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COURT OF APPEALS

STATE OF NEW YORK

PATRICK LYNCH, ET AL.,

Appellants,

-against-

NO. 44

THE CITY OF NEW YORK, ET AL.,

Respondents.

20 Eagle Street
Albany, New York
September 10, 2020

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Penina Wolicki
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.
2 The first appeal on this afternoon's calendar is appeal
3 number 44, Lynch v. The City of New York.

4 Counsel?

5 MR. SMITH: Thank you, Your Honor. The - - - the
6 point I want to emphasize, of course, I'm going to start
7 with the text of the statute, which says, "Any member who
8 is absent without pay for child care leave shall be
9 eligible for credit." And nobody disputes that "member"
10 means member of the Police Pension Fund.

11 But the City reads the language to say "any
12 member in tier 1 or tier 2, but not tier 3." And that's
13 flatly contrary to the text of the stat - - - the statute.
14 And I think it's fair to say that essentially the only
15 basis the City has for the way it reads the statute is the
16 theory, which comes up over and over again in their brief,
17 that Article 14 of the Retirement & Social Security Law - -
18 - excuse me - - - the Retirement & Social Security Law, is
19 the exclusive source of benefits for tier 3 members.

20 They say that if - - - when the 2000 legislature
21 - - - this was a bill passed in 2000 - - - when they passed
22 that statute, the legislature must have understood that if
23 they wanted to give a benefit to tier 3 members, they had
24 to do it by amending the RSSL and Article 14. They
25 couldn't do it by amending the City Administrative Code.



1 Now, I would say that even if the legislature - -
2 - there was some evidence the legislature thought that in
3 2000, I would argue that it could not overcome the plain
4 text of the statute. But if the 2000 legislature did not
5 have this understanding, and there's no basis for
6 attributing that understanding to the 2000 legislature,
7 then I think the City's case collapses completely.

8 And I'm going to argue that there's no basis,
9 whatever, for attributing to the 2000 legislature the idea
10 that Article 14 was the exclusive source of benefits.

11 The only statute or statutory text that the City
12 relies on for this ex - - - their exclusivity theory - - -
13 the theory that you've got to go to Article 14, is 519(1)
14 of the Social Security Law - - - sorry, Retirement & Social
15 Security law, which is on page - - - I brought it in full
16 at page 4 of my reply brief. And it just won't bear the
17 meaning that the City gives it. There's no way to read
18 that statute as an exclusivity statute.

19 JUDGE FAHEY: Mr. Smith, do we need to look at
20 the sponsor's memorandums, particularly - - - particularly
21 the 2005 amendment here?

22 MR. SMITH: Okay. I'm sorry, the - - - it's very
23 hard to tell who's talking. Judge Garcia?

24 JUDGE FAHEY: No, it was Judge Fahey.

25 MR. SMITH: I'm sorry.



1 JUDGE FAHEY: No, don't worry about it. It's the
2 masks. Everybody's had the same problem.

3 MR. SMITH: Yes, I apologize.

4 JUDGE FAHEY: It's no problem.

5 MR. SMITH: Your Honor, the - - - the - - - well,
6 the 2005 memorandum would, I think, be more relevant, if
7 you're interpreting the 2005 statute. But I would like to
8 talk - - - since you brought it up - - - about what
9 happened five - - - five years after, and to me, more
10 important, four years after this law was passed.

11 This one was passed in 2000. And then there's a
12 little drama in 2004 and 2005 involving the corrections
13 officer, which is a very major point to my adversary's
14 reliance. May I say in parenthesis, he does that because
15 there's nothing before 2000 that could possibly support - -
16 - and I mean, he says that there are things that do support
17 it, but they don't.

18 But he - - - what he has to rely on primarily is
19 what happened afterwards, and that's a weak point to begin
20 with, because how is the - - - how does that prove what the
21 2000 legislature thought? But it's weaker than it looks.

22 What happened was, in 2004, the - - - the
23 legislature, everyone agrees, wanted to give a benefit to
24 all correction officers, including tier 3. So it did so by
25 amending the Administrative Code.



1 And the - - - the City says, well, that - - -
2 that was an oversight. They - - - they made a mistake.
3 They - - - they didn't do what they intended to do. What
4 was the oversight? The oversight was that the 2004
5 legislature didn't know that they had to amend Article 14.

6 Well, if they didn't - - - if they didn't know
7 it, how's the two - - - how are we supposed to think the
8 2000 legislature knew it? How are we supposed to believe
9 that any legislature before 2005 had any idea that they
10 were supposed to amend Article 14 of the Administrative
11 Code?

12 And - - -

13 JUDGE FAHEY: I see the plain-language argument,
14 but you know, what I wonder here is the Appellate Division
15 seemed to rely on the concept that there was a conflict
16 between the Administrative Code and the RSSL. Why don't
17 you address that issue?

18 MR. SMITH: I don't think there's any conflict at
19 all. The - - - Article 14 doesn't have a child care
20 benefit in it. There's only a conflict if you accept the
21 premise that it doesn't - - - that it - - - that an
22 exclusion from Article - - - that - - - that anything
23 that's not in Article 14 is excluded. And that's not
24 right.

25 We have counter-examples. There's a variable



1 supplement fund that's not in Article 14 that applies to
2 tier 3 - - -

3 CHIEF JUDGE DIFIORE: Counsel, what about in 519,
4 the effect of other laws provision that says, "provisions
5 of the Administrative Code relating to procedural matters
6 shall apply to tier 3 members covered by 14"?

7 MR. SMITH: Yeah, that's where I was going a
8 second ago, Your Honor. The - - - that's a statute of
9 inclusion, not exclusion. It says these things shall
10 apply. The - - - the City's brief puts the word "only"
11 there, but not in quotation marks, because the word "only"
12 isn't in the statute.

13 It's in - - - 519 is an incorporation by
14 reference statute. It says in substance, we don't want to
15 type everything from every other statute that's going to be
16 just the same for tier 3 as for everybody else. So we
17 hereby incorporate it by reference.

18 And that's all 519 does. And they - - - and - -
19 - and I think that's why my adversary didn't quote the full
20 statute in his brief. If you - - - if you read the whole
21 statute, any provision of this chapter of the state - - -
22 of several things - - - including the New York City
23 Administrative Code, shall apply to members covered under
24 this statute, if it relates to certain subjects. That's
25 all it says. It says "shall apply". It doesn't say



1 anything shall not apply. It doesn't say the only way to
2 amend this is by amending Article 14.

3 If it had said that, by the way, they - - - it
4 would be ineffective, because you can't bind future
5 legislatures. That is, if they had said the - - - no
6 future legislature may amend this statute except by doing a
7 certain thing, the next legislature could say, sorry, we
8 don't agree, we're amending it any way we want.

9 But that - - - that doesn't come up. This is not
10 - - - this - - - this is purely an incorporation by
11 reference statute. It is not an exclusionary statute.
12 It's never been read as being an exclusionary statute.
13 There is no case anywhere, in fact, that adopts this
14 theory.

15 JUDGE WILSON: There's also - - - there's also
16 sort of the strain the City's papers, I think, that when
17 "any member" was written, there were no tier 3 members, and
18 the City knew that, and so it was meant to apply only to
19 tier 1 and tier 2.

20 MR. SMITH: Actually, I - - - I don't think
21 that's at all logical, Your Honor. First of - - - first of
22 course, tier 3, did exist and the possibility of applying
23 it to tier 3 members was very, very much alive. They had
24 to - - - every two years, they passed a law excluding tier
25 3 members.



1 And in any event, when you - - - the statute says
 2 any member of the police force. If you're going to - - -
 3 or any member of the Police Pension Fund, where - - - is
 4 what it means. If you say "any member of the Police
 5 Pension Fund", what you - - - the - - - the only natural
 6 interpretation of that, absent some other very strong
 7 reason, is any past or future member in any tier, even the
 8 tiers that haven't been created yet, even if they'd never
 9 heard of tier 3.

10 If they were going to say "any member", that can
 11 be understood as meaning "any member". If they wanted to
 12 say any member who's a member today, that's different.
 13 Then you wouldn't get to - - - to tier 3. But if you say
 14 any member of the police force shall get a badge or a cost-
 15 of-living adjustment or anything, it means any member of
 16 the police force. It doesn't mean just the tiers that
 17 happened to exist at the moment, even though tier 3 did
 18 exist at the moment, in 2000, and - - - and it was entirely
 19 possible - - - and something the legislature must have been
 20 - - - have been deemed to have - - - deemed to have
 21 understood that it could apply to - - - to - - - to police
 22 officers.

23 So I don't - - - I just don't think the City even
 24 gets to first base, unless you buy the idea that there is -
 25 - - which I think is an urban legend - - - that the - - -



1 that you have to amend Article 14 if you're going to give
2 any benefit to tier 3 officers.

3 No case has ever said that. No statute has ever
4 said that. No legislative history within five years of the
5 - - - of - - - that is until five years after the 2000
6 legislature passed this law, had ever said that. And the
7 2004 legislature obviously had a completely contrary
8 understanding.

9 I guess my time is up.

10 CHIEF JUDGE DIFIORE: Thank you, Counsel.
11 Counsel?

12 MR. MOORE: May it please the court, my name is
13 John Moore, and I represent the City of New York and the
14 New York City Police Pension Fund.

15 The legislature has made clear that it neither
16 understood nor intended the child care service credit
17 benefit to apply to tier 3 police officers.

18 JUDGE GARCIA: But Counsel, if - - - if we're
19 thinking - - - you know, I understand your adversary's
20 argument to be, look at the plain language of the statute
21 that was passed in 2000. I understand that argument.

22 I think does your argument have to be: when they
23 passed that statute in 2000, the legislature intended that
24 only to apply to tier 2 members, knowing that every two
25 years this thing had the possibility of rolling over into



1 tier 3? But that was their intention in 2000?

2 MR. MOORE: That - - - that's correct, Your
3 Honor. That - - - it was - - -

4 JUDGE GARCIA: What in the record indicates that?

5 MR. MOORE: What indicates that is that it was
6 included in the Administrative Code but not in the
7 Retirement & Social Security Law in Article 14. There are
8 numerous provisions in the Administrative Code that only
9 apply - - - that apply to members - - - the key term here -
10 - - but only apply to members in tier 1 and tier 2.

11 Now, I want to draw the court's attention to the
12 - - - the 2014 decision - - -

13 JUDGE GARCIA: But wouldn't you have to look at
14 each of those provisions and understand what it does and
15 what was in effect when that provision was passed? But in
16 this case we know it was 2000, we know that there was the
17 potential for roll-over, we know the intended benefit. And
18 I - - - I have a hard time constructing legislative intent
19 here - - - if we're going to look for one, beyond the plain
20 meaning of the statute - - - that says we only intend this
21 to apply as long as you're in tier 2, and as soon as
22 there's a roll-over, you're going to lose this benefit.

23 MR. MOORE: Well, there - - - there's numerous
24 places to look. And - - - and one of which is that - - -
25 the prime example that I would point Your Honor to is the -



1 - - is that the legislature understands the structure of
2 the pension system that it's enacted.

3 Now, it's a complex system. It's been amended
4 piecemeal over decades, which is why this court has always
5 been clear that it adopts a very holistic analysis and
6 interprets the statute as a whole.

7 In doing so, you have to look at Section 519,
8 which defines the effect of other laws. Now, the PBA
9 claims that that's a state - - - that's a statute of
10 inclusion, that it expr - - - expressly includes the
11 transfer of members and reserves between systems, the
12 reemployment of retired members, and procedural matters.

13 Then under the PBA's reading it also includes - -
14 - and everything else. But by a second - - - by
15 specifically naming those three sta - - - those three
16 areas, those three categories, where the Administrative
17 Code does apply to Article 14 members, it is, by
18 implication, excluding things that don't fall within those
19 three categories.

20 JUDGE FAHEY: Let me - - - let me address that
21 argument and one of my difficulties with it. The way I see
22 it is if we just stick to the plain-language argument, I
23 don't think the plain-language argument favors your point
24 of view. But - - - reasonable minds can differ about that,
25 however.



1 But what I'm wondering is, it seems that you're
2 arguing that the Administrative Code that was enacted in
3 2000 is repealed by an RSSL Section 15(h), which was
4 enacted in 1976. Does that make any sense?

5 MR. MOORE: Well, that - - - that's incorrect,
6 Your Honor.

7 JUDGE FAHEY: Okay.

8 MR. MOORE: The - - - the - - - the - - - and the
9 reason is that the Administrative Code provision was not
10 repealed at all. It continues to apply for tier 2 and tier
11 1 members. At this point, I suspect there are no tier 1,
12 but it does continue.

13 JUDGE FAHEY: But wouldn't - - - wouldn't the
14 court say that what we should be trying to do here is - - -
15 is reconcile these, is read them together?

16 MR. MOORE: The - - - that's correct. And what
17 that - - - and the way that you do that, is by reading the
18 Administrative Code to apply to tier 1 and tier 2 members
19 and Article 14 to apply to tier 3 members. And I want to -
20 - -

21 JUDGE FAHEY: Going back to the plain-language
22 territory, that's the problem there.

23 MR. MOORE: Well, so if I may, Your Honor - - -

24 JUDGE FAHEY: Sure.

25 MR. MOORE: - - - I'd like to return to - - - to



1 this court's 2014 decision in Lynch, because I think that
2 it addressed many of the issues that are - - - are being
3 questioned in this appeal, and because the rendition of
4 that, from the PBA is - - - does not accurately reflect
5 what the court decided.

6 In 2014, the court was considering an increased
7 take-home pay benefit that was granted in the
8 Administrative Code, to members in Section 13-226. That
9 was a temporary benefit that was eventually made permanent
10 during the te - - - the per -- - the pension reform
11 measures of - - - of the mid '70s. And so that was
12 extended and then made permanent.

13 It was made permanent, by the way, after tier 3
14 members - - - after tier 3 had been created. In - - - in
15 doing so, however, the - - - the court - - - this court
16 held that in making it permanent, it made it permanent for
17 those members who are already entitled to receive it. It
18 didn't expand the scope of those members.

19 So the question became: are tier 3 members - - -
20 are tier 3 police officers eligible to claim that benefit?

21 The supreme court, when it ruled on this issue,
22 said the statute says "members", tier 3 are members, that's
23 the end of the analysis. This court, however, rejected
24 that reasoning. This is the language in the Lynch decision
25 that says that in order for a benefit, even one applying to



1 members, to apply to tier 3 members, it has to be included
2 in Article 14.

3 JUDGE STEIN: But this one doesn't have that same
4 language. And that language is very distinctive from
5 what's - - - what's in - - - in this case. So I mean, I
6 think Lynch recognized that the benefit, you know, was - -
7 - was set forth in the Code.

8 I guess my - - - my question is, is if the
9 legislature in this case, without any language like that,
10 intended to limit it to tier 2 members, why didn't they
11 just put it in Article 11?

12 MR. MOORE: The reason for that - - - and two - -
13 - if I may, two points on that, Your Honor? The first is
14 that Article 11 primarily serves as limitations on the
15 benefits to tier 2 and tier 1 members. Primary benefits
16 are granted in the Administrative Code.

17 And that - - - you can actually still see that
18 today. Last spring, on May 30th, the governor signed into
19 law Chapter 89 of the Laws of 2020. And that created an
20 accidental death benefit related to public employees who
21 contracted COVID presumably during their work for - - - as
22 public employees.

23 In amending that law, which also applies to
24 members - - - again, the key term here - - - the
25 legislature added the benefit to four chapters of the - - -



1 of the Administrative Code for police, fire, teachers, and
2 New York City employees of the retirement system, not
3 Article 11; but then also into four chapters of the
4 Retirement & Social Security Law.

5 When the legislature wants to apply a benefit
6 across tiers, it knows how to do so, and it does so by
7 amending both the Administrative Code and the Retirement &
8 Social Security Law.

9 JUDGE FAHEY: The problem is that logic applies
10 to repealing an action also, and it seems to me that - - -
11 to follow up on Judge Stein's point - - - is that you're
12 arguing for repeal by implication rather than explicitly.

13 MR. MOORE: No, Your Honor. Again, it's not a
14 repeal, because the statute remains in effect and full
15 force for the members for whom it has always applied, which
16 is tier 1 and tier 2 members.

17 If a tier 2 member today - - -

18 JUDGE FAHEY: Yeah, you suffer there from the
19 "any" language - - - "any member" problem, though. But I
20 have your argument, thank you.

21 MR. MOORE: On - - - on that, Your Honor, I would
22 direct Your - - - Your Honor's attention to the Lynch
23 decision, to the - - - the amendments to the Administrative
24 Code and the Retirement & Social Security Law, relating to
25 "any correction member". I would - - - and the Wertheim



1 decision.

2 JUDGE GARCIA: But in Lynch - - - and I may have
3 the facts wrong; I'm sorry - - - but in Lynch, wasn't the
4 original statute passed before tier 3 existed? Or is that
5 not so?

6 MR. MOORE: That - - - that is correct. The
7 original statute in the Administrative Code was before tier
8 3.

9 JUDGE GARCIA: Yeah, I'm sorry, yeah.

10 MR. MOORE: It - - - it was subsequently amended
11 during the process by - - - by which officer - - - by which
12 the new tier was added. But the - - - similarly, here, the
13 benefit was added before there were any police officers in
14 tier 3.

15 JUDGE GARCIA: But it existed and there was a
16 foreseeability that they would be rolled into that. I
17 think they had to do it every two years. But so I - - - it
18 strikes me as somewhat different than Lynch. When they
19 drafted that provision, there was no tier 3.

20 MR. MOORE: That - - - that - - - that may be the
21 case. But I - - - I would say that the fact that the
22 legislature was aware that one day tier 3 officers could
23 become a member - - - police officers, rather, could become
24 members of tier 3, actually favors us, because we know that
25 when they - - - that they can amend the Retirement & Social



1 Security Law, Article 14, when they want to add that
2 benefit. That's what they did for correction members.

3 In 2012, they had the opportunity to do so. They
4 said we've realized that police officers aren't entitled to
5 this benefit, and rather than grant it to police officers,
6 they canceled the benefit for newly hired correction
7 members.

8 That indicates that the legislature both didn't
9 understand police officers to have it - - - they understood
10 the structure of the system that they were working within -
11 - - and didn't intend for tier 3 police officers to be able
12 to claim that benefit.

13 I want to address one additional point, which is
14 that the - - - the PBA cites to a variety of Administrative
15 Code provisions that it says indicate that substantive
16 benefits can, in fact, come from the Administrative Code,
17 for tier 3 members. I would suggest, Your Honor, that - -
18 - that that's simply untrue.

19 And the variable supplement fund that the PBA
20 specifically highlighted today, actually makes clear that
21 it's not actually a pension benefit. If you look to
22 Section 13-269(b), the statute says this is not a pension
23 benefit. Payments from this fund don't count as pension
24 payments.

25 So to say that that indicates that substantive



1 pension benefits can be granted to Article 14 members,
2 through the Administrative Code, simply doesn't hold true.

3 On a broader scale, the fact is that Section 519
4 creates a default rule that says here's how these statutes
5 ought to be interpreted together. And it doesn't include
6 substantive benefits.

7 To the extent that an occasional procedural issue
8 - - - which is the - - - the bulk of the statutes that the
9 - - - the PBA cites - - - take a hyper-cautious approach,
10 and say well, this - - - this - - - this - - - transfers of
11 funds, this - - - the payments that employers have to make
12 into the different interest rates, that that doesn't apply
13 to Article 14 members; first of all, that's a procedural
14 matter. It's arguably within 519. And it doesn't overturn
15 the entire pension structure.

16 The PBA's argument would upend that structure and
17 say that the Article 14 is not the source of - - - of tier
18 - - - of tier 3 benefits, that 519 ought to be read to
19 incorporate everything, and that any member, contrary to
20 the legislature's understanding and this court's
21 interpretation, transcends tiers, which is - - - again, is
22 simply not what this court or the legislature has ever
23 understood that term to mean.

24 CHIEF JUDGE DIFIORE: Thank you, Counsel.

25 Mr. Smith?



1 MR. SMITH: I think I neglected to reserve
2 rebuttal time, Your Honor.

3 CHIEF JUDGE DIFIORE: I reserved it for you, sir.

4 MR. SMITH: Thank you. How much did you reserve
5 for me?

6 CHIEF JUDGE DIFIORE: Two.

7 MR. SMITH: Two minutes. Thank you.

8 I guess I should - - - maybe I'll deal first with
9 the idea that the supplemental pension benefit - - - the -
10 - - the variable supplemental benefit isn't a pension
11 benefit, and therefore could be done without amending
12 Article 14. That is real hair splitting, Your Honor. It's
13 not a pension benefit, it's a supplement to a pension
14 benefit.

15 You - - - you can't seriously say that, oh, you
16 can - - - you can - - - if you want to amend the pension
17 benefits, you've got to go to Article 14, but if you want
18 to supplement the pension benefits, it's anything you like
19 in the Administrative Code is fine.

20 No one could understand a system that
21 complicated, and there's no basis for it. It's - - - it's
22 - - - it's essentially made-up.

23 The real difference, to the extent there is one -
24 - - and I'm not saying you can make a totally consistent
25 whole, because the - - - these things do get confusing - -



1 - the - - - the Retirement & Social Security Law, on the
2 whole is tier-specific. There is an article for each tier.
3 The Administrative Code is fund-specific. You've got an
4 article for the police, an article for the firemen, an
5 article - - - firefighters, an article for the corrections
6 officers.

7 If you're trying to do something for police and
8 you - - - and not for every City - - - not for every
9 employee in the state, the natural place to go is the
10 Administrative Code. And I think that's why the
11 Administrative Code was used here.

12 There are other things I could say, but I think
13 maybe the important - - - the thing I really want to say is
14 an old saw I learned in law school. It says - - - if the
15 legislative history is confusing - - - I don't think it's
16 all that confusing - - - but if the legislative history is
17 ambiguous, you're not forbidden to look at the statute.
18 And I suggest you look at the statute.

19 CHIEF JUDGE DIFIIORE: Thank you, Counsel.

20 (Court is adjourned)

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Patrick Lynch, et al. v. The City of New York, et al., No. 44 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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