2015 IL App (1st) 150552-U

No. 1-15-0552

Fifth Division
December 18, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

WHEATON FIREFIGHTERS UNION, LOCAL 3706, Petitioner, v. THE ILLINOIS LABOR RELATIONS BOARD, STATE PANEL; JOHN HARTNETT, PAUL BESSON, JAMES BRENNWALD, MICHAEL COLI, and ALBERT WASHINGTON, the Members of Said Board and Panel in Their Official Capacity Only; MELISSA MLYNSKI, Executive Director of Said Board in Her Official Capacity Only; and THE CITY OF WHEATON, Respondents.	)	Petition for Administrative Review of a Decision and Order of the Illinois Labor Relations Board, State Panel. No. S-CA-14-067

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* The union's appeal is transferred to the Second District Appellate Court where the First District lacks jurisdiction because the union "resides or transacts business" in Wheaton and the Illinois Public Labor Relations Act consequently confers appellate jurisdiction only on the Second District Appellate Court.

¶ 2 Petitioner, Wheaton Firefighters Union, Local 3706 (the union), appeals from the decision and order of the Illinois Labor Relations Board, State Panel (the Board), finding that the City of Wheaton (the City) had not committed an unfair labor practice in submitting the issue of health insurance coverage to arbitration. For the reasons that follow, we transfer the appeal to the Second District Appellate Court because the First District lacks jurisdiction to consider the appeal.

¶ 3 BACKGROUND

¶ 4 The facts in the instant case are largely undisputed, and come primarily from the parties' stipulated record, filed in lieu of a hearing before an administrative law judge.

¶ 5 The union and the City are parties to a collective bargaining agreement (CBA), effective from May 1, 2007, to April 30, 2012, which set forth the terms and conditions of employment for the bargaining unit represented by the union, which consisted of all sworn, full-time firefighters, lieutenants, and captains/shift commanders employed by the City. On February 23, 2012, the union and the City commenced negotiations for a successor CBA and, "[a]fter failed negotiations and mediation," the union invoked interest arbitration.

¶ 6 Prior to the interest arbitration hearing, the parties exchanged prehearing settlement offers. Through its prehearing offer, the City proposed to alter article 33[1] of the CBA, which concerned health insurance, to allow the City to provide insurance to bargaining unit members and their eligible dependents "on the same basis as is provided to non-bargaining unit City employees." The offer further provided that "[t]he City reserves the right to change: any and all terms of such benefits including, but not limited to: insurance carriers, self-insurance or risk pools, PPO networks, medical providers, covered benefits, maximum limits,

[1] Although there were numerous issues submitted to interest arbitration, article 33 is the only provision at issue on appeal, so we relate only the facts concerning its negotiation.

deductibles, and co-payments, so long as such changes apply equally to non-bargaining unit employees of the City."

¶ 7 With respect to article 33, the union's prehearing offer stated:

> "The Union will be filing a Charge Against Employer with the Illinois Labor Relations Board, State Panel for the City's insistence to impasse on a permissive subject of bargaining. Therefore, the Union specifically does not waive and reserves all rights it may have in the interest arbitration process to provide a final offer, if any, at the appropriate time."

¶ 8 During the interest arbitration hearing, conducted on October 15, 2013, the City proposed its modifications to article 33, and the union proposed different modifications without waiving its argument that the subject was a permissive subject of bargaining. The arbitrator ordered the parties to exchange final offers by the conclusion of the hearing. The City's final offer contained the same language with respect to article 33 as was contained in its prehearing offer and the union maintained its position that the City's proposal was a permissive subject of bargaining and submitted its own final offer on article 33.

¶ 9 As promised, on October 29, 2013, the union filed an unfair labor practice charge against the City based on the union's allegations that the City had engaged in an unfair labor practice in negotiating with the union over the CBA. The union alleged that "[b]y submitting its proposal on health insurance, the City insisted to impasse on a permissive subject of bargaining," which the union alleged was a violation of sections 10(a)(4) and 10(a)(1) of the Illinois Public Labor Relations Act (the Act) (5 ILCS 315/10(a)(4), (a)(1) (West 2012)).

¶ 10 On February 20, 2014, the arbitrator issued an opinion and award resolving all disputed issues except for article 33 and one other provision not at issue on appeal. The arbitrator

retained jurisdiction to resolve those issues upon resolution of the union's unfair labor practice complaint.

¶ 11 On February 26, 2014, after an investigation, the Board issued a complaint for hearing against the City for its alleged violations of the Act; the complaint was amended on March 4, 2014, to correct a typographical error. In its answer, the City claimed as an affirmative defense that its bargaining proposal to modify the language of article 33 of the CBA was a mandatory subject of bargaining. The City further claimed that it had not engaged in bad faith bargaining.

¶ 12 On May 19, 2014, the parties filed a stipulated record in lieu of a hearing before an administrative law judge (ALJ). On August 15, 2014, the ALJ issued a 17-page recommended decision and order in which it found that "the City did not violate Sections 10(a)(4) and (1) of the Act because a respondent does not refuse to bargain in good faith merely by submitting permissive proposals to an interest arbitrator." After reviewing the Board's precedent, the ALJ found that, under the most recent Board decision, the submission of an alleged permissive proposal to the interest arbitrator did not alone violate the duty to bargain in good faith because the charging party had the option of striking the permissive proposal from the arbitrator's consideration and the union had not done so in this case. Accordingly, the ALJ found that the complaint should be dismissed.

¶ 13 Despite its conclusion, "[i]n the event that the Board reverses this finding and at the request of the parties," the ALJ also considered the City's argument that the health insurance proposal was a mandatory, not permissive, subject of bargaining. The ALJ found that the health care proposal was a permissive subject of bargaining "because it requires the Charging Party to waive its right to bargain over unforeseen changes to unit employees' health

benefits." The ALJ noted that the Board had consistently held that questions regarding health insurance were mandatory subjects of bargaining, but explained that "a proposal seeking the waiver of a statutory right is a permissive subject of bargaining." The ALJ noted that statutory rights provided to public employees by the Act included the right to bargain on questions of wages, hours, and other conditions of employment, and also noted that the duty to bargain extended to issues that arose during the term of the CBA. The ALJ further explained that a union may waive the right to demand midterm bargaining, "but the waiver of that right must be clear and unmistakable." As an example, the ALJ pointed to a broad zipper clause, which "waives parties' right to midterm bargaining because it addresses matters covered by the statutory right to midterm bargaining and contains the type of explicit language required to waive such statutory rights."

¶ 14 The ALJ found that the City's health care proposal was a permissive subject of bargaining because "it is analogous to a broad zipper clause." The proposal contained language that clearly and unmistakably waived the union's right to bargain over future changes to members' health care benefits and the language applied to matters covered by the midterm right to bargain "because the Union cannot foresee the Respondent's midterm changes to bargaining unit members' health benefits and cannot control the indicia on which those changes are based." The ALJ concluded that, "[t]hus, the proposal is permissive because the Respondent's broad discretion to make midterm changes to Union members' health care benefits constitutes an abdication of the Union's right to midterm bargaining on those issues." The ALJ rejected the City's reliance on federal precedent, noting that "it is inappropriate to find this proposal a mandatory subject of bargaining based on federal precedent because the private sector applies a different approach than Illinois to proposals

that affect the midterm right to bargain. In the private sector, a proposal that seeks the waiver of a union's statutory right to midterm bargaining is a mandatory subject of bargaining; in Illinois, it is not."

¶ 15 Both the union and the City filed exceptions to the ALJ's recommended decision and order. The union argued that the ALJ erred in concluding that the City did not violate sections 10(a)(4) and (1) of the Act when it submitted its health insurance proposal to the interest arbitrator and in dismissing the complaint for hearing. The City argued that the ALJ erred in concluding that the City's health insurance proposal was a permissive, not a mandatory, subject of bargaining.

¶ 16 On November 18, 2014, the Board made its decision, and issued a written decision and order on January 26, 2015. The Board accepted the ALJ's recommendation and found that the health care proposal was a permissive subject of bargaining, but the submission of the proposal to interest arbitration did not violate the Act. The Board adopted the ALJ's reasoning concerning the question of whether the proposal was a permissive or mandatory subject of bargaining.

¶ 17 With respect to the issue of whether submission of the proposal violated the Act, the Board "affirm[ed] its prior decision in *Village of Bensenville,* [14 PERI ¶ 2042 (ISLRB 1998)], the only Board decision in which this issue has been squarely presented." The Board found that under this precedent, Board Rule 1230.90(k) provided a party with the mechanism for preventing an arbitrator's consideration of an issue that it believed was a permissive subject of bargaining, namely, the party could object to consideration of the issue in good faith and the arbitrator would then be precluded from ruling on it. Conversely, if the other party believed the subject was a mandatory subject of bargaining, that party could file an

unfair labor practice charge with the Board alleging that the objections to the arbitrator's consideration of the issue violated either the section 10(a)(4) or 10(b)(4) duty to bargain in good faith. The Board found that "[i]t is only in this context that this Board will consider the mandatory or permissive nature of the proposal." Consequently, the Board dismissed "the complaint alleging a violation of Section 10(a)(4) for mere submission to interest arbitration of a permissive subject of bargaining."

¶ 18 ANALYSIS

¶ 19 On appeal, we are asked to determine whether the Board properly concluded that the submission of a permissive subject of bargaining to interest arbitration does not constitute an unfair labor practice under the Act. However, we cannot consider the merits of the union's argument because we find that we lack jurisdiction to review the Board's order.

¶ 20 "[E]ven where no party raises the question, a reviewing court has a duty to consider *sua sponte* its jurisdiction and dismiss the appeal if it determines that jurisdiction is lacking." *Peabody Coal Co. v. Industrial Comm'n*, 307 Ill. App. 3d 393, 395 (1999) (citing *A.O. Smith Corp. v. Industrial Comm'n*, 109 Ill. 2d 52, 54 (1985)). In the case at bar, we are asked to review the order of an administrative agency, namely, the Board. "The appellate court's power to review administrative decisions derives not from the Illinois Constitution but from the legislature." *Cook County Sheriff's Enforcement Ass'n v. County of Cook*, 323 Ill. App. 3d 853, 855 (2001). Thus, "[t]he appellate court has jurisdiction to review administrative decisions only as provided by law." *People ex rel. Madigan v. Illinois Commerce Comm'n*, 231 Ill. 2d 370, 387 (2008). "When the appellate court undertakes direct review of an administrative decision, it exercises special statutory jurisdiction. [Citation.] Special statutory jurisdiction is limited to the language of the act conferring it." *People ex rel. Madigan*, 231

Ill. 2d at 387. See also *ESG Watts, Inc. v. Pollution Control Board*, 191 Ill. 2d 26, 30 (2000) ("When a court is exercising special statutory jurisdiction the language of the act conferring jurisdiction delimits the court's power to hear the case. A party seeking to invoke special statutory jurisdiction thus 'must strictly adhere to the prescribed procedures' in the statute." (quoting *McGaughy v. Illinois Human Rights Comm'n*, 165 Ill. 2d 1, 12 (1995)).

¶ 21 In the case at bar, the union claims that we have jurisdiction over its appeal pursuant to Supreme Court Rule 335 and section 11(e) of the Act (5 ILCS 315/11(e) (West 2012)). Section 11(e) of the Act provides, in relevant part:

> "(e) A charging party or any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may apply for and obtain judicial review of an order of the Board entered under this Act, in accordance with the provisions of the Administrative Review Law, as now or hereafter amended, except that such judicial review shall be afforded directly in the appellate court for the district in which the aggrieved party resides or transacts business ***." 5 ILCS 315/11(e) (West 2012).

The "aggrieved party" in the instant case would be the union, which had its complaint dismissed by the Board and filed the petition for review before this court. However, section 11(e) provides that judicial review "shall be afforded directly in the appellate court for the district in which the aggrieved party resides or transacts business." 5 ILCS 315/11(e) (West 2012). The charge against the City lists the union's address as located in Wheaton, and provides that the "[l]ocation(s) of the alleged wrongful action(s)" was also in Wheaton. We take judicial notice that Wheaton is located in Du Page County, within the Second District. See *City of Wood Dale v. Illinois State Labor Relations Board*, 166 Ill. App. 3d 881, 894

(1988) (taking notice of the fact that the city of Wood Dale was located in Du Page, within the Second District); see also *Susman v. North Star Trust Co.*, 2015 IL App (1st) 142789, ¶ 31 (taking judicial notice of the fact that Lake County was adjacent to Cook County); *Town of Bloomington v. Murphy*, 73 Ill. App. 2d 417, 419 (1966) ("the geography of a political subdivision is a matter that may be judicially noted"). Consequently, if the union wished to seek judicial review of the Board's decision, it was required to do so in the Second District, not here in the First District. See *City of Wood Dale*, 166 Ill. App. 3d at 894 (noting that "[r]esort to the circuit court of Sangamon County [was] not permitted under the statute and the facts" where the city of Wood Dale, the aggrieved party, was located in Du Page County, in the Second District). Since the petition for administrative review was not filed in accordance with the requirements of section 11(e), we lack jurisdiction to consider the merits of the union's claims. *ESG Watts*, 191 Ill. 2d at 30 ("When a court is exercising special statutory jurisdiction the language of the act conferring jurisdiction delimits the court's power to hear the case. A party seeking to invoke special statutory jurisdiction thus 'must strictly adhere to the prescribed procedures' in the statute." (quoting *McGaughy*, 165 Ill. 2d at 12)).

¶ 22 We note that this would not be the result were this appeal governed entirely by the Administrative Review Law. In *Slepicka v. Illinois Department of Public Health*, 2014 IL 116927, our supreme court analyzed the Administrative Review Law to determine whether filing an administrative review action in an improper venue deprived the circuit court of jurisdiction. That case was governed by the Administrative Review Law, which provided that "[j]urisdiction to review final administrative decisions is vested in the Circuit Courts, except as to a final order of the Illinois Educational Labor Relations Board in which case

jurisdiction to review a final order is vested in the Appellate Court of a judicial district in which the Board maintains an office." 735 ILCS 5/3-104 (West 2012). Section 3-104 further provided that "[i]f the venue of the action to review a final administrative decision is expressly prescribed in the particular statute under authority of which the decision was made, such venue shall control, but if the venue is not so prescribed, an action to review a final administrative decision may be commenced in the Circuit Court of any county in which (1) any part of the hearing or proceeding culminating in the decision of the administrative agency was held, or (2) any part of the subject matter involved is situated, or (3) any part of the transaction which gave rise to the proceedings before the agency occurred." 735 ILCS 5/3-104 (West 2012). On appeal, the cross-appellant nursing home argued that the appeal should have been dismissed for lack of jurisdiction because the appeal was filed in an improper venue. *Slepicka*, 2014 IL 116927, ¶ 29.

¶ 23 In rejecting the nursing home's argument, the supreme court noted that the provisions contained in article II of the Code of Civil Procedure applied to article III proceedings for administrative review except as otherwise provided by the Administrative Review Law. *Slepicka*, 2014 IL 116927, ¶ 36. The court pointed to section 2-104(a), which provided that " '[n]o order of judgment is void because rendered in the wrong venue ***. No action shall abate or be dismissed because commenced in the wrong venue if there is a proper venue to which the cause may be transferred' " (*Slepicka*, 2014 IL 116927, ¶ 36 (quoting 735 ILCS 5/2-104(a) (West 2012)), and further pointed to section 2-106(a), which provided that " '[i]f a motion to transfer is allowed on the ground that the action was commenced in a wrong venue, the cause shall be transferred to the court in a proper venue, subject to any equitable terms and conditions that may be prescribed' " (*Slepicka*, 2014 IL 116927, ¶ 36 (quoting 735

ILCS 5/2-106(a) (West 2012)). The court noted that there was nothing in the Administrative Review Law explicitly rejecting these provisions and concluded that "[a]ccordingly, those provisions apply to actions seeking review of a final administrative decision, and the filing of an action for administrative review in an improper venue does not deprive the circuit court of subject matter jurisdiction." *Slepicka*, 2014 IL 116927, ¶ 36.

¶ 24 The supreme court further noted that the language of section 3-104 of the Administrative Review Law treated the concepts of jurisdiction and venue separately. The court stated:

> "The first sentence of section 3-104 deals solely with jurisdiction and vests jurisdiction to review administrative decisions in the circuit courts—referenced in the plural and without any specific geographical designation—with the exception of final decisions by the Educational Labor Relations Board, which are reviewed in the appellate court of the judicial district in which the Board maintains an office. [Citation.] The second and third sentences address venue exclusively by stating that any specification of venue in the governing statute will control, but, in the absence of such a specification, the three-part test discussed above is to be applied in determining proper venue. [Citation.] Section 3-104 addresses jurisdiction and venue separately, demonstrating the legislature's recognition of the distinction between these two concepts." *Slepicka*, 2014 IL 116927, ¶ 42.

Accordingly, the supreme court found that a circuit court was not deprived of jurisdiction to review an administrative decision because the action was filed in an improper venue. *Slepicka*, 2014 IL 116927, ¶ 43.

¶ 25 In contrast to *Slepicka*, the administrative review of the Board's decision in the instant case was not governed entirely by the Administrative Review Law. Instead, judicial review

of a Board decision under the Act is conducted "in accordance with the provisions of the Administrative Review Law, as now or hereafter amended, *except that such judicial review shall be afforded directly in the appellate court for the district in which the aggrieved party resides or transacts business* ***." (Emphasis added.) 5 ILCS 315/11(e) (West 2012). Thus, the Administrative Review Law's section 3-104 jurisdictional provision expressly does not apply to review of the Board's decision under the Act. Furthermore, the *Slepicka* court noted that section 3-104 of the Administrative Review Law "vests jurisdiction to review administrative decisions in the circuit courts—referenced in the plural and without any specific geographical designation." *Slepicka*, 2014 IL 116927, ¶ 42. By contrast, section 11(e) of the Act vests jurisdiction in a specific district of the appellate court—referenced in the singular and with a specific geographical designation. This difference further highlights the inapplicability of *Slepicka* to the jurisdictional question present in the instant case.

¶ 26 Instead, we find more instructive our supreme court's reasoning in *People ex rel. Madigan v. Illinois Commerce Comm'n*, 231 Ill. 2d 370, 387 (2008), in which the supreme court expressed a similar view as our conclusion today with respect to administrative review under the Public Utilities Act (220 ILCS 5/1-101 *et seq.* (West 2006)). There, the supreme court considered whether the case before it would be remanded to the First District or the Fourth District. *People ex rel. Madigan*, 231 Ill. 2d at 386. The court noted that it was required to consider whether the Public Utilities Act had conferred jurisdiction on either the First or Fourth District, explaining that "[t]he Public Utilities Act specifically requires appeals to be brought in particular judicial districts." *People ex rel. Madigan*, 231 Ill. 2d at 387. The court quoted the language of the statute, which provided that parties " 'may appeal to the appellate court of the judicial district in which the subject matter of the hearing is

situated' " and further provided that the court first acquiring jurisdiction of any appeal would retain jurisdiction over the appeal. *People ex rel. Madigan*, 231 Ill. 2d at 387 (quoting 220 ILCS 5/10-201(a) (West 2006)). The court noted that "[t]he Public Utilities Act thus limits the appellate court's special statutory jurisdiction to districts that encompass the matter under review by the Commission." *People ex rel. Madigan*, 231 Ill. 2d at 387.

¶ 27 Similarly, in the case at bar, section 11(e) of the Act limits the appellate court's special statutory jurisdiction to "the appellate court for the district in which the aggrieved party resides or transacts business." 5 ILCS 315/11(e) (West 2012). Since there is no claim that the union resided or transacted business in Cook County, the First District does not have jurisdiction to consider the union's petition for review of the Board's decision.

¶ 28 However, this does not mean that the union's appeal must be dismissed. Under Supreme Court Rule 365, "[i]f a case is appealed to either the Supreme Court or the Appellate Court, or the wrong district of the Appellate Court, which should have been appealed to a different court, the case shall be transferred to the proper court[.]" Ill. S. Ct. R. 365 (eff. Feb. 1, 1994). The appeal "shall then proceed as if it had been appealed to the proper court in the first instance." Ill. S. Ct. R. 365 (eff. Feb. 1, 1994). In the case at bar, as noted, the record reflects that the union resided or transacted business in Du Page County, which is within the Second District. Therefore, it is the Second District that has the special statutory jurisdiction to consider the union's appeal of the Board's decision. Accordingly, pursuant to Rule 365, we order the clerk of the Illinois Appellate Court, First District, to transfer this appeal to the Second District for further proceedings. See also *People ex rel. Madigan v. Illinois Commerce Comm'n*, 407 Ill. App. 3d 207, 223 (2010) (transferring appeal under Public

Utilities Act to the Second District upon determining that the First District lacked jurisdiction).

¶ 29 CONCLUSION

¶ 30 The union's petition for administrative review of the Board's decision is transferred to the Second District where the Act's special statutory jurisdiction was conferred only on the Second District, the district in which the union resides or transacts business, and not on the First District. Pursuant to Illinois Supreme Court Rule 365 (eff. Feb. 1, 1994), the clerk of the First District "shall transmit the record on appeal and all other papers filed in the case, with the order of transfer, to the clerk of the proper court."

¶ 31 Appeal transferred.