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Appellate Division, First Department, Docket No. 157286/2015
New York County Clerk's Index No. 157286/2015

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-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.

DEFENDANTS' OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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January 3, 2019

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DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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PRELIMINARY STATEMENT

Plaintiffs seek leave to appeal to this Court from the unanimous ruling of the Appellate Division, First Department that New York City police officers hired after July 1, 2009 cannot claim a service credit buyback benefit that the Legislature granted to officers hired before that date. Plaintiffs claim that the Appellate Division misapplied this Court's precedents in its interpretation of the pension laws. But the court's decision applies well-established interpretive principles to discern the Legislature's clearly expressed intent. The Appellate Division denied plaintiffs leave to appeal. This Court should as well.

Plaintiffs strain to identify a leaveworthy issue of statutory interpretation in this straightforward case. Despite their efforts to make the case seem to hinge on two isolated words in a statute, the First Department correctly understood that its role was to interpret the pension statutes as a comprehensive whole. The court relied on its own precedent and that of this Court, as well as the plain statutory text, in construing Article 14 of the Retirement and Social Security Law (RSSL) and the New York City

Administrative Code. The court also relied on the history of relevant legislative enactments and a statement by the bill sponsor about an enactment's purpose, which are manifestly legitimate sources of evidence to help discern legislative intent, as this Court has repeatedly instructed.

These sources confirm that the Legislature did not intend to extend the service credit buyback provision to the police officers in question. Plaintiffs cannot manufacture a novel question of law or issue of statewide importance by asserting a meritless statutory interpretation that no finds no foothold in statutory text or legislative history. This Court should deny plaintiffs' motion for leave to appeal.

OVERVIEW OF THE CASE

A. The tier system for Police Pension Fund members

Police Pension Fund benefits are divided into a series of "tiers" depending on when the police officers were hired. Generally, officers in the earlier tiers are entitled to more generous pension benefits than those in the later tiers.

Police officers hired between July 1, 1973 and June 30, 2009 are Tier 2 members of the Police Pension Fund (Record on Appeal ("R") 9, 194). Tier 2 was created in Article 11 of the RSSL as an "overlay" tier, meaning that members receive benefits described in applicable Administrative Code provisions as delimited by the Article 11 provisions. RSSL §§ 400–51. Thus, the pension benefits of Tier 2 police officers are governed by the Administrative Code to the extent that its provisions are consistent with Article 11 (R9).

Tier 3 was enacted during the fiscal crisis of the 1970s in response to a demand for pension reform to reduce the costs of government. Tier 3 was codified in RSSL Article 14. RSSL §§ 500–20. Unlike the earlier Tier 2 legislation, Tier 3 was not an overlay on the preexisting pension system but an entirely new, stand-alone retirement structure of benefits and contributions. *See Civil Service Employees' Assn. v. Regan*, 71 N.Y.2d 653, 659 (1988). The rights and obligations of Tier 3 members regarding contributions and substantive benefits are governed exclusively by the provisions of Article 14. Thus, the Administrative Code provisions governing Tier 1 and Tier 2 benefits do not apply to Tier 3

members unless those benefits are specifically granted in Article 14. *Lynch v. City of New York*, 23 N.Y.3d 757, 773 (2014).[1]

Police officers hired starting July 1, 2009 are Tier 3 pension members (R194). Despite the creation of Tier 3 in 1976, newly hired New York City police officers continued to be assigned to the more generous Tier 2 status until 2009 as a result of periodic amendments to the RSSL extending the application of Tier 2 to certain members including police officers. *Lynch*, 23 N.Y.3d at 765–67. Those legislative extenders ended when Governor Paterson vetoed a bill to extend Tier 2 coverage to police officers for another two years. *Id.* at 767. As a result, police officers hired after June 30, 2009 are Tier 3 members. *Id.*

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[1] Provisions of the New York City Administrative Code also apply to Tier 3 members, but only those provisions "relating to the reemployment of retired members, transfer of members and reserves between systems and procedural matters." RSSL § 519(1). The benefit that plaintiffs seek plainly does not fall within that scope.

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

Plaintiffs have never disputed the sequence of enactments relevant to decide this case. In 2000, at a time when all newly hired police officers were placed in Tier 2, the Legislature added a service credit buyback provision for police officers. N.Y.C. Admin. Code § 13-218(h). Police officers hired thereafter, who were in Tier 2, could take advantage of this benefit, whereas correction officers hired during the same period could not.

In 2004, recognizing this disparity between the benefits granted to police officers and those granted to correction officers, the Legislature amended the Administrative Code correction officers could also buy back service credit for time spent on unpaid child care leave. N.Y.C. Admin. Code § 13-107(k). Because the Administrative Code provision applied only to Tier 2 correction officers, the Legislature amended Article 14 in 2005 so that Tier 3 correction officers could also take advantage of the benefit. RSSL § 513(h).

In 2009, newly hired police officers began to join the pension system in Tier 3, which did not provide a service credit buyback benefit. In 2012, the Legislature took note that a provision in Article 14 granted Tier 3 correction officers, but not police officers, the right to buy back service credit for unpaid child care leave. In response, rather than making the benefit available to Tier 3 police officers, the Legislature chose, by a further amendment to Article 14, to eliminate it for newly hired correction officers. It did so "in order to equate their benefits with Tier 3 police/fire benefits." Bill Jacket, L. 2012, ch. 18 at 10, 18.

C. Procedural history and the First Department's unanimous ruling in favor of defendants

Plaintiffs 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). Supreme Court, in deciding cross-motions for summary judgment, decided in favor of plaintiffs (R13). The First Department reversed in a unanimous decision. *Lynch v. City of New York*, 162 A.D.3d 589 (1st Dep't 2018).

In reversing, the First Department considered the broad statutory scheme governing police pension benefits. First, the court determined that, for Tier 3 members, the provisions in Article 14 of the RSSL govern in the event of a conflict with provisions in the Administrative Code. The Appellate Division noted that while Article 14 provided a service credit benefit for Tier 3 correction officers, it provided no such benefit for Tier 3 police officers. Moreover, the court explained, after police officers began joining the pension fund in Tier 3, the Legislature did not extend them the service credit benefit. To the contrary, the Legislature instead rescinded the benefit for newly hired correction officers to achieve parity with their police counterparts. This, the court noted, was consistent with the Legislature's intent in creating Tier 3 to reduce costs and end the special treatment of selected groups.

Plaintiffs moved in the First Department for leave to appeal to this Court. The court denied that motion.

REASONS TO DENY LEAVE

Plaintiffs' motion for leave to appeal presents no issue of law meriting this Court's review. *See* 22 N.Y.C.R.R. § 500.22(b)(4). The motion asks the Court to correct a purported error of statutory interpretation by the court below. But the First Department rightly rejected the mistaken interpretive approach that plaintiffs urge here: reading isolated words of a statute out of context and contrary to the Legislature's clearly expressed intent. Plaintiffs' simplistic reading would elevate two words in the New York City Administrative Code (the phrase "any member") over all other available evidence of legislative intent: the related statutory provisions, the enactment history of the relevant provisions governing service credit, and case law construing the pension scheme. But that is not how this Court has said statutory interpretation should work.

As the First Department correctly recognized, 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' Assn. v. Bloomberg, 19 N.Y.3d 712, 721 (2012). This holistic approach is particularly important in the context of the pension laws, where "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." *Sutka v. Conners*, 73 N.Y.2d 395, 403–04 (1989). In holding that the service credit buyback provision did not apply to police officers hired after July 1, 2009, the Appellate Division properly employed the tools of statutory interpretation that this Court has long approved and employed. Plaintiffs' attempts to manufacture a novel issue of law or matter of public importance are unavailing.

A. The Appellate Division correctly applied settled law in interpreting the pension statutes as a whole.

Plaintiffs raise two main challenges to the Appellate Division's statutory interpretation: (1) the court's consideration of the enactment history and legislative history of the successive revisions to the childcare leave service credit buyback benefit, and (2) the court's resolution of a supposed tension between the

conflict provisions in the relevant sections of the Administrative Code and RSSL Article 14. But the First Department's reasoning on both fronts follows directly from settled precedent.

1. The First Department appropriately considered the enactment history of the pension service credit provisions and their legislative histories.

The First Department committed no error by looking to a 2012 enactment and related legislative history in interpreting the scope of a benefit granted in 2000. When interpreting the body of pension law as a whole—as this Court has instructed—the First Department correctly considered the various enactments expanding and limiting the scope of the service credit buyback benefit and the legislative history of those enactments illuminating how the Legislature understands the relevant statutory provisions to interact. Far from engaging in some novel mode of analysis meriting further review, the court simply applied fundamental principles of statutory interpretation as set forth by this Court.

As summarized above (*supra* 5–6), the enactment and legislative history of the service credit buyback provisions for police and correction officers demonstrate that the Legislature intended to match benefits for those two groups of officers. First, the Legislature granted the benefit to police officers, and followed suit by granting it to correction officers. Then, when newly hired police officers could not claim the benefit because they joined the pension system in Tier 3, the Legislature similarly rescinded the benefit for correction officers. Plaintiffs offer no reason that the First Department—or any court—ought to have willfully blinded itself to this history or its implications for interpreting the pension statutes.

The fact that some of these enactments postdate the statute immediately at issue is irrelevant where the court's task is to interpret the pension scheme as a whole. 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.

Similarly misguided is plaintiffs' attack on the First Department's use of legislative history. To start, this Court has made clear that when discerning the Legislature's intent in drafting a statute, courts look to the language of the statute *and* the statute's legislative history. *Riley v. County of Broome*, 95 N.Y.2d 455, 463 (2000); *Sutka*, 73 N.Y.2d at 403–04. Thus, because it was appropriate to consider the entirety of the relevant pension statute—even those portions postdating the provision nominally at issue here—it was correct to consider the legislative history informing those enactments.

Without addressing this point, plaintiffs suggest that the statements from a legislative sponsor's memo and the Division of the Budget report on the legislation may not be reliable indicators of legislative intent (Mot. for Leave 17–18). This is a curious argument where, merely a few pages earlier, plaintiffs acknowledged that such sources are relevant in statutory interpretation (Mot. for Leave 14). Indeed, clear precedent shows that plaintiffs got it right the first time. *See, e.g.*, *Matter of Suarez v. Williams*, 26 N.Y.3d 440, 447–48 (2015); *Cayuga Indian Nation*

of N.Y. v. Gould, 14 N.Y.3d 614, 649 (2010); *Matter of Williams v. Dep't of Corr. & Cmty. Supervision*, 136 A.D.3d 147, 154 (1st Dep't 2016); *259 W. 12th, LLC v. Grossberg*, 89 A.D.3d 585, 586 (1st Dep't 2011).[2]

Moreover, while plaintiffs speculate without even a hint of evidentiary support that the sponsor's memorandum erroneously described the Legislature's understanding of its own legislation (Mot. for Leave 19–20), they point to no evidence that *anyone* understood the service credit benefit to be available to Tier 3 police officers, either at that time or at any point before they brought this suit. If the statement in the sponsor's memorandum were incorrect, as plaintiffs contend, one would expect to see some evidence of disagreement in the legislative history (or anywhere). But plaintiffs have identified nothing at all to support their claim.

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[2] Plaintiffs' argument is made even more curious by the fact that they repeatedly rely on similar, or even less reliable, statements in their own motion (*see* Mot. for Leave 6, 11, 20). Indeed, plaintiffs, too, rely on a Division of the Budget report, Bill Jacket L. 2000, ch. 594 at 4 (Mot. for Leave 6, 11, 20); as well as a letter drafted by a single Assembly Member, Bill Jacket L. 1999, ch. 646 at 9 (Mot. for Leave 6, 11, 20); and even a letter submitted by a teachers' union (which does not speak to the intent of the legislators who actually voted to pass the legislation), Bill Jacket L. 2000, ch. 552 at 14–15 (Mot. for Leave 6).

In any event, contrary to plaintiffs' suggestion, the First Department did not rely on legislative history to the exclusion of the legislation itself. Instead, the crucial factor in the court's analysis was an act of the Legislature—the fact that in 2012, the Legislature amended the statute so that newly hired correction officers would not be entitled to the service credit buyback benefit. Eliminating a benefit for correction officers that continued to exist for Tier 3 police officers would have been contrary to one of the Legislature's stated purposes in enacting Tier 3, which was to "provide uniform benefits for all public employees and eliminate the costly special treatment of selected groups 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).

Even setting aside the Legislature's clearly stated intent to equate police and fire benefits with those granted to correction officers, plaintiffs have never offered any reason to believe that the Legislature intended to grant Tier 3 police officers—and only police officers—costly special treatment. With or without the

statement from the legislative history, the Legislature's intent was clear from the series of enactments that help comprise the pension statutes.

Plaintiffs' refusal to acknowledge the proper framework for interpreting the pension statutes is further laid bare by their misleading and heavily elided quotations of the First Department's decision suggesting that, despite its unanimous ruling, the court believed the statute supports plaintiffs' position (Mot. for Leave 4, 8). The court said no such thing. While the court acknowledged that the particular provision at issue did not distinguish between pension tiers on its face, the court went on to explain that "the broader statutory scheme and legislative history" vindicated the City's interpretation. *Lynch*, 162 A.D.3d at 590 (citations omitted). Similarly, the court noted that while the legislative history did not distinguish between the tiers, at the time § 13-218(h) was enacted, no police officers were enrolled in Tier 3 and the benefits for Tier 1 and Tier 2 members were virtually identical. *Id.* at 590 & n.1. In short, the Appellate Division correctly interpreted the statutes as a whole, both in the

context of other, related statutory provisions and the state of the world as it existed when the statutes were enacted. Plaintiffs try to hide the ball by leaving that context out of their quotations to the court's decision. In fact, the First Department did exactly what this Court has instructed and considered the pension statutes as a comprehensive whole and not as context-free fragments.

2. The First Department properly applied this Court's precedents to resolve the purported statutory conflict here.

There is also no merit to plaintiffs' contention that the Appellate Division erred by finding that Article 14 of the RSSL controls over a conflicting provision in the Administrative Code. Plaintiffs claim that both statutes contain provisions purporting to control in the face of conflict with other statutes and that the later-enacted statute should control in such a situation (or that the resolution is a question that demands this Court's guidance) (Mot. for Leave 12–13, 16–17). But plaintiffs ignore the fact that this Court has already resolved the question they press here.

This Court has repeatedly made clear that where the New York City Administrative Code and Article 14 conflict, the terms

of Article 14 control. In *Matter of Kaslow v. City of New York*, this Court held that a Tier 3 member's pension was defined "in its entirety" by Article 14. 23 N.Y.3d 78, 80 (2014). Similarly, in *Wertheim v. New York City Teachers' Retirement System*, the First Department and this Court held that the terms of a Tier 3 pension are established solely by Article 14. 91 A.D.2d 514, 516 (1st Dep't 1982), *aff'd for reasons stated below* 58 N.Y.2d 1043 (1983). So, as the First Department correctly recognized here, where the terms of Article 14 and the Administrative Code come into direct conflict, Article 14 controls. Plaintiffs admitted as much in their merits briefing before the First Department (Resp. Br. at 17).

Here, plaintiffs claim there is a direct conflict between the conflicts provision of Administrative Code § 13-218(h) and the nearly identical provision in RSSL § 500(a). Plaintiffs offer no reason why a conflict between such conflicts provisions should be treated any differently than a conflict between any other provisions of those statutes. There is no reason for this Court to again consider an issue it has already resolved. *See Matter of Kaslow*, 23 N.Y.3d at 80.

Nor does it save plaintiffs' argument to point to the fact that § 13-218(h) was enacted after Article 14 (*see* Mot. for Leave 12–13). Plaintiffs' reasoning overlooks the crucial fact that, at the time § 13-218(h) was enacted, newly hired police officers were still being placed in Tier 2. The placement of newly hired police officers in Tier 3 did not happen for another nine years, and was the result of legislative action (via a gubernatorial veto) that post-dates the enactment of § 13-218(h). Had the Governor signed into law a new pension tier applicable to newly hired police officers in 2009, plaintiffs could not plausibly argue that § 13-218(h) was the last-enacted statute. Yet that is functionally what happened when Governor Paterson vetoed the bill extending Tier 2 coverage to police officers going forward.

In any event, the supposed conflict that plaintiffs push here is illusory. Tier 3 is a stand-alone retirement system that defines the rights and obligations of its members in their entirety. *See Regan*, 71 N.Y.2d at 659. As this Court has held, benefits that are not expressly included in Article 14 are not available to Tier 3 members, even if those same benefits were available for Tier 1 and

Tier 2 members. *Lynch*, 23 N.Y.3d at 773. In this instance, the Administrative Code provides a substantive benefit for one set of employees while Article 14 does not provide that benefit to a different set of employees. There is no conflict in this arrangement—these disparities exist by legislative design, and plaintiffs' attempt to convince the court otherwise is a naked attempt to thwart that design. This Court has repeatedly rejected such attempts. *See Lynch*, 23 N.Y.3d 757; *Kaslow*, 23 N.Y.3d 78.

B. Plaintiffs' meritless statutory argument does not create a novel issue of public importance.

Contrary to plaintiffs' contention (Mot. for Leave 10–11), merely positing a meritless statutory interpretation that, if correct, would affect many pension members is not enough to create an issue of public importance.

Likewise, the fact that this Court has granted leave to appeal in other pension-related matters is irrelevant (Mot. for Leave 11–12). This Court has granted leave to appeal numerous cases in any number of legal spheres. But those grants are hardly indicative of a per se rule that pension (or other) matters are

necessarily leaveworthy. Plaintiffs offer no reason why this case is more worthy of consideration by this Court than any number of other cases interpreting the pension statutes.

Finally, if any general principle of statutory interpretation actually required clarification, as plaintiffs contend, this is not the case to address it. This case is inextricably bound up with the particulars of the pension statutes generally, and the service credit buyback provision specifically. Thus, interpreting the statute requires examining a complex and interlocking series of legislative enactments codified in two entirely separate places (the New York City Administrative Code and the state RSSL) that have been modified piecemeal over several decades. The resolution of this matter is so bound up with the specifics of the statutes at issue here that it would be a poor vehicle for attempting to clarify any broader legal principles.

CONCLUSION

This Court should deny plaintiffs' motion for leave to appeal from the unanimous decision against them.

Dated: New York, New York
January 3, 2019

Respectfully submitted,

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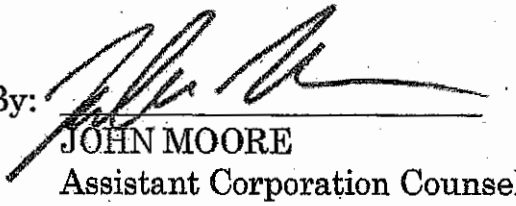
By: 
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