

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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In the Matter of the Application of
VILLAGE OF GARDEN CITY,
Petitioner

TRIAL/IAS PART 13

For a Decision & Order Pursuant to Article 75
of the Civil Practice Law and Rules,

-against-

Index No.: 609205-17
Submission Date: 9-10-18
Motion Sequence: 002

PROFESSIONAL FIREFIGHTERS ASSOCIATION OF
NASSAU COUNTY, LOCAL 1588,

Respondent.

**DECISION & ORDER
XXX**

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Upon the foregoing papers, this Petition by the Village of Garden City (“the Village”) pursuant to CPLR Article 75 for an order vacating the Arbitrator’s award dated March 6, 2018, is determined as provided herein.

In this proceeding, the Village seeks to vacate the Arbitrator’s award interpreting the parties’ Collective Bargaining Agreement (“CBA”) to provide health care coverage to disabled firefighters on leave under General Municipal Law § 207-a on the ground that the Arbitrator’s award violates strong public policy, is irrational and that the Arbitrator exceeded his powers under the parties’ CBA and engaged in misconduct under CPLR 7511.

The facts giving rise to this proceeding are as follows:

Non-party Vincent DiBona, a firefighter employed by the Village and a member of the Respondent Professional Firefighters Association of Nassau County, Local 1588 (“the Union”) was injured on the job on March 17, 2016. The Village placed DiBona on Worker’s Compensation as a result of that injury, consistent with all of the benefits which he was entitled to under the parties’ Collective Bargaining Agreement (“CBA”), which included extended sick leave and regularly paid salary together with all other benefits including health insurance, holiday pay and vacation and disability sick credits. The Village terminated DiBona’s sick leave benefits on or about June 30, 2017, as a result of which he was placed on “no pay status.” DiBona applied to be placed on General Municipal Law § 207-a status which was approved by the Village and he was placed on General Municipal Law § 207-a status retroactively to June 30, 2017. However, the Village advised Di Bona that as a result thereof, he would no longer receive health insurance benefits but would receive his regular salary (which included longevity payments and future raises) tax-free and the medical costs associated with his work-related injury. He was also advised by the Village that if he were to obtain disability retirement benefits, the Village would pay the difference between his pension benefits and his salary (including longevity payments and future raises) and the medical costs associated with his work-related injury until his 62nd birthday, which is the mandatory age of retirement.

The Union filed a contract grievance on August 10, 2017, on behalf of DiBona challenging the Village’s termination of his health insurance benefits. It demanded that DiBona’s health insurance benefits be restored immediately and that he be made whole for all medical costs he had incurred. It relied on Article IX, Section 6 of the parties’ CBA in support of its position. That Section provides:

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* (emphasis added).

Article XI of the parties’ CBA provides that the “Village shall pay the full cost of individual or family coverage in the New York State Empire Plan .”

In response to the grievance, the Union filed a demand for arbitration with the American Arbitration Association (“AAA”). The Village maintained that absent express language in the CBA affording members health insurance benefits when in receipt of benefits under Section 207-a of the General Municipal Law -which their CBA allegedly did not expressly provide- a

member on leave pursuant to General Municipal Law § 207-a was not entitled to them. The Village's motion for a stay of arbitration was denied by this court. It held that the scope of the parties' CBA was subject to interpretation and was therefore properly before the Arbitrator. The Village appealed that order and sought a stay from the Appellate Division but it was denied.

Early on at the hearing, the Arbitrator stated that the CBA language relied on by the Village was "on its face...somewhat ambiguous." He proposed that the issue presented boiled down to "what does 'express' mean?"

In his Award of March 6, 2018, the Arbitrator ultimately found that the language of Article IX, Section 6 of the parties' CBA is "clear and unambiguous." He reasoned that while firefighters on General Municipal Law § 207-a status are not entitled to "receive benefits in addition to the benefits provided by statute if the [CBA] is '*entirely silent*' as to the status of ...disabled employees (emphasis added)," since that "would require that the agreement be construed 'to explicitly expand' the right the statute provides....," he concluded that the CBA "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 (emphasis added)." He recognized that although General Municipal Law § 207-a benefits are not mentioned in the parties' CBA, "the parties have expressly agreed in their [CBA] 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."

The Village maintains that a simple reading of the parties' CBA reveals that it does not *expressly or specifically* provide for continued health benefits when a Union member is in receipt of General Municipal Law § 207-a benefits, which is required. Therefore, it maintains that continued health insurance benefits are a gift in contravention of public policy. The Village also maintains that the Arbitrator exceeded his authority under the parties' CBA insofar as it provides that the Arbitrator "shall have no power to add, subtract from, or modify in any way any terms of [the] agreement." On that note, the Village notes that the CBA does not specifically address General Municipal Law § 207-a benefits at all and that the Union in fact sought specific continued health insurance for members receiving General Municipal Law § 207-a benefits in the latest round of contract negotiations. Notes were submitted to the Arbitrator establishing that fact. In those negotiations, the Union sought language "similar to the PD" (the Garden City Police Department) whose contract provides that "a police officer receiving payment of the full amount of regular salary or wages pursuant to General Municipal Law § 207-c [which is comparable to 207-a] shall continue to receive medical, dental and optical benefits to the same extent as active members." The Village maintains that by providing a benefit that the

Union was unable to procure via negotiations, the Arbitrator exceed his authority by rewriting the parties' contract. The Village also alleges that the Arbitrator's refusal to consider and address this history of negotiation amounted to misconduct under CPLR 7511. Finally, the Village maintains that the Arbitrator's declaration at the hearing that the CBA language was "somewhat ambiguous" "on its face," coupled with his refusal to acknowledge the meaning of the word "express" and to apply it here renders his Award irrational.

The Union maintains that benefits are only precluded where there is a "total absence" of any provision in the CBA addressing disabled employees' entitlements thereto. It also notes that in negotiating a new CBA, in response to its aforementioned proposal seeking to clearly spell out disabled members' rights to health coverage when on General Municipal Law § 207-a leave, the Village proposed language clearly declaring that health insurance benefits are terminated for members on leave pursuant to General Municipal Law § 207-a after six months but the Union refused to agree. Thus, like the Village, it argues that the Village cannot get in arbitration what it was uable to procure in negotiating their agreement.

" [J]udicial review of arbitration awards is extremely limited.... An arbitration award must be upheld when the arbitrator offers even a barely colorable justification for the outcome reached' " (*Gassman Baiamonte Gruner, P.C. v Katz*, __AD3d__, 2018 WL 3999713 at *1 [2d Dept 2018], quoting *Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 479 [2006][citations and internal quotation marks omitted]; citing *Matter of Allstate Ins. Co. v GEICO [Govt. Empls. Ins. Co.]*, 100 AD3d 878 [2d Dept 2012]). " 'Unless an arbitration award violates a strong public policy, is totally irrational, or exceeds a specifically enumerated limitation on the arbitrator's powers, it may not be vacated' " (*Verille v Jeanette*, 163 AD3d 830, 830 [2d Dept 2018], quoting *Matter of T & C Home Design, LLC v. Stylecraft Corp.*, 140 AD3d 777, 778 [2d Dept 2016]; citing *Shnitkin v Healthplex IPA, Inc.*, 71 AD3d 979, 981 [2d Dept 2010]). In addition, "[a]n arbitration award shall be vacated if the court determines that a party's rights were prejudiced by 'corruption, fraud or misconduct in procuring the award' " (*Gassman Baiamonte Gruner, P.C. v Katz*, __AD3d__, 2018 WL 3999713 at *1, quoting CPLR 7511[b][1][i]; citing *Matter of Allstate Ins. Co. v. GEICO [Govt. Empls. Ins. Co.]*, 100 AD3d at 879). "The party seeking to vacate an arbitration award bears a 'heavy burden' of proving by 'clear and convincing evidence' that impropriety by the arbitrator prejudiced that party's rights or impaired the integrity of the arbitration process" (*Verille v Jeanette*, 163 AD3d at 830-831, quoting *Matter of Denaro v Cruz*, 115 AD3d 742, 743 [2d Dept 2014]; citing *Matter of Quality Bldg. Constr., LLC v Jagiello Constr. Corp.*, 125 AD3d 973, 973 [2d Dept 2015]; *Matter of Mounier v. American Tr. Ins. Co.*, 36 AD3d 617, 617 [2d Dept 2007]; *Matter of Local 295-295C, IUOE v. Phoenix Env'tl. Servs. Corp.*, 21 AD3d 901, 901 [2d Dept 2005]; see also, *Gassman Baiamonte Gruner, P.C. v Katz*, __AD3d__, 2018 WL 3999713 at *1; *Matter of Allstate Ins. Co. v. GEICO [Govt. Empls. Ins. Co.]*, 100 AD3d at 879). It is clear that:

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“ ‘Courts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies. A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one. Indeed, even in circumstances where an arbitrator makes errors of law or fact, courts will not assume the role of overseers to conform the award to their sense of justice’ ” (*Verille v Jeanette*, 163 AD3d at 831, quoting *Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York*, 94 NY2d 321, 326 [1999]; citing *Wien & Malkin LLP v. Helmsley–Spear, Inc.*, 6 NY3d at 479–480; *Matter of Liberty Mut. Ins. Co. v. Sedgewick of N.Y.*, 43 AD3d 1062, 1063 [2d Dept 2007]).

“Moreover, courts are obligated to give deference to the decision of the arbitrator” (*New York City Tr. Auth. v Transp. Workers' Union of Am., Local 100, AFL-CIO*, 6 NY3d at 336, citing *Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 629 [1979]).

“[J]udicial intervention on public policy grounds constitutes a narrow exception to the otherwise broad power of parties to agree to arbitrate all of the disputes arising out of their juridical relationships, and the correlative, expansive power of arbitrators to fashion fair determinations of the parties' rights and remedies” (*New York City Tr. Auth. v Transp. Workers Union of Am., Local 100, AFL-CIO*, 99 NY2d 1, 6-7 [2002]). Violations of public policy only bar arbitration in

“ ‘cases in which public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator. Stated another way, the courts must be able to examine an arbitration agreement or an award on its face without engaging in extended factfinding or legal analysis, and conclude that public policy precludes its enforcement’ ” (*New York City Tr. Auth. v Transp. Workers Union of Am., Local 100, AFL-CIO*, 99 NY2d 1, 7 [2002], quoting *Matter of Sprinzen*, 46 NY2d at 631 [emphasis supplied]).”

See also, *Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d at 327 [“a court may vacate an arbitral award where “strong and well-defined policy considerations embodied in constitutional, statutory or common law prohibit ... certain relief from being granted by an arbitrator”]). “A court...may not vacate an award on public policy grounds when vague or attenuated considerations of a general public interest are at

stake” (*New York State Correctional Officers and Police Benev. Ass'n, Inc. v State*, 94 NY2d at 327). “Courts shed their cloak of noninterference where specific terms of the arbitration agreement violate a defined and discernible public policy; where an arbitrator exceeds his or her legal authority; or where the final result creates an explicit conflict with other laws and their attendant policy concerns” (*New York State Correctional Officers and Police Benev. Ass'n, Inc. v State*, 94 NY2d at 327, citing *Matter of Cohoes City School Dist. v Cohoes Teachers Assn.*, 40 NY2d 774, 777 [1976]; *United Paperworkers Intl. Union v Misco, Inc.*, 484 US 29, 43 [1987]; *Matter of Aimcee Wholesale Corp. [Tomar Prods.]*, 21 NY2d 621, 629 [1968]; *International Bhd. of Elec. Workers v Niagara Mohawk Power Corp.*, 143 F3d 704, 714 [2d Cir 1998]). The court “must focus on the result only, and can vacate the award if the arbitration agreement itself violates public policy; if the award intrudes into areas reserved for others to resolve; or if, because of its reach, the award violates an explicit law of this State” (*New York State Correctional Officers and Police Benev. Ass'n, Inc. v State*, 94 NY2d at 327; see also, *International Bhd. of Elec. Workers, Local 97 v Niagara Mohawk Power Corp.*, 143 F3d at 716).

“Judicial restraint under the public policy exception is particularly appropriate in arbitrations pursuant to public employment collective bargaining agreements. In those instances, the Legislature in the Taylor Law explicitly adopted a countervailing policy ‘encouraging such public employers and such employee organizations to agree upon procedures for resolving disputes as a means of promoting harmonious relations between governmental employers and their employees, and preventing labor strife endangering uninterrupted governmental operations (*New York City Tr. Auth. v Transp. Workers Union of Am., Local 100, AFL-CIO*, 99 NY2d at 7, quoting Civil Service Law § 200 [c]; citing *Matter of Board of Educ. of Yonkers City School Dist. v Yonkers Fedn. of Teachers*, 40 NY2d 268, 273 [1976]; *Board of Educ. v Associated Teachers of Huntington*, 30 NY2d 122, 131 [1972]).

The Village has not shown that the Arbitrator’s finding that the parties’ CBA affords disabled members in receipt of benefits under General Municipal Law § 207-a health insurance benefits to be violative of any public policy. Contrary to its position, the disabled firefighters’ right to this health coverage is set forth in the parties’ CBA.

The Village’s reliance on *Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes* (94 NY2d at 694), is misplaced. While the court there clearly held that “[a]ny additional benefits must be expressly provided for in the agreement” with respect to the rights that firefighters on leave under General Admissions Law § 207-a have, the court was dealing

with a CBA that was completely silent regarding disabled firefighters' right to arbitrate an order requiring them to report for light duty shifts following a medical examination approving them for that duty and in fact specifically addressed other rights that group had. The Court held:

“Here, however, the CBA is *entirely silent* as to whether the contractual rights accorded regular duty firefighters in the CBA provisions cited in [the firefighters'] grievances are applicable to disabled firefighters on General Municipal Law § 207-a status. Significantly, the CBA does expressly provide that certain other contractual benefits extend to section 207-a recipients. Thus, article XVII states that section 207-a beneficiaries ‘shall accumulate sick leave, longevity, holiday pay and clothing allowance *in accordance with the contract* (emphasis supplied)’ ”

The Court in that case held that “the total absence of any express provision in the CBA making applicable to firefighters on General Municipal Law § 207-a status the specific contractual provisions the Union claims were violated, is fatal to [their] arbitration claim” (*Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v City of Cohoes*, 94 NY2d at 694). In contrast, here, the CBA does address disabled firefighters' rights to “other benefits,” which clearly includes health coverage.

The Village's reliance on *Chalachan v City of Binghamton* (81 AD2d 973 [3d Dept 1981], *affd*, 55 NY2d 989 [1982]) is similarly misplaced. In that case, disabled firefighters on General Municipal Law 207-a status sought to obtain unused vacation pay. Once again, however, the CBA in that case did not afford the benefit sought to disabled firefighters. The Court held “[i]f every benefit provided active firefighters in the collective bargaining agreement was intended to include disabled firefighters covered by section 207-a of the General Municipal Law, the contract should contain language to so provide” (*Chalachan v City of Binghamton*, 81 AD2d at 974). On Appeal the Court of Appeals held:

“The collective bargaining agreement in question is *entirely silent* regarding the status of disabled firemen as employees of the city. Their continued status as employees even after disability has occurred is strictly a matter of statutory right. The [CBA] should not therefore be construed to *implicitly expand* whatever compensation rights are provided petitioners under the statute. Any additional benefits must be expressly provided for in the agreement (emphasis added).” (*Chalachan v City of Binghamton*, 55 NY2d at 990).

Here, the arbitrator's finding is not based upon an implicit expansion of the CBA but rather, a specific provision thereof.

The Court's decision in *Town of Tuxedo v Town of Tuxedo Police Benev. Ass'n*, (78 AD3d 849, 851 [2d Dept 2010]) is distinguishable for the same reason. There, the Second Department held that "the CBA did not contain any language expressly providing that leave time would accrue during the period that a disabled officer receives General Municipal Law § 207-c benefits, or that a disabled officer would be paid for such leave time upon retirement" (*Town of Tuxedo v Town of Tuxedo Police Benev. Ass'n*, 78 AD3d at 851). *Inc. Vil. of Floral Park v Floral Park Police Benev. Ass'n* (89 AD3d 731, 732–33 [2d Dept 2011]), which the Village also relies on, is distinguishable for the same reason. There, the Second Department held "there is no language providing that leave time continues to accrue during the period an officer is disabled and receiving benefits under General Municipal Law § 207-c. Had the parties intended to allow disabled officers to continue to accrue leave time during their period of disability, they could have inserted such language into article XVI, § 4, but they did not do so" (*Inc. Vil. of Floral Park v Floral Park Police Benev. Ass'n*, 89 AD3d at 732–33; see also, *In re Town of Niskayuna (Fortune)*, 14 AD3d 913, 914 [3d Dept 2005], lv denied 5 NY3d 716 [2005] ["Here, the CBA is entirely silent as to whether the health benefits accorded regular police officers are applicable to disabled officers receiving General Municipal Law benefits and, accordingly, Supreme Court quite properly granted a stay of arbitration"]).

The Village's reliance on the distinction between Workers' Compensation benefits and benefits under the General Municipal Law is irrelevant in determining whether the CBA here affords the disabled firefighters receiving General Municipal Law benefits health insurance coverage. What is determinative here is the language of the parties' CBA, which makes no such distinction. And, contrary to the Village's argument, the adoption of Article IX, Section 7 does not make it clear that benefits under Article IX, Section 6 were limited to Workers' Compensation leave. As the Courts have stated: If that was the parties' intent, the CBA could and would have so provided.

As for the arbitrator's alleged abuse of his powers, an arbitrator's award may be set aside based upon an abuse of power only when he clearly exceeds a specifically enumerated limitation on his power (CPLR 7511 (b) (1) (iii); *Bd. of Educ. of Arlington Cent. School Dist. v Arlington Teachers Ass'n*, 78 NY2d 33, 37 [1991]; *Matter of Town of Callicoon [Civil Serv. Employees Assn.]*, 70 NY2d 907, 909 [1987]). The parties' CBA provides that the arbitrator "shall have no power to add, subtract from, or modify in any way any terms" thereof. Contrary to the Village's position, the Arbitrator did not rewrite the parties' CBA nor did he add or subtract the terms

thereof. He merely interpreted and applied it. As this court concluded in its order dated November 15, 2017, “the CBA provision...here...although broadly worded, contains express language relating to the dispute at issue-whether disabled firefighters who are out on disability leave are entitled to a continuation of contractual health insurance benefits,” and his conclusion that they are is not illogical.

“ ‘ “An award is irrational when there is no proof whatever to justify the award” ’ ” (O’Neill v GEICO Ins. Co., 162 AD3d 776, 777 [2d Dept 2018], quoting *Matter of Peterson v Katonah–Lewisboro UFSD*, 134 AD3d 1125, 1125 [2d Dept 2015], quoting *Matter of Vintage Flooring & Tile, Inc. v DCM of NY, LLC*, 123 AD3d 732, 732 [2d Dept 2014], lv denied 26 NY3d 965 [2015], citing *Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 NY3d 530 534 [2010]). “[T]he issue before this Court is not whether we agree with the arbitrator’s assessment of the evidence, interpretation of the contract or reasoning in fashioning the award” (*New York State Correctional Officers and Police Benev. Ass’n, Inc. v State*, 94 NY2d at 327). Where, like here, the arbitrator’s award finds support in the record, it must be affirmed. *Matter of Bd. of Educ. of Oneonta City School Dist. (Moore)*, 229 AD2d 888, 890 [3d Dept 1996]).

Interpreting the CBA as affording health insurance benefits to both firefighters that are on disability pursuant to the Workers’ Compensation Law and the General Municipal Law is not unreasonable: No such distinction is discernable anywhere in the parties’ CBA. The conclusion reached by the Arbitrator is not irrational. The parties’ attempts to rely on their respective recent bargaining positions with respect to this issue only emphasizes their disagreement as to how the CBA is to be interpreted as written. Obviously, both sides wished to eliminate entirely any ambiguity that in theory existed here. In their negotiations, neither the Union was clearly demanding a benefit that did not exist nor was the Village clearly seeking to remove one that did; Rather, both parties were seeking concrete clarification to avoid precisely the scenario facing the court here.

The Village also maintains that the Arbitrator refused to consider pertinent material evidence. “A refusal by an arbitrator to hear pertinent material evidence may constitute misconduct under CPLR 7511 (b) (1) (i)” (*Allstate Ins. Co. v GEICO*, 100 AD3d at 879, citing *Matter of State of N.Y. Off. of Mental Health [New York State Correctional Officers & Police Benevolent Assn., Inc.]*, 46 AD3d 1269 [3d Dept 2007], lv dismissed 10 NY3d 826 [2008]; *D’Amato v Leffler*, 290 AD2d 475, 476 [2d Dept 2002], lv denied 99 NY2d 502 [2002]; *Matter of Lewis v County of Suffolk*, 70 AD2d 107, 111 [2d Dept 1979]). “The party seeking to vacate the arbitration award has the burden of proving by clear and convincing evidence that the arbitrator committed misconduct” (*Allstate Ins. Co. v GEICO*, 100 AD3d at 879, citing *Matter*

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of *Susan D. Settenbrino, P.C. v Barroga-Hayes*, 89 AD3d 1096, 1096 [2d Dept 2011]; *Matter of Westchester County Correction Officers Benevolent Assn., Inc. v County of Westchester*, 81 AD3d 966, 967 [2d Dept 2011]).

The Village continues to fault the Arbitrator for not considering the evidence with respect to the parties' bargaining history. Again, viewing all of the evidence which includes the history of *both* parties' bargaining positions, that evidence does not establish that the Arbitrator misinterpreted or misapplied the language of the CBA.

Finally, to the extent that the Arbitrator mentioned that "apparently, in the past, the Village provided these benefits to all employees on disability leave," assuming, arguendo, that that reference was in error, the Arbitrator himself noted that it was at best "apparent," not definitive, and it did not affect his ultimate conclusion. In fact, the Arbitrator ultimately indicated that he reached his determination without considering past practice.

The Union's request for sanctions, fees and/or costs is not made in the proper form. CPLR §2214. In any event, it is not entitled to such relief here.

The Court has considered the remaining contentions of the parties and finds that they do not require discussion or alter the determination herein. Based upon the foregoing, it is

ORDERED, that the Petition is *denied* and this proceeding is dismissed.

All matters not decided herein are denied.

This constitutes the Decision and Order of this Court.

Dated: September 25, 2018
Mineola, New York

E N T E R:



Hon. Robert A. Bruno, J.S.C.