STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

YONKERS FIREFIGHTERS, LOCAL 628, IAFF, AFL-CIO,

Charging Party,

CASE NO. U-34936

-and-

CITY OF YONKERS,

Respondent.

In the Matter of

YONKERS UNIFORMED FIRE OFFICERS ASSOCIATION,

Charging Party,

CASE NO. U-34970

-and-

CITY OF YONKERS,

Respondent.

MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (RICHARD S. CORENTHAL and MEGANN McMANUS of counsel), for Charging Party Yonkers Firefighters, Local 628, IAFF, AFL-CIO

GLEASON, DUNN, WALSH & O'SHEA (RONALD G. DUNN of counsel), for Charging Party Yonkers Uniformed Fire Officers Association

COUGHLIN & GERHART, LLP (PAUL J. SWEENEY of counsel), for Respondent

DECISION OF ADMINISTRATIVE LAW JUDGE

On March 24, 2016, Yonkers Firefighters, Local 628, IAFF, AFL-CIO (Local 628) filed an improper practice charge (U-34936) alleging, as amended, that the City of Yonkers (City) violated §§ 209-a.1(a) and (d) of the Public Employees' Fair Employment

Act (Act) when it unilaterally ceased the practice of paying current employees certain supplemental salary payments under New York State General Municipal Law (GML) § 207-a(2), should they in the future retire with a line of duty disability. On April 8, 2016, the Yonkers Uniformed Fire Officers Association (UFOA) filed an improper practice charge (U-34970) raising the same allegations as Local 628.[1] The City filed an answer to each of the charges, denying the material allegations of the charges and asserting the affirmative defenses of election of remedies and management rights.[2]

A hearing was held on November 29 and December 9, 2016, at which the parties were present and represented. The parties also filed a partial stipulation of facts.[3] All parties have filed post-hearing briefs.

FACTS

Local 628 represents all regular, full-time firefighters working for the City. The UFOA represents all City fire officers holding the ranks of fire lieutenant, fire captain and assistant fire chief. Unless specified otherwise, the term firefighter is hereafter used to encompass both firefighters and fire officers.

Pursuant to GML § 207-a(2), the City is required to pay firefighters who receive performance of duty disability retirement benefits, the difference between the retirement benefits they receive and the "regular salary or wages" they received prior to retirement, until the firefighters have either attained mandatory retirement age, or have attained the

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[1] At the commencement of the hearing, Local 628 and the UFOA represented that the practice raised in each of their charges is limited to employees who were employed and in the unit at the time of the alleged unilateral change (even if they were on sick leave or GML § 207-a(1) leave) and who may retire in the future pursuant to GML § 207-a(2).

[2] During the hearing, the City withdrew its timeliness defense as to both charges.

[3] Administrative Law Judge (ALJ) Ex 12.

age or performed the period of service specified by applicable law for the termination of their service. The payment made pursuant to GML § 207-a(2) is referred to as the "supplemental" payment.

The collective bargaining agreements (CBAs) between the City and the UFOA and Local 628 provide for three types of payment, which are hereafter referred to as the night differential, check-in pay, and holiday pay.[4] Those payments are set forth in Article 4 of both of the CBAs.[5] The parties agree that the contractual provisions in the UFOA and Local 628 CBAs regarding night differential, check-in pay, and holiday pay, are substantially and materially the same for the purposes of the matters at issue in these charges.[6]

Section 4:01:01 of Local 628's agreement provides that firefighters shall receive a "base salary" as set forth in appendix A to the agreement. Section 4:05 of the agreement provides for payment of a night differential as follows:

> 4:05:1 – Night differential shall be paid at the rate of 3.33% of the firefighter's annual base salary plus longevity. This 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.
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> 4:05:2 – Payments shall be made in February and August of each year for the preceding thirteen (13) pay periods. Firefighters who qualify for night differential pursuant to "4:05:1" above, for any part of a bi-weekly pay period, shall receive the night differential payment for that entire bi-weekly pay period.
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> 4:05:3 – Night differential payments shall continue to be paid in

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[4] *See* Joint Exs 1 and 2. The parties agree that the language relevant to these proceedings is included in the "comprehensive agreements" (Local 628's 2002-2005 CBA, and UFOA's 1991-1992 CBA), and has not been modified by any subsequent agreement.

[5] Joint Ex 1, at 14; Joint Ex 2, at 103.

[6] *See* ALJ Ex 13 (ALJ letter dated December 12, 2016).

> accordance with the conditions as provided above during periods of paid absence such as: vacation, sick leave and personal leave days. During absence due to non-job-related illness or accident, night differential shall be included only at the discretion of the Commissioner of the Department, subject to review by the Mayor. During non-paid leave of absence firefighters shall not receive night differential payment.[7]

Section 4:06 of the Local 628 CBA provides as follows for 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) months.[8]

Section 4:07 of the Local 628 CBA provides as follows for 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. Newly appointed employees to the department shall be paid during the calendar year of their appointment, one day at the daily rate for each month worked from the date of appointment to December 31 of the year of appointment. 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. A retiring member is to be paid at the rate of one day at the daily rate for each month worked from the last regular payment period for holidays provided above to the date of his retirement, payable at the time of retirement.[9]

The parties stipulated as follows regarding the history of payment of the night differential, check-in pay, and holiday pay:

> Since at least 1995 to the present, the City has paid Night Differential, Check-in Pay and Holiday Pay to all active bargaining

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[7] Joint Ex 1, at 17. The CBA between the City and the UFOA includes a night differential provision at § 4:06. Joint Ex 2, at 105.

[8] Joint Ex 1, at 17-18. The UFOA CBA includes a check-in pay provision at § 4:04. Joint Ex 2, at 104-105.

[9] Joint Ex 1, at 18. The UFOA CBA includes a holiday pay provision at § 4:05. Joint Ex 2, at 105.

unit members of the UFOA and Local 628 employed by the City as part of their regular salary or wages regardless of their work status or their work schedule.[10]

Since at least 1995 to the present, the City has paid Night Differential, Check-in Pay and Holiday Pay to all UFOA and Local 628 bargaining unit members on sick leave, including extended sick leave.[11]

Since at least 1995 to the present, the City has paid Night Differential to all UFOA and Local 628 bargaining unit members as part of their regular salary or wages whether or not the individual actually worked a night tour.[12]

Since at least 1995 to the present, the City has paid Check-In Pay to all active bargaining unit members of the UFOA and Local 628 employed by the City as part of their regular salary or wages whether or not the individual was present for duty or was actively working.[13]

Since at least 1995 to the present, the City has paid Night Differential, Check-In Pay, and Holiday Pay to all UFOA and Local 628 bargaining unit members injured in the line of duty who have been approved for benefits under General Municipal Law § 207-a(1) ("GML 207-a(1)").[14]

Since at least 1995 to the present, the City has paid Night Differential, Check-In Pay, and Holiday Pay to UFOA and Local 628 bargaining unit members who have been approved for benefits under GML 207-a(1) and who were assigned to work in limited or light duty positions during the day.[15]

Since at least 1995 until the instant dispute arose, GML § 207-a(2) supplemental benefits paid by the City to UFOA and Local 628 bargaining unit members who received either Accidental or Performance of Duty ("POD") disability retirement from the New York State Police and Fire Retirement System have included Night Differential, Check-In Pay, and Holiday Pay.[16]

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[10] Joint Ex 12, at ¶ 7.
[11] *Id*, at ¶ 8.
[12] *Id*, at ¶ 9.
[13] *Id*, at ¶ 10.
[14] Joint Ex 12, at ¶ 11.
[15] *Id*, at ¶ 12.
[16] *Id*, at ¶ 13.

. . .

> Since at least 1995 until the instant dispute arose, 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.[17]
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> Since at least 1995 until the instant dispute arose, the City has provided tax letters to Retirees, which state that the earnings reported on their City W-2 statements represent payments made in accordance with the requirements of GML 207-a.[18]
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> Since at least 1995 until the instant dispute arose, the amounts listed in the payroll and other salary statements provided to Retirees has included Night Differential, Check-in Pay, and Holiday Pay.[19]

The UFOA and Local 628 each negotiated with the City a GML § 207-a policy, but those policies do not state whether the night differential, check-in pay, or holiday pay are included in the payment made to qualifying retirees under GML § 207-a(2).

Barry McGoey, president of Local 628, testified that the night differential, check-in pay, or holiday pay, are paid to firefighters irrespective of whether they work a night shift, perform check-in duties, or work a holiday, and are considered part of the firefighters' regular salary or wages. In particular he noted that, as president of Local 628, he is on full-time release from the Department and does not perform any of those duties or work on holidays, yet he still receives each of those payments. He also testified that, as president, he has explained to firefighters that if they file for a disability retirement due to an injury or illness incurred in the line of duty, they will receive their annual salary, which consists of their base pay, longevity, night differential, check-in

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[17] Joint Ex 12, at ¶ 21.
[18] *Id*, at ¶ 22.
[19] *Id*, at ¶ 23.

pay, and holiday pay. He testified that the term commonly used in the fire house is that the firefighters "will be kept whole."[20]

Anthony Pagano, who also testified on behalf of Local 628, began working for the Department as a firefighter in 1982 and was president of Local 628 from 1989 to 2002. In 2002, Pagano became one of three Department Commissioners, and then retired from the Department in 2011. Pagano was also paid the night differential, check-in pay, and holiday pay although, as president, he did not work the night tour, did not appear for check-in, and did not work holidays. He further testified that, as a Commissioner, he was aware that those three types of payments were made to all firefighters and fire officers, irrespective of whether they worked a night tour, appeared for check-in, or worked holidays.

Thomas F. Fitzpatrick, Jr., the Department's Deputy Chief of Personnel, testified on behalf of Local 628. Fitzpatrick is familiar with payroll and the payment of night differential, check-in pay, and holiday pay. He testified that every member of the UFOA and Local 628 receives those payments and that the payments have a separate line item on the paychecks issued to the unit employees.

In contrast, the City's witness, Ted Von Hoene, a Labor Relations Assistant who has worked for the City in its Human Resources Department for more than 15 years, testified that night differential, check-in pay, and holiday pay are different types of payments than regular salary. He testified that, as part of his job, he is familiar with the collective bargaining agreements of seven unions that represent City employees. Van Hoene further testified that the agreements between the City and the UFOA and Local

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[20] Tr, at 107.

628 each define base wage separately from night differential, check-in pay, and holiday pay, and that the latter payments are paid on a different schedule and are not included when calculating overtime payments to the unit employees.[21] Von Hoene also testified that, during the years 2010 to 2016, only ten percent of the firefighters and fire officers who retired from the City received the supplemental salary benefit pursuant to GML § 207-a(2).[22]

On December 9, 2015, the City issued a letter to approximately 43 retired firefighters and fire officers (hereafter, the Retirees) who were receiving the salary supplement pursuant to GML § 207-a(2). The letter informed the Retirees that the City had overpaid their GML § 207-a(2) benefits, and that their supplemental wage benefit should have been calculated based solely on their "regular wages or salary" and should not have included special pays and other payments afforded to active firefighters.[23] The letter further sets forth a specific dollar amount reflecting the biweekly overpayment made to each Retiree and advises that, going forward, their GML § 207-a(2) supplement would be reduced by that amount.[24] The overpayment amount identified by the City reflects payments it made for the night differential, check-in pay, and holiday pay.[25]

Thereafter, the City held due process hearings for each Retiree and, on April 5,

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[21] Tr, at 128-130.
[22] Tr, at 156; Respondent's Ex 4.
[23] Joint Ex 5; Joint Ex 12, at ¶ 16. The City previously sent the Retirees a letter dated October 5, 2015 regarding the overpayment, but issued a subsequent letter advising that the October 5, 2015 letter had been issued in error. Joint Exs 3 and 4; Joint Ex 12, at ¶¶ 14-15.
[24] Joint Ex 5.
[25] *Id.*

2016, the Commissioner of Human Resources issued to each of the Retirees a final determination letter setting forth the amount that the City overpaid each Retiree for their GML § 207-a(2) supplement.[26] The letter states that Retirees were not entitled to receive, as part of their GML § 207-a(2) supplemental benefits, payment for night differential, check-in pay, and holiday pay, that the City will adjust the Retirees' GML § 207-a(2) benefits going forward, and that the City would in the future be recouping overpayments retroactively to 2009.[27]

The City did not negotiate with the UFOA or Local 628 on the subject of recouping the night differential, check-in pay, and holiday pay.[28] On December 15, 2015, Local 628 filed a step 1 grievance with the Commissioner alleging that the reduction in GML § 207-a(2) supplemental benefits violated the parties' CBA. At approximately the same time, the UFOA filed a similar grievance. The Commissioner rejected both grievances at step 1 on the ground that the issue is not arbitrable and not subject to the respective CBAs' grievance procedures. The UFOA did not appeal the grievance further. Local 628 appealed the grievance to step 2. The City's Mayor issued a step 2 decision affirming the Commissioner's decision. Local 628 then served a demand for arbitration and the City moved for an order permanently staying arbitration of the dispute. In a decision and order dated October 17, 2016, the Supreme Court of the State of New York, County of Westchester, granted the City's motion to reargue and granted the City a permanent stay of arbitration.[29] Local 628 filed an appeal of that

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[26] Joint Ex 6; Joint Ex 12, at ¶ 19.
[27] Joint Ex 6.
[28] Joint Ex 12, at ¶ 24.
[29] The court's October 17, 2016 decision granted the City's motion to reargue a decision and order, issued on June 29, 2016, holding that Local 628's grievance was arbitrable.

decision.

William Treanor, a Fire Lieutenant with the Department and the UFOA's Financial Secretary, was a member of the team that negotiated the most recent CBA with the City. Treanor testified that during those negotiations, which preceded the City's notification that it would cease the at-issue payments, the City proposed the elimination of all special pays, including the night differential, check-in pay, and holiday pay, for all members on GML § 207-a leave.[30] The UFOA rejected the City's proposal and it was never incorporated into an agreement.

Several of the Retirees commenced a proceeding against the City, pursuant to Article 78 of the New York State Civil Practice Law and Rules, challenging the City's decision to reduce and recoup their GML § 207-a(2) benefits and seeking an order declaring that their supplemental payments under GML § 207-a include night differential pay, check-in pay, and holiday pay. In an order dated March 10, 2017, the Supreme Court denied the Retirees' motion for an order declaring that their GML § 207-a(2) payments include the night differential pay, check-in pay, and holiday pay, but permanently enjoined the City from recouping past overpayments.

DISCUSSION

As an initial matter, I find no record evidence to support a violation of § 209-a.1(a) of the Act. The charges in these matters, as well as the record evidence and parties' arguments, center on whether the City unilaterally changed an enforceable past practice. There is no record evidence demonstrating that the City interfered with,

[30] UFOA Ex 3. The City did not specify in its proposal whether it was seeking to eliminate special pays for active or retired employees receiving GML § 207-a benefits.

restrained, or coerced public employees in the exercise of their right to "form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing."[31]

To establish a past practice that is binding under the Act, a charging party must not only demonstrate that "the practice was unequivocal and continued uninterrupted for a period of time sufficient under the facts and circumstances to create a reasonable expectation among the affected unit employees that the practice would continue,"[32] but also that the practice concerns a mandatorily negotiable subject matter.[33]

The City argues that the matter here in issue is not mandatorily negotiable, because the payments in issue are made only to retirees and PERB, therefore, lacks jurisdiction over the matter. Generally, PERB does lack jurisdiction to enforce a practice involving individuals who were already retired when the alleged change in practice occurred.[34] However, both the UFOA and Local 628 seek to enforce the practice only to

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[31] *See* Act, § 202 and § 209-a.1(a).
[32] *See County of Sullivan and Sheriff of Sullivan County*, 51 PERB ¶ 3008, 3034 (2018); *County of Nassau*, 24 PERB ¶ 3029, 3058 (1991).
[33] *County of Nassau*, 13 PERB ¶ 3095 (1980), *confd sub nom, County of Nassau v New York State Pub Empl Relations Bd*, 14 PERB ¶ 7017 (Sup Court, Nassau County 1981), *affd*, 87 AD2d 1006, 15 PERB ¶ 7012 (2d Dept 1982), *appeal denied,* 57 NY2d 601, 15 PERB ¶ 7015 (1982).
[34] *See Troy Uniformed Firefighters Assn, Local 2304, IAFF,* 10 PERB ¶ 3015 (1977). For an exception to the general jurisdictional rule, *see Canadaigua City Sch Dist*, 27 PERB ¶ 3046 (1994) (PERB has jurisdiction over former public employees who allege they lost their employment in violation of the Act, and over individuals who allege they would have been public employees but for a public employer's unlawful discrimination). Exceptions have also been made to the general rule that a union has no duty to represent former employees. *Westchester County COBA, Inc. (Bartolini)*, 30 PERB ¶ 3075 (1997) (unions have a duty to represent former employees who seek assistance in contesting their severance from employment or where there is some other basis to find that the former employee has a continuing nexus to his or her employment). *See also Baker v Bd of Educ, Hoosick Falls Cent Sch Dist,* 3 AD3d 678, 37 PERB ¶ 7502 (3d Dept 2004) (union had a continuing duty to represent former employees during negotiations with respect to retroactive terms).

the extent that it affects current employees; that is, individuals who were active City employees, and not retired, as of the date that the charge was filed and who, in the future, qualify for the at-issue benefit.

PERB has repeatedly held that the continuation or discontinuation of a benefit to current employees who retire during the life of the agreement, if otherwise mandatory, is negotiable, even if the benefit involves payments that are to be made after the expiration of the agreement under which the employees retire.[35] In *Village of Lynbrook*, the employer specifically argued that, because the at-issue negotiation demands sought benefits that would be received only by retirees or the family of a retiree, the demands were not mandatorily negotiable.[36] The Board, however, held that those payments constituted deferred payment for actual services rendered and were mandatorily negotiable,[37] a finding that was upheld by the Court of Appeals.[38]

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[35] *Ulster County Deputy Sheriff's Police Benev Assn, Inc.,* 38 PERB ¶ 3033 (2005) (a demand for fully paid health insurance in retirement for current employees is mandatorily negotiable); *Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO*, 31 PERB ¶ 3020 (1998) (demands seeking the discontinuation of health insurance benefits and an increase in prescription drug deductible for current employees who retire during term of agreement are mandatorily negotiable); *Cohoes Police Benev and Protective Assn*, 27 PERB ¶ 3058 (1994) (a demand to negotiate health insurance coverage for the life of a current employee who retires on or after the effective date of the agreement is mandatorily negotiable); *Bridge and Tunnel Officers Benev Assn*, 29 PERB ¶ 3012 (1996) (demands seeking an increase in the amount of major medical coverage and the employer's contribution to a family protection plan were found to be mandatorily negotiable, as they covered only current employees and current employees who might retire during the life of the contract); *Village of Lynbrook*, 10 PERB ¶ 3067 (1977), *revd in part sub nom, Inc Village of Lynbrook v New York State Pub Empl Relations Bd,* 64 AD2d 902, 11 PERB ¶ 7012 (2d Dept 1978), *reinstated*, 48 NY2d 398, 12 PERB ¶ 7021 (1979) (demands to negotiate a termination pay provision and a provision requiring the payment of hospitalization insurance benefits for families of current employees who die after retirement are mandatorily negotiable).

[36] 10 PERB ¶ 3067, at 3121.

[37] *Id*, citing to *Inc Village of Lynbrook,* 35 PERB ¶ 3065, 3115 (1977).

[38] *Inc Village of Lynbrook,* 48 NY2d 398, at 405, 12 PERB ¶ 7021, at 7041-7042.

Although the foregoing cases involve the mandatory nature of proposals exchanged during contract negotiations, and an argument could be made that those cases should be distinguished from negotiability determinations concerning charges alleging a past practice,[39] in *Chenango Forks Central School District,* the Board held otherwise.[40] That case involved an employer's decision to unilaterally cease a long-standing practice of reimbursing retirees for their Medicare Part B premiums. In finding a violation in *Chenango Forks*, the Board stated:

> If an enforceable past practice existed regarding a mandatory subject of negotiations, the District would violate the Act by discontinuing that practice with respect to persons who were unit employees, even if the practice relates to a benefit to be provided upon retirement.[41]

Based upon the Board's finding in *Chenango Forks*, I find that the matter here in issue, a monetary payment made in retirement, is mandatorily negotiable.[42] I also reject, based upon that finding, the City's argument that no violation may occur where an employer does not announce a change in the benefits of current employees. In both

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[39] Enforceability problems that arise when a past practice involves a payment that becomes due when an employee is retired, do not necessarily arise when a party succeeds in negotiating the inclusion of such a benefit in an agreement.

[40] *Chenango Forks Cent Sch Dist,* 39 PERB ¶ 4602 (2006), *remanded*, 40 PERB ¶ 3012 (2007), *on remand,* 42 PERB ¶ 4527 (2009), *affd,* 43 PERB ¶ 3017 (2010), *confirmed sub nom, Chenango Forks Cent Sch Dist v New York State Pub Empl Relations Bd*, 92 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *affd*, 21 NY3d 255, 46 PERB ¶ 7008 (2013).

[41] 40 PERB ¶ 3012, at 3048, citing to *Cohoes Police Benev Protective Assn*, 27 PERB ¶ 3058 (1994).

[42] *See* Act, § 201.4(4), which defines "terms and conditions of employment" to include "salaries, wages."

Chenango Forks[43] and *City of Albany*,[44] the Administrative Law Judges (ALJs) found that only the announced change in practice, and not the practice itself, constituted a violation of the Act. The ALJs reasoned that a violation may not be found based on the practice itself, because the payments are made after the individuals retired, and PERB lacks jurisdiction over retirees.[45] In *Chenango Forks*, the ALJ found a violation because the employer had announced the change to both retirees and current employees; the ALJ dismissed the charge in *City of Albany*, where the employer only announced the change to retirees and not to its current employees. I note that the Board did not address, either in *Chenango Forks* or *City of Albany*, the issue of whether only the announcement, and not the practice itself, is mandatorily negotiable.[46]

I find without merit the City's argument that a violation may not exist because the City only notified its retirees, and not its current employees, of its change in practice. By ceasing the payments to retirees, the City has made it clear to its current employees

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[43] *Chenango Forks Cent Sch Dist,* 39 PERB ¶ 4602 (2006), *remanded*, 40 PERB ¶ 3012 (2007), *on remand,* 42 PERB ¶ 4527 (2009), *affd,* 43 PERB ¶ 3017 (2010), *confirmed sub nom, Chenango Forks Cent Sch Dist v New York State Pub Empl Relations Bd*, 92 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *affd*, 21 NY3d 255, 46 PERB ¶ 7008 (2013).

[44] *City of Albany*, 47 PERB ¶ 4593 (2014), *affd on other grounds*, 48 PERB ¶ 3026 (2015), *annulled sub nom, Albany Police Officers Union, Local 2841, Law Enforcement Officers Union DC 82, AFSCME, AFL-CIO v New York State Pub Empl Relations Bd*, 149 AD3d 1236, 50 PERB ¶ 7001 (3d Dept 2017), *affd as modified*, __ NYS3d __ (3d Dept 2019).

[45] *Chenango Forks,* 39 PERB ¶ 4602, at 4722; *City of Albany*, 47 PERB ¶ 4593, at 4864.

[46] In *Chenango Forks*, the Board sustained the ALJ's finding that the employer violated the Act when it sent a notification to current employees that their benefits would cease, and directed the employer to rescind the notice it issued to the current employees. 40 PERB ¶ 3012, at 3048. In *City of Albany*, the Board affirmed the dismissal of the charge, but on other grounds, and did not address whether the only actionable violation under the Act is the employer's announcement to current employees that it will cease paying a benefit to them in retirement. 48 PERB ¶ 3026, at 3104.

and their bargaining representatives that it will not pay the benefit to them, should they retire pursuant to a disability retirement and qualify for a supplemental payment under GML § 207-a(2). Further, a rule that would make notification determinative as to whether a violation exists, would allow employers to avoid their bargaining obligation regarding a mandatorily negotiable matter by simply remaining silent and not announcing a change to its current employees. Also, in cases where an employer does issue an announcement, if the sole remedy would be that the employer must rescind the announcement, there is no incentive for employee organizations to even file a charge at all—because the employer could simply silently re-implement the same unilateral change after the ALJ's decision has been issued.

Having found the matter in issue mandatorily negotiable, I turn to the issue of whether the UFOA and Local 628 have demonstrated the remaining elements required for a binding past practice: whether the practice was sufficiently unequivocal and longstanding such that the affected employees had a reasonable expectation that it would continue. It is undisputed that for more than 20 years, the City has included, as part of the salary supplement under GML § 207-a(2), the cost of night differential, check-in pay, and holiday pay. Regarding the expectation of receiving the benefit, McGoey's unrebutted testimony is that, as president of Local 628, he has explained to firefighters that if they file for a disability retirement due to an injury or illness incurred in the line of duty, they will "be kept whole" and will receive their annual salary, which includes payment for night differential, check-in pay, and holiday pay. The UFOA notes that the fire officers learned of the practice when they were firefighters. Therefore, the record facts demonstrate that the practice at issue was of a longstanding and

unequivocal nature, and that the employees of both units had a reasonable expectation that it would continue.

The City argues that the unit employees could not have a reasonable expectation that the practice would continue, because only ten percent of retired firefighters and fire officers actually received GML § 207-a(2) benefits over a ten-year period. Based thereon, the City argues that only approximately ten percent of current employees in both the UFOA and Local 628 units will receive the benefit when they retire. I find that the City's argument is without merit. It is not the percentage of employees who receive the benefit that determines the expectations of the unit employees, but whether the employees know of and reasonably expect the benefit to be paid, based on the longstanding and uniform nature of the practice. McGoey's testimony makes it clear that firefighters are advised that, if they are permanently disabled as a result of a line of duty injury, they and their families can rely on the assurance of "being made whole," which was explained to them as including payment for both their base salary, and night differential, check-in pay, and holiday pay as part of the supplemental salary payable under GML § 207-a(2).

The City further argues that current employees may not have a reasonable expectation to receive night differential, check-in pay, and holiday pay as part of their GML § 207-a(2) benefit because that benefit is not automatic – firefighters and fire officers must apply for it, and the benefit can be denied. However, the fact that unit employees must apply, and qualify, for the benefit does not diminish the unit employees' expectation, or the reasonableness of their expectation, that if they qualify for and receive the benefit, they will receive (as part of their regular wages) payment for night

differential, check-in pay, and holiday pay.

I now turn to the City's argument that GML § 207-a(2) preempts any duty it may have to negotiate the matter in issue under the Act. It is widely recognized that a public employer's duty to negotiate in good faith concerning all terms and conditions of employment is "strong and sweeping," and that the presumption in favor of bargaining:

> may be overcome only in "special circumstances" where the legislative intent to remove the issue from mandatory bargaining is "plain" and "clear" [citation omitted], or where a specific statutory directive leaves "no room for negotiation."[47]

The mere fact that a subject is treated by a statute does not remove it from the realm of mandatorily negotiable subjects, unless the statute "clearly preempt[s] the entire subject matter."[48] Further, unless a statute clearly forecloses negotiation of a particular subject, such that it becomes a prohibited subject of bargaining, or the Legislature has manifested an intention to commit a matter "to the discretion of the public employer," negotiation is permissive, but not mandatory.[49]

In the matters before me, future payments of wages to current employees is mandatorily negotiable, unless GML § 207-a(2) renders it a prohibited or permissive subject of negotiation. I find that there is nothing in GML § 207-a(2) that indicates a legislative intent to commit the matter "to the discretion of the public employer," so as to remove it from the Act's strong and sweeping presumption in favor of bargaining, nor is there a clear legislative intent to preempt the entire subject matter in issue so that there is no room for bargaining.

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[47] *City of Watertown v State of New York Public Empl Relations Bd*, 95 NY2d 73, 78, 33 PERB ¶ 7007 (2000).
[48] *Id*, at 81.
[49] *Id*.

In *City of Watertown*, the Court of Appeals stated that, where a statute does not specifically address a matter, it cannot be found to express a "plain" or "clear" intent to remove that subject from mandatory bargaining.[50] In these matters, although GML § 207-a(2) mandates that employers pay retired firefighters, who qualify for the benefit, their "regular salary and wages," the statute does not define what constitutes "regular salary and wages," or specify how that benefit is to be calculated. I find that the lack of specificity demonstrates that the legislature did not intend to remove those subjects from collective negotiations. I also note that various subjects under GML § 207-c (a statute that was modeled after GML § 207-a and provides parallel benefits to police officers) have been found to be mandatorily negotiable where, as here, the matter in issue is "not specifically covered by the statute."[51]

The City cites to *Chalachan v City of Binghamton* to support its argument that the matter here in issue is not mandatorily negotiable.[52] In that case, disabled firefighters sought payment of vacation time set forth in the collective bargaining agreement, as well as the salary and wages provided for in GML § 207-a.[53] The Court of Appeals held that "neither the statutory language, nor the specific collective bargaining agreement at issue, entitled the firefighters to vacation pay," that the collective bargaining agreement should not be construed "to implicitly expand whatever compensation rights" the firefighters were entitled to under the statute, and that additional compensation could be negotiated and would be payable to the firefighters under GML § 207-a if it is "expressly

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[50] *Id.*
[51] 95 NY2d 73, at 82 (citing to *Town of Carmel v Public Empl Relations Bd*, 246 AD2d 791, 792-793, 29 PERB ¶ 7016 (3d Dept 1996)).
[52] 55 NY2d 989 (1982).
[53] *Id*, at 990.

provided for in the agreement."[54] Since the employer is permitted under GML § 207-a to agree to benefits greater than that provided by the statute, the issue of salary and pay under that statute is mandatorily negotiable. Further, the Court of Appeals stated in *City of Watertown* that its decision in *Chalachan* "affirmed the importance of collective bargaining by holding that the firefighters' entitlement to vacation pay – a matter not covered by the statue – was governed by the language of the collective bargaining agreement."[55] That is, the issue of the amount firefighters are entitled to under GML § 207-a(2) is mandatorily negotiable. Therefore, GML § 207-a(2) does not render nonmandatory the subject matter here in question.

Because the City, in its brief, refers to the contractual provisions, I address now the issue of duty satisfaction as a defense. The City argues that the agreements between it and the UFOA and Local 628 serve as a defense in this matter because they provide for what constitutes regular salary, and that night differential, check-in pay, and holiday pay are "special pays" not included in the firefighters' or fire officers' regular pay or salary. In *County of Columbia*, the Board explained the defense of duty satisfaction as follows:

> [when] parties have bargained a specific subject to completion and have entered into an agreement with respect to that subject, an employer has satisfied its duty to negotiate and does not act unilaterally, in violation of the Act, when it takes an action that is permitted under the specifically negotiated term of the agreement [footnote omitted]. However, the burden rests with the respondent to both plead and prove a duty satisfaction defense through negotiated terms that are reasonably clear on the specific subject at issue.[56]

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[54] 95 NY2d 73, at 83.
[55] *Id.*
[56] 41 PERB ¶ 3023, 3108 (2008).

The City did not raise the defense of duty satisfaction in its answer; thus, it has waived its right to assert that defense. I note that, even if the City had raised that defense, the result would be unchanged. A review of the contractual provisions pertaining to night differential, check-in pay, and holiday pay clearly shows that the agreements are silent as to whether those payments are payable to current employees in retirement, should they qualify for GML § 207-a(2) benefits at that time. Since the agreements are silent on that issue, it cannot be said that the City negotiated that issue to completion with either the UFOA or Local 628.

Addressing the City's election of remedies defense, I find that defense to be without merit.[57] The election of remedies doctrine is not relevant to this matter, since the rights that the UFOA and Local 628 seek to enforce are only their rights under the Act, and not under the collective bargaining agreement or GML § 207-a(2).

Therefore, based upon the above, I find that the City violated § 209-a.1(d) of the Act when it unilaterally ceased its past practice of paying current employees, who may in the future retire and qualify for the salary supplement under GML § 207-a(2), the night differential, check-in pay, and holiday pay as part of the regular salary and wages payable under that statute. The § 209-a.1(a) allegation is dismissed.

IT IS, THEREFORE, ORDERED that the City forthwith will:

1. Restore the past practice of paying the cost of night differential, check-in pay, and holiday pay, as part of the regular salary and wages payable under GML § 207-a(2), to unit employees who were employed by the City on or after March 24, 2016, and who thereafter qualify for the wage supplement under GML § 207-a(2);

[57] The City did not argue this defense in its post-hearing brief.

2. To the extent that any unit employees affected by the unilateral change in practice are identified, make whole such employees for lost wages and benefits, if any, with interest at the maximum legal rate; and
3. Sign and post the attached notice at all physical and electronic locations customarily used to communicate with unit employees.

Dated at Brooklyn, New York
this 7th day of August, 2019

Angela M. Blassman
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

We hereby notify all employees of the City of Yonkers (City) in the unit represented by Yonkers Firefighters, Local 628, IAFF, AFL-CIO (Local 628) and in the unit represented by the Yonkers Uniformed Fire Officers Association (UFOA) that the City will forthwith:

1. Restore the past practice of paying the cost of night differential, check-in pay, and holiday pay, as part of the regular salary and wages payable under GML § 207-a(2), to unit employees who were employed by the City on or after March 24, 2016, and who thereafter qualify for the wage supplement under GML § 207-a(2); and

2. To the extent that any unit employees affected by the unilateral change in practice are identified, make whole such employees for lost wages and benefits, if any, with interest at the maximum legal rate.

Dated . . . . . **By** . . . . . .
on behalf of the **CITY OF YONKERS**

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD
PO BOX 2074, ESP
AGENCY BUILDING 2 – 20TH FLOOR
ALBANY, NEW YORK 12220-2074
TEL: (518) 457-2578
FAX: (518) 457-2664

ELECTRONIC FILING OF EXCEPTIONS, CROSS-EXCEPTIONS, AND RESPONSES

The Chair of the Public Employment Relations Board (PERB), in consultation with the Board, has authorized the electronic filing and service of Exceptions and supporting briefs, Cross-Exceptions and supporting briefs, and Responses for all cases submitted to the Board between March 1, 2019 and December 31, 2019. You may electronically serve the other parties to this proceeding if the other parties consent to electronic service. You must email proof that the other parties have consented to electronic service to boardsecretary@perb.ny.gov. Attached is an example form that may be used ("Consent to Electronic Service").

WHERE TO FILE

If you choose to electronically file, Exceptions and a supporting brief, Cross-Exceptions and a supporting brief, and Responses should be emailed to boardsecretary@perb.ny.gov by 11:59 p.m. on the day such filings are due. You must complete and submit a "Notification of Electronic Filing and Consent to Electronic Service" (included with this document) with your Exceptions, Cross-Exceptions, and Responses.

One signed original of each document filed must be served on the Board consistent with Rule 213.2 (a) of PERB's Rules of Procedure (Rules). The Rules are available at http://www.perb.ny.gov/rules-of-procedure/.

WHAT TO FILE

All documents shall be in a format that can be read using software that is readily available and is in widespread use by government, businesses, and individuals and electronically searchable, such as a searchable Adobe Acrobat pdf, unless you certify in a written attachment to the document served and/or in any required proof of service that you do not have the capacity to produce a searchable file. Rule 200.12 (c) of PERB's Rules.

Electronically filed documents cannot be larger than 20 megabytes (MB). Documents larger than 20 MB must be divided into two or more documents, each under the 20 MB limit.

The filing of a signed paper original and electronic filing and service of a copy with the Board shall constitute compliance with the filing and service requirements. A copy of such exceptions and/or briefs, along with the "Notification of Electronic Filing and Consent to Electronic Service", shall be simultaneously served upon all other parties. Rule 213.2 (a). **Electronic filing with the Board, absent service on other parties, does not constitute service upon other parties.**

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ALBANY, NEW YORK 12220-2074
TEL: (518) 457-2578
FAX: (518) 457-2664

WHEN TO FILE
All filings must conform to the timeliness requirements in Part 213 of PERB's Rules.

PROOF OF SERVICE
All e-filed documents must be **simultaneously** served on all other parties to the proceeding, along with the "Notification of Electronic Filing and Consent to Electronic Service". You may electronically serve the other parties to this proceeding if the other parties consent to electronic service. Electronic service is deemed complete upon sending unless an error message or other notification that the served document has not been successfully dispatched or received is returned, in which case the service is null and void. Rule 200.12 (d).

If the other parties do not consent to electronic service, you must serve a hard copy of your Exceptions and supporting brief, Cross-Exceptions and supporting brief, or Response on the other parties in accordance with Rule 200.11.

All e-filed documents must include proof of service on all other parties. Where electronic filing has been consented to, a copy of such consent, and inclusion of the party or representative who has consented to electronic service as a recipient on the email addressed to boardsecretary@perb.ny.gov (i.e. cc'ing on the email) will be deemed proof of service, subject to failure of service as described above.

CONSENT TO RECEIPT OF ELECTRONIC FILINGS
By electronically filing Exceptions or Cross-Exceptions, you consent to receive responses from the other parties electronically, at the email address provided on your "Notification of Electronic Filing and Consent to Electronic Service."

EXTENSION REQUESTS
Extension requests may be filed electronically, but must comply with Rule 213.7.

In the event of a conflict between the procedures set forth herein and PERB's Rules, PERB's Rules shall govern.

ELECTRONIC DELIVERY OF BOARD'S DECISION
If you wish to receive the Board's Decision and Order electronically, complete the enclosed form "Consent to Electronic Delivery of the Board's Decision" and return the completed form to boardsecretary@perb.ny.gov. The Board's Decision and Order will be delivered to the email address you provide. It will be the only copy of the decision that you will receive, and receipt of the decision via email will be deemed service of the decision by the Board.

Public Employment Relations Board

PO Box 2074
Empire State Plaza
Agency Building 2, 20th Floor
Albany, New York 12220-2074
Phone: (518) 457-2578 I Fax: (518) 457-2664
www.perb.ny.gov

Notification of E-Filing and Consent to Electronic Service

Case number(s): _____

Charging party: _____

Respondent(s): _____

_____

I, (enter your name) _____, am (check one)
- ☐ the representative of a party in the above-captioned action or
- ☐ a self-represented party in this matter.

On the date listed below I electronically filed with the Public Employment Relations Board (PERB) the following. I also filed one paper copy with PERB.
- ☐ Exceptions and supporting brief;
- ☐ Cross-Exceptions and supporting brief;
- ☐ Response.

CHOOSE **ONE** OF THE FOLLOWING **TWO** OPTIONS:

OPTION ONE:

☐ All of the other parties to this proceeding have consented to electronic service. I have simultaneously sent a copy of my filings to each party at the email address(es) listed below and included all parties on my email to PERB.

List the email address(es) used: _____

_____

_____

or:

OPTION TWO:

☐ I have simultaneously sent a paper copy of my filings to the representatives of each of the other parties to this proceeding and have included proof of service with my filing.

I hereby consent to receive service of Cross-Exceptions and/or Responses from the other parties to this proceeding at this email address: _____

Signature: _____ Date: _____

Print name: _____

Party Represented: _____

Email this completed form with Exceptions, Cross-Exceptions, or Response to boardsecretary@perb.ny.gov.

Public Employment
Relations Board

PO Box 2074
Empire State Plaza
Agency Building 2, 20th Floor
Albany, New York 12220-2074
Phone: (518) 457-2578 I Fax: (518) 457-2664
www.perb.ny.gov

Consent to Electronic Service

Case numbers: _____

Charging party: _____

Respondent(s): _____

_____

I, (enter your name) _____ , am (check one)

☐ the representative of a party in the above-captioned action or

☐ a self-represented party in this matter.

I hereby consent to receive service of Exceptions and supporting brief at this email address:

_____

Signature: _____ Date: _____

Print name: _____

Party Represented: _____

Email this completed form with Exceptions to boardsecretary@perb.ny.gov.

Public Employment
Relations Board

PO Box 2074
Empire State Plaza
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Albany, New York 12220-2074
Phone: (518) 457-2578 I Fax: (518) 457-2664
www.perb.ny.gov

Consent to Electronic Delivery of the Board's Decision (optional)

Case numbers: _____

Charging party: _____

Respondent(s): _____

_____

I, (enter your name)_____, am (check one)

☐ the representative of a party in the above-captioned action.

☐ a self-represented party in this matter.

I hereby consent to receive the Board's Decision and Order electronically at this email address:

_____

I acknowledge that this will be the only copy of the Board's Decision and Order that I will receive. I hereby waive my right to receive a copy of the Board's Decision and Order by registered or certified mail pursuant to Section 213(a) of the Civil Service Law (the Taylor Law). Receipt of the Board's Decision and Order via email will be deemed service of the decision by the Board, and service will be complete when the email is sent.

Signature: _____ Date: _____

Print name: _____

Party Represented: _____

Email this completed form with Exceptions, Cross-Exceptions, or Response to boardsecretary@perb.ny.gov.

Oral Argument Before the Board

If a party desires to argue orally before the Board, a written request with reasons therefore shall accompany the exceptions filed, the response thereto, or the cross-exceptions filed and be prominently displayed on the first page of the party's papers. The Board may grant such a request; it may also direct oral argument on its own motion.

Board Action

(a) Upon receipt of the case, the Board may adopt, modify or reverse the Director's or ALJ's decision or order.

(b) Unless a party files exceptions to the decision and recommended order of the Director or ALJ within 15 working days after receipt thereof, the decision and any accompanying order will be final, except that the Board may, on its own motion, decide to review any remedial action recommended within 20 working days after receipt by the parties of the decision and recommended order.

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Party

The term "party", as used in PERB's Rules of Procedure, means any public employee, employee organization or public employer filing a charge, petition or application under the Act or these Rules; any public employee, employee organization or public employer named as a party in a charge, petition or application, filed under the Act or these Rules; or any other public employee, employee organization or public employer whose timely motion to intervene in a proceeding has been granted.

Working Days

The term "working days", as used in PERB's Rules of Procedure, shall not include a Saturday, a Sunday, or a legal holiday.

Filing; Service

(a) The term "filing", as used in PERB's Rules of Procedure, shall mean delivery to the Board or an agent thereof, or the act of mailing to the Board, or deposit with an overnight delivery service for overnight delivery.

(b) The term "service", as used in PERB's Rules of Procedure, shall mean delivery to a party or the act of mailing to a party, or deposit with an overnight delivery service for overnight delivery.

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NOTICE TO PARTIES

Judicial Appeal of Board Orders.

A party may appeal a final order of the Board by filing with the court and serving the necessary parties the pleadings and papers required by Article 78 of the New York Civil Practice Law and Rules (CPLR) and New York Civil Service Law (CSL) §213 within thirty days after service of the Board's order. The Board's "filing" and "service" definitions (above) do not govern the filing and service requirements of the CPLR or CSL, which are covered by the terms of those statutes. Failure to comply with a final order of this agency will result in an enforcement proceeding in New York Supreme Court pursuant to CSL §213.

The following is an extract of PERB's Rules of Procedure, 4 N.Y.C.R.R. Parts 200-215. Any party filing exceptions or other papers with the Board should consult the Rules of Procedure to ensure compliance with all requirements. The Rules are available at: http://perb.ny.gov/PERBRules.asp.

Exceptions to Decision of Director; Exceptions to Administrative Law Judge's (ALJ) Decision and Recommended Order; Action by Board

(a) Within 15 working days after receipt of the decision of the Director or the decision and recommended order of the ALJ, a party may file with the Board an original and four copies of a statement in writing setting forth any exceptions thereto, and a separate original and four copies of a brief in support thereof, together with proof of service of copies of such exceptions and brief upon each party. A copy of such exceptions and briefs shall be simultaneously served upon all other parties.

(b) The exceptions shall:

(1) Set forth specifically the questions of procedure, fact, law or policy to which exceptions are taken;

(2) Identify that part of the decision or order to which objection is made;

(3) Designate by page citation the portions of the record relied upon; and

(4) State the grounds for exceptions. An exception to a ruling, finding, conclusion or recommendation which is not specifically urged is waived.

(c) The Board shall not determine violations of the Act and affirmative defenses that were not properly pled.

Cross-Exceptions

Within seven working days after receipt of exceptions, any party may file an original and four copies of a response thereto, or cross-exceptions and a separate brief in support thereof, together with proof of service of copies of these documents upon each party to the proceeding. Within seven working days after receipt of cross-exceptions, any party may file an original and four copies of a response thereto, together with proof of service of a copy thereof upon each party to the proceeding.

Request for Extension of Time

A request for an extension of time within which to file exceptions and briefs shall be in writing, and filed with the Board before the expiration of the required time for filing, provided that the Board may extend the time during which to request an extension of time because of extraordinary circumstances. A party requesting an extension of time shall notify all the parties to the proceeding of its request and shall indicate to the Board the position of each other party with regard to such request.

Objection to Certification Without Election

A written objection to the Director's determination that an employee organization should be certified without an election may be filed within five working days after receipt of the Director's determination. A party may file a response to the objection within five working days after its receipt of the objection. The objection and any response must be served on all parties.