THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2011-0462, City of Concord & a. v. State of New Hampshire & a., the court on September 28, 2012, issued the following order:

Having considered the petitioners' motion for reconsideration and the response thereto, the court modifies the slip opinion dated August 31, 2012, by amending the paragraph that begins on page 10 with the words "Indeed, to the extent" and that ends on page 11 of the slip opinion with the words "or to be performed by local government." Said paragraph is amended to state as follows:

> Indeed, to the extent "responsibility" could mean simply an obligation to spend money, then the operative language of Article 28-a would read, in essence, as follows: "The state shall not mandate or assign any new, expanded or modified programs or [expenditures] to any political subdivision in such a way as to necessitate additional local expenditures by the subdivision . . . ." But, of course, this is not what the amendment says – the first clause of the amendment speaks of "responsibilities," whereas the second clause speaks of "expenditures," and to adopt a construction that gives these terms the same meaning runs afoul of the well-recognized principle of construction that where the enacting body "uses two different words, it generally means two different things." Guildhall Sand & Gravel v. Town of Goshen, 155 N.H. 762, 765 (2007); see also John A. Cookson Co. v. N.H. Ball Bearings, 147 N.H. 352, 357 (2001) ("It is proper to presume that the legislature was aware of the difference between . . . words and chose to use them advisedly . . . ."). The language actually used in the amendment demonstrates an intention to distinguish between programs and responsibilities, on the one hand, and expenditures, on the other.[4] Accordingly, we conclude that to constitute a new, expanded or modified "responsibility," the state action must impose some substantive change to an underlying function, duty or activity performed or to be performed by local government. Contrary to the assertions of the petitioners and the dissent, our conclusion in this regard does not amount to an overruling of Flynn, and there is, therefore, no need to conduct a stare decisis analysis. This case is distinguishable from Flynn in an important respect: the statute at issue in that case did

[4] We note here that while the Flynn court thought its broad construction of "responsibilities" was necessary to distinguish it from "programs," a term also used in Article 28-a, see Flynn, 133 N.H. at 23, it gave no consideration to whether such broad construction had the effect of improperly conflating "responsibilities" with "expenditures."

impose an additional substantive responsibility on local subdivisions. The presumption it created had the effect of requiring them to provide workers' compensation benefits to some firefighters afflicted with cancer who would not theretofore have received benefits without the presumption. See Flynn, 133 N.H. at 24 ("[T]he effect of the legislative change is to mandate a responsibility upon local government to provide benefits for illnesses not covered under the prior law."); see also id. at 28-29 (Souter, J., dissenting) (explaining that the effect of the new presumption was to create two new classes of firefighter claimants – those without work-related cancers who would nonetheless receive benefits because local governments were unable to rebut the presumption, and those with work-related cancers who would receive benefits to which they would not have been able to show entitlement without the presumption – and that the statute violated Article 28-a only as respects the first category). Here, by contrast, section 52 makes no changes to the scope of retirement benefits local subdivisions are required to provide to police officers, firefighters and teachers. Thus, although our methodology for evaluating claims under Article 28-a has evolved over the years since Flynn was decided, the result reached in that case would in all likelihood be the same under the analysis we employ today.

In all other respects the motion for reconsideration is denied.

Slip opinion modified; reconsideration otherwise denied.

Dalianis, C.J., and Hicks and Lynn, JJ., concurred; Conboy, J., would grant the motion for reconsideration.

Eileen Fox,
Clerk