



New York State  
Public Employer Labor Relations Association Inc.

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**SAVE THE DATE**

The NYSPELRA Board is pleased to announce the dates for the 2023 Annual Training Conference:

**July 10 – 12, 2023**

Please save these dates for another informative, collaborative and productive time in Saratoga Springs!

**NYS Disability Retirement: Recent cases of note**

Performance of Duty/Accidental Disability Retirement: In the Matter Alexandra Bucci v. DeNapoli \_\_ A.D.3d \_\_, 2022 NY Slip Op 06968 (3<sup>rd</sup> Dept. 2022), the Appellate Division, Third Judicial Department, had the opportunity to review a State Retirement System denial of disability retirement. By way of pertinent background, Officer Bucci served as a Police Officer since 2006. In 2009 Officer Bucci claimed to have injured her left foot; in 2010 claimed injury to both her left foot and lower back; and in 2012 claimed injury to her left hip – all three to have been incurred while performing her duties as a police officer. When applying for disability retirement Officer Bucci submitted applications for both Performance of Duty (POD) and for Accidental Disability Retirement. The NYS Retirement System denied both applications finding, after a hearing, that “the 2009 and 2010 incidents causing left foot and back injuries did not result in [Bucci’s] permanent incapacity and that the 2012 incident which permanently incapacitated [Bucci] did not constitute an accident within the meaning of the Retirement and Social Security §363 [NYSRSSL §363] and did not cause her hip condition.”

Ultimately the Retirement System conceded that it erred in denying POD. The sole issue, therefore, before the Court was whether the incident of 2012 was an accident within the meaning of Section 363 NYSRSSL. The law tells us that an employee “shall be entitled to an Accidental Disability Retirement ... if, at the time of the Application” the individual is

1. Physically ... incapacitated ... as the natural and proximate result of an accident not caused by her own fault ... sustained in service; and
2. Actually in service.

(NYSRSSL, Sections 363 a.1, a.2) In 2012 Officer Bucci was working in the normal course of her police duties, meeting and interviewing a victim who was hospitalized. Officer Bucci took a break to visit the restroom. When she was about to exit the restroom she slipped on an unidentified substance, fell and injured her left hip. She needed three (3) surgeries to attempt repair of the damage caused. The surgeons who performed these many surgeries testified before the NYS Retirement System and stated that although Officer Bucci had a pre-existing congenital abnormality which made her more susceptible than others to hip injury (ie: labral tears, re-tears and longer surgical recoveries --- all which Bucci suffered), the 2012 slip and fall caused the hip pain (which she did not have previously), caused the labral tears and the resulting injuries.

Courts have held that an “accident” within the meaning of §363 is an event coming about as a “suddenly fortuitous mischance, unexpected, out of the ordinary and injurious in impact” (citing, Matter of Berman v. DiNapoli, 208 AD3d 1568, 1569 (3<sup>rd</sup> Dept., 2022)). Officer Bucci did have the burden to show and establish that “her injuries were caused by a precipitating event that was sudden, unexpected and not a risk inherent in [her] ordinary job duties” (citing, Crone v. DiNapoli, 201 AD3d 1260, 1261 (3<sup>rd</sup> Dept. 2022)). As Officer Bucci established cause and effect, the court held that the granting of Accidental Disability Retirement was warranted, under the law and facts of this case.

### **Regular Salary and Wages**

The NYS Court of Appeals recently had the opportunity to consider, once again, the meaning of “regular salary and wages” as that phrase pertains to firefighter retirees under General Municipal Law Section 207-a(2) supplemental pay (GML §207-a(2)). Firefighters who receive a NYS disability retirement may be entitled to a continuation of the “regular salary and wages” that they would have received had

they continued to work (Id.). Thirty-nine disability-retired firefighters from the City of Yonkers disputed what the City was considering when calculating this supplemental payment.

By way of background, since at least 1995, the City of Yonkers included in the calculation of supplemental “regular salary and wages,” holiday pay, check-in pay and night shift differential (among other benefits). In December of 2015 the City determined that these payments “had been a mistake” and that the City was going to remove these specific benefits from its calculations for purposes of the supplemental pay. Ultimately the matter made its way to the NY Court of Appeals. In the Matter of Borelli, et. al., v. City of Yonkers, \_\_ N.Y.3d \_\_, 2022 NY Slip Op 06968 NY3d (2022).

The issue before the Court was whether certain compensation outlined in the applicable collective bargaining agreement (CBA) constitutes “regular salary and wages” for the purposes of calculating the supplemental pay for disability-retired firefighters in accordance with GML §207-a(2).

The Court reminds us that the GML’s supplemental pay provisions require the municipality to pay the difference between amounts paid by the NYS Retirement System to the disability-retired firefighter and the monies that the retiree would have received if still an active firefighter.

Since “at least 1995” the applicable CBA contained relevant provisions as follows:

Holiday pay: CBA provides that every firefighter shall be paid for 12 holidays, whether worked or not.

Check-in pay: Although the CBA language expressly states that “firefighters [must] be present for duty 12-minutes prior to the commencement of their tour,” the CBA language goes on to specify, without qualification, that each employee “shall receive an additional 5 ½ days of pay per year.”

Night shift differential: The CBA specifically affords the differential to “firefighters who actually work the night shift.”

The Court held that “consistent with our precedent, “regular salary and wages” ... includes monetary compensation to which current firefighters are contractually entitled based on the performance of their regular job duties. It does not, however, include monetary compensation based on the performance of additional responsibilities beyond their regular job duties.” Id. at \*1. Based upon this conclusion the Court maintains that as holiday pay is afforded to all firefighters “whether worked or not,” this special pay is to be included in the “regular salary and wages.” So too, check-in pay, by the CBA express language, requires that each employee “shall receive an additional 5 ½ days of pay per year.” As this pay is mandated per the CBA, it is to be considered “regular salary and wages.” However, the Court concluded that since the night shift differential is paid only to “firefighters who actually work the night tour” this would be in the category of monies which are paid for work beyond regular duties and is not a part of the “regular salary and wages.” Id. at \* 11.

What is clear from this ruling is that the express language of a CBA will control what is to be included when calculating supplemental “regular salary and wages.” The ruling also reflects the Courts’ continued interpretation of the GML §207-a (and GML §207-c) as a:

... remedial statute enacted for the benefit of the firefighters and [is to be] liberally construed in their favor. Id. at \*5.

And that a:

... municipality may explicitly agree that certain benefits be included, even if the benefits are not “regular salary or wages” under Section 207-a(2). In that case a CBA must expressly provide that the benefits in question are to be included in the 207-a(2) supplement. Id. at \*3.

## **Bargaining in 2022**

### **Village of Hoosick Falls Police Department**

The Village of Hoosick Falls and its PBA (UPSEU) Unit entered into a three year successor agreement for the term of June 1, 2022 – May 31, 2025. The Unit is primarily made up of part time officers; there is only one full time officer. As with many police departments, the Village’s PD needed to consider how best to recruit additional officers and get better commitment to work open shifts from those currently employed ... all while searching for a full time Police Chief. After a few short negotiation sessions the parties reached a deal – unanimously approved by the Union.

Part-time Officer availability: a part time officer must commit to a minimum of two (2) shifts each month; if there is a failure to be available as required (without prior approval) the employee will be given two opportunities to improve his/her ability to commit to work or be terminated.

Accountability: All employees must sign and date their time sheets by/on “the last day working within the pay period.”

Wages: Part time officer hourly wage adjustments saw a significant boost throughout the contract term. Looking at the top of grade (after 3 years of service).

6/1/2021 (current)	6/1/2022	6/1/2023	6/1/2024
\$17.75	\$22.00	\$23.50	\$25.00

The full time officer receives \$1.00/hour above the part time officer hourly rate.

### **Village of Coxsackie: Water and Wastewater Departments**

The Village of Coxsackie and the UPSEU entered into a three year agreement, for the term June 1, 2022 - May 31, 2025. The Unit covers 6 employees working in the Village Water and Wastewater Departments. The highlights of the successor agreement:

Wages: 2% wage adjustment for each year of the three year agreement.

Longevity: add steps to the longevity schedule so that an employee with longer tenure gets additional monies: ie:

5 years of service:	\$ 850.00
8 years of service:	\$1,350.00
11 years of service:	\$1,450.00
15 years of service:	\$1,600.00
20 years of service:	\$1,750.00

Reimbursement for costs: Employees for whom the Village pays for Grade 2A Water or Wastewater Treatment Plant Operator License must continue work with the Village for up to three (3) years or must proportionally reimburse the cost of the license (including training, class work, and accommodations if out of town, meals and mileage costs).

### **Discipline for No-Call/No-Show**

In Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO v. Town of Shawangunk, PERB Case No. A2021-364, Arbitrator Monte Klein upheld discipline for a Highway employee who failed to report to work for four days, and failed to call in, due to what the employee claimed was a family emergency.

The Town's Highway Department has a policy requiring that employees notify either the Highway Superintendent or the Working Supervisor if he or she will be out of work for any reason. The employee had texted the Superintendent on a Sunday to advise he would be out of work the following day due to an emergency involving his girlfriend's family. He texted again on Monday to say that the situation had not resolved and asked if he could use his accrued time for Tuesday. The Superintendent responded that the employee was out of time and would be absent without leave. The employee replied that he would "get it figured out." The employee then failed to report to work or call in for the remainder of the week.

Despite the arguments of extenuating family circumstances, Arbitrator Klein sustained the discipline for no-call/no-show. He found that, regardless of how laudable the employee's actions were in assisting his girlfriend, his failure to in

any way inform the Highway Superintendent of his continued absence constituted a willful disregard of a reasonable work rule. However, and as an important note, in considering the employee's clean work record and the reason for the absence, Arbitrator Klein reduced the penalty from a 60 to a 30-day unpaid suspension.

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**Contact NYSPELRA**

NYSPELRA

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Please let us know your thoughts and opinions of the NYSPELRA Newsletter.

In addition, you are encouraged to forward to Jack or to Elayne Gold [[egold@rwgmlaw.com](mailto:egold@rwgmlaw.com)] any article, information from your municipality, agency, or school district relating to Arbitration Awards (grievance arbitration, discipline, etc.), Fact Findings, contract settlements, etc. for inclusion in future editions of our Newsletter.

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