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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF LYNCH,

Respondent-Appellant,

-against-

NO. 39

CITY OF NEW YORK,

Appellant-Respondent.

20 Eagle Street
Albany, New York
April 19, 2023

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

MACKENZIE FELLOW, ESQ.
CITY OF NEW YORK LAW DEPARTMENT
Attorney for Appellant
100 Church Street
Room 6-200
New York, NY 10007

ROBERT S. SMITH, ESQ.
FRIEDMAN KAPLAN SEILER ADELMAN
Attorney for Respondent
7 Times Square
New York, NY 10036

Xavier Austin Reyna
Official Court Transcriber



1 CHIEF JUDGE WILSON: All right. Now the next
2 matter is Lynch v. City of New York.

3 MR. FILLow: Good afternoon. MacKenzie Fallow
4 for the City and for the Police Pension Fund.

5 May I please reserve three minutes for rebuttal?

6 CHIEF JUDGE WILSON: Yes.

7 MR. FILLow: The Appellate Division radically
8 expanded the rights of tier 3 police members beyond what is
9 permitted by the plain language of the tier 3 statute. The
10 tier 3 law is clear that members get credit only if a tier
11 2 member was eligible for that credit in 1976, and in 1976,
12 the law provided that only police and fire service counted
13 towards an officer's service requirement.

14 JUDGE TROUTMAN: Were they ever gratuitously
15 given that - - - whether the statute required it or not by
16 the city?

17 MR. FILLow: It does seem that perhaps under
18 Article 43 the City was gratuitously giving some very
19 limited credit to tier 2 members. But that mistake is
20 obviously not binding on this court, which can read the
21 statute for itself and the legislative history - - -

22 JUDGE TROUTMAN: Is it binding on the city?

23 MR. FILLow: It may - - - well, I wouldn't want
24 to say for sure that - - - I don't know exactly what the
25 collective bargaining rules are. I'm not sure that we

1 could stop giving that credit to tier 2 employees, but that
2 doesn't mean that we are required to continue to make that
3 mistake with regard to tier 3 members.

4 And even if this court disagrees with us about
5 section 43, that is - - - that resolves only a very small
6 part of this case, because section 43 involves only
7 transfers from NYSLRS, the New York State and Local
8 Retirement System I think is what it's called. And there
9 seven other retirement systems that the union is claiming
10 to get allowable service transferred from.

11 And their other claims under the other statutes,
12 there is no doubt that tier 2 members were not receiving
13 those credits in 1976.

14 JUDGE SINGAS: So we should ignore the comments
15 from corporation counsel and another administrator that
16 said they could apply the credits? Are you - - - you're
17 grouping that into the 43?

18 MR. FILLow: That - - - that's only under 43,
19 yes. All of these - - - all of that evidence and comments
20 are related only to Section 43.

21 So if this court finds that past practice is
22 decisive rather than legal eligibility, there is evidence
23 that they were receiving that credit. But again, that
24 would only resolve a small part under Section 43. It would
25 not resolve any of the other claims of the union, which are

1 much broader.

2 So for example, they're claiming that they get
3 credit under these administrative law - - - administrative
4 code provisions that were enacted undeniably after 1976.
5 These credits were only allowed starting in 1980. Tier 2
6 members were not receiving those credits in 1976, and the
7 Appellate Division completely ignored that reference to
8 1976. The union asks this court to do the same. They're
9 basically asking the court to amend the statute, and that
10 is for the legislature to do.

11 CHIEF JUDGE WILSON: So isn't what you said
12 equally applicable to the maternity leave benefits in Lynch
13 1?

14 MR. FILLow: Not - - - the - - - you mean the - -
15 - sorry.

16 CHIEF JUDGE WILSON: Yes.

17 MR. FILLow: The recent - - -

18 CHIEF JUDGE WILSON: Yes.

19 MR. FILLow: - - - case, yes.

20 CHIEF JUDGE WILSON: Yes.

21 MR. FILLow: In that case - - - in that case,
22 this court said that Article 14 was silent about the
23 question, and so there was no conflict.

24 Here, there is no way to say that Article 14 is
25 silent about what credits tier 3 members get. It says

1 specifically that they get credit only if tier 2 got it in
2 1976. It's - - - and again, there are remedies with the
3 legislature. And in fact, the legislature recently
4 introduced a bill just in February, Assembly Bill 5055,
5 which would give firefighters some of the credit that the
6 union is claiming here. And if the union is right here,
7 that amendment is unnecessary because the law applies
8 equally to police/fire members.

9 So the legislature obviously doesn't think that
10 the reference to 1976 is meaningless. It thinks that if it
11 wants to give additional credits to tier 3, it needs to
12 amend 513, and that's what the legislature has proposed to
13 do.

14 The union's broadest claim is under 513(b). As
15 far as I can tell, their argument is not totally clear.
16 They're claiming that literally any credit can be
17 transferred under 513(b), even if it doesn't meet the
18 requirement of 513(c). But they have to meet the
19 requirements of both. 513(c) is about creditable service.
20 If they don't meet 513(c), it's not creditable.

21 They have never provided any explanation for what
22 they think the reference to 1976 is.

23 They are also claiming that they can get credit
24 under Section 645, which is just a tier reinstatement
25 program. The language of the statute and the legislative



1 history is clear. If any tier 3 member wants - - - is
2 eligible to reinstate to tier 2, they're free to do so, but
3 they don't get credit for service that was not creditable
4 to a tier 2 member in 1976.

5 JUDGE SINGAS: Can you speak to the issue of
6 whether the time is actually credited towards counting
7 years toward retirement versus benefits in general;
8 counting towards just general benefits that you'll receive?

9 MR. FILLLOW: Sure. Under tier 2, the credit that
10 was - - - did not count towards the service retirement, it
11 wasn't considered allowable to reduce the time that they
12 had to work as a police officer. That time could, perhaps,
13 increase the ultimate amount of their retirement.

14 JUDGE SINGAS: So is that what you're arguing in
15 response to some of these others - - - the other issues
16 that the PBA raised?

17 MR. FILLLOW: Not really, because under tier 3,
18 there's no extra benefit, I mean monetary benefit, to a
19 service that doesn't count towards the twenty-two years.
20 So they - - - that's why they need it all to be allowable
21 service. They need it to count towards the twenty-two
22 years, because otherwise it's useless to tier 3.

23 But they had just never come up with any
24 explanation to what the reference to 1976 means. They hint
25 in their papers that perhaps it's been repealed by

1 implication, but that is a disfavored principle and only
2 applicable when it is impossible to read the statutes
3 together.

4 And our reading gives meaning to every single
5 part of the statute, and theirs ignores part of it. And
6 our argument is also completely consistent both with the
7 long history of requiring police officers to perform their
8 service requirement with police duty, and also with the
9 whole point of the tier system, which is that later tiers
10 have somewhat less generous benefits.

11 If there are no questions, I'll - - -

12 CHIEF JUDGE WILSON: If you have nothing further,
13 thank you.

14 MR. FELLOW: - - - wait for rebuttal. Thank you.

15 CHIEF JUDGE WILSON: Yup.

16 MR. SMITH: Robert Smith for the respondents - -
17 - the plaintiffs-respondents of pounce, Your Honor.

18 Can I have one minute for rebuttal on the cross
19 appeal?

20 CHIEF JUDGE WILSON: Yes.

21 MR. SMITH: I think my adversary's entirely wrong
22 in saying that we don't explain 513(c)(2). I think the
23 Appellate Division explained it very well, and the
24 reference to 1976 is perfectly clear.

25 If you look at the two subsections of Section

1 513, which appear at page 6 and 7 of my brief. There are
2 two subsections enacted at the same time in 1976.

3 The first one says that a tier 3 member shall not
4 be eligible for credit other than - - - for credit - - -
5 "for service with the public employer other than the state
6 of New York, a political subdivision thereof, a public
7 benefit corporation." Although it's phrased negatively, it
8 gives quite broad rights. It says you can't get credit for
9 service of the public employer, except for most public
10 employers.

11 The second subsection qualifies the first and
12 refers to the first. It says a tier 3 police/fire member
13 shall be - - - shall be eligible to obtain what we gave - -
14 - what we gave everyone in paragraph 1, only if such
15 service is rendered prior to 1976 by tier 1 police/fire
16 member would have been eligible for credit. They're - - -
17 they're talking about what they're giving in 1976. To me,
18 it is a very far fetched interpretation to say that this is
19 intended to project forward and to say that no future
20 legislature may give anything that wasn't there in 1976.
21 And they put - - -

22 JUDGE SINGAS: I mean, I think they - - - they're
23 saying that that could happen if the legislature was
24 explicit in it, but that hasn't happened.

25 And why isn't the (b) (2) language restrictive?

1 Like I would tell my kids, you could go out and play only
2 if you do your homework. That wasn't - - - it wasn't an
3 expansive reading of their rights. They had to - - - it
4 was pre-conditioned on them doing something. So - - -
5 otherwise I don't understand why they would need that.

6 MR. SMITH: If you tell - - - if you tell your
7 kids today, you can go out and play only if you do your
8 homework. And you tell them tomorrow, you can go out and
9 play on Friday night, and you don't qualify, but you say
10 tomorrow, then that - - - then they can go out and play.
11 That's the common sense meaning.

12 I guess I - - - my sort of silly analogy is a
13 statute's passed in 1976, says all dogs get one bite,
14 except Labrador retrievers get two bites. I - - - I - - -
15 maybe I'll just put in the word only. Labrador retrievers
16 get only two bites. Then five years later, another law is
17 passed that says in rural counties, all dogs get three
18 bites. All dogs means all dogs. They aren't barred by
19 that - - - the new legislature isn't hobbled by that old
20 statute unless that intention is clearly expressed.

21 CHIEF JUDGE WILSON: What you're saying, I think,
22 is that the subsequent statutory grants that are specific
23 additional rights that happen after 1976 are a separate act
24 with the legislature, right?

25 MR. SMITH: Absolutely.

1 CHIEF JUDGE WILSON: In our granting and they
2 overrule - - - or they're not really even a conflict
3 because the way you look at it, I guess, is the early
4 restriction in 513 is static essentially.

5 MR. SMITH: Exactly. I mean, it's saying you got
6 to do your homework before you go out to play, and then the
7 kids sit down and do their homework before they got out and
8 play. A few months later or years later, you say go out
9 and play, they don't understand that to mean wait until
10 you've done your homework.

11 The - - - it's a new legislature; it's a new
12 statute. All - - - all dogs means all dogs. Any member
13 means any members. And it is - - - it's not reasonable to
14 read this as an attempt, which wouldn't be successful
15 anyway, to reach forward and control - - - and - - - to
16 control even the meaning of the future legislature. What
17 they're saying is you can do it, you can give more rights,
18 but you have to say you're amending this statute.

19 CHIEF JUDGE WILSON: Of course, when they say any
20 member subsequently, there aren't any tier 3 members at the
21 time; is that right?

22 MR. SMITH: Some - - - well, not tier 3 police
23 members - - -

24 CHIEF JUDGE WILSON: Right.

25 MR. SMITH: - - - as to most of these statutes.



1 That may be true, but I think you decided that in the
2 childcare case. Any member means any member, whether the
3 tier 3 members existed or not. That's the - - - that what
4 the - - - that was a key issue in the childcare case
5 because they said any member, and the city was saying,
6 well, that doesn't mean any member because there were only
7 two chair members then, only tier 1 and 2. And you said,
8 no, any member means any member. Any member still means
9 any member.

10 CHIEF JUDGE WILSON: The childcare provision had
11 a notwithstanding provision in that legislation, and this
12 one doesn't. The other ones do not, I think.

13 MR. SMITH: Well, this one does. One of them
14 does. 645 does, but I don't think you - - - I don't think
15 you need it. I mean - - - and - - - for me, the clearest
16 case is 513(b), the - - - which is another division of the
17 - - - the legislature passes in - - - in the year 2000.
18 The - - - yeah. 513(b), the so-called purchase section
19 begins, a member shall be eligible to obtain requirement
20 credit hereunder. A member; it doesn't say only a tier 2
21 member or only a tier 3 member. The idea that that - - -
22 that they had to say we hereby modify the other section of
23 the same statute, to which - - - I mean, it's inherently a
24 modification; it's an expansion. They granted more
25 benefits. Legislatures grant more benefits all the time.

1 That's what happens in politics.

2 CHIEF JUDGE WILSON: And I guess to stick your
3 analogy, it's a little bit like saying that is to children
4 - - - to my children who haven't been born yet.

5 MR. SMITH: Well, maybe. Yeah. Yes. Yeah.
6 There's - - - there's something in that, although I have a
7 little trouble with the analogy.

8 But yeah, you don't - - - if - - - and to me, in
9 common sense, if you say, you finish your homework before
10 you go out and play, you have not conveyed to your children
11 that they're never for the rest of their lives going to go
12 out and play without finishing their homework.

13 JUDGE SINGAS: Well, they got that.

14 MR. SMITH: Your family does. Yeah. I - - - but
15 to me, they're - - - yeah.

16 When a future legislature says all dogs get x
17 number of bites; all members get this benefit; all - - -
18 and any member may transfer, they mean what they say. And
19 the fact that in - - - back in 1976 they said, we're giving
20 only the benefits that exist today in 1976. Well, that's
21 what they gave in 1976. It did not - - - they did not
22 disable themselves from giving more, and they did not limit
23 themselves to some precise formulation of words for giving
24 more.

25 To me - - - and I think the Appellate Division

1 got it exactly right. And my adversary keeps saying that
2 we've never answered the question. We've answered it, and
3 the Appellate Division answered it. The point of (c)(2) in
4 513 is to qualify (c)(1), to give a less expansive grant
5 then was given in (c)(1). They gave broad rights in
6 (c)(1). They said, as to (c)(2), we're giving only those
7 rights, to which tier 2 members have them today. That has
8 nothing to do with the effective future statutes, which
9 give additional rights. And that really is the story - - -

10 JUDGE SINGAS: But if all dogs are all dogs, then
11 why do we need a (c)(2)?

12 MR. SMITH: You don't - - - well, you don't need
13 a (c)(2) - - - well, you don't - - - you didn't need a
14 (c)(2) - - - you need a (c)(2) to limit (c)(1), that was
15 the - - - if you hadn't had (c)(2), then we wouldn't be
16 standing here because back in 1976, the tier 3 members
17 would've got everything the tier 2 members had. That's why
18 they wrote (c)(2), because they weren't ready to give all
19 those rights in 1976.

20 But they did them in various statutes later in
21 Section 43, in Section 513(b), and in section 645, and in
22 the administrative code sections whose numbers I can never
23 remember. And they're all entirely clear statutes - - -

24 CHIEF JUDGE WILSON: The quirky thing to me is
25 that they - - - those grants are being made when there

1 aren't any tier 3 members.

2 MR. SMITH: The - - - well, again the - - - there
3 - - - yeah. Your Honor, they apply to tier 10 members if
4 there's ever a tier 10. When you say all members - - - if
5 you want to - - - if you want to say all members - - -
6 all members in the current tier, you can say all members in
7 the current tier.

8 And they - - - yeah. But - - - and they - - -
9 and although there weren't tier - - - tier 3 police
10 members in 2009, but tier 3 was not some unknown concept.
11 There were tier 3 members in every other pension fund, and
12 they were - - - and they were passing extension bills
13 every few years, sometimes with some controversy to keep
14 the police officers in tier 2. So there's nothing in the
15 least unforeseeable or remarkable that there were going to
16 be tier 3 - - - tier 3 police officers. Everyone knew
17 that there would be tier 3 police officers someday.

18 And so to - - - when you say all members, you
19 mean all members. And if you want to say only tier 2
20 members, that's what you say.

21 CHIEF JUDGE WILSON: Thank you.

22 MR. FILLow: The 513(b) claim is extreme and
23 would give tier 3 members more than what tier 2 members are
24 even receiving today. Tier - - - 513(b) and 513(c) address
25 completely separate things, and a tier 3 member has to

1 qualify for both to get the credit.

2 (b) talks about whether a member actually got
3 credit in the past for - - - during their prior service,
4 or whether they could have gotten credit had they been a
5 member, and they have at least two years of service.
6 That's what (b) says. They have to meet that to get the
7 credit.

8 They also have to meet (c), which is called
9 creditable service. Service does not qualify to be
10 credible unless they meet (c)(2) also.

11 And this reference to 1976 is extremely specific,
12 and if the legislature wanted to repeal it, they can do so
13 anytime. They could have done so; they have not done so.
14 It has not been implicitly repealed.

15 Our reading gives meaning to all of these
16 provisions. Tier 2 members get the subsequent additions,
17 and tier 3 members do not.

18 In the - - - oh, sorry. In fact, it would be
19 such an extreme change, what my colleague here is saying,
20 that suddenly in 1999, I think, the legislature tier 3
21 members should get more than tier 2 had ever gotten. If
22 the legislature really decided that, we would expect to see
23 something clearer than that in 513(b). In fact, we know
24 what it looks like when the legislature tells us that - - -
25 that non-uniformed work should be treated as uniformed work

1 because that's what they say - - -

2 CHIEF JUDGE WILSON: I assume counsel would say -
3 - -

4 MR. FILLLOW: - - - in these other statutes.

5 CHIEF JUDGE WILSON: - - - that the 1999 change
6 didn't apply just to the tier 3 members, but to the tier 2
7 members as well because it says all members.

8 MR. FILLLOW: Well, Article 14 only applies to
9 tier 3. So the 513(b) does not apply to tier 2; it only
10 applies to tier 3.

11 And it says nothing about what kind of
12 non-uniform service should be treated as police service.
13 We know what the legislature does when they want to say
14 that. They say, firefighter service shall be deemed police
15 service. They say, EMT service shall be considered police
16 service. There is nothing like that in 513(b). There is
17 nothing like that in 645. There is nothing like that in
18 Section 43. The only sections that contain that kind of
19 language are in the Administrative Code, and they were
20 enacted after 1976, and they apply only to tier 2 members
21 for that reason.

22 And I don't - - - since we didn't address the
23 cross repeal, I don't see any reason for rebuttal from my
24 colleague. Thank you.

25 CHIEF JUDGE WILSON: Thank you.



1 MR. SMITH: I was afraid she was going to say
2 that. Could I get - - - is it possible I can get my one
3 minute back?

4 CHIEF JUDGE WILSON: You saved - - - you saved
5 the minute.

6 MR. SMITH: Yeah.

7 If 513 - - - my colleague is right that 513(b)
8 doesn't apply to tier 2 members, it applies only to tier 3
9 members, and she's saying it gives them nothing. That they
10 get no more than they had in 1976. Why - - - why did the
11 legislature bother passing it?

12 CHIEF JUDGE WILSON: Thank you.

13 (Court is adjourned)

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

I, Xavier Austin Reyna, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Lynch v. City of New York, No. 39 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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Agency Name: eScribers
Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020
Date: April 29, 2023

