Matter of Village of Johnson City v Johnson City Firefighters Assn., Local 921 IAFF

2010 NY Slip Op 30189(U)

January 21, 2010

Supreme Court, New York County

Docket Number: 2009-2141

Judge: Ferris D. Lebous

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At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, 92 Court Street, in the City of Binghamton, New York, on the 25th day of September, 2009 and the 20th day of November, 2009.

PRESENT: HON. FERRIS D. LEBOUS
Justice, Supreme Court

STATE OF NEW YORK
SUPREME COURT : : BROOME COUNTY

In the Matter of the Arbitration between

VILLAGE OF JOHNSON CITY,

Petitioner,

-vs-

JOHNSON CITY FIREFIGHTERS ASSOCIATION, LOCAL 921 IAFF,

Respondent.

DECISION AND ORDER

Index No. 2009-2141
RJI No. 2009-1113-M

APPEARANCES:

COUNSEL FOR PETITIONER:

COUGHLIN & GERHART, LLP
BY: PAUL J. SWEENEY, ESQ., OF COUNSEL
19 CHENANGO STREET
BINGHAMTON, NY 13901

COUNSEL FOR RESPONDENT:

HINMAN, HOWARD & KATTELL, LLP
BY: PAUL T. SHEPPARD, ESQ., OF COUNSEL
700 SECURITY MUTUAL BUILDING
BINGHAMTON, NY 13901

FERRIS D. LEBOUS, J.S.C.

Petitioner Village of Johnson City moves for an order permanently staying the arbitration requested by respondent Johnson City Firefighters Association, Local 921 IAFF (hereinafter sometimes "the Union") regarding minimum shift levels (CPLR § 7503).

The Union opposes the application and cross-petitions for an order compelling arbitration. In the alternative, the Union seeks an order pursuant to Article 78 annulling Mayor Hannon's June 12, 2009 directive, a declaration of the parties' respective rights regarding a seven firefighter shift minimum, and either specific performance or injunctive relief regarding the Village's obligation to maintain a seven firefighter shift level.

The court heard preliminary oral argument from counsel on September 25, 2009, but adjourned the motion for substantive arguments until November 20, 2009.[1]

BACKGROUND

These parties are bound by a collective bargaining agreement covering June 1, 2006 through May 31, 2011 ("CBA"). This CBA contains an Article XV, entitled "Contract Administration", which sets forth a procedure for settling grievances or disputes involving the application or interpretation of the CBA which will be discussed in more detail below.

A brief history of the minimum shift manning levels in the Johnson City Fire Department is warranted. As early as 1986, the Department maintained a minimum manning of at least seven

[1]The adjournment was granted to await a determination by PERB as to whether it would accept the Union's demand for arbitration of a past practice.

firefighters per shift. In 1997, the shift minimum level was increased from seven to eight firefighters per shift. In May 1999, there was an attempt to return the minimum level back to seven firefighters per shift, however the attempt failed and the eight minimum per shift level remained. In August 2007, then Mayor Lewis stated a desire to reduce the minimum level per shift from eight to seven in order to avoid excessive overtime costs. On or about August of 2007, in a labor management meeting, the Village purportedly agreed to a seven firefighter shift level minimum.

On July 15, 2008, the Village Board attempted to rescind the seven firefighter minimum by way of Board Resolution #100 which proposed to:

> [i]immediately rescind the fire chiefs directive of August 22, 2007, authorizing minimum shift manning of seven (7) firefighters per shift, said manning clause authorized and approved by the village board. Further, to mandate that all non-emergency overtime receive prior approval from the Mayor, and that the Mayor inform the trustees in each instance.

(Exhibit 2 to Meany Affidavit sworn to September 18, 2009).

The resolution was defeated by a majority vote and the seven firefighters per shift minimum remained.

On January 21, 2009, the Village Board again sought a resolution rescinding the seven firefighter minimum. However, the resolution was tabled indefinitely by Board Resolution #10 which stated as follows: "Motion by Trustee King - seconded by Trustee Balles to TABLE INDEFINTELY [*sic*]: Authorization that the Fire Chief's directive of August 22, 2007, which

authorized minimum shift manning of seven (7) firefighters per shift, be rescinded, effective immediately. Be it further resolved that Fire Department overtime is authorized in emergency situations only" (Exhibit 3 to Meany Affidavit sworn to September 18, 2009).

On February 13, 2009, then Mayor Lewis issued a letter to Acting Chief Dempsey stating "[e]ffective immediately, overtime is no longer an option to supplement staffing levels when a firefighter takes time off for bereavement, family illness, personal leave, vacation, illness/injury, union business, training purposes, utilizing compensatory time or due to a position(s) being vacant (i.e. retirement, resignation, etc.)" (Exhibit 4 to Meany Affidavit sworn to September 18, 2009). The Union did not file a grievance or demand for arbitration in response to this directive.

Despite this directive from Mayor Lewis, Chief Dempsey continued to maintain the seven firefighter minimum and as a result he was charged with insubordination.

On June 12, 2009, Mayor Hannon[2] issued a letter to Acting Chief Dempsey stating, in pertinent part, as follows:

> The purpose of this directive is to reiterate the directive issued to you by former Mayor Harry Lewis on February 13, 2009, regarding the hiring of overtime.
>
> Overtime WILL NOT be utilized to supplement staffing levels when firefighters are absent for reasons of: personal illness/injury, family illness, personal leave, vacation, bereavement, union business, training purposes, utilizing compensatory time, vacancy due to retirement, resignation, termination or suspension.
>
> The ONLY exception to the above order will be when a true

[2]Mayor Lewis resigned on May 28, 2009 and Trustee Hannon was elected by a majority of the Village Board to serve the remainder of Mayor's Lewis' term.

> emergency exists such as a structure fire.
>
> In the case of a group being short personnel on any particular day, you or a department supervisor will notify Broome County Emergency Services of such, and utilize mutual aid in the event of a reported fire.

(Petitioner's Ex C).

On June 15, 2009, the Union filed a grievance pursuant to CBA Article XV regarding the alleged impact of Mayor Hannon's June 12, 2009 directive on the health and safety of the firefighters, namely:

> [t]he direct impact of the health and safety of the members of the Local caused by Mayor Hannon's directive dated June 12, 2009. Because of this directive the Village has made a unilateral change in the terms and condition of employment by altering past practice as incorporated in the CBA.

(Petitioner's Ex B).

On June 17, 2009, the Union filed a "Demand for Arbitration" with PERB seeking arbitration of an alleged past practice of not having less than seven firefighter per shift stating:

> [Parties] have had a long past practice of negotiating shift manning level most recently agreeing through labor management to a seven (7) man minimum which went in to effect September 2007.
>
> That on June 12, 2009, the Mayor of JC, Dennis Hannon, issued a directive changing shift minimums to six (6) officers and firefighters effective June 12, 2009 and that no overtime will be utilized to enhance the shifts beyond the 'six man minimum'.

> ...seeks to restore the seven (7) man minimum for shift strength.

(Petitioner's Ex D).

PERB ultimately rejected this Demand for Arbitration, as well as two revised Demands. The final PERB deficiency order stated that "[t]he charge concerning the layoffs appears jurisdictionally deficient as a breach of an agreement. You plead that it violated an article of a current collective bargaining agreement. If any other act is alleged to constitute the violation, please clearly identify it" (Second Supplemental Affidavit, Ex B, p 2).

Upon PERB's rejection of the past practice argument, this petition and cross-petition were placed back on this court's motion calendar. The court heard substantive oral arguments on November 20, 2009.

DISCUSSION

I. ARBITRATION

It is well-settled that a determination of arbitrability requires a two step threshold analysis known as the *Liverpool/Watertown* test. The first question is whether there is any statutory, constitutional or public policy prohibition against arbitration of the grievance (*Matter of Acting Supt. of Schools of Liverpool Cent. School Dist. [United Liverpool Faculty Assn.]*, 42 NY2d 509, 513 [1977]). Here, both parties agree there is no statutory, constitutional or public policy prohibiting arbitration of this grievance. Thus, the court turns to the second question of whether the parties agreed to arbitrate the dispute at issue by the terms of their collective bargaining agreement (*Matter of Board of Educ. of Watertown City School Dist. [Watertown Educ. Assn.]*,

93 NY2d 132, 140 [1999]).

The parties' CBA contains a provision entitled "Contract Administration" which states, in part, that "[i]n the event of a dispute between the parties to this agreement involving the interpretation or application of any provisions of this agreement, either party shall have a right to resolve the dispute in the following manner [multi-step grievance procedure]" (CBA, Article XV, p 11). The Village contends that this CBA is silent on shift minimum levels, thus the grievance on this issue is not arbitrable. The Union concedes that the CBA does not expressly address shift minimum levels, but argues that arbitration is warranted because several provisions of the CBA are implicated by this grievance.

The court finds the Union's arguments to be without merit. First and foremost, the court finds that the CBA is silent on any manning provisions. The court finds that the Village Board's prior recognition of the seven minimum shift level does not negate the fact that the CBA is, in fact, silent on the issue. There is not one reference whatsoever to shift minimum levels in any of the provisions cited by the Union including Article III ("Overtime"), Article XVI ("Fire Bureau Regulations"), Article XVII ("Working Rules"), and Article XVIII (" Hours of Duty"). The Union's argument that these provisions are "implicated" by the Mayor's directive is simply insufficient to support a finding that the parties expressly agreed to arbitrate the dispute at issue by the terms of the CBA. Moreover, as argued by the Village, the issue of shift manning is a non-mandatory subject of negotiation and, as such, an employer may freely and unilaterally discontinue such past practice without negotiating the change.

The Union also argues that the parties' past practices and oral agreements should equally be considered as part of the CBA even though not expressly contained therein (*Matter of Manhattan & Bronx Surface Tr. Operating Auth. v Local 100, Transp. Workers Union of Am.*, 84 AD2d 749, 750 [2nd Dept 1981]; hereinafter "*MABSTOA"*). The court acknowledges the nuance of the Union's argument, but finds that *MABSTOA* does not apply under these circumstances.

In *MABSTOA*, the issue that was arbitrated was specifically arbitrable under the CBA which permitted the union to challenge the impact a change in schedule would have on a drivers' health and safety, even though the underlying scheduling decisions were reserved for management. The Second Department found that the arbitrator properly looked to past practice including an oral agreement between the parties to maintain a certain level of runs. The key component of the Second Department's determination was that the arbitrator did not exceed his power and was permitted to issue an award that *"may well reflect the spirit rather than the letter of the agreement*" (*MABSTOA*, 84 AD2d at 750; emphasis added).

Here, the issue presented is whether the parties agreed to arbitrate the issue compared to the determination in *MABSTOA* which was reached in the context of reviewing an arbitrator's award. Moreover, in *MABSTOA*, unlike here, there was a provision entitling the issue to proceed to arbitration. In sum, under the procedural posture of this case, this court finds it is governed by the *letter of the agreement* in resolving the issue of arbitrability in the first instance.

Finally, the Union also argues that this case is distinguishable from the *Matter of City of Binghamton (Binghamton Firefighters, Local 729, AFL-CIO)*, 20 AD3d 859 [3rd Dept 2005]).

The court disagrees and finds the decision governs here. In *Matter of Binghamton*, the Third Department rejected a similar argument that there were implicit references in a collective bargaining argument to maintain any specific staffing levels. To the extent the Union argues this case is distinguishable based upon the existence of Board Resolutions this court disagrees. Board resolutions do "[n]ot create any vested contractual rights [citation omitted]" (*Matter of Aeneas McDonald Police Benevolent Assn. v City of Geneva*, 92 NY2d 326, 333 [1998]).

In view of the foregoing, the court finds that there is no reasonable relationship between this dispute and the CBA since the parties did not agree to arbitrate the dispute at issue. Consequently, the Village's petition for an order permanently staying the arbitration requested by respondent regarding minimum shift levels will be granted and the Union's cross-petition for an order compelling arbitration will be denied.

II. MISCELLANEOUS RELIEF

The court finds that the Union has failed to establish entitlement to declaratory relief, specific performance, injunctive relief and/or Article 78 relief.

There has been no showing of entitlement to specific performance or injunctive relief by way of irreparable harm, success on the merits of the claim, or a balancing of the equities (*Kuttner v Cuomo*, 147 AD2d 215, 218 [3rd Dept 1989].[3] With respect to any Article 78 relief, there has not been any showing that the actions of the Village Board were illegal, arbitrary or

[3]Parenthetically, the court notes that if injunctive relief were deemed proper then the Union would be required to post an undertaking. The Union has already demonstrated its unwillingness to post an undertaking despite a court order to do so in a prior proceeding.

capricious. Rather, the court finds the Village by and through its Fire Chief is authorized and empowered to make decisions on minimum staffing. The application for Article 78 relief is denied.

III. BREACH OF CONTRACT

The Union's remaining claim involves a common-law breach of contract claim. To the extent that the Union's cause of action would be based upon Board Resolutions #10 and #100, the court finds it to be without merit. As previously noted hereinabove, board resolutions do "[n]ot create any vested contractual rights [citation omitted]" (*Matter of Aeneas McDonald Police Benevolent Assn.*, 92 NY2d at 333).

That having been said, however, to the extent the breach of contract claim purports to be founded upon the August 2007 agreement of the parties fashioned in a labor management meeting, the court finds there are significant questions of fact. Accordingly, the court finds that the Union is left with a common-law breach of contract claim, subject to the Village's defenses including the Statute of Frauds. The court will schedule a preliminary conference on this remaining claim.

CONCLUSION

For the reasons stated, petitioner's motion for an order permanently staying the arbitration request of respondent regarding minimum shift levels is GRANTED; and the respondent's cross-petition for an order compelling arbitration is DENIED. Additionally, the Union's application for an order pursuant to Article 78 annulling Mayor Hannon's June 12, 2009

directive, a declaration of the parties' respective rights regarding the seven firefighter minimum, and either specific performance or injunctive relief regarding the Village's obligation to maintain the seven firefighter minimum is DENIED.

It is so ordered.

Dated: January 21, 2010
Binghamton, New York

s/ Ferris D. Lebous
Hon. Ferris D. Lebous
Justice, Supreme Court

ALL PAPERS SUBMITTED IN CONNECTION WITH THIS MOTION HAVE BEEN FILED, ALONG WITH THE ORIGINAL DECISION AND ORDER, WITH THE BROOME COUNTY CLERK