collective bargaining process and the rights of employees, and especially retirees. Arbitrators have long-held that to the maxim that the "law abhors a forfeiture." [*How Arbitration Works* (8th Edition, 2016) Elkouri and Elkouri at p. 9-54].

It is clear that the CBAs did not expressly limit retiree healthcare entitlement to a certain period of time, thereby reflecting the intent of the parties to have the benefit ongoing beyond the expiration of a CBA. Where the *Reese* court arrogantly stated, 'if the parties meant to vest health care benefits for life, they easily could have said so in the text. But they did not,' it is countered with the more logical and reasonable assertion that if the parties wanted to limit the duration of healthcare for a retiree under the CBA, as they did with the **three conditions to receipt of**

healthcare benefits, they would have expressly said so, yet they did not. Contrary to the *Tackett/Reese* Courts' conclusion that an "inference" of lifetime benefits cannot arise from silence, the **industry practice** consideration removes the inquiry from a mere inference and elevates it to extrinsic evidence of the history and practices that created the operative language.

The majority would have been better served to give credence to the time-honored analysis of arbitrators who deal with public sector contract interpretation issues on a daily basis. For example, in *Roumell's Primer on Labor Arbitration*, George T. Roumell, Jr. (4th Edition 1984) it is stated at pp. 90:

Even though collective bargaining agreements "are not ordinary contracts," they still are based on common intent. (cites omitted). Because of the ongoing relationship between the parties, one often is able to ascertain that intent through practice, conduct and prior agreements with the parties.

The second error (Error #4) applicable to the majority's declaration of fidelity to the U.S. Supreme Court decision, is that the majority has forgotten that the entirety of public sector labor law in Michigan is guided by PERA based principles. Because PERA authorizes execution of a CBA there is an additional inextricable tie to arbitration awards analyzing contract law principles germane to the labor setting.

As stated hereinabove, one of the time-honored principles under PERA is that a duration clause does not terminate a mandatory subject of bargaining, including retiree healthcare benefits. In addition, collective bargaining agreements are not always to be construed according to strict contract principles. *Wood v Duff-Gordon*, 222 NY 88, 91 (1922) (Justice Benjamin Cardozo, when sitting on the New York Court of Appeals wrote that "a promise may be lacking and yet the whole writing may be instinct with an obligation imperfectly expressed."). Likewise, arbitrators in decisions and treatises have emphasized that collective bargaining agreements are unique in their creation, interpretation and application. In his treatise, *Arbitrator and Law School* Professor George T. Roumell, Jr. further stated at p. 90:

Professor Samuel Williston in his treatise wrote to the effect there is an implied covenant in every contract "that neither party shall do anything which will have

the effect of destroying or injuring the right of the other party to receive the fruits of the contract.” 3 *Williston*, section 670 (rev. ed. 1963).

Professor Archibald Cox in an article entitled *The Legal Nature of Collective Bargaining Agreements*, 57 *Michigan Law Review* (1958), wrote first at 22 as to the nature of a collective bargaining agreement versus a commercial agreement as follows:

The governmental nature of a collective bargaining agreement results partly from the number of people affected in the diversity of their interests. Harry Shulman aptly suggests other determining conditions:

The collective bargaining agreement is not the typical offer and acceptance which normally is the basis for classroom or text discussions of contract law. It is not an undertaking to produce a specific result; in deed it rarely speaks of the ultimate product. It is not made by parties to seek each other out to make a bargain from scratch and then go on his own way. The parties to a collective agreement...meet in their contract negotiations to fix the terms and conditions of their collaboration for the future.

Additionally, Arbitrator Roumell in his treatise at p. 100 stated:

(citing Arbitrator Whitney in *Taylor Products*, 50 LA 535 at 537): It is axiomatic in contract construction that interpretation which tends to nullify or render meaningless any part of the contract should be avoided because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect.

As stated by Justice McCormack in the dissent in *Kendzierski*:

See *Consol Rail Corp v R Labor Executives' Ass'n*, 491 US 299, 311; 109 S Ct 2477; 105 L Ed 2d 250 (1989) (stating that practice, usage and American custom must be considered when interpreting a CBA); *United Steelworkers of America v American Mfg Co*, 363 US 564, 567; 80 S Ct 1343; 4 L Ed 2d 1403 (1960) (“[S]pecial heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve.”) (dissent at pp. 10-11)

Error #5:

The majority asserts the possibility of ambiguity could exist if the CBA language “tied benefits to an event that could only occur or would almost certainly not occur until after the expiration of the CBA...” (majority at p. 22, f.n. 21). The majority then does a 180-degree change in direction by concluding that the **three conditions to receipt of healthcare benefits** in the CBA “could occur during the three-year duration of the CBA. That each of these events could occur *beyond* that period does not indicate that the parties intended coverage to last beyond the term of the CBA’s.” (majority at pp. 21-22).

The inherent inconsistency in the majority’s own analysis is palpable. If the majority followed its own assertion in the footnote it is more logical and reasonable to conclude that when a retiree applies for Medicare at age 65, such act “would almost certainly not occur until after the expiration of the CBA.” For the majority to state that such occurrence “could occur beyond” the expiration of the CBA, hence no ambiguity exists, is irreconcilable with its other pronouncement that an event which “...would almost certainly not occur until after the expiration of the CBA...” establishes existence of an ambiguity. As an example, many law enforcement officers are subject to CBA defined benefit pension plans which provide that retirement may occur upon twenty-five years of service with no age restriction. An officer taking a normal retirement could retire under the age of 50. As a consequence, it is logical and reasonable to conclude that the “65” age requirement to apply for Medicare as a condition of continuing receipt of retiree healthcare, will “almost certainly not occur until after the expiration of the CBA” under which the employee retired. Public employers know that fact is certain when they negotiate a CBA with retiree healthcare. The Court’s flip-flop analysis was the impetus for Justice McCormack to state in dissent, “I am not convinced that the majority’s decision leaves open that possibility of ambiguity...” (dissent at p. 12).

Conclusion

The doorway to the judicial system to preserve and protect retiree healthcare benefits has been seriously narrowed, if not closed, by the majority decision of the Michigan Supreme Court. The decision denies employees and retirees the opportunity, in most cases, to present evidence to prove that the intent of the CBA is to provide vested lifetime healthcare benefits. The Michigan

Supreme Court, like the U.S. Supreme Court, has created a fictional standard of “ambiguity” that is nearly unattainable, because parties in the public sector collective bargaining process have historically not found it necessary to make it any clearer in a CBA than to state that a retiree will receive healthcare benefits. In fact, it has historically been public employers that have wanted to include conditions governing receipt of healthcare benefits, i.e., discontinuance at death, Medicare off-set, and gainful employment suspension of coverage----all done with full knowledge on the part of the employer that the healthcare benefits would be continuing for the retiree after the contract expired. To state otherwise is to be ignorant of reality and to exalt form over substance. To elevate the significance of a CBA duration clause to the point of condoning destruction of a retiree’s healthcare benefits, especially in light of the PERA based CBA principle mandating that EXPIRATION OF A CBA DOES NOT ALLOW UNILATERAL CHANGE OF BENEFITS, is disheartening and wrong.

The Court’s action may have substantially closed one door, but it will now certainly lead to a costly burden to taxpayers, public employers and unions. POAM will be at WAR over this critical issue and the damage the Court’s decision will cause. Administrative actions, including compulsory arbitration proceedings, will have to be filed to vindicate the historical intent of the parties that retiree healthcare benefits are intended to continue beyond the expiration of a CBA.

We are disappointed with the narrow-sighted decision of the Court. POAM and its affiliate organizations will certainly work hard on behalf of our collective membership to take whatever action (legal, legislative and political) is necessary to rectify the egregious action of the Court to protect our membership and retirees.