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FOR PUBLICATION

IN THE SUPERIOR COURT

OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MICHAEL P. CODY,	**Civil Action No. 09-0079E**
Petitioner,	
vs.	**FINAL ORDER**
NORTHERN MARIANA ISLANDS RETIREMENT FUND; and the NMIRF BOARD OF TRUSTEES,	
Respondents.	

I. INTRODUCTION

THIS MATTER came for hearing on September 17, 2009 at 1:30 p.m. in Courtroom 223A. Counsel Jeanne Rayphand appeared on behalf of Petitioner, Michael P. Cody (hereinafter "Petitioner"). Counsel James Hollman appeared on behalf of Defendant, Northern Mariana Islands Retirement Fund and the NMIRF Board of Trustees (hereinafter "NMIRF").

Petitioner argues that the NMIRF should pay him disability retirement in the amount of 66 2/3 percent of his salary, since he is a Class II member of the Retirement Fund (hereinafter "Fund") and has met all criteria necessary for a showing of permanent disability. Alternatively, the NMIRF counters by arguing that Petitioner is a Class I member, who has failed to meet the necessary requirements for

receiving disability. After considering the oral and written arguments of the parties, legal authorities, and the material facts, the Court renders its ruling below.

For the reasons discussed below, the Court finds that Petitioner is a Class II member of the Fund and further finds that Petitioner has satisfied all of the necessary requirements for a showing of disability pursuant to P.L. 13-60.

II. SYNOPSIS

Petitioner became employed on March 15, 1989, as a civil service employee of the Commonwealth of the Northern Mariana Islands. During that time, P.L. 1-43, as amended by P.L. 2-18 was the law governing Petitioner's contributions into the Fund. As such, Petitioner claims that he became a member of the Fund on the day he began his employment. However, Defendant argues that Petitioner did not become a member of the Fund until May 7, 1989 when membership became mandatory as required by P.L. 6-17.

Both parties agree that Petitioner was separated from service on December 31, 2007. However, the parties dispute Petitioner's length of creditable service under the Commonwealth retirement system.[1] At the date of separation, Petitioner claims that he had been employed by the government for more than 20 years, whereas, Defendant argues that Petitioner had only been employed by the government for 19 years, 3 months, and 27 days.

Prior to Petitioner's date of separation, Petitioner applied for disability retirement in November 2006. At the time he applied for disability, Petitioner claims to have followed the proper procedures set forth by the Fund, as well as, P.L. 1-43. Petitioner argues that he completed the application for disability and submitted written certifications from two licensed and practicing physicians stating that

[1]The Court would like to note that this is an important point because once a member has acquired twenty years of creditable service, he or she shall be credited an additional five years and shall be eligible to retire.

his disability was total and permanent and that he was unable to engage in gainful employment.

Alternatively, Defendant argues that at the time Petitioner submitted his application for disability retirement, pursuant to 1 CMC § 8342(a), P.L. 13-60 required that a disability applicant get a written certification by "a vocational rehabilitation counselor" which Petitioner never did. Regardless, 1 CMC § 8342(a) was later amended by P.L. 16-19 (effective date November 7, 2008), which did away with the "vocational rehabilitation requirement,"and instead substituted in its place a "specialist" requirement. Defendant later argues, that Petitioner failed to meet this requirement as well.

On December 19, 2006, Dr. Ala-Eldin Taha, a licensed and practicing physician (psychiatrist) submitted to the Fund a form stating that Petitioner was unable to perform his job duties due to his disability, and that his condition needed to be reassessed in six months to evaluate continued disability or ability to return to work. Dr. Ala-Eldin Taha did not declare Petitioner totally and permanently disabled, but did say that he was disabled at that time.

On July 31, 2007, the NMIRF denied Petitioner's application for disability retirement relying on 1 CMC § 8347(a) which provides that a member is considered "totally and permanently disabled after the board receives written certification by at least two licensed and practicing physicians selected by the board that the member is totally and permanently disabled for the further performance of the duties of any assigned position in the service of the government."

The basis for the denial was that "Dr. Taha's and Dr. Brenn's examinations determined that [Petitioner] was not totally and permanently disabled." Alternatively, Petitioner argues that Dr. Brenn, a licensed clinical psychologist, testified at the hearing that Petitioner's depressive disorder was permanent and that he was disabled from the performance of any job with the government. In addition, Dr. Wilgus stated that Petitioner's disability was total and permanent as well.

On July 31, 2007, Petitioner's claim for disability was denied. On August 29, 2007, Petitioner appealed the decision, an Administrative Hearing was held, and although the Administrator issued a letter denying Petitioner's claim for disability, no decision has been issued by the Hearing Officer or the

Board of Trustees.

III. ISSUES FOR REVIEW

1. Whether the Legislature's amendment to Petitioner's contract violates the contract clause?
2. Whether Petitioner is a Class I or Class II member of the Fund?
3. Whether Petitioner has satisfied all the necessary requirements for a showing of permanent disability pursuant to P.L. 13-60?

IV. DISCUSSION

Petitioner argues that a contractual relationship in the Fund was created when he began his employment in March 1989. As such, Petitioner argues that no law can be applied retrospectively to alter and impair the terms of that contract. More specifically, Petitioner argues that an increase in the rate of contribution in regard to employees who are members of the Fund at the time of the change, as well as, a reduction in the amount of disability retirement payments and an increase in certification requirements constitutes a breach of contract, and contravenes the contract clause.

Alternatively, Defendant argues that "the formula for disability annuities can be changed anytime prior to the Board's finding of disability." Thus, the Court must answer two questions prior to addressing the merits of Petitioner's claim. First, the Court must determine whether it is constitutional for the Legislature to alter a contract after it is entered into, and second, whether the amendments made subsequent to P.L. 1-43, amended by P.L. 2-18, as applied to Petitioner, were constitutional. At the outset, it is important to note that government retirement benefits are generally determined by the law in effect at the time of retirement. *Zucker v. United States*, 758 F. 2d 637, 640 (Fed. Cir. 1985).

I. Does The Legislature's Amendment To Petitioner's Contract Violate The Contract Clause?

Some courts have adopted a modified contract theory in regard to the rights of the public

employee in a state or local pension, which is based upon the rationale that if a public pension creates a contractual relationship, any alteration of the pension system must meet the requirements of State or Federal Contract Clause. *Fund Manager, Pub. Safety Personnel Retirement Sys.v. Phoenix Police Dep't Pub. Safety Personnel Retirement Sys. Bd.*, 728 P.2d 1237 (Ariz. Ct. App. 1986).

The United States Constitution provides, in relevant part, that "no state shall enter into any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10. Art. I § 1 of the Commonwealth Constitution further provides that: "[n]o law shall be made that is...an ex post facto law, [or] a law impairing the obligation of contracts..." In order to prove a violation of this constitutional provision, a plaintiff must demonstrate that a "change in state law has 'operated as a substantial impairment of a contractual relationship.' " *General Motors Corp v. Romein*, 503 U.S. 181, 186 (1992) (*quoting Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)).

Contract Clause analysis requires three threshold inquiries: (1) whether there is a contractual relationship; (2) whether a change in law impaired that contractual relationship; and (3) whether that impairment is substantial. *See Romein*, 503 U.S. at 186. If it is determined that a substantial impairment of a contractual relationship has occurred, the court must further inquire into whether the law at issue has a legitimate and important public purpose and whether the adjustment of the rights of the parties to the contractual relationship was reasonable and appropriate in light of that purpose. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242-244.

i. Was There A Contractual Relationship Between Petitioner And The Fund?

Article III Section § 20(a) of the Commonwealth Constitution provides:

> Membership in an employee retirement system of the Commonwealth shall constitute a contractual relationship. Accrued benefits of this system shall be neither diminished nor impaired. (Emphasis Added).

Based on the foregoing, the Court finds pursuant to Article III Section § 20(a) of the Commonwealth Constitution, Petitioner had a contractual relationship in the Fund when he became a

member in March 1989.[2]

ii. Did The Change(s) In Law Impair That Contractual Relationship?

In order to determine whether Petitioner's contractual relationship to the Fund was impaired, the Court must analyze three specific changes that were made to the Fund after Petitioner became employed in March 1989. First, the Court must determine whether the increase in the rate of contribution for Class II members from 6 ½ % to 9% impaired Class II members' contractual obligations to the Fund. Second,

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[2] A majority of jurisdictions take the view that public employees have certain contractual rights in a public pension where a pension is part of the terms of employment. *Transport Workers Union of America, Local 290 By and Through Fabio v. Southeastern Pennsylvania Transp. Authority*, 145 F.3d 619 (3d Cir. 1998). In a few pension systems, employees acquire unalterable contractual rights at the inception of their public employment. *City of Frederick v. Quinn*, 35 Md. App. 626, 371 A.2d 724 (1977). In others, although a state may reserve the right to revise or amend the public pension plan, the rights of the public employee are vested when he or she joins a voluntary pension plan and those vested rights may not be impaired. *Mascio v. Public Employees Retirement System of Ohio*, 160 F.3d 310 (6th Cir. 1998).

In several states, provisions of the state constitution protect an employee's right to retirement benefits from legislative impairment, depending on the particular provision, beginning either after the employee is hired, has entered the system, or at least as of the time of the constitutional amendment. *Sheffield v. Alaska Public Employees' Ass'n, Inc*., 732 P.2d 1083 (Alaska 1987).

A pension statute may contain an express reservation granting the legislature the right to amend or to repeal the laws on which the pension system is founded. *Transport Workers Union of America, Local 290 By and Through Fabio v. Southeastern Pennsylvania Transp. Authority*, 145 F.3d 619 (3d Cir. 1998). In such cases, a pensioner does not have a vested right to his or her pension, but merely an expectancy based upon an anticipated continuance of existing law. *Reames v. Police Officers' Pension Bd. of City of Houston*, 928 S.W.2d 628 (Tex. App. Houston 14th Dist. 1996). A public pension contract may be made subject to any contingency, consistent with public policy, built into the contract. *Kerner v. State Employees' Retirement System*, 72 Ill. 2d 507 (1978).

the Court must determine whether a reduction in the amount of disability retirement payments from 66 2/3% to 50% diminished that contractual relationship. Finally, the Court must make a determination as to whether or not the increase in the certification requirements (i.e. the vocational rehabilitation counselor and/or the specialist requirements) impaired Petitioner's contractual relationship to the Fund.

(1) The Increase In The Rate Of Contribution For Class II Members From 6 ½% to 9% Pursuant To P.L. 6-17 Is Not A Substantial Impairment To The Contractual Obligations Of Class II Members?

At the time Petitioner became employed, P.L. 1-43 § 19 stated:

> (a) Each member of the Fund shall contribute six and one-half percent (6 ½%) of salary earned and accruing to such member.
>
> (b) These contributions shall be made as a deduction from salary, notwithstanding that the salary paid in cash to such member may be reduced thereby below any established statutory rate. (Emphasis Added).

Petitioner states that deductions in the amount of 6 ½% have been made from his salary in accordance with the controlling statutory provision of P.L. 1-43. However, contributions for Class II members increased when P.L. 6-17 took effect. P.L. 6-17 not only created Class I and Class II memberships, but additionally altered the contributions required to be paid by Class II members, by increasing their contribution from 6 ½% of salary earned to 9%. Alternatively, Class I members were only required to pay 6 ½% of the salary earned. Therefore, Petitioner argues that P.L. 6-17 impairs the contractual obligation to the Fund by increasing the contributions required of Class II members.

The Court does not find that the 2 ½ % increase in contributions for Class II members was a substantial impairment to their contract with the Fund because Class II members received additional benefits in return for their increased contributions.

(2) The Reduction In The Amount Of Disability Retirement Payments From 66 2/3% to 50% Is A Substantial Impairment?

With respect to the disability retirement, the law at the time Petitioner entered into the Fund allowed for a 66 2/3% pay out for a showing of disability, however later that percentage was changed to 50% of the disabled retiree's salary at the time of the disability. Generally, this would be considered a substantial impairment to the contractual obligation of the Fund because a disabled retiree would lose one third of his expected disability retirement, however, as discussed later, disability retirement is a contingent interest which vests upon the occurrence of an injury. Thus, an employee does not have a right to disability retirement benefits until he or she becomes disabled.[3]

(3) The Increase In the Certification Requirements For A Showing Of Disability Is A Substantial Impairment to Petitioner's Contractual Obligation To The Fund?

Petitioner argues that the increase in the certification requirements for a showing of permanent disability impairs his contractual obligation to the Fund. Alternatively, Defendant claims that Petitioner would have to satisfy the added disability requirements of P.L. 13-60 and 16-19 in order to receive disability.

P.L. 13-60 amended Title 1 CMC § 8347, to require that potential disabled retirees be evaluated by two physicians and a vocational rehabilitation counselor. However, P.L. 16-19 amended this requirement because the Legislature found that the vocational rehabilitation counselor requirement "created a hardship for some retirees and for the Retirement Fund because a pool of qualified vocational rehabilitation counselors [was] not always readily available." The Legislature further found that "requiring two physicians, one of whom [was] a specialist in the area of the disability being evaluated, to certify the disability [was] adequate protection for the N.M.I. Retirement Fund and its members." Therefore, even though the Legislature's added certification requirement was meant to protect the Fund and its members from fraudulent claims, the Legislature by its own admission states that the "vocational rehabilitation counselor requirement" created a hardship (i.e. a substantial impairment) to Petitioner's

[3] This issue will be discussed in more detail in Part (D) of this Order.

contractual obligation to the Fund.[4]

iii. Was The Impairment Substantial?

In determining whether any or all of the proposed impairments were substantial, the Court must figure out whether Petitioner substantially received what he had bargained for at the time he entered into the Fund. Additionally, if any diminution is found, that diminution must be balanced by other benefits or justified by countervailing equities for the public's welfare. *City of Frederick v. Quinn,* 35 Md. App. 626, 631 (1977).

At the time Petitioner entered into the Fund he expected to contribute money into the Fund in exchange for a percentage back upon retirement. That expectation has not changed nor would it without the Fund finding itself in breach of its contractual obligation. With respect to the disability retirement, the law at the time Petitioner entered into the Fund allowed for a 66 2/3% pay out for a showing of disability, however later that percentage was changed to 50% of a disabled retiree's salary at the time of the disability. This decrease in the amount of disability retirement was a substantial impairment to Petitioner's contract. However, NMIAC Section 110-10-220(a) provides an exception for persons who became members before P.L. 13-60 took effect holding that persons who were members prior to December 5, 2003 would still be entitled to the 66 2/3% of their salary. Therefore, Petitioner's contract was never substantially impaired by the subsequent decrease in disability based on the aforementioned provision. However, assuming that this provision was not in the law, the subsequent decrease in disability would have been a substantial impairment and would need to be analyzed to determine whether the Legislature had a legitimate and important public purpose for such an amendment.

iv. Does The Law Have A Reasonable, Legitimate, And Important Public Purpose?

In many states recognizing contractual or vested rights of a public employee in a state or local pension system, those rights are subject to a reserved legislative power to make reasonable

[4] The issue of whether or not Petitioner satisfied the additional requirement is discussed in Part (D) of this Order.

modifications in the plan, or to modify benefits, if there is a simultaneous offsetting of a new benefit of equal or greater value. *City of Frederick v. Quinn*, 35 Md. App. 626 (1977).

The most commonly applied version of this approach is the "California rule," which permits modifications of state or local public pensions that are reasonable, provided that they are materially related to the theory of the pension system and its successful operation, and also provided that any disadvantages to employees are accompanied by "comparable new advantages." *Maffei v. Sacramento County Employees' Retirement System*, 103 Cal. App. 4th 993 (3d Dist. 2002). Further, these modifications must bear some material relation to the theory of a pension system and its successful operation.

Here, the modifications made to the Fund were reasonable and necessary to protect the actuarial soundness of the Fund. In the "Findings and Purpose" section of P.L. 13-60, the Legislature found that the government retirement system was saddled with an unfunded liability that threatened its financial soundness and ability to pay retirement and other benefits. Therefore, the Legislature repealed certain mandates and reformed other sections to protect the financial viability of the fund. In addition, the changes made to the Fund were instituted to maintain the financial integrity of the government retirement system.

Therefore, while the Court does believe that at least one of the amendments to the Fund was a substantial impairment to Petitioner's contractual relationship to the Fund, the government has demonstrated that the purpose behind the amendment was to protect the government retirement system as a whole. Thus, the government has provided a justification for said amendment. In addition, those amendments are related to the successful operation of the Fund.

In sum, the Court finds that pursuant to Article III Section § 20(a) of the Commonwealth Constitution, when Petitioner became a member of the Fund in March 1989, a contractual relationship was formed that could neither be diminished nor impaired. In addition, as stated *supra*, the only substantial impairments that affected Petitioner's contract with the Fund were the added vocational

rehabilitation counselor requirement and the decrease in the amount of disability the Fund would pay out. However, based upon the Fund's present financial difficulty, the Court finds that the decrease in the percentage of disability was reasonable and necessary to protect the actuarial soundness of the Fund. Therefore, the Court does not find that the subsequent amendments made to the Fund after Petitioner became employed in March 1989 violated the contract clause except for the "vocational rehabilitation counselor requirement."

II. Petitioner Is A Class II Member Of The Fund And Has Satisfied All The Requirements For A Showing Of Permanent Disability Pursuant to P.L. 13-60.

A. Pursuant to P.L. 1-43, 2-18, and 6-17, Petitioner Became A Member Of The Fund As a Condition Of His Employment Beginning On March 15, 1989.

The parties dispute when Petitioner became a member of the Fund. Petitioner argues that he became a member on March 15, 1989, the date he began his employment. However, Defendant claims Petitioner did not become a member until May 7, 1989 when membership became mandatory as required by Public Law 6-17. Defendant states that "plaintiff made no payments into the system before May 7, 1989," yet no evidence was introduced at the hearing to show that Petitioner did not contribute to the Fund when he began his employment. The Court finds that Petitioner became a member as a condition of his employment on March 15, 1989 for the foregoing reasons.

Petitioner became employed on March 15, 1989, as a civil service employee of the Commonwealth of the Northern Mariana Islands. At the time he began his employment as a civil service employee, the law regarding membership in the Northern Marianas Islands Retirement Fund was Public Law 1-43, as amended by Public Law 2-18.

P.L. 1-43 § 7b (Effective January 18, 1980) provides the following:

> All persons becoming employees after the effective date shall become members as a condition of employment, provided they are under the age of sixty (60) years on the date

of entry into service. (Emphasis Added).

P.L. 2-18 (Effective June 9, 1981) amended subsection (c) and (d) of Section 3 of P. L. 1-43 to read as follows:

(c) "Employee' shall mean --

(1) any person in the employment of the Northern Mariana Islands Government at any time in all positions classified in the Civil Service System;...

(d) 'Member' shall mean --

(1) any employee as defined by paragraphs (1) and (4) of subsection (c) of this Section;...

Petitioner was a civil service employee when he began his employment on March 15, 1989. Pursuant to P.L. 1-43 § 7b, Petitioner became a member of the Retirement Fund as a condition of his employment since he was under the age of sixty (60) at the time he began his employment. Therefore, Petitioner was both an 'employee' and 'member' of the Retirement Fund because he had been a civil service employee since March 15, 1989.

B. Petitioner Is A Class II Member Of The Fund Since He Was A Fund Member Prior To May 7, 1989 And Did Not Elect To Take Early Retirement.

Public Law 6-17, effective May 7, 1989, created two classes of fund members: those employees hired on or after May 7, 1989 ("Class I members") and those hired prior to May 7, 1989 ("Class II members"). Petitioner is a Class II member for the following reasons:

1 CMC §8313(m) defines Class II members as:

[A]ll persons who were fund members prior to May 7, 1989, and who [did] not elect to become class I members under the terms of this part.

Petitioner argues that he is a Class II member, since he was employed prior to May 7, 1989 and did not elect to become a Class I member. Defendant counters by arguing that Petitioner accepted the option for Class I Early Retirement pursuant to 1 CMC § 8342(a) sometime after December 31, 2007,

therefore making him a Class I member. Defendant further states that Petitioner is an early retiree "in part due to significant periods of Leave without Pay." The Court disagrees.

No evidence was presented during the hearing regarding any Leave Without Pay deductions that would have changed Petitioner's length of service. The Court will not go outside the record to determine whether a deduction should have been made that would have affected Petitioner receiving his 20 years of creditable service. Therefore, Petitioner is a Class II member of the Fund since he was hired prior to May 7, 1989, and did not elect to become a Class I member.

C. Whether Petitioner Is A Class I or Class II Member Does Not Affect His Eligibility And Entitlement to Disability.

A significant portion of Defendant's Opposition discusses whether Petitioner is a Class I or Class II member of the Fund, however, this does not affect Petitioner's eligibility or entitlement to disability. Instead, this affects the amount of money Petitioner would receive when reaching age 62.

1 CMC § 8345 provides:

> (a) Any member who becomes totally and permanently disabled for service from an occupational cause shall receive an annuity equal to 50 percent of the salary such member was receiving at the time the disability was incurred. Such annuity shall continue until the member reaches 62 years of age.
>
> (b) Upon reaching 62 years of age, a disability annuitant shall have such annuity recomputed utilizing the normal retirement annuity formula for class I members with an assumption that the annuitant had continued working as a member until age 62, with the same salary being received as was received at the time the disability was incurred. Such annuitant shall also, upon reaching age 62, be entitled to cost of living allowances equal to those received by members receiving a normal retirement annuity. For class II annuitants no recomputation shall result in an annuity of less than the individual received under subsection (a) of this section.

Here, because Petitioner is a Class II member of the Fund, "no recomputation shall result in an annuity of less than the individual received under subsection (a) of this section," which would be 50 percent of the salary he was receiving at the time of the disability. However, **NMIAC Section 110-10-220(a) provides**:

> Any member who becomes disabled from an occupational cause and qualifies for disability benefits will have his or her benefits computed at 50 percent of the salary earned at the time the disability was incurred, except that a person who became a member before December 5, 2003 (the effective date of Public Law 13-60) and did not refund contributions will have benefits computed at sixty-six and two-thirds percent of the salary earned at the time the disability was incurred. (Emphasis Added).

Here, this applies to Petitioner since he was a member of the Fund prior to December 5, 2003. Therefore, instead of receiving 50 percent of his salary at the time of his disability, Petitioner would be entitled to 66 2/3 percent.

Moreover, since Petitioner has more than 20 years of creditable service plus an additional five years as provided by Commonwealth Constitution Article III § 20, he is entitled to full retirement as a Class II member. Pursuant to 1 CMC § 8391, Petitioner may choose to collect under disability retirement or full retirement.

1 CMC § 8391 provides in part:

> "No member shall be eligible for more than one earned benefit at any one time... Annuitants who have a choice among earned benefits available to them shall elect which benefit they are to receive benefits under...An election for a change in category of benefit shall only be authorized twice." (Emphasis Added).

Thus, Petitioner has a right to elect whether to receive disability retirement or full time retirement since he is eligible for more than one earned benefit.

D. Petitioner Has Satisfied The Disability Requirements Set Forth in P.L. 13-60.

The right to a disability pension is contingent, and vests only upon the occurrence of the event or condition which would qualify the employee for a disability pension, that is, the injury. *Fund Manager, Pub. Safety Personnel Retirement Sys.v. Phoenix Police Dep't Pub. Safety Personnel Retirement Sys. Bd.*, 728 P.2d 1237 (Ariz. Ct. App. 1986). Generally, the retirement board makes a determination as to whether an applicant is entitled to disability retirement. Here, the Fund Administrator denied Petitioner's application for disability, however, the Board still has not made a determination as to whether Petitioner met the criteria for disability retirement.

The Court finds that Petitioner had an enforceable right to disability benefits when he began his employment, despite the fact that the benefits were contingent on him subsequently becoming disabled. Although the receipt of his benefit was contingent on a future event, Petitioner had a right to receive those benefits in the event that he did in fact become disabled. Therefore, the Court must determine whether Petitioner would have to satisfy the disability requirements set forth in P.L. 1-43, the law that was in effect at the time he began his employment with PSS, or alternatively, meet the requirements of P.L. 13-60, the law that was in effect at the date of his disability.

Petitioner applied for disability on November 27, 2006 stating that the reason for his application was due to severe depression and suicidal tendencies. Petitioner argued that to receive disability he must meet the requirements of P.L. 1-43 and further argued that if he met those requirements, he should be entitled to sixty-six and two-thirds percent (66 2/3%) of the salary he was receiving at the time he became disabled. Alternatively, Defendant argued that Petitioner must satisfy the requirements of P.L. 16-19.

Based on applicable law, the Court finds that since a disability is contingent and vests only upon the occurrence of an event, *et sequitur*, that Petitioner would have to satisfy the requirements set forth in P.L. 13-60, the law that was in effect at the time Petitioner applied for his disability. That being said, the Court does not believe that Petitioner should have to comply with the requirements of P.L. 16-19,

effective November 7, 2008, since this law took effect almost two years after Petitioner applied for disability.

P.L. 13-60 amended subsection (a) of 1 CMC § 8345 to read as follows:

> Any member who becomes totally and permanently disabled for service from occupational cause shall receive an annuity equal to 50 percent of the salary such member was receiving at the time the disability was incurred. Such annuity shall continue until the member reaches 62 years of age.

P.L. 13-60 amended 1 CMC § 8346 to read as follows:

> Any member with at least five years of membership service who becomes totally and permanently disabled for service from nonoccupational causes shall receive the same benefits as those provided members with an occupationally-caused disability.

As stated above, although Petitioner had a right to disability at the time he began his employment with PSS, that right vested only upon the occurrence of his disability. In other words, had Petitioner become disabled in 1999, his interest in the disability retirement fund would have vested in 1999 and Petitioner would have needed to satisfy the disability requirements of P.L. 6-17. However, since Petitioner became disabled in 2006, his right to disability vested in 2006. Therefore, Petitioner must satisfy the eligibility requirements set forth in 1 CMC § 8347 (a). If Petitioner satisfies these requirements he shall receive the same amount he would have received under P.L. 1-43 (66 2/3 percent) since NMIAC Section 110-10-220(a) provides that "...a person
who became a member before December 5, 2003 (effective date of P.L. 13-60)...will have benefits computed at sixty-six and two-thirds percent of the salary earned at the time the disability was incurred." The requirements for disability are set forth in 1 CMC § 8347 (a).

1 CMC § 8347 (a) states in part:

> A member shall be considered totally and permanently disabled after the board receives

> written certification by at least two licensed and practicing physicians and a vocational rehabilitation counselor preferably one with a master's degree selected by the board that the member is totally and permanently disabled for the further performance of the duties of any assigned position in the service of the government. If upon consideration of the reports of the physicians and the vocational rehabilitation counselor and any other evidence presented to the board by the member or others interested therein, the board finds the member to be totally and permanently disabled, it shall grant the member a disability retirement annuity upon written certification that the member has been separated from the service of the employer because of total disability of such nature as to reasonably prevent further service for the employer, and as a consequence is not entitled to compensation from the government. (Emphasis added).

Petitioner relied on P.L. 1-43 arguing that he has satisfied the eligibility requirements for disability because: (1) he is under the age of 60; (2) has at least seven years of creditable service; (3) has provided the board with written certification from two licensed and practicing physicians; and (4) he has provided the board with a written certification of his separation from service.

Alternatively, Defendant argues that Petitioner's application for disability should be denied because Petitioner failed to meet the "specialist" requirement set forth in P.L. 16-19. To support its position, Defendant claims that Dr. Ala-Eldin Taha, a Board Certified Psychiatrist, stated that Petitioner's disability was not permanent in December 2006. In addition, on April 18, 2008, the Administrator of the Fund, Mark Aguon, sent Petitioner an Amended Notice denying his claim for disability "based primarily on one of the physician's certification[s] that [Petitioner was] not totally and permanently disabled for service." Therefore, Defendant contends that Petitioner has not satisfied the requirements for disability pursuant to P.L. 13-60 or P.L. 16-19 since one of the physicians determined that Petitioner's disability was not total and permanent and no vocational rehabilitation counselor or specialist certified that he was totally and permanently disabled.

While the Court does agree that Petitioner must show that he is totally and permanently disabled in order to receive disability, the Court does not believe Petitioner was required to see a "specialist," since P.L. 16-19 took effect after Petitioner's disability. That being said, P.L. 13-60 was amended to get rid of the vocational rehabilitation counselor requirement and instead substitute in its place the "specialist" requirement. This was based on the Legislature's findings "that [the vocational rehabilitation counselor requirement] created a hardship for some retirees and for the Retirement Fund because a pool of qualified vocational rehabilitation counselors [was] readily available." In addition, the Legislature stated that the purpose for this change was to protect the Fund and its members.

Based on those findings, the Court believes that the vocational rehabilitation counselor requirement was an added hardship and substantial impairment to Petitioner's contractual obligation to the Fund which Petitioner need not satisfy. Thus, the next step is to determine whether the rest of 1 CMC § 8347 (a) was satisfied.

On December 19, 2006, Dr. Ala-Eldin Taha, a licensed and practicing physician (psychiatrist) submitted to the Fund a form stating that Petitioner was unable to perform his job duties due to his disability, and that his condition needed to be reassessed in six months to evaluate continued disability or ability to return to work Dr. Ala-Eldin Taha did not declare Petitioner totally and permanently disabled, but did say that he was disabled at that time. Upon evaluating Dr. Taha's report, she did conclude that Petitioner suffers from severe depression which has impaired his ability to function and has caused him to miss much work. She further stated that although Petitioner is on a number of medications, his condition seems to be getting worse. In addition, due to Petitioner's chronic mood disorder, it was her opinion that Petitioner was unable to perform his job duties at this time. Therefore, although Dr. Taha did not declare Petitioner totally and permanently disabled she did find Petitioner totally and permanently disabled at the present time.

Dr. Brenn, a licensed clinical psychologist, testified at the hearing that Petitioner's depressive disorder was permanent and that he was disabled from the performance of any job with the government.

When asked why Dr. Brenn changed her opinion at that hearing, she replied that based on the status of the Psychiatric assistance presently available in the Commonwealth, Petitioner's disorder was permanent.

Finally, on October 25, 2007, in a letter to the Retirement Fund, Dr. Janna B. Wilgus, recommended total and permanent disability for Petitioner because he suffered from "Major Depression." In her letter, Dr. Wilgus stated that Petitioner suffered from all nine symptoms for Major Depression, as defined by DSM-IV. In addition, in Form NMIRF-3-B, Dr. Wilgus further stated that Petitioner's disability is total and permanent and that he is no longer able to engage in gainful employment.

Therefore, the Court finds that Petitioner has met the requirements of P.L. 13-60 by showing that two licensed and practicing physicians, Dr. Brenn and Dr. Wilgus, both found Petitioner to be totally and permanently disabled. As stated above, based on the concerns and difficulty in obtaining a 'vocational rehabilitation counselor,' the Legislature amended P.L. 13-60 removing said requirement. Moreover, the Court does not believe that Petitioner needed to meet that requirement because it was a substantial impairment to Petitioner's contract and further finds that Petitioner satisfied all other requirements for a showing of permanent disability.

V. CONCLUSION

For the foregoing reasons, the Court **REVERSES** the Administrator's decision **DENYING** Petitioner's disability retirement in the amount of 66 2/3% of his salary.

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IT IS HEREBY ORDERED:

Defendant pay Petitioner a disability retirement annuity in the amount of 66 2/3% of his salary commencing on December 31, 2007.

Each party bears its own costs and attorney's fees without prejudice to any motion filed for the same.

So ORDERED this 15th day of June, 2010.

/ s /
David A. Wiseman, Associate Judge