*To be Argued by:*
Richard S. Corenthal
*(Time Requested: 15 Minutes)*

# New York Supreme Court

## Appellate Division—Second Department

**Docket No.:**
**2017-04562**
**2017-09778**

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.*

## BRIEF FOR PETITIONERS-APPELLANTS


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Westchester County Clerk's Index No. 2302/16

**STATEMENT PURSUANT TO CPLR § 5531**

# New York Supreme Court

## Appellate Division—Second Department

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.*

1. The index number of the case in the court below is 2302/2016
2. The full names of the original parties are as set forth above. There have been no changes.
3. The proceeding was commenced in Supreme Court, Westchester County.

4. The proceeding was commenced on or about July 1, 2016 by the filing of a Verified Petition pursuant to Article 78 of the CPLR. A Verified Answer was filed on or about December 30, 2016.

5. The nature and object of the proceeding is Petitioners seek an Order 1) vacating the City of Yonkers' decision to reduce Petitioners' benefits paid pursuant to New York General Municipal Law Section 207-a; and 2) directing the City of Yonkers to pay the deducted benefits.

6. This appeal is from the Decisions and Orders of the Honorable Helen Blackwood, entered on March 13, 2017 and on August 1, 2017.

7. This appeal is on the full reproduced record.

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## PRELIMINARY STATEMENT

Petitioners-Appellants, John Borelli, et al., ("Appellants" or "Disabled Retirees") submit this memorandum of law in support of their appeal from the August 1, 2016 Decision And Order Of The Honorable Helen M. Blackwood partially denying Appellants' Article 78 petition and from the March 10, 2017 Decision And Order Of The Honorable Helen M. Blackwood denying Appellants' motion to reargue and/or renew.

Appellants filed the subject Article 78 petition to challenge the decision of Respondent-Respondent, City of Yonkers, ("Respondent" or "City" or "Yonkers") to improperly terminate benefits paid to permanently disabled retirees in violation of General Municipal Law §207-a ("GML §207-a(2)" or "salary supplement"). R. 114-146. All Disabled Retirees, retired under collective bargaining agreements between the City and Local 628, IAFF, AFL-CIO ("Local 628") or between the City and Uniformed Fire Officers Association ("UFOA") as a result of their line of duty injuries or illnesses, which were approved by the City as permanent line of duty injures under GML §207-a(2). R. 147. As a result, all Appellants received a salary supplement under GML §207-a(2). R. 147. This case was prompted by the City's terminating a significant portion of the GML §207-a(2) supplemental benefits paid to the Disabled Retirees who, without challenge or question, are entitled to receive GML §207-a(2) supplemental benefits.

Accordingly, this case concerns the interpretation of GML §207-a. That statute provides that should a Fire Fighter incur an injury on the job and be unable to work, the municipality is responsible for advancing the "full amount of regular salary or wages" as well as providing necessary medical treatment for as long as the injury persists. N.Y. Gen. Mun. Law § 207-a (McKinney). Specifically, GML §207-a(2) applies to Fire Fighters and Fire Officers (hereinafter "Fire Fighters") who have been approved for a disability retirement from the N.Y.S. Retirement System because their line of duty injuries were deemed to be permanent. GML §207-a(2) protects Fire Fighters who are permanently disabled in the line of duty by holding municipalities liable for, "the difference between the amounts received under such allowance or pension and the amount of his regular salary or wages." N.Y. Gen. Mun. Law § 207-a (McKinney). The term "regular salary or wages" is not defined in the statute, and is critical to the outcome of this case.

For over thirty (30) years the City of Yonkers defined the "regular salary and wages" of all Fire Fighters, as including the same amounts of night differential pay, check-in pay and holiday pay. R. 147-155. Meaning that in Yonkers, a Fire Fighter who worked all night shifts, performed all check-in duties, and worked every holiday received the same amount night differential pay, check-in pay and holiday pay as a Fire Fighter who never worked a night shift or a holiday and never performed check-in duties. Id. To this day, a Fire Fighter, in a staff position, who

never works nights or holidays, and would never perform check-in duties, still receives in their pay, night differential, check-in pay, and holiday pay. R. 1264. To this day, a temporarily disabled Fire Fighter (GML §207-a(1)) receives their "regular salary or wages" which includes night differential pay, check-in pay and holiday pay. R. 147-155. And for over thirty years, the City properly paid night differential, check-in pay, and holiday pay to GML 207-a(2) recipients including all of the Disabled Retirees in this case.

Significantly, the key issue in this case is already addressed by stipulation in which the City readily admits that the salary items at issue in this case are part of "regular salary or wages" for active duty Fire Fighters in Yonkers. In November 2016, in a proceeding before the N.Y.S. Public Employment Relations Board concerning the City's compliance with the Public Employment Relations Act ("Taylor Law"), N.Y. Civ. Serv. Law § 209-a, et seq. the City stipulated that night differential pay, check-in pay, and holiday pay are part of "regular salary or wages" for active Yonkers Fire Fighters. R. 105-108. In short, because night differential pay, check-in pay and holiday pay were defined and paid as "regular salary or wages," to all Yonkers Fire Fighters, all Disabled Retirees must receive GML § 207-a(2) benefits which include these salary payments as required by the statute – the "regular salary or wages," of an active duty fire fighters.

manifestly unfair not to pay these monies to the Disabled Retirees. In Yonkers, night differential, check-in pay, and holiday pay are paid without respect to work actually performed, days worked or time day or night. Indeed the City has admitted that the payments are "regular salary or wages," and the holding of the March 10, 2016 Decision makes clear that this fact was overlooked by the Court. Also, Respondents admitted in their Answer that total benefits under GML §207-a(1) and GML §207-a(2) must be the same.

## QUESTION PRESENTED

1. Whether the Supreme Court erred in denying Appellants' Article 78 Petition? Yes.
2. Whether the Supreme Court erred in denying Appellants' motion to reargue and/or renew? Yes.

## STATEMENT OF FACTS

### A. GML §207-a Background

GML §207-a provides that should a Fire Fighter incur an injury on the job and be unable to work, the municipality is responsible for advancing the "full amount of regular salary or wages" as well as providing necessary medical treatment. N.Y. Gen. Mun. Law § 207-a (McKinney). The term "regular salary or

wages" is not defined in the statute. Prior to 1977, GML §207-a did not have subsections 1 or 2, and GML §207-a required a municipality to bear the full cost of regular salary and medical care for a Fire Fighter even if their disabilities continued for the rest of the Fire Fighter's life. The 1977 amendment resulted in the addition of five new subsections. GML §207-a(1) remained substantially identical to the original GML §207-a, stating that when a Fire Fighter sustains a line of duty injury or illness, the municipality must pay the "full amount of his regular salary or wages until his disability arising therefrom has ceased, and, in addition, such municipality or fire district shall be liable for all medical treatment and hospital care furnished during such disability." N.Y. Gen. Mun. Law § 207-a (McKinney)(emphasis added).

The addition of GML § 207-a(2), only permitted a municipality to share its GML §207-a burden with the state retirement system or pension fund,[1] but the amendment did not change the benefit from the perspective of the injured Fire Fighter. Currently, GML §207-a(2) provides that if a Fire Fighter is approved for a disability pension under "section three hundred sixty-three of the retirement and

---

[1] R. 2226-2315 (Bill Jacket for the 1977 amendment which includes Governor's Memorandum on approving L 1977, ch 965; Sponsor's Memorandum in support of Bill No. 8978 in Assembly; Memorandum of Department of State recommending approval of Bill No. 8978 in Assembly.).

social security law" as a result of his line of duty injuries, "such fireman shall continue to receive from the municipality . . . the difference between the amounts received under such allowance or pension and the amount of his regular salary or wages." N.Y. Gen. Mun. Law §207-a (McKinney)(emphasis added). In enacting the GML §207-a amendments, the Legislature expressly documented that the new law was to have no effect on the income received by a permanently disabled fire fighter. R. 2226-2308 (See, Sponsor's Memorandum in support of Bill No. 8978 in Assembly; letter of the Permanent Commission on Public Employee Pension and Retirement Systems, dated Aug. 4, 1977; letter of New York State Association of Counties, dated July 18, 1977).

Critically, the statute does not define "regular salary or wages," rather, the statute leaves it to the bargaining parties to define "regular salary or wages." Moreover, there is not one definition of "regular salary or wages" for active Fire Fighters and Fire Officers and another one for retirees. This means that the definition of "regular salary or wages" for active Fire Fighters is critical to the calculation of the GML §207-a(2) benefit which is "regular salary or wages" of an active Fire Fighter minus the amount of the New York State Disability Retirement payment.

## B. Line of Duty Injuries

This case does not exist but for the fact the individual Disabled Retirees agreed to put their health and safety on the line in service to the citizens of Yonkers with the expectation that should they become permanently disabled in the line of duty, GML 207-a(2) mandated that they receive the same salary they had regularly received when they were active Fire Fighters. R. 120-127 (Summary of injuries). It is not disputed that each Disabled Retiree applied for and was approved for benefits under GML §207-a(2).

Mr. Pat Sica responded to what he thought was

> [J]ust a medical call of a person, difficulty breathing. It was at a supermarket on North Broadway. When we get there we find two men unconscious so we immediately start CPR, awaiting ambulance and help to arrive. By the end of that, being in there for about twenty, thirty minutes, we find out that there was a major chemical exposure and high concentration of Carbon Monoxide fumes that we were exposed to. So, we were sent to the hospital with the same thing, blood gases. We find later that a chemical -- they were cleaning, I guess, the walk-in refrigerator and they mixed certain chemicals together and it created what they call Cyanogen Chloride, which is kind of used in like chemical warfare. If you're exposed to this gas for a long enough period of time it could kill you, which one of the victims there did pass away from it. So, on my report after I got out of the hospital they tested blood gases and found that we had increased chemical exposure. The report actually said that that chemical can do damage to heart and lungs, and that's what I have, is a heart problem. . . . I ha[ve] Cardiomyopathy. [R. 1756-1760.]

Today, Mr. Sica closely monitors his heart which has lost most of its function. He takes medication and hopes that his condition does not worsen because the only cure is a heart transplant. And while his cardiologist has advised Mr. Sica to "try to avoid stress" these proceedings initiated by the City have caused his stress level to be "quite high." Id.

According to Mr. Steven Ronan, he was crushed by the fire truck, Rescue 1, when he was "getting a hook off the side of Engine 304 and Rescue 1. . . [he was] squeezed in between. . . a police car that's blocking the street and Engine 304 . . . [being] pulled along and eventually run over by the two rear axles. R. 1492-1493. His whole body was bruised. He suffered an open compound fracture of his right tibia and sustained back injuries necessitating multiple surgeries on his leg including a rod that goes from his knee to ankle and muscle and skin grafts to close the wound. Id. Now, Mr. Ronan, worries how he will support his children, a four and a nine year old and deals with the stress of "having two small kids and not knowing what the future is going to be." According to Mr. Ronan, "my wife is constantly asking what's going to happen. What's going to happen, and I don't know." Id.

According to Mr. Neil Hickey he

> [W]as at a fire . . . off of South Broadway. We were the first engine and we pulled up. It was in February, that was a particularly bad winter. There were snow piles on the side of the road six to ten feet high. My job was to

> take the fire hydrants and hook up the lines. My officer and the other Fire Fighter took [an attack] line into the building and I hooked the fireman up and on my way back to the rig, there was black ice in the road. I didn't see, I slipped, my knee buckled. I went down on the ground and I knew right away I was in bad shape that I hurt myself again it wasn't good but I also know that my officer and the other fireman who were in the building. If I wasn't there in a certain period of time they were going to wondering where I was and that puts them in bad spot to come look for me.
>
> So, I limped over to the rig and grabbed my air bag limped up the building and crawled up to find them. This way they didn't have to come . . . . because I didn't want them thinking where was I and coming and stopping. Their primary function was to find the fire and put water on it. [R. 910-911.]

From 1994 until 2005, Mr. Connery worked as a Yonkers Fire Fighter, and he testified that throughout his career his pay always included regular and consistent payments of night differential, check-in pay, and holiday pay regardless of his work schedule, and even during times when Mr. Connery was out of work for personal sick leave or for a line of duty injury, his pay remained the same. According to Mr. Connery, his career was cut short due to a line of duty injury that nearly cost him his life.

> I was working at a fire on 4/18/05 when I fell off a fire escape some 25 feet. I was in full gear, landed on my Halligan tool punctured my lung, lacerations, rib fractures, broken ribs, cracked orbit. I suffered multiple injuries including hearing loss. I spent nine days at Westchester Medical in CICU. I was admitted. I was

> discharged after that and spent just the recovery time after that at which I'm still recovering.
>
> [In response to "What is a Halligan Tool?"]
>
> Yes, I fell on that tool, the Halligan tool punctured my lung, lacerated my liver and spleen.
>
> The Halligan tool is a tool we use for multiple purposes for overhauling and you know, breaking into doors and ripping down walls and ceilings. It's got a sharp edge on a point on one side and a flat side on the other. We use it for all sorts of things on the job.

In 2007, Mr. Connery received a disability retirement from the State of New York, and subsequently the City of Yonkers began to pay salary supplements under GML 207-a(2). The supplement payment, like his regular paychecks, included night differential, check-in pay, and holiday pay. When asked about the financial impact and the stress of having his GML 207-a(2) supplement reduced and recouped, Mr. Connery said,

> I'd probably have to sell my home and use the equity in my home to pay that back which would be devastating for me and my family.
>
> . . . .
>
> This has been quite stressful. A lot of therapy over the years to try to put this accident behind me and get over this with my family and myself. We have been through a lot. This accident that I had near death and just going through all this again reviewing all the paperwork and then finding out the City is trying to recoup monies already paid to me, it's been very very stressful. [R. 548-554.]

These Disabled Retirees represent civil servants who continued to sacrifice their health in order to protect others immediately after suffering serious bodily injury in the line of duty. The foregoing are just a few examples of the tremendous human sacrifice resulting from injuries or illnesses sustained in the line of duty by Yonkers Fire Fighters. The hearing transcript from each Disabled Retirees' hearing creates a record which is replete with examples of the severe financial hardship such adjustments and recoupments would have on these Disabled Retirees. Each Disabled Retiree relied upon and continues to upon rely on the City's representation of their GML §207-a supplement to care for their children (R. 1352, 1401, 1494, 1537, 1626, 1672, 1858, 2090) some with developmental disabilities (R. 1176); to care for elderly parents (R. 1401-02); to obtain and pay for mortgages; to plan for their children's college tuition (R. 468, 511, 919, 1005, 1761, 1904). The amounts the City is attempting to cut from Appellants' wage supplement represents a significant sum of money depending on whether the supplement represents fifty percent or twenty-five percent of the Disabled Retirees' retirement income; on average, they have lost between $10,000 - $15,000 per year. R. 366, 2182-2225.

**C. Reduction of GML §207-a(2) Benefits**

And even though the City approved each Disabled Retiree for this statutory benefit under GML §207-a(2) and each Disabled Retiree in fact received this

benefit based on "regular salary or wages" calculation which included night differential, check-in pay, and holiday pay, on about December 9, 2015, the City unilaterally advised approximately forty-four (44) permanently disabled retirees receiving GML §207-a(2) benefits that the City would reduce this benefit. R. 146. Further, the City threatened recoupment of benefits already paid. Id. The City claimed that, due to an "accounting error," it overpaid supplemental benefits pursuant to GML §207-a(2) by including payments called night differential, check-in pay, and holiday pay in the GML §207-a(2) supplement. Id.

On October 5, 2015, the City abruptly changed their own policy sending each Disabled Retiree a letter stating that,

> A review of the City records also indicates that you may have been overpaid GML Section 207-a(2) benefits in that you may have received payments that included special pays and other compensation afforded to active Fire Fighters under the CBA which should have been excluded from the calculation of your GML Section 207-a(2) benefit. This is your notice that the City is reviewing the overpayments made and will adjust your GML Section 207-a(2) benefit going forward to reflect the correct benefit provided for by law. [R. 325.]

Then inexplicably, on October 15, 2015, the City sent each Disabled Retiree, all permanently disabled as a result of firefighting, a letter which claimed that the October 5, 2015 letter "was sent in error," and that the City "will issue a final determination within the next twenty (20) business days." R. 326. Finally, on December 9, 2015, the City sent a letter stating that effective January 14, 2016, the

City planned to reduce each Disabled Retiree's GML §207-a(2) benefit by not including the night differential, check-in pay, and holiday pay salary items. R. 146. The letter further threatened that "the City reserves its right to recoup the overpayment from future GML §207-a(2) benefits as well as any other monies that may be due you, including retroactive wages and other compensation, under the CBA." Id. The notice afforded the Disabled Retirees the opportunity to object to the adjustment and provided for a due process hearing. Id.

Each individual Disabled Retiree objected to the reduction of their GML §207-a(2) benefits and requested a hearing. R. 150. The City unilaterally appointed their own hearing officers, to hold hearings and issue recommendations on whether the City could lawfully reduce the individual Disabled Retiree's GML §207-a(2) benefits. R. 345-2148. Hearings were held at Yonkers City Hall on February 22, 23, 29, and March 1, 2016. Id.

Individual Disabled Retirees argued *inter alia* that the City was collaterally estopped from stripping away this part of their GML §207-a(2) benefits because the Supreme Court ruled against the City in Smerek v. Christiansen, 111 Misc. 2d 580 (Westchester County Supreme Court, 1981), a case which defined GML §207-a(2) benefits for Yonkers Fire Fighters as including night differential, check-in pay, and holiday pay. The City did not appeal the Supreme Court's decision in Smerek v. Christiansen. That earlier decision in Smerek concerning precisely the

same issue and ruling on precisely the same question that night differential, check-in pay and holiday pay are part of salary for the purposes of GML §207-a calculations lays bare the falsity of the City's argument that it has engaged in a consistent 30 year accounting error.

Following the Disabled Retirees' individual due process hearings, on April 5, 2016, each Disabled Retiree received, via letter, "a final determination" in the matter of adjusting and recouping Appellants' GML §207-a(2) benefits. R. 2165. The City "adopt[ed] each and every finding of fact and recommendation" from the Hearing Officers Report and stated that "the City will adjust your GML §207-a(2) benefit and recoup any overpayment of that benefit as set forth in my initial determination. . . . I am directing the City to temporarily hold the recoupment in abeyance until further notice." Id.

**D. Article 78**

On July 1, 2016 Disabled Retirees filed a proceeding under CPLR Article 78 seeking declaratory relief from the City's decision to reduce and potentially recoup their GML §207-a(2) benefits. R. 114-151.

On November 28, 2016, after the submission of the Article 78 Petition, the parties stipulated, in a consolidated hearing before PERB, that since at least 1995 to the present, in a consolidated proceeding before PERB the City consistently paid night differential, check-in pay, and holiday pay to all Yonkers Fire Fighters

employed by the City regardless of their work status or their work schedule. R. 96.

In paragraphs 7, 9, and 10 of the Stipulation the City admitted that

> 7. Since at least 1995 to the present, the City has paid night differential, check-in pay and holiday pay to all active bargaining unit members of the UFOA and Local 628 employed by the City as part of their regular salary or wages regardless of their work status or their work schedule.
>
> . . . .
>
> 9. Since at least 1995 to the present, the City has paid night differential to all UFOA and Local 628 bargaining unit members as part of their regular salary or wages whether or not the individual actually worked a night tour.
>
> 10. Since at least 1995 to the present, the City has paid check-in pay to all active bargaining unit members of the UFOA and Local 628 employed by the City as part of their regular salary or wages whether or not the individual was present for duty or was actively working.

R. 96 (emphasis added). The forgoing critical, dispositive admissions were raised before the Supreme Court in Appellants' reply papers as well as in their motion to reargue and/or renew. R. 23-31. However, this critical admission was not addressed in either the Supreme Court's August 1, 2016 Decision And Order partially denying Appellants' Article 78 petition or in the March 10, 2017 Decision And Order denying Appellants' motion to reargue and/or renew. In fact, the

August 1, 2016 Decision And Order never even mentioned this critical and dispositive admission. R. 5-11.

On March 10, 2017, the Supreme Court denied the Article 78 Petition, finding that the City's decision to reduce the Disabled Retirees' GML §207-a(2) payments by deducting night differential, holiday, and check-in pay, was neither arbitrary nor capricious. R. 14-20. However, the Supreme Court granted the petition in part, finding that the City's decision to recoup overpaid §207-a(2) payments was arbitrary and capricious and lacked a rational basis. In denying part of Appellants' Article 78, the Supreme Court held,

> [A]pplying the logic of Chalachan and Benson, it would be unfair to pay 207-a(2) recipients holiday pay since they cannot work holidays, night differential since they cannot work night shifts, or check-in pay, since they need not be compensated for their early arrival for each shift to receive instructions, equipment and/or uniform inspection. For all of these reasons, the court finds that respondents had a rational basis for deciding to reduce the 207-a(2) payments by deducting night differential, holiday pay, and check-in pay.

Thereafter, because the March 10, 2017 Decision and Order did not reference admissions which are dispositive of this case and because the Supreme Court applied inapplicable facts, namely that Yonkers Fire Fighters are compensated for actual check-in duties, for working night shifts, and for working holidays, Appellants filed a motion to renew and reargue the portion of the Supreme Court's decision that denied the Article 78 petition. R. 23-105

Without addressing any of Appellants' arguments, the Supreme Court summarily denied the motion to reargue as a "reiteration of their original arguments." R. 9. Further, the Supreme Court acknowledged that "the city stipulated that night differential, check-in pay, and holiday pay are part of regular salary or wages." Nevertheless, the Supreme Court ignored this critical fact declining to even reference how this admission did not affect the outcome of this case. R. 9-10. This is a case about the definition of "regular salary or wages" for Fire Fighters in Yonkers which the City admits included night differential, check-in pay, and holiday pay.

This appeal followed.

## ARGUMENT

### I. THE SUPREME COURT ERRED BY FAILING TO APPLY THE DOCTRINE OF COLLATERAL ESTOPPEL BECAUSE "REGULAR SALARY OR WAGES" FOR GML §207-a BENEFITS IN YONKERS WAS CONCLUSIVELY DECIDED IN SMEREK V. CHRISTIANSEN

The Court failed to address Appellants' collateral estoppel claim premised on Smerek v. Christiansen, 111 Misc. 2d 580 (Westchester County Supreme Court, 1981). This case was dispositive of Appellants' Article 78 and the Supreme Court's failure to mention this this case is ample basis for reversal because no case other than Smerek addresses the definition of GML §207-a "regular salary or wages" in Yonkers.

Collateral estoppel, or issue preclusion, "'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party [or those in privity], whether or not the tribunals or causes of action are the same.'" Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 349 (1999)(quoting Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500 (1984)). Here, the doctrine of collateral estoppel precluded the City from re-litigating the issue raised and decided Smerek v. Christiansen. The issues in Smerek and in this case are identical and were decided against the City. By initiating due process hearings for the Disabled Retirees, the City sought another attempt at litigating over the definition of "regular salary or wages" under GML §207-a(2) by claiming mistake, but they lost Smerek v. Christiansen and did not appeal.

The disabled retiree in Smerek v. Christiansen was appointed to the Fire Department of the City of Yonkers on October 16, 1958. He served in his capacity as a fireman until February 24, 1977 when he sustained a tear of the deltoid muscle and rotary cuff of the right arm and shoulder while fighting a fire. At the time of his injury he had attained the rank of fire lieutenant and was receiving an annual salary of $29,534.08 which included base pay, longevity pay, check-in/check-out pay, night differential and holiday pay. Justice Ferraro rejected the exact same position claimed by the City here that "regular salary or wages" are to include base

salary and longevity pay and no other elements. The Supreme Court noted that the disabled retiree's annual salary at the time of his injury included base pay, longevity pay, check in check out pay, night differential and holiday pay and stated,

> The Court cannot accept respondents' narrow interpretation of the terms "regular salary or wages." Respondents paid petitioner an annual salary of $29,534.08 on a regular basis for over three and one half years immediately prior to their submission of his name for involuntary retirement. The New York State Retirement System considered these regular salary payments in arriving at their 75% allowance and respondents are now required to add 25% of such regular salary. The legislative intent is clear and unequivocal that a fireman disabled on the job is entitled to be made whole at least to the extent of receiving his full pay. The Court appreciates the financial plight of the City of Yonkers but economies should not be practiced at the expense of devoted men who render valiant service at the risk of their very lives. [Id. at 581.]

Significantly, although the City had a "full and fair opportunity to litigate the issue in the earlier action," City of New York 9 N.Y.3d at 128, the City chose not to appeal Justice Ferraro's decision. Therefore, the City is bound to the Smerek v. Christiansen decision under well-established principles of collateral estoppel, and they cannot now thirty-five years later begin litigation over the definition of "regular salary or wages" under GML §207-a(2).

The Supreme Court did not address this case, but Justice Ferraro's decision in Smerek is still good law as it is supported and consistent with subsequent case

law. In other words, the law has not changed since Smerek. Rather, courts have applied the guiding principles of GML §207-a to unique factual circumstances.[2] In the 2002 case, Wise v. Jennings, 290 A.D. 2d 702 (3d Dept. 2002), the Appellate Division expressly ruled, in reviewing a GML §207-a(2) supplement payment, that GML §207-a is "to ensure that permanently disabled Fire Fighters receive an amount equal to that of active Fire Fighters of the same position and rank with only the income source and not the amount effected..." Id. This decision is consistent with the earlier Court of Appeals decision in Mashnouck v. Miles, 55 N.Y.2d 80 (1982) which ruled that permanently disabled retirees are entitled to the same wage increases granted to active fire fighters as part of the supplements paid under GML §207-a(2) and that "General Municipal Law [§ 207-a] was intended only to affect the source, not the amount, of payments made to disabled fire fighters" Id., at 88 (emphasis added).

Significantly, the guiding principle of GML §207-a(2) as affirmed in recent, subsequent case law is that "benefits afforded Fire Fighters pursuant to this section

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[2] "[T]he primary aim of the new statute [GML 207-a(2)] [being] to shift a large portion of the financial burden generated by disabled fire fighters from the municipal payrolls to the appropriate retirement system or pension fund . . . . Aside from partially shifting the source of the payments made to disabled fire fighters, there is no indication that the Legislature also intended to reduce the amount of such payments[.]" Klonowski v. Dep't of Fire of City of Auburn, 58 N.Y.2d 398, 405 (1983)(quoting Mashnouk v. Miles, 55 N.Y.2d 80, 87 (1982)).

are remedial in nature and, thus, the statute is to be liberally construed in their favor." See Matter of Klonowski v. Department of Fire of City of Auburn, 58 N.Y.2d 398, 403; Matter of McGowan v. Fairview Fire Dist., 51 A.D.3d 796, 798 (2d Dept. 2008). "The statute guarantees that any fireman who suffers an employment-connected disability will receive a full annual wage not to be interrupted in any respect." Pease v. Colucci, 59 A.D.2d 233, 235 (4th Dept. 1977); see also (Phaneuf v City of Plattsburgh, 84 Misc. 2d 70 (1974), affd 50 A.D. 2d 614 (3d Dept.).

Apart from the holding in Smerek, there are only a few cases which draw bright lines with respect to the statutory definition of "regular salary or wages," under GML §207-a(2) and none of these cases undermine the Smerek holding, rather they support it. The Court of Appeals unequivocally established that the phrase "regular salary or wages" contained within GML §207-a(2) includes salary increases paid to active firemen. Mashnouk v. Miles, 55 N.Y.2d 80 (1982). Accordingly, the court determined that GML §207-a(2) requires that permanently disabled Fire Fighters receive full pay which means that the municipality is required to pay a disabled fireman not only his salary but also any pay increase granted to the nondisabled or active Fire Fighters. Matter of Klonowski v. Dept. of Fire of City of Auburn, 58 N.Y. 2d 398, 403 (1983) (citing, Matter of Barber v. Lupton, 282 A.D. 1008, affd 307 N.Y. 770).

There is only one case which specifically addresses night differential payments with respect to "regular salary or wages" under GML §207-a - this Court's decision in Benson v. County of Nassau, 137 A.D. 2d 642 (2d Dept. 1988). In Benson when the police officer sought to have his differential payment included as part of his "regular salary and wages" under §207-c benefits, the court held that awarding him a shift differential while not actually working an undesirable shift would discriminate against those uninjured officers who actually put in the undesirable hours of work. Benson v. County of Nassau, 137 A.D. 2d 642 (2d Dept. 1988). Here, in stark contrast, no such discrimination exists because all Yonkers Fire Fighters receive the same night differential payment regardless of whether they ever work a night shift. Accordingly, the sole purpose for excluding night differential payments from regular salary in Benson does not exist in this case. On the other hand, the manner in which night differential was regularly and consistently paid as part of regular salary in this case creates the opposite discrimination concern in that as a result of the City's act, only GML §207-a(2) permanently disabled retirees are excluded from receiving night differential.

Specifically with respect to holiday pay, only Carpenter v. City of Troy, 192 A.D.2d 920, 921 (3d Dept. 1993), held, without any statement of fact as to how holiday payments were paid in Troy, "these benefits do not constitute 'regular salary or wages' within the purview of [GML] 207–a." However, there are no

New York cases which address holiday payments made in the manner they were made in this case. Further, both collective bargaining agreements require the City to pay twelve days of holiday pay "whether worked or not." Petition, Ex. B(1) at 8; Petition, Ex. B(2) at 7.

Therefore, subsequent case law has not overturned Smerek. Rather, each court after Smerek looked to how the particular municipality paid their Fire Fighters to determine "regular salary or wages" under GML §207-a(2). The pay practice in Yonkers is unique and readily distinguishable from all the post-Smerek cases, and thus, Smerek is good law which precludes Yonkers from stripping GML §207-a benefits from their disabled retirees.

## II. IN DENYING THE SUBJECT ARTICLE 78 PETITION AND THE MOTION TO REARGUE AND/OR RENEW, THE COURT INCORRECTLY APPLIED CASE LAW AND BASED ITS HOLDING ON FACTS NOT PRESENT IN THE RECORD

The Supreme Court overlooked critical facts and misapprehended controlling case law in denying the Appellants' Article 78 petition as the factual and legal circumstances of the Article 78 petition differed significantly and materially from the circumstances presented in Chalachan and Benson – the only cases upon which this Court relied to deny Appellants' Article 78.

### A. The Supreme Court Ignored The City's Admission That "Regular Salary or Wages" Includes night differential, check-in pay, and holiday pay

The City has always considered night differential, check-in pay, and holiday pay to be "regular salary or wages" is a fact that Appellants maintain existed at the time the Article 78 Petition was filed, however, after the submission of the Article 78, the City admitted via a subsequent stipulation that night differential, check-in pay, and holiday pay are "regular salary or wages" for GML §207-a(1). Not only is this admission a material fact to the case at bar, but Appellants maintain that it is dispositive because under the teachings of Wise v. Jennings, 290 A.D. 2d 702 (3d Dept. 2002), GML §207-a(2) benefits are defined by GML §207-a(1) benefits with only "the income source and not the amount effected..." Id.

On November 28, 2016, the City of Yonkers entered into a Stipulation in a consolidated proceeding before the New York State Public Employees Relations Board in PERB Case Nos. 34936 and 34970 ("PERB case"). Ex E. In paragraphs 7, 9, and 10 of the Stipulation the City admitted that

> 7. Since at least 1995 to the present, the City has paid night differential, check-in pay and holiday pay to all active bargaining unit members of the UFOA and Local 628 employed by the City as part of their regular salary or wages regardless of their work status or their work schedule.
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> ....
>
> 9. Since at least 1995 to the present, the City has paid night differential to all UFOA and Local 628 bargaining unit members as part of their regular salary or wages whether or not the individual actually worked a night tour.

> 10. Since at least 1995 to the present, the City has paid check-in pay to all active bargaining unit members of the UFOA and Local 628 employed by the City as part of their regular salary or wages whether or not the individual was present for duty or was actively working.

This stipulation constitutes new and material facts which leave no question that night differential, check-in pay, and holiday pay are regular salary or wages for purposes of calculating GML §207-a benefits. Thus, in light of these facts, the Supreme Court should have granted Petitioners'' motion to renew its Article 78 Petition.

### B. The Supreme Court Misapplied Case Law Chalachan and Benson

In denying Appellants' Article 78, this Court held,

> [A]pplying the logic of Chalachan and Benson, it would be unfair to pay 207-a(2) recipients holiday pay since they cannot work holidays, night differential since they cannot work night shifts, or check-in pay, since they need not be compensated for their early arrival for each shift to receive instructions, equipment and/or uniform inspection. For all of these reasons, the court finds that respondents had a rational basis for deciding to reduce the 207-a(2) payments by deducting night differential, holiday pay, and check-in pay.

This holding, rooted in the concept of fairness, is illogical in light of the facts of this case, thus it seems clear that the Supreme Court overlooked the fact that the City pays the same amounts of night differential, check-in pay, and holiday pay to Fire Fighters regardless of whether they ever work night shifts, or check in early, or work holidays. Specifically, the City pays the same salary to Fire Fighters

temporarily injured in the line of duty receiving GML §207-a(1) benefits. Fairness requires the opposite result.

Benson v. County of Nassau, 137 A.D. 2d 642 (2d Dept. 1988) is the only case which specifically addresses night differential payments with respect to "regular salary or wages" under GML §207-a or GML §207-c.[3] In this New York Appellate Division case, a police officer was disabled in the line of duty and granted General Municipal Law §207-c benefits. During the time preceding his injury, he worked regular shifts as well as night shifts, and only when he worked the latter was he paid an increased shift differential. When the police officer sought to have this differential payment included as part of his "regular salary and wages" under §207-c benefits, the Court held that awarding him a shift differential while not actually working an undesirable shift would discriminate against those uninjured officers who actually put in the undesirable hours of work. Id. Likewise, Benson cited the Court of Appeal decision in Matter of Chalachan v City of Binghamton, 55 NY2d 989 (1982). The payment at issue in Chalachan was vacation pay which is readily defined as a fringe benefit and Appellants do not

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[3] Benson concerned GML 207-a but for purposes of the "regular salary or wages" analysis there is little differentiation between fire fighters and police officers. Unif. Fire Fighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes, 258 A.D.2d 24, 28 (1999) aff'd, 94 N.Y.2d 686 (2000).

dispute that vacation pay is a fringe benefit. Thus, since the decision to deny Appellants' Article 78 is premised on facts that are not present in this case, it is clear that the Supreme Court overlooked the facts in this case and accordingly misapprehended the law.

### C. The Supreme Court Overlooked The City's Admission That Total Benefits Under GML §207-a(1) and GML §207-a(2) Must Be Equal In Their Amounts

Furthermore, The Supreme Court overlooked the fact that the City failed to answer paragraph 54 of the Article 78 Petition, thereby admitting that GML §207-a(1) and (2) must be the same benefit with respect to amount, and thus, the City admitted that night differential, check-in pay, and holiday pay which are included in GML §207-a(1) benefits must be included in GML §207-a(2) benefits. Ex. B at ¶54. Paragraph 54 of the Article 78 Petition states, "GML 207-a [] mandates that total benefits under GML 207-a(1) and GML-a(2) be equal." And "[s]ilence in a responsive pleading is an admission[.]" Siegel, N.Y. Prac. § 221 (5th ed.); CPLR §3018(a)("A party shall deny those statements known or believed by him to be untrue. . . . All other statements of a pleading are deemed admitted[.]"). Appellants raised this admission in their reply brief. R. 78. Thus, the Supreme Court overlooked this critical admission when it, in effect, decided that GML §207-a(2) benefits can exclude payments of night differential, check-in pay, and holiday pay and as a result be a smaller benefit than GML §207-a(1) benefits

which the City admits must include payments of night differential, check-in pay, and holiday pay.

## III. THE CITY WAS WITHOUT AUTHORITY AND LACKED A RATIONAL BASIS TO REDUCE AND RECOUP THE GML §207-a(2) BENEFITS IN THIS CASE BECAUSE THERE IS NO OVERPAYMENT OR MISTAKE

The plain language of GML § 207-a provides that, "[a]ny payment made by a municipal corporation or fire district pursuant to the provisions of this subdivision shall be deemed to have been made for a valid and lawful public purpose." N.Y. Gen. Mun. Law §207-a (McKinney). Thus, it is contrary to the plain language of the statute for the City to now claim that payments made pursuant to GML § 207-a for over thirty years constitutes an overpayment according to case law. The very act of paying Appellants openly, voluntarily, and consciously validates the payments according to GML §207-a.

Moreover, in Heck v. Keane, 6 A.D.3d 95 (4th Dept. 2004), the Appellate Division rejected the City of Buffalo's claim that their decision to terminate GML §207-a(2) benefits was "rationally based upon all pertinent evidence[.]" Id. at 99. Indeed, it was irrational for the City of Buffalo to "consider[] no evidence other than their [own] records[.]" Id.

Here, the City provided no evidence or testimony to support its self-serving claim that its thirty year pay practice was an error. Indeed, no one testified on behalf of the City. Most recently, the City states that its calculation of GML §207-

a(2) benefits in Smerek was a mistake, while at the same time claiming that "there is no evidence that the City was even aware of the erroneous 207-a(2) wage supplement overpayments." On the other hand, Appellants submitted the following evidence, proving both that the City considered the disputed payments to be, "regular salary or wages" and that the City did not make a mistake in calculating GML §207-a(2) benefits.

- Since at least 1982, the City included these very salary items in its "final average salary" calculation to the New York State Retirement System for the purpose of calculating each individual's disability retirement benefits. R. 144.
- Night differential, check-in, and holiday pay salary items have been factored into the New York State pension calculation for each Disabled Retiree. R. 144.
- The City consistently labeled night differential, check-in pay, and holiday pay as parts of pay which make up "Total Salary." R. 148
- In 1995, the then Personnel Commissioner of Yonkers, Mr. Alfred Cava wrote, "In calculating 'regular salary and wages' the City has included early report pay [check-

in pay] and the night differential in addition to base pay and longevity pay." R. 322.

Most recently, the City has admitted that

- "GML §207-a [] mandates that total benefits under GML §207-a(1) and GML-a(2) be equal," by failing to answer paragraph 54 of the Petition. R. 70.
- night differential, Check-in pay, and holiday pay are part of "regular salary or wages" for active Fire Fighters and Fire Officers. R. 96.

Based on the record as a whole, its recent admissions, and conflicting statements, the City's determination has no rational basis; thus this Court is free to overturn the determination under the rational basis standard. Pell v. Board of Education, 34 N.Y.2d 222 (1974).

## IV. WHETHER THE SALARY ITEMS AT ISSUE IN THIS CASE ARE "EXPRESSLY PROVIDED FOR" IN THE APPLICABLE CBA IS IRRELEVANT

The Supreme Court held that Appellants are not entitled to night differential, check-in pay, and holiday pay in their GML §207-a(2) wage supplement because the relevant collective bargaining agreements do not extend these payments to retirees. R. 19. This holding is fatally flawed because it is based on two false assumptions 1) that night differential, check-in pay, and holiday pay are per se

fringe benefits; and 2) that GML §207-a(1) and GML §207-a(2) are different benefits.

The City has admitted that night differential, check-in pay, and holiday pay are "regular salary and wages" for active Fire Fighters and not fringe benefits. R. 152. Critically, the City has admitted that total benefits under GML §207-a(1) and GML §207-a(2) must be equal by failing to answer paragraph 54 of the Petition. R. 70-77. Furthermore, the City's "fringe benefit" argument is contrary to the express language in the applicable CBAs. Article 4:0 of the CBA is entitled Compensation. Section 4:01 of Local 628's CBA is entitled "Annual Salary." Night differential (Section 4:05), check-in pay (Section 4:06), and holiday pay (Section 4:07) fall under "Annual Salary" and "Compensation." R. 169-174. The UFOA's CBA also lists night differential, check-in pay, and holiday pay under Article 4 Compensation. R. 257-260. On the other hand, fringe benefits, which are normally for extra benefits such as a cell phone, are contained in different articles under the CBA, for example Meal Allowance is listed in Article 5 of the CBA, Uniform Allowance is listed in Article 7 of the CBA. R. 264-272.

Moreover, the cases the Supreme Court cited in support of the "expressly provided" requirement are inapposite to this case. In Matter of Chalachan v City of Binghamton, 55 N.Y.2d 989 (1982), the City claimed that the GML §207-a benefit does not include fringe benefits provided for in the CBA unless the CBA

'expressly' provides for this as a §207-a(2) wage supplement benefit." The Supreme Court adopted this argument based on the false assumption that payments of check-in pay, shift differential, or holiday pay are in any way tied to actual tasks performed or otherwise "fringe benefits." They are not. Rather the City pays these monies in the same amount as part of the "Total Salary" of a Yonkers' Fire Fighter. R. 153. Importantly, term "fringe benefits" is not defined or even mentioned in Matter of Chalachan. Further, the "additional benefit" in Matter of Chalachan was vacation pay, which is not disputed in this case. Therefore, absent from the record is any support for the finding that night differential, check-in pay, and holiday pay constitute "fringe benefits." Rather, the record clearly supports, and the City, admits that under the longstanding contract definition of compensation in the Yonkers Fire Department, night differential, check-in pay, and holiday pay are regular salary or wages.

Finally, the Disabled Retirees agree that the underlying policy concern for excluding certain pays from GML §207-a(2) in the post-Smerek decisions was fairness. All along the Disabled Retirees have argued that the policy concern of fairness demands that the City include the disputed payments in GML §207-a(2). In the March 10 Decision and Order, the Supreme Court in applying Chalachan and Benson, reached the wrong conclusion based on the facts in Yonkers. R. 18. In citing, Chalachan, the Supreme Court held that it was "unfair 'imply a right to

vacation benefits under section §207-a since disabled firemen do not have to work at all, and to pay them for unused vacation time would unfairly discriminate again employee actually working." R. 18. Chalachan, 55 N.Y. 2d at 990, citing Matter of Phaneuf v. City of Plattsburgh, 84 Misc. 2d 70 (Sup. Ct. 1974).

Likewise the Supreme Court relied on Benson v. County of Nassau, where the Appellate Division found shift differential in Nassau County was not GML §207-a "Regular salary or wages" based solely on the same public policy – that including shift differential in GML §207-a "would discriminate against those uninjured officers who actually put in the undesirable hours of work." 137 A.D. 2d 642 (2d Dept. 1988).

The same policy concern of fairness, applied to the facts in this case supports the inclusion of night differential, check-in pay, and holiday pay in the GML §207-a wage supplement because in Yonkers, Fire Fighters who have never worked a night tour are paid the same payments of night differential as Fire Fighters who only work night tours. In Yonkers, Fire Fighters in positions that never perform check-in duties are paid the same check-in pay as Fire Fighters who perform check-in duties before every tour they work. In Yonkers, all Fire Fighters are paid the same holiday pay whether they work all holidays or none. In Yonkers, Fire Fighters who may be out of work for years while recovering from a temporary line of duty disability receive the same night differential, check-in pay, and holiday

pay in their GML §207-a(1) benefits. Thus, by failing to pay night differential, check-in pay, and holiday pay in the GML §207-a wage supplement, Yonkers discriminates against those Fire Fighters who are permanently disabled. Benson 137 A.D. 2d 642.

## V. THE PUBLIC POLICY OF GML §207-a AS WELL AS THE LEGISLATIVE HISTORY SUPPORT THE CONCLUSION THAT NIGHT DIFFERENTIAL, CHECK-IN PAY, AND HOLIDAY PAY ARE 'REGULAR SALARY OR WAGES" FOR YONKERS FIRE FIGHTERS

Plain meaning should be given to language in a statute. When writing statutes, the legislature intends to use ordinary English words in their ordinary senses. The United States Supreme Court discussed the plain meaning rule in Caminetti v. United States, 242 U.S. 470 (1917), reasoning "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain... the sole function of the courts is to enforce it according to its terms." And if a statute's language is plain and clear, the Court further warned that "the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." Id.

GML §207-a does not define "regular salary or wages," accordingly; it is clear that the legislature recognized that "regular salary or wages," would be uniquely defined by municipalities, Fire Fighter unions, and their collective bargaining agreements. Further, courts have searched the legislative history of the

1977 GML §207-a amendment and concluded that, "[t]he legislative history of the amendment to section §207–a 'indicate[s] that . . . . Aside from partially shifting the source of the payments made to disabled fire fighters, there is no indication that the Legislature also intended to reduce the amount of such payments." Bobby v. City of Niagara Falls, 5 A.D.3d 997, 999 (4th Dept. 2004)(quoting Mashnouck, 55 NY2d at 87)(emphasis added). Therefore, since an active Yonkers Fire Fighter or a Yonkers Fire Fighter on GML §207-a(1) never goes without payments of night differential, check-in pay, and holiday pay, in their regular salary, the legislative history settles the issue that GML §207-a(2) benefits must also include such payments.

Nevertheless, an analysis of the plain language of GML §207-a(2) supports Appellants' position and provides that if a Fire Fighter is approved for a disability pension under "section three hundred sixty-three of the retirement and social security law" as a result of his line of duty injuries, "such fireman shall continue to receive from the municipality . . . the difference between the amounts received under such allowance or pension and the amount of his regular salary or wages." N.Y. Gen. Mun. Law §207-a (McKinney)(emphasis added). Because the plain language of the statute focuses solely on amount, then is follows that "regular salary or wages" must be defined by the amount of salary Appellants received regularly as Fire Fighters. Because it is undisputed that every paycheck Appellants

received included night differential, check-in pay, and holiday pay, thus their "regular salary or wages" for purposes of GML §207-a(2) must include these salary items. Also, because the statute requires that retirees under GML §207-a(2) "shall continue to receive" the "amount of his regular salary or wages" less the amount received from his pension and the City has admitted that regular salary or wages under GML §207-a(1) includes night differential, check-in pay, and holiday pay. R. 329

Additionally, a thorough search of the legislative history of GML §207-a shows the relationship between GML §207-a(1) and (2); namely that the addition of GML §207-a(2) was meant only to shift the source of benefits under GML §207-a not the amount. According to Mashnouk v. Miles

> Prior to the amendment of section 207-a of the General Municipal Law (see L 1977, ch 965, eff Jan. 1, 1978), the statute provided that any paid fire fighter disabled in the course of duty was to be "paid by the municipality or fire district by which he [was] employed the full amount of his regular salary or wages until his disability * * * ceased." . . . . In addition, payments under former section 207-a continued so long as the fire fighter did not recover from his injury, even if he remained disabled for the rest of his life. (Matter of Birmingham v Mirrington, 284 App Div 721, 728.)
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> . . . .
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> [T]he primary aim of the new statute was to shift a large portion of the financial burden generated by disabled fire fighters from the municipal payrolls to the appropriate retirement system or pension fund. (See, e.g., Governor's

> Memorandum on approving L 1977, ch 965, NY Legis Ann, 1977, p 337; Sponsor's Memorandum in support of Bill No. 8978 in Assembly; Memorandum of Department of State recommending approval of Bill No. 8978 in Assembly.) Aside from partially shifting the source of the payments made to disabled fire fighters, there is no indication that the Legislature also intended to reduce the amount of such payments. Indeed, the relevant memoranda are to the contrary; they indicate that the new law was to have no effect on the income received by a disabled fire fighter. (See, e.g., Sponsor's Memorandum in support of Bill No. 8978 in Assembly; letter of the Permanent Commission on Public Employee Pension and Retirement Systems, dated Aug. 4, 1977 [recommending that Bill No. 8978 in Assembly be vetoed by the Governor]; letter of New York State Association of Counties, dated July 18, 1977.) [55 N.Y.2d at 87-88; see also R. 2226-2315]

Additional letters and memoranda included in the bill jacket of the 1977 GML §207-a amendment further illuminate the legislature's understanding that "regular salary or wages" were to be defined by the amount of an active Fire Fighter's regularly received salary. R. 2226-2315. In describing the intent of the amendment and voicing approval of the bill, a July 18, 1977 letter from the New York State Association of Counties states, a "fireman who is disabled . . . will receive in full the same amount that he would have received had he not been injured and continued working." R. 2310. The New York State Commission on Public Employee Pension and Retirement Systems, wrote in opposition to the bill and stated, the statute still requires a municipality to pay "the difference between

such [disability pension] benefit and the employee's regular wage, if employment had continued. . ." R. 2258.

Most importantly, several references in the legislative history make clear that GML §207-a (2) benefits are to include the full salaries paid to active Fire Fighters including fringe benefits. The Chairman for the New York State Commission on Public Employee Pension and Retirement Systems cited examples of "the actual case of fireman "X" in an upstate city, who began receiving benefits pursuant to GML Section 207-a in 1962 . . . . Since 1962 he has received . . . salary plus fringe benefits." R. 2243. (emphasis added). The State of New York Insurance Department wrote, ""Section 207-a . . . requires the municipality to pay [] full salary as long as he is disabled. This has been interpreted to include salary increments and fringe benefits. . . In other words, he is treated . . . as an active employee for salary purposes." R. 2253. (emphasis added).

Here, in light of the Legislature's intent to ensure that the addition of GML §207-a(2) did not affect the amounts Fire Fighters received under the original GML §207-a, the City cannot define "regular salary or wages" one way under GML §207-a(1) and another way under GML §207-a(2). The decades-long policy and practice of paying active Fire Fighters payments of night differential, check-in pay, and holiday pay regardless of their work status or work schedule defined, by practice, "regular wages or salary" as including night differential, check-in pay,

and holiday pay. Because a retiree's benefit under GML §207-a(2) is defined by an active Fire Fighter's regular wages or salary, the practice as to the active Fire Fighters receiving GML §207-a(1) defines GML §207-a(2) benefits. By statute, the amount of GML §207-a(1) determines the amount of benefits to be received under GML §207-a(2).

Indeed, in its Verified Petition in another case before this Court, respondent conceded that the definition of "regular salary or wages" includes these payments, "GML §207-a(1) benefits paid to active Fire Fighters will receive his or her regular wages and salary . . . . [i]n other words, the City continues to pay active Fire Fighters a GML §207-a(1) benefit that includes night differential, holiday pay and check in pay in addition to their base pay." R. 334. Accordingly, based on the clear legislative intent, that GML §207-a(1) and GML §207-a(2) total the same amount, and based on respondent's own admission that "GML §207-a(1) benefits paid to active Fire Fighters will receive his or her regular wages and salary GML §207-a(1) benefits" the GML §207-a(2) benefits paid to permanently disabled retirees must include night differential, check-in pay, and holiday pay.

Therefore, because relevant case law and legislative intent make clear that GML §207-a(2) benefits must include night differential, check-in pay, and holiday pay the City's decision to exclude these payments from GML §207-a(2) benefits and recoup benefits already paid is illegal. Further, because the City's decision

contradicts its own policy practiced for over thirty years and its own admission that "active Fire Fighters will receive his or her regular wages and salary . . . . [i]n other words, the City continues to pay active Fire Fighters a GML §207-a(1) benefit that includes night differential, holiday pay and check in pay in addition to their base pay." Ex. G. at ¶18. The City's decision to reduce and recoup GML §207-a(2) benefits for disabled retirees is arbitrary and capricious.

## CONCLUSION

For the forgoing reasons, this Court should reverse the August 1, 2016 and March 10, 2017 Decisions and Orders Of The Honorable Helen M. Blackwood partially denying Appellants' Article 78 petition (and motion to reargue and renew) and thereby annul the City's decision to reduce benefits granted under GML §207-a(2), order the City to pay Appellants all monies improperly deducted from their GML §207-a(2) benefits with interest thereon at the legal rate, and order the City to pay Appellants' costs and attorney's fees.

Dated: December 1, 2017
New York, New York

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**APPELLATE DIVISION – SECOND DEPARTMENT**
**CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to 22 NYCRR §670.10-c (f) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: New York, New York
December 1, 2017

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