To be Argued by:
PAUL J. SWEENEY
(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 PETITIONER-APPELLANT

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STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13 of the Courts Rules of Practice, the following information as to the status of related litigation is provided as of the date of this brief. The Petitioner-Appellant City of Yonkers moved the Westchester County Supreme Court pursuant to Article 75 of the Civil Practice Law and Rules to vacate an arbitration award in the same matter in favor of Respondent-Respondent Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO, based on the same issues, facts and grounds on which this Court granted leave to appeal to the City (*see Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, Sup Ct Westchester County Index No. 60260-2021). By Decision and Order dated December 3, 2021, Supreme Court (Giacomo, J.) denied that relief and dismissed the special proceeding. On December 8, 2021, the City filed and served a notice of appeal to the Appellate Division, Second Department. That appeal is still pending.[1]

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

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STATEMENT OF JURISDICTION

Petitioner-Appellant the City of Yonkers (hereinafter, the "City") moved this Court for leave to appeal from a Decision and Order of the Appellate Division, Second Department dated October 14, 2020. On October 7, 2021, this Court granted the City leave to appeal by Order dated October 7, 2021 [R: 387]. [2]

The Court of Appeals has jurisdiction to entertain this appeal pursuant to CPLR 5602 (a) (1) (i). The Second Department's Decision and Order [R: 388-390] reversed the Decision and Order of Supreme Court (Ruderman, J.) entered October 17, 2016 [R: 5-12], which had granted the City's application pursuant to CPLR Article 75 to stay the arbitration demanded by Respondent-Respondent Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO (hereinafter, the "Union") [R: 178-180] pursuant to the parties' Collective Bargaining Agreement (hereinafter, the "CBA") [R: 30-155]. The Second Department's Decision and Order constitutes a final determination of the instant proceeding, which was not appealable as of right, inasmuch as it "dispose[d] of all of the causes of action between the parties in the . . . proceeding and le[ft] nothing for further judicial action apart from mere ministerial matters" (*Burke v Crosson*, 85 NY2d 10, 15 [1995]).

[2] All citations preceded by "R:" refer to the consecutively paginated volume entitled, "Record on Appeal."

This Court also has jurisdiction to review the question raised on appeal, namely, whether the Second Department's Decision and Order employed an improper legal standard, leading to an erroneous determination that the Union could arbitrate its grievance over the City's decision to exclude certain contractual, fringe benefits as part of its payment of statutory benefits to GML § 207-a (2) recipients, despite the fact that nothing in the CBA expressly provides or extends such contractual benefits to disabled, retired firefighters receiving GML § 207-a (2) payments. Throughout the course of this proceeding, the City has raised and, thus, preserved this question, inasmuch as it extensively argued before Supreme Court and the Second Department for the application of this Court's more stringent, "expressly provision" test governing the arbitrability of GML § 207 benefits. The City's arguments to this effect appear in multiple places in the Record on Appeal to the Second Department. [R: 7-12, 17-18, 21-26].

Although the Second Department inexplicably did not address the "express provision" test in its Decision and Order (which, in and of itself, is a defect of the Second Department's ruling) [R: 388-390], the test's applicability to the facts of this case was extensively argued in the City's appellate brief to the Second Department, which was attached as Exhibit "D" to the City's Motion for Leave to Appeal to this Court.

QUESTION PRESENTED

Question: Did the Appellate Division, Second Department err by disregarding this Court's, as well as its own prior decisions, apply an incorrect, lesser legal standard and wrongly find that the Union's grievance over whether CBA "fringe" benefits should be included as part of a disabled retiree's General Municipal Law (hereinafter, "GML") § 207-a (2) benefit was arbitrable, notwithstanding the absence of any provision in the parties' CBA that "expressly provided" that said fringe benefits were actually intended to be included as part of the GML § 207-a (2) benefit?

Answer: Yes. This Court, in *Uniformed Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes* (94 NY2d 686 [2000]), previously held that a contract grievance pertaining to the provision of a CBA fringe benefit to GML §§ 207-a and 207-c (collectively, "GML § 207") recipients was not arbitrable unless an "express provision" of the CBA extended such a contractual benefit to GML § 207 recipients. Put another way, if a CBA has no language expressly providing that the contractual benefit at issue is to be included in the statutory GML § 207 benefit, a dispute over exclusion of that benefit is not arbitrable. The Second Department ignored this well-established legal standard and, instead, found that the fringe benefits at issue were merely "reasonably related" to "some general subject matter" of the CBA. Thus, the court concluded, erroneously, that the dispute was arbitrable.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Collective Bargaining Agreement

The City and the Union are parties to a CBA which covered the period July 1, 2002 through June 30, 2005 [R: 30-111] and, as extended by stipulations between the parties, covered the periods July 1, 2005 through June 30, 2009 [R: 112-117] and July 1, 2009 through June 30, 2019 [R: 117-155].

CBA Article 1 ("Recognition") provides that "[t]he City recognizes the Union as the exclusive bargaining agent for all those employees holding the rank of Firefighter (herein referred to as "members") *who are now on active duty and employed* by the Fire Department of the City of Yonkers" [R: 33, emphasis added].

CBA Article 29 ("Grievance Procedure") provides for grievance arbitration "[i]n the event of a dispute between the parties to this Agreement involving the interpretation or application of any provision of this Agreement" [R: 61].

Appendix "C" to the CBA, as modified by the July 1, 2009 through June 30, 2019 stipulation [R: 123-155], is the negotiated procedure pertaining to GML § 207-a benefits. Section 1 of the updated procedure provides that "[t]his policy is intended to provide a procedure to regulate both the application for, and the award of, benefits under section 207-a of the General Municipal Law" [R: 123]. While the revised GML § 207-a procedure (which became effective July 1, 2009) does address GML§ 207-a (2) claims, it does not define the GML § 207-a (2) benefit or

address Special Pays and limits arbitration to disputes over the City's initial determination of an applicant's eligibility for GML § 207-a (2) benefits in the first instance [R: 129-131].

The CBA at Section 4:01.01 ("Base Salary") defines "annual base salary" as that "provided on the Appendix A annexed" [R: 36]. Appendix A, which only addresses base salary and longevity, does not include the fringe benefits [R: 80].

Section 4:02 of the CBA ("Rate of Pay") provides that a "member's rate of pay shall be one and two hundred thirty-secondths (1/232ths) of annual base salary plus longevity . . . Members who are assigned to [the arson squad] shall in addition, have their arson pay included in computing their hourly and daily rates" [R: 37].

Significantly, The CBA provisions governing the contractual fringe benefits at issue in this case – *i.e.*, "Night Differential", "Check-In Pay" and "Holiday Pay" (collectively, the "Special Pays") – are located in completely different sections of the CBA and, in any event, provide the Special Pays only to "firefighters" or "members" [R: 39-40], not to disabled retirees receiving GML § 207-a (2) benefits.

It is undisputed that the term "annual base salary" is a defined term in the CBA, that the CBA's "Rate of Pay" section excludes all other salary benefits from its definition, and that the Special Pays are found in other sections of the CBA.

B. Procedural History

The events giving rise to the instant appeal occurred over six years ago, when on December 9, 2015, the City issued determinations to forty-four (44) retired firefighters and fire officers who received an "Accidental" or "Performance of Duty" ("POD") disability retirement from the New York State Retirement System ("NYSRS") by reason of an injury in the performance of duties as a firefighter. The determinations advised the retirees that the City had overpaid them GML § 207-a (2) benefits [R: 158-159].

GML § 207-a (2) benefits include a tax free "wage supplement" paid to those retired firefighters who received an "Accidental" or "POD" disability retirement from the NYSRS. The GML § 207-a (2) benefit represents the difference between the retiree's disability retirement pension paid by New York State and his or her "regular wages or salary" with the City [R: 17]. The overpayment was created by the City's gratuitous inclusion of the Special Pays in the calculation of the firefighters' GML § 207-a (2) wage supplements, despite the absence of any express provision in the CBA that included the Special Pay fringe benefits were intended to be included in the GML § 207-a (2) [R: 18, 30-155].

The City's December 9, 2015 determination provided notice to the retirees that the City intended to adjust the GML § 207-a (2) benefit and recoup the overpayment [R: 158-159]. Prior to affecting the adjustment or recoupment, the City

afforded each retiree with a right to a due process hearing, which were held between February and March of 2016 [R: 18-19]. All but one of the 44 retired firefighters and fire officers participated in the hearings. The majority of the retirees were represented by Attorney Richard S. Corenthal (also the Union's legal counsel) who requested an adjournment of the due process hearings which were originally scheduled for mid-January 2016 [R: 18].[3]

On or about December 15, 2015, the Union filed a "step 1" grievance with the City, alleging that the "reduction in GML 207a(2) pension supplement benefits is a violation of Local 628's CBA for those retirees (who retired subject to the terms of Local 628's CBA) as well as for all present members of Local 628 who are currently on GML 207-a status and in the application process for Accidental or POD disability retirements benefits, as well as all current members of Local 628 who may become injured or ill and be entitled to GML 207a benefits" [R: 156-157]. Two days later, on December 17, 2015, the Union supplemented its grievance by alleging that the City's actions amounted to a violation of CBA Article 31 ("Maintenance and Continuation of All Other Benefits") and a violation of CBA Article 12, Section 12:02 and CBA Appendix C [R: 160].

[3] Significantly, the City has not attempted to adjust or recoup the GML § 207 a (1) benefits paid to currently employed or "active duty" City firefighters who are members of the bargaining unit. The City continues to pay active duty firefighters a GML § 207-a (1) benefit that includes the Special Pays, in addition to their base pay [R: 19, 165].

By letter dated December 22, 2015, the City rejected the grievance at step 1 as pertaining to a matter outside the scope of the CBA. In the letter, the City advised the Union that it was not seeking to adjust or recoup the GML § 207-a benefits being paid to active firefighters and Union members [R. 165].

After the Union filed a "step 2" grievance, which the City again rejected on the same grounds [R: 167-177], on or about March 17, 2016, the Union served a Demand for Arbitration ("Demand") with the American Arbitration Association [R: 178-180]. In the "Nature of Grievance" portion of the Demand, the Union checked "Contract Interpretation" and stated that the "City's decision to stop paying holiday pay, night differential pay and check-in pay as part of GML 207-a(2) supplement violates the CBA, including Appendix C and Article 31, Maintenance of Benefits" [R: 180]. In the "Remedy Sought" portion of the Demand, the Union made a demand to "[c]ontinue to include holiday pay, night differential pay and check-pay [*sic*] in GML 207-a(2) supplement" [R: 180]. In the "Name of the Grievant(s)" portion of the Demand, the Union identified "active and retired members" [R: 180].

In response, on April 6, 2016, the City commenced the underlying proceeding pursuant to CPLR Article 75 seeking a permanent stay of the Union's demand for arbitration [R: 13-29]. Initially, Supreme Court (Smith, J.) issued an Order to Show Cause with a Temporary Restraining Order to stay arbitration due to the Union's and

the American Arbitration Association's actions to commence arbitration despite the Petitioner's efforts to stay arbitration [R: 181-196].

Then, on June 29, 2016, Supreme Court (Ruderman, J.) issued its first decision and order on the merits in this proceeding, which, among other things, denied the City's petition to permanently stay arbitration, vacated the temporary restraining order staying arbitration and directed the parties to proceed with arbitration of the dispute [R: 317-323].

On July 26, 2016 the City moved, *inter alia*, to reargue its CPLR Article 75 petition on the primary ground that Supreme Court overlooked or misapprehended controlling Court of Appeals and appellate division case law holding that a court shall stay arbitration of a grievance over the scope of GML § 207 benefits when the CBA does not expressly provide for the extension of the contested contractual benefits to disabled retirees as a part of their statutory payments pursuant to GML § 207 [R. 326-335].

On reargument, the Supreme Court issued a second Decision and Order dated October 17, 2016, which reversed course and granted the City's petition to permanently stay arbitration between the City and the Union. In its Decision and Order, the Supreme Court agreed with the City that the Union's grievance was not arbitrable because the parties' CBA does not expressly provide for the inclusion of the Special Pays in GML § 207-a (2) payments [R: 4-12].

On or about October 24, 2016, the Union filed its notice of appeal to the Second Department of Supreme Court's Decision and Order of October 17, 2016 following reargument [R: 3]. Thereafter, on October 14, 2020, the Second Department reversed Supreme Court's October 17, 2016 Decision and Order, finding that the dispute concerning the recalculation of retiree benefits pursuant to GML § 207-a (2) was arbitrable, stating, among other things, that "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" [R: 388-390].

At the same time, in a companion decision affecting the 44 retirees (*see Matter Borelli v City of Yonkers*, 187 AD3d 897 [2020], *lv granted* 36 NY3d 911 [2021] [hereinafter, "*Borelli*"]), the Second Department reached a different, contradictory conclusion, holding that the CBA did not provide for the inclusion of the Special Pays in the GML § 207-a (2) benefit. There, the court noted that "[d]isability entitlements are generally a matter of statutory right, 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" (*id.* at 898-899 [internal citations omitted]).

The City then moved the Second Department to reargue and/or for leave to appeal to this Court in the instant case, which motion was denied. Subsequently, the City moved this Court for an Order pursuant to CPLR 5602 (a) (1) (i), granting it

leave to appeal the Second Department's October 14, 2020 Decision and Order. By Order dated October 7, 2021, the Court granted the City's motion [R: 387], and separately granted the 44 retirees leave to appeal in the *Borelli* case.

ARGUMENT

POINT I

THE APPELLATE DIVISION, SECOND DEPARTMENT WRONGLY IGNORED THIS COURT'S "EXPRESS PROVISION" TEST AND INCORRECTLY APPLIED THE LESSER, "REASONABLE RELATIONSHIP" TEST, LEADING TO AN ERRONEOUS FINDING THAT THE PARTIES AGREED TO ARBITRATE THE GRIEVANCE

In the Supreme Court's 2016 Decision and Order on reargument in the instant CPLR Article 75 proceeding, the Supreme Court held that the Union's grievance challenging the City's decision to eliminate the Special Pays from disabled, retired firefighters' GML § 207-a (2) benefits was not arbitrable because the parties' CBA did not have an "express provision" or otherwise "expressly provide" for the inclusion of the Special Pays in GML § 207-a (2) payments. In reaching this conclusion, Supreme Court's relied upon this Court's seminal holding in *Matter of Uniformed Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes* (hereinafter, "*Cohoes*"), which articulates the "well-settled rule that recipients of [GML §] 207-a benefits cannot claim additional employment entitlements beyond those in the statute unless there is an express provision in the collective bargaining agreement awarding them" (94 NY2d 686, 695 [2000]).

On appeal, the Second Department, with little discussion, no citations to relevant case law of this Court or its own precedent, and contrary to its holding in *Borelli*, reversed the Supreme Court's holding which was correctly based upon the "express provision" test set forth in *Cohoes* [R: 388-390]. In so doing, the Second Department appeared to ignore the key fact that the Union's grievance deals exclusively with contractually fringe benefits which are not "expressly provided" in the CBA to be part of the statutory, GML § 207-a (2) benefit. Indeed, nowhere in the Decision and Order does the Second Department explain why the Supreme Court's reliance on *Cohoes* was incorrect and, for that matter, the court did not even cite to the case.

Rather, in its analysis, the Second Department summarily reverted to the far less stringent "reasonable relationship" test for determining whether the parties' agreed to arbitrate the Union's grievance (*see Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn.]*, 93 NY2d 132, 143 [1999]). Ultimately, the Second Department held that the parties' did agree to arbitrate the dispute, simply because the parties' CBA contains a broad arbitration clause and because the Union's grievance "bore a reasonable relationship to some general subject matter of the parties' CBA" [R: 390].

It is submitted the Second Department erred in its application of the "reasonable relationship" test to conclude that the instant grievance is arbitrable.

The court's analysis completely ignores this Court's prior holding in *Cohoes*, as well as a number of prior Appellate Division decisions (including some of its own) which establish that the "express provision" test – not the "reasonable relationship" test – is the applicable standard by which courts determine whether parties to a CBA agreed to arbitrate a grievance regarding the scope of a municipality's GML § 207-a (2) payment obligations. Alternatively, it is further submitted that, even if the reasonable relationship test is, technically, applicable here, the same holdings of this Court, at the very least, establish a heightened, or more stringent reasonable relationship test, which the Second Department failed to consider, or follow.

A. The Incorrect Standard Under the Present Circumstances: "Reasonable Relationship" Test

As a general rule, the standard governing the arbitrability of grievances over alleged CBA violations is the two-part test enunciated in *Matter of Acting Supt. of Schools of Liverpool Cent. School Dist. (United Liverpool Faculty Assn.)* (42 NY2d 509 [1977] [hereinafter *Liverpool*]) and *Matter of Board of Educ. of Watertown City School Dist. (Watertown Educ. Assn.)* (93 NY2d 132, 143 [1999] [hereinafter *Watertown*]). Under the *Liverpool*-*Watertown* analysis, a court first must address the "may-they-arbitrate" prong of the test, which asks whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance (*see Watertown*, 93 NY2d at 138; *Liverpool*, 42 NY2d at 513). If there is no legal or policy prohibition against arbitrating, courts then address the second prong of the

test, which asks whether the language of the CBA indicates that the parties agreed to arbitrate the underlying dispute (*see Watertown*, 93 NY2d at 140; *Liverpool*, 42 NY2d at 513-514).

As relevant here, under the second prong of the *Liverpool-Watertown* analysis,[4] where contractually-based benefits or procedures are the subject of the grievance at issue and the CBA contains a broad arbitration clause, a court's task is to "determine whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA. If there is none, the issue, as a matter of law, is not arbitrable. If there is, the court should rule the matter arbitrable" (*Watertown*, 93 NY2d 132, 143 [1999] [analyzing grievance regarding a reduction in contractual health insurance benefits]; *see Matter of City of Johnstown [Johnstown Police Benevolent Assn.]*, 99 NY2d 273, 279 [2002] [analyzing grievance alleging that CBA provided a class of employees with additional retirement benefits]).

[4] It should be noted that, despite the numerous applications of the "express provision" test in *Cohoes* and its progeny (*see* Point I.B., *infra*), no appellate court, including this Court, has ever affirmatively commented on whether this test applies to the first prong of the *Liverpool-Watertown* analysis, the second prong, or to both prongs. It is submitted that, while the "express provision" test may appear to more readily apply to the second prong of the *Liverpool-Watertown* analysis, it is arguably applicable to the first prong as well, inasmuch as public policy should prohibit the Union's attempt to expand the scope of a statutorily defined retiree benefit through contract-based grievance arbitration. "Public employers executing a CBA are prohibited from negotiating and granting retirement benefits that are not already expressly provided under state law" (*Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, 20 NY3d 651, 656 [2013]). Here, the GML § 207-a (2) disability retirement benefit is "expressly provided under state law."

Significantly, while this "reasonable relationship" test has been widely utilized to determine whether parties to a CBA agreed to arbitrate grievances based upon various benefits and administrative procedures that are rooted in the CBA itself, it would appear that since this Court's 1999 holding in *Watertown*, neither this Court, nor any other appellate court – aside from the Second Department in the Decision and Order on appeal – has ever applied the less stringent, "reasonable relationship" test to a grievance over the inclusion or exclusion of fringe benefits in a police officer's or firefighter's GML § 207 payments.

Indeed, other than the present case, it appears that there are only two appellate division cases that have utilized the reasonable relationship test to determine the arbitrability of a grievance implicating *any* aspect of GML §§ 207-a or 207-c. However, in both of those instances, the subject matter of the grievances was alleged failings on the part of the municipality to adhere to contractually-negotiated GML § 207 procedures. Importantly, neither case dealt with the calculation of the GML § 207-(2) wage supplement payments (*see Matter of City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CI*O, 153 AD3d 617, 617 [2d Dept 2017] [grievance alleged City's third-party administrator violated negotiated 207-a procedure by "engag[ing] in a continuing practice of delaying and denying medical care and treatment to its members who had sustained General Municipal Law § 207–a line of duty injuries"]; *Matter of City of Buffalo [Buffalo Professional Firefighters*

Ass'n, Local 282, IAFF, AFL-CIO-CLC], 27 AD3d 1093, 1093 [4th Dept 2006] [grievance alleged city violated negotiated 207-a procedure when firefighter was denied GML § 207-a (2) benefits after being granted accidental disability retirement.]).

Thus, the Second Department's choice to apply the lesser, "reasonable relationship" test to the Union's grievance over the exclusion of the Special Pays from retired, disabled firefighters' GML § 207-a (2) benefits is, for all intents and purposes, unprecedented, and finds no support in CPLR Article 75 case law. It is submitted that this constitutes strong evidence that the Second Department applied the incorrect standard to determine whether the City and the Union agreed to arbitrate the grievance at issue here.

B. The Correct Standard Under the Present Circumstances: "Express Provision" Test

The absence of any case law supporting the Second Department's application of the reasonable relationship test in the present context is good evidence that its decision to do so was incorrect. Perhaps the best evidence of the court's error, however, is the fact that both it, this Court and other departments of the appellate division have repeatedly held that a court shall stay arbitration of a grievance that a particular CBA benefit or right should be included in a disabled police officer's or fire fighter's statutory GML § 207 benefits when the CBA does not "expressly provide" the contested benefit to GML § 207 recipients.

The justification for this "express provision" standard is found in the language of GML § 207-a itself, and the subsequent judicial interpretations thereof. Where, as here, disabled firefighters are receiving benefits under GML § 207-a (1), and subsequently receive an accidental disability allowance under the Retirement and Social Security Law (hereinafter "RSSL") § 363, a performance of duty disability retirement allowance pursuant to RSSL § 363-c, or another pension provided by a pension fund of which the firefighter is a member, a municipality's responsibility is limited by statute to paying the now-retired firefighter a wage supplement, that is, the difference between the amount of the pension or allowance and the "amount of his regular salary or wages" as if he or she were still employed (GML § 207-a [2]).

While the term "regular salary or wages" is not defined in the statute, both the Second Department and this Court have consistently interpreted this term to mean (a) base wages or salary; (b) negotiated wage or salary increases (*see Mashnouk v Miles*, 55 NY2d 80 [1982]); and (c) longevity payments (*see Matter of Farber v. City of Utica*, 97 N.Y.2d 476, 479 [2002]; *Whitted v City of Newburgh*, 126 AD3d 910 [2d Dept 2015]; *Matter of Aitken v City of Mount Vernon*, 200 AD2d 667, 668 [2d Dept 1994]), and nothing more.

It is submitted that these facts regarding the purely statutory and well-defined nature of GML § 207-a benefits confirm both the logic and the necessity of the *Cohoes* Court's "express provision" test for determining the arbitrability of disputes

over whether GML § 207-a benefits should include additional benefits or rights provided to active duty firefighters that are outside the scope of GML § 207-a "regular salary or wages."

1. The "Express Provision" Test: Court of Appeals

In *Cohoes*, the union submitted a demand for arbitration over disputed return-to-work orders for firefighters to report for light duty assignments (*see* 94 NY2d 686, 693-94 [2000]). However, the CBA at issue did not speak to whether firefighters receiving GML § 207-a benefits were entitled to arbitrate disputes concerning light duty assignments (*see id*. at 694). The Court reasoned that "because disabled firefighters do not perform regular duty in exchange for the 'payment of the full amount of regular salary or wages' under [GML] § 207-a, apart from contractual entitlements, '[t]he collective bargaining agreement should not therefore be construed to *implicitly expand* whatever compensation rights are provided petitioners under the statute. Any *additional benefits must be expressly provided for in the agreement*" (*Id.* [emphases and alterations original], quoting *Matter of Chalachan v City of Binghamton*, 55 NY 2d 989, 990 [1982]).

In the *Cohoes* Court's view, the "total absence of any express provision" in the CBA providing the disputed contractual rights to GML § 207-a recipients was "fatal" to the union's claim that arbitration could be compelled (94 NY2d at 694). Notably, the Court ruled that additional benefits beyond "regular salary or wages"

that are purportedly owed to firefighters receiving GML § 207-a benefits must be "expressly provided" for in the CBA, even though the CBA at issue in *Cohoes* contained a broad grievance arbitration clause, much like the one at issue here (*see id.*). This makes sense because, again, § 207 benefits are statutory benefits, derived from the General Municipal Law, rather than contractual benefits derived from the terms of a CBA. Thus, in order for a union to engage in contract-based grievance arbitration over a purely statutory entitlement, it stands to reason that the grievance would have to be based upon some express language of the CBA that purports to enhance the level of benefits that a disabled firefighter already receives, notwithstanding the language of the CBA, via GML § 207-a.

2. The "Express Provision" Test: Second Department

Since *Cohoes*, the Second Department has employed on multiple occasions the "express provision" test to stay arbitration where a municipal employer refused to provide the same level of contract benefits that active duty employees receive to disabled current or former employees receiving statutory, GML § 207 payments, on the ground that the CBA did not expressly grant such benefits to GML § 207 recipients.[5]

[5] While the Second Department was adjudicating the claims of the 44 retirees in the context of an Article 78 proceeding in *Borelli*, it agreed that the evidence did not support a finding that the Special Pays were part of the retirees GML § 207–a(2) benefit. "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-

For example, in *Matter of Town of Tuxedo v Town of Tuxedo Police Benevolent Assn.*, which involved leave benefits (*see* 78 AD3d 849 [2d Dept 2010]), the Second Department stated that

> contrary to the PBA's contention, the CBA did not contain any language expressly providing that leave time would accrue during the period that a disabled officer receives General Municipal Law § 207-c benefits, or that a disabled officer would be paid for such leave time upon retirement. Accordingly, the Supreme Court should have granted the petition . . . to permanently stay arbitration

(*id.* at 851 [internal citation omitted]).

Similarly, in *Matter of Incorporated Vil. of Floral Park v Floral Park Police Benevolent Assn.* (89 AD3d 731 [2nd Dept. 2011]), the Second Department again upheld the trial court's decision to stay arbitration over the Village's exclusion from GML § 207-c payments various types of leave time accruals provided to active police officers under the CBA, but not expressly provided to GML § 207-c recipients. There, the court stated that

> contrary to the PBA's contention, the parties' collective bargaining agreement does not expressly provide that leave time accrues during the period that a disabled officer is not working and is receiving benefits pursuant to [GML] § 207-c.. . . [T]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. Had the parties intended to allow disabled officers to continue to accrue leave time during their period of disability, they could have inserted such

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in pay, and holiday pay as part of their disability benefits under the language of General Municipal Law § 207–a(2)." (*Borelli*, 187 AD3d 897, 899 [2d Dept 2020]).

> language into [the CBA] but they did not do so. Under such circumstances, the dispute is not arbitrable

(*id.* at 732-733).

Here, the Union's grievance [R: 178-180] deals with the exact same issue that the court addressed in *Town of Tuxedo* and *Village of Floral Park*, that is, whether additional, contractual benefits should be provided to a person receiving GML § 207 benefits, even though the contract does not expressly make such benefits a part of that person's "regular salary or wages" (*see* Point I.C., *infra*). Despite the clear applicability of the analysis and holdings in those cases to the facts of the instant case, the Second Department inexplicably failed to discuss, or even cite to *Town of Tuxedo, Village of Floral Park, Cohoes*, or any other case that employs the "express provision" test when analyzing the arbitrability of a municipality's exclusion of contractual fringe benefits from statutory GML § 207 payments [R: 388-390]. Instead, without providing any rationale for its choice, the court opted to employ the less stringent, "reasonable relationship" test to find the Union's grievance arbitrable. This was clear error.

3. The "Express Provision" Test: Other Appellate Departments

As has long been the case in the Second Department (*see* Point I.B.2., *supra*), all other departments of the appellate division that have addressed the issue presented here have utilized the *Cohoes* "express provision" test to stay arbitration

in GML § 207 grievance cases. For example, In the Fourth Department case of *Matter of Town of Evans (Town of Evans Police Benevolent Assn.)*, the PBA filed for grievance arbitration over the Town's determination that the terms of the parties' CBA did not entitle a recipient of GML § 207-c benefits to accrue holiday, vacation, personal, or sick time (66 AD3d 1408, 1408 [4th Dept 2009]). On appeal, the Fourth Department utilized the "express provision" test to stay arbitration to the extent that the CBA was "'entirely silent as to whether the contractual rights accorded regular duty [police officers] in the CBA are applicable to disabled [police officers] on General Municipal Law [§ 207–c] status'", but found that the portion of the grievance regarding sick time accrual was arbitrable because the CBA expressly stated that officers out on employment-related disability would continue to accrue sick leave (*id.* at 1409, quoting *Cohoes*, 94 NY2d 686, 694 [2000]).

Additionally, in *Matter of Town of Niskayuna (Fortune)*, the Third Department used the *Cohoes* "express provision" test to affirm a stay of arbitration of a grievance challenging the Town's determination that a police officer was not entitled to receive contractual health insurance benefits while also receiving GML § 207-c statutory benefits (14 AD3d 913, 914 [3d Dept 2005]). There, the court held that "the CBA is entirely silent as to whether the health benefits accorded regular police officers are applicable to disabled officers receiving [GML] benefits and,

accordingly, Supreme Court quite properly granted a stay of arbitration" (*Id*., citing *Cohoes* 94 NY2d at 695).

As the foregoing cases from this Court and three of the four departments of the appellate division make clear, grievances claiming that GML § 207 benefits should include one or more contractual benefits that otherwise exceed the statutory/judicial definition of "regular salary or wages" are routinely and uniformly found to be not arbitrable if the CBA lacks an "express provision" extending such benefits to GML § 207 recipients. Inasmuch as the Union's grievance implicates these exact issues with regard to the Special Pays [R: 178-180], this case is tailor-made for an application of the "express provision" test as articulated in *Cohoes*.

Despite this, in its Decision on appeal, the Second Department chose to employ the "reasonable relationship" test to vacate Supreme Court's Decision and Order on reargument granting the City's application for a stay of arbitration. In so doing, the court improperly departed from *Cohoes* (*see* Point I.B.1., *supra*) and, in the process, created an irreconcilable fissure with the Third and Fourth Departments, both of which follow *Cohoes* (*see* Point I.B.3., *supra*). Perhaps most confusingly, however, through this anomalous Decision, the Second Department has effectively turned its back on its own prior decisions, which consistently apply the *Cohoes* "express provision" test under circumstances strikingly similar to the ones presented here (*see* Point I.B.2, *supra*).

As the facts of this case and the great weight of established judicial authority dictate, the correct test for whether the City and the Union agreed to arbitrate the instant dispute is not whether the grievance bears a "reasonable relationship" to some general subject matter in the CBA, as the Second Department held here. Rather, the correct test is whether the CBA "expressly provides" the benefits at issue to GML § 207-a (2) recipients. And, as explained below, it does not.

C. The Application of the Proper, "Express Provision" Test to the Instant Grievance Reveals that the Parties Did not Agree to Arbitrate

As to the application of the "express provision" test to the instant grievance, at no point in this litigation has the Union attempted to dispute the fact that the parties' CBA does not expressly provide that the contractual Special Pays to which active duty firefighters are entitled are also extended to those who are now, or may in the future be recipients of GML § 207-a (2) benefits. And, indeed, that is not the case.

Section 4:02 of the CBA ("Rate of Pay") provides that a "member's rate of pay shall be one and two hundred thirty-secondths (1/232ths) of annual base salary plus longevity . . . Members who are assigned to [the arson squad] shall in addition, have their arson pay included in computing their hourly and daily rates" [R: 37]. Thus, the express language of the CBA establishes that, for GML § 207-a purposes, a firefighter's "regular salary or wages" is comprised of (a) base salary, (b) longevity payments and (c) arson pay [R: 37]. The CBA's rate of pay section does not

expressly include the Special Pays, or any other salary benefit in its definition, nor does the section and supplemental appendix that defines and discusses the term "Base Salary" [R: 36, 80].

As it relates to the CBA provisions governing the Special Pays themselves, the CBA at Sections 4:05 ("Night Differential"), 4:06 ("Check-In Pay") and 4:07 ("Holiday Pay"), provide the Special Pays to "firefighters" or "members" [R: 39-40]. None of these sections expressly provide that the Special Pay benefit shall be paid to retirees or those receiving GML § 207-a (2) benefits, nor do these sections contain any indication that the Special Pays are part of a member's base pay or rate of pay *(i.e.*, regular salary or wages). The Night Differential in particular is payable "only to firefighters actually working [the 6:00 p.m. to 8:00 a.m.] night tour" [R: 39].

As the foregoing makes clear, the CBAs are devoid of any distinctive language that expressly continues the Special Pays for bargaining unit members after they retire, or makes the Special Pays an integral part of Petitioners' "regular salary or wages" for the purposes of calculating GML § 207-a (2) benefits. To the contrary, the language of the CBA's Special Pays provisions clearly establishes that they are not "regular salary or wages."

Finally, it is true that the CBA incorporates a negotiated GML § 207-a procedure that deals with applications and determinations of eligibility for, and the

administration of such benefits [R: 123-137]. However, nowhere in the policy is there any express provision that purports to provide GML § 207-a (2) recipients with the Special Pays, or any other additional contractual benefit, other than their regular salary or wages, as the statute requires. As such, there is no express term anywhere in the CBA that would afford the Special Pays to firefighters that may, in the future, become eligible to receive GML § 207-a (2) benefits. Absent an express provision in the CBA, there is no right to arbitrate a dispute pertaining to a claimed GML § 207-a (2) benefit (*see* Point I.B., *supra*). Accordingly, it is submitted that the Second Department improperly reversed the Order of Supreme Court granting the City a permanent stay of arbitration, which this Court should now reinstate.

POINT II

THE UNION'S CURRENT OR "ACTIVE DUTY" MEMBERS ARE NOT ENTITLED AS A MATTER OF LAW TO THE CONTINUATION OF THE CITY'S PAST PRACTICE OF INCLUDING THE SPECIAL PAYS IN GML § 207-A (2) WAGE SUPPLEMENTS

As a final note, in its grievance, the Union also claims that the City's decision to exclude the Special Pays from the GML § 207-a (2) benefit violates the CBA's "maintenance of benefits" provisions. Specifically, CBA Section 31:01 provides that "[t]he 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" [R: 74, emphasis added]. Even assuming *arguendo* that this provision may, based on the City's purported extra-contractual past

practices, allow a current firefighter to continue to receive GML § 207-a(1) payments that include the Special Pays, this provision grants no similar "maintenance of benefits" rights to retirees, who cannot claim the benefit of an alleged past practice. [6]

It is undisputed that the City has not reduced Special Pays for active duty firefighters as part of their GML § 207-a(1) benefit. Instead, the City has corrected an overpayment of GML § 207-a(2) benefit which is paid to retired firefighters. Notwithstanding a purported past practice, and given the absence of an "express provision" in the CBA which included the Special Pays as part of the GML § 207-a(2) benefit, the City had the unilateral right to correctly pay the GML § 207-a(2) benefit, which ended the overpayment of that benefit, as it did here. In *Matter of Aeneas McDonald Police Benevolent Assn. v City of Geneva*, this Court addressed a strikingly similar scenario to the instant one, in which the City of Geneva ended a 24-year practice of providing a certain level of health insurance benefits to retired city employees, in favor of a less expensive plan (*see* 92 NY2d 326, 329-330 [1998]). Over the petitioner's objection that the City should be bound to its past practice of continuing to pay for the more expensive health plan, the Court held that "[w]here,

[6] Indeed, many of the cited cases that follow and apply the *Cohoes* "express provision" test to stay the arbitration GML § 207 benefits grievances involve a decision by a municipality to unilaterally modify or reduce the level of statutory benefits provided to GML § 207 recipients, due to the fact that the CBA did not expressly extend one or more contractual benefits offered to active duty employees to disabled firefighters or police officers (*see* Point I.B., *supra*).

as here, the past practice concededly is unrelated to any entitlement expressly conferred upon the retirees in a collective bargaining agreement, we hold that there is no legal impediment to the municipality's unilateral alteration of the past practice" (*id.* at 330-31).

Here, as previously established (*see* Point I.B. & C., *supra*), the CBA does not expressly confer any entitlement to the Special Pays upon GML § 207-a (2) retirees. And, in this Court's view, "the total absence of any express provision in the CBA making applicable to firefighters on [GML] § 207-a status the specific contractual provisions the Union claims were violated, is fatal to [its] arbitration claim" (*Cohoes*, 94 NY2d 686, 694 [2000]). Neither this Court nor any department of the appellate division has ever held that past practice is even remotely relevant, especially where, as here, the CBA is silent on the inclusion of the Special Pays as part of a GML § 207-a (2) benefit.

Thus, it is submitted that this Court's holdings in *City of Geneva* and *Cohoes* clearly permit the City to unilaterally terminate a past practice of erroneously including the Special Pays in GML § 207-a (2) wage supplements, regardless of how long the City had maintained such a practice.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court should reverse the Decision and Order of the Second Department dated October 7, 2021 and grant the City a permanent stay of arbitration in accordance with the Supreme Court's October 17, 2016 Order on reargument.

Dated: December 16, 2021
Binghamton, New York

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CERTIFICATION PURSUANT TO 22 NYCRR § 500.13 (c)

The undersigned hereby certifies the total number of words herein, inclusive of point headings and footnotes and exclusive of pages containing the statement of the status of related litigation; the table of contents; the table of cases and authorities; and the statement of questions presented, is (7,033).

Dated: December 16, 2021
Binghamton, New York

Paul Sweeney

Paul, J. Sweeney, Esq.

STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK	)		**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 December 16, 2021

deponent served the within**: Brief for Petitioner-Appellant**

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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 December 16, 2021

Mariana Braylovskiy

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

T. Heath

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