

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ELEANOR BAUX, ANN HELLER, and All others similarly situated	: SEPTEMBER TERM, 2002
v.	: No. 0780
CITY OF PHILADELPHIA BOARD OF PENSIONS and RETIREMENT, and CITY OF PHILADELPHIA	: Commerce Program
	: Class Action
	: Control No. 032791

ORDER

AND NOW, this 17th day of November 2003, upon consideration of the contemporaneous Opinion and the joint motion of the parties presented orally in open court, the attached stipulation of the parties is hereby incorporated herewith, approved and made an Order of the Court.

The plaintiff class hereby certified in accordance with the attached stipulation consists of all surviving spouses receiving survivor's benefits as a result of pensions earned by City of Philadelphia police officers or firefighters who retired and began receiving benefits prior to January 1, 1985 and were receiving pension benefits as of January 1, 1989, and died subsequent to January 1, 1989.

The cost of living adjustment (COLA) benefit referred to in the attached stipulation of the parties is that benefit conferred pursuant to the Special Ad Hoc Police and Fire Fighter Post-Retirement Adjustment Act, 1988, Dec. 14, PL 1192, No. 147, 53 P.S. Sect. 896.301, *et seq.* (Act 147).

Class counsel shall submit, for approval by the Court, a proposed Notice to the Class pursuant to Rule 1712 within thirty (30) days of the date of this Order. The Court will thereafter issue a Supplemental Order prescribing the type and content of notice to be used and the members to be notified and such other matters as may be necessary. Every member in the class will be included unless with thirty (30) days of notice, a member files of record a written election to be excluded from the class.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. November 17, 2003

Before the court is a Motion for Class Certification pertinent to the entitlement of surviving spouses of police officers and firefighters to additional monthly pension benefit payments pursuant to Act 147 and applicable sections of the First Class Cities Act 1915, May 20, P.L. 566, as amended, 53 P.S. Sect. 13431, *et seq.* and/or the Philadelphia City Code and Home Rule Charter, Section 22-101, *et seq.* Pursuant to Pennsylvania Rule of Civil Procedure 1719(a), the following Findings of Fact and Conclusions of Law are submitted in support of the Order for Class Certification.

FINDINGS OF FACT

1. Originally this class action was commenced on behalf of surviving spouses of deceased Philadelphia police officers and consisted of approximately 1,600 or more members. Subsequently, the parties agreed to expand the class to include surviving spouses of deceased Philadelphia firefighters.

2. Plaintiff Eleanor Baux was married to and is the widow of Philadelphia police officer Robert S. Baux. Officer Baux retired from the Philadelphia Police Department in 1981.

3. Officer Baux received a pension from the City of Philadelphia Board of Pensions and Retirement in the amount of \$1,114.52 per month.

4. An additional \$25.00 was paid to Officer Baux pursuant to the Special Police and Fire Fighter Post-Retirement Adjustment Act (Act 147).

5. The total monthly pension received by Officer Baux was \$1,139.52.

6. Officer Baux made an election of retirement and survivorship benefit options pursuant to section 22-306 of the Home Rule Charter.

7. Officer Baux died on March 11, 1998.

8. Plaintiff Eleanor Baux was entitled to fifty percent of the \$1,139.52, pursuant to said election, or \$569.76.

9. Since Officer Baux's death the City of Philadelphia Board of Pensions and Retirement and/or the City of Philadelphia pays Eleanor Baux \$557.26 per month.

10. The City of Philadelphia Board of Pensions and Retirement and/or City of Philadelphia has failed and refused to pay Eleanor Baux the portion of her benefit attributable to Act 147.

11. Plaintiff Ann Heller was married to and is the widow of Philadelphia police officer Charles T. Heller. Officer Heller retired from the Philadelphia Police Department in 1970.

12. Officer Heller received a pension from the City of Philadelphia Board of Pensions and Retirement in the amount of \$1,255.43 per month.

13. Officer Heller additionally received \$25.00 per month pursuant to the Special Police and Fire Fighter Post-Retirement Adjustment Act (Act 147).

14. The total monthly pension received by Officer Heller was \$1280.43.

15. Officer Heller made an election of retirement and survivorship benefit options pursuant to section 22-306 of the Home Rule Charter.

16. Officer Heller died on May 7, 2000.

17. Pursuant to Officer Heller's election, his widow, Ann Heller was entitled to receive fifty percent of \$1,280.43 pursuant to the said election, or \$640.22.

18. Since Officer Heller's death, the City of Philadelphia Board of Pensions and Retirement and/or City of Philadelphia pays Ann Heller \$627.72 per month.

19. The City of Philadelphia Board of Pensions and Retirement and/or City of Philadelphia has also failed to pay Ann Heller the portion of her benefit attributable to Act 147.

20. The City of Philadelphia Board of Pensions and Retirement and/or the City of Philadelphia have failed to pay Ann Heller the amount of \$12.50 per month, which is fifty percent of Act 147.

21. In similar fashion to the named plaintiffs, each member of the class of surviving spouses of deceased Philadelphia police officers and firefighters has been deprived of the Act 147 portion of the monthly pension benefit owed by the City of Philadelphia Board of Pensions and Retirement and/or City of Philadelphia.

22. Plaintiffs filed an action in mandamus to compel the City of Philadelphia Board of Pensions and Retirement and/or City of Philadelphia to pay pension benefits as required under Act 147.

CONCLUSIONS OF LAW

1. The plaintiffs have satisfied the numerosity requirement of Pa.R.Civ.P. 1702(1) since the class is so numerous that joinder of all members is impracticable.

2. There are questions of law and fact common to the class under Pa.R.Civ.P. 1702(2) concerning plaintiffs claim for mandamus against the City of Philadelphia Board of Pensions and Retirement and/or the City of Philadelphia.

3. The representative parties do present claims typical to those of the class as a whole. Pa.R.Civ.P. 1702(3).

4. The representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Pa.R.Civ.P. 1702(4) and 1709.

5. The class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rules 1702(5) and 1708.

6. The joint Motion for Class Certification is granted.

DISCUSSION

The purpose of class action suits is “to provide a means by which the claims of many individuals could be resolved at one time, thereby eliminating the possibility of repetitious litigation and providing small claimants with a method to seek compensation for claims that would otherwise be too small to litigate.” *Foultz v. Erie Insurance Exchange*, February Term, 2000, No. 3053 (March 13, 2000) (Herron, J.)¹ (quoting *DiLucido v. Terminix Intern., Inc.*, 450 Pa. Super. 393, 397, 676 A.2d 1237, 1239 (Pa. Super. 1996)). For a suit to proceed as a class action, Rule 1702 requires that five criteria be met:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses or the representative parties are typical of the claims or defenses of the class;
- (4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and
- (5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

The moving party initially bears the burden of proof, although this burden “is not heavy and is thus consistent with the policy that decisions in favor of maintaining a class action should be liberally made.” *Foultz, supra.* (quoting *Cambanis v. Nationwide Ins. Co.*, 348 Pa. Super. 41, 45, 501 A.2d 635, 657 (Pa. Super. 1985)). Once the moving

¹Available at <http://courts.phila./gov>.

party has shown that each of the elements is satisfied, “the class opponent shoulders the burden, which has shifted, of coming forward with contrary evidence challenging the prima facie case.” *Id.* (quoting *D’Amelio v. Blue Cross of Lehigh Valley*, 347 Pa. Super. 441, 449, 500 A.2d 1137, 1141 (Pa. Super. 1985)).

I. The Class is Sufficiently Numerous

Plaintiffs seek to represent the class of surviving spouses of deceased Philadelphia police officers and firefighters who have been deprived by the City of Philadelphia Board of Pensions and Retirement and/or City of Philadelphia of pension benefits due them pursuant to Act 147. The purported class consists of approximately 3000 individuals. There is no magic number or arbitrary limit for the requisite number of members to constitute a class. *Wasilewski v. Eastman Kodak Company*, 15 Phila. Co. Rptr. 276, 281 (1986). In determining numerosity the court should examine whether the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants. *Janicik v. Prudential Ins. Co. of America*, 305 Pa. Super. 120, 131-32, 451 A.2d 451, 456 (Pa. Super. 1986). The class representative need not plead or prove the number of class members so long as she is able to define the class with some precision and affords the court with sufficient indicia that more members exist than it would be practicable to join. *Id.* The court must also determine whether the resources of the court would be needlessly drained by the nature of the action and the number of litigants. *Id.* Given the number of purported class members, the proof required to

establish the defendants' liability, and the substantial efficiencies that a class action would provide, this court finds that the numerosity requirement is met.

II. Common Questions of Law and Fact (Commonality)

A plaintiff generally satisfies its burden of showing common questions of fact and law where "the class members' legal grievances arise out of the same practice or course of conduct on the part of the class opponent." *Foust v. Southeastern Pennsylvania Transp. Authority*, 756 A.2d 112, 118 (Pa. Commw. Ct. 2000). In examining the commonality of the class' claims, a court should focus on the cause, and not the amount, of the alleged damages. *Weismer by Weismer v. Beech-Nut Nutrition Corp.*, 419 Pa. Super. 403, 409, 615 A.2d 428, 431 (Pa. Super. 1992) ("Once a common source of liability has been clearly identified, varying amounts of damages among the plaintiffs will not preclude class certification.").

The plaintiff advances the following common questions of law and fact that make their claims appropriate for class certification:

* The City of Philadelphia Board of Pension and Retirement and/or the City of Philadelphia deprived each member of additional monthly pension benefits payable pursuant to Act 147.

* The amount of monthly payments and any past due amounts can be determined by using the same mathematical calculation differing only with respect to the retirement status of the deceased officer or firefighter.

This court finds that plaintiffs have established that their claims arise from the same grievance and present questions of law and fact that are common to the class.

III. Typicality

The third step in the certification test requires the plaintiff to show that the class action parties' claims and defenses are typical of the entire class. The purpose behind this requirement is to determine whether the class representatives' overall position on the common issues is sufficiently aligned with that of the absent class members, to ensure that the pursuit of their interests will advance those of the proposed class members. *DiLucido v. Terminix Intern., Inc.* 450 Pa. Super. 393, 404, 676 A.2d 1237, 1242 (Pa. Super. 1996).

To support their assertion that their claims are typical of the entire class, plaintiffs state that no separate issues exist among the entire class and the class representatives except with respect to calculation of the individual amounts. Here, the court finds that plaintiffs' claims regarding pension benefits are typical of the class.

IV. Adequacy of Representation

For the class to be certified, this court must also conclude that the plaintiffs "will fairly and adequately assert and protect the interests of the class." Pa.R.Civ.P. 1702(4). In determining whether the representative parties will fairly and adequately represent the interests of the class, the court shall consider the following:

- (1) whether the attorney for the representative parties will adequately represent the interests of the class,
- (2) whether the representative parties have a conflict of interest in the maintenance of the class action, and
- (3) whether the representative parties have or can acquire financial resources to assure that the interests of the class will not be harmed.

Pa.R.Civ.P. 1709.

Rule 1709 is not a place to revisit issues and rehash arguments raised during the discussion of Rule 1702's commonality and typicality requirements. *In re Pennsylvania Diet Drugs Litigation*, 41 Pa. D. & C. 4th 78 (1999). Instead, the three criteria require the court to consider evidence and find facts distinct from those necessary in its determination regarding the requisites of commonality and typicality. *Id.*

In response to the first factor, generally, "until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession." *Id.* (quoting *Janicik*, 305 Pa. Super. at 136, 451 A.2d at 458). Because defendants have not raised this issue and plaintiffs' counsel's extensive experience in litigating class suits is well-known, the court is confident that plaintiffs are adequately represented.

With regard to the second factor, "courts have generally presumed that no conflict of interest exists unless otherwise demonstrated, and have relied upon the adversary system and the court's supervisory powers to expose and mitigate any conflict." *In re Pennsylvania Diet Drug Litigation, supra.* at 111 (quoting *Janicik*, 305 Pa. Super. at 136, 451 A.2d at 458). When there is no allegation of impropriety between plaintiff and his counsel, a finding of conflict that would prevent certification is inappropriate. *Id.* The court presumes that no conflict of interest exists because the defendants have not raised this issue in their briefs nor is the court aware of any conflict of interest.

Finally, as to the adequacy of plaintiffs' ability to fund the litigation, the proposed settlement of the case renders this contention moot.

Having considered the factors of Rule 1709, this court finds that the class will be fairly and adequately represented.

V. Fair and Efficient Method of Adjudication

When reviewing whether a class action plaintiff will fairly and adequately represent the class' interests, a court must consider the following:

- (1) whether common questions of law or fact predominate over any question affecting only individual members;
- (2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action.
- (3) whether the prosecution of separate actions by or against individual members of the class would create a risk of:
 - (i) inconsistencies or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;
 - (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
- (4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;
- (5) whether the particular forum is appropriate for the litigation of the claims of the entire class;
- (6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
- (7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

Pa.R.Civ.P. 1708.

The issue of common question of law and fact has been addressed by the court.

A. This Case Presents No Insurmountable Management Difficulties

While a court must consider the potential difficulties in managing the class action, any such difficulties generally are not accorded much weight. Problems of administration alone ordinarily should not justify the denial of an otherwise appropriate class action for to do so would contradict the policies underlying this device. *Foutz, supra.* (citing *Yaffe v. Powers*, 454 F.2d 1362 (1st Cir. 1972)). Rather the court should rely on the ingenuity and aid of counsel and upon its plenary authority to control the action to solve whatever management problems the litigation may bring. *Id.* (citing *Buchanan v. Brentwood Federal Sav. and Loan Ass'n.*, 457 Pa. 135, 320 A.2d 117, 131 (Pa. 1974)).

Here, the opposing attorneys have been cooperative and will work together in the future.² The claims of the proposed class would be manageable because members of the class can be identified through the City's records. As such, there are no manageability issues that preclude the certification of the class.

B. The Risks of Separate Actions are Considerable

In considering the risks of separate actions, the precedential effect of a decision is to be considered. The court may also consider the parties' circumstances and respective ability to pursue separate actions. *Janicik*, 305 Pa. Super. at 143, 415 A.2d at 462.

² Indeed, this court compliments counsel on their professionalism and courtesies extended each to the other and to this court.

Here, if the Class as a whole is not certified, each class member will have to pursue an individual claim against defendants with the possibility of differing conclusions. Thus, the risk of separate actions is considerable.

C. This Forum is Appropriate for the Litigation of the Claims of the Entire Class

There is no dispute that this forum is appropriate for this litigation.

D. The Amount of Recovery for Each Class Member Makes Separate Actions Impracticable and Justifies Certification

Rule 1708 also requires the court to consider the amount of damages sought by the individual plaintiffs in determining the fairness and efficiency of a class action. On the other hand, the court must analyze “whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient to support separate amounts.” *Basile v. H & R Block*, 34 Phila. Co. Rptr. 1, 62 (1997) (citing Pa.R.Civ.P. 1708(a)(7)). Alternatively, the rule asks the court to analyze “whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.” *Id.* (citing Pa.R.Civ.P. 1708(a)(7)). This criteria is rarely used to disqualify an otherwise valid class claim. In *Kelly v. County of Allegheny*, 519 Pa. 213, 215, 546 A.2d 608, 609 (Pa. 1988), the Pennsylvania Supreme Court held that a trial court erred in refusing to certify a class on the grounds that the class members average claim of \$13.61 was too small in comparison to the expenses incurred. *Basile, supra*.

Here, the recovery for each putative class member cannot be greater than \$12.50 per month or \$156.25 per year. As the *Kelly* Court emphasized, the Pennsylvania rules for class certification “manifest a particular sensitivity to providing a procedure for persons with small claims to obtain judicial relief through the use of a class action.” *Id.* at 62. The suggested amount of recovery is high enough to justify the expenses of carrying on a class action suit and low enough to preclude actions for each class member. Thus, Pa.R.Civ.P. 1708(a)(6) and (7) have been satisfied.

CONCLUSION

The litigants have submitted a joint motion for class certification, a stipulation and a joint proposed Order for Certification which this court has entered on this date. The case is appropriate to be handled as a class action.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.