SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of Arbitration between:

CITY OF YONKERS,

Petitioner,

Index No.: 54477/2016
Hon. Terry Jane Ruderman

-against-

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

Respondent.

RESPONDENT'S MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION TO STAY ARBITRATION

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PRELIMINARY STATEMENT

The sole issue in this case is whether a union may arbitrate a unilateral change in "line of duty" benefits paid for many years constituting an established past practice. This very question between the parties in this case was answered in the affirmative two years ago when the Honorable Mary H. Smith held

> Based upon the foregoing, this Court necessarily finds that there is a reasonable relationship between the subject dispute as to whether a retired firefighter is entitled to receive GML 207-a(2) benefits and the general subject matter of the CBA, and thus arbitration of the subject grievance is required.
>
> Accordingly, the petition is denied and this proceeding hereby dismissed. Cf. Dorme v. Slingerland, 41 A.D. 3d 596 (2nd Dept. 2007).

City of Yonkers v. Yonkers Fire Fighters Local 628 IAFF, AFL-CIO, Index No.: 68224/2013 (Jan 1, 2014). Attached hereto is a copy of the Decision and Order as Exhibit A.

Petitioner City of Yonkers ("Petitioner" or "City") did not appeal Judge Smith's controlling decision and is bound by it. Judge Smith's decision is dispositive of this case. As found by Judge Smith, because the parties have a broad arbitration clause in their collective bargaining agreement ("CBA") along with procedures governing General Municipal Law 207-a benefits at issue here and because this very issue currently before this Court has been previously decided in the Union's favor, Respondent Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO ("Union" or "Local 628"), respectfully requests that this Court: (1) dismiss the City's petition to stay arbitration; (2) vacate the temporary stay of arbitration; (3) order the City to pay the Union's necessary costs and attorney's fees; and (4) issue such other and further relief as the Court deems appropriate.

FACTS

Respondent, by its attorneys Meyer, Suozzi, English & Klein, P.C., submits this Memorandum of Law in opposition to the Verified Petition of the City dated April 5, 2016, seeking to stay arbitration of a dispute involving the interpretation of the General Municipal Law 207-a ("GML 207-a") procedure contained in parties' CBA.

The parties' CBA contains a broad grievance and arbitration procedure granting either party the right to arbitrate a dispute "involving the interpretation or application of **any provision of this Agreement**." (Verified Pet., Ex. A at 29; see also, Verified Pet., Ex. C at 15)[1] (Emphasis added). The Union seeks to arbitrate a dispute arising under the General Municipal Law Section 207-a Procedure annexed to the CBA as Appendix C. (Verified Pet., Ex. A; Verified Pet., Ex. C). This procedure explicitly states that it is "intended to regulate both the application for, and the award of, benefits under section 207-a of the General Municipal Law" (hereinafter referred to as "GML 207-a").[2] Significantly, Section 32[3] of the GML 207-a Procedure also explicitly states that "[t]his procedure shall take effect on November 20, 1989 and shall apply to **any claim of**

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[1] The updated GML 207-a Procedure annexed as Appendix C to the 2009-2019 CBA incorporates Section 23 from the original procedure into Section 32.

[2] In October 1989, a Public Arbitration Panel issued an Interest Arbitration Opinion and Award in The Matter of the Interest Arbitration Between City of Yonkers and Mutual Aid Association of the Paid Fire Department of the City of Yonkers, NY, Inc., Local 628, IAFF, AFL-CIO, PERB Case Nos. IA87-30; M87-197. John E. Sands was the Public Member and Chairman of the Public Arbitration Panel in that proceeding. Accordingly, the Interest Arbitration Award in that proceeding is referenced as the "Sands Award." Annexed to the Sands Award as Appendix A is "General Municipal Law Section 207-a Procedure" which established a procedure "concerning the statutory benefits provided by General Municipal Law Section 207-a" which, according to the Sands Award, "shall appear in the parties' agreement and shall be effective on November 20, 1989." Attached hereto as Respondent Ex. B.

[3] Section 32 incorporated language from the previous Section 23.

entitlement to or use of GML 207-a benefits made after that date." (Verified Pet., Ex. A at Appendix C and Verified Pet. Ex. C at Section 32) (emphasis added).[4]

While some sections of the 207-a procedure distinguish between benefits under GML 207-a(1) and supplemental benefits under GML 207-a(2) in various sections throughout the procedure, the remaining sections of the procedure reference GML 207-a generally. Accordingly, the general reference to GML 207-a apply to all benefits under GML 207-a(1) and (2). As petitioner points out, Section 20 specifically provides for the arbitration of a denial of a benefit under GML 207-a(2). However, petitioner failed to mention that Section 14 also provides that an,

> Arbitrator shall have the authority to decide, de novo, the claim of entitlement to GML 207-a benefits. The **Arbitrator shall have the authority to consider and decide all allegations and defenses made with regard to the GML 207-a claim**. In the event of a dispute between the parties as to the nature of the proceeding, the Arbitrator shall first decide whether the proceeding presents an issue of an applicant's initial entitlement to GML 207-a benefits or whether the proceeding presents an issue of an applicant's initial entitlement to GML 207-a benefits.
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> [Verified Pet., Ex. A and C]

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[4] GML 207-a(1) requires a city or fire district to pay to a paid firefighter who is disabled as a result of injury or sickness incurred or resulting from the performance of duty the full amount of his or her regular salary or wages until the disability ceases. GML 207-a(1) also provides that the municipality or fire district is liable for all medical treatment and hospital care furnished during such disability. GML 207-a(2) requires payment of the full amount of regular salary or wages to be discontinued with respect to any firefighter who is permanently disabled as a result of such injury or sickness if the firefighter is granted a disability retirement allowance or disability pension, provided that the city or fire district shall pay the difference between the amounts received under such allowance or pension and the amount of his regular salary or wages.

Accordingly, in addition to the broad arbitration procedure contained in the parties' CBA, the GML 207-a Procedure grants authority to an arbitrator "to consider and decide all allegations and defenses made with regard to the GML 207-a claim." Id.

GML 207-a(2) protects firefighters who are permanently disabled in the line of duty, and pursuant to the letter and the purpose of this law and the under the parties' GML 207-a Procedure, it is undisputed that for decades the City paid GML 207-a(2) salary supplement payments to its disabled retirees in an amount equal to the regular salary paid to an active Firefighter or Officer of similar rank. Specifically, for all active Firefighters the City has paid, since at least the early 1980's salaries which included the payments called Night Differential, Check-in Pay, and Holiday Pay regardless of the schedule worked. Additionally, the same payments were included in the salary for Firefighters working a light duty assignment, or on non-work related sick leave, and/or receiving benefits under GML 207-a(1). On or about December 9, 2015, the City unilaterally departed from its undisputed longstanding consistent past practice and advised approximately forty-four (44) permanently disabled retirees receiving GML 207-a(2) benefits that the City would reduce this benefit. Verified Pet. Ex. D and E. Further, the City threatened recoupment of benefits already paid. Id. The City claimed that it overpaid supplemental benefits pursuant to GML 207-a(2) by including Night Differential, Check-in Pay, and Holiday Pay in the GML 207-a(2) supplement. The City's letters stated that the "City reserves the right to recoup the overpayment from future GML Section 207-a(2) benefits as well as any other monies that may be due you, including retroactive wages and other compensation under the CBA." Id.

By letters dated December 15 and 17, 2016, the Union instituted a contract grievance pursuant to the Grievance Procedure contained in Article 29:0 of the CBA. Verified Pet., Ex. D

and E. In addition to the purported violation of the negotiated GML 207-a Procedure, the Union also alleged that the City's unilateral decision to reduce GML 207-a(2) benefits was in contravention of the parties' longstanding past practices in violation of Article 31:0 of the CBA, Maintenance and Continuation of All Other Benefits. Id. Article 31:0.01 of the CBA (Verified Pet. Ex. A) provides, in part, that the "City and the Union agree that they will not alter or revoke any benefits or other provisions heretofore negotiated for or granted to the members..."

After exhausting the grievance procedure, the Union demanded arbitration by letter dated March 17, 2016. Verified Pet., Ex. J. The Union presented the issue of the arbitration as follows: "The City's decision to stop paying holiday pay, night differential and check-in pay as part of GML 207-a(2) supplement violates the CBA, including Appendix C and Article 31, Maintenance of Benefits." Id.

Now, despite the broad arbitration clause in the parties' CBA and the provisions for arbitration contained within the GML 207-a Procedure, petitioner seeks to permanently stay arbitration of this matter. For the reasons outlined below, the Union respectfully requests that this Court (1) dismiss the City's petition to stay arbitration; (2) direct the City to proceed to arbitration; (3) order the City to pay the Union's necessary costs and attorney's fees; and (4) issue such other and further relief as the Court deems appropriate.

ARGUMENT

I. THE CITY IS COLLATERALLY ESTOPPED FROM RELITIGATING THE ARBITRABILITY OF GML 207-a(2) RETIREE BENEFITS.

Collateral estoppel, or issue preclusion, "'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party [or those in privity], whether or not the tribunals or causes of action are the same.'" Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 349 (1999)(quoting Ryan

v. New York Tel. Co., 62 N.Y.2d 494, 500 (1984)). "This doctrine applies only if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the [party to be bound] had a full and fair opportunity to litigate the issue in the earlier action." City of New York v. Welsbach Elec. Corp., 9 N.Y.3d 124, 128 (2007).

Here, the doctrine of collateral estoppel precludes the City from relitigating the single issue raised and decided in the 2014 case, City of Yonkers v. Yonkers Fire Fighters Local 628 IAFF, AFL-CIO, Index No.: 68224/2013 (Jan 1, 2014). Respondent Ex. A. In that case, Local 628 filed a grievance on behalf of one of its retired members because the City of Yonkers had unilaterally changed the process by which retirees receive the GML 207-a(2) supplemental salary benefit. The sole issue in that case was identical to the single issue in this case - whether the parties agreed to arbitrate GML 207-a(2) benefits for retirees under the parties broad arbitration clause and its GML 207-a Procedure. Judge Smith rejected the very same claim that the City now asserts - that the GML 207-a Procedure did not apply to GML 207-a(2) or retired members. Rather, she ordered the parties to arbitrate the GML 207-a(2) issue concerning the retired member because 1) the parties had negotiated a broad arbitration clause; 2) by its terms the GML 207-a Procedure "applied to any claim of entitlement to or use of GML 207-a benefits;" and 3) the GML 207-a Procedure itself provided for de novo review by an arbitrator of "any claim of entitlement to GML 207-a benefits."

Specifically, Judge Smith wrote

> In determining whether a party may be compelled to submit a particular dispute to arbitration, the Court must first determine whether there is any statutory, constitutional, or public policy prohibition against arbitration of the grievance and, if there is no such prohibition, whether the parties have agreed to arbitrate the dispute in issue. See Matter of City of Johnstown (Johnstown Police Benevolent Association), 99 N.Y. 2d 273, 278 (2002).

Initially, the Court notes that petitioner City does not argue that arbitration of the subject grievance is prohibited by any statutory, constitutional, or public policy, and this Court cannot find that any reasonable argument may be proffered in support of such position.

The next required inquiry is whether the parties had agreed by the terms of their CBA to submit to arbitration the Union's grievance pertaining to a retired firefighter's entitlement to GML 207-a(2) benefits. Where a CBA contains a broad arbitration clause, the issue of whether the parties had agreed to arbitrate an issue is limited to "determin[ing] whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA." In re City of Elmira (Elmira Professional Firefighters' Ass'n AFL-CIO, 34 A.D. 3d 1075, 1076 (3rd Dept 2006).

The subject CBA provides in Article 29:0, Grievance Procedure, that "in the event of a dispute between the parties to this Agreement involving the interpretation or application of any provision of this Agreement, either party shall have the right to solve the dispute in the following manner," which provides in Step 3 for arbitration of a grievance. Such a provision has been previously judiciously held to be broad. See Johnson City Professional Firefighters Ass'n, Local 921 v. Village of Johnson City, 75 A.D. 3d 805, 806 (3rd Dept. 2010).

Additionally, the parties' negotiated "General Municipal Law Section 207-a Procedure" not only provides for a Step 3 arbitration procedure relating to "the application for and the award of benefits under section 207-a of the General Municipal Law" but it also expressly provides in Section 14 that "[t]he Arbitrator shall have the authority to decide, de novo, the claim of entitlement to GML 207-a benefits."

Based upon the foregoing, this Court necessarily finds that there is a reasonable relationship between the subject dispute as to whether a retired firefighter is entitled to receive GML 207-a(2) benefits and the general subject matter of the CBA, and thus arbitration of the subject grievance is required.

Accordingly, the petition is denied and this proceeding hereby dismissed. Cf. Dorme v. Slingerland, 41 A.D. 3d 596 (2nd Dept. 2007). [Id.]

Accordingly, because both cases involve the same GML 207-a(2) issue and the City had a full and fair opportunity to litigate, yet it chose not to appeal, the City is collaterally estopped from bringing this Petition to Stay Arbitration.

II. NEW YORK STATE COURTS FAVOR ARBITRATION AND DISCOURAGE JUDICIAL INTERFERENCE

New York courts have adopted the profoundly deferential policy articulated by the United States Supreme Court in the "Steelworkers Trilogy" - three seminal decisions that affirmed the central role of arbitration in the collective bargaining process and significantly limited judicial intervention. See New York City Transit Authority v. Transp. Workers Union of Am., 99 N.Y.2d 1, 7-8 (2002) (citing United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960)("arbitration [of labor disputes] is the substitute for industrial strife [and] ... has quite different functions from arbitration under an ordinary commercial agreement .... For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself")). The New York Court of Appeals, in quoting United Steelworkers, held,

> [I]n labor disputes, arbitrators are mutually chosen by labor and management because of their particular expertise and insight into the relationship, needs of the parties, conditions existing in the specific bargaining unit, and **the parties' "trust in [the arbitrator's] personal judgment to bring to bear considerations which are not expressed in the contract** .... The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because [the judge] cannot be similarly informed

New York City Transit Authority, 99 N.Y.2d at 8 (quoting United Steelworkers, 363 U.S. at 582) (emphasis added).

Judicial restraint is particularly appropriate in arbitrations pursuant to public employment collective bargaining agreements. New York City Transit Authority, 99 N.Y.2d at 7. In these

situations, "the [l]egislature . . . explicitly adopted a countervailing policy encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes (Civil Service Law § 200 [c]), as a means of promoting harmonious relations between governmental employers and their employees, and preventing labor strife endangering uninterrupted governmental operations." Id. (citations and quotations omitted). See also Board of Education v. Yonkers Federation of Teachers, 40 N.Y.2d 268, 273 (1976); Board of Education v. Associated Teachers of Huntington, Inc., 30 N.Y.2d 122, 131 (1972).

It is within this context, which favors arbitration, that courts ask only two questions to evaluate whether a party must be compelled to submit a particular dispute to arbitration: (1) "whether there is any statutory, constitutional, or public policy prohibition against arbitration of the grievance"; and, if there is no prohibition, (2) whether "the parties have agreed to arbitrate the dispute at issue." In re City of Johnstown and Johnstown Police Benevolent Ass'n., 99 N.Y.2d. 273, 278 (2002). The Court of Appeals refers to these two questions as the "May They Arbitrate" prong and the "Did They Agree to Arbitrate" prong. Id.

With respect to the first prong, over the last thirty years, the Court of Appeals "has overwhelmingly rejected contentions by public employers that particular issues fall outside the scope of permissible grievance arbitration." In re Bd. of Educ. of Watertown City Sch. Dist., 93 N.Y.2d 132, 139 (1999). "The decisional law reflects the reality of greatly increased public sector arbitration, and its acceptance, compatible with the government's public policy concerns." Id. at 139-40. In the instant case, the City concedes that there is no statutory, constitutional, nor public policy prohibition against arbitration of the grievances. See In re Union Free Dist. #15 v. Lawrence Teachers Ass'n., 33 A.D.3d 808, 808 (2d Dept. 2006). ("[A] stay of arbitration is

reserved for disputes involving a public policy of the first magnitude") (internal quotation marks and citation omitted)).

III. THE PARTIES AGREED TO ARBITRATE THIS DISPUTE

Under the second prong, the clear language of the parties' CBA and controlling case law make evident that the parties have agreed to arbitrate this grievance. First, the parties have negotiated a broad arbitration clause to govern their disputes. The arbitration clause states, "In the event of a dispute between the parties to this Agreement involving the interpretation or application of **any provision of this Agreement**, either party shall have the right to solve the dispute" by "submit[ting] the grievance to arbitration." Verified Pet. Ex. A. (emphasis added). Because the parties have negotiated a GML 207-a provision which governs "**any claim of entitlement to or use of GML 207-a benefits**," under the express terms of the CBA, the parties agreed to arbitrate this dispute which concerns a "claim of entitlement to . . . GML 207-a benefits." Verified Pet. Ex. C. Accordingly, under the express terms of the CBA, the parties agreed to arbitrate this grievance.

Two years ago, the City attempted to permanently stay a similar grievance brought by the Union on behalf of one of its retirees, and this Court found that the City of Yonkers was obligated to arbitrate a grievance which alleged a unilateral change in GML 207-a(2) benefits as a violation the parties GML 207-a procedure. Specifically, the Union alleged that "the City wrongfully [] require[ed] a retired member to file a separate application for GML 207-a(2) supplemental benefits[.]" City of Yonkers v. Yonkers Fire Fighters Local 628 IAFF, AFL-CIO, Index No.: 68224/2013 (Jan 1, 2014)(Respondent Ex. A). The Honorable Mary H. Smith held

> The subject CBA provides in Article 29:0, Grievance Procedure, that "in the event of a dispute between the parties to this Agreement involving the interpretation or application of any provision of the Agreement, either party shall have the right to

> solve the dispute in the following manner," which provide in Step 3 for arbitration of a grievance. Such a provision has been previously judiciously held to be broad. See Johnson City Professional Firefighters Ass'n Local 921 v. Village of Johnson City, 75 A.D. 3d 805, 806 (3d Dept. 2010).
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> Additionally, the parties' negotiated "General Municipal Law Section 207-a Procedure" not only provides for a Step 3 arbitration procedure relating to the "the application for, and the award of benefits under section 207-a of the General Municipal Law," but it also expressly provide in Section 14 that "[t]he Arbitrator shall have the authority to decide, de novo, the claim of entitlement to GML 207-a benefits."
>
> Based on the foregoing, the Court necessarily finds that there is a reasonable relationship between the subject dispute as to whether a retired firefighter is entitled to receive GML 207-a(2) benefits and the general subject matter of the CBA, and thus arbitration of the subject grievance is required. [Id.]

In this case, clearly there is a "a reasonable relationship between the subject dispute as to whether a retired firefighter is entitled to receive GML 207-a(2) benefits and the general subject matter of the CBA." Id. The City made a unilateral determination to reduce the payment of supplemental wages under GML 207-a(2), this change impacts the benefits for current retirees, members in the process of retiring and members who may retire in the future. The parties have agreed to arbitrate the "application of any provision of this Agreement" and in this case the applicable provision is a GML 207-a Procedure which governs, "any claim of entitlement to or use of GML 207-a benefits." The general reference to GML 207-a necessarily includes claims under GML 207-a(1) and (2). Therefore, the parties agreed to arbitrate the dispute in this case.

Yet, despite the clear language and case law to the contrary, petitioner, somewhat creatively, but confusingly, maintains that because Section 20 of the GML 207-a Procedure confers a right to arbitrate the denial of GML 207-a(2) benefits, this provision somehow negates all other arbitration rights within the GML 207-a procedure and in Article 29:0 Grievance Procedure. Pet. Brief at 7. Clearly, this argument, not only defies logic in light of the broad and

controlling grievance procedure, but it is wholly inaccurate as Section 20 of GML 207-a Procedure, which petitioner cites as evidence limited arbitration rights for GML-a(2) claims, expressly cites Section 14 as the controlling arbitration procedure. Section 14 states,

> Arbitrator shall have the authority to decide, de novo, the claim of entitlement to GML 207-a benefits. The Arbitrator shall have the authority to consider and decide all allegations and defenses made with regard to the GML 207-a claim. In the event of a dispute between the parties as to the nature of the proceeding, the Arbitrator shall first decide whether the proceeding presents an issue of an applicant's initial entitlement to GML 207-a benefits or whether the proceeding presents an issue of an applicant's initial entitlement to GML 207-a benefits.

Therefore, petitioners attempt to write out the broad arbitration clause of Article 29 and the arbitration procedure of Section 14 of the GML 207-a Procedure must fail.

Furthermore, despite an explicit agreement to arbitrate disputes under the GML 207-a Procedure, petitioner argues that the CBA's recognition clause somehow limits the contract's benefits to current members only. However, it is black letter law that benefits to be paid to current employees who retire during the life of the collective bargaining agreement are a mandatory subject of negotiations. Chenango Forks Cent Sch Dist, 40 PERB ¶ 3012 (2007)(health insurance); City of Buffalo PBA, 43 PERB ¶ 4562 (2010) (life insurance). The fact that the CBA's recognition clause states that the Union is the "exclusive bargaining agent for all those employees holding the rank of Firefighter (hereinafter referred to as "members"), who are now on active duty and employed by the Fire Department of the City of Yonkers..." does not mean that the Union cannot negotiate benefits in the CBA for members who retire.

In fact, the CBA between the Union and City contains numerous provisions providing benefits for retirees contrary to the City's claim that nothing in the CBA encompasses retired Firefighters. For example, Section 8:04.01 of the CBA, entitled "Retiree Health Insurance" expressly provides:

> "City shall continue to provide individual and family health insurance benefits for **members who retire** from the Department with the same employee contribution rates as the member had on the date of retirement. The **retirees** will have the same health benefit plan options as the active members offered by the City."

Verified Pet., Ex. A. at 12. (Emphasis added).

Article 15 of the CBA, entitled "Pensions", expressly provides for "optional **retirement** plans" and "Final Average Salary" pursuant to Retirement and Social Security Law Sections 302(9) and 443(f). Article 16 of the CBA also provides for "Widow's" pension benefits. Verified Pet. Ex. A, at 18. Thus, the City and the Union have negotiated benefits for its members who retire and the GML 207-a Procedure in the CBA plainly applies to claims for supplemental benefits under GML Section 207-a(2). Therefore, the CBA explicitly and obviously provides for retiree benefits and violations of these provisions are subject to arbitration.

IV. PETITIONERS REMAINING ARGUMENTS ADDRESS THE MERITS OF THE DISPUTE AND ARE PROPERLY BEFORE AN ARBITRATOR

The issue of whether or not the GML 207-a Procedure applies to the reduction of supplemental benefit claims under GML 207-a(2) raises an issue of contract interpretation for an Arbitrator to decide in the first instance. Nevertheless, petitioner's points III-IV argue the merits of the underlying grievance. Their arguments on the merits fail because the Court of Appeals held, courts "distinguish between the merits of grievances and the threshold question of whether courts or arbitrators have the authority to decide the merits and that even an apparent weakness of the claimed grievance is not a factor in the court's threshold determination." New York State Office of Children & Family Servs. v. Lanterman, 14 N.Y.3d 275, 283 (2010) ; Matter of City of Johnstown, 99 N.Y.2d 273, 279 (2002); Matter of Board of Educ. of Watertown City School Dist., 93 N.Y.2d 132, 142 (1999).

Petitioner further asserts, in Point V, that the Maintenance of Benefits provision does not protect the past practice of paying of Night Differential, Check-in Pay, and Holiday Pay to retirees. As a preliminary matter this argument should be dismissed as it is an attempt to argue the substance of the grievance. However, relevance notwithstanding, the argument also fails because it relies on a mischaracterization of the grievance. Respondent does not claim that a past practice was created by payments to retirees, but rather the decades-long policy of paying active Firefighters payments of Night Differential, Check-in Pay, and Holiday Pay regardless of their work status or work schedule defined, by practice, regular wages or salary as including Night Differential, Check-in Pay, and Holiday Pay. Because a retiree's benefit under GML 207-a(2) is defined by an active Firefighter's regular wages or salary, the practice as to the active Firefighters is critical to the calculation of GML 207-a(2) benefits. Indeed, in its Verified Petition and Brief petitioner conceded that the definition of regular wages and salary includes these payments, "GML 207-a(1) benefits paid to active firefighters will receive his or her regular wages and salary" "[i]n other words, the City continues to pay active firefighters a GML 207-a(1) benefit that includes night differential, holiday pay and check in pay in addition to their base pay." Verified Pet. at ¶18. Therefore, for these reasons, petitioner's argument that the Maintenance of Benefits provision was not violated must fail.

Finally, petitioner claims that the affected retirees "have elected their remedies by participating in the due process appeal process," lacks merits because there are separate issues and different parties. First, the subject matter of this dispute involves a violation of various provisions in the parties' CBA, this issue is wholly distinct from the due process hearings conducted by the City which involved an individual's claim to an government entitlement. Furthermore, the parties to the due process hearings were the City of Yonkers and individual

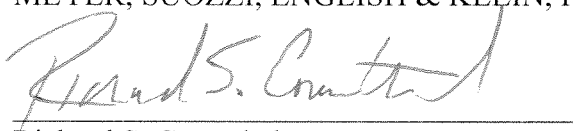
retirees, while the parties to this dispute are Local 628, its current members, members in the process of retiring, as well as retired members. Therefore, because the issues and the parties in each action are distinct, the referenced due process hearings have no preclusive effect on this arbitration dispute.

CONCLUSION

No statute or public policy forbids arbitration of this matter. The CBA contains a broad arbitration provision, and there is simply no reason why the parties' mutually selected arbitrator cannot decide this matter. Accordingly, this Court should deny the Petition to stay arbitration; vacate the temporary arbitration stay; order the parties to arbitrate the subject grievance; and award the Union's costs and disbursements, including reasonable attorneys' fees.

Dated: New York, New York
May 11, 2016

MEYER, SUOZZI, ENGLISH & KLEIN, P.C.



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