2016 IL App (2d) 160373-U
No. 2-16-0373
Order filed December 20, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

POLICEMEN'S BENEVOLENT LABOR COMMITTEE, LOCAL 501,	)	Appeal from the Circuit Court of DuPage County.
Plaintiff-Appellant,	)	
v.	)	No. 16-CH-108
THE COUNTY OF DUPAGE; SHERIFF JOHN ZARUBA, DuPage County Sheriff; and DANIEL CRONIN, Chairman, DuPage County Board,	)	Honorable Bonnie M. Wheaton,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in dismissing plaintiff's complaint to compel arbitration as to the grievance at issue on appeal: because the parties' agreement was ambiguous as to the arbitrability of that grievance, the issue of arbitrability had to be referred to the arbitrator.

¶ 2 Plaintiff, Local 501 of the Policemen's Benevolent Labor Committee, appeals a judgment dismissing its complaint (see 735 ILCS 5/2-615 (West 2014)) under the Uniform Arbitration Act (710 ILCS 5/1 *et seq.* (West 2014)), against defendants, the County of Du Page (County), Sheriff

John Zaruba (Sheriff), and Daniel Cronin, chairman of the DuPage county board. On appeal, plaintiff contends that the trial court erred in holding as a matter of law that its grievance was not subject to arbitration under the parties' collective bargaining agreement (Agreement). We affirm in part, reverse in part, and remand with directions.

¶ 3 Plaintiff's complaint, filed January 26, 2016, alleged as follows. The Agreement states that it is effective March 26, 2012, through November 30, 2015, and subject to automatic renewal absent specific action by either party. Under article 1.1 of the Agreement, plaintiff is the sole collective-bargaining representative for all deputies assigned to the corrections bureau and employed by the County and the Sheriff. Article 1.1 defines the bargaining unit as consisting of "all full-time employees as follows certification issued by the Illinois State Labor Relations Board on March 26, 2012." The term "employee" as used in the Agreement "shall only refer to employees who are specifically included in the above-described bargaining unit." Article 8 of the Agreement sets out the grievance procedure. Article 8.1 defines a grievance as "any difference, complaint or dispute between the Employer and the Union or any employee(s) regarding the application, meaning or interpretation of this Agreement."

¶ 4 The complaint continued as follows. The Illinois Public Labor Relations Act (Labor Act) (5 ILCS 315/1 *et seq.* (West 2014)) requires that all collective-bargaining disputes involving public security employees (see 5 ILCS 315/14 (West 2014)), a category that includes plaintiff's members, be submitted for resolution to impartial arbitrators (see 5 ILCS 315/2 (West 2014)). On or about April 21, 2015, plaintiff filed grievance 2015 PBLC 0001, which alleged that defendants had violated the Agreement. The grievance stated, "Retro pay was not given to members that left the unit prior to December 18, 2014. [But] were in the unit after or on March

26, 2012. The date used for the start date for retro pay." The grievance alleged that this failure violated sections 18.1 and 18.2 of the Agreement. Section 18.1 reads:

> "As of March 26, 2012, bargaining unit members will be brought to the appropriate step salary based on each employee's years of service with the Sheriff's Office. Effective during the pay periods which include December 1, 2012, December 1, 2013, and December 1, 2014, employees will receive a 2% across the board wage increase. In addition, based on years of service with the Sheriff's Office, employees shall receive step increases on their anniversary date, in accordance with the below step schedule. [For] [a]ny member with a sworn date after March 20, 2015, such sworn date shall be utilized for placement on the Deputy Sheriff salary scale."

Section 18.2 lists pay levels for the periods beginning March 26, 2012, December 1, 2012, December 1, 2013, and December 1, 2014, based on years of service (each year being a "step").

¶ 5 The complaint alleged further as follows. The grievance was denied. Defendants, through counsel, told plaintiff that the grievance was not arbitrable, for two reasons. First, plaintiff was seeking relief for persons who were not members of the bargaining unit when plaintiff submitted the grievance (or when the Agreement was ratified). Second, sections 18.1 and 18.2 did not refer to "retro pay" and thus could not have been violated. On June 8, 2015, plaintiff referred the grievance to arbitration. On September 21, 2015, defendants, through counsel, refused to arbitrate the grievance.

¶ 6 The complaint alleged the following as to grievance 2015 PBLC 0002, which was filed April 28, 2015, and concerned vacation pay. The grievance was denied. On September 24, 2015, the parties chose an arbitrator to decide it, and a hearing was scheduled for January 25,

2016. On January 12, 2016, however, defendants declined arbitration, acknowledging that a cancellation fee applied.

¶ 7 Count I of the complaint alleged that both grievances were arbitrable under the Agreement, and it sought an order compelling arbitration. Count II alleged that defendants had breached the Agreement by cancelling the arbitration of grievance 2015 PBLC 0002, incurring a charge of $1,600, to be divided equally. Count II requested $800 plus attorney fees and costs.

¶ 8 Defendants moved to dismiss both counts. Their motion stated as follows. Generally, the scope of an arbitrator's authority depends on what the parties have agreed to submit to arbitration. *Donaldson, Lufkin, & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 445 (1988). If the arbitration agreement is clear and it is apparent that the dispute is within the agreement's scope, then the trial court should compel arbitration. *Id.* If the agreement is clear and it is apparent that the issue is outside the agreement's scope, the trial court should deny arbitration. *Id.* Here, it was clear that the grievances were not arbitrable. The first grievance was filed on behalf of people who, having left defendants' service no later than December 17, 2014, before the grievance was filed, were not within the bargaining unit as defined in article 1. Further, the grievance was based on a claim for retroactive pay, but the Agreement contained no provision for retroactive pay for any current or former employee.

¶ 9 Defendants contended that the second grievance was outside the Agreement because, although labeled a "class grievance," it did not name any grievants, as the Agreement required. However, defendants noted, plaintiff had provided the names of two grievants, and defendants had agreed to arbitrate the grievance. Thus, defendants contended, any issue relating to the second grievance was now moot.

¶ 10 Plaintiff's response stated as follows. Defendants' motion lacked factual or legal merit and was based on unsupported assertions. The questions of whether the former employees were part of the bargaining unit, and whether the Agreement covered the "retro pay," were for the arbitrator to decide. Specifically, where it is unclear whether the subject matter of a dispute falls within an arbitration clause, the arbitrator initially decides questions of substantive arbitrability. Plaintiff's response also noted that Defendants ratified the Agreement on March 20, 2015. The Agreement provided that, as of March 26, 2012, bargaining unit members would be brought to the appropriate step salary based on their years of service. The Agreement also provided that bargaining unit members were defined with reference to the March 26, 2012, date. Plaintiff's response indicated that the Agreement's only viable construction was that bargaining unit members employed on March 26, 2012, were to be compensated pursuant to the wage scale; the Agreement did not provide that the bargaining unit members were required to be employed on the date that it was ratified (March 20, 2015). Plaintiff further argued that, because there was no grievance process in place before ratification, former bargaining unit members were able to avail themselves of the grievance procedure provided for in the Agreement, so long as they were employed on March 26, 2012 (the date of retroactivity). Thus, plaintiff concluded in its response that count I should not be dismissed, at least as it pertained to grievance 2015 PBLC 0001.

¶ 11 Plaintiff also argued that count II should not be dismissed. Defendants' unilateral cancellation of the arbitration hearing cost plaintiff $800, based solely on defendants' refusal to arbitrate what the Agreement had obligated it to submit to arbitration.

¶ 12 In their reply, defendants contended as follows. Article 18.1 did not call for retroactive pay but merely memorialized the parties' agreement to periodic step increases starting March 26, 2012. The Agreement contained nothing requiring those payments to be made retroactively to

bargaining-unit members. Further, citing *International Brotherhood of Electrical Workers, Local 193 v. City of Springfield*, 2011 IL App (4th) 100905, defendants asserted that former employees were not part of the bargaining unit when the grievance was filed or when the Agreement was ratified (which, according to defendants, was in December 2014). Defendants also contended that count II should be dismissed because article 8 of the Agreement required plaintiff to file a grievance and initially seek relief from the arbitrator, not the trial court.

¶ 13 The trial court dismissed the complaint. On appeal, plaintiffs argue that the dismissal of count I was erroneous insofar as it concerned the first grievance, seeking step-pay increases for former employees of defendants. Plaintiff does not challenge either the dismissal of count I insofar as it involves the second grievance or the dismissal of count II. Therefore, we do not consider any issues relating to the second grievance. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (arguments not raised are forfeited).

¶ 14 Defendants now argue that the trial court lacked subject-matter jurisdiction of the grievance, because section 5(b) of the Labor Act (5 ILCS 315/5(b) (West 2014)) confers exclusive jurisdiction on the Local Panel of the Illinois State Labor Relations Board (Local Panel) over this dispute. Defendants simply misread the statute. Section 5(b) states, "The Local Panel shall have jurisdiction over collective bargaining agreement matters between employee organizations and *units of local government with a population in excess of 2 million persons*, but excluding the Regional Transportation Authority." (Emphasis added.) 5 ILCS 315/5(b) (West 2014). We take judicial notice that Du Page County has fewer than 2 million persons.[1] See

[1] Defendants' jurisdictional argument also cites *Amalgamated Transit Union, Local 308 v. Chicago Transit Authority*, 2012 IL App (1st) 112517, without explaining why this opinion is pertinent. We see nothing in the opinion that relates to either section 5(b) of the Labor Act or the

http://www.census.gov/quickfacts/table/PST045215/17043 (last visited Dec. 7, 2016). We reject defendants' jurisdictional argument and turn to the merits.

¶ 15 A section 2-615 motion tests the sufficiency of the complaint. *DeHart v. DeHart*, 2013 IL 114137, ¶ 18. A court must accept as true the complaint's well-pleaded facts and any reasonable inferences that may arise from them. *Id.* The issue is whether the complaint's allegations, construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action on which relief may be granted. *Id.* Our review is *de novo*. *Id.*

¶ 16 Plaintiff contends that the Agreement is at least ambiguous, if not clearly favorable to it, in the two respects at issue: (1) whether the former employees on whose behalf the grievance was filed are members of the bargaining unit; and (2) whether their claim for "retro pay" is within the Agreement. Plaintiff notes that, where it is unclear whether the subject matter of a dispute falls within an arbitration clause, the arbitrator initially decides the question of substantive arbitrability. *Barr*, 124 Ill. 2d at 447-48. Plaintiff requests that this court hold either that (1) the arbitrability issue is unclear, requiring the arbitrator to decide it or (2) the arbitrability issue is clear and must be resolved in favor of plaintiff. We elect the former course.

¶ 17 Defendants' argument that the bargaining unit does not include persons who were employed by them between March 26, 2012, and December 17, 2014, is debatable at best. We cannot say that the Agreement *clearly requires* this construction. Moreover, their contention that the Agreement does not cover "retroactive pay" does not even rise to the level of debatable.

¶ 18 It is important to note that the Agreement was not ratified until sometime in December 2014 (according to defendants) or March 20, 2015 (according to plaintiff). However, the Agreement states (indeed, on its very cover) that it is in effect from March 26, 2012, through

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trial court's jurisdiction in this case.

November 30, 2015. Further, article 1.1 states that the bargaining unit consists of "all full-time employees as follows certification issued by the Illinois State Labor Relations Board on March 26, 2012." Moreover, article 18.1 of the Agreement, which is at issue here, states, "As of March 26, 2012, bargaining unit members will be brought to the appropriate step salary based on each employee's years of service with the Sheriff's Office," and it specifically requires not only step increases for the periods beginning March 26, 2012, December 1, 2012, December 1, 2013, and December 1, 2014—all wholly or partly before the Agreement was ratified—but also an across-the-board wage increase of 2% percent for each period.

¶ 19 By its very terms, the Agreement is "retroactive." It clearly creates contractual rights that predate its ratification. Thus, defendants' argument that the Agreement says nothing about "retroactive pay" is formalistic. The Agreement need not use the term "retroactive." By creating rights to step-pay increases and a general wage increase that take effect on March 26, 2012, the Agreement necessarily creates retroactive rights. Until it was ratified, there was no basis for these pay adjustments; after it was ratified, the adjustments became a contractual obligation of defendants extending back to March 26, 2012. A right to pay for a period in which such pay was not required until the right was created much later is, by definition, a right to "retroactive pay."

¶ 20 Had the persons allegedly entitled to this retroactive pay still been employed by defendants when the grievance was filed, we would be hard pressed to find a reasonable construction of the Agreement that would defeat their request for arbitration. Thus, the only basis on which to affirm the judgment is that, as former employees as of the date of the grievance, the persons involved are outside the bargaining unit. We cannot say that the Agreement clearly necessitates this conclusion, however.

¶ 21 The language that we have cited in articles 1.1 and 18.1 negates any simple conclusion that a former employee cannot be a grievant. Article 1.1 arguably includes in the bargaining unit any full-time employees as of March 26, 2012. Article 18.1 arguably entitles any full-time employee in the period covered by the Agreement to step-pay adjustments and cost-of-living increases for that period, and to deny that employee any redress under the Agreement merely because he has left defendants' employ would risk creating a right without any remedy. We cannot say that defendants' interpretation of the Agreement otherwise is necessarily unreasonable, however; perhaps the parties intended employees who knowingly left employment in the period in question to lose the opportunity to have their claims arbitrated (without necessarily losing alternative means of redress). We believe that the issue is sufficiently doubtful for us to defer to the prerogative of the arbitrator.

¶ 22 Defendants' invocation of *International Brotherhood of Electrical Workers* is unavailing, as that case is easily distinguished. There, the plaintiff submitted a grievance on behalf of Dianna Malcom, who had worked for six months at a union position covered by the parties' collective-bargaining agreement, then was transferred to a nonunion position. The plaintiff alleged that the defendant had orally promised Malcom that, in return for the transfer, her salary would be increased after six months in the nonunion position. She was transferred but did not receive the allegedly promised salary increase. The plaintiff petitioned to compel arbitration of her claim to the salary increase. The trial court granted the plaintiff summary judgment. *International Brotherhood of Electrical Workers*, 2011 IL App (4th) 100905, ¶¶ 1-10.

¶ 23 The appellate court reversed, holding that the case was clearly not subject to arbitration. The court noted that the collective-bargaining agreement did not cover Malcom's current position; it listed job classifications that did not include hers. *Id.* ¶ 18. As the period in which

she could have returned to her former position had expired, she no longer could qualify as a probationary member of the bargaining unit. *Id.* ¶ 19. Thus, the dispute was not arbitrable, because it concerned "an oral agreement to increase the salary of a person who is not a part of a bargaining unit." *Id.* ¶ 22.

¶ 24 Aside from involving a grievance filed on behalf of a former employee, *International Brotherhood of Electrical Workers* has little in common with this case. The resolution of each case turns on the specific language of the parties' collective-bargaining agreement, and the distinctive features of the Agreement have no apparent counterparts in the agreement in *International Brotherhood of Electrical Workers*. Moreover, this case involves a claim for rights that are rooted in the parties' agreement, as opposed to Malcom's claim, which was based on an oral promise and affected a position that was also outside the agreement.

¶ 25 We reverse the dismissal of count I of plaintiff's complaint and affirm the dismissal of count II. As we have held that the Agreement is ambiguous as to the arbitrability of the first grievance, we conclude that the arbitrator must decide whether that controversy is arbitrable. Therefore, we remand the cause to the trial court with instructions to refer the matter to the arbitrator to determine the arbitrability of the first grievance.

¶ 26 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed in part and reversed in part, and the cause is remanded with directions.

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