To Be Argued By: Jennifer C. Zegarelli
Time Requested: 15 Minutes

CTQ 2020-00008

Court of Appeals
State of New York

Danny Donohue, as Pres. of the Civil Serv. Empl. Assoc., Inc., Local 1000, AFSCME, AFL-CIO, Civil Service Employees Association, Local 1000 AFSCME, AFL-CIO, Milo Barlow, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Thomas Jefferson, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Cornelius Kennedy, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Judy Richards, on behalf of herself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Henry Wagoner, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units,

Appellants,

v.

Andrew M. Cuomo, in his official capacity as Governor of the State of New York, Patricia A. Hite, individually and in her official capacity as Acting Commissioner, New York State Civil Service Department, Caroline W. Ahl, in her official capacity as Commissioner of the New York State Civil Service Commission, J. Dennis Hanrahan, in his official capacity as Commissioner of the New York State Civil Service Commission, Robert L. Megna, individually and in his official capacity as Director of the New York State Division of the Budget, Thomas P. DiNapoli, in his official capacity as Comptroller of the State of New York, Janet DiFiore, in her official capacity as Chief Judge of the New York State Unified Court System,

Respondents,

The State of New York, New York State Civil Service Department, New York State and Local Retirement System, New York State Unified Court System,

Defendants.

ON APPEAL FROM THE QUESTIONS CERTIFIED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT IN DOCKET NO. 18-3193

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

PAGE

PL/20-0857/EEW/mv/Table of Contents #916835

TABLE OF AUTHORITIES

New York Statutes

PERB Cases

Other Authorities

PL/20-0857/EEW/mv/Table.of.authorities/#916579

DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Court's Rules of Practice, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO ("CSEA"), states that it is a local of the American Federation of State, County and Municipal Employees ("AFSCME"), through which CSEA is affiliated with the American Federation of Labor-Council of Industrial Organizations ("AFL-CIO"). CSEA is a labor organization organized as a not-for-profit corporation. There is no publicly held corporation that owns any stock in CSEA.

PRELIMINARY STATEMENT

This case presents certified questions that afford the New York State Court of Appeals an opportunity to address the vesting of retiree health insurance benefits in relation to collective bargaining agreements covering public sector employees in New York State. Appellants' underlying causes of action are based on two theories, namely, that the State of New York and the other named Respondents (hereinafter "the State") violated New York contract law when it breached its contractual obligations, provided for under various collective bargaining agreements, by unilaterally increasing the health insurance contribution rates for retirees.[1] Appellants' second cause of action claims that the State impaired its contracts with these retirees, in violation of the Contract Clause of the United States Constitution.

In 2011, the State reduced, through the amendment of a state statute and regulation, its health insurance contribution rates to certain retired former State employees. Appellants, along with ten other labor unions and their retired former members, brought actions against the State in federal court alleging that it improperly

[1] Appellants here include: Danny Donohue, as President of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Civil Service Employees Association, Local 1000 AFSCME, AFL-CIO, Milo Barlow, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Thomas Jefferson, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Cornelius Kennedy, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Judy Richards, on behalf of herself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units, Henry Wagoner, on behalf of himself, on behalf of Retirees of the State of New York formerly in the CSEA Bargaining Units (hereinafter referred to as "Appellants").

implemented such increases per the underlying collective bargaining agreements that were in effect at the time of each individual's retirement.

After motions for summary judgment were filed by Appellants and the State, the United States District Court for the Northern District of New York (Hon. Mae A. D'Agostino) granted the State's motions in all eleven actions, finding that the collective bargaining agreements did not provide for the vesting of the State's agreement to pay a fixed rate of 90 percent of retirees' individual coverage costs and 75 percent of their dependent coverage costs under the New York State Health Insurance Plan (hereinafter "NYSHIP"). In doing so, the District Court also denied Appellants' cross-motion for summary judgment and Appellants, along with the plaintiffs in the other 10 related matters, appealed to the Second Circuit Court of Appeals.

In analyzing Appellants' claims and in answering the second certified question, the Second Circuit Court of Appeals stated that "[b]oth of these issues depend on aspects of New York law on which the State's courts have not conclusively ruled and that meet our other criteria for certification." (A023-A024).[2] The Second Circuit Court of Appeals further noted, "[i]n order to prevail on either claim, Appellants must establish that the relevant CBAs [collective bargaining

[2] References to the accompanying Appendix are cited herein as "A__."

agreements] provide for a vested right to health-insurance coverage at fixed contribution rates for the life of the retiree." (A023).

Relying on this Court's prior holding in *Kolbe v. Tibbetts*, 22 NY3d 344 [2013], the vesting of retiree health insurance benefits focus first on the terms of a labor contract. As general contract application principles state, however, such an analysis does not end at such juncture, if the contract language is deemed to be ambiguous with respect to the issue of vesting. Based upon the import of New York State law, the presumption that retiree health insurance benefits are vested for life should be followed, absent evidence of a contrary intent. Furthermore, when a collective bargaining agreement is deemed to be ambiguous or subject to more than one interpretation, it is appropriate to examine extrinsic evidence to determine the parties' intent. Here, Appellants have demonstrated a vested right to a fixed contribution rate as the language, under Article 9 of the collective bargaining agreements, suggest there is vesting or, at the very least, is subject to more than one interpretation and the extrinsic evidence, in the form of bargaining history and other documentation, provides conclusive or irrefutable evidence that retirees were entitled to such coverage for their lifetime. Specifically, the collective bargaining agreements contain §§9.13, 9.23(a), 9.24(a), 9.24(b) and 9.25, all of which pertain to retiree health insurance.

Besides looking to the contract, and any applicable extrinsic evidence, compelling public policy considerations concerning public sector collective bargaining negotiations support an inference of vesting for retiree health insurance benefits. Not only are retiree health insurance benefits deemed to be a form of deferred compensation, but retiree health insurance is also a mandatory subject of negotiation in New York State for those current employees and non-mandatory for those individuals who have already retired. Moreover, once bargaining unit employees retire, they are no longer a member of a bargaining unit and, therefore, have no voting right on any collective bargaining agreement. These circumstances present significant factors, which weigh in favor of accepting an inference of vesting for retiree health insurance benefits and in upholding and extending *Kolbe* in relation to the facts of this matter.

With respect to the second certified question presented to this Court, Appellants respectfully submit that the language of Civil Service Law §167(8) provides conclusive proof that the Legislature did not intend for any modification of the health insurance contribution rates to invalidate the State's contractual obligations under any collective bargaining agreement. Therefore, the adoption by the State and the increase in health insurance contribution rates were not intended to circumvent the State's responsibilities to retirees.

QUESTIONS PRESENTED

This Court certified the following questions presented to it by the United States Court of Appeals for the Second Circuit:

1. Under New York state law, and in light of *Kolbe v. Tibbetts*, 22 NY3d 344 (2013), *M & G Polymers USA, LLC v. Tackett*, 574 US 427 (2015), and *CNH Indus. N.V. v. Reese*, 138 S.Ct. 761 (2018), do §§9.13 (setting forth contribution rates of 90 percent and 75 percent), 9.23(a) (concerning contribution rates for surviving dependents of deceased retirees), 9.24(a) (specifying that retirees may retain NYSHIP coverage in retirement), 9.24(b) (permitting retirees to use sick-leave credit to defray premium costs), and 9.25 (allowing for the indefinite delay or suspension of coverage or sick-leave credits) of the 2007-2011 collective bargaining agreement between the Civil Service Employees Association, Inc. and the Executive Branch of the State of New York ("the CBA"), singly or in combination, (1) create a vested right in retired employees to have the State's rates of contribution to health-insurance premiums remain unchanged during their lifetimes, notwithstanding the duration of the CBA, or (2) if they do not, create sufficient ambiguity on that issue to permit the consideration of extrinsic evidence as to whether they create such a vested right? (A095).

Appellants respectfully submit that the language contained within the collective bargaining agreements, coupled with the consideration of extrinsic evidence, provide sufficient certainty that the parties intended for the health insurance contribution rates to remain fixed for the lifetimes of the retirees.

2. If the CBA, on its face, or as interpreted at trial upon consideration of extrinsic evidence, creates a vested right in retired employees to have the State's rates of contribution to health-insurance premiums remain unchanged during their lives, notwithstanding the duration of the CBA, does New York's statutory and regulatory reduction of its contribution rates for retirees' premiums negate such a vested right so as to preclude a remedy under state law for breach of contract? (A096).

Appellants respectfully submit that the statutory and regulatory amendments do not preclude a remedy for damages under New York State law for breach of contract.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to New York Constitution, Article VI, §3(b)(9) and §500.27 of the Rules of Practice of the New York State Court of Appeals. On November 6, 2020, the United States Court of Appeals for the Second Circuit certified two questions to the New York State Court of Appeals, finding that both of the Appellants' claims raise unresolved issues of state law that are appropriate for certification. Pursuant to Section 500.27 of the Rules of Practice of the New York State Court of Appeals, on December 15, 2020, the New York State Court of Appeals accepted the certified questions presented by the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

A. Background.

Appellants, a group of approximately 71,000 retired New York State employees and their dependents represented by CSEA in five different collective bargaining units, brought this class action challenging the State's unilateral increase in health insurance contribution rates, which was made effective October 1, 2011. The Appellants retired from State service between January 1, 1983 and October 1, 2011. Prior to October 1, 2011, Appellants' contribution rates for retiree health insurance coverage remained fixed at 10 percent for individual coverage and 25 percent for family or dependent coverage. Effective October 1, 2011, the State increased such health insurance contribution rates for Appellants to 12 percent for individual coverage and 27 percent for family or dependent coverage. N.Y. Comp. Codes R. & Regs. tit. 4, §73.3(b).

The various collective bargaining agreements made between CSEA and the State, which were in effect from January 1, 1983 through October 1, 2011, govern the State's obligations to Appellants and their right to continued health insurance coverage at a fixed contribution rate. Appellants assert that these contractual obligations provide the basis for its claims that the State breached its promise to afford a certain level of health insurance in retirement.

Besides impacting this group of CSEA Appellants, the State's actions also impacted all State employees who retired during the same time period and who are covered by other collective bargaining agreements and represented by other labor unions. Similar lawsuits were filed by 10 other labor unions on behalf of other State retirees and their dependents. These parallel lawsuits involve the same individual Defendants and all relate to the increase in contribution rates for retiree health insurance coverage. The District Court consolidated all matters for purposes of discovery. As part of the summary judgment decisions issued by the District Court in these matters, it was determined that this appeal would be considered to be the "Lead Case." Furthermore, as the United States Court of Appeals for the Second Circuit noted, the issues in this case were presented for certification to this Court since its questions will "significantly advance, if not control, the dispositions of the other cases." (A035, fn. 6).

In the Memorandum-Decision and Order issued from the District Court, the Honorable Mae A. D'Agostino, Northern District of New York, granted the State's motion for summary judgment and denied the Appellants' cross motion for summary judgment. ((A634-A686); *Donohue v. State of New York*, 347 F.Supp.3d 110 (NDNY Sept. 24, 2018)). In ruling, the District Court erroneously found that Appellants have no right to the continuation of health insurance into retirement at a certain fixed contribution rate. Specifically, the District Court found that Appellants

maintained a vested right to health insurance for their lifetimes, but not to a specific contribution rate. Appellants appealed the District Court's decision to the United States Court of Appeals for the Second Circuit asking that Court to: (1) reverse the District Court's decision granting the State's motion for summary judgment; (2) reverse the District Court's decision denying Appellants' cross motion for summary judgment; (3) or, in the alternative, remand the matter to the District Court for a new determination, including but not limited to, a trial to determine any questions of material fact. The Second Circuit has reserved decision and certified the two questions of New York State law before this Honorable Court.

B. The CSEA/State Collective Bargaining Agreements.

Prior to 1983 and to the present, CSEA is and has been the exclusive bargaining representative for the following bargaining units of certain employees employed by the State of New York: Administrative Services Unit ("ASU"), Operational Services Unit ("OSU"), Institutional Services Unit ("ISU"), and the Unified Court System Unit ("UCS"). (A263 ¶3). From 1985 to the present, CSEA has been the exclusive bargaining representative for certain employees employed by the State of New York in the Division of Military and Naval Affairs Unit ("DMNA"). (A263 ¶4).

Prior to January 1, 1983, State employees who were covered by the collective bargaining agreements between CSEA and the State and who retired with ten or

more years of service received individual retiree health insurance coverage in retirement at no cost to the retiree; the premiums for the individual coverage were fully paid by the State. (A237-A238). Also prior to January 1, 1983, such retirees had the option of receiving family health insurance coverage by contributing 25 percent toward the cost of the premiums while the State paid 75 percent. (A237-A248).

The CSEA/State collective bargaining agreements in effect on January 1, 1983, had a duration of April 1, 1982 – March 30, 1985. Those agreements stated in Article 9, Section 1(b):

> The State agrees to continue to pay 100 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage provided under the Statewide Plan …

They further stated in Article 9 Section 8(a):

> The unremarried spouse of an employee, who retires after April 1, 1979 with ten or more years of active State service and subsequently dies, shall be permitted to continue coverage in the Health Insurance Program with payment at the same contribution rates as required of active employees.

Finally, Article 9, Section 9 provided:

> Employees added to the payroll and covered by the State Health Insurance Plan have the right to retain health insurance coverage after retirement, upon the completion of 10 years of State service.

(A210-A220, A226-A229).

In November 1982, CSEA, together with other unions representing employees of the State, entered into a Memorandum of Understanding (hereinafter "MOU") with the State in which the parties agreed to implement a 10 percent contribution rate for individual health insurance coverage effective January 1, 1983. (A590-A596).

The collective bargaining agreements between CSEA and the State in effect from January 1, 1983 through October 1, 2011, contained substantively similar provisions requiring the State to contribute toward health insurance at the rate of 10 percent for individual coverage and 25 percent for family coverage; those same agreements also provided that employees shall "retain health insurance coverage after retirement." (A216-A224, A226-A227, A270 ¶37, A402, A410, A430, A434, A450, A455, A478, A486, A599, A601)[3].

Specifically, the 2007-2011 collective bargaining agreements provided:

> §9.13 Premium Contribution Level- Health Only
>
> (a) The State agrees to pay 90 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage toward the hospital/medical/mental health and substance abuse components provided under the Empire Plan. (A190).
>
> §9.23 Retirement/Deceased Employees
>
> (a) The unremarried spouse and otherwise eligible dependent children of an employee, who retires after April 1, 1979, with ten or more years of active State service and subsequently dies, shall be permitted

[3] The collective bargaining agreements between CSEA and UCS provide that CSEA members "shall receive health insurance benefits… at the same contribution level…that Executive Branch employees represented by CSEA" receive. (A562, A565-A566, A569, A573-A547, A577, A582).

to continue coverage in the health insurance program with payment at the same contribution rates as required of active employees for the same coverage. (A195).

§9.24 Service Requirements/Sick Leave Credit

(a) Employees covered by the State Health Insurance Plan have the right to retain health insurance after retirement upon completion of ten years of service.

(b) An employee who is eligible to continue health insurance coverage upon retirement is entitled to a sick leave credit to be used to defray any employee contribution toward the cost of the premium. The basic monthly value of the sick leave credit shall be calculated according to the procedures in use on March 31, 2007. Employees retiring on or after January 1, 1989 may elect an alternative method of applying the basic monthly value of the sick leave credit. Employees selecting the basic sick leave credit may elect to apply up to 100% of the calculated basic monthly value of the credit towards defraying the required contribution to the monthly premium during their own lifetime. If employees who elect that method predecease their eligible covered dependents, the dependents may continue to be covered, but must pay the applicable dependent survivor share of the premium. Employees selecting the alternative method may elect to apply only up to 70% of the calculated basic monthly value of the credit toward the monthly premium during their own lifetime. Upon the death of the employee, however, any eligible surviving dependents may also apply up to 70% of the basic monthly value of the sick leave credit toward the dependent survivor share of the monthly premium for the duration of the dependents' eligibility. The State has the right to make prospective changes to the percentage of credit to be available under this alternative method for future retirees as required to maintain the cost neutrality of this feature of the plan. The selection of the method of sick leave credit application must be made at the time of retirement, and is irrevocable. In the absence of a selection by the employee, the basic method shall be applied. (A195 – A196).

§9.25 Deferral of Health Insurance

> An employee retiring from State service may delay commencement or suspend his/her retiree health coverage and the use of the employee's sick leave conversion credits indefinitely, provided that the employee applies for the delay or suspension, and furnishes proof of continued coverage under the health care plan of the employee's spouse, or from post retirement employment. (A196).

The requirement that retirees pay 10 percent toward the cost of individual coverage was enacted into law by Chapter 14 of the Laws of 1983, amending Civil Service Law §167(1), "in relation to implementing agreements between the state and employee organizations." (A239 – A248). The Governor's Memorandum in Support of Chapter 14 of the Laws of 1983 stated that the purpose of the statute was to "effectuate provisions of various memoranda of understanding executed pursuant to the collectively-negotiated agreements between the State and the employee organizations … dealing with health insurance." (A241).

C. The State's Contract Proposals Seeking to Modify Retiree Health Insurance Contributions during the 1991, 2003, and 2007 Negotiations.

Ross Hanna was employed by CSEA for thirty-six years until his retirement in October of 2016. (A263 ¶1). At the time of his retirement from CSEA, he held the position of Director of Contract Administration, which is a position he held for twenty-seven years. (A263 ¶2). Prior to serving as the Director of Contract Administration at CSEA, he held the position of Deputy Director of Contract Administration for approximately two years. (A263 ¶2).

During Mr. Hanna's tenure with CSEA, the Contract Administration Department was responsible for overseeing the administration of the ASU, OSU, ISU, DMNA, and UCS collective bargaining agreements between CSEA and the State of New York on behalf of CSEA. (A263 ¶5). As part of his duties as Director of Contract Administration for CSEA, he was directly involved in preparing and attending collective bargaining negotiation sessions for successor agreements between CSEA and the State of New York. (A263 – A264 ¶6). Specifically, he participated in the drafting of proposals on behalf of the CSEA bargaining units and reviewed proposals submitted to CSEA by the State of New York. (A263 – A264 ¶6). In fact, from approximately 1989 to October, 2016, Mr. Hanna served as CSEA's chief negotiator for all of CSEA's State bargaining units, including the ASU, OSU, ISU and DMNA and provided oversight for the UCS bargaining unit.[4] (A264 ¶7).

During Mr. Hanna's tenure at CSEA, the collective bargaining negotiations for each of the four CSEA bargaining units had been performed jointly, except for separate unit negotiations which are held to discuss and negotiate specific topics and issues within each of the separate bargaining units. (A264 ¶9). The topic of health insurance is a subject matter which was negotiated jointly. (A264 ¶9).

[4] At or around 2003, the UCS collective bargaining unit agreed to follow the health insurance provisions within the collective bargaining agreements for CSEA executive branch bargaining units.

1. CSEA Collective Bargaining Agreements and Retiree Health Insurance.

As a negotiator on behalf of CSEA, Ross Hanna negotiated prospective deferred benefits and coverage for active employees that would retire in the future. (A264 ¶10). However, changes to benefits and/or coverage for employees who are already retired at the time of the negotiations are not permitted. (A264 ¶10). Furthermore, prospective retiree health insurance is a mandatory subject of negotiation and a topic that has been negotiated and discussed between CSEA and the State for decades. (A264 ¶11).

Prospective retiree health insurance for then current CSEA bargaining unit members was a topic of negotiation as set forth in the 1991-1995 CSEA collective bargaining agreements. (A265 ¶12). The 1991-1995 collective bargaining agreements between CSEA and the State in the AUS unit included the following language under Article 9.12(a) of the health insurance provisions:

> Employees covered by the State Health Insurance Plan have the right to retain health insurance after retirement upon completion of ten years of service. However, in recognition of the forthcoming changes to the Government Accounting Standards Board (GASB) requirements, both the State and CSEA recognize the need to address the inequity of providing employees who serve the minimum amount of time necessary for health insurance in retirement with the same benefits as career employees. Prior to the expiration of this contract CSEA and the State shall, through the Joint Committee process, develop a proposal to modify the manner in which employer contributions to retiree premiums are calculated.

(A286).

The other CSEA bargaining units, including the OSU, ISU and DMNA units, had similar language in their collective bargaining agreements. (A265 ¶13). This language continued to remain in the CSEA collective bargaining agreements with the State until being removed by the parties in 2004 for their negotiated 2003-2007 collective bargaining agreement. (A265 ¶14).

The Government Accounting Standards Board ("GASB") language pertained to the requirement that the State needed to demonstrate how it funded post-retirement benefits. (A265 ¶15). In 2004, CSEA and the State discussed removing this language from the collective bargaining agreements. (A265 ¶16). Due to the concern by CSEA that it did not want to diminish retiree health insurance benefits by agreeing to some sort of sliding scale related to the health insurance contribution levels for retirees, the above language was removed from the 2003-2007 collective bargaining agreements. (A265 ¶17).

In or around June 2004, the State, through Priscilla E. Feinberg, then-Director of Employee Benefits for the Governor's Office of Employee Relations, contacted CSEA to discuss reinserting the language into the health insurance provisions of the contract. (A266 ¶18). Ms. Feinberg provided Laura Balogh, who at the time served as the Director of Health Benefits for CSEA, with an internal State memorandum setting forth the State's position on retiree health insurance contribution rates. (A266 ¶18). That internal State memorandum, which was sent by Ms. Feinberg to John V.

Currier, then Executive Deputy Director of the Governor's Office of Employee Relations, outlined language from certain labor contracts, including CSEA, which provided that the parties would "develop a proposal to modify the manner in which employer contributions to retiree premiums are calculated." (A266 ¶18, A293-A295).

The internal memorandum from the State was forwarded to Ms. Balogh in an effort to have CSEA reconsider putting some kind of language regarding the GASB requirements back into the collective bargaining agreements. (A266 ¶19, A293-A295). CSEA chose not to agree to reinsert such language into the contracts as it did not want to decrease retiree health insurance benefits. (A266 ¶19).

2. 2003 and 2007 Contract Proposals.

During the negotiations between CSEA and the State of New York for the 2003-2007 ASU, OSU, ISU, DMNA, and UCS collective bargaining agreements, the State made a proposal to change the health insurance benefits for future retirees so that such benefits were based upon a sliding scale. (A266 ¶20, A297-A299). Specifically, the State proposed changing the premium contribution rate for "employees retiring on or after a date to be determined" to reflect the employee's length of service. (A266 ¶20, A297-A299). This proposal was provided to CSEA on September 24, 2003. (A266 ¶20, A297-A299).

The State's 2003 collective bargaining proposal sought to "modify" the retiree health insurance premium contribution rate, with the State contributing the following

percent: (1) 10 years of service = 50 percent individual / 35 percent dependent; (2) 15 years of service = 58.75 percent individual / 43.75 percent dependent; (3) 20 years of service = 67.5 percent individual / 52.5 percent dependent; (4) 25 years of service = 76.25 percent individual / 61.25 percent dependent; (5) 30 years of service = 85 percent individual / 70 percent dependent. (A267 ¶21, A299). In 2003 to 2004, the percentage of premium health insurance contribution for retirees was 10 percent for individuals and 25 percent for dependent. (A267 ¶22). The State's 2003 proposal decreased the employer contribution towards retiree health insurance premiums from 90 percent for individual coverage to 85 percent, based upon 30 years of service, and from 75 percent for dependent coverage to 70 percent based, again, on 30 years of service. (A267 ¶22, A299).

At that time, CSEA was not interested in agreeing to decrease such contribution rates for future retirees, as proposed by the State. (A267 ¶23). As a result, during the 2003 to 2004 negotiations between CSEA and the State, CSEA never agreed to the State's proposal to change the health insurance contributions for retirees. (A267 ¶23). Thereafter, on March 2, 2004, at approximately 2:20 p.m., the State withdrew its proposal, in its entirety, to change the retiree health insurance premium contribution. (A267 ¶24, A301-A303). This proposal was withdrawn by the State at the very cusp of the parties coming to an agreement on the overall

contract as such negotiations were settled between CSEA and the State at or around midnight on March 2, 2004. (A267 ¶24).

As part of the next round of collective bargaining negotiations for the 2007-2011 contracts for the CSEA bargaining units, the State again proposed to change the retiree health insurance contribution rates, such that benefits would reflect a sliding scale based upon years of State service. (A267-A268 ¶25). Since the parties had not agreed to change the contribution rates for future retirees during the previous round of contract negotiations, the contribution rates for retiree health insurance at that time remained the same at 10 percent for individual coverage and 25 percent for dependent coverage. (A268 ¶25). The State's proposal was presented to CSEA on August 20, 2007. (A268 ¶26, A305-A315).

The State's 2007 collective bargaining proposal sought to change the retiree health insurance premium contribution rate, with the State's contribution starting at 10 years of service, with a percent of contribution from the State at 50 percent for individual coverage and 35 percent for dependent coverage. (A268 ¶27, A305). The proposal further indexed retiree health insurance contributions by increasing the State's contribution rate incrementally in 5-year steps until the State's percentage of contribution rates was the same as the State's percentage contribution rates for active employees, with the maximum contribution rates being applied to an individual with at least 30 years of service. (A268 ¶27, A305). This proposal was never agreed to by

CSEA as it would have decreased the contribution rates paid by the State towards retiree health insurance coverage for future retirees. (A268 ¶28). On September 11, 2007, the State withdrew its proposal to change retiree health insurance contribution rates. (A268 ¶29, A313).

As the chief negotiator for CSEA, it was Mr. Hanna's position and understanding that, since health insurance was a mandatory subject of bargaining, the specified contribution rates would continue unless otherwise negotiated. (A268 ¶30). Since the parties never agreed to change the contribution rates for future retirees during the 2007 contract negotiations, the health insurance premiums for retirees remained at 10 percent individual coverage and 25 percent dependent coverage. (A268 ¶30).

Based upon Mr. Hanna's experience as CSEA's chief negotiator for 29 years, he stated that once a CSEA member has completed 10 years of service with the State, that member is entitled to health insurance in retirement. (A270 ¶38). Indeed, the language providing the State's percentage of premium payment does not specifically apply to active employees or retirees since it applies to all individuals that are entitled to participate in the State Health Insurance Plan. (A270 ¶38).

Therefore, according to Mr. Hanna and his understanding during his almost three decade long position as CSEA's chief negotiator, these two provisions of the CSEA labor contracts mean that a post-1983 retiree is permanently entitled to health

insurance coverage with the State paying 90 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage upon completion of 10 years of State service. (A270 ¶39).

3. Dependent Survivors of Retirees.

Prior to October 1, 2011, retirees, dependent survivors of retirees and active employees were paying 10 percent of the individual premium cost and 25 percent of the dependent premium cost for health insurance coverage. (A271 ¶44). Despite the State unilaterally increasing the premium contribution rates for retirees on October 1, 2011, the contribution rates for a dependent survivor of a bargaining unit retiree has remained at the contribution rate of 10 percent for individual coverage and 25 percent for dependent coverage. (A272 ¶45). Therefore, since January 1, 1983, the State has not changed the premium contribution rates from 10 percent for individual coverage and 25 percent for dependent coverage. (A272 ¶46).

D. Unilateral Implementation of Increased Rates in 2011.

In April 2011, CSEA and the State entered into a new collective bargaining agreement covering 2011-2016 that included a provision to increase the contribution rates that *employees* pay toward health insurance premiums effective October 1, 2011; however, the parties did *not* agree to increase retiree contribution rates retroactively. (A269 ¶¶34-36). In fact, the negotiations concerning the 2011 – 2016 ASU, OSU, ISU, DMNA, and UCS collective bargaining agreements, there were no

changes negotiated or even proposed by the State to the contribution rates for health insurance premiums paid by future retirees. (A268-A269 ¶31). Therefore, the State's contribution towards retiree health insurance continued at the rates of 10 percent for individual coverage and 25 percent for dependent coverage. (A268-A269 ¶31).

The legislation implementing the 2011-2016 CSEA/State agreement, Chapter 491 of the Laws of 2011, states in part: "The president [of the Civil Service Commission], with the approval of the director of the budget, may extend the modified state cost of premium or subscription charges for … retirees not subject to an agreement … and shall promulgate the necessary rules or regulations to implement this provision." (A361).

The Legislature did not issue a declaration or any other kind of finding, as part of the 2011-2012 State budget, or separate from the State budget, stating that it was necessary to raise the rates that retirees contribute toward the cost of their health insurance to serve the purpose of closing the State budget deficit, or to serve any other public purpose. Chapter 491 of the Laws of 2011 did not expressly authorize the impairment of the collective bargaining agreements between CSEA and the State covering the period of January 1, 1983 to October 1, 2011. (A333-A383). In addition, the memoranda contained in the bill jacket, including the memo from the Executive Chamber, Division of the Budget, Department of Civil Service, and the memo from the Governor's Office of Employee Relations, do not mention raising the

percentage of premium contribution towards health insurance for people who had already retired. (A333-A357).

The State's witness, Joseph Bress, was hired by the Cuomo administration in 2010, through Howard Glaser, Director of State Operations, to negotiate the collective bargaining agreements between the State and the different employee unions. (A530-A531, A542-A544). According to Mr. Bress, there were no written proposals and/or directives from the Governor's Office to advance, other than to save $450 million. (A534-A535). Furthermore, Mr. Bress testified that the way in which state negotiations were to achieve those savings was left up to the negotiators. (A535). Mr. Bress claimed that he alone "raised the issue" to increase the premium contribution levels paid by individuals that were already retired. (A536). Individuals within the Cuomo administration with whom Mr. Bress broached the issue informally concurred. (A537). Mr. Glaser apparently did not object or consent to advancing the idea of raising contribution levels for health insurance premiums for retirees. (A537). Furthermore, Mr. Bress did not have any discussions regarding savings to the State budget if insurance premium contribution rates for retirees were increased, since that was not the basis for his recommendation. (A538).

Priscilla Feinberg was the Director of Employee Benefits for the Governor's Office of Employee Relations from 1996 until she retired in 2012. (A522). She explained in her deposition testimony that during her tenure, she worked with Robert

Brondi from the Division of Budget. (A524). According to Ms. Feinberg, Mr. Brondi made claims during every negotiation with the employee unions that the State was facing a fiscal crisis and that 2011 was no different than any other year. (A525-A526).

Ms. Feinberg's testimony is consistent with Mr. Hanna's account that during the 29 years that he was involved in collective bargaining negotiations with the State, the State has claimed in each round of negotiations for successor agreements for the need to cut costs as it was facing a budget deficit. (A271 ¶42). Mr. Hanna explained that the State has repeatedly asserted throughout those 29 years that it needed to balance its budget and was looking to decrease its labor costs to achieve such savings. (A271 ¶42). Routinely, health insurance costs were one of the main subject areas where changes were proposed by the State or have been negotiated by the parties. (A271 ¶42). Much like Ms. Feinberg's experience, during the 2011 round of negotiations, the State again made the claim to Mr. Hanna that it was facing a financial crisis and needed to implement cost-saving measures to achieve a balanced budget. (A525-A526, A271 ¶43). However, both Ms. Feinberg and Mr. Hanna did not view the stated financial condition of the State in 2011 as being fundamentally different from prior years. (A525-A526, A271 ¶43).

POINT I

THIS COURT SHOULD EXTEND AND UPHOLD *KOLBE* AND FIND THAT THE CBAs CREATED A VESTED RIGHT TO RETAIN HEALTH INSURANCE COVERAGE IN RETIREMENT AT A FIXED CONTRIBUTION RATE.

A. The Collective Bargaining Agreements Provide Retirees With A Vested Right to Health Insurance at a Fixed Contribution Rate.

Parties to a collective bargaining agreement can provide that retiree health insurance benefits vest upon retirement and survive the expiration of a contract. As a general rule, collective bargaining agreements, like any other contract, must be construed based upon ordinary principles of construction. In terms of evaluating the vesting of rights, generally, contractual rights and obligations do not survive beyond the termination of a collective bargaining agreement. *Litton Financial Printing Div., v. N.L.R.B.*, 501 US 190, 207 (1991). As the Supreme Court has found, however, rights which have "accrued" or "vested" under the labor contract will survive termination of the agreement. *Id*. at 207.

These general principles concerning the vesting of retiree health insurance benefits have been articulated in this Court's landmark decision in *Kolbe, et al v. Tibbetts, et al.*, 22 NY3d 344, 353 (2013) (hereinafter "*Kolbe*"). The Appellate Courts have also voiced and emphasized this holding in their review of retiree health insurance coverage and benefits. *See, Evans v. Deposit Cent. School Dist.*, 183 AD3d 1081 (3d Dep't 2020) (hereinafter "*Evans*"); *Hudock v. Village of Endicott*, 28

AD3d 923 (3d Dep't 2006) (hereinafter "*Hudock*"); *Della Rocco v. City of Schenectady*, 252 AD2d 82 (3d Dep't 1998) (hereinafter "*Della Rocco*"); *Myers v. City of Schenectady*, 244 AD2d 845 (3d Dep't 1997) (hereinafter "*Myers*").

"In determining whether a [CBA] creates a vested right to future benefits, courts should not construe ambiguous writings to create lifetime promises. Critically, when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." *Evans*, 183 AD3d at 1083, *citing*, *Village of Old Brookville v. Village of Muttontown*, 117 NYS3d 264 [internal quotation marks and citation omitted], 179 AD3d 972, 975 (2d Dep't 2020) (hereinafter "*Old Brookville*")). "To that end, only when an agreement is ambiguous or subject to more than one interpretation is it appropriate to '[r]esort to extrinsic evidence to determine the parties' intent.'" *Evans*, 183 AD3d at 1083, *citing Hudock*, 28 AD3d at 924. "If extrinsic evidence shows that it was the defendant's intent to vest rights under a contract or shows that there was established precedent of such practice, rights are considered vested." *Id.* at 289; *see*, *Della Rocco*, 252 AD2d at 84, *lv dismissed*, 93 NY2d 999, 1000, 695 NYS2d 745 (1999); *Myers*, 244 AD2d at 847, 665 NYS2d 716 (3d Dep't 1997), *lv denied* 91 NY2d 812, 672 NYS2d 848, 695 NE2d 717 (1998).

Both of Appellants' claims are resolved through the principles of contract interpretation. As the Second Circuit expressly stated, "[i]n order to prevail on either

[its state law breach of contract or federal impairment] claim, Appellants must establish that the relevant CBAs provide for a vested right to health-insurance coverage at fixed contribution rates for the life of the retiree." (A023). The Second Circuit further noted, "[i]t is beyond dispute that the CBAs do not expressly provide for a vested right to coverage at fixed contribution rates." (A023).

B. Extrinsic Evidence Supports Appellants' Claim to Health Insurance Coverage Throughout Retirement at a Fixed Contribution Rate.

If this Court agrees that the collective bargaining agreements do not provide express language concerning the vesting of rights, the analysis under the first certified question starts with a review of the health insurance provisions, coupled with extrinsic evidence.

In *Kolbe*, this Court held that contract language is ambiguous if there are at least two "plausible interpretations of the operative provision" of the contract. When interpreting ambiguous language, this Court held, "it is appropriate for the Court to consider extrinsic evidence outside the four corners of the contracts." *Id*. at 355. This Court emphasized that a key word in the contract at-issue there, "coverage" (as in "health insurance coverage"), was "not defined" in the contract, therefore, the word was ambiguous, requiring clarification by extrinsic evidence. *Id*. at 354.

In making this ruling, this Court upheld prior contractual retiree health insurance cases, namely, *Myers, supra*, and *Williams v. Village of Endicott*, 91 AD3d 1160 (3d Dep't 2012). In *Myers*, the Third Department held "[i]nasmuch as we are

of the view that the provisions providing for retiree health insurance are ambiguous … Supreme Court properly considered extrinsic evidence." *Myers*, 244 AD2d at 847. Similarly, in *Williams*, it was noted that "the parties have advanced two equally plausible and reasonable interpretations of the CBA provision in question, thereby evidencing an ambiguity that requires consideration of evidence outside the four corners of the CBA relevant to the parties' intent." *Williams*, 91 AD3d at 1163.

In applying these contract interpretation principles, the Second Circuit correctly stated that, "[i]n order to reach such a conclusion [in favor of Appellants], we would need to infer the existence of a vested right, or ambiguity with respect to the existence of such a right, notwithstanding that the CBAs do not provide for such vesting in explicit terms." (A033). Any ambiguity found in the underlying contract language should be resolved in Appellants' favor as the extrinsic evidence, involving the parties' intent and bargaining history, provides a basis for concluding that Appellants are entitled to vest with lifetime retiree benefits at a fixed contribution rate. It is undisputed that the contract language at-issue herein has been included in such agreements since the 1982-1985 collective bargaining agreements. (A270 ¶37). Furthermore, such collective bargaining agreements specifically reference retiree health insurance coverage. (A270-A271 ¶¶37-41).

As set forth in the 2007-2011 collective bargaining agreements between the State of New York and CSEA, Sections 9.13, 9.24(a), 9.24(b), and 9.25 collectively

provide for retiree health insurance coverage, including contribution rates. (A190, A195-A196). When read together, these health insurance provisions provide for the same health insurance coverage during retirement as that which was in effect at the time of Appellants' retirement.

Specifically, Section 9.27(a) provides that, "[e]mployees covered by the State Health Insurance Plan have the right to retain health insurance after retirement upon completion of ten years of service." (A270 ¶37). Furthermore, Section 9.14(a) provides that "[t]he State agrees to pay 90 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage toward the hospital/medical/mental health and substance abuse components provided under the Empire Plan." (A270 ¶37). The language contained in both clauses within Section 9 has been in the collective bargaining agreements between CSEA and the State since the 1982-1985 collective bargaining agreements. (A270 ¶37).

Furthermore, there is language contained in the 2007-2011 collective bargaining agreements, in Section 9.23, that provides, "[t]he unremarried spouse and otherwise eligible dependent children of an employee, who retires after April 1, 1979, with ten or more years of active State service and subsequently dies, shall be permitted to continue coverage in the health insurance program with payment at the same contribution rates as required of active employees for the same coverage." (A195). This language has remained in the collective bargaining agreements between

CSEA and the State of New York substantially unchanged from at least January 1, 1983, to the present. (A272 ¶46).

Prior to October 1, 2011, retirees, dependent survivors of retirees and active employees were paying 10 percent of the individual premium cost and 25 percent of the dependent premium cost for health insurance coverage. (A271 ¶44). Despite the State unilaterally increasing the premium contribution rates for those people that retired between January 1, 2011 to October 1, 2011, the contribution rates for a dependent survivor of a bargaining unit retiree who retired during the same period has remained at the contribution rate of 10 percent for individual coverage and 25 percent for dependent coverage. (A272 ¶45). Therefore, since January 1, 1983, the State has not changed the premium contribution rates for a dependent survivor of a retiree from 10 percent for individual coverage and 25 percent for dependent coverage. (A272 ¶46).

This benefit for dependent survivors of retirees has clearly been interpreted as the percentage of premium contribution required within the various collective bargaining agreements from January 1, 1983 to October 1, 2011. Certainly, the State's argument runs afoul when looking at such evidence that a surviving spouse is receiving a better contribution rate than the actual retiree. The fact that these individuals have not seen an increase in their health insurance premium contributions

is evidence that the parties intended to lock in the premium contribution rates contained within each collective bargaining agreement between 1983 and 2011.

It is important to note that, at the time the health insurance contribution rates were increased in 2011, the next collective bargaining agreements added language in Section 9.14(a) identifying the increase only to employees. The supplemental language was included to effectuate the parties' agreement to increase health insurance contribution rates for current employees only and provides:

> Effective October 1, 2011 *for employees* in a title Salary Grade 9 or below or an employee equated to a position title Salary Grade 9 or below, the State agrees to pay 88 percent of the cost of individual coverage and 73 percent of the cost of dependent coverage toward the hospital/medical/mental health and substance abuse components provided under the Empire Plan. Effective October 1, 2011 for employees in a title Salary Grade 10 and above the State agrees to pay 84 percent of the cost of individual coverage and 69 percent of the cost of dependent coverage toward the hospital/medical/mental health and substance abuse components provided under the Empire Plan.

(A402, A430, A450, A478).

This addition did not specify or include retirees, whereas other provisions of this article identify and relate explicitly to retirees. As further evidence that this increase was to pertain to only current employees, the supplemental language identified the increases to certain salary grades, again, without mention of retirees. Certainly, if the parties intended to include retirees in this group, they would have identified them in this language, as included in other retiree provisions. In addition, if the at-issue increases to the contribution rates were to apply to retirees, as well as

active employees, it begs the question as to why the first sentence of Section 9.14(a), identifying the rates of 90 percent and 75 percent, remained in the labor contracts if, as the State alleges, such rates do not apply to retirees and the 2011 increases applied to current employees. (A402, A430, A450, A478).

Furthermore, the assertions of CSEA's chief negotiator, Ross Hanna, provide additional evidence of the parties' intent governing the 2011 increases in contributions rates. According to Mr. Hanna, his understanding of the aforementioned provisions of CSEA's collective bargaining agreements is that a post-1983 retiree is entitled to health insurance coverage with the State paying 90 percent of the cost of individual coverage and 75 percent of the cost of dependent coverage upon completion of 10 years of State service. (A270-A271 ¶¶37-41). Mr. Hanna asserts that the agreed upon language of Section 9.14(a) does not identify that the contribution rates of 90 percent and 75 percent only apply to current or active employees. (A270 ¶38).

Additional extrinsic evidence of the parties understanding of this language is found in the State's proposals during the negotiations in 1991, 2003, and 2007. The State's proposals sought to change the eligibility and contribution rates for retiree health insurance from the above language. (A265-A269 ¶¶12, 16-33). It is important to note that during the period in question, although the State sought to increase the retirees' contribution percentage for decades, CSEA never agreed to change or

modify this language and the practice of providing retiree health insurance contribution rates for retirees at 90 percent for individual coverage and 75 percent for dependent coverage remained unchanged for nearly thirty years, until October 1, 2011. (A269 ¶36).

As Appellants pointed out in their earlier submissions, the declarations and assertions submitted by the State in support of its position on this issue are made by individuals who have little to no experience or knowledge regarding the past history of collective bargaining negotiations between the parties. In fact, all of these declarations make the bald assertion as to the meaning behind such language without any proof that such individual(s) have any knowledge or information concerning the parties' intent or understanding concerning the health insurance provisions of Article 9. At most, these declarants were involved in the 2016-2021 collective bargaining negotiations between the State and CSEA and did not participate in any negotiations between 1983 and 2011. Where Appellants have provided information from Ross Hanna, CSEA's chief negotiator since 1989, to explain the meaning of the collective bargaining agreements as they relate to retiree health insurance, the State has provided no evidence concerning past negotiating history between the parties concerning the intent or meaning of Article 9.

At a minimum, the extrinsic evidence, in the form of bargaining history and information from individuals involved in the drafting and finalization of the at-issue

language, provides the necessary support that the provisions establish that Appellants have a vested right to retiree health insurance contribution rates paid by the State at 90 percent for individual coverage and 75 percent for dependent coverage. Therefore, this Court should find that Appellants have demonstrated a vested right to a fixed contribution rate throughout retirement.

If, however, this Court finds that the extrinsic evidence is incomplete in determining whether the contract provides for a vested right to a fixed contribution rate, the record should be further developed on remand to determine the parties' intent consistent with the established case law. The Second Circuit noted that such a possibility could exist. (A094, fn.19).

C. New York Case Law And Public Policy Supports Inferring a Vested Right to Health Insurance In Retirement for Public Sector Employees.

If this Court determines that it must address whether to adopt or reject an inference that retirees' health insurance benefits vest under collective bargaining agreements in the absence of express vesting language, this Court should apply and extend its holding in *Kolbe*. Whether the contract language is clear on its face or ambiguous, the presumption that the benefits are vested for life, absent evidence of a contrary intent should be followed. In *Kolbe*, this Court stated, "[a]s the contract is clear on its face, there is no need for this Court to rule on whether New York applies an inference of vesting for retiree health insurance rights." *Kolbe*, 22 NY3d at 354. Although this Court in *Kolbe* specifically acknowledged that it did not need to rule

on whether to apply an inference of vesting, it is submitted that such an inference falls in line with New York case law and the principles of public sector collective bargaining.

An inference should be made that the at-issue collective bargaining agreements guarantee fixed contribution rates for the lifetime of the retiree. In looking at appellate division cases on this issue, retiree health insurance contract language in union contracts has been analyzed since 1997. *Myers*, 244 AD2d 845 (3d Dept. 1997), *leave to appeal denied*, 91 NY2d 812 (1998); *Della Rocco*, 252 AD2d 82 (3d Dept. 1998); *Hudock*, 28 AD3d 923 (3d Dept. 2006); *Williams*, 91 AD3d 1160 (3d Dept. 2012); *Warner v. Cobleskill-Richmondville CSD*, 108 AD3d 835 (3d Dept. 2013) (hereinafter "*Warner*"); *Old Brookville*, 179 AD3d 972 (2d Dep't 2020); *Evans*, 183 AD3d 1081 (3d Dep't 2020). *Myers*, *Della Rocco*, *Hudock*, *Williams*, *Warner*, and *Evans* have each held that collective bargaining contract provisions specifying the level of retiree health coverage are intended to provide an unchanged level of benefits for the life of the retiree, unless the record contains evidence of contrary intent.

In *Myers*, the employer argued that retiree health insurance rights were not intended to last beyond the term of the collective bargaining contract under which the retiree retired. The Third Department rejected this argument, holding that it "ignores

the important distinction to be made between retirees and existing City employees." *Myers*, 244 AD2d at 847. The Third Department reasoned:

> We must question, however, whether the parties to the collective bargaining agreements at issue here intended the retirees' benefits to be as fungible [as employees' health benefits], inasmuch as at the expiration of such agreements CSEA no longer represents the retirees. … In our view, the potential for retirees to be accorded such patently inconsequential benefits under the agreements further calls into question the intent of the parties in this regard.

Id.

Accordingly, *Myers* held that absent evidence to the contrary, a retiree health insurance provision in a collective bargaining contract is intended to lock-in the benefits for the life of the retirees.

In *Della Rocco*, decided a year after *Myers*, the Third Department enunciated this principle even more forcefully, holding, "it is logical to assume that the bargaining unit intended to insulate retirees from losing important insurance rights." *Della Rocco*, 252 AD2d 82 at 84. The at-issue labor contract in *Della Rocco* provided for a vested right to retiree health insurance, which was also supported by extrinsic evidence. In that case, the court ruled that the collective bargaining agreements maintained a certain level of coverage, when a member of the class retired, which was to remain fixed in time and could not be changed. *Id*. at 83. In terms of supporting an inference of vesting for retiree health insurance rights, it was noted that "since the retirees are not involved in subsequent negotiations, it is logical

to assume that the bargaining unit intended to insulate retirees from losing important insurance rights during subsequent negotiations by using language in each and every contract which fixed their rights to coverage as of the time they retired." *Id*. at 84.

The Second Circuit correctly found that two recent Appellate Court cases, namely *Evans* and *Old Brookville*, "have taken divergent approaches to applying the Supreme Court's holdings in *Tackett* [*M & G Polymers USA, LLC, et al. v. Tackett, et al.*, 574 US 427 (2015) (hereinafter "*Tackett"*)] and *Reese [CNH Industrial N.V. v. Reese*, 138 S.Ct. 761 (2018) (hereinafter *"Reese"*)]." (A053). In the Third Department's recent decision in *Evans*, that Court expanded upon its holding in *Myers*. In *Evans*, the Court was asked to review whether an expired collective bargaining agreement was in effect at the time of plaintiffs' retirements. While articulating that the expired labor contract remained in effect pending the negotiation of a new successor agreement, *Evans* reviewed New York case law to address whether it should infer that the parties intended for retiree health insurance benefits to vest for the lifetime of the retiree. In order to review the issue of vesting, the Third Department stated that it "has put great weight on whether retirees had voting rights because, if there were no such rights, 'it is logical to assume [from the absence of any such durational language of how long retirees will receive benefits] that the bargaining unit intended to insulate retirees from losing important insurance rights during subsequent negotiations by using language in each and every contract which

fixed their rights to coverage as of the time they retired.'" *Evans*, 183 AD3d at 289, *citing to, Della Rocco*, 252 AD2d at 84, *referring to, Myers*, 244 AD2d at 847. Not only did the *Evans* court find that an inference was proper to assume, but it also concluded that the extrinsic evidence, in the form of affidavits and documents submitted between the parties during discovery, "support[ed] the conclusion that it was defendants' intent to provide full coverage for retired employees such as plaintiffs." *Id*. at 289.

As noted by the Second Circuit, *Evans* reached this conclusion while not citing to any federal cases on the issue of vesting when a labor contract does not expressly provide durational language. (A054, fn 10). Therefore, *Evans* seems to demonstrate that, while Federal law and New York law may differ in this context, New York courts are not bound to apply Federal law in analyzing public-sector collective bargaining agreements.

Finally, in seeking an opinion from this Court on the issue of vesting and the application of extrinsic evidence, the Second Circuit also properly observed the conflicting decision by the Second Department in *Old Brookville*. (A053). In *Old Brookville*, the Second Department reviewed whether the labor contract obligated the employer to contribute to retired police officers' health insurance costs after the expiration of the contract. While citing to both *Kolbe* and *Tackett*, the appellate court determined that since the contract was "silent as to the duration of the health benefits

promised therein and, therefore, it must be assumed that those benefits were promised only until the expiration of the contract." *Old Brookville*, 179 AD3d at 975. The decision reached in *Old Brookville* differs significantly from other appellate division opinions and from this Court's decision in *Kolbe* and should not be followed.[5]

In evaluating whether to accept or reject such an inference, the Sixth Circuit's decision in *United Automobile Aerospace and Agric. Workers v. Yard-Man*, 716 F2d 1476 (6th Cir. 1983) (hereinafter "*Yard-Man*") serves to provide important considerations in the context of collective bargaining negotiations. In *Yard-Man*, it was held that, when a union and an employer agree to a contractual provision for retiree health insurance identifying the level of coverage in effect on the date of retirement, there is an "inference" that the parties intended to provide a vested, lifetime right to that level of coverage. The *Yard-Man* court gave three reasons for the inference: (1) retiree health insurance is a "status" benefit, so it necessarily must

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[5] Appellants would be remiss in failing to note this Court's decision *in Matter of Aenas McDonald Police Benevolent Ass'n v. City of Geneva*, 92 NY2d 326 (1998) (hereinafter "*Aenas McDonald*"). In *Aeneas McDonald*, this Court did not rule on the question of inferences in the context of retiree health insurance. However, and as eloquently stated by the Second Circuit, this Court "in *Kolbe* presumably did not understand *Aeneas McDonald* to foreclose the possibility that New York law might apply inferences of vesting to retiree health benefits, given its indication that the status of such inferences under New York law was an open question. [citing to *Kolbe*]. Thus, *Aeneas McDonald* does not command the conclusion that the holdings of *Tackett* and *Reese* reflect established principles of New York law. Nor does the fact that both the Supreme Court and the New York Court of Appeals have held that CBAs should be interpreted according to traditional contract principles dictate that the New York courts will follow *Tackett* and *Reese*. As noted above, different jurisdictions may and sometimes do interpret those principles differently." (A052 fn 9).

be understood to continue during the entire time the individual holds the "status" of retiree; (2) it is a form of delayed compensation; and, (3) unions do not represent retirees in collective bargaining negotiations. *Id*.

Regarding the "status" nature of the retiree benefit, the court held:

> Retiree benefits are in a sense 'status' benefits, which, as such, carry with them an **inference** that they continue so long as the prerequisite status is maintained. Thus, when the parties contract for benefits, which accrue upon achievement of retiree status, there is an **inference** that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree.

Id. at 1482 (emphasis added).

As to the second point concerning delayed compensation, *Yard-Man* concluded that retiree health insurance is understood to be "a form of delayed compensation or reward for past services," and as such, retiree health benefits were **not** intended to be left to "the contingencies of future negotiations." The court in *Yard-Man* explained that, if retirees forego wages while they are employees in exchange for retirement benefits, there is an inference that "once they retire, they will continue to receive such benefits regardless of the bargain reached in subsequent agreements." *Id*. This same point has been reiterated and emphasized by New York's appellate divisions.

Regarding the third point − the relationship of the parties to the agreement − the court in *Yard-Man* reasoned that the contract negotiators for union and

management, "are presumably aware that the union owes no obligation to bargain for continued benefits for retirees," and "the court should review the interpretation ... of the language, context and other indicia of intent for consistency with [relevant] labor policy." *Id*., *citing*, *Allied Chemical Workers v. Pittsburgh Plate Glass Co*., 404 US 157 (1971) (hereinafter *"Pittsburgh Plate Glass"*).

The logic in *Yard-Man*, based on the holding in *Pittsburgh Plate Glass*, is essentially the same logic that New York Appellate Courts have applied in analyzing whether health insurance benefits for retirees vest upon retirement. From a review of the relevant case law on this issue, it is clear that the courts have logically relied on the following three propositions: (1) retiree health insurance is a form of deferred compensation; (2) health benefits for current employees in retirement is a mandatory subject of negotiations; and (3) the union and the employer are not statutorily required to bargain over the health benefits for people who have already retired, because they are no longer employees in the bargaining unit. Practically speaking, for a group of approximately 71,000 affected individuals it would be impossible to negotiate retiree health insurance benefits, as CSEA would need to obtain each individual's consent. Based on this logic, when a labor contract contains a retiree health insurance provision which designates a level of retiree health coverage, the lower courts have consistently held that the benefit level specified in the contract is intended to be vested for the life of the retiree, absent record evidence to the contrary.

Since this Court's holding in *Kolbe*, the United States Supreme Court decided and rejected the inference that retiree health insurance is intended to provide a vested, lifetime right to a certain level of coverage. In *Tackett*, the United States Supreme Court found that general contract principles precluded applying such an inference, which was previously articulated by the Sixth Circuit in *Yard-Man*. This holding was further applied and clarified by the United States Supreme Court in *Reese*.

The holding of *Tackett* belies the labor management relationship in the New York public sector. Here, CSEA and the State have negotiated and been parties to collective bargaining agreements for decades, building on each successor agreement. Specifically, the language of Article 9 has provided for health insurance benefits, including benefits in retirement, without any change to the portion of premium contribution during the time period at-issue. It is illogical that career civil servants would be entitled to a benefit that would end with the expiration of the collective bargaining agreement, which were typically of a three-year duration during this time period. While the United States Supreme Court may have rejected the *Yard-Man* inference, this Court should decline to follow such ruling as it is inconsistent with New York precedent.

1. The Nature of Collective Bargaining in the Public Sector Favors An Inference of Vesting.

Due to the nature of collective bargaining in New York State, it is fair to infer that retiree health insurance benefits survive beyond the termination of a labor contract. Any argument that the health insurance contribution rates for retirees does not "accrue" or "vest" during the term of the agreement is simply inconsistent with the principles governing public sector negotiations for retiree health insurance benefits.

In the context of collective bargaining negotiations, this Court's holding in *Kolbe* is also consistent with the logic of Public Employment Relations Board ("PERB"), the United States Supreme Court and its previous ruling in *Lynbrook v. PERB*, 48 NY2d 398 (1979). Absent the consent of all parties, a union does not represent retirees when it negotiates with an employer in collective bargaining. *See*, *Pittsburgh Plate Glass*, 404 US 157, 180, fn 20 (1971). Indeed, the Supreme Court stated, that "[s]ince retirees are not members of the bargaining unit, the bargaining agent is under no statutory duty to represent them in negotiations with the employer." *Id*. Further, "vested retirement rights may not be altered without the pensioner's consent." *Id*.

It is important to point out that, in 1979, this Court made a substantial change in the background and legal framework governing negotiability of retiree health insurance. In *Lynbrook v. PERB*, 48 NY2d 398 (1979) (hereinafter *"Lynbrook"*), this

Court held that pensions were a prohibited subject of bargaining for public employee unions, however, retiree health insurance was still considered a mandatory subject of bargaining. In 2009, the Retirement and Social Security Law was amended to conform to the holding of this Court in *Lynbrook.* Chapter 504 of the Laws of 2009, which added Section 470 of the Retirement and Social Security Law, provides: "[c]hanges negotiated between any public employer and public employee, as such terms are defined in section two hundred one of the civil service law, with respect to any benefit provided by … a public retirement system, … shall be prohibited."

However, this Court in *Lynbrook* upheld a series of decisions by PERB that found retiree health insurance benefits for active employees to be a mandatory subject of bargaining, whereas health benefits for individuals after they have retired is not a mandatory subject of bargaining. *City of Troy*, 10 PERB ¶3015 (1977); *Village of Lynbrook*, 10 PERB ¶3065 (1977); and *Village of Lynbrook*, 10 PERB ¶3067 (1977). Moreover, PERB has followed this Court's ruling in *Lynbrook* and found that under §209-a.1(d) the Taylor Law, "the subject of health insurance benefits for current employees upon their retirement constitutes a form of deferred compensation and is mandatorily negotiable." *Matter of Civil Service Employees Association, Inc. and Yonkers City School Dist.*, 45 PERB ¶3039 (2012).

Lynbrook's principle was also expressly stated by PERB in *Matter of City of Cohoes and Cohoes Police Benevolent*, 27 PERB ¶3058 (1994). The PERB Board was

asked to review whether a demand by the police union, which would have required the City of Cohoes to pay the health insurance premiums for the life of current employees retiring on or after the effective date of the labor agreement, was either a mandatory or nonmandatory subject of negotiation. In finding that the demand was a mandatory subject of negotiation, the PERB Board found that,

> Because the union is not the representative of retirees, it has no bargaining rights or obligations on behalf of retirees. Similarly, the employer could not compel the union to negotiate on their behalf and there are questions under *Pittsburgh Plate Glass* [citation omitted], as to the parties' right to even bargain voluntarily on behalf of retirees, at least to the extent the bargaining would effect a change in retiree benefits which was unacceptable to them. Therefore, the demand once negotiated might well be insulated from any subsequent negotiation by the parties.

Id.

Since retirees are no longer members of the bargaining unit and are precluded from voting on collective bargaining agreements after their retirement, any change made in their contractual benefits ignores labor law principles. In rejecting the employer's argument in *Myers*, which claimed that retiree health insurance rights were not intended to last beyond the term of the collective bargaining agreement, the Third Department stated that such an argument "ignores the important distinction to be made between retirees and existing City employees." *Myers*, 244 AD2d at 847. In the context of public sector labor negotiations, an inference or presumption of vesting would confirm such rulings that retiree health insurance benefits cannot be changed by the parties to a collective bargaining agreement. If this court were to

ignore the current state of the law and deprive retirees of health insurance benefits that they earned and legitimately were expected to receive in retirement, it would allow employers to eviscerate contractual benefits.

POINT II

NEW YORK'S AMENDED STATUTORY AND REGULATORY SCHEME BREACHED THE STATE'S CONTRACTUAL OBLIGATIONS, BUT DID NOT INVALIDATE THE AGREEMENTS.

As the Second Circuit correctly noted, "liability for impairment and liability for breach are mutually exclusive. A contract creates alternative obligations. Either perform the contract or pay damages." (A042, *citing TM Park Ave. Associates v. Pataki*, 214 F3d 344 at 349 (2d Cir. 2000)). "The distinction between a contractual breach and contractual impairment 'depends on the availability of damages.'" (A042, *citing E & E Hauling, Inc. v. Forest Preserve Dist. Of Du Page Cty., Ill.*, 613 F2d 675, 679 (7th Cir. 1980)). Where there is not only a breach, but a contract is invalidated may a claim arise under the contracts clause for impairment of a contract.

In *E&E Hauling, Inc.*, plaintiff entered into an agreement with defendant Forest Preserve District of Du Page County, a state corporate and politic body with authority delegated to it by the State. *Id.* As part of the agreement in that matter, plaintiff was given the exclusive right to operate and maintain a sanitary landfill and from May of 1975, plaintiff and its customers were depositing liquids and sludge at the site. *Id.* at 677. Defendants subsequently adopted an ordinance that prohibited any liquid or sludge to be deposited at the site, and defendants stationed uniformed armed attendants at the site that turned away trucks under the threat of arresting the drivers and impounding the trucks. *Id.* at 677. In that instance, the State used its

legislative authority to prevent plaintiffs from fulfilling its obligations under the agreement. Under such circumstances, plaintiffs' complaint stated not only a breach of the agreement, but also a federal claim for contract impairment since there is no remedy at state law given that the ordinance preventing liquids and sludge from being deposited would have been an absolute defense to any breach of contract action. *Id.* at 680.

To the contrary, in *Jackson Sawmill Company*, it was held that there was no impairment when a competing bridge was constructed that would diminish the returns to bondholders for bonds issued to build an extension of an expressway and bridge over the Mississippi River, since "no attempt was made to use the law, federal or state, to repudiate a contractual obligation." *E & E Hauling, Inc.*, 613 F2d at 679, *citing Jackson Sawmill Company, Inc. v. United States, et al.* 580 F2d 302 at 311 (8th Cir. 1978). "The mere construction of a competing bridge did not preclude a remedy for damages and thus the contract had merely been breached; its obligation had not been impaired." *Id.* at 679.

In 2011, the New York Legislature amended Civil Service Law §167(8) to read as follows:

> Notwithstanding any inconsistent provision of law, where and to the extent that an agreement between the state and an employee organization entered into pursuant to article fourteen of this chapter so provides, the state cost of premium or subscription charges for eligible employees covered by such agreement may be modified pursuant to the terms of such agreement. The president, with the approval of the

> director of the budget, may extend the modified state cost of premium or subscription charges for employees or retirees not subject to an agreement referenced above and shall promulgate the necessary rules or regulations to implement this provision.

N.Y. Civ. Serv. Law §167(8).

Here, Appellants are retirees that are covered by language contained in collective bargaining agreements in effect at the time of their retirement. Such language provided vested lifetime benefits of health insurance at a fixed rate of premium contributions. The language, "[n]otwithstanding any inconsistent provision of law," may also apply to the collective bargaining agreements at issue that Appellants assert contain a vested right to benefits at a fixed rate. Indeed, there is no language contained within Civil Service Law §167(8) that expressly invalidates the vested rights contained within the collective bargaining agreements negotiated between 1983 and 2011.

The statute continues, "where and to the extent that an agreement between the state and an employee organization entered into pursuant to article fourteen of this chapter so provides, the state cost of premium or subscription charges for eligible employees covered by such agreement may be modified pursuant to the terms of such agreement." Article Fourteen of the New York Civil Service Law is the "Public Employees Fair Employment Act," which allows for public sector employees in New York State to organize and collectively bargain their terms and conditions of employment. Health insurance benefits for current employees upon their retirement

constitutes a form of deferred compensation and is mandatorily negotiable. *Matter of Civil Service Employees Association, Inc. and Yonkers City School Dist.*, 45 PERB ¶3039 (2012); *Cohoes Police Benevolent and Protective Assn,* 27 PERB ¶3058 (1994); *Chenango Forks City School Dist.*¸ 40 PERB ¶3012 (2007). The explicit language of Civil Service Law §167(8) refers to the collective bargaining agreements entered into between the State and employee organizations, such as CSEA, and does not invalidate any obligations contained in those agreements regardless of when they were entered into.

Further, §167(8) provides, "[t]he president, with the approval of the director of the budget, may extend the modified state cost of premium or subscription charges for employees *or retirees not subject to an agreement* referenced above and shall promulgate the necessary rules or regulations to implement this provision" (emphasis added). CSEA members that retired between January 1, 1983 and October 1, 2011, were subject to the agreements in effect on the date when they retired, since those agreements contained a vested right to health insurance at a fixed premium contribution rate. As such, the statute does not invalidate those agreements and a remedy is available under New York State law.[6]

[6] In *Retired Public Employees Association, Inc. v. Cuomo,*123 AD3d 92 at 95 (3d Dept. 2014), Petitioners were a lobby organization and former New York State employees who were receiving health insurance benefits from the State in retirement and between 1983 and 2011, retirees were responsible for 10 percent of the premium cost of an individual plan and 25 percent of the cost of the premium for a family plan with the State paying for the remainder of the premiums. The difference between Appellants in the instant matter and the petitioners in *Retired Public Employees*

In the event that this honorable Court determines that the 2011 amendment of Civil Service Law §167(8) invalidated the agreements, therefore precluding any remedy for the Appellants under New York State Law, this would result in an impairment of the contractual language that would be properly before the Federal Courts.

Association, Inc., is that Appellants in the instant matter were represented by CSEA as their bargaining agent during their employment and the basis of Plaintiffs' claim is that a vested right was created by the language contained within the collective bargaining agreements between 1983 and 2011. The Petitioners in *Retired Public Employees Association, Inc.* made no such claim and is not instructive here.

CONCLUSION

For the foregoing reasons, Appellants respectfully requests that the Court answer the Second Circuit's certified questions by finding that the at-issue collective bargaining agreements, between CSEA and the State, create a vested right to fixed health insurance contribution rates for the lifetime of retirees, despite the duration of such labor contracts. In reaching this conclusion, this Court should consider the extrinsic evidence demonstrating Appellants' entitlement to a vesting of retiree health insurance contribution rates. In answering the Second Circuit's second certified question, Appellants submit that the State breached its contractual obligation when it took legislative action, by changing the statute and regulation, for retiree health insurance. Therefore, the statutory and regulatory amendments do not preclude a remedy under New York State law.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 1250.8(J), the foregoing brief was prepared on a computer. A proportionally spaced typeface was used as follows:

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