Patrolmen's Benevolent Assoc. of the City of N.Y., Inc. v City of New York
2016 NY Slip Op 31729(U)
September 12, 2016
Supreme Court, New York County
Docket Number: 652620/16
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 63

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., on behalf of itself and all Police Officers,

Plaintiff,

- against -

THE CITY OF NEW YORK and THE NEW YORK CITY OFFICE OF LABOR RELATIONS,

Defendants.

Index No.: 652620/16

DECISION/ORDER

COIN, ELLEN, J.:

In this action, plaintiff Patrolmen's Benevolent Association of the City of New York, Inc. (PBA, or plaintiff) alleges that defendant City of New York (City) anticipatorily breached the parties' collective bargaining agreement (CBA), by intending to implement changes to PBA members' health benefits pursuant to an agreement between the City and the Municipal Labor Committee (MLC). The complaint asserts causes of action for breach of contract, violation of the New York City Collective Bargaining Law (NYCCBL) (Administrative Code of the City of New York [Administrative Code] § 12-301 et seq.), a declaratory judgment, and a preliminary and permanent injunction. The PBA now moves for a preliminary injunction pursuant to CPLR § 6301, or, alternatively, pursuant to CPLR § 7502 (c).[1] Defendants oppose

[1]The branch of the motion which sought a temporary restraining order was denied by this court. On appeal, the First

the motion and cross-move to dismiss the complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action.

BACKGROUND

The PBA is the certified bargaining representative for approximately 23,000 police officers currently employed by the New York City Police Department (NYPD). Complaint, ¶¶ 8-9; Affidavit of David Nicholson in Support of PBA's Motion (Nicholson Aff.), ¶¶ 2-3. Since 1963, the PBA and the City have entered into a series of collective bargaining agreements governing wages, including health benefits, hours, and working conditions. *Id.* The New York City Office of Labor Relations (OLR) represents the Mayor in labor negotiations between the City and the unions representing City employees, and is responsible for administering health care benefits for City employees. Complaint, ¶ 12.

The current CBA, executed in February 2016, covered the two-year period from August 1, 2010 to July 31, 2012; its terms continue in effect until a new agreement is negotiated. *Id.*, ¶¶ 15, 25; Nicholson Aff., ¶ 4; *see* Civil Service Law § 209-a (1) (e). Under the terms of the CBA, "[t]he City recognizes the Union as the sole and exclusive bargaining representative for the unit consisting of the employees of the New York City Police

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Department, by order dated July 21, 2016, granted the temporary restraining order, pending a decision on this motion.

Department in the title of Police Officer, except those detailed as First, Second or Third Grade Detectives." CBA, Ex. 1 to Complaint, Art. I, Section 1.

The MLC, created in 1966 pursuant to a memorandum signed by representatives of the City and certain municipal labor unions, "is an association of New York City municipal labor organizations, which collectively addresses matters of shared concern and advocates on issues of labor relations relevant to City workers." *Lynch v City of New York*, 23 NY3d 757, 764 n 5 (2014); *see* Administrative Code § 12-303 (k); *see also* Letter/Memorandum, Ex. 2 to Complaint. The MLC also has certain statutory functions, which include the designation of the two labor members of the Board of Collective Bargaining (BCB). *See* New York City Charter § 1171. The BCB is "the statutorily authorized neutral adjudicative agency charged with making determinations under the New York City Collective Bargaining Law" as to whether an employer, or an employee organization, has committed an improper practice under the law. *Matter of City of New York v Uniformed Fire Officers Assn.*, 95 NY2d 273, 284 (2000); *see* Administrative Code §§ 12-306, 12-309 (a) (4); *see also Matter of Levitt v Board of Collective Bargaining*, 79 NY2d 120, 127-128 (1992) (BCB has "powers at the local level akin to those of the Public Employment Relations Board at the State level").

The MLC, of which the PBA is a member, has for decades negotiated with the City on behalf of its members to reach agreements on citywide health care benefits. Complaint, ¶ 21; Nicholson Aff., ¶¶ 13, 14. In 1992, the MLC and the City entered into an agreement "with regard to the procurement of employee health benefit contracts which are the subject of collective bargaining between the City and the Unions." Letter dated July 10, 1992 (1992 agreement), Ex. A to Affidavit of Renee Campion in Opposition to Plaintiff's Motion (Campion Aff.). The agreement provided, in part, that "the City and the Unions shall jointly continue to participate in all aspects of the procurement process by which the choice of vendors of collectively bargained health benefits shall be made." *Id.* The 1992 agreement also provided that "the parties will continue to bargain over and determine by mutual agreement the terms and conditions of employee health benefits. . .The parties shall also determine on an ongoing basis whether a material change in the terms of any benefits contained in the contract is necessary." *Id.*

The PBA acknowledges that the MLC has previously negotiated health benefit agreements on its behalf, but alleges that those agreements applied to its members only when the PBA expressly authorized MLC to represent it and approved the resulting agreement, or when, as in 2001, the agreement was incorporated into its CBA following arbitration; and it argues that the 1992

agreement supports its position. While asserting that it has at all times retained its right to negotiate separately, and has periodically asserted that it would not be part of the MLC coalition for purposes of health benefit agreements, the PBA does not dispute that, with or without its consent, all MLC health benefit agreements have been made applicable to its members, at least until the 2014 and 2016 agreements it disputes here. The PBA does not claim that at any time it negotiated separately with the City with respect to the citywide health benefits covered by the MLC agreements.

The City has long provided health insurance to its employees, and has given its employees a choice of health insurance plans offered by Health Insurance Plan of Greater New York (HIP) and Group Health Incorporated (GHI), such as the widely used HIP HMO Prime Plan (HIP/HMO Plan) and GHI Comprehensive Benefits Plan (GHI/CBP). Nicholson Aff., ¶ 7. As codified in Administrative Code §12-126 (b) (1), the City has an obligation, to "pay the entire cost of health insurance coverage for city employees, city retirees, and their dependents, not to exceed one hundred percent of the full cost of H.I.P.-H.M.O on a category basis." *See* CBA, Art. XII, Section 1. According to OLR First Deputy Commissioner Renee Campion, there is one health benefits program for all City employees, that is, all City employees are offered the same choice of health plans; and, for

more than 40 years, the City has negotiated agreements with the MLC concerning the citywide healthcare benefits program, and has separately negotiated agreements with individual unions regarding payments made to the unions' welfare plans, which provide supplemental benefits. Campion Aff., ¶¶ 3-4, 6.

In 1986, the City and MLC members, including the PBA, agreed to establish a Health Insurance Stabilization Reserve Fund (Stabilization Fund), to equalize employees' payments under the GHI/CBP and HIP/HMO plans, and to which the City makes an annual contribution for all City employees. *See* Nicholson Aff., ¶ 9; Letter Agreement, dated June 16, 1986, Ex. 4 to Nicholson Aff. (1986 Agreement), ¶¶ 1, 2; *see also* Memorandum of Agreement, dated April 13, 1995, Ex. 5 to Nicholson Aff., § 1 (p). Under the current CBA, the City agreed to contribute $35 million to maintain the Stabilization Fund, "which shall be used to continue equalization and protect the integrity of health insurance benefits." CBA, Ex. 1 to Complaint, Art. XII, Section 3 (c). The CBA also, notably, provides that "it is understood that the PBA will not be treated any better or any worse than any other Union participating in the Citywide or Program-wide Health Program with regard to increased health insurance costs." *Id.*, Art. XII, Section 3 (d).

In May 2014, the MLC and the City signed an agreement to generate specific annual and cumulative healthcare benefit

savings for fiscal years 2015 through 2018, and to make joint efforts and consider various options to achieve those savings. *See* Letter Agreement dated May 5, 2014, Ex. 7 to Complaint, ¶¶ 5-6 (2014 MLC agreement). The agreement also provided that certain funds from the Stabilization Fund would be used "to support wage increases and other economic items for the current round of collective bargaining . . . [and] will be available . . . for the welfare funds, the allocation of which shall be determined by the parties." *Id.*, ¶ 2.

The PBA alleges that it "did not join the coalition that negotiated the 2014 MLC Agreement and did not approve that Agreement." Complaint, ¶ 33. By letters in May and June 2013, and in May 2014, the PBA informed the OLR that it was not consenting or ceding its authority to the MLC to negotiate over health benefits for its police officers, while it insisted that it retained the right, as a member of the MLC, to participate in MLC meetings and would continue to attend MLC meetings to hear the City's proposals. *Id.*, ¶¶ 34-35; *see* Letters, Exs. 8-10 to Complaint. The PBA also asserts that in its separate collective bargaining negotiations with the City, the City proposed incorporating the 2014 MLC agreement into the current CBA, but the PBA did not agree, and that therefore the 2014 MLC agreement is not part of the current CBA. Complaint, ¶¶ 37-38.

The City and the MLC reached another agreement in August

2014 to use certain amounts from the Stabilization Fund to increase the City's contribution to Union-administered welfare funds. *Id.*, ¶ 44; *see* Letter, dated August 14, 2014, Ex. 12 to Complaint. By letter dated September 9, 2014, the City requested that the PBA, in order to implement distribution payments to the PBA Welfare Fund, indicate its acceptance of the agreement. Complaint, ¶ 45; *see* Letter, Ex. 13 to Complaint. The PBA did not sign the letter and alleges that it received no increase in distributions to its welfare fund. Complaint, ¶ 46.

In September 2014, the PBA filed a Step III grievance, challenging the application of the 2014 MLC Agreement to the PBA and its members. *Id.*, ¶ 47. The grievance alleged that the City violated Article XII, Section 3, Article XIII, Section 1, and Article I, Section 1 of the CBA, by using money from the Stabilization Fund for unauthorized purposes, by modifying its members' health benefits and obligations, and by negotiating with the MLC instead of the PBA over health benefits. *See* Complaint, ¶ 47; Grievance dated September 29, 2014, Ex. 8 to Affidavit of David W. Morris in support of PBA's motion (Morris Aff.) (2014 grievance); Morris Aff., ¶ 19. The Step III grievance was denied in October 2014, and in December 2014, the PBA filed a Step IV grievance. Complaint, ¶¶ 48-49. The Step IV grievance was denied by letter dated December 12, 2014, which the PBA asserts it did not receive until February 17, 2016. *Id.*, ¶ 50; *see* PBA

Letter, Ex. 13 to Morris Aff. The PBA did not request arbitration of the 2014 grievance, and, at oral argument on this motion, counsel for the PBA stated that no relief with respect to the 2014 MLC agreement is sought in this action. *See* Transcript dated June 16, 2016, at 15.

In February 2016, the City announced that it had reached an agreement with the MLC to achieve certain health care savings targets, which would result in significant changes to the City's employee health plans. Complaint, ¶ 51; *see* OLR Report, dated February 25, 2016, Ex. 15 to Complaint (2016 MLC Agreement). Among other things, under the 2016 MLC Agreement, the existing HIP/HMO plan is replaced with a new program called HMO Preferred Plan, which "provides the same coverage as the current HMO except that the plan encourages the use of preferred providers.". *Id.* at 3-4. Under the new plan, there is no copayment for using a preferred provider, but there is a $10 copayment, not previously required, for primary care services from a non-preferred provider and for specialty office visits, and diagnostic and lab tests, when a patient is referred by a non-preferred provider. *Id.*, at 4; Complaint, ¶ 56. The 2016 MLC Agreement also increases copayments for hospital emergency room and urgent care center visits, and for certain tests, while eliminating copayments for some preventive care visits and procedures. *See* 2016 MLC Agreement, at 2-3, 11; *see also* Affidavit of Claire Levitt in

Opposition to Plaintiff's Motion (Levitt Aff.), ¶¶ 9-11. As set forth in the 2016 MLC Agreement, the City and the MLC also agreed to take $120 million from the Stabilization Fund to provide a one-time $100 per employee and retiree contribution to the union welfare funds, and a one-time $60 million payment to the City. 2016 MLC Agreement, at 4; Complaint, ¶ 58.

In February and April 2016, the PBA notified the OLR that it did not authorize the MLC to bargain or agree to any health benefit proposals on its behalf, and it did not sign the 2016 MLC agreement; and, therefore, any health benefit changes reflected in the agreement should not be implemented with respect to PBA members. *Id.*, ¶¶ 52, 60; *see* Letters dated February 22, 2016, and April 7, 2016, Exs. 14, 16 to Complaint. OLR Commissioner Robert Linn responded that the practice of the OLR and the MLC negotiating on health benefits for city employees has "existed for decades," and the PBA did not have standing to bargain on those issues independent of MLC. Complaint, ¶ 61; OLR Letter, Ex. 17 to Complaint. When the PBA then requested confirmation that changes in the 2016 MLC Agreement would not be applicable to the PBA, OLR responded, by letter dated April 22, 2016, that in line with the past practice of negotiating with MLC on health benefits, the 2014 agreement established health savings goals, some of which already were implemented for fiscal years 2015 and 2016 and applied to all employees, including PBA members; and

health benefit programs for fiscal year 2017, effective July 1, 2016, are applicable to PBA members. Complaint, ¶¶ 62-63; *see* PBA Letter, Ex. 18 to Complaint; OLR Letter, Ex. 19 to Complaint.

On May 13, 2016, the PBA filed a step III grievance challenging the implementation of the 2016 MLC Agreement's health benefit changes with respect to its member police officers (2016 grievance). Complaint, ¶ 71; Ex. 14 to Morris Aff. The PBA alleges, as it did in its 2014 grievance, and as it does in this action, that the City violated Article I, Section I, Article XII, Section 3, and Article XIII, Section 1 of the CBA, by negotiating with the MLC instead of the PBA over health benefits, by using money from the Stabilization Fund for unauthorized purposes, and by modifying its members' health benefits and obligations without its approval. *See* Step III Grievance, Ex. 14 to Morris Aff., at 1. The 2016 grievance also alleges that "The City's payment of the lesser Preferred Plan rate fails to satisfy its obligation under Article XII, Section I to pay the full cost of the negotiated HIP HMO rate." *Id.* at 6.

On May 16, 2016, the PBA filed the instant action. The complaint asserts three causes of action for anticipatory breach of the CBA. The first cause of action alleges that the City, by intending to implement health benefit changes which were negotiated with the MLC without the PBA's approval, violated Article I, Section 1, which provides that the City recognizes the

PBA "as the sole and exclusive bargaining representative" for PBA members. The second cause of action alleges that the City, by eliminating the existing HIP/HMO option and replacing it with a lower-cost Preferred Plan, violated Article XII, Section 1, which provides that the City "shall continue to provide a fully paid choice of health and hospitalization insurance plans for each employee." The third cause of action alleges that the City diverted money from the Stabilization Fund for purposes not authorized by the current CBA, in violation of Article XII, Section 3 (c), which provides that the Stabilization Fund "shall be used: to provide a sufficient reserve; to maintain to the extent possible the current level of health insurance benefits provided under the Blue Cross/GHI-CMP plan; and, if sufficient funds are available, to fund new benefits." Ex. 1 to the Complaint at 15.

The PBA also alleges that the City violated Administrative Code § 12-126 (b) (1), which provides that "[t]he city will pay the entire cost of health insurance coverage for city employees, city retirees, and their dependents, not to exceed one hundred percent of the full cost of H.I.P.-H.M.O. on a category basis" (fourth cause of action). It further seeks a declaratory judgment that the PBA is the sole and exclusive bargaining agent for its members with regard to health benefits under the CBA (fifth cause of action); and a preliminary and permanent

injunction to prevent defendants from implementing the health benefit changes with respect to its members (sixth cause of action).

DISCUSSION

Defendants' Cross-Motion To Dismiss

The court turns first to defendants' cross-motion, as it is potentially dispositive. Defendants argue, at the outset, that the complaint should be dismissed because plaintiff must proceed through the grievance process set out in the CBA before seeking judicial relief.

"The critical role of collective bargaining agreements' grievance/arbitration machinery in stabilizing labor relations has been well recognized." *Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, AFL-CIO*, 99 NY2d 1, 7-8 (2002). Thus, "[a]s a general proposition, when an employer and a union enter into a collective bargaining agreement that creates a grievance procedure, an employee subject to the agreement may not sue the employer directly for breach of that agreement but must proceed, through the union, in accordance with the contract." *Matter of Bd. of Educ., Commack Union Free Sch. Dist. v Ambach*, 70 NY2d 501, 508 (1987), *cert denied sub nom Margolin v Board of Educ., Commack Union Free Sch. Dist.*, 485 US 1034 (1988); *see Montgomery County Deputy Sheriff's Assn., Inc. v County of Montgomery*, 57 AD3d 1061, 1063 (3d Dept 2008) (failure

to pursue grievance procedures in collective bargaining agreement was "fatal" to action for breach of contract); *Matter of City Empls. Union Local 237, IBT AFL-CIO v City of New York*, 28 AD3d 230 (1st Dept 2006) (union alleging violation of CBA was "bound, in the first instance, to proceed in accordance with [CBA grievance procedure]"). Further, "public policy in this State favors arbitral resolution of public sector labor disputes." *Professional, Clerical, Tech. Empls. Assn. v Buffalo Bd. of Educ.*, 90 NY2d 364, 372 (1997); *see Matter of City of Long Beach v Civil Serv. Empls. Assn., Inc.—Long Beach Unit*, 8 NY3d 465, 470 (2007); *Matter of Ciccone v Jacobson*, 262 AD2d 78, 79 (1st Dept 1999).

The PBA does not dispute that its claims fall within the scope of the CBA grievance procedures and, in fact, has filed a grievance, which remains pending, alleging the same violations of the CBA as are at issue here. Plaintiff contends, however, that the CBA's grievance procedure does not provide a means to resolve its dispute with defendants regarding health benefits. Complaint, ¶ 72. It claims that Steps III and IV of the grievance procedure are futile because the City has already taken the position that the health benefit changes apply to the PBA. *Id.*, ¶ 73. It further alleges that arbitration would be futile because there are no arbitrators on the panel and the parties have not been able to agree on filling the vacancies. *Id.*, ¶ 74.

It is well settled that a party objecting to an act of an administrative agency generally "must exhaust available administrative remedies before being permitted to litigate in a court of law." *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 (1978); *see Young Men's Christian Assn. v Rochester Pure Waters Dist.*, 37 NY2d 371, 375 (1975). "The exhaustion rule, however, . . . is subject to important qualifications . . . It need not be followed, for example, when . . . resort to an administrative remedy would be futile . . . ." *Watergate II Apts.*, 46 NY2d at 57; *see e.g. Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation*, 87 NY2d 136, 141 (1995) (seeking declaratory ruling from agency regarding application of law to plaintiff's petition would be futile where agency made clear its longstanding position that law did not apply); *Matter of Prey v County of Cattaraugus*, 79 AD2d 205, 207-208 (4th Dept 1981) (grievance procedures inadequate for employee seeking appointment to position where arbitration could only be requested by union, which had advised employer not to appoint him); *George A. Fuller Co., Inc. v Albin Gustafson Co.*, 55 AD2d 872, 872 (1st Dept 1977) (in action to recover damages for delays, where plaintiff alleged fault by the architect, futile to conduct arbitration before the architect); *see also Reed v Oakley*, 172 Misc 2d 659, 662 (Sup Ct, Saratoga County 1996) (arbitration with insolvent company would be futile); *compare Matter of Goddard v*

City Univ. of N.Y. (CUNY), Hunter Coll., 129 AD3d 583, 583 (1st Dept 2015) (employee's petition, challenging university's denial of reappointment, dismissed for failure to pursue grievance under CBA; Chancellor's judgment of scholarly record does not constitute an agency policy that would render arbitration futile); *Matter of Meegan v Brown*, 66 AD3d 1437, 1439 (4th Dept 2009) (failure to exhaust administrative remedies under CBA warrants dismissal; no showing of futility where union previously arbitrated similar disputes).

Application of exceptions to the exhaustion of remedies doctrine lies in the court's discretion. *See Community Sch. Bd. Nine v Crew*, 224 AD2d 8, 13 (1st Dept 1996), lv denied 89 NY2d 807 (1997); *Matter of Monaco v New York Univ.*, 48 Misc 3d 1210(A), 18 NYS3d 580, 2015 NY Slip Op 51025(U) (Sup Ct, NY County 2015). In this case, the court finds that the exception to the exhaustion of remedies doctrine does not apply.

Even assuming that Steps III and IV of the grievance procedures would be resolved against plaintiff, the court finds unpersuasive plaintiff's argument that arbitration would be futile due to vacancies on the panel of arbitrators; and the cases on which plaintiff relies are distinguishable. *See Matter of Prey*, 79 AD2d at 207-208 (employee could not demand arbitration and could not force union, which did not support employee, to represent him); *Nassau Ch., Civ. Serv. Empls. Assn.*

v Board of Educ., Union Free School Dist. No. 3, Town of Hempstead, 63 Misc 2d 49 (Sup Ct, Nassau County 1970) (grievance procedure futile where school board position unalterable and not willing to submit dispute to arbitration).

Contrary to plaintiff's contention, there is an arbitrator on the panel who was previously agreed to by the parties. While plaintiff now asserts that it has withdrawn its consent to the available arbitrator, and notwithstanding that defendants dispute plaintiff's authority to unilaterally remove an arbitrator from the panel, plaintiff has not shown that an available arbitrator could not be found, whether through agreement with the City to add panel members, resort to an outside arbitration organization as suggested by defendants, or application to the court pursuant to CPLR 7504. At this point, moreover, plaintiff has not requested arbitration, and has made no application to have an arbitrator appointed.

The three causes of action for breach of contract accordingly are dismissed, as is the fifth cause of action for a declaratory judgment. *See PLP, II LP v New York State Dept. of Envtl. Conservation*, 68 AD3d 1709, 1710 (4th Dept 2009) [declaratory judgment action dismissed for failure to exhaust administrative remedies); *cf Lehigh Portland Cement Co.*, 87 NY2d at 140 (court has discretion to dismiss declaratory judgment). Similarly, the sixth cause of action seeking a permanent

injunction, and a preliminary injunction "during the pendency of this action," is dismissed. *See Uniformed Firefighters Assn. of Greater N.Y. v City of New York*, 79 NY2d 236, 239 (1992) (injunctive relief under CPLR 6301 unavailable where no judicial action pending). As to the fourth cause of action, alleging that the City violated Administrative Code § 12-126 (b) (1), plaintiff neither opposes dismissal of, nor otherwise addresses this claim, and it also is dismissed.

Plaintiff's Motion for a Preliminary Injunction

In view of the above, plaintiff's motion for a preliminary injunction under CPLR § 6301 is denied. Plaintiff also moves, in the alternative, for a preliminary injunction in aid of arbitration, under CPLR § 7502 (c), and the court will consider that application. *See International Union of Operating Engrs., Local No. 463 v City of Niagara Falls*, 191 Misc 2d 375, 378 (Sup Ct, Niagara County 2002) (court dismissed action, finding union must proceed with grievance procedures under CBA, and considered application for preliminary injunction under CPLR 7502[c]); *see also Matter of New York State Hous. Fin. Agency Employees' Assn. v New York State Hous. Fin. Agency*, 183 AD2d 435, 435 (1st Dept 1992) (application under CPLR § 7502 [c] may be made even if demand for arbitration not yet served).

Under CPLR §7502 (c), a party may seek a preliminary injunction "in connection with an arbitration that is pending or

that is to be commenced inside or outside this state, . . . but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." In addition, the party seeking the preliminary injunction must demonstrate "the traditional factors for injunctive relief under CPLR article 63" (*Interoil LNG Holdings, Inc. v Merrill Lynch PNG LNG Corp.*, 60 AD3d 403, 404 [1st Dept 2009]), that is, "a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005); *see Doe v Axelrod*, 73 NY2d 748, 750 (1988); *see also Erber v Catalyst Trading, LLC*, 303 AD2d 165, 165 (1st Dept 2003) ("the criteria for provisional relief set forth in CPLR articles 62 and 63 are not relaxed when such relief is sought in aid of arbitration pursuant to CPLR 7502 [c]"); *Winter v Brown*, 49 AD3d 526, 528-529 (2d Dept 2008) (applications under CPLR § 7502[c] require showing under both Article 63 and "rendered ineffectual" standards). "Irreparable injury," in the context of a preliminary injunction, "'has been held to mean any injury for which money damages are insufficient." *L & M 353 Franklyn Ave., LLC v S. Land Dev., LLC*, 98 AD3d 721, 722 (2d Dept 2012), quoting *Di Fabio v Omnipoint Communications, Inc.*, 66 AD3d 635, 636-637 (2d Dept 2009); *see Zodkevitch v Feibush*, 49 AD3d 424, 425 (1st Dept 2008)

(irreparable harm requires showing that "an award of monetary damages would not adequately compensate" movant); *U.S. Re Cos., Inc. v Scheerer*, 41 AD3d 152, 155 (1st Dept 2007) (availability of money damages precludes a finding of irreparable harm).

"The decision to grant or deny a preliminary injunction lies within the sound discretion of the trial court." *Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 24 (1st Dept 2011), citing *Nobu Next Door, LLC*, 4 NY3d at 840; *see Doe v Axelrod*, 73 NY2d at 750. "The movant has the burden of establishing a right to this equitable remedy" (*McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co.*, 114 AD2d 165, 172 [2d Dept 1986]), by providing "clear and convincing" evidence in support. *See Platinum Equity Advisors, LLC v SDI, Inc.*, 132 AD3d 420, 420 (1st Dept 2015); *Temple-Ashram v Satyanandji*, 84 AD3d 1158, 1161 (2d Dept 2011); *see also City of New York v 330 Cont. LLC*, 60 AD3d 226, 234 (1st Dept 2009) (movant must demonstrate "a clear right to the drastic remedy of a preliminary injunction"); *Scotto v Mei*, 219 AD2d 181, 182 (1st Dept 1996) (proof establishing "'elements must be by affidavit and other competent proof, with evidentiary detail'" [citation omitted]).

Here, plaintiff argues that without a preliminary injunction, an arbitration award in its favor would be rendered ineffectual and its members would be irreparably harmed because implementation of the 2016 MLC agreement's health benefit changes

would "adversely affect Police Officers' healthcare and undermine the PBA's effectiveness and Police Officers' right to bargain collectively through their chosen representative." PBA Memorandum of Law in Support, at 24. More particularly, plaintiff contends that the new HIP/HMO Preferred Plan introduced in the 2016 MLC agreement encourages employees to change doctors by imposing a copayment for non-preferred providers, and it would be difficult and disruptive for police officers to change providers, particularly for those members or their dependents who are receiving ongoing treatment for a condition or are being treated by a specialist. Nicholson Aff., ¶¶ 34, 36. Plaintiff also contends that the increase in copayments for certain services or procedures, such as MRIs, can present a hardship for members who currently need those services and procedures as part of ongoing treatment. *Id.*, ¶ 37.

Plaintiff makes no showing, however, or even alleges, that its members will not be able to continue treatment with their current doctors, if they are non-preferred providers, or that the new $10 copayment for non-preferred providers would force police officers to change doctors. Plaintiff submits no affidavits, for instance, from any individual member who would have to change providers, or whose ongoing treatment would be disrupted, as a result of the increase in copayments. *Compare Matter of Plattsburgh City Retirees' Assn. v City of Plattsburgh*, 51 Misc

3d 1209(A), 2016 NY Slip Op 50512(U) (Sup Ct, Clinton County 2016) (evidence submitted included affidavits from individuals whose treatment would be affected); *see also Valentine v Schembri*, 212 AD2d 371, 372 (1st Dept 1995) (allegation of possible loss of health benefits speculative and insufficient to demonstrate irreparable harm). Further, in the event that plaintiff prevails in arbitration, money damages, such as reimbursement of copayments, will provide adequate compensation. *See Matter of Gamma v Ferrara*, 274 AD2d 479, 481 (2d Dept 2000).

Plaintiff also has not demonstrated that the new HIP/HMO Preferred Plan, or any other available plan that may or may not require copayments (*see* Nicholson Aff., ¶ 35), is less comprehensive or more restrictive than, or otherwise not as good as, the existing plans. *Compare Matter of Plattsburgh City Retirees' Assn.*, 51 Misc 3d 1209(A) (evidence, including new plan coverage document and affidavits from individual insureds, showed significant restrictions on and reductions of services under new plan sufficient to warrant preliminary injunction); *International Union of Operating Engrs., Local No. 463*, 191 Misc 2d at 379-380 (preliminary injunction pending arbitration granted where evidence showed substantial increase in premiums would force employees out of plan considered best plan).

The PBA claims that without a preliminary injunction, its relationship with its members will be irreparably harmed, because

its effectiveness and its members' confidence in it as a bargaining representative will be undermined. This conclusory assertion does not establish irreparable harm. *See Joseph v MTA Bridges & Tunnels (Triborough & Tunnel Auth.)*, 2012 WL 6090098, 2012 NY Misc LEXIS 5409, 2012 NY Slip Op 32831(U) (Sup Ct, NY County 2012) (union's assertion that it will "lose respect and authority" without injunction restraining employer from transferring employees pending arbitration, does not establish irreparable harm).

The court thus finds that plaintiff has not demonstrated that an arbitration award in its favor would be rendered ineffectual or that it would be irreparably harmed unless a preliminary injunction is granted.

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction is denied; and it is further

ORDERED that defendants' cross-motion is granted and the complaint is dismissed, and the Clerk is directed to enter judgment accordingly.

Dated: September 12, 2016

ENTER:

HON. ELLEN M. COIN, A.J.S.C.