STATE OF MICHIGAN

COURT OF APPEALS

CHARLES MASTER, JR. and ALFRED PARE', for themselves and on behalf of all retirants or beneficiaries of THE POLICE AND FIREMEN RETIREMENT SYSTEM OF THE CITY OF DETROIT,

Plaintiff-Appellees,

v

CITY OF DETROIT,

Defendant-Appellant,

and

THE BOARD OF TRUSTEES OF THE POLICEMEN AND FIREMEN'S RETIREMENT SYSTEM OF THE CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
October 11. 1996
ON REMAND

No. 191421, 191422
LC No. 91-100875 AZ

CHARLES MASTER, JR. and ALFRED PARE', for themselves and on behalf of all retirants or beneficiaries of THE POLICE AND FIREMEN RETIREMENT SYSTEM OF THE CITY OF DETROIT,

Plaintiff-Appellees,

v

CITY OF DETROIT,

Defendant-Appellee,

and

THE BOARD OF TRUSTEES OF THE
POLICEMEN AND FIREMEN'S RETIREMENT
SYSTEM OF THE CITY OF DETROIT,

Defendant-Appellant.

Before: Jansen, P.J., and White and Saad, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court for consideration of a single issue: whether the circuit court's ruling that the Act 312[1] arbitrator's award was a recognition by the arbitrator of a prior improper practice in computing benefits, by which pension benefits were improperly reduced to pre-1990 retirees, was erroneous. In our first opinion we concluded that this issue was unpreserved. *Master et al v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued February 23, 1995 (Docket Nos. 154681, 154984), p 3. On cross applications for leave to appeal, the Supreme Court concluded that defendants sufficiently preserved the issue and, by order dated November 17, 1995, remanded the matter to this Court for consideration on the merits, denying the applications for leave to appeal and cross appeal in all other respects. Because the record on this issue is sparse and the circuit court's reasoning is not clear, we remand for development of the record on this issue prior to our consideration of the merits.

Plaintiff argues that

> [t]he contract of November 20, 1974, does not provide for the reduction of pensions on the interest accumulated on the contributions. It only provides for a reduction of annuity on the accumulated contributions. There is no mention of the word "interest" in the 1974 provision. On July 1, 1990, the arbitrator recognized this discrepancy and clarified the issue.
>
> * * *
>
> Plaintiffs-Appellees maintain that the ordinance of November, 1974, states that the annuity shall be based upon the accumulated contributions. Defendants-Appellants freely acknowledge that the term "accumulated contributions" means the sum of all the amounts deducted from the compensation of a member and does not include interest. (See Trial Court transcript p. 22, lines 3-6 attached hereto as Exhibit I). The City has taken the employees' funds and invested them and used the interest on those funds to reduce their portion of the total pension. Since the 1974 pension provision calls only for the reduction of pensions by the contributions and does not mention any deduction on the interest, the City has been illegally reducing the pension benefits for retirees.

The portion of the trial transcript that plaintiff attached to its appellate brief in support of this argument states:

> MR.BOVE [*counsel for defendant Trustees*]: The Charter specifically says accumulated contributions shall mean the sum of all amounts deducted from the compensation of a member. Interest is not deducted.
>
> THE COURT: I hear you.
>
> MR. BOVE: Shall be credited to his individual account in the annuity savings fund.
>
> THE COURT: You don't need to make that argument again, I understood your argument the first time . . .

However, that transcript of defendants' motion for summary disposition hearing also contains the following argument by defendant Trustees' counsel:

> . . . Now, accumulated contributions aren't outlined in the pension provision in the collective bargaining provision and that collective bargaining agreement also incorporates by reference the Charter of the City of Detroit, specifically Title 9, Chapter 7, Article 2, Section 26. And Section 13 of that section of the Charter reads:
>
> > "Accumulated contributions shall mean the sum of all amounts deducted from the compensation of a member and credited to his individual account in the Annuity Savings Fund, together with regular interest."
>
> Now, it would appear that counsel's argument is certainly misphrased, because "accumulated contributions" is in fact defined. It's defined as the employee's contributions in his annuity fund with regular interest. Thats the entire package that was in the 1974 Optional Annuity Withdrawal, accumulated contributions including interest. In 1990 accumulated contributions including interest. Except, the arbitrator in 1990 said we will not consider the interest credit for your reduction. Now, I, I think the argument has got to fail.
>
> THE COURT: Or did he say just that it has been improperly computed?
>
> MR. BOVE: No, no he never said that, Your Honor, never said there was anything improper or that it was improperly computed.

Counsel also argued that the pension provision had been applied in the same manner for over twenty years without objection by the union or retirees. Later, plaintiff's counsel responded:

> . . . As to the merits o [sic] it, he mentioned accumulated contribution. Accumulated contribution in the sections in question here are not the same as

accumulated contributions in the pension chart provisions, and he specifically pointed that out by saying that these contributions went into a pension fund, deferred pension fund. He named two types, and it was not the same thing. This deals with the contributions that had been accumulated that are contributed by the members while they are in active services. That's all that means to say. Now, what we are doing is confusing interest and principal here and there should be no confusion here. . .

The Charter of the City of Detroit is not before us, except a copy of the page on which the term accumulated contributions is defined.

The Act 312 Arbitration "Opinion and Award of Panel" is before us and states in pertinent part:

Union Issue #10

OPTIONAL ANNUITY WITHDRAWAL

UNION PROPOSAL:

The Union has proposed that employees who retire on or after July 1, 1990 and have elected to receive their total or partial refund of accumulated contributions to the Defined Contribution Plan suffer no actuarial reduction in their Defined Benefit Plan benefits with respect to withdrawn interest earnings, but only with respect to actual contributions which the employee withdraws.

The following is the language proposed by the Union as adding to Article 48 of the collective bargaining agreement entitled OPTIONAL ANNUITY WITHDRAWAL, a new Section H.

New Section:

H. For employees who retire on or after July 1, 1990, and who have made or make an election to receive a total or partial refund of his or her accumulated contributions to the Defined Contribution Plan, there shall be no reduction of retirement allowances due to the portion of withdrawal representing interest credits.

CITY RESPONSE:

The present language of the collective bargaining agreement requires that an employee who exercises his/her option to withdraw all or part of his/her accumulated contributions to the defined contribution shall be subject to an actuarial reduction in the benefits provided or to be provided by the Defined Benefit Plan to the extent of the amounts withdrawn whether such amounts consist of principal or interest or both.

DISCUSSION:

1. It is the position of the City that the historically collectively bargained for provision with respect to all such amounts withdrawn, i.e. both the original amount of employee contributions together with interest earned thereon in the Defined Contribution Plan should cause an actuarial reduction in the benefits to be received by the employee from the Defined Benefit Plan notwithstanding that additional earnings in excess of the actuarially assumed interest rate are sufficient to fund the proposed benefit. The City further argues that the current funding features of the retirement system are in excess of that required by the State Constitution, any applicable law and the Retirement System provisions.

2. It is the position of the Union that only the actual contributions made to the Defined Contribution Plan and withdrawn and not the interest earned thereon should be the base for the actuarial reduction in the benefits to be received from the Defined Benefit Plan.

The Union argues that such amounts as are contributed by or for the benefit of employees to the Defined Contribution Plan are mandatory contributions and that the interest earnings on such amounts should not be part of the basis for the reduction in the benefits paid from the Defined Benefit Plan as the result of the partial or total withdrawal of such interest earnings and that the retirement system has the ability to provide such benefit with no increase in employer percent of payroll contribution rates.

The City further argues that in the event this Panel awards the benefit to the Lieutenants and Sergeants Association, historically, because of parity, the benefit will be extended to all firefighter and police officers and there is no safeguard that such benefit extension will not result in increased cost. The City appears to argue that if it is determined that the retirement system can provide the proposed benefit without increased cost to the employer, that the Retirement System can further provide for reduced employer contributions without violating the established constitutional and other legal funding requirements.

AWARD:

The Panel is persuaded by the Union's arguments in favor of adopting the proposal. However, the Panel also recognizes the validity of the City's concerns. Therefore, this Panel orders the adoption of the Union's proposal with the following provisions to become a part of the collective bargaining agreement.

Provisions indicated in the following paragraphs which will be added to Section H and which along with Said Section H will be made part of the retirement system provisions as applicable to employees affected by this award. The above paragraph is expressly subject to the following requirements.

1. That this award will not result in an increase in the Employer contribution precentage [sic] of payroll as determined in the June 30, 1989 actuarial valuation.

2. That the board of Trustees of the Policemen and Firemen Retirement System of the City of Detroit determines after assurance from the retirement system's actuary that the cost associated with the implementation of this award can be borne by the retirement system earnings without violation of the constitutional requirements of Article 9, Section 4 of the Michigan Constitution or the funding provisions of the retirement system.

3. That the Board of Trustees of the Policemen and Firemen Retirement System, and its actuary review the actuarial valuation of June 30, 1989 in light of the new updated financial information and adopt the appropriate resolutions consistent with the above provisions.

4. This award with respect to Issue 10 will not be operative unless the Board of Trustees of the Policemen and Firemen Retirement System receives written concurrence from the City with the resolutions of the Board of Trustees as referred to in the preceding paragraph.

Finally, defendant Board of Trustees attached to its appellate brief a document entitled "ACTUARIAL ASSUMPTION CHANGES" which states that the 1990 Board of Trustees forwarded the provisions of the Act 312 arbitration award to the Board's actuary; received the actuary's recommendation that "certain economic assumptions be revised to 7.0% with respect to investment return and 5.0% with respect to wage inflation;" that the Board's actuary submitted to the Board of Trustees those amendments of the June 30, 1989 valuation report resulting from the alternative economic assumptions recommended by the Board's actuary; and that the actuary has assured the Board of Trustees that the adoption of the alternative economic assumptions are consistent with the requirements of Article 9, Section 24 of the Michigan Constitution and the funding requirement provisions of the Policemen and Firemen Retirement System. The following resolutions are then set forth: that the Board of Trustees adopts the arbitrator's award as part of the provisions of the Retirement System, Defined Contribution Plan and Defined Benefit Plan; and that the Board of Trustees adopts and certifies to the City of Detroit that the employer contribution as recommended and determined by the Board's actuary pursuant to the June 30, 1989 actuarial valuation for the fiscal year July 1, 1990 through June 30, 1991 is 36.52% of payroll of those members of the Policemen and Firemen Retirement System of the City of Detroit.

In addressing the issue, the circuit court stated only:

Defendant seek summary disposition on three grounds:

I. Plaintiffs are not entitled to any contractual improvements in pensions received by active employees after plaintiffs retired.

Defendants cite persuasive case law for this proposition and plaintiffs do not argue with it.

> **However, plaintiffs argue that defendant had been reducing pensions, not only by the amount of employee contributions withdrawn, but, improperly, by the amount of interest thereon since November 20, 1974.**
>
> **It is plaintiff's argument that the July, 1990, arbitration award is not merely a newly-bargained-for-benefit awarded to active employees. Rather, plaintiffs suggest that it was also a recognition by the arbitrator that defendants had improperly reduced pension benefits to pre-1990 retirees by the amount of the interest credits.**
>
> **This Court will HOLD that plaintiffs' interpretation of the 1990 arbitration award is the correct one. Plaintiffs cite Grand Rapids Schools v City of Grand Rapids, 146 Mich App 652 for the proposition that, "Interest on public funds designated for a specific purpose follows those funds... In general, interest is merely an incident of the principal making it the property of the party owning the principal."** Even if one views the arbitration award as a new form of compensation bargained for and awarded to 1990 active employees ... and thus not available to pre-1990 retirees by operation of law... it then CLEARLY becomes available to those retirees pursuant to the terms of the YANK/GENTILE consent judgment which required that retirees receive a proportionate share of any new form of compensation granted to active employees.

We conclude that the record before us contains insufficient information from which we can address this issue on the merits. The arbitration opinion and order does not state on its face that it is rectifying a prior improper practice, and the circuit court's opinion and order does not make clear its reasons for concluding that plaintiff's position to that effect is a proper interpretation of the arbitration award.[2] We therefore remand for further development of this issue. The court shall consider the matter anew, entertaining whatever additional testimony, proofs or argument it deems appropriate, and shall clearly set forth its findings and the reasons for its decision. The amplified record and the court's decision shall be transmitted to this court within ninety-one days of the release of this opinion. We retain jurisdiction.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Henry W. Saad

[1] MCL 423.231 *et seq.*; MSA 17.455(31) *et seq.*.

[2] We do not find the circuit court's reliance on *Grand Rapids Schools v City of Grand Rapids*, 146 Mich App 652 (1985), and the proposition quoted therefrom illuminating without further explication.