

To be Argued by:
RICHARD S. CORENTHAL
(Time Requested: 30 Minutes)

APL 2021-00076
Westchester County Clerk's Index No. 2302/16
Appellate Division—Second Department Docket Nos. 2017-04562, 2017-09778

Court of Appeals
of the
State of New York

In the Matter of the Application of:

JOHN BORELLI, CHRISTOPHER BOSSEY, MICHAEL BURKE, FRANK
CALLACE, THOMAS CONNERY, BRIAN CRISTIANO, MICHAEL
DILIDDO, RAYMOND FOX, ROBERT FUMARELLI, ALEXANDER
HANON, BRIAN HARVEY, PAUL HESSLER, NEIL HICKEY, KEVIN
KEHOE, KENNETH KELLY, BRIAN KENNY, WILLIAM McKENNA,
EUGENE McNULTY, JOSEPH MURRAY, VINCENT PACIARIELLO,
WILLIAM PARKER, TIMOTHY POWERS, ARTHUR RIVERA, JEROME
RODRIGUEZ, STEPHEN RONAN, FRANK RUCKEL, MICHAEL SAMMON,
JOSEPH SANTOLO, WILLIAM SEMRAI, MARK SHAPIRO, PAT SICA,
ANDREW VERRINO, GUY VETRANO, MICHAEL WARD, ROBERT
CAVALLO, PAUL DIMELLA, RICHARD HIGGINS, KEVIN McGRATH
and THOMAS SPAUN,

Petitioners-Appellants,

– against –

THE CITY OF YONKERS,

Respondent-Respondent.

REPLY BRIEF FOR PETITIONERS-APPELLANTS

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PRELIMINARY STATEMENT

This reply brief is submitted on behalf of Thirty-nine Petitioners-Appellants, John Borelli, *et al.*, (“Appellants” or “Disabled Retirees”), in further support of Appellants’ appeal from the final order of the Appellate Division, Second Department dated October 14, 2020 (the “October 14, 2020 Decision”), regarding the determination of the City of Yonkers (the “City”) to exclude certain compensation paid to active firefighters for night differential, check-in pay, and holiday pay from General Municipal Law (“GML”) § 207-a(2) supplemental benefits paid to permanently disabled, retired firefighters. The City’s arguments in opposition are—in their entirety—premised on a mischaracterization of the October 14, 2020 Decision.

First, in the October 14, 2020 Decision, the Second Department only addressed the statutory interpretation issues and expressly deferred questions of contract interpretation to the arbitration between Appellants’ former union, Yonkers Fire Fighters, Local 628, IAFF (the “Union”) and the City. This arbitration has been completed, and the arbitrator concluded that the relevant collective bargaining agreement (“CBA”) expressly entitles members to payment of night differential,

check-in pay, and holiday pay for the purposes of the GML § 207-a(2) supplement. The arbitrator's award has been confirmed by the courts. Thus, the City's repeated assertion that the Second Department interpreted the parties' CBA as to Appellants' contractual entitlement to such benefits is categorically incorrect. All of the City's arguments in opposition rest on this defective foundation.

Second, the City distorts the Third Department's decision in *Matter of Joseph W. McKay v. Village of Endicott, et al.*, 161 A.D.3d 1340 (3d Dept 2018) ("*McKay*"), and prior decisions from the Second Department and this Court, beyond all recognition in an attempt to harmonize these decisions with the analysis of the Second Department in the October 14, 2020 Decision. Had the Second Department actually applied the logic of *McKay* to the instant facts, it would have examined whether night differential, check-in pay, and holiday pay, was paid to all active firefighters, regardless of work status or schedule, in the rank held by a Disabled Retiree upon retirement (*i.e.*, whether these elements of compensation are paid regardless of whether a firefighter actually works nights, checks in, or works holidays). As it is undisputed that such compensation was—and still is—paid to all active City firefighters,

regardless of work status or schedule, these elements of compensation should therefore have been included in the Disabled Retiree's "regular salary or wages" for purposes of GML § 207-a.

Accordingly, the October 14, 2020 must be reversed, or in the alternative, modified consistent with the clarification of Appellants' contractual entitlement to the disputed compensation as part of "regular salary or wages" for purposes of GML § 207-a.

ARGUMENT IN REPLY

I. The Second Department Did Not Resolve Appellants' Contractual Entitlement to Night Differential, Check-In Pay, and Holiday Pay as Part of the GML § 207-a(2) Supplement

According to the City, the different results in *McKay* and the Second Department's October 14, 2020 Decision under review "[are] entirely attributable to the different CBAs and unique facts of each case." (City's Br. p. 7). The City reimagines the Second Department as engaging in a close textual analysis of the CBA in order to define Appellants' contractual entitlement to night differential, check-in pay, and holiday pay as part of the GML § 207-a(2) supplement. (*See*, City's Br. pp. 12-13) (attempting to distinguish subparts of Section 4, entitled "Compensation," from other subparts of the very same section). But, the

Second Department explicitly refrained from doing that. To the contrary, the Second Department acknowledged that the parties “may agree in a [CBA] to include such additional amounts in the regular salary or wages payable to disable firefighters pursuant to [GML] §207-a,” and pointed to its “observ[ation] in the related appeal in *Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO* [187 A.D.3d 900 (2d Dept 2020), *lv granted* 37 N.Y.3d 910 (2021)],” decided therewith, that “the distinct claim by the labor union representing active City of Yonkers firefighters that the City's unilateral decision to exclude these items of compensation from General Municipal Law § 207-a(2) disability benefits violated the parties’ applicable collective bargaining agreement and past practices is a matter properly addressed to arbitration. Accordingly, we express no opinion regarding whether and to what extent the petitioners’ disability benefits may be affected by the ultimate resolution of that arbitration.” (R. 2330) (emphasis added).

The City falsely repeats—again and again—that the Second Department interpreted the CBA and concluded that the disputed compensation paid to all active firefighters for night differential, check-in pay, and holiday pay was not “expressly provided” by the CBA, when

the Second Department made no such finding. (City’s Br., pp. 1, 2, 3, 6, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 24, 26, 27) (referencing the City’s “expressly provided” standard). Indeed, the Second Department explained that the interpretation of the CBA, and what the CBA expressly provides or does not provide, “is a matter properly addressed to arbitration.” (R. 2330). The City simply ignores Second Department’s actual reasoning and attempts to backdoor its fabricated “expressly provided” contract interpretation standard that was rejected by the Second Department in *Matter of City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, 187 A.D.3d 900 (2d Dept 2020), *lv granted* 37 N.Y.3d 910 (2021).¹

The Second Department deferred the interpretation of the CBA to arbitration. Upon arbitration of the “distinct claim” identified by the October 14, 2020 Decision, (R. 2330), the mutually-selected arbitrator interpreted the CBA and clarified that Appellants had a contractual entitlement to the inclusion of night differential, check-in pay, and holiday pay, as part of the GML § 207-a(2) supplement, insofar as the CBA expressly provides for the inclusion of these disputed elements of

¹ APL-2021-00162 calendared together with this appeal.

compensation. (See, Compendium of Supplemental Authorities annexed to Appellants' principal brief) (finding that the CBA is "not silent" and expressly provides for the inclusion of the disputed elements of compensation).²

All of the City's arguments in opposition are based on the erroneous premise that the Second Department interpreted the terms of the CBA, instead of deferring such interpretation to arbitration.

II. The City Misconstrues the Analysis of *McKay* and Analogous Cases Defining the Scope of "Regular Salary or Wages"

In *McKay*, the Third Department addressed whether the calculation of the amount of a permanently disabled retired Fire Fighter's GML § 207-a(2) supplement should include two contractual benefits that he was receiving when he retired, namely, EMS pay and "schedule adjustment" pay. 161 A.D.3d at 1340. As the relevant CBA did "not expressly award either benefit to disabled firefighters, petitioner [was] entitled to the inclusion of these payments only if they [were] part of his regular salary or wages within the meaning of [GML] §207-a." *Id.* If the

² The City petitioned to vacate the arbitrator's award pursuant to Article 75 of the N.Y. Civil Practice Law and Rules ("CPLR"). The Supreme court, Westchester County denied the City's petition and confirmed the award. *City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, Supreme Court Westchester County, Index No. 60260-2021 (December 3, 2021).

City’s “expressly provided” formulation of the standard had been actually applied by *McKay*, the Third Department’s analysis would have ended here. However, the Third Department continued to examine the compensation paid to all active firefighters in the rank held by a disabled retiree upon retirement, for the purpose of the GML § 207-a(2) supplement. *Id.*

Following “the basic principle that supplemental disability payments are based upon the salaries of active firefighters... ‘upon retirement,’” the Third Department held that both benefits were included in petitioner’s regular salary or wages. *Id.* (emphasis in original) (quoting *Matter of Farber v. City of Utica*, 97 N.Y.2d 476, 479 (2002), *cert denied*, 537 US 823 (2002)) (citations omitted).

Thus, under the Third Department’s analysis in *McKay*, compensation, such as salary, differentials, special pays, and salary adjustments, paid to all active firefighters, regardless of work status or schedule, in the rank held by a disabled retiree upon retirement are statutorily included in the disabled retiree’s “regular salary or wages” for purposes of the GML § 207-a(2) supplement. *Id.*

This analysis is consistent with *Matter of Chalachan v. City of Binghamton*, 55 N.Y.2d 989 (1982) (unused vacation time); *Phaneuf v. City of Plattsburgh*, 84 Misc. 2d 70 (Sup Ct, Clinton County) (vacation and sick time) *affd*, 50 A.D.2d 614; and *Benson v. County of Nassau*, 137 A.D.2d 642 (2d Dept 1988) (shift differentials), as each decision equalizes “regular salary or wages” pursuant to GML § 207-a(2) with the compensation paid to all active firefighters in the rank held by a disabled retiree at retirement, regardless of status or schedule, *e.g.*, regardless of whether the active firefighters worked undesirable evening shifts. *Benson*, 137 A.D.2d at 644 (2d Dept 1988).

The City attempts to recast the reasoning in these decisions as rigidly applying an “expressly provided” standard that it still hopes to manifest into existence apparently by ritual incantation and force of repetition. (City’s Br., pp. 1, 2, 3, 6, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 24, 26, 27). However, in each case, the analysis centered on the compensation paid to the active members in the rank held by a disabled retiree upon retirement. And in each case, the court held that the compensation paid to all active members, regardless of status or schedule, must be equal to the amount of compensation for purposes of

GML § 207-a(2). This analysis is consistent with the Court’s mandate that the GML § 207-a(2) supplement should equal the compensation received by active firefighters in the rank held by the disabled retiree, with only the “source, not the amount,” affected. *Mashnouk v. Miles*, 55 N.Y.2d 80, 88 (1982). Indeed, the Third Department in *McKay* found that the relevant CBA did “not expressly award” the disputed benefits. 161 A.D.3d at 1340. Yet, the Third Department concluded that they were properly included in “regular salary or wages” for purposes of the GML § 207-a(2) supplement as they were paid to all active firefighters, regardless of status of or schedule. 161 A.D.3d at 1340.

Unlike *all* of the cases on which it relies, under the “expressly provided” standard now advanced by the City—which was not the standard actually applied by the Second Department in the October 14, 2020 Decision under review—the City wants to reduce the amount of compensation received by a firefighter under GML § 207-a(2) as compared to active firefighters in the rank held by the disabled retiree upon retirement. The City is unable to cite to a single case where a court endorsed a mismatch between compensation paid to all active firefighters, regardless of status of status or schedule, and the amount of

compensation received by recipients of the GML § 207-a(2) supplement, and none exists.

Had the Second Department followed the reasoning of *McKay*, *Chalachan*, and *Benson*, and considered whether the inclusion of the disputed elements of compensation would unfairly discriminate against those actively working, the record would have compelled the Second Department to conclude that night differential, check-in pay, and holiday pay are part of the “regular salary or wages” for purposes of the GML § 207-a(2) supplement, because it is undisputed that all City firefighters, (including non-retired temporarily disabled firefighters receiving GML § 207-a(1) benefits) receive night differential, check-in pay, and holiday pay, as part of regular salary or wages, regardless of whether the firefighter actually works nights, checks in prior to his or her shift, or works on a holiday. (R. 96). All active firefighters receive night differential, even those who do not work nights. All active firefighters receive check-in pay, even those who do not check-in. All active firefighters receive holiday pay, even those who do not work holidays. Temporarily disabled firefighters on GML § 207-a(1) leave status may not be working at all. (R. 96). The City wants to calculate “regular salary

or wages” differently for only one discreet group of individuals— permanently disabled retired firefighters who retired prior to December 9, 2015. See, *Uniformed Fire Officers Association of the City of Yonkers and Yonkers Fire Fighters, Local 628 v. New York State Public Employment Relations Board and City of Yonkers*, 197 A.D.3d 1470 (3d Dept 2021) (ordering, *inter alia*, the City to reinstate the past practice of including night differential, check-in pay, and holiday pay in the GML § 207-a(2) supplement for those disabled firefighters retiring on or after December 9, 2015).

Accordingly, the Second Department should have distinguished *Benson v. County of Nassau*, 137 A.D.2d 642 (2d Dept. 1988) and *Matter of Chalachan v. City of Binghamton*, 55 N.Y.2d 989 (1982) for the same reasons as the Third Department did in *McKay*: the City pays the same amounts of compensation for night differential, check-in pay, and holiday pay to all firefighters regardless of whether they ever work night shifts, or check in early, or work holidays.

CONCLUSION

For the foregoing reasons, the Court should reverse the Second Department’s October 14, 2020 Decision that affirmed the judgment of

the Supreme Court, Westchester County (Helen Blackwood, J.), dated March 17, 2017, insofar as appealed from, that denied that branch of Appellants' petition which was to annul so much of Respondent City of Yonkers' determination as excluded from the supplemental benefits paid to the Appellants pursuant to GML § 207-a(2) compensation paid to active firefighters for night differential, check-in pay, and holiday pay. In the alternative, the October 14, 2020 Decision should be modified consistent with the arbitration referenced by the October 14, 2020 Decision, which clarified Appellants' contractual entitlement to night differential, check-in pay, and holiday pay as part of the GML § 207-a(2) supplement.

Dated: Melville, New York
March 17, 2022

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this document complies with the word limit of Court of Appeals Rule of Practice 500.13(c), because this reply brief contains 2,315 words, excluding the table of contents; table of authorities; and this certificate. Font: Century Schoolbook; Size: 14-point.

Dated: Melville, New York
March 17, 2022

Richard S. Corenthal

Richard S. Corenthal

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss.:

**AFFIDAVIT OF SERVICE
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EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On March 17, 2022

deponent served the within: **Brief for Petitioners-Appellants**

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the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on March 17, 2022



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