Ogdensburg Professional Firefighters' Assn., Local 1799 v City of Ogdensburg
2021 NY Slip Op 31305(U)
January 11, 2021
Supreme Court, St. Lawrence County
Docket Number: EFCV-20-158986
Judge: Mary M. Farley
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STATE OF NEW YORK

SUPREME COURT COUNTY OF ST. LAWRENCE

OGDENSBURG PROFESSIONAL FIREFIGHTERS' ASSOCIATION, LOCAL 1799,

Petitioner,

- against -

THE CITY OF OGDENSBURG, NEW YORK,

Respondent.

Index No. EFCV-20-158986

DECISION & ORDER

IAS No. 44-1-2020-0646

Appearances: Blitman & King, LLP, (Nathaniel G. Lambright, Esq., of counsel), attorneys for Petitioner; Coughlin & Gerhart, LLP (Paul J. Sweeney, Esq., of counsel), attorneys for Respondent.

FARLEY, J.

Petitioner Ogdensburg Professional Firefighters, Local 1799 ("Petitioner" or "Union") commenced this special proceeding under New York Civil Practice Law and Rules ("N.Y.C.P.L.R.") Art. 75 against Respondent City of Ogdensburg, New York ("Respondent" or "City") by Order to Show Cause (NYSCEF Doc. 23) signed by the Court on December 28, 2020. Before the Court is the Union's request for a preliminary injunction pursuant to C.P.L.R. § 7502 (c) prohibiting the City from reducing the number of bargaining unit members employed by the City's fire department below 27 due to budgetary reasons; reducing the number of fire department bargaining unit members below 24; and, "failing to comply with its [the City's] obligations" under the parties' 2020-2025 Collective Bargaining Agreement ("Agreement") (Doc. 3). The Petition seeks injunction relief relating to staffing levels pending arbitration. It does not seek an order to compel or stay arbitration pursuant to C.P.L.R. § 7503. On this point, the City's January 6, 2021 Verified Answer (Doc. 25) avers there is no pending arbitration. Having reviewed in detail the parties' written submissions and heard oral argument of counsel by virtual

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means on January 8, 2021 (transcribed on the stenographic record), and for the reasons that follow, the Court now denies the Union's application for preliminary injunction.

SUMMARY OF FACTS AND ALLEGATIONS

On or about November 22, 2019, the Union and City entered into the Agreement, which both parties ratified pursuant to the Taylor Law, and which is for the period of six (6) years commencing January 1, 2020, and ending December 31, 2025. The Petition alleges that, on or about December 9, 2020, the City Council voted, as part of the 2021 fiscal year budget, to reduce fire department staffing by seven positions -- from 27 to 20 -- effective January 1, 2011. Petition (Doc. 1) at ¶ 9; see Affidavit of City Manager Stephen Jellie ("Jellie") (Doc. 16) ("Jellie aff.") at ¶ 9. Petitioner alleges that it grieved this reduction, and that its grievance was denied at Step 1 and Step 2 of the Agreement's grievance procedure on December 11, 2020. Petition at ¶ 34.[1]

The parties cite to specific provisions of the Agreement to support their respective positions. The Union relies upon several provisions of Article 18, titled "Compensation & Staffing," as well as Article 20, titled "Vacancies." In pertinent part, Article 18 provides:

> c) Hazard Pay - Any bargaining unit employee assigned to a shift with less than 6 assigned members shall receive $3 per hour in addition to their regular salary, with an additional $3 per hour added for each subsequent reduction to the number of assigned shift members [ ]. This section 18 c) Hazard Pay shall apply for the period of this contract only or until a successor agreement is reached.
>
> d) There shall be 4 shifts of bargaining unit employees and each shift must have an officer structure of one Assistant Chief, one Captain, with the remaining shift members being Firefighters.

[1] Jellie avers the Union did not comply with Steps 1 and 2. Jellie aff. at ¶ 7. The Court received the Order to Show Cause on Monday, December 21, 2020, and did not sign it until Monday, December 28, 2020, solely for the purpose of accommodating the "Step Three" grievance process set forth in Article 22 of the Agreement.

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e) A minimum of 5 bargaining unit employees (4 firefighters plus 1 officer, or 3 firefighters plus 2 officers) shall be on-duty at all times unless otherwise mutually agreed to in writing for the period of this contract.

f) During the life of this contract the total complement of bargaining unit employees may not be reduced between the numbers of 28 and 24 due to budgetary reasons or the abolishment of positions but only if the employee retires or is lawfully removed pursuant to the Civil Service Law.
Id. (emphases added).

Article 20 provides, in pertinent part:

> When a vacancy occurs in any competitive class of Firefighter within the Fire Department, such that the full-time staffing falls below 24, such vacancy will be filled as soon as practical [sic] from a Civil Service eligibility list.
> Id. (emphases added).

The City's Memorandum of Law ("Memorandum") (Doc. 19) cites to and relies upon these same provisions. The City asserts -- and the Union does not disagree -- that the Agreement was negotiated during a period of severe financial distress for the City. Jellie aff. at ¶ 6; see Memorandum at 19.

The Union argues: (1) "[a] reduction from 27 members to 24 members may occur only if employees retire or are removed lawfully"; (2) the "minimum complement provisions [of the Agreement] were negotiated and enforced to ensure safe, effective and expedient fire protection services"; (3) the announced abolition of seven (7) positions (from 27 to 20) will violate the Agreement because staffing each shift with five (5) members "would be effectively impossible"; and, (4) reduction below "the minimum complement of 24" runs contrary to the express Agreement. See Affidavit of Jason Bouchard ("Bouchard") (Doc. 2) ("Bouchard aff.") at ¶¶ 15, 20, 27-29. In support of its request for preliminary injunction in aid of arbitration pursuant to C.P.L.R. § 7502 (c), the Union asserts -- principally for health and safety reasons -- it will suffer irreparable harm that cannot be undone by an arbitration award. See Petition at ¶ 38.

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DISCUSSION

The only issue before the Court is the Union's request, pursuant to N.Y. C.P.L.R. § 7502 (c), for the provisional remedy of preliminary injunction in connection with an arbitration which it asserts it will commence if its Step 3 grievance is denied. See Petition at ¶¶ 13, 36, 45, 48; Bouchard aff. at ¶ 8. In pertinent part, this section, titled "Provisional remedies", provides:

> The supreme court [ ] may entertain an application for [ ] 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. The provisions of [article] 63 [preliminary injunctions] of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose), except that the sole ground for the granting of the remedy shall be as stated above.
> Id. (emphases added).

The Union argues that failure by the Court to enjoin the City's anticipated staff reductions would render a later arbitration which it anticipates commencing (see Petition at ¶ 35) ineffectual, and that the usual test for a preliminary injunction has been met.

Taken together, C.P.L.R. § 7502 (c) and the well-established test for preliminary injunctions set forth four requirements for an injunction "in connection with an arbitration": (1) any award in arbitration "may be rendered ineffectual" if a preliminary injunction is not granted; (2) a probability of success on the merits; (3) danger of irreparable injury in the absence of an injunction; and, (4) a balance of the equities in movant's favor. E.g., Matter of Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd., 53 A.D.3d 612, 613 (2d Dep't 2008); Founders Ins. Co. Ltd. v. Everest Natl. Ins. Co., 41 A.D.3d 350, 351 (1st Dep't 2007); see Biles v. Whisher, 160 A.D. 3d 1159, 1160 (3d Dep't 2018). A preliminary injunction constitutes "drastic relief," which is not routinely granted. Marietta Corp. v. Fairhurst, 301 A.D. 2d 734, 736 (3d Dep't 2003).

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The burden on a motion for preliminary injunction is heavy, and lies with the movant. Village of Cazenovia v. Cazenovia College, 161 A.D. 2d 986, 987 (3d Dep't 1990). "A court evaluating a motion for a preliminary injunction must be mindful that the purpose of a preliminary injunction is to maintain the status quo and not to determine the ultimate rights of the parties." 538 Morgan Ave. Props., LLC v. 538 Morgan Realty, LLC, 186 A.D.3d 657, 659 (2d Dep't 2020) (internal quotation marks and citations omitted). "Whether a party is entitled to a preliminary injunction is a determination entrusted to the sound discretion of the motion court." Eastview Mall, LLC v. Grace Holmes, Inc., 182 A.D.3d 1057, 1058 (4th Dep't 2020). "As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court." Congregation Erech Shai Bais Yosef, Inc. v. Werzberger, __ A.D.3d __, 2020 Westlaw 7380005 at * 2 (2d Dep't Dec 16, 2020); accord: Laker v. Association of Property Owners of Sleepy Hollow Lake, Inc., 172 A.D.3d 1660, 1663 (3d Dep't 2019).

A. Will Arbitration Award be "Rendered Ineffectual" Without a Preliminary Injunction?

Together with Petitioner's application seeking a preliminary injunction, by Order to Show Cause, it also sought a temporary restraining order ("T.R.O.") pending the Court's determination on the preliminary injunction. In denying Petitioner's request for T.R.O., this Court expressly relies upon the first requirement -- stated in C.P.L.R. § 7502 (c) -- concluding that it "fails to find that any award to which Petitioner may be entitled [through arbitration] would be rendered ineffectual by failure to grant the T.R.O." Order to Show Cause (Doc. 23), at pg. 2. Similarly, the Court concludes any arbitration award which might later be rendered in the Union's favor will not be rendered ineffectual by the failure to grant a preliminary injunction in this special proceeding. If the Union is successful, harm to the Union or its members may be remedied by the awards of

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reinstatement, back pay, and accrued but unpaid benefits. See Matter of G Bldrs. IV, LLC v. Madison Park Owner, LLC, 84 A.D.3d 694, 695 (1st Dep't 2011) (arbitration relief not rendered ineffectual when "damages would be quantifiable"). The Court concludes the Union has not met its burden of showing that any award through arbitration would be "rendered ineffectual" by denial of a preliminary injunction.

B. Likelihood of Success on the Merits

Despite concluding that denial of a preliminary injunction will not render an arbitration award ineffectual being fully dispositive of the Petition, the Court also addresses the remaining three elements applicable to Petitioner's application. The first element requires the Union show, "by clear and convincing evidence, a likelihood of success on the merits." Platinum Equity Advisors, LLC v. SDI, Inc., 132 A.D.3d 420, 420 (1st Dep't 2015). "[A] likelihood of success on the merits '[ ] means a strong showing in affidavits and other proof supplying evidentiary detail.'" Smith v. City of Albany, 115 A.D.2d 825, 826 (3d Dep't 1985) (emphases added) (*quoting* Siegel, N.Y. Prac at § 328); Rural Community Coalition, Inc. v. Village of Bloomingburg, 118 A.D.3d 1092, 1095 (3d Dep't 2003) ("strong showing" of likely success on the merits required).

In asserting the Union is unlikely to succeed on the merits, the City argues principally that the Agreement language at issue constitutes a job security clause which, as a matter of public policy, may not be enforced through arbitration. Here, the City relies upon the Court of Appeals' decision in Matter of Johnson City Professional Firefighters Local 921 (Village of Johnson City), 18 N.Y.3d 32 (2011). In that case, respondent Village of Johnson City terminated six firefighters, which the union asserted violated a "no layoff" clause in the Collective Bargaining Agreement ("CBA"). The Court of Appeals stated:

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> This Court has long held that a purported job security provision does not violate public policy, and therefore is valid and enforceable, only if the provision [1] is explicit, [2] the CBA extends for a reasonable period of time," and [3] the CBA was not negotiated in a period of a legislatively declared financial emergency between parties of unequal bargaining power.

Id. at 37 (internal quotation marks and citations omitted). To be arbitrable, job security clauses must meet this "stringent test." Id. The City argues that the provisions upon which the Union relies (1) are job security clauses which (2) do not meet this stringent test. The City therefore asserts they are not enforceable in arbitration. Memorandum at 10.

Several decisions have addressed whether particular language in collective bargaining agreements ("CBA's") involving public employers and employees constitutes "job security" clauses and, if so, whether they may be enforced in arbitration. In Matter of City of Plattsburgh (Plattsburgh Permanent Firemen's Assn.), 174 A.D.3d 1017 (3d Dep't 2019), the CBA between the City and the local firefighters' union included provisions which "prohibited layoffs, required minimum staffing levels of 36 firefighters and obligated petitioner to fill vacancies to maintain the agreed-upon minimum staffing levels." 174 A.D.3d at 1017. Because the Agreement required vacancies be filled "'as soon as possible' when staffing fell below [the parties'] agreed upon minimum," Plattsburgh Permanent Firemen's Assn. concluded the contract language comprised a job security clause. Id. at 1018. Rejecting the union's argument that the staff reduction provisions implicated safety concerns, the Third Department stated that, "[i]n light of the potentially drastic effects that [the City's] waiver of the right to adjust future staffing levels entails, a clause that addresses both job security and safety concerns is considered a job security clause that must meet this stringent test to be enforceable." Id. at 1018 (quoting Matter of Johnson City) (emphasis added). The Third Department quoted Matter of Johnson

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City for the proposition that "[a] purported 'job security' clause that is not explicit in its terms is violative of public policy, rendering it invalid and unenforceable." Id. (citation omitted).

Plattsburgh Permanent Fireman's Assn. expressly distinguished the Court of Appeals' determination in Matter of Burke v. Bowen, 40 N.Y.2d 264 (1976). In its 2020 decision, Matter of Village of Endicott (Village of Endicott Police Benevolent Assn., Inc.), 182 A.D.3d 738 (3d Dep't 2020), the Third Department distinguished Plattsburgh Permanent Fireman's Assn. based on the specific language of the CBA then at issue. The CBA in Matter of Burke -- also involving firefighters -- included "explicit language" that, "in no event shall the presently agreed upon minimum [staffing] be readjusted downward." Plattsburgh Permanent Fireman's Assn., 174 A.D.3d at 1019 (*quoting* Burke, 40 N.Y.2d at 266). In distinguishing Plattsburgh Permanent Fireman's Assn., the Third Department in Village of Endicott Police Benevolent Assn. concluded that the contract language at issue -- which "merely provide[d] for minimum staffing on particular shifts" -- was not a job security provision at all. 182 A.D.3d at 741. As a result, the "stringent test" in Matter of Johnson City simply did not apply.

Owing to the discrete relief being sought in this special proceeding, the Court does not express an opinion as to whether the language in the Agreement cited by the parties comprises either "job security provision(s)" or, if so, whether public policy bars submission to arbitration. Likewise, the Court does not resolve any arguments as to whether the duration of the alleged job security provision (six years) either exceeded a "reasonable period of time" (Memorandum at 18-19) or was "negotiated in a time of severe economic duress" (id. at 19) so as to render the issue non-arbitrable, lessening the Union's likelihood of success on the merits. The Court also does not address the

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City's assertion that, because it has abolished firefighter positions, Article 20, which concerns "Vacancies", is inapplicable. Instead, the question is simply whether the Union has made a "strong showing" (Smith, Rural Community Association, Inc.), by "clear and convincing evidence" (Platinum Equity Advisors, LLC) of likelihood of success on the merits. The Court concludes it has not.

C. Irreparable Harm

The Court next considers the danger, if any, of irreparable harm if a preliminary injunction is not granted. Here, the Union asserts that the staffing changes which will result from the City's planned reduction in staffing will jeopardize the health and safety of firefighters, arguing, among other things, that it is "inherently unsafe to respond to a fire and enter a burning building with less than five firefighters"; they have not been trained to operate with less than five members on duty; the ability to respond to simultaneous alarms is impeded; and, the effects of COVID "will not allow enough members to backfill in the event an entire shift is infected." See Petition at ¶ 38. In response, the City asserts it will lessen or eliminate these health and safety concerns by "immediately call[ing] for mutual-aid support to reports of significant emergencies (i.e. structural fires) instead of the old policy of waiting until [City] personnel are recalled", and thereby "provide effective firefighting with reduced manning levels." Jellie aff. at ¶ 8. The City also argues that "the affected firemen [sic] will be made whole by the award of money damages in the event that they prevail." Memorandum at 23. The City further points to CBA Article 18 (c) -- quoted above -- which provides hazard pay of an additional $3 per hour for firefighters "assigned to a shift with less than 6 assigned members"; from this, the City asserts the parties "have contemplated staffing levels below five firefighters per shift [ ]." Memorandum at 13 (underlining in original).

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It is well established that, "if the [party seeking preliminary injunction] has an adequate remedy at law and may be fully compensated by monetary damages, a preliminary injunction will not be granted." Roushia v. Harvey, 260 A.D.2d 687, 688 (3d Dep't 1999) (citation omitted). "[I]njunctive relief is inappropriate where [ ] the party seeking that relief has an adequate remedy at law." Matter of Camp Scatico v. Columbia County Dept. of Health, 277 A.D.2d 689, 690 (3d Dep't 2000). "Economic loss, which is compensable by money damages, does not constitute irreparable harm." EdCia Corp. v. McCormick, 44 A.D.3d 991, 994 (2d Dep't 2007) (citations omitted); accord: Di Fabio v. Omnipoint Communications, Inc., 66 A.D.3d 635, 636-37 (2d Dep't 2009). "Damages compensable in money and capable of calculation, albeit with some difficulty, are not irreparable." Chiagkouris v. 201 W. 16 Owners Corp., 150 A.D. 3d 442, 442 (1st Dep't 2017) (emphasis added; internal quotation marks and citation omitted).

In addition, "[b]are conclusory allegations [of irreparable harm] are insufficient to support a motion for a preliminary injunction." Kaufman v. International Bus. Machs. Corp., 97 A.D. 2d 925, 926 (3d Dep't 1983), aff'd, 61 N.Y. 2d 930 (1984). "The prospect of irreparable harm must be imminent, not remote or speculative." White v. F.F. Thompson Health System, Inc., 75 A.D.3d 1075, 1076 (4th Dep't 2010) (internal quotation marks and citations omitted). "The movant [for a preliminary injunction] must show that the irreparable harm is 'imminent, not remote or speculative.'" Family-Friendly Media, Inc. v. Recorder Tel. Network, 74 A.D. 3d 738, 739 (2d Dep't 2010) (citation omitted).

Much, or all, of the loss about which the Union complains derives from lost wages and fringe benefits. This loss may be recompensed by monetary awards.

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Further, although the Union expresses legitimate health and safety concerns, the City's response indicates that increased use of mutual aid will eliminate or lessen the risks of the inherently dangerous task of firefighting. Although the City's anticipated actions may not eliminate the possibility of irreparable harm resulting from the Union's health and safety concerns, the Union has not shown the possibility of harm to be "imminent, not remote or speculative" (White, Family Friendly Media, Inc.).

D. Balancing of Equities

The final element of the test for whether to grant a preliminary injunction here requires the party seeking such relief -- the Union -- demonstrate a balancing of equities "tipping in the moving party's favor." Doe v. Axelrod, 73 N.Y. 2d 748, 750 (1988); see Biles, 160 A.D.3d at 1160. "Such a balancing involves an inquiry whether the irreparable injury to be sustained [ ] is more burdensome [to the petitioner] than the harm caused to [respondent] through imposition of the injunction." Felix v. Brand Serv. Group LLC, 101 A.D.3d 1724, 1726 (4th Dep't 2012) (internal quotation marks and citation omitted); accord: Eastview Mall, LLC, 182 A.D.3d at 1059 (*quoting* Felix); Lombard v. Station Sq. Inn Apts. Corp., 94 A.D.3d 717, 721-22 (2d Dep't 2012). "Plaintiffs must show that the irreparable injury to be sustained by them is more burdensome to them than the harm caused by defendants through imposition of the injunction." Metropolitan Package Store Ass'n v. Koch, 80 A.D.2d 940, 941 (3d Dep't 1981) (citation omitted).

According to the City, its action in reducing staffing is driven by "severe financial distress." Jellie aff. at ¶ 6. "When factoring in the cost of salary, special pays and stipends, longevity, fringe benefits (including health insurance) and New York State Retirement System contributions, the [anticipated] cost of employing a City firefighter in

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2020 will be on average $ 131,968.00 per firefighter, which is not sustainable for the City under any circumstances." Id. at ¶ 9. The harm to the Union and its members -- loss of employment with benefits, as well as potential increase in personal risk for those who continue to work under reduced staffing -- is also severe. Nonetheless, the Court must conclude that the Union has not carried its burden of showing the equities sufficiently tip in its favor to merit a preliminary injunction here.

CONCLUSION

For the foregoing reasons, the Court denies Petitioner's request for a preliminary injunction, and dismisses the Petition.

SO ORDERED.

DATED: January 11, 2021, at Chambers, Canton, New York.

MARY M. FARLEY, J.S.C.

ENTER:

{Decision & Order, and moving papers filed}

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