

2012 IL App (2d) 120514-U
No. 2-12-0514
Order filed July 31, 2012

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|---|---|-------------------------------|
| RUSSELL J. ERTL, |) | Appeal from the Circuit Court |
| |) | of De Kalb County. |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 11-MR-16 |
| |) | |
| CITY OF De KALB, SAM FINCH, Chairman |) | |
| of the Board of Fire and Police Commissioners |) | |
| of the City of De Kalb, BOARD OF FIRE |) | |
| AND POLICE COMMISSIONERS |) | |
| OF THE CITY OF De KALB, and |) | |
| BRUCE V. HARRISON, Fire Chief |) | |
| of the City of De Kalb Fire Department, |) | |
| |) | |
| Defendants-Appellants, |) | |
| |) | |
| (INTERNATIONAL ASSOCIATION OF |) | Honorable |
| FIREFIGHTERS, LOCAL 1236, AFL-CIO, |) | Kurt P. Klein, |
| Intervening Defendant-Appellant). |) | Judge, Presiding. |

JUSTICE McLAREN delivered the judgment of the court.
Justices Bowman and Birkett concurred in the judgment.

ORDER

Held: The issue of whether a reinstated employee was properly considered a probationary employee under the collective bargaining agreement between the City and the Union was an arbitrable issue under the agreement, and the trial court erred in denying the motion to stay proceedings and compel arbitration.

¶ 1 In this interlocutory appeal, brought pursuant to Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010)), defendants, City of De Kalb, Sam Finch, the Board of Fire and Police Commissioners, and Bruce V. Harrison (collectively, City) and intervenor International Association of Firefighters, Local 1236, AFL-CIO (Union) appeal from the trial court's order denying their joint motion to stay proceedings and compel arbitration. We reverse and impose a stay on the trial court proceedings.

¶ 2 I. BACKGROUND

¶ 3 Ertl was a firefighter for the City from October 10, 1995 to April 19, 1996, when his employment was terminated. Ensuing litigation and appeals led to awards of money damages to Ertl and to this court's ruling in favor of the plaintiff in *Ertl v. City of De Kalb*, 303 Ill. App. 3d 524, 530 (1999) (*Ertl I*) which, *inter alia*, directed the trial court to order plaintiff's reinstatement as a firefighter. See also *Ertl v. City of De Kalb*, No. 2-01-0145 (2002) (unpublished order under Supreme Court Rule 23) (*Ertl II*). The City's 2010 attempt to reinstate Ertl and then terminate him based on the events that led to the improper 1996 termination led to a permanent injunction prohibiting the City from taking any disciplinary actions against Ertl based on those events.

¶ 4 On February 4, 2011, the City notified Ertl that he was to be reinstated on February 10. He was to be reinstated as a "probationary employee," as that had been his status at the time of his 1996 termination. Ertl had worked for the City for six months and nine days, and the remaining probationary term, per the union contract, was eight months and 21 days. On February 9, Ertl filed a complaint for declaratory judgment and a petition for a temporary restraining order, seeking to prevent the City from requiring him to report for duty until the court determined the parties' rights and obligations regarding his pay and probationary status upon reinstatement. The trial court granted the temporary restraining order on February 17.

¶ 5 On April 14, 2011, the Union filed a motion to intervene (which the trial court subsequently granted) and a motion to dismiss Ertl's complaint, arguing that Ertl had "failed to exhaust his contractual remedies." Shortly thereafter, the City filed a combined motion to dismiss under section 2-619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2010)). The motions to dismiss were denied on November 8, 2011. The City and the Union then filed a joint motion to stay proceedings and compel arbitration, arguing that the collective bargaining agreement (Agreement) between them "includes a mandatory grievance-arbitration provision for the settlement of all disputes arising under the CBA." Following argument, the trial court denied the joint motion, stating:

"Here is the way I see it, the motion by the City and the Union to have arbitration makes sense eleven years ago. That's the problem with this. When Judge Countryman heard this case he made a decision. The defendants chose to ignore his decision. Defendants appealed the matter. The Appellate Court affirmed, ten years ago, Judge Countryman and ordered the plaintiff reinstated. To date that hasn't happened.

Now it seems to me that the wheel has gone full circle and now you want to go into arbitration. I don't know if this issue was raised before Judge Countryman or not but it certainly should have been. I don't think any party can allege that by an eleven-year delay. It makes no sense to me to start now going back around for the second time. I'm not going to do it."

This timely appeal followed.

¶ 6

II. ANALYSIS

¶ 7 The City and the Union now contend that the trial court erred in denying the joint motion to stay the proceedings and compel arbitration. Ordinarily, the proper standard of review for an appeal brought pursuant to Rule 307(a)(1) is whether the trial court abused its discretion. *Household Finance Corp. III v. Buber*, 351 Ill. App. 3d 550, 553 (2004). However, where the trial court does not make any factual findings or the underlying facts are not in dispute, and this court is presented with review of a legal question, we will review that issue *de novo*. See *Fahlstrom v. Jones*, 2011 IL App (1st) 103318, ¶ 13. Here, the trial court did not make factual findings regarding the Agreement and the status of the parties under it; the court merely ruled that the attempt to apply it was not timely. Therefore, we will give this issue *de novo* review.

¶ 8 The Illinois Public Labor Relations Act was instituted “to regulate labor relations between public employers and employees, including *** resolution of disputes arising under collective bargaining agreements.” 5 ILCS 315/2 (West 2010). The collective bargaining agreement negotiated between a public employer and the employees’ exclusive representative

“shall contain a grievance resolution procedure which shall apply to all employees in the bargaining unit and shall provide for final and binding arbitration of disputes concerning the administration or interpretation of the agreement unless mutually agreed otherwise.” 5 ILCS 315/8 (West 2010).

¶ 9 According to the collective bargaining agreement (Agreement) between the City and the Union, the City recognizes the Union as the exclusive representative and bargaining agent for all employees of the Fire Department, and the Agreement governs the terms and conditions of employment of all City firefighters. Section 4.1 of the Agreement provides in relevant part:

“All new employees of the Fire Department except the Fire Chief and Assistant Fire Chief shall serve a probationary period of twelve (12) months under this Agreement and may be terminated by the Fire Department without recourse to any of the procedures set forth in this Agreement, but shall be subject to all other provisions of this Agreement. All employees of the Fire Department covered by this agreement who have worked twelve (12) months shall be known as permanent employees, and thereafter the probationary period shall be considered part of the seniority time.”

Section 4.7 of the Agreement provides a grievance procedure “to settle contractual grievances between the City and the Union as quickly as possible.” Should any employee or the Union “feel aggrieved as a result of any condition arising out of the City-employee relationship, *** adjustment shall be sought as follows by the employee, at the discretion of the Union.” The first steps in the grievance procedure involve informal and formal meetings with the Fire Chief and a formal meeting with the City Manager. If the Union and the aggrieved employee are dissatisfied with the City Manager’s decision:

“and said grievance involves the interpretation or application of the express provisions of this Agreement, the Union may refer the matter to Arbitration ***.

* * *

The decision of the Arbitrator shall be final and binding upon the City and the Union. The Arbitrator, however, shall be limited to interpreting this Agreement and applying it to the facts of the particular case presented to him. The Arbitrator shall have no authority to add to, subtract from, or in any way modify the terms of this Agreement.”

¶ 10 The Arbitration Act (Act) empowers courts to compel or stay court action pending arbitration upon the application of a party showing an agreement to arbitrate. 710 ILCS 5/2 (West 2010); *Fahlstrom*, 2011 IL App. (1st) 103318, ¶ 14. The Act “ ‘embodies a legislative policy favoring enforcement of agreements to arbitrate future disputes.’ ” *Id.*, ¶ 16, quoting *Donaldson, Lufkin, & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 443 (1988). In general, courts have construed “generic” arbitration clauses broadly, concluding that the parties are obligated to arbitrate any dispute that arguably arises under an agreement containing a “generic” provision. *Id.*, ¶ 17. Arbitration clauses that have been properly characterized as “generic” include those demanding the arbitration of all disputes or claims “arising out of” or “arising out of or related to” or “regarding” the agreement at issue. *Id.*

¶ 11 Here, section 4.7 B of the Agreement set up the means for settling grievances involving “any condition arising out of the City-employee relationship.” Step three of the written grievance process (after formal presentation of the grievance to the Fire Chief and the City Manager) for a grievance that “involves the interpretation or application of the express provisions of this Agreement” is arbitration. This is clearly a “generic” arbitration clause that makes Ertl’s claim arbitrable.

¶ 12 Ertl argues that, since the City considers him a “new” or “probationary employee,” as opposed to merely an “employee,” he is excluded from the grievance process that requires arbitration. According to Ertl, as a probationary employee, he is “without recourse to any of the procedures set forth” in the Agreement pursuant to sections 4.1 and 4.7 of the Agreement. This argument is without merit for several reasons.

¶ 13 First, we note that paragraph 2 of Section 1.1 of the Agreement defines “Employees of the Fire Department covered by this Agreement” as “All active full time employees of the Fire

Department who hold certificates of appointment by the Board of Fire and Police Commissioners, excluding, however, the Fire Chief and Assistant Fire Chiefs.” The Agreement does not distinguish “new” or “probationary” employees from the defined group of “employees”: as Ertl is not claiming to be the Fire Chief or an Assistant Fire Chief, he is an employee as defined in the Agreement. Second, in his verified complaint for declaratory judgment, Ertl stated that “he is no longer a probationary employee” and that he “disputed and continues to dispute, his probationary status.” A plaintiff will not be allowed to take a position in one court and the opposite and contrary position on appeal. See *Kunde v. Prentice*, 329 Ill. 82, 87-88 (1928). Ertl cannot contest below his status as a probationary employee yet claim such status as a shield here. Third, Ertl either misreads or intentionally misrepresents the probationary restriction contained in Section 4.1 of the Agreement. Ertl argues that, as a probationary employee, he is “without recourse to any of the procedures set forth in this Agreement” pursuant to Section 4.1. However, the “without recourse” restriction only applies to termination; Section 4.1 further states in the same sentence that probationary employees “shall be subject to all other provisions of this Agreement.” Ertl’s argument here is not well-founded.

¶ 14 Ertl also argues that the Agreement does not address his current “return-to-duty status following successful wrongful termination litigation”; further, the current dispute does not arise out of an alleged breach of the Agreement but out of “the implementation of prior legal decisions involving the parties and this Court.” In *Ertl I*, this court addressed Ertl’s improper termination by the City. When we ordered that Ertl “be reinstated until such time, if ever, that he is properly discharged” (*Ertl*, 303 Ill. App. 3d at 530), we properly did not address *how* that was to occur or what the implications of his reinstatement would be *vis-a-vis* his status. Those issues were not

before this court. The City has attempted to reinstate Ertl as a probationary employee under the definitions of the Agreement. Whether Ertl is properly classified as a probationary employee under the Agreement is a dispute that “involves the interpretation or application of the express provisions of” the Agreement and arises “out of the City-employee relationship,” not the implementation of our prior ruling. Pursuant to section 4.7 of the Agreement, such a dispute is arbitrable. Therefore, the trial court erred in denying the joint motion to stay proceedings and compel arbitration. We reverse and impose a stay on the trial court proceedings.

¶ 15

III. CONCLUSION

¶ 16 For these reasons, the judgment of the circuit court of Kane County denying the joint motion to stay proceedings and compel arbitration is reversed, and a stay on the trial court proceedings is imposed.

¶ 17 Reversed; stay imposed.