

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

BORELLI, CITY OF YONKERS,

Appellants,

-against-

CITY OF YONKERS, YONKERS FIRE
FIGHTERS,

Respondents.

NO. 95
96

20 Eagle Street
Albany, New York
November 16, 2022

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

RICHARD S. CORENTHAL
ARCHER, BYINGTON, GLENNON & LEVINE, LLP
Attorney for Appellant
Attorney for Respondent
534 Broadhollow Road, Suite 430
Melville, NY 11747

PAUL J. SWEENEY
COUGHLIN & GERHART, LLP
Attorney for Appellant
99 Corporate Drive
Binghamton, NY 13904

Melissa Key
Official Court Transcriber



1 ACTING CHIEF JUDGE CANNATARO: Numbers 95 and 96,
2 matter of Borelli v. Yonkers, and Yonkers v. Yonkers Fire
3 Fighters.

4 Counsel?

5 MR. CORENTHAL: Good afternoon, Your Honors. May
6 it please the court, I respectfully request to reserve five
7 minutes for rebuttal.

8 ACTING CHIEF JUDGE CANNATARO: You have five
9 minutes.

10 MR. CORENTHAL: Thank you. The term regular
11 salary or wages is not defined in General Municipal Law
12 Section 207-a. Key words came at the end of the Second
13 Department's decision in the Borelli case, where the court
14 acknowledged that the parties may agree in a collective
15 bargaining agreement to include additional amounts, like
16 night differential, check-in pay, and holidays, in the
17 regular salary or wages. And it's appropriate for an
18 arbitrator to decide.

19 ACTING CHIEF JUDGE CANNATARO: And was that given
20 to - - - I know you're talking about the Borelli case and
21 not the other case right now, but was that given to the
22 arbitrator to decide here?

23 MR. CORENTHAL: Yes. So there are two cases, but
24 they are related, as acknowledged in the Borelli decision.
25 So after the Second Department reversed and denied the stay



1 of arbitration, it went to arbitration. Arbitrator Jay
2 Siegel construed the collective bargaining agreement and
3 found - - - the decision is attached to our brief - - - and
4 found that express provisions of the collective bargaining
5 agreement provide for night differential, check-in pay, and
6 holidays as part of compensation. He cited article 4,
7 compensation of the collective bargaining agreement, the
8 maintenance of benefits provision, as well as the 207-a
9 procedure, which is a - - - next to the collective
10 bargaining agreement as appendix C.

11 JUDGE WILSON: So are you asking us to construe
12 the statute, or you're not asking us to construe the
13 statute?

14 MR. CORENTHAL: Well, I think what - - - the
15 statute says - - - regular salary or wages. So in order to
16 answer that question, whether it's regular salary or wages,
17 it requires the arbitrator to construe the collective
18 bargaining agreement to see if there was an agree - - -

19 JUDGE WILSON: Tha - - - that's possible, or the
20 statute might have some extrinsic meaning, right?

21 Well, there's too ways - - - let me see if I can
22 make it clearer. I can imagine two ways that you might
23 approach this. One would be to say, statute says regular
24 salary or wages. That has some defined meaning that the
25 legislature meant, and you should decide what that means.



1 Another way to construe it is to say, the statute
2 says regular salary or wages, and that allows the parties
3 to define that however the way they want irrespective of
4 whether the legislature thought it meant something. It
5 could be either of those two.

6 MR. CORENTHAL: Well, I think when the - - - when
7 the legislature said, regular salary or wages, what they
8 wanted to establish was that a permanently disabled
9 firefighter would receive the same amount of regular salary
10 or wages of a - - - of an active firefighter on retirement.

11 ACTING CHIEF JUDGE CANNATARO: Counsel, before
12 you get into the statutory argument, and we can debate the
13 finer points of that, but - - - it - - - I don't know if
14 this was something implicit in Judge Wilson's question or
15 not, but do we have to answer that question about what it
16 is under the statute if it's already been decided that it's
17 included as part of the CBA? Do - - - do you have to have
18 belts and suspenders here?

19 MR. CORENTHAL: I don't think so. I think the
20 court properly deferred to the arbitrator to decide that
21 each case is - - -

22 JUDGE GARCIA: But Counsel, I'm sorry.

23 MR. CORENTHAL: - - - going to be different - - -

24 JUDGE GARCIA: Just to go on that point again,
25 and following up on Judge Wilson. So what did the



1 Appellate Division decide in Borelli?

2 MR. CORENTHAL: Well, the - - - the - - - the - -
3 - the Appellate Division basically, in my opinion, deferred
4 - - - at the end of that decision, deferred and said that
5 the parties can agree to add dish - - - compensation to
6 regular salary or wages - - -

7 JUDGE GARCIA: Seems to me they said - - -

8 MR. CORENTHAL: - - - and it's for the arbitrator
9 to decide.

10 JUDGE GARCIA: But it seems to me they said first
11 - - - it doesn't - - - it isn't - - - it isn't what you
12 would normally consider under the statutory definition of
13 wages and salary. But you can define it under the CBA, and
14 that's for the arbitrator.

15 MR. CORENTHAL: Well, the - - - I don't think
16 they said that it's not normally considered. I think they
17 decided - - -

18 JUDGE GARCIA: "We agree with the Supreme Court
19 that the petitioners did not sustain their burden of
20 establishing their entitlement" to the three categories of
21 disability pay - - - benefits under the language of 207-
22 a(2).

23 MR. CORENTHAL: I think - - - I think the court
24 cited some cases that are distinguishable in that the
25 collective bargaining agreements did not cover the types



1 of - - - what's key in this case - - - what's really key in
2 this case, is that the night differential, and the check-in
3 pay, and the holiday pay are paid whether you work it or
4 not. You could be on sick leave. You could be on 207-
5 a(1). You could be on long-term illness.

6 JUDGE WILSON: So if you - - - are there
7 firefighters who never work at night, who get the night
8 differential?

9 MR. CORENTHAL: Yes, and who never check-in for a
10 shift.

11 JUDGE WILSON: I'm just - - -

12 MR. CORENTHAL: Yeah.

13 JUDGE WILSON: I'm just focusing on the night
14 differential for a moment.

15 MR. CORENTHAL: Sure.

16 JUDGE WILSON: Are there actually firefighters
17 who never work a night shift?

18 MR. CORENTHAL: Well, you're asking me about
19 active - - - there are fi - - -

20 JUDGE WILSON: Yeah, active. Active.

21 MR. CORENTHAL: There are - - - there are - - -
22 the - - - the night differential is paid regardless of the
23 schedule. The - - - so - - -

24 ACTING CHIEF JUDGE CANNATARO: That's a different
25 question, though, than I think the one Judge Wilson asked.



1 But is it the case that all active firefighters, at some
2 point, do work a night shift?

3 MR. CORENTHAL: Not if they're on sick leave.
4 Not if they're on 207-a(1).

5 ACTING CHIEF JUDGE CANNATARO: Well - - - but - -
6 -

7 MR. CORENTHAL: So you can be - - - you could
8 still be - - -

9 JUDGE WILSON: Yeah. I'm not - - -

10 MR. CORENTHAL: You could - - -

11 JUDGE WILSON: I'm trying - - -

12 MR. CORENTHAL: - - - still be an active
13 firefighter - - -

14 JUDGE WILSON: So - - - well, let me - - - let me
15 - - -

16 MR. CORENTHAL: - - - an active firefighter - - -

17 JUDGE WILSON: Okay. That's not exactly what I'm
18 asking. So there are schedules in the record that look as
19 if there is a nine-day rotation for all the firefighters.
20 And the night differential is paid if you work one night
21 during a two-week period. Looking just at the paper
22 record, it would look as if every firefighter, because of
23 the nine-day rotation and the two-week period that - - -
24 that establishes entitlement to the night differential,
25 everybody is working one - - - at least one night somewhere



1 during that two-week period. But I can't tell if that is,
2 in fact, true. That's what I'm asking.

3 MR. CORENTHAL: I think the schedules vary. I
4 think the schedules vary, and what's really relevant here
5 is that an active firefighter includes firefighters who are
6 on sick leave, who are not working; who are on 207-a(1),
7 injured in the line of duty, and not working. And they are
8 paid those monies. They are paid - - -

9 JUDGE WILSON: The ones who are - - -

10 MR. CORENTHAL: - - - night diff - - -

11 JUDGE WILSON: The ones who are injured, let's
12 say, in a jet ski accident, unrelated to work, may or may
13 not get the night - - - night differential based on a
14 discretionary determination of the Commissioner, right?

15 MR. CORENTHAL: No.

16 JUDGE WILSON: No?

17 MR. CORENTHAL: Everyone - - - no. That's - - -
18 that's the key point here, is that night differential is
19 paid as part of salary whether you work or not. That's the
20 key. So by not paying it to these disabled - - -
21 permanently disabled firefighters, you're discriminating
22 against them when everyone else gets it. In fact, as a
23 result of the decision in this case and the Third
24 Department decision, all permanently disabled firefighters
25 after 2015 have received those monies. The only ones that



1 haven't received those monies are the Borelli appellants
2 and petitioners.

3 So you have this subclass, who are being treated
4 differently. So whether you work or not, regardless of
5 schedule or status, in Yonkers, firefighters receive these
6 monies; the night differential, the check-in pay, and the
7 holiday pay. It's dec - - -

8 JUDGE SINGAS: Well, how does that impact 207-a?
9 I mean, aside from the fairness of it, aside from the
10 custom and procedure. How - - - how do - - -

11 MR. CORENTHAL: So - - -

12 JUDGE SINGAS: How should we analyze it - - -

13 MR. CORENTHAL: So - - -

14 JUDGE SINGAS: - - - in terms of 207?

15 MR. CORENTHAL: So 207-a is - - - is a statute
16 that provides that firefighters in New York State who are
17 injured in the line of duty should receive the same salary
18 as firefighters who are active. That's the guiding
19 principle, and they - - - it refers to regular salary or
20 wages. And to define that, what's regular salary or wages,
21 you have to look at the facts of the particular case.

22 ACTING CHIEF JUDGE CANNATARO: That's interesting
23 because what the Appellate Division looked at was the body
24 of case law that has grown up around the definition of
25 regular salary or pay. And they said it is the following



1 things: it's annual or base salary, plus increases or
2 possibly decreases, and excluding any unused vacation time
3 and sick time accruing during disability. And that's it.

4 MR. CORENTHAL: Yeah. But that's - - -

5 ACTING CHIEF JUDGE CANNATARO: Nothing else.

6 MR. CORENTHAL: But those were based upon those
7 cases. They - - - they did not properly refer - - -

8 ACTING CHIEF JUDGE CANNATARO: So you're - - -

9 MR. CORENTHAL: - - - to the - - -

10 ACTING CHIEF JUDGE CANNATARO: - - - asking for
11 an expansion of the statutory - - -

12 MR. CORENTHAL: I don't - - -

13 ACTING CHIEF JUDGE CANNATARO: - - - definition.

14 MR. CORENTHAL: - - - think so. I think the
15 Third Department in McKay got it right, and
16 basically - - - this case will - - -

17 JUDGE TROUTMAN: So is it that this case, because
18 of practice, they created the pay as reg - - - the city
19 created it as regular pay by giving it to people
20 irrespective of what their duties were?

21 MR. CORENTHAL: Correct. And in the record, 105,
22 in the 628 case, there's a stipulation. It's a very key
23 stipulation of facts in the case, and that stipulation
24 clearly says that for - - - since 1995, and - - - and
25 earlier than that, the City has always paid these monies



1 regardless of schedule or status, and they're part of
2 salary. You can disagree with it, but that is the
3 practice. And so injured firefighters - - - permanently
4 injured firefighters under the concept of 207-a should be
5 treated the same until they reach their maximum retirement
6 age.

7 JUDGE SINGAS: Yeah. But custom can change. An
8 employer can change the custom, so then what happens?

9 MR. CORENTHAL: Well - - -

10 JUDGE SINGAS: Like, why not be more explicit in
11 the CBA?

12 MR. CORENTHAL: Well, so they tried to change it,
13 and we filed an improper practice charge. And the Third
14 Department found that the City violated the law by trying
15 to change it, and ruled that there should not be - - - that
16 the - - - that these monies are owed. And they should
17 pay - - - be paid.

18 So right now, the Third Department, when it
19 wasn't appealed in that PERB case on the same subject
20 matter, ruled that these monies should be paid. And so
21 respectfully, I think that you have the Third Department
22 case. You have the Second Department, which referred it to
23 arbitration; the Siegel award, which has been confirmed by
24 Westchester County Supreme Court.

25 The - - - the - - - the - - - the petitioner



1 appellants in Borelli are the subclass who are the only
 2 ones who are not getting these monies, because they retired
 3 prior to 2015. And there's no question. It's stipulated
 4 that everyone else, whether they're working or not, if
 5 they're on 207-a, sick leave, they get these monies. And
 6 the statute, the policy behind the statute - - - and it's a
 7 good thing.

8 It's a good thing that firefighters who are
 9 permanently injured, that they continue to receive these
 10 monies, you know, because of their injuries. They've
 11 sacrificed themselves. The record, I think, is clear in
 12 that regard, and they shouldn't be treated as second class
 13 because of these injuries - - -

14 JUDGE RIVERA: You saying it's in part - - -

15 MR. CORENTHAL: - - - which is what happened.

16 JUDGE RIVERA: You're saying it's in part an
 17 expectational remedy. Right, this is what they all
 18 anticipate. This is what they all expect - - -

19 MR. CORENTHAL: This is the law - - -

20 JUDGE RIVERA: - - - and they shouldn't be
 21 treated differently?

22 MR. CORENTHAL: Yes. But it's the law. The 207-
 23 a, the legislature, the State of New York has said that
 24 firefighters permanently injured should receive the same
 25 regular salary as active firefighters.



1 ACTING CHIEF JUDGE CANNATARO: Thank you,
2 Counsel.

3 MR. CORENTHAL: And - - - thank you.

4 MR. SWEENEY: Good afternoon, Your Honors. Paul
5 Sweeney of Coughlin & Gerhart, on behalf of the City of
6 Yonkers. Your Honor, if I could reserve five minutes for
7 rebuttal?

8 ACTING CHIEF JUDGE CANNATARO: It's not generally
9 the case, rebuttal for the Respondent. Is it for the
10 second appeal?

11 MR. SWEENEY: Yes, Your Honor.

12 ACTING CHIEF JUDGE CANNATARO: Yes.

13 MR. SWEENEY: In - - - in case I need it.
14 I - - - I may not need it, obviously.

15 ACTING CHIEF JUDGE CANNATARO: Yeah.

16 MR. SWEENEY: Your Honor, in response to
17 questions to - - - Counsel, this court, since 1982, has
18 indicated that there is a methodology to analyze the issue
19 at hand. And you have to look at the CBA. The court - - -
20 this court has never said, you look at the past practice of
21 the parties to determine that.

22 JUDGE GARCIA: Counsel, is it your view - - -
23 we've been debating this here, I think - - - that the
24 statutory term - - - regular wages and salary wages, that
25 has a - - - a meaning, a core meaning. And that if you



1 want something beyond that heartland meaning, and I think
2 Acting Chief gave that definition, you need to expressly
3 provide it in the CBA?

4 MR. SWEENEY: Yes, Your Honor. That is what the
5 Chalachan, this - - - this court's decision says. That's
6 what this court said in Cohoes, a 2002 case. It - - -
7 it - - - it - - - and I use the words throughout the brief
8 of "expressly provided for" because this court has
9 consistently said that, if you want to give something
10 beyond regular salary and wages, you have to expressly
11 provide that in the contract.

12 JUDGE GARCIA: So where do we find the definition
13 of regular salary and wages outside of a CBA?

14 MR. SWEENEY: Well, I - - - I - - - Farber, Your
15 Honor, this court's decision from 2002, as well, says - - -
16 it's used the words "current salary" at the time of
17 retirement. But in terms of - - -

18 JUDGE GARCIA: But doesn't that - - - isn't that
19 the CBA then? Isn't that - - - we're kind of circular.

20 MR. SWEENEY: Well, Your Honor, I'm - - - I'm
21 happy to live within the world of the CBA because as
22 this - - - as this court knows, if you look at article 4,
23 it actually defines what base salary is.

24 JUDGE GARCIA: Um-hum.

25 MR. SWEENEY: And to - - - to your point, Your



1 Honor, it says, it will be the - - - the base salary, plus
2 longevity. That's in article 4. For - - -

3 JUDGE WILSON: But then you're really, I think,
4 saying that, you know, the two - - - of the two options I
5 provided, that it's the second, that the - - - that is, the
6 term in the statute, regular salary or wages, has no
7 meaning independent of the collective bargaining agreement.
8 It's whatever the parties agree to in the way of the
9 collective bargaining agreement.

10 MR. SWEENEY: It's - - -

11 JUDGE WILSON: Is that what you're saying?

12 MR. SWEENEY: Yes, Your Honor. Not defined in
13 the statute, not defined in the legislative history.

14 JUDGE WILSON: So - - - well, but - - - so
15 to - - - to put a point on it, so that the parties could
16 agree that regular salary and wages is a dollar in the
17 collective bargaining agreement, and then say, we're also
18 going to make discretionary payments to everybody in the
19 amount of \$100,000 a year. And that would not be - - -
20 that would not fill in the sas - - - statutory definition?

21 MR. SWEENEY: Correct, Your Honor. But to be
22 more particular, in Cohoes, this court was faced with an
23 issue where certain fringe benefits were expressed to be
24 provided for as a 207-a(2) benefit, including holiday pay.

25 JUDGE WILSON: Um-hum.



1 MR. SWEENEY: And this Court said, because other
2 benefits were not and some were, then obviously the parties
3 had negotiated to provide certain benefits. Here, it's
4 undisputed - - -

5 JUDGE WILSON: Um-hum.

6 MR. SWEENEY: - - - that check-in pay, night
7 diff, holiday pay are not included as a 207-a(2) benefit.

8 JUDGE GARCIA: But then it - - - it brings me
9 back to the question I asked your - - - your adversary
10 here. What did the Appellate Division decide here?

11 MR. SWEENEY: Your Honor, it's interesting. In
12 Borelli, the - - - the - - -

13 JUDGE GARCIA: In Borelli. I'm sorry. Yeah.

14 MR. SWEENEY: In - - - in Borelli, the Appellate
15 Division followed this court's case law and other case law
16 throughout the Second Department and other places, and said
17 that - - - you know, the City had a rational basis for
18 denying the expansion of A(2) benefits to the retirees for
19 these three categories.

20 JUDGE GARCIA: But it seemed almost to be saying,
21 and I may be misreading it, that this doesn't qualify - - -
22 going back to Judge Wilson's point - - - this - - - these
23 three categories don't qualify as regular salary and wages
24 under the statute. If you want them to be regular salary
25 and wages, you have to look to the CBA and do it there.



1 And they deferred to the arbitrator, which seems to say
2 that there is some ideal of regular salary and wages
3 definition or heartland definition that these were not part
4 of. But I'm not entirely clear on if that's - - - that
5 that's what they were doing.

6 MR. SWEENEY: Well, Your Honor, de - - - despite
7 the ambiguity that might be in this record, the CBA is
8 explicit as to what base salary is. There's definitional
9 sections, including the rate of pay. The rate of pay, you
10 know, a daily rate would be one two hundred and thirty-
11 second of - - - of the annual salary, in - - - which
12 includes the base, plus longevity. It excludes all of
13 these other pays, including arson pay, night diff, holiday
14 pay, check-in pay.

15 And Your Honor, there's a reference to an
16 arbitration award from Jay Siegel. The City is moving to
17 vacate that for the same reasons that I'm here before you,
18 that Mr. Siegel had no lawful ability to issue an award
19 which expanded the CBA.

20 JUDGE WILSON: Are the three special pays, in
21 fact, paid to everybody?

22 MR. SWEENEY: Your - - - Your Honor, I think it's
23 undisputed by practice. The City, for some time, through
24 an erroneous payment, was paying these night - - - these
25 special pays to essentially all firefighters - - -



1 JUDGE WILSON: Including - - - including the
2 night diff.

3 MR. SWEENEY: Including night diff.

4 JUDGE WILSON: Okay.

5 MR. SWEENEY: And - - - and that - - - not right.
6 That happened.

7 JUDGE WILSON: Okay.

8 MR. SWEENEY: But again, it's not a past practice
9 issue because that's not what this court said. This court
10 said, look to the language of the CBA.

11 ACTING CHIEF JUDGE CANNATARO: To go back to the
12 question Judge Wilson asked your adversary before - - -
13 earlier, is it - - - is it the case that all actively
14 working firefighters who received night diff worked nights,
15 or do you get night diff even if your schedule doesn't have
16 night duty?

17 MR. SWEENEY: Your - - - Your - - - Your Honor, I
18 believe, and it's not clear in the record. I believe you
19 could have a onesie and twosie, where you have somebody
20 that, as Mr. Corenthal indicated, that is, like, on 207-
21 a(1), where they're sitting home, and they're getting a
22 night diff payment. You could have the union president,
23 who is on release time, who doesn't work at the fire house,
24 I'm pretty sure he gets night diff. So un - - -
25 unfortunately, I think that as a matter of practice - - -



1 ACTING CHIEF JUDGE CANNATARO: Everybody gets it.

2 MR. SWEENEY: - - - a - - - a lot of people got
3 paid night diff.

4 And Your Honor, the flip side of that is if you
5 look at the actual language of the CBA, there are terms and
6 conditions are tied to it. You have to work at night. You
7 have to check-in in order to - - -

8 JUDGE SINGAS: What happens if you don't check
9 in?

10 MR. SWEENEY: I think you still get your check-in
11 pay, Judge. And again, that - - - that's by - - - you
12 know, by practice. And Attorney Corenthal mentioned PERB.
13 Interesting fact, PERB has no jurisdiction to interpret
14 contract disputes.

15 JUDGE TROUTMAN: So the fact that everybody's
16 getting it, whether they do extra work, or whether they do
17 check-in or not, it doesn't mean anything. It's just
18 discretionary extra pay that you're giving?

19 MR. SWEENEY: Your Honor, what I would say is
20 that there was - - - there's evidence of a practice of
21 making these payments, say, over forty years in error.
22 What I'm also saying is there's clear, unambiguous contract
23 language, which should control, and what this court looked
24 at.

25 JUDGE WILSON: Isn't there a provision of the



1 contract that protects against diminutions or - - - or
2 reductions of payments that are made by custom?

3 MR. SWEENEY: Ye - - - ye - - - yes, Your Honor.
4 There's a maintenance of benefits provision at article
5 31 - - -

6 JUDGE WILSON: No.

7 MR. SWEENEY: - - - but actually, that - - - that
8 article supports my position because it's a catch-all
9 provision, which says those benefits or those
10 understandings which are not explicitly set forth are
11 protected. Well, that means we're talking about implicit
12 expansions of a contract, and that's not what this court
13 held - - -

14 JUDGE WILSON: Well, it's - - - it's explicit in
15 the thir - - - article 31.

16 MR. SWEENEY: Well, Your Honor, it - - - it - - -
17 article 31 is just - - - it is a catch-all paragraph,
18 which - - -

19 JUDGE WILSON: But it's something that you agreed
20 to.

21 MR. SWEENEY: Well - - - well, Your Ho - - - Your
22 Honor, it goes to - - - it goes to a past practice
23 argument, and again, this - - - unless this court wants to
24 develop a different rule, it - - - it - - - you have to
25 look at the express language of the contract.



1 JUDGE WILSON: I guess, that's what I'm
2 struggling with a little bit. It - - - at - - - at least a
3 way to read article 31 is that you expressly agreed that if
4 there was a benefit that was paid that is not included in
5 the collective bargaining agreement, because that's one of
6 the conditions in article 31, that was paid to people as a
7 matter of customer practice, that you agreed you wouldn't
8 diminish that.

9 MR. SWEENEY: That's what article 31 says, Your
10 Honor.

11 JUDGE WILSON: Yeah.

12 MR. SWEENEY: And I would - - - and - - - and - -
13 - and, Your Honor, in Cohoes, which had a broad arbitration
14 clause much like the one here, this court said that - - -

15 JUDGE WILSON: It didn't have a provision like
16 article 31, did it?

17 MR. SWEENEY: I don't believe Cohoes' had a - - -
18 it was not about a maintenance of benefits issue, Your
19 Honor. But I guess, my - - - my point is the maintenance
20 of benefits provision talks about a past practice type of
21 theory, and that would fly in the face of what this Court
22 has done in Chalachan and - - -

23 JUDGE WILSON: Well, no. I don't - - -

24 MR. SWEENEY: - - - Cohoes.

25 JUDGE WILSON: I'm not sure about that because



1 those cases say, if you didn't have a contractual
2 agreement, then you wouldn't look to a pra - - - past
3 practice.

4 MR. SWEENEY: Right.

5 JUDGE WILSON: But if you have a contractual
6 provision in which you are agreeing to a past practice,
7 that seems to me different.

8 MR. SWEENEY: Your Honor, and I would
9 respectfully point out that in Cohoes, this court said, the
10 fact that we're talking about holiday pay, among other
11 defined benefits, that's express.

12 JUDGE WILSON: Um-hum.

13 MR. SWEENEY: And the fact that the union in
14 Cohoes wanted other benefits in - - - added is - - -
15 is - - - they said, we could - - - we ca - - - this court
16 said, we can't go that far.

17 Notwithstanding article 31, there is no express
18 provision in this contract which makes those three special
19 pays part of a 207-a(2) benefit. And that's - - - and
20 that's what this court has held for the last forty years is
21 sufficient for this - - - for the Appellate Division to
22 have denied - - -

23 JUDGE RIVERA: So - - - so then what does article
24 31 do? What's the benefit they got for negotiating that?

25 MR. SWEENEY: Well, in - - - in a different



1 context, Your Honor, in a different dispute, article 31 may
2 be relevant for a case that should go to arbitration. It's
3 the City's position that this case should never have gone
4 to arbitration. And therefore, the maintenance of benefit
5 provision would never kick in.

6 JUDGE WILSON: What about appendix C, which
7 is sort of six pages of rules governing arbitration of 207-
8 a disputes?

9 MR. SWEENEY: Your Honor, 207 - - - that 207-a
10 appendix, that procedure, that negotiating procedure - - -

11 JUDGE WILSON: Um-hum.

12 MR. SWEENEY: - - - makes no reference to special
13 pays being part of this statutory benefit, and I think
14 that's significant.

15 ACTING CHIEF JUDGE CANNATARO: Doesn't exclude
16 them, though, specifically.

17 MR. SWEENEY: Doesn't - - - doesn't - - - it's
18 silent, Your Honor. It doesn't mention it, and based on
19 Cohoes and other cases, that doesn't err to the favor of
20 the union. That actually would support the City's
21 position, that there's no express provision making those
22 special pays as part of a 207-a benefit. So I'll - - - I -
23 - - I think that actually supports the City's position.

24 ACTING CHIEF JUDGE CANNATARO: Thank you,
25 Counsel.



1 MR. SWEENEY: Thank you, Your Honor.

2 MR. CORENTHAL: The Cohoes case, I believe, dealt
3 with light duty. It did not address the specific issue
4 here in dealing with two - - - General Municipal Law 207-
5 a(2), regular salary. I think the record in that case is
6 clear that there were no provisions in the collective
7 bargaining agreement relating to the subject.

8 I think this case - - - based upon the record
9 here, which is that we have a collective bargaining
10 agreement that has an article 4 compensation that the
11 arbitrators cited that listed, as part of compensation, the
12 three types of payments that we're talking about. The
13 maintenance of benefits provision, which he cited, is a
14 very strong provision with a stipulated past practice going
15 for years. It's undisputed, as Counsel acknowledges. And
16 the 207-a procedure, which was not in these other cases.

17 So the - - - the 628 contract has many provisions
18 that the arbitrator relied upon and cited. In finding, he
19 found that it was a violation of the collective bargaining
20 agreement, and that these payments, the night differential,
21 check-in pay, and the holiday pay, are to be paid under
22 207-a(2).

23 JUDGE GARCIA: But is - - -

24 MR. CORENTHAL: So - - -

25 JUDGE GARCIA: That award isn't before us, right?



1 The only arbitration issue, I thought, that's before us on
2 this appeal is whether it should have gone to an arbitrator
3 or not.

4 MR. CORENTHAL: Well, you know, Your Honor, it's
5 interesting because I started out the oral argument by
6 citing the last words of the Bore - - - Second Department's
7 Borelli decision, where they referred. They deferred.
8 They said, yes, we can't give an opinion here, but it's for
9 the arbitrator to decide. And so we have an arbitration
10 decision. I don't think it's right to just now reargue
11 that arbitration case here. The arbitrator decided, and
12 it's been confirmed.

13 ACTING CHIEF JUDGE CANNATARO: I - - - assume we
14 agree with that, or assume I agree with that anyway, but
15 there's still - - - you're still standing up here, and
16 you're asking us to do something with the Borelli decision.
17 And I am not entirely clear what that is because my view of
18 the decision is that they are only talking about the
19 statutory definition of regular base pay under 207-a.

20 You have your contractual argument. It actually
21 went to an arbitrator. It broke your way. The resolution
22 is - - - was - - - was that it is part of the contractual
23 ba - - - base salary. So what - - - what are we reviewing
24 here?

25 MR. CORENTHAL: So what - - - Your - - - Your



1 Honor, what you're reviewing, and - - - and I - - - and I
2 ask that you look at that stipulation because I worked on
3 that stipulation. And it's in the record of - - - of - - -
4 of these cases, both these cases.

5 You have a stipulation with the City of Yonkers
6 agreeing in writing. It says, regular salary or wages
7 includes night differential, check-in pay, and holiday pay,
8 whether it's worked or not. They've agreed to it. And so
9 this is, to me, pretty straightforward.

10 JUDGE GARCIA: So what would happen if we
11 disagree with the arbitrator in terms of the interpretation
12 of the contract? What's the result here?

13 MR. CORENTHAL: Well, that case is - - - there's
14 a decision by Judge Giacomo in Westchester County. I think
15 it's on appeal. That's going to take its course.

16 ACTING CHIEF JUDGE CANNATARO: So we can't
17 disagree now, here. Is that what you're saying?

18 JUDGE GARCIA: Yeah. But let's say we just - - -
19 we - - - we have Borelli. We say - - - we look at Borelli,
20 and we say, okay, for the Borelli petitioners, we're going
21 to interpret the CBA because we think that the statute
22 refers you to the CBA. We look at the CBA. We come out
23 differently. We say, no, under the CBA, this isn't - - -
24 I - - - I'm just - - - hypothetical. We say, no, this
25 isn't regular salary - - - wages and salary. No.



1 MR. CORENTHAL: I think the Second Department in
2 the Borelli decision basically said, we're going to defer
3 to the arbitrator who has the power to decide the contract.
4 And the arbitrator decided. And the Second Department in
5 the 628 case said that the arbitrator has the authority to
6 do it. It's not against public policy. The subject matter
7 is reasonably related.

8 JUDGE GARCIA: But we affirm in Borelli, you - -
9 - then get what you want, because all we're doing is
10 affirming the Appellate Division's - - -

11 MR. CORENTHAL: Well, no - - -

12 JUDGE GARCIA: - - - saying you're deferring - -
13 -

14 MR. CORENTHAL: - - - because - - -

15 JUDGE GARCIA: - - - to the arbitrator.

16 MR. CORENTHAL: Well, the parties are - - - are
17 different because the - - -

18 JUDGE GARCIA: No, but you - - - your - - -

19 MR. CORENTHAL: - - - petitioner's
20 appellants - - -

21 JUDGE GARCIA: - - - position is - - - your
22 position is the Appellate Division deferred to the
23 arbitrator in Borelli. So if we affirm the Appellate
24 Division, we are then doing what the Appellate Division
25 did.



1 MR. CORENTHAL: I - - - I think - - - I think the
2 decision is that the - - - the Second Department got it
3 wrong in that they applied a - - - construed the term
4 "regular salary or wages" too narrowly, not considering the
5 facts and the stipulation in the record. Here, we have
6 payments as part of regular salary wages that are paid to
7 active firefighters, whether they're working it or not.
8 That is the controlling legal principle, and the Second
9 Department went astray. They - - -

10 JUDGE GARCIA: But if the Second Department - - -

11 MR. CORENTHAL: At the end of the decision, they
12 gave us some benefit of agreeing - - -

13 JUDGE GARCIA: If they're really just saying,
14 this doesn't qualify under the statute. You can look to
15 the CBA. We defer to the arbitrator on the CBA. Wouldn't,
16 then, if we affirm that, be saying the same thing?

17 MR. CORENTHAL: Well, as I'm standing here, and
18 I'm trying to put myself in your place, I would say,
19 remanded. I would say, remand to the Second Department to
20 reconsider the decision in - - - in light of the Second
21 Department decision and the arbitrator's decision.

22 ACTING CHIEF JUDGE CANNATARO: So because the
23 arbitrator found that the special pays were part of regular
24 base salary, that would be a basis for the Appellate
25 Division to reconsider its legal determination that they're



1 not part of the statutory definition?

2 MR. CORENTHAL: No. I - - - I think a remand
3 would - - - the Second Department should reconsider its
4 decision because I think it gave a much too narrow
5 definition of - - - of - - -

6 ACTING CHIEF JUDGE CANNATARO: Regular base pay,
7 yeah.

8 MR. CORENTHAL: - - - of regular salary or wages,
9 and it should be remanded for reconsideration of that.
10 That's what I think.

11 ACTING CHIEF JUDGE CANNATARO: Okay. Thank
12 you, Counsel.

13 MR. CORENTHAL: Thank you.

14 MR. SWEENEY: Your Honor, briefly, as - - - as
15 Counsel pointed out, the Borelli decision and the motion-
16 to-stay arbitration are - - - actually involve two
17 different groups of people. The retire - - - the forty-
18 four retirees is part of Borelli. Active firefighters are
19 part of the motion-to-stay arbitration. So it's really not
20 the same issue.

21 And - - - and to your point, Your Honor, I - - -
22 I believe the co - - - the Appellate Division got it right
23 in Borelli because they cited the same case law that we've
24 been talking about today.

25 In the motion-to-stay arbitration, they ignored



1 this court's case law. They didn't even refer to it
2 because they couldn't refer to it and still - - - and still
3 refer this matter or let - - - let this matter go to
4 arbitration.

5 ACTING CHIEF JUDGE CANNATARO: So just so I'm
6 clear, please help me. If - - - if we were to affirm the
7 Appellate Division in Borelli, who loses? Because, you
8 know, the - - - they're - - - the eight - - - the - - - the
9 retirees are still going to get their benefit under the
10 contractual arbitrator decision, aren't they?

11 MR. SWEENEY: No, Your Honor. The - - -
12 the - - - the - - - the forty-four retirees in Borelli are
13 not part of that arbitration proceeding. So that - - -
14 that - - - and the - - -

15 ACTING CHIEF JUDGE CANNATARO: So that's who
16 loses, the retirees.

17 MR. SWEENEY: Yes, Your Honor. The retirees that
18 are part of the Borelli class would be affected by this.
19 However, Your Honor, we are moving to vacate the
20 arbitration award that's been referred here for the same
21 reasons that I'm here today. It's - - - it was a - - -
22 a - - - a improper expansion of the CBA beyond what this
23 court would permit in Chalachan and - - -

24 ACTING CHIEF JUDGE CANNATARO: Are you arguing
25 that we can do that now?



1 MR. SWEENEY: No, Your Honor. I - - - I - - - I
2 believe it has to run its course.

3 JUDGE WILSON: That's what Judge Garcia's
4 question, I think, goes to, right? The circumstance where
5 the arbitrator has already construed the entitlement for
6 the current employees a certain way based on either the
7 reading of the statute or the collective bargaining
8 agreement. And were we here to have a different reading in
9 the case involving the retirees, the first thing you would
10 do is to take that decision on appeal and say, the Court of
11 Appeals has construed this in a way different from the
12 arbitrator, and therefore, you ought to vacate it, right?

13 MR. SWEENEY: Yes, Your Honor. If that - - - if
14 that - - -

15 JUDGE WILSON: I mean, that's what I would do if
16 I were you.

17 MR. SWEENEY: If that issue was before you - - -
18 I mean, obviously, the - - - the - - - the Appellate
19 Division, for whatever reason, on the same day, issued two
20 different decisions where it acknowledges court's case law
21 in one case, Borelli, and ignored the case law in the
22 motion-to-stay arbitration. And I think they had to do
23 that in order to get the result that they wanted.

24 ACTING CHIEF JUDGE CANNATARO: Thank you.

25 MR. SWEENEY: Thank you, Your Honor.



1 JUDGE GARCIA: I'm sorry, Counsel.

2 ACTING CHIEF JUDGE CANNATARO: Come back.

3 JUDGE RIVERA: Before it's too late.

4 JUDGE GARCIA: Sorry. You're almost - - - what
5 was the dispute that was arbitrated?

6 MR. SWEENEY: Whe - - - whether or not the
7 active-duty firefighters - - -

8 JUDGE GARCIA: Right. I know the - - - the
9 parties there, but it seems to me part of that, and it's
10 not entirely clear to me, at least from the Appellate
11 Division decision on that part of the case. But part of it
12 was you were paying - - - the City was paying these
13 benefits and stopped.

14 MR. SWEENEY: Yes.

15 JUDGE GARCIA: And could you stop paying these
16 benefits. Is that a different question than were you
17 originally entitled to these as wages and benefits under
18 this CBA?

19 MR. SWEENEY: I - - - I - - - I think, Your
20 Honor, that they're linked, meaning that the - - - the City
21 had a good-faith basis to stop - - - they were overpaying
22 these benefits, and therefore, they terminated the payment
23 of these benefits. And to be clear, we were never talking
24 about 207-a(1) benefits, which are for active-duty
25 firefighters. We've always been talking, in Borelli and in



1 the motion-to-stay arbitration, about 207-a(2) benefits for
2 retired firefighters.

3 ACTING CHIEF JUDGE CANNATARO: Would you say it's
4 fair to say that you have to answer the question about
5 whether they're a part of base pay in order to answer the
6 question about whether the City rightfully decided to
7 suspend those payments?

8 MR. SWEENEY: Yes, Your Honor. I think you have
9 to do - - - you have to do an analysis of the CBA.

10 ACTING CHIEF JUDGE CANNATARO: You can't answer
11 one without answering the other.

12 JUDGE GARCIA: You can't say customs and practice
13 is enough to - - -

14 MR. SWEENEY: I - - - Your Honor, I - - - I - - -
15 I don't see anywhere where custom and practice has ever
16 been a factor for this court. This court has co - - -
17 consistently looked at the strict construction of that CBA
18 to interpret that.

19 JUDGE RIVERA: Un - - - un - - - unless you've
20 negotiated that you're going to honor customary practice.

21 MR. SWEENEY: Your Honor, I would - - - I would
22 not be standing before you if I - - - if the CBA was
23 different and said, the following special pay is a part of
24 your - - - of the 207-a(2) benefit, or you know, the City
25 will continue to honor the practice of paying 207-a(2)



1 benefits, which include the following. We don't have that
2 fact pattern here.

3 ACTING CHIEF JUDGE CANNATARO: Thank you.

4 JUDGE GARCIA: Thank you.

5 MR. SWEENEY: Thank you, Your Honor.

6 (Court is adjourned)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Melissa Key, certify that the foregoing transcript of proceedings in the Court of Appeals of Borelli, City of Yonkers v. City of Yonkers, Yonkers Fire Fighters, No. 95, 96 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: November 21, 2022

