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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____x

In the Matter of the Application of

SHERIFF OFFICERS ASSOCIATION, INC., EX REL MICHAEL STASKO and all other similarly affected members of the Sheriff Officers Association, Inc.,

Petitioner(s),

For a Judgment Pursuant to Article 75 of the NY Civil Practice Law and Rules

-against-

NASSAU COUNTY and the OFFICE OF THE NASSAU COUNTY COMPTROLLER,

Respondent(s).

_____x

Index No. 4621/12

Motion Submitted: 4/30/12
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....
Briefs: Plaintiff's/Petitioner's.....XX
Defendant's/Respondent's.....

Upon the foregoing papers, it is ordered that the Petitioners' 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 Sheriff Officers Association, Inc. (hereinafter "ShOA") and the County of Nassau (hereinafter "County"), respectively, and concerns the latter's obligation to pay health insurance premiums for certain former employees.

Under an existing Memorandum of Agreement (hereinafter "MOA"), which served to extend and modify an extant collective bargaining agreement, the County, with respect to the provision of health insurance coverage, is contractually obligated to "[p]ay the full cost of the premium for enrollment for its active, retired, and retiring employees, pursuant to the law and regulations now in force or as hereinafter amended."(Ex B, Petition, MOA § 19 [a])

Michael Stasko, for whose immediate and direct benefit the instant proceeding was initiated, was a correction lieutenant employed by the County and a member of ShOA at the time of his retirement on **December 31, 2011**. *(see*, Petition, ¶ 2)

Mr. Stasko avers: "In total, I was employed as a uniformed officer for 23 years." (Ex D, Petition, Stasko Affidavit, ¶ 2)

Mr. Stakso further avers: "In 2011 I purchased (*sic*) two years of my prior military service to have those two years deemed 'creditable service' so that I could retire with my full pension with 25 total years of 'creditable service.' " (Ex D, Petition, Stasko Affidavit, ¶ 3)

Mr. Stasko further avers: "I am presently receiving my full pension benefits with 25 years of 'creditable service' [and am] 51 years old." (Ex D, Petition, Stasko Affidavit, ¶¶ 4 - 5)

By correspondence dated **March 15, 2012** and directed to Mr. Stasko, the Office of the Nassau County Comptroller, a co-respondent herein, through its Assistant Director of Payroll and Benefits advised, in pertinent part, as follows: "We received your application for early retirement under the 25-Year Special Retirement Plan for Nassau County. We performed a review of your employment records, and concluded that you did not fulfill the service-years requirement to retire under this plan. We verified this with the State and received confirmation that you are not eligible to retire now because Nassau County requires you to have 25 years of service in a correctional officer title, and does not recognize service in other titles or military service for health insurance purposes. Please note that while some services may qualify as creditable service for pension retirement purposes, they do not always qualify for health benefit retirement.

"However, based on your length of employment (23 years) you are eligible to vest until you reach the age of 55 ... To keep this right you must enroll as a vestee and maintain

continuous enrollment until you are 55 years; otherwise you will permanently lose your right to retire with health benefits.

"Please submit payment of $4,688.40 for the period beginning February 1, 2012 thru April 30, 2012 ... If we do not receive your payment by March 30, 2012 your coverage will be cancelled retroactively to February 1, 2012 . . . ." (Ex G, Petition [emphasis supplied])

It is asserted that the deadline for payment was extended to April 13, 2012. (*see*, Petition, ¶ 24; *see also*, Ex I, Petition, Jaronczyk Affidavit, ¶ 15)

By Order of this Court dated April 12, 2012, the Respondents, pending hearing and determination of the instant application, were "enjoined from stopping County paid medical health insurance contributions . . . on behalf of retired corrections officers, including Michael Stasko," and, through this proceeding, the Petitioners seek to extend such provisional relief through disposition of a corresponding contract grievance in an arbitral forum.

"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 A.D.3d 1051, 1052, 886 N.Y.S.2d 41 (2d Dept., 2009); *see* ***Coinmach Corp. v. Alley Pond Owners Corp.***, 25 A.D.3d 642, 643, 808 N.Y.S.2d 418 [2d Dept., 2006])." (***Masjid Usman, Inc. v. Beech 140, LLC***, 68 A.D.3d 942, 942 - 943, 892 N.Y.S.2d 430 [2d Dept., 2009]).

"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 A.D.2d 165, 172, 498 N.Y.S.2d 146 [2d Dept., 1986]). 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 N.Y.2d 748, 750, 532 N.E.2d 1272, 536 N.Y.S.2d 44 [1988]). 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 N.Y.2d 860, 862, 552 N.E.2d 166, 552 N.Y.S.2d 918 (1990); ***W.T. Grant Co. v. Srogi***, 52 N.Y.2d 496, 517, 420 N.E.2d 953, 438 N.Y.S.2d 761 (1981); ***Apa Sec, Inc. v. Apa***, 37 A.D.3d 502, 503, 831 N.Y.S.2d 201 (2d Dept., 2007); ***Matter of Merscorp, Inc. v. Romaine***, 295 A.D.2d 431, 432, 743 N.Y.S.2d 562 (2d Dept., 2002); ***Albini v. Solork Assoc.***, 37 A.D.2d 835, 326 N.Y.S.2d 150 [2d Dept., 1971])." (***Trump on the Ocean, LLC v. Ash***, 81 A.D.3d 713, 715, 916 N.Y.S.2d 177 (2d Dept., 2011), *lv dismissed* 17 N.Y.3d 875, 956 N.E.2d 1270, 932 N.Y.S.2d 425 [2011]).

"[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 A.D.3d 688, 689-690, 793 N.Y.S.2d 67 [2d Dept., 2005])." (***Winter v. Brown***, 49 A.D.3d 526, 528 - 529, 853 N.Y.S.2d 361 (2d Dept., 2008) [emphasis supplied]; *see also*, ***Alexander, Supplemental Practice Commentaries, Mc Kinney's Cons. Laws of N.Y., Book 7B, § 7502:6***)

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, 369 N.E.2d 746, 399 N.Y.S.2d 189 (1997) (***Liverpool***) and ***Matter of Board of Educ. of Watertown City School Dist. (Watertown Educ. Ass'n)***, 93 N.Y.2d 132, 143, 710 N.E.2d 1064, 688 N.Y.S.2d 463 (1999) [***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 Ass'n)***, 99 N.Y.2d 273, 278, 784 N.E.2d 1158, 755 N.Y.S.2d 49 [2002]).

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 Village of Horseheads (Horseheads Police Benevolent Assn., Inc.)***, 94 A.D.3d 1191, 941 N.Y.S.2d 785 [3d Dept., 2012]).

The controlling aspects of the parties' agreements provide for binding arbitration of any unresolved grievance arising thereunder which implicates the meaning, interpretation or application of its substantive provisions. (*see*, Ex A, Petition, CBA, §§ 2-4; 20; *see also*, Ex B, Petition, MOA § 33)

"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.), supra***; *see,* ***Matter of Acting Supt. of Schools of Liverpool Cent. School Dist. (United Liverpool Faculty Ass'n.), supra***)." (***Matter of Van Scoy (Holder)***, 265 A.D.2d 806, 807 - 808, 695 N.Y.S.2d 834 [4th Dept., 1999]).

The dispute at bar turns on whether the Respondents may exclude a retiree's military service in calculating the minimum temporal service requirements necessary to catalyze its contractual obligation to pay health insurance premiums (*see*, Ex B, Petition, MOA § 19 [a]) notwithstanding the inclusion thereof in determining qualification for full pension benefits.

Although Respondents' counsel argues that the distinction drawn is authorized, the failure to cite the authority on which the position is predicated is conspicuous.

That the Petitioners' interpretation 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 Educ. of Deer Park Union Free School District v. Deer Park Teachers Assn.***, 50 N.Y.2d 1011, 1012, 409 N.E.2d 1356, 431 N.Y.S.2d 682 [1980]).

"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 (***Hoppman v. Riverview Equities Corp.***, 16 A.D.2d 631, 226 N.Y.S.2d 805 (1st Dept., 1962); ***Moody v. Filipowski***, 146 A.D.2d 675, 537 N.Y.S.2d 185 (2d Dept., 1989); ***Peekskill Coal & Fuel Oil Co. v. Martin***, 279 A.D. 669, 670, 108 N.Y.S.2d 30 (2d Dept., 1951); *cf.* ***Walker Mem. Baptist Church v. Saunders***, 285 N.Y. 462, 474, 35 N.E.2d 42 [1941]). 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, 380 N.Y.S.2d 839 [Sup. Ct. N.Y. Co.1975]). It is enough if the moving party makes a prima facie showing of his right to relief." (***Tucker v. Toia***, 54 A.D.2d 322, 325 - 326, 388 N.Y.S.2d 475 (4th Dept., 1976); in accord: ***McLaughlin, Piven, Vogel v. Nolan & Company, Inc.***,114 A.D.2d 165, 172-173, 498 N.Y.S.2d 146 (2d Dept., 1986), *lv den.* 67 N.Y.2d 606, [1986]) .

Here, the Petitioners' interpretation is reasonable on its face and consistent with the scope of "creditable service" utilized to determine other aspects of retirement eligibility. It finds support in the regulatory scheme promulgated under the Retirement and Social Security Law which, stranding 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 an inadequate substitute for the anticipated disruption in the continuity of medical care that may result absent the perpetuation of injunctive relief. (*see generally,* ***International Union of Operating Engineers, Local No. 463 v. City of Niagara Falls***, 191 Misc.2d 375, 380 - 381, 743 N.Y.S.2d 236 [Sup. Ct. Niagara Co., 2002])

To fulfill the remaining criterion, the applicants 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 A.D.2d 631, 588 N.Y.S.2d 424 (2d Dept., 1992); ***McLaughlin, Piven, Vogel v. Nolan & Co., supra; Poling Transp. Corp. v. A & P Tanker Corp.***, 84 A.D.2d 796, 443 N.Y.S.2d 895 [2d Dept., 1981])." *(**Lombard v. Station Square Inn Apartments Corp.***, 94 A.D.3d 717, 942 N.Y.S.2d 116 [2d Dept., 2012]).

In this regard it merits mention that Respondents engage in no such analysis and fail to address the ramifications of an extension of the relief sought.

In any event, unquantified economic consequences that may ensue would not tip the balance of equities in Respondents' favor. In the event the Respondents ultimately prevail on the merits, premium payments expended may be recovered and any savings that might have been realized will not be forfeited, merely delayed.

Based on the foregoing, the Court finds it appropriate to continue the provisional relief heretofore afforded in order to maintain the status quo pending disposition of the underlying grievance. Without its issuance, the award, were the Petitioners 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 A.D.2d 411, 538 N.Y.S.2d 826 [2d Dept., 1989]).

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 in the sum of $5,000.00 *(see,* ***Putter v. Singer***, 73 A.D.3d 1147, 901 N.Y.S.2d 382 [2d Dept., 2010]; ***Masjid Usman, Inc.v. Beech 140, LLC, supra***).

The foregoing constitutes the Order of this Court.

Dated: June 8, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.