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.

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTIONS TO REARGUE AND RENEW

Index No.: 54477/2016

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

Preliminary Statement

The Petitioner, City of Yonkers ("Petitioner" or "City") submits this memorandum of law in reply to the responsive pleadings submitted by the Respondent, Yonkers Firefighters, Local 628, IAFF, AFL-CIO ("Respondent" or "Local 628") and in further support of Petitioner's motions to renew and reargue the Petitioner's application to permanently stay arbitration of Respondent's grievance regarding the overpayment and recoupment of General Municipal Law ("GML") § 207-a(2) benefits.

Discussion

Point I: Respondent Ignores the Correct "Expressly Agreement" Standard Promulgated by the Court of Appeals and Judicial Departments

In opposition, Respondent erroneously cites to the more lenient and erroneous "reasonably related" standard rather than the strict "express agreement" standard the Court of Appeals has held must be used in deciding claims to GML 207 benefits. (Respondent Brief at p. 4-7). As was more fully set forth in the City's initial moving papers, the Court of Appeals and Second Department have repeatedly held that the calculation of GML 207-a(2) benefits shall

only include regular wages, longevity, and negotiated wage increases unless the collective bargaining agreement ("CBA") "expressly" provides otherwise. As such, the Respondent ignores the case law which requires that a court stay grievance arbitration of those claims to GML 207 benefits that are not expressly included in the CBA.

See 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); *Matter of Chalachan v. City of Binghamton*, 55 N.Y.2d 989, 990 (1982); *Matter of Uniformed Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes*, 94 N.Y.2d 686 (2000); *Town of Tuxedo v. Town of Tuxedo Police Benev. Ass'n,* 78 A.D.3d 849 (3rd Dep't 2010); *Inc. Vill. of Floral Park v. Floral Park Police Benev. Ass'n*, 89 A.D.3d 731 (2nd Dept. 2011); *In re Town of Evans (Town of Evans Police Benev. Ass'n)*, 66 A.D.3d 1408 (4th Dept. 2009); and *Matter of Whitted v. City of Newburgh*, 126 A.D.3d 910, 911 (2d Dept. 2015),

The City has argued that this Court did not address this case law. Similarly, in its opposition, the Respondent does not address this case law, because it cannot distinguish the cases from these facts which turn on the express wording of the CBA.

Turning to the merits of the agreement, Respondent's own argument establishes that there is no agreement to arbitrate the fringe benefits. Respondent asserts that "[t]he 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." (ECF Doc. # 54, pg. 6). However, the Respondent, of course, cannot establish that the CBA fringe benefits at issue (Night Differential, Holiday Pay and Check-In Pay) are not "expressly" addressed for as GML 207-a(2) benefits in the "older" or "new" CBA's (ECF Doc. #2, Appendix "C" and ECF Doc. #4, Appendix "C") and are therefore cannot be the subject of grievance arbitration.

Respondent is unable to rebut the fact that the "original" GML 207-a procedure was completely silent as to GML 207-a(2) benefits. (ECF Doc. #2, Appendix "C"). Moreover, that original GML 207-a procedure provided that only two disputes were arbitrable: (1) if the member disagreed with the City's decision regarding the initial entitlement to GML 207-a benefits; and (2) if the member disagreed with the City's decision regarding termination of already existing GML 207-a benefits. As such, the original CBA did not address GML 207-a(2) benefits or disputes other than eligibility and the continuation of GML 207-a(1) benefits.

Similarly, while the "new" GML 207-a procedure now addresses the retiree's application for and the City's initial determination of GML 207-a(2) benefits, the new GML 207-a procedure does not allow for the arbitration of other GML 207-a disputes, including disputes pertaining to the inclusion of CBA fringe benefits at issue (Night Differential, Holiday Pay and Check-In Pay). (ECF Doc. #4, Appendix "C" at Sections 17 - 20).

According to the Respondent, the original GML 207-a procedure allowed arbitration of anything related to GML 207-a(1) or (2). If that were true, then why would the parties negotiate a new GML 207-a procedure which included a new category of arbitration limited to disputes pertaining to determinations on GML 207-a(2) applications? Respondent's logic is flawed. By permitting only one new category of arbitration under the new CBA, the parties intentionally excluded other disputes which are not so included. Despite providing a fresh opportunity to expressly address and revisit the disputed CBA fringe benefits as part of a GML 207-a benefit, the parties elected not to do so and so the "new" GML 207-a procedure (like the "old" GML 207-a procedure) fails to expressly provide that those fringe benefits are to be included in the GML 207-a benefit.

As such, neither the "original" or "new" CBA contain any provision which expressly addresses the inclusion of the disputed fringe benefits as a GML 207-a benefit or the right to arbitrate such a dispute. The long pattern of negotiations between the parties, who were represented by able legal counsel, establishes that parties consciously agreed not to address the disputed fringe benefits as a GML 207-a benefit or provide an employee or retiree with the right to arbitrate disputes related to those fringe benefits.

In the end, the Respondent is unable to address (much less reconcile) the "expressly agreed" standard with the CBA's and their respective GML 207-a procedures. The "reasonably related" standard is simply not relevant for disputes pertaining to the expansion of GML 207-a benefits beyond those found by the Court of Appeals. In addition, the 207-a procedure only permits the arbitration of certain disputes and a dispute as to what constitutes the GML 207-a(2) benefit is not one of those for which arbitration is permitted. For these reasons, the motion to reargue must be granted and the Petition to permanently stay arbitration must be granted.

Point II: The Motion to Renew Is Based On New Facts Not Available At The Time Of The Original Motion; By Filing the Article 78 Petition, Respondent Waived Its Right to Arbitrate

Respondent argues in its opposition that the Article 78 proceeding cannot be used to support the motion to renew. At the outset, it appears that the Respondent is conflicted over wanting to argue that the Article 78 was either (a) known at the time of the original motion (and therefore not a "new" fact); or (b) not a "new fact" "in existence at the time of the original motion" as the Article 78 was commenced after this Court issued its decision. (Respondent Brief at p. 7).[1]

[1] Anticipating this position, the City simultaneously commenced a special proceeding seeking to stay arbitration based on new facts which arose after this Court's decision. *City of Yonkers v. Yonkers Firefighters, Local 628, IAFF, AFL-CIO* (Westchester County Supreme Court Index No. 60328/2016).

Respondent is in error on the standard for a motion to renew under CPLR § 2221(e) which provides that such motion:

> 1. shall be identified specifically as such;
>
> 2. **shall be based upon new facts not offered on the prior motion that would change the prior determination** or shall demonstrate that there has been a change in the law that would change the prior determination; and
>
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.
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> CPLR 2221(e) (emphasis added).

The new or additional facts must have either not been known to the party seeking renewal (*see Matter of Shapiro v. State of New York,* 259 A.D.2d 753 (2d Dept. 1999) 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 (*see Cole–Hatchard v. Grand Union,* 270 A.D.2d 447 (2d Dept. 2000). The requirement that a motion for renewal be based on new facts is a flexible one, and it is within the court's discretion to grant renewal upon facts known to the moving party at the time of the original motion "if the movant offers a reasonable excuse for the failure to present those facts on the prior motion" *Matter of Surdo v. Levittown Pub. School Dist.,* 41 A.D.3d 486 (2d Dept. 2007); and *Heaven v. McGowan,* 40 A.D.3d 583 (2d Dept. 2007).

However, the statute contains no requirement that the "new fact" must be "in existence at the time of the original motion." While the motion could be based on new or additional facts which were "in existence at the time of the original motion", there is no requirement that this be the case. Such a standard would be nonsensical as relevant developments, actions or admissions by a party occurring after the original motion could never be presented to the court on a motion to renew the original motion. Indeed, the opposite is true.

In *Oremland v. Miller Minutemen Const. Corp.*, 133 A.D.2d 816 (2d Dept. 1987), the Second Department held that erred by not considering newly discovered evidence, an engineer's affidavit, which was generated after the original motion and therefore not in existence at the time of the original motion. "The Supreme Court, Dutchess County, by declining to consider the engineer's affidavit and by denominating the defendant's motion to renew as one for reargument, failed to recognize that the standards for renewal are flexible and thereby failed to exercise its discretion accordingly. *Oremland v. Miller Minutemen Const. Corp.*, 133 A.D.2d at 816.

Here, the City is relying on "new facts" (the commencement of an Article 78 proceeding on July 1, 2016) which was certainly not "in existence at the time of the original motion." Moreover, there is no dispute that the Article 78 petition is a "new fact" that was "not known" to the City or the Court, as it was commenced after this Court issued its decision on the original motion to stay arbitration. As such, the Article 78 filed on July 1, 2016 is a "new or additional fact" that was not "in existence at the time of the original motion."

It is truly disingenuous for the Respondent to claim that the City's forecasting the possibility of a future Article 78 in its original motion to stay arbitration and the Court's noting of this possibility in its decision, undercuts the "new fact" prong of the analysis. Absent the filing of an Article 78 proceeding, the City could not have comprehensively addressed the waiver and election of remedies argument because that Article 78 proceeding had not yet been filed. Moreover, how could the City possibly know what the Article 78 proceeding would allege in terms of claims or what relief would be sought by the petitioners in the Article 78? While the City maintains that the retirees' participation in due process hearings may be sufficient grounds to stay arbitration, this Court did not address the waiver or election of remedies issue beyond summarizing the City's position. In the end, the Respondent's decision to file an Article 78

Petition seeking the same relief sought in the grievance constitutes a new fact that cannot be overlooked.

Of course, the Respondent glosses over the fact that the Article 78 (that it chose to file after this Court ruled in its favor), now seeks the exact same relief it sought in the demand for grievance arbitration ("Demand"). While Respondent asserts that the Article 78 Petition and the grievance are not the same issues, the opposite is true. 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).

While Respondent asserts that the parties to the Article 78 Petition and the grievance are not the same, the opposite is true. 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." (See Exhibit "A" to the Sweeney Affirmation at ¶ 2).[2]

[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

The filing of the Article 78 petition constitutes a "new or additional" fact that was not "in existence at the time of the original motion" that would change this Court's prior decision. For these reasons above, the motion to renew must be granted and the Petition to permanently stay arbitration must be granted.

Conclusion

WHEREFORE, the Petitioner, City of Yonkers, respectfully requests that this Court grant the motions for leave to reargue and/or renew and, after granting such leave, permanently stay arbitration of Respondent's grievance on the overpayment and recoupment of General Municipal Law 207-a(2) benefits and grant such other and further relief as this Court deems just and proper.

Dated: August 18, 2016
Binghamton, New York

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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).