To be argued by:
JOHN MOORE
15 minutes requested

New York County Clerk's Index No. 655831/16

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

BRIEF FOR DEFENDANTS-RESPONDENTS-APPELLANTS

JAMES E. JOHNSON
Corporation Counsel
of the City of New York
100 Church Street
New York, New York 10007
212-356-0840 or -0817
jomoore@law.nyc.gov

DEVIN SLACK
JOHN MOORE
of Counsel

August 21, 2020

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (cont'd)

Page(s)

TABLE OF AUTHORITIES (cont'd)

Page(s)

Statutes

TABLE OF AUTHORITIES (cont'd)

Page(s)

Other Authorities

TABLE OF AUTHORITIES (cont'd)

Page(s)

PRELIMINARY STATEMENT

The central question in this case is how long a police officer hired after July 1, 2009 (a "Tier 3" officer) must serve as a police officer before retiring with full pension benefits. The Patrolmen's Benevolent Association ("the PBA") urges that time spent out of uniform in a different job can be counted toward a Tier 3 officer's retirement. But this is not the system that the Legislature created.

Recognizing that police and fire service is special because it is particularly hazardous and strenuous, the Legislature created a special benefit for such service, permitting Tier 3 police officers and firefighters to retire with full benefits after 22 years of service, regardless of age. This is significant because most other public employees must be at least 62 years old before claiming full benefits. Under the PBA's theory, a member could take advantage of the benefit to retire regardless of age without serving the full 22 years as a police officer or firefighter, and could instead count time spent in other, less hazardous or strenuous, jobs. Claiming a special benefit reserved for certain jobs without completing the

special service to earn that benefit runs contrary to the Legislature's design and should be rejected.

This Court should affirm the order of Supreme Court, New York County (Chan, J.) to the extent that it denied the PBA's attempt to claim benefits for Tier 3 officers beyond what the Legislature granted. The Retirement and Social Security Law ("RSSL") makes clear that Tier 3 police members are entitled to credited service only for time served as a police officer or firefighter. The PBA's attempts to ignore that limitation or override it with other statutes would undermine the legislative scheme.

In rejecting the PBA's arguments, however, Supreme Court included language that could be read to grant certain benefits—which were not sought by the PBA—to Tier 3 officers beyond what the Legislature set forth. To the extent the order could be read to grant those benefits, it would run directly counter to explicit statutory provisions. Thus, this Court should modify Supreme Court's order to eliminate the possibility of misinterpretation.

QUESTIONS PRESENTED

1. Should this Court affirm Supreme Court's rejection of the PBA's attempts to permit non-police/fire service to count toward Tier 3 police officers' retirement eligibility?

2. Should this Court modify Supreme Court's order to make clear that the Administrative Code provisions from 1976 only apply for the purpose of determining what types of service are creditable as allowable police service?

3. Did Supreme Court properly reject the PBA's attempt to apply the terms of a 2002 settlement agreement to a class of police officers who did not exist at the time and would not exist for another seven years after the settlement was reached?

4. Did Supreme Court properly convert this matter into an Article 78 proceeding where the PBA alleges than an agency's interpretation of a statute is affected by an error of law?

STATEMENT OF THE CASE

A. Statutory Background

1. The tier system for police pension members

Police Pension Fund ("PPF") members are classified into a series of "tiers," set forth under Title 13 of the Administrative Code of the City of New York and the State Retirement and Social Security Law ("RSSL"), dependent on when the officers were hired. Generally, officers in earlier tiers are entitled to more generous pension benefits than those in the later tiers. In this matter, the PBA attempts to extend a benefit the Legislature granted to Tier 1 and Tier 2 officers hired before July 1, 2009 to officers in subsequent tiers, regardless of when they were hired.

a. Tier 2: Article 11 of the Retirement and Social Security Law and the New York City Administrative Code

New York City police officers hired between July 1, 1973 and June 30, 2009 are classified as Tier 2 members of the Police Pension Fund (Record on Appeal ("R") 89). Officers hired before July 1, 1973 are Tier 1 pension members. *Lynch v. City of New York*, 23 N.Y.3d 757, 761 (2014).

The State Legislature created Tier 2 of the pension system in the face of the 1970s financial crisis "to deal with the steeply mounting costs of public employee pensions." *Lynch*, 23 N.Y.3d at 762. The Legislature codified the new tier in Article 11 of the RSSL. RSSL §§ 440–51. Tier 2 was designed to be only a temporary benefit structure while the Legislature crafted a new, comprehensive retirement plan. *Lynch*, 23 N.Y.3d at 762; *Civil Serv. Emples. Ass'n v. Regan*, 71 N.Y.2d 653, 657 (1988).

Reflecting its temporary nature, Tier 2 did not attempt to comprehensively define all aspects of public employee pensions, especially as they related to police officers. Instead, Tier 2 members were entitled to benefits described in applicable New York City Administrative Code provisions, subject to certain limitations set forth in Article 11. RSSL §§ 440–51; *Lynch v. City of New York*, 162 A.D.3d 589, 590 (1st Dep't 2018).[1]

[1] This Court's decision in *Lynch* is currently the subject of an appeal to the Court of Appeals. Oral argument is anticipated on September 10, 2020.

b. Tier 3: Article 14 of the Retirement and Social Security Law

Following the recommendations of a Permanent Commission on Public Employee Pension and Retirement Systems, a new comprehensive pension plan—Tier 3—was created three years later and codified in Article 14 of the RSSL. RSSL §§ 500–20. As with Tier 2, Tier 3 was enacted in response to the demand for pension reform to reduce government costs. *Lynch*, 23 N.Y.3d at 765.

Unlike Tier 2, Tier 3 was an entirely new stand-alone retirement structure of benefits and contributions (R12). *See Civil Serv. Emples. Ass'n*, 71 N.Y.2d at 659 ("[T]he legislative history of chapter 890 [of the laws of 1976] confirms a comprehensive package creating a 'new retirement program for employees hired on or after July 1, 1976.'" (quoting Governor's Message of Approval, 1976 McKinney's Session Laws of NY, at 2455)). Article 14 specifies that other provisions of law—including other chapters of the RSSL and the New York City Administrative Code—are incorporated into Tier 3 only when they relate to "the reemployment of retired members, transfer of members and

reserves between systems and procedural matters" and only when those outside provisions do not conflict with Article 14's provisions. RSSL § 519(1).

Thus, the system of substantive benefits and responsibilities applicable to Tier 1 and Tier 2 members does not apply to Tier 3 members unless those benefits were expressly included in Article 14, which established Tier 3. *Lynch*, 23 N.Y.3d at 773. A mere failure to exclude from Tier 3 a particular benefit granted to earlier tiers is not enough. *Id.* Moreover, Article 14 provides that "[i]n the event that there is a conflict between the provisions of this article and the provisions of any other law or code, the provisions of this article shall govern." RSSL § 500(a).

Despite the creation of Tier 3 in 1976, newly hired police officers did not become subject to the new plan until July 1, 2009 (R92-93). RSSL § 440(c). This was the result of periodic amendments to the RSSL extending the application of Tier 2 to certain members including police officers. *Lynch*, 23 N.Y.3d at 765-67. Those legislative extenders ended in June 2009. *Id.* at 767. Saying that he was unwilling to "ignore the present reality, and

simply re-enact the same provisions that have contributed to New York's financial straits," Governor Paterson vetoed a bill to extend Tier 2 coverage to police officers for another two years. *Id.* As a result, police officers hired after June 30, 2009 become Tier 3 members whose pension benefits are governed by Article 14 of the RSSL. *Id.*

c. Tier 3 Revised Plan: Article 14 of the Retirement and Social Security Law

In 2012, the Legislature created a new pension tier. *Lynch*, 23 N.Y.3d at 767 n.8. The new tier applied to police officers hired beginning April 1, 2012. *Id.* These employees are Tier 3 "revised" plan members and their benefits are governed by particular provisions within Article 14. *Id.* The differences between Tier 3 benefits and Tier 3 revised plan benefits are not relevant here.

2. Article 14's distinctions between general members and police/fire members

Article 14, which defines the benefits of the Tier 3 members at issue in this appeal, sets forth a series of distinctions between "police/fire members" (uniformed members of the police or fire

pension funds) and "general members" (members who are not police/fire members). RSSL § 501(12), (21). For instance, the retirement benefits are calculated differently for the two classes of members. RSSL §§ 504(a), 505(a). The statutes also provide for differing treatment regarding deferred vested benefits, RSSL § 516(b), (c), and the number of years members must contribute a portion of their wages to the retirement system, RSSL § 517(a).

Perhaps the most significant difference between the two plans is the differing ages at which retirement is permitted. General members are required to meet the minimum service requirements *and* reach the age of 62 before claiming their full pension benefits. RSSL § 503(a). In contrast, police/fire members are permitted to retire after 22 years of allowable police/fire service, "without regard to age upon retirement." RSSL § 503(d); *see also* RSSL § 501(17) (defining "normal retirement age" as 62 for general members and the age at which police/fire members complete 22 years of service). This means that police members who joined at the age of 21 would be able to retire with full benefits at 43 years old, 19 years before their general member

counterparts who joined at the same age. Similar distinctions are reflected in the provisions defining early retirement benefits and escalated benefits. RSSL §§ 501(5), 503(c), (d), 510(d). In each instance, general members are required to meet both service and age requirements, while police/fire members are only required to accumulate the specified years of credited uniformed service. *Id.*

B. Procedural background

1. The PBA's complaint seeking to claim police service credit for time spent as general members in different retirement systems

The PBA filed suit in Supreme Court, New York County seeking a declaratory judgment that Tier 3 officers were permitted to buy back, purchase, and transfer previous non-police service into the PPF and have that time count for the officers' credited service toward retirement (R88-112). The PBA claimed that a series of statutory provisions—as well as the terms of a 2002 settlement agreement between the PBA and the City—entitled Tier 3 members to be able to count such non-police service toward satisfying the minimum eligibility period before an officer could

retire (*id.*). The PBA claimed that the PPF had wrongfully interpreted those statutory and contractual provisions (R89). The complaint sought an order declaring that the PPF was required to credit pension service transferred or purchased under those provisions as satisfying the minimum service credit requirements for retirement in the PPF (R110-11).

2. Supreme Court's order granting partial summary judgment to both sides

On cross-motions for summary judgment, Supreme Court granted partial summary judgment to both sides (R10-24). First, the court converted the PBA's action into an Article 78 proceeding, noting that claims that an agency's interpretation and implementation of a statute have been affected by an error of law is properly considered under the Article 78 framework (R13-15). Thus, a four-month statute of limitations applies to PBA members claiming they were improperly denied service credit (R14-15).

Turning to the merits, Supreme Court found that police members' rights to purchase, buy back, and transfer prior non-police/fire service was determined by how those rights were

defined when the Legislature enacted Tier 3 in 1976 (R16). The court, therefore, looked to the state of the law as it existed in 1976 to determine the benefits that Tier 3 members can claim today and ordered that Tier 3 members be permitted to transfer service credit under the terms of RSSL § 513(c)(2) and the relevant provisions of the Administrative Code as it existed in 1976 (R17-18, 23). In doing so, the court rejected the PBA's claims to relief under the various statutory provisions it cited (R18-21). The court found that the PBA consistently urged an overly broad reading of those statutes, which was inconsistent with how the law stood in 1976 (*id.*).

Supreme Court also rejected the PBA's claim that Tier 3 officers were able to claim the benefits of a 2002 settlement agreement between the City and the PBA (R21-22). The court noted that the agreement did not contemplate Tier 3 officers, who did not exist until 2009—seven years after the agreement was reached (R22). Because those officers were not contemplated at the time the parties entered into the agreement, the officers could not avail themselves of the benefits of that agreement (*id.*).

Both parties subsequently moved for reargument (R1254-1431). Supreme Court denied both motions (R69-72).

ARGUMENT

POINT I

THE PENSION STATUTES DO NOT PERMIT TIER 3 POLICE OFFICERS TO CREDIT NON-POLICE OR -FIRE SERVICE TOWARD THEIR RETIREMENT ELIGIBILITY

Whether Tier 3 police officers are entitled to credit time served in non-uniformed pension systems toward satisfying the minimum eligibility period for retirement is a question of statutory interpretation. The interpretation of the statutes that the PBA urges is contrary to the Legislature's intent, disrupts the fundamental structure of the well-established tier system applicable to public pensions, and should be rejected.

The task of courts settling questions of statutory interpretation is to "ascertain and give effect to the intention of the Legislature." *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006); *Riley v. County of Broome*, 95 N.Y.2d 455, 463 (2000). In doing so, courts must construe the statute as a whole, considering its various sections together and with reference to one

another. *Matter of N.Y. County Lawyers' Ass'n v. Bloomberg*, 19 N.Y.3d 712, 721 (2012). The starting point for doing so always begins with the language itself, giving effect to its plain meaning. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583 (1998).

Moreover, courts are aware that the New York City Pension Funds have a strict statutory obligation to follow the law as written in order to preserve the integrity of the public retirement systems. Thus, courts have consistently rejected attempts to modify or alter the requirements of the pension laws. *Creveling v. Teachers' Ret. Bd.*, 255 N.Y. 364 (1931). That applies notwithstanding sometimes harsh results, because "it would be equally unfortunate for all the others interested in the retirement fund if the fundamental requirements of the law were not enforced." *Id.* at 372-73; *see also Guzman v. N.Y.C. Emples. Ret. Sys.*, 45 N.Y.2d 186, 193 (1978).

Applying these principles, this Court should hold that Tier 3 police members are permitted to count only police and fire service when determining whether members have served the time

necessary to retire with full benefits. The substantive pension benefits for Tier 3 police officers are governed exclusively by RSSL Article 14, which specifically defines which service is credited toward an employee's retirement. The service the PBA would like to see credited falls outside the applicable statutes' provisions.

A. RSSL § 513 limits credited service for police/fire members to service in a police/fire retirement system.

Under Article 14, police/fire members, like the plaintiffs here, are permitted to retire with full benefits "after twenty-two years of service," regardless of their age. RSSL § 503(d). The question then becomes: what service can be credited toward those 22 years? Article 14 provides explicit definitions for what qualifies as "credited service" and "creditable service" for Tier 3 members. RSSL § 501(3), (4). These provisions define credited and creditable service entirely by reference to RSSL § 513. *Id.* Looking to § 513, the statute is clear that only police/fire service may be credited toward a police/fire member's retirement. RSSL § 513(c)(2).

In setting forth what qualifies as credited service for Tier 3 members, RSSL § 513 includes a provision devoted specifically to

the ability of police/fire members to obtain service credit for time spent in a different retirement system: the exact question at issue in this appeal. The only creditable service under the provision is that which would have qualified as police/fire credit before July 1, 1976, the date Tier 3 took effect:

> A police/fire member shall be eligible to obtain credit for service with a public employer described in paragraph one only if such service, if rendered prior to July first, nineteen hundred seventy-six by a police/fire member who was subject to article eleven of this chapter, would have been eligible for credit in the police/fire retirement system or plan involved.

RSSL § 513(c)(2). Thus, the plain language of the statute makes clear that Tier 3 police members may receive credit for prior service for the purpose of satisfying minimum uniformed service requirements only if, in 1976, such service would have been credited as police or fire service in the member's previous retirement system for that purpose. *Id.* Other kinds of service cannot be credited as allowable police service.

Looking to the benefits available to police members in 1976, the relevant Administrative Code provisions made clear that only

police and fire service could be credited toward police service retirement. The Administrative Code provided that "no member of the said police pension fund shall be eligible for retirement for service until he has served *in the police force* for a minimum period of twenty or twenty-five years" (R902, 1168, 1173). Admin. Code §§ B-18-15.0(d) (1976), B3-30.1 (1976) (emphasis added).[2] In other words, police officers had to meet their minimum eligibility requirements through service as police officers or firefighters.[3]

It was not until *after* June 30, 1976 that any non-police or fire prior service became creditable as allowable police service for Tier 2 members. *See* L. 1980, ch. 640; L. 2004, ch. 728; L. 2005, ch. 498. Those later provisions say nothing about what service "rendered prior to July first, nineteen hundred seventy-six by a police/fire member who was subject to article eleven of this

---

[2] The modern-day successors to these provisions (with amendments) are codified in Administrative Code §§ 13-218 and 13-143, respectively.

[3] A separate provision of the Administrative Code afforded police members the ability to have prior service completed as a member of the uniformed fire department credited as allowable police service. Admin. Code § 434a-11.0 (1976). The modern-day version of this statute is codified in Administrative Code § 14-112(a).

chapter, would have been eligible for credit in the police/fire retirement system." RSSL § 513(c)(2).

Limiting what can be credited as police/fire service to service actually performed as a police officer or firefighter makes perfect sense in the statutory scheme the Legislature crafted. Again, Article 14 treats police/fire members differently than general members in a variety of ways (*see supra* at 8-10). As relevant here, the statute strikes a bargain that recognizes the particular strains and hazards of police work. Unlike general members, police officers may retire, regardless of their age when they have achieved the minimum service requirement: 22 years. RSSL § 503(d). Thus, an officer who started at age 21 can retire with full benefits at the relatively young age of 43. This is a significant benefit for a career served as a police officer. But to earn that benefit, officers are required to put in their 22 years of service as a police officer or firefighter. *Id.*; RSSL § 513(c)(2). Service in a less strenuous or hazardous role does not count for Tier 3 officers.

The PBA's misguided interpretation of the statutes denies the bargain struck by the Legislature. The PBA's reading would

permit individuals to serve the bulk of their employment with one public employer (say, the New York City Law Department), then become a police officer, transfer their previous service, and retire with full benefits at age 43, having served only a few years as a police officer. That's not the deal the Legislature struck and it is not the statute the Legislature enacted.

It is no answer to this fact to assert that Tier 2 officers are currently able to import certain non-police or fire service into their credited time. Tier 2 and Tier 3 are different statutory schemes, governed by different statutory provisions, and providing members with different benefits. In more ways than this, Tier 2 members are entitled to more generous benefits than those in the later tiers. *See, e.g.*, *Lynch*, 23 N.Y.3d 757 (holding that Tier 3 members cannot claim the increased take home pay benefit available to Tier 2 members). That the Legislature chose to grant this particular benefit to Tier 2 members does not mean that it intended for Tier 3 members to claim the same benefit. To the contrary, Tier 3 members may only claim those benefits that are

expressly included in Article 14. *Id.* at 773. The benefit the PBA seeks is nowhere to be found in Article 14.

There is also no merit to the PBA's claim that Article 14 "creates full equivalence between Tiers 2 and 3" on the question of prior service credit (Appellants' Brief ("App. Br.") 27). Had the Legislature intended this result, it could have said so very easily. Because it did not do so, the PBA attempts to judicially amend the statute to read:

> A police/fire member shall be eligible to obtain credit for service with a public employer described in paragraph one only if such service, if rendered ~~prior to July first, nineteen hundred seventy-six~~ by a police/fire member who ~~was~~ **is** subject to article eleven of this chapter, would ~~have been~~ **be** eligible for credit ~~in the police/fire retirement system or plan involved~~.

The PBA speculates that this is what the Legislature really meant. But it offers no support in the statutory language or legislative history for this rewriting of the statute.

There is even less merit to the PBA's attempt to rewrite the statute to change the date the Legislature specifically included in the statute (App. Br. 29). The PBA claims that effectuating the

Legislature's intent requires replacing the date listed in the statute with the date police officers began joining Tier 3, a full 33 years later (*id.*). But a specific date is as unambiguous a statutory term as can be imagined. This Court should decline to rewrite unambiguous language based on the PBA's unsupported speculation about what the Legislature was really trying to do. Again, beyond its own say-so, the PBA offers no support for its claim that its proposed revisions are the only way satisfy the Legislature's intent.

Nor is the PBA's speculation even the most reasonable reading of the Legislature's intent in specifying a particular date in the statute. It is perfectly rational for the Legislature to have pinned the date in the statute to the passage of the statute. The Legislature knew what benefits were granted to police officers on July 1, 1976 and determined that those benefits were appropriate to grant to members of the new, less-generous pension tier. But it gave no indication that it was willing to tie Tier 3 members' benefits to whatever then-unknown provisions future Legislatures may adopt for Tier 2 members. And to the extent those future

Legislatures intended to extend the new provisions to Tier 3 members, they would be able to amend Article 14. No such amendments were ever made.

Thus, the clear statutory language of RSSL § 513—the exclusive means to determine what qualifies as credited service for Tier 3 members—limits such creditable service to time spent as a police officer or firefighter. Officers are permitted to retire with full benefits after 22 years of service, regardless of their age, but they must have spent those 22 years in police or fire service. The bargain is plain: a special benefit for special service. The PBA's claims fail because the PBA seeks to count time spent outside police or fire service toward a police/fire retirement in contravention of Article 14's terms.

B. The various statutes the PBA cites do not entitle Tier 3 officers to count non-police/fire service toward their retirement.

Unable to show that RSSL § 513(c)(2)—the provision defining what prior service can be credited for Tier 3 police/fire members—grants the relief it seeks, the PBA turns to a series of other statutory provisions in an attempt to bolster its claims. But

none of the statutes on which the PBA attempts to rely can override the plain terms of RSSL § 513(c)(2).

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) (which is discussed in more detail below), all of the provisions the PBA cites are found outside Article 14. Article 14 expressly defines how such other bodies of law are to be applied. RSSL § 519. It limits the application to only a narrow category of situations, and only then when the provisions are consistent with what is found in Article 14:

> Any other provision of this chapter, of the state education law or of the administrative code of the city of New York, or rules and regulations thereunder, relating to the reemployment of retired members, transfer of members and reserves between systems and procedural matters shall apply to members covered under this article during the duration thereof unless inconsistent herewith.

RSSL § 519(1). The PBA's argument thus faces two hurdles: the provisions it asks the Court to apply do not fall within the bounds

specified by § 519 and, in any event, the provisions are inconsistent with the terms found in Article 14.

First, § 519 forecloses the PBA's attempt to import a substantive benefit from outside Article 14 into the Tier 3 system. The statute specifies that the only provisions from outside of Article 14 that can apply to Tier 3 members are those concerning "the reemployment of retired members, transfer of members and reserves between systems and procedural matters." RSSL § 519(1). Thus, for instance, an Administrative Code provision setting forth the composition of PPF membership and specifying who can and cannot become a member of the system applies to Tier 3 members. Admin. Code § 13-215. This is a purely procedural matter that does not affect members' substantive rights or obligations within the system.

The PBA claims that § 519's limitation is no problem because it is seeking only to apply "transfer" provisions (App. Br. 26). But that claim is a distortion of what the PBA actually asks of this Court. The PBA is not seeking to incorporate a provision governing the procedural means by which members transfer

between retirement systems. Rather, it is seeking a substantive redefinition of what Article 14 classifies as creditable police/fire service. This kind of substantive claim is beyond what § 519 allows to be incorporated from laws outside Article 14.

Second, even if the provisions the PBA cites did fit within one of the categories that § 519 sets out, the provisions it cites cannot be used to override § 513(c)(2) because, if they mean what the PBA claims, they would be inconsistent with the terms of Article 14. Section 519 makes clear that the effect of other laws cannot be to contradict the provisions of Article 14. Yet that is exactly what the PBA seeks to do. Where § 513(c)(2) limits what can be credited as police/fire service to service as a police officer or firefighter, the PBA cannot rely on provisions from outside of Article 14 to reach a different result.

This is not the first time that the PBA has attempted to claim benefits found only outside Article 14 for Tier 3 members and it has failed each time. *See Lynch*, 23 N.Y.3d at 760 (rejecting attempt to claim benefit granting increased take home pay found only in Article 11); *Lynch*, 162 A.D.3d 589 (rejecting attempt to

claim benefit found only in Administrative Code granting ability to buy back service credit for time spent on unpaid childcare leave). As this Court wrote, when there is a conflict between the provisions of the Administrative Code and Article 14, "article 14 governs." *Lynch*, 162 A.D.3d at 590-91.

Thus, the PBA's attempt to rely on statutory provisions not found in Article 14 necessarily fails at the outset before delving into the specifics of those provisions. Even passing over that fatal fact and looking to the text of the statutes themselves, the PBA's arguments still fail.

1. RSSL § 43 does not change the criteria for crediting police/fire members' service.

The PBA is incorrect in claiming that RSSL § 43 permits Tier 3 police members to count non-uniformed service in the New York State & Local Employees' Retirement System ("NYSLERS") as creditable police service (App. Br. 13-16). To be sure, the statute allows NYSLERS members to transfer membership to the PPF (and other pension systems "operating on a sound basis" in the state) and provides that the member "shall be given such

status and credited with such service in the second retirement system as he was allowed in the first retirement system." RSSL § 43(a), (d). The PBA, however, attempts to stretch this language further than it goes.

To start, the PBA ignores the fact that such transferred service can only be credited in the new retirement system as it would have been credited in the first retirement system. RSSL § 43(d). And civilian service in NYSLERS would be credited only as non-uniformed civilian service. It would not be credited as allowable uniformed police service in that system. Thus, by the plain language of the statute, civilian service is not credited as allowable police service simply because the member transferred to the PPF.

The PBA's gloss on RSSL § 43 also fails because it would render other portions of the pension statutory scheme meaningless. In 2005, the Legislature amended the New York City Administrative Code to, among other things, allow certain NYSLERS service (for instance, as a peace officer) to be credited as allowable police service for Tier 2 police members. Admin. Code

§§ 13-143(b), 13-218(d)(2). If § 43 did what the PBA claims, these Administrative Code provisions would be entirely superfluous.

The PBA makes no meaningful attempt to grapple with this fact. Instead, it suggests in a footnote that the Administrative Code amendments were "probably unnecessary" (App. Br. 15 n.3). But that is not how statutory interpretation works. Instead, the Court of Appeals has repeatedly instructed that statutes must be interpreted to give meaning to every word and part of the statute. *Andryeyeva v. N.Y. Health Care, Inc.*, 33 N.Y.3d 152, 176-77 (2019); *Avella v. City of New York*, 29 N.Y.3d 425, 434 (2017); *Kamhi v. Planning Bd. of Yorktown*, 59 N.Y.2d 385, 391 (1983).[4] The PBA's urging that these provisions in the Administrative Code should be deemed mere surplusage is the opposite of how statutes should be interpreted. *Id.*

The PBA's attempt to rely on a memo written by the New York City Corporation Counsel in 1963 fares no better (App. Br. 14). As Supreme Court noted, the memo does not speak to the

[4] The PBA recognizes (though it misapplies) this doctrine elsewhere in its brief (App. Br. 22).

Legislature's intent in crafting RSSL § 43 (R20). More to the point, the memo was written 13 years before Tier 3 was created (and 46 years before police officers began joining Tier 3). Indeed, the memo was written a full decade before the Legislature first instituted the tier system with the creation of Tier 2. It can, thus, provide no guidance for how § 43 should be interpreted in conjunction with the then-nonexistent provisions of Article 14. Likewise, the PBA's citation to a 2002 Supreme Court opinion in *Lynch v. Giuliani*, Index No. 112959/2001 (N.Y. Sup. Ct. 2002) (App. Br. 14), says nothing about the rights of Tier 3 police members for the simple reason that there were no such police members at the time. Nothing in either document can controvert the plain terms of § 43 or the clear provisions of Article 14.

2. RSSL § 645 does not grant Tier 3 members the right to have civilian service credited toward police/fire retirement.

Contrary to the PBA's claims, RSSL § 645 does not provide the relief the PBA seeks either (App. Br. 16-19). RSSL § 645 permits members in any tier whose previous membership in a public retirement system had ceased under specified

circumstances (e.g. by withdrawing contributions) to reinstate their original date of public retirement system membership. RSSL § 645(2). Upon doing so, the reinstated member is "entitled to all the rights, benefits and privileges to which he or she would have been entitled had his or her current membership begun on such original date of membership." *Id.* The most significant benefit this provides is that Tier 3 police officers who had been members of a public retirement system prior to July 1, 2009 may reinstate their membership as Tier 2 police members. At the time the statute was passed, it was conceived of primarily as a "tier reinstatement" measure (R1023, 1025, 1075). Bill Jacket L. 1999, ch. 646 at 10, 12, 62.

The PBA is not seeking tier reinstatement, however, and instead is seeking the right for Tier 3 officers to claim post-2009, non-police/fire service as creditable police/fire service toward retirement. But in doing so, the PBA overstates what the statute actually provides. To be sure, a public retirement system member who buys back previous time—even within the same tier—can claim "the rights, benefits and privileges to which he or she would

have been entitled had his or her current membership begun on such original date of membership." RSSL § 645(2). That just doesn't get the PBA very far.

The problem for the PBA's argument is that Tier 3 members have never had the right, benefit, or privilege of claiming non-police/fire service as creditable toward the 22 years needed for police/fire retirement with full benefits. RSSL § 513(c)(2). Establishing an earlier date of membership does not change the rights, benefits, and privileges of Tier 3 members with regard to the issue on which the PBA seeks relief in this matter. Regardless of the date they joined the pension system, Tier 3 officers still need to complete 22 years of credited police/fire service before retiring. Time as a pension system member that is not credited police/fire service does not count toward those 22 years for Tier 3 members and it never has. RSSL § 513(c)(2).

To qualify for the relief that the PBA seeks, the statute would have to provide that Tier 3 members could buy back post-2009 civilian service *and* have that service counted under the Tier 2 methodology as creditable police/fire service. As Supreme Court

noted, permitting Tier 3 members to assert benefits granted only to Tier 2 members "would transform a statute on tier reinstatement into a vehicle for the destruction of the tier system" (R21). The court correctly chose not to go down that road.

The PBA claims that it is "illogical" not to permit Tier 3 members "to buy back their time under section 645 and so count that time towards pension eligibility" (App. Br. 18). But it is the PBA that seeks to apply a benefit that the Legislature nowhere granted. Again, nothing in the rights, benefits, and privileges of Tier 3 members (regardless of when they joined) permits civilian service to be credited as police/fire service for determining a member's retirement date or benefits. Instead, Tier 3 members have always been required to rely on their credited time as PPF members or as police/fire members in another retirement system. RSSL § 513(c)(2). There is nothing illogical about applying the statute as written.

The PBA's suggestion that Supreme Court believed § 645 was inapplicable to Tier 3 police officers is contradicted by the very next sentence of its brief acknowledging that Supreme Court

recognized that members in any tier could reinstate to a previous tier if their dates of service warranted it (App. Br. 17; *see also* R20). Any attempt to attribute error based on this self-contradicting argument must fail. The problem with the PBA's attempted reliance on § 645 is not that the statute doesn't apply to Tier 3 officers. The problem is that the statute doesn't grant the benefit the PBA seeks. Supreme Court correctly found as much.

3. The New York City Administrative Code cannot override Article 14's provisions.

There is no merit in the PBA's attempt to rely on provisions in the Administrative Code granting Tier 2 officers the ability to obtain police service credit for certain prior civilian service (App. Br. 23-26). The benefit the PBA seeks is squarely prohibited by the terms of Article 14, which necessarily controls in the event of a conflict. RSSL § 519(1). Again, RSSL § 513(c)(2) limits credit for police/fire members' prior service to what would have been credited as police/fire service in 1976. Review of the law at the time makes clear that only service as a police officer or firefighter

could be deemed credited service (R902, 1168, 1173). Admin. Code §§ B-18-15.0(d) (1976), B3-30.1 (1976).

The PBA does not dispute that the Administrative Code, as it existed in 1976, does not entitle it to the relief it seeks. Instead, the PBA attempts to rely on a series of post-1976 legislative enactments (App. Br. 25, citing L. 2005, ch. 498; L. 2004, ch. 728; L. 1981, ch. 941; L. 1980, ch. 640). In other words, the PBA hopes to rely on the Administrative Code as it exists today, not as it existed in 1976 (App. Br. 25-26). But the statute commands otherwise. RSSL § 513(c)(2); *see also supra* at 15-22.

The PBA also claims that looking at the state of the law in 1976, somehow, requires considering the Administrative Code as it exists today (App. Br. 25). It claims that the Legislature did not "disable a later legislature from granting more" benefits (*id.*). That's undoubtedly true, but the avenue available to the Legislature for granting those substantive benefits to Tier 3 members is to amend Article 14, not the Administrative Code. RSSL §§ 500(a), 519(1). The PBA can point to no such amendments to Article 14 here.

Moreover, the provisions the PBA cites cannot apply to Tier 3 police members because they concern features unique to Tier 1 and Tier 2 members. The provisions require an adjustment in members' contribution rate when they become entitled to an earlier retirement based on the crediting of prior service. Admin. Code §§ 13-143(b)(2), 13-218(d)(2)(b). But only Tier 1 and Tier 2 members' contribution rates are based on the members' age upon commencement of police service. Tier 3 police members, in contrast, contribute a flat three percent of salary, which does not change over the course of their membership. RSSL § 517(a). It would thus be nonsensical to attempt to adjust a Tier 3 police member's contribution rate as required by the sections of the Administrative Code the PBA says apply to Tier 3 members. The PBA offers no explanation for how it would square this inconsistency. Nor does it explain why only certain inconsistent provisions of the Administrative Code sections they cite should be swept into Article 14, while others are left out.

4. The general terms of RSSL § 513(b) do not control over the specific statutory provision governing police/fire members' service credit.

The only statute the PBA cites not subject to the threshold bar of RSSL § 519(1) is RSSL § 513(b), but that provision offers no more help than any of the other statutes the PBA cites. Section 513(b) permits a member of a public retirement system to receive "retirement credit" for prior service. RSSL § 513(b). This is a general provision that applies to the bulk of Tier 3 members across the state. The statute does not, however, address the question of what prior service can be credited toward a police/fire pension. That question is answered instead in § 513(c)(2). The more specific provision of § 513(c)(2) controls over the general provision in § 513(b). *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974); *Dutchess Cty. Dep't of Soc. Servs. ex rel. Day v. Day*, 96 N.Y.2d 149, 153 (2001); Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* 183-88 (2012).

The PBA's various arguments attempting to give priority to § 513(b) fall short. The PBA rightly points out that § 513(b) does not exclude police officers (App. Br. 20). But there is no need to

exclude police members from the provision because those members' rights to claim service credit for prior service are expressly laid out in a later provision of the same statute dedicated specifically to that issue. Again, the specific controls over the general. *Morton*, 417 U.S. at 550-51; *Day*, 96 N.Y.2d at 153; Scalia and Garner at 183-88.

There is no merit to the PBA's claim that granting precedence to the specific provisions of § 513(c)(2) would fail to give effect to all parts of the statute (App. Br. 22). In fact, this argument has it exactly backward. If, as the PBA contends, § 513(b) permits all Tier 3 members to obtain creditable service by purchasing the credit that they earned or could have earned in previous public employment, then § 513(c)(2)'s limitation on police/fire members obtaining such credit would be without effect. In contrast, applying § 513(c)(2) to police/fire members—as its terms dictate—while leaving § 513(b) in place for general members gives effect to all parts of the statute.

This conclusion—that different parts of § 513 apply with greater or lesser force to different members—is completely

consistent with the Court of Appeals' decision in *Matter of Kaslow v. City of New York*, 23 N.Y.3d 78 (2014), on which the PBA attempts to rely (App. Br. 22-23). There, the Court noted that § 513 "provides in subdivision (b) for credit for *most* public service rendered in the state or City." *Id.* at 85 (emphasis added). That's true. But most is not all. While most public service rendered in the state or City can be credited, civilian service cannot be credited for police/fire members in Tier 3. RSSL § 513(c)(2). That the Court noted there was no distinction between uniformed and non-uniformed service for correction officers, *id.* at 86, says nothing about this case. While not making special allowance for uniformed correction service, the statute does include a provision specific to the prior service that police/fire members may credit. Nothing in *Kaslow* holds, or even suggests, that § 513(b) entirely swallows the provisions of § 513(c)(2). Thus, § 513(b)—like all of the other statutory provisions the PBA cites—does not grant Tier 3 police members the benefit that the PBA seeks.

POINT II

SUPREME COURT'S ORDER SHOULD BE MODIFIED TO THE EXTENT THAT IT GRANTED BENEFITS NOT CONTAINED IN ARTICLE 14

While Supreme Court correctly rejected the PBA's argument that Tier 3 police members are permitted to count non-police/fire service toward their retirement eligibility, some of the court's language in doing so could be read to stretch the application of the Administrative Code provisions from 1976 further than Article 14 allows. The court wrote that the PPF is required to allow Tier 3 members to "transfer service credit pursuant to RSSL § 513(c)(2) and 1976 Admin Code § B3-30.1" (R23). While this is correct in terms of determining what service can be credited for satisfying the retirement eligibility requirements, Supreme Court did not recognize that § B3-30.1 covers more than that one aspect of transferring service. Taken literally, the language could be read to suggest that Tier 3 police members may obtain additional monetary benefits for certain types of non-allowable service and alter the number of years of allowable police service a Tier 3 police member must complete before retiring with full benefits. Neither

of these benefits were sought by the PBA in its complaint and neither is warranted by the statute. Given that the PBA did not seek these benefits, it is unlikely that Supreme Court meant to bestow them. This Court should take the opportunity to clarify any confusion that could arise from an overly broad reading of Supreme Court's decision and order.

To the extent the court held (or that anyone could claim the court held) that Tier 3 officers were entitled to those benefits, the holdings would erase the clear boundaries between Tier 2 and Tier 3, and ignore Tier 3 provisions that specifically address those topics. While RSSL § 513(c)(2) requires PPF to look at the 1976 version of the Administrative Code to determine what types of service are creditable as allowable police service for the purpose of satisfying minimum service requirements, it neither requires nor permits PPF to look at that law to determine (a) whether a Tier 3 police member is entitled to any additional monetary benefit for years of service that are not creditable as allowable police service, or (b) the number of years of allowable police service a Tier 3 police member must complete before being eligible to retire with

full benefits. Neither benefit is permitted Tier 3 police members under Article 14. This Court should modify Supreme Court's order to make clear that the 1976 Administrative Code should be considered only for the purpose of determining what prior service Tier 3 officers are permitted to credit toward their time needed to meet minimum eligibility requirements.

A. Article 14 does not grant police members an additional monetary benefit for service that is not creditable as allowable police service.

Tier 3 police members may not obtain additional monetary benefits in their pensions for service that is not creditable as police service. The benefits calculations for such members must be made in accordance with RSSL § 505, which makes no provision for such additional benefits. This stands in contrast with Tier 2 police members, who may be entitled to increase their pension benefits by transferring credit for service that is not creditable as allowable police service. Admin. Code § 13-255(3). But Article 14 and decisions from the Court of Appeals make clear that Tier 3 members are limited to the substantive benefits set forth in Article 14. RSSL §§ 500(a), 519(1); *Lynch*, 23 N.Y.3d at 773

(holding that the only substantive benefits available to Tier 3 members are those included in Article 14).

Supreme Court's decision and order contains language that, if read broadly, could contradict that statutory framework. The court held, in part, that "NYCERS members whose membership in NYCERS is terminated by attaining membership in PPF [are] entitled to transfer credits to the PPF in accordance with the restrictions contained in § B3-30.1" (R18). This holding could suggest that 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. Even the PBA does not claim such a right. This Court, thus, should modify the decision 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.

B. Article 14 does not grant police members the ability to retire with full benefits after completing 20 or 25 years of allowable service.

Article 14 requires that Tier 3 police members complete 22 years of credited police service before retiring with full benefits. RSSL § 503(d); *see also* RSSL § 501(17). Tier 2 police members, in contrast, may elect when they are hired to retire after completing either 20 or 25 years of service. Admin. Code § 13-218(d)(1). Permitting Tier 3 members to retire after completing only 20 years of credited service contradicts the plain mandates of Article 14 and is, thus, prohibited. RSSL § 500(a).

Supreme Court's order contains language that, if interpreted in the broadest possible manner, could suggest that Tier 3 members could retire after completing 20 years of credited service:

> The PPF must allow Tier 3 members to transfer service credit pursuant to RSSL section 513(c)(2) and 1976 Admin Code section B3-30.1 for PPF members who previously obtained credit in the NYCERS system, as long as section B3-30.1 requirements are met: Tier 3 PPF members will have "served in the police force for a minimum period of twenty or twenty-five years, or until he has reached the age of fifty-five, according to the minimum period

> or age of retirement elected by such member prior to the certification of his rate of contribution". To this extent only defendant's motion is denied and plaintiffs' cross-motion is granted. (R23)

The portion of the statute Supreme Court quoted refers to a member's date of eligibility for retirement. Admin. Code § B3-30.1 (1976). Thus, Supreme Court's order could be read to suggest that Tier 3 police members are eligible to retire after only 20 years of credited service.

Allowing Tier 3 police members to retire after 20 years of credited service is plainly contrary to the provisions of Article 14 and beyond anything the PBA has requested in this case. RSSL § 503(d); *see also* RSSL § 501(17). This Court should modify Supreme Court's order to make clear that Article 14's retirement eligibility requirements for Tier 3 police members—22 years of credited service—remain the standard, even for those members who seek to transfer prior service credit under RSSL § 513(c)(2).

Neither of the modifications requested in this cross-appeal should be controversial. Again, neither of the benefits that could be read into Supreme Court's order were included in the PBA's

prayer for relief in this matter (R110-12). Both are also inarguably contrary to the unambiguous statutory provisions in Article 14 governing Tier 3 members' pensions. Moreover, the City's cross-appeal is not dependent on its success on any of its other arguments. Even if (contrary to the law) the PBA succeeded in obtaining all of the relief it sought in this case, it would still not be entitled to claim the benefits that Supreme Court's order arguably bestows.

In the end, it is unlikely Supreme Court considered its decision and order to grant those benefits. But leaving the order ambiguous on these counts opens the possibility for mischief down the line. This Court should modify Supreme Court's order to eliminate that possibility.

POINT III

THE 2002 SETTLEMENT AGREEMENT DOES NOT GRANT SUBSTANTIVE BENEFITS TO TIER 3 POLICE OFFICERS

There is no merit to the PBA's argument that the 2002 settlement agreement between the PBA, the City, and the PPF settles the rights of Tier 3 officers in this matter (App. Br. 30-32).

The PBA attempts to exaggerate a single portion of the agreement to cover an issue the agreement plainly did not address.

First, at 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. It is an axiom of contract interpretation that the role of the Court is "to ascertain the intention of the parties at the time they entered into the contract." *AQ Asset Mgmt. LLC v. Levine*, 111 A.D.3d 245, 256 (1st Dep't 2013) (internal quotation marks omitted). 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 (and were thus, necessarily, not part of the litigation). As Supreme Court found, such officers were simply not contemplated as falling within the agreement at the time the agreement was struck (R22).

The PBA's claim that the parties may have contemplated the possibility that one day officers would join a newly created tier misunderstands the inquiry (App. Br. 31). The question is not

what the parties may have considered to be possible future states of the world, but rather who they considered to be covered by their agreement. In 2002—after more than a quarter century of the Legislature extending Tier 2 benefits to police officers by unanimous or near-unanimous votes—there was no reason to think that the City, the PPF, or even the PBA intended this agreement to cover a thus-far nonexistent tier of police pension members whose benefits were governed by a separate body of law.

Second, attempting to apply the agreement to Tier 3 officers would result in a nonsensical application of its terms. The PBA points out that the agreement purports to confer rights to "any person who is a member of the PPF and a member of the uniformed service of the NYPD" who satisfies certain terms (R517). But this Court has warned that "in interpreting any agreement, it is 'important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases.'" *AQ Asset Mgmt. LLC*, 111 A.D.3d at 256 (quoting *South Rd. Assoc., LLC v. International Bus. Machs.*

Corp., 4 N.Y.3d 272, 277 (2005)). Examining the whole document, the PBA's argument falls apart.

The operative section on which the PBA hopes to rely describes how prior service is to be treated (R517-18). It says that the covered services described "shall be deemed 'city service' within the meaning of Administrative Code §§ 13-214(3), 13-246, and 13-247" and that it will be taken into consideration to determine "whether such person has attained the minimum period for service retirement from the NYPD pursuant to the provisions of Administrative Code §§ 13-214(3), 13-246, and 13-247" (R518, 519-20). Further, the credited service will be used for "determining the amount of any retirement allowance computed pursuant to [Administrative Code] section 13-255" (R518, 519-20).

The problem for the PBA's argument is that none of the Administrative Code provisions listed in this section of the agreement—the section on which the PBA hopes to rely (App. Br. 31)—apply to Tier 3 officers. Granting Tier 3 officers the right to have prior service count toward the minimum period for service retirement under the Administrative Code makes no sense

because Tier 3 officers' minimum service requirements are set forth in RSSL § 503(d). Nor does computing the relevant pension allowance "pursuant to" Administrative Code § 13-255 make sense for Tier 3 officers whose pension benefits are calculated exclusively under Article 14. RSSL §§ 501(5), 503(c), (d); § 510(d). Thus, the plain text of the agreement, taken as a whole, makes clear that the parties did not intend the agreement to apply to a potential future class of Tier 3 police officers or to other future tiers that have not yet been created.

Third, the parties' understanding that the agreement did not cover all police members—even those currently in existence—is plain from contemporaneous documentation. In 2005, the Legislature enacted Chapter 498 of the Laws of 2005 to amend two provisions of the Administrative Code to codify the 2002 settlement (R237). The legislation, however, expanded somewhat upon the benefits agreed to in the settlement (R239, 244). Writing in support of the legislation, the PBA wrote that such expansion was necessary because "[n]ot all police officers, however, were able to receive the benefit of these settlements" (R241). The City,

writing in opposition to the legislation, agreed (R244). Thus, both parties to the agreement demonstrated their understanding that the agreement did not apply even to all classes of police officers then in existence.

The PBA never explains its newfound realization that, in fact, the agreement applies to all officers regardless of tier, including those tiers that were not yet operative for police officers at the time the agreement was reached. Such an interpretation is contrary to the parties' clear understanding of their agreement at the time and the plain language of the agreement itself. This Court should affirm Supreme Court's rejection of the PBA's erroneous interpretation.

POINT IV

SUPREME COURT CORRECTLY CONVERTED THIS MATTER TO AN ARTICLE 78 PROCEEDING

While the PBA attempts to frame its complaint as one for declaratory judgment, Supreme Court correctly converted the matter to an Article 78 proceeding (R13-15). CPLR 103(c).

Article 78 proceedings provide the exclusive remedy to challenge whether an administrative determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3); *People v. Liden*, 19 N.Y.3d 271, 276 (2012). Thus, where a party challenges "the performance by administrative agencies of legislatively imposed duties," Article 78 applies. *Arietta v. State Bd. of Equalization & Assessment*, 56 N.Y.2d 356, 362 (1982); *accord N.Y.C. Health & Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 204 (1994); *459 W. 43rd St. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 152 A.D.2d 511, 512-13 (1st Dep't 1989). That is exactly what the PBA alleges here when it claims that the PPF misapplied the law governing its members' ability to purchase service credit for non-uniformed service.

Indeed, courts have repeatedly considered proceedings under Article 78 where, as here, the PBA claims that the PPF has misapplied or misinterpreted the relevant pension statutes. The Court of Appeals considered the matter under Article 78 when the PBA tried to claim for Tier 3 officers a benefit granting increased

take home pay to Tier 1 and Tier 2 officers. *Lynch*, 23 N.Y.3d 757. Likewise, this Court considered the matter under Article 78 when the PBA tried to claim for Tier 3 officers a benefit permitting Tier 1 and Tier 2 officers to buy back service credit for time spent on unpaid childcare leave. *Lynch*, 162 A.D.3d 589. In both of those cases, as here, the PBA claimed (unsuccessfully) that the PPF was engaging in a practice of incorrectly interpreting the pension statutes and improperly denying its members benefits. Just as those matters were considered under Article 78, so too should this matter.

There is no merit to the PBA's assertion that Article 78 does not apply because the PBA challenges a continuing policy or practice (App. Br. 33-34). To start, the PBA makes no attempt to explain why this matter should be considered any differently than its prior attempts to expand the benefits available to Tier 3 officers. In all three proceedings, the PBA challenged the PPF's interpretation of the governing pension statutes and its continuing application to police members. While the statutes and

benefits involved may have changed, the underlying nature of the proceedings have not.

Nor do the cases the PBA cites provide support for its assertion. In *Zuckerman v. Board of Education*, 44 N.Y.2d 336, 341 (1978), the plaintiffs challenged not simply an interpretation of a statute, as here, but rather "a series of illegal activities calculated to circumvent" statutory requirements. Similarly, the plaintiffs in *Allen v. Blum*, 58 N.Y.2d 954 (1983), challenged a series of actions rather than a single statutory interpretation. There, the plaintiffs alleged that "the continuing policy of lack of investigation by the Agency prior to the suspension or revocation of home relief is unlawful." *Allen v. Blum*, 85 A.D.2d 228, 230 (1st Dep't 1982).[5]

In contrast to the cases it cites, the PBA here is challenging a single determination—the interpretation of the applicable pension statutes—that it claims was made in error (R89). While

[5] The PBA also cites *Dorst v. Pataki*, 167 Misc. 2d 329 (Sup. Ct. 1995), but that case says even less about the situation here. There, an Article 78 proceeding was found to be inappropriate because the challenge was to the constitutionality of the executive order at issue. *Id.* at 333. The PBA has not similarly brought a constitutional challenge here.

that determination may have an effect on many members over many years, the thrust of the PBA's claim is that the PPF committed an error of law. Its challenge is thus properly considered under Article 78.

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
August 21, 2020

Respectfully submitted,

JAMES E. JOHNSON
Corporation Counsel
of the City of New York

By: 
JOHN MOORE
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
212-356-0840
jomoore@law.nyc.gov

DEVIN SLACK
JOHN MOORE
of Counsel

PRINTING SPECIFICATIONS STATEMENT

This brief was prepared on a computer, using Century Schoolbook 14 pt. for the body (double-spaced) and Century Schoolbook 12 pt. for the footnotes (single-spaced). According to Microsoft Word 2010, the portions of the brief that must be included in a word count contain 10,021 words.