

Tier 6/Civil Service Reforms Briefing

Monday February 6, 2012

Article VII

Part H – Tier VI

The Executive proposal would apply to members hired on or after April 1, 2012.

Tier VI would apply to all members who newly enroll in any of the public retirement systems of the State or City of New York.

In Addition to the breakdown below, Sanitation, Investigators and Correction Employees in a 20 year plan would have their plan reduced to Tier 3 benefits, to put these Uniformed Titles in line with Police and Fire in the City of New York.

| Item | ERS/TRS/BERS – Tier 6 | Uniformed – Tier 6 |
|-----------------------|---|---|
| Retirement | Age 65 | 20 or 25 yrs, regardless of age |
| Employee Contribution | 4%-6% depending on income | 4%-6% depending on income |
| Vesting | 12 year vesting | 12 year vesting |
| FAS Calculation | <ul style="list-style-type: none"> • 5 yr average salary calculation would apply - salary in excess of 8% of the average of the previous 4 yrs would be excluded from the FAS determination; • Overtime would be excluded from FAS; • Sick time, vacation leave, terminal pay, and any additional compensation would be excluded from FAS calculation; and • Wages above the Governor's salary (currently \$179,000) would also be excluded from the FAS calculation. | <ul style="list-style-type: none"> • 5 yr average salary calculation would apply - salary in excess of 8% of the average of the previous 4 yrs would be excluded from the FAS determination; • Overtime would be excluded from FAS; • Sick time, vacation leave, terminal pay, and any additional compensation would be excluded from FAS calculation; and • Wages above the Governor's salary (currently \$179,000) would also be excluded from the FAS calculation. |

Employee Contributions

| Members | 4% | 5% | 6% |
|-------------------------|------------------|--------------------|---------------------|
| NYSLERS | \$32,000 or less | \$32,001-\$63,000 | more than \$63,000 |
| NYSTRS | \$35,000 or less | \$35,001-\$69,000 | more than \$69,000 |
| NYCERS | \$43,000 or less | \$43,001-\$85,000 | more than \$85,000 |
| NYCTRS | \$47,000 or less | \$47,001-\$94,000 | more than \$94,000 |
| NYCBERS | \$26,000 or less | \$26,001-\$52,000 | more than \$52,000 |
| | | | |
| NYSPFRS | \$66,000 or less | \$66,001-\$132,000 | more than \$132,000 |
| NYC Police Pension Fund | \$61,000 or less | \$61,001-\$122,000 | more than \$122,000 |
| NYC Fire Pension Fund | \$63,000 or less | \$63,001-\$126,000 | more than \$126,000 |

Variable "Risk/Reward System"

- Under this proposal, employees' contribution rate would be variable dependent upon market conditions;
- The bill establishes a statutory "corridor" for employees, wherein;
 - If the employer's contribution on behalf of a civilian/teacher member is scheduled to exceed 7 percent, then the employee's contribution is increased by half of the difference;
 - If the employer's contribution on behalf of a civilian/teacher member is below 4 percent, then the employee's contribution is decreased by half of the difference;
- Similarly, a "corridor" is established for Police and Fire at a rate of 10 percent and 14 percent and savings and costs would be shared;
- For NYC systems, the same principle applies. As of the Executive Budget release date, the "corridor" rates for employer contributions have not been established but DOB expects to amend this in the 30-day amendments; and

- The current minimum employer contribution (a.k.a. "floor") of 4.5 percent of salary is eliminated for Tier VI employees.

New Defined Contribution Plan

- Each public retirement system would administer this option and each system would choose a vendor (like TIAA-CREF or others) to administer the plan;
- The employee would choose this option at the time they are hired. After election, the option cannot be changed;
- The basic employer contribution is 4 percent;
- The employer will additionally match up to 3 percent of an employee's contribution with a maximum annual employer contribution of 7 percent; and
- Employee contributions are not required.

Other

- The Executive Budget assumes no administrative costs or savings associated with Tier VI. The Executive estimates that the proposal would save \$83 billion over 30 years for the State and local governments and an additional \$30 billion for New York City.
- The Division of Budget does not have any new authority under this proposal with respect to pension administration.
- No enhancements, increases or changes to Tier VI provisions will be authorized.
- Fiscal notes are not yet available. DOB is expecting notes from OSC and NYSTRS. They have requested one from NYC.

Civil Service "State Only" Reforms Part M:

Back Ground: The Executive proposes a menu of changes in civil service law that would allow politically appointed managers to select favored individuals for jobs, while evading the normal competitive examination process.

It should be noted that the State already has considerable flexibility in Civil Service Law to move employees to different agencies including the ability to transfer employees in the face of a promotion or open competitive eligible list under sections 52.6 and 70.1 of

the Civil Service Law. The Executive has provided no evidence that current Civil Service law practices do not provide the State with enough flexibility to deploy the State workforce to agencies and work where they are most needed.

The Executive also claims these reforms will allow them to expand diversity in the workforce. In 2006 the Legislature enacted a law to create a Commission to look specifically into how we can make the State workforce more diverse; none of the Commission's reports recommended any of the Governor's proposals that are in this bill. The major impediment to making the workforce more diverse is the current hiring freeze.

The purpose of Article V, §6 of the *New York Constitution* was to reform the Civil Service System in order to end the political struggles for possession of the spoils of office and the attendant corruption and fraud. *Rogers v. Common Council of Buffalo, et al.*, 123 N.Y. 173, 25 N.E. 274 (1890). The Court of Appeals has emphasized the importance of that constitutional mandate, holding that **"the specific constitutional requirement for competitive examination, where practicable, 'may not be blinked away or avoided.'"** *Wood v. Irving*, 85 N.Y.2d 238, 248, 623 N.Y.S. 824, 830 (1995) *quoting Matter of Board of Educ. v. Nyquist*, 31 N.Y.2d 468, 473, 341 N.Y.S.2d 441, 445 (1973). **In addition, the Court has stated that "noncompetitive appointments are the exception, not the rule."** *Matter of Anderson v. Rice*, 277 N.Y. 271, 276 (1938).

The Executive's Proposal: Sections 2 and 3 - Allow Open Promotion Examinations and Eligible Lists

This section of the bill allows the Department of Civil Service (DCS) to create a new open promotion examination which allows a candidate to apply for either the promotion test or the open competitive test but not both. DCS is authorized to create both a promotion eligible list and a separate open competitive eligible list from this exam. It then gives State agencies the discretion to hire candidates from either the promotion eligible list or the open competitive eligible list.

Under current law, the State often holds a promotion examination, which is for current State employees, and an open competitive examination for the same title. Candidates are currently allowed to take both examinations if they are not held at the same time and they meet the minimum qualifications for both. Candidates do this in order to improve their career mobility as section 70.4 of the Civil Service Law currently allows State employees who are on an open competitive eligible list to transfer to those positions if an agency wishes to hire them. It is unclear why the Executive wants to limit this ability.

More importantly current law requires that an agency exhaust a promotion eligible list prior to hiring a candidate off an open competitive eligible list for the same title. Consistent with the Constitutional principle of merit and fitness, current law gives

preference to candidates who qualify for promotion examinations because they already have experience working for the State agency in which a job is to be filled.

This proposal would also allow a State agency to hire a candidate from an open competitive list who has a lower score than a candidate on a promotion list. For example if ten candidates on a promotion list have a score of 100, under current law a State agency must hire one of those ten candidates. Under this proposal if the highest score on an open competitive list is a 95, then the State could hire that candidate even though they had a lower score than the candidates on the promotion list. This clearly would undermine the merit and fitness provisions of New York's Constitution and allow an increased opportunity for patronage.

Section 4 – Allows State Agencies to Fill Positions from an Inter-Departmental Promotion Eligible List Before a Departmental Promotion Eligible List is Exhausted

This section of the bill authorizes the Department of Civil Service (DCS) to allow State agencies to fill positions from an inter-departmental promotion eligible list without preference for a departmental promotion eligible list. Under current law a departmental promotion list must be exhausted (less than three willing acceptors remaining on the list) before a State agency can fill a vacancy from an interdepartmental list.

Since its inception, Civil Service law has always given first preference to employees who work in an agency to fill vacancies within their agencies. This is consistent with the Constitutional principal of merit and fitness which holds that employees who have experience in a state agency are better suited to fill higher level positions within that agency than a candidate who has no experience in that agency.

This proposal would also allow a State agency to hire a candidate from an interdepartmental promotion list who has a lower score than a candidate a departmental promotion list. The specific example given above for how this can occur in eligible lists created from the open promotion exam proposal would also apply to this proposal.

Section 5 - Permit Non-Competitive State Employees to Participate in Competitive Promotional Exams.

This section of the bill authorizes the Department of Civil Service (DCS) to allow employees who hold or have held non-competitive positions, in other words who have been appointed to their position without passing a competitive examination, to be eligible to take promotion exams. Except for disabled appointees, non-competitive employees are not generally eligible to take promotion examinations. Under current law non-competitive employees can take open competitive examinations in order to get permanent competitive class status. This is how almost all State employees obtain their original permanent competitive status.

The State Constitution gives a clear preference to employees who take competitive examinations to obtain their State positions. We should not turn the Constitution on its head and give a preference to non-competitive employees. They should obtain their permanent status in the same way as most other State employees, by taking and passing an open competitive examination.

Sections 6 through 8 – Allows Non-Competitive Employees to be Transferred to Competitive Class Positions Without Taking an Examination

These sections of the bill would make it possible for non-competitive State employees to transfer into competitive positions, with the approval of the Department of Civil Service (DCS), provided the employees meet minimum qualifications of the position. This is potentially the Executive's most dangerous assault on the merit and fitness system. **It attempts to evade compliance with a recent Appellate Division ruling** which stopped DCS from moving several medical titles represented by PEF from the competitive to the non-competitive class.

Under current law (CSL 52.6) employees in the competitive class can, in the face of an eligible list, transfer to administrative positions, which include legal, personnel, budgeting, methods and procedures, management, records analysis, and administrative research titles,. There are over 1,000 titles that are currently considered "administrative positions". In addition CSL section 70.1 allows competitive class employees to transfer to comparable titles, as determined by DCS, also in the face of an eligible list. This encompasses at least another thousand titles.

This means under current law a competitive class employee who scores poorly on a competitive examination can still be transferred into that position provided it is "comparable" or "administrative" and within two salary grades of their current position. This loophole currently evades the merit and fitness clause of the State Constitution. The Executive's proposal drives a tractor trailer through the current loophole and would create a civil service system Boss Tweed would be proud of and Teddy Roosevelt would abhor. It would allow a State employee who has never proven their merit and fitness through a competitive examination to achieve equal status with competitive class employees and transfer into the competitive class without ever complying with Article V section 6 of the State Constitution. This would overturn over a hundred years of court rulings that limit the use of non-competitive appointments.

These sections of the Executive proposal will also overturn the Appellate Division's December 2010 decision in *Brynien v. Department of Civil Service, et al* (79 A.D.3d 1501; 913 N.Y.S.2d 411 3d Dep't 2010) which prohibited the Civil Service Commission from moving twenty-nine medical titles from the competitive to the non-competitive class. The court found "... the record is bereft of evidence providing a rational basis for the Commission's determination that competitive testing is not a practicable method to ascertain the merit and fitness of applicants..." Instead of moving non-competitive titles to the competitive class the Executive proposal would instead move non-competitive

employees into competitive class positions and accomplish the same policy goal that the court found unconstitutional.

Section 1 Extends Section 66 of the Civil Service Law to All Titles in the Professional, Scientific, and Technical Unit

In 2009 after extensive negotiations between the Executive, and Legislature, Section 66 of the Civil Service Law was created to authorize five-year term appointments without examination for positions that require special expertise or qualifications in information technology. The appointments were used when it was deemed impracticable to hold a skills-based examination because of the type of services to be rendered or the uniqueness of such services needed. The period for such appointments was no longer than five years, and the maximum number of persons in such appointments could not exceed five hundred at any one time. The law had a sunset date of December 31, 2011 and has expired.

This proposal resurrects much of wording of CSL §66 that previously existed but extends this authority to all professional, scientific, technical, positions as well as other positions with specialized skills. It no longer contains provisions in the original law which required bi-annual reports to the Legislature and affected Bargaining units regarding the implementation of the law. Only annual reports were provided during the two years the law was in effect.

The original law was also accompanied with a memorandum of understanding between PEF and the Executive that provided \$200,000 for every 100 consultant positions converted to State employee positions to fund the expansion of the existing professional development training program for IT employees. The training was geared to providing the IT workforce with the skills necessary to replace IT consultants and was a crucial element of the original legislation.

As of December 2011, 186 appointments occurred under CSL §66 yielding savings of \$9.5 million with an average savings of \$50,000 per position. However only one quarter (46 employees) of those hired were existing State IT employees. When CSL §66 was first enacted the informal goal was to replace about half the consultants with existing State IT employees. Clearly this goal was not met. We believe this failure was due to the State's insistence on tailoring minimum qualifications for the consultant positions to be replaced so they exactly matched the qualifications of the consultants already doing the work. This did not give existing State IT employees a fair opportunity to replace consultants and instead resulted in IT consultants entering the State workforce. The best evidence that this occurred is the State admission's that 75% of the IT consultant positions were replaced by non-state employees.

This is not the only implementation problem that occurred over the last two years. CSL §66 has specific language that was intended to insure that in the event of a layoff of IT employees that employees hired in the 5-year temporary positions would be laid off before any permanent State IT employee as long as they had comparable skills and

responsibilities. In September the Department of Taxation and Finance was prepared to layoff four permanent State employees in the Information Technology Specialist 4 (SG-27) title even though they had comparable skills and responsibilities to consultants that were hired into five-year temporary IT positions.