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NEW PENSION RULING IS GOOD NEWS FOR MUNICIPAL EMPLOYERS

The New York State Court of Appeals had good news for municipal employers in the state when it clarified a provision of the 2009 law that created a contributory tier for newly hired police and firefighters in the state. In two decisions issued on April 2 of this year the New York State Court of Appeals ruled that police officers and firefighters hired after January 1, 2010, must make contributions toward their pensions — even if the language of the applicable collective bargaining agreements states that employees are not required to contribute toward their pensions.

In 2009, the State of New York adopted Article 22 of the New York State Retirement and Social Security Law, which took effect January 1, 2010. This new article ended the right of newly hired police officers and firefighters to participate in a non-contributory pension plan. It placed new members of the New York State and Local Police and Fire Retirement System in a new tier of pension benefits, Tier V, which requires members to contribute 3 percent of their salaries toward their pensions (Retirement and Social Security Law § 1204). The State Legislature created great confusion by including Section 8 in Article 22, which states:

> Notwithstanding any provision of law to the contrary, nothing in this act shall limit the eligibility of any member of an employee organization to join a special retirement plan open to him or her pursuant to a collectively negotiated agreement with any state or local government employer, where such agreement is in effect on the effective date of this act and so long as such agreement remains in effect thereafter; provided, however, that any such eligibility shall not apply upon termination of such agreement for employees otherwise subject to the provisions of Article 22 of the retirement and social security law.

Across the state, municipalities and police and fire unions argued over whether the Triborough Provision of the Taylor Law, Civil Service Law §209-a(1)(e), caused their expired collective bargaining agreements to be "in effect" on January 1, 2010. In Yonkers, the collective bargaining agreement between the city and the firefighters union expired on June 30, 2009. The city then required firefighters who were hired after Article 22 took effect to pay 3 percent of their wages toward their retirement benefits. The union challenged this action, causing the city to commence a special proceeding for a Stay of Arbitration.

The Supreme Court rejected the city's Petition to Stay Arbitration; however, the Appellate Division reversed, and granted the petition, holding that that arbitration is barred by Civil Service Law § 201(4) and Retirement and Social Security Law § 470. The Appellate Division ruled that the agreement that expired on June 30, 2009 was not "in effect" at the time that Article 22 went into effect, and therefore, "the exception set forth in Section 8 of that article is inapplicable." The Court of Appeals granted the union leave to appeal.

In Oswego, the agreement between the city and the Oswego City Firefighters Association, Local 2707, expired on December 31, 2009. Like Yonkers, Oswego required firefighters who were hired after Article 22 took effect to pay 3 percent of their wages towards their retirement benefits. The union filed a grievance and took the city to arbitration.

The arbitrator ruled that firefighters hired after the effective date of Article 22 should be permitted to elect a noncontributory pension plan as enumerated in the collective bargaining agreement. The city commenced a special proceeding to vacate the arbitrator's award, which was denied by the Supreme Court. The city appealed that decision to the Appellate Division, Fourth Department, which affirmed the Supreme Court's ruling in favor of the union. The Court of Appeals granted Oswego leave to appeal.

In the Matter of City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO,decided on March 16, 2013, the Court of Appeals held:

> We conclude that the exception contained in Retirement and Social Security Law Article 22, Section 8 does not apply to the CBA at issue here, so that the non-contributory pension benefits to which firefighters were entitled pursuant to the CBA are prohibited by Article 22, despite the Triborough Law. Therefore, the arbitration sought by the Union is barred, as an impermissible negotiation of pension benefits, by Civil Service Law § 201 (4) and Retirement and Social Security Law § 470.

The court reasoned that it was clear that the legislature did not intend to apply the exception in Section 8 of Article 22 to agreements that had expired and could only be deemed to continue through the application of the Triborough Law. Further, the court rejected the argument raised by Chief Judge Jonathan Lippman in his dissent that the legislature intended to authorize participation in noncontributory pension benefits pursuant to agreements that had expired.

In the Matter of City of Oswego v. Oswego City Firefighters Association, Local 2707, also decided March 16, 2013, the Court of Appeals reversed the Appellate Division, Fourth Department and vacated the arbitrator's award for the reasons stated in the above decision. As he did in *City of Yonkers*, *supra*,

Chief Judge Lippman dissented from the court's decision in *City of Oswego*.

The Court of Appeals rulings preserve the financial savings that the state intended to create for municipalities in 2009 when it adopted Tier V to the New York State Police and Fire Retirement System. Even if a municipal police or fire contract states that covered employees will have a "non-contributory" pension plan, the Court of Appeals has made it clear that new employees must make the contributions required by the pension tier that they are placed in by law.

For more information on the impact of this case, please contact:

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