Matter of Village of Garden City v Professional Firefighters Assoc. Of Nassau County, Local 1588
2015 NY Slip Op 32731(U)
April 28, 2015
Supreme Court, Nassau County
Docket Number: 011107-14
Judge: Arthur M. Diamond
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SUPREME COURT – STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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In the Matter of the Application of

VILLAGE OF GARDEN CITY,

Plaintiff,

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

-against-

PROFESSIONAL FIREFIGHTERS ASSOCIATION OF NASSAU COUNTY, LOCAL 1588,

Defendant.

---x

TRIAL PART: 9

NASSAU COUNTY

INDEX NO.: 011107-14

MOTION SEQ. NO.: 1,2

SUBMIT DATE: 2/6/15

The following papers having been read on this motion:

Notice of Petition.....1
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Memorandum in Reply.....7&8

This Petition by the Village of Garden City ("Village") pursuant to Article 75 of the CPLR for a judgment permanently staying arbitration of its "Recall Procedures" demanded by the respondent Professional Firefighters Association of Nassau County, Local 1588 ("the Union") is determined as provided herein.

This motion (erroneously denominated a cross-motion) by the Union for a judgment compelling arbitration is determined as provided herein.

The Union has sought arbitration of the Village's interpretation and application of their1998 "Recall Procedures." That agreement sets forth the rules governing which firefighters are required to be called into service when the number on duty is not adequate to meet the Garden City Fire Department's ("Department") needs. The Recall Procedures require that paid members of the Department be recalled to duty in the event of a second, third and fourth alarms. The Village seeks via this proceeding to permanently stay that arbitration on the grounds that it is against public policy to arbitrate that matter. In the alternative, the Village maintains that the Recall Procedures are not included in a valid and enforceable agreement and that in any event, since the Recall Procedures are not set forth in the parties' Collective Bargaining Agreement ("CBA") , arbitration does not lie. The Union has moved to compel arbitration.

The facts pertinent to the determination of this petition are as follows:

The Department consists of both paid and volunteer firefighters and officers. William Castoro is the Volunteer Chief who is alleged to be in charge of both paid and volunteer firefighters and officers. On September 27, 2014, at approximately 9:45PM, the Department received an alarm of a house fire at 5 Terrace Park in Garden City. Upon arriving at the scene and assessing the situation, Chief Castoro used his radio to transmit a "Signal 10" through Firecom, the county-wide governmental organization which transmits fire alerts to fire departments throughout Nassau County. Signal 10 did not alert paid Garden City firefighters but instead alerted not only Garden City Fire Department volunteers, but also surrounding Fire Departments to assist with Mutual Aid to a "working fire." As a result of that Signal, pursuant to the Village's Mutual Aid procedures, the Franklin Square Fire Department's Ladder Truck and the New Hyde Park Fire Department Firefighter Assist and Search Team ("FAST" Team) responded to the scene. A Ladder Truck from the Mineola Fire Department and an engine from the Westbury Fire Department responded to Garden City Village Fire Department's Headquarters to remain on stand-by. At the scene of the fire, Chief Castoro assigned the "FAST" team to pull down ceilings in the kitchen area of the house and then alerted Firecom via radio that "[t]he 'FAST' team is going to work. Give me another 'FAST' team." As a result, Firecom directed the Mineola Ladder Truck which was on stand-by at the Garden City Fire Department Headquarters to report to the scene and directed the Garden City Park Fire Department to respond to Garden City Fire Department

Headquarters with a Ladder Truck to remain on standby. In total, the Village had four paid on-duty Garden City firefighters, approximately 46 volunteer Garden City firefighters, approximately 25 volunteer firefighters from surrounding communities and approximately seven Mutual Aid units from other communities either at the scene or on standby with various apparatus including Ladder Trucks, Engines and Ambulances. Chief Castoro determined that the scene was adequately staffed and that a "Recall" of the Department's off-duty paid firefighters was not necessary.

The Union filed a Step One grievance under the parties' CBA on October 3, 2014, alleging that the Village had violated the "Recall Procedures" by failing to call four off-duty paid firefighters and a Lieutenant to respond to the fire on September 27th. It alleged:

> the Village was required to initiate and follow the Recall Procedures set forth in the agreement. The Village failed to follow the agreed upon Recall Procedure. No Recall was initiated as required. The Village is required to comply with the attached Recall Procedures.

The Union maintained that a second alarm had been triggered because the New Hyde Park 'FAST' Team performed work and additional Ladder Trucks from Franklin Square and Mineola had responded as a result of which the Village was required to recall certain off-duty paid firefighters.

The "Recall Procedures" relied upon by the Union are not set forth in the parties' CBA, but rather, are set forth in a stand alone document labeled "Addendum." Under the Recall Procedures, a second alarm is triggered either when a "Fast" Team is put to work at the scene of a fire or when an additional Engine or Ladder Truck is called to the scene. Under the Recall Procedures, if a "second alarm" is set off, four off-duty paid Department firefighters and an off-duty paid Lieutenant must be recalled to Headquarters to be on standby and they must be compensated for overtime at the rate of one-and-a-half times their regular rate of pay for a minimum of four hours.

Under the parties' CBA, Step One was required to be referred to a Captain but since there was not a Captain in the Department, the Step One grievance was converted to a Step Two grievance. The Village denied the Step Two grievance on October 15, 2014. Village

Administrator Suozzi maintained that the agreement relied on by the Union was unenforceable because it was not signed by the Village's Chief Executive Officer, i.e., the Mayor, but rather, was signed by Village Administrator Schoelle. Suozzi maintained that the Village Administrator lacked the authority to enter into an addendum to the CBA. On October 31, 2014, the Village received the Union's demand for arbitration and on November 3, 2014 the parties received notice of the Union's demand for arbitration from the American Arbitration Association ("AAA"), accompanied by a list of arbitrators. This proceeding ensued.

The Village maintains that the Recall Procedures for fire departments are a matter of public policy and that arbitration is accordingly not permitted. It also maintains that Recall Procedures are not subject to mandatory negotiations and are considered management prerogatives under the Taylor Law. In addition, the Village maintains that the Recall Procedures which the Department relies on were enacted in 1994 and amended in 1998 and were never made part of its CBA with the Union. It is in fact not disputed that the Recall Procedures were only executed by the Union President and the Village Administrator and were never ever executed by the Mayor, as is ordinarily required by Section 201 (12) of the Civil Service Law and Section 4-400(i) of the Village Law nor were they ratified by the Village Board of Trustees which is also required by Sections 201(12) and 204-a of the Civil Service Law. In arguing that the dispute is in fact governed by the parties' CBA and is arbitrable, the Union relies heavily on the parties' past practices and agreements, to wit:

On January 20, 1989, Captain John E. Shields, a paid Fire Officer employed by the Village who oversaw the Department's operations who was not a member of the Union, issued an Order titled "Headquarters Company Recall List." That list outlined the Recall Procedures then in effect on official Garden City Fire Department letterhead. A cover letter from Captain Shields to the Village Administrator states "[u]pon your signature, I shall forward the list to the [volunteer] Chief of Department for implementation at the Department level." The Village Administrator signed under "Approved." Chief Shields then sent the January 20, 1989 Recall Procedure to the volunteer Fire Chief on May 3, 1989 along with a cover memo which stated:

> Enclosed is a copy of the Headquarters Company Re-Call List for additional manpower at incidents within the Village of Garden City. This was approved by

the Village Administrator and [the Union]; **and is an addendum to the current contract between the Village and the [Union]** [emphasis added].

Please review this with your Assistant Chiefs and Fire Council. This recall list will take effect immediately upon receipt.

In March, 1992, Captain Shields issued an "Update of Order Issued on January 20, 1989" containing rules for issuing, inter alia, a second alarm and the recall of Career Firefighters, a/k/a Department employees to address "manpower shortage." According to a memo dated July 8, 1993 from Captain Shields to the Volunteer Fire Chief, an issue arose concerning a Career Firefighter's implementation of the "Re-Call Order dated March 1992 during Alarm # 380-93 in July, 1993." That letter stated "RE-CALL ORDER WAS IMPLEMENTED IN MAY, 1989, AND WAS APPROVED BY CHIEF ROELOFSEN AND SUBSEQUENTLY ADDED AS PART OF THE CONTRACT BETWEEN THE VILLAGE AND THE [UNION]." In response, the volunteer Fire Chief issued an Order dated July 19, 1993 which allegedly also violated the aforementioned Recall Procedures. On or about July 26, 1993, the Union grieved the unilateral change in the Recall Procedure implemented via the volunteer Fire Chief's Order dated July 19, 1993. Its grievance stated "[t]he order in question alters, modifies and revises a Recall Procedure mutually agreed upon by the [Village] and the [Union] in 1989..., and revised pursuant to agreement by both parties in March 1992 and incorporated as an addendum to the [CBA] between the [Village] and the [Union] ." It additionally stated that the "chief's order is in violation of Article V, Section 2 of the [CBA]; the revised addendum on Recall Procedure dated March of 1992; and Article XIX of the [CBA]." The Village's Administrator Robert Schoelle wrote to the Union's President and stated that he must speak with counsel before responding to the grievance.

Following the Union's filing for arbitration, on November 12, 1993, the Village Administrator Schoelle notified the Union President in writing that its 1993 grievance was "upheld ... based on the fact that the Chief's Order of July 19, 1993 on Recall Procedure **modifies a procedure which was mutually agreed upon by the Village and [the Union] in collective bargaining** (emphasis added)." In addition, Village Administrator Schoelle asked the Union to agree to additional changes to the "Recall Procedure of 1989, as amended in 1992." The Union

agreed to discuss the proposed changes and on September 14, 1994, the Village Administrator and the Union signed an "ADDENDUM TO [CBA] BETWEEN THE PROFESSIONAL FIREFIGHTERS ASSOCIATION OF NASSAU COUNTY LOCAL 1588 'PFFA' AND THE INCORPORATED VILLAGE OF GARDEN CITY." That Addendum describes in detail the revised Recall Procedure mutually agreed upon by the Village Administrator and the Union. That Agreement was again slightly amended in 1998 by the Union and the Village Administrator.

The Union further notes that the Village's records reflect that it traditionally followed the agreed upon Recall Procedures in recalling off-duty Career (paid) Firefighters. It has identified approximately 20 times from 1989 until June 2012 when the Village did so, contrary to the procedure employed at the Terrace Park fire. The Union maintains that the Village's present position that the Village Administrator lacked the authority to sign agreements is inconsistent with many years of practice as well as his duties as outlined in the Village Code.

The Union notes that the Village Administrator signed a letter agreement on May 6, 2009 confirming a pre-tax contribution plan regarding dental benefits in connection with collective bargaining negotiations for a new CBA. However, that was contingent on the "ratification by both parties of Mediator Howard Edelman's revised contract recommendation;" was attached to the contract recommendation; and, was placed before the Board together with the Mediator's recommendation and formally ratified by the vote of the Mayor and the Board in 2008-2009.

A dispute similar to the parties' dispute here was arbitrated in 2012. The issue before the arbitrator there was "whether the [Village] violated the [CBA] by assigning bargaining unit work to non-bargaining unit employees on April 10, 2012?" In that case, the Union maintained that the Chief improperly permitted a volunteer to drive a Ladder truck to the scene of a fire before a professional firefighter was dispatched to do so. The Union maintained that except in limited circumstances, the parties' agreement required that professional firefighters be assigned the work of driving the first line apparatus and that volunteers be assigned the work of driving the second line of apparatus. The Union relied on agreements signed by and/or approved by the Village Administrator, several successful Union grievances and repeated concessions by the Fire Chief in the Union's favor. Relying on an agreement between the Union and Schoelle as Village Administrator as well as agreements between the Union and the Fire Chief which were not

disavowed by the Village although made know to the Village Administrator, as well as the parties' past practices, the arbitrator ruled in favor of the Union despite the fact that the rule which the Union was seeking to have enforced was not contained in the parties' CBA.

In that matter, the parties had stipulated to limiting the arbitrator's authority to determining "whether the [Village] violated the [CBA] by assigning bargaining unit work to non-bargaining unit employees on April 10, 2012...." This court in fact ruled that the arbitrator had exceeded her authority because she did not squarely address that issue but instead "found that the Village violated a past agreement as well as past practices **and in so doing**, violated the CBA without establishing the necessary connection between the Village's violation of agreements and past practices and the parties' CBA (emphasis added)." Matter of Professional Firefighters Association of Nassau County, Local 1588, Internationlal Assocaition of Fire Fighters, AFL-CIOv Village of Garden City, Sup Ct, Nassau County, June 17, 2013 Diamond, J. Index No. 600927-13. However, the Appellate Division, Second Department reversed, holding that "the arbitrator acted within her broad authority under the [CBA] **by relying upon the prior agreements and past practices in interpreting the provisions of the agreement** (emphasis added), and in determining that the Village violated it by assigning the operation of first line equipment to volunteer firefighters rather than to paid firefighters...." Matter of Professional Firefighters Ass'n of Nassau County v. Village of Garden City, 119 AD3d 803(2d Dept 2014), lv denied 24 NY3d 909 (2014).

As an preliminary matter, this court refuses to reject the Petition for lack of a proper verification pursuant to CPLR 3020(d). "CPLR 402 contains no requirement that the petition be verified...." Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C402:1.

"[T]he intent to arbitrate of parties to a collective bargaining agreement in the field of public employment may not be presumed (citations omitted)" (*Matter of Board of Educ. of Valhalla Union Free Sch. Dist. v. Valhalla Teachers Ass'n*, 112 AD3d 620, 621 [2d Dept 2013]). "[I]t must be taken, in the absence of clear, unequivocal agreement to the contrary, that [a public employer]did not intend to refer differences which might arise to the arbitration forum," and such reference may not be based on implication (*Matter of Acting Supt. of Schools of Liverpool Cent. School Dist. [United Liverpool Faculty Assn.]*, 42 NY2d 509,514 [1977]).

In determining an application of this kind, two inquiries are required. First, the court must determine whether the issue(s) are subject to arbitration, i.e., whether there is "any statutory, constitutional or public policy prohibition against arbitration of the grievance." Matter of City of Johnstown (Johnstown Police Benevolent Ass'n), 99 NY2d 273, 278 (2002), citing Matter of Acting Supt. of Schools of Liverpool Cent. School Dist. (United Liverpool Faculty Assn.), supra and Matter of Board of Educ. of Watertown City School Dist. (Watertown), 93 NY2d132, 143 (1999); see also, Matter of New York City Trans. Auth. v. Transport Workers Union of Greater N.Y., Local 100, 117 AD3d 955 (2d Dept 2014). The court "must ... determine[] whether arbitration claims with respect to the particular subject matter are authorized by the terms of the Taylor Law" (*Matter of Acting Supt. of Schools of Liverpool Cent. School Dist. (United Liverpool Faculty Assn.)*, supra at 513). " If, of course, the subject matter of the dispute between the parties falls outside the permissible scope of the Taylor Law, there is no occasion further to consider the language or the reach of the particular arbitration clause" (*Matter of Acting Supt. of Schools of Liverpool Cent. School Dist. (United Liverpool Faculty Assn.)*, supra at 513). "If there is no prohibition against arbitrating, [the court] then examine[s] the CBA to determine if the parties have agreed to arbitrate the dispute at issue" (*Matter of City of Johnstown (Johnstown Police Benevolent Ass'n)*, supra at 278 citing *Matter of Board of Educ. of Watertown City School Dist. (Watertown)*, supra at 140; *Matter of Acting Supt. of Schools of Liverpool Cent. School Dist. (United Liverpool Faculty Assn.)*, supra at 513–514). If arbitration may be had, "inquiry then turns at a second level to a determination of whether such authority was in fact exercised and whether the parties did agree by the terms of their particular arbitration clause to refer their differences in this specific area to arbitration" (*Matter of Acting Supt. of Schools of Liverpool Cent. School Dist. (United Liverpool Faculty Assn.)*, supra at 513). Thus, the court must determine whether the parties' dispute is arbitrable and if so, whether they agreed to do arbitrate.

Is the subject matter subject to arbitration?

"Despite [the] policy of according an arbitrator seemingly unfettered discretion in matters submitted to him by the consent of the parties, it is the established law in this State that an award which is violative of public policy will not be permitted to stand" (*Matter of Sprinzen [Nomberg]*, 46 NY2d 623, 630 [1979]). There are "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" (*Matter of Buffalo Police Benevolent Assn. (City of Buffalo)*, 4 NY3d 660, 664 [2005], quoting *Matter of Sprinzen [Nomberg]*, supra at 631; see also, *Matter of Mineola Union Free School Dist. v Mineola's Teachers' Assoc.* 37 AD3d 605,505 [2d Dept 2007]). "A public employer's decisions are not bargainable as terms and conditions of employment where 'they are inherently and fundamentally policy decisions relating to the primary mission of the . . . employer (citations omitted)' "(*Matter of County of Erie v State of N.Y. Pub. Empl. Relations Bd.*, 12 NY3d 72, 78 [2009]). Nevertheless, "[u]nder our modern arbitration jurisprudence, judicial 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" (*Matter of New York City Transit Authority v. Transport Workers Union of America, Local 100, AFL-CIO*, 99 NY2d 1, 6-7 [2002]).

It is not disputed that arbitration here is not precluded here by constitution, statue or regulation. In arguing that the subject matter here is not subject to arbitration, the Village relies on a number of decisions by the New York State Public Employees Relation Board ("PERB"). In City of Corning (15 PERB ¶4663 at 4791[1981]), PERB held that matters that imposed upon an employers prerogative relating to the dimension of services rendered to the community was not arbitrable and so a demand that a minimum number of personnel be on duty at any given time related to the equipment was not enforceable. In City of Saratoga Springs (16 PERB ¶ 4523 at 4553 [1983]) PERB held that staffing levels or manning were non-mandatory as it is well settled that the employer has the right to determine the number of firefighters on duty at any given time. In International Association of Firefighters of the City of Newburgh Local 589 (10 PERB ¶ 3001 [1977]), PERB found that the staffing levels of firefighters assigned to various rigs was a management prerogative and a subject of nonmandatory arbitration. It held that "manpower and the deployment of firefighters...is essentially one of management prerogative as to how to best serve public safety needs and is not a subject of negotiation." In City of New York (40 PERB ¶ 6001 at 6003 [2007]) and City of Niagra Falls (16 PERB ¶ 4553, 4625 [1983]), PERB held that staffing levels are a matter of managerial prerogative. Similarly, in Troy Uniformed Firefighters

Association (10 PERB ¶ 3015 [1977] and City of Rochester (43 PERB ¶4569 [2010]), PERB held that a clause requiring a certain rank of employee to be called to a fire was also a nonmandatory subject of negotiations.

The Village argues that here, the Recall Procedures which the Union seeks to enforce dictate the number and rank of firefighters which must be called on a second alarm as well as the rate of pay to which they are entitled. Accordingly, the Recall Procedures allegedly interfere with the Village's managerial prerogative to determine staffing and personnel demands. This argument however overlooks the fact that the Union's primary challenge is not to the number or rank of firefighters which must be called. Rather, the Union challenges whether, once the Village has exercised its prerogative regarding whether additional firefighters are needed, pursuant to the parties' agreement and past practices, union members must be called before volunteers in the case of a second, third, fourth alarm, etc, and paid overtime. None of the cases relied on by the Village address that issue. The matter here is arbitrable. Town of Stony Point, 6 PERB ¶ 3030 (1973); Bd. Of Educ. Of the City Sch. Dist. Of the City of New York, 6 PERB¶ 3006 (1973); Spring Valley PBA v Village of Spring Valley, 80 AD2d 910, 14 PERB ¶ 7515 (2d Dept 1982); City of Peekskill, 35 PERB ¶ 4509 (2002), rvsd on other grounds, 35 PERB ¶ 3016 (2002).

In fact, a County Sheriff's Office was found to have engaged in improper practices by assigning non-union members to perform security screening at the County Jail and Correctional facility and the court specifically held that public policy did not require that that determination be annulled. Matter of Monroe County v. New York State Pub. Emp. Relations Bd., 111 AD3d 1342 (4th Dept 2013), citing Matter of City of New York v Board of Collective Bargaining of the City of N.Y., 107 AD3d 612, 612-613 [1st Dept 2013]; cf. Matter of New York City Tr. Auth. v New York State Pub. Empl. Relations Bd., 19 NY3d 876, 878 [2012]). Similarly, PERB applied a past practice analysis in finding that the County Sheriff violated its duty to bargain under Civil Service Law § 209-a (1)(d)when it unilaterally transferred the exclusive bargaining unit work of security function at a county building to non-union part-time deputies. Seneca County Deputy Sheriff Police Benevolent Association, v County of Seneca and Seneca County Sheriff, 47 PERB ¶ 3005 (2014).

Whether paid verses volunteer firefighters are entitled to be called first on second, third,

fourth, etc., alarms has not been shown to be matter of profound public interest negating the parties' right to arbitrate it. In addition, should the Village believe that the arbitrator's award is violative of public policy, it may pursue that theory in an article 78 proceeding challenging the holding.

Did the parties agree to arbitrate the matter?

"Absent a valid collective bargaining agreement containing an arbitration clause," a demand for arbitration fails and the employer may not be compelled to arbitrate the dispute. Matter of Hudson Valley, 152 AD2d105 (3d Dept 1989).

Under the parties' CBA, a grievance is limited to "a dispute arising out of the interpretation, application, performance or construction of the terms of **this agreement** or any alleged breach thereof (emphasis added)...." The arbitrator's jurisdiction is limited in the parties' agreement. The arbitrator does not have power "to add to, subtract from or modify in any way any terms of [the] agreement." The CBA further provides that a grievance which is not resolved within 10 days may be referred to arbitration by an employee, the union or the Village and that decisions by arbitrators are "final and binding" on the Village, the union and the employee.

The parties' CBA provides:

> Employees ... who are recalled for any ... reason during off duty hours shall perform duties as directed and shall be paid time and one-half the regular rate, provided that a minimum of four (4) hours on a time and one-half basis shall be credited for such appearance or recall duty when such duty does not immediately precede or follow a regular tour of duty. Recall is a communication to an employee directing him to proceed immediately to engage in work or to report for such work at a designated time, other than a regularly scheduled tour of duty.

Curiously, the Union has not cited that portion of the CBA let alone accused the Village of breaching it. In fact, nothing in this paragraph or the parties' CBA requires the Village to recall paid firefighters as opposed to volunteer firefighters at any given time. In addition, the parties CBA provides:

> The Village has the exclusive right to manage its affairs, to direct and control its

> operations, and independently to make, carry out and execute all plans and decisions deemed necessary in its judgment for its welfare, advancement or best interests. Such management prerogatives shall include but not be limited to the following rights:
>
> To determine schedule of work including overtime.

Finally, the CBA provides that "[t]his agreement disposes of all matters which are the proper subject of collective bargaining between the parties and no modification hereof shall be effective except by mutual consent of the parties evidenced in writing." The parties' CBA clearly left to the Village the decision about when, how many, what ranks and whether paid or volunteer firefighters would be called to a fire on a second, third or fourth, etc., alarm.

Furthermore, under Section 201 (12) of the Taylor Law, "[t]he term 'agreement' means the result of the exchange of mutual promises between the chief executive officer of a public employer and an employee organization which becomes a binding contract, for the period set forth therein, except as to any provisions therein which require approval by a legislative body, and as to those provisions, shall become binding when the appropriate legislative body gives its approval." Similarly, Civil Service Law §§ 201(12) and 204-a require that any provisions of an agreement by the Village that requires the expenditure of funds must be approved by the Village's "Legislative Body," here, the Village Board of Trustees ("Board"). In fact, the parties' Collective Bargaining Agreement("CBA") provides:

> IT IS AGREED BY AND BETWEEN THE PARTIES THAT ANY PROVISION OF THIS AGREEMENT REQUIRING LEGISLATIVE ACTION TO PERMIT ITS IMPLEMENTATION...BY PROVIDING THE ADDITIONAL FUNDS THEREFOR, SHALL NOT BECOME EFFECTIVE UNTIL THE APPROPRIATE LEGISLATIVE BODY HAS GIVEN APPROVAL.

In addition, under Village Law § 4-400 (i), the Mayor has the exclusive authority to sign all agreements on the Village's behalf.

The Recall Procedures were never approved by the Mayor who had the sole authority to

bind the Village (see Village Law § 4-400; see also, *Watkins Glen Central School District* , 23 PERB ¶ 3035 [1990]; *Matter of Hudson Valley*, supra), but rather, were approved by the Village Administrator. The Village Code defines the Village Administrator's duties as follows:

> See that all laws applicable to the village, its officers and employees, and all ordinances, resolutions, rules and regulations of the village are faithfully executed and enforced.
>
> Supervise and direct all functions and activities of the village and of its officers and employees, except the Police Justice, Village Attorney, Board of Appeals, Planning Commission and Board of Review.
>
> Make reports to the Mayor and Board of Trustees on the affairs of the village and recommend to them such measures as he may deem necessary or appropriate for the purpose of obtaining greater efficiency and economy in the government and operation of the village.
>
> Exercise general supervision over all expenditures of the village in accordance with the budget and keep the Board of Trustees fully advised of the financial condition of the village and its future financial needs.
>
> Prepare annually a tentative budget for consideration by the Board of Trustees and serve as Budget Officer when so designated by the Mayor in accordance with § 5-500 of the Village Law.
>
> Have such other powers and duties, not inconsistent with law, as from time to time the Board of Trustees may by resolution determine.

The Village Administrator's powers clearly do not include the power to enter into agreements binding on the Village and in any event, are "subject to the direction, control and approval by the Mayor and the Board of Trustees." The Village Administrator lacked the authority to execute the subject agreements under the Village Law. Matter of Hudson Valley, supra. In addition, the Board never ratified the agreement relied on by the Union or authorized the Village Administrator or the Mayor to execute the "Recall Procedures," which is also required given the necessity of

appropriating funds for overtime. Civil Service Law §§ 201(12); 204-a; Watkins Glen Central School District, supra). The lack of Mayoral approval and Board ratification would ordinarily render the Recall Procedures unenforceable.

In addition, while each and every collective bargaining agreement entered into by the parties covering the periods from 1992-1996, 1996-2000, 2000-2004, 2004-2008 were negotiated by Schoelle as the Village Administrator and the Village's Legal Counsel, each and everyone of them was ratified by the Village Board which authorized the Mayor, as the Village's Chief Executive Officer, to execute them and he did so. On June 4, 2008, the Village Board ratified an agreement which had been recommended by a mediator to cover the period from June 1, 2008 through May 30, 2009 [sic] and authorized the Mayor to execute it and he did so. Most recently, an agreement covering the three year period from June 1, 2009 through May 31, 2011 was imposed by a three member Interest Arbitration Panel. That agreement was binding on the Village by operation of law. Civil Service Law § 209(4)(c)(vi). None of the aforementioned collective bargaining agreements which were all entered following the most recent Amendment to the Recall Procedures in 1998 made any reference to them, which would also ordinarily defeat the Union's attempt to incorporate the Recall Procedure into the parties' CBAs. Matter of Local 2841 of N.Y. State Law Enforcement Officers Union, AFSCME, AFL-CIO (City of Albany), 53 AD3d 974 (3d Dept 2008); Board of Educ. of East Meadow Union Free School Dist. v. East Meadow Teachers Ass'n, 46 AD3d 810 (2d Dept 2007), lv dismissed in part and denied in part 11 NY3d 780 (2008); Sheriff's Officers Association, Inc. v County of Nassau, Sup Ct, Nassau County, October 7, 2008, McCarty, J. Index No. 5403/07).

The Union does not dispute that the "Recall Procedures" were not approved by the Mayor or the Board. While it acknowledges that the rule it now seeks to enforce was implemented by the Union and the Village Administrator, it maintains that those procedures have in fact been the practice for many years and have been enforced by the courts. See, Professional Firefighters Ass'n of Nassau County v. Village of Garden City, supra. In addition, the Union suggests that the Village Board may in fact have actually officially authorized the Village Administrator to execute the pertinent documents here. In sum, the Union maintains that the Recall Procedures are an existing Fire Department Order which was collectively bargained by the parties at a time when

there were volunteer firefighters.

The Union's reliance on the letter executed by the Village Administrator relating to a pre-tax plan for dental contributions is misplaced as there, unlike here, the agreement was specifically tied to ratification by both parties, was so ratified. And that letter does not evidence the Village's acquiescence in allowing the Village Administrator to negotiate collective bargaining agreements.

The Union's reliance on Prudenti v County of Suffolk (42 Misc3d 1232[A] [Sup Ct Suffolk County 2014]), is misplaced. The agreement in that case had been signed by the required officials and it was found to be binding without further approval because there was not adequate proof that it "necessarily mandated additional funding." Here, not only was the agreement not executed by the Mayor or Trustees, there is no question that it mandated the expenditure of additional funds.

Assuming, arguendo, that the Recall Procedures were binding on the Village, they lack language requiring arbitration anyway. Side agreements like the Recall Procedures which again, were never incorporated in or even referred to in the numerous subsequent CBAs entered into by the parties, are not subject to arbitration absent a clause so specifying. Rahman v Park, 63 AD3d 812 (2d Dept 2009); Matter of General Re Corp. v Foxe, 177 Misc2d 867 (Sup Ct New York County 1998). An "agreement must be express, direct and unequivocal as to the issues or disputes to be submitted to arbitration; anything less will lead to a denital of arbitration." Matter of Acting Supt. of Schools of Liverpool Cent. School Dist. (United Liverpool Faculty Assn.), supra at 511.

The Union relies on the Court of Appeals' denial of leave to appeal in Matter of Professional Firefighters Ass'n of Nassau County v. Village of Garden City, supra, to establish that the matter at hand is arbitrable. Like the denial of *ceritorari*, a denial of leave to appeal is indicative of nothing. It neither endorses nor undermines the underlying decision. In Matter of Professional Firefighters Ass'n of Nassau County v. Village of Garden City, supra at 803, the court held that "the arbitrator acted within her broad authority under the collective bargaining agreement by relying upon the prior agreements and past practices of the parties in interpreting the provisions of the agreement, and in determining that the Village violated it by assigning the operation of first line equipment to volunteer firefighters rather than to paid firefighters represented by the petitioner." "A party who has participated in arbitration cannot later seek to vacate the award on the ground that the controversy was not arbitrable. By statute that question must be raised before

arbitration, and if it is not it is deemed to be waived" *(Rochester City School Dist. v. Rochester Teachers Ass'n*, 41 NY2d 578, 583 [1977], citing *Matter of National Cash Register Co. [Wilson]*,8 NY2d 377, 382 [1977]; CPLR 7503).By participating in that arbitration, the Village cannot be heard to say that the matter there was not arbitrable. Rochester City School Dist. v. Rochester Teachers Ass'n, 41 NY2d 578 (1977). The court notes that the arbitrator's findings and the court's holdings are at a minimum persuasive here that this matter is also arbitrable.

"A contract that is not approved by a relevant municipal or governmental body, as required by law, rule, or regulation, may be ratified by the municipality or government body by subsequent conduct....(citations omitted) " (*East Hampton Union Free School District v. Sandpebble Bldrs. Inc.*, 90 AD3d 815[2d Dept 2011]). In fact, "it is well settled that '[a] municipality may ratify a contract made on its behalf which it has the authority to make even if the contract was initially invalid due to a defective execution or because the municipal officer who purported to execute it did not have the requisite authority' " (*Della Rocco v. City of Schenectady,* 278 AD2d 628, 630-631[3d Dept 2000], lv denied 96 NY2d 701 [2001], quoting *Imburgia v City of New Rochelle*, 223 AD2d 44, 48 [3d Dept 1996], lv denied 88 NY2d 815 [1996]; see also, *Town of North Hempstead v. Winston & Strawn, LLP*, 28 AD.d 746 [2d Dept 2006], lv denied 7 NY3d 715 [2006]). And, " the doctrine of estoppel may be applied against a municipality in the case of extraordinary circumstances where the municipality acts wrongfully or negligently (citations omitted)" *JRP Old Riverhead Ltd. v. Town of Southampton*, 44 AD3d 905, [2d Dept 2007]; *Hendrick Hudson Cent. School Dist. v. Falinski*, 71 AD3d 769, 896 N.Y.S.2d 435 [2d Dept 2010], leave denied 15 NY3d 703 [2010]).

In fact, " ' a past practice concerning [overtime] benefits for current employees, even where unrelated to any specific contractual provision, cannot be unilaterally modified by the public employer' " (*Matter of Meegan v Brown*, 81 AD3d 1403, 1404 [4th Dept 2011], lv denied 83 NY2d 1603 [2011]; quoting *Matter of Aeneas McDonald Police Benevolent Assn. v City of Geneva*, 92 NY2d 326, 332 [1998]; see also, *Matter of City of Watertown (Watertown Professional Firefighters' Association-Local #191),* 280 AD2d 893 [4th Dept 2001], lv denied, 96 NY2d 711 [2001]). "The public employer has 'a duty to negotiate with the bargaining representative of current employees regarding any change in past practice affecting [such] benefits' " *(Matter of*

Meegan v Brown, supra at 1404, quoting *Matter of Aeneas McDonald Police Benevolent Assn. v City of Geneva*, supra at 332).

It is not disputed that the Village followed the procedures set forth in the agreements relied on by the Union for well over 20 years without incident. In fact, until recently, whenever the Village attempted unilateral changes or failed to follow those procedures, the ensuing disputes were easily resolved in the Union's favor. And even the dispute in 2012 ultimately resolved in the Union's favor. It is against public policy to allow the Village to disavow an agreement which it has followed for as long as the Village has followed the agreement here especially since the reasons for disavowing it have always existed but were never advanced.

Accordingly, in conclusion, the petition to permanently stay arbitration is denied and the motion to compel arbitration is granted.

This shall constitute the decision and order of this Court.

ENTER

Dated: April 28, 2015

Hon. Arthur M. Diamond
J.S.C