SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

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PATRICK LYNCH, THE PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Plaintiffs,

- v -

THE CITY OF NEW YORK, BILL DE BLASIO, THE NEW YORK CITY POLICE PENSION FUND, THE BOARD OF TRUSTEES OF THE NEW YORK CITY POLICE PENSION FUND, JAMES O'NEILL

Defendants.

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INDEX NO. 655831/2016

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 59, 60, 61, 62, 63, 64, 66, 68, 69, 70, 71, 72

were read on this motion to/for JUDGMENT - SUMMARY.

In this matter seeking declaratory relief, plaintiffs Patrick Lynch, as President of the Patrolmen's Benevolent Association of City of New York, Inc. (PBA) and the PBA commenced this action against defendants City of New York; Bill De Blasio, as mayor of the City of New York; The New York City Police Pension Fund (PPF); The Board of Trustees of the New York City Police Pension Fund (Trustees); and James P. O'Neill, as Police Commissioner of the New York City Police Department and as Executive Chairman of the Board of Trustees of the New York City Police Pension Fund. Plaintiffs seek a declaratory order to:

> (1) extend New York City Administrative Code (AC) §§ 13-142 and 13-218, which permit members of the Police Pension Fund (PPF) hired before July 1, 2009 (Tier 2 Members) to purchase pension credit based on prior government service, to police officers hired on or after July 1, 2009 (Tier 3 Members)[1];
>
> (2) find defendants' determination to not extend those Tier 2 buy-back provisions contained in AC §§ 13-143 and 13-218 to Tier 3 members of the PPF as violative of a stipulation of settlement entered into in 2002 between the PBA, the City, and the PPF (2002 Agreement);

[1] The parties make no distinction between Tier 3 members, Tier 3 Revised members (hired between April 1, 2012 and March 30, 2017), and Tier 3 Enhanced members (hired after March 30, 2017). As such, the relief sought is applicable to all Tier 3 members

(3) allow for a time period for those previously denied or those that did not apply to buyback, purchase, or transfer their prior service and that such rights be retroactive;

(4) nullify any individual determinations made by defendants based on their interpretation of New York Retirement and Social Security Law (RSSL) §43, AC §§13-143 and 13-218, Chapter 646 of the Laws of 1999, Chapter 552 of the Law of 2000 or the 2002 Agreement; and

(5) award plaintiffs' costs, disbursements, and attorneys' fees.

In this motion, defendants move for: (1) an order pursuant to CPLR §103(c), converting this declaratory judgment action into a CPLR Article 78 special proceeding, and then dismissing as time-barred, pursuant to CPLR 217(1), plaintiffs' application for relief for any claims that accrued more than four months prior to the commencement of this litigation; and (2) an order, pursuant to CPLR 3212, granting summary judgment to defendants in all respects (NYSCEF #6). Plaintiffs oppose defendants' motion and cross-move for summary judgment pursuant to CPLR 3212 on all claims (NYSCEF #18). The Decision and Order is as follows:

FACTS

This matter concerns the pension rights of police officers appointed on or after July 1, 2009. The New York City Police Pension Fund (PPF) is a public retirement system of New York State, and is governed by the NY RSSL. The PPF is one of five public employee retirement systems maintained by the City (*see Lynch v City of New York*, 23 NY3d 757, 761, n1 [2014]). Pension benefits and obligations throughout the five pension systems are largely determined by a member's tier status, which is primarily determined by job title and the date on which the member joins a retirement system.

Tier 1 and Tier 2

Tier 1 status applies to pension members who joined any of the five City pension systems before July 1, 1973 pursuant to Administrative Code Title 13. In 1973, the New York State Legislature enacted Tier 2 for new members joining a State or City pension system. An eligible employee who became a City pension system member in any of the five pension systems between July 1, 1973, and July 26, 1976, is a Tier 2 member. Statutory provisions governing Tier 2 are contained in Article 11 of the RSSL and Title 13 of the Administrative Code. Article 11 contains overlay provisions that modify certain Tier 1 Administrative Code [Admin Code] provisions (*see* RSSL § 440).

Tier 3 and Tier 3 Revised

The fiscal crisis of the early 1970's led to a demand for pension reform to reduce the costs of government. Following the recommendation of a Permanent Commission on Public Employee Pension and Retirement Systems, the Legislature in 1976 enacted Chap. 890, RSSL Art. 14 § 500 et. seq., which created Tier 3. Unlike the earlier Tier 2 legislation, Tier 3 was not an overlay on the existing pension system but an entirely new retirement structure of benefits and contributions. In approving the Tier 3 legislation, the Governor stated: "These bills create a new retirement program for public employees hired on or after July 1, 1976" (1976 McKinney's Session Laws at 2455; *see also Civil Service Employees' Assn. v. Regan*, 71 NY2d 653, 659 [1988] ["the 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'"]).

Nevertheless, New York Police Department (NYPD) officers hired up until June 30, 2009, retained Tier 2 status because of periodic amendments to the RSSL (*see Lynch*, 23 NY3d at 765-767). However, on June 2, 2009, during the heart of the late-2008 financial crisis, then-Governor Paterson vetoed the extender bill that would have continued Tier 2 coverage for police officers hired in the following two-year period (*id.*). As a result, police officers hired on or after July 1, 2009 are classified as Tier 3 members.

Tier 3 members are governed exclusively by RSSL Article 14, as articulated in RSSL § 500, which provides: "Notwithstanding any other provision of law ... the provisions of this article [14] shall apply to all members who join or rejoin a public retirement system of the state on or after July first nineteen seventy-six... In 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."

Under the most recent pension reform measures, police officers hired on or after April 1,2012 are classified as "Tier 3 revised plan members" ("Tier 3R") (RSSL § 501(26); *see also Lynch*, 23 NY3d at 767). As with Tier 3 members, the Admin Code provisions governing Tiers 1 and 2 benefits and contributions do not apply to Tier 3 revised plan members. Additionally, police officers hired by the City on or after April 1,2017, and those Tier 3 or 3R police officers who elected to opt-in on or before August 10, 2017, are Tier 3 enhanced members ("Tier 3E police officers") (*see* RSSL § 501[28]).

Credit for Previous Service – Tier 1 and 2

Defendants claim that under Admin Code §13-218(d)(2)(a), Tier 1 and 2 police officers are permitted to purchase service credit based on certain types of service completed immediately before joining the Police Department, which service is treated as allowable police service for pension credit purposes. Prior service would

then be included in the calculation of a Tier 2 member's years of service toward qualifying for a service pension (NYSCEF #11 – Tier 2 Summary Plan Description, 5-10). Service as a NYC uniformed correction officer, uniformed sanitation member, emergency medical technician, peace officer, sheriff, deputy sheriff, marshal or district attorney investigation, and certain "law enforcement-type" positions count for service credit (*id.*).

Credit for Previous Service – Tier 3

Defendants' policy for Tier 3 members regarding creditable service allows for the following types of service to be transferred: (1) prior service in the uniformed force of the New York City Police Department; (2) prior service as a member of the uniformed force of the New York City Fire Department that is acquired pursuant to Admin Code § 14-112; and (3) prior uniformed police or uniformed fire service rendered as a member of the New York State and Local Police and Fire Retirement System.

The 2002 Stipulation of Settlement between the City and the PBA

In 2002, the City and PPF signed a Stipulation of Settlement (2002 Stipulation) resolving three pending matters involving police officers who were Tier 2 members. The 2002 Stipulation expanded the type of service that would be considered "'city service' within the meaning of [the] Administrative Code" and that such service would be considered "in determining whether such person [had] completed the minimum period necessary to retire for service from the NYPD" (NYSCEF #13 – 2002 Stipulation). At the time of the 2002 Stipulation, no police officers were classified as Tier 3.

DISCUSSION

Converting the Declaratory Action into an Article 78 Special Proceeding

Defendants move pursuant to CPLR 103(c) to convert this declaratory action into an Article 78 special proceeding. Plaintiffs' complaint identifies this litigation as a "declaratory action to determine the rights and benefits under the buyback, purchase, and transfer provisions" applicable to police officers hired on or after July 1, 2009 (NYSCEF #1 – Complaint at ¶1). Plaintiffs claim that the City has made a "wrongful statutory interpretation" of the relevant law in not allowing police officers who are Tier 3 members to "buy-back" or receive credited service pursuant to Chapter 646 of the Laws of 1999, Chapter 552 of the Laws of 2000, provisions from Admin. Code Title 13, and RSSL § 43 (NYSCEF #1 at ¶6). This branch of defendants' motion is granted.

Plaintiffs' challenge here to the validity of defendants' interpretation and implementation of the RSSL and Admin Code §§ 13-143(b)(1) and 13-218(d)(2)(a), by which defendants denied buy-back credit to Tier 3 police officers. "[W]here a quasi-legislative act by an administrative agency . . . is challenged on the ground that it 'was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion' (CPLR 7803[3]), a proceeding in the form prescribed by Article 78 can be maintained," and the four-month statute of limitations for special proceedings governs (*New York City Health & Hosps. Corp. v McBarnette*, 84 NY2d 194, 204 [1994]).

While an agency's generally applicable decisions "do not lend themselves to consideration on their merits" under Article 78's mandamus review, because they involve "rational choices among competing policy considerations," in some cases, "even a nonindividualized, generally applicable quasi-legislative act such as a regulation or an across-the-board rate-computation ruling can be challenged" as lacking a rational basis, affected by an error of law, or arbitrary and capricious (*id.; see also Lynch v City of New York,* 23 NY3d 757 [2014] [declaratory judgment claim, challenging whether City violated RSSL § 480[b][i] for failing to contribute required amounts to pensions of Tier 3 police and fire members, converted to Article 78]; *Matter of Kaslow v City of New York*, 23 NY3d 78 [2014] [Article 78 proceeding appropriate to determine meaning of "Credited Service" under RSSL for Tier 3 CO-20 retirement plan for correction officer]). Plaintiffs' claim here presents such an instance. Plaintiffs' challenge to defendants' buy-back policy is a proper Article 78 proceeding as the policy is a nonindividualized, generally applicable quasi-legislative act that does not involve sifting through competing policy considerations.

Plaintiffs cite to *Zuckerman v Board of Education* (44 NY2d 336 [1978]) and *Allen v Blum* (58 NY2d 954 [1983]) for the proposition that this matter should remain a declaratory action because the "action seeks review of a continuing policy" (*Allen*, 58 NY2d at 956). *Zuckerman* is inapplicable here because the *Zuckerman* petitioners challenged not merely an interpretation by the Board of Education of a statutory mandate, but rather a series of procedures established by the Board of Education that plaintiff claimed was unlawful. *Allen* is identical to *Zuckerman* in that the plaintiffs sought a review of a continuing policy. These cases are distinct from the instant matter which involves a discrete statutory interpretation that is applied widely but is effectively a single determination that is well-suited for Article 78 review.

Accordingly, this matter is converted to an Article 78 proceeding pursuant to CPLR 103 (c). As defendants correctly contend, this subjects plaintiffs' claim to the four-month statute of limitations contained in CPLR 217. In matters seeking mandamus, the statute of limitations begins to run upon the refusal to perform such a duty (*see Donoghue v New York City Dept. of Educ.*, 80 AD3d 535, 536 [1st Dept 2011]; *Kolson v New York City Health & Hosps. Corp.*, 53 AD2d 827, 827 [1st Dept

1976]). In this instance, the accrual date would be calculated from the date a PPF Tier 3 member was denied the buy-back credit as sought. Therefore, all buy-back claims in this matter that were decided by the PPF four or more months prior to the initiation of this lawsuit are dismissed as untimely.

Summary Judgment

Defendants' motion for summary judgment is granted in part and denied in part; plaintiffs' cross-motion is, likewise, granted in part and denied in part.

In interpreting a statute, this court's primary consideration "is to ascertain and give effect to the intention of the Legislature" (*Riley v County of Broome*, 95 NY2d 455, 463 [2000] [internal quotation marks and citation omitted]). While the text of the statute "is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning" (*Matter of DaimlerChrysler Corp. v Spitzer*, 7 NY3d 653, 660 [2006]), the legislative history may also be relevant (*see Riley v County of Broome*, 95 NY2d at 463). The court notes that, where the issue presented to the court is one of purely of statutory interpretation, "there is little basis to rely on any special competence or expertise of the administrative agency," and the court "need not accord any deference to the agency's determination" (*Matter of Albano v Board of Trustees of N.Y. City Fire Dept., Art. II Pension* Fund, 98 NY2d 548, 553 [2002] [quotation marks and citation omitted]; *see also International Union of Painters & Allied Trades v New York State Dept. of Labor*, 147 AD3d 1542, 2017 NY Slip Op 01112, * 1-2 [4th Dept 2017] [Labor Department's interpretation is contrary to plain meaning of statute language, so no deference is required]).

RSSL §513 and Administrative Code §§ 13-143 and 13-218

"Tier 3 police officers' pension benefits are governed by article 14 of the RSSL and title 13 of the Administrative Code" (*Lynch v City of New York*, 162 AD3d 589, 590 [1st Dept 2018]). RSSL §500(a) 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".

Central to this dispute is the proper interpretation of RSSL §513(c)(2) which defines creditable service for Tier 3 police members. It reads:

> A police/fire member shall be eligible to obtain credit for service with a public employer described in [RSSL §513(c)(1)] only if such service, if rendered prior to July first, nineteen hundred seventy-six by a police/fire member who was subject to article eleven of this chapter, would have been eligible for credit in the police/fire retirement system or plan involved (RSSL §513[c][2]).

Defendants argue that §513(c)(2) should be interpreted to mean that Tier 3 police members may receive credit for prior service as creditable service only if such prior service was uniformed police or uniformed fire service, as currently allowed for Tier 3 members (*see* NYSCEF #64 – Def's Reply at 8). Plaintiffs, on the other hand, argue that RSSL §513(c)(2) provides that Tier 3 "police officers are entitled to the same prior service credit as their counterparts in Tier 2" (NYSCEF #19 – Pl's Memo of Law and Opposition at 9). Plaintiffs also make the slightly different argument that "[T]ier 3 police officers are entitled to the same creditable service as existed for tier 2 police officers in 1976" (*id.* at 8).

Defendants' interpretation is incorrect. Acceptable prior service is not cabined to only uniformed police or fire service by the plain language of RSSL §513. Defendants' interpretation effectively (i) limits police or fire service to those members in uniform; (ii) bypasses the clause "prior to July first, nineteen hundred seventy-six"; and (iii) skips to "by a police/fire member"; in an apparent attempt to restrict acceptable service credit.

Plaintiffs' first interpretation is also incorrect. RSSL §513(c) by its plain language does not grant Tier 2 equivalence to Tier 3 members on the issue of creditable service.

It is in fact plaintiffs' second interpretation of RSSL §513(c)(2) that rings true. The clause – "[a] police/fire member shall be eligible to obtain credit for service with a public employer described in paragraph one" – is modified by the second part of the clause – "only if such service, if rendered prior to July first, nineteen hundred seventy-six by a police/fire member who was subject to article eleven of this chapter, would have been eligible for credit in the police/fire retirement system or plan involved" (RSSL §513[c][2]). The second part of the clause indicates that the drafters of RSSL Article 14 intended to create equivalence between Tier 2 and Tier 3, but frozen in time so that Tier 3 members receive the same creditable service benefits as Tier 2 members in 1976.

The legislative history confirms this reading of RSSL §513(c)(2). In March 1976, the Permanent Commission of Public Employee Pension and Retirement Systems reported to the Legislature on the creditable service issue that "[c]redit for service shall be governed by provisions similar to those currently contained in Section 446 of the Retirement and Social Security Law" (NYSCEF #26 – Bill Jacket for Chapter 890 of the Laws of 1976 at 151). The police/fire member's carve-out of RSSL §513(c)(2) was created in contrast to RSSL §513(c)(1), which governs all other Tier 3 pension members creditable service with the "sole justification for a separate service retirement benefit for policemen and firemen is the stated management goal of maintain a young and vigorous police and fire force" (*id.* at 112).

As RSSL §513(c)(2) requires application of 1976 era creditable service rules to Tier 3 police members, plaintiffs' claims in this matter under Admin Code §§ 13-143 and 13-218 must fail as both code provisions were passed after 1976. Administrative Code §13-218, which allows for purchase of prior service completed as a uniformed transit member, uniformed corrections member, housing police member, or uniformed sanitation member, came into effect with the enactment of Chapter 650 of the Laws of 1980. Administrative Code §13-143, which allows for prior service completed as an EMT member to be transferred as police service credit, came into effect with the enactment of Chapter 728 of the Laws of 2004. As such, plaintiffs cannot obtain the relief sought as RSSL §513(c)(2) prohibits the importation of post-1976 creditable service reforms.

1976 Administrative Code §§ B18-15.0 and B3-30.1 Applicability

Plaintiffs ask this court to look at the 1976 predecessors to §§ 13-143 and 13-218, Admin Code §§ B3-30.1 and B18-15.0, respectively, to support their claims.

Section B18-15.0 permits transfers from NYCERS to the PPF of creditable service in determining the "pension or retirement allowance". This benefit is restricted only to "[a]ny person who was a member of [NYCERS] on or before December thirty-first, nineteen hundred sixty-five, and whose membership therein was terminated by his attaining membership in the police pension fund". Additionally, §B18-15.0 provides that no member of the PPF is eligible for service retirement "until he has served in the police force for a minimum period of twenty or twenty-five years, or until he has reached the age of fifty-five, according to the minimum period or age of retirement elected by such member prior to the certification of his rate of contribution" (NYSCEF #33 – 1976 NY Admin Code §B18-15.0). Based on the plain language of §B18-15.0, only PPF members who were NYCERS members prior to December 31, 1965 are eligible for the benefit as described in the 1976 Admin Code.

However, §B3-30.1 allows the benefit sought by plaintiffs. Administrative Code §B3-30.1 provides as follows:

> Any member of [NYCERS] may transfer his credit therein to the police pension fund provided for in article two, title B of the chapter eighteen of the administrative code of the city of New York upon attaining membership in said police pension fund. Any person heretofore a member of [NYCERS] whose membership therein was terminated by his attaining membership in said police pension fund and who has not withdrawn his contributions to [NYCERS] may similarly transfer his credits to the said police pension fund (1976 Administrative Code §B3-30.1).

The plain language of §B3-30.1 allows for the transfer of NYCERS credit to the PPF. However, this right, cabined as §B3-30.1, includes identical language to §B18-15.0 that prohibits service retirement "until [an officer] has served in the police force for a minimum period of twenty or twenty-five years, or until he has reached the age of fifty-five, according to the minimum period or age of retirement elected by such member prior to the certification of his rate of contribution" (NYSCEF #63 – 1976 NY Admin Code §B3-30.1). As such, NYCERS members whose membership in NYCERS is terminated by attaining membership in PPF is entitled to transfer credits to the PPF in accordance with the restrictions contained within §B3-30.1.

RSSL §43 Applicability

Plaintiffs further argue that RSSL §43 permits Tier 3 police members to transfer non-uniformed service completed as a state NYSLERS member to PPF as allowable police service (NYSCEF #19 – Pl's Memo of Law at 11-12). RSSL §43(a) provides as follows:

> Notwithstanding any other provision of law providing for transfers, any member of any retirement system maintained by the state or a municipality thereof... subject to the supervision of the department of financial services of this state may transfer his membership pursuant to this section to the New York state and local employees' retirement system, the New York city board of education employees' retirement system, the New York state teachers' retirement system, the New York city teachers' retirement system or to the New York city employees' retirement system. Any member of the New York state and local employees' retirement system may transfer his membership to any retirement system... which is operating on a sound basis and is subject to the supervision of the department of financial services of this state (RSSL §43[a]).
>
> In addition, RSSL §43(b) states:
>
> A person so transferring from one retirement system to another shall be deemed to have been a member of the system to which he or she has transferred during the entire period of membership service credited to him or her in the system from which he or she has transferred. Such transferee, however, shall not receive more than three percent interest on his or her contributions and accumulated contributions unless he or she has continuously been a member in either the system from which or to which he or she is transferring since a date prior to July first, nineteen hundred forty-three.

In concert with §43(a) and (b), RSSL §43(d) states that members "be given such status and credited with such service in the second retirement system as he was allowed in the first retirement system. Such contributor, notwithstanding any other provision of law, shall on retirement be entitled to a pension based on salary earned during member service in both retirement systems together, pursuant to the statutory requirements of the second retirement system" (RSSL §43[d]).

Plaintiffs next point to *Lynch v Giuliani* (Sup Ct, NY County, July 10, 2002, Lebedeff J., Index No. 112959/01) for the proposition that all RSSL §43 transferred time shall be deemed creditable service for Tier 2 police officers, and that, since RSSL §43 predates RSSL § 513(c)(2)'s post-1976 prohibitions, it must apply to Tier 3 members as well. The *Lynch v Giuliani* motion court determined that "the individual petitioners are entitled to have their prior state time, properly rolled over into NYCERS pursuant to the transfer provisions of RSSL §43(a) and then transferred into the PPF at the time of the merger, counted toward their twenty-year service period for eligibility for retirement."

Plaintiffs also submit an August 5, 1963 Memorandum from Corporation Counsel to Hon. Michael J. Murphy, Police Commissioner which details Corporation Counsel's interpretation of RSSL §43. The Memorandum states that "a member of the Police Pension Fund, who has transferred to such Fund from [NYSLERS] pursuant to § 43 of the [RSSL], is entitled to have the service credit, acquired by such transfer, included in determining his eligibility for benefits under § 307-e of the General Municipal Law and to receive a pension or retirement allowance based on his combined credited State service and Police Department service as if the entire service were performed as a member of the Police Pension Fund" (NYSCEF #32 at 7).

Defendants, on the other hand, argue that RSSL § 43(d) does not allow prior NYSLERS service to be credited as allowable police service in PPF. Rather, defendants argue that the statute explicitly states that transferred service can be credited in the second retirement system only as it would have been in the first retirement system. Defendants claims that "[b]ecause such prior NYSLERS service could never be credited as allowable uniformed police service in NYSLERS, as it is indisputably *civilian* service, consequently such prior NYSLERS service cannot be credited as allowable uniformed police service in PPF" (NYSCEF #64 at 13). Defendants further argue that if RSSL §43 alone created a right for NYSLERS members to transfer prior credit as allowable service credit in the PPF, there would have been no need for the Legislature to enact any of the transfer provisions of the Administrative Code, such as Administrative Code §§ 13-143 or 13-218 or any subsequent amendments explicitly providing for prior NYSLERS service to be creditable in the PPF.

Defendants' argument is correct – there would have been no need for the Legislature to create the myriad amendments that expanded creditable service to Tier 2 members if RSSL §43 properly allowed them to transfer service. Further, the *Lynch v Giuliani* decision relied on RSSL §43 being applied through Admin Code §§ 13-143 that is inapplicable to Tier 3 members, as discussed earlier. While the 1963 Memorandum is persuasive, it does not speak to the Legislature's intent when crafting RSSL §43 and is therefore of limited value in this court's analysis. As such, RSSL §43 cannot be utilized to import creditable service for Tier 3 members wholesale.

RSSL § 645 Applicability

Plaintiffs argue that RSSL § 645, titled "Benefits for Certain Members Who Re-Enter Public Service", allows for any public employee to buy back their prior service in another retirement system of the New York State or City. RSSL § 645(2) provides that:

> "Upon such reinstatement date of membership, such member shall be entitled to all the rights, benefits and privileges to which he or she would have been entitled had his or her current membership begun on such original date of membership except that, solely for the purposes of granting retirement credit to members of a public retirement system other than the New York city teachers' retirement system for service credited during such previous ceased membership where such was in a public retirement system other than the member's current retirement system, such previously credited service shall be deemed to be prior service, not subsequent service" (RSSL § 645[2]).

However, plaintiffs' interpretation of RSSL § 645 is far broader than the actual language of the statute. RSSL § 645 permits members in any tier who had a prior public retirement system membership that ceased under specified circumstances to reinstate their original date of public retirement system membership. Thus, under RSSL § 645, Tier 3 police members may become Tier 2 police members if (1) they joined another public retirement system prior to July 1, 2009; (2) subsequently terminated that prior membership by withdrawing their membership; and (3) filed an application under RSSL § 645 upon joining PPF. If the members meet these requirements, they will acquire Tier 2 membership, with entitlement to the same prior government service credited as allowable police service as all other Tier 2 members. Therefore, Tier 3 police members who can reinstate to Tier 2 on the basis of such a prior membership are not aggrieved by the limitations on allowable police service at issue in this case.

Of course, these limitations do affect the remaining Tier 3 police members who cannot reinstate to Tier 2 under RSSL § 645 because they lack a lapsed prior

membership in a public pension system that predates July 1, 2009. As such, plaintiffs' argument that RSSL § 645 grants Tier 3 police members Tier 2 rights is incorrect, as that would transform a statute on tier reinstatement into a vehicle for the destruction of the tier system.

RSSL § 446 Applicability

Plaintiffs claim that RSSL § 446(b) permits Tier 3 police members to purchase prior NYCERS or NYSLERS service and have it credited as allowable police service. However, RSSL § 446(b) cannot possibly apply to Tier 3 members as it is a component of RSSL Article 11, not Article 14 which governs Tier 3 members. As discussed above, RSSL § 500 precludes the application of RSSL § 446(b) to Tier 3 members.

RSSL § 519 Applicability

Plaintiffs argue that RSSL § 519 extends the transfer rules applicable to Tier 2 members to Tier 3 members. The language is as follows:

> Any other provision of this chapter, of the state education law or of the administrative code of the city of New York, or rules and regulations thereunder, relating to the reemployment of retired members, transfer of members and reserves between systems and procedural matters shall apply to members covered under this article during the duration thereof unless inconsistent herewith (RSSL § 519).

However, the plain language of RSSL § 519 does not allow for the relief sought by plaintiffs as it would be inconsistent with RSSL § 513(c)(2), as discussed at length above.

2002 Settlement Applicability

Finally, plaintiffs argue that the 2002 Settlement Agreement between the PBA and the PPF relating to service purchased pursuant to RSSL §645 was breached because it was not applied to Tier 3 police members. The elements for a breach of contract claim are: (1) formation of a contract between the parties; (2) performance by one party; (3) failure to perform by the other party; and (4) resulting damage (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The court must look at the plain language of the contract to determine if there is a breach (*see Golden Gate Yacht Club v Societe Nautique de Geneve*, 12 NY3d 248, 256 [2009]).

Plaintiffs highlight Art. A, ¶9 of the 2002 Settlement for the proposition that it applies to Tier 3 members, which reads as follows:

Services covered. The following paragraph 10 shall apply to service acquired by any person who is a member of the PPF and a member of the uniformed service of the NYPD which service was:
(i) acquired pursuant to the provisions of section 645 of the RSSL; and
(ii) is service performed as a member of a public retirement system which is not service in the member's current system within the meaning of section 645 of the RSSL; and either
(iii) was service performed in the uniformed service of a police department, fire department, corrections department or sanitation department of the City of New York or the State of New York or any agency or political subdivision thereof; or
(iv) was service as a peace officer as specified in section 2.10 of the criminal procedure law; or
(v) was service performed as a member of the New York State Policemen's and Firemen's Retirement System; or
(vi) was service in the title of sheriff, deputy sheriff, marshal, district attorney investigator or other position specified in Appendix A (NYSCEF #24 – 2002 Stipulation of Settlement at 5).

Plaintiffs claim that the 2002 Settlement applies to "any person who is a member of the PPF and a member of the uniformed service of the NYPD" which, they argue, must apply to Tier 3 members.

Defendants counter that there were no Tier 3 police members when the 2002 Settlement was signed and that "no language exists in the Stipulation to indicate that any subsequent tiers would benefit from its provisions" (NYSCEF #64 at 15). Defendants further argue that Legislature enacted Chapter 498 of the Laws of 2005 as a remedial statute that amended Administrative Code §§13-218(d)(2)(a) and 13-143 and essentially codified that 2002 Stipulation of Settlement (NYSCEF #14 – Chapter 498 of 2005 Bill Jacket at 18-19). The Legislature made no indication that they intended to extend the benefits to Tier 3 pension members.

Defendants' interpretation is correct. While the language of the 2002 Settlement does indeed state that "any person who is a member of the PPF and a member of the uniformed services of the NYPD", Tier 3 members were not contemplated in the agreement as no Tier 3 police members existed until 2009. As such, Tier 3 members cannot avail themselves of the benefits of the 2002 Settlement Agreement. Plaintiffs' breach of contract claim fails.

CONCLUSION

In sum, the relief accorded is as follows: 1) defendants' motion to convert this proceeding from a declaratory action to an Article 78 proceeding is granted; 2)

defendants' motion to prohibit as time barred all claims arising four months or more prior to the initiation of this lawsuit on November 4, 2016 is granted; 3) upon conversion, defendants' motion for summary judgment is granted in part and denied in part; and 4) plaintiffs' cross-motion for summary judgment is granted in part and denied in part.

The PPF must allow Tier 3 members to transfer service credit pursuant to RSSL § 513(c)(2) and 1976 Admin Code §B3-30.1 for PPF members who previously obtained credit in the NYCERS system, as long as §B3-30.1 requirements are met: Tier 3 PPF members will have "served in the police force for a minimum period of twenty or twenty-five years, or until he has reached the age of fifty-five, according to the minimum period or age of retirement elected by such member prior to the certification of his rate of contribution". To this extent only, defendants' motion is denied, and plaintiffs' cross-motion is granted.

Other than this exception, defendants' motion for summary judgment is granted and plaintiffs' cross-motion is denied. Tier 3 members are not entitled to obtain service credit for their NYSERS service or to the benefits of Tier 2 members as sought in their complaint. RSSL §§ 43, 446, 519, and 645 do not confer the benefits sought by plaintiffs. Administrative Code §§ 13-143 and 13-218 do not apply to Tier 3 members. The 2002 Stipulation of Settlement between the PPA and the PPF does not apply to Tier 3 members.

Accordingly, it is hereby ORDERED that the branch of defendants' motion to convert this declaratory judgment action into an Article 78 proceeding, and then to dismiss the proceeding as time-barred, is granted only to the extent of converting the action to an Article 78 proceeding which is subject to the four-month statute of limitations pursuant to CLPR 217; and it is further

ORDERED that the branch of plaintiffs' cross-motion for summary judgment, which seeks a declaration that defendants have violated RSSL § 513(c)(2) and 1976 Admin Code §§ B3-30.1 and B18-15.0 is granted; and it is further

ORDERED that all other branches of plaintiffs' cross-motion are denied; it is further

ORDERED that the branch of defendants' motion seeking summary judgment on RSSL § 513(c)(2) and 1976 Administrative Code §§ B3-30.1 and B18-15.0 is denied; it is further

ORDERED that all other branches of defendants' motion for summary judgment are granted; and it is further

ADJUDGED and DECLARED that defendants 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 have violated and continue to violate RSSL §513(c)(2) and 1976 Administrative Code §§ B3-30.1 and B18-15.0 by refusing to permit all police officers, including those hired on or after July 1, 2009, in Tier 3 from availing themselves of the benefits afforded by that statute.

This constitutes that Decision and Order of the court.

7/5/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE