2014 IL App (3d) 130662-U

Order filed December 2, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

COUNTY OF KANKAKEE, ILLINOIS and SHERIFF OF KANKAKEE COUNTY,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Petitioners-Appellees,	)	
v.	)	Appeal No. 3-13-0662 Circuit No. 11-L-150
ILLINOIS FRATERNAL ORDER OF POLICE LABOR COUNCIL,	)	The Honorable Kendall Wenzelman,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice Holdridge specially concurred.

ORDER

¶ 1 *Held*: As with any contract, a court will not enforce an arbitration award that is repugnant to established norms of public policy.

¶ 2 Respondent, the Illinois Fraternal Order of Police Labor Council (the Union), appeals the judgment of the circuit court reversing an arbitration award. The arbitration award, entered as part of a collective bargaining process, ordered that petitioners, the County of Kankakee (the

County) and the Sheriff of Kankakee County (the Sheriff), reinstate Nicholas Brais as a correctional officer. On appeal, the Union raises the following issues: (1) whether the circuit court erred in finding the arbitrator's award failed to capture the essence of the collective bargaining agreement, and (2) whether the circuit court erred in finding the arbitrator's award violated public policy. We affirm on the public policy ground.

¶ 3 FACTS

¶ 4 Brais was hired by the Sheriff as a correctional officer in 2005. The Union serves as the exclusive bargaining representative for all correctional officers employed by the Sheriff. The parties were subject to a collective bargaining agreement (CBA), which provides, in pertinent part:

> "The Employer possesses the sole right to operate the Sheriff's Office of the County and all management rights repose in it. *** [T]hese rights include, but are not limited to, the following:
>
> * * *
>
> (b) To establish reasonable work rules.
>
> * * *
>
> (d) To suspend, discharge and take other disciplinary action for just cause against employees under the established work rules and regulations of the Kankakee County Sheriff's Department."

¶ 5 In an exercise of rule making authority, the Sheriff adopted the Code of Ethics for Jail Officers (the Code) established by the Board of Directors of the American Jail Assocation. All

correctional officers, including Brais, agreed to abide by the rules and regulations of the Code. The Code provides, in pertinent part:

> "3-005 CONDUCT; UNBECOMING. Members shall conduct themselves at all times, both on and off duty in such a manner as to reflect most favorably on the Department. Conduct unbecoming shall include conduct which brings the Department into disrepute or which reflects discredit upon the employee as a member of the Department or that which impairs the operation or efficiency of the Department or member.

¶ 6 The CBA contained an arbitration clause. The clause provided that all grievances shall ultimately be settled by arbitration and "[t]he decision of the arbitration panel shall be binding to the parties concerned in the grievance."

¶ 7 On September 22, 2010, members of Kankakee's Major Crimes Task Force learned from David Caban, a long-time career criminal with multiple felony convictions and an affiliation with the Latin Kings gang, that he and Brais engaged in a conversation via text message the previous day. The conversation was extracted from Caban's cell phone.

> "BRAIS: Fuck man so it’s the front page wit Conrad. God dam man I tried to tell yall man. That sucks dude!
>
> CABAN: Weeble too
>
> BRAIS: Dude u better be clean or stay clean as of now dude u don't need to go to man
>
> CABAN: I haven't done nother for bout Two years so I'm cool been there done that aint tryin to go back

BRAIS: Good to hear man. We aint been to close but we got history dude and I don't wanna see u go down to Bro

CABAN: U been hearin my name in there

BRAIS: No but for real man I haven't been to work in like three weeks and don't go back till the end of the month. But when I heard it was Conrads [referring to recently arrested Conrad Bell] name mentioned

CABAN: Cool lmk u hear omethin

BRAIS: If I hear ur name ever mentioned I'll keep you posted man. U know ur in the click thow so I'm sure they gota be lookin at ya, Just stay straight nigga

CABAN: For sho

BRAIS: Piece out man"

¶ 8 On October 14, 2010, the Sheriff discharged Brais effective immediately. The Union filed a grievance on Brais' behalf and the matter proceeded to arbitration. The issue submitted for resolution was: Whether the Sheriff had just cause to discipline Brais and if so, whether discharge was an appropriate remedy. The arbitration award states:

"The evidence clearly shows the Grievant engaged in unbecoming conduct that brought substantial discredit upon himself, and by implication the Department, in violation of Rule 3-005. He did this by promising a convicted felon (Caban) that he would keep him informed if he heard anything about Caban inside the Department.

At the same time, there is no evidence the Grievant ever followed through on this promise, so he never transmitted any compromising, confidential, or sensitive information. However, the Grievant's statement to Caban is a highly improper and unacceptable statement for the Grievant to make to any criminal, and it reflects in a strongly negative manner on the Grievant and, by implication, on the Department. *** It *** indicates that the Grievant needs to be disciplined in an attention-getting manner that sharpens his awareness that his inappropriate conduct cannot be repeated.

This conclusion is reinforced by the Grievant's poor disciplinary history. The Grievant's disciplinary record is not good, in that he experienced five disciplinary episodes during the period August 2007 – August 2010 (excluding the instant matter): [1] in August 2007 (a three-day suspension for insubordination), [2] March 2009 (a 20-day suspension for unsatisfactory performance – bringing a personal cell phone into the secure area of the jail), [3] January 2010 (a written reprimand for not properly assisting with an inmate transfer, [4] July 2010 (a written reprimand for tardiness), and [5] August 2010 (a 25-day suspension for insubordination). The Grievant's disciplinary history indicates that a 25-day and a 20-day suspension did not

'sink in' with the Grievant. I find, therefore, that more substantial discipline is warranted.

At the same time, the Grievant's September 2010 text message exchange with Caban does not provide an adequate justification for the Grievant's discharge. There is no evidence connected with that episode that the Grievant communicated any specific Department information about investigations or any other Departmental business to Caban or anyone else. There is no evidence that the Grievant informed Caban of anything occurring in the Department that could interfere in any way with ongoing Department activities. *** Expressed another way, I find that the discharge penalty is overly severe in light of the nature of the actual misconduct committed by the Grievant in this matter.

As a result, I find that this grievance is sustained in part and denied in part. I find that there is just cause for the Employer to discipline the Grievant, but there is not just cause to discharge him."

¶ 9 The arbitrator held that the appropriate discipline was a 90 day unpaid suspension. The Sheriff was ordered to pay Brais back pay and benefits for the balance of his time away from work beyond the 90 days. The Sheriff was also ordered to reinstate Brais "to a full-time position as a Correctional Officer as soon as is feasible." Finally, the award stated:

"The Sheriff's *** discharge letter to the Grievant says that 'Officer Brais has lost the trust and confidence that was placed in

him by the Sheriff of Kankakee County as a Correctional Officer.' As a result, the Employer may reinstate the Grievant to a Correctional Officer position in which the Grievant will not have access to any sensitive or confidential information."

¶ 10 The Sheriff appealed from the arbitrator's order. Ultimately, the circuit court granted summary judgment to the County and Sheriff, thereby reversing the arbitration award and reinstating Brais's termination. Specifically, the court found that the award "ignores the management rights retained by the Sheriff *** [under] CBA." It also "ignores" the "specific [CBA] process which must be followed when new positions [in the Department] are created."[1] The court therefore concluded that "the arbitrator in drafting his remedy failed to capture the essence of the CBA and instead engaged in formulating 'his own brand of industrial justice.' "

¶ 11 The circuit court also found that the arbitration award violated public policy favoring "safety of employees in the workplace" and "effective law enforcement." The court stated:

"[I]t is without question that the occupation of correctional officers and police officers is hazardous. The actions of Brais in his text exchange giving rise to this grievance, and as evidenced by his prior disciplinary events indicates a total and complete disregard for the rules and policies of his occupation which are

[1] The CBA requires posting, application and a specific selection process to be followed "[w]hen a new position classification is created." The circuit court called attention to the fact that the arbitration award requires that Brais be reinstated to a position where he could not access sensitive or confidential information, however, "[t]here is no indication such a position even exists."

designed not only for his protection, but also the protection of his fellow employees. And his willingness to communicate investigative information if he becomes aware of it could impact the investigation and prosecution of crime as well as potentially place police officers in danger.

* * *

[C]ase law does not require a negative result to have occurred before reinstatement can be found to be in violation of public policy. [Citation.] *** Thus, this Court finds that the absence of proof being presented showing direct harm from Brais's actions does not resolve the public policy issue.

* * *

[The arbitrator's] award provides that the 'employer may reinstate the grievant to a Corrections Officer position in which the Grievant will not have access to any sensitive or confidential information' because the Sheriff has lost trust and confidence in Brais as a correctional officer. None of these statements suggest that this is an employee with a prior exemplary record that the arbitrator has determined is not likely to reoffend. If such was the case, why did he attempt to provide for the creation of a new position that removes him from the opportunity to reoffend? Brais had been employed as a correctional officer for less than five years, and had been disciplined five times in a three year period

> prior to his discharge. Thus[,] the Court finds that the award of reinstatement is unsupported by the arbitrator's findings, and that said reinstatement violates the recognized public policies identified by the Court."

¶ 12 ANALYSIS

¶ 13 On appeal, the Union alleges the circuit court erred in reversing the arbitrator's award on the basis that the award: (1) failed to capture the essence of the CBA, and (2) violated public policy. While we find that the circuit court exceeded its authority when it found the arbitrator's award failed to capture the essence of the CBA, we believe it correctly held that the award violated public policy.

¶ 14 (1) Essence of CBA

¶ 15 The supreme court has consistently recognized that the judicial review of an arbitral award is extremely limited. *American Federation of State, County & Municipal Employees v. Department of Central Management Services*, 173 Ill. 2d 299, 307 (1996) (*AFSCME II*); *American Federation of State, County & Municipal Employees v. State of Illinois* (*AFSCME I*), 124 Ill. 2d 246, 254 (1988); *Board of Trustees of Community College District No. 508 v. Cook County College Teachers Union, Local 1600*, 74 Ill. 2d 412, 418 (1979). The *AFSCME II* court explained:

> "This standard reflects the legislature's intent in enacting the Illinois Uniform Arbitration Act—to provide finality for labor disputes submitted to arbitration. [Citation.] 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. [Citation.] Thus, a court is duty bound to enforce a labor-arbitration award if the arbitrator acts within the scope of his or her authority and the award draws its essence from the parties' collective-bargaining agreement. [Citation.]
>
> To this end, any question regarding the interpretation of a collective-bargaining agreement is to be answered by the arbitrator. Because the parties have contracted to have their disputes settled by an arbitrator, rather than by a judge, it is the arbitrator's view of the meaning of the contract that the parties have agreed to accept. We will not overrule that construction merely because our own interpretation differs from that of the arbitrator. [Citation.]" *AFSCME II*, 173 Ill. 2d at 304-05.

¶ 16 The record is devoid of any evidence that the arbitrator's conclusion that there was not "just cause" to discharge Brais arose from "fraud, corruption, partiality, misconduct, mistake, or failure to submit the question to arbitration." See *AFSCME II*, 173 Ill. 2d at 304. The question of whether the facts establish "just cause" to terminate Brais, as opposed to merely suspending him, is a discretionary one which the parties have contracted to have "settled by an arbitrator, rather than by a judge." See *AFSCME II*, 173 Ill. 2d at 305. Thus, we defer to the arbitrator's conclusion.

¶ 17 An award only fails to capture the essence of a collective bargaining agreement where "the arbitrator bases his award on a body of thought, feeling, policy, or law outside the agreement." *Village of Posen v. Illinois Fraternal Order of Police Labor Council*, 2014 IL App

(1st) 133329, ¶ 37; *Amalgamated Transit Union v. Chicago Transit Authority*, 342 Ill. App. 3d 176, 180 (2003). Here, the CBA allows the Sheriff to "suspend, discharge and take other disciplinary action for just cause." Suspension and discharge are both sanctions allowed under the CBA. The arbitrator's conclusion that suspension is warranted, but not discharge, does not derive from a "body of thought, feeling, policy or law outside the agreement." See *Posen*, 2014 IL App (1st) 133329, ¶ 37; *Transit Union*, 342 Ill. App. 3d at 180. Where the parties have contracted to have disputes settled by an arbitrator rather than by a judge, it is the arbitrator's view of the facts and meaning of the contract that they have agreed to accept. *Griggsville-Perry Community Unit School District No. 4 v. Illinois Educational Labor Relations Board*, 2013 IL 113721, ¶ 18. Further, where, as here, "just cause" is not defined in the collective bargaining agreement, it is left up to the arbitrator to determine if the grievant was discharged for just cause. *AFSCME I*, 124 Ill. 2d at 256. Thus, the arbitrator's decision to reinstate rather than discharge did not fail to capture the essence of the CBA.

¶ 18 The Sheriff and the County also independently argue that the actual terms of the reinstatement remedy fail to capture the essence of the CBA. First, they cite to the section of the award that discusses Brais' reinstatement to a position that does not have access to sensitive or confidential information. The Sheriff and the County believe this violates the CBA by mandating the creation of a position that does not exist within the department. The arbitration award, however, merely states that "the Employer *may* reinstate the Grievant to a Correctional Officer position in which the Grievant will not have access to any sensitive or confidential information." (Emphasis added.) We find this provision does not fail to capture the essence of the CBA.

¶ 19 Second, the Sheriff and the County cite to the fact that the suspension was 90 days. The CBA provides that "[t]he authority of the Sheriff to suspend shall be limited to an aggregate of not more than thirty (30) days in any twelve (12) month period." The Union argues that the arbitrator had the authority to exceed 30 days as a result of the parties stipulating to the arbitrator's authority to determine the appropriate remedy. While the Union is correct that this stipulation was made prior to the commencement of arbitration, it ignores the fact that any remedy must still fall within the scope of the CBA itself. *Rauh v. Rockford Co.*, 143 Ill. 2d 377, 386-89 (1991). Applying the same reasoning discussed above, the terms of the CBA are what the parties have agreed to accept. We do not view a generic stipulation that the arbitrator can determine the appropriate remedy to constitute a waiver of the parties' fundamental agreement that any remedy must derive from the terms of the CBA. Thus, we find this *specific* ruling fails to capture the essence of the CBA. This holding is limited only to the length of the reinstatement sanction and does not change the fact that all the remaining portions of the arbitrator's award fall within the scope of the CBA.[2]

¶ 20 (2) Public Policy

¶ 21 The supreme court has recognized a public policy exception to vacate arbitration awards which otherwise derive their essence from a collective bargaining agreement. *AFSCME II*, 173 Ill. 2d at 306. "As with any contract, a court will not enforce a collective bargaining agreement that is repugnant to established norms of public policy." *AFSCME II*, 173 Ill. 2d at 307. The circuit court in the instant case correctly held that the arbitrator's award violates public policy.

[2] We do not discuss the dispositional impact of this limited holding due to the fact that we find the entire arbitration award violates public policy.

> "[I]n order to vacate an arbitral award upon these grounds, the contract, *as interpreted* by the arbitrator, must violate some explicit public policy. [Citations.] In this respect, the exception is a narrow one and is invoked only when a contravention of public policy is clearly shown. [Citations.] Moreover, the public policy must be 'well-defined and dominant' and ascertainable 'by reference to the laws and legal precedents and not from generalized considerations of supposed public interests.' [Citation.] This court has stated that it will look to our 'constitution and *** statutes, and when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of the government officials' when determining questions regarding public policy. [Citation.]
>
> Thus, application of the public policy exception requires a two-step analysis. The threshold question is whether a well-defined and dominant public policy can be identified. If so, the court must determine whether the arbitrator's award, as reflected in his interpretation of the agreement, violated the public policy." (Emphasis in original.) *AFSCME II*, 173 Ill. 2d at 307-08.

¶ 22 Regarding the first-step, the circuit court identified the following public policies -- "safety of employees in the workplace" and "effective law enforcement." We find both policies to be "well-defined and dominant." See *AFSCME II*, 173 Ill. 2d at 307-08. Public policy favoring "safety of employees in the workplace" can be found in: (1) The Illinois Health and

Safety Act (820 ILCS 225/3(a) (West 2012))[3] and (2) Illinois case law, which recognizes a cause of action for negligent retention of an employee (*Van Horne v. Muller*, 185 Ill. 2d 299 (1998)). Public policy favoring "effective law enforcement" can be found in: (1) The Civil Administrative Code of Illinois (20 ILCS 2605/2605-200(a)(3) (West 2012)),[4] (2) The Citizens Participation Act (735 ILCS 110/5 (West 2012))[5] and (3) The Illinois Uniform Conviction Information Act (20 ILCS 2635/2(B) (West 2012)).[6]

¶ 23 We also note the following public policy which we believe all law enforcement officers within Illinois are charged with upholding.

> "There is no public policy more basic, nothing more implicit in the concept of ordered liberty [citation], than the

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[3] "It shall be the duty of every employer under this Act to provide reasonable protection to the lives, health and safety and to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

[4] The Department of the Illinois State Police is charged with the statutory duty of employing "skilled experts, scientists, technicians, investigators, or otherwise specifically qualified persons to aid in preventing or detecting crime, apprehending criminals, or preparing and presenting evidence of violations of the criminal laws of the State."

[5] The public policy statement of the Citizens Participation Act provides that "[t]he information, reports, opinions, claims, arguments, and other expressions provided by citizens are vital to effective law enforcement."

[6] The purpose of the Illinois Uniform Conviction Information Act is "to establish guidelines and priorities which fully support effective law enforcement."

> enforcement of a State's criminal code. [Citations.] There is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens. [Citations.] *** 'Public policy favors the exposure of crime ***.' [Citation.] *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 132 (1981).

¶ 24 Turning to the second-step, the circuit court found that Brais' reinstatement violates public policy. We agree with both the circuit court's conclusion and its stated reasoning. The promise to provide information (confidential or public) concerning law enforcement investigations to known felons or gang members compromises the safety of law enforcement personnel and hinders their ability to carry out their prescribed duties. Simply stated, it directly conflicts with the entire purpose of law enforcement. Law enforcement is charged with the duty of exposing crime, not concealing it. Moreover, in a time where the gulf of mistrust between law enforcement and the public is widening, it is imperative that law enforcement enforce the criminal laws of this State without prejudice or favoritism. Anything short of this standard will destroy any remaining public trust and result in the complete collapse of the entire purpose and policy behind law enforcement. The arbitrator's decision endangers both law enforcement *and* the public.

¶ 25 In coming to this conclusion, we find it significant this is Brais' sixth documented act of misconduct. He was suspended previously on multiple occasions. These suspensions obviously did not have their intended effect. Another suspension, as the arbitrator ordered, cannot be said to in any way promote safety of employees in the workplace, effective law enforcement or exposure of crime. Furthermore, had the Sheriff taken the arbitrator's route and simply

suspended Brais such an act would *arguably* have exposed the Sheriff to a cause of action for negligent retention of an employee.

¶ 26 We reject the arbitrator's reliance upon the fact that Brais only promised to provide information and said promise never resulted in any actual harm since Brais never followed through on his promise. First, the promise alone violates section 3-005 of the Code (Conduct; Unbecoming). Even the arbitrator acknowledges this fact. Second, as the circuit court correctly pointed out, Illinois law does not require a negative result to occur before reinstatement can be found to be in violation of public policy. See *AFSCME II*, 173 Ill. 2d at 333, *Chicago Transit Authority v. Amalgamated Transit Union, Local 241*, 399 Ill. App. 3d 689, 702 (2010).

¶ 27 It defies logic to require the Sheriff to continue to employ an officer who expressly promised to undermine and endanger both law enforcement *and* the public. "When public policy is at issue, it is the court's responsibility to protect the public interest at stake." *AFSCME II*, 173 Ill. 2d at 333.

¶ 28 The arbitration award violates public policy. Therefore, the judgment of the circuit court is affirmed.

¶ 29 Affirmed.

¶ 30 JUSTICE HOLDRIDGE, specially concurring.

¶ 31 I concur. However, I would affirm the circuit court's judgment based solely upon Brais's violation of the public policy promoting effective law enforcement. I find it unnecessary to address the public policy favoring the safety of employees in the workplace.