To be argued by:
JOHN MOORE
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New York Supreme Court
Appellate Division: First Department

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.

Case No. 2019-03925

REPLY BRIEF FOR DEFENDANTS-RESPONDENTS-APPELLANTS

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PRELIMINARY STATEMENT

As explained in our previous brief (City Br. 38-44), ambiguous language in Supreme Court's order could be read to give Tier 3 officers benefits that the Legislature did not grant them and that the PBA never sought in this litigation. The PBA's response to the City's arguments misunderstands the issues involved, misrepresents the City's position, and reinforces the need to modify Supreme Court's order. This Court should make clear that transferring service credit for Tier 3 members does not (a) grant additional monetary benefits for non-credited service, or (b) affect the age at which members may claim full benefits upon retirement.

There is no legal basis for the PBA's new claim—raised for the first time in its reply brief—that Tier 3 police members may claim a monetary bonus based on service that cannot be credited toward minimum retirement eligibility. Granting such a benefit for un-creditable service would change the way Tier 3 members' pensions are calculated, and in a manner contrary to the governing Article 14 provision. At best, the PBA has conflated an

undisputed fact (that members credited with more than the minimum service may sometimes obtain enhanced benefits for that credited service) with the issue actually raised in the City's cross-appeal (that Tier 3 members have no right to additional monetary benefits for service that is *not* creditable toward the minimum service requirement). Whether the PBA raises a new argument contrary to law or is simply confused about the issues, the end result is the same: the City's cross-appeal should be granted.

The PBA's brief also does nothing to rebut the City's argument that Supreme Court's order should be modified to make clear that Tier 3 members must complete the minimum service requirements set forth in Article 14 before claiming full benefits on retirement. Indeed, the PBA concedes this central point. The PBA's argument that there is no need for any modification is belied by the PBA's own confusion over which body of law governs. And its claim that the City incorrectly presented its argument is contradicted by any tenable reading of the City's brief. On this point, too, the City's cross-appeal should prevail.

ARGUMENT

THE PBA FAILS TO REFUTE THE CITY'S ARGUMENTS ON CROSS-APPEAL

A. The PBA cites nothing that would change the method of calculating Tier 3 members' pension benefits.

Having framed and argued its entire appeal around the issue of what kind of service Tier 3 police members are able to transfer and count toward their minimum eligibility requirements (uniformed police/fire service versus civilian service), the PBA reveals on the penultimate page of its reply brief that it is also seeking to change the very method by which Tier 3 members' pensions are calculated (PBA Reply 31). It now asserts—without any statutory support—that Supreme Court's order correctly grants Tier 3 members the right to claim additional monetary benefits for years of service that are not creditable toward a member's minimum eligibility requirement (*id.*). This late-breaking claim is entirely meritless.

To see where the PBA goes wrong, it is worth reiterating some key differences between how Article 14 calculates benefits for Tier 3 members and how the Administrative Code determines

those benefits for Tier 2 members. As explained in our previous brief (City Br. 40-42), Article 14 provides that retirement benefits for Tier 3 members are calculated as a portion of a member's final average salary, less a portion of that member's social security benefits. RSSL § 505. The Administrative Code provides a slightly more complicated formula for Tier 2 members. As relevant here, the Code allows Tier 2 members to increase their pension benefits based on service that was *not* counted toward their retirement requirement. Admin. Code § 13-255(3). Thus, for Tier 2 members, service that could not be credited toward the years of service required to claim full retirement benefits can still be considered to provide a monetary bonus beyond those benefits (e.g. members may claim benefits based on the non-credited years *after* serving the requisite number of credited years). *Id.* Article 14 provides no equivalent mechanism for Tier 3 members.

The distinction between how Article 14 and the Administrative Code calculate pension benefits matters because Tier 3 members' benefits are governed by Article 14. The PBA dismisses this fact as *ipse dixit* but fails to grapple meaningfully

with the provisions of law that compel the conclusion (PBA Reply 31). Not least of these provisions is § 519 of the Retirement and Social Security Law, which incorporates provisions of the Administrative Code only insofar as they relate to "the reemployment of retired members, transfer of members and reserves between systems and procedural matters" to the extent that they are not inconsistent with the provisions of Article 14. RSSL § 519(1). Plainly, the calculation of pension benefits does not fall within that ministerial domain and so is excluded from incorporation. Again, to find the substantive benefits available to Tier 3 members, we look to Article 14 itself (*see* City Br. 23-26), and here that exercise directs us to § 505, which dictates precisely how monetary benefits are to be calculated and makes no allowance for a monetary bonus based on un-creditable service.

The PBA argues that § 519's incorporation of certain enumerated provisions does not necessarily mean it excludes non-enumerated provisions (PBA Reply 4-5). But that runs squarely into the well-established canon of statutory interpretation *expressio unius est exclusio alterius* ("the expression of one thing is

the exclusion of the other"). *See Morales v. Cty. of Nassau*, 94 N.Y.2d 218, 224 (1999). Under that canon, "where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." *Matter of Awe v. D'Alessandro*, 154 A.D.3d 932, 934 (2d Dep't 2017) (quotation marks and citations omitted). The PBA urges an opposite reading whereby those provisions which are omitted from the statute are also, somehow, included. That's not how it works.

At bottom, if the amount of Tier 3 members' pension benefits is not calculated according to the provisions of Article 14, but rather based on whatever provisions of the Administrative Code the PBA feels like reaching for, the tier system would be essentially meaningless. And the PBA points to nothing in Article 14 or in any of the other statutes on which it hopes to rely in this appeal that would grant Tier 3 members the right to claim additional monetary benefits for time that is not creditable toward a service retirement. To the contrary, each of those statutes is, under the PBA's reading, geared toward expanding what can be

transferred and counted as creditable time (App. Br. 12-26). Nothing in any of those statutes purports to grant benefits for un-credited service.

The problem with Supreme Court's order is that it could be read to suggest that Tier 3 members are permitted to transfer service that is not allowable police service for the purpose of obtaining the additional monetary benefits available to Tier 2 police members (R18; City Br. 40-42). The PBA has not—and never has—pointed to any provision of law that could possibly grant the benefit it now claims to seek.

Contrary to the PBA's claim (PBA Reply 31-32), this issue was not litigated below, squarely or otherwise. The PBA's assertion on that front appears to be based on a misunderstanding of the actual issue involved. The portions of the record to which the PBA cites (R458-59, 1216-17) address the provisions granting additional benefits for members who serve longer than the minimum required to obtain full service or early retirement benefits. *See* RSSL §§ 505(b), 510(b). But the benefits set out in those statutes are based on *credited* police service (however it may

be acquired). Those statutes say nothing about additional benefits for time that is *not* counted as credited police service.

The PBA's conflation of these two issues is a last-minute grab for a benefit that it never before claimed and that it cannot legally justify. To the extent Supreme Court's order grants the right to count non-credited time toward an additional monetary benefit, it erred and its order should be modified.

B. The PBA concedes that Tier 3 members may not retire with full benefits after completing only 20 years of allowable service.

It is unclear what (if any) basis the PBA asserts in opposition to the City's second ground for its cross-appeal (PBA Reply 32). There is no doubt that Tier 3 police members are required to complete 22 years of credited service before retiring with full benefits. RSSL § 503(d); *see also* RSSL § 501(17). But, as explained in our previous brief (City Br. 42-43), Supreme Court's order contains language that could be read to suggest that Tier 3 members may claim those benefits after only 20 years of service (R23). To the extent that reading is possible, it is error and this Court should modify it.

The PBA does not appear to dispute the key legal facts. Indeed, on the very first page of its reply brief, the PBA concedes that Tier 3 police and fire members may not claim full benefits before completing 22 years of service, while Tier 2 police and fire members are required to serve only 20 years (PBA Reply 1). Thus, the parties agree as to the requirements for retirement with full benefits.

The PBA claims that no clarification is needed because "Supreme Court's opinion clearly says that the Code's requirements as to service time must be complied with" (PBA Reply 32). But that is exactly the problem. For Tier 3 members, Article 14—not the Administrative Code—determines the service time requirements, as the PBA elsewhere recognizes (PBA Reply 1). Even if the PBA were to prevail on the main appeal and police members were permitted to claim credit for civilian service (and they should not, for the reasons set out in our previous brief), they must still accumulate 22 years of credited service before retiring with full benefits. RSSL § 503(d); *see also* RSSL § 501(17). The PBA's demonstrated confusion between whether the

Administrative Code or Article 14 governs the retirement requirements for Tier 3 members reflects exactly the ambiguity in Supreme Court's order that the City is asking this Court to correct.

Finally, the PBA's throwaway claim that the City made the wrong argument in its brief cannot be taken seriously. There is simply no fair reading of the City's brief that would suggest the City believed that police/fire members are forbidden from retiring under any circumstances before serving 22 years. The City's argument and the statutes it cites make plain that it is referring to the ability to retire with full benefits. Lest there be any doubt, the heading for that section of the brief reads: "Article 14 does not grant police members the ability to retire *with full benefits* after completing 20 or 25 years of allowable service" (City Br. 42 (emphasis added)).

The PBA articulates no actual grounds to refute the City's cross-appeal on this point. Nor does it claim that this is a benefit it has ever actually sought at any point during the course of this litigation. This Court should, therefore, modify Supreme Court's

order to make clear that Article 14's normal service retirement eligibility requirements for Tier 3 police members—22 years of credited service—remain the standard for retirement with full benefits, even for those members who seek to transfer prior service credit under RSSL § 513(c)(2).

Again, it is unlikely Supreme Court considered its decision and order to grant the benefits identified here. The PBA did not ask for them and provides no legal basis to claim those benefits even if it had asked. Letting the order stand as written opens the possibility of misunderstanding (of the kind demonstrated in the PBA's reply brief) in the future. Accordingly, this Court should modify Supreme Court's order to make clear that police members may transfer allowable police/fire service credit to the PPF *for the purpose of determining the minimum eligibility requirements for retirement*, as was set forth in Administrative Code § B3-30.1 in 1976. The pension statutes allow no more.

CONCLUSION

This Court should affirm Supreme Court's rejection of the PBA's attempt to expand the prior service benefits available to Tier 3 officers and modify Supreme Court's order to make clear that Tier 3 police members may not obtain additional monetary benefits for certain types of non-allowable service or alter the number of years of allowable police service such a member must complete before retiring with full benefits.

Dated: New York, NY
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Respectfully submitted,

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