STATE OF NEW YORK
SUPREME COURT

CLINTON COUNTY

PRESENT: HON. MARK L. POWERS
SUPREME COURT JUSTICE

DECISION and ORDER
Index No. 2017-1780
RJI Nos. 09-1-2017-0606

In the Matter of the Arbitration between
CITY OF PLATTSBURGH,
Petitioner,

-and-

PLATTSBURGH PERMANENT FIREMEN'S ASSOCIATION,
Respondent.

APPEARANCES:

For Petitioner:
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For Respondent:
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HON. MARK L. POWERS

Petitioner commenced two CPLR article 75 proceedings seeking to permanently stay arbitration and respondent cross-moved to compel arbitration. Both proceedings arise from petitioner's decision not to fill a firefighter position after a firefighter retired in June 2017. As a result, the total number of firefighters fell from 36 to 35. Petitioner states that it has not filled the position because it is allegedly facing a financial crisis that has already resulted in numerous lay-offs of employees in other departments.

This proceeding (Index No. 17-1780) arises from a grievance filed by respondent on August 22, 2017 asserting that petitioner's failure to employ a total of at least 36 firefighters violates the parties' collective bargaining agreement (hereinafter CBA). A second related proceeding (Index No. 17-1782), which is decided herewith in a separate Decision and Order, emanates from a grievance filed by respondent on August 24, 2017 alleging that petitioner violated the CBA and a June 2011 memorandum of agreement (hereinafter MOA) regarding staffing

levels and replacing unfilled firefighter positions. Both grievances were denied, respondent then demanded arbitration which prompted petitioner to bring this proceeding and the related proceeding seeking to permanently stay arbitration.

Although the CBA expired in December 2007, the parties do not dispute that it remains in effect since a new agreement between the parties has not been executed (see Civil Service Law § 209-a [1] [e]). The CBA provides in pertinent part:

> "[T]he City agrees that it shall organize shift workers into four (4) platoons and that each platoon shall consist of at least nine (9) persons which shall include one (1) captain, one (1) lieutenant and seven (7) firefighters. No member of the bargaining unit will be laid off. Present staffing levels above the minimum of thirty-six (36) will only be reduced by attrition."

The staffing provision of the CBA was the subject of an earlier dispute which resulted in the June 2011 MOA. After a firefighter resigned in 2010, petitioner did not fill the vacancy and respondent filed a grievance, which was scheduled for an arbitration hearing. Before the hearing commenced, the parties resolved the

dispute in the MOA, which provided, in relevant part:

> "1. In the event, [sic] the resignation, retirement, or other separation of an employee results in the City falling to less than 36 firefighters, the City shall have 45 days to hire a replacement.
> "2. In the event the City fails to hire a replacement within 45 days of the effective date of the resignation, retirement, or separation of the Firefighter, the City shall replace the position pursuant to the Non-Emergency Call In Procedure (Article I, Section 13) until the replacement hire is made. The City's obligation to replace the position shall commence on the first shift scheduled by the short platoon which occurs after the expiration of the 45 day period set forth in paragraph 1."

The CBA includes a provision for grievances to be resolved through arbitration. A contract grievance is defined as "a dispute concerning the interpretation, application or claimed violation of a provision of the [CBA]" (CBA, art XIII, § 1 [a]).

Petitioner contends as to both demands for arbitration that public policy prohibits arbitration under the circumstances. In support of such contention, petitioner states that it is facing a significant financial crisis and that it did not

explicitly bargain away its right to reduce staffing for budgetary or economic reasons. With respect to the proceeding implicating the June 2011 MOA (Index No. 17-1782), petitioner additionally argues that the arbitration provision of the CBA does not extend to a grievance referencing the MOA.

"[P]ublic policy favors arbitration as a means of settling labor disputes" (Matter of Town of Haverstraw [Rockland County Patrolmen's Benevolent Assn., 65 NY2d 677, 678 [1985]). "The court's role in determining applications to stay arbitration is limited" (Matter of Brunswick Cent. Sch. Dist. [Brittonkill Teachers Assn.], 114 AD3d 1076, 1076 [3rd Dept 2014]). "Court's determine arbitrability according to a two-prong test – whether the parties may arbitrate the dispute and, if so, whether they in fact agreed to do so" (Matter of Town of Saugerties [Town of Saugerties Policemen's Benevolent Assn., 91 AD3d 1264, 1264-1265 [3rd Dept 2012]; see Matter of County of Chautauqua v Civil Serv. Empls. Assn., Local 1000, AFSCME, AFL-CIO, County of Chautauqua Unit 6300, Chautauqua County Local 807, 8 NY3d 513, 519 [2007]).

The focus in this case is on the first prong. "Under the first prong, the subject matter of the dispute controls the analysis . . . [and] [i]f there is some statute, decisional law or public policy that prohibits arbitration of the subject matter of dispute, then the answer to the first inquiry is no, and the claim is not arbitrable" (Matter of City of New York v Uniformed Fire Officers Assn., Local 854, IAFF, AFL-CIO, 95 NY2d 273, 280-281 [2000]; see e.g. Matter of City of Kingston [Kingston Professional Fire Fighters Assn., Local 461, IAFF, AFL-CIO], 83 AD3d 1254, 1255 [3rd Dept 2011]). "[J]udicial intervention on public policy grounds constitutes a narrow exception to the otherwise broad powers of parties to agree to arbitrate" (Matter of New York City Tr. Auth. v Transport Workers Union of Am., Local 100, AFL-CIO, 99 NY2d 1, 6-7 [2002]; see Matter of County of Broome [New York State Law Enforcement Officers Union, Dist. Council 82, AFSCME, AFL-CIO], 80 AD3d 1047, 1049 [3rd Dept 2011]). Indeed, "'judicial restraint under the public policy exception is particularly appropriate in arbitrations pursuant to public employment collective bargaining agreements'"

(Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board 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 Union of Am., Local 100, AFL-CIO, 99 NY2d at 7).

Petitioner relies heavily upon the Court of Appeals decision in Matter of Johnson City Professional Firefighters Local 921 (Village of Johnson City) (18 NY3d 32, 37 [2011]). In Johnson City, the Court of Appeals concluded, in a 4 to 3 decision, that the job security clause in question violated public policy. Where, however, it is not readily apparent that a disputed provision of a collective bargaining agreement was intended solely for job security, then the public policy preclusion to arbitration is not necessarily implicated (see e.g. Matter of City of Lockport [Lockport Professional Firefighters Assn., Inc.], 141 AD3d 1085 [4th Dept 2016]; Matter of Village of Garden City [Local 1588, Professional Firefighters Assn.], 132 AD3d 887 [2nd Dept 2015], lv denied 27 NY3d 903 [2016]; see also Matter of City of Kingston [Kingston Professional Fire Fighters

Assn., Local 461, IAFF, AFL-CIO], 83 AD3d 1254, supra [3rd Dept 2011]).

The CBA in this case does not contain a provision clearly indicating that it is intended as being for the firefighters' job security. The firefighters are divided into four platoons with each having one captain, one lieutenant and seven firefighters; hence the need for 36 total employees is apparent. This is more akin to a safety level for staffing rather than simply a job security provision for firefighters (see Matter of City of Lockport [Lockport Professional Firefighters Assn., Inc.], 141 AD3d 1085, supra [4th Dept 2016]). This is not to suggest that the relevant language of the CBA is unambiguous or its intent apparent, but merely that it lacks the type of clarity necessary to conclude that this case falls within the parameters of the "extremely narrow" public policy exception necessary to foreclose arbitration (Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y., 1 NY3d at 80).

Nor does this mean that petitioner's financial condition will necessarily not be relevant in the arbitration (see Matter of City of Kingston [Kingston

Professional Fire Fighters Assn., Local 461, IAFF, AFL-CIO], 83 AD3d at 1256). If a breach of the CBA is found, then a remedy is necessary and in fashioning an appropriate remedy "the financial condition of [petitioner] and its ability to fund [firefighter] positions are relevant and may be considered" (Matter of Board of Educ. of Yonkers City School Dist. v Yonkers Fedn. of Teachers, 40 NY2d 268, 276 [1976]; see Matter of City of Kingston [Kingston Professional Fire Fighters Assn., Local 461, IAFF, AFL-CIO], 83 AD3d at 1256).

The remaining arguments are academic or unavailing.

Based upon the foregoing analysis and upon review of the papers as set forth hereinafter, it is

ORDERED that petitioner's application to permanently stay the demanded arbitration is DENIED; and it is further

ORDERED that respondent's cross motion to compel arbitration is GRANTED; and it is further

ORDERED that any relief not specifically addressed has nonetheless been

considered and is hereby expressly DENIED.

The above constitutes the Decision and Order of this Court.

HON. MARK L. POWERS
Supreme Court Justice

Signed at Plattsburgh, New York

this 23 day of May, 2018

Papers Reviewed:

Verified Petition (dated November 1, 2017) and Annexed Exhibits; Memorandum of Law (dated November 1, 2017).

Notice of Counter Petition (dated November 21, 2017); Verified Answer (dated November 13, 2017); Affidavit of Douglas Walker (dated November 13, 2017) and Annexed Exhibits; Affidavit of Scott Barshaw (dated November 8, 2017) and Annexed Exhibits; Affidavit of Kevin Decker (dated November 16, 2017) and Annexed Exhibits; Memorandum of Law (dated November 27, 2017).

Affirmation of Robert H. McKertich, Esq. (dated December 1, 2017); Reply Memorandum of Law (dated December 1, 2017).