# ARCHER, BYINGTON, GLENNON & LEVINE LLP

ROBERT M. ARCHER*
JOHN H. BYINGTON III
MARTY GLENNON
JULES B. LEVINE (1932-2012)
GARY A. THAYER
JAMES W. VERSOCKI
RICHARD S. CORENTHAL

......................

MATTHEW HROMADKA
PAUL K. BROWN
JENNY LAM

......................

* Partner emeritus-retired

ONE HUNTINGTON QUADRANGLE, SUITE 4C10
P.O. BOX 9064
MELVILLE, NY 11747-9064

PHONE: (631) 249-6565
FACSIMILE: (631) 777-6906

WWW.ABGLLAW.COM
INFO@ABGLLAW.COM

NEW YORK CITY ADDRESS:

1430 BROADWAY, SUITE 1107
NEW YORK, NY 10018

July 8, 2021

Hon. John P. Asiello
Clerk of the Court
Court of Appeals of the
State of New York
20 Eagle Street
Albany, NY 12207

*Re:* *John Borelli, et al. v. City of Yonkers*
*Court of Appeals APL 2021-00076*
*Westchester County Index No. 2302/2016*
*Appellate Division, Second Dept.*
*Dkt Nos. 2017-04562 and 09778*
*Our File No. 26489.0002*

Dear Mr. Asiello:

This firm represents Appellants in the above matter. This letter is submitted pursuant to Court of Appeals Rule of Practice §500.11(c).

Thirty-nine Petitioners-Appellants, John Borelli, *et al.*, ("Appellants" or "Disabled Retirees"), all permanently disabled Fire Fighters and Fire Officers (hereinafter "Fire Fighters"), submit this letter in support of Appellants' appeal from the final order of the Appellate Division, Second Department dated October 14, 2020, 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 General Municipal Law

("GML") §207-a(2) certain compensation paid to active firefighters for night differential, check-in pay, and holiday pay.

This appeal concerns a misinterpretation of GML §207-a—which requires the payment of the "full amount of regular salary or wages" to Fire Fighters disabled in the line of duty—and a resultant split in authority among Departments of the Appellate Division.

If a permanently disabled Fire Fighter is granted an accidental disability retirement allowance pursuant to Retirement and Social Security Law §363, a performance of duty disability retirement allowance pursuant to Retirement and Social Security Law §363-c, or a similar accidental disability pension provided by the pension fund of which he is a member, a municipality is obligated to "continue" to pay "the difference between the amounts received under such allowance or pension and the amount of his regular salary or wages." GML §207-a(2). This is known as the "GML §207-a(2) supplement," and ensures that permanently disabled Fire Fighters are not treated differently than active Fire Fighters in terms of compensation.

However, the term "regular salary or wages" is not defined in the GML. And the Departments of the Appellate Division have arrived at different interpretations of what compensation is included or excluded in the statutory term "regular salary or wages."

Under the analysis of the Third Department (and prior Second Department decisions), compensation, such as salary, differentials, special pays, and salary adjustments, that are paid to all active Fire Fighters, regardless of work status or schedule, in the rank held by a disabled retiree *upon retirement* are included in the disabled retiree's "regular salary or wages" for purposes of GML §207-a. *Matter of Joseph W. McKay v. Village of Endicott, et al.*, 161 A.D.3d 1340 (3d Dept 2018) ("*McKay*").

Contrastingly, in the appealed from decision, the Second Department applied a restrictive rule limiting "regular salary or wages" to a Fire Fighter's "annual" or "base" salary "plus prospective salary

increases…and longevity increments,…but excluding unused vacation time and sick time accruing during disability…holiday pay…and certain shift differential payments." It is undisputed here that the Respondent City of Yonkers (the "City") had—for decades—paid night differential, check-in pay, and holiday pay to all active and disabled Fire Fighters, regardless of status or schedule, *i.e.*, regardless of whether Fire Fighters actually worked nights, actually checked in prior to their shifts, or actually worked holidays. It is also undisputed that the City included night differential, check-in pay, and holiday pay in the "final average salary" calculation submitted to the New York State Retirement System (the "Retirement System") for the purpose of calculating disability retirement benefits and thus the amount of the attendant GML §207-a(2) supplement. Under the Second Department's analysis, these sums paid for night differential, check-in pay, and holiday pay—otherwise paid to all Fire Fighters, regardless of status or schedule—are excludable from the GML §207-a(2) supplement of permanently disabled Fire Fighters.

Accordingly, permanently disabled Fire Fighters in the Third Department receiving the GML §207-a(2) supplement are guaranteed to continue to receive as part of "regular salary or wages" all contractual compensation, such as salary, differentials, special pays, and salary adjustments, that are paid to all active Fire Fighters, regardless of work status or schedule, in the rank held by a disabled retiree upon retirement. On the other hand, permanently disabled Fire Fighters in the Second Department receiving the GML §207-a(2) supplement may have their "regular salary or wages" reduced to exclude compensation otherwise paid to all Fire Fighters, regardless of status or schedule, and, as here, have their supplemental benefits stripped down to cover only "annual" or "base" salary "plus prospective salary increases…and longevity increments."

Appellants respectfully request that the Court of Appeals resolve this split in authority and adopt (or readopt) the Third Department's approach, which is consistent with the plain language and legislative history of the GML, as well as subsequent case law recognizing that total benefits received by a permanently disabled Fire Fighter receiving the GML §207-a(2) supplement should equal the total benefits received by all

Fire Fighters—regardless of status or schedule—in the rank held by the disabled retiree upon retirement, with only the "source, not the amount" affected. *Mashnouk v. Miles*, 55 N.Y. 2d 80, 88 (1982).

## FACTS

### A. The GML §207-a(2) Supplement

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. GML §207-a(1). Prior to 1977, GML §207-a did not have subsections 1 or 2. Instead, GML §207-a required a municipality to bear the full cost of regular salary and medical care for a disabled Fire Fighter, even if the Fire Fighter's disabilities continued for the rest of his or her life. The 1977 amendment resulted in the addition of several new subsections. GML §207-a(1) remained substantively unchanged from the original GML §207-a, providing that when a Fire Fighter sustains a line of duty injury or illness, the municipality must pay the "full amount of his or her regular salary or wages until his or her 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." GML §207-a(1) (emphasis added).

Importantly, the addition of GML §207-a(2), permitted a municipality to share its GML §207-a burden with the Retirement System or pension fund,[1] but the amendment did not change the benefit amount from the perspective of the disabled Fire Fighter. Currently, if a permanently disabled Fire Fighter is granted an accidental disability retirement allowance pursuant to Retirement and Social Security Law §363, a performance of duty disability retirement allowance pursuant to

[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).

Retirement and Social Security Law §363-c, or a similar accidental disability pension provided by the pension fund of which he is a member, "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." GML §207-a(2) (emphasis added) (the "GML §207-a(2) supplement"). 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).

The term "regular salary or wages" is not defined in the GML, and the definition of this statutory term is the source of this dispute.

### B. The City's Reduction of the GML §207-a(2) Supplement to Exclude Compensation Paid to All Other City Fire Fighters for Night Differential, Check-In Pay, and Holiday Pay

For well over thirty (30) years, the City paid night differential, holiday, and check-in pay to GML §207-a(2) supplement recipients, including all of the Appellants. *See*, *Smerek v. Christiansen*, 111 Misc. 2d 580 (Westchester Cty 1981) (ordering the City of Yonkers to include night differential, check-in pay, and holiday pay as part of "regular salary or wages" for purposes of GML §207-a(2), and rejecting the City's argument that "only [petitioner's] base pay plus longevity pay and no other elements" should be included).

Indeed, on November 28, 2016, the City stipulated in a consolidated hearing before the New York State Public Employment Relations Board ("PERB") that, since at least 1995, the City included night differential, holiday, and check-in pay as part of regular salary or wages to all City Fire Fighters, regardless of their work status or schedule. R. 96. Specifically, the City stipulated, in relevant part:

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.

8. Since at least 1995 to the present, the City has paid Night Differential, Check-In Pay and Holiday Pay to all UFOA and Local 628 bargaining unit members on sick leave, including extended sick leave.

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.

11. Since at least 1995 to the present, the City has paid Night Differential, Check-In Pay and Holiday Pay to all UFOA and Local 628 bargaining unit members injured in the line of duty who have been approved for benefits under General Municipal Law §207-a(1) ("GML 207-a(1)").

12. Since at least 1995 to the present, the City has paid Night Differential, Check-In Pay, and Holiday Pay to all UFOA and Local 628 bargaining unit members who have been approved for benefits

> under GML 207-a(1) and who are assigned to work in limited or light duty positions during the day.
>
> **[…]**
>
> 18. Those retirees, who were GML 207-a (1) benefits prior to their disability retirement, received Night Differential, Check-In Pay and Holiday Pay as part of their GML 207-a(1) benefits when they were employed by the City as active Yonkers Fire Fighters and active Yonkers Fire Officers.
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> 20. Since at least 1995 until the instant dispute arouse, the City has included Night Differential, Check-in Pay, and Holiday Pay in its calculation of the GML Law 207-a(2) benefit, which was paid to retired all Yonkers Fire Fighters and all Yonkers Fire Officers who received Accidental or Performance of Duty disability retirement benefits from the New York State Retirement System.
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> 21. Since at least 1995 until the instant dispute arose, the salary reported by the City to the New York State Retirement System for the purpose of calculating an individual's Accidental or Performance of Duty Disability retirement benefits has included Night Differential, Check-in Pay, and Holiday Pay.

R. 96.

However, on December 9, 2015, the City sent a letter to Appellants providing that effective January 14, 2016, the City planned to reduce each Appellant's GML §207-a(2) supplement by deducting compensation paid for night differential, holiday, and check-in pay. R. 146. These sums are otherwise paid to all active City Fire Fighters, as well as non-retired temporarily disabled Fire Fighters receiving GML §207-a(1) benefits, as

part of their regular salary or wages, regardless of work schedule or status. R. 151.

The December 9, 2015 letters afforded Appellants the opportunity to object to the adjustment and provided for a due process hearing. R. 146. Each individual Appellant objected to the reduction of their GML §207-a(2) benefits and requested a hearing. R. 150. The City unilaterally appointed its own hearing officers, to hold hearings and issue recommendations on whether the City could lawfully reduce the individual Appellant'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.*

Following the Appellants' individual due process hearings, on or about April 5, 2016, each Appellant received a letter "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 City's 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.* The sums that the City cut from Appellants' GML §207-a(2) supplement represents a significant amount of money depending on whether the supplement represents fifty percent or twenty-five percent of the Appellants' retirement income; on average, they have lost between $10,000 to $15,000 per year since the City excluded night differential, check-in pay, and holiday pay from the GML §207-a(2) supplement. R. 366, 2182-2225.

### C. Appellants' Line of Duty Injuries and Illnesses

Appellants are disabled Fire Fighter retirees injured on the job while working for the City. Each Appellant is entitled to—and has been approved by the City to continue to receive—the GML §207-a(2) supplement for the "full amount of regular salary or wages." R. 120-127 (Summary of Injuries).

For example, Appellant Steven Ronan, 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. 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.*

Another Appellant, Thomas Connery, explained:

> 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.

R. 550.

There is no rational basis to discriminate against retired City Fire Fighters receiving the GML §207-a(2) supplement by reducing the amount of compensation included in regular salary or wages as to them.

## **JURISDICTION AND PROCEDURAL POSTURE**

On July 1, 2016, Appellants commenced the proceeding below against the City, pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR"), *inter alia*, for an order declaring the City's decision to reduce Appellants' payments pursuant to GML §207-a(2) by deducting compensation paid for night differential, holiday, and check-in pay, as arbitrary and capricious and an abuse of discretion, as well as a violation of GML §207-a(2). R. 114-151.

Meanwhile, on November 28, 2016, the City stipulated in a consolidated hearing before PERB that, since at least 1995, the City included night differential, holiday, and check-in pay as part of regular salary or wages to all City Fire Fighters, "regardless of their work status or schedule," including active bargaining unit members, those on sick leave, including extending sick leave, those receiving GML §207-a(1) benefits, those on light duty, and retirees receiving the GML §207-a(2) supplement. R. 96. Further, the City specified that it paid these elements of compensation regardless of "whether or not the individual actually worked a night tour" and "whether or not the individual was present for duty or was actively working." R. 96. Moreover, the City stipulated that it reported these elements of compensation to the Retirement System for the purpose of calculating an individual's accidental or performance of duty disability retirement. R. 96.

By judgment of the Supreme Court, Westchester County (Helen Blackwood, J.), dated March 10, 2017, the Supreme Court denied that branch of Appellants' petition seeking an order to annul the City's determination to reduce Appellants' payments pursuant to GML §207-a(2) by deducting the night differential, holiday, and check-in pay. R. 14-20. Appellants moved to renew and reargue that portion of the Supreme Court's decision that denied the petition, pursuant to CPLR §2221, arguing, *inter alia*, that the Supreme Court overlooked and ignored the City's dispositive stipulation that since at least 1995, the City included night differential, holiday, and check-in pay as part of regular salary or wages paid to all City Fire Fighters, regardless of work status or schedule. R. 23. The Supreme Court denied Appellants' motion to renew and reargue, but acknowledged that "the city stipulated that night differential, check-in pay, and holiday pay are part of regular salary or wages."[2] R. 9.

Appellants appealed the Supreme Court's March 10, 2017 judgment and the Supreme Court's decision denying Appellants' motion to renew and reargue to the Appellate Division, Second Department (Docket Nos.

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[2] The Supreme Court misdated the decision denying Appellants' motion to renew and reargue, which was heard and decided on May 12, 2017.

2017-09919; 2017-09778). By letter dated May 17, 2018, Appellants notified the Second Department of the Memorandum and Order of the Appellate Division, Third Department, decided and entered on May 10, 2018 in *McKay*, 161 A.D.3d 1340 (3d Dept 2018) ("*McKay*"), wherein the Third Department found that emergency medical services "EMS" pay and a salary schedule adjustment to compensate active firefighters for additional hours needed to implement a 24-hour schedule were properly included in the computation of the petitioner's "regular salary or wages" pursuant to GML §207-a(2), because all active Fire Fighters at the rank held by the petitioner when he retired received the EMS pay and schedule adjustment. *Id.* In other words, the benefits were paid as compensation to all Fire Fighters, regardless of status or schedule, *i.e.*, regardless of whether the actually Fire Fighter performed EMS duties or actually worked additional shifts to accommodate a 24-hour schedule. *Id.*

By Decision and Order dated October 14, 2020 (the "October 14, 2020 Decision"), the Appellate Division, Second Department, *inter alia*, affirmed the Supreme Court's judgment dated March 10, 2017 denying that branch of Appellants' petition seeking an order to annul the City's determination to reduce Appellants' payments pursuant to GML §207-a(2) by deducting the night differential, holiday, and check-in pay. The October 14, 2020 Decision of the Appellate Division, together with notice of entry, was served by regular mail on October 30, 2020.

By motion dated November 30, 2021, Appellants moved in this Court for leave to appeal. By Order dated April 29, 2021, this Court granted Appellants' motion for leave to appeal.

## ARGUMENT

### I. THERE IS A SPLIT IN AUTHORITY AMONG DEPARTMENTS OF THE APPELLATE DIVISION

#### A. The Third Department's Interpretation of "Regular Salary or Wages" for Purposes of the GML §207-a(2) Supplement

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 collective bargaining agreement 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.*

After "reiterat[ing] 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).

First, because a current Fire Fighter employed at the rank held by petitioner when he retired would be an active participant in the EMS program and would receive the EMS pay, the Third Department held that EMS pay was included in petitioner's regular salary or wages for purposes of GML §207-a. *Id.*

Second, because the petitioner "like all other firefighters on active duty, was receiving the [salary] adjustment when he retired, and an active firefighter currently employed at petitioner's rank would likewise receive the adjustment," the Third Department held that the schedule

adjustment was included in petitioner's regular salary or wages for purposes of GML §207-a. *Id.*

Importantly, the Third Department expressly rejected the argument "that the schedule adjustment should not be included in the calculation…on the ground that [petitioner] has retired and has been absent from duty for more than 30 days" and noted that "because all active firefighters are employed on the 24-hour schedule and receive the adjustment, this determination does not "unfairly discriminate against employees actually working' as does the inclusion of shift differential payments received only by those active employees who are scheduled for undesirable shifts." *Id* (quoting and distinguishing *Benson v. County of Nassau*, 137 AD2d 642, 643-644 (1988), *lv denied* 72 N.Y.2d 809 (1988) and *Matter of Chalachan v City of Binghamton*, 55 N.Y.2d 989, 990 (1982)).

Accordingly, under the Third Department's analysis, compensation, such as salary, differentials, special pays, and salary adjustments, paid to all active Fire Fighters, 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.*

Appellants notified the Second Department of the Memorandum and Order of the Third Department, decided and entered on May 10, 2018 in *McKay*, and the Second Department explicitly considered the Third Department's decision in that case and cited to it in its October 14, 2020 Decision. However, the Second Department—without explanation—departed from the Third Department's interpretation of "regular salary or wages" for purposes of the GML §207-a(2) supplement and permitted the exclusion of compensation paid to all active Fire Fighters, regardless of work status or schedule, in the rank held by Appellants upon their respective retirements.

**B. The Second Department's Misinterpretation of "Regular Salary or Wages" for Purposes of the GML §207-a(2) Supplement in the October 14, 2020 Decision**

In the appealed-from Decision and Order, the Second Department applied a restrictive rule limiting "regular salary or wages" to a Fire Fighter's "annual" or "base" salary "plus prospective salary increases…and longevity increments,…but excluding unused vacation time and sick time accruing during disability…holiday pay…and certain shift differential payments." Unlike the Third Department in *McKay*, 161 A.D.3d 1340 (3d Dept 2018), and prior decisions of the Second Department, the Second Department's October 14, 2020 Decision did not address whether the inclusion of night differential, check-in pay, or holiday pay unfairly discriminated against employees actually working, as did the inclusion of shift differential payments received only by those active employees who are scheduled for undesirable shifts (*Benson v. County of Nassau*, 137 AD2d 642, 643-644 (1988), *lv denied* 72 N.Y.2d 809 (1988)), or the inclusion of unused vacation time paid only to active employees who did not use their respective vacation allotments (*Matter of Chalachan v. City of Binghamton*, 55 N.Y.2d 989 (1982)).

Instead, the Second Department treated salary differentials and other compensation paid to all other Fire Fighters in the rank held by a disabled retiree upon retirement, regardless of status or schedule, in the same manner as salary differentials and compensation only paid to certain active Fire Fighters who are scheduled for undesirable shifts, work holidays, or who do not use their vacation allotments. Thus, the Second Department wrongly analogized to cases excluding certain types of compensation, such as salary differentials and unused vacation, from the GML §207-a(2) supplement, by overlooking or ignoring the rationale underlying the exclusion of compensation in those cases: that their inclusion in the GML §207-a(2) supplement would unfairly discriminate against employees actually working. *Matter of Chalachan v. City of Binghamton*, 55 N.Y.2d 989 (1982) ("disabled firemen do not have to work at all, and to pay them for unused vacation time would unfairly discriminate against employees actually working"); *Phaneuf v. City of Plattsburgh*, 84 Misc 2d 70 (Sup Ct, Clinton County) (inclusion of

vacation and sick time would be "unfair to those actively working") *affd*, 50 A.D.2d 614; *Benson v. County of Nassau*, 137 A.D.2d 642 (2d Dept. 1988) (inclusion of shift differential would "unfairly discriminate against those persons actually working the undesirable shifts and suffering the inconvenience inherent in working evening hours").

The concern that inclusion of certain compensation in "regular salary or wages" for purposes of the GML §207-a(2) supplement may unfairly discriminate against those actively working is not implicated here, because all City Fire Fighters, including non-retired, temporarily disabled Fire Fighters 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 Fire Fighter actually works nights, checks in prior to his or her shift, or works on a holiday. Indeed, temporarily disabled Fire Fighters on GML §207-a(1) leave status may not be working at all. Thus, this appeal presents the exact opposite discrimination concern, in that the City has excluded elements of compensation for permanently disabled retired Fire Fighters receiving the GML §207-a(2) supplement *only*, and has not done the same for any other group of Fire Fighters.

It is undisputed that the City has—since at least 1995—paid night differential, check-in pay, and holiday pay as part of regular salary or wages to all active Fire Fighters, regardless of work status or schedule. R. 96. The City has also—since at least 1995—paid night differential, check-in pay, and holiday pay as part of regular salary or wages to non-retired, temporarily disabled Fire Fighters receiving GML §207-a(1) benefits. *Id.*

Put plainly, 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(2) supplement, the City discriminates against those Fire Fighters who are permanently disabled and treat them less favorably, contrary to the legislative history and purpose of GML §207-a(2). *Benson*, 137 A.D. 2d 642. There is no justification for treating permanently disabled Fire Fighters less favorably than temporarily disabled Fire Fighters or all active Fire Fighters.

Therefore, had the Second Department engaged in the same analysis as did the Third Department in *McKay*, 161 A.D.3d 1340 (3d Dept 2018) or even the Second Department in its prior decisions, *e.g.*, *Benson v. County of Nassau*, 137 AD2d 642, 643-644 (1988), *lv denied* 72 N.Y.2d 809 (1988), the Second Department would have reversed the Supreme Court's judgment below that Appellants did not sustain their burden of establishing their entitlement to night differential, check-in pay, or holiday pay as part of "regular salary or wages" for purposes of GML §207-a(2). The City's stipulation that it paid the at-issue sums to all Fire Fighters, regardless of status or schedule, is dispositive proof sufficient to establish Appellants' entitlement to night differential, check-in pay, and holiday pay as part of "regular salary or wages" for purposes of the GML §207-a(2) supplement under the rationale of the Third Department. *McKay*, 161 A.D.3d at 1340 ("because all active firefighters are employed on the 24-hour schedule and receive the adjustment, this determination does not 'unfairly discriminate against employees actually working' as does the inclusion of shift differential payments received only by those active employees who are scheduled for undesirable shifts").

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: the City pays the same amounts of compensation for night differential, check-in pay, and holiday pay to all Fire Fighters regardless of whether they ever work night shifts, or check in early, or work holidays.

Accordingly, the Second Department's October 14, 2020 Decision creates a split in authority among Departments of the Appellate Division, concerning the interpretation of the term "regular salary or wages" for purposes of the GML §207-a(2) supplement.

## II. THE COURT SHOULD ADOPT THIRD DEPARTMENT'S INTERPRETATION OF "REGULAR SALARY OR WAGES"

In *Wise v. Jennings*, 290 A.D. 2d 702 (3d Dept. 2002), the Third Department 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 Court's decision in *Mashnouk 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 GML §207-a(2) supplement, and that "General Municipal Law [§207-a] was intended only to <u>affect the source, not the amount</u>, of payments made to disabled fire fighters" *Id.,* at 88 (emphasis added).

Significantly, the guiding principle of GML §207-a(2) is that "benefits afforded Fire Fighters pursuant to this section 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 (1983); *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). The City's exclusion of night differential, check-in pay, and holiday pay violates this guarantee.

### A. The Public Policy of GML §207-a and its Legislative History Support the Third Department's Approach and Including Night Differential, Check-In Pay, and Holiday Pay in the GML §207-a(2) Supplement

"Regular salary or wages" is not defined in GML §207-a. Courts, including this Court, have searched the legislative history of the 1977 GML §207-a amendments 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 <u>no indication that the Legislature also intended to reduce the amount of such payments</u>." *Bobby v. City of Niagara Falls*, 5 A.D.3d 997, 999 (4th Dept 2004) (emphasis added) (quoting *Mashnouk*, 55 NY2d at 87). Therefore, since an active City Fire Fighter or a temporarily disabled Fire Fighter receiving GML §207-a(1) benefits never goes without payments of night differential, check-in pay, and holiday pay, in their regular salary, the legislative history strongly supports that GML §207-a(2) benefits must also include such payments.

Moreover, a thorough search of the legislative history of GML §207-a shows the relationship between GML §§207-a(1) and (2); significantly that the addition of GML §207-a(2) was meant only to shift the source of benefits under GML §207-a not the amount. This Court has explained:

> 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.*)

> [. . .]
>
> [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.)

*Mashnouk v. Miles*, 55 N.Y.2d at 87-88.

Additional letters and memoranda included in the bill jacket of the 1977 GML §207-a amendment further illuminate the Legislature's understanding that the term "regular salary or wages" was 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.

Therefore, because relevant case law and legislative intent make clear that the GML §207-a(2) supplement must treat Disabled Retirees as active employees for salary purposes, the approach of the Third Department is most consistent with the GML §207-a, and the Court should reject the City's decision to exclude night differential, check-in pay, and holiday pay the City's decision to from the GML §207-a(2) supplement.

### B. The Inclusion of Benefits in the "Final Average Salary" Calculation to the Retirement System Mandates the Inclusion of the Same Benefits in the GML §207-a(2) Supplement

For decades, the City has included night differential, check in pay, and holiday pay in the "final average salary" calculation to the Retirement System for the purpose of calculating disability retirement benefits and the attendant amount of the GML §207-a(2) supplement. R. 144.

This was a dispositive fact in *Smerek v. Christiansen*, 111 Misc. 2d 580 (Westchester Cty Sup Ct, 1981), also involving the City of Yonkers and the exclusion of night differential, check-in pay, and holiday pay from the GML §207-a(2) supplement. There, the Supreme Court, Westchester County, held, "The New York State Retirement System considered these regular salary payments [of night differential, check-in pay and holiday pay] in arriving at their 75% allowance and respondents are now required to add 25% of such regular salary." *Id.* Today, the same fact is true. For each Appellant, the City submitted a calculation of final average salary to the Retirement System which included payments of night differential, check-in pay and holiday pay. R. 144.

The City cannot be allowed to throw the calculation out of balance by lowering the denominator on its side of the equation in order to reduce its liability under GML 207-a(2). To comply with the dictates of GML §207-a(2), the City must pay each Appellant, "the difference between the amounts received under such allowance or pension and the amount of his regular salary or wages." GML §207-a(2). Since the "amount" on the pension side of the equation includes night differential, check-in pay and holiday pay, it follows that the GML §207-a(2) supplement side of the equation must include these payments as well.

## III. THE SECOND DEPARTMENT'S DEFERRAL OF CONTRACT INTERPRETATION QUESTIONS TO ARBITRATION REQUIRES THE INCLUSION OF NIGHT DIFFERENTIAL, CHECK-IN PAY, AND HOLIDAY PAY IN THE GML §207-a(2) SUPPLEMENT

The Second Department acknowledged that the parties "may agree in a collective bargaining agreement ["CBA"] to include such additional amounts in the regular salary or wages payable to disable firefighters pursuant to [GML] §207-a," but the Second Department further departed from the Third Department's analysis by explicitly referencing a different appeal decided therewith and implied that the entitlement to the night differential, check-in pay, and holiday pay for the Disabled Retirees may depend on the arbitration demanded by the Disabled Retirees' former union, on behalf of active and then-active Fire Fighters employed by the City—an arbitration to which the Disabled Retirees are not parties.

Thus, unlike the Third Department's decision addressing whether a benefit contained in the CBA was part of petitioner's "regular salary or wages" upon retirement under the GML head on, the Second Department declined to comment and deferred the interpretation of the CBA to the arbitration demanded by active City Fire Fighters. Of course, Disabled Retirees are now retired and no longer in the bargaining unit covered by the CBA. As such, they can no longer directly utilize the grievance and arbitration procedure contained therein. In short, the Third Department addressed former members' rights under the CBA, while the Second

Department required Appellants to rely on the result of an arbitration to which they were not parties.

Notwithstanding the Second Department's confusing roadmap for how Disabled Retirees can enforce their statutory rights to benefits pursuant to GML §207-a(2), to the extent that the Second Department deferred questions of contract interpretation to an arbitration brought by Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO ("Local 628") against the City, the arbitration referenced by the Second Department has now been completed. *In the Matter of the Arbitration between Yonkers Fire Fighters Local 628, IAFF, AFL-CIO and City of Yonkers*, AAA Case No. 01-16-0001-2882 (Siegel, May 6, 2021) (finding the City violated the CBA by excluding night differential, check-in pay, and holiday pay from the GML §207-a(2) supplement for members obtaining accidental disability retirements or performance of duty disability retirements and becoming eligible for the GML §207-a(2) supplement on or after December 9, 2015).

Consequently, any issue implicated by the Second Department's October 14, 2020 Decision or raised by the City regarding the proper interpretation of the CBA has already been resolved by the Arbitrator, who found the CBA required the City to include night differential, check-in pay, and holiday pay in the GML §207-a(2) supplement.

## CONCLUSION

There is a split in authority among Departments of the Appellate Division:

Under the analysis of the Third Department (and prior Second Department decisions), compensation, such as salary, differentials, special pays, and salary adjustments, that are paid to all active Fire Fighters, regardless of work status or schedule, in the rank held by a disabled retiree upon retirement are included in the disabled retiree's "regular salary or wages" for purposes of GML §207-a. *McKay*, 161 A.D.3d 1340 (3d Dept 2018).

Contrastingly, in the appealed from decision, the Second Department applied a restrictive rule limiting "regular salary or wages" to a Fire Fighter's "annual" or "base" salary "plus prospective salary increases…and longevity increments,…but excluding unused vacation time and sick time accruing during disability…holiday pay…and certain shift differential payments."

In doing so, the Second Department wrongly analogized to cases excluding certain types of compensation, such as salary differentials and unused vacation, from the GML §207-a(2) supplement, by overlooking or ignoring the rationale underlying the exclusion of compensation in those cases: that their inclusion in the GML §207-a(2) supplement would unfairly discriminate against employees actually working.

Further, the exclusion of night differential, check-in pay, and holiday pay is contrary to the public policy and legislative history of GML §207-a(2); inconsistent with the City's submissions to the Retirement System; and irreconcilable with the subsequently-issued award in the arbitration proceeding referenced by the Second Department, wherein the Arbitrator held that the City's exclusion of night differential, check-in pay, and holiday pay from the GML §207-a(2) supplement violated the CBA.

For the foregoing reasons, the Court should adopt the Third Department's approach and 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.

Dated: Melville, New York
July 8, 2021

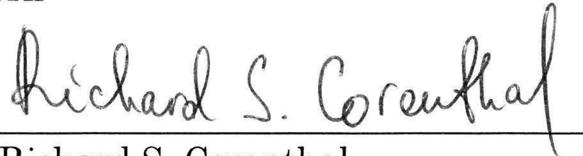
ARCHER, BYINGTON, GLENNON & LEVINE
*Attorneys for Petitioners-Appellants*

By: Richard S. Corenthal
Richard S. Corenthal
Paul K. Brown
One Huntington Quadrangle, Suite 4C10
P.O. Box 9064
Melville, NY 11747-9064
Phone: (631) 249-6565

**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this document complies with the word limit of Court of Appeals Rule of Practice 500.11(m), because the body of this submission contains 6,812 words; Font: Century Schoolbook; Size: 14-point.

Dated: Melville, New York
July 8, 2021



Richard S. Corenthal