

To be Argued by:
ROBERT S. SMITH
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New York Supreme Court
Appellate Division – First Department

**Appellate
Case No.:**
2019-03925

PATRICK J. LYNCH, AS PRESIDENT OF THE PATROLMEN'S
BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,
ON BEHALF OF THE TIERS 3 AND 3 REVISED MEMBER POLICE
OFFICERS EMPLOYED BY THE POLICE DEPARTMENT OF THE
CITY OF NEW YORK; THE PATROLMEN'S BENEVOLENT
ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs-Appellants-Respondents,

– against –

THE CITY OF NEW YORK; BILL DE BLASIO, MAYOR OF THE CITY
OF NEW YORK; THE NEW YORK CITY POLICE PENSION FUND;
THE BOARD OF TRUSTEES OF THE NEW YORK CITY POLICE
PENSION FUND; JAMES P. O'NEILL, AS POLICE COMMISSIONER OF
THE NEW YORK CITY POLICE DEPARTMENT AND AS
EXECUTIVE CHAIRMAN OF THE BOARD OF TRUSTEES OF
THE NEW YORK CITY POLICE PENSION FUND,

Defendants-Respondents-Appellants.

**SUPPLEMENTAL BRIEF FOR PLAINTIFFS-
APPELLANTS-RESPONDENTS**

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PRELIMINARY STATEMENT

In accordance with the Court’s December 1, 2020 order, Plaintiffs¹ submit this supplemental brief to address the impact of the recent decision of the Court of Appeals (the “Child Care Credit Decision”) in a case also called *Lynch, et al. v. City of New York, et al.*, 2020 WL 6136299 (N.Y. Court of Appeals, Oct. 20, 2020) (the “Child Care Credit Case”). In the Child Care Credit Decision, the Court of Appeals held that (1) a reference to “any member” in a pension statute, without reference to any particular tier of members, means what it says and is not restricted by tier and (2) Article 14 of the RSSL is not the exclusive source of substantive pension rights for Tier 3 members. These holdings are dispositive of the most significant issues on this appeal.

ARGUMENT

As Plaintiffs’ previous briefs explain, this case involves statutes and a settlement agreement under which Tier 3 police officers are entitled to the same rights to prior service credit as Tier 2 officers. As relevant here, these rights derive from four specific statutes, RSSL §43, RSSL §645, RSSL §513(b), and New York

¹ This brief uses the same abbreviated names as Plaintiffs’ previous briefs, Brief for Plaintiffs-Appellants-Respondents (Dkt. #9) (“Pl. Br.”) and Reply Brief for Plaintiffs-Appellants-Respondents (Dkt. #14) (“Pl. Reply Br.”).

City Administrative Code §§ 13-143(b)(1)/13-218(2)(a)² (Pl. Br. at 12-26; Pl. Reply Br. at 6-20); and from a 2002 Settlement (Pl. Br. at 30-32; Pl. Reply Br. at 26-28).

In the Child Care Credit Decision, the Court of Appeals decided the same question presented here – are Tier 2 and Tier 3 officers to be treated alike? – under another statute relating to police pension credits. That statute is New York City Administrative Code §13-218(h) (the “Child Care Credit Law”), which grants police officers pension service credit for unpaid child care leave. The Court of Appeals held that the Child Care Credit Law places Tier 2 and Tier 3 members on an equal footing. The Court’s reasoning requires a similar holding in this case.

Plaintiffs and the City disagreed, in the Child Care Credit case, about two issues that are also disputed in the present appeal. One was the meaning of the term “any member.” Plaintiffs argued that it referred to any member of the PPF, while the City argued that it referred only to Tier 1 and Tier 2 members. The other issue was the source of Tier 3 police officers’ pension rights. The City argued that those rights stemmed exclusively from RSSL Article 14, while Plaintiffs argued that no such exclusivity existed.

² Since the two Administrative Code provisions are substantially identical, we treat them as a single statute.

The Court of Appeals ruled for Plaintiffs on both issues. We explain below the impact of those rulings on this case.

I.

THE CHILD CARE CREDIT DECISION ESTABLISHES THAT “ANY MEMBER” AND SIMILAR TERMS ARE “UNBOUNDED AND UNFIXED TO EMPLOYEES OF A PARTICULAR TIER”

The Child Care Credit Law says that “*any member* who is absent without pay for child care le[a]ve of absence pursuant to regulations of the New York city police department shall be eligible for credit” Child Care Credit Decision at *3 (quoting §13-218(h); emphasis by the Court of Appeals).

In the Child Care Credit Case, the City argued that the credit provided by the Child Care Credit Law is not available to Tier 3 police officers. Its position was that because there were no Tier 3 police officers when the law was enacted it could not apply to them. The Court of Appeals rejected this argument, saying:

“‘Any member’ can mean only what it says. *The reference to ‘any member’ is unbounded and unfixed to employees of a particular tier*, and the absence of an exception applicable to tier 3 employees cannot reasonably be attributed to carelessness or mistake Although there were no tier 3 police officers when this part of the Administrative Code was passed, that fact is irrelevant. Inasmuch as it does not distinguish between tiers of officers, and simply provides that ‘any member,’ regardless of retirement tier, is eligible for the childcare leave service credit benefit, the second subdivision of Administrative Code § 13-218 (h) necessarily opens that benefit to tier 3 officers.”

Id. at *3 (emphasis added).

All four of the specific statutes at issue in this case use either the words “any member” (RSSL §43: “any member” of NYSLERS may transfer membership to the PPF) or a similarly inclusive term (RSSL §645: “any person ... who previously was a member of a public retirement system” may buy back credit for service; RSSL §513(b): “a member” is eligible to purchase credit for prior service; Administrative Code §§ 13-143(b)(1)/13-218(2)(a): “any period of allowable service” in specified positions “shall be deemed to be service in the police force”). Under the Child Care Credit Decision, it is clear that these statutes must be read to mean what they say, and to impose no restriction as to tier. As to the statutes, the City has not argued otherwise in this case.

But as to the 2002 Settlement, which says that the benefits provided by RSSL §§ 645 and 513(b) shall be available to “any person” who is a member of the PPF and a member of the uniformed service of the NYPD (R517, 519), the City makes exactly the argument that was rejected in the Child Care Credit Decision.

The City’s main brief says:

[A]t the time the stipulation was signed in 2002, there were no police officers in Tier 3. It was not until seven years after the stipulation was signed that the Tier 3 class of police pension members first came into existence. ... There is no indication anywhere in the agreement settling then-ongoing litigation that the parties intended that

agreement to also cover a class of officers who did not exist at the time

Brief for Defendants-Respondents-Appellants (Dkt. #12) (“City Br.”) at 46. The Child Care Credit Decision requires rejection of this argument. The 2002 Settlement applies to all police officers, “without restriction as to tier,” and therefore resolves in Plaintiffs’ favor the issues of whether RSSL §§ 645 and 513(b) cover Tier 3 officers.

II. THE CHILD CARE CREDIT DECISION REJECTS THE CITY’S “EXCLUSIVITY THEORY”

In the Child Care Credit Case, the City argued that the Child Care Credit Law, an Administrative Code provision, could not apply to Tier 3 officers because “the pension rights of tier 3 police officers are exclusively governed by article 14 of the RSSL.” Child Care Credit Decision at *2. The City said that its “exclusivity” theory was supported by RSSL §519(1) and by case law, including yet another case called *Lynch v. City of New York*, 23 N.Y.3d 757 (2014). *Id.* at *5.

The Court of Appeals rejected this argument. It said that RSSL §519(1) “creates no such exclusivity” but only “incorporates by reference relevant parts of, among other things, the Administrative Code that do not conflict with the guidelines of the RSSL.” Child Care Credit Decision at *5. It also said that the City’s “exclusivity theory lacks support in our case law. Defendants’ reliance upon *Lynch v City of New York* (23 NY3d 757 [2014]) is misplaced.” *Id.* The Court

added that in the 2014 *Lynch* case “we did not so much as hint that the RSSL might be the sole instrument for determining the retirement benefits of Tier 3 members.”

Id.

Much of the City’s case here is based on the “exclusivity” argument the Court of Appeals rejected in the Child Care Credit Decision. In the introduction to its discussion of the four specific statutes Plaintiffs rely on here, the City says:

The first, *and most formidable*, challenge the PBA faces is that its preferred application of most of the statutes it cites is barred by the terms of Article 14. With the exception of RSSL § 513(b) ... all of the provisions the PBA cites are found outside Article 14.

City Br. at 23. (emphasis added)

Here, as in the Child Care Credit Case, the City insists that “Tier 3 members are limited to the substantive benefits set forth in Article 14” (*id.* at 41) and that “[t]he benefit the PBA seeks [under the Administrative Code] is squarely prohibited by the terms of Article 14” (*id.* at 33). The City repeats its reliance on RSSL §519, which proved unsuccessful in the Child Care Credit Case: “§ 519 forecloses the PBA’s attempt to import a substantive benefit from outside Article 14 into the Tier 3 system” (*id.* at 24). It cites the 2014 *Lynch* case – the case that, the Child Care Credit Decision says “did not so much as hint” at exclusivity – four times as support for its exclusivity theory (*id.* at 7, 19-20, 25, 41-42). The exclusivity argument – which the City calls its “most formidable” – has been


squarely foreclosed by the Child Care Credit Decision. Its alternative arguments are weak, for the reasons Plaintiffs' earlier briefs have explained.

CONCLUSION

The Child Care Credit Decision requires a holding that the four specific statutes Plaintiffs rely on and the 2002 Settlement make no distinction between Tier 2 and Tier 3 officers. For that reason and the reasons stated in Plaintiffs' earlier briefs, on Plaintiffs' appeal, the order of Supreme Court should be reversed, and declarations issued in Plaintiffs' favor. On the City's cross-appeal, so much of Supreme Court's order as is favorable to Plaintiffs should be affirmed.

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