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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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In the Matter of the Application of,

FREEPORT POLICE BENEVOLENT ASSOCIATION,

Petitioner,

For an Order Pursuant to Article 75 of the Civil Practice Law and Rules,

-against-

The INCORPORATED VILLAGE OF FREEPORT

Respondent.

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TRIAL PART: 10

NASSAU COUNTY

INDEX NO:003363-12

MOTION SEQ. NO# 1

SUBMIT DATE: 04/06/12

The following papers having been read on this motion:

Order to Show Cause.....1
Opposition.....2
Reply Memorandum.....3

Upon the foregoing papers, it is ordered that the Petitioner's application for preliminary injunctive relief pending disposition, through arbitration, of an interrelated contract grievance is determined as hereinafter articulated.

The instant proceeding emanates from a dispute between contracting parties, the Freeport Police Benevolent Association and the Incorporated Village of Freeport, respectively, and concerns the latter's unilateral decision to implement changes in health insurance provided to a segment of its retirees.

Under an existing collective bargaining agreement (hereinafter "CBA"), the Respondent is contractually obligated to "[p]ay one hundred (100%) percent of the medical and hospitalization insurance for retired members of the Department in the same manner the member would have been covered if he or she were still an active member if he or she does not receive such coverage by virtue of other employment, State legislation or otherwise" (ex A, Petition, CBA § 25.0 [emphasis supplied]).

Shawn Randall, the Petitioner's current president, avers that the changes contemplated violate the CBA "[b]ecause the new plans do not cover the [retired] member in the same manner the active members are covered [in that retirees] have lost access to in network doctors, have to use a debit card and e-mail to have the same copay coverage, and must keep receipts of transactions in order to validate the debit card charges" (¶ 11, supporting affidavit).

At the time of the execution of the underlying Order to Show Cause, the proposed changes had yet to be implemented.

"A court evaluating a motion for a preliminary injunction must be mindful that '[t]he purpose of a preliminary injunction is to maintain the *status quo*, not to determine the ultimate rights of the parties' *(Matter of Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.*, 65 AD3d 1051, 1052; *see Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, 643)." (*Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942, 942 - 943).

"Although the purpose of a preliminary injunction is to preserve the *status quo* pending a trial, the remedy is considered a drastic one, which should be used sparingly (*see McLaughlin, Piven, Vogel v Nolan & Co.*, 114 AD2d 165, 172). As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (*see Doe v Axelrod*, 73 NY2d 748, 750). In exercising that discretion, the Supreme Court must determine if the moving party has established: (1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction (*see Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862; *W.T. Grant Co. v Srogi*, 52 NY2d 496, 517; *Apa Sec, Inc. v Apa*, 37 AD3d 502, 503; *Matter of Merscorp, Inc. v Romaine*, 295 AD2d 431, 432; *Albini v Solork Assoc.*, 37 AD2d 835)" (*Trump on the Ocean, LLC v Ash*, 81 AD3d 713, 715, *lv dismissed* 17 NY3d 875).

"[P]ursuant to CPLR 7502 (c), the Supreme Court may grant a preliminary injunction 'in connection with an arbitration that is pending or that is to be commenced inside or outside this state,' but such relief may be granted 'only upon the ground that the [arbitration] award to which the applicant may be entitled may be rendered ineffectual without such provisional relief' (CPLR 7502 [c]). A party seeking relief under this provision must also make a showing of the traditional equitable criteria for the granting of temporary relief under CPLR article 63 *(see Matter of K.W.F. Realty Corp. v Kaufman*, 16 AD3d 688, 689-690)." *(Winter v Brown*, 49 AD3d 526, 528 - 529 [emphasis

supplied]; *see also*, Alexander, Supplemental Practice Commentaries, Mc Kinney's Cons. Laws of N.Y., Book 7B, C7502:6).

In this Court's view, application of the governing legal principles to the facts presented in the Record supports the issuance of preliminary injunctive relief.

"A grievance may be submitted to arbitration only where the parties agree to arbitrate that kind of dispute, and where it is lawful for them to do so. In determining whether a grievance is arbitrable, we therefore follow the two-part test enunciated in *Matter of Acting Supt. of Schools of Liverpool Cent. School Dist. (United Liverpool Faculty Ass'n)* (42 N.Y.2d 509 [Liverpool]) *and Matter of Board of Educ. of Watertown City School Dist. (Watertown Educ. Ass'n)* (93 N.Y.2d 132, 143 [Watertown]). We first ask whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance *(see Liverpool*, 42 N.Y.2d at 513). This is the 'may-they-arbitrate' prong. If there is no prohibition against arbitrating, we then examine the CBA to determine if the parties have agreed to arbitrate the dispute at issue (*see Watertown*, 93 N.Y.2d at 140; *Liverpool*, 42 N.Y.2d at 513-514). This is the 'did-they-agree-to-arbitrate' prong." (*Matter of City of Johnstown* [*Johnstown Police Benevolent Association*], 99 NY2d 273, 278).

Lacking a statutory, constitutional or public policy argument against the grievance's submission to arbitration, the Court's focus narrows to the scope of the parties' agreement. (*see, Matter of Matter of Village of Horseheads* [*Horseheads Police Benevolent Association, Inc.*], __ AD3d __, __ NYS2d __, 2012 N.Y. App. Div. LEXIS 2564 [3d Dept.])

Tellingly, the controlling provisions of the CBA provide for arbitration of any unresolved grievance concerning the interpretation of the parties' contract (*see*, ex A, Petition, CBA, § 3.0).

"Where, as here, there is a broad arbitration clause and a 'reasonable relationship' between the subject matter of the dispute and the general subject matter of the parties' collective bargaining agreement, the court 'should rule the matter arbitrable, and the arbitrator will then make a more exacting interpretation of the precise scope of the substantive provisions of the [collective bargaining agreement], and whether the subject matter of the dispute fits within them' *(Matter of Board of Educ.* [*Watertown Educ. Assn.*], 93 NY2d 132, 143; *see, Matter of Acting Supt. of Schools of Liverpool Cent. School Dist.* [*United Liverpool Faculty Assn.], supra*)." (*Matter of Van Scoy v Holder*, 265 AD2d 806, 807 - 808 [4th Dept.])

Moreover, and contrary to the view espoused by Respondent's counsel, the Petitioner has the requisite standing to seek relief for its former members. *(See, Matter of City of Ithaca* [*Ithaca Paid Fire Fighters Association., IAFF, Local 737*], 29 AD3d 1129 [3d Dept.]).

Notably, "issues concerning the [Petitioner's] relationship to retired employees, issues concerning whether retirees are covered by the grievance procedure, and issues concerning whether the clauses of the contract support the grievance are matters involving the scope of the substantive contractual provisions and, as such, are for the arbitrator (*see Matter of Vestal Cent. School Dist. [Vestal Teachers Assn.*], 2 AD3d 1190, 1192, *lv denied* 2 N.Y.3d 708). We note in addition that New York's public policy encourages arbitration of labor disputes involving public employees (*see Matter of Board of Educ. of W. Irondequoit Cent. School Dist. v West Irondequoit Teachers Assn.*, 55 AD2d 1037, 1038)." *(Matter of Mariano v Town of Orchard Park*, 92 AD3d 1232 [4th Dept.]; *see also, Matter of Union- Endicott Central School District* [*Union-Endicott Maintenance Workers' Association*], 85 AD3d 1432, 1436 [3d Dept.]).

That the Petitioner's interpretation of the substantive clauses in the underlying CBA may be rejected, ultimately, is not an issue within the Court's purview. On the contrary, "[i]t is for the arbitrator, and not the courts, to resolve any uncertainty concerning the substantive rights and obligations of these parties (*Matter of Wyandanch Union Free School Dist. v Wyandanch Teachers Assn., supra*)." (*Matter of Board of Education of the Deer Park Union Free School District v Deer Park Teachers Association*, 50 NY2d 1011, 1012).

"Importantly, it is not for this court to determine *** the merits *** upon a motion for preliminary injunction; rather, the purpose of the interlocutory relief is to preserve the status quo until a decision is reached on the merits (citations omitted). Viewed from this perspective, it is clear that the showing of a likelihood of success on the merits required before a preliminary injunction may be properly issued must not be equated with the showing of a certainty of success (*cf. Rosemont Enterprises v McGraw-Hill Book Co.*, 85 Misc 2d 583, 585). It is enough if the moving party makes a *prima facie* showing of his right to relief." (*Tucker v Toia*, 54 AD2d 322, 325 - 326 [4th Dept.]; in accord: *McLaughlin, Piven, Vogel, Inc. v W. J. Nolan & Company, Inc.*,114 AD2d 165, 172-173, *lv denied* 67 NY2d 606).

Here, the changes contemplated in health insurance coverage afforded the effected group

represent, at a minimum, a facial deviation from that which is provided active members of the Respondent's police force. Such facial deviation, standing alone, satisfies the first of the traditional criteria for injunctive relief.

"The second element of proof required for a preliminary injunction is proof that irreparable injury will occur if the relief is denied. Irreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient (citation omitted)."(*McLaughlin, Piven, Vogel, Inc. v W. J. Nolan & Company, Inc., supra,* at 174)

Here, monetary damages are a weak substitute for the anticipated disruption in the continuity of medical care that may result from the implementation of the changes contemplated with its variant panel of "in-network" physicians.

To fulfill the remaining criterion, the applicant must demonstrate "that the irreparable injury to be sustained is more burdensome to [its retirees] than the harm that would be caused to the [municipality] through the imposition of the injunction (*see Klein, Wagner & Morris v Lawrence A. Klein, P.C.*, 186 AD2d 631; *McLaughlin, Piven, Vogel v Nolan & Co.*, 114 AD2d 165; *Poling Transp. Corp. v A & P Tanker Corp.*, 84 AD2d 796)." (*Lombard v Station Square Inn Apartments Corp.*, __ AD3d __, __ NYS2d __, 2012 N.Y. App. Div. LEXIS 2458).

In this regard it merits mention that *ipse dixit* statements within counsel's opposing affirmation which address the issue of respective burdens is devoid of probative value. (*see, Zuckerman v City of New York*, 49 NY2d 557, 562 - 563).

In any event, the claimed, albeit unquantified, economic consequences the Respondent envisions as a corollary to the issuance of preliminary injunctive relief does not tip the balance of equities in its favor. In the event the Respondent ultimately prevails on the merits, the savings it expects to realize will not be forfeited, merely delayed.

Based on the foregoing, the Court finds it appropriate to enjoin implementation of the contemplated changes in order to maintain the status quo pending disposition of the grievance . Without its issuance, the award, were the Petitioner to prevail, may be rendered ineffectual (*see*, CPLR 7502 [c]). Stated alternately, the granting of injunctive relief will " 'preserve the efficacy of [a] potential arbitral award' (1985 N Y Legis Ann, at 118). " (*Cove v Rosenblatt*, 148 AD2d 411).

The temporal parameters of the relief herein afforded are governed by CPLR 7502 (c), and

the attention of counsel is most respectfully directed thereto.

Pursuant to the unequivocal mandate of CPLR 6312 (b), the Petitioner shall post an undertaking. (*See, Putter v Singer*, 73 AD3d 1147; *Masjid Usman, Inc.v Beech 140, LLC, supra*). Counsel shall submit affirmations as to the issue of the amount of the undertaking to be imposed by the court to cover any damages to respondent as a result of the injunction granted.

This constitutes the decision and order of this Court.

DATED: April 20, 2012

ENTER

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J. S.C.

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