SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 31
NASSAU COUNTY

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., A.F.S.C.M.E., LOCAL 1000, A.F.L.-C.I.O., by its LOCAL 830,

Plaintiff,

- against -

NASSAU HEALTH CARE CORPORATION,

Defendant.

Index No.: 10655/09
Motion Seq. Nos.: 01, 02
Motion Dates: 01/27/12
02/29/12
XXX

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affidavit, Affirmation and Exhibits and Memorandum of Law	**1**
Notice of Cross-Motion (Seq. No. 02) and Memorandum of Law and Exhibits	**2**
Defendant's Memorandum of Law in Further Support of its Motion (Seq. No. 01) and in Opposition to Plaintiff's Cross-Motion (Seq. No. 02)	**3**
Plaintiff's Memorandum of Law in Further Support of Cross-Motion (Seq. No. 02)	**4**

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant moves (Seq. No. 01), pursuant to CPLR § 3211[1], for an order of this Court granting summary judgment, dismissing plaintiff's Verified Complaint. Plaintiff opposes the motion and cross-moves (Seq. No. 02), pursuant to CPLR § 3212, for an order of this Court

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[1]The moving defendant cites CPLR § 3211 as the statutory basis for relief; however, its papers indicate that it intends the motion to be one seeking Summary Judgment under CPLR § 3212.

granting summary judgment in its favor. Defendant opposes the cross-motion.

The instant motion and cross-motion arise from a declaratory action commenced by plaintiff to confirm a June 2009 arbitration award of Arbitrator Michael S. Alonge, sustaining plaintiff's underlying class action grievances regarding the reinstatement rights of two employees, Sweta Parikh ("Parikh") and James Gilmartin ("Gilmartin") .

Parikh was hired by defendant in September 1996, for the position of Med Tech I, and was laid off in December 2003. She was a full time employee at the time she was laid off. In August 2006, she was reappointed to the same position from a preferred list.

Gilmartin was first employed by Nassau County Medical Center in April 1995. He was transferred to defendant facility in 1999 and laid off in January 2005. According to plaintiff, Gilmartin was full time at the time he was laid off. In November 2005, Gilmartin was reinstated from a preferred list to the same position as a part-time employee. He resigned from this part-time position in April 2006, and was reinstated to the same position as a full-time employee in February 2007.

Defendant regarded the two employees, Parikh and Gilmartin, as "new" employees and, under the Collective Bargaining Agreement ("CBA"), new employees receive health benefits after six months of service. Further, Parikh and Gilmartin, as "new" employees, were not entitled to the vacation leave entitlements and/or accruals that they previously received during their initial full-time tenure.

In March 2007, a class action grievance, alleging violations of certain sections of the CBA, was filed by plaintiff on behalf of Parikh and Gilmartin. Plaintiff alleged that defendant failed to credit Parikh and Gilmartin with the proper time accruals upon their reinstatement and

also failed to reinstate health insurance benefits to Parikh and Gilmartin upon their reinstatement. A hearing was conducted on April 22, 2008, June 25, 2008, and July 7, 2008, where Arbitrator Michael S. Alonge issued an advisory award in January 2009 sustaining the grievances. Plaintiff commenced the underlying action in June 2009 alleging a breach of contract and seeking declaratory relief.

With respect to Parikh, defendant contends that the long-standing practice between the parties has been that employees who are rehired after being separated from employment for more than one year return as "new" employees. In Gilmartin's case, he returned within the year after part-time service. He did not receive health benefits as a part-time employee and, therefore, was not entitled to immediate restoration of such benefits upon his return to full-time status.

Plaintiff argues that Civil Service § 81 applies to the dispute at bar, since the time of expiration of an employee's placement on a preferred list is four years. Because both Parikh and Gilmartin returned to service within that time period, the statute provides for the full restoration of benefits they enjoyed before they were separated from employment.

With respect to Parikh, plaintiff argues that defendant is estopped from denying her such benefits as its Human Resources Vice-president represented that Parikh was entitled to full restoration of benefits and she relied on the representation to her detriment. Further, health benefits and other benefits have been long regarded as inclusive in an employee's wages and, if the statute provides for restoration of salary, such salary includes leave entitlement and health benefits.

The standards for summary judgment are well settled. A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is therefore

entitled to summary judgment as a matter of law. *See Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). Thus, when faced with a summary judgment motion, the Court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial. *See Miller v. Journal-News*, 211 A.D.2d 626, 620 N.Y.S.2d 500 (2d Dept. 1995).

The burden on the party moving for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of material issue of fact. *See Ayotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of the opposing papers. *See Alvarez v. Prospect Hospital*, *supra*; *Miceli v. Purex*, 84 A.D.2d 562, 443 N.Y.S.2d 269 (2d Dept. 1981). Once the this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form, sufficient to create material issues of fact requiring a trial.

In light of the foregoing, it is noted that defendant relies on the following provisions of the CBA, which state in relevant part:

> "2-6...'Original Date of Employment' means (1) for employees who were employed by the NHCC on or before September 29, 2000, the date on which an individual commenced working for the NHCC or the County...and thereafter, without a break in service of more than one year, became employed in a regular County-funded position, whether or not such position was in the negotiating unit, or (2) for employees who commenced employment with NHCC after September 29, 2000, their first date of employment with NHCC..."
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> "2-15...'Years of actual completed service' means (1) for employees employed by NHCC on or before September 29, 2000, all public service from the original date of employment with NHCC... to the date of termination of such public services, or (2) for employees who commenced

employment with NHCC on or about September 20, 2000, their first date of employment with NHCC provided, however, that service interrupted for a period of one year or less shall not be deemed to be a termination; however such interruption shall not be credited as actual service to NHCC, unless otherwise required by law..." *See* Plaintiff's Memorandum of Law Exhibit C.

However, the CBA, also states in relevant part:

"14-2 All persons in the labor and non-competiive class, who have been laid off, shall be re-hired in accordiance with the plan set forth in Section 81 of the Civil Service Law, notwithstanding that such section does not apply to them as matter of law, and further provided that the re-hiring rights under this section shall expire eighteen (18) months after the lay-off." *See id.*

Civil Service Law § 81 provides in relevant part:

"1. The head of any department, office or institution in which an employee is suspended...with the provisions of sections eighty and eighty-a of this title shall, upon such suspension... or demotion, furnish the state civil service department...a statement showing his name, title or position, date of appointment, and the date of and reason for suspension.... It shall be the duty of such civil service department or commission,... to place the name of such employee upon a preferred list...and to certify such list, as hereinafter provided, for filling vacancies in the same jurisdictional class; first, in the same or similar position; second, in any position in a lower grade in line of promotion; and third, in any comparable position. Such preferred list shall be certified for filling a vacancy in any such position before certification is made from any other list, including a promotion eligible list, notwithstanding the fact that none of the persons on such preferred list was suspended from or demoted in the department or suspension and demotion unit in which such vacancy exists. No other name shall be certified from any other list for any such position until such preferred list is exhausted. **The eligibility for reinstatement of a person whose name appears on any such preferred list shall not continue for a period longer than four years from the date of separation**....(emphasis added)

...

6. A person reinstated from a preferred list to his former position or a similar position in the same grade shall receive at least the same salary such person was receiving at the time of suspension or demotion..."

The purpose of the statute relating to reinstatement of civil service employees from a preferred list was to assure that an employee separated from civil service without fault, whether by abolition of position or because of disability, upon reinstatement to same or similar position from preferred list, would receive at least his former pay. *See* Civil Service Law § 31–b. Therefore, it is not irrational for an arbitrator to interpret salary as inclusive of health benefits and vacation accruals for purposes of reinstatement under the cirucmstances regarding Parikh and Gilmartin.

As to defendant's contention that the parties have regarded similarly situated employees as "new" employees pursuant to a long standing past practice, it is well settled that past practice may be considered to discern the intent of the parties to a collective bargaining agreement where that agreement is *ambiguous.* (emphasis added) *See Corsaro v. County of Nassau*, 210 A.D.2d 286, 620 N.Y.S.2d 75 (2d Dept 1994). However, in the instant matter, there is no claim of ambiguity by either party. It is noted that if the drafters of the CBA intended that employees, who are seperated from service and are then reinstated based on their placement on a preferred list, be treated as "new" employees upon reinstatement to service with defendant, they could have clearly provded for that within the CBA.

Even if such language was ambiguous, defendant has the burden of proof to establish the relevant past practice by a preponderance of the evidence. *See Matter of Benson v. Cuevas,* 288 A.D.2d 542, 731 N.Y.S.2d 816 (3d Dept. 2001). Defendant attempts to meet this burden solely by way of the Affidavit of Maureen Roarty, its Vice President for Human Resources. This is woefully insufficient and therefore unavailing to meet defendant's *prima facie* burden.

Additionally, the fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent. The best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *See Civil Service Employees Association, Inc. v. Plainedge Union Free*, 12 A.D.3d 395, 786 N.Y.S.2d 59 (2d Dept. 2004).

As to whether Arbitrtrator Alonge exceeded his authority in the rendering of his decision, he was guided by a prior arbitration decision, *In the Matter of Arbitration between County of Nassu and Civil Service Employees Association Local 830*, Docket Nos. 48-93, 116-93 and 127-93, submitted by plaintiff, in making his determination. He also applied the law as set forth in the Civil Service statutes.

It is well settled law that a court may not vacate an arbitration award except in those limited situations where the award has been procured by fraud, corruption or misconduct, or is violative of a strong public policy, is totally irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power. Further, the Court of Appeals has even held that an arbitrator's award should not be vacated for errors of law and fact committed by the arbitrator. *See Matter of Peterec-Tolino v. Commercial Electrical Contractors, Inc.*, 59 A.D.3d 752, 872 N.Y.S.2d 599 (3d Dept. 2009).

Here, both Parikh and Gilmartin were full-time employees who had earned certain benefits under the CBA. They were not seperated by their own actions, but by a lay off governed

by Civil Service Law § 80. In further support of their entitlement to full restoration of benefits, Civil Service Law § 80-a, paragraph (2) provides in relevant part:

> "...A period of employment on a temporary or provisional basis,... immediately preceded and followed by permanent service in the classified service, shall not constitute an interruption of continuous service for the purposes of this section; nor shall a period of leave of absence without pay pursuant to law or the rules of the civil service commission having jurisdiction, or any period during which an employee is suspended from his position pursuant to this section, constitute an interruption of continuous service for the purposes of this section...."

Based on the foregoing, it is also rational for Arbitrator Alonge to conclude that the essential purposes of the relevant Civil Service Law provisions are to ensure that the "layoff and rehiring of a laid off employee are as least disruptive as possible." In addition, according to the foregoing statutory provision, the fact that Gilmartin had an intervening part-time tenure does not negate his prior service.

Finally, the cases relied upon by defendant, *Civil Service Employees Association, Inc. v. The Nassau Health CIO*, Index No. 013652-07, and *Civil Service Employees Association, Inc. v. The Nassau Health CIO*, Index No. 15722/06, are distinguishable. The first case involved the issue as to whether a part-time employee is entitled to the same vacation leave as full-time employees and whether part-time service should be treated as actual completed service under the CBA for that purpose. Here, the issue is Parikh and Gilmartin's restoration to the leave entitlement they would have enjoyed had their full-time service not been interrupted.

As to the second case, the seminal issue to be determined by that Court was the applicability of past practice. There, the record clearly set out what the practice had been

between the parties in determining the definition and meaning of the language of a collective bargaining agreement. As already stated herein, the only evidence in the record before this Court, is the self-serving affidavit of defendant. *See Jacques v. Richal Enterprises Inc.*, 300 A.D.2d 45, 751 N.Y.S.2d 726 (1st Dept. 2002).

Based on the foregoing, defendant has failed to meet its *prima facie* entitlement to summary judgment, while plaintiffs have met their burden entitling them to the declaratory relief sought.

Accordingly, defendant's motion (Seq. No. 01), pursuant to CPLR § 3212, for an order of this Court granting summary judgment, dismissing plaintiff's Complaint is hereby **DENIED.** Plaintiff's cross-motion (Seq. No. 02), pursuant to CPLR § 3212, for an order of this Court granting summary judgment in its favor is hereby **GRANTED**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

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Dated: Mineola, New York
April 27, 2012