STATE OF NEW YORK
SUPREME COURT : COUNTY OF WESTCHESTER

In the Matter of the Arbitration between CITY OF YONKERS, Petitioner, vs. YONKERS FIREFIGHTERS, LOCAL 628, IAFF, AFL-CIO, Respondent.	**REPLY MEMORANDUM OF LAW** Index No.: 54477/2016 RJI No.: Assigned Judge: Hon. Terry Jane Ruderman AAA Case No.: 01-16-0001-2822 (Improper Reduction of GML 207-a(2) Benefits)

PRELIMINARY STATEMENT

The Petitioner, City of Yonkers ("Petitioner" or "City) submits this memorandum in reply to the Answer and other opposition submitted by the Respondent, Yonkers Firefighters, Local 628, IAFF, AFL-CIO ("Respondent") to Petitioner's application to permanently stay arbitration of Respondent's grievance on the overpayment and recoupment of General Municipal Law ("GML") 207-a(2) benefits submitted by Respondent to American Arbitration Association ("AAA") and identified as AAA Case No.: 01-16-0001-2822.

DISCUSSION

POINT I: NO ARBITRATION PERMITTED WHEN CITY DID NOT AGREE TO ARBITRATE GML 207-A(2) BENEFITS WHICH ARE NOT EXPRESSLY GRANTED IN THE CBA

The Respondent failed to address the Court of Appeals and Second Department case law which holds, as a matter of law, that a retiree cannot claim GML 207-a(2) wage supplement benefits based on fringe benefits provided in a collective bargaining agreement, unless those wage supplement benefits are expressly set forth in that collective bargaining agreement. *Matter*

of Chalachan v. City of Binghamton, 55 N.Y.2d 989 (1982); *Mashnouk v. Miles,* 55 N.Y.2d 80, 88 (1982); *Matter of Farber v. City of Utica,* 97 N.Y.2d 476; *Matter of Whitted v. City of Newburgh,* 126 A.D.3d 910 (2d Dept. 2015); and *Matter of Aitken v. City of Mt. Vernon,* 200 A.D.2d 667, 668 (2d Dept. 1994).

While the City maintains that it has a statutory right to make a calculation of the GML 207-a(2) benefit and that Respondent is improperly seeking to grieve a matter that is barred by a statutory, constitutional or public policy prohibition (*Matter of City of Johnstown (Johnstown Police Benevolent Association)*, 99 N.Y.2d 273, 278 (2002)), it is undisputed that any modification of its statutory power to calculate the GML 207-a(2) benefit must be voluntarily undertaken as the result of "a conscious choice" (*Matter of Buffalo Police Benevolent Assn. [City of Buffalo],* 4 N.Y.3d 660, 664, [2005]). Here, of course, there was no such agreement, much less a "conscious choice."

Further, and contrary to Respondent's assertions, courts—including the Second Department—have stayed arbitration over similar grievances. In addition to the above cases, the Second Department has stayed arbitration where the CBA did not provide GML 207 benefits which were not expressly granted in the CBA. In the case of *Town of Tuxedo v. Town of Tuxedo Police Benev. Ass'n,* 78 A.D.3d 849 (3rd Dep't 2010), which involved leave benefits, the Second Department held:

> Benefits provided to a police officer pursuant to General Municipal Law § 207–c, like the benefits provided to a firefighter pursuant to General Municipal Law § 207–a, are exclusive, and a collective bargaining agreement will not be construed to implicitly expand such benefits (*see Benson v. County of Nassau,* 137 A.D.2d 642, 643, 524 N.Y.S.2d 733; *Matter of Town of Niskayuna* [*Fortune*], 14 A.D.3d 913, 789 N.Y.S.2d 746), since a disabled individual's continued status as an employee, even after disability, is "strictly a matter of statutory right" (*Matter of Chalachan v. City of Binghamton,* 55 N.Y.2d 989, 990, 449 N.Y.S.2d 187, 434 N.E.2d 256). Unless a collective bargaining agreement expressly provides for compensation rights to disabled officers in addition to those provided by General

Municipal Law § 207–c, there is no entitlement to such additional compensation (*see Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL–CIO v. City of Cohoes,* 94 N.Y.2d 686, 694, 709 N.Y.S.2d 481, 731 N.E.2d 137).

Here, 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 in Proceeding No. 2 to permanently stay arbitration (*see Matter of Town of Evans* [*Town of Evans Police Benevolent Assn.*], 66 A.D.3d 1408, 1408–1409, 886 N.Y.S.2d 276). In light of our determination, the appeal from the first order dated September 30, 2009, which denied the petition in Proceeding No. 1 as premature, and, in effect, dismissed that proceeding, has been rendered academic.

Id., 78 A.D.3d at 851. (emphasis added).

Similarly, the Second Department held the same way in *Inc. Vill. of Floral Park v. Floral Park Police Benev. Ass'n*, 89 A.D.3d 731 (2d Dep't 2011) when it upheld the Supreme Court's decision to stay arbitration over a GML 207 benefit (leave time) not found in the CBA--even though the CBA referenced the disputed vacation benefit:

Here, 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 General Municipal Law § 207-c. The PBA relies upon two sentences contained in article XVI, § 4, of the collective bargaining agreement, which state that "[i]n cases of on-the-job injuries, no proration shall be deducted" and that "[n]o officer (member) out on leave provided by General Municipal Law Section 207-c shall lose earned vacation." However, those sentences must be read, not in a vacuum, but in the full context of section 4, which unequivocally prohibits the accrual, inter alia, of personal and vacation days during the period of absence for any member who is absent from duty for more than 90 consecutive calendar days "due to sickness or disability of any kind" and provides that "a Member shall be entitled to any unused vacation earned prior to the commencement of the period of absence." Therefore, while an officer out on leave pursuant to General Municipal Law § 207-c cannot lose vacation time that was earned prior to his or her disability leave, and the benefits for an officer who has suffered an on-the-job injury cannot be prorated, there 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 language into**

> **article XVI, § 4, but they did not do so. Under such circumstances, the dispute is not arbitrable** (*see Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes*, 94 NY2d at 694-695).
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> *Id.,* 89 A.D.3d at 732-33. (emphasis added).

Moreover, the Appellate Division, Fourth Department in the case of *In re Town of Evans (Town of Evans Police Benev. Ass'n)*, 66 A.D.3d 1408 (4th Dep't 2009) ruled on a near identical case when it agreed with the town to stay arbitration of GML 207 benefits (holiday, vacation and personal leave) which were not expressly set forth in the CBA.

> **We agree with petitioner, however, that Supreme Court erred in denying those parts of the petition for a permanent stay of arbitration with respect to the disputed holiday, vacation and personal time accruals** (*see generally Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chautauqua County Local 807*, 8 NY3d 513 [2007]), and we therefore modify the order and judgment accordingly. "[T]he benefits provided to a police officer under General Municipal Law § 207-c are exclusive, and a CBA will not be construed to implicitly expand such benefits" (*Matter of Town of Niskayuna [Fortune]*, 14 AD3d 913, 914 [2005], *lv denied* 5 NY3d 716 [2005]; *see Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes*, 94 NY2d 686, 694-695 [2000]). "In order to be entitled to additional benefits, the CBA must expressly provide that such benefits are applicable to disabled police officers receiving General Municipal Law benefits" (*Town of Niskayuna*, 14 AD3d at 914). **Here, the provisions of the CBA concerning holiday, vacation and personal time benefits are "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"** (*Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO*, 94 NY2d at 694).
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> *Id.*, 66 A.D.3d at 1409. (emphasis added).

Accordingly, in the cases of the *Town of Tuxedo Police Benev. Ass'n*, *Floral Park Police Benev. Ass'n*, and *Town of Evans Police Benev. Ass'n*, the Second and Fourth Departments—citing the Court of Appeals cases cited by the City—have stayed arbitration of claims to GML 207 benefits for the same reasons urged by the City. Like these cases, the CBA here does not contain any "express" reference that the GML 207-a(2) benefit shall contain, holiday pay, shift differential or check-in pay. While the issue

of whether a grievance relating to GML 207-a(1) benefits is not before you, grievances on those arbitrations could be stayed as well.

POINT II: NO *RES JUDICATA* OR COLLATERAL ESTOPPEL GIVEN THE DIFFERENT ISSUE AND THE DIFFERENT GML 207-A PROCEDURE

With respect to Respondent's assertion that the Decision and Order of the Hon. Mary H. Smith dated January 7, 2014 allegedly represents *res judicata* or collaterally estops the City from bringing its application, the Respondent is in error as the issues before the Court are not "identical."

First, the issue before Judge Smith dealt with a retired firefighter's claim that he did not have to submit a separate application for GML 207-a(2) benefits. In that case, retiree Kevin McGrath, who had received GML 207-a(1) benefits prior to his disability retirement, objected to filing a separate application for obtaining GML 207-a(2) benefits for the same injury. The City readily concedes that a dispute involving the application or eligibility for GML 207-a(2) benefits is subject to the arbitration process provided for in the negotiated GML 207-a procedure. However, in this case, the issue which is subject to the grievance involves the City's statutory right to calculate the GML 207-a(2) benefit paid to a retiree in the absence of express CBA language to the contrary and to adjust and recoup an overpayment of a GML 207-a(2) benefit paid to that retiree.

Second, the negotiated GML 207-a procedure at issue in this case is significantly different that the earlier procedure that Judge Smith reviewed with respect to the grievance involving Mr. McGrath's case. In its opposition, the Respondent glosses over the fact that the Petitioner and Respondent negotiated over and entered into an agreement to settle the expired collective bargaining agreement on February 12, 2015, that included a revised GML 207-a procedure.

In the revised GML 207-a procedure, the parties, for the first time, expressly addressed provisions specific to retirees who were claiming GML 207-a(2) benefits. See sections 15 – 20. However, while the revised agreement expressly addressed the scenario raised by Mr. McGrath's grievance, the parties limited a retiree's right to arbitration of a GML 207-a(2) benefit only to matters of application and eligibility. There is no dispute that the Respondent's grievance is subject to the GML 207-a procedure revised in 2014, and not the different procedure applicable to Mr. McGrath in 2013. More importantly, even after revising the GML 207-a procedure, the procedure and CBA are still silent on an "express" grant of the disputed fringe benefits to retirees.

Third, the revised GML 207-a procedure contains no provision which allows an active duty firefighter or a retired firefighter the right to seek arbitration in the event of an overpayment of a GML 207-a benefit. This makes sense as the City would have to arbitrate every overpayment of GML 207-a benefits, a remedy to which neither party ever agreed.

POINT III: RESPONDENT'S IP CHARGE IS A CONCESSION OF NON-ARBITRABILITY

Finally, the Respondent did not disclose the fact that it filed an Improper Practice Charge (U-34936) before the Public Employment Relations Board ("PERB") alleging that the City's actions in adjusting and recouping the overpayment of GML 207-a(2) benefits (the very same actions which are the subject of the grievance) are an alleged violation of the Taylor Law.

Of course, PERB has no jurisdiction to address contract disputes. *Roma v. Ruffo*, 92 N.Y.2d 489 (1998). As such, the Respondent's filing of an IP Charge in PERB is an admission that the Respondent too believes that the real dispute falls outside the CBA, which, of course, would render it non-arbitrable. The Respondent should not be permitted to pursue the same relief in two different forums.

CONCLUSION

WHEREFORE, the Petitioner, City of Yonkers, respectfully requests that this Court grant a permanent stay of arbitration of Respondent's grievance on the overpayment and recoupment of General Municipal Law ("GML") 207-a(2) benefits and grant such other and further relief as to this Court may seem just and proper.

Dated: May 16, 2016

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