

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

-----X
CITY OF YONKERS,

Petitioner,

DECISION AND ORDER

Index No. 54477/2016

Sequence No. 3

-against-

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

Index No. 60328/2016

Sequence No. 1

Respondent.

-----X
RUDERMAN, J.

The following papers were considered in connection with petitioner's motion to reargue and renew its prior motion (Index No. 54477/2016, Motion Seq. No. 3), and petition to permanently stay arbitration (Index No. 60328/2016, Motion Seq. No. 1), both of which are opposed:

<u>Papers</u>	<u>Numbered</u>
<i>Index No. 54477/2016, Motion Seq. No. 3</i>	
Notice of Motion, Affirmation in Support and Exhibits A – B	1
Memorandum of Law in Support	2
Memorandum of Law in Opposition	3
Reply Memorandum of Law	4
<i>Index No. 60328/2016, Motion Seq. No. 1</i>	
Notice of Petition, Verified Petition and Exhibits A – G	5
Memorandum of Law in Support	6
Verified Answer and Memorandum of Law in Opposition	7
Reply Memorandum of Law	8

Petitioner City of Yonkers ("City") and respondent Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO ("Local 628" or "Union") are parties to a Collective Bargaining Agreement ("CBA"). The CBA is in effect, by Stipulation of Agreement, through June 30, 2019. (See ECF Doc. #4.)¹ Appendix C to the CBA contains a procedure that regulates "both the application for, and the award of, benefits under section 207-a of the General Municipal Law ("GML 207-a")."

¹ Due to the volume of documents, all references to the parties' prior filings will be made to their ECF document number.

(ECF Doc. #4, Appendix C.) In the event a firefighter is dissatisfied with a decision denying GML 207-a benefits, the firefighter may serve a demand for arbitration and submit the claim to binding arbitration pursuant to the procedures set forth in Appendix C of the CBA.

GML 207-a subdivision (1) requires that any firefighter injured in the line of duty be paid the full amount of his or her regular salary or wages by the municipality or fire district where the firefighter is employed, until the disability has ceased. It also requires the municipality or fire district to pay for all medical treatment and hospital care furnished during such disability. GML 207-a subdivision (2) provides that payment of the full amount of regular salary or wages shall be discontinued if a permanently disabled firefighter is granted an accidental or line of duty disability retirement allowance. In such cases, however, the municipality or employing fire district must still pay the firefighter the difference between the retirement allowance and his or her regular salary until the firefighter reaches the mandatory service retirement age.

On December 9, 2015, the City issued letters to 44 retired firefighters receiving accidental or line of duty disability retirement allowances, informing them that the City had overpaid their GML 207-a (2) benefits. The letters advised the retirees that their prior GML 207-a (2) payments had erroneously included “special pays and other compensation afforded to active firefighters under the CBA, which should have been excluded from the calculation” of benefits. (ECF Doc. #5.) The special pays were comprised of night differential pay, holiday pay and check-in pay, which are benefits expressly granted to active firefighters but not to retired firefighters. (ECF Doc. #2, Sections 4:05-4:07.) The City further stated that it would adjust the retirees’ payment amounts and would reserve its right to recoup the overpayment from the retirees’ future GML 207-a (2) benefits.

On December 15, 2015, the Union filed a “Step 1” grievance with the Yonkers Fire Commissioner alleging that the reduction in GML 207-a (2) pension supplemental benefits violated the parties’ CBA. The Commissioner rejected the grievance, asserting that the Union’s dispute related to a matter outside the scope of the CBA. The respondent then filed a Step 2 grievance with Yonkers Mayor Mike Spano. After the Mayor reaffirmed the Commissioner’s decision, the respondent served a Demand for Arbitration. The petitioner then moved for an order permanently staying arbitration of the dispute.

This Court denied petitioner’s application in a Decision and Order dated June 29, 2016. The Court applied the “reasonable relationship test,” enunciated in *Matter of Board of Educ. of Watertown City School Dist. (Watertown Educ. Assn.)*, 93 N.Y.2d 132 [1999] [“*Watertown*”] in

holding that the Union's grievance was reasonably related to the general subject matter of the CBA, and therefore, the dispute was arbitrable. The Court noted that, while the CBA did not expressly state that GML 207-a (2) benefits shall include differential pay, holiday pay and check-in pay, the Court could not conclude, as the City urged, that the CBA excluded from its scope, grievances related to the elimination of those fringe benefits from the calculation of retirees' GML 207-a (2) payments.

The petitioner now moves to reargue its prior motion on the ground that the Court misapprehended Court of Appeals and Second Department case law. Petitioner also seeks to renew its prior motion based upon new facts not known to the petitioner at the time of the prior motion. The respondent submits written opposition.

As explained more fully below, the Court grants that branch of petitioner's motion which seeks reargument and denies that branch which seeks to renew the prior motion.

I. *Motion to Reargue*

A motion for leave to reargue "shall be based upon matters of law or fact allegedly overlooked or misapprehended by the court in determining the prior motion." (CPLR 2221[d][2].)

In support of its motion to reargue, the petitioner contends that the Court misapprehended case law from the Court of Appeals and Second Department. According to petitioner, *Matter of Uniform Firefighters of Cohoes. Local 2562, IAFF, AFL-CIO v. City of Cohoes* (94 N.Y.2d 686, 694 [2000]) ("*Cohoes*") and its progeny hold that "recipients of section 207-a benefits cannot claim additional employment entitlements beyond those in the statute unless there is an express provision in the collective bargaining agreement awarding them." (*Id.* at 694.) In the absence of such a provision, grievances brought by 207-a recipients concerning their right to additional employment entitlements cannot be subject to arbitration because such grievances do not effectively allege any breach of the CBA. (*Id.* at 695.)

Thus, according to petitioner, *Cohoes* introduced a new rule to be applied when there is a dispute over the arbitrability of claims to additional GML 207-a entitlements. Petitioner argues that the correct test to be applied in situations like the one here is whether there is an "express agreement" to arbitrate such disputes, and not whether there is a "reasonable relationship" between the subject of the dispute and the CBA, as was applied by this Court. Further, in applying this "express agreement" standard to the instant matter, petitioner asserts that it is clear that Yonkers' retired GML 207-a (2) firefighters may not arbitrate this dispute, which relates to their claim to

night differential, holiday and check-in pay, because the CBA does not expressly grant them such additional benefits.

In opposition, respondent argues that the Court correctly applied controlling case law and, contrary to petitioner's argument, *Cohoes* did not introduce a new rule for determining the arbitrability of grievance disputes. The relevant test continues to be whether the dispute is "reasonably related" to the general subject matter of the CBA, as articulated in *Watertown*. Respondent further contends that the cases upon which petitioner relies are distinguishable from the instant matter. In *Cohoes*, there was no mention of a GML 207-a procedure in the parties' CBA, let alone one with its own arbitration clause. In contrast, under the CBA at issue here, the parties agreed to arbitrate the "application of any provision of this Agreement" (ECF Doc. # 2), and "any claim of entitlement to or use of GML 207-a benefits" (ECF Doc. # 4, Appendix C). Lastly, respondent argues that courts must distinguish between the threshold question of arbitrability and the merits of the dispute, which this Court properly did when it refused to address *Cohoes* and the related line of cases cited by petitioner on its prior motion.

Petitioner is correct that the total absence of any express provision in the CBA making night differential, holiday and check-in pay applicable to retired firefighters on GML 207-a status precludes arbitration of respondent's claim of entitlement to those supplemental benefits. This conclusion is supported by case law prohibiting arbitration of claims, by GML 207 recipients, to employment entitlements above and beyond what is provided by statute, where the parties' CBA does not expressly grant such additional entitlements. This rule applies despite the fact that the CBA at issue here regulates the application for, and award of, benefits under 207-a generally.

The leading case upon which petitioner relies is *Cohoes*, which involved a grievance by the Union claiming that certain light duty assignments directed to GML 207-a firefighters violated various provisions of the parties' CBA. The *Cohoes* Court stated:

Undoubtedly, the light duty assignments here would have been subject to arbitration under the CBA if directed to regular duty firefighters, rather than to firefighters previously found to be disabled for purposes of General Municipal Law § 207-a. That is because of the general rule that, under a broad arbitration clause in a CBA, if the matter in dispute bears a 'reasonable relationship' to some general subject matter of the CBA, it will be for the arbitrator and not the courts to decide whether the disputed matter falls within the CBA (*see, Matter of Board of Educ. [Watertown Educ. Assn.]*, 93 N.Y.2d 132, 143). Here, however, the CBA is entirely silent as to whether the contractual rights accorded regular duty firefighters in the CBA provisions cited in appellants' grievances are applicable to disabled firefighters on General Municipal Law § 207-a status.

(*Cohoes*, 94 N.Y.2d at 694.) The Court of Appeals found it significant that the parties' CBA made certain other contractual rights applicable to section 207-a recipients (e.g. sick leave, longevity, holiday pay and clothing allowance), but was silent as to the applicability, to the recipients, of the specific contractual provisions claimed to have been violated. Accordingly, the Court held that "[i]n our view, the total absence of any express provision in the CBA making applicable to firefighters on General Municipal Law § 207-a status the specific contractual provisions the Union claims were violated, is fatal to appellants' arbitration claim." (*Id.*)

In *Town of Tuxedo v. Town of Tuxedo Police Benev. Ass'n* (78 A.D.3d 849, 851 [2d Dept. 2010]), Town of Tuxedo Police Officer John Tamburello was injured in the line of duty and awarded a disability retirement. Tamburello was paid his full salary, pursuant to GML § 207-c,² for a period of four years until the date of his retirement. Upon his retirement, Tamburello was paid for unused sick, vacation, personal, and compensatory time that had accrued *prior* to his disability retirement. The Town of Tuxedo Police Benevolent Association ("PBA") filed a grievance and a demand for arbitration alleging that Tamburello was entitled to payment of unused leave that had accrued *during* the four-year period he was receiving GML 207-c benefits. The Town's petition to permanently stay arbitration was denied and an appeal followed.

In *Tuxedo*, the Second Department cited *Benson v. County of Nassau* (137 A.D.2d 642, 643 [2d Dept. 1988]) and *Matter of Town of Niskayuna [Fortune]* (14 A.D.3d 913 [3d Dept. 2005]) ("*Niskayuna*") for the proposition that "[b]enefits provided to a police officer pursuant to General Municipal Law § 207-c, like the benefits provided to a firefighter pursuant to General Municipal Law § 207-a, are exclusive, and a collective bargaining agreement will not be construed to implicitly expand such benefits." (78 A.D.3d at 851.) Relying on *Cohoes*, the Appellate Court further stated that "[u]nless a collective bargaining agreement expressly provides for compensation rights to disabled officers in addition to those provided by General Municipal Law § 207-c, there is no entitlement to such additional compensation." (*Id.*) The Appellate Division concluded that

² GML §§ 207-a and 207-c "were enacted for the benefit of firefighters and police officers, respectively, who sustain disabling injuries in the line of duty." (*Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes*, 258 A.D.2d 24, 27 [3d Dept. 1999], *affd*, 94 N.Y.2d 686 [2000].) Since GML 207-c is a nearly identical statutory counterpart to GML 207-a, courts generally apply the same analysis to both. (*See, e.g. Davidson v. LaGrange Fire Dist.*, 82 A.D.3d 1227 [2d Dept. 2011]; *Town of Tuxedo v. Town of Tuxedo Police Benev. Ass'n*, 78 A.D.3d 849 [2d Dept. 2010]; *In re Town of Niskayuna (Fortune)*, 14 A.D.3d 913 [3d Dept 2005]; *Benson v. Nassau County*, 137 A.D.2d 642 [2d Dept 1988]; *Curley v. Dilworth*, 96 A.D.2d 903 [2d Dept. 1983]; *but see Schenectady County Sheriff's Benev. Ass'n v. McEvoy*, 124 A.D.2d 911, 912 [3d Dept. 1986] ["because General Municipal Law §§ 207-a and 207-c are markedly distinguishable, decisions construing § 207-a are not controlling".])

the Supreme Court should have granted the Town's petition to permanently stay arbitration because the CBA "did not contain any language expressly providing that leave time would accrue during the period that a disabled officer receives General Municipal Law § 207-c benefits, or that a disabled officer would be paid for such leave time upon retirement." (*Id.*)

Most recently, in *Inc. Vil. of Floral Park v. Floral Park Police Benev. Ass'n* (89 A.D.3d 731 [2d Dept. 2011]), the Second Department upheld a lower court's decision permanently staying arbitration of a Floral Park Police Officer's grievance claiming he was entitled to accrue personal and vacation days while on GML 207-c status. While the CBA clearly stated that an officer on GML 207-c leave cannot lose vacation time earned prior to his or her disability, and that a disabled officer's benefits cannot be prorated, "there is no language providing that leave time continues to accrue during the period an officer is disabled and receiving benefits under General Municipal Law § 207-c." (*Id.* at 732.) The Court further stated that "[h]ad the parties intended to allow disabled officers to continue to accrue leave time during their period of disability, they could have inserted such language into article XVI, § 4 [of the CBA], but they did not do so. Under such circumstances, the dispute is not arbitrable." (*Id.* at 733.)

The Third and Fourth Departments have reached similar conclusions in cases involving arbitration of GML 207 recipients' entitlement to fringe benefits that are not provided for by statute or contract. In *Niskayuna*, an employee in the Town of Niskayuna's police department who was receiving GML 207-c disability benefits sought to change his health insurance plan under article 13 of the underlying CBA. He was advised that employees out of work on GML 207-c status were not entitled to health care coverage under the terms of the General Municipal Law. The Niskayuna Police Benevolent Association ultimately filed a grievance and a notice of intention to arbitrate. The Town sought a stay of arbitration, which was granted by the Supreme Court. In upholding the stay of arbitration on appeal, the Third Department relied on *Cohoes* and the 1982 Court of Appeal's decision in *Matter of Chalachan v. City of Binghamton* (55 NY2d 989, 990 [1982]) and held that:

It is now clear that the benefits provided to a police officer under General Municipal Law § 207-c are exclusive, and a CBA will not be construed to implicitly expand such benefits (*see Matter of City of Cohoes [Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO]*, 94 N.Y.2d 686, 694 [2000]). In order to be entitled to additional benefits, the CBA must expressly provide that such benefits are applicable to disabled police officers receiving General Municipal Law benefits (*see Matter of Chalachan v City of Binghamton*, 55 NY2d 989, 990 [1982]). Here, the CBA is entirely silent as to whether the health benefits accorded regular police officers are applicable to disabled officers receiving General Municipal Law benefits and, accordingly, Supreme Court quite properly granted a stay of

arbitration (see *Matter of City of Cohoes [Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO]*, *supra* at 695).

(*Niskayuna*, 14 A.D.3d at 914 [3d Dept 2005].)

In the Fourth Department, *In re Town of Evans (Town of Evans Police Benev. Ass'n* (66 A.D.3d 1408, 1409 [4th Dept. 2009]) involved a dispute concerning petitioner's determination that a disabled police officer receiving GML § 207-c benefits was not entitled to accrue holiday, vacation, personal, and sick time pursuant to the terms of the parties' CBA. The lower court denied the petition in its entirety. On appeal, the Fourth Department modified the decision, in part, noting, as iterated by the other Appellate Divisions, that:

[T]he benefits provided to a police officer under General Municipal Law § 207-c are exclusive, and a CBA will not be construed to implicitly expand such benefits . . . In order to be entitled to additional benefits, the CBA must expressly provide that such benefits are applicable to disabled police officers receiving General Municipal Law benefits.

(*Id.* at 1408–09.) The Fourth Department held that the absence of a provision in the parties' CBA granting disabled officers on GML 207-c status holiday, vacation and personal time accruals precluded arbitration of that portion of the petitioner's grievance. However, that branch of the parties' dispute related to *sick* leave accruals was, in fact, arbitrable since the CBA expressly stated that disabled officers absent from work shall continue to accumulate sick leave.

In view of the language and holding of these cases, it appears clear that arbitration will not lie in the absence of an express provision granting GML 207 recipients the specific contractual provisions they claim were violated. Since the parties' CBA grants night differential, holiday and check-in pay to active firefighters, but is entirely silent as to the applicability of those benefits to retired GML 207-a (2) firefighters, this Court agrees with petitioner that the present dispute is not arbitrable.

Accordingly, upon reargument, petitioner's motion to permanently stay arbitration of the subject grievance is granted.

II. *Motion to Renew*

Petitioner also seeks to renew its prior motion based on the fact that the respondent waived its right to arbitrate this grievance by filing an Article 78 petition. The petition, which was filed one day after this Court's Decision and Order, seeks an order and judgment declaring the City's decision to reduce and recoup the retirees' GML 207-a benefits as arbitrary, capricious and an abuse of discretion. According to the City, the respondent deliberately elected to proceed with a

court action for determination of its claim by filing the Article 78 petition, and therefore, waived its right to arbitration of this grievance.

A motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination” (CPLR 2221[e][2]) and “shall contain reasonable justification for the failure to present such facts on the prior motion” (CPLR 2221[e][3]; *Abrams v. Berelson*, 94 A.D.3d 782, 783 [2d Dept. 2012].) “The new or additional facts either must have not been known to the party seeking renewal or may, in the Supreme Court’s discretion, be based on facts known to the party seeking renewal at the time of the original motion.” (*Wells Fargo Bank, N.A. v. Rooney*, 132 A.D.3d 980, 982 [2d Dept. 2015], lv to appeal dismissed, 27 N.Y.3d 1147 [2016], quoting *Deutsche Bank Trust Co. v. Ghaness*, 100 A.D.3d 585, 586 [2d Dept. 2012]; see *Rowe v. NYCPD*, 85 A.D.3d 1001, 1003 [2d Dept. 2011].)

In view of this Court’s decision permitting petitioner to reargue its prior motion and granting petitioner all of the relief it seeks by permanently staying arbitration, the petitioner’s motion to renew is denied as academic.

III. *Petitioner’s New Motion to Permanently Stay Arbitration*

In addition, since this Court has permanently stayed arbitration of the dispute over the City’s decision not to award retired GML 207-a (2) firefighters night differential, holiday and check-in pay, petitioner’s second motion seeking to permanently stay arbitration is also denied as academic, and the petition in Index No. 60328/2016 is dismissed.

Based on the foregoing, it is hereby

ORDERED that the branch of petitioner’s motion to reargue (Index No. 54477/2016) is granted and, upon reargument, the motion to permanently stay arbitration is granted; and it is further

ORDERED that the branch of petitioner’s motion to renew (Index No. 54477/2016) is denied; and it is further

ORDERED that petitioner’s motion for an order permanently staying arbitration (Index No. 60328/2016) is denied and the petition is dismissed.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
October 17, 2016


HON. TERRY JANE RUDERMAN