STATE OF NEW YORK
SUPREME COURT : COUNTY OF WESTCHESTER

In the Matter of Arbitration between

CITY OF YONKERS,

Petitioner,

-vs-

YONKERS FIREFIGHTERS, LOCAL 628, IAFF, AFL-CIO,

Respondent.

MEMORANDUM OF LAW

Index No.: 54477/2016

AAA Case No.: 01-16-0001-2822
(Improper Reduction of GML § 207-a(2) Benefits)

PRELIMINARY STATEMENT

This memorandum of law is submitted by the Petitioner/Movant, City of Yonkers ("City"), in support of its motion to reargue and/or motion to renew the Verified Petition to permanently stay arbitration in the above captioned matter pursuant to CPLR 2221. It is respectfully submitted that (i) this Court overlooked or misapprehended Court of Appeals and Appellate Division, Second Department case law and facts; and (ii) new facts not offered on the prior motion now exist that would change the Court's prior determination.[1]

FACTS

On April 6, 2016, the City filed and served its Notice of Petition dated April 5, 2016, the Petition verified on April 5, 2016, with Exhibits, and Memorandum of Law in support of said Petition. (ECF Doc. # 1-16).

On April 22, 2016, the Supreme Court (Hon. Smith, J.) issued an Order to Show Cause with a Temporary Restraining Order (OTSC/TRO) to stay arbitration in the above captioned

[1] The City is simultaneously filing a new motion to stay as of right based on these new facts.

matter due to Respondent and the American Arbitration Association's actions to commence arbitration despite the Petitioner's efforts to stay arbitration. (EFF Doc. # 28).

On May 11, 2016, Respondent filed and served its Verified Answer with Exhibits to the City's Petition and its Memorandum of Law. (ECF Doc. # 31-34)

On May 16, 2016, the City filed and served the Reply Affidavit of Carlos Moran, Commissioner of Human Resources with the City with Exhibits and Reply Memorandum of Law. (ECF Doc. # 36-39).

On May 17, 2016, Respondent sent correspondence requesting either oral argument or a sur-reply to respond to Petitioner's reply. (ECF Doc. # 40). This Court permitted a sur-reply.

On May 24, 2016, Respondent submitted a Sur-Reply in opposition to the City's Reply. (ECF Doc. # 41).

On June 29, 2016, this Court issued a Decision and Order denying the Petition to permanently stay arbitration, vacating the temporary restraining order staying arbitration, and directing the parties to proceed with arbitration of the dispute. (ECF Doc. # 42).

On June 30, 2016 Respondent filed and served a copy of the signed Decision and Order together with Notice of Entry.

On July 1, 2016, one day after the Respondents served the Supreme Court's Decision and Order with Notice of Entry upon the Petitioner, thirty (39) retired firefighters filed a proceeding under CPLR Article 78 and an action for declaratory relief seeking to review the City's actions in regard to the very same issues in dispute in the original petition to stay arbitration proceeding ("Article 78 Petition"). (A copy of the Notice of Petition and Verified Petition from the Article 78 proceeding is annexed as Exhibit "A" to the Affirmation of Paul J. Sweeney dated July 26,

2016 ("Sweeney Affirmation")).[2] That Article 78 Petition, captioned *John Borelli, et al v. City of Yonkers* (Westchester County Supreme Court Index No. 2302/16), is pending before the Hon. Helen Blackwood.[3]

DISCUSSION

Point I: The City's Motion to Reargue Is Based Upon Matters of Law and Facts that were Overlooked or Misapprehended by this Court in Determining the City's Petition to Stay Arbitration.

Pursuant to CPLR 2221, "a motion for leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." N.Y. CPLR 2221(d)(2). "A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law, or for some reason mistakenly arrived at its earlier decision." *Mayer v. Nat'l Arts Club*, 192 A.D.2d 863, 865 (3rd Dept. 1993) (internal citations omitted).

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." *Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dept. 1979). "[A] motion for reargument should be founded on papers showing that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with the statute, or a controlling decision." *Fosdick v. Town of Hempstead*, 126 N.Y. 651, 652 (1891). Because the Court did not address or reconcile well settled case law

[2] Due to the hundreds of pages of hearing transcripts and exhibits annexed to the Article 78 Petition, the City did not attach the entire Article 78 Petition, but can provide a paper copy of same if requested by the Court or opposing counsel.

[3] Inasmuch as the relief sought is identical, it seems odd that opposing counsel would not indicate that this case was "related" to the above captioned matter.

in its Decision and Order, the City seeks an opportunity to reargue the meaning and effect of this case law.

A. This Court Overlooked or Misapprehended Controlling and Precedential Case Law from the Court of Appeals and Second Department

It is respectfully submitted that this Court overlooked or misapprehended controlling and precedential case law from the Court of Appeals and the Appellate Division, Second Department when it denied the City's motion to stay arbitration.

The Court of Appeals and the Second Department have repeatedly held that (i) the calculation of the GML 207-a(2) benefit shall only include regular wages, longevity and negotiated wage increases unless the CBA "expressly" provides otherwise; and (ii) a court shall stay arbitration of a grievance brought by a GML 207 recipient relating to a claimed CBA benefit when the CBA does not "expressly" provide for the payment of that CBA benefit to the GML 207 recipient. However, this Court does not have appeared to address, much less reconcile, this case law by the Court of Appeals and Second Department.

First, the Court of Appeals and the Second Department have long held that, for purposes of GML 207-a(2), the term "regular wages or salary," consists only of "salary increases given to active firefighters following the award of the disability retirement allowance or pension as well as the benefit of longevity pay increases provided to active firefighters." *Matter of Whitted v. City of Newburgh*, 126 A.D.3d 910, 911 (2d Dept. 2015), citing *Matter of Mashnouk v. Miles*, 55 N.Y.2d 80, 88 (1982); *Matter of Farber v. City of Utica*, 97 N.Y.2d 476 (2002); *Matter of Aitken v. City of Mt. Vernon*, 200 A.D.2d 667, 668 (2d Dept. 1994).

The Court of Appeals and the Second Department have also held that the GML 207-a(2) wage supplement benefit is calculated by excluding all other contract fringe benefits paid to active fire fighters unless the parties "expressly" negotiated a GML 207-a(2) wage supplement

benefit that includes such fringe benefits. In addressing claims by active firefighters who were provided GML 207-a(1) benefits that they were also entitled to other benefits under the CBA, the Court of Appeals has held:

> The collective bargaining agreement in question is entirely silent regarding the status of disabled firemen as employees of the city. Their continued status as employees even after disability has occurred is strictly a matter of statutory right. *The collective bargaining agreement should not therefore be construed to implicitly expand whatever compensation rights are provided petitioners under the statute.* Any additional benefits must be expressly provided for in the agreement, and petitioners' argument that they are entitled to unused vacation benefits by reason of the absence of language specifically excluding their class from vacation benefits is thus without merit.
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> *Matter of Chalachan v. City of Binghamton*, 55 N.Y.2d 989, 990 (1982) (emphasis added).

Second, and contrary to what this Court decided, the Court of Appeals and the Second Department has repeatedly held that arbitration of the grievance involving a dispute over GML 207 benefits shall be stayed unless the CBA "expressly" provided the employee with that specific GML 207 benefit. In *Matter of Uniformed Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes*, 94 N.Y.2d 686 (2000), the Court of Appeals held that the failure of the CBA to expressly provide for a contract benefit would adversely impact the right to arbitrate a dispute relating to that benefit.

> In 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. We, lower courts and other authorities have recognized that, because disabled firefighters do not perform regular duty in exchange for the "payment of the full amount of regular salary or wages" under General Municipal Law § 207-a, apart from contractual entitlements, "[t]he collective bargaining agreement should not therefore be construed *to implicitly expand* whatever compensation rights are provided petitioners under the statute. Any *additional*

> *benefits must be expressly provided for in the agreement*" [citations omitted].
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> *Id.* at 94 N.Y.2d 686, 694-95 (2000) (emphasis original).

Prior to *Cohoes*, the Second Department had also implemented this same rule. In *Board of Education, West Babylon Union Free School District v. W. Babylon Teachers Association*, 60 A.D.2d 577 (2d Dept. 1977), the Second Department in staying arbitration held:

> There is no provision in the collective bargaining agreement dealing with the subject matter of this dispute, which is only a permissible, as opposed to a mandatory, subject of bargaining, except for one clause which sets forth the compensation of department directors if and when appointed; there is no express and unequivocal agreement to arbitrate disputes which are unrelated to the "meaning or applications of (the parties') Agreement."
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> *Id.* at 60 A.D.2d 577, 577.

Moreover, several courts—including the Second Department—have stayed arbitration over similar grievances. In addition to the above cases, the Second Department has stayed arbitration where the CBA did not provide GML 207 benefits which were not expressly granted in the CBA. In the case of *Town of Tuxedo v. Town of Tuxedo Police Benev. Ass'n,* 78 A.D.3d 849 (3rd Dep't 2010), which involved leave benefits, the Second Department held:

> Benefits 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 (*see Benson v. County of Nassau,* 137 A.D.2d 642, 643, 524 N.Y.S.2d 733; *Matter of Town of Niskayuna* [*Fortune*], 14 A.D.3d 913, 789 N.Y.S.2d 746), since a disabled individual's continued status as an employee, even after disability, is "strictly a matter of statutory right" (*Matter of Chalachan v. City of Binghamton,* 55 N.Y.2d 989, 990, 449 N.Y.S.2d 187, 434 N.E.2d 256). Unless 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 (*see Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL–CIO v.*

> *City of Cohoes,* 94 N.Y.2d 686, 694, 709 N.Y.S.2d 481, 731 N.E.2d 137).
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> **Here, contrary to the PBA's contention, 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. Accordingly, the Supreme Court should have granted the petition in Proceeding No. 2 to permanently stay** arbitration (*see Matter of Town of Evans* [*Town of Evans Police Benevolent Assn.*], 66 A.D.3d 1408, 1408–1409, 886 N.Y.S.2d 276). In light of our determination, the appeal from the first order dated September 30, 2009, which denied the petition in Proceeding No. 1 as premature, and, in effect, dismissed that proceeding, has been rendered academic. *Id.,* 78 A.D.3d at 851. (emphasis added).

Similarly, the Second Department held the same way in *Inc. Vill. of Floral Park v. Floral Park Police Benev. Ass'n*, 89 A.D.3d 731 (2nd Dept. 2011) when it upheld the Supreme Court's decision to stay arbitration over a GML 207 benefit (leave time) not found in the CBA--even though the CBA referenced the disputed vacation benefit:

> **Here, contrary to the PBA's contention, the parties' collective bargaining agreement does not expressly provide that leave time accrues during the period that a disabled officer is not working and is receiving benefits pursuant to General Municipal Law § 207-c.** The PBA relies upon two sentences contained in article XVI, § 4, of the collective bargaining agreement, which state that "[i]n cases of on-the-job injuries, no proration shall be deducted" and that "[n]o officer (member) out on leave provided by General Municipal Law Section 207-c shall lose earned vacation." However, those sentences must be read, not in a vacuum, but in the full context of section 4, which unequivocally prohibits the accrual, inter alia, of personal and vacation days during the period of absence for any member who is absent from duty for more than 90 consecutive calendar days "due to sickness or disability of any kind" and provides that "a Member shall be entitled to any unused vacation earned prior to the commencement of the period of absence." Therefore, while an officer out on leave pursuant to General Municipal Law § 207-c cannot lose vacation time that was earned prior to his or her disability leave, and the benefits for an officer who has suffered an on-the-job injury 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. **Had 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, but they did not do so. Under such circumstances, the dispute is not arbitrable** (*see Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes*, 94 NY2d at 694-695). *Id.*, 89 A.D.3d at 732-33. (emphasis added).

Moreover, the Appellate Division, Fourth Department in the case of *In re Town of Evans (Town of Evans Police Benev. Ass'n)*, 66 A.D.3d 1408 (4th Dept. 2009) ruled on a near identical case when it agreed with the town to stay arbitration of GML 207 benefits (holiday, vacation and personal leave) which were not expressly set forth in the CBA.

> **We agree with petitioner, however, that Supreme Court erred in denying those parts of the petition for a permanent stay of arbitration with respect to the disputed holiday, vacation and personal time accruals** (*see generally Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chautauqua County Local 807*, 8 NY3d 513 [2007]), and we therefore modify the order and judgment accordingly. "[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" (*Matter of Town of Niskayuna [Fortune]*, 14 AD3d 913, 914 [2005], *lv denied* 5 NY3d 716 [2005]; *see Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes*, 94 NY2d 686, 694-695 [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" (*Town of Niskayuna*, 14 AD3d at 914). **Here, the provisions of the CBA concerning holiday, vacation and personal time benefits are "entirely silent as to whether the contractual rights accorded regular duty [police officers] in the CBA . . . are applicable to disabled [police officers] on General Municipal Law [§ 207-c] status"** (*Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO*, 94 NY2d at 694). *Id.*, 66 A.D.3d at 1409. (emphasis added).

Accordingly, in the cases of the *Town of Tuxedo Police Benev. Ass'n*, *Floral Park Police Benev. Ass'n*, and *Town of Evans Police Benev. Ass'n*, the Second and Fourth Departments—

citing the Court of Appeals cases cited by the City—have stayed arbitration of claims to GML 207 benefits for the same reasons urged by the City. As such, the correct test is whether the CBA "expressly" provided the GML 207 benefit, not whether the dispute is "reasonably related" to a provision in the CBA.

B. This Court Overlooked or Misapprehended the Facts that the CBA Did Not Expressly Grant the Disputed Special Pays as a GML 207-a Benefit

Despite the holdings in the above cases, it is respectfully submitted that the Court may have overlooked or misapprehended the fact that the CBA here does not contain any "express" reference that the GML 207-a(2) benefit shall include holiday pay, shift differential or check-in pay. As such, it is undisputed that the negotiated GML 207 procedure and the balance of the CBA at issue do not expressly grant the Local 628 members night differential pay, check-in pay or holiday pay as a GML 207-a benefit.

The CBA at Section 4:01.01 ("Base Salary") defines "the annual base salary" as that "provided on the Appendix A annexed." (ECF Doc. # 2 at pg. 4). Appendix A, which only addresses base salary and longevity, does not include the fringe benefits. As such, the term "annual base salary" is a defined term.

The CBA at Section 4:02 ("Rate of Pay") provides that a "members rate of pay shall be one and two hundred thirty-secondths (1/2323ths) of *annual base salary plus longevity* . . . Members who are assigned to arson pursuant to 4:01.03 shall in addition, have their arson pay included in computing their hourly and daily rates." (ECF Doc. # 2 at pg. 5, emphasis added). The CBA's rate of pay section excludes all other salary benefits from its definition, including the fringe benefits.

The CBA at Sections 4:05 ("Night Differential"), 4:06 ("Check-In Pay") and 4:07 ("Holiday Pay"), provide these special pays to "firefighter" or "members." (ECF Doc. # 2 at pg. 7-8). These sections do not address the payment of fringe benefits to retirees.

While the CBA does address some retiree benefits, such as retiree health insurance (ECF Doc. # 2 at pg. 12), the CBA does not address a retiree benefit pertaining to fringe benefits.

In sum, the CBA incorporates a negotiated (and now updated) GML 207-a procedure which does not expressly provide the disputed fringe benefits as part of a GML 207-a(2) benefit for the retirees. The stipulations that extended the expired CBA did include negotiated wage increases that benefit the Retirees. However, these stipulations do not provide for fringe benefits as part of a GML 207-a(2) benefit for the retirees. (ECF Doc. # 3 and 4).

As such, there is no express terms in the CBA that provide that active or retired firefighters are entitled to the dispute fringe benefits. Accordingly, based on the above case law, this Court should have stayed arbitration.

Point II: The City's Motion to Renew Based Upon New Facts Not Offered in the Prior Petition to Stay Arbitration Must be Granted.

"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]). '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 (2nd Dept. 2015), *leave to appeal dismissed,* No. 2016-449, 2016 WL 3525000 (N.Y. June 28, 2016) quoting *Deutsche Bank Trust Co. v. Ghaness*, 100 A.D.3d 585 (2nd Dept. 2012). As established by the above facts, the City meets both standards under CPLR 2221(e) in that, in

addition to the foregoing and the IP Charge that was submitted by Local 628 after the initial Verified Petition, the City asserts that new facts that were not available during pendency of the prior special proceeding require the granting of a motion to renew the Petition to permanently stay arbitration.

A. The Grievance and the Article 78 Petition Are Based on the Same Issue, Seek the Same Relief and Involve the Same Parties

The Article 78 Petition, filed after this Court's Decision and Order, seeks the following relief:

> Order and Judgment pursuant to Article 78 of the Civil Practice Law and Rules declaring the City's decision to reduce and recoup Petitioners' GML 207-a(2) benefits as arbitrary, capricious and an abuse of discretion as well as a violation of GML 207-a(2); requiring the City to include payments of Night Differential, Check-in Pay, and Holiday Pay in an individual Petitioners GML 207-a(2) benefits; requiring the City to pay all moneys including Night Differential, Check-in Pay, and Holiday Pay, improperly withheld and reduced from the individuals Petitioners GML 207-a(2) benefits...; permanently enjoining the City from recouping GML 207-a(2) benefits from individual Petitioners...; declaring that supplemental payments paid to Yonkers Fire Fighters and Yonkers Fire Officers under GML 207-a(2) include Night Differential Pay, Check-in Pay and Holiday Pay.
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> (See Exhibit "A" to the Sweeney Affirmation at ¶ 76).

Local 628's Demand referenced the same dispute which is the subject matter of the Article 78 Petition. In the "Nature of Grievance" portion of the Demand, the Respondent checked "Contract Interpretation" and states "City's decision to stop paying holiday pay, night differential pay and check-pay [sic] *as part of GML 207-a(2) supplement* violates the CBA, including Appendix C and Article 31, Maintenance of Benefits." (ECF Doc. # 11, emphasis added).

Local 628's Demand sought the same relief as is sought by the 39 retirees in the Article 78 Petition: to "[c]ontinue to include holiday pay, night differential pay and check-pay [sic] *as part of GML 207-a(2) supplement.*" (ECF Doc. # 11, emphasis added).

Local 628's Demand establishes that it represents the same individuals who commenced the subject matter of the Article 78 Petition. In the "Name of the Grievant(s)" portion of the Demand, the Respondent identifies "active *and retired members.*" (ECF Doc. # 11, emphasis added).

The Article 78 Petition identifies that the 39 individual petitioners are "*retired* under collective bargaining agreements between the City and petitioner [Local 628] and petitioner Uniformed Fire Officers Association[4]." (See Exhibit "A" to the Sweeney Affirmation at ¶ 2).

Moreover, footnote "1" to the Article 78 removes any doubt that Local 628 (which refers to itself as a "petitioner") represents the retired members of Local 628 in their GML 207-a(2) claims: "Local 628 is a public employee organization within the meaning of Section 201(5) of the New York Civil Service Law and represents Yonkers Fire Fighters who may be injured in the line of duty and eligible for compensation and benefits under New York General Municipal Law § 207a(1) and (2). (See Exhibit "A" to Sweeney Affirmation at footnote 1, p. 2).

B. The Local 628 Waived its Right to Arbitrate and Elected a Litigation Remedy

By filing the Article 78 proceeding the Local 628 waived any potential right to arbitrate contained within the CBA. Pursuit of arbitration may have collateral effects on related litigation. *Simon v. Boyer*, 51 A.D.2d 879, 880 (4th Dept. 1976), *aff'd,* 41 N.Y.2d 822 (1977).

"A party can waive his right to arbitration by deliberate election to proceed with a court action for the determination of his claim." *E. Ramapo Cent. Sch. Dist. v. E. Ramapo Teachers*

[4] Unlike Local 628, the Uniformed Fire Officers Association or "UFOA" did not file a grievance. However, the UFOA and its retired members would now be barred from doing so, in addition to any timeliness bars that may exist.

Ass'n, 91 A.D.2d 969, 970 (2nd Dept. 1983). "Here, the grievants and others elected to pursue their claims through the courts. By participating in those earlier proceedings, although on behalf of others than the grievants, the teachers association waived its right to submit the contractual salary dispute to arbitration." *Id.*

Thus, while the grievance did not expressly list the retired members of the Local 628 by name, it is undisputed that the parties to the pending grievance arbitration and the Article 78 Petition, both of which seeks the same relief, are identical with respect to the retired members of the Local 628 and Local 628's representation of those retirees.

Moreover, to the extent that Local 628 will be making the same arguments on behalf of retirees and active duty firefighters in the Article 78 proceeding, the City maintains that the active duty firefighters, who are also represented by Local 628, have waived their right to arbitrate the grievance.

Local 628 recently attempted a very similar two-prong attack by simultaneously demanding grievance arbitration and then filing an Article 78 proceeding in Westchester County Supreme Court. However, the Supreme Court (Cacace, J.) held, on June 10, 2016, that Local 628 "had waived their right to arbitration by electing to commence the Article 78 proceeding following their filing of their Demand for Arbitration. *City of Yonkers v. Yonkers Firefighters Local 628 International Assoc. of Firefighters, AFL-CIO*, Index No. 70952/15 (Sup. Ct. Westchester Cnty. June 10, 2016). (Exhibit "B" to Sweeney Affirmation).

Noting that "[t]he"Local 628 maintained both the Arbitration proceeding and the Article 78 proceeding simultaneously", Judge Cacace held:

> the Court of Appeals recently reaffirmed its longstanding pronouncement of law providing that where a party affirmatively acts to pursue the benefits of litigation to resolve a dispute, in a manner which is 'clearly inconsistent with [its] later claim that the

> parties [to the dispute] were obligated to settle their differences by arbitration' and thereby demonstrated an election to litigate the dispute rather than arbitrate the same, the right to compel arbitration will be deemed waived."
>
> *Id.* quoting *Stark v. Molod Spitz DeSantis & Stark, P.C.*, 9 N.Y.3d 59, 66 (2007).

Very similar to this case, "[Local 628's] election to commence an Article 78 proceeding to simultaneously prosecute the very same claims they had previously raised two weeks earlier through their Demand for Arbitration, served to enable them to drag the [City] through two distinct proceedings in two distinct forums for nearly an entire year, while hedging their bets and hoping for a favorable result in one of those two forums." *Id.*

In this case, Local 628 is actually attempting to litigate this same issue and seek the same relief in three different forums: i.e. by demanding grievance arbitration, then by filing an Improper Practice Charge before the Public Employment Relations Board ("PERB"), and now by commencing an Article 78 proceeding. By initiating the new Article 78 proceeding, Local 628 has elected its remedy outside of arbitration and "by actions inconsistent with a claim that the dispute must be resolved only by arbitration and thereby lost his right to arbitrate, said right cannot be regained." *Sherrill v. Grayco Builders, Inc.*, 64 N.Y.2d 261, 264 (1985).

In another very similar case, the Second Department held "a right to arbitration may be modified, waived, or abandoned. The commencement of the CPLR Article 78 proceeding seeking a judicial determination of whether the County breached the collective bargaining agreement constituted a waiver of the right to arbitration." *Cty. of Rockland v. Rockland Ass'n of Mgmt.*, 69 A.D.3d 621 (2nd Dept. 2010).

Like *County of Rockland*, there are (at least) two parallel actions in the instant proceeding. In *County of Rockland*, an employee was terminated and commenced an Article 78

proceeding to challenge the County's determination. *Id.* After commencing the Article 78, the union served notice of intent to arbitrate as a final step to the grievance procedure. *Id.* The county moved to permanently stay and the Second Department held that the union and former employee waived the right to arbitrate because the two matters were so similar. *Id.* Like the union in the *County of Rockland*, the Local 628 has effectively waived their right to arbitrate by simultaneously pursuing arbitration, a PERB action, and an Article 78 proceeding.

Thus, because Local 628, and individual retired members of Local 628 have elected to pursue their claims in a court of competent jurisdiction, they have absolutely waived any potential right to arbitration. Based on these new facts that were not available or known to the City at the time of the initial action to stay arbitration, the City's motion to renew its petition to stay arbitration must be granted and the petition to stay must be granted. Local 628 has elected to pursue claims in the Supreme Court (and PERB) and cannot simultaneously have "three bites at the apple."

C. These New Facts Were Not Available Until After This Court's Decision and Order

It is undisputed that Local 628 and the 39 firefighters waited until after this Court issued its Decision and Order on June 29, 2016 to file the Article 78 Petition seeking the same relief on July 1, 2016. Based on the new facts surrounding the recent filing of the Article 78 proceeding which was filed after this Court ruled on the Petition, there are sufficient grounds for the City to renew its arguments to permanently stay arbitration.

CONCLUSION

For the foregoing reasons, Petitioner/Movant, City of Yonkers requests that this Court grant an order permitting the City to renew and/or reargue its Petition, and following such leave to renew and/or reargue, grant a further order permanently stay the arbitration between the

Petitioner, City of Yonkers, and the Respondent, Yonkers Firefighters, Local 628, IAFF, AFL-CIO. The Petitioner further requests that this Court grant such other and further relief as this Court may deem just and proper, together with the costs and disbursements of this special proceeding.

Dated: July 26, 2016
Binghamton, New York

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