To be argued by:
PAUL J. SWEENEY
(Time requested: 20 minutes)

APL No. APL-2021-00076
Appellate Division, Second Department Docket Nos. 2017-04562 & 2017-09778
Westchester County Clerk's Index No. 2302/2016

Court of Appeals

of the

State of New York

In the Matter of the Application of

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

Petitioners-Appellants,

– against –

THE CITY OF YONKERS.,

Respondent-Respondent.

BRIEF FOR RESPONDENT-RESPONDENT

COUGHLIN & GERHART, LLP
Paul J. Sweeney, Esq., of Counsel
Attorneys for Respondent-Respondent
99 Corporate Drive
Binghamton, New York 13904
Tel: (607) 723-9511
Fax: (607) 723-1530
psweeney@cglawoffices.com

March 3, 2022

STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13 of the Courts Rules of Practice, the following information as to the status of related litigation is provided as of the date of this brief.

The Respondent-Respondent City of Yonkers ("City") moved the Westchester County Supreme Court pursuant to Article 75 of the Civil Practice Law and Rules to vacate an arbitration award in favor of the Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO ("Union") in the *Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO* (Sup Ct Westchester County Index No. 60260-2021). The City moved to vacate the arbitration award due to the absence of an "express provision" in the collective bargaining agreement ("CBA") including the CBA fringe benefits as part of a General Municipal Law § 207-a(2) benefit. This same issue is subject of the City's companion appeal to this Court in *Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, 187 AD3d 900 [2d Dept 2020], *lv granted* 37 NY3d 910 [2021].[1] By Decision and Order dated December 3, 2021, Supreme Court (Giacomo, J.) denied the City's motion to vacate the arbitration award and dismissed the special proceeding. On December 8, 2021,

[1] APL-2021-00162.

the City filed and served a notice of appeal to the Appellate Division, Second Department. That appeal is still pending.[2]

In its Brief, the Petitioners-Appellants represent that a proceeding before the Public Employment Relations Board ("PERB") which was transferred to the Appellate Division, Third Department, *Uniformed Fire Officers Association of the City of Yonkers and Yonkers Fire Fighters, Local 628 v. New York State Public Employment Relations Board and City of Yonkers*, 197 AD3d 1470 [3d Dept 2021] is related litigation. For reasons set forth in its letter to the Clerk of the Court dated December 17, 2021, the City noted the reasons why the PERB matter may not be deemed related litigation.[3] While the City took no position on the Petitioners-Appellants' request to include the PERB proceeding as related litigation, it did request an opportunity to brief the issues summarized in its December 17, 2021 letter

[2] Pursuant to Rule 500.6, counsel for the parties have advised the Clerk of the Court as to the change in status and provided filed copies of the Supreme Court's Decision and Order dated December 3, 2021 and the Notice of Appeal dated December 8, 2021.

[3] In that letter, the City noted *inter alia* that (i) opposing counsel did not list the matter as a "related" case or proceeding in its Preliminary Appeal Statement dated May 5, 2021; (ii) PERB is an administrative agency which lacks jurisdiction to hear cases involving contract disputes such as the one brought by the Union in the pending appeal and PERB "has consistently interpreted [Civil Service Law § 205 (5) (d)] to deprive it of jurisdiction over failure-to-negotiate improper practice charges when the underlying disputes are essentially contractual, in favor of resolving the dispute through the parties' grievance-arbitration machinery, or resort to the courts." *Matter of Roma v Ruffo*, 92 NY2d 489, 497 [1998]; and (iii) as the issues were not "identical," collateral estoppel against the City as to PERB's factual findings based on the PERB record, including, an alleged past practice, would not apply. *Kaufman v. Eli Lilly & Co.*, 66 N.Y.2d 449 (1985).

to the Clerk of the Court in the event that the Court agreed to consider the PERB proceeding.[4]

[4] The Petitioner-Appellant has not been advised that the PERB matter will be considered by this Court as related litigation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Other Authorities:

PRELIMINARY STATEMENT

Petitioners-Appellants (hereinafter referred to as "Petitioners") are a group of retired City of Yonkers fire fighters, who are receiving GML § 207-a (2) wage supplement benefits. In the instant appeal, Petitioners ask this Court resolve a purported split in authority between departments of the Appellate Division, which, according to Petitioners, have differing views of what is properly included in their "regular salary and wages" for purposes of the City's obligation to pay these statutory benefits. More specifically, Petitioners suggest that the Decision and Order of the Second Department that is the subject of the instant appeal should be reversed because it allegedly "departed" from the Third Department's "correct" interpretation of "regular salary or wages" in *Matter of McKay v Village of Endicott*, (161 AD3d 1340 [3d Dept 2018] [hereinafter *McKay*]).

However, it is submitted that no "split" exists amongst these Departments. In fact, the *McKay* decision actually lends support to the Second Department's holding. The Third Department, like the Second Department, has long followed this Court's requirement that, to be enforceable, a CBA must "expressly" include a fringe benefit as part of a GML § 207 benefit (*see e.g. Matter of Town of Niskayuna [Fortune]*, 14 AD3d 913, 914 [3d Dept 2005]). And in both *McKay* and the matter on appeal, each court applied essentially the same legal rules and analysis.

The fact that the Third Department in *McKay* reached a different conclusion than the Second Department did here is not attributable to anything other than the unique facts of each case, specifically, key differences in the wording of the respective collective bargaining agreements ("CBAs") at issue. On the one hand, the Third Department in *McKay* concluded that, based on the express language of the CBA at issue there, certain special pays were appropriately included as part of a disabled retiree's "regular salary or wages" for purposes of the calculation of his GML § 207-a (2) benefit. On the other hand, the Second Department held that the special pay fringe benefits at issue here were properly excluded from Petitioners' 207-a (2) wage supplement payments, because the CBAs did not expressly require their inclusion.

Contrary to Petitioners' suggestion, the Third Department did not expand the definition of "regular salary or wages", nor did the Second Department contract it. Each court appropriately applied the same precedent to different facts, and appropriately reached different conclusions as a result. Thus, there is no need to resolve a split in authority between the two departments, because there is none. As a result, it is respectfully submitted that the Court should affirm the Decision and Order of the Second Department that is the subject of this appeal, and allow the City to remove various special pays from the calculation of Petitioners' GML § 207-a (2) benefits.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY

For many years, the City erroneously overpaid Petitioners a GML § 207-a (2) benefit, inasmuch as the benefit calculation included certain special payments intended to compensate firefighters for working a night tour ("Night Differential"), for working holidays ("Holiday Pay"), or for the time spent reporting in early prior to an assigned tour ("Check-In Pay") (hereinafter collectively referred to as the "Special Pays") [R: 71]. These Special Pays are set forth in the CBA between the City and the firefighters union, Local 628, IAFF, AFL-CIO ("Local 628") and the CBA between the City and the fire officers union, the Uniformed Fire Officers Association ("UFOA"). It is undisputed that the Local 628 and UFOA CBAs contain no express language that guarantee the Special Pays to GML §207-a (2) recipients, such as Petitioners [R: 172-173, 258-260].

In or around October 2015, the City discovered that it was mistakenly including the Special Pays when calculating GML § 207-a (2) benefit payments [R: 325]. Consequently, the City set out to correct the error and, by letter dated October 5, 2015, wrote to all affected retirees regarding the overpayment [R: 325]. The letter advised the retirees that the City would seek to adjust their GML § 207-a (2) payment and recoup the overpayment. It further advised that each retiree could request a hearing on the adjustment/recoupment [R: 325].

Thereafter, the City appointed two hearing officers to handle the due process hearings [R: 2153-2164] 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 Petitioner was permitted to be heard and offer evidence in support of their appeal [R: 345-2142].

On March 14, 2016, Hearing Officer Kenneth Bernstein, Esq. issued his Report of Findings and Recommendation, which sustained the City's decision. The Bernstein Recommendation specifically found, among other things, that substantial evidence supported the City's determination that GML § 207-a (2) benefits did not include the Special Pays and the Appellants had been erroneously paid these additional benefits. [R: 2159-2164]. Accordingly Bernstein recommended that the City recalculate Petitioners' GML § 207-a (2) benefits to exclude the Special Pays and recoup the resulting overpayments [R: 2164].

On March 30, 2016, Hearing Officer Robert Ponzini, Esq. issued his respective Report of Findings and Recommendation, which arrived at substantially the same findings and recommendations as the Bernstein Recommendation [R: 2153-2158]. 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].

In response, on or about June 30, 2016, Petitioners commenced the underlying proceeding pursuant to CPLR Article 78 seeking relief, which included, among other things, setting aside the adjustment of the Appellants' GML § 207-a (2) benefits [R: 114-146]. After Supreme Court denied the City's subsequent preanswer motion to dismiss [R: 17], the City joined issue [R: 70-77].

Ultimately, in a Decision and Judgment dated March 10, 2017, Supreme Court partially dismissed the Verified Petition, finding that the City's decision to adjust Petitioners' GML § 207-a (2) payments by removing the Special Pays was neither arbitrary nor capricious and, in fact, was wholly consistent with controlling case law from the Second Department and this Court. Supreme Court partially granted the Verified Petition to the extent that it prohibited the City from recouping or otherwise recovering the past overpayments of the Special Pays [R: 16-19].

Thereafter, Petitioners filed a notice of appeal to the Appellate Division, Second Department, from so much of Supreme Court's March 2017 Decision and Judgment that upheld the City's determination to correct its own error and remove the Special Pays from Petitioners' GML § 207-a (2) payments [R: 12-13].

Upon review, the Second Department issued a Decision and Order affirming the Judgment of Supreme Court and, by extension, the appropriateness of the City's decision to cease the practice of including the Special Pays in Petitioners' GML

§ 207-a (2) wage supplements CBAs (*see Matter of Borelli v City of Yonkers*, 187 AD3d 897 [2d Dept 2020]).

Specifically, the Second Department noted in its Decision and Order that "[d]isability entitlements are generally a matter of statutory right, and recipients of [GML] § 207-a (2) benefits cannot claim additional employment entitlements beyond the 'regular salary or wages' provided for in the statute absent an agreement of the parties" (*Id.* at 898-899 [emphasis added], citing *Matter of Chalachan v City of Binghamton*, 55 NY2d 989, 990 [1982]; *McKay*, 161 AD3d 1340, 1341-1342 [3d Dept 2018]; and *Benson v County of Nassau*, 137 AD2d 642, 643 [2d Dept 1988]). This, together with citations to numerous cases in which courts have previously interpreted what is contemplated by the statutory term "regular salary or wages", led to the court's conclusion that, because there was no language in the parties' CBAs that expressly provided the Special Pays to GML § 207-a (2) recipients, and because the well-established judicial interpretation of the statutory term "regular salary or wages" excludes all types of contractual benefits other than base salary, prospective salary increases and longevity payments, Petitioners were not entitled to have the Special Pays calculated into their GML § 207-a (2) payments.

Thereafter, Petitioners moved this Court for leave to appeal, which motion the Court granted by Order dated April 29, 2021 [R: 2329].

ARGUMENT

I. THE SECOND DEPARTMENT DECISION ON APPEAL AND THE THIRD DEPARTMENT'S PRIOR DECISION IN *McKAY* DO NOT REPRESENT A PURPORTED SPLIT IN AUTHORITY FOR THIS COURT TO RESOLVE

Petitioners first argue that the Second Department's decision on appeal should be reversed because it was allegedly based upon an erroneous interpretation of what is properly included in a retired, disabled firefighter's "regular salary and wages" for purposes of the City's obligation to pay such firefighters the GML § 207-a (2) supplement. Specifically, Petitioners assert that the Second Department "departed" from the Third Department's "correct" interpretation of the term in *McKay*, (161 AD3d 1340 [3d Dept 2018]), thus creating a split in Appellate Division authority for this Court to resolve. It is submitted that Petitioners' argument is inapposite here, inasmuch as it based on a gross overstatement of the significance of the holding in *McKay*.

While it is true that the Third Department in *McKay* reached the opposite conclusion as the Second Department did in the instant matter, the difference between Third Department's holding (*i.e.*, that certain special pays were appropriately included as part of a retiree's regular salary or wages for purposes of GML § 207-a [2]), and the Second Department's holding (*i.e.*, that the contested special pays are properly excluded from Petitioners' 207-a [2] payments), is entirely attributable to the different CBAs and unique facts of each case.

As is explained in greater detail below, both courts' engaged in the same analysis and application of the well-established precedent of this Court and the Appellate Division regarding 207-a "regular salary or wages", and reached different conclusions because of key distinctions in the language of the respective CBAs involved in each case. In other words, contrary to Petitioners' suggestion, the Third Department did not expand the definition of "regular salary or wages", nor did the Second Department contract it. Each Court appropriately applied the same precedent to different facts, and appropriately reached different conclusions as a result. Thus, there is no need to resolve a split in authority between the two departments, because there is none.

A. The Prevailing Judicial Interpretation of the Term "Regular Salary or Wages" in the GML § 207-a (2) Context.

Where, as here, disabled firefighters are receiving benefits under GML § 207-a (1), and subsequently receive an accidental disability allowance under the Retirement and Social Security Law (RSSL) § 363, a performance of duty disability retirement allowance pursuant to RSSL § 363-c, or another pension provided by a pension fund of which the firefighter is a member, a municipality is only responsible to pay the now-retired firefighter a wage supplement, that is, the difference between the amount of the pension or allowance and the "amount of his regular salary or wages" as if he or she were still employed (GML § 207-a [2]).

While the term "regular salary or wages" is not defined in the statute, New York courts, including this Court, have consistently interpreted this term to mean (a) base wages or salary; (b) negotiated wage or salary increases (*see Mashnouk v Miles*, 55 NY2d 80 [1982]); and (c) longevity payments (*see Whitted v City of Newburgh*, 126 AD3d 910 [2d Dept 2015]; *Matter of Aitken v City of Mount Vernon*, 200 AD2d 667, 668 [2d Dept 1994]). As is especially relevant here, appellate courts have not only recognized what is ordinarily included in a disabled fire fighter's regular salary or wages, they have also recognized what is ordinarily *not* included.

For example, in *Matter of Chalachan v City of Binghamton*, the Court upheld the dismissal of an Article 78 petition by disabled firemen who claimed that their GML § 207-a payments should include unused vacation benefits found in the parties' CBA. In so holding, the Court observed that

> [t]he 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

(55 NY2d 989, 990 [1982]). In *Matter of Uniformed Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes*, this Court further expressed its view that a CBA must "expressly" include disputed fringe benefits in a firefighter's GML 207-a payments:

> We, lower courts and other authorities have recognized that, because disabled firefighters do not perform regular duty in exchange for the "payment of the full amount of regular salary or wages" under General Municipal Law § 207-a, apart from contractual entitlements, "[t]he 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*"

(94 NY2d 686, 695 [2000] [emphasis in original], quoting *Matter of Chalachan v City of Binghamton,* 55 NY2d at 990, and citing *Benson v County of Nassau,* 137 AD2d 642, 643-644 [2d Dept 1988]; *Matter of Geremski v Department of Fire,* 78 Misc2d 555, 558 [Sup Ct Onondaga County 1974]; *Phaneuf v City of Plattsburgh,* 84 Misc2d 70, 74-75 [Sup Ct Clinton County 1974]; 1986 Ops St Comp No. 86-48; 1983 Ops St Comp No. 83-161; and 1982 Ops St Comp No. 82-352).

In sum, the basic rule that can be distilled from the foregoing cases is that any special pays or other purely contractual benefits provided by a CBA that are outside of what courts have traditionally held to be part of a GML § 207-a (2) recipient's "regular salary or wages" (*i.e.*, base salary, subsequent salary increases and longevity payments) are not properly included in 207-a (2) payments unless the CBA

expressly awards those benefits to retired, disabled fire fighters, or the CBA expressly includes such special pays as part of a fire fighter's regular salary or wages.

B. The Second Department in the Decision and Order on Appeal Correctly Applied Controlling Case Law to Exclude the Special Pays from Petitioners' 207-a (2) Payments

Petitioners argue that in the Decision and Order on appeal, the Second Department erroneously "applied a restrictive rule" [Pet. Br. at 22] when it held that Petitioners are not entitled to the night differential, check-in and holiday pays that the City has determined that it will no longer provide to Petitioners as a part of their GML 207-a (2) benefits. Notably, Petitioners do not argue that the Second Department's determination misinterpreted any prior holdings (apart from *McKay*) that address what is and is not encompassed by the term "regular salary or wages" in the GML § 207-a context. Rather, Petitioners postulate that the Second Department's holding is overly "restrictive" because it did not specifically address the issue of whether continuing to provide such pays to retired, disabled firefighters would "unfairly discriminate against employees actually working" (*Matter of Chalachan v. City of Binghamton* 55 NY2d at 990).

Contrary to these assertions, it is submitted that the Second Department correctly concluded that Petitioners are not entitled to the inclusion of the Special Pays in their GML § 207-a (2) benefits because the CBAs do not expressly provide for it, which is what well-established precedent unequivocally requires (*see* Point

I.A., *supra*). It is further submitted that the court's conclusion is unaffected by the absence of a discussion about whether or not the continued inclusion of the Special Pays in Petitioners' benefits discriminate against fire fighters actually working. Unlike the bright line rule that only express CBA language can alter the traditional formulation of "regular salary or wages", there has never been a legal requirement that additional benefits may only be excluded from a GML § 207-a (2) benefits calculation if the continued payment of such benefits would discriminate against active duty fire fighters.

In order to better understand why the Second Department reached the conclusion that Petitioners are not entitled to the inclusion of the Special Pays in their GML §207-a (2) wage supplement, an examination of the relevant provisions of the parties' CBAs is instructive.

To begin, 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)]. Similarly, the recognition clause of the CBA between the UFOA and the City (Section 1:01) provides that it covers fire officers (*i.e.*, Lieutenant, Captain and Assistant Chief) who are referred to as "members" [R: 253]. As such, neither CBA expressly applies to retirees, including GML § 207-a (2) recipients.

Furthermore, neither CBA expressly includes the Special Pays in the bargaining unit members' "regular salary or wages." For example, the Local 628 CBA at Section 4:02 ("Rate of Pay") provides that a "member's rate of pay shall be one and two hundred thirty-secondths (1/232ths) of annual base salary plus longevity . . . Members who are assigned to [the arson squad] shall in addition, have their arson pay included in computing their hourly and daily rates" [R: 170]. Thus, the express language of the Local 628 CBA establishes that a fire fighter's regular salary or wages is comprised of (a) base salary, (b) longevity payments and (c) arson pay [R: 169-170, 213]. The CBA's rate of pay section does not expressly include the Special Pays, or any other salary benefit in its definition. The rate of pay provision within the UFOA CBA contains nearly identical language regarding what is and is not included in a fire officer's rate of pay, though, in addition to not expressly including the Special Pays, it also does not include arson pay [R: 257-258].

As it relates to the CBA provisions governing the Special Pays themselves, the Local 628 CBA at Sections 4:05 ("Night Differential"), 4:06 ("Check-In Pay") and 4:07 ("Holiday Pay"), provide the Special Pays to "firefighters" or "members" [R: 172-173]. None of these sections expressly provide that the Special Pay benefit shall be paid to retirees or those receiving GML § 207-a (2) benefits, nor do these sections contain any indication that the Special Pays are part of a member's base pay or rate of pay (*i.e.*, regular salary or wages). The Night Differential in particular is

payable "only to firefighters actually working [the 6:00 p.m. to 8:00 a.m.] night tour" [R: 172]. The UFOA CBA also discusses the Special Pays with nearly identical language, including language limiting payment of the Night Differential to "[m]embers actually working that night tour" [R: 258-59].

As the foregoing makes clear, the CBAs are devoid of any distinctive language that expressly continues the Special Pays for bargaining unit members after they retire, or makes the Special Pays an integral part of Petitioners' "regular salary or wages" for the purposes of calculating GML § 207-a (2) benefits. To the contrary, the language of the Special Pays provisions in both CBAs, which designate them as special, semi-annual payments [R: 172-73, 257-60], strongly suggests they are not "regular salary or wages," but "a separate, additional benefit" (*McKay*, 161 AD3d at 1342).

Taking the above CBA language into consideration, the Second Department noted in the Decision and Order on appeal that "[d]isability entitlements are generally a matter of statutory right, and recipients of [GML] § 207-a (2) benefits cannot claim additional employment entitlements beyond the 'regular salary or wages' provided for in the statute absent an agreement of the parties" [R: 2331] (*see Matter of Chalachan v City of Binghamton*, 55 NY2d at 990; *McKay*, 161 AD3d at 1341-1342; *Benson v County of Nassau*, 137 AD2d 642, 643 [2d Dept 1988]).

Then, after noting that Petitioners' argument in support of their entitlement to the Special Pays was based solely on the "express language of [GML] § 207-a (2)", rather than the express language of the relevant CBAs [R: 2331], and citing to a litany of cases in which courts have previously interpreted what is contemplated by the statutory term "regular salary or wages", the court concluded that Petitioners "did not sustain their burden of establishing their entitlement to compensation for night differential, check-in pay, and holiday pay as part of their disability benefits under the language of General Municipal Law § 207-a (2)" [R: 2332]. In other words, the court correctly held that, because there was no language in the CBAs that expressly provided the Special Pays to GML § 207-a (2) recipients, and because the well-established judicial interpretation of the statutory term "regular salary or wages" excludes all types of contractual benefits other than base salary, prospective salary increases and longevity payments, Petitioners were not entitled to have the Special Pays calculated into their GML § 207-a (2) payments.

Significantly, Petitioners do not dispute the correctness of the prior case law the Second Department cited that categorically prohibits the inclusion of the Special Pays in their GML § 207-a (2) benefits calculation barring express language in the parties' CBAs that provide for it. They also do not dispute the court's implied conclusion that no such CBA language exists here.

Although these facts should, in and of themselves, fully defeat their claims, Petitioners attempt to save their case by misguidedly claiming that the Second Department's decision is flawed because it did not explicitly address whether continuing to pay the Special Pays to Petitioners would discriminate against fire fighters actually working. However, in *Matter of Chalachan v City of Binghamton*, where the Court first articulated this idea, the actual and sole basis for the Court's decision was the fact that the parties' CBA did not expressly provide for the inclusion of payments for unused vacation time in the petitioners' GML § 207-a benefits calculation (*see* 55 NY2d at 990), which is precisely the basis of the Second Department's decision in the instant case. The Court's additional observation in *Matter of Chalachan* that "since disabled firemen do not have to work at all . . . to pay them for unused vacation time would unfairly discriminate against employees actually working" was made in dicta and, thus, did not establish an additional legal requirement to be analyzed in GML 207-a "regular salary or wages" cases (*Id.*; *see Benson v County of Nassau*, 137 AD2d at 644 [holding that shift differential payments were properly excluded from GML § 207-c benefits calculation where there was no CBA provision that expressly provided them during disability, and further observing, in dicta, that remitting such payments to 207-c recipients "would

unfairly discriminate against those persons actually working the undesirable shifts"]).[5]

Thus, it is submitted that the Second Department's Decision and Order excluding the Special Pays from Petitioners' GML § 207-a (2) benefits appeal does not articulate an overly "restrictive rule", as Petitioners suggest. Rather, the court's holding is simply a straightforward and entirely appropriate application of the well-established rule that if a CBA does not expressly provide additional contractual payments to retired, disabled firefighters, and does not expressly include such payments to a fire fighter's "regular salary or wages", such payments are properly excluded from a municipality's calculation of GML § 207-a (2) benefits.

C. The Third Department's Decision in *McKay* Applied the Law in a Manner Consistent with the Second Department's Decision on Appeal; Their Different Outcomes are Attributable to Factual Differences Between the Two Cases.

Petitioners claim that the Third Department's holding in *McKay*, essentially pronounces a new rule, which conveniently jibes with their argument before the Second Department that the language of GML § 207-a itself entitles them to receive the Special Pays, which the Second Department correctly excluded from their

---

[5] Aside from misconstruing the dicta in *Chalachan* and *Benson* as part of the actual holding in those cases, Petitioners take their inapposite argument even further, additionally accusing the City of discriminating against disabled, retired firefighters by ending its erroneous practice of including the Special Pays in their 207-a (2). This additional accusation is baseless. Indeed, according to this Court's past precedent, the City's decision to end its extracontractual practice of overpaying 207-a (2) benefits to retirees is entirely permissible (*see Matter of Aeneas McDonald Police Benevolent Assn. v City of Geneva*, 92 NY2d 326 [1998], and Point II, *infra*)

benefits (*see Matter of Borelli v City of Yonkers*, 187 AD3d at 898; *see also* Point I.B., *supra*). Specifically, Petitioners argue that *McKay* stands for the proposition that "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" [Pet. Br. at 21]. However, this is a dramatic overstatement of the significance of *McKay*, not to mention a patently incorrect interpretation of its holding.

Contrary to Petitioners' assertions, the holding in *McKay* does not reformulate the well-established precedent of *Chalachan* and its progeny. In *McKay*, the petitioner, a disabled, retired firefighter claimed that his § GML 207-a (2) supplemental disability payments should include two contractual benefits that he was receiving when he retired, namely, "EMS" pay and "schedule adjustment" pay (*see McKay*, 161 AD3d 1340, 1342 [3d Dept 2018]).

The Third Department in *McKay* began its analysis of the petitioner's argument just as the Second Department did in the instant case, by citing to this Court's cases for the proposition that "unless a CBA expressly awards contractual benefits that are not part of regular salary or wages to recipients of benefits under [GML] § 207-a, the recipients are not entitled to them" (*Id.* at 1341-1342, citing

Matter of Chalachan v City of Binghamton, 55 NY2d at 990; *Matter of Uniformed Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes*, 94 NY2d 686, 694-695 [2000]; and *Matter of Town of Niskayuna [Fortune]*, 14 AD3d 913, 914 [3d Dept 2005]).[6] Also consistent with the Second Department's analysis in the instant case, *McKay* further acknowledges that because "the CBA does not expressly award either [EMS pay or salary adjustment pay] to disabled firefighters, petitioner is entitled to the inclusion of these payments only if they are part of his regular salary or wages within the meaning of [GML] § 207-a" (*McKay*, 161 AD3d at 1342).

From there, the Third Department's analysis diverges from the Second Department's, but not for any reason other than the fact that the language of the CBA at issue in *McKay* warranted a different application of the law to the facts presented in that case. Specifically, the CBA in *McKay* expressly provided that EMS pay was "to be added to [a firefighter's] base salary," and subtracted from base salary if the firefighter ceased participating in the EMS program (*Id.* at 1342). Accordingly, the Third Department concluded that "[t]he plain language of the contract thus

[6] In *Town of Niskayuna*, the Third Department followed this Court's prior rulings in *Chalachan* and *Cohoes* and, absent an express provision in the CBA, declined to find that a fringe benefit was included as part of GML 207-c benefits. Specifically, the Third Department held that "[i]n order to be entitled to additional benefits, the CBA must expressly provide that such benefits are applicable to disabled police officers receiving General Municipal Law benefits. Here, the CBA is entirely silent as to whether the health benefits accorded regular police officers are applicable to disabled officers receiving General Municipal Law benefits" (*Matter of Town of Niskayuna [Fortune]*, 14 AD3d at 914 [internal citations omitted]). Importantly, the Third Department did not overturn or modify this prior holding in *McKay*.

contemplates that EMS pay is included in a participant's base salary, rather than treated as a separate, additional benefit" (*Id.*). Similarly, the Third Department noted that, by the express language of the CBA, schedule adjustment pay was "added to [firefighters'] base pay . . . and is removed when a firefighter is absent from duty for 30 days" (*Id.* at 1344).

Ultimately, because the court found that the EMT and schedule adjustment payments were added to the firefighters' base salary by the express, unequivocal terms of the CBA, and the petitioner was earning those additional pays as part of his regular salary or wages at the time he began receiving GML §207-a (2) wage supplement payments, the *McKay* court affirmed the judgment of the Supreme Court, which granted the petitioner's CPLR Article 78 petition to annul the respondent municipality's denial of payment of those fringe benefits as part of a GML § 207-a (2) benefit (*see id.*).

As the foregoing makes clear, *McKay* does not affect a sea change in GML § 207-a "regular salary or wages" case law, as Petitioners claim it does. Rather, *McKay* is simply another example of a case in which a court relied on the well-established rule of *Chalachan* and its progeny that, in order for 207-a (2) beneficiaries to receive any additional payments over and above what courts have traditionally deemed to constitute "regular salary or wages" (*i.e.* base salary, salary increases and longevity pay) "[a]ny additional benefits must be expressly provided

for in the [CBA]" (*Matter of Chalachan v City of Binghamton*, 55 NY2d at 990; *accord Matter of Uniformed Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes*, 94 NY2d at 694).

Thus, it follows that the Decision and Order of the Second Department here does not conflict with the Third Department's decision in *McKay*, or otherwise create a split in Appellate Division authority. As stated above, both courts utilized the same foundational law to support their analyses. The only difference between the two cases is the outcome of their applications of the law to the facts, which is attributable solely to the fact that the CBAs at issue in each case contained key differences in their language. Here, it is beyond dispute that the CBAs at issue do not expressly provide that the Special Pays are "added to" the base salary of firefighters or are otherwise intended to be part of a negotiated GML § 207-a (2) benefit (*see* Point I.B., *supra*). By contrast, in *McKay*, the Third Department found that the CBA in that case expressly incorporated the special pays at issue into the firefighters' base salary (*see McKay*, 161 AD3d at 1342-1344).

Thus, it is submitted that the purported conflict alleged by Petitioners is nothing more than the product of two courts appropriately applying well-established law to distinguishable sets of facts and contractual language. Therefore, there is no conflict between the departments of the Appellate Division for this Court to resolve regarding the inclusion or exclusion of certain benefits in the calculation of GML

§ 207-a (2) supplements. Nor is it necessary to choose one analysis over the other, as *McKay* and the Decision and Order on appeal simply represent applications of the same legal rules to different facts, which can, and should be read to be in harmony with one another.

II. THE CITY MAY UNILATERALLY DISCONTINUE ITS FORMER PRACTICE OF INCLUDING THE SPECIAL PAYS IN PETITIONERS' GML § 207-a (2) SUPPLEMENT PAYMENTS

Petitioners spill a great deal of ink in Point II of their brief straining to convince the Court that, for various reasons, the "Third Department's Approach" [Pet. Br. at 30] to awarding special pays/fringe benefits to GML § 207-a (2) recipients is the correct one. Notwithstanding the fact that such an argument actually *supports* the City's decision to end its erroneous practice of including the Special Pays in the calculation of retired fire fighters' 207-a (2) benefits (*see* Points I.B. and C., *supra*), it is submitted that Petitioners' references to the legislative history of the 1977 amendments to GML §207-a and the City's former, extracontractual practice of including the Special Pays in its "final average salary" calculation to the New York State Retirement System are irrelevant to the decision in *McKay* and the outcome of the instant case.

In fact, it appears that nothing in Point II of Petitioners' brief even constitutes a legal argument. Rather, Petitioners' attempt to bend the GML § 207-a legislative history to fit their argument by cherry picking a handful of seemingly favorable

quotes,[7] and citing a trial court case that predates *Chalachan* as "proof" that the City must continue to pay them the Special Pays,[8] are, at bottom, different disguises for the same equitable argument, which is, essentially, that it would be unfair to allow the City to terminate its erroneous practice of including the Special Pays in Petitioners' GML § 207-a (2) wage supplement payments, because the City has been doing it since at least 1995. However, this Court's own precedent dictates that this argument should be summarily rejected.

In *Matter of Aeneas McDonald Police Benevolent Assn. v City of Geneva*, this Court addressed a strikingly similar scenario to the instant one, in which the City of Geneva ended a 24-year practice of providing a certain level of health insurance benefits to retired City employees, in favor of a less expensive plan (*see* 92 NY2d

---

[7] Contrary to Petitioners' characterization of the legislative history, a close examination of those documents [R: 2226-2312] reveals a predominating legislative concern with the undue financial burdens retired firefighters receiving GML § 207-a (2) benefits imposed on municipalities across the State (*see Mashnouk v Miles*, 55 NY2d 80, 84-86 [1982] [discussing legislative history of 1977 amendments]). "[T]he primary aim of the new statute was to shift a large portion of the financial burden generated by disabled firefighters from the municipal payrolls to the appropriate retirement system or pension fund" (*Id.* at 87).

[8] Petitioners cite *Smerek v Christiansen*, (111 Misc2d 580 [Sup Ct Westchester County 1981]) for the proposition that, at some point in the past, at least one court held that the Special Pays were properly included in the regular salary or wages of a GML § 207-a (2) beneficiary. However, *Smerek* was decided the year before this Court limited the statutory benefits due to GML § 207-a recipients in *Chalachan v. City of Binghamton* (55 NY2d 989 [1982]). *Smerek* also involved a different CBA than the one at issue here. In light of this Court's holding in *Chalachan* and subsequent decisions, the City rightly decided it was not obligated under GML § 207-a to continue paying the Special Pays to the detriment of the public fisc. The hearing officers who presided over Petitioners' due process hearings both considered and rejected the argument that *Smerek* – a Supreme Court case that has not been cited once in a reported New York decision – is controlling here in light of subsequent countervailing appellate authority [R: 2157, 2161-2162].

326, 329-330 [1998]). Over the petitioner's objection that the City should be bound to its past practice of continuing to pay for the more expensive health plan, the Court held that "[w]here, as here, the past practice concededly is unrelated to any entitlement expressly conferred upon the retirees in a collective bargaining agreement, we hold that there is no legal impediment to the municipality's unilateral alteration of the past practice" (*Id.* at 330-31).

The Court's analysis in *City of Geneva* should apply with equal force here as well. As has been previously established (*see* Point I, *supra*), Petitioners do not dispute that the parties' CBAs contain no express language entitling Petitioners to the inclusion of the Special Pays in their GML § 207-a (2) benefits and, indeed, no such language exists [R: 169-170, 172-173, 213, 257-258]. And because this Court has also held on multiple occasions that GML 207-a recipients are not entitled to any additional benefits over and above the traditional judicial formulation of "regular salary or wages" if the CBA at issue does not expressly provide such additional benefits to them (*see Matter of Uniformed Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes*, 94 NY2d at 694-695, *Matter of Chalachan v City of Binghamton*, 55 NY2d at 990), it can be concluded that, here, the City's erroneous practice of doing so "concededly is unrelated to any entitlement expressly conferred upon the retirees in a collective bargaining agreement" (*Matter of Aeneas McDonald Police Benevolent Assn. v City of Geneva*, 92 NY2d at 330-331).

Thus, it is submitted that, when read together, *City of Geneva, City of Cohoes,* and *Chalachan* clearly permit the City to unilaterally terminate its past practice of erroneously including the Special Pays in the calculation of Petitioners' GML § 207-a (2) benefits, regardless of the legislative history of GML 207-a, or how long the City had maintained the mistaken practice of reporting the Special Pays as part of Petitioners' regular salary or wages to the New York State Retirement System.

III. THE SUBSEQUENT ARBITRATION AWARD FOR ACTIVE BARGAINING UNIT MEMBERS IS OUTSIDE THE RECORD, IRRELEVANT AND SHOULD NOT BE CONSIDERED BY THIS COURT

Finally, Petitioners also attempt to diminish the validity of the Second Department's entirely proper Decision and Order in this matter by referencing a separate arbitration proceeding between one of Petitioners' former unions and the City [Pet. Br. at 35-36].

The City commenced a CPLR Article 75 proceeding to stay the union's demand for arbitration in the separate proceeding, which stay was granted by Supreme Court, but was later reversed by the Second Department in a decision which this Court also granted leave to hear, together with the instant case (*see Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, 187 AD3d 900 [2d Dept 2020], *lv granted* 37 NY3d 910 [2021]). However, the referenced arbitration proceeding that resulted from the Second Department's separate decision occurred long after the events and circumstances that comprise the present record on

appeal. As such, it is submitted that the "[s]ubmission by [Petitioners] of material outside the record and discussion in [their] brief of such material [should be] disregarded" (*Amsterdam Sav. Bank v City View Mgt. Corp.*, 45 NY2d 854, 855 [1978]; *see Sangi v Sangi*, 2021 NY Slip Op 04270, 2021 WL 2828544, *2 [3d Dept, July 8, 2021]).

Notwithstanding the foregoing and for reasons argued in Point I above, it is the City's position that, like Petitioners, the arbitrator, in his Decision and Award, ignored the controlling precedent of *Chalachan* and its progeny as well as the undisputed fact that the parties' CBAs do not contain any "express" language requiring the City to include the Special Pays in the calculation of GML § 207-a (2) benefits. Consequently, the City continues to pursue litigation in order to vacate said arbitration award for the same reasons set forth in this brief. Moreover, because the Second Department utilized the incorrect legal standard to conclude that the union's grievance in the *Yonkers Fire Fighters* case was arbitrable [*see* City's Briefs in APL-2021-00162], it is submitted that the subsequent arbitration proceeding referenced in Petitioners' brief is *void ab initio* and, thus, irrelevant to this case.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court should affirm the Decision and Order of the Second Department, which properly concluded that the City may unilaterally cease its erroneous practice of including night differential, holiday and check-in pay in Petitioners' GML § 207-a benefits. Nothing in the CBAs expressly requires that the City extend such payments to GML § 207-a (2) recipients, nor expressly requires that the Special Pays be included in a fire fighter's "regular salary or wages" as that term is understood in the GML § 207-a context.

Dated: March 3, 2022
Binghamton, New York

COUGHLIN & GERHART, LLP

By: _____

Paul J. Sweeney, Esq., of Counsel
Attorneys for Respondent-Respondent City of Yonkers
Office and P.O. Address
99 Corporate Drive
Binghamton, New York 13904
P.O. Box 2039
Binghamton, New York 13902-2039
Telephone: (607) 723-9511
Facsimile: (607) 723-1530

CERTIFICATION PURSUANT TO 22 NYCRR § 500.13 (c)

The undersigned hereby certifies the total number of words herein, inclusive of point headings and footnotes and exclusive of pages containing the statement of the status of related litigation; the table of contents; the table of cases and authorities; and the statement of questions presented, is 6,603.

Dated: March 3, 2022
Binghamton, New York

Paul J. Sweeney, Esq.