

AMERICAN ARBITRATION ASSOCIATION

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In the Matter of the Arbitration

between

PROFESSIONAL FIREFIGHTERS ASSOCIATION  
OF NASSAU COUNTY, LOCAL 1588, IAFF

and

VILLAGE OF GARDEN CITY

Case No. 01-17-0005-1878  
(Fire Fighter Vincent DiBona's health insurance benefits)

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OPINION AND AWARD

Pursuant to the terms of a collective bargaining agreement, the undersigned Arbitrator was selected in accordance with the rules of the American Arbitration Association to hear and decide a dispute between the parties. A hearing was held on December 21, 2017, at the offices of Meyer, Suozzi in Garden City, New York, at which both parties appeared through counsel who submitted evidence and made arguments. The Union was represented by Richard Corenthal, Esq., and the Village was represented by Terry O'Neil, Esq., Christopher Kurtz, Esq. and Emily Iannucci, Esq. The parties also submitted post-hearing briefs. Based on the evidence presented and arguments made, the Arbitrator renders this Opinion and Award.

### Issue

At the outset of the hearing, the parties agreed to the following issues:

Is the grievance arbitrable? If so, did the Village violate Article IX, Section 6 and Article X, Section 1 of the collective bargaining agreement by terminating the health insurance of Fire Fighter Vincent DiBona? If so, what shall be the remedy?

### Facts

The facts, most of which the parties stipulated, are not in dispute. In September 2002, the Village employed Vincent DiBona as a full-time professional firefighter. Mr. DiBona is a member of the bargaining unit represented by the Union, and he is covered by the Agreement between the Village and the Union, which provides for sick leave, and for family health insurance benefits under the New York State Empire Plan, fully paid for by the Village. On March 17, 2016, Mr. DiBona was injured in the performance of his duties as a firefighter. He was out of work from March 17, through March 30, 2016, and returned to work from March 31, through June 30, 2016. However, Mr. DiBona has not returned to active duty as a firefighter since July 1, 2016. The Village paid Mr. DiBona sick leave benefits, and it processed Mr. DiBona's injury under the New York State Workers Compensation Law. The Village received compensation from the Workers Compensation Board for salary payments it made to Mr. DiBona after he was injured on March 17, 2016.

On August 4, 2017, the Village approved Mr. DiBona's request to receive benefits under General Municipal Law Section 207-a

in connection with the injury he sustained on March 17, 2016, and it granted Mr. DiBona Section 207-a status retroactive to June 30, 2017. Also on August 4, the Village sent Mr. DiBona a letter advising him that he would receive salary, longevity and health benefits that were associated with his injury, but that he "will no longer receive health insurance benefits effective August 31, 2017." The Union filed a grievance dated August 10, 2017, challenging the Village's termination of Mr. DiBona's health insurance benefits. The Village denied the grievance, and terminated Mr. DiBona's benefits effective August 31, 2017. The parties were unable to resolve the dispute, and this hearing occurred. In early September, the Village filed several motions, including a motion for a permanent stay of arbitration. The courts have denied the Village's motions, and appeals by the Village to stay the arbitration have also been denied.

The issues presented in this case require the Arbitrator to interpret Article IX, Section 6, which states as follows:

An employee shall receive holiday pay and earn vacation and disability sick leave for only the first year of a job related or non-job related disability leave but will continue to receive all other contract benefits. Employees who were on a job related leave on June 1, 1983 and who had not otherwise lost the right to receive holiday pay and earn vacation and sick leave under the prior contract shall continue to receive holiday pay and earn vacation and sick leave until their present leave terminates.

This provision has been in the parties' agreements since 1983, without any change. Before 1981, the agreements provided that for on the job injuries, employees would receive sick leave pay and worker's compensation equal to their salary for "not more than one

calendar year." The 1981-1983 agreement contained the same language, but provided that after one year, employees on disability leave would not receive any holiday pay, or earn vacation or sick leave. Other provisions cited by the parties, in relevant part, state as follows:

Article IX, Section 1(c):

Recurrent absence for an illness or disability that relates to an on the job injury that has been determined not to be eligible for 207-a benefits may be chargeable to intermittent sick leave.

Article IX, Section 7:

Employees who go out on sick leave after January 10, 2005, shall not earn vacation or be paid holiday pay for the period while on sick or workers compensation leave after ninety (90) consecutive work days.

Article X, Section 1

The Village shall pay the full cost of individual or family coverage in the New York State Empire Plan (Enhanced)....

Article XIV, Section 4:

The arbitrator shall have jurisdiction only over disputes arising out of grievances and shall have no power to add to, subtract from or modify in any way any terms of this agreement.

#### Positions of the Parties

In response to the Village's argument that the grievance in this case is substantively not arbitrable, the Union asserts that this is the same argument the Village has made, unsuccessfully, in the Supreme Court, and in the Appellate Division, Second Department. The Union contends that based on the decision of Supreme Court Judge Bruno, the Village is precluded by the doctrines of *res judicata* and collateral estoppel from re-litigating the arbitrability issue since

the Village has raised the same issue in the prior actions, which the courts have decided against the Village. The Union further contends that this dispute is arbitrable because the grievance concerning the Village's termination of Mr. DiBona's health benefits is "more than reasonably related" to the language of Article IX, Section 6 which, the Union argues, "expressly provides" that the Village provide "all other contract benefits," including health insurance benefits, for an employee out on a job-related injury covered by Section 207-a.

In addition, the Union argues that the case law supports its position by holding that only if the agreement is silent with respect to the benefits afforded to Section 207-a recipients, i.e., only if there is a "total absence" of an express provision in the agreement dealing with the rights or benefits of disabled employees, is the grievance deemed not arbitrable under a broad arbitration provision. The Union asserts that the Agreement is not silent, but that it expressly provides that employees on disability leave "will continue to receive all other benefits," aside from holiday pay and the right to earn vacation and disability sick leave, after the first year of disability leave, and that includes the health care benefits provided in Article X, Section 1. Thus, the Union submits that this grievance is substantively arbitrable.

On the merits, the Union argues that the Village violated the clear and unambiguous language of Article IX, Section 6 when it terminated Mr. DiBona's health coverage, which the Agreement requires the Village to pay in full. The Union points out that the Village acknowledges that Mr. DiBona was injured in the performance of his

duties, and that the Village approved him for Section 207-a benefits; thus, the Union insists that since Mr. DiBona is undisputedly on a job related disability leave, he is entitled to "continue to receive all other contract benefits," which includes family health benefits pursuant to Article X, Section 1. The Union also argues that the parties knew how to exclude benefits, as they did in Article IX, Section 7, and if they had wanted to exclude family health coverage for Section 207-a employees, they would have done so. The Union further argues that the Arbitrator should give meaning to all the provisions of the Agreement, and that to accept the Village's interpretation of the language of Article IX, Section 6 would render the clause meaningless, and would result in a forfeiture of benefits.

Finally, the Union asserts that in the negotiations for the 2015 Agreement, the Village made a proposal to terminate health insurance benefits after six months for employees on Section 207-a, that the Union rejected this proposal, and that the Village cannot get in arbitration what it failed to get in negotiations. For all of these reasons, the Union submits that the grievance should be sustained, that Mr. DiBona's individual and family health insurance should be reinstated, that he should be made whole for any costs he sustained as a result of the Village terminating his health insurance coverage, and that the Arbitrator should retain jurisdiction over this matter to resolve any issues that may arise under the Award, including any issues regarding remedy.

The Village contends that the grievance is neither arbitrable nor meritorious, and that both case law and public policy

prohibit the arbitration of this case. The Village argues that the Court of Appeals has clearly held that "the rights provided under Section 207-a are expressly limited to 'regular salary or wages,'" that "a collective bargaining agreement should not be ... construed to implicitly expand whatever compensation rights are provided under" Section 207-a, and that if the parties intend to expand the limited benefits provided to employees by Section 207-a, such "additional benefits must be expressly provided for in the agreement," because, otherwise, employees actually working would be discriminated against. The Village also cites other court decisions holding that in order for Section 207-a employees to be entitled to benefits in addition to those provided by statute, the collective bargaining agreement "must expressly provide that such benefits are applicable" to employees who receive Section 207-a benefits, and that a dispute is not arbitrable unless the agreement contains such explicit language.

The Village asserts that the Agreement does not contain any express language entitling Section 207-a firefighters to continue receiving health insurance coverage, and that Article IX, Section 6 "makes no reference to firefighters on 207-a, let alone the express reference required" by the courts. The Village argues that "express" means "stated explicitly, not merely implied," that "language is either express or it is not," and if the language does not expressly provide the additional benefits, as many agreements do, including the Village's agreement with its police officers, (who are statutorily covered by similar language under Section 207-c,) Section 207-a employees are not entitled to receive any additional benefits. The

Village contends that the language of Article IX, Section 6 is ambiguous, and cannot be properly read as expressly providing health insurance coverage for firefighters who are receiving benefits under Section 207-a, especially since Section 207-a is not even mentioned in Article IX, Section 6.

The Village further contends that the ambiguous language of Article IX, Section 6 must be read in light of the entire Agreement, that when read in light of Article IX, Section 7, it is clear that Article IX, Section 6 applies only to an employee while on sick or workers' compensation leave, and that Article IX, Section 1(c) shows that the parties were well aware of Section 207-a, and that they could have, but they did not provide for Section 207-a benefits in Article IX, Section 6. The Village also contends that neither the parties' bargaining history nor past practice should be considered in this case, that either the Agreement expressly provides that 207-a firefighters are entitled to health insurance coverage or it does not, and since Article IX, Section 6 does not make any reference to Section 207-a, the grievance must be denied.

According to the Village, the fact that the Union has resorted to extrinsic evidence shows the weakness of the Union's position, and supports the Village's position. The Village points out that the Union, in negotiations, sought to "Add language similar to PD," demonstrating the fact that the Agreement does not currently entitle employees receiving Section 207-a benefits to continue to receive health insurance coverage. As to the Union's reliance on an alleged past practice, the Village notes that any extra-contractual

past practice is within the exclusive jurisdiction of the New York State Public Employment Relations Board (PERB), and that the Union has filed an improper practice charge on this issue with PERB. Apparently, the Union alleges that in the past, the Village placed firefighters who sustained work-related injuries automatically on Section 207-a status, and they continued to receive all contract benefits while on disability leave. The Village disputes that such a practice exists, and contends that the Union has not provided proof that any firefighter other than Mr. DiBona was granted 207-a status.

Finally, the Village makes several other arguments why it should prevail - that case law, public policy and the language of the Agreement prohibit the Arbitrator from granting the relief sought by the Union, that the Union has offered no evidence or explanation as to how the Village has violated the Agreement, and that the Union is trying to get in arbitration what it was unable to get from the Village in negotiations, a benefit employees are not entitled to receive, especially since the Agreement provides that the Arbitrator has "no power to add to, subtract from or modify in any way any terms of this agreement." For all of these reasons, the Village submits that the grievance should be denied.

#### Discussion

If the Village had not granted Mr. DiBona Section 207-a status, the cases the Village cited would not be applicable, and Mr. DiBona would clearly be entitled to continue to receive the health insurance coverage that the Village had previously provided to him.

The clear and unambiguous language of Article IX, Section 6 states that "An employee shall receive holiday pay and earn vacation and disability sick leave for only the first year of a job related or non-job related disability leave but will continue to receive all other contract benefits." In other words, after the first year, an employee on disability leave no longer receives holiday pay, or earns vacation and disability leave, but he/she continues to receive "all other contract benefits," one of which is health insurance coverage.

In this case, the Village contends that Mr. DiBona is not entitled to continue to receive health insurance coverage once the Village granted him Section 207-a status because the case law does not permit employees on Section 207-a status to receive any benefits in addition to the statutory benefits unless those benefits are expressly provided for in the collective bargaining agreement, and, according to the Village, the parties have not expressly provided any additional benefits here. Thus, the question for the Arbitrator to decide is whether the language of Article IX, Section 6, which does not state in so many words that an employee on Section 207-a status will receive benefits in addition to those provided by Section 207-a, expressly provides for additional benefits.

As spelled out in the cases the Village has cited, the courts will not permit employees on Section 207-a status to receive benefits in addition to the benefits provided by the statute if the collective bargaining agreement is "entirely silent" as to the status of these disabled employees, which would require that the agreement be construed "to implicitly expand" the rights the statute provides

to disabled employees. As noted above, the collective bargaining agreement, in Article IX, Section 6, is not silent, but it expressly provides that employees on disability leave shall receive "all other contract benefits," one of which is health care coverage. Indeed, the parties agreed, over 35 years ago, that employees on disability leave would continue to receive additional benefits, including health coverage, after their first year of disability leave. In short, although Section 207-a is not mentioned in Article IX, Section 6, the parties have expressly agreed in the collective bargaining agreement to provide additional benefits, including health insurance coverage, to employees out on Section 207-a, and, apparently, in the past, the Village provided these benefits to all employees on disability leave.

In finding that the dispute was arbitrable, and holding that the merits of the grievance were subject to interpretation by an arbitrator, Judge Bruno came to some of the same conclusions as the Arbitrator. Once it is decided that the parties expressly agreed to provide additional benefits to employees on Section 207-a status, the dispute is substantively arbitrable, the Village's arguments based on the requirement that Section 207-a must be specifically mentioned become unavailing, and the Arbitrator need not consider bargaining history or past practice. There also is no public policy reason why the Arbitrator cannot grant the relief sought by the Union since the Union has established that the Village has violated the Agreement by failing to provide health benefits to Mr. DiBona. As a result, the Arbitrator is not adding anything to the terms of the Agreement.

Therefore, based on the facts and circumstances of this

case, and for the reasons explained, the Arbitrator issues the following

Award

The grievance is arbitrable. The Village of Garden City violated Article IX, Section 6 and Article X, Section 1 of the collective bargaining agreement by terminating the health insurance benefits of Mr. DiBona. The Village shall reinstate Mr. DiBona's individual and family health coverage, effective August 31, 2017, forthwith, and the Village shall make Mr. DiBona whole for the reasonable costs he incurred as a result of the Village terminating his health insurance coverage. The Arbitrator shall retain jurisdiction over any issue that arises regarding the interpretation or implementation of this Award.


It is so ordered.

  
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RICHARD ADELMAN

STATE OF NEW YORK )  
                          ) ss.:  
COUNTY OF NEW YORK)

I, RICHARD ADELMAN, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is my Award.

Dated: March 6, 2018

  
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RICHARD ADELMAN