SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED JUSTICE OF SUPREME COURT Justice PART 5

Alexander Hagan, Et Al.

- v -

City of NY

INDEX NO. 152070/13

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7-25-13

HON. KATHRYN FREED J.S.C.
JUSTICE OF SUPREME COURT

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

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In the Matter of the Application of

ALEXANDER HAGAN, AS PRESIDENT OF THE UNIFORM FIRE OFFICERS ASSOCIATION, LOCAL 854, IAFF, AFL-CIO,

Petitioner,

-against-

THE CITY OF NEW YORK

Respondent.

For an Order Pursuant to CPLR Article 75 Confirming an Arbitration Award.

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DECISION/ORDER
Index No.: 152070/2013
Seq. No.: 001

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF PETITION AND AFFIDAVITS ANNEXED	1-3
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED	4-6
ANSWERING AFFIDAVITS	7
REPLYING AFFIDAVITS	
EXHIBITS	
STIPULATIONS	
OTHER (Memos of Law)	8-9

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Petitioner Alexander Hagen ("Hagen"), as President of the Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO ("UFOA"), brings the within petition for a judgment confirming an arbitration award. Respondent City of New York ("the City"), opposes and cross-moves for a judgment dismissing said petition and vacating the arbitration award.

After a review of the papers presented, all relevant statutes and case law, the Court grants the instant petition and denies the cross-motion.

Factual and procedural background:

The UFOA is the collective bargaining representative for the uniformed employees of the Fire Department of New York City ("FDNY"). Both the UFOA and the City are parties to a collective bargaining agreement ("CBA"), which governs the terms and conditions of the employment of Fire Officers employed by the City. The CBA establishes a grievance procedure under Article XVIII of the CBA, which permits the UFOA to proceed to arbitration, after a series of certain procedures have been exhausted, and the problem remains unresolved. In the instant matter, the UFOA exhausted all established grievance procedures, without success. Consequently, on January 28, 2011, it requested that the matter be reviewed by an arbitrator. The arbitrator designated to hear the grievance was Alan R. Viani, who conducted the hearings on July 11, 2011 and December 13, 2011, respectively.

During said hearings, the UFOA alleged that the City, via the FDNY, violated Article XIII, Section 2, (annexed as Exhibit "A" to the Petition), of the CBA, (the Safety Standard's Provision), which requires the FDNY to "institute a ten year replacement policy for all first line (regularly assigned), firefighting vehicles..." Article XIII, Section 2 further notes that all such vehicles shall be less than eleven years of age and "[i]f such vehicle is unavailable, this Section shall not affect the Fire Officer's (line) duty to respond to fires on available equipment." It is important to note that the parties stipulated that the issues to be decided at arbitration would be if the City actually violated this section, and if so, what remedy would be available.

Positions of the parties:

The City argues that it did not violate the CBA because it had a ten year replacement policy in place for all fire vehicle apparatus, as required by Article XIII. Additionally, it argues that Article XIII only creates an affirmative obligation that the FDNY must begin the process of replacing apparatus prior to the ten year anniversary, which it in fact, did. The City also argues that the delays in replacement occurred solely due to the fault of the manufacturers. Therefore, it was not and cannot be held responsible.

The City also argues that even if it is determinated that it violated the CBA, the union was deprived of a remedy pursuant to the express terms of same, wherein the parties acknowledged that there would be situations where vehicles more than 11 years old would be in service. Moreover, the parties agreed that the agreement "shall not affect the Fire Officer's (line) duty to respond to fires on available equipment" (see the Award, p. 5). Given this language, it is clear that the parties contemplated the possibility of vehicles passing eleven years of age and "explicitly negotiated language requiring members to continue to perform their duties even if a vehicle passed its 11th anniversary." (*Id.* p. 5).

On October 30, 2012, the arbitrator issued his Opinion and Award, (see Exhibit "B," annexed to the petition), sustaining the grievance and finding that the City had violated Article XIII, Section 2 "by operating first line engine, ladder, squad and rescue companies with vehicles of more than eleven years of age." The arbitrator ordered the FDNY to refrain from using such vehicles "except to respond to fires." Petitioner argues that the Arbitration Award is thus final and binding on the parties pursuant to the terms of the Grievance Procedure and Section § 12-312 of the New York City Collective Bargaining Law. It further argues that the Arbitrator's Award should be confirmed

pursuant to Article 75 of the Civil Practice Law and Rules.

The City notes in its Cross Motion, that an Arbitration Award can only be vacated pursuant to Article 75, which grounds are set forth in CPLR §7511 (b). However, the City argues that despite the fact that an arbitrator's award is entitled to great deference, it may be set aside where it "violates a strong public policy" (*Matter of New York State Dep't of Labor (Unemployment Ins Appeal Board) v. New York State Div. Of Human Rights*, 2010 NY Slip Op 1854, 2-3 (3rd Dep't 2010), see *Henneberry v. ING Capital Advisors, LLC*, 37 A.D.3d 353 (1st Dept. 2007); *Matter of Kowaleski v. New York State Dep't of Correctional Services*, 16 N.Y.3d 85 [2010]). Additionally, the City argues that, as in the instant matter, an arbitrator's award may be set aside, and the arbitrator found to have exceeded his powers under §7511 (b)(1)(ii), if the award gives a "completely irrational construction to the provisions in dispute and, in effect, made a new contract for the parties" (*Pine Plains Cent. School District v. Kimball*, 277 A.D.2d 332, 333 [2nd Dept. 2000], see also *Riverbay Corp.v. Local 32-E*, 91 A.D.2d 509, 510 [1st Dept. 1982]).

Conclusions of law:

CPLR§ 7510 provides that a "court shall confirm an award upon application of a party made within one year after its delivery to him, unless the award is vacated or modified upon a ground specified in section 7511." First, as a preliminary matter, the Court notes that it is devoid of authority to review arbitral decisions, even where "an arbitrator has made an error of law and fact" (*Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15 N.Y.3d 530, 534 [2010]). Moreover, the Court is not permitted to substitute its own judgment for that of the arbitrator (see *New York* City *Transit Auth. v. Transport Workers Union*, 99 N.Y.2d 1 [2002]). However, pursuant to CPLR§7511(b), an arbitration award must be vacated if, a party's rights were impaired by an

arbitrator who "exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made" (CPLR§7511[b][l][iii]; see *Kowalski v. New York State Department of Correctional Services*, 16 N.Y.3d 85 [2010]).

Thus, it well settled that an arbitrator "exceeds[s] his power" under the meaning of the statute where his "award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of New York City Tr. Auth. v. Transport Workers' Union of Am., Local 100, AFL-CIO*, 6 N.Y.3d 332, 336 [2005]; see also *Matter of Falzone [New York Cent. Mut. Fire Ins. Co.,]*, 15 N.Y.3d at 534]; *Hausknecht v. Comprehensive Med. Care of New York, P.C.*, 24 A.D.3d 778, 779 [2d Dept. 2005]; *Wien & Malkin LLP v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471 [2006]; *Kalyanaram v. New York Inst. of Tech.*,79 A.D.3d 418 [1st Dept. 2010], *lv denied* 17 N.Y.2d 712 [2011]).

The City argues that the instant award violates a strong public policy because it "violates respondent's statutory prerogative to take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work" (see NYC Administrative Code §12-307(b)). The City argues that it is critical to health and safety that Fire Officers utilize all available vehicles, in that said vehicles are used for numerous emergencies, other than actual fire fighting, throughout the City. Thus, the arbitration award, by curtailing their usage, will inevitably jeopardize this vital mission.

The City also argues that the collective bargaining chapter of the Administrative Code contains specific protections in emergency situations which permit the FDNY "to execute its public safety obligations without violating the CBA." (*Id.*). The City asserts that it certainly has not waived these managerial prerogatives and that this award is "in clear contravention of a public policy

embodied in statutory law, and thus, should be vacated" (see City Mem. of Law, p. 14). The City further argues that as within the instant matter, numerous cases exist wherein an arbitration award has been overturned upon being deemed to be in violation of policies to protect the welfare of the public (see *Matter of Castle Oil Corp. (Reliance Ins. Co.),* 24 Misc.3d 1226(A),2009 N.Y. Slip Op. 51621(U) (Sup Ct, NY County 2009). The City asserts that based on this, the Court should vacate the within award as being violative of law and public policy.

The City also argues that the arbitrator exceeded his authority in that he formulated a totally irrational interpretation of the CBA. In support of this contention, the City refers to and relies on the case of *Rochester City School Dist. v. Rochester Teachers Ass'n*, 41 N.Y.2d 578, 581 [1977], which stands for the proposition that an arbitrator's "power to fashion a remedy is not unlimited. If the arbitrator's award is 'completely irrational,' it may be considered misconduct on his part or it may be said that he exceeded his power." The City also argues that in the instant matter, the arbitrator exceeded his power, in that ordering the City to not use available equipment for emergencies, except fire fighting "and not other imminent and critical emergencies...is completely irrational and creates an absurd and potentially life threatening result" (see Mem. Of Law in Support of Cross Motion, p. 17).

The Court finds the arbitrator's award to be rationale and appropriate, in that said award is based exclusively on a plain reading of the language contained in the CBA, giving effect to the remedy contained therein (see *Goldberg v. Thelen Reid Brown Raysman & Steiner* LLP, 25 Misc.3d 1205 (A), 901 N.Y.S.2d 906 (Sup. Ct. N.Y. Co. 2007), *affd* 52 A.D.3d 392 [1st Dept. 2008]).

Article XIII, Section 2 of the CBA ("Safety Standards Provision"), states:

"The Fire Department shall institute a ten year replacement policy for all first line (regularly

assigned) firefighting vehicles. The Department shall operate first line engine, ladder, squad and rescue companies with vehicles less than eleven years of age. If such vehicle is unavailable, this Section shall not effect the Fire Officer's (line) duty to respond to fires on available equipment." (See Safety Standards Provision, Section 2, annexed as Exhibit "A").

The instant arbitrator determined that "[t]he City/Department violated collective bargaining agreement, Article XIII, Section 2, by operating first line engine, ladder, squad and rescue companies with vehicles more than eleven years of age....." (See Award at, Exhibit "B"). Indeed, the City's vehement opposition to the Safety Standards Provision is disingenuous and patently ridiculous, considering the fact that said provision has been a component of the CPA in excess of forty years. More importantly, the City obviously agreed to the incorporation of this provision via the collective bargaining process.

Furthermore, the Court finds that the award does not contravene, but actually promotes public policy, by helping maintain the safety of the public as well as firefighters by insuring that out of date vehicles and equipment will be replaced by state of the art, sound equipment. This is essential to the safety of all involved. The Court also rejects the City's argument that the inability to utilize merely 13 out of 350 (or 3%) of its vehicles to respond to all non fire related emergencies will have a "critical impact on the public health and safety" (see Kilduff Aff. ¶ 8). Indeed, the Court believes that responding to any emergency with faulty equipment is decidedly a more dangerous proposition.

Therefore, in accordance with the foregoing, it is hereby

ADJUDGED that the petition is granted and the award in favor of petitioner and against respondent is confirmed; and it is further

ORDERED that respondent's cross-motion is denied; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: July 25, 2013

ENTER:

JUL 25 2013

Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT