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.

ARCHER, BYINGTON, GLENNON & LEVINE, LLP (PAUL K. BROWN 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

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the City of Yonkers (City) to a decision of an Administrative Law Judge (ALJ) finding that the City violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) as to employees represented by the Yonkers Firefighters, Local 628, IAFF, AFL-CIO (Local 628) and the Yonkers

Uniformed Fire Officers Association (UFOA).[1] The ALJ found that the City violated the Act by ending 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," in particular, the night differential, check-in pay, and holiday pay."[2]

EXCEPTIONS

The City excepts to the ALJ's decision on five grounds. First, the City contends that the ALJ disregarded controlling precedent from the Court of Appeals and PERB holding that a claim to a monetary benefit as a part of a GML § 207-a disability benefit is unenforceable as a matter of law unless the applicable collective bargaining agreement explicitly includes the monetary benefit within the GML § 207-a benefit.

Second, the City asserts that the ALJ erred in failing to distinguish the non-statutory and non-discretionary benefits at issue in *Chenango Forks Central School District*,[3] to find the statutory and discretionary GML § 207-a (2) benefit paid to retired firefighters who suffer on-duty injuries after an application process were mandatorily negotiable.

The City's third exception claims that the ALJ ignored the central holding of *Chenango Forks Central School District* that the past practice was established by the fact that all the at-issue employees had a reasonable expectation of receiving the benefits at issue. By contrast, the City avers that current active firefighters have no

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[1] 52 PERB ¶ 4551 (2019).
[2] 52 PERB ¶ 4551, at 4740, 4746.
[3] 40 PERB ¶ 3012, 3048 (2007), *on remand* 42 PERB ¶ 4527 (2009), *affd*, 43 PERB ¶ 3017 (2010), *confirmed sub nom, Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 92 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *affd*, 21 NY3d 255, 46 PERB ¶ 7008 (2013).

reasonable expectation that they would receive the GML § 207-a (2) benefit as only 10% of the membership of both charging party unions ever receive the benefit.

In its fourth exception, the City argues that GML § 207-a (2) benefits are excluded from "terms and conditions of employment" covered by the Act, as the benefits can only be paid to retired firefighters following their retirement and "therefore constitute a classic 'payment to retirees or their beneficiaries'" and are a prohibited subject under Civil Service Law (CSL) § 201 (4).[4]

Finally, the City excepts to the ALJ's finding that the City violated its duty to negotiate in good faith under § 209-a.1 (d) of the Act without any showing by either of the charging parties that it had demanded to negotiate over the subject of the reduction of the GML § 207-a payments to the retired firefighters.

Local 628 and UFOA support the ALJ's decision. Neither union cross-excepted to the ALJ's dismissal of the charges to the extent that they claimed a violation of § 209-a.1 (a) of the Act.

For the reasons given below, we reverse the ALJ's decision and dismiss the charges.

FACTS

The facts are fully stated in the ALJ's decision and are only set out here to the extent necessary for deciding the issues presented. Local 628 represents all regular, full-time firefighters working for the City, while the UFOA represents all City fire officers holding the ranks of fire lieutenant, fire captain and assistant fire chief.

GML § 207-a provides for the payment of benefits to firefighters (defined broadly enough to include fire officers) who are injured in the performance of their duties or who

[4] Exception No 4.

are "taken sick as a result of the performance of [their] duties."[5] Pursuant to GML § 207-a (1), firefighters and fire officers who are expected to return to full duty receive "the full amount of [their] regular salary or wages until [their] disability arising therefrom has ceased."[6] Pursuant to GML § 207-a (2), firefighters and fire officers who are permanently disabled and who receive a disability retirement pension receive, until they reach the mandatory retirement age, the difference between their disability retirement allowance or pension and their "regular salary or wages."[7] The payment made pursuant to GML § 207-a (2) is referred to as the "supplemental" payment.

On December 9, 2015, the City issued a letter to approximately 43 retired firefighters and fire officers (Retirees) who were receiving the salary supplement pursuant to GML § 207-a (2). The letter stated that the City had overpaid the Retirees' 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.[8] The letter further set forth a specific dollar amount reflecting the biweekly overpayment made to each Retiree and advised that, going forward, the Retirees' GML § 207-a (2) supplement would be reduced by that amount.[9] The overpayment amount identified by the City reflects

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[5] GML § 207-a (1), (2).
[6] *Id.*
[7] *Id.* More precisely, the firefighters and fire officers receive benefits pursuant to GML § 207-a (2) "until such time as he or she shall have attained the mandatory service retirement age applicable to him or her or shall have attained the age or performed the period of service specified by applicable law for the termination of his or her service." *Id.*
[8] Joint Ex 5; ALJ 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, 4; ALJ Ex 12, at ¶¶ 14-15.
[9] Joint Ex 5.

payments it made to the Retirees for the night differential, check-in pay, and holiday pay.[10] Prior to sending this letter, the City engaged in correspondence with counsel for both Local 628 and the UFOA in which the City informed counsel of its intention to cease including the "overpayments" to Retirees receiving supplements pursuant to GML § 207-a (2), and counsel's objections thereto.[11]

The collective bargaining agreements (CBA) between the City and the UFOA and the City and Local 628 provide for three types of payment, referred to by the parties as the night differential, check-in pay, and holiday pay.[12] Those payments are set forth in Article 4 of both of the CBAs between the parties.[13] The parties agree that the provisions in the UFOA and Local 628 CBAs with respect to the night differential, check-in pay, and holiday pay are substantially and materially the same as related to the matters at issue here.[14]

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 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.[15]
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> 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

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[10] *Id.*
[11] Joint Exs 7-19.
[12] *See* Joint Exs 1, 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.
[13] Joint Ex 1, at 14; Joint Ex 2, at 103.
[14] *See* ALJ Ex 13 (ALJ letter dated December 12, 2016).
[15] ALJ Ex 12, at ¶ 7.

leave.[16]

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.[17]

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.[18]

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)").[19]

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.[20]

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.[21]

. . .

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.[22]

Since at least 1995 until the instant dispute arose, the City has

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[16] *Id*, at ¶ 8.
[17] *Id*, at ¶ 9.
[18] *Id*, at ¶ 10.
[19] ALJ Ex 12, at ¶ 11.
[20] *Id*, at ¶ 12.
[21] *Id*, at ¶ 13.
[22] ALJ Ex 12, at ¶ 21.

> 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.[23]
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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.[24]

Both the UFOA and Local 628 negotiated with the City a GML § 207-a policy. These 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).[25]

Barry McGoey, President of Local 628, 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 pay, and holiday pay. He testified that the term commonly used in the fire house is that the firefighters "will be kept whole."[26]

Ted Von Hoene, a Labor Relations Assistant who has worked for the City in its Human Resources Department for more than 15 years, testified on its behalf that night differential, check-in pay, and holiday pay are different types of payments than regular salary. Van Hoene further testified that the CBA between the City and the UFOA and Local 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.[27] Von Hoene also

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[23] *Id*, at ¶ 22.
[24] *Id*, at ¶ 23.
[25] 52 PERB ¶ 4551, at 4742; *see* Joint Ex 1 (Local 628); Joint Ex 2 (UFOA).
[26] Tr, at 107.
[27] Tr, at 128-130.

testified that, during the years 2010 to 2016, only 10 percent of the firefighters and fire officers who retired from the City received the supplemental salary benefit pursuant to GML § 207-a (2).[28]

DISCUSSION

As a preliminary matter, we reject the City's argument that "there can be no refusal to negotiate when Local 628 and UFOA have failed to present any demand for negotiations."[29] As we recently reaffirmed in *Cayuga Community College*, we have long held that "[w]hile a demand is a necessary precondition to an obligation under the Act to negotiate the impact of an employer's decision, the duty to negotiate a change to a mandatory subject of negotiations does not require a demand as a precondition to the filing of a charge."[30] Indeed, we expressly stated in *Cayuga Community College* that "a charge premised on a refusal to negotiate on demand is distinct from a charge 'premised on a unilateral change in terms and conditions of employment,' and '[t]herefore, a demand to negotiate is not a condition precedent to the violation found' in the latter case."[31] Accordingly, this exception is meritless, and it is denied.

We need not treat with all the remaining exceptions, as we find one dispositive of the matter before us. An employer is obligated to negotiate on demand proposals on mandatory subjects, including post-retirement monetary benefits, put forth by the bargaining agent on behalf of current employees who may retire during the life of the

[28] Tr, at 156; Respondent's Ex 4.
[29] Brief in Support of Exceptions, at 26.
[30] 50 PERB ¶ 3003, 3011-3012 (2017), quoting *City of Niagara Falls*, 44 PERB ¶ 3015, 3055 (2011) (footnotes omitted), *confd*, *City of Niagara Falls v NYS Pub Empl Relations Bd*, 45 PERB ¶ 7004 (Sup Ct Albany Co 2012) (Ceresia, J.); *see Bd of Educ, City Sch Dist City of New York*, 40 PERB ¶ 3002 (2007); *City of Niagara Falls*, 31 PERB ¶ 3085, 3190-3191 (1998); *Great Neck Water Pollution Control Dist*, 28 PERB ¶ 3030 (1995).
[31] *Id*, quoting *City of Niagara Falls*, 31 PERB ¶ 3085, at 3190, citing *Roma v Ruffo*, 92 NY2d 489, 495 (1998).

CBA.[32] However, as we held in *Chenango Forks Central School District*, among other cases, this continuing obligation to negotiate does not prohibit the employer from acting unilaterally as to individual retired employees because they are no longer employees and thus no longer in the bargaining unit.[33]

Here, the ALJ's conclusion that "both the UFOA and Local 628 seek to enforce the practice only to 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[s] [were] filed and who, in the future, qualify for the at-issue benefit"[34] is contradicted by the undisputed facts of the case. Though the charges assert a claim on behalf of current employees, there is no allegation or evidence of communication of any such action or intent toward current employees who might elect to retire during the life of the agreement. In the absence of such evidence, the mailing of the December 9, 2015 letters solely to 43 retired former bargaining unit members and former employees substantiates that no action was taken towards current employees.

Indeed, the correspondence between the City's counsel and the counsel to Local 628, in which the City puts both Local 628 and the UFOA on notice as to its intentions, is couched solely in terms of discontinuing (and possibly seeking recoupment of what

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[32] *Inc Vill of Lynbrook*, 10 PERB ¶ 3065, at 3115-3116; *Myers v City of Schenectady*, 244 AD2d 845, 846-847 (3d Dept 1997), *lv denied*, 91 NY2d 812 (1998).
[33] 40 PERB ¶ 3012 (2007) ("[t]here is no duty under the Act to bargain for those who are not in the bargaining unit, including retirees"), *remanded* 42 PERB ¶ 4527 (2009), *affd*, 43 PERB ¶ 3017 (2010), *confirmed sub nom, Chenango Forks Cent Sch Dist v NYS Pub Emp Relations Bd*, 92 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *affd*, 21 NY3d 255, 46 PERB ¶ 7008 (2013). *See also Troy Uniformed Firefighters Assn, Local 2304, IAFF*, 10 PERB ¶ 3015, at 3034; *Inc Village of Lynbrook*, 10 PERB ¶ 3067, 3121 (1977), *revd in part sub nom, Inc Village of Lynbrook v NYS Pub Emp Relations Bd*, 64 AD2d 902, 11 PERB ¶ 7012 (2d Dept 1978), *reinstated*, 48 NY2d 398, 12 PERB ¶ 7021 (1979).
[34] 52 PERB ¶ 4551, at 4743.

the City considered to be overpayment from) the 43 "retirees."[35] Current employees received no similar notice regarding what to expect in the future. In response to an email request to provide the names of the affected Retirees to Local 628 and the UFOA, the City replied "[s]ince your respective contracts state that you represent active members only, we would request that you FOIL a list of the retirees affected."[36]

Since the City took no action against current employees, the instant case essentially mirrors the facts in *Aeneas McDonald Police Benevolent Assn v City of Geneva*.[37] Where, as here, retirees base a claim to post-retirement benefits on a past practice, absent an explicit contractual right to receive such a benefit,[38] the Court of Appeals in *Aeneas McDonald PBA* has squarely ruled in terms that are dispositive:

> At issue is whether retired municipal employees, who are no longer members of any collective bargaining unit, may enforce a past practice in civil litigation with their former municipal employer. Where, 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.[39]

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[35] Joint Exs 7-19.
[36] Joint Ex 12.
[37] 92 NY2d 326, 330-331 (1998).
[38] Where collective bargaining agreements expressly provide for post-retirement benefits for current employees, evidence of past practice is properly used to address ambiguities in the collective bargaining agreements, including as to subjects such as duration of the benefit. *Myers v City of Schenectady*, 244 AD2d 845, at 847-848.
[39] 92 NY2d 326, at 330-331; *Kolbe v Tibbetts*, 22 NY3d 344, n 1 (2013); *see also Rocco v City of Schenectady*, 252 AD2d 82, 84 (3d Dept 1998) ("[O]nce employees retire, they are no longer represented by the union and would not possess collective bargaining rights on their own."). Where a collective bargaining agreement provides an explicit right to receive a post-retirement benefit, the enforcement of that contractual right is outside the scope of our jurisdiction as limited by § 205.5 (d) of the Act. *Myers v City of Schenectady*, 244 AD2d 845, 847 (3d Dept 1997) ("[A]t the expiration of [the collective bargaining agreements under which the retirees obtained the disputed health benefits, the union] no longer represents the retirees, has no bargaining rights or obligations on their behalf and, indeed, may not even have the right to bargain voluntarily on their behalf").

We are bound by this holding.

Moreover, it is undisputed that no express definition of the parties' understanding of what constitutes "regular salary and wages" is provided in the collective bargaining agreements. Instead, both Local 628 and the UFOA acknowledge that they seek enforcement of a "past practice . . . to include the Night Differential, Call-in Pay, and Holiday Pay as components of 'regular salary and wages' for the purpose of calculating GML § 207-a (2) benefits."[40]

Here, as was the case in *Aeneas McDonald PBA*, the position of Local 628 and the UFOA that "a past practice concerning retirement [] benefits that was in place when an individual retired, in and of itself, prevents the City from unilaterally reducing those benefits for such person after cessation of public service" cannot be upheld.[41] "Such a conclusion misconstrues and unjustifiably extends the role of past practice in the field of public employment relations."[42]

Accordingly, and for the reasons stated herein, the ALJ's decision is reversed, and the charges must be and hereby are dismissed.

Dated: November 6, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[40] Local 628 Memorandum in Response to Exceptions, at 10; UFOA Brief in Response to Exceptions, at 14.
[41] 92 NY2d at 332.
[42] *Id.*