by Christopher T. Kurtz and Subhash Viswanathan, Esqs.,
Bond, Schoeneck & King, PLLC

Court: No arbitration for government retirement plan disputes

A state appeals court has reversed a lower court ruling and held that the city of Yonkers' refusal to reimburse new employees for their statutorily required Tier V retirement plan contributions was not subject to arbitration.

Our firm—Bond, Schoeneck & King—represented the city of Yonkers in the litigation.

Retirement plan at issue

The dispute arose in connection with the 2009 enactment of Article 22 of New York's Retirement and Social Security Law (Tier V). Among other changes, Tier V provides that those who join the Police and Fire Retirement System (PFRS) on or after Jan. 10, 2010, must "contribute 3% of their salary towards the ... retirement [plan] in which they are enrolled."

Before enactment of Tier V, the city and the Yonkers Firefighters union were parties to a collective-bargaining agreement that expired on June 30, 2009. Like many other firefighter contracts in New York, the contract required the city to provide a noncontributory retirement plan to its firefighters.

In late 2009, the city hired several firefighters who, because of a gap in the law, had the option of joining the PFRS as either members of Tier III or Tier V—both of which called for employer contributions of 3% of employee pay.

Attempting to apply the terms of the expired contract to relieve Tier V members of the statutorily required 3% member contribution, the union filed a grievance. It sought arbitration, based upon the contractual obligation to provide a noncontributory requirement plan.

The union relied on an exception in the law that created Tier V, which provides that members of the PFRS need not join the contributory Tier V if there is an alternative retirement plan available to them under a collective bargaining agreement that "is in effect on the effective date" of Tier V.

The appellate court found that the union's reliance on this exception was misguided, because the collective bargaining agreement had expired on June 30, 2009. Therefore, it was not in effect on Jan. 10, 2010, the effective date of Tier V.

The union also asserted in its grievance that, even if new members were not eligible to join the noncontributory plan, the city was nevertheless obligated under the collective bargaining agreement to pay the new members' 3% contributions.

The decision

The appellate court found that this claim was not arbitrable because Civil Service Law Section 201(4) and Retirement and Social Security Law Section 470 prohibit negotiating changes to benefits or fund payments related to a public retirement system.

At press time, the New York Court of Appeals was considering a motion filed by the union for leave to appeal the decision. Regardless of whether the New York Supreme Court chooses to hear the case or not, this issue is sure to surface again.

Gov. Andrew Cuomo's recent deal with the Legislature to establish a Tier VI in the various state retirement systems includes, among other things, a sliding-scale of increased employee contributions based on annual salary. (Scales begin at 3% and top out at 6%.) Thus, in some ways, the already high—and very costly—stakes have already doubled.

NLRB posting rule now in effect

Effective April 30, most New York employers must post the NLRB's new employee rights poster. Although appeals continue, the U.S. District Court for the District of Columbia has denied a request by the National Association of Manufacturers and other business groups to prohibit the NLRB from enforcing a rule requiring employers to post a notice of employee rights under the National Labor Relations Act. *(See "Court upholds April 30 pro-union poster requirement" on page 1.)*

The District Court held that there would be no irreparable harm to employers if the NLRB's notice-posting rule were permitted to become effective prior to the issuance of a decision by the U.S. Court of Appeals for the District of Columbia regarding the appeal. The court said posting the notice only makes employees aware "of the rights that they are already guaranteed by law."

The court further stated, "If the Court of Appeals ultimately determines that the Board exceeded its authority in promulgating the Rule, the employers can take the notice down."

You can get a copy of the poster and find links to more information at **www.theHRSpecialist.com/unionposter**.

Some employers are exempt from having to display the notice:

- Federal, state and local governments, including public schools, libraries, parks, Federal Reserve banks and wholly owned government corporations.
- Employers that employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery.
- Employers subject to the Railway Labor Act, such as interstate railroads and airlines.