

affirm the trial court's judgment in part and reverse it in part, and we remand this case with directions to enter an order compelling the arbitration of the union's class-action grievance.

¶ 4

I. BACKGROUND

¶ 5

A. The Collective-Bargaining Agreement

¶ 6

1. *The Grievance Procedure*

¶ 7

The union is the exclusive representative of a bargaining unit consisting of 142 people employed in the city's Office of Public Utilities. The union and city are parties to a collective-bargaining agreement, which is effective from October 1, 2007, through September 20, 2011.

¶ 8

Article II of the collective-bargaining agreement is entitled "Grievance Procedure," and in section 1 of article II, the parties agree that if any differences arise between them, they will meet and attempt to resolve the differences.

¶ 9

In its definition of a "grievance," section 1 enumerates the types of differences that might arise between the city and the union or the employees. It says: "A grievance for purposes of this Agreement shall be defined to mean a complaint or dispute between the parties as to issues relating to wages, hours, terms, conditions of employment, established procedures of the parties, and the meaning, interpretation or application of this Agreement to those issues."

¶ 10

After providing this definition of a "grievance," section 1 describes four steps for resolving a grievance. In step 1, the "steward on the job" takes up the matter in writing with the immediate supervisor of the department in which the aggrieved person is employed. In step 2, the union submits the written grievance to the manager of the department, and in step 3, to the general manager. In step 4, "either party may submit the matter to arbitration."

¶ 11

Although the four steps of the grievance procedure appear to contemplate that the

union will be the one submitting the grievance, section 2 of article II makes clear that an employee may submit a grievance on his or her own initiative, without the union's assistance or intervention.

Section 2 reads as follows:

"Nothing in this Agreement prevents an employee from presenting a grievance to the Employer and having the grievance heard and settled without the intervention; provided that the Union shall be afforded the opportunity to be present at such conference and that any settlement made shall not be inconsistent with the terms of the agreement in effect between the Employer and the Union.

1. The Employer must notify the Union of the dates and times of all meetings concerning such grievance.

2. If the Union contends that a settlement of such grievance is inconsistent with the contract or established procedures of the parties, the Union may file a grievance of its own.

3. Only the Union shall have the right to refer grievances to arbitration under the Agreement."

¶ 12 Thus, if an employee submits a grievance on his or her own, the city must notify the union of any meetings regarding the grievance so that the union can be present and object to any proposed settlement between the city and the employee that would violate the collective-bargaining agreement. If the city and the employee reach a settlement that, in the union's view, violates the

collective-bargaining agreement, the union may file a grievance over the settlement and, if necessary, take the grievance to arbitration--regardless of whether the employee consents to the union's doing so.

¶ 13 Only the union has the right to refer a grievance to arbitration. So, if an employee files a grievance without the union's assistance and the city declines to take the employee's view of the matter, the employee is stuck with the employer's decision unless the union adopts the employee's grievance, or files a grievance of its own, and refers the grievance to arbitration.

¶ 14 *2. The Mention of Grievances in Connection With Layoffs*

¶ 15 Article XXIII, entitled "Layoff/Recall," also discusses grievances--specifically, grievances over layoffs. Like article II, article XXIII presupposes that the employee and the union have independent contractual rights to pursue a grievance. Article XXIII provides in relevant part as follows:

"The employer has the right to employ, lay off, discharge and promote employees in accordance with the provisions of this Agreement. However, any employee laid off or discharged for any reasons other than lack of work or lack of funds may file a grievance pursuant to the procedure outlined in this Agreement and the layoff or discharge shall be processed in accordance with the Grievance and Arbitration Procedure in this Agreement. The reason for discharge or layoff shall be given to the employee and Union in writing and the Union may in all respects appear for and represent in its name or the employee's name the interest of the employee and the Union."

¶ 20 Article XVI of the collective-bargaining agreement is entitled "Classification and Wage Rates," and section 2 provides for automatic across-the-board pay increases of 3% every October and 1% every April. Under the heading "Across-the-Board Increases," section 2(a) reads as follows:

"October 1, 2007	3%
April 1, 2008	1%
October 1, 2008	3%
April 1, 2009	1%
October 1, 2009	3%
April 1, 2010	1%
October 1, 2010	3%
April 1, 2011	1%."

¶ 21 B. The Union's Rejection of a Proposed Memorandum of Understanding, Followed by Layoffs

¶ 22 In January 2010, the city met with the union and proposed several changes in the collective-bargaining agreement, including a waiver of the remaining scheduled wage increases in article XVI, section 2(a), to be replaced by a 1/2% wage increase to go into effect on March 1, 2010, along with 12 unpaid furlough days. The city presented the union with a proposed memorandum of understanding, which would have incorporated these proposed changes into the collective-bargaining agreement, with the provision that the budget would be reviewed in August to see if it were feasible to reduce or eliminate the remaining furlough days.

¶ 23 The union rejected the proposed memorandum of understanding, and on February 26,

2010, the city responded by laying off 58 unit employees for 30 days. In its layoff notices, the city stated that the layoffs were due to a lack of funds.

¶ 24 C. The Grievances, Which the City Denied,
and the City's Refusal To Submit to Arbitration

¶ 25 On February 26, 2010, each of the 58 laid-off employees filed grievances asserting that the layoffs violated the collective-bargaining agreement. Also, on March 3, 2010, the union submitted a grievance over the layoffs.

¶ 26 On March 5, 2010, the city sent out letters denying the employee's individual grievances as well as the union's grievance. The letters asserted that because the layoffs were due to a lack of funds, the denial of the grievances could not be arbitrated.

¶ 27 The union demanded the arbitration of the 58 employees' individual grievances as well as its grievance. The city, however, adhered to its position that the grievances were not arbitrable, and accordingly the City refused the union's demand for arbitration.

¶ 28 D. The Union's Action To Compel Arbitration

¶ 29 On March 30, 2010, the union brought an action in the Sangamon County circuit court to compel the city to arbitrate the grievances. The parties filed cross-motions for summary judgment, and the trial court denied the union's motion and granted the city's motion.

¶ 30 In its summary-judgment order, which it entered on August 11, 2010, the trial court concluded that article XXIII, section 1, clearly evinced an intention to "exclude from grievance and arbitration procedures layoffs due to lack of funds or lack of work." The court quoted from that section, including the provision that "any employee laid off or discharged *for any reasons other than lack of work or lack of funds* may file a grievance." (Emphasis added.) In the court's view, this

provision was consistent with article XXI, in which the city retained its management rights. The court reasoned: "The City's exclusive right under the Agreement to control its operations, particularly its budget and the direction of its workforce, could be impaired if layoffs due to lack of funds and work were arbitrable." Consequently, the court found that "under the plain language of the Agreement, layoffs due to lack of funds [were] not subject to the Agreement's grievance procedure and [were] not arbitrable by either individual Union members or the Union itself."

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 A. The Question of Arbitrability as One for Judicial Resolution

¶ 34 A question of arbitrability can come in two forms: (1) whether the parties are bound by an arbitration agreement and (2) whether the arbitration agreement covers a particular dispute. *Rent-A-Center, West, Inc. v. Jackson*, ___ U.S. ___, ___, 130 S. Ct. 2772, 2777 (2010); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002). This appeal presents a question of arbitrability only in the second sense: whether the arbitration agreement covers the dispute over the layoffs.

¶ 35 We begin with the presumption that the arbitrability of a dispute is for the courts to decide. This presumption can be rebutted only by evidence that the parties "clearly and unmistakably" agreed to have an arbitrator decide the question of arbitrability. *Salsitz v. Kreiss*, 198 Ill. 2d 1, 15 (2001); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986). In reviewing the collective-bargaining agreement in this case, we find no evidence at all, let alone clear and unmistakable evidence, that the parties have agreed to submit the question of arbitrability to an

arbitrator instead of to the courts. Therefore, we conclude that the arbitrability of the dispute over the layoffs is a question for judicial resolution.

¶ 36 B. The Qualification in Article XXIII, Which Has the Effect of Barring
an Employee From Submitting a Grievance Over a Layoff That Was Due to a Lack of Funds

¶ 37 The city argues that article XXIII of the collective-bargaining agreement defeats the union's case by prohibiting the filing of a grievance over a layoff that was due to a lack of funds. According to the city, article XXIII expresses this prohibition in terms of an exception to the contractual right to file a grievance. Again, article XXIII reads as follows:

"The employer has the right to employ, lay off, discharge and promote employees in accordance with the provisions of this Agreement. However, any employee laid off or discharged for any reasons other than lack of work or lack of funds may file a grievance pursuant to the procedure outlined in this Agreement and the layoff or discharge shall be processed in accordance with the Grievance and Arbitration Procedure in this Agreement. The reason for discharge or layoff shall be given to the employee and Union in writing and the Union may in all respects appear for and represent in its name or the employee's name the interest of the employee and the Union."

¶ 38 As the union observes, this quoted text does not directly prohibit the filing of a grievance over a layoff that was due to a lack of funds. Article XXIII does not directly say: "If the Employer lays off an employee because of a lack of funds, the employee shall not file a grievance over that layoff." All the same, the indirect prohibition is as clear as a direct one. When article

XXIII says that "any employee laid off or discharged for any reasons other than *** lack of funds may file a grievance," the clear and unavoidable implication is that an employee laid off because of a lack of funds has no right to file a grievance over the layoff.

¶ 39 By analogy, if A tells B, "You may ask me for money if you are broke for any reason other than gambling," one must understand A as telling B, "Don't ask me for money if you are broke from gambling." Otherwise, the qualifying phrase "if you are broke for any reason other than gambling" would be meaningless. Similarly, if we interpreted article XXIII of the collective-bargaining agreement as permitting an employee to submit a grievance over a layoff that was due to a lack of funds, we would nullify the qualifying phrase "for any reasons other than *** lack of funds." Instead of nullifying contractual language, we should strive to interpret contracts in such a way as to give effect to each word and phrase. *Walters v. Walters*, 409 Ill. 298, 303 (1951). We will give effect to all the contractual language by interpreting article XXIII as meaning that an employee may file a grievance over a layoff unless the layoff was due to a lack of work or funds, in which case the employee may not file a grievance over the layoff.

¶ 40 C. The Erroneous Subjection of the Union to the Same Limitation

¶ 41 As we have explained, the law presumes that the parties intended the courts to decide the question of arbitrability, and that presumption can be rebutted only by evidence that the parties clearly and unmistakably agreed to have an arbitrator decide the question of arbitrability.

¶ 42 When, however, the question is *whether* a particular dispute comes within the scope of the arbitration agreement, the law presumes the dispute is arbitrable. Note that this is a different question from *who* gets to decide arbitrability. If the question is *whether* a claim is arbitrable (as opposed to *who* decides arbitrability), the law resolves any doubts in favor of arbitration. *First*

Options, 514 U.S. at 944-45. "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

¶ 43 We can say with positive assurance that the collective-bargaining agreement is not susceptible to an interpretation whereby an employee could submit a grievance over a layoff that was due to a lack of funds. Nevertheless, the same thing could not be said of the union—at least not with positive assurance.

¶ 44 On its face, the qualification in article XXIII applies only to an "employee," not to the union. "[A]ny *employee* laid off or discharged for any reasons other than lack of work or lack of funds may file a grievance ***." (Emphasis added.) Unless this quoted sentence is the only source of a contractual right to file a grievance over a layoff, the sentence does not, on its face, limit the union from doing so. Arguably, the union can find such a contractual right for itself in the very definition of a "grievance." Article II, section 1, defines a "grievance" to include a dispute between the parties as to the "terms" and "conditions of employment." A dispute over a layoff is a dispute over the terms or conditions under which an employee shall remain employed.

¶ 45 The argument might be made, however, that even if, considered by itself, the definition of a "grievance" would seem to allow the union to submit a grievance over a layoff (and take the grievance to arbitration), article XXIII qualifies that right by excluding layoffs due to a lack of funds, and if the qualification applies to the employee, it must apply to the union, too, because the union is the employee's representative. According to this argument, it would be illogical to suppose that the employee has greater rights *via* a representative than the employee would have without the

representative.

¶ 46 The fallacy of this argument, however, lies in its assumption that in the case of a layoff, the union could submit a grievance only as the representative of the particular laid-off employee. Actually, as article II, section 2, makes clear, the union also has the contractual right to file a grievance in its own interest, as the representative not merely of the laid-off employee but of the entire bargaining unit. For example, if an employee filed a grievance and obtained a settlement of the grievance that was favorable to the employee but which violated the collective-bargaining agreement, the union could file a grievance in its own interest, that is, as the representative of the entire bargaining unit. Because the collective-bargaining agreement explicitly recognizes the separate rights of the employee and the union to file a grievance, one cannot say, with positive assurance, that by barring an employee from filing a grievance over a layoff that was due to a lack of funds, the collective-bargaining agreement bars the union from doing so.

¶ 47 Granted, in article XXI, the city retains all of its inherent managerial authority, including the exclusive right to control its operations and budget. And, granted, layoffs are a way of controlling operations and the budget. Nevertheless, article XXI says that the city retains its managerial authority "[s]ubject to the provisions of this Agreement." One of those provisions is the definition of a "grievance," which--resolving any ambiguity in favor of arbitration--appears to encompass a dispute over layoffs.

¶ 48 D. "Lack of Funds"

¶ 49 This case actually presents us with two questions of arbitrability: (1) whether the employees' grievances are arbitrable and (2) whether the union's grievance is arbitrable. We have concluded that the employees' grievances are not arbitrable because their layoffs were due to a lack

of funds and because article XXIII withholds from employees--though not from the union--the right to file a grievance over a layoff that was due to a lack of funds.

¶ 50 When we say, however, that the layoffs were "due to a lack of funds," we mean only that a lack of funds was the city's stated reason for the layoffs. We do not purport to resolve, one way or the other, whether that stated reason was reasonable or whether the city gave that reason in good faith. That will be a question for arbitrator in the arbitration of the union's grievance.

¶ 51 The arbitrator will have to decide, in light of the intentions and reasonable expectations of the parties to the collective-bargaining agreement, whether the layoffs were an honest, good-faith exercise of the city's contractual discretion. "Implicit in every contract is a duty of good faith and fair dealing; this obligation requires a party vested with contractual discretion to exercise it reasonably, and further he may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 131 (2008). The collective-bargaining agreement gives the city discretion to decide whether it suffers from an absence or deficiency of funds that necessitates the layoff of employees, and the city is required to exercise this discretion reasonably. The arbitrator will decide whether the city did so.

¶ 52 III. CONCLUSION

¶ 53 For the foregoing reasons, we affirm the trial court's judgment in part and reverse it in part, and we remand this case with directions. We affirm the judgment inasmuch as it holds that the 58 employees' individual grievances are not arbitrable. The city's stated reason for these layoffs was a deficiency of funds, and therefore article XXIII precluded the employees from filing grievances over these layoffs. If the employees had no right to file the grievances, they had no right

to arbitrate the grievances. Nevertheless, we reverse the judgment inasmuch as it held that the union's grievance as to the layoff of the 58 employees was not arbitrable. We remand this case with directions to enter an order compelling the arbitration of the union's grievance.

¶ 54 Affirmed in part and reversed in part; cause remanded with directions.

¶ 55 JUSTICE TURNER, specially concurring in part and dissenting in part:

¶ 56 Although I agree with the majority's conclusion that the grievances by the laid-off employees were not arbitrable, I cannot agree the grievance submitted by the union as to those same layoffs was. Therefore, I respectfully dissent.

¶ 57 The majority in this case is correct in finding the collective-bargaining agreement prohibits an employee from filing a grievance over a layoff if that layoff was due to a lack of funds. However, for all the questionable relevance of the majority's gambling analogy in disposing of that clear issue, the majority's quixotic quest to find the union can submit a grievance over layoffs brought on by the lack of funds and then arbitrate the matter is nothing more than a judicial legerdemain.

¶ 58 In oral argument, the union conceded that permitting it to arbitrate would have no practical effect if the employees in its grievance were barred from arbitration. Undeterred, the majority scours the collective-bargaining agreement and concludes the union may file a grievance over a layoff, even if based on a lack of funds. Thus, the majority concludes the union can do for the employees what the employees cannot do for themselves. In my view, the majority gives short shrift to the City's inherent managerial authority, including its right to control its operations and budget, and now lays the ultimate question of whether the City actually had insufficient funds in the hands of the arbitrator. From this day forward, will every layoff due to lack of funds be met with a grievance and arbitration? What happens if the arbitrator finds the City had sufficient funds but the City disagrees? Presumably the employees become more flush, the City must fold, and the taxpayers are dealt a pair of aces and eights--and we all know how that turns out.