STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of an Article 75 Proceeding

ALBANY PERMANENT PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCALS 2007, 2007-A,

Petitioners,

-against-

CITY OF ALBANY, NEW YORK,

Respondent.

DECISION AND JUDGMENT

Index No. 48-17

APPEARANCES

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Hartman, J.

Petitioners Albany Permanent Professional Firefighters Association Locals 2007 and 2007-a (the Association) seek to confirm so much of an arbitrator's award as directed the City to participate in expedited arbitration regarding the imposition of a new deductible for a retiree health insurance plan and to vacate so much of the award as denied the Association's grievance regarding increased retiree co-pays and co-insurance. Respondent City of Albany (the City) cross-moves to vacate the former and confirm the latter. Because neither party has demonstrated that any portion of the award exceeds the arbitrator's authority or is irrational, the award is confirmed.

Background

In October 2015, the City sent letters to City retirees detailing changes to their health insurance co-pays and deductibles. The City imposed increases for three health plans: Empire PPO (Empire plan), CDPHP HMO (CDPHP), and MVP Medicare Advantage HMO (MVP Medicare Advantage). The Empire plan increases in co-pays range from $ 5 for primary care to $ 65 for emergency room services. The CDPHP co-pay increases range from $ 15 for specialty, chiropractor, and diagnostic services to $ 500 for hospital stays. The MVP Medicare Advantage co-pay increases range from $ 10 for primary care to $ 55 for "Tier 5" pharmacy prescriptions. The City also imposed co-insurance requirements for certain services and supplies. And the City imposed for the

first time annual $ 250 and $ 500 deductibles for the Empire plan. Because the changes affected only retiree health insurance, the City did not provide notice of these changes to the Association or active employees.

The Association filed a grievance on behalf of active firefighters pursuant to article 19 of the parties' collective bargaining agreement (CBA). The CBA gives employees the right to file grievances challenging claimed violations of the CBA or "terms and conditions of employment" as defined by the Taylor Act. When the parties are unable to resolve the issue through the grievance procedure, article 20 of the CBA authorizes either party to submit the matter to binding arbitration. The only contractual limitation on the arbitrator's power is that "[t]he arbitrator shall have no power to add to, subtract from or modify the terms" of the CBA.

The Association argued in its grievance, as it does here, that the City's unilateral changes of co-payment, co-insurance, and deductible amounts for retiree health insurance violated section 27.1 of the parties' most recent CBA. Section 27.1 required the City to "present proposals to the Union for discussion and possible agreement" when "the City wishes to change the existing health insurance plan," and to arbitrate any such proposals if no agreement could be reached. "The issue of the arbitration will be whether the new City proposal grants substantially equivalent coverage to members of the bargaining unit" (CBA § 27.1).

The parties' most recent CBA covered the period from January 1, 2010 through December 31, 2011. When negotiations for a successor agreement proved unsuccessful, the parties proceeded to compulsory interest arbitration. That compulsory interest arbitration award extended the CBA through December 31, 2013; the CBA continues in effect by statute.

The Arbitration Award

Arbitrator Dennis J. Campagna issued his determination and award on November 3, 2016. He framed the issues before him, with the consent of the parties, as follows:

> "1. Does the arbitrator have jurisdiction to hear and determine the instant grievance? 2. If so, did the City violate Article 27 (Health Insurance) at Section 27.1 when it changed the existing health insurance plans offered to retirees as well as prospective retirees . . . . 3. If so, what shall the remedy be?"

Arbitrator Campagna first determined that the matter was arbitrable under the CBA. He relied in part on a previous arbitration decision in which an arbitrator had decided that the elimination of Medicare Part B premium reimbursements for retirees affected current employees who expected the benefit to continue, and thus constituted a change in the existing health insurance plan.

Turning to the merits of the Association's grievance, Arbitrator Campagna restated the issue as a two-part question: whether the City's

changes to co-pays, co-insurance, and deductibles (a) "represented a change in the existing health insurance plan within the meaning of Section 27.1" and (b) "have had an adverse impact on bargaining unit employees." Arbitrator Campagna found that the Association had in the past acquiesced without objection to changes by the City to "the benefits available to retirees and members upon retirement in terms of the available range of plans, and thus, associated benefits, as well as" prescription and doctor visit co-pay amounts. Arbitrator Campagna inferred from the lack of objection by the Association that "from the City's perspective, the Association condoned all such changes made unilaterally by the City," and that the Association was on notice that the City would make unilateral changes to plans and benefits. The arbitrator acknowledged that the Association had in one instance challenged the imposition of $ 5 co-pay increase and that an arbitrator had found that the increase represented a change to the existing health insurance plan, but emphasized that the co-pay at issue in the prior arbitration applied to current employees, not retirees. Arbitrator Campagna denied the Association's grievance with respect to the City's changes in retiree co-pays and coinsurance, implicitly concluding that such changes had no significant adverse impact on bargaining unit employees.

Arbitrator Campagna reached a different conclusion about the newly imposed $ 250 / $ 500 deductibles in the Empire plan. He concluded that the

City violated section 27.1 of the CBA because the relatively high deductible worked a change in the existing health insurance plan for those active firefighters nearing retirement. The arbitrator relied in part on the interest arbitration award covering calendar years 2013–2014, wherein the panel recognized "that pursuant to the City's prevailing policy/practice, a retiree [was required to] pay that percentage of the premium amount in retirement as he/she paid while employed in active City status."[1] Arbitrator Campagna reasoned that "the imposition of deductibles . . . represents a back-door method of passing a portion of the premium contribution for which the City is obligated to pay off to plan recipients, and therefore represents a change 'in the existing health insurance plan.'" He thus directed the City to participate in arbitration regarding the newly imposed $ 250 / 500 deductible under the Empire plan.

[1] During the interest arbitration process, the Association had proposed that the contract include a provision requiring the City to provide health insurance coverage to retirees who retire after December 31, 2011 "at no cost and with coverage and benefits equal to or better than those employed on their last day of employment." The panel declined to include the proposed language, noting that "[c]urrently, there is no language in either CBA that addresses health insurance in retirement." Nevertheless, the panel stated: "with regard to those bargaining unit members who, as of December 31, 2013, were not contributing to their Health Insurance Coverage, [they] shall be deemed, under the City Policy/Practice in effect as of the execution of this Award, to be contributing 0% of their health insurance premium." The panel explained in a footnote that "[i]t is understood that pursuant to the City's prevailing policy/practice, a retiree shall pay that percentage of the premium amount in retirement as he/she paid while employed in active City status."

Applicable Legal Principals

A court may vacate an arbitration award only if "it violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power under CPLR 7511 (b) (1)" (*Matter of N.Y. State Corr. Officers & Police Benevolent Assn. v State*, 94 NY2d 321, 326 [1999]; *see Matter of Bukowski [State of N.Y. Dept. of Corr. & Community Supervision]*, 148 AD3d 1386, 1388 [3d Dept 2017]). A court generally cannot disturb "an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies" or "examine the merits of an arbitration award and substitute its judgment" (*Matter of N.Y. State Corr. Officers*, 94 NY2d at 326). An arbitrator "may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement, even though the award exceeds the remedy requested by the parties" (*Matter of Silverman v Benmor Coats, Inc.*, 61 NY2d 299, 308 [1984]; *see Matter of Jandrew v County of Cortland*, 84 AD3d 1616, 1621 [3d Dept 2011]). "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 (*Matter of N.Y. State Corr. Officers*, 94 NY2d at 326).

Analysis

The Arbitrator Did Not Exceed His Authority When He Directed the City to Arbitrate the Annual $ 250 / 500 Deductible Pursuant to the CBA, and the Award Was Not Irrational in That Respect

The City argues that despite the CBA's express prohibition against adding terms to the contract, Arbitrator Campagna added a term granting "Association retirees . . . a right, at least with respect to the Empire BlueCross PPO, to avoid the $ 250 / $ 500 deductible. The award creates no such right; rather its effect is more limited. Pursuant to the award, the City will next be required to participate in expedited arbitration of the issue. The question there will be whether association members have "substantially equivalent coverage" to the coverage they had before, pursuant to section 27.1 of the CBA.

Arbitrator Campagna acted within the express terms of the CBA. The Association's grievance alleged that the City violated section 27.1 of the CBA. Arbitrator Campagna's award determined that the deductible represented a change in the existing health insurance plan for *active members* who are soon to retire. Changes to active firefighters' existing health insurance plan are subject to arbitration pursuant to the CBA. In other words, Arbitrator Campagna did not add a term to the contract, but found that the contract required arbitration of the City's imposition of the Empire Plan deductible on retired employees. Although the City rejects Arbitrator Campagna's interpretation of the CBA, substantive contract interpretation is reserved to

the arbitrator (*see Matter of Bd. of Educ. of the Catskill Cent. Sch. Dist. (Catskill Teachers Assn.)*, 130 AD3d 1287, 1290 [3d Dept 2015], *lv denied* 26 NY3d 912 [2015]).

The cases the City relies on are inapposite. The City contends, based on *Matter of Aeneas McDonald Police Benevolent Association v City of Geneva,* that it is "well settled that when a public employer unilaterally adopts a policy . . . to provide retiree health insurance benefits, it remains free to unilaterally modify or even eliminate those benefits" (*see* 92 NY2d 326 [1998]). But *Aeneas* was a CPLR Article 78 proceeding, not a CPLR Article 75 proceeding, where an arbitrator is not bound by substantive law or precedent and is free to rely on past practice and equitable principals to effect justice (*see Matter of N.Y. State Corr. Officers & Police Benevolent Assn.*, 94 NY2d at 326; *Matter of Jandrew*, 84 AD3d at 1621). "[I]t is certainly not the role of the courts to chart a course as to how the arbitrator is to apply 'past precedent' or to determine if the arbitrator strayed from the best route in the guise of declaring that he exceeded his power" (*Matter of N.Y. City Tr. Auth. v Transp. Workers Union of Am., Local 100*, 14 NY3d 119, 126 [2010]). In any event, *Aeneas* was brought by retirees, not current employees, a critical fact that the Court itself recognized (*see* 92 NY2d at 331–332 ["health benefits for *current employees* can be a form of compensation . . . that is a mandatory subject of negotiation" under the Taylor Law] [emphasis added]).

The remaining cases the City cites involve awards that directly contravened or "rewrote" the terms of the CBA. In *Matter of New York State Correctional Officers*, the court vacated so much of an award as directed paid administrative leave because the CBA explicitly restricted the arbitrator to determinations of guilt or innocence and appropriateness of penalties (*see* 13 AD3d 961, 962–963 [3d Dept 2004]. In *Matter of Kocsis v New York State Division of Parole*, the court similarly held that the arbitrator exceeded his power when he awarded paid leave where the CBA mandated leave without pay for occupational injury (*see* 41 AD3d 1017, 1020 [3d Dept 2007]). In *Board of Education v North Babylon Teachers' Organization*, the court held that the "arbitration award read into the collective bargaining agreement a provision for the 'vesting' of a teacher's right to terminal leave upon attaining 10 years of service, which directly contravened the language of" the CBA (*see* 104 AD2d 594, 597 [2d Dept 1984]). Finally, in *Local Union 1566, Intl. Bhd. of Elec. Workers v Orange & Rockland Util., Inc.*, the court held that an arbitrator "rewrote the contract" by adding to the CBA's sick leave terms a requirement that employees "submit claims for statutory disability benefits in order to qualify for sick-leave benefits from the employer" (126 AD2d 547 [2d Dept 1987], *appeal denied* 70 NY2d 603 [1987]).

In contrast, here the award does not contravene, add to, or rewrite the CBA. The import of Arbitrator Campagna's award is that imposition of a

$ 250 / $ 500 deductible is a change to the existing health insurance plan as defined by section 27.1 of the CBA. Thus, he was within his authority to direct the City to Arbitrate pursuant to the CBA.

The rationality of the award is supported by case law as well as the prior arbitrations between the Association and the City over similar issues. In *Matter of Chenango Forks Central School District v New York State Public Employees Relations Board [PERB]*, the Third Department upheld PERB's determination that the school district had committed an improper employer practice by refusing to negotiate with the employees' association and unilaterally ceasing its longstanding practice of reimbursing retirees Part B Medicare premiums (95 AD3d 1479 [3d Dept 2012], *affd* 21 NY3d 255 [2013]). The appellate court rejected the school district's assertion that reimbursement cannot be considered a term and condition of employment subject to mandatory negotiation, reasoning that "reimbursement of Medicare Part B premiums . . . although paid after retirement, constitutes a form of compensation earned by the employee while employed" (*id.* at 1481; *see also Matter of Albany Police Officers Union, Local 2841 v NY Pub. Empl. Relations Bd.*, 149 AD3d 1236 [3d Dept 2017] [annulling PERB's determination that City's unilateral cessation of reimbursement to retirees for Medicare Part B premiums was not an improper employer practice]).

In addition, previous arbitrations between the parties to this case resulted in arbitral awards sustaining the Association's grievance regarding the City's unilateral decision to stop paying Medicare Part B premiums for retired firefighters. That arbitrator there reasoned that halting the longstanding payments represented a change to the employees' existing health care plan for active employees. And the interest arbitration award (issued by a panel of arbitrators that included Arbitrator Campagna) established that, under the City's longstanding practice, employees who had not been contributing any amount to their health insurance premiums at the date of their retirement would continue to pay nothing toward their premiums in retirement. Arbitrator Campagna rationally analogized the Empire plan deductibles at issue here to Medicare Part B reimbursements and premium payments, and thus rationally concluded that the imposition of the deductibles represented a change to the existing health insurance plan that adversely affects current employees.

Accordingly, the Association's motion to confirm so much of the arbitration award as directed the City to participate in expedited arbitration regarding the imposition of deductibles is granted, and the City's cross-motion is denied to the same extent.

That Part of the Award That Denied the Association's Grievance with Respect to Co-Pays and Co-Insurance Was Not Irrational

The Association argues that the award is internally inconsistent and thus irrational because Arbitrator Campagna found that the City's unilateral imposition of deductibles on retirees' Empire Plan violated the CBA, but that the City's unilateral imposition of co-pay and co-insurance increases did not. Although both parties argue that there is no meaningful distinction between co-pays and deductibles, deductibles are annual charges, whereas co-pays are not, and most of the co-pay and co-insurance increases were relatively minor compared to the annual deductibles. Moreover, Arbitrator Campagna found that "the City has changed, without challenge from the Association, the benefits available to retirees and members upon retirement in terms of the available range of plans, and thus, the associated benefits available . . . ." He reasoned that Association members therefore could not have had a reasonable expectation that co-pays and co-insurance would not change.

The Association further argues that the evidence before the arbitrator did not support his award because the changes at issue here are more severe than past changes and because past changes provided retirees with substantially equivalent coverage to the coverage they enjoyed before. These arguments represent challenges to the factual findings of the arbitrator and his interpretation of the contract. "It is not for the courts to interpret the

substantive conditions of the contract or to determine the merits of the dispute" (*United Fedn. of Teachers, Local 2 v Bd. of Educ.*, 1 NY3d 72, 82–83 [2003]; *see Matter of N.Y. State Corr. Officers*, 94 NY2d at 326).

Arbitrator Campagna was empowered to apply equitable principles and to interpret the law in his own way in order to effect the spirit of the contract and do justice (*see Matter of N.Y. City Tr. Auth. v Transp. Workers' Union, Local 100*, 6 NY3d 332, 336 [2005]; *Silverman*, 61 NY2d at 308). Given the parties' past practice, the seemingly disparate prior arbitral awards that Arbitrator Campagna synthesized, and his consideration of equitable factors, the Court cannot conclude that it was irrational for him to determine that the co-pay and co-insurance changes did not violate section 27.1 of the CBA.

Because neither party has demonstrated that any part of the award should be vacated, it is

ORDERED that the motion of Albany Permanent Professional Firefighters Association, Locals 2007, 2007-a is granted in part and denied in part, consistent with this decision; it is

ORDERED that the City of Albany, New York's cross-motion is denied in part and granted in part, consistent with this decision; it is

ORDERED that the arbitration award of Dennis J. Campagna, dated November 3, 2016, is confirmed in full.

This constitutes the decision and judgment of the Court. The original decision and judgment is being transmitted to petitioner's counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this decision and judgment does not constitute entry or filing under CPLR 2220 or 5016 and counsel is not relieved from the applicable provisions of those rules respecting filing and service.

Dated: Albany, New York
June 13, 2017

Denise A. Hartman

Denise A. Hartman
Acting Justice of the Supreme Court

Papers Considered

1. Notice of Petition and Verified Petition, with Exhibits 1–3
2. Petitioner's Memorandum of Law, with Exhibits 1–5
3. Verified Answer
4. Notice of Cross-Motion
5. Affidavit in Support of Cross-Motion to Vacate, with Exhibit A
6. Memorandum of Law in Support of Cross-Motion
7. Petitioner's Reply Affidavit
8. Respondent's Reply Memorandum of Law