2018 IL App (1st) 171089-U

FIFTH DIVISION
June 29, 2018

No. 1-17-1089

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

POLICEMEN'S BENEVOLENT & PROTECTIVE ASSOCIATION OF ILLINOIS, UNIT 156A – SERGEANTS,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
	)	No. 16 CH 11634
v.	)	
CITY OF CHICAGO,	)	Honorable Anna Helen Demacopoulos,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Reversing the judgment of the circuit court of Cook County confirming an arbitration award where the plain language of the collective bargaining agreement precluded arbitration and remanding to the circuit court with instructions to vacate the arbitration award.

¶ 2 The City of Chicago (City), defendant-appellant, appeals from an order of the circuit court of Cook County confirming an arbitration award. The City contends that the arbitrator erred in interpreting the 2012 collective bargaining agreement (CBA) between the City and the Policemen's Benevolent & Protective Association of Illinois, Unit 156A – Sergeants (Union) to allow the arbitration of the police superintendent's recommendation of a 365-day suspension for

Sergeant Samuel Cirone (Cirone). According to the City, the CBA recognizes the exclusive jurisdiction of the Chicago Police Board (Police Board) – not an arbitrator – over recommended suspensions in excess of thirty days, in accordance with state law and local ordinance. The Union, on behalf of its member Cirone, responds that the circuit court properly confirmed the arbitration award. According to the Union, the arbitrator correctly interpreted the CBA and did not exceed his authority, and the award draws from the essence of the CBA. For the reasons discussed herein, we (i) reverse the judgment of the circuit court confirming the arbitration award and denying the City's cross-petition to vacate the award, and (ii) remand to the circuit court with instructions to vacate the arbitration award.

¶ 3 BACKGROUND

¶ 4 The operative CBA between the City and the Union covers the period from July 1, 2012, to June 30, 2016, and Article 9 is entitled, "Grievance Procedure." Section 9.1 provides, in part: "A grievance is defined as a dispute or difference between the parties to this Agreement concerning the interpretation and/or application of this Agreement or its provisions. The separation of a Sergeant from service and suspensions in excess of thirty (30) days are cognizable only before the Police Board and shall not be cognizable under this procedure[.]" Section 9.1 further provides, in part, that "[t]he grievance procedure provisions herein and the Police Board procedure are mutually exclusive, and no relief shall be available under both[.]"

¶ 5 On February 3, 2016, the superintendent of the Chicago Police Department (Department) filed charges against Cirone with the Police Board (16 PB 2901), recommending a 365-day suspension based on his alleged violation of the Department's rules and regulations in connection with his supervision of a re-investigation commenced by the Department in 2011.

¶ 6 On February 11, 2016, the Union filed a grievance on behalf of Cirone, requesting that

the recommendation for a 365-day suspension be stricken. The Union asserted that the superintendent's "unreasonable" delay in filing the charges prejudiced Cirone's ability to prepare a defense. The grievance report referenced section 9B.2 of the CBA, which provides, in part: "A Sergeant who receives a recommendation for suspension of eleven (11) days or more, not including a suspension accompanied by a recommendation for separation, may file a grievance challenging and seeking review of that recommendation. Such grievances will be sent for a full arbitration on an expedited basis." Article 9B of the CBA – entitled "Suspension Grievances" – is comprised of section 9B.1, addressing suspensions of 10 days or fewer,[1] and section 9B.2, addressing suspensions of 11 days or more.

¶ 7 Citing section 9.1 of the CBA, the City requested the withdrawal of the grievance and asserted that "an arbitrator does not have jurisdiction to hear this matter." The Union demanded arbitration. The City then requested the bifurcation of the arbitration hearing, *i.e.*, the arbitrator would initially decide the issue of arbitrability.

¶ 8 The arbitrator held a two-day hearing solely on the issue of arbitrability. Donald J. O'Neill (O'Neill), the Director of Human Resources for the Department, testified that neither the City nor the Union proposed any changes to section 9.1 during the negotiations of the 2012 CBA. According to O'Neill, Article 9B was a new provision "developed to more effectively handle suspensions of 30 days and fewer." Although certain of his notes from the negotiations of Article 9B referred to periods of "under 11 days" and "11 to 30 days," he acknowledged that the final version of section 9B.2 of the CBA, which was drafted by outside counsel, did not refer to "30 days." O'Neill also testified that while the Fraternal Order of Police (FOP), which represents members below the rank of sergeant, had agreed in its CBA that recommended suspensions of less than 365 days "do not go to the Police Board," the Union (representing

[1] Section 9B.1 sets forth a "[s]ummary [o]pinion process" for suspensions of 10 days or fewer.

sergeants) had previously rejected such a modification during the negotiation of a prior CBA.

¶ 9 Thomas Pleines, an attorney for the Union, testified that, at the time of the 2012 CBA negotiations, the Union was concerned with investigative delays and unfair treatment before the Police Board. Pleines testified that he "leveraged that against the City's pension problems to get what we wanted here, which was language that said an officer who receives a recommendation for discipline has a right to file a grievance upon receipt of that recommendation." According to Pleines, the CBA provides that for any recommendation of suspension, except for a separation, a sergeant may file a grievance which may be heard by an arbitrator.

¶ 10 David Johnson (Johnson), an attorney who represented the City in the 2012 CBA negotiations, testified in rebuttal that he did not recall any proposals or conversations regarding any reduction of or restriction on the jurisdiction of the Police Board to impose suspensions in excess of 30 days. According to Johnson, any expansion of the superintendent's authority akin to that in the FOP agreement would have required clearance from the mayor's office, which was not obtained in the instant case.

¶ 11 In a decision and award entered on August 15, 2016, the arbitrator concluded that the matter was arbitrable, *i.e.*, that he had jurisdiction to hear the issue of the "unreasonable" delay and, depending on that ruling, to consider the case on the merits. In so ruling, the arbitrator characterized the bargaining history as "murky," and opined that section 9B.2 is "clear on its face." According to the arbitrator, the "contract was signed with only one exception to expedited arbitration," *i.e.*, a suspension accompanied by a recommendation for separation.

¶ 12 On September 1, 2016, the Union filed a motion to confirm and enter judgment on the arbitration award in the circuit court of Cook County (2016 CH 11634). The Union argued that the City had "ignored" the arbitrator's conclusion that the recommended suspension was

arbitrable and had continued to prosecute the charges against Cirone through the Police Board action.

¶ 13 In its petition to vacate the arbitration award, the City argued that the arbitrator exceeded his authority under the CBA because both state law and the local ordinance provide that the Police Board has exclusive jurisdiction over recommendations for suspensions in excess of 30 days. The City further contended that the arbitration award did not draw its essence from the parties' CBA and violated a well-defined public policy favoring impartiality and transparency in the discipline of Department personnel. In its response to the motion to confirm, the City also denied that section 9B.2 applies to suspensions exceeding 30 days.

¶ 14 During the pendency of the circuit court proceedings the Police Board action continued. On November 17, 2016, the Police Board denied Cirone's motion to strike and dismiss the charges, concluding that it had been granted exclusive jurisdiction to hold hearings and decide cases regarding suspensions of more than 30 days. The Police Board opined that the arbitrator's decision was "clearly in error."[2]

¶ 15 On April 24, 2017, the circuit court entered a memorandum opinion and order confirming the arbitrator's award and denying the City's petition to vacate the award.[3] The circuit court found that the arbitrator did not exceed the scope of his authority when deciding the issue of arbitrability, that his decision was supported by the unambiguous language of the CBA, and that the award was not against public policy. The circuit court stated, in part, that "[b]y finding that a sergeant may make an election between whether to proceed before the Police Board or an

[2] Neither the record nor the briefs on appeal clearly indicate the current status of any proceedings before the Police Board and/or the arbitrator.

[3] On April 24, 2017, the Union filed an emergency motion to stay the police board hearing, which the circuit court denied as moot in light of its order confirming the arbitration award. The City subsequently sought an order staying the enforcement of the circuit court's order confirming the arbitration award. In denying the City's motion on April 28, 2017, the circuit court noted, in part, that the City could file a motion before the Police Board to stay the Police Board proceedings.

arbitrator," neither section 9.1 or 9B.2 were rendered meaningless. The Union timely filed the instant appeal.

¶ 16 ANALYSIS

¶ 17 The City argues on appeal that the arbitrator erred in interpreting the CBA to allow the arbitration of a recommended suspension in excess of 30 days. The City further asserts that, even under the common-law standard applicable to the review of decisions on the merits (discussed below), the arbitration award should be vacated because it exceeded the arbitrator's authority and failed to draw its essence from the CBA. The Union challenges these contentions.

¶ 18 General Principles Governing Review of Arbitration Awards

¶ 19 We initially observe that a court's review of an arbitrator's award is extremely limited. *Griggsville-Perry Community Unit School District No. 4 v. Illinois Educational Labor Relations Board*, 2013 IL 113721, ¶ 18. The above standard reflects the legislature's intention in enacting the Illinois Uniform Arbitration Act (Act) (710 ILCS 5/1, *et seq.* (West 2016)): "to provide finality for labor disputes submitted to arbitration." *American Federation of State, County and Municipal Employees, AFL-CIO v. Department of Central Management Services*, 173 Ill. 2d 299, 304 (1996).

¶ 20 Generally, the grounds for vacating an arbitration award are listed in section 12(a) of the Act. 710 ILCS 5/12(a) (West 2016). See *AFSCME*, 173 Ill. 2d at 304 (noting that the Act "contemplates judicial disturbance of an award only in instances of fraud, corruption, partiality, misconduct, mistake, or failure to submit the question to arbitration"). Arbitration in a collective bargaining situation, however, is a "unique type of arbitration" and special rules apply. *County of Tazewell v. Illinois Fraternal Order of Police Labor Council*, 2015 IL App (3d) 140369, ¶ 12. In collective bargaining cases, courts have applied the standards which existed for vacating an

agreement at common law. *Village of Posen v. Illinois Fraternal Order of Police Labor Council*, 2014 IL App (1st) 133329, ¶ 36; 710 ILCS 5/12(e) (West 2016). See *Water Pipe Extension, Bureau of Engineering Laborers' Local 1092 v. City of Chicago*, 318 Ill. App. 3d 628, 636 (2000) (noting that "this common law standard limits the power of review in a collective bargaining agreement case to an even greater degree than the standard enunciated for all other non-collective bargaining disputes").

¶ 21 Under common law, an award will be vacated if the arbitrator exceeds his authority, and "that authority is ordinarily determined by the provisions of the arbitration agreement." *Village of Posen*, 2014 IL App (1st) 133329, ¶ 37. Furthermore, a court examines the merits of the arbitrator's interpretation to determine only if the award drew its essence from the agreement so as to prevent a manifest disregard of the parties' agreement. *Id*. Applying this standard, a court will not overrule a contractual interpretation "merely because it differs from that which the court considers to be the more correct interpretation." *Water Pipe Extension*, 318 Ill. App. 3d at 637. An award will be overturned as not drawing its essence from a collective bargaining agreement where the award was based "on a body of thought, feeling, policy, or law outside of the contract." *Village of Posen*, 2014 IL App (1st) 133329, ¶ 37.

¶ 22 Courts also have crafted a public policy exception to vacating arbitration awards which otherwise draw their essence from a collective bargaining agreement. *Id.* ¶ 44. "To vacate an arbitration award on this basis, we must find that the contract as interpreted by the arbitrator violates some explicit public policy that is well-defined and dominant." *Id.*

¶ 23 Applicable Standard of Review

¶ 24 As a threshold matter, the parties disagree regarding the applicable standard of review. The City contends that our review is *de novo*, whereas the Union advocates a deferential standard

of review, as discussed below.

¶ 25 In the circuit court proceedings, the City argued that the arbitration award should be vacated under the foregoing deferential standards, *i.e.*, the arbitrator exceeded his authority, and the award failed to draw its essence from the CBA and violated public policy. As discussed above, the circuit court rejected these arguments. On appeal, however, the City contends that a *de novo* standard applies where an arbitrator decides the question of arbitrability in the first place. We agree with the City's contention on appeal regarding the applicable standard of review, as discussed below. *Chief Judge of the Circuit Court of Cook County v. American Federation of State, County and Municipal Employees, Council 31, AFL-CIO*, 153 Ill. 2d 508, 513 (1992) (stating that we are bound by our standard of review); *Sieron & Associates, Inc. v. Department of Insurance*, 368 Ill. App. 3d 181, 188 (2006) (same); *Zurich Insurance Co. v. Raymark Industries, Inc.*, 213 Ill. App. 3d 591, 594 (1991) (noting that "[t]here is not any case in Illinois which has held that a party waived the standard of review by failing to recite the standard in its brief"). See also *Worth v. Tyer*, 276 F.3d 249, 262 n.4 (7th Cir. 2001) (noting "the court, not the parties, must determine the standard of review, and therefore, it cannot be waived").

¶ 26 The Union argues that the question of arbitrability is reviewed deferentially because the City requested a bifurcated proceeding before the arbitrator. The City asserts that its request to bifurcate the arbitration to initially address the issue of arbitrability "was not an expression of the City's agreement to arbitrate but, rather, the City's adherence to the proper procedure under Illinois law of allowing the arbitrator to decide the issue of arbitrability in the first instance where the parties' contract did not clearly reserve the issue of arbitrability to the arbitrator." As discussed below, we are persuaded by the City's position.

¶ 27 "Where there is an arbitration agreement, but it is unclear whether the subject matter of

the dispute falls within the scope of the arbitration agreement, the question of substantive arbitrability should initially be decided by the arbitrator." *City of Naperville v. Illinois Fraternal Order of Police, Labor Council, F.O.P. Lodge No. 42*, 2013 IL App (2d) 121071, ¶ 15. *Salsitz v. Kreiss*, 198 Ill. 2d 1, 9-10 (2001) (stating that the question of substantive arbitrability should initially be decided by the arbitrator, but the arbitrator's decision is subject to an ultimate determination of arbitrability by the court). "This is consistent with the purpose of the arbitration, employing the arbitrator's skilled judgment to resolve the ambiguity." *City of Naperville*, 2013 IL App (2d) 121071, ¶ 15. Where an arbitrator decides the question of arbitrability in the first instance, the circuit court must still review the arbitrator's decision *de novo*. *Salsitz*, 198 Ill. 2d at 13; *City of Naperville*, 2013 IL App (2d) 121071, ¶ 15; *Menard County Housing Authority v. Johnco Construction, Inc.*, 341 Ill. App. 3d 460, 463 (2003). "Were this not so, a 'party would be bound by the arbitration of disputes he had not agreed to arbitrate and would be left with only a court's deferential review of the arbtirator's decision on the question of arbitrability.' " *City of Naperville*, 2013 IL App (2d) 121071, ¶ 15, citing *Salsitz*, 198 Ill. 2d at 14. Additionally, we review *de novo* the circuit court's construction of an arbitration clause. *City of Naperville*, 2013 IL App (2d) 121071, ¶ 15.

¶ 28 The Illinois Supreme Court has recognized that, in those instances where the parties agreed to submit the question of arbitrability itself to arbitration, "the circuit court should review the question of arbitrability deferentially, that is, the court's standard of reviewing the arbitrator's decision on arbitrability should be the same standard courts apply when they review any other matter that the parties have agreed to arbitrate." *Salsitz*, 198 Ill. 2d at 14. Merely arguing the arbitrability issue to an arbitrator, however, does not indicate a clear willingness to arbitrate that issue, *i.e.*, a "willingness to be effectively bound by the arbitrator's decision on that

point." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946 (1995). See also *Salsitz*, 198 Ill. 2d at 16-17 (finding that party did not waive any objection to arbitrability by participating in the arbitration hearing). In the instant case, nothing in the CBA indicates that the parties intended to submit the question of arbitrability to arbitration. See *id.* at 15.

¶ 29 Interpreting the Collective Bargaining Agreement

¶ 30 Having established the applicable standard of review, we proceed to the City's contention on appeal that the arbitration award finding arbitrability of Cirone's recommended suspension of 365 days was in error because the CBA unambiguously limits the scope of arbitration to recommended suspensions of 11 to 30 days. The City alternatively argues that, even if the provisions of the CBA are ambiguous, the extrinsic evidence demonstrates that the parties did not intend to authorize arbitration of suspensions in excess of 30 days. The Union initially responds that the City waived these arguments by failing to present them to the circuit court. While we agree that issues not raised below are forfeited (*Wisam 1, Inc. v. Illinois Liquor Control Comm'n*, 2014 IL 116173, ¶ 23), the record indicates that the City advanced the foregoing arguments before the arbitrator and the circuit court. Therefore, the issue was not forfeited by the City. We thus turn to the merits.

¶ 31 To resolve whether the arbitrator erred in finding the recommended suspension was arbitrable, we must construe the CBA. The basic rules of contract interpretation are well settled. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). The primary objective in construing a contract is to give effect to the intention of the parties. *Id.* We first look to the contract language itself to determine the parties' intent. *Id.* "A contract must be construed as a whole, viewing each provision in light of the other provisions." *Id.* The parties' intent is not determined by looking at detached portions of the contract or by viewing a provision or clause in isolation. *Id.*

Accord *Morningside North Apartments I, LLC v. 1000 N. LaSalle, LLC*, 2017 IL App (1st) 162274, ¶ 15.

¶ 32 If the words in the contract are clear and unambiguous, they must be given their plain, ordinary, and popular meaning. *Thompson*, 241 Ill. 2d at 441. The contract is ambiguous, however, if its language is suspectible to more than one meaning. *Id.* "If the contract language is ambiguous, a court can consider extrinsic evidence to determine the parties' intent." *Id.* The determination of a whether a contract is ambiguous is a question of law. *Morningside North Apartments I, LLC*, 2017 IL App (1st) 162274, ¶ 15; *City of Northlake v. Illinois Fraternal Order of Police Labor Council, Lodge 18*, 333 Ill. App. 3d 329, 338 (2002).

¶ 33 Section 9.1 of the CBA provides, in part, that "suspensions in excess of thirty (30) days are cognizable only before the Police Board and shall not be cognizable under this procedure[.]" To determine the plain, ordinary and popular meaning of words, we look to their dictionary definitions. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 366 (2006). The applicable definition of "cognizable" in Black's Law Dictionary is "[c]apable of being judicially tried or examined before a designated tribunal." *Black's Law Dictionary* (10th ed. 2014). When we insert such definition into section 9.1, it essentially reads as "suspensions in excess of thirty (30) days are [*capable of being judicially tried or examined*] only before the Police Board and shall not be [*capable of being judicially tried or examined*] under this procedure[.]" Section 9.1 further provides, in part, that the "grievance procedure provisions herein and the Police Board procedure are mutually exclusive, and no relief shall be available under both[.]" Section 9.1 is clear that suspensions in excess of 30 days are to be tried or examined only by the Police Board, and not pursuant to the grievance procedures in the CBA.

¶ 34 Section 9B.2 provides, in part, that a sergeant "who receives a recommendation for

suspension of eleven (11) days or more, not including a suspension accompanied by a recommendation for separation, may file a grievance challenging and seeking review of that recommendation. Such grievances will be sent for full arbitration on an expedited basis." The arbitrator concluded that "the clear '11 days or more' sets forth no cap of 30 days." As the arbitrator appears to have viewed section 9B.2 in isolation, we reject his interpretation. See *Morningside North Apartments I, LLC*, 2017 IL App (1st) 162274, ¶ 15. Construing the CBA as a whole, section 9.1 makes clear that suspensions in excess of 30 days are solely within the province of the Police Board, and are not subject to the grievance procedures.

¶ 35 "A court will not interpret a contract in a manner that would nullify or render provisions meaningless, or in a way contrary to the plain and obvious meaning of the language used." *Thompson*, 241 Ill. 2d at 442. According to the arbitrator, section 9.1 "has not necessarily been made 'meaningless' by [section 9B.2] because *** a Sergeant could elect to go to the Board rather than arbitrate." The arbitrator's construction, however, ignores the language of section 9.1 that suspensions in excess of 30 days are cognizable "*only* before the Police Board." (Emphasis added.) The circuit court further opined that "[t]o accept the City's position *** would have been to wholly ignore Section 9B.2 as written." We respectfully disagree. When section 9.1 and 9B.2 are read together, as they must be, the clear intent of the parties is that section 9B.2 applies to suspensions of 11 to 30 days, by virtue of the limitations imposed in section 9.1.

¶ 36 In sum, the parties to the CBA are bound to arbitrate only those issues that they have agreed to arbitrate, as demonstrated by the clear language of the CBA and their intentions expressed in that language. See *Salsitz*, 198 Ill. 2d at 13. For the reasons discussed above, the CBA is clear that the recommended 365-day suspension of Cirone was cognizable only before the Police Board, not an arbitrator. The CBA is not rendered ambiguous solely because the City

and the Union disagree regarding its meaning. See *Thompson*, 241 Ill. 2d at 443. See also *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005) (noting that we will not strain to find ambiguity in a contract where none exists). Because the CBA is unambiguous, we need not consider the parties' contentions concerning extrinsic evidence presented to the arbitrator regarding the negotiation and drafting of the CBA. *Thompson*, 241 Ill. 2d at 441 (stating a court may consider extrinsic evidence if the contract is ambiguous). Furthermore, as our review of the arbitrator's decision on arbitrability is *de novo*, we need not consider the parties' arguments regarding the common law bases for challenging an arbitration award.

¶ 37 Finally, although not necessary for our analysis, we observe that the foregoing result is consistent with state and municipal law regarding the authority of the Police Board. *E.g.*, 65 ILCS 5/10-1-18.1 (West 2016) (providing that "[i]n any municipality of more than 500,000 population, no officer or employee of the police department *** [may be] suspended for more than 30 days except for cause upon written charges and an opportunity to be heard in his own defense by the Police Board"); Chicago Municipal Code § 2-84-030 (amended Sept. 8, 2011) (providing that "[u]pon the filing of charges for which removal or discharge or suspension of more than 30 days is recommended, a hearing before the police board, or any member or hearing officer designated by it shall be held").

¶ 38 CONCLUSION

¶ 39 The judgment of the circuit court confirming the arbitration award and denying the City's cross-petition to vacate the award is reversed. We remand this matter to the circuit court with instructions to vacate the arbitration award.

¶ 40 Reversed; remanded with instructions.