Matter of Chemung County v New York State Law Enforcement Officers Union
2019 NY Slip Op 31199(U)
May 3, 2019
Supreme Court, Chemung County
Docket Number: 2018-2430
Judge: Eugene D. Faughnan
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[* 1]

At a Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Chemung County Courthouse, Elmira, New York, on the 1st day of February, 2019.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CHEMUNG

In the matter of the application of

CHEMUNG COUNTY AND THE CHEMUNG COUNTY SHERIFFS' OFFICE,

Petitioner,

DECISION AND ORDER

For an Order Pursuant to Article 75 of the CPLR vacating an Arbitration Award

Index No. 2018-2430

-against-

NEW YORK STATE LAW ENFORCEMENT OFFICERS UNION, COUNCIL 82, AFSCME, AFL-CIO, CHEMUNG COUNTY CORRECTIONS OFFICERS UNION INC., LOCAL 3978, MICHELE BENNETT,

Respondents.

APPEARANCES:

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EUGENE D. FAUGHNAN, J.S.C.

The County of Chemung, and the Chemung County Sheriffs' Office (hereinafter "County" or "Petitioners") filed the instant Petition, pursuant to CPLR §7511, seeking to vacate an Arbitration Award dated August 31, 2018. The New York State Law Enforcement Officers Union, Council 82, AFSCME, AFL-CIO, Chemung County Corrections Officers Union Inc, Local 3978 ("Union") and the injured officer, Michele Bennett (hereinafter "Bennett" or collectively "Respondents") filed an Answer in Opposition to the Petition, and requested that the Arbitration Award be confirmed pursuant to CPLR §7511(e). The Court heard oral arguments from both parties regarding the Petition.

BACKGROUND FACTS

The relevant facts are not in dispute. The County and the Corrections Officers Union are parties to a Collective Bargaining Agreement ("CBA") which contains a dispute resolution procedure that includes arbitration. Bennett is a Deputy Sheriff-Corrections Officer employed by the County, and sustained a work-related injury to her right shoulder and arm on May 18, 2008. As a result of the injury, she was taken out of work, but continued to receive her salary pursuant to General Municipal Law ("GML") §207-c. With the exception of one day of attempted return to work, she remained out of work until April 27, 2009, and then she returned to work in a light duty capacity with full pay. After April 27, 2009, Bennett had some additional periods of intermittent lost time from work, but then worked uninterrupted light duty from September 24, 2012 until October 2017.

After she had reached maximum medical improvement from this injury, Bennett received a determination from the Workers' Compensation Board concerning permanency. On May 8, 2014, the Workers' Compensation Board made a finding that Bennett had sustained a 55% schedule loss of use of her right arm as a result of the May 18, 2008 work related injury. This entitled her to a gross amount of $104,000. From that amount, pursuant to Workers' Compensation Law, the employer was reimbursed $62,688.88 representing the prior GML§207-c salary payments that had been made while Bennett was out of work. This resulted in Bennett receiving an additional $41,311.12 (minus a $4,900 fee for her attorney). At the time of the Workers' Compensation award, Bennett was still working light duty with regular pay.

Subsequently, Bennett once again began losing time from work in October, 2017. The County again approved Bennett's GML §207-c benefits, but instead of giving her full pay, it reduced her pay by the Workers' Compensation rate of $500 per week; reasoning that the balance of the schedule loss of use was a credit against further causally related lost time. Since the Workers' Compensation award was calculated at $500 per week, the County reduced Bennett's GML §207-c payments by $500 per week.

Bennett's union filed a grievance of the reduction of her GML §207-c benefits, seeking to have the full salary benefits paid without reduction. After County denials, the matter went to arbitration per the CBA. The Arbitrator found "that the County did not have justification for taking deductions against [Bennett's] General Municipal Law 207-c wages" on the basis of the schedule loss of use award previously paid to Bennett.

LEGAL ANALYSIS AND DISCUSSION

There are only three "narrow grounds" to vacate an arbitrator's award, and those grounds are where the "[award] violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power." *Matter of New York City Transit Auth v. Transportation Workers' Union of Am.*, 14 NY3d 119, 123 (2010) (citation omitted);

Matter of Kowaleski (New York State Dept. of Correctional Servs), 16 NY3d 85, 91 (2010). "Outside of these narrowly circumscribed exceptions, courts lack authority to review arbitral decisions, even where 'an arbitrator has made an error of law or fact.'" *Kowaleski*, 16 NY3d 85, 91, *quoting Matter of Falzone (New York Cent. Mut. Fire Ins. Co.)*, 15 NY3d 530 (2010); *Matter of Walker (Read)*, 168 AD3d 1253 (3rd Dept. 2019)

Petitioners' position is essentially that since Bennett received a schedule loss of use award which represented, in part, permanent residual damage, Petitioner is entitled to utilize those payments made as a credit against future lost time from work. The County claims that if it is not allowed to take the reduction, then Bennett is receiving a double recovery-the schedule loss of use award made as a result of her permanent loss of use, as well as her regular salary. Petitioners assert that the Arbitrator exceeded his power because his award would violate a strong public policy against double recovery under GML §207-c and Workers' Compensation Law and, and would constitute a gift of public funds in violation of the State Constitution.

The Court of Appeals has stated that "[j]udicial restraint under the public policy exception is particularly appropriate in arbitrations pursuant to public employment collective bargaining agreements." *Matter of New York City Tr. Auth. v. Transport Workers*, 99 NY2d 1, 7. To that end, the Court has laid out a two prong test:

> First, where a court can conclude "without engaging in any extended factfinding or legal analysis" that a law "prohibit[s], in an absolute sense, [the] particular matters [to be] decided . . . by [arbitration]" (99 N.Y.2d at 8, 9 [citations and emphasis omitted]), an arbitrator cannot act. Second, an arbitrator cannot issue an award where "the award itself 'violate[s] a well-defined constitutional, statutory or common law of this State'" (id. at 11 [citation omitted]).

United Fed'n of Teachers, Local 2, AFT, AFL-CIO v. Bd of Educ. Of City School Dist. Of City of N.Y. 1 NY3d 72, 80 (2003), *quoting Matter of New York City Tr. Auth. v. Transport Workers*, 99 NY2d 1.

Petitioners assert a basis under the second prong, and claim that the Arbitrator's award violates a "well-defined constitutional, statutory or common law of this State" because it permits Bennett a double recovery and is equivalent to an impermissible gift of public funds.

Respondents contend that the Arbitrator properly concluded that Bennett's GML §207-c benefits could not be reduced because of the schedule loss of use award, and that there was no double recovery. They base their argument on three primary grounds: there is no statutory authority that would permit a reduction in GML §207-c benefits; GML §207-c establishes a floor of benefits and the County cannot reduce an officer's salary below that; and that even if this situation does represent a double recovery, that is still not a basis for the reduction of salary asserted by Petitioners. Therefore, Respondents seek to have the Arbitration Award confirmed.

The Arbitrator's Award observed that this appears to be a case of first impression. Thus, he reviewed the relevant statutory authority in coming to his conclusion. The Arbitration Award found that the Petitioner's position, and reduction of Bennett's salary, was not supported by the relevant statutes. The Arbitration Award gave careful consideration to the positions of the parties, and this Court concludes that the Arbitration Award correctly interpreted the various statutes, and that the Petitioners' request to vacate the Arbitration Award must be denied.

GML §207-c(1) provides that a correction officer "who is injured in the performance of his or her duties ... shall be paid by the municipality ... the full amount of his or her regular salary or wages ... until his or her disability arising therefrom has ceased." *See Matter of Park v. Kapica*, 8 NY3d 302 (2007); *Theroux v. Reilly*, 1 NY3d 232 (2003). Additionally, "[p]ursuant to General Municipal Law § 207-c (2), the [municipality] is permitted to discontinue its payments only if the ... officer receives benefits from one of three other sources--an accidental disability retirement allowance under Retirement and Social Security Law § 363; a disability retirement allowance under section 363-c of that statute; or a 'similar accidental disability pension provided by the pension fund of which he [or she] is a member.'" *Matter of McCaffrey v. Town of E. Fishkill*, 42 AD3d 22, 24 (3rd Dept. 2007), quoting GML 207-c(2). It is well established "that, as a remedial statute, section 207-c should be liberally construed in favor of the injured employees the statute was designed to protect." *White v. County of Cortland*, 97 NY2d 336, 339 (2002) (citation omitted).

An officer injured in the course of his or her employment could be eligible for Workers' Compensation benefits, as well as benefits under GML §207-c. Under the Workers' Compensation Law, there are two statutes which permit the municipality to be reimbursed for the GML §207-c payments it has made- Workers Compensation Law §25 and §30.

Workers' Compensation Law §25 (4)(a) directs that "[i]f the employer ... has made payments to an employee in like manner as wages during any period of disability, he shall be entitled to be reimbursed out of an unpaid instalment or instalments of compensation due, provided his claim for reimbursement is filed before award of compensation is made, or if insured, by the insurance carrier at the direction of the board." Under that section, "an employer's payment of wages to an employee during any period of disability shall be reimbursed out of unpaid installments of workers' compensation benefits." *Harzinski v. Endicott*, 126 AD2d 56, 57-58 (3rd Dept. 1987); *see, Matter of O'Brien v. Albany County Sheriff's Dept.*, 126 AD3d 1064 (3rd Dept. 2015). When an officer, who is injured in the line of duty and entitled to GML §207-c benefits reaches a point of maximum medical improvement, in some instances the officer may be entitled to additional compensation in the form of a schedule loss of use award under the Workers' Compensation Law, for his or her permanent injury. "[I]t is well settled that where a claimant receives a schedule loss of use award, the employer is entitled to full reimbursement of the payments made during the period of disability." *Matter of Collins v. Montgomery County Sheriff's Dept.*, 153 AD3d 1453, 1454 (3rd Dept. 2017) (citations omitted). "Unlike an award of weekly compensation for a disability, which is based upon the actual period during which an employee is disabled from earning full wages, liability for a schedule award arises as of the date of the accident, and the weekly rate and number of weeks specified in the schedule are merely the measure by which the total amount of the award is calculated; while the decisions often list the schedule award as covering certain dates, the schedule award 'is not allocable to any particular period of disability.'" *Matter of Newbill v. Town of Hempstead*, 147 AD3d 1191, 1192 (3rd Dept. 2017), *quoting Matter of LaCroix v. Syracuse Exec. Air Serv., Inc.*, 8 NY3d 348, 356 (2007) (other citations omitted).

In the present case, the Workers' Compensation Board issued various decisions finding lost time awards, and directed that the County be reimbursed. Then, upon a finding of permanency in May, 2014, the Workers' Compensation Board directed that the County be reimbursed the full amount of wages it had advanced pursuant to GML §207-c. The GML §207-c payments were made before the schedule loss of use award was made in 2014, and thus, the County could be reimbursed out of the schedule loss of use award.

Workers' Compensation Law § 30 (3) provides that "[n]o benefits, savings or insurance of the injured employee, independent of the provisions of this chapter, shall be considered in determining the compensation or benefits to be paid under this chapter, except that ... in case of any award of compensation to a member of a police force of any county ... any salary or wages paid to ... such member under and pursuant to the provisions of section two hundred seven-c of the general municipal law shall be credited against any award of compensation to such member under this chapter." The courts have recognized that this section "was added to 'avoid duplication of benefits to an injured police [officer], the combined total of which might exceed the salary [the officer] would have received for the period' had the injury not occurred." *Leone v. Oneida County Sheriff's Dept.*, 80 NY2d 850, 852 (1992) (quoting Mem of Indus Commr, Bill Jacket, L 1963, ch 280, § 2) (concluding that medical payments made by a municipality as a result of the injury cannot also be used as a credit against the schedule loss of use award); *Matter of Diegelman v. City of Buffalo*, 28 NY3d 231 (2016); *Matter of McCabe v. Albany County Sheriff's Dept.*, 129 AD3d 1348 (3rd Dept. 2015). It has also been noted that §30 was intended to ensure that a claimant's entitlement to awards under the Workers' Compensation Law are not influenced by other payments that a claimant might be able to receive. *Lombardi v. Brooklyn Gas Co.*, 306 AD2d 704 (3rd Dept. 2003) (citations omitted).

Bennett was entitled to, and granted, GML §207-c benefits following her original injury, as well as subsequent to the additional period of lost time in October, 2017. The medical reports show that the lost time in October, 2017 was attributable to the work injury from May, 2008, and that was not disputed by the County. *See e.g. Scofield v. City of Beacon Police Dept.*, 290 AD2d

845 (3rd Dept. 2002). Thus, if the schedule loss of use award was made after all the GML §207-c payments had been issued, there is no dispute that the County would have been entitled to full reimbursement. *Id.* However, the difference in this case is that the lost time at issue came after the schedule loss of use award.

Petitioners claim that if they are not permitted to reduce Bennett's GML §207-c benefits by the Workers' Compensation benefits she has already received, then she would be, in effect, obtaining a double recovery. Petitioners contend that the proper reading of GML §207-c and Workers Compensation Law §30(3) would be to allow them to offset the salary payments, and in so doing, avoid a double recovery.

Because §25(4) and §30 "are related statutes in the Workers' Compensation Law, they 'must be construed together unless a contrary legislative intent is expressed, and courts must harmonize the related provisions in a way that renders them compatible.'" *Matter of O'Brien v. Albany County Sheriff's Dept.*, 126 AD3d 1064, 1066, *quoting Matter of Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington*, 97 NY2d 86, 91 (2001). "If by any fair construction, a reasonable field of operation can be found for [both of these related] statutes, that construction should be adopted." *People v. Newman*, 32 NY2d 379, 390 (1973), *cert denied* 414 US 1163 (1974) (internal quotation marks and citation omitted). "Workers' Compensation Law §§ 25 and 30 both provide a right to reimbursement out of future benefits, with section 30 being more specific regarding the statutory basis for the wage replacement payments sought to be reimbursed." *Matter of O'Brien v. Albany County Sheriff's Dept.*, 126 AD3d 1064, 1066. General Municipal Law §207-c benefits are a subset of Workers' Compensation benefits, applying only to the law enforcement profession. *Matter of Campo v. City of Mount Vernon*, 156 AD3d 694 (2nd Dept. 2018). In the case of injured law enforcement officer, both GML §207-c and the Workers' Compensation Law are implicated and "[t]he provisions of the Workers' Compensation Law and the General Municipal Law providing for payment of benefits reveal an integrated legislative scheme that 'should [not] be construed as being antagonistic and hostile in their approach to the same problem.'" *O'Dette v. Parton*, 190 AD2d 1074 (4th Dept. 1993), *citing*

Matter of McKay v. Town of W. Seneca, 51 AD2d 373, 380 (3rd Dept. 1976)

Under Workers' Compensation Law §30(3), payments made under GML §207-c are credited against payments under the Workers' Compensation Law (e.g. a schedule loss of use award). Thus, the Workers' Compensation award to the injured employee is reduced. *See O'Dette v. Parton*, 190 AD2d 1074, 1075 ("the municipal corporation paying [GML 207-c] benefits receives a credit against those benefits to which the employee is entitled pursuant to the Workers' Compensation Law."). There is nothing specifically contained in §30(3) suggesting that the converse is true-that a municipality can reduce the GML §207-c payments on account of the Workers' Compensation award.

Similarly, Workers' Compensation Law §25(4) also allows reimbursement for wages advanced (e.g. GML 207-c payments) out of unpaid Workers' Compensation awards. Again, those wage payments serve to reduce the amount of a Workers' Compensation award, but §25(4) says nothing about reducing the GML §207-c benefits. A plain reading of §25(4) and §30(3) supports the conclusion that if any reduction is to be taken to avoid a duplication of benefits, it must come by way of a reduction of the Workers' Compensation benefits.

Furthermore, the plain language of §25(4) states that the employer can take a credit for wages advanced out of unpaid Workers' Compensation awards. Here, the schedule loss of use award has already been paid, so the statute does not apply. If, in the future, Bennett becomes entitled to an additional Workers' Compensation award by virtue of an increased schedule loss of use, then the County could once again get a credit, and reimbursement, out of the Workers' Compensation award.

As noted above, GML §207-c(2) sets forth the situations when a reduction or cessation of salary benefits is allowable. However, GML §207-c does not contain any language authorizing a reduction based upon the receipt of any Workers' Compensation benefits. Thus, the Court agrees with the Arbitrator that there is no specific statutory authorization, under the Workers'

Compensation Law or under GML §207-c that would permit the reduction of Bennett's GML §207-c payments.

Nor is the Court convinced that this situation presents a "double recovery" for Bennett. First, as the Court of Appeals noted in *Balcerak v. County of Nassau*, 94 NY2d 253 (1999) "the issue involving the entitlement to benefits in the General Municipal Law setting is not necessarily the same one decided in a Workers' Compensation determination. The latter forum features a more lenient and more inclusive standard of covered activity than is intended to be covered and compensated in a General Municipal Law § 207-c benefits universe. The burdens, procedures and prescribed benefits are also significantly distinct between the two statutory formulas." *Balcerak*, 94 NY2d at 261. Workers' Compensation Law §25(4) and §30 have a different interpretation and application than the General Municipal Law, and absent statutory authority, benefits from one are not necessarily the same as benefits from the other. In point of fact, the schedule loss of use award represents a permanent residual impairment, while GML §207-c is paid specifically for lost time associated with an injury in the performance of duty. Thus, the awards or benefits under the two systems are not necessarily "duplicative." The Court also cannot conclude that the benefits are "doubled." As mentioned earlier, the County may actually become entitled to additional reimbursement in the event Bennett receives an increased schedule loss of use. If that occurs, the County's reimbursement is simply delayed. Although it is entirely possible that there may not be an increase in the schedule loss of use, the Court cannot say at this point that the benefits are actually doubled. Additionally, rather than Bennett actually getting a "double recovery", delaying any reimbursement to the County at this point is actually consistent with the mandate of Workers' Compensation Law §25(4) that the reimbursement come out of unpaid Workers' Compensation benefits.

Even if it can be said that Bennett's factual situation might present a double recovery, this still does not amount to a violation of a strong public policy that would merit vacatur of the Arbitrator's Award. In *Matter of McCaffrey v. Town of E. Fishkill*, 42 AD3d 22, the municipality sought to reduce an injured officer's GML §207-c benefits based on the officer being approved

for Social Security Disability Insurance ("SSDI") Benefits. The Town argued that if the officer received full GML §207-c benefits, plus his SSDI benefits, he would be making more than he did while working. The Second Department noted that GML §207-c(2) only permits reduction of GML §207-c benefits if the officer is approved for accidental disability retirement under Retirement and Social Security Law §363, or a disability retirement under §363-3 of that statute, or a similar accidental disability pension provided by the pension fund of which he is a member. The court concluded that SSDI benefits did not fit in any of those 3 categories, and therefore reduction of GML §207-c payments would not be allowed. The *McCaffrey* court also noted that, in fact, the claimant's SSDI benefits should be reduced by the claimant's GML §207-c payments, not the other way around. However, even if claimant's SSDI was not reduced, "the mere fact that the petitioner is receiving both payments is not a basis for the reduction. Payments pursuant to General Municipal Law § 207-c constitute the disabled officer's salary and wages, not some additional compensation for the disability that is limited by the loss the officer has suffered..." *Matter of McCaffrey v. Town of E. Fishkill*, 42 AD3d 22, 29. The Second Department also noted that GML §207-c directs the municipality to actually pay the officer's regular salary, subject only to the enumerated setoffs, and "thereby implying, if not stating directly, that the [municipality] is obligated to pay the officer's full compensation, regardless of any payments from a collateral source that may be available to the officer." *Id.*

As *McCaffrey* illustrates, the legislative history surrounding GML §207-c as well as GML §207-a (applying to firefighters) shows the Legislature has been aware that there are certain circumstances where an injured firefighter or law enforcement officer may receive an amount higher than when they were working. Nevertheless, the Legislature has only authorized limited bases to setoff or discontinue GML §207-c payments. The Legislature has not authorized a reduction of GML §207-c payments based on the receipt of a prior schedule loss of use award, and the Court cannot create an exception where the Legislature has specifically identified the situations where a setoff is allowable but did not include the current scenario. In the absence of a setoff for Workers' Compensation schedule loss of use awards in GML §207-c, the canon of construction of *expressio unius est exclusio alterius* applies, and the Court can infer that the

expression of specific exemptions in the statute indicates an exclusion of others. *See Uribe v. Merchants Bank*, 91 NY2d 336 (1998). Thus, by identifying the specific circumstance where a setoff is permitted against GML §207-c benefits, other bases are excluded. Under this reasoning and statutory construction, Bennett's receipt of full GML §207-c does not constitute a violation of strong public policy, but reflects compliance with applicable law. The statutes and caselaw require her payments to continue without reduction, and the Arbitrator's Award was consistent with a reading of the relevant statutes and decisional law.

CONCLUSION

Based upon the foregoing discussion, the Court concludes and finds that Petitioners have failed to establish that the Arbitration Award should be vacated. Accordingly, the Petition is DISMISSED. Respondents' request to have the Arbitration Award confirmed is GRANTED, and the Court directs that Judgment be entered consistent herewith.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

ENTER:

Dated: May 3, 2019
Elmira, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice

The Court reviewed the following documents in connection with the instant application:

1. Notice of Petition dated November 27, 2018 with annexed Verified Petition dated November 27, 2018 with Exhibits; Petitioner's Memorandum of Law dated November 27, 2018;

2. Verified Answer dated January 22, 2019, with Exhibits; Affirmation of A. Andre Dalbec, Esq., dated January 22, 2019; Memorandum of Law in Support of Respondent, dated January 22, 2019.