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**
-vs-	:	**Hon. Terry Jane Ruderman**
YONKERS FIREFIGHTERS, LOCAL 628, IAFF, AFL-CIO	:	
Respondent.	:	

MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION TO REARGUE AND/OR MOTION TO RENEW

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PRELIMINARY STATEMENT

Respondent, Yonkers Firefighters, Local 628, IAFF, AFL-CIO ("respondent," "Union," or "Local 628") submits this memorandum of law in opposition to petitioner, the City of Yonkers', ("petitioner," or "City") motion to reargue and/or motion to renew this Court's Decision and Order of June 29, 2016 denying petitioner's motion to permanently stay arbitration and ordering the parties to proceed to arbitration.

In opposing this motion to reargue, the Union contends, as this Court properly found, that the parties negotiated a GML 207-a policy which applies to "any claim of entitlement to or use of GML 207-a benefits," and because the subject of the present grievance and the parties' CBA are reasonably related, the grievance is arbitrable. Furthermore, arbitrability of this grievance is further supported by the fact that in addition to the broad arbitration clause in the parties' CBA, the GML 207-a policy contains its own comprehensive arbitration clause which states 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."** (Emphasis added).

As for petitioner's motion to renew, such motion "must be based upon additional material **facts which existed at the time the prior motion was made**, but were not then known to the party seeking leave to renew, and, therefore, not made known to the court." Foley v. Roche, 68 A.D.2d 558, 568 (1st Dept 1979) (Emphasis added). Yet, according to the merciless confines of linear time, an Article 78 filed on July 1, 2016 cannot be a fact which existed at the time the prior petition was made on April 6, 2016. Further, the fact of a potential Article 78 was expressly raised by petitioner in their initial petition to stay this arbitration, and this Court acknowledged the possibility of an Article 78 in its June 29, 2016 Decision and Order. Nevertheless, because

the potential filing of an Article 78 by parties separate and distinct[1] from the present dispute, permanently disabled retirees of the Yonkers Fire Department, lacked relevance, this Court properly declined to entertain petitioner's claim that the election of an Article 78 remedy precluded arbitration of Local 628's Grievance and addressed only the proper issue before this Court – whether the parties agreed to arbitrate the present Grievance. This Court correctly found that the parties had agreed. Accordingly, for reasons stated herein, the Union asks this Court to deny the City's motion to reargue and/or renew.

STATEMENT OF FACTS

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**." (ECF Doc #2 at 29, see also, ECF Doc #4 at 15)[2] (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. (ECF Doc #2 and 4). 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").[3] Significantly, Section 32[4]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 entitlement**

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[1] Petitioner incorrectly claims that "Local 628 and the thirty-nine (39) retirees waited . . . to file the Article 78." ECF Doc #52 at 15. This statement is false; Local 628 is not a party to the Article 78. See, John Borelli et al. v. City of Yonkers (Westchester County Supreme Court Index No. 2301/16) (Blackwood, J.) (Exhibit A hereto).

[2] Consistent with petitioner's motion, respondent cites to the Electronic Case File Document Numbers, ("ECF Doc #___").

[3] The GML 207-a procedure resulted from an arbitration. 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." ECF Doc #33.

[4] Section 32 incorporated language from the previous Section 23 of the GML 207-a Procedure.

to or use of GML 207-a benefits made after that date." (ECF Doc #2 at Appendix C; ECF Doc #4 at Section 32) (Emphasis added).[5] Section 14 of the GML 207-a procedure 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.
>
> [ECF Doc #2 and #4]

As fully described in respondent's memorandum of law in opposition to the initial Petition, (ECF Doc #34), when the City unilaterally changed its long standing practice with respect to payments made under GML 207-a(2), Local 628 filed the subject Grievance. The City denied the Grievance at each step, and Local 628 filed a demand for arbitration. Despite the broad arbitration clause in the parties' CBA and the provisions for arbitration contained within the GML 207-a Procedure, on April 6, 2016 petitioner filed a Petition to Stay arbitration of the subject Grievance. (ECF Doc #1-16).

On June 29, 2016, this Court denied petitioner's motion to permanently stay arbitration and ordered the parties to proceed to arbitration. (ECF Doc #42). According to its Decision and Order this Court acknowledged that, "[t]he City further asserts that because the 44 retirees elected to participate in due process hearings to challenge the City's decision to adjust their

[5] General Municipal Law §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. Section 207-a(1) also provides that the municipality or fire district is liable for all medical treatment and hospital care furnished during such disability. General Municipal Law §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.

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." (ECF Doc #42 at 3). However, this Court declined petitioner's invitation to address legal issues other than the one before it and found, "that there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA." (ECF Doc #42 at 6).

Meanwhile, following their individual due process hearings, the City of Yonkers reduced the GML 207-a(2) benefits for forty-four permanently disabled retirees. As predicted by petitioners and noted by the Court, on July 1, 2016 thirty-nine of these individuals filed an proceeding under CPLR Article 78 seeking declaratory relief from the City's decision to reduce and potentially recoup their GML 207-a(2) benefits. (ECF Doc #49). Respondent, Local 628, is not a party to that Article 78 proceeding. See John Borelli et al. v. City of Yonkers, Westchester County Supreme Court Index No. 2301/16 (Blackwood, J.)

On July 27, 2016, this motion to reargue and/or for leave to appeal followed. (ECF Doc #42).

ARGUMENT

I. THE CITY'S MOTION TO REARGUE SHOULD BE DENIED BECAUSE THE COURT CORRECTLY APPLIED CONTROLLING CASE LAW AND THE PARTIES EXPRESSLY AGREED TO ARBITRATION GML 207-a DISPUTES.

First, petitioner incorrectly contends this Court "misapprehended" the law and failed to apply the controlling precedent in cases which addressed the merits of the subject grievance – namely what constitutes "regular salary and wages" under GML 207-a(2). Petitioner's argument fails because the Court of Appeals held that courts must "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).

Here, in her July 29th Order and Decision, Justice Ruderman correctly did not address cases which discussed the merits of the subject grievance because in deciding a Petition to Stay Arbitration such analysis is improper as the sole issue before the Court was whether the parties agreed to arbitrate the subject grievance. In re City of Johnstown, 99 N.Y.2d. at 278. Rather, this Court denied petitioner's motion after properly addressing whether the parties agreed to arbitrate the subject grievance. Petitioner averred for the first time in their reply papers that this grievance is barred by a statutory, constitutional or public policy prohibition. Nevertheless, Justice Ruderman entertained the improperly raised argument and noted that, "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 calculations of those benefits to arbitration."

In further support of their present motion to reargue, petitioners boldly but incorrectly introduced a new rule for determining arbitrability of matters concerning GML 207-a(2). According to petitioners, "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." Petitioner Brief at 9. To assert its claim, petitioner cites Unif. Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes, 94 N.Y.2d 686, 694 (2000); Bd. of Ed., W. Babylon Union Free Sch. Dist. v. W. Babylon Teachers Ass'n, 60 A.D.2d 577 (2d Dept 1977)(Arbitration stayed because there was no provision in the collective bargaining agreement dealing with the subject matter of the dispute). These cases are inapposite to the present case. In City of Cohoes the

union's grievance concerned a violation of the CBA regarding hours of employment, seniority, previous condition of employment and assignments. 94 N.Y.2d at 694. There is no mention of a GML 207-a procedure in the parties' CBA, especially one with its own arbitration clause. In W. Babylon Teachers Ass'n the union's grievance concerned the board of education's refusal to fill vacant position of director of attendance. In staying the arbitration the court found, "[t]here 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, . . .; there is no express and unequivocal agreement to arbitrate disputes which are unrelated to the 'meaning or applications of [the parties'] Agreement[.]'" 60 A.D.2d at 577.

Here, in stark contrast to these cases, the City made a unilateral determination to reduce the payment of supplemental wages under GML 207-a(2), a change which impacts the benefits for current retirees, members in the process of retiring and members who may retire from a line of duty injury in the future. The parties 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), otherwise GML 207-a(2) claims would have been expressly excluded. Therefore, the parties agreed to arbitrate the dispute in this case. 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.

II. THE FILING OF AN ARTICLE 78 BY DISABLED RETIREES IS NOT A NEW FACT WHICH EXISTED AT THE TIME OF THE PRIOR MOTION AND THE FILING OF THE ARTICLE 78 HAS NO EFFECT ON THE PRESENT DISPUTE

Turning to petitioner's new facts argument, according to a case cited by petitioner,

> An application for leave to renew must be based upon additional material facts **which existed at the time the prior motion was**

> **made**, but were not then known to the party seeking leave to renew, and, therefore, **not made known to the court.** Renewal should be denied where the party fails to offer a valid excuse for not submitting the additional facts upon the original application. Foley v. Roche, 68 A.D.2d 558, 568, 418 N.Y.S.2d 588 (1979) (Emphasis added).

Here, the City asserted in its brief in support of their initial Petition to stay arbitration that "Retirees Have Elected to Pursue Appeals Outside of Arbitration. In this case, the affected retirees have already elected their remedies by participating in the due process appeal process. If dissatisfied with the result of the process, these retirees will **have further rights of review under CPLR Article 78**. Accordingly, the retirees should not be permitted to litigate the same dispute in two different forums. Pursuit of arbitration may have collateral effects on related litigation." (Emphasis added)

Further, in this Court's July 29, Decision and Order, Justice Ruderman acknowledged the City's argument with respect to the Article 78 and wrote, "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." (Emphasis added)

As mentioned at the outset, the filing of the Article 78 on July 1, 2016 could not have been a fact that existed at the time petitioner's motion to stay was filed in April 2016. Nevertheless, substantively, the facts present then are the same facts present now that this Court considered but rejected, and as such they cannot form the basis for a motion to renew. Furthermore, 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 and the Article 78 that followed which involve an individual's claim to an government entitlement. Furthermore, the parties to the due process hearings and the Article 78 are the City of Yonkers and individual retirees and not Respondent, Local 628, while the parties to this dispute are the City and Local 628. Contrary to what petitioner represented to this Court, Local 628 is not a party to the Article 78. In its brief supporting this present motion, petitioner falsely stated that, "[i]t is undisputed that Local 628 and the 39 [F]irefighters waited until after this Court issued its Decision and Order on June 29, 2016 to file the Article 78 Petition." Therefore, because the issues and the parties in each action are distinct, the referenced due process hearings have no impact on this arbitration dispute. Accordingly, petitioner's motion to reargue and/or renew should be denied.

CONCLUSION

No statute or public policy forbids arbitration of the Grievance and the parties have agreed to arbitrate this type of Grievance. The motion to reargue and/or to renew, therefore, should be denied together with an award for the Union's costs and disbursements, including reasonable attorneys' fees.

Dated: August 15, 2016
New York, New York

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

In the Matter of the Application of
JOHN BORELLI, CHRISTOPHER BOSSEY, MICHAEL BURKE, FRANK CALLACE, THOMAS CONNERY, BRIAN CRISTIANO, MICHAEL DILIDDO, RAYMOND FOX, ROBERT FUMARELLI, ALEXANDER HANON, BRIAN HARVEY, PAUL HESSLER, NEIL HICKEY, KEVIN KEHOE, KENNETH KELLY, BRIAN KENNY, WILLIAM MCKENNA, EUGENE MCNULTY, JOSEPH MURRAY, VINCENT PACIARIELLO, WILLIAM PARKER, TIMOTHY POWERS, ARTHUR RIVERA, JEROME RODRIGUEZ, STEPHEN RONAN, FRANK RUCKEL, MICHAEL SAMMON, JOSEPH SANTOLO, WILLIAM SEMRAI, MARK SHAPIRO, PAT SICA, ANDREW VERRINO, GUY VETRANO, MICHAEL WARD, ROBERT CAVALLO, PAUL DIMELLA, RICHARD HIGGINS, KEVIN MCGRATH and THOMAS SPAUN,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and a Declaratory Judgment Pursuant to CPLR §3001

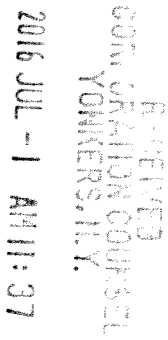
-against-

CITY OF YONKERS,

Respondents.

Index No. 232/2016

VERIFIED PETITION



Petitioners, John Borelli, Christopher Bossey, Michael Burke, Frank Callace, Thomas Connery, Brian Cristiano, Michael Diliddo, Raymond Fox, Robert Fumarelli, Alexander Hanon,