APL-2019-00032

To be argued by:
JOHN MOORE
15 minutes requested

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 RESPONDENTS

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Respondents
100 Church Street
New York, New York 10007
Tel: 212-356-0840 or -2502
Fax: 212-356-1148
jomoore@law.nyc.gov

RICHARD DEARING
CLAUDE S. PLATTON
JOHN MOORE
of Counsel

July 8, 2019

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

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

PRELIMINARY STATEMENT

In this converted Article 78 proceeding, plaintiffs the Patrolmen's Benevolent Association and its president, Patrick Lynch (collectively, "the PBA"), seek to extend to all New York City police officers a pension benefit that the Legislature granted only to officers hired before July 1, 2009. The text, structure, enactment history, and legislative history of the pension statutes all support the unanimous holding of the Appellate Division, First Department that the Legislature did not grant "Tier 3" officers hired after that date the right to purchase service credit for time spent on unpaid child care leave. This Court should affirm.

The substantive benefits of Tier 3 officers are governed exclusively by Article 14 of the Retirement and Social Security Law ("RSSL"), which contains no such service credit. The Legislature granted the credit to Tier 1 and Tier 2 police officers in 2000, and later to correction officers, but did not grant it to police officers who joined the pension system in Tier 3 starting in 2009. Instead, it discontinued the credit for correction officers in 2012 expressly to achieve parity with Tier 3 police officers.

To argue otherwise, the PBA gives an expansive reading to a two-word phrase ("any member") in a single statutory provision (Administrative Code § 13-218(h)) and disregards all countervailing considerations—including the Legislature's explicit acknowledgement that the phrase does not encompass Tier 3 police members. The PBA asks the Court to simply ignore these clear indicators of legislative intent. But focusing on isolated words out of context is never an appropriate method of statutory interpretation. And it is particularly misguided for the pension statutes, a repeatedly amended system of interlocking provisions that must be read together.

The PBA would have the Court disregard the foundational structure of the pension system, in which members join in a certain tier and are limited to the substantive benefits granted under that tier. Its alternative interpretation would improperly replace the Legislature's system of tiered pension benefits with one of the PBA's devising. Examination of the relevant statutes shows that the Appellate Division correctly dismissed the PBA's complaint.

QUESTION PRESENTED

Did the Appellate Division, First Department correctly find that police officers hired after July 1, 2009, whose benefits are defined by Article 14 of the RSSL, could not claim a substantive pension benefit found only in the New York City Administrative Code?

STATEMENT OF THE CASE

A. Statutory Background

1. The tier system for police pension members

Police Pension Fund members are classified into a series of "tiers," as defined under Title 13 of the Administrative Code of the City of New York and the RSSL, dependent on when the officers were hired. Generally, officers in the 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") 9, 194). 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 New York City Administrative Code alone defines the benefits for such Tier 1 members.

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.[1] Instead, Article 11 created an overlay tier, meaning that Tier 2 members are entitled to benefits described in applicable New York City Administrative Code provisions, subject to certain limitations set forth in Article 11 (R9). RSSL §§ 440–51. This interaction is reflected in the fact that the article is entitled "Limitations Applicable to New Entrants." RSSL art. 11.

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, the new comprehensive 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. The new retirement program was designed to "provide uniform benefits for all public employees and eliminate the costly special treatment of selected groups

[1] While benefits generally vary between tiers, the pension benefits for Tier 1 and Tier 2 police officers are "virtually identical." *Lynch*, 23 N.Y.3d at 761.

inherent in the previous program." *Lynch*, 23 N.Y.3d at 765 (quoting Mem. from Robert J. Morgado [Secretary to the Governor] to Judah Gribetz [Governor's Counsel], Bill Jacket, L. 1976, ch. 890).

In contrast to Tier 2, the substantive rights and obligations of Tier 3 members regarding contributions and benefits are governed exclusively by the provisions of Article 14. Unlike the earlier Tier 2 legislation which adopted (with limitations) the existing pension benefits from the Administrative Code, Tier 3 was not an overlay on the existing pension system. Instead, it was an entirely new stand-alone retirement structure of benefits and contributions. *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 specifically limited what it incorporated from the Administrative Code (or other bodies of law) to only administrative matters "relating to the reemployment of

retired members, transfer of members and reserves between systems and procedural matters" unless those outside provisions are inconsistent with Article 14. RSSL § 519(1) (defining the "effect of other laws").

Thus, the system of contributions and benefits available to Tier 1 and Tier 2 members do not apply to Tier 3 members unless those benefits were expressly included in Article 14. *Lynch*, 23 N.Y.3d at 773. A mere failure to exclude a particular benefit granted to earlier tiers is not enough. *Id.* Moreover, the statute 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 begin joining the new plan until July 1, 2009 (R194). 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 765–67. Those legislative extenders ended on June 2, 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 are deemed 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 overlay 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 also governed by Article 14. *Id.*

2. The Legislature's creation of, and later discontinuance of, a pension service credit for unpaid child care leave

This case concerns a service credit for child care leave that the Legislature granted to Tier 1 and Tier 2 New York City police officers by amendment to the Administrative Code in 2000. In subsequent enactments, the Legislature offered the same credit to

correction officers. Later, motivated by the need to constrain the rising costs of New York City public pensions, the Legislature declined to extend this benefit to Tier 3 police officers and discontinued it for newly hired correction officers.

a. 2000: The Legislature grants a service credit for child care leave to Tier 1 and Tier 2 police officers

In 2000, the Legislature amended § 13-218 of the Administrative Code by adding subdivision (h). When it was enacted, the provision allowed Tier 1 and Tier 2 police officers to obtain credit for certain periods of absences without pay due to child care leave:

> Notwithstanding the provisions of subdivision c of this section, any member who is absent without pay for child care le[a]ve of absence pursuant to regulations of the New York city police department shall be eligible for credit for such period of child care leave provided such member files a claim for such service credit with the pension fund by December thirty-first, two thousand one or within ninety days following termination of the child care leave, whichever is later, and 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. Service credit provided pursuant to this subdivision shall not exceed one year of credit for each period of authorized child care leave. In 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.

Admin. Code § 13-218(h).[2] In short, the law allowed for certain New York City police officers to receive up to one year of pension service credit for a leave of absence without pay taken for child care purposes (R182). As noted in the bill's legislative history, the new provision allowed police officers "to obtain retirement credit for periods of child care leave, [but] it does not similarly address this issue for other classes of employees" (R184).

b. 2004 and 2005: The Legislature grants a similar service credit to correction officers

The Legislature subsequently decided to extend a nearly identical leave credit to New York City correction officers. In 2004, it extended the benefit to Tier 1 and Tier 2 correction officers by

---

[2] There are two (h) subdivisions in this section of the law. Admin. Code § 13-218. The portion of the code quoted here is the second of those subdivisions.

adding § 13-107(k) to the Administrative Code. *See* L. 2004 ch. 581 § 1. Much like the Administrative Code provision governing Tier 2 police officers and granting a benefit for "any member" of the Police Pension Fund, Admin. Code § 13-218(h), the provision governing Tier 1 and Tier 2 correction officers grants the right to purchase this credit to "any correction member," *id.* § 13-107(k).

Notwithstanding this broad language, the new Administrative Code provision did *not* extend the leave benefit to correction officers in Tier 3. *See* Bill Jacket, L. 2005, ch. 477 at 3. Again, the only substantive benefits available to Tier 3 members are those included in Article 14. *Lynch*, 23 N.Y.3d at 773. And § 13-107(k) was not incorporated into Article 14 from the Administrative Code because it did not relate to the narrow set of issues as to which Article 14 looks to the Code: "the reemployment of retired members, transfer of members and reserves between systems and procedural matters." RSSL § 519(1). Moreover, Article 14 contains express definitions of the terms "credited service" and "creditable service," defining them exclusively by reference to RSSL § 513. *See* RSSL §§ 501(3), (4). Thus, to create a

service credit for Tier 3 correction officers, the Legislature had to amend RSSL § 513 to define a credit for unpaid child care leave. *See* Bill Jacket, L. 2005, ch. 477 at 3.

In 2005, the Legislature did just that, adding a new subdivision (h) to § 513 that entitled Tier 3 correction officers to purchase service credit for time spent on unpaid child care leave. RSSL § 513(h). Neither this provision nor any other portion of § 513 afforded a similar credit to any other Tier 3 members.

c. 2009: Tier 2 membership for newly hired police officers ends, but the Legislature does not provide a credit for police officers entering in Tier 3

As discussed above, a 2009 gubernatorial veto brought an end to Tier 2 membership for newly hired police officers. The result was that police officers hired on or after July 1, 2009, entered the Police Pension Fund in Tier 3, which is governed by Article 14 of the RSSL. Article 14 afforded a child care leave credit only to correction officers. RSSL § 513(h). The Legislature did not amend RSSL § 513 to provide a similar credit for Tier 3 police officers.

d. 2012: The Legislature achieves parity between police officers and correction officers by discontinuing the credit prospectively for correction officers

In 2012, the Legislature amended Article 14 to correct what it recognized as a disparity within Tier 3: correction officers were entitled to service credit for child care leave, while police officers were not. The Legislature addressed this imbalance by amending RSSL § 513(h) to discontinue the credit for newly hired correction officers, who were joining as members of the Tier 3 revised plan. Bill Jacket, L. 2012, ch. 18 at 38. Thus, § 513(h) now provides that "the provisions of this subdivision shall not apply to a member of the uniformed force of the New York city department of correction who is a New York city uniformed correction/sanitation revised plan member." RSSL § 513(h).

As explained in the legislative history, the purpose of this change was to match the child care leave benefits that correction officers enjoyed to the benefits that police officers and firefighters received under Tier 3. Both the Senate Introducer's Memorandum in support of the bill and the Division of the Budget's Memorandum include explanations that the amendment would

"make new NYC Tier 3 uniformed correction members ineligible to obtain service credit for child care leave in order to equate their benefits with Tier 3 police/fire benefits." Bill Jacket, L. 2012, ch. 18 at 10, 18.

B. Procedural Background

1. The PBA's challenge to the Police Pension Fund's determination that § 13-218(h) only applies to Tier 2 pension members

On July 17, 2015, the PBA filed suit in Supreme Court, New York County seeking a declaratory judgment that Administrative Code § 13-218(h) applies to all New York City police officers, regardless of when they were hired (R35). The PBA brought suit "on behalf of all police officers who have been or may in the future be aggrieved" by the Police Pension Fund's position that Tier 3 police officers could not avail themselves of § 13-218(h)'s service credit benefit (R35, 41). The suit sought an order (1) declaring that the Fund's position that § 13-218(h) only applies to Tier 2 members is unlawful and invalid because it "lacks a reasonable basis in law," (2) nullifying any individual determinations made in accordance with that policy, (3) declaring that all police officers

can avail themselves of the leave credit under § 13-218(h) regardless of when they were hired, (4) awarding costs to the PBA, and (5) awarding other relief the court deemed just and proper (R42–43).

2. Supreme Court's order granting summary judgment to the PBA

On cross-motions for summary judgment, Supreme Court, New York County (Chan, J.) converted the action into an Article 78 proceeding and granted the PBA's motion for summary judgment, finding that all police officers, regardless of when they were hired, were eligible for child care leave credit under § 13-218(h) (R13). The court believed that the service credit benefit in the Administrative Code applied to members of any pension tier, notwithstanding the tiered pension structure in general or the specific provisions of Article 14 (R16).

3. The Appellate Division's order reversing and holding that the child care service credit is not available to police officers in Tier 3

The Appellate Division, First Department unanimously reversed Supreme Court's judgment (R327). While recognizing that § 13-218(h) did not distinguish between the pension tiers on its face, the court looked to the broader statutory scheme and legislative history to determine that the benefit was not available to Tier 3 police officers (R328). The fact that the particular provision's legislative history did not distinguish between tiers was no surprise given that no police officers were members of Tier 3 when the Legislature enacted the provision (R328 n.1).

Construing the statutory scheme as a whole, the court determined that Article 14 governed in case of a conflict between the Administrative Code and Article 14 (R329). The court also recognized that including the service credit benefit for correction officers in both the Administrative Code and the RSSL evinced the Legislature's understanding that benefits must be included in Article 14 to be enjoyed by Tier 3 members (R330). A service credit not contained in RSSL § 513 is not available to Tier 3 members

(*id.*). But the Legislature never granted the service credit benefit to police officers in RSSL § 513 or anywhere else in Article 14 (*id.*).

Moreover, the Legislature's decision to remove the benefit for newly hired correction officers to equate their benefits with those granted to police officers was consistent with the Legislature's intent in crafting Tier 3 to eliminate special treatment for selected groups (R330–31). Thus, the court concluded that Tier 3 police officers are not entitled to service credit for unpaid child care leave (R328).

ARGUMENT

POINT I

THE LEGISLATURE DID NOT GRANT A CHILD CARE SERVICE CREDIT TO TIER 3 POLICE OFFICERS

Whether Tier 3 police officers are entitled to service credit for time spent on unpaid child care leave is a question of statutory interpretation. The Appellate Division's interpretation of the RSSL as excluding this benefit fulfills the Legislature's intent and should be upheld.

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 Avella v. City of New York*, 29 N.Y.3d 425, 434 (2017); *Matter of N.Y. County Lawyers' Ass'n v. Bloomberg*, 19 N.Y.3d 712, 721 (2012). This Court has cautioned that, particularly in the context of interpreting the RSSL, "no one clause isolated from its statutory setting could be determinative of a lack of ambiguity or of legislative intent as to the issue presented." *Sutka v. Conners*, 73 N.Y.2d 395, 404 (1989).

Applying these principles, this Court should affirm the Appellate Division's statutory interpretation and confirm the Police Pension Fund's position that Tier 3 police officers are not entitled to credit under § 13-218(h). The substantive pension benefits for those employees are governed exclusively by RSSL Article 14, which does not grant such a credit to police officers.

A. Substantive pension benefits for Tier 3 police officers are governed entirely by Article 14 of the RSSL.

There is no dispute—nor could there be—that police officers hired on or after July 1, 2009 are members of the Police Pension Fund's Tier 3 or the Tier 3 revised or enhanced plans (R39, 194). *Lynch*, 23 N.Y.3d at 767 n.8. Accordingly, those officers are entitled only to the benefits provided for members of those tiers and cannot claim benefits provided exclusively for members of previous tiers. The first step in identifying the benefits that Tier 3 members may claim is to look to the correct body of law. The PBA's fundamental error is invoking a different statute—Administrative Code § 13-218(h)—that does not apply to Tier 3 members.

1. Substantive pension benefits are available to Tier 3 members only if expressly included in Article 14.

The pension system's statutory structure and this Court's precedents make clear that Tier 3 members' contributions and benefits are governed exclusively by the provisions of Article 14. Tier 3 is, and was designed to be, a comprehensive, stand-alone

retirement structure defining the rights and obligations of its members. *See Civil Serv. Emples. Ass'n*, 71 N.Y.2d at 659; *see also Lynch*, 23 N.Y.3d at 773.

This Court's decision in *Lynch v. City of New York* illustrates the point well. The plaintiffs there—including the same plaintiffs who have brought the instant case—sought to extend to Tier 3 police officers a benefit granting increased take home pay to Tier 1 and Tier 2 officers. 23 N.Y.3d at 768. Looking to the statutory language and legislative history of the particular provisions at issue along with the overall scheme of New York's tiered pension system, the Court dismissed the plaintiffs' claims. *Id.* at 772–76. In doing so, the Court rejected Supreme Court's finding that use of the word "members" in the Administrative Code applied "without reference to tiers" and the Appellate Division's conclusion that a relevant statute applied across tiers because it did not restrict the benefit to Tier 1 and Tier 2 members. *Id.* at 769, 770–71.

As this Court's decision made clear, to grant the child care service credit to Tier 3 police officers in the matter here, "the legislature would have been required to *include* this benefit" in

Article 14 of the RSSL. *Lynch*, 23 N.Y.3d at 773. The fact that the Legislature did not exclude Tier 3 members from a benefit granted to previous tiers (for instance, by creating what the PBA terms a "Tier 3 exception") is not enough to conclude that those members are entitled to the benefit. *Id.* As this Court has held, explicit *inclusion* is required. *Id.* The appellants' brief does not cite *Lynch* or acknowledge the core principles explicated in the decision.

2. Article 14 looks to the Administrative Code only as to a narrow class of matters unrelated to substantive benefits.

The PBA looks outside of Article 14 to the New York City Administrative Code as the source of the child care service credit it seeks. But the Administrative Code cannot be the source of a substantive benefit for Tier 3 members. Article 14 explicitly defines the effect of other laws, including the Administrative Code, and precludes Tier 3 members from claiming benefits found elsewhere.

Article 14 makes clear that only the portions of the Administrative Code "relating to the reemployment of retired members, transfer of members and reserves between systems and

procedural matters" apply to Tier 3 members and only then if they are consistent with Article 14. RSSL § 519(1). Thus, while certain provisions of the Administrative Code can apply to Tier 3 members, they do so because they relate to the specifically defined list of matters set forth in Article 14. *See, e.g.*, Admin. Code § 13-240 ("Termination of membership; discontinuance of service"). As this Court has affirmed, "Although the Administrative Code may delineate how an application for retirement system membership is to be processed, the Legislature clearly evinced an intention to restrict [Tier 3] applicants solely to membership under procedures established in article 14." *Wertheim v. New York City Teachers' Retirement Sys.*, 91 A.D.2d 514, 516 (1st Dep't 1982), *aff'd for reasons stated below*, 58 N.Y.2d 1043 (1983). In other words, the Administrative Code helps dictate how a Tier 3 application for membership is to be processed, but Article 14 alone defines the member's substantive benefits.

The PBA does not even mention RSSL § 519, let alone explain how the substantive benefit that it seeks fits within that provision's narrow bounds. Nor, throughout the course of this

litigation, has the PBA has ever cited an authority granting Tier 3 members a substantive benefit found only in the Administrative Code.

This Court's decision in *Matter of Kaslow v. City of New York*, 23 N.Y.3d 78 (2014), further demonstrates that the PBA has gone astray as it seeks to extend a benefit found only in the Administrative Code to cover Tier 3 members. In *Kaslow*, the petitioner contended that the reference to "credited service" in Article 14 encompassed and incorporated the Tier 2 benefit calculation formula in Administrative Code § 13-155(a)(3). *Id.* at 87–88. The Court rejected the petitioner's "pick-and-choose approach" to Article 14 and the Administrative Code in defining "credited service." *Id.* Instead, the Court held, the petitioner's pension is defined "in its entirety" by Article 14. *Id.* at 80. The PBA's attempt here to extend the Administrative Code's child care service credit to Tier 3 members fails under the logic of *Kaslow*.

The PBA, in passing, attempts to distinguish this case from *Kaslow* by asserting that *Kaslow* dealt with a direct conflict between the Administrative Code and the RSSL (App. Br. 9). But

in advancing this argument, the PBA, like Supreme Court before it, misses a more basic and more relevant fact. This Court did not stop with resolving the matter as it related to the direct conflict at issue there. Instead, the Court determined that Article 14 governed the petitioner's retirement benefits "in its entirety." *Id.* at 80. This follows from the Court's recognition that Article 14, and not the Administrative Code, defines the contributions and benefits of Tier 3 members. Indeed, it is the only statute governing those substantive benefits. That's what it means to define a Tier 3 member's benefits entirely according to Article 14.

3. The "statutory scheme" does not authorize importing substantive benefits from outside of Article 14.

The Court should give no credence to the PBA's "statutory scheme" argument (App. Br. 16–17), which ignores the statutorily prescribed interaction between the Administrative Code and Article 14 under RSSL §519(1). The PBA claims that the Legislature did not limit the child care service credit solely to Tier 2 members because it did not define the credit in RSSL Article 11, which specifies some benefits for Tier 2 members. This

hardly means that the benefit was "intended to apply to all members" of the Police Pension Fund, as the PBA claims (*id.*).

First, it makes sense to include substantive benefits for Tier 2 members in the Administrative Code because Article 11 is concerned primarily with defining the "*Limitations* Applicable to New Entrants." RSSL art. 11 (emphasis added). Article 11, unlike Article 14, is not a standalone tier of pension benefits, but instead constitutes an overlay tier intended to save money by narrowing the benefits found in the Administrative Code for newly hired members (*see supra* 4–5).

Second, placing the service credit provision in the Administrative Code makes sense because including it in Article 11 would have excluded any Tier 1 police members still in the system from claiming the benefit.[3] By including the benefit in the Administrative Code, the Legislature intended that all police officers currently in service be able to claim the credit. But that

[3] The provision encompassed child care leave taken before the statute was enacted, so long as the officer who took that leave filed a claim seeking credit by December 31, 2001. Admin. Code § 13-218(h).

does not mean that the Legislature intended it to govern over an entirely separate statutory framework that would apply to future officers. The structure of the pension system makes clear that a benefit granted to one tier does not carry over to future tiers unless the Legislature expressly provides for it to do so. *Lynch*, 23 N.Y.3d at 773.

B. Article 14 does not grant child care service credit to Tier 3 police officers and, in fact, precludes such credit.

Because the substantive pension benefits of police officers hired starting July 1, 2009 are governed solely by the provisions of Tier 3 set out in Article 14 of the RSSL, the question then becomes what benefits Tier 3 provides. Notably, the PBA never claims that any provision in Article 14 gives Tier 3 police officers the right to purchase service credit for time spent on unpaid child care leave. Nor could they. The plain language of the statute precludes such a benefit.

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 or creditable

service entirely by reference to RSSL § 513. *Id.* The fact that the Legislature saw fit to explicitly define credited and creditable service by the provisions of RSSL § 513 indicates an intent to limit credited and creditable service for Tier 3 members strictly to the terms of that provision.

Under RSSL § 513—the provision defining Tier 3 members' credited and creditable service—members are not entitled to credit for time they are not on payroll, for instance because they are on unpaid leave. RSSL § 513(a)(2). There is an exception in the statute for *correction* officers hired before April 1, 2012 who take unpaid child care leave. RSSL § 513(h). But neither that provision, nor any other provision of Article 14, permits police officers to claim the same credit.

Whether Article 14's failure to grant the child care service credit to police officers is viewed solely on its own terms, or in comparison to its grant of the benefit for correction officers, the canon of statutory interpretation *expressio unius est exclusio alterius* applies here. *See Morales v. Cty. of Nassau*, 94 N.Y.2d 218, 224 (1999). Under that canon, "where a law expressly

describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded." *Matter of Awe v. D'Alessandro*, 154 A.D.3d 932, 934 (2d Dep't 2017) (quotation marks and citations omitted). Thus, where a statute like § 513 sets out exactly what counts as credited and creditable service, the absence of a provision entitling police officers to obtain service credit for time spent on unpaid child care leave is significant. That significance is heightened where other employees—namely, correction officers—are expressly granted such a benefit.

Reading § 13-218(h) to allow Tier 3 police officers to obtain service credit for unpaid child care leave, as the PBA urges, would expand the bounds of service credit beyond what the Legislature provided in § 513. Doing so, however, would contravene the definitions of credited and creditable service set out in § 501. The PBA claims this is not a problem because these definitions provisions are mere surplusage that add nothing to the analysis (App. Br. 23). But that is not how statutory interpretation works.

Instead, this Court has held 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 (2019); *Kamhi v. Planning Bd. of Yorktown*, 59 N.Y.2d 385, 391 (1983). Giving the definitions meaning requires reading § 513 as the exclusive provision by which Tier 3 members can obtain service credit.

There is also no merit to the PBA's contention that Article 14's definition of "creditable service" has "little relevance" to a Tier 3 police officer's ability to purchase service credit for time spent on unpaid child care leave (App. Br. 23–24). The PBA asserts for the first time that "the purchase of credit at issue here is not a benefit that relates to a member being granted credit for service performed," but rather is credit for time the member is out of service (App. Br. 24). But that distinction is not recognized in the statute. Instead, the statute defines "credited service" as "all service which has been credited to a member pursuant to section five hundred thirteen." RSSL § 501(3). This definition is capacious enough to encompass service credit for time spent working and service credit purchased for time spent on unpaid leave.

The PBA's attempted distinction is rendered even more spurious by the fact that the identical benefit for correction officers appears in § 513 and thus falls within the definitions provisions of § 501. Why the benefit needed to be included in § 513 for correction officers, but not police officers, is left unanswered by the PBA's reasoning.

C. The enactment history and legislative history of the child care service credit provisions confirm that the credit is not available to Tier 3 police officers.

The enactment history and legislative history of the various provisions allowing public employees to buy service credit for time spent on unpaid child care leave makes clear what the statutory structure and language have already established. The history demonstrates that the Legislature (1) does not understand the credit to apply to Tier 3 police officers, and (2) expressly amended Article 14 to remove the service credit for correction officers enrolled in the Tier 3 revised plan to achieve parity with their Tier 3 police counterparts. It further establishes the Legislature's

intent to limit the child care service credit benefit to Tier 1 and Tier 2 police officers.

To start, it is undisputed that the Court may consider the history of the Legislature's enactments on an issue in construing the meaning of a particular statute. This consideration properly includes statutes that postdate the provision in question. *See People v. Rodriguez y Paz*, 58 N.Y.2d 327, 334 (1983) (considering subsequent legislative enactments in discerning the Legislature's intent for the statutory scheme as a whole); *Roosevelt Raceway, Inc. v. Monaghan*, 9 N.Y.2d 293, 305–06 (1961) (same); *People v. Smith*, 69 N.Y. 175, 186–87 (1877) (same).

Moreover, contrary to the PBA's suggestion (App. Br. 14), this Court has held that even where the statutory language appears clear, courts must examine "the statutory context of the provision as well as its legislative history." *Sutka*, 73 N.Y.2d at 403. This broad approach assumes "particular significance where, as here, the Legislature has spoken to an issue simultaneously in separate laws, sometimes cross-referencing them, and has repeatedly adopted and amended pertinent provisions piecemeal

throughout decades." *Id.* at 403–04. The PBA offers no reason that the Court should limit the valid considerations it may take into account and abandon New York courts' "long tradition of using all available interpretive tools to ascertain the meaning of a statute." *Riley*, 95 N.Y.2d at 464.

1. The sequence of enactments shows the Legislature's intention that Tier 3 police officers not be able to claim the benefit.

The PBA does not dispute the sequence of the relevant enactments, which demonstrates that the Legislature intended to exclude Tier 3 police officers from the child care service credit. In 2000, at a time when all police officers were Tier 1 or Tier 2 members, the Legislature added the benefit for police officers. Admin. Code § 13-218(h). In 2004, recognizing a disparity between the benefits granted to police officers and those granted to correction officers, the Legislature amended the Administrative Code so that Tier 1 and Tier 2 correction officers could also purchase service credit for time spent on unpaid child care leave. Admin. Code § 13-107(k). Due to an oversight in the 2004 bill, the Legislature returned to the issue in 2005 and amended Article 14

so that Tier 3 correction officers could also take advantage of the benefit. RSSL § 513(h); Bill Jacket L. 2005, ch. 477 at 3. The decision to do so confirms the Legislature's understanding that the Administrative Code provision granting the benefit to Tier 2 correction officers could not grant this substantive benefits to Tier 3 correction officers covered by Article 14.

In 2009, newly hired police officers began to join the pension system in Tier 3. If the PBA's position in this case were correct, at this point Tier 3 police officers and correction officers would have had an equivalent child care service credit available to them. But that is not the case. In 2012, the Legislature took note that Article 14 granted Tier 3 correction officers, but not police officers, the right to purchase service credit for unpaid child care leave. In response, the Legislature amended Article 14 again to eliminate this benefit for newly hired correction officers. L. 2012, ch. 18. It did so "in order to equate their benefits with Tier 3 police/fire benefits." Bill Jacket, L. 2012, ch. 18 at 10, 18.

This sequence of enactments demonstrates that the Legislature did not intend for Tier 3 police officers to be able to

claim the service credit that the PBA seeks. It also shows the clear legislative intent to provide equal benefits to police and correction officers as it relates to buying service credit for time spent on unpaid child care leave. Such equity reflects one of the Legislature's stated purposes in enacting Tier 3, which was to eliminate special treatment for certain classes of pension members. *Lynch*, 23 N.Y.3d at 765. The PBA never disputes this purpose, but its argument would grant Tier 3 police officers costly special treatment that other City employees in Tier 3 do not enjoy. There is no reason to think the Legislature intended to do so.

2. The Appellate Division properly consulted legislative history to help discern the Legislature's intent.

Instead of attempting to dispute the clear import of this sequence of enactments, the PBA takes issue with the Appellate Division's quotation from the legislative history (App. Br. 26–31). As discussed, that legislative history—the sponsor memo accompanying the 2012 enactment—explains that the legislation removed the child care service credit benefit from correction officers to equate their benefits with those enjoyed by Tier 3 police

and fire members. Bill Jacket, L. 2012, ch. 18 at 10, 18. But the PBA's broadside against the use of legislative history flies in the face of this Court's repeated reliance on memoranda from bill sponsors and the Division of the Budget as sources of evidence of legislative intent. *See, e.g.*, *Matter of Kosmider v. Whitney*, 2019 NY Slip Op 04757 (June 13, 2019); *Expressions Hair Design v. Schneiderman*, 32 N.Y.3d 382, 388 (2018); *Matter of Suarez v. Williams*, 26 N.Y.3d 440, 447–48 (2015); *Matter of Shannon*, 25 N.Y.3d 345, 352–53 (2015); *Lynch*, 23 N.Y.3d at 774–75; *Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 649 (2010). Thus, the PBA's contention that the comment should be disregarded as unreliable is meritless (App. Br. 28–29).

Likewise, the Court should not discount the probative value of this evidence based on the PBA's repeated suggestion that the City misled the Legislature as to the effects of the Legislature's own enactments (App. Br. 26, 27–28, 30–31). Over the course of six pages of briefing, the PBA goes from speculating that the City "may well have" influenced the Legislature's understanding (App. Br. 26), to claiming the City "probably" influenced the Legislature

(*id.* at 27), to finding it "highly likely" that the Legislature was simply "echoing the City's view" (*id.* at 31). But at no point during this evolution does the PBA offer a shred of evidence to support its increasingly emphatic claim.

The PBA instead offers nothing but its own say-so for the claim that the City somehow bamboozled the Legislature about its own intent and the effects of its own enactments. While the PBA describes the sponsor's memorandum as mistaken, it points to no evidence that even a single legislator ever understood the service credit benefit to be available to Tier 3 police officers. If the statement in the sponsor's memorandum were incorrect, as the PBA contends, one would have expected to see some evidence of disagreement somewhere in the legislative history or elsewhere. The PBA cites nothing.

Nor is there any merit to the PBA's argument that the comment must be ignored simply because it postdates the enactment of the child care service credit for police officers (App. Br. 29–30). Courts are charged with interpreting the intricate pension scheme as a whole, and it is entirely proper for them to

consider legislative enactments—and the legislative history surrounding those enactments—even when they postdate the statute immediately at issue. *See Rodriguez y Paz*, 58 N.Y.2d at 334; *Roosevelt Raceway*, 9 N.Y.2d at 305–06; *Smith*, 69 N.Y. at 186–87. Consideration of later enactments is not an attempt to retroactively amend prior legislation; it is an acknowledgment of the Legislature's demonstrated understanding of its own statutes defining the benefits currently available to members of the pension system. This is precisely the inquiry in which the Court is engaged. *Sutka*, 73 N.Y.2d at 403–04.

The authorities on which the PBA attempts to rely for the contrary position are to no avail. For instance, the PBA quotes this Court's decision in *Caprio v. New York State Department of Taxation & Finance*, 25 N.Y.3d 744, 755 (2015), for the proposition that the Legislature cannot retroactively declare that a statute receive a different construction than it would ordinarily have received (App. Br. 29). But the PBA only quotes half of the sentence. The second half, which the PBA neglected to include, clarifies that "this Court has long stated that, 'when the

Legislature does tell us what it meant by a previous act, its subsequent statement of earlier intent is entitled to very great weight.'" *Caprio*, 25 N.Y.3d at 755 (quoting *Chatlos v. McGoldrick*, 302 N.Y. 380, 388 (1951)); *see also People ex rel. Mut. Life Ins. Co. v. Bd. of Supervisors*, 16 N.Y. 424, 435–36 (1857). Thus, under the PBA's own authorities, the legislative comment here ought not to be ignored, but instead should be given "very great weight."

Even taking the PBA's partial quotation on its own terms, the argument is unavailing because the Appellate Division did not give the statute here a construction contrary to what it would ordinarily have received. As explained in the previous sections, Article 14 does not grant Tier 3 police members a child care service credit. Moreover, because Tier 3 is a standalone tier, there is no basis to import substantive benefits from the Administrative Code into Article 14. Where, as here, the Legislature's later comment is consistent with the construction a statute would ordinarily receive, there is no problem. *See Caprio*, 25 N.Y.3d at 755; *James Sq. Assoc. LP v Mullen*, 91 A.D.3d 164, 171–72 (4th Dep't 2011).

3. The legislative history provides no support for the PBA's statutory interpretation.

The PBA's own resort to legislative history does nothing to change the conclusions urged here (App. Br. 14–16). The PBA argues that the 2000 bill granting the service credit benefit refers only to police officers and makes no distinction for Tier 3 (*id.* at 6–7, 14–16). The PBA is forced to acknowledge, of course, that this is to be expected because there were no Tier 3 police officers at the time (*id.*). But, the PBA argues, the Legislature could foresee police officers one day joining Tier 3 because the officers remained in Tier 2 only through the repeated passage, "not without controversy," of the extender legislation (*id.*). This argument does not hold up under scrutiny.

To the extent there was any controversy, it did not extend to the floor of the Legislature itself. The Legislature routinely extended Tier 2 status to police officers for more than three decades. The latest extender bill before the service credit legislation and the first one afterward were both passed by unanimous votes in both chambers of the Legislature. *See* L. 2001,

ch. 45; L. 1999, ch. 144. The history of the extenders is filled with unanimous or near-unanimous votes. *See* L. 2007, ch. 63; L. 2005, ch. 32; L. 2003, ch. 91; L. 2001, ch. 45; L. 1999, ch. 144; L. 1997, ch. 152; L. 1995, ch. 125. Even in the midst of the State's financial crisis when Governor Paterson vetoed the extender, only six of the 200 recorded votes on the bill were against extending Tier 2 eligibility. To the extent that the Legislature understood there to be a chance that police officers would in the future join Tier 3, it would have been understood as a remote possibility.

Moreover, it is unclear how this possibility aids the PBA's argument. Faced with the possibility that police officers could one day join Tier 3, the Legislature could have amended Article 14 (as it did in 2005 for correction officers), but declined to do so. Indeed, it declined to do so even after new police hires began joining the pension system as Tier 3 members. And when faced with the fact that Tier 3 correction officers received a benefit that Tier 3 police officers did not, the Legislature amended Article 14 not to extend the benefit to police officers, but to eliminate it for newly hired correction officers. Bill Jacket, L. 2012, ch. 18 at 38. This all

makes clear that the Legislature understood and intended the statutory scheme it enacted to preclude Tier 3 police officers from claiming the service credit benefit the PBA seeks here.

POINT II

THE PBA'S ATTEMPT TO INJECT AN ADMINISTRATIVE CODE BENEFIT INTO TIER 3 FAILS

In the face of this clear evidence of legislative intent, the PBA asserts that the Legislature extended the child care service credit to Tier 3 police officers in Administrative Code § 13-218(h). That Code provision cannot plausibly be read in this way. And, read as the PBA would like, the provision conflicts with, and must yield to, the substantive benefits defined in Article 14. Moreover, the PBA's construction fails because it would flout the tiered structure of the pension system.

A. The reference to "any member" in Administrative Code § 13-218(h) does not include Tier 3 police officers.

1. Section 13-218(h) must be read in light of its statutory context.

The PBA's primary argument is that § 13-218(h) says it applies to "any member," and so must apply to all police officers

regardless of when they were hired (App. Br. 1, 12–13). That simplistic reading is unsound. As explained above, Article 14 defines a new standalone tier that does not incorporate the benefits of earlier tiers unless those benefits are expressly included in Article 14. *Lynch*, 23 N.Y.3d at 773. The Legislature understood the pension structure it had crafted, and it legislated within that framework. Thus, the word "members" in the Administrative Code provision refers only to those members eligible for the Code's substantive benefits, and does not include members in Tier 3. This Court has already rejected the argument that benefits granted to "members" in the Code applies without reference to tiers. *See Lynch*, 23 N.Y.3d at 769.

The PBA's overbroad reading of the phrase "any member" also ignores the context in which the statute was enacted. In 2000, when the Legislature enacted § 13-218(h), New York City police officers were all Tier 1 and Tier 2 pension members. The phrase thus properly applied only to those members and there was no need for greater specificity as to tiers. Certainly the phrase does not indicate that it should apply to all new police officers in

perpetuity regardless of changes to the underlying pension structure. Just such a change happened in 2009 when Governor Paterson vetoed the law extending police officers' time to enroll in Tier 2, thus requiring that newly hired officers join the pension fund as Tier 3 members.

The phrase "any member" in § 13-218(h) cannot be read without reference to these changes in the underlying pension-benefits framework that occurred since the provision's enactment. Indeed, this Court's precedents foreclose the PBA's attempt to pluck this phrase out of context. In *Wertheim v. New York City Teachers' Retirement System*, the Appellate Division considered whether a teacher who had withdrawn from the pension system was able to opt into a more favorable benefits plan after she rejoined service. 91 A.D.2d 514 (1st Dep't 1982), *aff'd for reasons stated below*, 58 N.Y.2d 1043 (1983). Complicating matters was the fact that the teacher had been a member of Tier 1 when she withdrew from service, but would be rejoining at a time when new hires joined in Tier 3. The Administrative Code provision that the teacher sought to invoke, however, applied to "[a]ny contributor

who was in member-service on" June 30, 1972, which the teacher had been during her earlier period of service. Admin. Code § 13-547(1)(c). Despite this apparent textual basis for allowing the teacher to receive the more favorable benefits, this Court (by adopting the Appellate Division's decision) nevertheless found that the teacher was limited to the benefits available to Tier 3 members under RSSL Article 14. *Wertheim*, 58 N.Y.2d 1043, *aff'g* 91 A.D.2d 514.

Under the Court's reasoning, the Administrative Code provision—despite its plain language seemingly encompassing the teacher's circumstances—did not apply to the teacher because the teacher, by withdrawing from the pension system and then rejoining after Tier 3 took effect, could claim only the benefits provided by Article 14 when she rejoined the system. *Id.* The Administrative Code provision allowing Tier 1 status for "any contributor" in service on a particular date did not override this fundamental principle of the pension system. So too, in this case, the phrase "any member" cannot be given controlling weight over the contrary provisions of Article 14.

To be sure, the primary issue decided in *Wertheim* was whether the pension system had improperly excluded the teacher from her original tier when she rejoined city service. But that issue mattered only because the "any contributor" language in the Administrative Code did not apply to Tier 3 members. If the Administrative Code benefit really applied to any contributor in member-service in June 1972 (as the statute stated), the teacher would have qualified for the benefit regardless of her current tier status. It is only because the Administrative Code does not grant benefits to Tier 3 members—no matter how broad the Code's language—that the question of tiers even mattered. The fact that the teacher's membership in Tier 3 prevented her from claiming a benefit that the Administrative Code granted to "any contributor" bolsters the conclusion that a benefit the Code granted to "any member" does not apply to Tier 3 police officers.

2. The PBA's reading is inconsistent with other, similarly worded provisions of the Administrative Code.

The broad construction that the PBA urges this Court to give the phrase "any member" in § 13-218(h) is also invalid because it

would create inconsistencies with related, similarly worded provisions of the Administrative Code. *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (noting the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks omitted)).

The PBA's preferred reading cannot be reconciled with the Legislature's series of enactments regarding the child care service credit for correction officers. As recounted above, in 2004, the Legislature amended §13-107 of the Administrative Code so that "any correction member" was eligible to obtain service credit for time spent on unpaid child care leave. Admin. Code § 13-107(k). After amending § 13-107, the Legislature amended RSSL § 513(h) the following year to provide the same benefit to Tier 3 correction officers. The Legislature noted that it had intended to grant the benefit to all correction officers, but the 2004 amendment to the Administrative Code extended the benefit only to Tier 1 and 2 correction officers. Thus, an amendment to § 513 was required to

provide the benefit to Tier 3 correction officers. Bill Jacket, L. 2005, ch. 477 at 3.

In other words, despite the language in the Administrative Code applying the service credit to "any correction member," that provision did not apply to all correction members, and specifically, did not apply to Tier 3 correction officers. If the "any correction member" language in Administrative Code § 13-107(k) applied to Tier 3 correction officers, there would have been no need for the subsequent amendment to RSSL § 513. But the Legislature understood (albeit belatedly) that it also had to amend Article 14 to extend the service credit to correction officers in Tier 3.

The same is true of police officers: the reference to "any member" in Administrative Code § 13-218(h) does not encompass Tier 3 police officers. The Legislature would have had to amend Article 14 to extend the credit to those officers. It never did so.

The Legislature's 2012 amendment of RSSL § 513(h) confirms this conclusion. The Legislature returned to this provision to specify that Tier 3 revised plan correction officers would be ineligible to claim the child care benefit that Tier 3

correction officers had previously enjoyed. *See* RSSL § 513(h); Bill Jacket, L. 2012, ch. 18 at 38. The Legislature did not similarly revise the Administrative Code, which continues to provide the opportunity to purchase service credit for "any correction officer."

Under the PBA's reading, then, correction officer members of the Tier 3 revised plan could still claim the child care service credit benefit. But plainly, the Legislature understood that this broad phrase in the Administrative Code did not apply to members in later pension tiers, and thus saw no need to alter that language to exclude Tier 3 revised members. As to police officers, too, the Legislature understood that the reference to "any member" in §13-218(h) did not apply to police officers in Tier 3 whose substantive benefits are governed exclusively by RSSL Article 14.

The PBA attempts to dismiss this fact by claiming that the explanation for the Legislature's actions is "hard to discern" or "a wild goose chase" (App. Br. 25, 26). But it is only made a mystery by ignoring the structure underlying the pension statutes. The Legislature's actions make perfect sense in light of the fact that

Article 14 is the sole source of substantive benefits for Tier 3 members and that benefits granted in the Administrative Code do not apply unless they are expressly included in Article 14. *Lynch*, 23 N.Y.3d at 773; *Kaslow*, 23 N.Y.3d at 80.

The PBA's attempt to craft an alternative explanation for the Legislature's enactments is unpersuasive (App. Br. 25). The PBA argues that the definition of "correction member" in the Administrative Code is limited to those members who elected optional retirement under another Code provision § 13-155. *See* Admin. Code § 13-101(40). The PBA never explains why the Legislature would have limited a benefit intended for all correction officers strictly to a subset of employees even within the tiers to which the Administrative Code applies.

The better reading of the phrase "any correction member" is that it is designed to encompass the three separate classes of correction members defined in the Administrative Code who, together, comprise all Tier 1 and Tier 2 correction officers: "correction member," "new correction member," and "prior correction member." Admin. Code § 13-101(40), (41), (42). Viewed

in the full statutory context, the word "any" sought to ensure that all correction officers received the benefit, as intended, by applying it to all three classes. The fact that a revision to Article 14 was needed to extend the benefit to Tier 3 officers underscores the fact that the Administrative Code does not grant substantive benefits to those officers, whose substantive benefits are defined by Article 14 alone.

Similarly, § 13-218(h)'s "any member" phrase should be read to apply to all members of Tier 1 and Tier 2, but not to transcend the tier structure. *See Lynch*, 23 N.Y.3d at 769. This reading, and not the PBA's, grants meaning to the phrase without violating the structure of the pension statutes, ignoring this Court's holding in *Wertheim*, and creating a contradiction with the provisions governing child care leave benefits for correction officers.

B. The PBA's reading fails to harmonize Administrative Code § 13-218(h) with the other pension statutes.

1. The PBA's reading would cause a conflict between § 13-218(h) and Article 14, which would be resolved in favor of Article 14.

The PBA's reading of the phrase "any member" in Administrative Code § 13-218(h) is also invalid because it would conflict with Article 14, which controls in the case of a conflict. Under a proper reading of the pension statutes, however, there is no contradiction between § 13-218(h) and Article 14.

There is no conflict because, as explained above, the substantive benefits provisions of the Administrative Code do not apply to Tier 3 members. RSSL § 519(1). No conflict exists between a provision of the Administrative Code granting a benefit to Tier 1 and Tier 2 members and a different provision of the RSSL that doesn't grant that benefit to Tier 3 members. The statutes just apply to different sets of members. Members of different pension tiers receiving different benefits is not a conflict, it's how the system is structured.

This structure belies the PBA's contention that the Appellate Division's decision "effectively repeals" § 13-218(h) by implication (App. Br. 18). Nothing has been repealed where Tier 2 police members continue to remain eligible for the benefit as the Legislature intended. The court simply declined to extend the benefit to a different tier of police members the Legislature did not intend to receive it.

An apparent conflict arises only under the PBA's erroneous reading of the Administrative Code as granting service credit to Tier 3 members that was not provided for in Article 14's exclusive definitions. RSSL §§ 501(3), (4), 513(a)(2), (h). The RSSL states, and this Court has made clear, that the terms of Article 14 must prevail in the event of a conflict with the Administrative Code as to the substantive benefits available to Tier 3 members. RSSL § 500(a); *accord Lynch*, 23 N.Y.3d at 769; *Kaslow*, 23 N.Y.3d at 80; *Wertheim*, 91 A.D.2d at 516, *aff'd* 58 N.Y.2d 1043. Again, there is no need to reach this issue because the conflict the PBA pushes is illusory. But, should the Court consider the matter, the reasons the PBA gives for resolving the conflict in its favor all fail.

Having concocted a conflict, the PBA's primary argument for why it should be resolved in their favor is that § 13-218(h), like Article 14, *see* RSSL § 500(a), contains a provision stating that it governs in the event of conflicts, and that its conflicts provision was enacted after Article 14's (App. Br. 18–20). But the fact that § 13-218(h) has such a provision is not grounds to insert it into the Tier 3 framework in contravention of the clear text and structure of the pension system's statutory scheme explained above.

In any event, § 13-218(h)'s conflict provision is not even properly understood as later enacted.[4] The PBA's argument regarding which statute was the last enacted overlooks the fact that § 13-218(h) was enacted nearly a decade *before* the Legislature applied Tier 3 to police officers. The following hypothetical helps to illustrate why this is significant. Imagine that in 2009 the Legislature had enacted a new pension tier—one identical to Article 14—applicable to newly hired police officers. In

[4] Nor is it clear that, under the PBA's reading, § 13-218(h) is the more specific provision. The PBA contends that the language there applies to all New York City police officers. In contrast, the relevant portions of Article 14—RSSL §§ 500(a), 513(a)(2), 519(1)—apply specifically to a narrower subset of police officers: Tier 3 members.

that scenario, the PBA's argument that § 13-218(h) should control because it was the last-enacted statute would be absurd. Yet that hypothetical is functionally what happened when legislative action (via a gubernatorial veto) placed newly hired police officers into Tier 3. The application of Article 14 to police officers in 2009 takes precedence over the extension of a benefit to Tier 1 and Tier 2 officers in the Administrative Code nine years earlier.

2. The PBA ignores significant textual and structural differences between Article 11 and Article 14.

No more availing is the PBA's claim that its reading of § 13-218(h) is necessary to harmonize RSSL Article 11 (defining Tier 2) and Article 14 (defining Tier 3). In the PBA's view, our reading of "any member" must be wrong because it would apply with equal force to Tier 2 members (who are undisputedly able to claim the child care service credit) (App. Br. 20–26). The PBA devotes a substantial portion of its briefing to pointing out similarly worded provisions in Article 11 and Article 14. But in picking out these provisions, the PBA fails in its task of construing the statutes as a whole. When considering the entire statutory framework,

attention must also be paid to the differences between Article 11 and Article 14. Those differences refute the PBA's argument.

The PBA places similarly worded passages from RSSL § 446(c) (part of Article 11) and RSSL § 513(c)(1) (from Article 14) side-by-side. But this attempt to equate the provisions fails to consider how they fit within the broader statutory structure. *See Matter of Avella*, 29 N.Y.3d at 434; *Matter of N.Y. County Lawyers' Ass'n*, 19 N.Y.3d at 721. First, Article 14 defines credited and creditable service exclusively by the terms of § 513. *See* RSSL §§ 501(3), (4). Article 11 contains no such limitation. The inclusion of these exclusive definitions in Article 14 indicates the Legislature's intent to define the terms more specifically for Tier 3 members than had been done for Tier 2 members. The PBA's attempt to read these provisions out of the statutory scheme should be rejected. *Andryeyeva*, 33 N.Y.3d 152; *Kamhi*, 59 N.Y.2d at 391.

Second, the PBA completely ignores the differences in the ways Article 11 and Article 14 interact with the Administrative Code. For instance, the PBA makes no mention at all of RSSL

§ 519(1), which sharply limits the areas in which the Administrative Code applies to Tier 3 members. Those areas do not include substantive benefits like the one the PBA claims here. Article 11, in contrast, contains no such provision specifically limiting the applicability of the Administrative Code to certain areas. Nor would such a provision make sense. Tier 2, governed by Article 11, is an overlay tier that largely incorporated the structure and benefits of the Administrative Code with certain limitations imposed on new members. The tier was designed only as a temporary benefit structure while the Legislature crafted a new comprehensive framework. *Civil Serv. Emples. Ass'n*, 71 N.Y.2d at 657. That new framework was codified in Article 14, which created a tier of substantive pension benefits independent of the Administrative Code. *Id.* at 659.

The PBA does not pay even lip service to these fundamental differences between the two tiers. But they are crucial to understanding the matter before the Court. A substantive benefit in the Administrative Code can apply to Tier 2 members (and its conflicts provision can control) because the Administrative Code

and Article 11 are meant to be read together. Indeed, the substantive benefits set forth in the Code are presumptively applicable to Tier 3 members, absent limitations in Article 11.

By contrast, Article 14 is meant to stand alone in defining the substantive benefits available to Tier 3 members. This is made explicit in its provision limiting substantive benefits to those provided within the article itself. RSSL § 519(1); *Lynch*, 23 N.Y.3d at 773. Thus, a substantive benefit set forth only in the Administrative Code simply does not apply to Tier 3 members.

C. The PBA's statutory-purpose argument would collapse the tiered pension system.

The PBA's statutory purpose argument for granting the phrase "any member" in the Administrative Code an expansive definition applicable to every police officer hired in New York City fares no better than any of their other arguments. At bottom, the PBA argues that because Tier 3 officers would benefit from child care service credit, the Legislature must have intended to grant it to them (App. Br. 13–14).

This argument cannot stand because *any* benefit granted to Tier 2 members would also be likely to benefit Tier 3 members. For instance, there is no reason to think that Tier 3 officers would not benefit from increased take home pay. Indeed, that is why the PBA brought an earlier lawsuit seeking to expand a Tier 2 take-home-pay benefit to Tier 3 officers. *See Lynch*, 23 N.Y.3d 757. Accepting the PBA's argument that the Legislature intended a provision to apply to all those who might benefit from it would destroy the tiered pension system that the Legislature has enacted.

Moreover, the PBA's argument is too narrowly focused on a particular provision rather than construing the pension statutes as a whole. The basic purpose of the tiered pension framework is to allocate New York's limited fiscal resources. Thus, the "overall design" of the tiered system is geared "to reduce public employers' pension costs." *Lynch*, 23 N.Y.3d at 775. The tiers typically operate by reducing benefits for members of the later tiers. *Id.* Thus, in *Lynch*, this Court rejected another attempt by these same

plaintiffs to extend a benefit granted only to Tier 1 and Tier 2 police officers to all police officers.

That conclusion has particular weight here, where one of the Legislature's explicit purposes in enacting Tier 3 was to "eliminate the costly special treatment of selected groups inherent in the previous program." *Lynch*, 23 N.Y.3d at 765 (quoting Bill Jacket, L. 1976, ch. 890). The PBA seeks to import a benefit for its members that has not been granted to other groups and has been explicitly denied to newly hired correction officers. This cannot be squared with an interpretation of the entire pension statutory scheme.

The PBA's argument that § 13-218(h) ought to be interpreted expansively because it is a so-called "remedial statute" also fails (App. Br. 14). In support, the PBA quotes from *Rizzo v. New York State Division of Housing and Community Renewal*, 6 N.Y.3d 104 (2005). The PBA does not mention, however, that it is actually quoting from the dissent in that case. *Id.* at 114 (Ciparick, J., dissenting). The majority opinion makes clear that even remedial statutes are not entitled to the broadest possible interpretation.

The question in *Rizzo* was whether, under a particular statute, a court considering an Article 78 challenge to a determination of the State Division of Housing and Community Renewal could consider events that postdated the agency's determination. *Id.* at 110–11. While the dissent (on which the PBA relies) looked to the general benefits of the state's rent control laws and argued that the statute ought to be interpreted to maximize those benefits, *id.* at 114–16, the majority disagreed, *id.* at 110–11. Instead, the Court settled on a narrower reading of the statute that was consistent with a "fundamental principle of article 78 review" that such review is limited to the administrative record and the need to avoid "endless review." *Id.* Similarly here, even viewing § 13-218(h) as a remedial statute does not merit an interpretation that runs counter to the fundamental statutory scheme governing public employee pensions.

But that is exactly what the PBA seeks in this suit. It would cast aside the underlying structure of the pension system to incorporate a benefit from the Administrative Code into the pensions of Tier 3 members, whose substantive benefits are

governed exclusively by the terms of Article 14. By its plain terms, Article 14 does not permit Tier 3 members the benefit the PBA claims. For this reason, the PBA has never identified any authority for extending the substantive benefits in the Administrative Code to Tier 3 police officers, even though police officers began joining Tier 3 a decade ago.

The PBA may disagree with the Legislature's choices, but it may not litigate around them. Even if the PBA finds this result unappealing, neither the pension fund trustees nor the courts may alter the requirements of the pension laws. *See Guzman v. N.Y.C. Emples. Ret. Sys.*, 45 N.Y.2d 186, 193 (1978); *Rapp v. N.Y.C. Emples. Ret. Sys.*, 42 N.Y.2d 1, 6 (1977). The PBA's recourse lies with the Legislature, not the Court. *Rapp*, 42 N.Y.2d at 6.

CONCLUSION

This Court should affirm the judgment of the Appellate Division granting summary judgment to the defendants.

Dated: New York, NY
July 8, 2019

Respectfully submitted,

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Respondent

By: _____
JOHN MOORE
Assistant Corporation Counsel

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

RICHARD DEARING
CLAUDE S. PLATTON
JOHN MOORE
of Counsel

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word 2010, and according to that software, it contains 11,400 words, not including the table of contents, the table of cases and authorities, the statement of questions presented, this certificate, and the cover.

JOHN MOORE