STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

THE BUFFALO NIAGARA AIRPORT FIREFIGHTERS ASSOCIATION and KAMALI DAVIS, JESSICA DEVINNEY, MICHAEL GUERRA, RUSSELL JACKMAN II, ROBERT KAMINSKI, ANDREW LAFORCE, JOHN MAKIN, WALTER PIECZYNSKI, JESSICA STROM, and MARK WOJNAR,

Petitioners,

-against-

ORDER and JUDGMENT
INDEX NO. 483-2011

THOMAS P. DINAPOLI, in his official capacity as COMPTROLLER OF THE STATE OF NEW YORK, THE NEW YORK STATE AND LOCAL EMPLOYEES' RETIREMENT SYSTEM and THE NIAGARA FRONTIER TRANSPORTATION AUTHORITY,

Respondents.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

(Supreme Court, Albany County, Special Term, April 1, 2011)
(Hon. Eugene P. Devine, J.S.C., presiding)

APPEARANCES:

Paul D. Weiss, Esq.
Bartlo, Hettler & Weiss
22 Victoria Blvd.
Kenmore, New York 14217
Attorney for Petitioners

Eric T. Schneiderman
Attorney General of the State of New York
By Charles J. Quackenbush, Assistant Attorney General
The Capitol
Albany, New York 12224
Attorney for Respondents New York State Comptroller Thomas P.

DiNapoli and the New York State & Local Employees' Retirement System

Wayne R. Gradl, Esq.
Niagara Frontier Transportation Authority
181 Ellicott Street
Buffalo, New York 14203

DEVINE, J.:

Petitioner, the Buffalo Niagara Airport Firefighters Association (hereinafter the union), and certain of its members, commenced this proceeding to challenge respondent Thomas P. DiNapoli, as Comptroller of the State of New York, and respondent New York State and Local Employees' Retirement System's (hereinafter NYSLRS) determination that petitioners did not fall under a statutory exception that would permit petitioners to enroll in a non-contributory state retirement benefits plan and the directive to the union members' employer, respondent Niagara Frontier Transportation Authority (hereinafter NFTA), to withhold 3% of petitioners' annual wages. Following the denial of their motion to dismiss, respondents have served a verified answer. The Court heard oral argument on the matter on November 14, 2011.

The facts underlying this proceeding, as previously cited in the Court's decision and order on respondents' dismissal motion, are that the NFTA and petitioners had entered into a 2008-2009 collective bargaining agreement (hereinafter 2008-2009 CBA) which adopted enhanced benefit plans pursuant to Retirement and Social Security Law § 384-d and § 384-e, which are non-contributory. On July 1, 2009, legislation that would have extended enrollment into Tier II of the Police and Firefighters Retirement System (hereinafter PFRS) was vetoed by then-Governor Paterson, thereby closing Tier II on that date. New PFRS members, who joined on or after July 1, 2009, were covered by RSSL Article 14, known as Tier III. According to Philomena Gilchrist, the Assistant Director of NYSLRS' Member and Employers Services Bureau, members

of Tier III "electing special retirement plans or for whom an employer had elected a one year final average salary benefit were required to contribute three percent of wages to the funding of benefits."[1] Subsequently, additional amendments to the RSSL were made by the enactment of Chapter 504 of the Laws of 2009, primarily the creation of a new Tier V, into which tier petitioners DeVinney, Guerra, Jackman, Kaminski, Makin, Pieczynski and Strom, having joined the retirement system between July 1, 2009 and January 8, 2010, enrolled by filing the requisite form. On their election forms, petitioners wrote that such mandatory election was made "under protest with all rights reserved," thereby preserving their rights to placement in a non-contributory plan as it had not been confirmed that they would be deemed to be non-contributory enrollees.[2]

Effective January 9, 2010, the newly created Tier V law required a 3% salary contribution from participating members, among other things, but also included a narrow exception which stated that:

> "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 any 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 twenty-two of the retirement and social security law."[3]

In October 2010, NYSLRS informed the NFTA, in writing, that "[b]ased on our review of the contract you provided for the Buffalo Niagara Airport Firefighters Association, permanent

---

[1] Gilchrist Affidavit, at ¶ 3.

[2] Petitioners Davis, Laforce and Wojnar automatically became members of Tier V as they entered the system in September 2010.

[3] L 2009, ch. 504, Part A.

Aircraft, Rescue and Firefighting Officers in full pay status hired by the [NFTA] after January 9, 2010" would be required to make a three percent salary contributions because the 2009-2013 CBA had been "ratified late, on August 20, 2010."[4] The letter also stated that members "hired between 7/1/2009 and 1/8/2010 had 120 days to elect to be covered by the benefits of Article 22, Tier 5," thereby giving the members contributory status.

Petitioners disputed this finding and insisted that, although the 2008-2009 CBA had expired on April 1, 2009, the 2009-2013 CBA was later ratified on August 20, 2010 and its provisions were 'in effect' retroactively. Therefore, because a collective bargaining agreement was in effect on the effective date of the Tier V legislation and it obligated the NFTA "to provide retirement benefits pursuant to RSSL sections 384-d and 384-e," petitioners assert that they are entitled to an order annulling NYSLRS' erroneous determination that petitioners did not come under the exception created under section 8 of the Tier V statute and, furthermore, that the NFTA cease its withdrawal of three percent of petitioners' wages and return the collected monies to petitioners.

The question before the Court, namely the meaning of the term "in effect," is one of statutory construction and analysis, "dependent only on accurate apprehension of legislative intent."[5] "The legislative intent is to be ascertained from the words and language used, and the statutory language is generally construed according to its natural and most obvious sense, without resorting to an artificial or forced construction."[6]

---

[4] Petition, at Exhibit I.

[5] Guido v New York State Teachers' Retirement System, 94 NY2d 64, 68 [1999].

[6] Excellus Health Plan, Inc. v Serio, 303 AD2d 864, 867 [3d Dept. 2003], affd 2 NY3d 166 [2004], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 94.

Petitioners make two arguments; first, that the 2009-2013 CBA's terms were in effect retroactively to April 1, 2009, therefore, being in effect on January 9, 2010 as required by section 8 of the Tier V legislation and, alternatively, that the terms of the 2008-2009 CBA continued to be "in effect" past its expiration date of March 31, 2009 under the Triborough doctrine.

Generally, the Triborough principle ensures that the status quo is maintained while parties to an expired collective bargaining agreement attempt to reach a new contract. The common law rule was later codified in statute, under Civil Service Law § 209-a (1) (e), making it an improper practice for public employers to refuse to continue to honor "the terms of an expired agreement until a new agreement is negotiated." The Court of Appeals has held that the "practical effect of continuing all the terms of a CBA during the status quo period is that mutual obligations are imposed on both employers and employees." Importantly, however, the Triborough doctrine does not bind or otherwise obligate anyone beyond the contracting parties, including NYSLRS or Comptroller DiNapoli, rendering petitioners' argument regarding the 2008-2009 CBA unpersuasive.

The exception language contained in section 8 of the Tier V legislation indicates that the legislature intended to limit eligibility for non-contributory status to those members who had a collective bargaining agreement actually in effect on January 9, 2010 and did not include a future agreement that may or may not materialize several months later. Specifically, the legislature honored existing agreements that provided for non-contributory status for its members that existed at the time the legislation took effect and provided that, once the existing agreements, if any, expired, the covered member would be "otherwise subject to the provision of article twenty-two of the retirement and social security law," including the requirement to make annual income contributions toward their pensions. Therefore, respondents' determination that the individually

named petitioners did not qualify under the exception language as there was no existing, non-expired CBA at the time the statute became effective is deemed to be rationally based and free from any flawed statutory interpretation and application, the petition must be dismissed.[7]

Accordingly, it is

ORDERED and ADJUDGED that the petition is dismissed and the relief requested therein is denied.

This Memorandum shall constitute both the Order and Judgment of the Court. This original **ORDER and JUDGMENT** is being sent to the Attorney General. The signing of this **ORDER and JUDGMENT** shall not constitute entry or filing under CPLR 2220. Legal counsel for the respondent is not relieved from the applicable provisions of that section with respect to filing, entry and notice of entry.

SO ORDERED
ENTER

DATE: 1/31/12
Albany, New York

EUGENE P. DEVINE, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, Verified Petition, with exhibits, and Memorandum of Law in Support of Petition, dated January 24, 2011.
2. Verified Answer of Respondent Niagara Frontier Transportation Authority, dated February 17, 2011.

---

[7] see e.g. Matter of Nicit v Regan, 199 AD2d 606, 608 [3d Dept. 1993], lv denied 83 NY2d 753 [1994].

3. Verified Answer of Respondents Thomas P. DiNapoli and the New York State & Local Employees' Retirement System, dated July 21, 2011.
4. Affidavit of Philomena Gilchrist, dated July 20, 2011.
5. Memorandum of Law in Opposition to the Petition, dated July 21, 2011.
6. Letter from Charles J. Quackenbush, Esq., dated January 3, 2012.
7. Letter from Paul D. Weiss, Esq., dated January 4, 2012.