To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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CITY OF YONKERS,

Petitioner,

-against-

DECISION AND ORDER
Sequence Nos. 1 and 2
Index No. 54477/2016

YONKERS FIRE FIGHTERS, LOCAL 628, IAFF, AFL-CIO,

Respondent.

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RUDERMAN, J.

The following papers were considered in connection with petitioner's application for an order permanently staying arbitration pursuant to CPLR 7503 and temporarily enjoining respondent from prosecuting, defending or otherwise participating in arbitration:

Papers	Numbered
Order to Show Cause, Affirmation in Support, Exhibits A – F	1
Notice of Petition to Stay Arbitration, Verified Petition, Exhibits A – J	2
Petitioner's Memorandum of Law in Support	3
Respondent's Verified Answer	4
Respondent's Memorandum of Law in Opposition	5
Petitioner's Reply Affirmation and Reply Affidavit	6 – 7
Respondent's Sur-Reply Memorandum of Law in Opposition	8

By Order to Show Cause dated April 22, 2016, the petitioner City of Yonkers ("City") seeks to permanently stay the arbitration of a dispute over the reduction of GML207-a (2) benefits for retired firefighters demanded by respondents Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO ("Local 628" or "Union"). The Union submits written opposition.

The petitioner and respondent are parties to a Collective Bargaining Agreement ("CBA") which is in effect through June 30, 2019. On December 9, 2015, the City issued 44 letters to retired firefighters who received an "Accidental" or "Performance of Duty" ("POD") disability retirement from the New York State Retirement System due to a line of duty injury, informing the retirees that the City had overpaid them GML 207-a (2) benefits. The notices advised the retirees that they had received payments that erroneously included "special pays and other compensation afforded

to active firefighters under the CBA, which should have been excluded from the calculation" of the retirees' benefits. (Petition, Exhibit D.) These additional fringe benefits included night differential pay, holiday pay and check-in pay. As a result, the City stated that it would adjust or reduce the retirees' benefit and it reserved the right to recoup the overpayment from the retirees' future GML 207-a (2) benefits.

On December 15, 2015, the Union President filed a "Step 1" grievance with the Yonkers Fire Commissioner, pursuant to the CBA, alleging that the "reduction in GML 207-a (2) pension supplemental benefits is a violation of Local 628's CBA." On December 17, 2015, the respondent supplemented the grievance with a second letter alleging that the City's actions also violated Article 31, Article 12, and Appendix C of the CBA.

By letter dated December 22, 2015, the Fire Commissioner rejected the respondent's Step 1 grievance asserting that the dispute related to a matter outside the scope of the CBA. On December 24, 2015, respondent filed a Step 2 grievance with Yonkers Mayor Mike Spano, who reaffirmed the Fire Commissioner's decision that the grievance was not arbitrable under the CBA. On March 17, 2016, the respondent served its Demand for Arbitration. The City now moves for an order permanently staying arbitration.

In support of its motion, the City argues that the parties did not agree to arbitrate the present dispute as evidenced by the terms of the CBA. Article 29 of the CBA provides for grievance arbitration "in the event of a dispute between the parties to this Agreement involving the interpretation or application of any provision of this Agreement." (Petition, Exhibit A, p. 29.) The City argues that the dispute must relate to a specific provision of the agreement and since there is no provision providing for payment to retirees of the supplemental GML 207-a (2) benefits, the subject dispute is not arbitrable. Further, Appendix C to the CBA contains the procedure that "regulate[s] both the application for, and the award of, benefits under section 207-a to the General Municipal Law." (*Id.* at Exhibit C, Section 1.) According to the City, by this language, Appendix C limits arbitration of GML 207-a (2) grievances to situations where the City has denied GML 207-a (2) benefits.

In addition, the City claims that the Union's demand to arbitrate this dispute under the CBA's Article 31 Maintenance of Benefits provision is without merit. That section provides for the continuation of certain past practices for the benefit of *members* of the Union, and members

do not include retirees. As such, the City contends that Article 31 does not provide the retiree respondents with a contract basis to arbitrate the dispute.

The City further asserts that because the 44 retirees elected to participate in due process hearings to challenge the City's decision to adjust their GML 207-a (2) benefits (the results of which may be contested in an Article 78 proceeding), respondent should be precluded from litigating this dispute in two different forums.

Lastly, the City avers, for the first time in its reply, that this grievance is barred by a statutory, constitutional or public policy prohibition. Moreover, respondent's filing of an Improper Practice Charge with the Public Employment Relations Board alleging the City violated the Taylor Law, constitutes "an admission that the Respondent too believes that the real dispute falls outside the CBA, which, of course, would render it non-arbitrable." (Petitioner's Memorandum of Law in Reply, p. 6.)

In opposition, Local 628 contends that the dispute is arbitrable and that, contrary to the City's contention, Appendix C of the CBA does not limit GML 207-a (2) benefit disputes to those circumstances where the City has denied retirees' benefits. Instead, Appendix C provides a much broader arbitration provision, as evidenced in Sections 14 and 32. Specifically, Section 14 grants the arbitrator the "authority to consider and decide all allegations and defenses made with regard to the GML 207-a claim." (Petition, Exhibit C, Section 14.) Section 32 states that the GML 207-a procedure "shall apply to any claim of entitlement to or use of GML 207-a benefits" after November 20, 1989. (Petition, Exhibit A, Appendix C, Section 23.)[1]

Local 628 also argues that the City is collaterally estopped from relitigating the arbitrability of GML 207-a retiree benefits, because the same issue was raised and decided in a prior action before the Hon. Mary H. Smith (*See City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, Index No. 68224/2013). In that case, the Union challenged the City's decision to change the process by which retirees receive the GML 207-a (2) supplemental salary benefit. In a Decision and Order dated January 7, 2014, Judge Smith found that there was a reasonable relationship between the dispute over whether a retired firefighter is entitled to receive GML 207-a (2) benefits and the general subject matter of the CBA, making arbitration of the subject grievance required.

[1] The GML 207-a Procedure was recently modified by the July 1, 2009 through June 30, 2019 stipulation extending the applicability period of the CBA. Section 32 of the modified Appendix C incorporates the language of the previous Appendix C, Section 23.

Local 628 argues that because both cases involve the same GML 207-a benefits, and the City had a full and fair opportunity to litigate the issue, the City is now collaterally estopped from bringing the instant petition to stay arbitration.

Local 628 further opposes the City's motion on grounds that New York State courts favor arbitration and discourage judicial interference, and the Union also argues that whether the GML 207-a procedure applies to the reduction of supplemental benefit claims under GML 207-a (2) is itself, an issue for the arbitrator to decide.

Finally, in a Sur-Reply Memorandum of Law, submitted with permission of the Court, the respondent objects to petitioner's argument that the Improper Practice Charge is an admission that this dispute is not arbitrable. The respondent avers that the same conduct can violate multiple laws that require different forums, and, because the Improper Practice Charge is separate and distinct from the grievance at issue in this proceeding, it is not a basis to stay arbitration.

Analysis

I. *Collateral Estoppel*

"Under the doctrine of collateral estoppel, or issue preclusion, 'a party is precluded from relitigating an issue which has been previously decided against him [or her] in a prior proceeding where he [or she] had a full and fair opportunity to litigate such issue.'" (*Westchester County Correction Officers Benev. Ass'n, Inc. v. County of Westchester*, 65 A.D.3d 1226, 1227 [2d Dept. 2009], quoting *Franklin Dev. Co., Inc. v. Atlantic Mut. Ins. Co.,* 60 A.D.3d 897, 899 [2d Dept. 2009].)

Contrary to respondent's contention, the Court finds that the issue in the pending proceeding was not previously litigated in the 2014 case before the Hon. Mary H. Smith. In that action, the City sought to stay arbitration of the Union's grievance concerning the process by which retirees applied for GML 207-a (2) benefits. The City claimed the matter was not arbitrable because the GML 207-a procedure in effect at the time did not reference GML 207-a (2) benefits, nor did it expressly state that retired firefighters were entitled to receive such benefits. Here, however, the City seeks to stay arbitration of a grievance concerning the City's decision to reduce retirees' GML 207-a (2) supplemental benefits. While the basis for the City's petition is similar to the prior case (that the grievance is not arbitrable), the dispute presented in the instant matter is separate and distinct from that presented in the prior case. As such, the City is not collaterally estopped from litigating the matters presented in its petition.

II. *Agreement to Arbitrate Dispute*

In determining whether a grievance is arbitrable, courts follow the two-part test enunciated in *Matter of Acting Supt. of Schools of Liverpool Cent. School Dist. (United Liverpool Faculty Assn.)*, 42 N.Y.2d 509 [1977] ["*Liverpool*"] and *Matter of Board of Educ. of Watertown City School Dist. (Watertown Educ. Assn.)*, 93 N.Y.2d 132 [1999] ["*Watertown*"]. (*See County of Rockland v. Correction Officers Benevolent Ass'n of Rockland County, Inc.*, 126 A.D.3d 694, 695 [2d Dept. 2015].) Initially, the Court must determine whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance. (*See Liverpool,* 42 N.Y.2d at 513.) If no prohibition exists, the Court then examines the CBA to determine if the parties agreed to arbitrate the dispute at issue. (*See Watertown,* 93 N.Y.2d at 140; *Liverpool,* 42 N.Y.2d at 513–514; *see also In re City of Johnstown (Johnstown Police Benevolent Ass'n)*, 99 N.Y.2d 273, 278 [2002].)

Where the CBA contains a broad arbitration clause, a court is merely required to determine if there is "a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA." (*Bd. of Educ. of Yorktown Cent. School Dist. v Yorktown Congress of Teachers*, 98 A.D.3d 665, 667 [2d Dept. 2012], citing *City of Johnstown*, 99 N.Y.2d at 279 [internal quotation marks omitted].) If a reasonable relationship exists, "it is the role of the arbitrator, and not the court, to make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them." (*City of Syracuse v. Syracuse Police Benevolent Ass'n, Inc.*, 119 A.D.3d 1396, 1397-98 [4th Dept. 2014], citing *In re Bd. of Educ. of Watertown City School Dist. (Watertown Educ. Ass'n)*, 93 N.Y.2d 132, 135 [1999].)

As an initial matter, the City's contention that arbitration of this dispute is barred by a statutory, constitutional or public policy prohibition is improperly raised for the first time in the City's reply papers. In any event, the City fails to cite the specific prohibition against arbitration to which it refers. Its argument that it has a "statutory right to make a calculation of the GML 207-a (2) benefit" (Reply Affirmation, p. 2), does not prohibit the parties from voluntarily agreeing to submit controversies related to the calculation of those benefits to arbitration. (*See City of Johnstown*, 99 N.Y.2d at 278 ["The relevant inquiry is not whether the benefits may be lawfully provided, but whether law or public policy bars arbitration of the grievances."].)

In addition, the Court finds that there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA. The Union's grievance alleges that the City violated Appendix C and Article 31[2] of the CBA by altering the calculation for, and reducing the payments of, supplemental GML 207-a (2) benefits to retired firefighters, so as to exclude differential pay, holiday pay and check-in pay. It is undisputed that the CBA provides for the payment of supplemental GML 207-a (2) benefits. Appendix C to the CBA states that "this policy is intended to provide a procedure to regulate both the application for, and the award of, benefits under section 207-a of the General Municipal Law" (Petition, Exhibit C) and it "shall apply to any claim of entitlement to or use of GML 207-a benefits." (Petition, Exhibit A, Appendix C, Section 23.) Article 31 of the CBA states that the City and Union "agree that they will not alter or revoke any benefits or other provisions heretofore negotiated for or granted to the members not specifically referred to in this Agreement and which are in existence on the date of the signing of this Agreement." (Petition, Exhibit A, Article 31.) As such, a dispute related to the exclusion of differential pay, holiday pay and check-in pay from the calculation of supplemental GML 207-a (2) benefits is reasonably related to the subject matter of the CBA.

While the CBA does not expressly state that the supplemental benefits shall include differential pay, holiday pay and check-in pay, the Court cannot conclude, as the City urges, that the CBA excludes from its scope, grievances related to the City's decision to eliminate those payments from the GML 207-a (2) benefits. In any event, where, as here, there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA, the Court should merely "rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the CBA, and whether the subject matter of the dispute fits within them." (*Watertown*, 93 N.Y.2d at 143; *see Bd. of Educ. of Deer Park Union Free School Dist. V. Deer Park Teachers' Ass'n*, 77 A.D.3d 747, 748 [2d Dept. 2010] ["[t]he question of the scope of the substantive provisions of the contract is itself a matter of contract interpretation and application, and hence it must be deemed a matter for resolution by the arbitrator"].)

[2] Although the December 17, 2015 addendum to the Union's grievance alleges that the City violated Article 12 of the CBA, none of the motion papers argue the arbitrability of the Union's grievance under this section. As such, the Court does not address whether the subject dispute is arbitrable under Article 12.

Accordingly, because the Court finds that there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA, arbitration of the subject grievance is required.

Based on the foregoing, it is hereby

ORDERED that the petitioner's motion for an order permanently staying the arbitration between the petitioner and respondent is denied; and it is further

ORDERED that the petitioner's motion for an order temporarily enjoining and restraining respondent from prosecuting, defending or otherwise participating in the arbitration is denied as academic; and it is further

ORDERED that the temporary restraining order set forth in the April 22, 2016 Order to Show Cause is vacated; and it is further

ORDERED that the parties shall proceed to arbitration.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
June 29, 2016

Terry Jane Ruderman
HON. TERRY JANE RUDERMAN