1	COURT OF APPEALS
2	STATE OF NEW YORK
3	
4	MATTER OF CITY OF YONKERS,
5	Respondent,
6	-against-
7	No. 48 YONKERS FIRE FIGHTERS, LOCAL 628, IAFF, AFL-CIO,
8	Appellant.
9	
10	MATTER OF CITY OF OSWEGO,
11	Appellant,
12	-against-
13	No. 49
14	OSWEGO CITY FIREFIGHTERS ASSOCIATION, LOCAL 2707,
15	Respondent.
16	
17	20 Eagle Street Albany, New York 12207
18	February 13, 2013
19	
20	Before:
21	CHIEF JUDGE JONATHAN LIPPMAN ASSOCIATE JUDGE VICTORIA A. GRAFFEO
22	ASSOCIATE JUDGE SUSAN PHILLIPS READ ASSOCIATE JUDGE ROBERT S. SMITH
23	ASSOCIATE JUDGE EUGENE F. PIGOTT, JR. ASSOCIATE JUDGE JENNY RIVERA
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2	Appearances:
3	RICHARD S. CORENTHAL, ESQ. MEYER, SUOZZI, ENGLISH & KLEIN, P.C.
4	Attorneys for Appellant, Yonkers Union 1350 Broadway
5	Suite 501 New York, NY 10018
6	TERENCE M. O'NEIL, ESQ.
7	BOND SCHOENECK & KING, PLLC Attorneys for Respondent, City of Yonkers
8	1399 Franklin Avenue Suite 200
9	Garden City, NY 11530
10	EARL T. REDDING, ESQ. ROEMER WALLENS GOLD & MINEAUX, LLP
11	Attorneys for Appellant, City of Oswego 13 Columbia Circle
12	Albany, NY 12203
13	MIMI C. SATTER, ESQ. SATTER & ANDREWS, LLP
14	Attorneys for Respondent, Oswego Union 217 South Salina Street
15	6th Floor Syracuse, NY 13202
16	
17	
18	
19	
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25	Karen Schiffmiller Official Court Transcriber

1	CHIEF JUDGE LIPPMAN: 48 and 49. Okay, so
2	we're doing Yonkers?
3	Do you want any rebuttal time, counsel?
4	MR. CORENTHAL: Two minutes.
5	CHIEF JUDGE LIPPMAN: Okay, go ahead.
6	MR. CORENTHAL: May it please the Court,
7	Richard Corenthal for Appellant Yonkers Firefighters,
8	Local 628. There are two main issues: whether the
9	grandfather clause under Tier V applies to the
10	Yonkers CBA, collective bargaining agreement, which
11	was in effect on the effective date
12	CHIEF JUDGE LIPPMAN: Is "in effect" the
13	operative language that you rely on?
14	MR. CORENTHAL: Yes, there's clear and
15	explicit language in the grandfather clause of Tier
16	V, which uses the phrase "in effect on the effective
17	date".
18	JUDGE SMITH: What about
19	JUDGE READ: And that means what to you?
20	That includes something that's in effect by virtue of
21	the Triborough amendment?
22	MR. CORENTHAL: Yes, the Triborough
23	amendment became the Triborough law, was codified
24	and, as construed by this court in many decisions,
25	continues the terms of a public sector collective

1	bargaining agreement post-expiration. They continue
2	until a successor agreement is negotiated.
3	JUDGE SMITH: Well, you
4	JUDGE GRAFFEO: Well, that semantics is
5	very important because in your opinion does the
6	Triborough doctrine mean that the CBA hasn't expired,
7	or is it that there's an expired CBA, but the terms
8	and conditions continue?
9	MR. CORENTHAL: The contract has a term
10	with an expiration date. And under this court's
11	decision in Surrogates II
12	JUDGE GRAFFEO: Well, that's not my
13	question. Is it does the Triborough doctrine
14	declare the CBA is not expired, or that it is expired
15	but the terms and conditions continue?
16	MR. CORENTHAL: The contract's expired; the
17	terms and conditions in the contract continues. And
18	in this court's decision in Surrogates II, this court
19	held that the contract is extended. What's really
20	critical here is the language itself
21	JUDGE SMITH: But what about what
22	about the proviso to the grandfather clause? Why was
23	why did the legislature bother writing those
24	words, "Provided, however, that any such eligibility
25	shall not apply upon termination of such agreement."

1 What were they thinking about? MR. CORENTHAL: Well, contracts do 2 3 terminate and - - -JUDGE SMITH: How does - - - how does CBAs 4 5 terminate other than by expiration? MR. CORENTHAL: Well, you could have an 6 7 abolishment of positions. A town could abolish a 8 recreation department. You have cut out 9 subcontracting - - -10 JUDGE SMITH: I see. You mean, if every -- - if every position subject to the CBA was 11 12 abolished, then the contract would be terminated? 13 MR. CORENTHAL: There are a number of - - you could be decertified. 14 15 JUDGE SMITH: Well, I mean, I just - - -MR. CORENTHAL: You could be decertified. 16 17 JUDGE SMITH: I just have trouble - - - I have trouble believing that - - -18 19 JUDGE GRAFFEO: Who would be - - -20 JUDGE SMITH: - - - that's what the 21 legislature was thinking about when they wrote this. JUDGE GRAFFEO: Who would be - - - who'd be 22 23 joining the plan if the unit's terminated? 2.4 MR. CORENTHAL: Well, then there wouldn't 25 be - - - the employees' retirements would basically -

1	their service time would end when their positions
2	ended, but there are termination of contracts.
3	JUDGE SMITH: Are there
4	JUDGE GRAFFEO: So maybe we should ask you
5	generally. What's your interpretation, then, of why
6	the legislature put that grandfather clause there?
7	And who do you think it was intended to cover?
8	MR. CORENTHAL: Well, I think that it was
9	there to protect the terms of a contract under the
10	contract impairment clause of the constitution. I
11	think it was there so that in the public sector, it
12	protected contracts which are in effect, which are
13	Triborough agreements. The Tier VI law
14	JUDGE SMITH: But there's no there's
15	no impairment problem here, is there, for after-hired
16	employees?
17	MR. CORENTHAL: Impairment problem for af -
18	
19	JUDGE SMITH: You we're talking
20	you're as I understand it, your clients or your
21	the employees you're speaking for were
22	hired after they yeah, after Tier III was no
23	longer – – – or, well, I lose track – – – Tier II,
24	Tier III, one of those tiers was no longer available,
25	that is, when they could no longer have a

1 noncontributory plan. So they didn't - - - there's 2 no impairment. They never had a contract for a 3 noncontributory plan. 4 MR. CORENTHAL: No, the impairment - - -5 the impairment is that this contract has a pension 6 provision which provides that the employer shall pay 7 a hundred percent of the contributions. 8 JUDGE SMITH: I understand that, but your -9 10 MR. CORENTHAL: And the grandfather clause 11 12 JUDGE SMITH: But your people were not 13 parties to that contract until - - - until they - - -14 unless they became so, because the legislature gave 15 them an opportunity to. 16 MR. CORENTHAL: Oh, they were clearly 17 covered as employees. They were covered by that contract. That's what we want an arbitrator to 18 19 decide. We want an arbitrator to interpret the terms 20 of the collective bargaining agreement, that pension 21 provision, and determine whether or not - - -22 CHIEF JUDGE LIPPMAN: What's - - - what's 23 the significance of the new language in Tier VI vis-2.4 a-vis - - -25 MR. CORENTHAL: I think - - -

CHIEF JUDGE LIPPMAN: - - - the language in 1 Tier V? 2 3 MR. CORENTHAL: I think it's - - -CHIEF JUDGE LIPPMAN: What - - - what - - -4 5 how do you put that together? MR. CORENTHAL: Well, I think it's very 6 7 significant, because - - -CHIEF JUDGE LIPPMAN: And how does 8 9 Triborough play into the two different tiers? 10 MR. CORENTHAL: Well, because in the Tier 11 VI grandfather clause, they explicitly stated that it 12 only applies to contracts prior to the expiration 13 date. So clearly the legislature knew when they 14 drafted the language how they could define 15 application. Tier V grandfather clause, it applies 16 to contracts in effect. 17 Now, that term, "contracts in effect", that's a term of art. That's been used repeatedly by 18 19 this court. That's Triborough language. If the 20 court - - - if the legislature wanted to limit it - -21 22 CHIEF JUDGE LIPPMAN: As opposed to Tier 23 VI, nonexpired? 2.4 MR. CORENTHAL: Exactly. Tier VI says that 25 it has to be prior - - - and so for the City to win

in this case, that Tier VI language would have been 1 2 in Tier V. That's not the case. 3 JUDGE PIGOTT: So notwithstanding - - notwithstanding any provisions of law to the contrary 4 5 language have any effect in your view? MR. CORENTHAL: Well, I think that - - -6 7 no, because I think that the Triborough law is consistent with that grandfather clause. I think 8 9 that there's nothing inconsistent. In fact, rules of 10 statutory construction, those - - - the Triborough 11 law and the grandfather clause have the similar 12 purpose. They should give effect to the collective 13 bargaining agreement. I don't think that language is meant to somehow be in conflict with the Triborough 14 15 law whatsoever. 16 JUDGE READ: So you're saying what? 17 Because it's - - - because under Triborough it's in effect, it doesn't have to be not withstood? 18 19 MR. CORENTHAL: Under Triborough - - - yes, 20 I mean, the contract remains in effect and there's 21 nothing in conflict with that grandfather clause. 22 It's consistent. 23 CHIEF JUDGE LIPPMAN: But you read them - -24 - you read them together? 25 MR. CORENTHAL: I read them together - - -

1	JUDGE READ: So explain to me again what
2	you think that if somebody asked you what do think
3	the situations the legislature had in mind when they
4	said "in effect"?
5	JUDGE SMITH: The proviso.
6	JUDGE READ: The proviso, yeah.
7	MR. CORENTHAL: Well, I think that the
8	purpose of that provision is to basically address the
9	issue that was in the
10	JUDGE SMITH: Can you can you give an
11	example of an employee who would not who would
12	be affected by the words beginning "provided
13	however"? What employee would be covered by the
14	statute but is taken out of it by that "provided
15	however" language?
16	MR. CORENTHAL: At the end at the end
17	of the grandfather clause?
18	JUDGE SMITH: Yes.
19	JUDGE READ: Yeah.
20	MR. CORENTHAL: Well, only after a
21	termination of the agreement, I think, would they not
22	be
23	JUDGE SMITH: Well, what what
24	CHIEF JUDGE LIPPMAN: What does that mean,
25	he's asking? What is what is term what

are the situations - - -1 2 MR. CORENTHAL: I - - -3 CHIEF JUDGE LIPPMAN: - - - where it's terminated? 4 5 MR. CORENTHAL: I think that's actually a very rare circumstance in the public sector, but they 6 7 JUDGE SMITH: Can you come up with one? 8 9 MR. CORENTHAL: If there's a 10 decertification of the union. If the contract - - -11 if it - - - it's not really applicable, let's say - -12 13 JUDGE SMITH: Are you really saying - - -MR. CORENTHAL: - - - for firefighters. 14 15 The chances - - -JUDGE SMITH: Are you really saying that 16 17 that proviso was written to take care of those rare situations like decertification? 18 19 MR. CORENTHAL: Well, not only 20 decertifications or where the contract ends. There's 21 no future contracts. They abolish that public sector 22 type of employment. 23 JUDGE SMITH: Well, if they've abolished 24 it, then there's no - - - then you don't have to 25 worry. There are no employees.

MR. CORENTHAL: Well, but the contract then 1 2 terminates. The contract then terminates. 3 JUDGE SMITH: I understand; I understand. 4 But this - - - this - - - what this proviso says is 5 that you're - - - the eligibility that you would otherwise have - - - "the eligibility to join a 6 7 special retirement plan shall not apply upon termination of the such agreement." Well, of course, 8 9 if there's no worker to - - - if there isn't any - -10 - if there aren't any workers left, of course, the 11 eligibility doesn't apply. So that can't be what 12 they meant. 13 MR. CORENTHAL: You need to read that 14 clause, though, consistently with the "in effect" 15 language. 16 CHIEF JUDGE LIPPMAN: Counsel, what's the 17 difference between termination and expire? 18 MR. CORENTHAL: Sorry? 19 CHIEF JUDGE LIPPMAN: What's the difference 20 between a collective bargaining agreement that 21 terminates or has expired? MR. CORENTHAL: Well, in the context of - -22 23 24 CHIEF JUDGE LIPPMAN: You know, I think 25 that's the issue.

MR. CORENTHAL: I think in the context of 1 2 the public sector collective bargaining agreements, 3 contracts have terms, let's say, for two years, three 4 years, and they expire pursuant to those terms. The 5 terms and the agreement is extended under the Triborough law and they remain in effect. 6 The 7 contract remains in effect. 8 CHIEF JUDGE LIPPMAN: Okay, and - - -9 MR. CORENTHAL: The contract terminates - -10 11 CHIEF JUDGE LIPPMAN: Yeah, go ahead. 12 MR. CORENTHAL: A contract would terminate 13 when it's no longer in existence. In other words, 14 there's no - - -15 CHIEF JUDGE LIPPMAN: So your view is 16 termination is an unusual event that really is not 17 the same usage as when you're talking about 18 expiration. 19 MR. CORENTHAL: Right, and I think that the 20 legislature put that in there as a protection so that 21 \_ \_ \_ 22 CHIEF JUDGE LIPPMAN: Okay. 23 MR. CORENTHAL: - - - you wouldn't have it 24 qo on forever. 25 JUDGE READ: It's - - -

CHIEF JUDGE LIPPMAN: Judge Read?
JUDGE READ: It's unusual, but I'm still
not grasping what it is what it means for the
contract to terminate, as opposed to expire?
MR. CORENTHAL: Well, I well, the
legislature used that language. And in reviewing the
legislative history, there's nothing in the
legislative history which supports this view that it
only applies to contracts prior to their expiration
date. We have the language
JUDGE SMITH: Unless unless they were
using termination as a synonym for expiration. But
if they weren't, then what were they saying?
MR. CORENTHAL: But they they know
how to use the word expiration, because they use it -
JUDGE SMITH: I understand your I
understand your point.
MR. CORENTHAL: They used it in Tier VI.
JUDGE SMITH: They certainly
certainly you'd have a much your adversary
would have a stronger case if it said expiration, not
termination. But I guess I keep coming back to the
question: if termination doesn't mean expiration,
why weren't they wasting their breath writing

1 this clause? 2 MR. CORENTHAL: Well, I think it's - - - I 3 think it was lawyer's language at the end, and there's nothing in the legislative history to discern 4 5 what they meant by it. I think you have to read it consistent with the "in effects" language and compare 6 7 it with other legislative enactments. 8 CHIEF JUDGE LIPPMAN: Okay, counsel. 9 Thanks, counsel. You'll have rebuttal. 10 MR. CORENTHAL: Thank you. 11 MR. O'NEIL: Good afternoon, Your Honors. 12 Terry O'Neil for the City of Yonkers. 13 CHIEF JUDGE LIPPMAN: Counsel, what's the significance of the language in VI versus V? Why 14 15 can't you read it that the legislature understood 16 what the meaning of V was, given the - - - in the 17 context of the Triborough doctrine, and changed it in VI? Why is that not a logical way to read it? 18 19 MR. O'NEIL: Your Honor, I looked at both 20 languages and had the same question as you. What is 21 the difference? 22 CHIEF JUDGE LIPPMAN: So what's your 23 answer? 2.4 The second question, if they MR. O'NEIL: 25 wanted to make Triborough apply, they know how to

write that. They could also - - - they could have 1 2 said including - - -3 CHIEF JUDGE LIPPMAN: No, no, but that - -4 5 MR. O'NEIL: - - - contracts extended by 6 Triborough. 7 CHIEF JUDGE LIPPMAN: But tell me why they 8 changed the language in VI as opposed to V? 9 MR. CORENTHAL: There's no clue to it 10 anywhere in the legislative history. And - - -11 CHIEF JUDGE LIPPMAN: So what are we to 12 conclude if there's no - - -13 MR. O'NEIL: Well - - -CHIEF JUDGE LIPPMAN: - - - if there's no -14 15 - - there had to be a purpose. It's such a clear - -- it seems to be such a clear attempt to 16 17 differentiate Tier VI from Tier V. 18 MR. O'NEIL: I - - - the language about 19 contracts is very clear about who it's intended to 20 cover. There are people who did have a contract in 21 fact - - -22 JUDGE SMITH: Is it possible that when they 23 wrote the Tier VI law they just decided - - - they 24 had a little practice, and they decided to make it a 25 little clearer?

MR. O'NEIL: Well, it could have been, but 1 2 we're focusing on an issue that doesn't apply to the 3 City of Yonkers. This is the first I've heard we have two issues here. And we've been involved in 4 5 this for over three and a half years. He still wants to put these people in Tier III and Tier V. That 6 7 ship has left. We have no control over this issue. 8 The judge asked me at the Appellate 9 Division: what did you do? We've done nothing. 10 These people came to work for us after a certain 11 date. We asked the retirement system: where do you 12 put them? They put them in III, not us. They didn't 13 go after the retirement system. 14 JUDGE SMITH: Well, but they say you're 15 bound by a contract to pick up their contributions. 16 MR. O'NEIL: But that's only if that 17 applies to us, if that statute applies to us. 18 JUDGE SMITH: Yeah, well, yeah, so that's -- - so - -19 20 MR. O'NEIL: But the statute does - - -21 JUDGE SMITH: Isn't that what we're here 22 talking about? 23 MR. O'NEIL: The statute applies to the 24 retirement system. The retirement system is the one 25 who accepts people in the tiers, not the employers.

So the exception from this legislation has nothing to 1 do with the City of Yonkers at this point. 2 CHIEF JUDGE LIPPMAN: Yeah, but you have a 3 4 collective bargaining agreement with these guys, no -5 MR. O'NEIL: We do have a collective 6 7 bargaining agreement. It - - -8 CHIEF JUDGE LIPPMAN: - - - that says that 9 - - - at least under that contract - - - that you're 10 going to pay their costs. 11 MR. O'NEIL: But that doesn't come into 12 play unless you say that Tier V legislation and the 13 Section 8 exception applies to us. JUDGE READ: So what does that mean? 14 15 You're collecting money and you've got no place to 16 send it - - -17 MR. O'NEIL: No, we send the money - - -JUDGE READ: - - - because the retirement 18 19 system - - -20 MR. O'NEIL: The retirement system said 21 we're putting them in Tier III. And we sent the 22 money that we're supposed to send. 23 JUDGE SMITH: But your theory, if I 24 understand it, is that the 2- - - the December - -25 - the legislation that became effective in January

1	2010, is completely inapplicable to you?
2	MR. O'NEIL: No, it's effective, because
3	that's when we put people in Tier V. The new hirees
4	
5	JUDGE SMITH: I thought you just told me
6	you don't put them anywhere?
7	MR. O'NEIL: The system put them in there.
8	That's what we send up, here's the
9	JUDGE SMITH: But the collective bargaining
10	agreement is yours, not the system's, right?
11	MR. O'NEIL: Correct.
12	JUDGE SMITH: So if it was and if it
13	required you to pay their contributions before the
14	legislation was enacted, why doesn't it still?
15	MR. O'NEIL: Okay, then you're on a pure
16	Triborough issue. It has nothing to do with this
17	legislation or this exception. Then you say, okay,
18	we want we want you to continue Triborough and
19	take this case to arbitration. Now you're in a more
20	traditional stay of arbitration case. In that case,
21	we have statutes that say you can't negotiate these
22	items. They're trying to get through arbitration
23	_
24	JUDGE SMITH: Are you are you saying
25	that

MR. O'NEIL: - - - something you can't even 1 2 negotiate. 3 JUDGE SMITH: Are you saying that the collective bargaining provisions are void? 4 5 MR. O'NEIL: That's what the statute says. 6 You cannot negotiate changes to the retirement 7 system. You cannot negotiate that instead of 8 contributing three percent, we'll contribute nothing. 9 That's what 201.4 says, and 470 says - - -10 JUDGE SMITH: So those - - -11 MR. O'NEIL: - - - exactly the same thing. 12 JUDGE SMITH: So those - - - those very 13 clear documents that say we guarantee you a 14 noncontributory pension, are just waste paper. They 15 were illegal the day they were signed? 16 MR. O'NEIL: Oh, no, they were absolutely 17 legal then, because back then there was no contribution. It's just like the case - - -18 19 JUDGE SMITH: Well, but - - - the contri -20 - - yeah. Maybe - - - maybe they were not 21 significant, but you say they obligated the City to 22 nothing. 23 MR. O'NEIL: No - - -24 JUDGE SMITH: They're all - - - yeah - - -25 they merely - - - yeah. The - - - it's one thing for

1 there to be a retirement plan in which by state law 2 these people are enrolled. But you say the 3 collective - - - the collective bargaining agreement 4 can't deal with that, you say. 5 MR. O'NEIL: They - - - well, they 6 paraphrased their obligations at that time to 7 contribute a hundred percent. JUDGE PIGOTT: Put it this way - - -8 9 MR. O'NEIL: But you cannot agree that 10 you'll contribute a hundred percent - - -11 JUDGE SMITH: So you're saying - - - you're 12 saying - - -13 MR. O'NEIL: - - - if the law requires 14 ninety-seven percent. 15 JUDGE SMITH: - - - that the collective bargaining agreement was just a harmless reiteration 16 17 of what state law was, but it can't have any 18 independent force. 19 MR. O'NEIL: Well, not only do I say that, 20 PERB said that also. 21 JUDGE PIGOTT: Well, look at it this way -22 MR. O'NEIL: PERB said it in the case in 23 24 Niagara. 25 CHIEF JUDGE LIPPMAN: Counsel, Judge

Pigott.

1

2 MR. O'NEIL: Sorry, Judge. 3 JUDGE PIGOTT: You can have a collective 4 bargaining agreement where you agree to pay a 5 clothing allowance. You're not required to. You 6 just say, you guys are spending a lot of money on 7 boots or shoes or uniforms; we're going to give you 8 so much money. And you can do that or not do that. 9 At the same time, the State of New York has 10 got all these tiers out there. They've got all these 11 retirement plans. And they set the rules on those. 12 But you can say to your workers, we don't care what 13 the State does. If they say you get this for free, 14 that's fine. If they say you have to pay three 15 percent, don't worry about it. We'll pay that for 16 you. 17 What is wrong with making that kind of an agreement? It doesn't affect the pension plan. 18 They

19 say it's a three-percent contribution. They don't 20 care where it comes from, whether it comes out of 21 their paychecks or whether it comes out of the city 22 fisc, as long as DiNapoli gets his money, right? 23 MR. O'NEIL: Except there's a public policy 24 against that. It's expressed in 201.4. And the 25 legislative history of 201.4 and 470 is we're doing

1 this because we want to save money for the employers. 2 The legislative history behind Tier V says we're in 3 the worst fiscal state we've ever been in, in the 4 history of the State. 5 There's a lot of policy JUDGE PIGOTT: 6 reasons for it, but are you suggesting that you 7 cannot - - - you cannot say, we'll pick this up for 8 you? 9 MR. O'NEIL: You absolutely cannot, under 10 201.4 and 470, agree to pick up their three percent. 11 It's against public policy and that's PERB's interpretation of their statute. This is in 201 of 12 13 the civil service law, the Taylor Law. 14 JUDGE SMITH: If you're right - - -15 MR. O'NEIL: They've interpreted it to say 16 you can't do it. 17 JUDGE SMITH: If you're right, then how - -- how can they write a statute in the section - - -18 19 the Tier V bill, or whatever it is, that says "this 20 shall not limit the eligibility of any member to join 21 a retirement plan open to him or her, pursuant to a 22 collectively negotiated agreement." 23 MR. O'NEIL: That was in effect, and let me 24 try to give you an example of when that would be in 25 If I had a contract that ran from January effect.

1 1st, 2009 through December 31, 2011, and now it came 2 time for me - - -3 JUDGE SMITH: No, okay, but you tell me - -4 5 MR. O'NEIL: I go in. JUDGE SMITH: - - - but you're saying under 6 7 201(4) there can't be a collectively negotiated 8 agreement for a pension. 9 MR. O'NEIL: No, there can't be. But this 10 statute - - -11 JUDGE SMITH: There can or there can't? MR. O'NEIL: - - - that created Tier V - -12 13 14 JUDGE SMITH: There can or there can't? 15 MR. O'NEIL: There cannot - - - any agreement to do that would be void. 16 17 JUDGE SMITH: Well, then why - - - then why did the legislature refer to this nonexistent animal 18 19 when it wrote the statute? 20 MR. O'NEIL: I actually have the same 21 opinion as Mr. Corenthal. They did it because of the 22 contract clause. If I'm living under a contract that 23 ran from 2009 through 2011, that gave me a hundred 24 percent coverage, and now I create - - - I pass a 25 statute that says - - -

1	JUDGE SMITH: But the
2	MR. O'NEIL: here's Tier V
3	JUDGE SMITH: The Association of Surrogates
4	problem.
5	MR. O'NEIL: Yeah, well, the same
6	JUDGE SMITH: Yeah, but that's I
7	- but I that wasn't a collectively bargained -
8	collectively negotiated agreement. That was a -
9	well, I guess it was, but it wasn't a pension.
10	MR. O'NEIL: No, but this is a statute that
11	is coming down and saying, all you people who had
12	that contract that said you were getting a hundred
13	percent, we're going to say, you can get a hundred
14	percent until that contract expires.
15	JUDGE SMITH: But, yeah
16	MR. O'NEIL: And after that it goes to
17	ninety-seven.
18	JUDGE SMITH: Okay, but you're also telling
19	me that that contract never bound never was
20	- that that contract was essentially meaningless
21	under 201(4).
22	MR. O'NEIL: Well, it was negotiated well
23	before then. They say you can't alter the benefits
24	under the contract. Under Tier V
25	JUDGE SMITH: All right, so you're

1	MR. O'NEIL: they allow you to join -
2	
3	JUDGE SMITH: you're I'm sorry.
4	Are you saying the nego the contracts were
5	negotiated before Section 201(4) came into existence?
6	MR. O'NEIL: We don't know. It's not in
7	the record. But likely, 201.4, it was adopted in
8	'73, but didn't go into effect, if you look at the
9	Fairport case, it says it didn't go into effect till
10	'83. They kept extending it and extending it.
11	But when they put that in, you could
12	and you can agree to a pension plan. You can agree
13	to the one-sixtieth, or you can agree to a twenty-
14	five-year plan or a twenty-year plan. What you can't
15	do is alter the benefits under that plan. And that's
16	what they're trying to do. They're trying to say,
17	no, even though Tier V says you have to contribute
18	three percent, we don't want to contribute anything.
19	JUDGE GRAFFEO: Well, the proviso
20	MR. O'NEIL: And we don't
21	JUDGE GRAFFEO: The proviso doesn't use the
22	word expired; it says "remained in effect." So what
23	do you say "remained in effect" means? It would have
24	been a lot clearer if they had said an expired
25	contract.

MR. O'NEIL: Well, the "remained in effect" 1 2 under Triborough, it would carry forward. There's no 3 question about it. But then you have to carry that 4 through. What is the obligation, then, of us, if 5 that contract carries forward? They don't - - - we 6 can't put them in the system. You have to go - - -7 that ship has passed. 8 There's a case that shows you exactly how 9 to do this, the Niagara decision with Judge Smith. 10 He said they went there. The union said we're 11 challenging the retirement system. We want our people in. And he said no, Triborough doesn't mean 12 13 that, because - - -14 CHIEF JUDGE LIPPMAN: Well, because - - -15 even – – 16 MR. O'NEIL: - - - Triborough only binds 17 the employer and the union, not the retirement 18 system. 19 CHIEF JUDGE LIPPMAN: So, I'm not - - I'm 20 not following. So even if the - - - if the statute 21 applies in this situation and says that if the 22 contract is in effect, it's okay, you know, you're 23 not - - - the employer can pick up the three percent, 24 it still doesn't apply to you because that statute 25 from day one is - - - can't apply to you? I'm not -

- - I'm really not following your argument. 1 2 MR. O'NEIL: Section 8, the exception of 3 people going into Tier V, applies to people who want 4 to get into that tier. Their dispute is with the 5 retirement system. And the exception is if you had a contract in effect, they should take you. Well, they 6 7 went, in Niagara, in the case - - -8 CHIEF JUDGE LIPPMAN: So you have nothing 9 to do with this even though you signed a collective 10 bargaining agreement with them? 11 MR. O'NEIL: We have nothing to do with 12 tier placement. There's nothing we can do about it. 13 Only the retirement system can. That's what they 14 said in the Niagara case. And they went to them and 15 said, we want to come in. And what they said is, no, 16 Triborough doesn't bind us; Triborough is between you 17 and your employer. JUDGE RIVERA: Counsel, on a different 18 19 point, and maybe you don't think it has any meaning, 20 and that's in this language, "where such agreement is 21 in effect on the effective date of this act", but 22 then it goes on to say, "and so long as such 23 agreement remains in effect thereafter". What, if 2.4 anything, does that mean? 25 MR. O'NEIL: Here's what it means. If I

1 can go back to the contract I spoke about before that 2 went into effect on January 1st of 2009 and expired 3 on December 31st of 2011, that's a contract; it's got 4 two dates. Anybody hired during that window, if they 5 were after July 8th of 2009 - - - 2010, then they 6 went into Tier V, because they were - - - I'm sorry; 7 they stayed in the old tier, because they had a 8 contract in effect that said, we'll put you in this 9 system and we'll pay a hundred percent. 10 CHIEF JUDGE LIPPMAN: Yeah, but all of that 11 - - - but all - - -12 MR. O'NEIL: And when that expired on 13 December 31st, you - - -CHIEF JUDGE LIPPMAN: But all of that has 14 15 nothing to do with you, is that what you're saying? 16 That has to do with the retirement system, not you. 17 MR. O'NEIL: They're the only ones who can 18 allow them to come into that system. 19 CHIEF JUDGE LIPPMAN: No, but that's your 20 argument, is that - - -21 MR. O'NEIL: That's one argument. If you 22 get to the Triborough argument - - -23 JUDGE SMITH: How - - - how - - -24 JUDGE GRAFFEO: But if you lose - - - if 25 you lose this case, they can't get into Tier V?

1	MR. O'NEIL: Absolutely not. There's no
2	way they can get into Tier V. They have the wrong
3	defendant here. They should have gone after the
4	retirement system
5	JUDGE SMITH: Well, they they're
6	- they I guess, they
7	MR. O'NEIL: like the firefighters in
8	Niagara did.
9	JUDGE SMITH: As I view it, this is really
10	a suit for indemnity. Maybe they can't get into Tier
11	V, but they can make you pay their contributions.
12	MR. O'NEIL: But that's what they can't do
13	under 201(4). You cannot and you have to look
14	at the PERB decision
15	JUDGE SMITH: I guess I understand that
16	argument, but then I don't understand how you
17	how the collect how that could be that this
18	collectively bargained agreement in the first place
19	that says, well, we'll give you a no-cost pension
20	plan?
21	MR. O'NEIL: In 1976, the employer had the
22	same exact clause. We'll pay a hundred percent.
23	Tier III came in. You have to contribute three
24	percent. The union said, okay, we want our people
25	under that. We want you to pay a hundred percent.

1 And PERB said, no, you can't do that. 2 CHIEF JUDGE LIPPMAN: Okay, counsel. 3 MR. O'NEIL: You can't negotiate. It violates 201(4). And that's them - - - PERB 4 5 interpreting their contract. CHIEF JUDGE LIPPMAN: Okay, we've got your 6 7 argument. 8 Counsel, what's your answer to your 9 adversary's argument? 10 MR. CORENTHAL: Well, let me just say - - -11 CHIEF JUDGE LIPPMAN: They say they have 12 nothing to do with this. It doesn't matter, your 13 collective bargaining agreement. MR. CORENTHAL: Let me - - - let me - - -14 15 we are - - -CHIEF JUDGE LIPPMAN: Why is that not the 16 17 case? 18 MR. CORENTHAL: We are not negotiating - -19 20 CHIEF JUDGE LIPPMAN: The 201(4), go ahead. 21 MR. CORENTHAL: Yeah, that's what I want to 22 address. 23 CHIEF JUDGE LIPPMAN: Tell us. 24 MR. CORENTHAL: We are not negotiating 25 benefits here. We are not altering benefits. The

1 collective bargaining agreement has two plans, 2 special plans, in it: 384(d), a twenty-year plan, 3 and 384(e). Under the statute, unions can negotiate 4 those plans, special plans, into their collective 5 bargaining agreements. And we have a provision that says the employer is responsible for all the 6 7 contributions. Just as this court held in Johnstown, 8 9 Johnstown PBA, this is not a negotiation of benefits. 10 This is an interpretation of the collective 11 bargaining agreement provisions. We're not 12 negotiating - - -13 JUDGE SMITH: How can there be a collective 14 bargaining agreement on pensions in light of 201(4)? 15 MR. CORENTHAL: Because if you look at 16 384(e), in the last provision, it says the unions 17 have the right to nego - - - we're not negotiating 18 the benefits. It's a special plan and the unions can 19 negotiate that plan into its contract. For example, 20 at the bargaining table, we want to get 384(e), 21 because it has certain benefits, so we give up a wage 22 increase for that year, to get that plan in. We're 23 not negotiating the benefits. What this - - -2.4 JUDGE READ: Those are set. You're saying 25 those are set?

1	JUDGE PIGOTT: You're picking a plan.
2	MR. CORENTHAL: We're picking a plan.
3	We're not negotiating the benefits. And the
4	Johnstown case is the is, I think, a
5	controlling case, because in that case, what the
6	arbitrator had to construe was final year average
7	application to a new tier. When the contract was
8	negotiated, it was Tier I was in existence and the
9	grievance was basically how do you calculate final
10	average salary under Tier II?
11	And this court said that's not a
12	negotiation of a benefit. That's an interpretation
13	of this contract, and it should go to arbitration.
14	We haven't talked about the strong policy favoring
15	arbitration, but I think that the Second Department's
16	decision flies in the face of all the court's
17	decisions favoring it.
18	CHIEF JUDGE LIPPMAN: Okay, counsel.
19	MR. CORENTHAL: Thank you.
20	CHIEF JUDGE LIPPMAN: Thank you.
21	All right, let's do now, 49, Oswego.
22	JUDGE READ: Oswego.
23	CHIEF JUDGE LIPPMAN: Oswego. Counsel.
24	MR. REDDING: May it please the court, Earl
25	Redding, the City of Oswego.

1 CHIEF JUDGE LIPPMAN: Do you want rebuttal time? 2 3 MR. REDDING: Two minutes, Your Honor. CHIEF JUDGE LIPPMAN: Okay. Counsel, how 4 5 does your case differ from Yonkers? MR. REDDING: We went to arbitration, Your 6 7 Honor. And our - - -CHIEF JUDGE LIPPMAN: Right. But are the -8 9 - - are the principles the same? 10 MR. REDDING: The arguments are the same. 11 CHIEF JUDGE LIPPMAN: The arguments are the 12 same. 13 MR. REDDING: The collective bargaining 14 agreement - - -15 CHIEF JUDGE LIPPMAN: The only difference 16 is you've already been to arbitration? 17 MR. REDDING: That's correct, Your Honor. 18 JUDGE SMITH: Do you have - - - is it part 19 of your argument that by submitting to arbitration, 20 the City abandoned the right to say it's not 21 arbitrable? 22 MR. REDDING: No, Your Honor. We can - - -23 obviously, we can say that the arbitrator exceeded 24 his power, exceeded his - - - his authority - - -25 JUDGE SMITH: So your - - - this - - - your

1	case and Yonkers, you can't come out different ways?
2	MR. REDDING: I would agree.
3	JUDGE SMITH: One way if Yonkers
4	wins, Oswego wins. Yonkers loses, Oswego loses.
5	Right?
6	MR. REDDING: Unless you were to say that
7	they need to go to arbitration, but the ultimate
8	issue is, well, what are they going to arbitration on
9	if there's noncontributory plans? Because, really,
10	the issue is do or does the cities the
11	City of Yonkers and the City of Oswego have to
12	pay the contribution for these new individuals that
13	had been enrolled by the retirement system in Tier V?
14	That's the real issue. So yes, I would
15	agree that what you really need to decide is that
16	_
17	CHIEF JUDGE LIPPMAN: Take us through your
18	interpretation of the different language in V and VI
19	and the termination clause. What is your view
20	exactly the same as your counterpart?
21	MR. REDDING: Well, it's similar, and
22	CHIEF JUDGE LIPPMAN: So tell us,
23	compactly, what
24	MR. REDDING: What I really think happened
25	is, is that based upon these lawsuits and

1 there's been others that are waiting - - - that based 2 upon these lawsuits, the legislatures added just a 3 couple extra words. But really the intent and the intent of both Tier V and Tier VI was to control 4 5 spiraling pension costs. CHIEF JUDGE LIPPMAN: Yeah, but let me ask 6 7 you a question. If - - - it may have been the intent 8 in V, but does the language comport with that intent? 9 MR. REDDING: Yes, I believe so and I 10 believe that - - -11 CHIEF JUDGE LIPPMAN: Why did they see the 12 need to make VI? Just to make it clearer even though 13 it was good enough? MR. REDDING: Yes, otherwise there would 14 15 continue to be more lawsuits based upon Tier VI. I 16 believe that - - - and it leads to an absurd result. 17 CHIEF JUDGE LIPPMAN: Or did they cut their losses and say VI - - - we better make it - - -18 19 because V is not a good case - - - VI, we better make 20 sure that this isn't the case anymore, that - - -21 MR. REDDING: Well, I'm glad you've said 22 that, because what I was about to say was that it 23 leads to an absurd result. You essentially then have 24 almost a year and a half to almost two years of time 25 where certain individuals don't have to contribute,

1	but where other individuals do have to contribute.
2	It's what I believe happened here is the
3	legislature intended to have contributions made by
4	new members of the new members and new hires,
5	and what happened
6	CHIEF JUDGE LIPPMAN: But it's conceivable
7	that if the language means, right if the
8	language "in effect" means that under Triborough it's
9	going to it's still in effect, why isn't that a
10	perfectly logical way to look at that provision? And
11	then in VI, let's assume the legislature decided, you
12	know, that that's not going to do it, because of
13	Triborough, so so then they changed the
14	language.
15	MR. REDDING: Well, I also want to point to
16	the beginning language of the statute. I believe
17	that the beginning language of the statute it says
18	notwithstanding any loss to the contrary, what I
19	believe that that does it ends up preempting
20	Triborough. And I think what the
21	CHIEF JUDGE LIPPMAN: Yeah, but Triborough,
22	you can't read it in concert with these provisions?
23	MR. REDDING: No, I don't think so. I
24	understand what the PBA said just a what Mr.
25	Corenthal said in terms of fact that it says "in

1	effect". But I would also point out what Judge Smith
2	said which is, well, in terms of termination, when
3	that when the legislature used that word,
4	"termination"
5	CHIEF JUDGE LIPPMAN: What does that mean -
6	what does it mean to you?
7	MR. REDDING: Contracts don't terminate
8	anymore. Contracts continue on. And that's where
9	Triborough was put in. Triborough was put in to say,
10	well, the terms and conditions of the contract will
11	continue to work for an expired
12	CHIEF JUDGE LIPPMAN: How do you how
13	do you read in concert "in effect" and "terminate"?
14	MR. REDDING: I would read that the
15	unfortunately, I don't think the legislature got its
16	terminology down. What I think what the legislature
17	was and if that's why you have to look at
18	the actual legislative history of what they were
19	intending to do. That if the language, you know, is
20	open to interpretations, which it obviously it
21	is here, look to the intent.
22	And the intent was to control spiraling
23	pension costs. It doesn't do that if you read what
24	the PBA is saying. If you take what the PBA is
25	saying that they still have to contribute, then why

1	have a statute in the first place? Why have a
2	contribution?
3	JUDGE SMITH: Can you explain I'm
4	totally bewildered by how 201(4) plays into this
5	whole thing. Can you take me through it?
6	MR. REDDING: From our context, I think
7	it's a I think it's our because we
8	went through arbitration, I think this will be
9	easier, or at least, maybe hopefully.
10	What the arbitrator in our case said was
11	that we didn't violate the contract, but we have to
12	contribute. By now having to contribute, we're
13	violating the law, because now it's saying that we
14	have that it's a negotiation of benefits that
15	weren't
16	JUDGE SMITH: Okay, I get that. So why
17	weren't you negotiating the law when you why
18	weren't you violating the law when you signed the CBA
19	in the first place?
20	MR. REDDING: Well, this CBA's been in
21	existence for a long, long time. And I believe that
22	that language
23	JUDGE SMITH: So it may have predated
24	201(4)?
25	MR. REDDING: It I'm not exactly sure

1 if that language - - -JUDGE SMITH: But it - - - but as new - - -2 3 but are you saying that essentially, even though it 4 was retained in future agreements, after 201(4) was 5 enacted, it's an illegal provision? 6 MR. REDDING: I'm not saying that - - - I'm 7 saying that the collective bargaining agreement, 26.1 8 in ours, yes, that - - -9 JUDGE SMITH: It is illegal. 10 MR. REDDING: Yes. 11 CHIEF JUDGE LIPPMAN: So you negotiated an 12 illegal provision and, you know, that was quite 13 clear, the provision you negotiated? Did you know it was illegal when you did it? 14 15 MR. REDDING: Well, at the time that it was - - - at the time it was negotiated, it wasn't 16 17 illegal. That's my point. 18 JUDGE SMITH: You're saying it got - - -19 MR. REDDING: What my point was that at the 20 time it was negotiated, it wasn't - - -21 JUDGE SMITH: - - - it got left in all 22 these years? 23 MR. REDDING: Yes, it's just been left in. 2.4 It's just been something that's been given. But here 25 what we have is we have - - - we're in an

1 unprecedented times - - -2 CHIEF JUDGE LIPPMAN: But they thought they 3 were - -MR. REDDING: - - - fiscal crisis for 4 5 municipalities - - -6 CHIEF JUDGE LIPPMAN: But they thought they were getting something, and in negotiations you get 7 8 something and you give something, right? 9 MR. REDDING: At the time, yes. 10 JUDGE PIGOTT: Well, it all seems to be 11 going back to "in effect", you know, what those words 12 are, because what - - - as I understand it, what's 13 happened here in the past is that it's very easy to 14 give away somebody else's money. So if the 15 government is contrib - - - is negotiating with a 16 union, and it's the taxpayers' money, it's not too 17 hard to work things out and then - - - and that, 18 apparently, has built up quite a - - - quite a wave 19 that's coming our way, I guess. 20 So now they've said, no more of that. If 21 you're going to hire anybody new, they're going to 22 have to pay three percent of their pension. They're 23 saying, that's great, but you had an agreement with 24 us that you were going to pick up our costs, so why 25 don't you just kick in the three percent? We're not

1 fighting over the pension; we're just fighting over 2 that three percent. 3 MR. REDDING: Right. 4 JUDGE PIGOTT: And you have an agreement 5 that said you couldn't do that. 6 MR. REDDING: And we're saying you can't -7 - - and we're saying you can't do that. JUDGE PIGOTT: Because of this "in effect" 8 9 business. It's - - -MR. REDDING: No, no, no. We're saying you 10 11 can't - - - we're saying you can't do that because 12 the legislation says you can't do that, says that you 13 - - - the longer - - - that they have to contribute 14 the three percent. 15 JUDGE PIGOTT: Section 8 or 201(4)? 16 MR. REDDING: We're saying the Section 8. 17 JUDGE PIGOTT: Yeah, okay. 18 JUDGE GRAFFEO: You can't negotiate to reimburse them? If they - - - if they pay the three 19 20 percent, you can't agree to reimburse them as part of 21 their compensation package for that three percent? MR. REDDING: That could - - - I - - - that 22 23 could be something that you could negotiate at the 2.4 table. That could be something that could be done. 25 CHIEF JUDGE LIPPMAN: If you have a current

1 2 MR. REDDING: It's not done. 3 CHIEF JUDGE LIPPMAN: The judge asked if 4 you have a current contract that you just negotiate, 5 and you say you're going to pay the three percent, 6 it's okay? 7 MR. REDDING: Well, we would say, if we were negotiating, that we would - - - and that was 8 9 brought to the table as one of the - - -10 CHIEF JUDGE LIPPMAN: Yeah. 11 MR. REDDING: - - - parts of the package, 12 we would say you can't do that under the law. We 13 would say the Town of Niagara says you can't do that under the law. 14 15 JUDGE SMITH: His - - - his - - -MR. REDDING: That's what we would do in 16 17 terms - - - at the table. 18 JUDGE SMITH: Your adversary will say that that's negotiate - - - that that's not negotiating 19 20 benefits, that's negotiating contributions. That's 21 different. Why aren't they right? 22 MR. REDDING: Why isn't my adversary right? 23 JUDGE SMITH: Yeah. 2.4 MR. REDDING: As to the contribution? As 25 to negotiating - - -

1 JUDGE SMITH: He says it doesn't - - he says it doesn't violate 201(4) to negotiate - - -2 3 that you'll pay the contributions, as long as the 4 benefits remain the same, the pension benefits. 5 There's a difference between benefits and contributions. 6 MR. REDDING: Well, I - - - in our case, I 7 8 think it's a lot different, because what they've 9 actually said - - - what the arbitrator has said that 10 it actually goes to - - - it's not contributions. 11 For us, it's benefits. It's actually the fact that 12 we are having to pay now the three percent for the 13 Tier V members that have been newly enrolled. 14 CHIEF JUDGE LIPPMAN: All right, counsel. 15 Let's hear from your adversary, and then you'll have 16 rebuttal, okay? 17 MR. REDDING: Thank you. CHIEF JUDGE LIPPMAN: Let - - - let - - -18 19 counsel, address first this business between benefits 20 and contributions. 21 MS. SATTER: I -- I will. CHIEF JUDGE LIPPMAN: And what did the 22 23 arbitrator say? Go ahead. MS. SATTER: Okay, if I could just make one 2.4 25 point before I do anything.

1	CHIEF JUDGE LIPPMAN: Yes, please do.
2	MS. SATTER: I'll be happy to answer that.
3	The language in the Oswego contract was negotiated
4	after 201.4 was enacted. It was negotiated in 1993.
5	That was before the arbitrator. That's clearly in
6	the record. 201.4 was nego was enacted before
7	that. And the language was not illegal when it was
8	negotiated, and it's not illegal now. And
9	CHIEF JUDGE LIPPMAN: Why is it not
10	illegal?
11	MS. SATTER: Because 384(d), which is the
12	special plan that my members are in, specifically
13	allows that the parties can negotiate it. And that
14	what they can negotiate is inclusion in that plan.
15	And as
16	CHIEF JUDGE LIPPMAN: So this just goes to
17	this "it's not benefits; it's picking a plan"
18	MS. SATTER: That's correct.
19	CHIEF JUDGE LIPPMAN: issue?
20	MS. SATTER: And we have the right to
21	negotiate over which plan our members are going to be
22	in.
23	JUDGE PIGOTT: That's what Mr. Corenthal
24	said about picking a plan, right?
25	MS. SATTER: Yes.

JUDGE PIGOTT: Well, now they're saying 1 that after January 10th, 2010 or something, if you're 2 3 not in effect, you can't do that. MS. SATTER: First of all, I think our 4 5 contract is in effect. 6 JUDGE PIGOTT: But isn't it the argument? 7 I mean, isn't that where we are - - -8 JUDGE SMITH: Yeah. 9 JUDGE PIGOTT: - - - on what Section 8 10 means? 11 MS. SATTER: I think "in effect" is the critical issue. 12 13 JUDGE SMITH: I mean, on your theory, if I'm understanding it, and I'm not at all sure I'm 14 15 understanding anything, but on your theory, Section 8 16 may have been unnecessary, where it says, "nothing in 17 this act shall limit the eligibility to join a 18 special retirement plan." You say nothing did 19 anyway? 20 MS. SATTER: Well, nothing did pursuant to 21 the special plan that we joined, yes. 22 JUDGE SMITH: So it - - - so do you say 23 that Section 8 was needless? 2.4 MS. SATTER: I think that Section 8's a lot 25 more confusing than it needs to be. I'm not sure I'm

1 2 JUDGE SMITH: That I have no doubt at all. 3 MS. SATTER: Yeah. I think what - - -4 JUDGE SMITH: It's one thing I'm sure of. 5 I think the point of Section MS. SATTER: 8, as I understand it, is to deal with the impairment 6 7 of contract issue - - -8 JUDGE PIGOTT: No, I - - - well, let me 9 suggest something else. I mean, you keep saying what 10 we negotiated, 384. Everybody that's in 384 now 11 isn't moving, right? It's only the new people after 12 January 10th, and they're saying union or nonunion, 13 we can't do it, because - - -MS. SATTER: And - - - and what we're 14 15 saying is we negotiated with the City to have 384(d) 16 as a special - - -17 JUDGE PIGOTT: But not for the person who's 18 going to get hired tomorrow. 19 MS. SATTER: It's been in our contract - -20 - and in fact - - -21 JUDGE PIGOTT: I understand that, but what 22 you're saying is when you negotiated that contract, 23 you're saying, by the way, you may hire some new 2.4 firefighters in 2013, and we want them covered in? 25 MS. SATTER: We negotiated in '93 is when

it came in, and we said - - -1 2 JUDGE PIGOTT: I'm not saying that. 3 MS. SATTER: - - - whoever you may hire, we want him in, and between - - -4 5 JUDGE PIGOTT: But now the law says you 6 can't. 7 MS. SATTER: The law says that they have to qo in Tier V. 8 9 JUDGE PIGOTT: Right. 10 MS. SATTER: And we're saying, fine, put 11 them in Tier V, but you agreed to pay for it. JUDGE PIGOTT: Right, goes back - - -12 13 MS. SATTER: That's what 26.1 of our 14 contract says - - -15 CHIEF JUDGE LIPPMAN: So let me - - -16 MS. SATTER: - - - and that issue was 17 submitted to the arbitrator and the arbitrator agreed with us. 18 19 CHIEF JUDGE LIPPMAN: Let me - - - let me 20 ask you a question. With all this discussion and 21 this circular discussion that we've had for the last 22 half an hour, it all comes down to "in effect"? 23 MS. SATTER: I think it does. 2.4 CHIEF JUDGE LIPPMAN: That's - - - that's 25 the issue.

1	MS. SATTER: I think it comes down to
2	whether or not there was a contract in effect.
3	CHIEF JUDGE LIPPMAN: Okay, okay.
4	JUDGE SMITH: Question what's your
5	answer to the question, what's the proviso supposed
6	to mean?
7	MS. SATTER: I think it's to get around the
8	Association of Surrogates impairment
9	JUDGE SMITH: No, the proviso. The pro
10	- the
11	MS. SATTER: Where is says "provide"
12	JUDGE SMITH: That yeah. Proviso,
13	"however that" "provided, however, that any
14	such eligibility shall not apply upon termination of
15	such agreement." In other words, they're making
16	people not eligible. That's obviously not to solve a
17	contract clause problem. What is it doing?
18	MS. SATTER: Well, when it talks about
19	termination, first of all, I don't think that's
20	before this court, because I think we're talking
21	about how people get in, not what would cause them to
22	get out. I'm not sure I'm going to take
23	CHIEF JUDGE LIPPMAN: Well, what does
24	termination mean, is basically the question?
25	MS. SATTER: I don't think it was an issue

that was really briefed to this court in this case. 1 2 CHIEF JUDGE LIPPMAN: No, no, I hear you, 3 but - - - but let's - - -4 MS. SATTER: And I'm not sure that I agree 5 with my counterpart from Yonkers' opinion on it. I think it may mean that a contract terminates when 6 7 another contract supersedes it. JUDGE SMITH: So but that - - - okay. 8 But 9 that - - - are you saying the legislature went to the 10 trouble of writing all those words to say that you're 11 not eligible under the old agreement when a new 12 agreement has replaced it? That's self-evident. 13 They don't need to say that. MS. SATTER: Well, I don't know what else 14 15 it could have meant by it. And - - -16 JUDGE SMITH: Well, your adversaries have a 17 suggestion that termination, as used there, means 18 expiration. 19 MS. SATTER: I don't think it does mean - -20 21 JUDGE SMITH: Is it - - - is it ridiculous 22 to use termination and expiration as synonyms? 23 MS. SATTER: I think it is. 2.4 JUDGE SMITH: I understand expiration is 25 clearer.

1 MS. SATTER: I - - - well, I think it is in 2 this case. Because - - -3 CHIEF JUDGE LIPPMAN: Can you answer Judge Smith's question in the context of also "in effect"? 4 5 MS. SATTER: Okay. 6 CHIEF JUDGE LIPPMAN: In other words, 7 reading it together. MS. SATTER: Well, I - - -8 9 CHIEF JUDGE LIPPMAN: What does it mean in 10 the context where you have one part that says "in effect" and the other one uses this word 11 "termination"? 12 13 MS. SATTER: I don't think that termination 14 can mean expiration, because if the legislature meant 15 expiration, they would have used the word expiration. 16 They didn't. 17 CHIEF JUDGE LIPPMAN: Is that why they changed the - - - in Tier VI to expiration? 18 19 MS. SATTER: It may very well be, because -20 21 JUDGE SMITH: Is it - - - well, maybe it's 22 because they were trying to express more clearly the 23 same intention, isn't it? 24 MS. SATTER: Well, unfortunately, we don't 25 have a legislative history that enables us to know

that.

2	JUDGE SMITH: Okay, but then what if
3	they didn't if termination can't mean
4	expiration, what earthly use is all those words
5	"provided, however, that any such eligibility shall
6	not apply upon termination of such agreement," et
7	cetera. What employee is ever going to be affected
8	by those words?
9	MS. SATTER: I'm sorry; can I ask you to
10	repeat the question?
11	JUDGE SMITH: There's at the end of
12	Section 8, it says "provided, however, that any such
13	eligibility shall not apply upon termination of such
14	agreement for employees otherwise subject to the
15	provisions of Article 22 of the Retirement and Social
16	Security Law." Give me an example of an employee who
17	is affected by that clause.
18	MS. SATTER: I guess it would be an
19	employee that was hired after the Triborough period,
20	when a new contract came into effect.
21	JUDGE SMITH: You but when the new
22	contract came into effect, we don't need a law to
23	tell us that he's not governed by the old contract?
24	MS. SATTER: Well, that's all I can think
25	that the legislature meant. Other I don't know

1 what they meant. I - - - they couldn't have made it 2 more confusing, but I don't think that termination 3 means expiration or they would have used the word 4 expiration. 5 JUDGE RIVERA: Well, counsel, that - - that part that I've asked about before, "where such 6 7 agreement is in effect on the effective date of this 8 act and so long as such agreement remains in effect 9 thereafter" that's - - - is that just redundancy? I 10 mean, what do you think that means? MS. SATTER: What I think it means is that 11 12 as long as you either have a contract that's actually 13 in effect, or you have a contract that's in effect 14 pursuant to Triborough - - -15 JUDGE RIVERA: Actually in effect, as in 16 the days as - - -17 MS. SATTER: Before it expires. 18 JUDGE RIVERA: - - - as you keep saying, 19 before the last date that's on the actual CBA. 20 MS. SATTER: Yes. Or you have a contract 21 that it is in effect pursuant to the Triborough 22 doctrine, which is a contract whose - - - under 23 Triborough - - - whose terms continue until the 2.4 parties negotiate a successor. 25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1	MS. SATTER: Okay.
2	CHIEF JUDGE LIPPMAN: Anything else,
3	counsel?
4	MS. SATTER: It's a it's simply our
5	position that enormous this court gives
6	enormous deference to arbitration awards. We
7	presented the case to the arbitrator, and the
8	arbitrator ruled that pursuant to the terms of the
9	contract, that the union and the City had negotiated
10	
11	JUDGE SMITH: Let me ask you that. I
12	should have asked you the question I was asking your
13	adversary.
14	MS. SATTER: Okay.
15	JUDGE SMITH: I shouldn't admit it. I got
16	confused about who's the appellant and who's the
17	respondent. But are you saying that by participating
18	in the arbitration, they waived their right to make
19	the arguments they're now making?
20	MS. SATTER: I really am saying that, and I
21	do think they waived it. And the reason I think they
22	waived it is because when the case was presented to
23	the arbitrator, the arbitrator was confronted with
24	the issue of whether or not the City had to
25	contribute.

1 And the arbitrator is either going to say, 2 yes, you have to contribute, or no, you don't. And I 3 really think that they're seeking a second bite at 4 the apple by then bringing an action to vacate the 5 award because it was inevitable that either they were going to win, or if they lost, they were going to 6 7 make this argument. Okay. 8 CHIEF JUDGE LIPPMAN: Thanks, counsel. 9 MS. SATTER: Thank you very much, Your 10 Honors. 11 CHIEF JUDGE LIPPMAN: Okay, counsel, 12 rebuttal? 13 MR. REDDING: Thank you. We're absolutely not trying to take a second bite of the apple. What 14 15 the arbitrator did is the arbitrator found that we 16 didn't violate the agreement but then said that you 17 still have to pay. By doing that, what the arb - - -CHIEF JUDGE LIPPMAN: What's the grounds -18 19 - - you know, arbitration awards are very narrow 20 grounds for overturning. What's the grounds here? 21 MR. REDDING: Ours here is simply public 22 policy. It's as - - - it's clear public pol - - -23 CHIEF JUDGE LIPPMAN: This violates public 24 policy? 25 MR. REDDING: Clearly. That's exactly what

1 I was about to say is that what we - - - the - - -2 what the arbitrator said was, well, you have to pay 3 the employee's cost, and pursuant to, obviously, the 4 Chapter 504, the laws of 2009, 201, and 470, that we 5 don't have to do that. 6 JUDGE SMITH: Couldn't you have done what 7 Yonkers did and move to stay arbitration? 8 MR. REDDING: We could have. We thought we 9 were going to win. 10 JUDGE SMITH: And can't - - - are you allowed to do that? Are you allowed to pass up a 11 12 chance to stay arbitration and then after you've 13 lost, say, oh, the whole thing was never arbitrable? MR. REDDING: No, unless there's certain 14 15 circumstances such as one of the circumstance - - -16 well, this - - - we're not saying that it's not 17 arbitrable. What we're saying is that his award 18 violated public policy. 19 JUDGE SMITH: Okay, but you - - - but it 20 isn't arbi - - - you may not be saying it, but you 21 don't think it's arbitrable, do you? 22 MR. REDDING: Well, we - - - well, we did 23 qo to arbitration. We did - - -2.4 JUDGE SMITH: I guess what I'm saying - - -25 I'll put it more artfully - - -

1	MR. REDDING: Right.
2	JUDGE SMITH: The grounds on which you say
3	it's contrary to public policy are equally good
4	grounds for staying arbitration to begin with?
5	MR. REDDING: Correct.
6	CHIEF JUDGE LIPPMAN: Okay, counsel.
7	Thanks.
8	MR. REDDING: Thank you.
9	(Court is adjourned)
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1	CERTIFICATION
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3	I, Karen Schiffmiller, certify that the
4	foregoing transcript of proceedings in the Court of
5	Appeals of Matter of City of Yonkers v. Yonkers Fire
6	Fighters, Local 628, IAFF, AFL-CIO, No. 48, and
7	Matter of City of Oswego v. Oswego City Fire Fighters
8	Association, Local 2707, No. 49 was prepared using
9	the required transcription equipment and is a true
10	and accurate record of the proceedings.
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22	Date: February 20, 2013
23	Date: replacy 20, 2015
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