NEW YORK LAW SCHOOL

NYLS Law Review

Volume 50
Issue 4 *Llewellyn's Dueling Canons and A Corporate Analysis of Public Authority Administration*

Article 5

January 2006

Fleming v. Guiliani

Christopher G. Boies
New York Law School Class of 2007

FLEMING V. GIULIANI
(decided December 21, 2004)

CHRISTOPHER G. BOIES*

"The power to tax involves the power to destroy."[1]

In the 1970s, New York City was in the midst of what the Temporary Committee on City Finances characterized as "nothing less than a 'depression' . . . a period of sharp decline in both the economic base . . . and the population."[2] In the twenty years before 1970, it was estimated that nearly one million city residents, many of them members of the middle-class, left the City and moved to the suburbs.[3] The departure of significant portions of the City's middle-class resulted in a population more dependent on government expenditures than ever before, while the City lost many of those persons capable of funding such expenditures through the tax revenues they provided.[4] During this time, the City also faced a general decrease in employment. In the twenty-five years since World War II, manufacturing employment in the City had declined by half.[5] Although, for a time, employment in other industries rose to fill this gap, the City's economy began to experience a "sharp contraction" in 1969, which, by 1977, resulted in the loss of 600,000 jobs.[6] The City was, in essence, losing a significant portion of its tax base.

Among the legislative measures enacted by the City Council during this economically troubled time was New York City Charter section 1127, a provision obligating nonresident City employees, as a condition of employment with the City, to make payments in the form of contractually agreed-upon salary deductions (section 1127 payments) as if they were City residents paying City personal in-

* J.D. candidate New York Law School, 2007.

1. McCulloch v. Maryland, 17 U.S. 316, 431 (1819).

2. TEMP. COMM. CITY FINANCES, THE CITY IN TRANSITION: PROSPECTS AND POLICIES FOR NEW YORK 29 (1978).

3. *Id.* at 22.

4. *Id.*

5. *Id.*

6. *Id.* Interestingly, the only sector of the City economy that experienced a rise in employment between 1970 and 1975 was City government. *See id.* at 23-24.

come tax.[7] At the time of section 1127's enactment, Mayor John V. Lindsay said the statute was designed to "help keep our work force in the City and bring back some suburban residents."[8]

In *Fleming v. Giuliani*, the New York Court of Appeals was called upon to determine whether section 1127 payments made by nonresident City employees should be computed using total taxable income or only the City salary earned by the employee.[9] The court held that the City was entitled to use total taxable income in computing the payments, basing its decision on a strict reading of section 1127 along with an analysis of the policies behind the provision's enactment.[10] The court noted that section 1127 was enacted to "mitigate such financial incentive that could contribute to City employees relocating their residences outside of the City."[11] This case comment contends that the Court of Appeals' holding in *Fleming*, while consistent with prior cases interpreting the statute, demonstrates a pressing need to critically reexamine section 1127 in

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7. New York City Charter section 1127 provides as follows:

§ 1127. Condition precedent to employment.

a. Notwithstanding the provisions of any local law, rule or regulation to the contrary, every person seeking employment with the city of New York or any of its agencies regardless of civil service classification or status shall sign an agreement as a condition precedent to such employment to the effect that if such person is or becomes a nonresident individual as that term is defined in section 11-1706 of the administrative code of the city of New York or any similar provision of such code, during employment by the city, such person will pay to the city an amount by which a city personal income tax on residents computed and determined as if such person were a resident individual, as defined in such section, during such employment, exceeds the amount of any city earnings tax and city personal income tax imposed on such person for the same taxable period.

b. Whenever any provision of this charter, the administrative code of the city of New York or any rule or regulation promulgated pursuant to such charter or administrative code employs the term "salary", "compensation", or any other word or words having a similar meaning, such terms shall be deemed and construed to mean the scheduled salary or compensation of any employee of the city of New York, undiminished by any amount payable pursuant to subdivision a of this section.

N.Y. CITY CHARTER § 1127 (2004).

8. *See* Brief for Petitioners-Appellants at 6, Ganley v. Giuliani, 94 N.Y.2d 207 (1999).

9. Fleming v. Giuliani, 3 N.Y.3d 544, 547-48 (2004).

10. *Id.*

11. *Fleming*, 3 N.Y.3d at 551-52 (citing City of New York v. Lieutenants Benevolent Ass'n, 730 N.Y.S.2d 78, 79 (1st Dep't 2001)).

light of the City's current economic situation. Rather than "placing resident and nonresident City employees on an equal footing,"[12] the Court of Appeals' decision in *Fleming* places an increased financial burden on nonresident employees, particularly part-time employees; a burden that can no longer be justified by the circumstances that led to section 1127's enactment. The court's holding has the potential to deter valuable nonresident professionals from pursuing or continuing part-time City employment when such professionals already derive income from private practice outside the City or other non-City sources and may easily push more part-time employees into the suburbs.

The plaintiffs in *Fleming* were thirteen part-time employees[13] of the New York City Police Department.[14] Plaintiffs had each been appointed to the position of Police Surgeon at varying times between 1981 and 1995.[15] In addition to their part-time City employment, plaintiffs also derived income outside the City from "private practices and other sources."[16] The plaintiffs all resided outside of the City.[17] Following discovery, they moved for summary judgment and made three arguments. First, alleging that they had never executed written agreements to make section 1127 payments, plaintiffs asserted the City had improperly withheld such payments from their salaries.[18] Second, even if the court held that they were bound to make section 1127 payments, the plaintiffs argued that the City improperly calculated such payments by using their total income, rather than the income derived from their work for the City.[19] Third, they sought a declaration that any section 1127 payments calculated using total income amounted to an unconstitutional tax.[20]

The City cross-moved for summary judgment, and presented written agreements of ten of the plaintiffs agreeing to make section

12. *Id.* at 552.

13. New York City defines a "part-time" employee as one who works less than 35 hours per week. *Id.*

14. *Id.* at 548.

15. Brief for Respondents at 5-10, Fleming v. Giuliani, 3 N.Y.3d 544 (2004).

16. *Fleming*, 3 N.Y.3d at 548.

17. *Id.* at 549.

18. *Id.* at 548.

19. *Id.*

20. *Id.* at 549.

1127 payments.[21] The City also presented a written certification by plaintiff Dr. Bernard Paul White that he agreed to "conform to Chapter 49 of the [City] Charter."[22] The City was unable to locate any written pre-employment agreements or certifications signed by plaintiffs Dr. Avtar Josen or Dr. Israel Berkowitz.[23] The Supreme Court denied plaintiffs' motion for summary judgment and granted the City's cross-motion insofar as it applied to the eleven plaintiffs for whom some form of written agreement could be found.[24] The court decided, however, that a justiciable controversy existed as to whether plaintiffs Josen and Berkowitz had ever executed agreements to be bound by the terms of section 1127.[25] These plaintiffs and the City both appealed.

On appeal, the Appellate Division modified the trial court's ruling and granted the City's cross-motion for summary judgment in its entirety.[26] Addressing the plaintiffs' contentions that section 1127 payments represented an unconstitutional tax, the Appellate Division cited *Matter of Legum v. Goldin*[27] and reframed the debate

21. *Id.* at 548. The obligations currently in place under section 1127 were originally codified in New York City Charter section 820, later recodified at section 822 and then recodified again at section 1127. *See* Brief for Petitioners-Appellants, *supra* note 8, at 5. Due to the fact that some of the plaintiffs in *Fleming* had been employed for over 20 years before commencement of their action, some had signed section 822 agreements and others had signed section 1127 agreements. The obligations under the various codifications of the current section 1127 are substantially the same. *See* Brief for Plaintiffs-Appellants at 2 & n.2, Fleming v. Giuliani, 3 N.Y.3d 544 (2004).

22. *Fleming*, 3 N.Y.3d at 548. Section 1127 is contained in Chapter 49 of the Charter.

23. *Id.* at 548.

24. *Id.*

25. *Id.*

26. Fleming v. Giuliani, 763 N.Y.S.2d 609, 609-10 (1st Dep't 2003). Despite the fact that the City was unable to produce any writing whereby plaintiffs Dr. Avtar Josen and Dr. Israel Berkowitz agreed to make section 1127 payments, the Appellate Division ruled that their claims against the city were barred under the equitable doctrine of laches. *See id.* The Appellate Division also noted that it had an additional basis for denying plaintiff Berkowitz's claim. *Id.* at 610-11. Only three and a half months months following plaintiff Berkowitz's appointment to the position of Police Surgeon, Berkowitz had signed an acknowledgment that he had received a copy of Chapter 49 of the Charter. *Id.* As a matter of law, the Appellate Division found that this signed acknowledgment and Berkowitz's silent acquiescence in the City's payroll deductions from his salary for five years gave rise to an implied-in-fact agreement that he would be bound by the terms of section 1127. *Id.*

27. 55 N.Y.2d 104 (1982).

in contractual terms: "The mere fact that [a] debt incurred pursuant to [a] contract of employment is owed to the City of New York does not transform it into a tax."[28] As for determining the sources of income to which section 1127 should apply, the Appellate Division was persuaded by both the legislative history behind the charter provision's enactment[29] and the Court of Appeals' decision in *Ganley v. Giuliani*,[30] and held that section 1127 should apply to all income of the City employee, wherever derived.[31] In *Ganley*, the Court of Appeals stated: "[section 1127] was intended to equalize the take-home pay of City employees, both resident and nonresident, and encourages those who work for the City to live in the City."[32] The Appellate Division in *Fleming* held that such purpose could "only be realized by applying section 1127 to all income."[33] Plaintiffs were granted leave to appeal by the Court of Appeals.[34]

The Court of Appeals began its review of the decision below by noting that the issue of whether section 1127 applied to all taxable income or merely the nonresident employee's City salary had not been considered in either *Legum* or *Ganley*; thus, the specific issue raised by plaintiffs in *Fleming* was one of first impression.[35] The court observed that the language of section 1127(a) requires an individual seeking City employment to enter into an agreement

28. *Fleming*, 763 N.Y.S.2d at 610 (quoting Matter of Legum v. Goldin, 55 N.Y.2d 104, 108 (1982) (holding that a full-time City employee of the New York City Law Department was bound by section 1127 and that payments under this section do not constitute a tax)); *see also* Central Sav. Bank v. New York, 279 N.Y. 266, 281 (1938) ("A tax is a forced charge levied by the State upon persons or property. It operates *in invitum* and is in no way dependent upon the will or contract, express or implied, of the persons taxed.").

29. *See id.*

30. *Fleming*, 763 N.Y.S.2d 609 at 610 (citing Ganley v. Giuliani, 94 N.Y.2d 207 (1999) (holding that full-time employees of the New York City Police Department, hired by the New York City Transit Authority and Housing Authority Police Departments *before* section 1127's enactment but involuntarily transferred to the New York City Police Department *after* section 1127's enactment were not obligated to make section 1127 payments because the obligations imposed thereunder affected only persons *applying* for City employment, not those persons who became City employees as a result of involuntary transfers)).

31. *Id.*

32. *Ganley*, 94 N.Y.2d at 216.

33. *Fleming*, 763 N.Y.S.2d at 610.

34. Fleming v. Giuliani, 1 N.Y.3d 509 (2004).

35. *Fleming*, 3 N.Y.3d at 550; *see also Legum*, 55 N.Y.2d 104; *Ganley*, 94 N.Y.2d 207.

"wherein the prospective employee promises to pay the City, if the employee resides or moves outside the City during the course of employment, the difference between the 'city personal income tax . . . determined as if [the nonresident] were a resident' and 'any city earnings tax and city personal income tax' actually imposed on the nonresident."[36] The Court of Appeals noted that the City personal income tax is imposed on all taxable income of City residents at a rate varying between 2.907% and 4.45%.[37] The fact that the City resident personal income tax applies to *all* income, regardless of source, swayed the Court of Appeals to find that, in calculating section 1127 payments, the City properly included all income of nonresident City employees.[38] The Court of Appeals rejected plaintiffs' contention that if plaintiffs were obligated to make section 1127 payments, those payments should be calculated using personal income tax rates applied *only* to City salaries.[39]

The court reasoned that plaintiffs' construction of the statute would fail both to place resident and nonresident City employees on an equal footing and to promote the City Council's goal of "encouraging employees to maintain their residences in the City."[40]

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36. *Fleming*, 3 N.Y.3d at 550; *see also* N.Y. CITY CHARTER § 1127 (a) (2004).

37. *Fleming*, 3 N.Y.3d at 550-51 & n.3 (citing N.Y. CITY ADMIN. CODE § 11-1701). The tax rates indicated here are those rates in effect in 2004, when the Court of Appeals was considering the issues raised in this case.

38. *Id.* at 552.

39. *Id.* Indeed, a plausible argument can be made for restricting the taxable base of income to a City employee's City wages when one considers section 1127(b), which states:

> Whenever any provision of this charter, the administrative code of the city of New York or any other rule or regulation promulgated pursuant to such charter or administrative code employs the term 'salary', 'compensation', or any other word or words having similar meaning, such terms shall be deemed and construed to mean the scheduled salary or compensation of any employee of the city of New York, undiminished by any amount payable pursuant to subdivision a of this section.

N.Y. CITY CHARTER § 1127(b) (2004).

Plaintiffs relied on this precise language in claiming that section 1127 payments should be calculated using only City wages. *See* Brief for Plaintiffs-Appellants, *supra* note 21, at 8-11. Dismissing these claims, the Court of Appeals stated that section 1127(a) was the dispositive provision at issue and that section 1127(a) made no reference to "salary" or "compensation" as described in section 1127(b). *Fleming*, 3 N.Y.3d at 551.

40. *Fleming*, 3 N.Y.3d at 551. The Court of Appeals' rejection of this claim was followed by a similar rejection of plaintiffs' arguments as to section 1127's constitution-

The consistent theme underlying many state and local tax policies is that a nonresident should not be subjected to the same tax burden as that of a resident because of the admittedly lesser cost of services furnished to nonresidents.[41] In imposing a tax on nonresident income earned within a state or locality, state and local governments generally rely on a "benefits received" approach.[42] New York State's approach to nonresident taxation resembles that of other states in that it only permits the taxation of nonresident personal income insofar as it is "derived from or connected with New York sources."[43] Similarly, on a local scale, the City earnings tax, a City nonresident income tax in place from 1966 until its repeal in 1999, applied only to wages earned by a nonresident employed in the City.[44] Section 1127 payments, however, place upon nonresident City employees a financial burden greater than that imposed on nonresident employees generally because such payments are not, in a strict legal sense, taxes but, rather, contractual payments. The practical effect of section 1127 is to place on nonresident City employees a burden even greater than that imposed on their resident City colleagues, as nonresidents typically remain subject to an additional tax on total income in their places of residence.[45]

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ality. The court affirmed the holding of the Appellate Division and denied plaintiffs constitutional claims by, once again, citing to the contractual interpretation of section 1127 set forth in the *Legum* case. *Fleming*, 3 N.Y.3d at 552 (citing *Legum*, 55 N.Y.2d at 107). The Court of Appeals also agreed with the Appellate Division as to the dismissal of plaintiffs Josen and Berkowitz's claims under the doctrine of laches. *Id.* at 552-53.

41. *See generally* RONALD JOHN HY & WILLIAM L. WAUGH, JR., STATE AND LOCAL TAX POLICIES: A COMPARATIVE HANDBOOK (1995) (discussing the range of public policies underlying state and local taxation).

42. *Id.* at 40. Payments made pursuant to contract terms, rather than tax obligations, are obviously not subject to this limitation.

43. N.Y. TAX LAW § 631 (McKinney 2003); *see also* N.Y. TAX LAW § 1301 (McKinney 2006); *see generally* Shaffer v. Carter, 252 U.S. 37, 57 (1920) (holding that a state's power to tax nonresidents "extends only to their property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources"); Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920) ("The question of the right to impose a tax on incomes of nonresidents is not a question of the nature of the tax nor is it a question of whether income is property or the acquisition of it a right or a privilege; but it is a question of the *situs* of the income.").

44. *See* N.Y. CITY ADMIN. CODE §§ 11-1901–11-1915 (2005).

45. *See generally* Daniel C. Soriano, Jr., *Multi-State Taxation of Personal Income*, 111 U. PA. L. REV. 974, 994 (1963) (examining the different approaches to, and the burdens associated with, multi-state taxation of personal income).

The City Council clearly intended to mitigate some of the tax advantages enjoyed by nonresident City employees by enacting section 1127.[46] Yet, under the Court of Appeals' ruling in *Fleming*, it is conceivable that a physician working part-time for the City while also operating a reasonably profitable private practice in his suburban hometown could, in effect, pay a larger amount of money to the City in the form of section 1127 payments than a City resident holding the same City employment full-time would pay in personal income tax. While prior cases interpreting section 1127 lend some support to the Court of Appeals' literal reading of section 1127 in *Fleming*, such a result seems inapposite to the City's professed desire to "*equalize* the income of employees who are City residents and those who are not."[47] The United States Supreme Court has stated that where "the literal reading of a statute will produce a result demonstrably at odds with the intentions of its drafters . . .those intentions must be controlling."[48] The Court of Appeals in *Fleming* seems to have paid too little attention to this maxim, and its ruling may discourage employment with the City.

One of the burdens imposed upon nonresident City employees under section 1127 is that such employees will generally remain subject to personal income tax liability on their total income in their actual places of residence, notwithstanding the fact that they are, in effect, paying resident personal income tax to the City in the form of section 1127 payments.[49] This double financial burden is well illustrated by the 2003 case of *In re Eisenstein*.[50] In that case, the State of New York Tax Appeals Tribunal held that a City employee could not rely on section 1127 payments to offset personal income tax liability.[51] Despite acknowledging compelling reasons for doing so, the court in *Eisenstein* held that it was bound by the rule of *Legum*: namely, that section 1127 payments are contractual pay-

46. *See Fleming*, 3 N.Y.3d at 547-48.

47. *See* Brief for Respondents, *supra* note 15, at 15 (emphasis added).

48. Griffin v. Oceanic Contractors, 458 U.S. 564, 571 (1982).

49. *See generally* Soriano, *supra* note 45.

50. 2003 WL 1790596 (N.Y. Tax. App. Trib. Mar. 27, 2003) (holding that a City employee who moved from New Jersey to Brooklyn in 1996 yet failed to notify the City of his change in residency status until 2000 remained liable to the City for personal income taxes over this four-year period notwithstanding the fact that he had made section 1127 payments during the time in question).

51. *See Eisenstein*, 2003 WL 1790596 at *4.

ments and, as such, have no relation to and, thus, no ability to offset an individual's tax obligations.[52]

By characterizing the financial burden associated with section 1127 payments in contractual terms, the City has consistently avoided the constitutional issues raised by nonresident taxation.[53] Generally, a state's ability to tax the income earned by nonresidents is limited to income earned within the taxing jurisdiction.[54] In addition, New York State Tax Law section 1301 authorizes New York City to tax only residents on their total personal income.[55] Indeed, the court in *Eisenstein* implied that if section 1127 were considered a tax statute, payments by nonresidents thereunder would constitute an "impermissible tax burden."[56]

The ruling of the Court of Appeals in *Fleming* also raises the question: to what extent should City employees, especially part-time City employees, be fiscally "encouraged" to live in the City? For many City employees the question is moot, as the New York Public Officers Law section 3(1) requires municipal employees to be "a resident of the political subdivision or municipal corporation" by which such person is employed.[57] Section 3(2) of the same law, however, exempts members of the Police Department from this residency requirement.[58]

It also bears noting that the City's present economic situation is altogether different from that of the 1970s, and many of the same urgent policy considerations that spurred section 1127's enactment are no longer as pressing. With a population that is expected to swell from 8.1 million persons in 2000 to 8.4 million persons in 2010, it can hardly be contended that the City faces the same population exodus it did in the 1970s.[59] Meanwhile, the number of City

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52. *Id.*

53. *See* HY & WAUGH, *supra* note 41.

54. *See* Seth Goldstein, *"Resident" Taxpayers: Internal Consistency, Due Process and State Income Taxation*, 91 COLUM. L. REV. 119, 119-20 (1991) ("The Supreme Court has held that the Constitution permits states to tax residents, but not nonresidents, on their worldwide income.")

55. N.Y. TAX LAW § 1301 (McKinney 2003).

56. *See Eisenstein*, 2003 WL 1790596 at *4.

57. N.Y. PUB. OFF. LAW. § 3(1) (McKinney 2005).

58. *Id.* § 3(2).

59. Press Release, New York City Department of City Planning, City Planning Releases Newest New Yorkers Immigration Report: Foreign-Born Swell NYC Population

residents requiring public assistance has declined by nearly 63% between 1995 and 2003.[60] The New York City Independent Budget Office estimated that the City will add nearly 100,000 private sector jobs in 2005 and 2006.[61] In recent years some City neighborhoods have even begun to stem the flow of new residents into the five boroughs by introducing "downzoning" measures, often with the support of the City administration.[62] In light of the City's current position, the present seems an odd time to extend section 1127's City residency "incentive" by requiring that section 1127 payment calculations include the total income of nonresident part-time City employees.

In *Fleming*, the fact that plaintiffs were part-time City employees was given little consideration by the Court of Appeals.[63] In terms of statutory analysis, omission of this fact is supportable. Indeed, section 1127 clearly refers to "*every person* seeking employment with the city of New York . . . *regardless of civil service classification or status*."[64] In considering the policies and history underlying section 1127, however, the lack of any discussion as to the differences between part-time and full-time employment is unfortunate.

Although section 1127 appears on its face to include all employees, the legislative history of the statute suggests that its application to part-time employees may contravene the City's professed purpose of encouraging employees who work for the City to live there as well.[65] In many cases, the reason why certain white-collar professionals pursue part-time employment over full-time employ-

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Figures, Strengthen Economy (Jan. 24, 2005), *available at* http://www.nyc.gov/html/dcp/html/about/pr012405.shtml.

60. NEW YORK CITY DEPARTMENT OF CITY PLANNING, ANNUAL REPORT ON SOC. INDICATORS 75 (2003).

61. NEW YORK CITY INDEP. BUDGET OFFICE, FISCAL OUTLOOK (Dec. 2004).

62. *See* Janny Scott, *In a Still-Growing City, Some Neighborhoods Say Slow Down*, N.Y. TIMES, Oct. 10, 2005, at B1 ("Since 2002, 42 rezonings 'to preserve neighborhood character,' as the administration puts it, have been approved or are under review. About 3,600 blocks have been rezoned, and more proposals are on the way. By contrast, officials say, the city approved only eight such rezonings in the three years before 2002.").

63. Plaintiffs' part-time status is only mentioned once in the Court of Appeals opinion. *See Fleming*, 3 N.Y.3d at 548.

64. N.Y. CITY CHARTER § 1127(a) (emphasis added).

65. *See* Brief for Petitioners-Appellants, *supra* note 8, at 6.

ment is to be able to retain flexibility in their professional pursuits.[66]

The ability to work part-time benefits employers as well in that it enables them to "keep and maintain workers that might otherwise leave the workforce."[67] It can also serve the important City interests, such as when efforts are made to reduce the overall cost of the City payroll. Indeed, when the Giuliani administration conducted a large-scale cost-saving reduction in full-time City personnel between 1993 and 1996, City expenditures relating to part-time employment swelled from 0.5% of total City personnel costs to 2.0%.[68] The availability of part-time City employment can thus be seen as a relatively less expensive way for City agencies to cope with full-time staff cutbacks.

The Court of Appeals' ruling in *Fleming*, however, could dissuade nonresidents from pursuing such employment, as it is often said that non-full-time employees have less of an attachment to their jobs than their full-time equivalents.[69] The Court of Appeals' ruling in *Fleming* essentially creates a situation where the nonresident City employee is subject to double-taxation of total personal income, while the contractual character of section 1127 precludes the use of section 1127 payments to offset income tax liability elsewhere.[70] Where the acceptance of a part-time job with the City by a nonresident would subject significant additional sources of income to section 1127's reach, the statute as construed by the Court of Appeals in *Fleming* creates a strong disincentive to part-time City employment.

Fleming is yet another in a line of cases challenging what is, in *effect* if not in name, a tax on the personal income, wherever derived, of nonresident individuals.[71] Although payment obligations

66. *See The Balancing Act: Key Factors for Part-Time Workers During Prime Working Years* (Employment Policy Foundation), Nov. 24, 2003, at 1.

67. *Id.*

68. *The Municipal Workforce: Big as a Decade Ago, but Composition has Changed,* INSIDE THE BUDGET 92 (New York City Indep. Budget Office) Dec. 11, 2001, at 2.

69. *See* Danielle D. van Jaarsveld, *Overcoming Obstacles to Worker Representation: Insights from the Temporary Agency Workforce*, 50 N.Y.L. SCH. L. REV. 355, 377 (2005-2006).

70. *See Eisenstein*, 2003 WL 1790596 at *4.

71. *See, e.g., Legum*, 55 N.Y.2d 104; *Ganley*, 94 N.Y.2d 207; Hill v. City of New York, 678 N.Y.S.2d 44 (1st Dep't 1998); *Lieutenants Benevolent Assn.*, 730 N.Y.S.2d 78; *Eisenstein*, 2003 WL 1790596.

under section 1127 clearly present the nonresident part-time City employee with an "incentive," it would appear hasty to assume he would not choose severing his professional ties to the City entirely to pursue employment in a more favorable taxing jurisdiction. The ruling in *Fleming* displays, once more, the favor shown by the Court of Appeals toward the City's contractual interpretation of section 1127. Yet to encourage the relocation of part-time City employees by fiscal means, especially when the City is by no means still affected by the decrease in taxable population that typified the City's fiscal crisis of the 1970s, seems a harsh policy that fails to take into account drastic changes in the City's economy and population. The court's holding in *Fleming* could easily have the practical effect of discouraging part-time employment with the City; such a result might well contravene the purpose section 1127 was designed to serve.