SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

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INDEX NO. 159305/2022

MOTION DATE 05/03/2023

MOTION SEQ. NO. 001 001 002

In the Matter of the Application of

UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK LOCAL 94, IAFF, AFL-CIO,

Petitioner,

For a Judgment Pursuant to Article 78 of the CPLR,

- v -

THE CITY OF NEW YORK, THE FIRE DEPARTMENT OF THE CITY OF NEW YORK and THE NEW YORK CITY BOARD OF COLLECTIVE BARGAINING,

Respondents.

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DECISION, ORDER and JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 18, 19, 23, 25, 27

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 18, 19, 23, 25, 27

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 24, 26, 28

were read on this motion to/for DISMISSAL.

I. Introduction

Petitioner Uniformed Firefighters Association of Greater New York Local 94, IAFF, AFL-CIO (UFA) brings this article 78 proceeding to annul and reverse a decision and order of respondent the New York City Board of Collective Bargaining (the Board) related to the arbitrability of a grievance UFA had filed about the implementation by respondents the City of New York (City) and the Fire Department of the City of New York (FDNY) (together, City) of a

COVID-19 vaccine mandate. In motion sequence no. 001, the City cross-moves, pursuant to CPLR 3211 (a) (7) and 7804 (f), to dismiss the petition for failure to state a cause of action. In motion sequence no. 002, the Board moves under CPLR 7804 (f) to dismiss the petition.

II. Background

The following facts are drawn from the petition and the exhibits submitted therewith unless otherwise noted and are assumed to be true for purposes of these motions (*Matter of Castro v Schriro*, 140 AD3d 644, 644 [1st Dept 2016], *affd* 29 NY3d 1005 [2017]; *Matter of Burgher v Purcell*, 87 AD2d 888, 888 [2d Dept 1982]).

UFA is the exclusive bargaining representative for all firefighters, fire marshals, pilots, marine engineers and wipers employed by the FDNY, which is a municipal agency of the City (NY St Cts Elec Filing [NYSCEF] Doc No. 1, petition ¶¶ 15-17).

On October 20, 2021, the New York City Department of Health and Mental Hygiene (DOHMH) issued an order mandating that all public sector employees of the City be vaccinated against COVID-19 (*id.*, ¶ 3). The FDNY issued an order incorporating DOHMH's October 20, 2021 order the next day (together, the Vaccine Mandate) (*id.*, ¶ 4). The Vaccine Mandate required employees to furnish proof of vaccination by October 29, 2021, or else be excluded from the premises at which they work starting November 1, 2021 (*id.*, ¶ 6). An employee could also seek an exemption from the FDNY's EEO Office (*id.*, ¶ 7). If an employee was not vaccinated and had not submitted a request for reasonable accommodation by October 27, 2021, then the FDNY placed that employee on leave without pay (LWOP) (*id.*, ¶ 8).

On December 1, 2021, UFA filed a grievance alleging violations of its collective bargaining agreements (collectively, the CBA) with the City, including those provisions concerning member compensation and the section on "Individual Rights," and violations of FDNY

regulations (NYSCEF Doc No. 3, petition, exhibit 1 at 4). On February 9, 2022, an FDNY Hearing Officer issued a decision partially granting the grievance as to FDNY policy PA/ID 12-67, which pertained to extra-departmental employment (EDE), and determined that members placed on LWOP had been denied access to earned contractual benefits, or "'benefits for which they already worked and earned'" (*id.* at 6).

On March 28, 2022, UFA filed a request for arbitration of its grievance with the Board[1] (NYSCEF Doc No. 4, petition, exhibit 2 at 1). UFA alleged that, by placing its members on LWOP involuntarily, the City had "violated, misinterpreted or inequitably applied the most fundamental economic provisions of the CBA, including the terms and conditions of employment applicable to, for example, wages, longevity, night differential and other types of financial remuneration, when they placed UFA members on LWOP status" (NYSCEF Doc No. 1, ¶¶ 9 and 34). UFA also claimed that the City had violated FDNY Regulations Chapter 17, Section 17.5 ("Special Leaves"), specifically Section 17.5.1, which reads as follows:

> "Special leaves of absence (without pay) shall be applied for in writing at least 24 hours in advance of such leave, and include all pertinent information and reasons for request. Such leaves shall be limited to a minimum of one-half work day, and to a maximum of 15 work days. Applications for such leaves in excess of 15 days may be submitted, subject to approval of the Fire Commissioner.
>
> In addition, if applying for such leaves in excess of 30 days, members must telephone the Badge Desk to make an appointment to turn in their badge and ID card"

(NYSCEF Doc No. 4, petition, exhibit 2 at 12).

In response, the City filed a petition challenging arbitrability, arguing that UFA cannot establish a nexus between the subject of the dispute and the specific contract provisions cited in

[1] The Board was created under New York City Charter § 1171. It is "a constituent body of the New York City Office of Collective Bargaining" (*Matter of City of New York v Patrolmen's Benevolent Assn. of the City of N.Y., Inc.*, 14 NY3d 46, 52 [2009]).

the grievance (NYCEF Doc No. 5, petition, exhibit 3 at 25). Administrative Code of the City of New York § 12-309 (a) (3) states that the Board is authorized "on the request of a public employer or a certified or designated employee organization which is party to a grievance, to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure established pursuant to section 12-312 of this chapter."

On September 28, 2022, the Board issued its decision, *Matter of Arbitration of Fire Department of the City of New York (Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO)* (15 OCB2d 33 [BCB 2022]) (NYSCEF Doc No. 3, petition, exhibit 1 [the Decision]). In assessing whether the dispute was arbitrable, the Board employed a two-pronged test:

> "(1) whether the parties are in any way obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so
> (2) whether the obligation is broad enough in its scope to include the controversy presented. In other words, whether there is a nexus, that is, a reasonable relationship between the subject matter of the dispute and the general subject matter of the Agreement"

(*id*. at 9).

The Board determined that UFA had satisfied the first prong, noting that the CBA provided for grievance and arbitration of certain issues and that the City had failed to identify a statutory or constitutional restriction or a court-enunciated public policy that precluded arbitration (*id.* at 10). Furthermore, the Board observed UFA's grievance concerned the City's implementation of the Vaccine Mandate, not the mandate itself (*id.* at 12).

As to the second prong, the Board found a nexus, or reasonable relationship, between the subject matter of the grievance, i.e. the City's implementation of the Vaccine Mandate, and the FDNY's EDE policy and the CBA provisions discussing contractual benefits, such as annual leave, that had already accrued to its members (*id.* at 13-14). As a result, the Board determined that these

two aspects of UFA's grievance were arbitrable (*id.*) and denied the City's petition to that extent (*id.* at 17).

However, the Board concluded that there was no nexus between FDNY Regulation Section 17.5.1 and the placement of unvaccinated UFA members on LWOP (*id.* at 14). The section discussed the procedures by which a UFA member may apply for LWOP and did not exclude all other circumstances under which a member may be placed on LWOP (*id.*). Regarding the Individual Rights section of the CBA, that section set forth guidelines on how the FDNY shall conduct disciplinary investigations, interrogations, trials and hearings of UFA members and the rights of members under investigation (*id.* at 4-5 n 5). The City's implementation of the Vaccine Mandate, though, did not involve an investigation, interview, trial or hearing (*id.* at 15). The Board likened the Vaccine Mandate to a qualification or condition of employment, citing several cases where courts have determined that the Vaccine Mandate was a lawful condition of employment, and stated that the failure to maintain a qualification of employment was not arbitrable under the CBA's discipline procedures (*id.* at 14-15). The Board also determined that there was no reasonable relationship between UFA's grievance and the compensation-related provisions in the CBA on salaries, longevity pay, chauffeur differential pay, night shift differential pay, performance compensation, and cleaning and maintenance allowances (*id.* at 4 n 4 and 15). The Board acknowledged "that placement of unvaccinated bargaining union members on LWOP deprived them of the economic terms and conditions of employment" in the CBA (*id.* at 16). But, the Board concluded those provisions were "insufficient to establish a source of right … to the continuation of contractual pay and benefits under these circumstances, or to limit the City's right to enforce the Mandate by placing employees who chose not to vaccinate on LWOP" (*id.* at 16).

Consequently, the Board granted the City's petition, in part (*id.* at 17). The Board served the Decision upon UFA by certified mail postmarked October 3, 2022 (NYSCEF Doc No. 1, ¶ 63).

UFA brings this petition to annul and reverse that part of the Decision that prevented from proceeding to arbitration on its grievance. In lieu of answering the petition, the City cross-moves and the Board moves separately to dismiss the petition.

III. Discussion

An application seeking judicial review under article 78 of the CPLR of an order made by the Board must be made within 30 days after service by registered or certified mail of a copy of the order upon an aggrieved party (*see* Administrative Code § 12-308 [a]). The scope of judicial review is limited to "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed" (CPLR 7803 [3]).

The New York City Collective Bargaining Law (NYCCBL) (*see* Administrative Code § 12-301 et seq.) "regulates labor relations between the City and its employees" (*Matter of City of New York v New York State Nurses Assn*., 130 AD3d 28, 31 n 3 [1st Dept 2015], *affd* 29 NY3d 546 [2017]). The Board "is the body charged with interpreting and implementing the NYCCBL and determining the rights and duties of labor and management in New York City" (*Matter of City of New York v Plumbers Local Union No. 1 of Brooklyn & Queens*, 204 AD2d 183, 184 [1st Dept 1994], *lv denied* 85 NY2d 803 [1995]). Thus, the court must accord broad deference to the Board's determinations (*id.*). A determination by the Board will not be disturbed "unless it is arbitrary and capricious or an abuse of discretion, or unless arbitration of the dispute offends public policy" (*Matter of City of New York v Uniformed Fire Officers Assn., Local 854, IAAF, AFL-CIO*, 95 NY2d 273, 284 [2000]). An action is arbitrary or capricious when it is taken "without sound basis

in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). The court must sustain a determination if it is supported by a rational basis even if it would have reached a different result (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

In its petition, UFA argues that the Board's Decision denying arbitrability is contrary to the principles of the Public Employees' Fair Employment Act, commonly referred to as the Taylor Law (*see* Civil Service Law § 200 et seq.), the NYCBBL, and general labor dispute resolution, all of which promote arbitration of contractual disputes[2] (NYSCEF Doc No. 1, ¶¶ 91-92). UFA also contends that the Board's determination on the second prong of the arbitrability test was flawed and erroneous and led to an arbitrary and capricious decision (*id.*, ¶¶ 74-76). UFA does not challenge the Board's employment of its two-pronged test, its determination that UFA had satisfied the first prong, or its determination that UFA had satisfied the second prong with respect to FDNY's EDE policy and accrued benefits provisions, such as annual leave.

Here, the court finds that the Board's determination that there was no nexus between the UFA's grievance and FDNY Regulation Section 17.5.1, the Individual Rights section and the compensation-related provisions of the CBA has a rational basis and was not arbitrary or capricious (*see Matter of Detectives' Endowment Assn., Inc. of the Police Dept. of the City of N.Y. v City of New York*, 125 AD3d 475, 475 [1st Dept 2015]).

[2] The Taylor Law "promote[s] harmonious and cooperative relationships between government and its employees" (Civil Service Law § 200) and affords public employees the right to organize and bargain with a public employer on the terms of their employment (*see Patrolmen's Benevolent Assn. of N.Y., Inc. v City of New York*, 97 NY2d 378, 383 [2001]). "The NYCBBL … is the City's local analogue statute to the … Taylor Law" (*Matter of City of New York*, 130 AD3d at 31 n 3]).

First, the Board's conclusion that UFA failed to establish a nexus between FDNY Regulation Section 17.5.1 and the City's enforcement of the Vaccine Mandate has a rational basis and is not arbitrary and capricious. Based on a plain reading of the text, the regulation does not purport to encompass all circumstances under which a member is placed on LWOP, as that regulation only describes how a UFA member may apply for LWOP.

The Board's determination that there was no nexus between the Individual Rights section of the CBA and the grievance also has a rational basis and was not arbitrary and capricious. As the Board properly concluded, placement of a UFA member on LWOP did not involve an investigation, interrogation, trial, or hearing.

Similarly, the Board had a rational basis for concluding that there was no nexus between UFA's grievance and the CBA provisions on salaries, longevity pay, chauffeur differential pay, night shift differential pay, performance compensation, and cleaning and maintenance allowances. The Board cited several cases where courts found that vaccination against COVID-19 was a lawful condition of employment (*see Garland v New York City Fire Dept*., 574 F Supp 3d 120, 128 [ED NY 2021], citing *We the Patriots USA, Inc. v Hochul*, 17 F4th 266, 294 [2d Cir 2021]; *Marciano v de Blasio*, 589 F Supp 3d 423, 436 [SD NY 2022]; *New York City Mun. Labor Comm. v City of New York*, 75 Misc 3d 411, 415 [Sup Ct, NY County 2022]). The Board, citing its own prior case law, stated that the failure to maintain a qualification of employment was not arbitrable under the CBA's discipline procedures. It reasoned that UFA's grievance centered on the result of a member's choice not to receive a vaccination. Because vaccination was a qualification of employment, the continuation of contractual pay and other economic benefits for unvaccinated members was not arbitrable because that member failed to satisfy and maintain a qualification or condition of employment. The Board's determination on these provisions also does not contradict

its findings related to FDNY's EDE policy or the accrued benefits provisions. As the Board rationally concluded, those benefits had accrued to UFA's members before the City's implementation of the Vaccine Mandate. Thus, the Board's analysis and determination on the second prong of the arbitrability test has a rational basis and was not arbitrary and capricious.

Counter to UFA's contention, the Board did not act contrary to public policy or misapply precedent with respect to determining arbitrability. Administrative Code § 12-302 states, in part, that it is the City's policy "to favor and encourage … written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances." While this stated policy favors arbitration, the Board is authorized to make the final determination whether a dispute arising out a collective bargaining agreement is arbitrable (*see* Administrative Code § 12-309 [a] [3]). Thus, the public policy underlying the NYCBBL does not mandate arbitration of all disputes. UFA does not dispute that the Board was within its statutory authority to issue the Decision (*see New York City Dept. of Sanitation v MacDonald*, 215 AD2d 324, 324 [1st Dept 1995], *affd* 87 NY2d 650 [1996] [the Board is authorized by statute to determine if a grievance is arbitrable]).

IV. Conclusion

Accordingly, it is

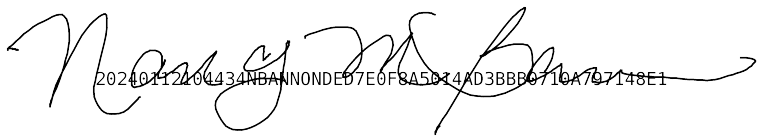
ORDERED that the cross-motion of respondents The City of New York and the Fire Department of the City of New York to dismiss the petition (motion sequence no. 001) is granted; and it is further

ORDERED that the motion of respondent the New York City Board of Collective Bargaining to dismiss the petition (motion sequence no. 002) is granted; and it is further

ADJUDGED that the petition is denied, and the proceeding is dismissed, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision, Order and Judgment of the court.



1/11/2024
DATE

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
	X	**GRANTED**		**DENIED**	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**