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New York County Clerk's Index No. 157286/15

Court of Appeals

STATE OF NEW YORK

PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May in the Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs-Appellants,

against

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND and THE BOARD OF TRUSTEES of the New York City Police Pension Fund,

Defendants-Respondents.

BRIEF FOR PLAINTIFFS-APPELLANTS

FRIEDMAN KAPLAN SEILER
& ADELMAN, LLP
7 Times Square, 28th Floor
New York, New York 10036
212-833-1100
rsmith@fklaw.com

and

RIVKIN RADLER, LLP
926 RXR Plaza
Uniondale, New York 11556
516-357-3000
henry.mascia@rivkin.com

Attorneys for Plaintiffs-Appellants

Of Counsel:
Robert S. Smith
Cheryl F. Korman
Henry Mascia

Date Completed: April 22, 2019

COURT OF APPEALS
STATE OF NEW YORK

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PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs-Movants,

-against-

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND, and THE BOARD OF TRUSTEES of the New York City Police Pension Fund,

Defendants-Respondents.

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STATEMENT PURSUANT TO COURT OF APPEALS RULE 500.13(a)

New York County
Index No. 157286/2015

Plaintiffs, PATRICK LYNCH, as President of the POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC. f/k/a the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC. f/k/a the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, as and for their statement pursuant to 22 NYCRR § 500.13(a), hereby state as follows:

As of the date of this brief, there is no pending related litigation.

Dated: New York, New York
Dated: April 22, 2019

COURT OF APPEALS
STATE OF NEW YORK

----------X

PATRICK LYNCH, as President of the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs-Movants,

-against-

THE CITY OF NEW YORK, the NEW YORK CITY POLICE PENSION FUND, and THE BOARD OF TRUSTEES of the New York City Police Pension Fund,

Defendants-Respondents.

----------X

STATEMENT PURSUANT TO COURT OF APPEALS RULE 500.1(f)

New York County
Index No. 157286/2015

Plaintiffs, PATRICK LYNCH, as President of the POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC. f/k/a the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, on behalf of the Police Officers Who Have Been or May In The Future Be Aggrieved, and the POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC. f/k/a the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, as and for their statement pursuant to 22 NYCRR § 500.1(f), hereby state as follows:

Police Benevolent Association of the City of New York, Inc. f/k/a the Patrolmen's Benevolent Association of the City of New York certifies that Police Benevolent Association of the City of New York, Inc. f/k/a the Patrolmen's Benevolent Association of the City of New York does not have any parents, subsidiaries or affiliates.

Dated: New York, New York
April 22, 2019

Respectfully submitted,
FRIEDMAN KAPLAN SEILER & ADELMAN LLP

By: _____
Robert S. Smith, Esq.

7 Times Square
New York, New York 10036-6516
Telephone: (212) 833-1100
rsmith@fklaw.com

RIVKIN RADLER LLP
Cheryl F. Korman, Esq.
Henry Mascia, Esq.
926 RXR Plaza
Uniondale, New York 11556-0926
Telephone: (516) 357-3000
cheryl.korman@rivkin.com
henry.mascia@rivkin.com

MICHAEL T. MURRAY
Office of the General Counsel of the Police Benevolent Association of the City of New York, Inc.
125 Broad Street
New York, New York 10004

Of Counsel:
Gaurav I. Shah, Esq.
David W. Morris, Esq.
Christopher T. Luise, Esq.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT

In 2000, New York State enacted a law (the "Child Care Credit Law") permitting "any member" of the New York City Police Pension Fund (the "NYCPPF") to purchase pension credit for time that the member spent on child care leave. As the Appellate Division noted, the law "on its face does not distinguish between tiers of membership", and its legislative history "does not reflect any intent to distinguish between tiers". (328)[1]

Nevertheless, the Appellate Division has interpreted "any member" to mean "any member except those in Tier 3" of the NYCPPF. This interpretation is not supportable, and will deprive the majority of the City's police force of a benefit the Legislature provided them in unambiguous language. The order of the Appellate Division should be reversed.

[1] Numbers in parentheses refer to the pages of the record on appeal.

QUESTION PRESENTED

Does the Child Care Credit Law apply to all members of the NYCPPF, including Tier 3 members? The Appellate Division answered no.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

Plaintiff-appellant Patrick Lynch is a New York City police officer and the President of plaintiff-appellant Patrolmen's Benevolent Association of the City of New York, Inc. ("the PBA").[2] The PBA is the designated collective bargaining agent for New York City police officers.

Defendant-respondent City of New York ("the City") is a municipal corporation organized under the laws of the State of New York. Defendant-respondent NYCPPF was incorporated in 1940 under the New York City Administrative Code (the "Code") and the City Charter for the purpose of assisting active and retired members of the New York City Police Department and their beneficiaries with pension-related matters.

The NYCPPF is administered by defendant-respondent Board of Trustees of the NYCPPF ("Board of Trustees"), pursuant to Title 13 of the Code (§ 13-200 *et seq*). The Board of Trustees consists of police union representatives and city

[2] In January 2019, the PBA changed its name to Police Benevolent Association of the City of New York, Inc.

government officials, and it governs and administers the NYCPPF in accordance with the powers, duties, and obligations set forth and established in the Code. This brief will refer to defendants-respondents collectively as "the City."

B. The New York State Public Retirement System

The public employee pension system in New York State consists of eight discrete funds or systems, of which the NYCPPF is one. As relevant here, the rights of New York City police officers and other City public employees in each fund of which they are members are governed by two complementary legislative regimes: the Code, which contains provisions specific to each fund, and the Retirement and Social Security Law ("RSSL"), which, with certain exceptions, applies generally to members of the various pension funds. Compare New York City Administrative Code §§ 13-201 to 13-267.1 (NYCPPF) with RSSL § 440(a). Title 13, subchapter 2 of the Code applies to the NYCPPF, and the Legislature has modified New York City police officers' rights in that fund by amending that subchapter, as it did in the case of the Child Care Credit Law. See Code § 13-218 (h);[3] L 2000, ch 594.

The tiers relevant to this case are known as Tiers 2 and 3. Tier 2 was created by Article 11 of the RSSL, enacted in 1973. That article is applicable to "all members who join or rejoin a public retirement system of the state or of a

[3] Section 13-218(h) of the Code contains two subdivisions h. The subdivision h at issue here is the second.

municipality thereof… on or after [July 1, 1973], but prior to [July 1, 1976]." RSSL § 440(a); see generally, Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO v Regan, 71 NY2d 653 (1988). Tier 3 was created by Article 14 of the RSSL, enacted in 1976. It includes (subject to exceptions) "all members who join or rejoin a public retirement system of the state on or after [July 1, 1976]." RSSL § 500(a).

For New York City police officers, the year that marks the boundary between Tiers 2 and 3 is 2009, not 1976 – i.e., officers hired between 1973 and June 30, 2009, are Tier 2 members. See RSSL § 440(c). That is because police officers were initially carved out from Tier 3 and newly-hired officers continued to be placed in Tier 2. See RSSL § 500(c); see Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, 71 NY2d at 657. From the 1980s until June 2009, the Legislature re-authorized the application of Tier 2 for New York City police officers by enacting extensions every two years. See L 1983, ch 411, § 1; see also Mem No. 19-81 of Permanent Commn on Pub Empl Pension & Retirement Sys, Bill Jacket for L 1983, ch 411 at 14-15 (explaining history of and rationale for Tier 2 status for police officers and firefighters). The carve-out ended in 2009, when Governor Paterson vetoed a bill that would have extended Tier 2 membership for

police officers for two more years. See Governor Veto No. 5 of the Laws of 2009. As a result, officers hired after July 1, 2009, are placed in Tier 3 of the NYCPPF.[4]

C. The Child Care Credit Law

In 2000, the Legislature passed the Child Care Credit Law, a law specific to New York City police officers that allowed them to buy back service credit for unpaid time spent on child care leave. Code § 13-218 (h); L 2000, ch 594. The law was part of a series of pension initiatives aimed at assisting working parents. The Legislature wanted, as one legislator put it, to avoid putting pressure on New York City police officers who became parents to "rush back to the workplace without properly caring for their children". Bill Jacket, L 1999, ch 646 at 9 (explaining L 2000, ch 552). This Child Care Credit Law furthered this goal without putting a major burden on the City's treasury. The Division of the Budget, though it recommended that Governor Pataki veto the bill, estimated its annual cost to the City at $200,000. Bill Jacket, L 2000, ch 594 at 5. The Governor rejected the Division's recommendation and signed the bill.

[4] City police officers hired on or after July 1, 2009, but before April 1, 2012, are called simply Tier 3 members. A 2012 amendment caused those hired on or after April 1, 2012, to be deemed Tier 3 revised members. See RSSL § 501(26). Those hired on or after April 1, 2017, and those Tier 3 or Tier 3 revised members who elected to opt-in on or before August 10, 2017, are Tier 3 enhanced members. See RSSL § 501(28). For ease of reference, all City police officers hired on or after July 1, 2009, are referred in this brief as being in Tier 3. The differences among Tier 3, Tier 3 revised, and Tier 3 enhanced members are not relevant to this appeal.

The Child Care Credit Law allows "any member" of the NYCPPF to buy back credit for the time that he or she "is absent without pay for child care leave of absence" as long as he or she "contributes to the pension fund an amount which such member would have contributed during the period of such child care leave, together with interest thereon." Code § 13-218(h). The statute provides that "[i]n the event there is a conflict between the provisions of this subdivision and the provisions of any other law or code to the contrary, the provisions of this subdivision shall govern." Id.

The reference to "any member" in the Child Care Credit Law is not limited by any reference to the member's tier, and nothing in the legislative history suggests such a limitation. The absence of a "Tier 3 exception" could hardly have been an oversight. While there were as yet no New York City police officers in Tier 3 when the Child Care Credit Law was passed, the future existence of Tier 3 police officers was completely foreseeable. As mentioned above, legislation passed in 1976 had said that "all members who join or rejoin a public retirement system of the state on or after" July 1, 1976 would be Tier 3 employees. The application of that legislation to police officers had been staved off by temporary carve-out legislation and by a series of enactments extending the carve-out two years at a time. The passage of the extensions had met significant opposition and had never been certain to occur. See, e.g., Letter, dated May 22, 1995, from

Executive Director of New York State Conference of Mayors and Municipal Officials, Bill Jacket L 1995, ch 125 at 19.

In 1995, an extension was signed only five days before the officers' Tier 2 status expired. See Bill Jacket L 1995, ch 125 at 19. In 1999, the year before the Child Care Credit Law was passed, the New York State Comptroller specifically called to the Legislature's attention the temporary nature of police officers' Tier 2 status: "previous bills which would have made the Tier Two membership status for policemen and firefighters permanent have not been enacted". See Comptroller's Memo, Bill Jacket to L 1999, ch 144 at 4. When the Child Care Credit Law was signed into law on December 8, 2000, the then-current extension of police officers' placement in Tier 2 had less than seven months to run. Thus, the Legislature was well aware, when it made the Child Care Credit Law applicable to "any member" of the NYCPPF, that some such members might soon be in Tier 3.

D. The City's Application Of The Child Care Credit Law

When, beginning July 1, 2009, Tier 3 did begin to include New York City police officers, the City refused to honor the plain meaning of the words "any member". Officers hired on or after July 1, 2009 who have sought to purchase service credit have had their applications denied (195), and other officers have been told not to submit applications since the benefit is not available to them.

Similarly situated officers will be similarly aggrieved in the future when they seek to purchase service credit under the Child Care Credit Law.

E. Proceedings in Supreme Court

The PBA brought this action for a declaration that the Child Care Credit Law applies to all New York City police officers, including those hired after July 1, 2009. (32-45) On cross-motions for summary judgment, Supreme Court (Chan, J.), after converting the action to an Article 78 proceeding, granted summary judgment for plaintiffs. (8-20) The Court held that the Child Care Credit Law "plainly and unambiguously states that it applies to 'any member' and … does not limit its application to Tier 2 police officers only." (15-16) The Court added that the "legislative history supports the plain statutory text". (16)

Supreme Court went on to reject several arguments made by the City. Discussing the City's argument "that Tier 3 police officers are covered exclusively by Article 14 of the RSSL", the Court pointed out that an essentially identical argument could be made about Article 11, which is applicable to Tier 2 officers. Thus, the City's reasoning would lead to the conclusion that the Child Care Credit Law does not apply to Tier 2 officers, "which defendants admit is not the case". (16-17) The Court also observed that the City had identified no conflict between the Child Care Credit Law and RSSL Article 14. (17) It rejected the City's reliance on the legislative history of RSSL § 513(h), a statute enacted subsequent

to the Child Care Credit Law relating to the benefits available to corrections officers (17-18), and distinguished Kaslow v. City of New York, 23 NY3d 78 (2014), on which the City had relied, on the ground that that case involved a "direct conflict" between Code and RSSL provisions. (18-19)

F. The Appellate Division Decision

The Appellate Division reversed, holding that "tier 3 police officers are not entitled to service credit for unpaid child care leave". (328) The Court recognized that the Child Care Credit Law "does not distinguish between tiers of membership" and also that "[t]he legislative history of [the Child Care Credit Law] does not reflect any intent" to draw such a distinction. Nevertheless, the Court found the distinction supported by a "review of the broader statutory scheme and legislative history". (328; citation omitted).

The Appellate Division offered three justifications for its conclusion. First, the court found a "conflict" between the Child Care Credit Law and Article 14 of the RSSL, because the Child Care Credit Law applies to "any member", and "article 14 contains no provision for service credit for unpaid child care leave for Tier 3 officers." According to the Court, "[i]n the face of this conflict between the two, article 14 governs." The Court relied on a sentence in the RSSL saying that its provisions would govern in the event of a conflict "between the provisions of this article and the provisions of any other law" (329, quoting RSSL § 500(a)), but

did not mention that the later-enacted Child Care Credit Law contains a similar provision.

Second, the Appellate Division, citing laws passed in 2004 and 2005 that extended child care credits to correction officers, concluded that a law permitting a Tier 3 member to purchase service credit could only be accomplished through an amendment to Article 14 of the RSSL, specifically RSSL § 513. The Court said that this was so because "article 14, which governs tier 3 employees, contains definitions of the terms 'credited service' and 'creditable service,' and expressly defines those terms by reference to [RSSL] § 513", while article 11 "contains a corresponding provision ('Credit for Service') for tier 2 members, but it defines only a few terms, and none of them are related to service credit." (330) (citations omitted). As we explain in the Argument section of this brief, the Court was simply mistaken about this. Article 11 and article 14 define "Creditable service" in the same way. See pp. 22-25 below.

Third, the Appellate Division relied on the legislative history of a third statute relating to child care credit for corrections officers, passed in 2012 – more than a decade after the Child Care Credit Law. The 2012 statute made Tier 3 correction officers ineligible to purchase service credit for time spent on child care leave. The sponsor's memorandum for the 2012 bill said that it would "equate [tier 3 correction officers'] benefits with tier 3 police/fire benefits." (331, quoting the

Bill Jacket for L 2012, ch 18 at 10 and 18) We argue below that the Appellate Division erred in allowing the legislative history of a later enactment to negate the Child Care Credit Law's plain text. See pp. 26-31 below.

ARGUMENT

POINT I

THE CHILD CARE CREDIT LAW APPLIES TO ALL MEMBERS OF THE NYCPPF

Under the Child Care Credit Law, all New York City police officers can purchase service credit for time spent on child care leave, irrespective of their tier membership. The Child Care Credit Law's text, history and purpose demonstrate that the Legislature intended to provide a tier-neutral benefit to all members of the NYCPPF, including Tier 3 members.

A. The Text of the Statute

The Child Care Credit Law, Code § 13-218(h), says that "any member who is absent without pay for child care leave of absence" shall be eligible for a child care credit (emphasis added). The term "any member" is not ambiguous. The applicable Code provision defines "member" as "any person included in the membership of the pension fund as provided in section 13-215." Code § 13-214 (4). Membership in the pension fund, under Section 13-215, includes "all persons in city service … after the time when this section shall take effect.…" Code § 13-215(1). The term "city-service" means "service in the police force in the department." Code § 13-214 (3).

When interpreting a statute, this Court's primary consideration "is to ascertain and give effect to the intention of the Legislature." Riley v County of

Broome, 95 NY2d 455, 463 (2000). To that end, "[t]he statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning." Matter of Daimler Chrysler Corp. v Spitzer, 7 NY3d 653, 660 (2006). The plain text of Section 13-218(h) conclusively establishes the Legislature's intent to afford the benefits of the Child Care Credit Law to all present and future members of the NYCPPF. There is simply no basis in the statute for excluding those who join after July 1, 2009. The Court need look no further than the text – but if it does so, it will find that the purpose and legislative history of the statute confirm its plain meaning.

B. The Statutory Purpose

A plain reading of the Child Care Credit Law will further its purpose. That purpose is to assist working parents by permitting them to purchase retirement credit for time spent on child care leave – a purpose that applies to all "members" of the NYCPPF, regardless of their membership tier. See generally, Budget Report on Bills, Bill Jacket for L 2000, ch 594 at 4. There is nothing unique to Tier 3 police officers to suggest that they are not facing the same challenges the Legislature sought to address. Indeed, younger police officers entering the force after July 1, 2009 are at least as likely to become parents as officers entering before that date.

"When faced with the application of a remedial statute," this Court "must give it liberal construction to carry out the reform intended and to spread its beneficial results as widely as possible." Rizzo v New York State Div. of Hous. & Cmty. Renewal, 6 NY3d 104, 114 (2005) (citing Post v 120 E. End Ave. Corp., 62 NY2d 19, 24 [1984]); see also Polkabla v Comm'n for Blind & Visually Handicapped, 183 AD2d 575, 577 (1st Dep't 1992) ("a remedial statute is to be liberally construed"). The "liberal construction" that advances this statute's "remedial purpose" is one that reads the words "any member" to mean what they say.

C. The Legislative History

The Court need not consider the legislative history of the Child Care Credit Law or any other provision, because the statutory text is clear and unambiguous, and the text furthers the statutory purpose. As this Court has often held, "if the language of a statute is plain and unambiguous, there is neither need nor warrant to look elsewhere for its meaning." Roosevelt Raceway, Inc. v Monaghan, 9 NY2d 293, 304-05 (1961) (citing Meltzer v Koenigsberg, 302 NY 523, 525 [1951]; Town of Putnam Valley v Slutzky, 283 NY 334, 343 [1940]; McCluskey v Cromwell, 11 NY 593, 601-602 [1854]); see also Sega v State of New York, 60 NY2d 183, 191 (1983). But the legislative history confirms that that the Legislature intended the Child Care Credit Law to survive tier changes and apply to all members.

The materials in the Bill Jacket commenting on the legislation that became the Care Credit Law refer - as does the statute itself - to the people the bill intended to benefit in terms that imply no limitation as to tier. See Bill Jacket L 2000 ch 594 at 4 ("New York City police officers"), 6 ("members of the police pension fund"), 7 ("police officers…forced to take leaves of absence after the birth of a child or an adoption"), 10 ("members of the police pension system"), 11 ("members of the police pension fund"), 12 ("men and women who have interrupted their careers to raise their children"), 13 (same). And while it is true that in 2000 no police officers had been placed in Tier 3, the possibility that that would happen was one of which the Legislature and those interested in the legislation were very much aware. As we explained above, the law that generally assigned newly hired members of the pension system to Tier 3 had been in force since 1976, and its applicability to the New York City police was suspended, not without controversy, only by repeated two-year extensions of a carve-out. When the Child Care Credit Act became law, the end of the then-current extension was only seven months away.

It is unreasonable to suppose that the legislators considering the bill did not anticipate that Tier 3 members could be among its beneficiaries. But absolutely nothing in the legislative history supports the existence of a "Tier 3 exception". As the Appellate Division acknowledged, "[t]he legislative history of [this statute]

does not reflect any intent to distinguish between the tiers in the pension system." (328)

D. The Statutory Scheme

As explained above, the rights that members have in the NYCPPF are governed by two complementary statutory regimes: Title 13, Subchapter 2 of the Code, which is specific to New York City police officers, and the RSSL, which establishes the "tier" of all public employees based upon the date that the employee began public service. Compare Code § 13-218(h) with RSSL § 440(a); and RSSL § 500(a). The RSSL, unlike the Code, contains separate subdivision applicable to Tier 2 employees (Article 11) and Tier 3 employees (Article 14).

In this context, the Legislature's decision to amend the Code to create the Child Care Credit Law reflects an understanding that tiers were irrelevant – that the law was intended to apply to all members of the NYCPPF, regardless of their tier. If the Legislature had intended to exclude Tier 3 members, it could have placed the Child Care Credit Law in Article 11 of the RSSL, which does not apply to Tier 3 members. But the Legislature did not do that. It amended Title 13, subchapter 2 of the Code, which applies to all police officers, and used the all-encompassing phrase "any member".

The placement of the Child Care Credit Law in the statutory scheme confirms what the text, purpose and legislative history of the statute also show: the

law was intended to cover all members, including Tier 3 members, of the NYCPPF.

POINT II

THE REASONS GIVEN BY THE APPELLATE DIVISION FOR ITS DECISION ARE FLAWED

The Appellate Division relied on three grounds for finding a "Tier 3 exception" in the Child Care Credit Law: an asserted conflict between the Child Care Credit Law and RSSL Article 14; an asserted difference between definitional provisions of RSSL Articles 11 (governing Tier 2 employees) and 14 (governing Tier 3 employees); and the legislative history of a 2012 statute relating to corrections officers. All three grounds lack merit.

A. The Asserted Conflict between Article 14 and the Child Care Credit Law

The Appellate Division held that the Child Care Credit Law conflicted with Article 14 of the RSSL because the Child Care Credit Law applies to "any member", while Article 14 "contains no provision for service credit for unpaid child care leave for tier 3 officers." According to the court, "[i]n the face of this conflict between the two, article 14 governs." There are several flaws in the Appellate Division's reasoning.

1. The Asserted Conflict Does Not Exist

First, there is simply no contradiction between the two statutes. The Child Care Credit Law allows members to purchase service credit by contributing an amount equal to what the member would have contributed if he or she were not on child care leave, plus interest. Article 14 is silent on whether members can purchase this form of service credit. Silence is not in "conflict" with the creation of a benefit. The Appellate Division's decision to the contrary effectively repeals the Child Care Credit Law by implication, and it is well settled that repeals of statutes by implication are not favored. See Consolidated Edison Co. of N.Y. v Department of Environmental Conservation, 71 NY2d 186, 195 (1988); Alweis v. Evans, 69 NY2d 199, 204 (1987); see also New York Statutes Law § 391.

2. If There Were a Conflict, the More Specific and Later-Enacted Child Care Credit Law Would Prevail

Article 14 of the RSSL was enacted in 1976. The Child Care Credit Law, providing a specific benefit to all members of the NYCPPF, was enacted in 2000. Even if Article 14 said – which it does not – that Tier 3 members shall have no benefits other than the ones mentioned in Article 14, Article 14 would yield to the Child Care Credit Law, not the other way around.

It is a "well established rule of statutory construction … that a prior general statute yields to a later specific or special statute." Dutchess Cty. Dep't of Soc.

Servs. Ex rel. Day v Day, 96 NY2d 149, 153 (2001) (internal quotation marks and citations omitted); see People v Zephrin, 14 NY3d 296, 301 (2010); Matter of Town of Riverhead v New York State Bd. of Real Prop. Servs., 5 NY3d 36, 42 n 8 (2005); Erie County Water Auth. v Kramer, 4 AD2d 545, 550 (4th Dept 1957), aff'd, 5 NY2d 954 (1959); Wager v Pelham Union Free Sch. Dist., 108 AD3d 84, 89 (2d Dept 2013); Horowitz v Incorporated Village of Roslyn, 144 AD2d 639, 640-41 (2d Dept 1988), appeal dismissed, 74 NY2d 835 (1989) ("[A] special law enacted subsequent to an apparently inconsistent general law will, in general, be viewed as 'the creation of an exception to the general rule' and will be given effect") (internal citations and quotations omitted); Matter of Level 3 Communications, LLC v Clinton County, 144 AD3d 115, 119 (3d Dept 2016), lv denied, 29 NY3d 918 (2017).

The Appellate Division did not cite these authorities, and offered no valid reason why the general provisions of Article 14 – even on the incorrect assumption that they could be read as excluding any benefits not mentioned in that Article – should prevail over the specific provisions of the later-enacted statute. The Appellate Division quoted RSSL § 500(a), which says that "[i]n the event that there is a conflict between the provisions of [Article 14] and the provisions of any other law or code, the provisions of this article shall govern." (329) But the Appellate Division apparently overlooked the very similar provision of the Child

Care Credit Law, the last sentence of which says: "In the event there is a conflict between the provisions of [the Child Care Credit Law] and the provisions of any other law or code to the contrary, the provisions of this subdivision shall govern." At worst, the two provisions create a standoff: they do not change the conclusion that the later and more specific statute must prevail.

3. The Conflict, if it Existed, Would Apply Equally to Tier 2 and Tier 3 Officers

As Supreme Court recognized, the City's "conflict" argument, which the Appellate Division adopted, proves too much. If mere silence created a conflict, the Child Care Credit Law would not apply to the members of Tier 2, because RSSL Article 11, which governs Tier 2, is no less silent than Article 14 as to whether members may purchase service credit for time spent on child care leave. As Justice Chan explained, after quoting the "this article shall govern" sentence from Article 14, § 500(a):

> Article 11 § 440(a) contains an analogous provision, with the identical last sentence. If, as defendants urge, RSSL § 500(a) bars the application of [the Child Care Credit Law] to Tier 3 police officers, then, similarly, RSSL § 440(a) would bar it as to Tier 2 police officers, which defendants admit is not the case.

(17)

The Appellate Division's opinion does not offer any answer to this part of Supreme Court's reasoning. There is, we submit, no good answer.

B. The Asserted Distinction Between Article 11 and Article 14

The second ground for the Appellate Division's decision was a distinction that the Appellate Division mistakenly found to exist between RSSL Article 11 (governing Tier 2) and Article 14 (governing Tier 3).

This part of the Appellate Division's analysis begins with two laws enacted in 2004 and 2005, applicable to correction officers, not police officers. In 2004, the Legislature enacted an analogue to the Child Care Credit Law providing a similar opportunity to purchase credit for child care leave to "any correction member." Code § 1307(k), L. 2004, ch. 581. In 2005, as the Appellate Division opinion notes, "the legislature amended RSSL § 513 expressly to make that benefit available to tier 3 correction officers, whom it had had intended to include in the 2004 legislation but who were 'accidentally omitted from the original bill'." (330, quoting the Bill Jacket for L 2005, ch 477 at 3)

The Appellate Division struggled to explain why the 2005 Legislature thought there was an omission that made new legislation necessary, and came up with a completely mistaken answer. The Appellate Division said:

> The RSSL had to be amended to accomplish the purpose [of including Tier 3 correction officers] because article 14, which governs tier 3 employees, contains definitions of the terms "credited service" and "creditable service," and expressly defines those terms by reference to RSSL § 513 ("Credit for Service") (see RSSL § 501[3], [4]). Thus, a service credit not included in RSSL § 513 would

> not be available to tier 3 members. (In contrast, article 11 contains a corresponding provision ["Credit for Service"] for tier 2 members [see RSSL § 446 (article 11)], but it defines only a few terms, and none of them are related to service credit.)

(330)

The Appellate Division was incorrect. A review of the two RSSL articles shows that the Legislature used the same definition of "creditable service" in Articles 11 and 14 – a definition that does not affect this case.

Article 11, § 446 and Article 14, § 513 have the same basic structure. Both are entitled "Credit for Service." In both sections, subdivision "a" defines "Part-time service", subdivision "b" defines "Previous service", subdivision "c" defines "Creditable service", subdivision "d" authorizes administrative interpretations and subsequent subdivisions create various exceptions. Subdivision (c) of section 446 and section 513(c)(1) contain substantively identical definitions of "Creditable service." Section 446(c) provides:

> "A member of a retirement system who is subject to the provisions of this article shall not be eligible to obtain retirement credit for service with a public employer other than the state of New York, a political subdivision thereof, a public benefit corporation, or a participating employer; provided, however, military service with the federal government may be credited pursuant to section two hundred forty-three of the military law up to a maximum of four years; and further provided that retirement credit may be granted for service with an agency located within the state of New York currently

> specified in law as providing retirement credit for service."

Section 513(c)(1) (omitting a subpart not relevant for this discussion) provides:

> "A member shall not be eligible to obtain credit for service with a public employer other than the state of New York, a political subdivision thereof, a public benefit corporation, or a participating employer; provided, however, military service with the federal government may be credited pursuant to section two hundred forty-three of the military law up to a maximum of four years; and further provided that retirement credit may be granted for service with an agency located within the state of New York currently specified in the law as providing retirement credit for service."

These definitions are identical in every meaningful way, and neither has anything to do with this case. Neither prohibits a member from purchasing service credit for time spent on child care leave.

It is true that Article 14 contains a more extensive section entitled "Definitions" than Article 11, a circumstance that apparently misled the Appellate Division. Compare RSSL §§ 501 and 450. But Article 14's definition section adds nothing that is relevant here. Section 501(4) provides: "'Creditable service' is service which qualifies to be counted as credited service pursuant to [RSSL § 513]." This simple reference back to Section 513 (quoted above) does not create any substantive distinction between the two articles.

Indeed, the creditable service definitions in the RSSL have little relevance to the Child Care Credit Law. Those provisions concern what forms of "service"

with an employer will be creditable in a retirement system. However, the purchase of credit at issue here is not a benefit that relates to a member being granted credit for service performed. Rather, it requires the pension fund to grant a member "service credit" for time that the member is out of service on child care leave, and thus operates as an explicit and intentional legislative carveout from the provisions of the Code and the RSSL which otherwise prohibit a pension fund from granting retirement credit for a member's time off of an employer's payroll. See RSSL § 446(a)(2) ("Except for retirement credit for military service as specified in subdivision d of this section, a member shall not receive retirement credit for any day that he is not on the payroll of the state, a political subdivision thereof, or a participating employer."); Code § 13-218 ("Time during which a member was absent on leave without pay shall not be allowed in computing service as a member except as to time subsequent to approval of such allowance for retirement purposes granted by the commissioner and approved by such board."); RSSL 513(a)(2): ("Except for retirement credit for military service as specified in subdivision c of this section, a member shall not receive retirement credit for any day that he is not on the payroll of the state, a political subdivision thereof, or a participating employer"). Given the legislature's unambiguous command that the provisions of the Child Care Credit shall govern where there is a conflict with "the provisions of any other law or code to the contrary," there is no basis for the Child Care Credit

Law to prevail against RSSL § 446(a)(2) to allow service credit for time off of the payroll for Tier 2 members, yet be defeated by identical language in RSSL 513(a)(2) so that the same credit is not allowed for Tier 3 members.

Thus, the Appellate Division's explanation for the need that the 2005 Legislature perceived for the amendment of RSSL § 513 was wrong. The correct explanation is hard to discern, but that does not affect the outcome of this case. The legislative history of the 2005 amendment (L 2005, ch 477) gives no clue as to why its authors believed Tier 3 corrections officers were "omitted" from the law passed in 2004, so the answer can only be speculative. A more likely explanation than that offered by the Appellate Division is that "correction member", the term used in the 2004 enactment, has a different, and more limited, statutory definition than "member" (referring to members of the NYCPPF), the term used in the Child Care Credit Law. Compare Code § 13-101(40) (defining "correction member" as only those members of the uniformed correction force who had elected optional retirement under Code § 13-155) with Code § 13-214(4) (definition of "member" for NYCPPF purposes as "any person included in the membership of the pension fund"). The 2005 Legislature may have read the "correction member" definition as excluding Tier 3 correction officers, for whom an optional retirement election may be made under RSSL § 504-a, rather than Code § 13-155. An alternative speculation is that the City, after passage of the 2004 legislation, may have taken

the same erroneous position as to Tier 3 correction officers that it took as to Tier 3 police officers in 2009 and thereafter – that Tier 3 officers are not entitled to purchase credit for time spent caring for children – and the Legislature may have solved the problem simply by passing the amendment the City wrongly said was necessary.

But neither of these speculative explanations for the 2005 enactment relating to corrections officers, nor any other explanation, is relevant here, because no attempt to read the mind of the 2005 Legislature can alter the plain language used by the Legislature when it passed the Child Care Credit Law in 2000, nor the equally clear purpose and legislative history of the 2000 enactment. The search for the true significance of the 2005 amendment is essentially a wild goose chase.

C. The Legislative History of the 2012 Enactment

Discounting the legislative history of the Child Care Credit Law, which it acknowledged did not support the result it reached (328), the Appellate Division relied on the legislative history of a statute enacted 12 years later. This is, we submit, an incorrect method of statutory interpretation. The views of the authors of a 2012 statute do not control, and shed no significant light on, the meaning of a law passed in 2000 – particularly because the views expressed in 2012 may well have been the result of the position the City has taken in this lawsuit.

The 2012 statute amended RSSL § 513(h), the counterpart of the Child Care Credit Law applicable to correction officers, to say that its provisions "shall not apply to" Tier 3 correction officers who are "revised plan" members (those hired after April 1, 2012) – thus writing into the correction officer legislation words that are conspicuously absent from the Child Care Credit Law applicable to police officers. See L 2012, ch 18. But the sponsor's memorandum for the 2012 legislation says that it "would equate [Tier 3 revised plan correction officers'] benefits with Tier 3 police/fire benefits". Bill Jacket for L 2012, ch 18 at 10. In other words, the sponsor's memorandum makes the puzzling assertion that the 2012 law will "equate" correction and police officers' benefits by putting into the text of the statute applicable to correction officers an exception that is absent from the text of the law applicable to police officers. The sponsor's memorandum squarely contradicts the statutory text.

The explanation for the contradiction is probably to be found in the very dispute that gave rise to this litigation. As mentioned above, after Governor Paterson's veto in 2009 of a bill to extend the police officers' carve-out from Tier 3 caused newly hired police officers to be placed in that tier, the City asserted that the newly-hired officers could not benefit from the Child Care Credit Law. The City found an imaginary "Tier 3 exception" in the Child Care Credit Law, causing plaintiffs-appellants to bring this lawsuit. It seems that the sponsors of the 2012

legislation took the City's word for it that a Tier 3 exception to the Child Care Credit Law existed, and thus that a similar exception for correction officers would "equate" the two laws.

In short, the City's reliance on the 2012 legislative history is a bootstrap argument – an attempt to make its erroneous argument valid by citing legislative history that was generated by that very argument. The City's attempt should fail, for several reasons.

First, nothing in any legislative history – much less in legislative history of a different law passed 12 years after the fact – can change the unambiguous language of the Child Care Credit Law. When "the legislative intent is apparent from the [statutory] language, there is no occasion to consider the import, if any, of the legislative memorandum." Sega, 60 NY2d at 191; see also Roosevelt Raceway, Inc., 9 NY2d at 304-05 (citing Meltzer, 302 NY at 525; Slutzky, 283 NY at 343; McCluskey, 11 NY at 601-602). Here, as demonstrated above, the Child Care Credit Law could not be clearer in its application to "any member" of the NYCPPF.

Second, the 2012 sponsor's memorandum is not a reliable indication – indeed, not an indication at all – of the intention underlying the Child Care Credit Law passed twelve years earlier. This Court has instructed the courts to be cautious when relying even on contemporaneous statements by legislators because

they are not part of the statutory text. See Knight-Ridder Broadcasting, Inc. v Greenberg, 70 NY2d 151, 159 (1987); Matter of Delmar Box Co. (Aetna Ins. Co.), 309 NY 60, 67 (1955); Matter of Morse (Bank of Am.), 247 NY 290, 302-303 (1928); Woollcott v Shubert, 217 NY 212, 221 (1916). The caution must be redoubled when the statement in question was written a dozen years after the relevant statute was passed. The sponsor's memorandum is at best evidence of what the 2012 Legislature thought, not what the 2000 Legislature thought.

As this Court has repeatedly explained, "[t]he Legislature has no power to declare, retroactively, that an existing statute shall receive a given construction when such a construction is contrary to that which the statute would ordinarily have received." Caprio v New York State Dept. of Taxation & Fin., 25 NY3d 744, 755 (2015) (quoting Matter of Roosevelt Raceway Inc., 9 NY2d at 304-305); see McKinney's Cons Law of NY, Book 1, Statutes § 75 (same). Accordingly, this Court has refused to rely on post-enactment statements when interpreting statutes. See, e.g., Consol. Edison Co., 71 NY2d at 195 n4 (holding that the letter on which the litigant relied "was prepared some two years after the 1983 Act was passed and such postenactment history, even by a bill's sponsor, is not a reliable indication of what the legislative body as a whole intended"); Delmar Box Co., 309 NY at 67 (holding that "the views expressed by the assemblyman who introduced the bill in 1952…cannot serve as a reliable index to the intention of the legislators who

passed the bill" because "they were stated, not in the course of debate on the floor of the legislature, but in a memorandum submitted to the governor after the passage of the bill, and there is no showing that the other legislators were aware of the broad scope apparently intended for the bill by its sponsor"). The Second, Third, and Fourth Departments have applied this rule faithfully. See, e.g., James Square Assocs. LP v Mullen, 91 AD3d 164, 172 (4th Dept 2011) (quoting Roosevelt Raceway, 9 NY2d 13 at 304 ; Island Waste Servs. Ltd. v Tax Tribunal of State of NY, 77 AD3d 1080, 1083 (3d Dept 2010), lv denied, 16 NY3d 712 (2011) (same); Boltja v Southside Hosp., 186 AD2d 774, 775 (2d Dept 1992) (same).

The United States Supreme Court has similarly held that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." US v Price, 361 US 304, 313 (1960); see Brandt Revocable Tr. v US, 572 US 93, 134 (2014); Pension Benefit Guar. Corp. v LTV Corp., 496 US 633, 650 (1990). It has been said that "subsequent legislative history" is "a contradiction in terms." Sullivan v Finkelstein, 496 US 617, 631-32 (1990) (Scalia, J., concurring). To say "subsequent history" is a bit like saying "back to the future".

And finally, the bootstrap nature of the statement the City relies on undermines its reliability. The memorandum occurred years after the City had begun its policy of denying Child Care Credit Law rights to Tier 3 members. It is

highly likely, as we have pointed out, that the memorandum's author was simply echoing the City's view that the Child Care Credit Act does not apply to Tier 3 police officers. The author may simply have assumed the City's view of the statute was right. That, of course, is the very error that plaintiffs-appellants are seeking to have the courts correct.

Instead of relying on a 2012 legislative memorandum, the Appellate Division should have looked to the Child Care Credit Law itself. The clear intent of the 2000 Legislature, as expressed by the text, purpose and history of the Child Care Credit Law itself, was to provide "any member" of the NYCPPF with the option to purchase service credit for the period during which that member was on leave to care for newly born or adopted children.

CONCLUSION

This Court should reverse the order of the Appellate Division, grant plaintiffs' motion for summary judgment to the extent of declaring that defendants have violated and continue to violate Code § 13-218(h) by refusing to permit Tier 3 police officers, those hired on or after July 1, 2009, from availing themselves of the benefits afforded by the Child Care Credit Law and deny the City's cross-motion for summary judgment dismissing the complaint.

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Respectfully submitted,
FRIEDMAN KAPLAN SEILER & ADELMAN LLP

By: _____
Robert S. Smith, Esq.

7 Times Square
New York, New York 10036-6516
Telephone: (212) 833-1100
rsmith@fklaw.com

RIVKIN RADLER LLP
Cheryl F. Korman, Esq.
Henry Mascia, Esq.
926 RXR Plaza
Uniondale, New York 11556-0926
Telephone: (516) 357-3000
cheryl.korman@rivkin.com
henry.mascia@rivkin.com

MICHAEL T. MURRAY
Office of the General Counsel of the Police Benevolent Association of the City of New York, Inc.
125 Broad Street
New York, New York 10004

Of Counsel:
Gaurav I. Shah, Esq.
David W. Morris, Esq.
Christopher T. Luise, Esq.

Attorneys for Plaintiffs-Appellants

TO: Zachary W. Carter, Esq.
John Moore, Esq.
Claude S. Platton, Esq.
CORPORATION COUNSEL OF THE CITY OF NEW YORK
Attorneys for Defendants-Respondents
100 Church Street
New York, New York 10007
212-356-0840 or -2501
jomoore@law.nyc.gov

CERTIFICATE OF COMPLIANCE

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