

October 20, 2011

The Honorable Patricia Hite
Acting NYS Department of Civil
Service Commission President
NYS Department of Civil Service
Alfred E. Smith State Office Building
Albany, NY 12239

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Dear President Hite:

The Retired Public Employees Association, Inc. (RPEA) notes the Department of Civil Service's posting of an Emergency Rule that would affect the Health Benefit Plan for Active and Retired New York State Employees, I.D. No. CVS-41-11-00007-E, Filing No. 854, filed on September 27, 2011 and to take effect on that date, in the State Register, dated October 12, 2011.

With respect to such "Emergency Rule" providing, in pertinent part, that:

Effective October 1, 2011, the rate of contribution ...shall be as follows:

(i) for retirees who retired on or after January 1, 1983, and employees retiring prior to January 1, 2012, New York State shall contribute 88 percent of the charge on account of individual coverage and 73 percent of the charge on account of dependent coverage..., and

(ii) for employees retiring on or after January 1, 2012, from a title allocated or equated to salary grade 9 or below, New York State shall contribute 88 percent of the charge on account of individual coverage and 73 percent of the charge on account of dependent coverage, ...and

(iii) for employees retiring on or after January 1, 2012, from a title allocated or equated to salary grade 10 or above, New York State shall contribute 84 percent of the charge on account of individual coverage and 69 percent of the charge on account of dependent coverage....

RPEA, on behalf of retirees of the State as an employer and their dependents in general and its members who are retirees of the State as an employer and their dependents in particular, objects to the adoption of such provisions for the following reasons:

POINT I

Except as otherwise provided by an agreement between the State and an employee organization entered into pursuant to Article fourteen of the Civil Service Law, Section 167.1(a) requires the State to contribute nine-tenths of the cost of premiums or subscription charges for health insurance coverage of each such State employee or retired State employee and three-quarters of the cost of premium or subscription charges for the coverage of dependents of such State employees and retired State employee except as otherwise provided by Section 167.1(a).

Suffice it to note that “It is well-settled that a State regulation should be upheld if it has a rational basis and is not unreasonable, arbitrary, capricious **or contrary to the statute under which it was promulgated**” (see *Kuppersmith v Dowling*, 93 NY2d 90, 96) [emphasis supplied].

Clearly the Emergency Rule CVS-41-11-00007-E and, presumably, a final rule that would track Emergency Rule CVS-41-11-00007-E “is contrary to the statute under which it was promulgated” with insofar as it requires a retiree of the State as the employer to pay more than (1) 10% of the health insurance premium for individual health insurance coverage and (2) 25% of the health insurance premium for dependent health insurance coverage.

POINT II

Assuming, but not conceding, that Civil Service Law §167.8 as relied upon by the President as authority for promulgating the changes set out in CVS-41-11-00007-E is viable, nothing in the “memorandum in support” of Senate 5486, which was signed into law as Chapter 491 of the Laws of 2011, and which, in pertinent part, amended Section 167.8, suggests that this amendment was to apply to a retiree of the State as the employer.

Indeed, the consistent theme, as demonstrate in the Sponsor’s Memorandum's reference the amendment of CSL §167.8, is that the provision would apply with respect to “employer and employee” shares of the cost of health insurance and conspicuous by its absence is any reference to “retirees.” The Sponsor’s Memorandum states:

“Section 2 of Part A of this law amends Civil Service Law § 167(8) to provide authority to modify the **employer and employee shares of health premium and subscription costs under the New York State Health Insurance Plan.**” (emphasis supplied)

As the Sponsor’s Memorandum further explains, the bill is intended to apply as follows:

“Part B of this bill provides the State's approximately **12,000 unrepresented employees** who are prohibited from collective negotiations by the Taylor Law, including managerial or confidential ("M/C") employees, with benefits and increases in compensation at levels that are comparable to the benefits and increases in compensation received by employees represented by employee organizations.” [emphasis supplied]

Again, the phrasing of the Sponsor’s Memorandum – “provides the State’s approximately 12,000 unrepresented employees” – clearly neither contemplates nor implies that retirees of the State as the employer are to be subjected to the extension of the terms negotiated in the course of collective bargaining pursuant to Article 14 of the Civil Service Law with respect to any ratio of health insurance contributions by the State and its employees in such collective bargaining unit in contrast to the President, with the approval of the Director of the Budget, electing to promulgate a rule, regulation or policy under color of §167.8 extending such provisions to managerial or confidential employees and unrepresented employees.

POINT III

Assuming, arguendo, that in some way §167.8 is deemed applicable to retirees of the State as an employer, such application would be prospective only, applying to those employees of the State retiring on or after the claimed effective date, September 27, 2011, of the emergency rule as was the case when §167.1(a) was amended in 1983.

The “prospective application” of changes in retiree contributions for health insurance is reflected in both the Bill Jacket concerning the measure that was signed into law as Chapter 14 of the Laws of 1983, a “Governor’s Program Bill,” enacting the amendment to Civil Service Law, Section 167.1(a) changing the ratio of employer and employee contributions for health insurance prospectively as of January 1, 1983 with respect to employees of the State as the employer retiring on or after January 1, 1983 and continuing in place the superior contribution ratios for those retirees of the State as the employer retiring on or before December 31, 1982.

In a letter to you dated, September 14, 2011, RPEA offered a proposed amendment to the President's Rules which should have been promulgated instead of the above Emergency Rule. For the above reasons, and for the reasons stated in our letter of September 14, 2011, RPEA respectfully requests an immediate withdrawal of the Emergency Rule and promulgation of our suggested proposed amendment which would be consistent with legal and historical precedent as we have painstakingly demonstrated.

Sincerely,

Alan Dorn
Executive Director

cc: Comptroller DiNapoli