

COURT OF APPEALS
STATE OF NEW YORK

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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,

Supreme Court, Westchester
County Index No. 2302/2016

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

**NOTICE OF MOTION FOR
LEAVE TO APPEAL**

Petitioners-Appellants,

- against -

THE CITY OF YONKERS,

Respondent-Respondent.

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PLEASE TAKE NOTICE, that upon all papers and prior proceedings in this proceeding, the Record and Briefs to the Appellate Division, Second Department, and the papers submitted herewith, Petitioners-Appellants, 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, will move this Court pursuant to CPLR § 5602(a)(1)(i) and 22 NYCRR §§ 500.21 and 500.22 at Court of Appeals Hall, 20 Eagle Street, Albany, New York on December 14, 2020, or as soon thereafter as counsel may be heard, for an order granting Petitioners-Appellants leave to appeal from the final order of the Appellate Division, Second Department dated October 14, 2020, that affirmed the judgment of the Supreme Court, Westchester County (Helen Blackwood, J.), dated March 17, 2017, insofar as appealed from, that denied that branch of the petition which was to annul so much of Respondent-Respondent's determination as excluded from the

supplemental benefits paid to the petitioners pursuant to General Municipal Law § 207-a(2) certain compensation paid to active firefighters for night differential, check-in pay, and holiday pay.

Dated: Melville, New York
November 30, 2020

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In the Matter of the Application of:

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Supreme Court, Westchester
County Index No. 2302/2016

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

**AFFIRMATION IN SUPPORT
OF MOTION FOR LEAVE TO
APPEAL TO THE COURT OF
APPEALS**

Petitioners-Appellants,

- against -

THE CITY OF YONKERS,

Respondent-Respondent.

----- X

PAUL K. BROWN, an attorney duly admitted to the Courts of the State of
New York, affirms the following under penalty of perjury:

1. I am associated with the firm Archer, Byington, Glennon & Levine, LLP, attorneys for Petitioners-Appellants 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 (“Appellants”) in the above-captioned proceeding.

2. This affirmation is submitted in support of Appellants’ Motion, pursuant to New York Civil Practice Law and Rules (“CPLR”) § 5602(a)(1) and Sections 500.21 and 500.22 of the Rules of this Court, for Leave to Appeal to the Court of Appeals.

3. Appellants seek permission to appeal the decision of the Appellate Division, Second Department, dated October 14, 2020. A copy of the October 14, 2020

Decision and Order of the Appellate Division with Notice of Entry dated October 30, 2020 is attached hereto as Exhibit "A."

BACKGROUND

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

5. If a permanently disabled firefighter is granted an accidental disability retirement allowance pursuant to Retirement and Social Security Law § 363, a performance of duty disability retirement allowance pursuant to Retirement and Social Security Law § 363-c, or a similar accidental disability pension provided by the pension fund of which he is a member, the municipality is obligated to pay only "the difference between the amounts received under such allowance or pension and the amount of his regular salary or wages." GML § 207-a(2). This is known as the "GML § 207-a(2) supplement."

6. In enacting GML § 207-a(2), the Legislature expressly documented that the GML § 207-a(2) supplement was not have no effect on the income received by permanently disabled Fire Fighters. (R. 2226-2308).

7. The term "regular salary or wages" is not defined in the GML.

8. Appellants are disabled Fire Fighter and Fire Officer (“Fire Fighter”) retirees injured on the job while working for Respondent-Respondent City of Yonkers (the “City”), and are entitled and have been approved by the City to receive GML § 207-a(2) supplements for the “full amount of regular salary or wages.” (R. 120-127).

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

10. However, on December 9, 2015, the City sent a letter to Appellants providing that effective January 14, 2016, the City planned to reduce each Appellant’s GML § 207-a(2) benefit by deducting night differential, holiday, and check-in pay—salary components which are paid to all active City Fire Fighters as part of their regular salary or wages, regardless of work schedule or status. (R. 151).

PROCEDURAL HISTORY

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

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

13. By judgment of the Supreme Court, Westchester County (Helen Blackwood, J.), dated March 10, 2017, the Supreme Court denied that branch of Appellants' petition seeking an order to annul the City's determination to reduce Appellants' payments pursuant to GML § 207-a(2) by deducting the night differential, holiday, and check-in pay. (R. 14-20). A copy of the March 10, 2017 Decision and Order is attached hereto as Exhibit "B."

14. Appellants moved to renew and reargue that portion of the Supreme Court's decision that denied the petition, pursuant to CPLR § 2221, arguing, *inter alia*, that

the Supreme Court overlooked and ignored the City's stipulation that since at least 1995, the City included night differential, holiday, and check-in pay to all City Fire Fighters, regardless of their work status or schedule. (R. 23).

15. The Supreme Court denied Appellants' motion to renew and reargue. (R. 7-10). A copy of the decision denying Appellants' motion to renew and reargue is attached hereto as Exhibit "C."¹

16. In its decision, the Supreme Court acknowledged that "the city stipulated that night differential, check-in pay, and holiday pay are part of regular salary or wages." (*Id.*)

17. Appellants appealed the Supreme Court's March 10, 2017 judgment and the Supreme Court's decision denying Appellants' motion to renew and reargue to the Appellate Division, Second Department (Docket Nos. 2017-09919; 2017-09778) (the "Appeal").

18. By letter dated May 17, 2018, Appellants notified the Second Department of the Memorandum and Order of the Appellate Division, Third Department, decided and entered on May 10, 2018 in *Matter of Joseph W. McKay v. Village of Endicott, et al.*, 161 A.D.3d 1340 (3d Dept. 2018), wherein the Third Department found that

¹ The Supreme Court misdated the decision denying Appellants' motion to renew and reargue, which was heard and decided on May 12, 2017.

“EMS” pay and a salary schedule adjustment to compensate active firefighters for additional hours needed to implement a 24-hour schedule was properly included in the computation of the petitioner’s regular salary and wages under GML § 207-a(2), because all active Fire Fighters at the rank held by the petitioner when he retired receive the EMS pay and schedule adjustment. A copy of Appellants’ May 17, 2018 letter enclosing the Third Department’s May 10, 2018 Memorandum and Order is attached hereto as Exhibit “D.”

19. The Appeal was argued on January 24, 2020.

20. By Decision and Order dated October 14, 2020 (the “October 14, 2020 Decision”) (Exhibit “A”), the Appellate Division, Second Department, *inter alia*, affirmed the Supreme Court’s judgment dated March 10, 2017 denying that branch of Appellants’ petition seeking an order to annul the City’s determination to reduce Appellants’ payments pursuant to GML § 207-a(2) by deducting the night differential, holiday, and check-in pay.

21. This Motion for Leave to Appeal to the Court of Appeals followed.

TIMELINESS

22. The October 14, 2020 Decision of the Appellate Division, together with notice of entry, was served by regular mail on October 30, 2020. (Exhibit “A”).

23. Appellants have thirty (30) days from service with notice of entry pursuant to CPLR § 5513(b), plus an additional five (5) days pursuant to CPLR § 2103(b)(2), to submit this Motion for Leave to Appeal.

24. Accordingly, Appellants have until December 4, 2020 to serve this Motion for Leave to Appeal.

JURISDICTION OF THIS COURT

25. The Court of Appeals has jurisdiction over this motion pursuant to CPLR § 5602(a)(1)(i). This is an appeal from the Appellate Division, Second Department finally determining the proceeding that originated in the Supreme Court, Westchester County.

QUESTION PRESENTED FOR REVIEW

26. This appeal presents the following question of law for the Court's review, raised at both the Supreme Court (R. 114-151) and the Appellate Division (Appellants' Brief at pp. 24-29; 31-41; Exhibit "D" annexed hereto) and preserved for review:

(1) Whether the Appellate Division, Second Department erred in its October 14, 2020 Decision by affirming, *inter alia*, the Supreme Court's judgment denying that branch of Appellants' petition seeking an order to annul the City's determination to reduce Appellants' payments pursuant to GML § 207-a(2) by

deducting the night differential, holiday, and check-in pay, thus creating a split in authority among Departments of the Appellate Division.

THE QUESTION PRESENTED MERITS REVIEW BY THIS COURT

I. THE OCTOBER 14, 2020 DECISION CREATES A SPLIT IN AUTHORITY BETWEEN THE SECOND AND THIRD DEPARTMENTS OF THE APPELLATE DIVISION

27. In *Matter of Joseph W. McKay v. Village of Endicott, et al.*, 161 A.D.3d 1340 (3d Dept. 2018), the Third Department addressed whether the calculation of the amount of the petitioner's GML § 207-a(2) supplement should include two contractual benefits that he was receiving when he retired—specifically, [emergency medical services] (“EMS”) pay and “schedule adjustment” pay. (Exhibit “D”).

28. As the relevant collective bargaining agreement did “not expressly award either benefit to disabled firefighters, petitioner [was] entitled to the inclusion of these payments only if they [were] part of his regular salary or wages within the meaning of [GML] § 207-a.” *Id.*

29. After “reiterat[ing] the basic principle that supplemental disability payments are based upon the salaries of active firefighters... ‘upon retirement,’” the Third Department held that both benefits were included in petitioner’s regular salary or

wages. *Id.* (emphasis in original) (quoting *Matter of Farber v. City of Utica*, 97 N.Y.2d 476, 479 (2002), cert denied, 537 US 823 (2002)) (citations omitted).

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

31. Next, because the petitioner "like all other firefighters on active duty, was receiving the [salary] adjustment when he retired, and an active firefighter currently employed at petitioner's rank would likewise receive the adjustment," the Third Department held that the schedule adjustment was included in petitioner's regular salary or wages for purposes of GML § 207-a. *Id.*

32. The Third Department expressly rejected the argument "that the schedule adjustment should not be included in the calculation...on the ground that [petitioner] has retired and has been absent from duty for more than 30 days" and noted that "because all active firefighters are employed on the 24-hour schedule and receive the adjustment, this determination does not 'unfairly discriminate against employees actually working' as does the inclusion of shift differential payments received only by those active employees who are scheduled for undesirable shifts." *Id.* (quoting and distinguishing *Benson v. County of Nassau*,

137 AD2d 642, 643-644 (1988), *lv denied* 72 N.Y.2d 809 (1988) and *Matter of Chalachan v City of Binghamton*, 55 N.Y.2d 989, 990 (1982)).

33. Under the Third Department's analysis, contractual benefits, such as 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 included in the disabled retiree's "regular salary or wages" for purposes of GML § 207-a. *Id.*

34. Contrastingly, the Second Department applied a bright-line rule limiting "regular salary or wages" to a Fire Fighter's "annual" or "base" salary "plus prospective salary increases...and longevity increments,...but excluding unused vacation time and sick time accruing during disability...holiday pay...and certain shift differential payments." (Exhibit "A") (citations omitted).

35. It is undisputed that the City has always paid night differential, check-in pay, and holiday pay as part of "regular salary or wages" to all active Fire Fighters, regardless of work status or schedule. (R. 96).

36. Specifically, the City stipulated in a consolidated proceeding before PERB that:

7. Since at least 1995 to the present, the City has paid night differential, check-in pay and holiday pay to all active bargaining unit members of the UFOA and Local 628 employed by the City as part of

regular salary or wages regardless of their work status or their work schedule

[***]

“9. Since at least 1995 to the present, the City has paid night differential to all UFOA and Local 628 bargaining unit members as part of their regular salary or wages whether or not the individual actually worked a night tour.

[***]

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

(*Id.*)

37. Nevertheless, despite these undisputed and stipulated facts in the record that all active City Fire Fighters receive the night differential, holiday pay, and check-in pay, regardless of work status or schedule (a fact pattern that is indistinguishable from the one presented to the Third Department in *Matter of Joseph W. McKay v. Village of Endicott, et al.*, 161 A.D.3d 1340 (3d Dept. 2018)), the Second Department affirmed the Supreme Court's judgment that Appellants did not sustain their burden of establishing their entitlement to the night differential, holiday, and check-in pay as part of “regular salary or wages” under GML § 207-a. (Exhibit “A”).

38. The City's stipulation is dispositive proof sufficient to establish Appellants' entitlement to night differential, check-in pay, and holiday pay as part of “regular salary or wages” for purposes of the GML § 207-a(2) supplement under the

rationale of the Third Department. *Matter of Joseph W. McKay v. Village of Endicott, et al.*, 161 A.D.3d 1340 (3d Dept. 2018) (“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”).

39. The Second Department should have distinguished *Benson v. County of Nassau*, 137 A.D.2d 642 (2d Dept. 1988)² and *Matter of Chalachan v. City of Binghamton*, 55 N.Y.2d 989 (1982)³ for the same reasons as the Third Department did: the City pays the same amounts of night differential, check-in pay, and holiday pay to Fire Fighters regardless of whether they ever work night shifts, or check in early, or work holidays. (*See*, Exhibit “D”).

40. As a result of the Second Department’s split with the Third Department, for purposes of the GML § 207-a(2) supplement, contractual benefits such as night

² In *Benson v. County of Nassau*, 137 A.D.2d 642 (2d Dept. 1988), the shift differential payment at issue was paid only to those Fire Fighters “actually working the undesirable shifts,” and not all active Fire Fighters regardless of schedule.

³ In *Matter of Chalachan v. City of Binghamton*, 55 N.Y.2d 989 (1982), the unused vacation time at issue was only paid to active employees who did not use their respective vacation allotments, and not all active Fire Fighters regardless of schedule.

differential, holiday pay, or check-in pay received by all active Fire Fighters are included in “regular salary or wages” in the Third Department but excluded from “regular salary or wages” in the Second Department.


41. Compounding the confusion between the Departments, the Second Department further departed from the Third Department’s reasoning by providing that the parties “may agree in a collective bargaining agreement to include such additional amounts in the regular salary or wages payable to disable firefighters pursuant to [GML] § 207-a,” and explicitly referenced a related appeal decided therewith and implied that the entitlement to the night differential, holiday, and check-in pay is properly addressed at the arbitration demanded by active Fire Fighters employed by the City—an arbitration to which Appellants are not a party. (Exhibit “A”).

42. Thus, unlike the Third Department’s decision addressing whether a benefit contained in the CBA was part of petitioner’s “regular salary or wages” under the GML head on, the Second Department declined to comment and referred to an arbitration brought by active City Fire Fighters, instead of addressing the issue of whether the contractual benefits in the CBA were included in “regular salary or wages” for purposes of Appellants’ GML § 207-a(2) supplements.

43. In accordance with the foregoing, Appellants respectfully request that this Court grant the instant Motion for Leave to Appeal to the Court of Appeals to resolve the split in authority 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 who have been permanently disabled in the line of duty.

Dated: Melville, New York
November 30, 2020

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EXHIBIT “A”

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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_____AD3d_____

Argued - January 24, 2020

WILLIAM F. MASTRO, J.P.
MARK C. DILLON
LINDA CHRISTOPHER
PAUL WOOTEN, JJ.

2017-04562
2017-09778

DECISION & ORDER

In the Matter of John Borelli, et al., appellants,
v City of Yonkers, respondent.

(Index No. 2302/16)

Archer, Byington, Glennon & Levine, LLP, Melville, NY (Richard S. Corenthal of counsel), for appellants.

Coughlin & Gerhart, LLP, Binghamton, NY (Paul J. Sweeney and Shannon E. Kane of counsel), for respondent.

In a proceeding pursuant to CPLR article 78 to review a determination of the respondent, City of Yonkers, dated April 5, 2016, made after due process hearings, which, inter alia, excluded from the supplemental benefits paid to the petitioners pursuant to General Municipal Law § 207-a(2) certain compensation paid to active firefighters for night differential, check-in pay, and holiday pay, the petitioners appeal from (1) a judgment of the Supreme Court, Westchester County (Helen Blackwood, J.), dated March 10, 2017, and (2) a decision of the same court dated August 1, 2017. The judgment, insofar as appealed from, denied that branch of the petition which was to annul so much of the respondent's determination as excluded from the supplemental benefits paid to the petitioners pursuant to General Municipal Law § 207-a(2) certain compensation paid to active firefighters for night differential, check-in pay, and holiday pay.

ORDERED that the appeal from the decision is dismissed, as no appeal lies from a decision (*see Schicchi v J.A. Green Const. Corp.*, 100 AD2d 509); and it is further,

ORDERED that the judgment is affirmed insofar as appealed from; and it is further,

October 14, 2020

Page 1.

MATTER OF BORELLI v CITY OF YONKERS

ORDERED that one bill of costs is awarded to the respondent, City of Yonkers.

Since at least 1995, the City of Yonkers has included certain sums paid to active firefighters for night differential, check-in pay, and holiday pay in calculating the “regular salary and wages” that must be paid to retired disabled firefighters and fire officers entitled to receive General Municipal Law § 207-a(2) benefits. By letters dated December 9, 2015, the City advised the petitioners, retired disabled firefighters and fire officers receiving such benefits, that it had determined to exclude from the supplemental benefits paid to them pursuant to General Municipal Law § 207-a(2) certain compensation paid to active firefighters for night differential, check-in pay, and holiday pay. After the petitioners were afforded due process hearings, the hearing officers issued reports concluding that the City’s determination had a rational basis and was not arbitrary and capricious, and recommending that it be upheld. By a final determination dated April 5, 2016, the City concurred with the hearing officers’ recommendations and issued notices to all retired disabled firefighters and fire officers of its intention, inter alia, to adjust their General Municipal Law § 207-a(2) benefits accordingly.

By the filing of a petition dated June 30, 2016, the petitioners commenced this proceeding pursuant to CPLR article 78 against the City to review and annul, inter alia, so much of the determination as excluded the sums paid to active firefighters for night differential, check-in pay, and holiday pay from their prospective disability benefit payments, claiming entitlement to those amounts pursuant to the express language of General Municipal Law § 207-a(2). In a judgment dated March 10, 2017, the Supreme Court, inter alia, denied that branch of the petition. The petitioners appeal from so much of the judgment as denied that branch of their petition which was to annul so much of the determination as excluded compensation for night differential, check-in pay, and holiday pay from their prospective General Municipal Law § 207-a(2) benefit payments. We affirm.

“General Municipal Law § 207-a guarantees a firefighter who is disabled in the performance of his or her duties entitlement to, among other benefits, the continued payment by his or her municipal employer of the ‘full amount of his [or her] regular salary or wages until [the] disability . . . has ceased’” (*Matter of Whitted v City of Newburgh*, 126 AD3d 910, 910-911, quoting General Municipal Law § 207-a[1]). “If, however, a permanently disabled firefighter is granted an accidental disability retirement allowance pursuant to Retirement and Social Security Law § 363, a performance of duty disability retirement allowance pursuant to Retirement and Social Security Law § 363-c, or a ‘similar accidental disability pension provided by the pension fund of which he [or she] is a member,’ the municipality is obligated to pay only ‘the difference between the amounts received under such allowance or pension and the amount of his [or her] regular salary or wages’” (*Matter of Whitted v City of Newburgh*, 126 AD3d at 911, quoting General Municipal Law § 207-a[2]).

Disability entitlements are generally a matter of statutory right (*see Benson v County of Nassau*, 137 AD2d 642, 643), and recipients of General Municipal Law § 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 (*see Matter of Chalachan v City of Binghamton*, 55 NY2d 989, 990; *Matter of McKay v Village of Endicott*, 161 AD3d 1340, 1341-1342).

The amount of a disabled firefighter's regular salary or wages under General Municipal Law § 207-a(2) "is calculated based on the current salary of an active firefighter at the same grade the pensioner held upon retirement" (*Matter of Farber v City of Utica*, 97 NY2d 476, 479; see *Matter of Whitted v City of Newburgh*, 126 AD3d at 911). The statutory term "regular salary or wages" has been interpreted by various courts as ordinarily being limited to a firefighter's "annual" or "base" salary plus prospective salary increases (see *Matter of Farber v City of Utica*, 97 NY2d at 479; *Matter of Mashnoug v Miles*, 55 NY2d 80, 88) or decreases (see *Matter of Whitted v City of Newburgh*, 126 AD3d at 911), and longevity increments (see *Matter of Whitted v City of Newburgh*, 65 AD3d 1365, 1368; *Matter of Wise v Jennings*, 290 AD2d 702, 703; *Matter of Aitken v City of Mount Vernon*, 200 AD2d 667, 668), but excluding unused vacation time and sick time accruing during disability (see *Matter of Chalachan v City of Binghamton*, 55 NY2d at 990; *Phaneuf v City of Plattsburgh*, 84 Misc 2d 70 [Sup Ct, Clinton County], *affd* 50 AD2d 614), holiday pay (see *Matter of Carpenter v City of Troy*, 192 AD2d 920, 921), and certain shift differential payments (see *Benson v County of Nassau*, 137 AD2d at 644).

In view of the foregoing authority, we agree with the Supreme Court that the 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). Accordingly, we agree with the Supreme Court's determination to deny that branch of the petition which was to annul so much of the determination as excluded compensation to the petitioners for night differential, check-in pay, and holiday pay under the terms of that statute.

However, parties may agree in a collective bargaining agreement to include such additional amounts in the regular salary or wages payable to disabled firefighters pursuant to General Municipal Law § 207-a. As we have observed in the related appeal in *Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO* (___ AD3d ___ [decided herewith]), the distinct claim by the labor union representing active City of Yonkers firefighters that the City's unilateral decision to exclude these items of compensation from General Municipal Law § 207-a(2) disability benefits violated the parties' applicable collective bargaining agreement and past practices is a matter properly addressed to arbitration. Accordingly, we express no opinion regarding whether and to what extent the petitioners' disability benefits may be affected by the ultimate resolution of that arbitration.

The petitioners' remaining contentions are without merit.

MASTRO, J.P., DILLON, CHRISTOPHER and WOOTEN, JJ., concur.

ENTER:



Aprilanne Agostino
Clerk of the Court

EXHIBIT “B”

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
In the Matter of the Application of
JOHN BORELLI, CHRISTOPHER BOSSEY,
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WILLIAM PARKER, TIMOTHY POWERS,
ARTHUR RIVERA, JEROME RODRIGUEZ,
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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,

DECISION

Index No: 2302/2016

Petitioners,

For a Judgement Pursuant to Article 78 of the Civil
Practice Law and Rules

-against-

CITY OF YONKERS,

Respondent.

-----X
BLACKWOOD, A.J.S.C.

The above-named petitioners commenced the within proceeding against the City of Yonkers (hereinafter "the City") pursuant to Article 78 of the New York State Civil Practice Law and Rules ("CPLR"), for an order declaring the City's decision to reduce and recoup the

petitioners' payments pursuant to GML §207-a(2) (hereinafter "207-a(2) payments") as arbitrary and capricious and an abuse of discretion, as well as a violation of GML §201-a(2); requiring the City to continue to include Night Differential, Check-in Pay and Holiday Pay in the petitioners' 207-a(2) payments; requiring the City to pay all monies including Night Differential, Check-in Pay and Holiday Pay, that were improperly withheld and reduced from petitioners' 207-a(2) payments with interest; permanently enjoining the city from recouping overpaid 207-a(2) payments; requiring the City to provide a detailed calculation of each petitioners' payments including an itemized list of any deductions; and declaring that supplemental payments paid to Yonkers Fire Fighters and Yonkers Fire Officers under GML 207-a(2) include Night Differential Pay, Check-in Pay and Holiday Pay. Thereafter, the City Filed a motion to dismiss the action in its entirety.

On November 22, 2017, this Court dismissed respondents' motion to dismiss, affording the pleadings "a liberal construction," accepting "the facts as alleged in the complaint as true," and according plaintiffs "the benefit of every possible favorable inference," (Leon v. Martinez, 84 N.Y.2d 83 (1994), Morone v. Morone, 50 N.Y.2d 481). The facts in that decision are incorporated herein.

The court must now determine whether, based upon all of the pleadings, the determination by the respondents to reduce the petitioners' 207-a(2) payments and recoup the overpaid money was arbitrary and capricious and lacked a rational basis (Pell v. Board of Ed. Of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222, 313 N.E.2d 321 (1974)). In so doing, the court must examine whether or not the administrative action was "without foundation in fact," "without sound basis in reason," and was "generally taken without regard to the facts," (Pell, at 231).

With respect to the respondent's decision to reduce the petitioners' 207-a(2) payments by deducting the night differential, holiday, and check-in pay, the court finds that the decision was not arbitrary or capricious. The respondent's decision relied on the findings of both hearing officers, who, in turn, relied heavily upon the Second Department and Court of Appeals cases that distinguish between "regular salary and wages" and "fringe benefits," (see, Chalachan v. City of Binghamton, 55 N.Y.2d 989, 434 N.E.2d 256 (1982); Whitted v. City of Newburgh, 65 A.D.3d 1365; 886 N.Y.S.2d 207 (2009); Benson v. Nassau County, 137 A.D. 642, 524 N.Y.S.2d 733 (1988)).

In Chalachan, a case that dealt with the payment of unused vacation time, the Court of Appeals held that unless a collective bargaining agreement explicitly states that additional benefits are to be included in 207-a(2) payments, those payments will only include regular salary and wages (Chalachan, 55 N.Y.2d at 989). The Court reasoned that it was unfair to "imply a right to vacation benefits under section 207-a since disabled firemen do not have to work at all, and to pay them for unused vacation time would unfairly discriminate against employees actually working," (Id. at 990). Furthermore, the Second Department found in Benson that shift differential payments do not fall within the definition of "regular salary or wages," (Benson, 137 A.D.2d at 643). Similar to the reasoning in Chalachan, the Second Department stated in Benson that to pay 207-c recipients shift differential pay would "unfairly discriminate against those persons actually working the undesirable shifts and suffering the inconvenience inherent in working evening hours," (Id. at 644). In the case at bar, the collective bargaining agreements between the firefighters, fire officers, and the City of Yonkers are silent as to what constitutes 207-a(2) payments. Furthermore, applying the logic in Chalachan and Benson, it would be unfair to pay 207-a(2) recipients holiday pay since they cannot work holidays, night differential since


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

As to the City's decision to recoup overpaid 207-a(2) payments, the court finds that such decision was arbitrary and capricious and lacked a rational basis. The overpayment paid out to the petitioners over the course of several years was through no fault of the petitioners or any representation or misrepresentation made by them or on their behalf. Unlike the payments made in Sheehan, it would be patently unfair of the City to seek the recoupment of money that they chose to include in the 207-a(2) payments, despite being aware of the existing caselaw that indicated otherwise (County of Westchester v. Sheehan, 292 A.D.2d 486, 741 N.Y.S.2d 244 (2002)).

Therefore, the petitioner's motion is denied except to the extent that the court finds that the City's decision to recoup the petitioners' over payments pursuant to GML §207-a(2) (hereinafter "207-a(2) payments") as arbitrary and capricious and an abuse of discretion and permanently enjoins the City from recouping said payments. Additionally, the City is hereby ordered to provide a detailed calculation of each petitioners' payments including an itemized list of any deductions made in accordance with this decision and order.

This constitutes the opinion, decision, and order of this Court.

Dated: White Plains, New York
March 1st, 2017



HON. HELEN M. BLACKWOOD
Acting Justice of the Supreme Court

TO: Richard S. Corenthal, Esq.
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1350 Broadway, Suite 501
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Attorneys for Petitioners

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Attorneys for Respondent

EXHIBIT “C”

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
In the Matter of the Application of
JOHN BORELLI, CHRISTOPHER BOSSEY,
MICHAEL BURKE, FRANK CALLACE,
THOMAS CONNERY, BRIAN CRISTIANO,
MICHAEL DILIDDO, RAYMOND FOX,
BRIAN HARVEY, PAUL HESSLER,
NEIL HICKEY, KEVIN KEHOE,
KENNETH KELLY, BRIAN KENNY,
WILLIAM MCKENNA, EUGENE MCNULTY,
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DECISION

Index No: 2302/2016

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BLACKWOOD, A.J.S.C.

The above-named petitioners commenced a proceeding against the City of Yonkers (hereinafter "the City") pursuant to Article 78 of the New York State Civil Practice Law and Rules ("CPLR"), for an order declaring the City's decision to reduce and recoup the petitioners' payments pursuant to GML §207-a(2) (hereinafter "207-a(2) payments") as arbitrary and

capricious and an abuse of discretion, as well as a violation of GML §201-a(2); requiring the City to continue to include Night Differential, Check-in Pay and Holiday Pay in the petitioners' 207-a(2) payments; requiring the City to pay all monies including Night Differential, Check-in Pay and Holiday Pay, that were improperly withheld and reduced from petitioners' 207-a(2) payments with interest; permanently enjoining the city from recouping overpaid 207-a(2) payments; requiring the City to provide a detailed calculation of each petitioners' payments including an itemized list of any deductions; and declaring that supplemental payments paid to Yonkers Fire Fighters and Yonkers Fire Officers under GML 207-a(2) include Night Differential Pay, Check-in Pay and Holiday Pay. Thereafter, the City filed a motion to dismiss the action in its entirety.

On November 22, 2017, this Court denied respondents' motion to dismiss, affording the pleadings "a liberal construction," accepting "the facts as alleged in the complaint as true," and according petitioners "the benefit of every possible favorable inference," (Leon v. Martinez, 84 N.Y.2d 83 (1994), Morone v. Morone, 50 N.Y.2d 481). In denying the motion to dismiss, the court ordered that the respondents file an answer to petitioner's motion in accordance with CPLR §7804(f).

On March 10, 2017, based upon all of the pleadings, this court denied the petitioners' application, finding that the City's decision to reduce petitioners' 207-a(2) payments by deducting the night differential, holiday, and check-in pay, was neither arbitrary nor capricious. However, the court also granted the petition in part, finding that the City's decision to recoup overpaid 207-a(2) payments was arbitrary and capricious and lacked a rational basis. Pursuant to that decision, petitioners filed the within motion to renew and reargue the portion of the court's decision that denied the petition.

CPLR § 2221 is a mechanism whereby a defendant may seek to reargue a court's determination "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)). In this motion to reargue, petitioners argue that the court should grant their motion to reargue because the court incorrectly applied the case law with regard to the "fairness doctrine." Additionally, they argue that the court failed to address the issue of collateral estoppel, and finally, that the court overlooked the city's "admission" that GML 207-a(1) and GML 2071a(2) benefits must be equal.

A motion to reargue is "addressed to the sound discretion of the court which decided the prior motion," (Carrillo v. PM Realty Group, 16 A.D.3d 611, 611, 793 N.Y.S.2d 69 (2005) and "may be granted upon a showing that the court overlooked or misapprehended the facts or for some reason mistakenly arrived at its decision," (Delcrete Corp. v. Kling, 67 A.D.2d 1099, 1099-1100, 415 N.Y.S.2d 148 (1979)). The petitioners' reiteration of their original arguments does not make such a showing. 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)).

Also included within this motion is a motion to renew. Pursuant to CPL §2221(e)(2), a motion for leave to renew may be "based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." In support thereof, petitioners argue that subsequent to the filing of the original Article 78 proceeding, the city stipulated that night differential, check-in pay, and holiday pay are part of regular salary or wages. Therefore, they


contend, this new fact should lead this court to a conclusion other than that included in its original decision.

As noted by respondents, this information 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."

As such, the petitioners' motion for leave to reargue and renew is denied in its entirety.

This constitutes the decision of this Court.

Dated: White Plains, New York
August 1, 2016



HON. HELEN M. BLACKWOOD
Acting Justice of the Supreme Court

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May 17, 2018

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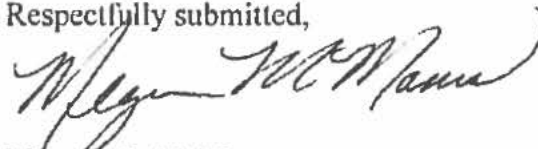
Aprilanne Agostino, Esq.
Clerk of the Court
Supreme Court of the State of New York
Appellate Division, Second Judicial Department
45 Monroe Place
Brooklyn, NY 11201

**Re: In the Matter of the Application of John Borelli, et. al. v.
City of Yonkers Appellate Division Docket Nos. 2017-04562 and 2017-09778**

Dear Ms. Agostino:

We represent Appellants, John Borelli et al., in the above referenced appeals. For the Court's consideration, we are enclosing a relevant New York Supreme Court, Appellate Division Third Judicial Department case decided and entered on May 10, 2018 – In the Matter of McKay v. Village of Endicott et al., __ AD3d ___, appeal No. 525212 (3d Dept. 2018).

Respectfully submitted,



Megann K. McManus

Enclosure

cc: Paul J. Sweeney, Esq., Coughlin & Gerhart, LLP (Via Facsimile Only (607) 723-1530)
w/encl.

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: May 10, 2018

525212

In the Matter of JOSEPH W.
McKAY,
Respondent,
v

MEMORANDUM AND ORDER

VILLAGE OF ENDICOTT et al.,
Appellants.

Calendar Date: March 29, 2018

Before: Garry, P.J., Egan Jr., Devine, Aarons and Rumsey, JJ.

Coughlin & Gerhart, LLP, Binghamton (Lars P. Mead of
counsel), for appellants.

McDonough & Artz, PC, Binghamton (Philip J. Artz of
counsel), for respondent.

Garry, P.J.

Appeal from a judgment of the Supreme Court (Lebous, J.),
entered June 8, 2017 in Broome County, which granted petitioner's
application, in a proceeding pursuant to CPLR article 78, to
annul a determination of respondent Village of Endicott denying
petitioner's application for supplemental benefits pursuant to
General Municipal Law § 207-a (2).

Petitioner was employed as a firefighter by respondent
Village of Endicott (hereinafter respondent) until he became
disabled as the result of an April 2008 work-related injury.
Petitioner and respondent then disagreed about petitioner's
eligibility for disability benefits pursuant to General Municipal
Law § 207-a, and their dispute led, among other things, to the

commencement of this CPLR article 78 proceeding. The related facts are described in more detail in our prior decision in this proceeding (139 AD3d 1327 [2016], lv denied 28 NY3d 912 [2017]) and in our decisions in two previous appeals in a separate but closely related CPLR article 78 proceeding (Matter of McKay v Village of Endicott, 137 AD3d 1462 [2016]; Matter of McKay v Village of Endicott, 113 AD3d 989 [2014], lv dismissed 23 NY3d 1015 [2014]).

The current appeal arises from this Court's 2016 determination that respondent is bound by a Hearing Officer's determination that petitioner is entitled to supplemental permanent disability benefits under General Municipal Law § 207-a (2) for a period beginning in December 2010 and continuing until he reaches mandatory service retirement age (139 AD3d at 1330-1331). Following that decision, petitioner proposed a judgment establishing the amount of benefits due to him. In opposition, respondent argued that petitioner's calculations were incorrect because, as pertinent here, they were premised upon a base salary that improperly included certain payments provided for in the governing collective bargaining agreement (hereinafter CBA). In September 2016, Supreme Court (Tait, J.) found that the payments were properly included and, in June 2017, Supreme Court (Lebous, J.) issued a judgment directing respondent to pay retroactive and prospective benefits to petitioner based upon a salary calculation that includes the disputed payments. Respondents appeal.¹

General Municipal Law § 207-a (2) requires respondent to pay supplemental disability benefits to petitioner as of December 2010, when he began receiving performance of duty disability

¹ In October 2016, Supreme Court (Tait, J.) issued an amended judgment in the separate CPLR article 78 proceeding that ordered respondent to pay retroactive benefits to petitioner for the period from December 2010 through February 2014, in an amount based upon the inclusion of the disputed contractual payments. Respondent appealed, raising essentially identical issues to those involved in this appeal (Matter of McKay v Village of Endicott, ___ AD3d ___ [appeal No. 525154, decided herewith]).

retirement benefits, in the amount of "the difference between the [performance of duty disability retirement] amounts received . . . and the amount of his regular salary or wages" (see Retirement and Social Security Law § 363-c; Matter of McKay v Village of Endicott, 137 AD3d at 1463). The amount of a disabled firefighter's regular salary or wages, within the meaning of this statute, "is calculated based on the current salary of an active firefighter at the same grade the pensioner held upon retirement" (Matter of Farber v City of Utica, 97 NY2d 476, 479 [2002], cert denied 537 US 823 [2002]; see Matter of Wise v Jennings, 290 AD2d 702, 703 [2002], lv denied 97 NY2d 612 [2002]). This calculation includes prospective salary increases and decreases that take effect after a disabled firefighter retires (see Matter of Whitted v City of Newburgh, 126 AD3d 910, 911 [2015]; Matter of Wise v Jennings, 290 AD2d at 703; Matter of Drahos v Village of Johnson City, 80 AD2d 106, 107 [1981]; see also Matter of Mashnook v Miles, 55 NY2d 80, 88 [1982]). However, a CBA may not be construed to imply the expansion of a disabled firefighter's rights beyond those granted by the statute (see Matter of Chalachan v City of Binghamton, 55 NY2d 989, 990 [1982]). Thus, unless a CBA expressly awards contractual benefits that are not part of regular salary or wages to recipients of benefits under General Municipal Law § 207-a, the recipients are not entitled to them (see id.; see also Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes, 94 NY2d 686, 694-695 [2000]; Matter of Town of Niskayuna [Fortune], 14 AD3d 913, 914 [2005], lv denied 5 NY3d 716 [2005]).

The parties' dispute here focuses on whether the calculation of the amount of petitioner's supplemental disability payments should include two contractual benefits that he was receiving when he retired, identified in the CBA as "EMS" pay and "schedule adjustment" pay. As the CBA does not expressly award either benefit 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 General Municipal Law § 207-a. Respondent contends that both are additional payments that were not part of petitioner's regular salary or wages and, thus, that they should not have been included in the calculation of petitioner's supplemental disability benefits.

Turning first to EMS pay, petitioner was employed when he retired at the rank of "Firefighter 1st Grade/EMS" and was participating in a contractual benefit described in the CBA as the EMS program. According to the CBA, participants in this program receive an annual payment in a specified amount "to be added to [his or her] base salary." When an employee ceases to participate, his or her "base salary shall be reduced" by the amount of the additional payment. 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. Also supporting this conclusion, the rank of "[First] Grade/EMS" that petitioner held at the time of his retirement - and the applicable salary - are listed in respondent's pay schedule separately from those ranks and salaries that do not apply to EMS participants.

We reject the contention by respondent that a separate CBA provision precludes a finding that EMS pay is part of petitioner's regular salary and wages. The provision referenced by respondent pertains generally to additional compensation for firefighters with various professional specializations, and states that these payments "shall not be added to the base salary." However, the provision appears in a part of the CBA headed "Future Impact Issues," and further states that, "upon operation by [respondent] of a new revenue-generation program" outside respondent's boundaries that involves firefighters with certain professional certifications, the bargaining unit will receive a stated percentage of any revenues received by respondent, which funds are to be divided equally among the unit's membership. Nothing in the language of this provision other than a reference to emergency medical technicians suggests that the EMS program is included. Indeed, the EMS provision appears separately within the CBA, and is otherwise clearly distinct; it applies to a single, identified program, sets out a specific amount of EMS compensation rather than a percentage of a revenue source, is paid only to program participants, and is not divided equally among the membership. "It is well established that where a contract employs contradictory language, specific provisions control over general provisions" (Foley v Foley, 155 AD3d 1506, 1507 [2017] [internal quotation marks, brackets, ellipsis and citations omitted]; see Muzak Corp. v Hotel Taft

Corp., 1 NY2d 42, 46 [1956]). To the extent that these two provisions may be read to contradict one another, the specific language of the EMS provision controls over the more general terms of the professional specialties provision. Thus, the language in the EMS provision indicating that EMS payments are included in an employee's base salary is unaffected by the preclusory language in the other provision.

There is no merit in the further argument by respondent that petitioner is not entitled to EMS pay because the EMS provision within the CBA limits such payments to active participants, while petitioner has retired. We reiterate the basic principle that supplemental disability payments are based upon the salaries of active firefighters employed at the same grade held by a disabled firefighter "upon retirement" (Matter of Farber v City of Utica, 97 NY2d at 479 [emphasis added]; see Matter of Wise v Jennings, 290 AD2d at 703). A current firefighter employed at the "[First] Grade/EMS" rank that petitioner held when he retired would, by virtue of that rank, be an active participant in the EMS program and would receive the salary applicable to that grade, which includes EMS payments. "[General Municipal Law §] 207-a is a remedial statute enacted for the benefit of fire[fighters] which should be liberally construed in their favor" (Matter of Klonowski v Department of Fire of City of Auburn, 58 NY2d 398, 403 [1983] [internal quotation marks, brackets and citations omitted]). Interpreting the statutory phrase "regular salary or wages" in that light, we agree with Supreme Court that petitioner's base salary for this purpose is that of a current firefighter employed at the "[First] Grade/EMS" rank and, thus, that the EMS payment is part of his regular salary or wages for the purpose of calculating the amount of his supplemental disability benefits.

Turning next to schedule adjustment pay, the CBA states that, because the fire department works on a 24-hour schedule rather than a standard 40-hour work week, firefighters will receive a schedule adjustment, added to their base pay, that is calculated to compensate them for the additional work hours needed to implement the schedule. The schedule adjustment, equivalent to an additional 5.5 work hours per week, is paid to all on-duty firefighters and is removed when a firefighter is

absent from duty for 30 days. Petitioner, like all other firefighters on active duty, was receiving the adjustment when he retired, and an active firefighter currently employed at petitioner's rank would likewise receive the adjustment. Thus, for the same reasons discussed in relation to EMS pay, we reject respondent's argument that the schedule adjustment should not be included in the calculation of petitioner's benefits on the ground that he is retired and has been absent from duty for more than 30 days (see Matter of Farber v City of Utica, 97 NY2d at 479). Further, 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 (Benson v County of Nassau, 137 AD2d 642, 643-644 [1988], lv denied 72 NY2d 809 [1988], quoting Matter of Chalachan v City of Binghamton, 55 NY2d at 990; see also Matter of City of New York v Davis, 146 AD2d 480, 483-484 [1989]). Accordingly, schedule adjustment pay was properly included in the computation of petitioner's regular salary or wages.

Finally, the argument that Supreme Court's interest calculations were incorrect was premised upon a theory that EMS pay and schedule adjustment pay should not have been included in petitioner's regular salary or wages. In view of our determinations in that regard, we find no error in the court's interest calculations.

Egan Jr., Devine, Aarons and Rumsey, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:



Robert D. Mayberger
Clerk of the Court

COURT OF APPEALS
STATE OF NEW YORK

X

In the Matter of the Application of:

JOHN BORELLI, CHRISTOPHER BOSSEY,
MICHAEL BURKE, FRANK CALLACE, THOMAS
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DILIDDO, RAYMOND FOX, ROBERT FUMARELLI,
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HESSLER, NEIL HICKEY, KEVIN KEHOE,
KENNETH KELLY, BRIAN KENNY, WILLIAM
MCKENNA, EUGENE MCNULTY, JOSEPH
MURRAY, VINCENT PACIARIELLO, WILLIAM
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WARD, ROBERT CAVALLO, PAUL DIMELLA,
RICHARD HIGGINS, KEVIN MCGRATH, and
THOMAS SPAUN,

Supreme Court, Westchester County
Index No. 2302/2016

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

Petitioners-Appellants,

- against -

THE CITY OF YONKERS,

Respondent-Respondent.

X

AFFIDAVIT OF SERVICE BY FIRST CLASS MAIL

STATE OF NEW YORK)
) ss.:
COUNTY OF SUFFOLK)

Andrea Mc Auliffe, being duly sworn, deposes and says: I am not a party to the action. I am over 18 years of age. I reside in Nassau County, New York. On November 30, 2020, I served the annexed **Notice of Motion for Leave to Appeal, Affirmation in Support and Exhibits** upon:

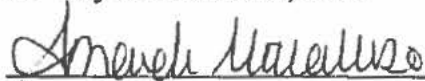
Paul J. Sweeney, Esq.
Coughlin & Gerhart, LLP
99 Corporate Drive
Binghamton, New York 13904

by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department within New York State, located at One Huntington Quadrangle, Melville, New York, New York 11747 addressed to said attorney at the address above set forth, being the address designated by said attorney for that purpose.



Andrea Mc Auliffe

Sworn to before me this
30th day of November, 2020



Notary Public

AMANDA MACALUSO
NOTARY PUBLIC-STATE OF NEW YORK
No. 01MA6246758
Qualified in Suffolk County
My Commission Expires 8/15/23