To be Argued by:
RICHARD S. CORENTHAL
(Time Requested: 30 Minutes)

APL-2021-00162
Westchester County Clerk's Index Nos. 54477/16 and 60328/16
Appellate Division–Second Department Docket No. 2016-11321

Court of Appeals

of the

State of New York

In the Matter of the Arbitration between

CITY OF YONKERS,

Petitioner-Appellant,

– against –

YONKERS FIRE FIGHTERS, LOCAL 628, IAFF, AFL-CIO,

Respondent-Respondent.

BRIEF FOR RESPONDENT-RESPONDENT

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STATUS OF RELATED LITIGATION

(A) *City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, Supreme Court Westchester County, Index No. 60260-2021 (December 3, 2021)

Following the Second Department's October 14, 2020 decision under review denying the application of Petitioner-Appellant City of Yonkers (the "City") to permanently stay arbitration of a grievance brought by Respondent-Respondent Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO (the "Union"), the subject arbitration proceeded and by award dated May 6, 2021, Arbitrator Jay M. Siegel, Esq. found that the exclusion of Night Differential, Check-in pay, and Holiday pay violated the express terms of the relevant collective bargaining agreement. *Matter of the Arbitration between Yonkers Fire Fighters Local 628, IAFF, AFL-CIO and City of Yonkers*, AAA Case No. 01-16-0001-2882 (Siegel, May 6, 2021) (the "Award") (Compendium of Unreported Authorities attached hereto).

The City's preliminary appeal statement reports *City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, Supreme Court Westchester County Index No. 60260-2021, as a related proceeding brought by the City against the Union pursuant to Article 75 of the New

York Civil Practice Law and Rules ("CPLR"), wherein the City petitioned to vacate the Award

By Decision and Order dated December 3, 2021, the Supreme Court Westchester County (Hon. William J. Giacomo, J.S.C.) denied and dismissed the City's petition brought pursuant to Article 75 of the CPLR and confirmed the Award.

Pursuant to Court of Appeals Rules of Practice §500.6, by letter dated December 6, 2021, the parties in APL 2021-00162 and APL 2021-00076, which are calendared together, notified the Clerk's Office of the Supreme Court's December 3, 2021 Decision and Order as a change in status in related litigation.

(B) *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 A.D.3d 1470 (3d Dept 2021)

In *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 A.D.3d 1470 (3d Dept 2021), the Third Department annulled a decision of the New York State Public Employment Relations Board ("PERB") regarding the City's unilateral decision to discontinue the stipulated past practice of including night

differential, check-in pay and holiday pay in calculating regular salary or wages for purposes of General Municipal Law ("GML") §207-a(2) for then-current bargaining unit members who may become permanently disabled and entitled to GML § 207-a(2) benefits in the future, in violation of the Public Employees' Fair Employment Act (*see* Civil Service Law art 14).

The Third Department's decision arises out of the same facts as the instant appeal—the discontinuation of night differential, check-in pay, and holiday pay as part of the GML §207-a(2) supplement for the Union's bargaining unit members. Under the Third Department's decision, the City is prohibited from excluding night differential, check-in pay, and holiday pay as part of the GML §207-a(2) supplement for current members (as of December 9, 2015), and must make affected members whole. Pursuant to Court of Appeals Rules of Practice §500.6, by letter dated December 9, 2021, the parties in APL 2021-00162 and APL 2021-00076, which are calendared together, notified the Clerk's Office of the Third Department's decision as a change in status in related litigation.

TABLE OF CONTENTS

STATUS OF RELATED LITIGATION i

Table of Authorities vi

QUESTION PRESENTED 1

FACTS AND PROCEDUARL POSTURE 2

A. The CBA 2

B. The Underlying Dispute and the Union's Demand for Arbitration 4

C. The City's Application to Permanently Stay the Arbitration is Denied by the Second Department 5

D. The Arbitration Award Finding that the City Violated the Express Terms of the CBA 6

E. Judicial Confirmation of the Arbitration Award Finding that the City Violated the CBA 10

ARGUMENT 11

I. Legal Standards 11

II. The Second Department Correctly Applied The Court's Familiar Watertown Arbitrability Standard 13

III. There Is No Separate and Distinct Arbitrability Standard For GML §207-a(2) Issues 16

IV. The City's Proposed Standard Violates Public Policy and is Contrary to the Directives of the Legislature 25

V. Even Under the City's Proposed Standard, the Grievance Would Be Arbitrable 29

CONCLUSION 31

TABLE OF AUTHORITIES

Cases

Fairfield Towers Condo v. *Fishman,*
1 A.D.3d 252 (1st Dept 2003) 13

Inc. Vill. Of Floral Park v. Floral Park Police Benev. Assn.,
89 A.D.3d 731 (2d Dept 2011) 20

Matter of Acting Supt. of Schs. of Liverpool Cent. Sch. Dist. v. United Liverpool Faculty Ass'n.,
42 N.Y.2d 509 (1977) 27, 28

Matter of Associated Teachers of Huntington v Board of Educ, Union Free School Dist. No. 3, Town of Huntington,
33 N.Y.2d 229 (1973) 25

Matter of Board of Educ. of Watertown City School Dist. (Watertown Educ. Assn.),
93 N.Y.2d 132 (1999) .... *passim*

Matter of City of Johnstown (Johnstown Police Benevolent Assn.),
99 N.Y.2d 273, (2002) 12, 13, 14

Matter of City of Long Beach v. Civ. Servs. Empls. Assn.,
8 N.Y.3d 465 (2007) 26

Matter of City of Ogdensburg v. Ogdensburg Firefighters Ass'n Loc. 1799,
No. 533115, 2022 BL 12237, at *2 (3d Dept Jan. 13, 2022) 19

Matter of City of Oswego v. Oswego City Firefighters Ass'n Local 2707,
21 N.Y.3d 880 (2013) 25

Matter of City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO,
153 A.D.3d 617 (2d Dept 2017) 23

Matter of City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO,
167 A.D.3d 599 (2d Dept 2018) 14

Matter of Comm. of Interns and Residents v. Dinkins,
86 N.Y.2d 478 (1995) 12

Matter of Cortland County,
140 A.D.3d 1344 (3d Dept 2016) 23

Matter of New York City Transit Auth. v. Transport Workers Union of Am., Local 100,
99 N.Y.2d 1 (2002) 11

Matter of Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299 (1984) 13

Matter of the Arbitration between Yonkers Fire Fighters Local 628, IAFF, AFL-CIO and City of Yonkers,
AAA Case No. 01-16-0001-2882 (Siegel, May 6, 2021) i

Matter of Town of Evans v. Town of Evans Police Benevolent Assn.,
66 A.D.3d 1408 (App. Div. 4th Dept 2009) 21, 22

Matter of Town of Haverstraw v. Rockland Cty. Patrolmen's Benevolent Ass'n,
65 N.Y.2d 677 (1985) 26

Matter of Town of Niskayuna v. Fortune, 14 A.D.3d 913 (3d Dept 2005) 21, 22

Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes,
94 N.Y.2d 686 (2000) .... *passim*

Matter of Vill. of Manlius, 185 A.D.3d 1501 (4th Dept 2020) 23

Smerek v. Christiansen,
111 Misc. 2d 580 (Sup. Ct Westchester Cty 1981) 29

Town of Tuxedo v. Town of Tuxedo Police Benev. Assn.,
78 A.D.3d 849 (2d Dept 2010) 20

Statutes

Article 75 of the CPLR .... *passim*

GML §207 .... *passim*

QUESTION PRESENTED

Question: Whether the Appellate Division, Second Department erred in applying the Court's well-settled arbitrability standard set forth in *Matter of Bd. of Educ. of Watertown Sch. Dist. v. Watertown Educ. Assn.*, 93 N.Y.2d 132 (1999) ("*Watertown*") in finding arbitrable the Union's grievance regarding the City's exclusion of Night Differential, Check-In Pay, and Holiday Pay as part of regular salary or wages for purposes of the General Municipal Law ("GML") §207-a(2) supplement paid to permanently disabled Fire Fighters.

Answer: *No*. The Second Department correctly applied the Court's "reasonably related" arbitrability standard set forth in *Watertown*, 93 N.Y.2d 132, 139 (1999). There is no separate and distinct arbitrability standard applicable only to disputes involving GML §207-a, and Article 75 of the CPLR prohibits the courts from interpreting substantive provisions of the parties' collective bargaining agreement or passing on the merits of the dispute. Consequently, the Second Department properly denied the City's application for a permanent stay of arbitration pursuant to Article 75 of the CPLR and deferred questions of contract interpretation and the merits of the dispute to arbitration.

FACTS AND PROCEDURAL POSTURE

A. The CBA

The Union and the City are parties to a collective bargaining agreement (the "CBA"). (R. 30). The CBA contains a broad grievance and arbitration procedure, which, *inter alia*, grants either party the right to arbitrate disputes "involving the interpretation or application of any provision of this Agreement." (R. 61).

Article 31 of the CBA contains a strong Maintenance of Benefits provision, providing, in full:

> The City and the Union agree that they *will not alter or revoke any benefits or other provisions heretofore negotiated for or granted to the members not specifically referred to in this Agreement* and which are in existence on the date of the signing of this Agreement and which are presently effective either by State laws, local laws, ordinances or resolutions or departmental rules and regulations or departmental orders or contained within the budget of the City of Yonkers, *or which exist by reason of either usage or custom within the Department*. This provision is for the benefit of both parties to this Agreement.

(R. 74) (emphasis added).

Appendix C and Article 12 of the CBA also contain and incorporate a negotiated GML §207-a procedure for the determination

of claims for GML §§207-a(1) and (2) benefits. (R. 82). The GML §207-a procedure is expressly intended "to regulate both the application for, and the award of, benefits under section 207-a of the General Municipal Law." (R. 82). It applies "to any claim of entitlement to or use of GML 207-a benefits made after [the procedure's effective] date." (R. 87).

Further, Article 12:02 of the CBA incorporates and references the GML §207-a procedure contained in Appendix C, explaining "the procedure annexed hereto as Appendix C concerning the statutory benefits provided by General Municipal Law Section 207-a shall be effective November 20, 1989." (R. 47).

The underlying dispute concerned the City's exclusion of sums paid for Night Differential, Check-in Pay, and Holiday Pay from GML §207-a(2) benefits. (R. 178).

Holiday Pay, Check-In Pay, and Night Differential are listed as elements of "Compensation" in Article 4 the CBA, along with "base" salary, "rate of pay" and "longevity." (R. 31) (Table of Contents). Distinct from the components of regular salary or wages contained in Article 4, "Compensation," other benefits traditionally considered "fringe benefits" are not found in Article 4, but rather in other Articles

of the CBA. (R. 31) (*e.g.* Article 5, Meal Allowance; Article 7, Uniform Allowance; Article 8, Insurance; Article 10, Vacation Leave; Article 13, Funeral Leave; and Article 22, "Special Payments"). The CBA does not contain the term "fringe benefits." (*See*, R. 30 *et seq*).

B. The Underlying Dispute and the Union's Demand for Arbitration

On December 9, 2015, the City, for the first time, excluded sums paid for Holiday Pay, Check-In Pay, and Night Differential from the calculation of GML §207-a(2) benefits for bargaining unit members retiring on or after December 9, 2015. (R. 158).

By letters dated December 15 and 17, 2016, the Union filed a grievance (the "Grievance") pursuant to the grievance procedure contained in the CBA, alleging the City's actions violated, *inter alia*, Article 31 and Appendix C of the CBA and past practice. (R. 166, 168, 172). After exhausting the grievance procedure contained in the CBA, the Union filed a demand for arbitration dated March 17, 2016 (the "Demand") with the American Arbitration Association ("AAA"). (R. 180).

C. The City's Application to Permanently Stay the Arbitration is Denied by the Second Department

On April 5, 2016, the City filed a petition to stay arbitration of the Grievance pursuant to Article 75 of the CPLR. (R. 13-29). The Supreme Court initially denied the City's motion to permanently stay arbitration and ordered the parties to proceed to arbitration, based on a finding that the Grievance was reasonably related to the subject matter of the CBA under the "reasonably related" legal standard enunciated in *Matter of Bd. of Educ. of Watertown Sch. Dist. v. Watertown Educ. Assn.*, 93 N.Y.2d 132 (1999) ("*Watertown*"). (R. 322-23). Thereafter, the City filed a motion to reargue and/or renew. (R. 326). On October 17, 2016, Justice Terry Jane Rudderman reversed her original decision and order, and permanently stayed arbitration of the Grievance. (R. 5-12).

The Union appealed the Supreme Court's decision, and by unanimous Decision and Order dated October 14, 2020 (the "October 14, 2020 Decision"), the Appellate Division, Second Department reversed the Supreme Court's order and denied the City's petition to stay the arbitration. (R. 388). Applying the familiar *Watertown* two-prong test, the Second Department reasoned:

> [G]iven the breadth of the arbitration clause in this case, the disputed payments clearly bore a reasonable relationship to some general subject matter of the parties' CBA, since Appendix C of the CBA, as subsequently modified by the parties' stipulation, expressly addresses the payment of General Municipal Law § 207-a benefits, and Article 31 of the CBA recites the parties' agreement that benefits will not unilaterally be altered or revoked. Thus, the Union's grievance—that the exclusion of sums paid for night differential, check-in pay, and holiday pay from General Municipal Law § 207-a benefits violates the CBA—constitutes an arbitrable dispute, and it is for an arbitrator to determine whether those disputed payments fall within the scope of the parties' CBA.

(R. 390) (applying *Watertown*, 93 N.Y.2d 132 (1999)). The City filed a motion for leave to appeal with the Court of Appeals, which this Court granted by Order entered on October 7, 2021. (R. 387).

D. The Arbitration Award Finding that the City Violated the Express Terms of the CBA

Following the Second Department's order compelling arbitration, (R. 388), the parties proceeded to arbitration before a mutually-selected arbitrator. On May 6, 2021 Arbitrator Jay M. Siegel, Esq. (the "Arbitrator") issued an award (the "Award"), wherein the Arbitrator sustained the Union's grievance. (Compendium of Unreported Authorities ("Comp."), Award p. 1).

In reaching his decision, the Arbitrator interpreted the parties' CBA, including Article 31, entitled Maintenance and Continuation of All Other Benefits, noting that "this provision is hugely advantageous to the Union because it provides a clear and unambiguous contractual right to object (and ultimately prevail) any time the Union challenges the City's decision to revoke or alter any benefits negotiated for or granted to firefighters that are not specifically referred to in the CBA." (Comp., Award p. 17) (parenthetical in original). The Arbitrator continued to explain "[u]nder this provision, the City agreed that any benefits being provided that are not expressly included in the CBA are locked in and cannot be changed or revoked. In other words, this provision is a strong source of right for the Union any time the City seeks to revoke or alter a benefit it previously provided." (Comp., Award p. 17).

Interpreting and applying the express terms of the CBA to the parties' dispute, the Arbitrator reasoned:

> […] the negotiated language establishes that any benefits not expressly listed in the CBA nonetheless become express contractual rights because that is what the provision states. Since Section 31:01 provides the Union's members with the right to the disputed benefits, the grievance must be deemed arbitrable.

> For the very same reason, *the express language of Article 31 establishes that night differential, check-in pay, and holiday pay are regular salary and wages for GML [§]207-a(2) recipients because that is the law of the contract*. This is the case because both parties stipulated to the open and notorious nature of the practice of the City paying night differential, check-in pay, and holiday pay to firefighters in every imaginable circumstance […] for dozens of years […]

(Comp., Award p. 18) (emphasis added).

The Arbitrator also noted that while "[t]he City was aware of how these benefits were calculated, […] it chose not to negotiate a change knowing full well that Article 31 required negotiations in order to change any benefits previously conferred." (Comp., Award p. 19). Contrastingly, "the Union had no reason to expressly add these benefits to the CBA because Article 31 provides it with a source of right to such benefits…" (Comp., Award p. 19).

The Arbitrator distinguished the arguments and decisional law provided by the City—inaptly revived on the instant appeal—because "Article 31 provides clear and unambiguous language that any benefits not listed in the contract are just as sacrosanct as those listed. In other words, *the CBA is not silent* because any benefits previously provided

but not expressly listed as essentially listed by operation of Article 31." (Comp., Award p. 20) (emphasis added).

Examining other terms of the CBA, the Arbitrator also found support for continuation of the disputed payments, because "they are all listed in the CBA under the Compensation section [...] and because the parties have a broad GML [§]207-a procedure governing the award of benefits." (Comp., Award p. 20). The Arbitrator specifically rejected the City's interpretation of the disputed payments as "fringe benefits"—a term that does not appear in the CBA—explaining "[s]ince these benefits are expressly stated in the CBA and history shows the City has treated them as compensation in the past, these benefits must be considered compensation and are not fringe benefits." (Comp., Award p. 20).

Finally, in summation, the Arbitrator correctly recognized that "[t]he situation that formed the basis of the initial grievance is exactly what Article 31 is intended for," and "[t]he only way for Article 31 to be truly effectuated in this case is for the Union to prevail." (Comp., Award pp. 20-21).

Accordingly, consistent with the October 14, 2020 Decision of the Second Department, the Arbitrator interpreted the express terms of the CBA and found that the Union's grievance was arbitrable; found that the City violated Article 31 of the CBA by excluding Night Differential, Check-In Pay and Holiday Pay from the GML §207-a(2) supplement; directed the City to cease and desist from excluding such payments from the GML §207-a(2) supplement; and retained jurisdiction to resolve disputes regarding the remedy ordered. (Comp., Award p. 22).

E. Judicial Confirmation of the Arbitration Award Finding that the City Violated the CBA

The City commenced a special proceeding pursuant to Article 75 of the CPLR seeking to vacate the Award. *City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, Supreme Court Westchester County, Index No. 60260-2021 (December 3, 2021). By Decision and Order dated December 3, 2021, the Supreme Court Westchester County (Hon. William J. Giacomo, J.S.C.) denied the City's petition and confirmed the Award. *See*, "Status of Related Litigation," *supra*, describing *City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, Supreme Court Westchester County, Index No. 60260-2021 (December 3, 2021).

ARGUMENT

I. Legal Standards

In public sector labor disputes in particular, there is a strong public policy against unwarranted judicial interference in the arbitral process. In the seminal case *Matter of Board of Educ. of Watertown City School Dist. (Watertown Educ. Assn.)*, 93 N.Y.2d 132, 139 (1999) ("*Watertown*") the Court noted that it "has overwhelmingly rejected contentions by public employers that particular issues fall outside the scope of permissible grievance arbitration" and—even several decades ago—"the decisional law reflects the reality of greatly increased public sector arbitration, and its acceptance, compatible with the government's public policy concerns." 93 N.Y.2d at 139 (citations omitted). Similarly, in *Matter of New York City Transit Auth. v. Transport Workers Union of Am., Local 100,* 99 N.Y.2d 1, 7 (2002), the Court cautioned that "judicial restraint under the public policy exception is particularly appropriate in arbitrations pursuant to public employment collective bargaining agreements." 99 N.Y.2d at 7.

Under the familiar *Watertown* arbitrability standard, a court must first inquire if there is any constitutional or statutory provision or

common law principle which would, on public policy grounds, prohibit arbitration of the dispute at issue. *Matter of City of Johnstown v. Johnstown Police Benevolent Ass'n,* 99 N.Y.2d 273 (2002); *Matter of Comm. of Interns and Residents v. Dinkins,* 86 N.Y.2d 478, 484 (1995). This is the "may they arbitrate" prong.

If there is no public policy prohibition against arbitration, the court will proceed to examine the parties' agreement to determine if they agreed to arbitrate the particular dispute. *Matter of City of Johnstown,* 99 N.Y.2d at 278. This is the "did they agree to arbitrate" prong.

As long as there is a "reasonable relationship between the subject matter of the dispute and the general subject matter of the [agreement]," the parties will be deemed to have intended to arbitrate their dispute. *Watertown,* 93 N.Y.2d at 143; *see also Matter of City of Johnstown,* 99 N.Y.2d at 279.

Moreover, pursuant to CPLR 7501, in determining a stay of arbitration case, the Legislature has expressly prohibited the courts from "consider[ing] whether the claim with respect to which arbitration is sought is tenable, or otherwise pass[ing] upon the merits of the

dispute." CPLR 7501. Accordingly, in *Matter of Silverman v. Benmor Coats, Inc.,* 61 N.Y.2d 299, 307 (1984) this Court held:

> Any limitation upon the power of the arbitrator must be set forth as part of the arbitration clause itself, for to infer a limitation from the substantive provisions of an agreement containing an arbitration clause calling for arbitration of all disputes arising out of the contract, or for arbitration in some other broadly worded formulation, is to involve the courts in the merits of the dispute - interpretation of the contract's provisions - in violation of the legislative mandate [CPLR 7501].

61 N.Y.2d at 307; *see also Matter of City of Johnstown,* 99 N.Y.2d at 279 (holding that the appropriate inquiry for the court is whether the parties agreed to have the arbitrator decide the proper interpretation of contract, and that the arbitrator is to weigh the merits of the claim, not the courts). Any ambiguity as to whether an arbitration clause covers a particular dispute must be resolved in favor of arbitration. *Fairfield Towers Condo v. Fishman,* 1 A.D.3d 252, 253 (1st Dept 2003).

II. The Second Department Correctly Applied The Court's Familiar *Watertown* Arbitrability Standard

The Second Department correctly articulated the Court's well-settled test for determining arbitrability, explaining:

> Where, as here, the relevant arbitration provision of

> the CBA is broad, if the matter in dispute bears a reasonable relationship to some general subject matter of the CBA, it will be for the arbitrator and not the courts to decide whether the disputed matter falls within the CBA (*Matter of City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, 167 A.D.3d [599,] at 601; *see Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn.],* 93 N.Y.2d 132, 143; *Matter of City of Yonkers v. Yonkers Fire Fighters, Local 628, AFL-CIO*, 153 A.D.3d [617,] at 618). If there is none, the issue, as a matter of law, is not arbitrable. If there is, the court should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them.

(R. 389) (bracketed text in original) (citing *Watertown*, 93 N.Y.2d at 143).

The Second Department then correctly applied the *Watertown* arbitrability standard to the facts of the petition by examining the subject matter of the parties' CBA in relation to the matter in dispute, explaining:

> Here, the Supreme Court erroneously determined, upon reargument, that Local 628's grievance was not arbitrable. There is no constitutional, statutory, or public policy provision prohibiting the submission to arbitration of disputes between the parties regarding the payments at issue in this matter (*see Matter of City of Johnstown [Johnstown Police Benevolent Assn.],* 99 N.Y.2d [273,] at 278) Moreover, given the breadth of

> the arbitration clause in this case, the disputed payments clearly bore a reasonable relationship to some general subject matter of the parties' CBA, since Appendix C of the CBA, as subsequently modified by the parties' stipulation, expressly addresses the payment of General Municipal Law § 207-a benefits, and Article 31 of the CBA recites the parties' agreement that benefits will not be unilaterally altered or revoked. Thus, the Union's grievance – that the exclusion of sums paid for night differential, check-in pay, and holiday pay, from General Municipal Law §207-a benefits violates the CBA – constitutes an arbitrable dispute, and it is for an arbitrator to determine whether those disputed payments fall within the scope of the parties' CBA.

(R. 389-390).

Thus, the Second Department followed the well-established arbitrability standard enunciated by this Court several decades ago in *Watertown*, 93 N.Y.2d 132, 143 (1999). Indeed, the underlying dispute invites a straightforward application of this standard, as the Second Department correctly recognized that "Appendix C of the CBA, as subsequently modified by the parties' stipulation, expressly addresses the payment of General Municipal Law § 207-a benefits, and Article 31 of the CBA recites the parties' agreement that benefits will not be unilaterally altered or revoked." (R. 390).

Placing the issue of whether the underlying dispute was reasonably related to the subject matter of the CBA beyond all doubt, after the Second Department lifted the stay, the matter proceeded to arbitration, and the Arbitrator found that the express terms of the CBA had been violated by the City's conduct challenged by the Union. (Comp., Award p. 22). According to the Arbitrator interpreting the terms of the CBA and deciding the merits of the dispute—functions specifically reserved for him (and not the courts) by the Legislature—"the express language of Article 31 establishes that night differential, check-in pay, and holiday pay are regular salary and wages for GML [§]207-a(2) recipients because that is the law of the contract." (Comp., Award p. 18).

In sum, the Second Department did not err in applying this Court's arbitrability standard set forth in *Watertown*, 93 N.Y.2d 132 (1999) in finding that the underlying dispute was reasonably related to the subject matter of the parties' CBA. (R. 389-390).

III. There Is No Separate and Distinct Arbitrability Standard For GML §207-a(2) Issues

The City's main argument is that the Second Department should have applied a different arbitrability standard, rather than the well-

settled standard set forth in *Watertown*. (City's Br., pp. 11-26). Specifically, the City misreads precedent from the Court and a smattering of decisions from Departments of the Appellate Division applying the *Watertown* arbitrability standard—in some instances explicitly—as somehow creating a brand new, separate and distinct arbitrability standard applicable only to GML §207-a(2) issues. (City's Br., pp. 16-21). Under this standard, the City urges that the courts should override the Legislature's mandate in Article 75 of the CPLR and wade deeply into issues of contract interpretation and the merits of the dispute—the province of the arbitrator—to determine what regular salary or wages are "expressly provided" by a CBA in connection with a demand to arbitrate an issue involving GML §207-a, rather than examining the general subject matter of the CBA in relation to a dispute under *Watertown*. (City's Br., pp. 16-18).

The City relies heavily on *Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes*, 94 N.Y.2d 686 (2000) ("*Cohoes*") in support of its argument that the new arbitrability standard—bespoke for GML §207-a benefits—should be whether the CBA "expressly provided" certain GML §207-a(2) benefits, rather than

whether a dispute involving GML §207-a is "reasonably related" to the general subject matter of the CBA. (*See*, City's Br., *passim*). However, the City's position is inconsistent with the analysis contained in *Cohoes* itself. *See*, *Cohoes*, 94 N.Y.2d 686 (2000). The Court's arbitrability analysis in *Cohoes* begins with "the general rule that, under a broad arbitration clause in a CBA, if the matter in dispute bears a 'reasonable relationship' to some general subject matter of the CBA, it will be for the arbitrator and not the court to decide whether the disputed matter falls within the CBA." *Cohoes*, 94 N.Y.2d at 694. <u>*Applying that general rule*</u> in the very next sentence following citation to *Watertown*, the Court in *Cohoes* held that the parties' dispute was not arbitrable because, unlike the instant CBA, the contract in *Cohoes* "[was] silent as to whether the contractual rights [at issue] . . . [were] applicable to firefighters on [GML] §207-a status." *Id.*

In short, *Cohoes* did not announce a new and distinct arbitrability standard applicable only to disputes regarding GML §207-a benefits. *Id.* (expressly articulating and endorsing the Court's *Watertown* arbitrability standard). Rather, the Court faithfully applied the well-settled "reasonable relationship" test of *Watertown* and the Court

stayed arbitration of the dispute in that case due to the "total absence" of any language of the CBA related to the dispute. *Id.* All that the *Cohoes* Court would have required for access to arbitration was the presence of some language in the CBA that related to the subject matter of the grievance, as the Court stressed the "total absence" of any express provision of the CBA concerning the entitlement to benefits for disabled employees pursuant to GML §207-a. *Cohoes*, 94 N.Y.2d at 694. Moreover, it is respectfully submitted that if the *Cohoes* Court intended to overrule the *Watertown* arbitrability standard for certain types of disputes, it would have signaled it was doing so.

Fundamentally, *Cohoes* is just one of the hundreds of reported decisions where the courts have adhered to *Watertown,* refused to interfere with the arbitral process, and limitedly examined only whether the subject matter of a CBA is reasonably related to a given dispute. *E.g.*, *Matter of City of Ogdensburg v. Ogdensburg Firefighters Ass'n Loc. 1799*, No. 533115, 2022 BL 12237, at *2 (3d Dept Jan. 13, 2022). Based on the parties' CBA in *Cohoes*, there was no reasonable relationship—the CBA was silent. Here, as found by both the Second Department and the Arbitrator, there was a reasonable relationship—

the instant CBA is decidedly *not* silent.

The City's citations to earlier Second Department decisions are inapt for the same reasons. Specifically, the City discusses two short Second Department decisions addressing the arbitrability of GML §207-c benefits for police, *Town of Tuxedo v. Town of Tuxedo Police Benev. Assn.*, 78 A.D.3d 849 (2d Dept 2010) ("*Tuxedo*") and *Inc. Vill. Of Floral Park v. Floral Park Police Benev. Assn.*, 89 A.D.3d 731 (2d Dept 2011) ("*Floral Park*"). (City's Br., pp. 20-21). In both of these decisions, the Second Department concluded that the relevant CBAs did not contain any language relating to the underlying dispute. *Tuxedo* 78 A.D.3d at 851 ("the CBA did not contain any language"); *Floral Park*, 89 A.D.3d at 732 ("here is no language providing that leave time continues to accrue during the period an officer is disabled and receiving benefits under General Municipal Law § 207-c").

Consistent with the mandates of Article 75, the Second Department only examined the subject matter of the CBA to determine whether it was reasonably related to the relevant dispute and did not pass on the merits of the dispute. In *Tuxedo* and *Floral Park*, the relevant contracts were silent; therefore, the underlying disputes were

not arbitrable. *Id.* Again, the parties' CBA here is not silent; therefore, the instant Grievance was correctly found to be arbitrable.

In addition, both of these Second Department decisions cite to the Court's decision in *Cohoes*, which, in turn, expressly applied *Watertown*. *Id; Cohoes*, 94 N.Y.2d at 694. Thus, even without a direct citation to *Watertown*, it is implicit and part of the fabric of the Second Department's analysis in both of those decisions, just as it is with every arbitrability dispute in public sector labor relations since the Court's decision in *Watertown* over two decades ago.

Next, the City cherry-picks several decisions from other Departments of the Appellate Division wherein the relevant contracts were—unlike here—"entirely silent" on GML §207-a issues and again confuses the application of *Watertown* with the creation of an entirely different "expressly provided" standard for arbitrability. (*See*, City's Br., p. 21). Specifically, the City points to the Third Department decision in *Matter of Town of Niskayuna v. Fortune*, 14 A.D.3d 913 (3d Dept 2005) and the Fourth Department decision in *Matter of Town of Evans v. Town of Evans Police Benevolent Assn.*, 66 A.D.3d 1408 (4th Dept 2009). (City's Br., p. 22). Just as in *Cohoes*, the CBAs in both *Niskayuna* and

Evans were both "entirely silent" as to whether the benefits in question were required to be paid to disabled recipients of GML §207-a benefits. *Niskayuna*, 14 A.D.3d at 914; *Evans*, 66 A.D.3d at 1409. For example, neither of these cases featured an explicit agreement by the parties to arbitrate "any claim of entitlement to or use of GML 207-a benefits," as is the case here. (R. 87). Nor did they contain an exceptionally strong maintenance of benefits provision, as is also the case here. (R. 74).

Like *Cohoes*, the Third and Fourth Departments in *Niskayuna* and *Evans* did not apply a separate, discrete arbitrability standard used only for purposes of GML §207-a benefits. Rather these decisions straightforwardly applied the Court's general "reasonable relationship" test announced in *Watertown* (even if not directly stated), finding that the parties' CBAs were "silent" as to the matter in dispute, and thus the Third and Fourth Departments found specific grievances not arbitrable after examining the general subject matter of the relevant CBAs. In sum, *Niskayuna* and *Evans* are properly understood as examples of the application of *Watertown*, not the rejection of that well-settled standard. *See*, *Niskayuna*, 14 A.D.3d at 914; *Evans*, 66 A.D.3d at 1409.

Putting to rest any remaining uncertainty as to the applicable arbitrability standard for disputes involving GML §207-a benefits in different Departments, both the Third and Fourth Departments have subsequently reaffirmed and expressly applied the Court's "reasonable relationship" test announced in *Watertown* to disputes regarding GML §207 benefits. *Matter of Vill. of Manlius*, 185 A.D.3d 1501 (4th Dept 2020) (applying *Watertown* to arbitrability of disputes regarding GML §207-a benefits); *Matter of Cortland County*, 140 A.D.3d 1344 (3d Dept 2016) (applying *Watertown* to arbitrability of disputes regarding GML §207-c benefits). As has the Second Department. (R. 388) (2d Dept 2020) (applying *Watertown* to arbitrability of disputes regarding GML §207-a benefits); *Matter of City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO,* 153 A.D.3d 617 (2d Dept 2017) (applying *Watertown* to arbitrability of disputes regarding GML §207-a benefits).

On the other hand, the City is unable to find any decision from any Department of the Appellate Division explicitly declining to apply *Watertown* when addressing the arbitrability of GML §207-a issues, or even drawing a distinction between the Court's arbitrability standard in *Watertown*, and the Court's application of *Watertown* in *Cohoes*, as the

City misguidedly does here. There is simply no authority for the City's argument that there are two different arbitrability standards.[1]

To be sure, as demonstrated by the Court's decision in *Cohoes* and the decisions of the Appellate Division relied on by the City, there may very well be disputes involving GML §207-a issues that are not arbitrable upon review of the general subject matter of a given CBA under *Watertown*. This dispute is not one of them. The instant CBA includes a GML §207-a provision within the body of the CBA and an incorporated GML §207-a procedure as an appendix thereto, as well as a strong maintenance of benefits provision, in conjunction with a broad form arbitration clause. (R. 47, 61, 74, 82, 87). This CBA language required that the Second Department reverse the Supreme Court and deny the City's application to permanently stay arbitration of the

[1] Unable to find any support for its double standards position, the City grossly distorts the Second Department's holding in *Borelli et al v. City of Yonkers*, 187 A.D.3d 897 (2020) *lv granted* 36 N.Y.3d 911 ("*Borelli*"), which is calendared herewith. Contrary to the City's assertion, the Second Department did *not* "hold[] that the CBA did not provide for the inclusion of [the disputed payments]." City's Br., p. 10. In point of fact, the Second Department carefully and explicitly refrained from interpreting the substantive provisions of the parties' CBA—the role of the Arbitrator—noting that the Union's claim 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*." *Id.* (emphasis added). Thus, consistent with *Watertown*, the Arbitrator was authorized to interpret the scope of the parties' CBA.

underlying dispute. In the routine application of *Watertown* now under review, the Second Department unanimously concluded that the Union's Grievance challenging the City's exclusion of certain elements of compensation from GML §207-a(2) benefits bore a reasonable relationship to the CBA's GML §207-a provision, incorporated GML §207-a procedure, and the maintenance of benefits provision set forth in Article 31:01, and appropriately deferred questions of the interpretation of those provisions to an arbitrator. (R. 388-390). Subsequently, the appointed Arbitrator interpreted these terms and found that the City violated the CBA by excluding Night Differential, Check-In Pay, and Holiday Pay from regular salary or wages for purposes of the GML §207-a(2) supplement. (Comp., Award p. 20).

IV. The City's Proposed Standard Violates Public Policy and is Contrary to the Directives of the Legislature

The Court has long recognized that "'arbitration is considered so preferable a means of settling labor disputes that it can be said that public policy impels its use.'" *Matter of City of Oswego v. Oswego City Firefighters Ass'n Local 2707*, 21 N.Y.3d 880 (2013) (quoting *Matter of Associated Teachers of Huntington v Board of Educ, Union Free School Dist. No. 3, Town of Huntington*, 33 N.Y.2d 229, 236 (1973));

Matter of City of Long Beach v. Civ. Servs. Empls. Assn., 8 N.Y.3d 465, 476 (2007) ("This policy of encouraging arbitration is even weightier when it comes to public employment, as not only does the Taylor Law require collective bargaining, but also 'public policy in this State favors arbitral resolution of public sector labor disputes' […] In fact, we have noted that 'arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.'") (citations omitted); *Matter of Town of Haverstraw v. Rockland Cty. Patrolmen's Benevolent Ass'n*, 65 N.Y.2d 677, 678 (1985) ("public policy favors arbitration as a means of settling labor disputes […] This court will intervene for reasons of public policy only where a policy 'prohibit[s], in an absolute sense, particular matters being decided […] by an arbitrator") (citations omitted).

The City wants to jettison *Watertown*, which encapsulates the Court's recognition of the strong public policy in favor of arbitral resolution of public sector labor disputes, in favor of a double standard with a new default presumption *against* arbitrability for disputes involving GML §207-a. Specifically, the City urges that the courts should examine the substantive terms of the parties' CBA to determine

what benefits are "expressly provided" by a CBA and only then submit the dispute to arbitration. (City's Br., pp. 16-21). The fact that the City has continued this appeal even after the Arbitrator has rendered an award finding that the City's conduct violated the express terms of the CBA is telling: the City simply does not want to be bound to its agreement to arbitrate disputes involving GML §207-a benefits, despite the fact it has specifically negotiated contract terms with the Union involving GML §207-a, including GML §207-a(2), a strong maintenance of benefits clause, and a broad form arbitration clause. (R. 30 *et seq*) (the CBA). The City's attempt to flip the applicable presumption on its head to disfavor the arbitration of disputes involving GML §207-a is contradictory to the public policy long recognized by the Court favoring arbitral resolution of public sector labor disputes.

Essentially, the City wants to rewind the clock on public sector labor law back a quarter of a century—before the Court's decision in *Watertown*—and return to the framework of *Matter of Acting Supt. of Schs. of Liverpool Cent. Sch. Dist. v. United Liverpool Faculty Ass'n.*, 42 N.Y.2d 509 (1977) ("*Liverpool*"), which was comprehensively addressed and overruled by this Court in *Watertown*. 93 N.Y.2d at 142 (citing

Liverpool and holding, *inter alia*, "an anti-arbitrational presumption is no longer justified either in law, or in the public sector labor environment").[2]

In any event, the deficiencies in the City's approach and proposed arbitrability standard are made immediately apparent in its brief, as the City launches into a close textual analysis of the substantive provisions of the CBA after advocating for its new arbitrability standard. (City's Br., pp. 24-26). The City goes so far as to explicitly request the Court of Appeals parse through various subsections of Article 4 of the CBA, entitled "Compensation," in an effort to supplant the interpretation of the Arbitrator. (City's Br., pp. 24-25). This is not the role of the courts in an Article 75 proceeding. CPLR 7501. Courts may not interpret the substantive provisions of a CBA or otherwise pass on the merits of the dispute. *Id.* The Legislature has categorically prohibited this type of analysis in Article 75 of the CPLR, as compared to reviewing the general subject matter of the CBA to determine whether there exists a reasonable relationship to the matter in dispute.

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[2] The City's insistence on recasting the Court's arbitrability standard set forth in *Watertown* as the "*Liverpool-Watertown* analysis" (*see* City's Br., p. 13) further reveals the City's intent to revive the outdated, anti-arbitration presumptions of *Liverpool*.

Id.

In practice, it is impossible to divorce the City's defective "expressly provided" arbitrability standard from the merits of a dispute involving GML §207-a benefits, as the City's proposed standard requires the courts to determine what the terms of the CBA "provide" prior to determining arbitrability.

Accordingly, the City's proposed standard must be rejected as it violates public policy and is contrary to the express directives of the Legislature in CPLR 7501.

V. Even Under the City's Proposed Standard, the Grievance Would Be Arbitrable

Even assuming the City's "expressly provided" arbitrability standard applied in some form—it does not—the express terms of the parties' CBA requires inclusion of Night Differential, Check-In Pay, and Holiday Pay as part of the GML §207-a(2) supplement.

Night Differential, Check-In Pay, and Holiday Pay, are all listed under Article 4, "Compensation," and have been treated as part of regular salary or wages, for decades. (R. 31) (CBA table of contents); *Smerek v. Christiansen*, 111 Misc. 2d 580 (Sup. Ct Westchester Cty 1981) (1981 decision 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 [...] base pay plus longevity pay and no other elements" should be included); (Comp., Award p. 18) ("both parties stipulated to the open and notorious nature of the practice of the City paying night differential, check-in pay, and holiday pay to firefighters in every imaginable circumstances...for dozens of years"); (*see also*, City's Br., p. 7, n. 3) (acknowledging that the City continues to include Night Differential, Check-In Pay, and Holiday Pay for active Fire Fighters and temporarily disabled GML §207-a(1) recipients).

In addition, the CBA contains an express GML §207-a(2) provision in Article 12:02 of the CBA, as well as a negotiated and appended GML §207-a(2) procedure governing the award of benefits. (R. 47, 82). Moreover, Article 31, entitled "Maintenance and Continuation of All Other Benefits," prohibits the City from revoking or altering any benefits negotiated for or granted that are not specifically referred to in the CBA. (R. 74). Thus, the City agreed that any benefits being provided that are not expressly included in the CBA are locked in and cannot be changed or revoked.

Accordingly, the CBA expressly provides for the continued inclusion of Night Differential, Check-In Pay, and Holiday Pay as part of regular salary and wages for purposes of the GML §207-a(2) supplement. (R. 30 et seq). Unlike *Cohoes* and the cases cited by the City relying thereon, the instant CBA is not silent. Therefore, the question of whether the City violated the CBA by excluding sums paid for Night Differential, Check-In Pay, and Holiday Pay was properly submitted to arbitration.[3]

CONCLUSION

The Second Department correctly applied the Court's "reasonably related" arbitrability standard set forth in *Matter of Board of Educ. of Watertown City School Dist. (Watertown Educ. Assn.*), 93 N.Y.2d 132, 139 (1999). There is no separate and distinct arbitrability standard

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[3] The City's "Point II" "final note" regarding the proper interpretation of Article 31, (City's Br., p. 26), is a contract interpretation question and was likewise for the Arbitrator to determine. In addition, the City's arguments regarding past practice have not been preserved for review on this appeal and constitute a collateral attack on a different Department's decision, which is not the subject of this appeal or the appeal in *Borelli* calendared herewith. Specifically, in *Uniformed Fire Officers Association of the City of Yonkers and Yonkers Fire Fighters, Local 628 v. [PERB] and City of Yonkers*, 197 A.D.3d 1470 (3d Dept 2021), the Third Department vacated a decision of PERB and required the City to continue the undisputed past practice of including Night Differential, Check-In Pay, and Holiday pay for the Union's bargaining unit members who may become permanently disabled and eligible for the GML §207-a(2) supplement paid in retirement. *See*, Status of Related Litigation, *supra*. The City did not seek leave to appeal the Third Department's decision mandating the City to continue this past practice.

applicable only to disputes involving GML §207-a. Consequently, the Second Department properly reversed the Supreme Court and denied the City's application for a permanent stay of arbitration pursuant to Article 75 of the CPLR and referred questions of contract interpretation and the merits of the dispute to the Arbitrator. The correctness of the Second Department's decision is underscored by the subsequent arbitration award, confirmed by the Supreme Court, finding that the City violated the express terms of CBA by excluding sums paid for Night Differential, Check-In Pay and Holiday Pay from the GML §207-a(2) supplement.

Accordingly, the City's appeal should be denied and the Second Department's October 14, 2020 decision should be affirmed.

Dated: February 1, 2022
Melville, New York

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this document complies with the word limit of Court of Appeals Rule of Practice 500.13(c), because this brief contains 5,999 words, exclusive of table of contents, table of citations, proof of service, certificate of compliance, questions presented, statement of related cases, or compendium of unreported authorities; Font: Century Schoolbook; Size: 14-point.

Dated: Melville, New York
February 1, 2022

Richard S. Corenthal

COMPENDIUM OF UNREPORTED AUTHORITIES

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration between

YONKERS FIRE FIGHTERS LOCAL 628, IAFF, AFL-CIO

-and-

CITY OF YONKERS

OPINION

AND

AWARD

Re: Reduction of GML 207-a(2) Benefits
AAA Case Number 01-16-0001-2822

BEFORE: Jay M. Siegel, Esq.
Arbitrator

APPEARANCES: For Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO
Archer, Byington, Glennon & Levine, LLP
By: Richard S. Corenthal, Esq. & Paul K. Brown, Esq., Of Counsel

For City of Yonkers
Coughlin & Gerhart, LLP
By: Paul J. Sweeney, Esq. & Steven L. Foss, Esq., Of Counsel

In accordance with the grievance procedure of the Collective Bargaining Agreement (CBA) between the Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO (Union) and the City of Yonkers (City), the undersigned was duly designated as Arbitrator to hear and decide the above-referenced grievance between the parties. A virtual hearing was held via Zoom on February 24, 2021.

The parties were accorded a full and fair hearing, including the opportunity to present evidence, examine and cross-examine witnesses, and make arguments in support

of their respective positions. The record was closed upon the Arbitrator's receipt of the parties' briefs on April 16, 2021.

ISSUE

Both parties submitted issues for the Arbitrator's review and consideration and agreed to have the Arbitrator decide the specific issue. After such consideration, the Arbitrator will decide the following issue:

> Is the instant grievance arbitrable?
>
> If so, did the City violate the Article 31 (Maintenance of Benefits) and/or Appendix C (GML 207-a Procedure) of the CBA by excluding night differential, check-in pay, and holiday pay from GML 207-a(2) benefits for bargaining unit members who retired on or after December 9, 2015 who have been granted performance of duty or accidental disability retirements or may be granted performance of duty or accidental disability retirements on or after December 9, 2015[1]?
>
> If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

ARTICLE 31:0 – MAINTENANCE AND CONTINUATION OF ALL OTHER BENEFITS

Section 31:01

> The City and the Union agree that they will not alter or revoke any benefits or other provisions heretofore negotiated for or granted to the members not specifically referred to in this Agreement and which are in existence on the date of the signing of this Agreement and which are presently effective either by State laws, local laws, ordinances or resolutions or departmental rules and regulations or departmental orders or contained within the budget of the City of

[1] The parties are involved in other litigation involving former Union members who retired from the City before December 9, 2015, which this arbitration opinion and award does not address. This arbitration addresses **only** Union members who became permanently injured and awarded disability retirements on or after December 9, 2015.

Yonkers, or which exist by reason of either usage or custom within the Department. This provision is for the benefit of both parties.

ARTICLE 12:0

SICK LEAVE AND PRODUCTIVITY PLAN

Section 12:02 – General Municipal Law Section 207-a Procedure

12:02.01 – The parties agree that Section 207-a of the General Municipal Law applies to all members. The procedure annexed hereto as Appendix C concerning the statutory benefits provided by General Municipal Law Section 207-a shall be effective November 30, 1989

APPENDIX C

General Municipal Law Section 207-a Procedure

This policy is intended to provide a procedure to regulate the application for, and the award of benefits under Section 207-a of the General Municipal Law (hereafter referred to as GML 207-a)….

ARTICLE 4.0 – COMPENSATION

Section 4:01 – Annual Salary

4:01.01 – Base Salary: The annual base salary for firefighters shall be as provided on Appendix A annexed and made part of this Agreement and shall be in effect during the term of this Agreement. All newly appointed Firefighters shall be paid at the hiring rate as provided for in Appendix A regardless of prior service with the City.

Section 4:05 – Night Differential

4:05.01 – Night differential shall be paid at the rate of 3.33% of the firefighter's annual base salary plus longevity. The differential shall be paid only to firefighters who are regularly scheduled to work rotating tours that include the 6:00 p.m. to 8:00 a.m. night tour, and only to firefighters actually working that night tour.

Section 4:06 – Check-In Pay

Each firefighter shall be present for duty at his assigned command twelve (12) minutes prior to the commencement of his tour of duty for receipt of instruction, equipment and/or uniform inspection. Each firefighter shall receive an additional five and one-half (5-1/2) days per year at the rate of pay as set forth in section 4.02 above. This payment shall be earned as of the first day of each year. Payment shall be on a semi-annual basis and made in May and November for the preceding six (6) month period.

Section 4:07 – Holiday Pay

4:07.01 – Members shall be paid for twelve (12) legal holidays, whether worked or not, at the daily rate established in section 4:02 above…Payment for said legal holidays shall be made as follows: six (6) days in the first pay period in June and six (6) days in the first pay period in December…

BACKGROUND FACTS

Under Section 207-a(2) of the General Municipal Law (GML) of New York State, a firefighter's salary benefits continue even if the firefighter is granted a disability retirement. Firefighters receiving 207-a(2) benefits continue receiving their full salary, including negotiated salary increases, until they reach the mandatory retirement age for the retirement plan they are in.

From at least 1995 until December 9, 2015, the City included night differential, check-in pay, and holiday as part of the GML 207-a(2) benefits paid to former employees receiving this supplemental benefit. This case concerns the City's December 9, 2015 action to exclude night differential pay, check-in pay, and holiday pay from GML 207-a(2) benefits for bargaining unit members retiring on or after December 9, 2015.[2]

[2] While the Arbitrator has been made aware of related litigation involving members of the Yonkers Uniformed Officers Association and retired members of this Union, this

The parties have stipulated to the following relevant facts:

1. 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 regardless of their work status or work schedule.
2. Since at least 1995 to the present, the City has paid night differential, check-in pay, and holiday pay to all bargaining unit members on sick leave, including extended sick leave.
3. Since at least 1995 to the present, the City has paid night differential to all bargaining unit members as part of their regular salary or wages, regardless of whether the firefighter actually worked a night tour.
4. Since at least 1995 to the present, the City has paid check-in pay to all bargaining unit members as regular salary or wages, regardless of whether the firefighter was present for duty or actively working.
5. Since at least 1995 to the present, the City has paid night differential, check-in pay, and holiday pay to all bargaining unit members injured in the line of duty and who were approved for GML 207-a(1) benefits.
6. Since at least 1995 to the present, the City has paid night differential, check-in pay, and holiday pay to all bargaining unit members injured in the line of duty and who were approved for GML 207-a(1) benefits and were assigned light or limited duty.

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decision is applicable only to those bargaining unit members who may be granted performance of duty or accidental disability retirements on or after December 9, 2015.

7. Since at least 1995 until December 9, 2015, the City included night differential, check-in pay, and holiday pay in its calculation of GML 207-a(2) benefits to all former bargaining unit members who received Accidental or Performance of Duty disability benefits from the New York State Retirement System.
8. Since at least 1995 until December 9, 2015, the salary reported by the City to the New York State Retirement System for the purpose of calculating an individual's Accidental or Performance of Duty Disability retirement benefits has included night differential, check-in pay, and holiday pay.

On December 15, 2015, Union President Barry B. McGoey filed a grievance with then Fire Commissioner John Darcy. It alleged that the City's decision to stop paying holiday pay, check-in pay, and night differential as part of the GML 207-a(2) supplement violated both Article 31 and Appendix C of the CBA. On or about December 22, 2015, the City denied the grievance. After completing the pre-arbitration steps of the grievance procedure, the Union demanded arbitration on or about March 17, 2016.

On or about April 5, 2016, the City commenced an Article 75 proceeding to stay arbitration. On June 29, 2016, the Supreme Court, Westchester County, issued a decision denying the petition to permanently stay arbitration. On July 26, 2016, the City filed a motion for reargument. Upon the City's request to reargue, the Supreme Court granted the City's petition to permanently stay arbitration. The Union appealed to the Appellate Division, Second Department, on October 24, 2016.

By unanimous Decision and Order dated October 14, 2020, the Appellate Division, Second Department, reversed the Supreme Court's order to stay arbitration. It stated:

> Given the breadth of the arbitration clause in this case, the disputed payments clearly bore a reasonable relationship to some general matter of the parties' CBA, since Appendix C of the CBA, as subsequently modified by the parties' stipulation, expressly addresses the payment of General Municipal Law Section 207-a benefits, and Article 31 of the CBA recites the parties' agreement that benefits will not unilaterally be altered or revoked. Thus, the Union's grievance – that the exclusion of sums paid for night differential, check-in pay, and holiday pay from General Municipal Law Section 207-a benefits violates the CBA – constitutes an arbitrable dispute, and it is for an arbitrator to determine whether those disputed payments fall within the scope of the parties' CBA (Union Exhibit 21).

This decision led the parties to schedule and then conduct arbitration on February 24, 2021. However, concurrent with the arbitration proceedings, the City filed a motion to reargue the Second Department's decision. The Second Department denied the motion. On April 7, 2021, the City made a motion to the Court of Appeals seeking leave to appeal the Second Department's dismissal of its petition to permanently stay arbitration.

POSITION OF THE UNION

The Union insists that the City's claim that the grievance is not arbitrable must be rejected. The Second Department explicitly held that the grievance over the exclusion of monies paid for night differential, check-in pay, and holiday from GML 207-a constitutes an arbitrable dispute because these exact issues are directly addressed in the CBA. The

Union asks the Arbitrator to follow the rationale of the Second Department and find the grievance to be arbitrable.

The Union asserts that, in its desperate attempt to prevail, the City intentionally mischaracterized night differential, check-in pay, and holiday pay as fringe benefits, a term not used in the CBA. Night differential, check-in pay, and holiday pay clearly do not constitute fringe benefits as they are clearly compensation. Moreover, all three of these salary benefits are recognized as compensation in the CBA as they fall under the category of "Compensation" in the CBA, along with base salary, rate of pay, and longevity. Moreover, for at least the last 20 years, the City has paid night differential, check-in pay, and holiday as regular wages.

When these provisions are considered along with the Maintenance of Benefits provision set forth at Article 31 of the CBA, it becomes abundantly clear that the grievance is arbitrable. The gravamen of the grievance concerns the City's decision to unilaterally cease paying three discrete benefits set forth in the CBA. It also concerns the parties GML 207-a procedure, which is in the CBA, as well as Article 31, a maintenance of benefits provision the Union claims the City violated when it ceased paying night differential, check-in pay, and holiday pay to individuals receiving 207-a(2) benefits or individuals who may be eligible for such benefits in the future. To the Union, there is no logical way to find this grievance inarbitrable.

As for the merits, the Union insists that the City's action to unilaterally reduce payments made to permanently disabled retired firefighters is precisely the type of conduct that the Article 31 Maintenance of Benefits provision was designed to protect

against. This provision provides broad, clear, and unambiguous language prohibiting the City from altering or revoking any benefits provided to unit members either by law, custom, or usage. It states that the City "will not alter or revoke any benefits or other provisions heretofore negotiated for or granted to the members not specifically referred to in this Agreement and which are in existence…either by State laws… or which exist by reason of either usage or custom within the Department."

The Union stresses that there is an undisputed and longstanding past practice of including night differential, check-in pay, and holiday pay in the calculation of GML 207-a(2) benefits as regular salary and wages. Moreover, as far back as 1981, the Supreme Court, Westchester County, held that night differential, check-in pay, and holiday pay constitute regular salary or wages for purposes of GML 207-a(2) [*Smerek v. Christiansen,* 111 Misc. 2d 580 (Westchester County, 1981)]. Notably, in *Smerek,* the Court rejected the City's argument that only base pay and longevity should be included as part of regular salary or wages. For these reasons, the City's revocation of including night differential, check-in pay, and holiday pay in the calculation of GML 207-a(2) benefits is a reduction of payments that is contrary to undisputed practice and custom.

The Union emphasizes that during the last round of negotiations for the 2009-2019 CBA, which was settled in 2015, the parties spent considerable time negotiating the GML 207-a procedure. At no time did the City ever raise the calculation of GML 207-a(2) benefits, which it reduced at the end of the same year. Union President McGoey testified that the GML 207-a procedure was a big part of the negotiations but the supplemental pay was never brought up. He testified that all interested parties from City Hall, to the

payroll department, to the fire commissioner, knew that the GML 207-a(2) supplement included night differential, check-in pay, and holiday pay. He also testified that there was a line item in the budget for this.

It is abundantly clear that the City was well aware of these payments as all firefighters had been receiving them for years and years, regardless of their employment status (i.e., actively working, receiving GML 207-a(1) benefits, or receiving GML 207-a(2) benefits). To the Union, it appears that upon issuance of the retroactive payments attributable to the 2009-2019 CBA settlement, the City was looking for financial relief. Unfortunately, the City has attempted to achieve financial relief on the backs of heroic firefighters, some of whom had their faces burnt off, or had other serious injuries. Since night differential, check-in pay, and holiday pay have always been part of regular salary and wages, the City violated Article 31 and Appendix C of the CBA by excluding these sums for GML 207-a(2) benefit recipients.

An award from Arbitrator Robert A. Grey with these same parties provides precedential support for a finding against the City. Arbitrator Grey found that the City violated Article 31 by eliminating certain no count holidays that were not specifically included in the CBA. He determined that there were certain no count holidays that both parties were aware of that were not listed in the CBA. He found a violation of Article 31 when the City unilaterally eliminated certain holidays that were not listed in the CBA, as such days were a matter of either custom or practice.

The Union maintains that the City uses a mischaracterized term of fringe benefits that does not even appear in the CBA. The Union asserts that the fringe benefit label has no basis in fact and is contradicted by the record.

The Union contends that the City's stipulation that it continues to pay night differential, check-in pay, and holiday pay as part of regular salary or wages to active firefighters and those receiving GML 207-a(1) benefits is irreconcilable with the City's attempt to label these same payments as a fringe benefit to permanently disabled firefighters receiving GML 207-a(2) benefits. In the Union's estimation, night differential, check-in pay, and holiday pay do not suddenly transform from regular salary and wages to a fringe benefit upon a member's disability retirement.

The Union emphasizes that Union President McGoey testified that these payments are part of salary and wages that everyone receives. He testified that check-in pay is a payment everyone in uniform receives as part of their annual salary, regardless of whether the firefighter checks in, is on sick leave, or is on GML 207-a(1) leave. President McGoey also testified that, just like check-in pay, holiday pay and night differential are part of the regular salary that every firefighter receives.

The City's inclusion of night differential, check-in, and holiday pay payments to employees in the "final average salary" to calculate disability retirement benefits and the GML 207-a(2) supplemental payments is clear evidence of the City's recognition that these payments constitute regular salary and wages and not fringe benefits, a term that is not even mentioned in the CBA.

The cases relied on by the City are completely different than this case and should not lead the Arbitrator to find in favor of the City. In *Chalachan v. City of Binghamton,* 55 N.Y.2d 989 (1982) and *Uniformed Firefighters of Cohoes,* 94 N.Y.2d 686 (2000), the so-called additional benefit was paid based on if certain duties were performed or certain shifts worked. Unlike the instant case, holiday pay was only paid if a firefighter worked on a holiday. In stark contrast, here the City made night differential, check-in, and holiday payments to all firefighters, regardless of whether they were active, disabled, or retired. Since all firefighters receive these payments regardless of employment status, they clearly fall within the category of salary or regular wages.

For all of the reasons above, the Union urges the Arbitrator to find the City violated the CBA when it took action to exclude monies paid for night differential, check-in pay, and holiday pay from GML 207-a(2) benefits for bargaining unit members who may be granted performance of duty or accidental disability retirement benefits on or after December 9, 2015. As a remedy, the Union requests a finding that affected retirees be made whole, including payment for the improperly excluded sums for night differential, check-in pay, and holiday pay from December 9, 2015 to present, and that the City be ordered and directed to cease and desist from violating the CBA by excluding sums paid for night differential, check-in pay, and holiday pay from GML 207-a(2) benefits.

POSITION OF THE CITY

The City contends that the grievance should be dismissed because it is not arbitrable. The City stresses that the Court of Appeals and the Appellate Divisions have repeatedly held that the calculation of the GML 207-a(2) benefit shall only include regular wages, longevity, and negotiated increases unless the CBA expressly provides otherwise. These courts have repeatedly stayed arbitration of grievances brought by claimants seeking GML 207-a(2) benefits where the CBA does not expressly provide such payments.

The City asserts that the Court of Appeals has regularly defined the term "regular salary or wages" under GML 207-a(2) as "salary increases given to active firefighters following the award of disability retirement allowance or pension as well as the benefit of longevity pay increases provided to active firefighters." The Court of Appeals has also determined that the GML 207-a(2) wage supplement benefit is calculated by excluding all other fringe benefits paid to active firefighters, unless the parties expressly negotiated a GML 207-a(2) supplement that expressly includes such fringe benefits. In the City's view, the following determination from the Court of Appeals demonstrates that firefighters in the City are not eligible for night differential, check-in pay, and holiday pay because such benefits are not expressly set forth in the CBA as GML 207-a(2) benefits:

> 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 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]).

The City emphasizes that the Court of Appeals took this notion a step further in *Uniformed Firefighters of Cohoes v. City of Cohoes,* 94 N.Y.2d 686, 694 (2000). It held that in cases involving arbitration of a grievance over 207-a(2) benefits, the arbitration shall be stayed as non-arbitrable unless the CBA expressly provides employees on GML 207-a(2) status with that specific fringe benefit. The City cites several Appellate Division rulings following this principle, i.e., if the benefit is not expressly provided as a 207-a benefit, arbitration of a grievance over this benefit shall not be allowed to occur.

The City insists that this CBA has no express language providing that employees receiving 207-a(2) benefits will have night differential, check-in pay, and holiday pay included as part of regular salary and wages. Since these benefits are not expressly provided to firefighters on disability leave, the matter is not arbitrable and the grievance should be dismissed with prejudice.

As for the merits, the City contends that numerous court rulings establish that when firefighters become disabled under GML 207-a, their continued status entitles them to the statutory benefits only, which includes payment of medical expenses and their "regular salary and wages." While the City concedes that firefighters receiving GML 207-a(2) benefits are entitled to prospective salary increases and longevity payments, the City notes that courts have repeatedly held that disabled firefighters

who are retired are not statutorily entitled to fringe benefits such as holiday pay and shift differential. The only way payments like this may be provided is if they are expressly provided under the CBA as GML 207-a benefits. The Union's case fails on the merits because the CBA is silent on this issue.

The City notes that base salary is defined in Appendix A of the CBA, an appendix that addresses salary and longevity. Appendix A does not include fringe benefits. The CBA also has a rate of pay section, which includes annual salary plus longevity. Notably, those firefighters assigned to the arson unit also have their arson pay included in computing their hourly and daily rates.

In stark contrast, the sections in the CBA addressing night differential, check-in pay, and holiday pay do not address payment of these fringe benefits to retirees. While the CBA addresses retiree entitlement to other benefits, such as retiree health insurance, it does not address retiree entitlement to other fringe benefits.

The GML procedure in the CBA clearly does not include entitlement to these benefits. In fact, the GML procedure limits arbitration of GML 207-a(2) disputes to a single circumstance, i.e., the City's refusal to award GML 207-a(2) benefits.

Despite Union President McGoey's attempt to characterize the fringe benefits at issue as a component of regular salary and wages, documentary evidence and caselaw establish that they are not. Check-in pay and holiday pay are paid twice a year, not bi-weekly like regular salary. Night differential is payable only to those firefighters who actually work the night tour. Since the evidence and caselaw strongly establish that firefighters on GML 207a-(2) disability are entitled only to regular

salary and wages, the Union's demand to include additional fringe benefits into the computation of regular salary and wages for these disabled firefighters is without merit and must be rejected.

The City contends that the Maintenance of Benefits clause does not expressly provide the disputed payments to disabled retirees and is not applicable. This is so because the disputed payments are already described in the CBA. Since the disputed payments are specifically referred to in the CBA but the CBA does not provide disabled retirees with such benefits, the Maintenance of Benefits clause is not applicable.

Moreover, the City should prevail because a literal reading of the CBA excludes these payments from base salary and, as all interested parties are well aware, express contract language supersedes any alleged practice. The City stresses that the New York State Public Employment Relations Board (PERB) caselaw holds that when a past practice is in conflict with express contract language, an employer has the right to revert to the express contract language. As such, the City has the right to end the practice of erroneously paying the disputed payments to retirees receiving GML 207-a(2) benefits and revert to the clear terms of the CBA.

For all of the reasons above, the City urges the Arbitrator to dismiss the grievance.

OPINION

After carefully considering the evidence in the record and the arguments of the parties, the Arbitrator determines that the grievance is arbitrable and that the grievance should be sustained.

The grievance is both arbitrable and meritorious under Article 31, which is entitled Maintenance and Continuation of All Other Benefits. While the last sentence of the maintenance and continuation of all other benefits provision states that the provision is for the benefit of both parties, the fact remains that this provision is hugely advantageous to the Union because it provides a clear and unambiguous contractual right to object (and ultimately prevail) any time the Union challenges the City's decision to revoke or alter any benefits negotiated for or granted to firefighters that are not specifically referred to in the CBA. The Arbitrator reaches this conclusion because that is precisely what Section 31:01 states:

> The City and the Union agree that they will not alter or revoke any benefits or other provisions heretofore negotiated for or granted to the members not specifically referred to in this Agreement and which are in existence on the date of the signing of this Agreement and which are presently effective either by State laws, local laws, ordinances or resolutions or departmental rules and regulations or departmental orders or contained within the budget of the City of Yonkers, or which exist by reason of either usage or custom within the Department. This provision is for the benefit of both parties.

Under this provision, the City agreed that any benefits being provided that are not expressly included in the CBA are locked in and cannot be changed or revoked. In other words, this provision is a strong source of right for the Union any time the City seeks to revoke or alter a benefit it previously provided.

Absent Article 31, the City was not obligated to expressly commit to continuing benefits that are not within the four corners of the CBA. Indeed, if Section 31:01 did not exist, this dispute would likely have a different outcome. However, by agreeing to allow the Union to have such a broad source of right in Article 31 and also committing not to alter or revoke any benefit not contained within the contract, any benefits not contained within the contract are tantamount to binding commitments made by the City. In other words, the negotiated language establishes that any benefits not expressly listed in the CBA nonetheless become express contractual rights because that is what the provision states. Since Section 31:01 provides the Union's members with the right to the disputed benefits, the grievance must be deemed arbitrable.

For the very same reason, the express language of Article 31 establishes that night differential, check-in pay, and holiday pay are regular salary and wages for GML 207-a(2) recipients because that is the law of the contract. This is the case because both parties stipulated to the open and notorious nature of the practice of the City paying night differential, check-in pay, and holiday pay to firefighters in every imaginable circumstance. To wit, for dozens of years:

- All active unit members received night differential, check-in pay, and holiday pay as part of their regular wages, regardless of their work schedule;
- All bargaining unit members on extended sick leave received night differential, check-in pay, and holiday pay;

- All bargaining unit members have been paid night differential regardless of whether the individual worked a night tour;
- All bargaining unit members have been paid check-in pay, regardless of whether the individual was actually working;
- Active employees approved for GML 207-a(1) benefits received pay for night differential, check-in pay, and holiday pay; and
- The City included night differential, check-in pay, and holiday pay in its calculation of GML 207-a(2) benefits and such payments were reported by the City as salary to the New York State Retirement System.

The history demonstrates a clear and unequivocal practice treating night differential, check-in pay, and holiday pay as salary for all GML 207-a leave purposes, including GML 207-a(2). The City budgeted and paid these benefits for more than 20 years. The City was aware how these benefits were calculated, yet it chose not to negotiate a change knowing full well that Article 31 required negotiations in order to change any benefits previously conferred.

On the other hand, the Union had no reason to expressly add these benefits to the CBA because Article 31 provides it with a source of right to such benefits. Under the language of Article 31, night differential, check-in pay, and holiday are treated as regular salary and wages, because that has been the practice and the City is prohibited from unilaterally changing any practice.

The caselaw provided by the City is not on point. None of the cases cited by the City include a maintenance of benefits clause like the one found in Article 31. All of the

cases cited by the City involve situations where the benefits the firefighter was seeking were not expressly set forth in the CBA. This case is different because Article 31 provides clear and unambiguous language that any benefits not listed in the contract are just as sacrosanct as those listed. In other words, the CBA is not silent because any benefits previously provided but not expressly listed are essentially listed by operation of Article 31. This is different and wholly distinguishable from the cases cited by the City.

The CBA also provides support for continuing these specific benefits because they are all listed in the CBA under the Compensation section of the CBA and because the parties have a broad GML 207-a procedure governing the award of benefits. Under Article 4.0, entitled Compensation, there are numerous sections addressing compensation. These include the benefits in dispute. Section 4.05 addresses night differential, Section 4.06 addresses check-in pay, and Section 4.07 addresses holiday pay. Since these benefits are expressly stated in the CBA and history shows the City has treated them as compensation in the past, these benefits must be considered compensation and are not fringe benefits.

The City's reversion argument would be applicable if there was language expressly stating that night differential, check-in pay, and holiday pay should not be counted as salary for GML 207-a purposes. There is no such language. As such, the City's reversion argument must fail.

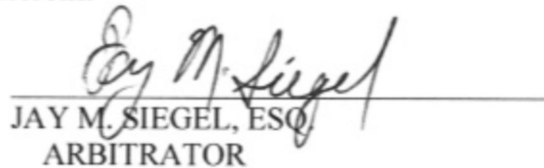
In the end analysis, at some point many years ago the Union expended negotiations capital to achieve the rights preserved in Article 31. The situation that formed the basis of the initial grievance is exactly what Article 31 is intended for,

namely, to prevent the City from unilaterally changing any longstanding pay or benefits being provided but that are not expressly listed in the CBA. The only way for Article 31 to be truly effectuated in this case is for the Union to prevail.

Accordingly, and based on the foregoing, I find and make the following:

<u>**AWARD**</u>

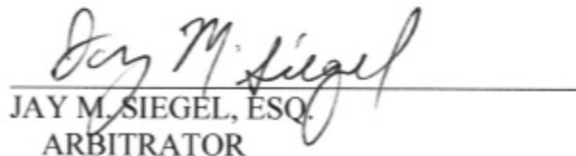
1. The instant grievance is arbitrable.
2. As for the merits, the grievance is sustained. The City violated Article 31 of the CBA by excluding night differential, check-in pay, and holiday pay from GML 207-a benefit payments for those firefighters retiring on or after December 9, 2015 who were granted performance of duty or disability benefits. The affected retirees who retired on or after December 9, 2015 shall be made whole, including payment for the improperly excluded sums for night differential, check-in pay, and holiday pay from December 9, 2015 to the present. The City is ordered to cease and desist from the action of not including night differential, check-in pay, and holiday pay from GML 207-a benefits for those firefighters granted performance of duty or disability benefits that retire on or after December 9, 2015.
3. The Arbitrator shall retain jurisdiction solely to resolve any disputes regarding the remedy ordered herein.



DATED: May 6, 2021

JAY M. SIEGEL, ESQ.
ARBITRATOR

STATE OF NEW YORK)
COUNTY OF PUTNAM) ss:
I, Jay M. Siegel, do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this Instrument, which is my Award.



DATED: May 6, 2021

JAY M. SIEGEL, ESQ.
ARBITRATOR

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

AFFIDAVIT OF SERVICE BY OVERNIGHT FEDERAL EXPRESS NEXT DAY AIR

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On February 2, 2022

deponent served the within: **Brief for Respondent-Respondent**

upon:

Coughlin & Gerhart LLP
Paul J. Sweeney Esq.
99 Corporate Drive
Binghamton NY 13904
Phone: (607) 723-9511

the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on February 2, 2022

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2022

Job# 310565