

# LAST CHANCE FOR NEW JERSEY PENSION FUNDING

By Matthew A. Peluso, Esq.



In the case of *Burgos v. State of New Jersey*, No. 075736 (decided June 9, 2015), the New Jersey Supreme Court decided whether L. 2011, c. 78 (Chapter 78) requires the State to make certain annual contributions to public pension funds. Chapter 78 was enacted by the New Jersey Legislature and signed into law by Governor Christie after a compromise reached between Governor Christie, the legislature and public unions in this state, including all of the major law enforcement unions. Under Chapter 78, every public worker in the pension system has a “contractual right to the annual required contribution” to be made by the State “on a timely basis.” *N.J.S.A.* 43:3C-9.5(c)(2). Chapter 78 specifies that the State’s failure “to make the annually required contribution shall be deemed to be an impairment of the contractual right of each employee.” *Ibid.*

Yet, Governor Christie refused to authorize the statutorily and contractually required minimum payments to the pension system in 2014, and numerous unions joined in a lawsuit against Governor Christie, the State of New Jersey and others to compel those contributions. In *Burgos*, the New Jersey Supreme Court ruled that Chapter 78 did not create a legally enforceable contract right to timely and recurring pension payments to reduce the unfunded liability of the pension funds to safe level. Rather, the Court ruled that voter approval was required to compel appropriations of that size and the payments may not be compelled by the court. “Our State Constitution compels the declaration that there is no valid contractual right under Chapter 78 that provides the basis for a contract impairment analysis under either the State or Federal Constitutions.” *Burgos* at 53.

In his dissenting opinion, Justice Barry Albin, joined by Chief Justice Stuart Rabner, persuasively criticized the majority opinion in *Burgos*. “The decision strikes down the promise made to hundreds of thousands of public workers by the political branches of government that deferred wages earned for years of service would be funded during their retirement. The decision unfairly requires public workers to uphold their end of the law’s bargain -- increased weekly

deductions from their paychecks to fund their future pensions -- while allowing the State to slip from its binding commitment to make commensurate contributions.” *Burgos v. State of New Jersey*, Dis. Op., p. 4.

Therefore, Justice Albin concluded that: “The Governor and Legislature cannot walk away from the contractual commitments they signed into law in Chapter 78. Their failure to make the required payments into the pension fund constitutes an impairment of their contract with public workers.” *Id.* at 5. “The majority’s decision will have far-reaching, negative consequences. The majority has declared that it will not enforce a statute intended to stem decades of political dysfunction that has resulted in the balancing of budgets on the backs of public workers.” *Id.* at 19.

Based upon Justice Albin’s reasoning and legal analysis in his dissenting opinion, numerous public unions have recently filed a petition to the United States Supreme Court asking it to over-turn the New Jersey Supreme Court’s opinion in *Burgos*. In their petition, attorneys for the unions have argued that “under the New Jersey Supreme Court’s decision [in *Burgos*], even an unmistakable contract becomes a hollow promise with no rights of enforcement.” The unions have further argued that: “The New Jersey Supreme Court, in an effort to avoid the political difficulty of enforcing the Federal Contract Clause, has once again eviscerated that clause as it applies to multi-year contracts entered into by the state.”

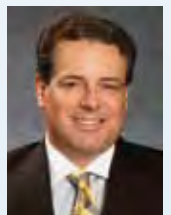
This argument by the unions is based upon Justice Albin’s analysis in his dissenting opinion. “The Federal Contracts Clause... restricts New Jersey from eviscerating the pre-existing contractual rights of public workers... and Chapter 78 meets the very conditions set by this Court for the establishment of a binding public contract.” *Id.* “By any measure, the State’s decision to cut pension funding by more than seventy percent constitutes a substantial impairment of the contractual rights of public employees.” *Id.* at 30.

“Chapter 78 was the product of a historic compromise, trumpeted by the Governor and Legislature, requiring public workers to accept greater pension deductions from their paychecks in exchange for the State

making required annual contributions to ensure the solvency of the pension system. *Id.* at 37-38. “[T]here can be no doubt that the central inducement to the passage of Chapter 78 was the portion requiring the State to pay its fair share into the pension system... [T]he State’s promise to make its annual required contribution was the consideration for public workers making greater financial sacrifices to ensure the solvency of the pension system.” *Id.* at 38-39. In closing, Justice Albin stated: “I conclude that the contractual rights of public workers, guaranteed by Chapter 78, have been substantially impaired in violation of the Federal Constitution.” *Id.* at 41.

The unions face an uphill battle in even getting the United States Supreme Court to consider their petition, since they only grant certification in a small number of petitions each year. However, given the significant and far-reaching legal and public policy issues presented in the case, law enforcement officers and other public employees in this state can be hopeful that they may ultimately obtain protection of their contractual pension rights by the highest court in our country.

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