2018 IL App (1st) 171217-U

THIRD DIVISION
March 30, 2018

No. 1-17-1217

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME) COUNCIL 31, AFL-CIO; and AFSCME LOCAL 3477,	)	Appeal from the Circuit Court of Cook County.
Petitioners-Appellees,	)	
v.	)	No. 16 CH 10890
TIMOTHY C. EVANS, as Chief Judge of the Circuit Court of Cook County,	)	The Honorable
Peter Flynn, Respondent-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

HELD: Where the agreement between the parties was clear that the labor dispute at issue did not fall within scope of their arbitration clause, summary judgment should have been granted in favor of Employer and, therefore, we reverse the trial court's

judgment in part.

& 1 Upon the parties' cross-motions for summary judgment in this labor relations dispute, the trial court granted petitioners-appellees American Federation of State, County and Municipal Employees (AFSCME) Council 31, AFL-CIO and AFSCME Local 3477's (Union) motion in part and denied respondent-appellant Timothy C. Evans, as Chief Judge of the Circuit Court of Cook County's (Employer) motion. The court found that the agreement between the parties at issue was ambiguous with respect to who should resolve whether the agreement had been violated, but further found that it was not ambiguous with respect to the applicable penalty if a violation were found. Employer appeals, contending that the first portion of the trial court's holding is erroneous because the agreement was clear. It asks that we reverse that portion of the trial court's judgment, but affirm its remainder. For the following reasons, we reverse in part.

& 2 BACKGROUND

& 3 The facts of this cause are uncontested.

& 4 Anthony Jordan was a probation officer in Employer's juvenile probation department. As Employer's employee, he was also part of the Union. A collective bargaining agreement (CBA) executed between Employer and the Union, effective December 1, 2008 through November 30, 2012, and automatically renewing itself from year to year thereafter, governed the terms and conditions of Jordan's employment. This included a five-step grievance-arbitration procedure for the resolution of employment grievances. The CBA defined "grievance" as "a difference between and employee or the Union and the Employer with respect to the interpretation or application of, or compliance with, the agreed upon provisions of the [CBA], the Employer's rules and regulations, or disciplinary action." The fifth step of the grievance procedure was arbitration.

& 5 In October 2011, Employer suspended Jordan for 30 days without pay for poor work performance and unprofessional behavior. At this point, Employer, the Union and Jordan agreed to enter into a Last Chance Agreement (LCA). The body of the letter suspending Jordan and outlining the LCA stated that "[a]ny singular recurrence of such non-compliance with department standards will result in" his termination. The text of the LCA itself mandated that Jordan follow department rules and work directives, and made clear that Jordan acknowledged:

> "any singular non-compliance with these conditions will cause his immediate termination from the department without the recourse of the collective bargaining [CBA's] grievance procedures."

The LCA further required Jordan to accept responsibility for his poor work performance and again stated, and repeated, that any non-compliance would lead to his immediate termination. And, right above the LCA's signature lines, the following paragraph appeared:

> "As a condition of your acceptance of these conditions relative to this 'last chance agreement' and your acknowledgement [*sic*] of your agreement to waive all rights to grieve this corrective action, please sign this document along with your union representative."

Jordan and the parties signed the LCA.

& 6 Some years later, in September 2014, Employer temporarily suspended Jordan, this time finding that he violated the LCA by not fulfilling various work duties. The Union filed a grievance on Jordan's behalf at step three of the CBA procedure, asserting that Employer failed to notify it and conducted an investigatory hearing of Jordan without it present. Upon review, Employer notified the Union that it could not resolve the grievance. Thereafter, the Union moved the grievance to step four.

& 7 In February 2015, Employer terminated Jordan's employment. The Union amended its grievance to contest his discharge, claiming it was without cause. The grievance moved to step five and the parties selected an arbitrator, who set it for hearing. However, a few weeks before the hearing date, Employer notified the arbitrator and the Union that it would not participate in the arbitration. In its communication, Employer explained that it believed the LCA "clearly delineated this is a non-arbitrable matter" and, because it was not subject to arbitration, the arbitrator had no jurisdiction. The arbitrator cancelled the hearing.

& 8 The Union filed a Petition to Compel Arbitration in the trial court. As litigation ensued, the parties filed cross-motions for summary judgment. The Union argued primarily that the LCA made clear Jordan's discharge fell within the scope of the CBA's grievance-arbitration procedure and, thus, the court should compel arbitration; alternatively, the Union argued that if the LCA was not clear as to the matter's arbitrability, the court should still refer it to an arbitrator to first decide its arbitrability. Employer, meanwhile, argued that the LCA clearly barred arbitration of the grievance and that the court, not an arbitrator, should decide whether the dispute is subject to arbitration.

& 9 The trial court granted the Union's motion for summary judgment in part and denied Employer's motion for summary judgment. It found that the LCA was "unclear" as to who–an arbitrator or the trial court–should determine whether Jordan violated the LCA. Accordingly, it referred the matter to an arbitrator for a determination as to the dispute's arbitrability. At the same time, however, the trial court further concluded that, if the arbitrator were to decide that the dispute was arbitrable, and if an arbitrator decided that Jordan had, in fact, violated the LCA, then the penalty for the violation could not be decided by the arbitrator because the LCA did make clear that the penalty for a violation is discharge.

& 10 Employer appealed, challenging that portion of the trial court's order finding that the LCA was unclear as to who should decide whether Jordan violated the LCA. The Union did not cross-appeal the portion with respect to who should determine the penalty for violation.

& 11 ANALYSIS

& 12 On appeal, Employer contends that summary judgment should have been entirely granted in its favor because the LCA clearly indicated that Jordan's termination was not subject to arbitration. Acknowledging arbitration's preferred status in resolving labor disputes and the presumption favoring its application, Employer asserts that this presumption was overcome in this cause because on the uniqueness of the LCA which specifically demonstrates the parties' explicit intent that Jordan's termination would not be subject to arbitration. Upon our review of the record, we agree.

& 13 As we have noted, this cause was decided within the context of cross-motions for summary judgment. Summary judgment is proper when the pleadings, depositions, and admissions on filed, together with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See *Pielet v. Pielet*, 2012 IL 112064, ¶ 29; *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001). Where, as here, the parties file cross-motions for summary judgment, they agree that only a question of law is involved and "invite the court to decide the issues based on the record." *Pielet*, 2012 IL 112064, ¶ 28; accord *Bremer v. City of Rockford*, 2016 IL 119889, ¶ 20; see also *Rock Island Boatworks, Inc. v. Rib Holding Co.*, 2017 IL App (3d) 150709, ¶ 94 (filing of cross-motions for summary judgment concedes absence of genuine issue of material fact). Our court reviews determinations on summary judgment *de novo*. See *Bremer*, 2016 IL 119889, ¶ 20; accord *Pielet*, 2012 IL 112064, ¶ 30.

& 14 The primary issue before us is whether the LCA, as signed by Jordan and the parties in this cause, makes clear who–a trial court or an arbitrator–is to decide if Jordan violated the LCA; in other words, whether the parties intended to exclude the issue from arbitration. The parties agree that there is no Illinois case law directly dealing with language like that found in the instant LCA and, thus, that this is a case of first impression. However, they do agree that there is Illinois case law that helps lay a general foundation for a determination in this respect.

& 15 Our supreme court has made clear that the question of who decides arbitrability is not always a simple one; sometimes it may properly lie with a court and other times it may properly lie with an arbitrator. See *Donaldson, Lufkin & Jenrette Futures, Inc. v. Barr*, 124 Ill. 2d 435, 444 (1988). Of course, with respect to general contracts, parties are free to contract away arbitration and instead agree that all questions regarding arbitrability should be decided by a court. See *Donaldson*, 124 Ill. 2d at 448-49. However, when it comes to the area of labor relations, the situation is flipped on its head. This is because labor policy strongly favors arbitration with respect to labor relation disputes. See *Thompson v. Policemen's Benevolent Labor Committee*, 2012 IL App (3d) 110926, ¶ 17; accord *City of Rockford v. Unit Six of Policemen's Benevolent & Protective Ass'n of Illinois*, 351 Ill. App. 3d 252, 256 (2004). Thus, there is a presumption in favor of arbitration in these matters; a labor dispute should be arbitrated unless the parties have specifically agreed otherwise. See *Thompson*, 2012 IL App (3d) 110926, ¶¶ 17-18 (everything in collective bargaining agreement should be subject to arbitration unless parties agree to forego it); accord *Rockford*, 351 Ill. App. 3d at 257; see also *Monmouth Public Schools, District No. 38 v. Pullen*, 141 Ill. App. 3d 60, 63-64 (1985).

& 16 In the instant cause, the parties agree that the question becomes, then, whether there was an agreement between them to arbitrate the dispute in question. See *Donaldson*, 124 Ill. 2d at

444. To resolve this question, as well as the intertwined question of who is to decide arbitrability, there must be an examination of their agreement. See *Donaldson*, 124 Ill. 2d at 444–45 (the "paramount factor in determining the parties' intention is the scope of the arbitration clause in the contract"). Did the parties, through their written agreement, show an intent to exclude the disputed matter from arbitration? See *Thompson*, 2012 IL App (3d) 110926, ¶ 17 (this is the relevant inquiry).

& 17 In making this determination, and again as the parties here agree, a three-prong approach is applied. Under the first prong, if the dispute clearly falls within the scope of their arbitration clause, the trial court should decide the arbitrability issue and compel arbitration; this is because, clearly, they intended from the outset that the issue be arbitrated if a dispute arose. See *Donaldson*, 124 Ill. 2d at 445-50. Under the second prong, if it is clear that the dispute does not fall within the scope of their arbitration clause, the trial court should likewise decide the arbitrability issue, this time denying the request for arbitration; this is because it is clear the parties did not intend the issue be arbitrated. See *Donaldson*, 124 Ill. 2d at 445-50. Finally, under the third prong, it if is unclear whether the dispute falls within the scope of their arbitration clause, the trial court should not decide the issue and instead should refer the matter to the arbitrator to decide the issue of substantive arbitrability; this is in line with the presumption favoring arbitration in labor disputes. See *Donaldson*, 124 Ill. 2d at 445-50.

& 18 It is at this point that the parties' agreement on the law and facts of this cause ends. Instead, their disagreement now begins with respect to which prong of analysis is applicable here. The Union asserts that the third prong applies; it claims that the CBA in this cause has an arbitration clause that is so broad that it is unclear whether the parties agreed to arbitrate the issue and, thus, its substantive arbitrability should be decided by an arbitrator. In contrast,

Employer argues that the second prong applies here, asserting that the language of the CBA, combined with the language of the LCA, show that the parties did not intend the issue to be subject to arbitration. Upon our review of the record, we agree with Employer.

& 19 The Union is correct that the arbitration clause in the CBA in the instant cause contains broad language. It is also correct that, generally, when a broad arbitration clause is involved, it can, more likely, be unclear whether the parties have agreed to arbitrate a particular dispute, thus requiring that initial determination be made by an arbitrator rather than a court. For example, the Union relies extensively on *Village of Bartonville v. Lopez*, 2016 IL App (3d) 150341, (McDade, J., *dissenting*), *rev'd*, 2017 IL 120643. In that case, a reviewing court examined the following arbitration clause of a labor contract:

> "A grievance is a dispute or difference of opinion raised by an Officer [c]overed by this Agreement or by the Union involving the meaning, interpretation or application of the provisions of this Agreement. *** If the grievance is not settled in accordance with the foregoing procedure, the Union may refer the grievance to arbitration."

Bartonville, 2016 IL App (3d) 150341, ¶ 4. Ultimately, the reviewing court reversed the trial court to hold that, from this language, the intent of the parties on disciplinary matters was unclear and that they must proceed to arbitration so that an arbitrator could decide whether the disciplinary matter at issue was subject to grievance arbitration under the parties' contract. See *Bartonville*, 2016 IL App (3d) 150341, ¶ 21.[1]

[1]It must be noted here that the appellate court holding in *Bartonville* ordering arbitration, which saw one justice dissenting, was reversed by our state supreme court. In that reversal, our

& 20 Noting that the instant CBA contains a grievance-arbitration procedure that defines "grievance" in a similarly broad way as the provision in *Bartonville, i.e.*, as "a difference between and employee or the Union and the Employer with respect to the interpretation or application of, or compliance with, the agreed upon provision of the [CBA]," the Union insists that, just as the reviewing court in *Bartonville*, we must find that the intent of the parties was unclear here and the matter must be forwarded to an arbitrator. For several reasons, we do not find this to be true. Most significant among them (apart from *Bartonville*'s reversal) is the existence in this case of the LCA–a factor which was not present in *Bartonville*.

& 21 Indeed, the CBA in the instant cause employed a five-step grievance-arbitration procedure for the resolution of employment grievances–grievances such as the one at issue which involve "a difference between and employee or the Union and the Employer with respect to the interpretation or application of, or compliance with, the agreed upon provisions of the [CBA], the Employer's rules and regulations, or disciplinary action." And, the fifth step of the grievance procedure was arbitration, thereby subjecting Employer's decision to terminate Jordan's employment to arbitration. However, in October 2011, when Jordan was suspended the first time for 30 days due to poor work performance and unprofessional behavior, he, the Union

---

supreme court found that the plaintiff-employer was entitled to summary judgment in its favor based on its complaint for declaratory judgment and for stay of arbitration, holding that under the parties' agreement, the labor relations dispute should not proceed to arbitration. See *Bartonville*, 2017 IL 120643, ¶¶ 47, 79 (by choosing to participate in administrative hearing rather than seek to stay the hearing and proceed in accordance with the labor contract, employee and union lost their right to arbitrate).

and Employer agreed to enter into the LCA.

& 22 LCAs are not separate agreements from CBAs. See *Casanova v. City of Chicago*, 342 Ill. App. 3d 80, 87-88. They are not considered independent but, rather, supplements to the CBA from which the employment arises. See *Casanova*, 342 Ill. App. 3d at 87-88 (they are effective as part of the larger collective bargaining agreement). As supplements, they are nevertheless considered to be binding contracts, with the ultimate end of providing a way, outside of the CBA, for an employee to save his job. See *Casanova*, 342 Ill. App. 3d at 88. This is exactly what happened here. Yes, Jordan's CBA provided a rubric for the resolution of employment grievances, namely, the five-step procedure which culminated in arbitration. But, the LCA he, and the parties, freely chose to sign created a different rubric by which they were now required to abide.

& 23 In dealing with any contractual situation, there are certain interpretational rules we, as a reviewing court, must follow. For example, we must attempt to give effect to the parties' intentions when interpreting a contract. See *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007); accord *Gomez v. Bovis Lend Lease, Inc.*, 2013 IL App (1st) 130568, ¶ 13. To do so, we are to look first, and foremost, to the contract's plain language, as this is the best indicator of the parties' intent. See *Gallagher*, 226 Ill. 2d at 232; accord *Gomez*, 2013 IL App (1st) 130568, ¶ 13. And, contract language must be interpreted in light of the contract as a whole. See *Gomez*, 2013 IL App (1st) 130568, ¶ 13, citing *Board of Trade of the City of Chicago v. Dow Jones & Co.*, 98 Ill. 2d 109, 122-23 (1983). Moreover, when a contract contains both specific and general language relating to the same subject, it is axiomatic that the specific language trumps the general. See *Preuter v. State Officers Electoral Bd.*, 334 Ill. App. 3d 979, 991 (2002), quoting *Continental Casualty Co. v. Polk Bros., Inc.*, 120 Ill. App. 3d 395, 399 (1983) ("It is well-

established that 'where a document contains both general and specific provisions relating to the same subject, the specific provision is controlling' "); accord *My Baps Construction Corp. v. City of Chicago*, 2017 IL App (1st) 161020, ¶ 131.

& 24 While the CBA in the instant cause may be have provided what can be considered a broad grievance procedure culminating in arbitration, the LCA, which must be read and considered in conjunction with it as a supplemental agreement, contained a different, and much more specific, resolution of a grievance between Jordan, the Union and Employer who signed it. Essentially, the parties agreed to change their prior agreement, in order to allow Jordan one "last chance" to save his job. That change, in our view, clearly was that Jordan and the Union agreed to forego the option they had under the more general CBA to use the original five-step grievance procedure moving toward arbitration as any employee would, to instead choose, in light of Jordan's specific situation and his particular suspension, to agree that Jordan would have no recourse to that original CBA five-step grievance procedure in exchange for this one last opportunity to keep his employment. This was, as evidenced by the plain language of the LCA, the very essence of the agreement they chose to supplant their original contract.

& 25 The support for this is clear and abundant. The LCA specifically laid this out, and did so repeatedly. First, the body of the letter suspending Jordan in October 2011 outlined the LCA and stated that "[a]ny singular recurrence of such non-compliance with department standards will result in [his] termination." At the outset, then, it was clear that arbitration would no longer be an option for Jordan should he fail to comply with department rules again (which he did). Next, the text of the LCA itself not only mandated that Jordan follow department rules and work directives, but specifically ordered him to acknowledge that "any singular non-compliance with these conditions will cause his immediate termination from the department without the recourse

of the collective bargaining grievance procedures." Again, the LCA explicitly stated that, were he to violate department rules again, he could not invoke the CBA's procedure, including its final grievance-resolution step of arbitration, to fight the matter. Rather, any violation–any "non-compliance"–would result in termination of his employment, leaving no room for debate. The LCA repeated this again two more times when it clarified that the "non-compliance" may be related to any directive, standard or protocol issued by Jordan's supervisor, deputy chief or any administrator, and when it ordered him, "in the presence of" the Union and Employer, to acknowledge his understanding of this. And, most evident here is the paragraph of the LCA appearing immediately above its signature lines, which stated:

> "As a condition of your acceptance of these conditions relative to this 'last chance agreement' and your acknowledgement [*sic*] of your agreement to waive all rights to grieve this corrective action, please sign this document along with your union representative."

Undeniably, Jordan and the Union, along with Employer here, signed this LCA and waived all rights to arbitration in any regard with respect to the issue of his employment and, likewise, its termination. The presumption of arbitration has been overcome.

& 26 In a final attempt to support its position, the Union asserts that the LCA is ambiguous because the parties executed a new CBA after the LCA was signed, thereby creating doubt as to the LCA's validity. The Union claims that, although the LCA was signed in October 2011, the parties executed a new CBA in August 2012 which was effective from December 2008 through November 2012 and that this CBA, which had a broad grievance-arbitration clause and did not carve out an exception for LCAs, must supersede Jordan's LCA. We find this argument to be unavailing. First, as we have already discussed, LCAs are supplements to CBAs. Neither

supplants the other; they work in combination, each with the same contractual power. Moreover, the Union cites no language in the new CBA demonstrating that the parties intended it to supersede Jordan's LCA or that the new CBA even contemplated Jordan's situation at all. Jordan's LCA pertained specifically to Jordan and how he, the Union and Employer chose to deal with his work failures in particular. To find that a new, generalized CBA covering a multitude of employees would supersede a specialize LCA as formed and agreed to by a particular employee, his union and his employer, without any specific provision stating as much, would render LCAs meaningless.

& 27 In sum, we find that summary judgment should have been granted to Employer in full here, as the agreement between the parties was clear with respect to who should resolve whether Jordan violated the LCA. According to their agreement, and in light of our analysis and the particular record in this cause, this dispute was clearly not within the scope of the parties' arbitration clause and, thus, a court should have decided the arbitrability of this issue by denying arbitration.

& 28 CONCLUSION

& 29 For all the foregoing reasons, we reverse that portion of the trial court's order granting the Union's cross-motion for summary judgment in part and denying Employer's cross-motion for summary judgment; the remainder of its holding (concerning the applicable penalty) stands.

& 30 Reversed in part.