To be Argued by:
PAUL J. SWEENEY
(Time Requested: 15 Minutes)

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.

Docket Nos.:
2017-04562
2017-09778

BRIEF FOR RESPONDENT-RESPONDENT

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PRELIMINARY STATEMENT

Respondent-Respondent, City of Yonkers ("the City"), submits this brief in opposition to the appeal by Petitioners-Appellants, John Borelli and the other named retired firefighters ("Appellants") who appeal from (i) a Decision and Order of the Westchester County Supreme Court (Hon. Helen M. Blackwood) dated March 10, 2017 ("March 2017 Decision"), which denied that part of Appellants' Article 78 petition to annul the City's adjustment of the Appellants' General Municipal Law ("GML") § 207-a(2) benefits;[1] and (ii) a Decision of the Supreme Court dated August 1, 2017 ("August 2017 Decision"),[2] which denied Appellants' motion to reargue and/or renew the Court's March 2017 Decision.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Question 1 Whether the Supreme Court properly held that the City's final determination to adjust the Appellants' GML § 207-a(2) benefits by removing special pay fringe benefits paid to active duty fire fighters was not arbitrary and capricious, and did not lack a rational basis.

Answer: Yes. Where the City acted in accord with case law from the Court of Appeals and this Court, the Supreme Court properly held that the City's determination to remove the special pays fringe benefits from the Appellants'

[1] In the March 2017 Decision, the Supreme Court prevented the City from recouping the past overpayment of these special pays. (R. 19).
[2] Although dated "August 1, 2016", the Decision was actually signed on August 1, 2017.

GML § 207 benefit was not arbitrary and capricious and did not lack a rational basis. It is now "black letter" law that a GML § 207-a recipient is not entitled to receive the fringe benefits of a collective bargaining agreement ("CBA") absent an express provision in the CBA to the contrary. Here, the CBA contains no express provision affording special pay fringe benefits to GML § 207-a recipients.

Question 2: Whether the Supreme Court properly denied Appellants' motions to reargue and/or renew.

Answer: Yes. The Supreme Court properly denied the Appellants' motion to reargue, finding that Appellants merely restated earlier, unsuccessful arguments made in support of their original petition. A denial of a motion to reargue is not appealable. The Supreme Court also properly denied the Appellants' motion to renew, finding that Appellants failed to present any new facts which were not previously offered in support of their original petition.

COUNTER-STATEMENT OF FACTS

Appellants are retired firefighters and fire officers of the Yonkers Fire Department who receive GML § 207-a(2) benefits. Over the years, the GML § 207-a(2) benefit paid to the Appellants had included three special pay fringe benefits known as "night differential", "check-in pay", and "holiday pay." These special pay fringe benefits are set forth in the CBA's between the City and the

firefighters union, Local 628, IAFF, AFL-CIO ("Local 628") and the City and the fire officers union, the Uniformed Fire Officers Association ("UFOA"). (R. 71).

In or around October 2015, the City discovered that it was mistakenly including these special pay fringe benefits when calculating a retiree's GML § 207-a(2) benefit. (R. 325). By letter dated October 5, 2015, the City wrote to the affected retirees regarding the overpayment. (R. 325). The letter advised the retiree that the City would seek to adjust the GML § 207-a(2) payment and recoup the overpayment and that each retiree could request a hearing on the adjustment/recoupment. (R. 325).

The City duly appointed Kenneth Bernstein, Esq., (R. 2159), and Robert J. Ponzini Esq., (R. 2153), to serve as hearing officers and to make a report and recommendation on the City's initial determinations. At their respective hearings, which were held on February 22, 2016, February 23, 2016, February 29, 2016, and March 1, 2016, each Appellant was permitted to be heard and offer evidence in support of their appeal. (R. 345-2148).

On March 14, 2016, Hearing Officer Bernstein issued his Report of Findings and Recommendation ("Bernstein Recommendation") sustaining the City's decision. (R. 2159). The Bernstein Recommendation specifically found that substantial evidence supported the City's decision that GML § 207-a(2) benefits did not include fringe benefits and the Appellants had been erroneously paid these

fringe benefits. (R. 2164). The Bernstein Recommendation further rejected Appellants' contention that a Westchester County Supreme Court decision, *Smerek v. Christiansen*, 111 Misc.2d 580 (Sup. Ct. 1981), barred the City—under the doctrines of res judicata and collateral estoppel—from recalculating the GML § 207-a(2) benefit. (R. 2161-2162). Accordingly he recommended that the City recalculate Appellants' GML § 207-a(2) benefits to exclude the fringe benefits and to recoup the resulting overpayments. (R. 2164).

On March 30, 2016, Hearing Officer Ponzini issued his respective Report of Findings and Recommendation ("Ponzini Recommendation"). (R. 2153). The Ponzini Recommendation arrived at substantially the same findings and recommendations as the Bernstein Recommendation. (R. 2156-2158).

On April 5, 2016, the City issued respective final determinations adopting the findings and recommendations of Hearing Officers Bernstein and Ponzini Recommendation. (R. 2165-2166).

On or about June 30, 2016, Appellants commenced the underlying Article 78 proceeding seeking relief, *inter alia*, which included setting aside the adjustment of the Appellants' GML § 207-a(2) benefits. (R. 114-116). Thereafter, the City filed a motion to dismiss the proceeding in its entirety. (R. 17).

On November 22, 2017, the Supreme Court denied the City's motion to dismiss, affording the pleadings "a liberal construction," accepting "the facts as

alleged in the complaint as true," and according Appellants "the benefit of every possible favorable inference." The Supreme Court ordered that the City file an answer to Appellants' motion in accordance with CPLR §7804(f). (R. 17).

The City filed its answer and opposition to the Article 78 petition on December 30, 2016. (R. 70-76).

In the March 2017 Decision, the Supreme Court denied Appellants' application, finding that the City's decision to adjust Appellants' GML § 207-a(2) payments by removing the night differential, holiday, and check-in pays, was neither arbitrary nor capricious and, to the contrary, was wholly consistent with controlling case law from the Court of Appeals and this Court. The Supreme Court did not allow the City to recoup or otherwise recover the past overpayments of these special pays. (R. 16-19).

In response to the March 2017 Decision, on or about April 7, 2017, Appellants filed a motion to renew and reargue that portion of the Court's March 2017 Decision that denied the petition. (R. 21).

In the August 2017 Decision, the Supreme Court denied Appellants' motion for leave to reargue and renew in its entirety. With respect to the motion to reargue, the Supreme Court held that the Appellants failed to show that the Supreme Court has misunderstood or misapprehended the law and, instead, relied upon a mere restatement of their earlier unsuccessful arguments. (R. 9). With

respect to the motion to renew, the Supreme Court held that the alleged new "information [a stipulation of fact] was readily available long before the court issued its final decision and was in fact, included in the petitioners' reply papers considered by the court in deciding the Article 78 proceeding. Therefore, it cannot be said that it is a new fact 'not offered on the prior motion.'" (R. 7-11).

The Appellants filed a Notice of Appeal from the March 2017 Decision on April 4, 2017 (R. 12-13) and filed a Notice of Appeal from the August 2017 Decision on August 16, 2017. (R. 3).

ARGUMENT

POINT I: THE COURT CORRECTLY APPLIED THE CONTROLLING CASE LAW FROM THE COURT OF APPEALS AND THIS COURT ON WHAT COMPENSATION IS TO BE INCLUDED IN THE GML § 207-A(2) BENEFIT

For the Appellants to be successful, the Appellants must show the City's determination was arbitrary and capricious and without a rational basis. However, far from being unreasonable or irrational, the City acted consistent with controlling case law from the Court of Appeals and this Court. Here, the Supreme Court agreed with the City and held that since the CBA's do not expressly provide for the payment of special pay fringe benefits to GML § 207-a(2) recipients, the City was correct to adjust the GML § 207-a(2) by removing these special pays.

A. The GML § 207-a(2) Benefit Does Not Include CBA Fringe Benefits Absent an Express CBA Provision to the Contrary

GML § 207-a(2) provides that the supplemental wage benefit shall consist of "the difference between the amounts received under [RSSL §§363 or 363-c] and the amount of his regular salary or wages." GML § 207-a(2).

New York courts have interpreted the key operative term—"regular salary or wages"—to mean (a) base wages or salary and (b) negotiated wage or salary increases (*Mashnouk v. Miles*, 55 N.Y.2d 80 (N.Y. 1982)) plus (c) longevity payments (*Matter of Schade v. Town of Wallkill*, 235 A.D.2d 542 (2d Dept. 1997). *See also Matter of Aitken v. City of Mount Vernon*, 200 A.D.2d 667 (2d Dept. 1994); *Whitted v. City of Newburgh*, 65 A.D.3d 1365 (2d Dept. 2009); and *Whitted v. City of Newburgh*, 126 A.D.3d 910 (2d Dept. 2015).

Importantly, the Court of Appeals has also held that the GML § 207-a benefit does not include fringe benefits provided for in the CBA unless the CBA so "expressly" provides. In *Matter of Chalachan v. City of Binghamton*, 55 N.Y.2d 989 (1982), the Court of Appeals upheld the dismissal of an Article 78 petition by disabled firemen who claimed that the GML § 207-a benefit included the vacation accruals benefits found in the CBA:

> The collective bargaining agreement in question is entirely silent regarding the status of disabled firemen as employees of the city. Their continued status as employees even after disability has occurred is strictly a matter of statutory right. The collective bargaining agreement should not therefore be construed to

> implicitly expand whatever compensation rights are provided petitioners under the statute. Any additional benefits must be expressly provided for in the agreement, and petitioners' argument that they are entitled to unused vacation benefits by reason of the absence of language specifically excluding their class from vacation benefits is thus without merit.

Id. at 990.

Furthermore, Appellants correctly concede that this Court's decision in *Benson v. County of Nassau*, 137 A.D.2d 642 (2d Dept. 1988) specifically addressed the exclusion of night differential payments rom "regular salary or wages" under GML § 207-a. (Appellants' Brief, p. 23). In *Benson*, this Court reversed a decision of the Supreme Court which included a night shift differential payment as part of a GML § 207-c benefit after reviewing the CBA. "There is no indication in the record of any provision in the collective bargaining agreement which provides for shift differential payments during disability." *Id.* at 644 (*internal citations omitted*).

As such, the Court of Appeals and this Court—as a matter of statutory interpretation— has recognized the distinction made between regular wages and salary, which is the essence of the GML § 207 benefit, and other CBA fringe benefits, like night differential pay, which are not.

B. The CBA's Do Not Expressly Provide For the Payment of Special Pays as a GML § 207-a(2) Benefit

Consistent with controlling case law, the Appellants would need to show how the relevant CBA's "expressly" provide for the payment of special pay fringe benefits to those retirees receiving GML § 207-a(2) benefits. However, a review of the relevant CBA's establishes that the CBA's are silent on expanding the GML § 207-a(2) benefit to include fringe benefits.

1. Local 628 CBA

The recognition clause in the CBA between Local 628 and the City (Section 1.0) recognizes Local 628 as representing "those employees holding the rank of Firefighter (hereinafter referred to as 'members'), *who are now on active duty and employed by the Fire Department*[.]" (R. 166) (emphasis added). As such, the CBA does not expressly apply to retirees, including GML § 207-a(2) recipients.

The Local 628 CBA at Section 4:01.01 ("Base Salary") defines "the annual base salary" as that "provided on the Appendix A annexed." (R. 169). Appendix A, which only addresses base salary and longevity, does not include the fringe benefits. (R. 2013). As such, the term "annual base salary" is a defined term.

The CBA at Section 4:02 ("Rate of Pay") provides that a "members rate of pay shall be one and two hundred thirty-secondths (1/2323ths) of *annual base salary plus longevity* . . . Members who are assigned to arson pursuant to 4:01.03 shall in addition, have their arson pay included in computing their hourly and daily

rates. (R. 170, emphasis added). The CBA's rate of pay section excludes all other salary benefits from its definition, including the special pay fringe benefits.

Finally, the negotiated GML § 207-a procedure between the union and the City does not address the payment of special pay fringe benefits to GML § 207-a recipients.

2. <u>UFOA CBA</u>

The recognition clause of the CBA between the UFOA and the City (Section 1:01) provides that it covers the fire officers (i.e., Lieutenant, Captain and Assistant Chief) who are referred to as "members." (R. 253). As such, the CBA does expressly apply to retirees, including GML § 207-a(2) recipients.

The UFOA CBA at Section 4:01.01 ("Base Salary") sets forth the "annual base salary." (R.257). Section 4:01.02 ("Longevity") sets forth a longevity benefit which is considered part of the "annual base salary." (R. 257). The salary and longevity schedule, which addresses base salary and longevity, does not include the fringe benefits. As such, the term "annual base salary" is a defined term.

The CBA at Section 4:02 ("Rate of Pay") provides that a "member's daily rate of pay shall be one and two hundred thirty-secondths (1/232) of *annual base salary, as defined in Section "4:01" above including longevity.* (R. 258) (emphasis added). The CBA's rate of pay section excludes all other salary benefits from its definition, including the special pay fringe benefits.

Finally, the negotiated GML § 207-a procedure between the City and the union does not address the payment of special pay fringe benefits to GML § 207-a recipients.

C. The Supreme Court Properly Relied on Controlling Case Law To Exclude CBA Fringe Benefits from the GML § 207-a Benefit

Appellants attempt to distinguish this Court's decision in *Benson* by pointing out that the CBA at issue in *Benson* contains a provision for shift differential payment for those hours "actually worked" on evening and night shifts. Based on this difference, Appellants urge the Court to conclude that *Benson* does not apply. This argument fails for at least two reasons.

First, Appellants' argument ignores this Court's primary rationale in *Benson* which turns on the express wording of the CBA. "[S]ince the collective bargaining agreement was silent regarding the status of disabled firefighters as city employees, the disability rights were strictly a matter of statutory right. As such,'(t)he collective bargaining agreement should not therefore be construed to explicitly expand whatever compensation rights are provided * * * under the statute.'" *Benson*, 137 A.D.2d at 643, citing *Chalachan*, 55 N.Y.2d at 990.

Based on this Court's rationale and the facts here, the Supreme Court examined the CBA's at issue and concluded that "[i]n the case at bar, the collective bargaining agreements between the firefighters, fire officers, and the City [ ] are silent as to what constitutes § 207-a(2) payments." (R. 18-19)

While the CBAs at issue may provide for night differential, holiday, and check-in pay to all active firefighters, a plain reading of these CBA's do not expressly provide that these special pay fringe benefits shall be paid as a GML § 207-a(1) benefit to active firefighters or retired firefighters as a GML § 207-a(2) benefit. Moreover, while active duty firefighters face the risk of working at night or on holidays, the retirees, as the Supreme Court correctly noted, do not.

Accordingly, the Supreme Court merely applied the decisions of the Court of Appeals and this Court which had long held that, for purposes of GML § 207-a(2), the term "regular wages or salary," consists only of base wages and those "salary increases given to active firefighters following the award of the disability retirement allowance or pension as well as the benefit of longevity pay increases provided to active firefighters." *Whitted*, 126 A.D.3d at 911, citing *Mashnouk*, 55 N.Y.2d at 88.

Unable to overcome this adverse and controlling case law, Appellants must default to an equitable "fairness" position—a flawed argument which provides a second reason to deny their appeal. Putting aside the "unfairness" to City taxpayers who have erroneously overpaid GML § 207-a(2) retirees millions of dollars over the years, the Appellants overlook the fundamental difference between the retirees receiving GML § 207-a(2) benefits and active duty fire fighters: the GML § 207-a(2) recipients are retired and will never again be required to suffer the

inconvenience of checking in early or be required to work nights or holidays, an occupational reality for active duty fire fighters, including those who return to full duty from being out on a GML § 207-a(1) absence.

It is irrelevant that the City's active duty firefighters receive the special pays at issue. Unlike retirees, the City's active duty firefighters are well able to litigate a change in "past practice" as it relates to the payment of GML § 207-a(1) benefits before the Public Employment Relations Board ("PERB"). *City of Lockport*, 40 PERB ¶ 4541 (2007). Here, the active duty firefighters and fire officers are currently litigating this issue before PERB as is evidenced by the stipulation of facts used in the PERB proceeding.

Moreover, as a general rule, benefits for retired employees are non-mandatory subjects because retirees are no longer members of the bargaining unit and not entitled to representation in the bargaining process.[3] *Troy Uniformed Firefighters Assn, Local 2304*, 10 PERB ¶ 3015 (1977); *Lynbrook PBA*, 10 PERB ¶ 3067 (1977); *Police Assn of New Rochelle*, 10 PERB ¶ 3042 (1977) and

[3] These fundamental differences also gut Appellants' attempt to use the current calculation of §207-a(1) "regular salary or wages" to somehow support their position on the narrow issue of §207-a(2) benefits. (R. 24-26). In a last ditch effort, Appellants claim that the City actually admitted that GML § 207-a(1) and GML § 207-a(2) must be equal in their amounts. (Appellants' Brief, p. 28-29). The allegation Appellants rely on is a legal conclusion that is reserved for the Court's determination. (R. 140, ¶ 54). As such the City was under no obligation to answer the paragraph that asserts a legal conclusion. *See Silberstein v. Presbyterian Hosp. in City of N.Y.*, 95 A.D.2d 773, 774, (2nd Dept. 1983) ("While a default admits all factual allegations of the complaint and all reasonable inferences therefrom, it does not admit legal conclusions which are reserved for the court's determination."); *Curtis Case, Inc. v. City of Port Jervis*, 150 A.D.2d 421 (2nd Dept. 1989) ("defendant's omission is not an admission of the pleaded legal conclusion"). The City cannot be deemed to have admitted a legal conclusion asserted by omission.

Patrolmens' Benevolent Assn, 37 PERB 3033 (2004). This difference in PERB's jurisdiction explains why the City is unable to adjust the overpayment of GML § 207-a(1) benefits to active duty firefighters who can litigate the alleged "past practice" issue before PERB. *City of Lockport, supra.*

As such, the fact that the City's active duty firefighters are currently receiving a GML § 207-a(1) benefit which includes the disputed special pay fringe benefits (and trying to enforce that alleged past practice before PERB) is wholly irrelevant to whether these special pays should be paid to retired fire fighters as part of a statutory GML § 207-a(2) benefit.

D. Collateral Estoppel Does Not Apply

The Appellants assert that the Supreme Court did not address collateral estoppel. However, because collateral estoppel does not apply, there was no misapprehension of fact or law in the Court's decision. Appellants continue to rely on a singular, outdated case that has never been cited or relied upon by any court: *Smerek v. Christiansen*, 111 Misc.2d 580 (Sup. Ct. 1981). Because the Court in *Smerek* was never requested to decide the issues now raised by the City, collateral estoppel is not a bar to the City's position.

Collateral estoppel precludes a party seeking to "relitigate an issue already decided against it." *Jimenez v. Shippy Realty Corp.*, 213 A.D.2d 377, 377-378 (2d Dept. 1995). The party asserting collateral estoppel must show: "First, the

identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination." *Kauffman v. Eli Lilly & Co.*, N.Y.2d 449, 455 (1985). Collateral estoppel is a "flexible doctrine which can never be rigidly or mechanically applied". *Gilberg v. Barbieri*, 53 N.Y.2d 285, 293 (1981). "[T]he fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 N.Y.2d 147, 153 (1988).

Relevant factors for the "full and fair opportunity" include "the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation." *Schwartz v. Pub. Adm'r of Bronx Cty.*, 24 N.Y.2d 65, 72, (1969).

First, the factual circumstances have changed in the 36 years since the *Smerek* decision. The parties have negotiated numerous collective bargaining agreements since *Smerek* was decided, including new agreements which show that

the base salary and wages do not include the disputed fringe benefits. *See Parker v. Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 349 (1999). As such, the contract language before the Supreme Court is different. Accordingly, based on the changed factual circumstances, collateral estoppel does not apply.

Second, it is elementary that collateral estoppel has no preclusive effect when there has been a change in the law. The United States Supreme Court has long held that the collateral estoppel "principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities[.]" *C.I.R. v. Sunnen*, 333 U.S. 591, 599 (1948); *see also Faulkner v. Nat'l Geographic Enterprises Inc.*, 409 F.3d 26. 37 (2d Cir. 2005) ("Therefore, even where the specified elements of collateral estoppel are present, reexamination of a legal issue is appropriate where there has been a change in the legal landscape after the decision claimed to have preclusive effect."), citing Restatement (Second) of Judgments § 28 (cmt. c).

Here, *Smerek* was a case decided in 1981, shortly after the GML § 207-a(2) amendment was passed, but before the Court of Appeals decided *Mashnouk*. Of course, after *Smerek*, the Court of Appeals and this Court clarified that the GML § 207-a(2) wage supplement benefit does not include any benefits other than regular

wages or salary, longevity or negotiated wage increases unless these were "expressly" negotiated as a retiree or GML § 207-a(2) wage supplement benefit.

Third, in *Smerek*, neither party raised the issues of contractual interpretation that were relevant after *Mashnouk*. Since *Smerek*, the parties have negotiated new CBA's, MOU's and other agreements, some of which now define the fringe benefits as excluded from "annual base salary" and treating the fringe benefits differently than GML § 207-a(1) payments. As such, the court in *Smerek* was never requested to decide the legal issues now raised by the City.

Given the different parties, different facts, the different issues and the change in the law, collateral estoppel is unavailable to the Appellants. Moreover, as the Supreme Court acknowledged, the controlling law, as set forth by the Court of Appeals and this Court after the *Smerek* decision, mandates that GML § 207-a(2) recipients only obtain fringe benefits if those benefits are provided under the law unless the CBA contains an express provision to the contrary. Here, the fringe benefits at issue are not included in the CBAs.

E. Appellants' "Rational Basis" Argument Based on *Heck v. Keane* Is Misplaced

Appellants argue in a separate point heading that the City lacked a rational basis to reduce and recoup the GML § 207-a(2) benefit "because there is not overpayment or mistake." (Appellants' Brief, p. 29-31). In response, the City respectfully refers the Court to the preceding argument, which establishes the facts

and controlling case law of this Court and the Court of Appeals that served as the basis for the City's determination, and the Supreme Court's subsequent decision to uphold the City's determination.

Moreover, the Appellants reliance on the Fourth Department's case of *Heck v. Keane*, 6 A.D.3d 95 (4th Dept. 2004) to support this point is incredibly misplaced. In *Heck v. Keane*, the commissioner of the fire department notified petitioner that the City had "reexamined" her section GML 207-a(2) award and had determined that all payments were in error. *Id.* The City denied both the petitioner's demand for her benefits to be reinstated, and her demand for a hearing. *Id.* The Fourth Department, affirmed the Supreme Court's determination that the City and commissioner's termination of benefits was not based upon all pertinent evidence, and deprived her of due process. *Id.*

In stark contrast to that fact pattern, the City has not once challenged the Appellants' entitlement to GML § 207-a(2) benefits.[4] Rather, the City recognized that they mistakenly included certain fringe benefits in the payment to GML § 207-a(2) retirees, and sought to correct the overpayment. At their respective hearings, each Appellant was permitted to be heard and offer evidence in support of their appeal. (R. 345-2148). The City then made a final determination, based on two separate Hearing Officer recommendations, that the Appellants were not entitled to

[4] As such, while it is humbling, Appellants' lengthy narrative regarding how selective Appellants were injured (Appellants Brief, p. 8-12) is completely irrelevant to the issue before the Court.

fringe benefits in their GML § 207-a(2) supplement. The Supreme Court then determined that it was not arbitrary or capricious for the City to come to this determination.

Appellants cannot possibly claim this case is analogous to the *Heck* fact pattern. Here, the City's determination was supported by a complete hearing record and had a rational basis.

POINT II: APPELLANTS' APPEAL FROM THE AUGUST 2017 DECISION MUST BE DENIED AND/OR DISMISSED

"A motion for leave to renew 'shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]) and 'shall contain reasonable justification for the failure to present such facts on the prior motion' (CPLR 2221[e][3]). 'The new or additional facts either must have not been known to the party seeking renewal or may, in the Supreme Court's discretion, be based on facts known to the party seeking renewal at the time of the original motion.' *Wells Fargo Bank, N.A. v. Rooney*, 132 A.D.3d 980, 982 (2nd Dept. 2015), *leave to appeal dismissed,* No. 2016-449, 2016 WL 3525000 (N.Y. June 28, 2016) quoting *Deutsche Bank Trust Co. v. Ghaness*, 100 A.D.3d 585 (2nd Dept. 2012).

In their motion for leave to renew, and now in their brief in support of this appeal, Appellants claim that a stipulation of fact signed by all parties on November 28, 2016 is a new material fact. Not only is the stipulation irrelevant,

but it is not a new fact. (Appellants' Brief, p. 26). On or about November 28, 2016 the parties entered into a stipulation of facts ("Stipulation") before the Public Employment Relations Board ("PERB") for issues relevant to that proceeding. Appellants allege, in contravention of earlier sworn filings, that this Stipulation amounts to a "new fact." (Appellants' Brief, p. 26).

However, to Appellants' detriment, Attorney Corenthal's Reply Affirmation, dated January 17, 2017, attached the Stipulation at issue, (R. 2316), while the Reply Memorandum of Law spent no less than three separate paragraphs explaining how the Stipulation supported Appellant's position. (R. 82-83).

The Supreme Court providently exercised its discretion in denying Appellants' motion for leave to renew. The Appellants failed to present new facts which were unavailable at the time of the original motion that would have changed the prior determination. (See CPLR 2221(e)(2), (3); *Kamel v. Mukhopady*, No. 2014-08135, 2017 WL 6347272 (N.Y. App. Div. Dec. 13, 2017)). Since such "new fact" was lacking, the Appellants' motion to "renew" was, in effect, solely a motion to reargue. *State Farm Mut. Auto. Ins. Co. v. Wernick*, 90 A.D.2d 519, 455 N.Y.S.2d 30, 31 (1982).

An order denying such a motion is not appealable. *Id. See Kamel v. Mukhopady*, No. 2014-08135, 2017 WL 6347272 (N.Y. App. Div. Dec. 13, 2017)(Appellate Division, Second Department, Order dismissing the Plaintiff's

appeal from so much of the Order that denied Plaintiff's motion for leave to reargue, "as no appeal lies from an order denying reargument"); *Blackwell v. Mikevin Management III, LLC*, 88 A.D.3d 836, 931 N.Y.S.2d 116 (2 Dept. 2011)(Plaintiffs' motion, denominated as one for leave to renew and reargue, did not offer any new facts not offered in opposition to the defendants' motion for summary judgment or in support of their prior cross motion for voluntary discontinuance, and, therefore, was, in actuality, a motion for leave to reargue, the denial of which was not appealable); *New York Cent. Mut. Fire Ins. Co. v. Rafailov*, 41 A.D.3d 603, 840 N.Y.S.2d 358 (2 Dept. 2007)(Insureds' motion for "Renewal and/or reargument," following grant of automobile insurer's motion to permanently stay arbitration of a demand for uninsured motorist benefits, was, in effect, a nonappealable motion for leave to reargue, where motion was not based on new facts which were unavailable at the time of the original motion, and insureds failed to offer a valid excuse for their failure to present such evidence earlier); and *Simon v. Mehryari*, 16 A.D.3d 664, 792 N.Y.S.2d 543 (2 Dept. 2005) (County defendants' motion denominated as one for leave to renew and reargue was, in effect, solely a motion for leave to reargue, precluding appeal from denial of motion, given that defendants addressed issue of signage in reply to personal injury plaintiff's opposition to their original cross-motion for summary judgment, arguing that absence of signs would have made no difference because accident was

caused by offending driver's negligence, and, erroneously, that plaintiff had failed to adduce evidentiary proof of absence of signs on date of accident, and that, in support of motion denominated as one for leave to renew and reargue, defendants again argued that cause of accident was offending driver's negligence and that there were signs at time of accident, a proposition supported by so-called new proof).

Although, in situations where the court denies the motion to reargue but addresses the merits of the motion, and then adheres to its original determination, the order is appealable, the Court here did not address the merits of the motion. Rather, the Court stated the standard for a motion to reargue and concluded that "[t]he petitioners' reiteration of their original arguments does not make such a showing". (R. 9). Consequently, the appeal from the Decision dated August 1, 2017 must be dismissed.

Assuming *arguendo* that the Appellants' motion is not treated solely as a motion to reargue and it is appealable, the appeal should, nevertheless, be denied. Pursuant to CPLR § 2221, "a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." CPLR § 2221(d)(2). "A motion for leave to reargue pursuant to CPLR § 2221 is addressed to the sound discretion of the court and may be

granted only upon a showing that the court overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision." *Mayer v. Nat'l Arts Club*, 192 A.D.2d 863, 865 (3rd Dept. 1993) (internal citations omitted).

As emphasized by appellate courts, a motion to reargue "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided". *McGill v. Goldman*, 261 A.D.2d 593, 594, 691 N.Y.S.2d 75 (1999); see also *Pahl Equip. Corp. v. Kassis*, 1982 A.D.2d 22, 588 N.Y.S.2d 8 (1992)). There is no showing that the Supreme Court did not correctly apply the controlling law from the Court of Appeals or this Court. In this case, the CBA's at issue are unambiguous in that there is no CBA provision which expressly provides that GML § 207-a(2) recipients will be afforded the special pay fringe benefits at issue.

For reasons set forth above, the Supreme Court correctly applied the law from the Court of Appeals and this Court and there are no grounds to reverse the Supreme Court's Decision denying Appellants' motion for leave to renew or reargue.

CONCLUSION

Appellants have failed to demonstrate that the City acted in an arbitrary and capricious manner. Instead, the City's actions are reasonable, rational and in complete conformity with the controlling decisions of the Court of Appeals and

this Court. Thus there are no grounds to reverse the Supreme Court's March 10, 2017 Decision and Order denying all of the relief sought in the Article 78 petition.

Further, Appellants have failed to demonstrate grounds to grant a motion for leave to renew or reargue. There is no showing that the Supreme Court misunderstood or misapplied the law or that Appellants offered any new facts not previously offered in their original application.

For the reasons set forth above, the Respondent, City of Yonkers, respectfully requests that this Court deny Appellants' appeal from the March 10, 2017 Decision and Order of the Supreme Court and dismiss, or otherwise deny, the Appellants' appeal from the Supreme Court's August 1, 2017 Decision denying Appellants' motion to reargue and/or renew and grant such other and further relief as to the Court may seem just and proper.

Dated: Binghamton, New York
January 5, 2018

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APPELLATE DIVISION – SECOND DEPARTMENT

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR §670.10.3(f) that the foregoing brief was prepared on a computer using Microsoft Word.

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