At a term of Supreme Court held in and for the County of Jefferson, in the City of Watertown, New York on the 16th day of January, 2018

PRESENT: HONORABLE JAMES P. McCLUSKY
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF JEFFERSON

In the Matter of the Application of

CITY OF WATERTOWN,

Petitioner,

-vs-

WATERTOWN PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCAL 191

Respondent.

For an Order pursuant to Article 75 of the Civil Practice Law and Rules

MEMORANDUM DECISION AND ORDER

Index No. 2017-2670

RJI No. 22-17-1042

Petitioner City of Watertown (City) commenced this proceeding pursuant to CPLR Article 75 seeking a permanent stay of arbitration of a grievance filed by Respondent, Watertown Professional Firefighters Association, Local 191 (Firefighters). In its grievance and demand for arbitration the Firefighters allege that the City violated, among other things, the parties' collective bargaining agreement (CBA) by failing to maintain the minimum staffing levels and failing to backfill positions of firefighters out on sick leave.

In deciding an application to stay arbitration under CPLR §7503, Courts do not determine the merits of the grievance and instead determine whether the subject matter of the grievance is arbitrable. "Proceeding with a two-part test, we first ask whether the

parties may arbitrate the dispute by inquiring if there is any statutory, constitutional or public policy prohibition against arbitration of the grievance...If no prohibition exists, we then ask whether the parties in fact agreed to arbitrate the particular dispute by examining their [CBA]. If there is a prohibition, our inquiry ends and an arbitrator cannot act", *Matter of County of Chautauqua v. Civil Serv. Empls. Ass'n, Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chautauqua County Local 807, 8 N.Y.3d 513,519,869 N.E.2d 1, 838 N.Y.S.2d 1.*

The City argues that the minimum manning clauses in Article 5 §4b and Article 5 §8 are against public policy. The CBA requires a minimum of 15 members for each shift and requires additional firefighters to be called in to cover any firefighter that calls in sick or is otherwise unavailable for work. The City posits that this is a job security provision.

The Court of Appeals has "long held that a purported job security provision does not violate public policy, and therefore is valid and enforceable, only if the provision is 'explicit', the CBA extends for a 'reasonable period of time,' and the CBA 'was not negotiated in a period of legislatively declared financial emergency between parties of unequal bargaining power." (Citations omitted) *Johnson City Professional Firefighters Local 921 v. Village of Johnson City, 18 N Y 3d 32, 37.* A purported "job security" clause that is not explicit is violative of public policy, rendering it invalid and unenforceable. *Id at 37.* This Court must determine if the clause is a job security clause, and if it is, determine if the clause is sufficiently explicit.

Unfortunately this Court can not find a definition of a "job security" clause. The Court does note that the Court of Appeals at times puts the term 'job security' in quotes (*see* Johnson City) suggesting that a job security clause can come in many forms. The

public policy behind the prohibition of job security clauses is that it is the purview of the legislative body to control the number of employees and cost of that employment.

In *Burke v. Bowen, 40 N Y 2d 264,* the Court of Appeals held that a clause requiring a minimum of six firefighters with a minimum compliment of thirty-four active firefighters to be a job security provision. This was so even though there was no provision indicating the municipality could not layoff employees.

Though the CBA does not specify a required minimum compliment of firefighters, Fire Chief Dale Herman has done the math and calculated the Fire Department needs a minimum compliment of 63.17 members to comply with the minimum manning clause. At this level overtime would be needed to cover any and all firefighter time off. The Fire Chief points out that at this level of staffing the firefighters may not be able to cover all shifts due to the requirement to allow for time off per the CBA and the fact that other required staff functions are not included in his calculations. Though the City has laid off firefighters since the minimum manning clause has been in effect, the overtime cost has risen substantially.

This Court does not read the Court of Appeals cases to require layoffs prior to the clause being considered a job security clause. (In other words, if the contract required a minimum number of 68 members and they currently had 80 members the clause is still a job security clause even though the City could layoff 12 members without violating the contract.) The Court believes the public policy protected by the Court of Appeals is not the right to layoff workers but rather the right of the elected officials to control the budget through managing the costs of employees. To rule otherwise would give the right to City to layoff 20 members and thus make it impossible for the firefighters to meet the minimum manning requirements of Article 5, yet the City could not take a less drastic measure that

would leave all current members employed.

This Court finds the provision is a job security provision. The Court must now determine if the provision is explicit, extends for a reasonable period of time, and was not negotiated in a period of legislatively declared financial emergencies between parties of unequal bargaining power. From a public policy standpoint, our requirement that a "job security" clause meet this stringent test derives from the notion that before a municipality bargains away its right to eliminate positions or terminate or lay off workers for budgetary, economic or other reasons, the parties must explicitly agree that the municipality is doing exactly so, and the scope of the provision must evidence that intent. "Absent compliance with these requirements, a municipality's budgetary decisions will be routinely challenged by employees, and its ability to abolish positions or terminate workers will be subject to the whim of arbitrators". *Johnson City (supra @ 37,38).* In other words, the staffing of a fire department (or police department or any other department) is entrusted to the elected officials who are answerable to the municipal residents.

The CBA does not indicate the City is signing away the ability to control the budget and resulting tax consequences. This job security clause does not indicate in any way the City is bargaining away its right to eliminate positions or workers for budgetary, economic or other reasons. The Court need not answer the other two factors based on it's finding on the first.

As such, it is

ORDERED that Article 5, Section 4 (b) and Article 5, Section 8 of the CBA is void as against public policy , and it is further

ORDERED that a permanent stay of arbitration is granted as to the demand for arbitration filed by the Respondent on or about December 5, 2017.

Dated: January 30, 2018
Watertown, New York

ENTER

JAMES P. McCLUSKY
Supreme Court Justice