Appellate Division Docket Nos. 2017-04562, 2017-09778
Westchester County Clerk's Index No. 2302/16

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 –

CITY OF YONKERS,

Respondent-Respondent.

OPPOSITION TO MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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December 10, 2020

COURT OF APPEALS
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.

AFFIRMATION IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

Supreme Court,
Westchester County
Index No. 2302/2016

Appellate Division,
Second Department
Docket Nos.
2017-04562
2017-09778

PAUL J. SWEENEY, ESQ., pursuant to CPLR Rule 2106, affirms the following under penalties of perjury:

1. I am an attorney at law admitted to practice in the State of New York and a member of the law firm of Coughlin & Gerhart, LLP, attorneys for the City of Yonkers ("City") the Respondent in the above-referenced matter.

2. I handled the proceedings in the Supreme Court, Westchester County ("Supreme Court") and the Appellate Division, Second Department ("Second Department"). Consequently, I am extremely familiar with the facts and with the questions of law involved in this motion for leave to appeal. The source of my information and the grounds for my belief are a review of the record on appeal, my independent legal research, and my involvement with this matter before the Supreme Court and Second Department.

3. I make this Affirmation in opposition to the Petitioner-Appellants' motion for leave to appeal the Second Department's October 14, 2020 decision and order ("Decision and Order") affirming the Supreme Court's denial of Petitioner-Appellants' petition pursuant to Article 78 of the Civil Practice Law and Rules. The Decision and Order is attached to the Affirmation of Richard S. Corenthal, Esq. in support of the motion for leave to appeal (hereinafter, "Corenthal Aff.") as Exhibit "A." The judgment of the Supreme Court, Westchester County is attached to the Corenthal Aff. as Exhibit "B."

BACKGROUND

4. Under General Municipal Law (GML) § 207-a(1), firefighters who suffer a disabling injury in the line of duty are entitled to the "full amount of regular salary or wages" in addition to the medical treatment and hospital care required for treatment of the disabling injury. These amounts are paid by the municipality that employs the firefighter. GML § 207-a(1).

5. However, if a disabled firefighter receiving benefits under GML § 207-a(1) receives 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, then the municipality is only responsible to pay the now-retired firefighter 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).

6. Contrary to Petitioner-Appellants' characterization of the legislative history behind the 1977 amendments to GML § 207-a, a close examination of those documents (included as part of the Record on Appeal ("R.") at 2226-2308) 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 N.Y.2d 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.

7. While "regular salary or wages" are not defined in GML § 207-a, this Court, the appellate divisions and supreme courts have interpreted that phrase to exclude any contractual fringe benefit, including special pays, paid time off and health insurance, unless the fringe benefit was expressly included as a benefit under GML § 207-a or GML § 207-c.[1]

8. Since at least 1995, the City had erroneously been paying GML § 207-a(2) recipients a benefit which included the following fringe benefits: Night Shift Differential, Holiday Pay, and Check-In Pay (the "Special Pays"). (R. 96).

9. In 2015, City determined that the Special Pays were not expressly included as a negotiated GML § 207-a benefit in the collective bargaining agreement ("CBA") and, to end this overpayment announced that the GML § 207-a(2) supplemental wage benefit would exclude the Special Pays, effective January 14, 2016. (R. 151, 325).

10. Each of the Petitioner-Appellants was provided with a due process hearing, (R. 345-2148), and in March 2016 two hearing officers duly appointed by the City to preside over those hearings issued reports and recommendations

[1] This Court and other courts have applied the same holding to benefits under both statutes.

sustaining the City's decision to reduce the GML § 207-a(2) payments by the amount of the Special Pays. (R. 2153, 2159). In accordance with the reports and recommendations of these hearing officers, the City issued a determination which reduced the GML § 207-a(2) payments by the amount of the Special Pays. (R. 2165-66).

11. The Petitioner-Appellants commenced a CPLR Article 78 proceeding to challenge the City's determination and the Supreme Court, except for the right to recoup overpayments, affirmed that determination based on precedent from this Court and other appellate divisions. The Petitioner-Appellants appealed to the Second Department, which affirmed the Supreme Court's judgment based on the same case law.

DISCUSSION

THE DECISION AND ORDER OF THE APPELLATE DIVISION, SECOND DEPARTMENT IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE APPELLATE DIVISION, THIRD DEPARTMENT

12. The motion for leave to appeal by the Petitioner-Appellants has no merit. The Decision and Order of the Second Department does not violate current public policy, does not create a dissonance among the Appellate Divisions and does not adversely impact public sector labor law across the State. It is respectfully submitted that the issues presented here are not novel, or of public importance, or involve a conflict with prior decisions of this Court or among the departments of the

Appellate Division. As such, there is no basis for leave to appeal. See Court of Appeals, Rules of Practice 500.22(b)(4).

13. Without support, the Movants allege that the Decision and Order of the Appellate Division, Second Department in this matter dated October 14, 2020 is somehow inconsistent with the decision of the Appellate Division, Third Department in the matter of *McKay v. Village of Endicott*, 161 A.D.3d 1340 (3d Dep't 2018). *See* Corenthal Aff. at ¶ 27. *McKay* is the only case Movants cite as creating a purported conflict between the judicial departments.[2]

14. With respect to the calculation of "regular wages or salary" for purposes of the GML § 207-a benefit, the Court of Appeals and the Second Department have long held that this benefit consists of salary increases and the longevity pay provided to active firefighters. *Mashnouk v. Miles*, 55 N.Y.2d 80 (1982); *Whitted v. City of Newburgh*, 126 A.D.3d 910 (2d Dep't 2015); and *Aitken v. City of Mt. Vernon*, 200 A.D.2d 667, 668 (2d Dep't 1994).

[2] Movants also cite *Smerek v. Christiansen*, 111 Misc.2d 580 (Sup. Ct. Westchester Cty. 1981) for the proposition that the City "properly paid night differential, holiday, and check-in pay to GML § 207-a(2) recipients, including all of the Appellants." Corenthal Aff., ¶ 9. 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 N.Y.2d 989 (1982) and *Mashnouk v. Miles*, 55 N.Y.2d 80 (1982). The case also involved a different collective bargaining agreement. In light of this Court's 1982 decisions and subsequent decisions, as further detailed herein, the City rightly decided it was not obligated under GML § 207-a to continue paying the Movants here the Special Pays to the detriment of the public fisc. The hearing officers who presided over Movants' 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, 2161-62).

15. With respect to claims for compensation beyond this, the Court of Appeals and the Second Department have also held that the GML § 207-a benefit is calculated by excluding all other contract fringe benefits paid to active fire fighters unless the parties "expressly" negotiated a GML § 207-a benefit that includes such fringe benefits. In addressing claims by injured active firefighters that they were also entitled to other benefits under the CBA as part of the GML § 207-a(1) benefit, this Court held:

> 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.
>
> *Chalachan v. City of Binghamton*, 55 N.Y.2d 989, 990 (1982).

16. Eighteen years later, in *Uniformed Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes*, 94 N.Y.2d 686 (2000), this Court held that the failure of the CBA to "expressly" provide for a contract benefit would adversely impact the right to arbitrate a dispute relating to that benefit. "[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*." *Id.* 694-95 (emphasis in original) (quoting *Chalachan*, 55 N.Y.2d at 990).

17. Here, the Second Department correctly held that Movants had not shown sufficient evidence to make a claim that Special Pays were "expressly" included as part of a negotiated GML § 207-a(2) benefit. Consequently, the City's decision to terminate such payments was not arbitrary, capricious, or contrary to law. Exhibit "A" to Corenthal Aff., at p. 3.

18. In its Decision and Order, the Second Department cited *McKay*, in addition to *Chalachan*, for the proposition that "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 p. 2.

19. Moreover, the facts of *McKay* are distinguishable from the instant controversy. In *McKay*, the CBA at issue provided for EMS pay and schedule adjustment pay, and those payments were expressly "added to the base salary" of firefighters by the terms of the CBA. 161 A.D.3d at 1342-44.

20. Consistent with precedent of this Court, the Third Department in *McKay* acknowledged 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 1341-42 (citing *Chalachan*, 55

N.Y.2d at 990; *Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes*, 94 N.Y.2d at 694-95; and *Town of Niskayuna (Fortune)*, 14 A.D.3d 913, 914 (3d Dep't 2005)).

21. The Third Department's reasoning in *McKay* hinged on the "express" contractual language presented in that case. The CBA 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. "The plain language of the contract thus contemplates that EMS pay is included in a participant's base salary, rather than treated as a separate, additional benefit." *Id.*

22. Reasoning that the petitioner would be "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," the *McKay* court reasoned that because the petitioner retired at the rank of "Firefighter 1st Grade/EMS," and was participating in the EMS program when he retired, he was entitled to the extra EMS pay. *Id.*

23. Similarly, the Third Department noted that schedule adjustment pay, by the express language of the CBA, was "added to [firefighters'] base pay . . . and is removed when a firefighter is absent from duty for 30 days." *Id.* at 1344. Accordingly, the Third Department held 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.* (citing *Benson v. County of Nassau*, 137 A.D.2d 642, 643-44 (2d Dep't 1988)).

24. Because the EMT pay and schedule adjustment pay were added to the firefighters' base salary by the express, unequivocal terms of the CBA, the *McKay* court affirmed the judgment of the Supreme Court, Broome County which granted the petitioner's Article 78 petition to annul the respondent municipality's denial payment of those fringe benefits as part of a GML § 207-a(2) benefit. *Id.* As such, the Decision and Order of the Second Department here does not conflict with *McKay*, as the CBAs at issue here do not expressly provide that the Special Pays are "added to" the base salary of firefighters or were otherwise intended to be part of a negotiated GML § 207-a(2) benefit.

25. In this case the base salary is a defined term and the Special Pays are excluded from that definition and paid differently. The CBA for the firefighters represented by the IAFF, Local 628 ("Local 628") 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 Special Pays. As such, the term "annual base salary" in the Local 628 CBA is a defined term which does not expressly reference the Special Pays. (R. 213).

26. The CBA for fire officers represented by the Uniform Fire Officers' Association (UFOA) contains nearly identical language, and similarly 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 Special Pays. As such, the term "annual base salary" in the UFOA CBA is a defined term that does not expressly reference the Special Pays.

27. The Local 628 CBA at Section 4:02 ("Rate of Pay") provides that a "members rate of pay shall be one and two hundred thirty-secondths (1/232ths) 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 fringe benefits. The UFOA CBA contains nearly identical language regarding Rate of Pay. (R. 258).

28. 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. 172-73). These sections do not address the payment of Special Pays to retirees or those on GML § 207-a. 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).

29. The UFOA CBA also provides for 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).

30. Both CBAs define "Check-In Pay" as compensation for the twelve minutes prior to the official start of each shift when firefighters report "for receipt of instruction, equipment and/or uniform inspection" (for Local 628), or "for receipt of officer instructions, notice of pertinent alarms, roll call, training, equipment and/or uniform inspection" (for UFOA). (R. 172, 258).

31. While the CBAs does address some retiree benefits, such as retiree health insurance, (R. 177, 275-76), the CBAs do not address a retiree benefit pertaining to the Special Pays either in the CBA itself or the negotiated GML 207-a procedure. As such, there are no express terms in the CBAs that provide retired firefighters with the Special Pays at issue.

32. In a related context, courts (including the Second and Third Departments) have held that arbitration cannot be compelled as to a firefighter or police officer's claim to retiree disability benefits under GML 207-a and 207-c unless such benefit is "expressly provided" by the CBA. *See Uniform Firefighters of Cohoes*, 94 N.Y.2d at 694-95; *Inc. Vill. of Floral Park v. Floral Park Police Benev. Ass'n*, 89 A.D.3d 731 (2d Dep't 2011); *Town of Tuxedo v. Town of Tuxedo Police Benev. Ass'n,* 78 A.D.3d 849 (2d Dep't 2010); *Town of Evans (Town of Evans*

Police Benev. Ass'n), 66 A.D.3d 1408 (4th Dep't 2009); *Town of Niskayuna (Fortune)*, 14 A.D.3d 913 (3d Dep't 2005).

33. Moreover, the record is clear that the Special Pays are paid differently than regular pay. Under both CBAs, all the Special Pays are payable semi-annually as a special payment, and not as part of the base salary. (R. 172-73, 258-59). The UFOA CBA specifically provides that all

> special payments to members of the Association which are to be made on other than regularly scheduled bi-weekly pay days will be combined with payments made on regular pay days. Such payments to be combined with the regular paycheck closest in time to the date of the special payment and gross amount of the special payment to be designated separately as such and will be identified and taxes will be calculated and deducted *as if two (2) separate paychecks were being issued.*
>
> (R. 260).

34. And unlike the payments at issue in *McKay*, it would be unfair to active firefighters to provide the Special Pays to retirees as a GML § 207-a(2) supplement, because retirees are not actually "scheduled for undesirable [night] shifts," required to work on holidays, or required to check in twelve minutes prior to the start of their shifts. *Cf. Benson*, 137 A.D.2d at 643-44 (quoting *Chalachan*, 55 N.Y.2d at 990).

35. Given the critical factual differences between *McKay* and the instant controversy, the Second Department's decision did not create a split in authorities between it and the Third Department.

36. The Second and Third Departments have adhered to this Court's mandate that a "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*." *Uniform Firefighters of Cohoes*, 94 N.Y.2d at 694 (emphasis in original) (quoting *Chalachan*, 55 N.Y.2d at 990); *see also Carpenter v. City of Troy*, 192 A.D.2d 920, 921 (3d Dep't 1993) (finding holiday pay not within statutory definition of "regular salary or wages").

37. Far from being evidence of a split in the judicial departments, the critical difference between *McKay* and the instant controversy is that in *McKay* the Third Department simply found the Special Pays were expressly incorporated into the firefighters' base salary. *McKay*, 161 A.D.3d at 1342-44. Here, by contrast, the Special Pays—which are not referenced in the definition of regular pay—are a "separate, additional benefit" that is not added to the firefighters' base salary, but made in semi-annual special payments. *See id.* at 1342; (R. 172-73, 257-60).

38. Both courts have simply followed the "expressly provided" rule as set forth in *Chalachan* and its progeny. *See McKay*, 161 A.D.3d at 1341-42 (citing *Chalachan*, 55 N.Y.2d at 990); Ex. "A" to Corenthal Aff., p. 2 (citing *Chalachan* and *McKay*, 161 A.D.3d at 1341-42); *see also Inc. Vill. of Floral Park*, 89 A.D.3d at 732 (citing *Chalachan*, 55 N.Y.2d at 990); *Town of Tuxedo*, 78 A.D.3d at

851(same); *Town of Niskayuna*, 14 A.D.3d at 914 (same); *Benson*, 137 A.D.2d at 643-44 (same) (noting a line of cases holding that fringe benefits, including paid holidays, are not within the meaning of "regular salary and wages").

39. The purported conflict alleged by Movants is nothing more than the product of applying well-established law to distinguishable facts and contractual language. Therefore, there is no conflict between the departments of the Appellate Division "regarding the inclusion or exclusion of certain benefits in the GML § 207-a(2) supplements paid to retired Fire Fighters[.]" Corenthal Aff. ¶ 43. Like many an issue of contractual interpretation, the resolution of the dispute in *McKay* turned on the specific and idiosyncratic language of the CBA that expressly made the Special Pays there part of annual base pay.

40. Here, no such distinctive language makes the Special Pays an integral part of Movants' "regular salary or wages" for the purposes of calculating GML § 207-a(2) benefits. To the contrary, the structure and language of the Special Pays provisions in both CBAs here, designating them special semi-annual payments, strongly suggests they are not "regular salary or wages," but "a separate, additional benefit." *See McKay*, 161 A.D.3d at 1342; (R. 172-73, 257-60).

WHEREFORE, the undersigned respectfully requests that Movant's motion for leave to appeal be denied, with costs, and such further relief that this Court deems just and proper.

Dated: December 10, 2020
Binghamton, New York

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