Court of Appeals Rejects a Union Attack on Pension Relief for Public Employers

By Terry O'Neil and Christopher T. Kurtz, Labor and Employment Law Attorneys, Bond, Schoeneck & King, PLLC

In a recent decision of statewide applicability to public employers with unionized members of the Police and Fire Retirement System ("PFRS"), the State of New York Court of Appeals ("court") addressed the issue of whether the City of Yonkers' (the "city") refusal to pay or reimburse new employees for their statutorily required Tier V pension contributions was arbitrable. The city, which was represented by Terry O'Neil and Chris Kurtz, members/partners in Bond, Schoeneck & King's Garden City (L.I.) office, received a ruling in its favor. In City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO, No. 48, April 2, 2013, the court affirmed the Appellate Division, Second Department (which had reversed the lower court's decision), and held that the dispute was not arbitrable, thereby affirming a permanent stay of arbitration. The case will likely have positive implications for similarly situated public employers across the state.

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 PFRS on or after Jan. 10, 2010 must "contribute 3 [percent] of their salary towards the … retirement [plan] in which they are enrolled."

Prior to the enactment of Tier V, the city and the Yonkers firefighters (the "union") were parties to a collective bargaining agreement ("CBA"), which expired on June 30, 2009. Like many other firefighter and police contracts in the state, under the terms of the CBA, the city was contractually required to provide a "non-contributory" pension/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 contributory (3 percent) tiers. In an attempt to apply the terms of the expired CBA to relieve its Tier V members of the statutorily required 3 percent member contribution, the union filed a grievance and sought arbitration based upon the contractual obligation to provide a noncontributory plan. The union attempted to rely upon an exception (Retirement and Social Security Law, Article 22, Section 8) in Tier V, which provides that members of the PFRS need not join the contributory Tier V if there is an alternative (e.g., noncontributory) retirement plan available to them under a CBA "that is in effect on the effective date of Tier V." This provision gives new members of the PFRS a means by which they could avoid Tier V and its 3 percent contributions and join an existing noncontributory plan. The union sought to use the "Triborough" provisions of the Taylor Law to extend this exception to its members hired in late 2009 on the theory that under the "Triborough" provisions of New York's Taylor Law, its CBA, which expired on June 30, 2009, was nonetheless still "in effect." Finding that the union's reliance on "Triborough" applying to the statutory Section 8 exception was misguided and "… not the Legislature's intent…," the court found that the CBA in question expired on June 30, 2009 and, therefore, was not "in effect" on Jan. 10, 2010, the effective date of Tier V. The court adopted a position taken by the city and determined:

Under the Union's interpretation of the statute, the Legislature would have been creating a loophole whereby a union, by the simple expedient of refusing to reach agreement on a new CBA, could ensure the continuation of non-contributory pension benefits to new hires, conceivably ad infinitum. Instead, it is clear that the Legislature intended to honor only agreements providing for non-contributory status that had not expired at the time the statute became effective.

The union also grieved, and attempted to arbitrate, an alternative argument that even if their new members could not join Tier V as non-contributing members, then, under the CBA, the city should pay (or potentially reimburse) their new members' 3 percent pension contributions. The court, however, found that "… the arbitration sought by the Union is barred, as an impermissible negotiation of pension benefits …" The court accepted the city's argument that Section 201(4) of the Civil Service Law and Section 470 of the Retirement and Social Security Law prohibit the arbitration of this dispute. While New York generally favors arbitration, an issue is not proper for arbitration when the subject matter of the dispute violates statutory law, as was the case here. Among other things, Sections 201(4) and 470 state that the benefits provided by a public retirement plan are not negotiable – they are prohibited subjects of collective bargaining. Thus, for example, a union could not reduce the mandatory years of service for retirement eligibility (e.g., 20 years to 15 years).

Whether an employer adopts specific retirement plans, however, is a mandatory subject of bargaining. Thus, for example, a public employer is required to negotiate over whether it will make Retirement and Social Security Law § 384-e available to its police and/or fire employees. However, it is prohibited from negotiating over the level of benefits provided therein. In this case, arbitration of the relevant dispute would be improper, as these statutes

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clearly bar the negotiation of benefits provided by a public retirement system such as the PFRS 3 percent contribution.

Finally, the court rejected the union's remaining contention that the Section 8 exception runs afoul of the Contract Clause of the United States Constitution (US Const, Art I, § 10, cl 1).

This 4-2 decision of the court (with Chief Judge Lippman and Judge Rivera dissenting) could impact any public employer that employs police and/or fire members of Tier V, and who has a collective bargaining agreement that addresses non-contributory (or similarly phrased/ meaning) retirement plans. However, because of the many complex legal issues (e.g., constitutional, the Taylor Law and theories of negotiability, Retirement and Social Security Law) involved in this or similar pension matters, it is recommended that these matters, as well as those involving questions surrounding the applicability of this decision to Tier VI, be reviewed with labor counsel. ❒

About the Authors

Terry O'Neil is a Labor and Employment Law attorney with Bond, Schoeneck & King, PLLC and Deputy Managing Member of the firm's Garden City office. Mr. O'Neil has represented some of the largest municipalities in the state of New York, and represented more than 20 school districts and regularly handles "high profile" disciplinary proceedings. Mr. O'Neil was one of eight editors of the first text on Public Sector Labor Law published by the New York State Bar Association. He also co-authored with E. J. McMahon from the Empire Center for New York State Policy -- a project of the Manhattan Institute for Policy Research -- an in-depth analysis of 40 years of the Taylor Law and its effects in New York State. The publication is titled, Taylor Made: The Cost and Consequences of New York's Public Sector Labor Law.

Mr. O'Neil also co-authored an opinion for the Empire Center on whether a legislatively imposed public sector statewide wage freeze would be legal under New York and federal law. In December 2011, he and Mr. McMahon published a report on the impact of the Triborough Law titled, Triborough Trouble -- How an Obscure State Law Guarantees Pay Hikes for Government Employees -- and Raises the Tax Toll on New Yorkers. Most recently, he co-authored an article in the Municipal Lawyer, Spring 2012/Vol. 26/ No. 2, titled Taylor Law Implications of Municipal Consolidation and Dissolution.

Christopher T. Kurtz is a Labor and Employment Law attorney at Bond, Schoeneck & King, PLLC with experience in the area of Public Sector Labor and Employment Law, representing public employers in Westchester County and on Long Island in all matters related to collective bargaining, grievance arbitration, interest arbitration, improper practice charges, administrative proceedings disciplinary hearings, workplace investigations and employment litigation. Mr. Kurtz regularly counsels public employers in matters involving New York's Taylor Law, New York General Municipal Law and New York Civil Service Law Sections, as well as in a variety of employment-related matters, including individual employment contracts, Title VII, the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA) and the New York Human Rights Law.

Mr. Kurtz was a featured speaker on the topic of "Interest Arbitration in a Depressed Economy" at the New York State Bar Association, Labor & Employment Law Section's 2009 Fall Meeting, as well as on the matter of Workplace Investigations at the New York State Public Employer Labor Relations Association's 35th Annual Conference. He has written for the New York State Bar Association's Labor & Employment Law Section blog.