[Cite as *Internatl. Assoc. of Firefighters Local 136 v. Dayton*, 2015-Ohio-898.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS LOCAL 136	:	Appellate Case No. 26346
Plaintiff-Appellant	:	Trial Court Case No. 14-CV-202
v.	:	(Civil Appeal from Common Pleas Court)
THE CITY OF DAYTON	:	
Defendant-Appellee	:	

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O P I N I O N

Rendered on the 13th day of March, 2015.

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HALL, J.

{¶ 1} The International Association of Firefighters, Local 136 (IAFF), appeals a trial

court's order vacating the arbitration award sustaining its grievance against the City of Dayton. The arbitrator concluded that the City violated the parties' collective bargaining agreement by not promoting a firefighter to the rank of lieutenant. We agree with the trial court that the arbitrator exceeded his power under the agreement and that therefore the award had to be vacated. So we affirm.

I. FACTS

{¶ 2} The IAFF represents the employees of the City's fire department, including firefighters, lieutenants, captains, and district chiefs, but excluding the director of fire and chief and the assistant fire chiefs. The parties' relationship is governed by a collective bargaining agreement, which contains provisions that govern promotions to vacancies in the ranks, e.g., firefighter to lieutenant, lieutenant to captain, captain to district chief. A vacancy in a rank is filled by selecting the first person on the rank's "promotional eligible list," which orders the promotion-eligible candidates by their scores on the relevant promotional examination. New promotional eligible lists are established every two years. Promotions are one-for-one. Thus, for example, when a vacancy occurs in the rank of lieutenant, and the vacancy is approved for filling, the first firefighter on the promotional list for lieutenant is promoted, that firefighter's name is removed from the list, and the second name moves up to first. The firefighter who is now first is promoted to the next lieutenant vacancy. Each time a lieutenant vacancy occurs, this process is followed, until the list is exhausted or it expires. That is, unless the City decides not to fill a vacancy. Under Article 35, Section 10, of the collective bargaining agreement once a vacancy occurs the City has 45 days in which to notify the IAFF whether it intends to fill the vacancy or abolish it.

{¶ 3} On August 9, 2012, Lieutenant Brian Monaghan was discharged, and on September 12, the City's director of human resources, Brett McKenzie, sent a letter to the president of the IAFF, Gaylynn Jordan, notifying her that the City intended to abolish Monaghan's position. The letter was copied to the Director of Fire, Chief Herbert Redden. Unfortunately, neither Jordan nor Chief Redden told anyone else in the fire department about the City's intention. Firefighter David Christian sat atop the promotional eligible list for lieutenant. At a staff meeting during the first week of October 2012, Assistant Chief Jeffrey Payne noted, "It looks like Firefighter Christian will get promoted." District Chief Rennes Bowers, who was also at the meeting, asked Payne if he (Bowers) could tell Christian this. Payne responded, "Well, if he doesn't get promoted, he has one hell of a grievance." Bowers told Christian later that day about the promotion.

{¶ 4} Despite the City's stated intention to abolish the lieutenant position, around October 15, Chief Redden told Assistant Chief Payne to draft a P-2 Position Action Form for a new lieutenant position. A P-2 is an internal document used by the City to track the process by which new City positions are established and vacant ones are filled. A new position is not established and a vacant one cannot be filled until the city manager signs the position's P-2. The human resources director explained at the arbitration hearing: "The city's process in our charter says that the city manager decides how many position there are that exist in the city, so civil service takes no steps to fill any existing position until they receive a duly-signed and executed P2 from the city manager." (Tr. 151). Redden and Payne signed the P-2 for the new lieutenant position on October 16, and the human resources director signed it the next day, but the city manager did not sign the P-2

until the following year on January 10. While the reason for the delay is unclear, the arbitrator speculated that the city manager did not sign the P-2 because the City had decided to abolish a lieutenant position, Lieutenant Monaghan's position. Monaghan, though, had appealed his termination to the Civil Service Board, and in late December 2012 or early January 2013, the Board ordered his reinstatement. So it appears, said the arbitrator, that the city manager approved the new lieutenant position only when it became clear that the City would have to reinstate Monaghan, who was reinstated four days after the city manager signed the P-2.

{¶ 5} On November 16, 2012, while the P-2 sat on the City Manager's desk, the promotional eligibility list for lieutenant, atop of which firefighter Christian sat, expired. Christian believed that he should have been promoted to the new lieutenant position, although it had yet to be created, so he filed a grievance. The City denied the grievance, and the IAFF elected to take it to arbitration. After an arbitration hearing at which the City and the IAFF presented evidence, the arbitrator issued an opinion and award that granted the grievance and ordered the City to promote Christian to the rank of lieutenant.

{¶ 6} The City filed a motion in the court of common pleas to vacate the arbitrator's award, and the IAFF filed a motion to confirm it. The court sustained the City's motion, overruling the IAFF's, and vacated the arbitrator's award under R.C. 2711.10(D), finding that the arbitrator had exceeded his power under the agreement.

{¶ 7} The IAFF appealed to this Court.

II. ANALYSIS

{¶ 8} The IAFF assigns a single error to the trial court, alleging that the court erred by granting the City's motion to vacate the arbitrator's award and overruling its motion to

confirm.

{¶ 9} "Once the arbitrator has made an award, that award will not be easily overturned or modified." *Queen City Lodge No. 69, Fraternal Order of Police Hamilton Cty., Ohio, Inc. v. Cincinnati*, 63 Ohio St.3d 403, 407, 588 N.E.2d 802 (1992). But "[t]he authority of an arbitrator to interpret and enforce a contract is drawn from the contract itself, and for this reason * * * '[a]n arbitrator's authority is limited to that granted him by the contracting parties * * *.' " *Cedar Fair, L.P. v. Falfas*, 140 Ohio St.3d 447, 2014-Ohio-3943, 19 N.E.3d 893, ¶ 5, quoting *Goodyear Tire & Rubber Co. v. Local Union No. 200, United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 42 Ohio St.2d 516, 519, 330 N.E.2d 703 (1975). If an arbitrator exceeds those powers, "the court of common pleas shall make an order vacating the award." R.C. 2711.10(D). An arbitrator acts within his authority if the award "draws its essence" from the parties' agreement, in other words, if there is a "rational nexus" between the agreement and the award and the award is not arbitrary, capricious, or unlawful. *Id.* at ¶ 7. An award departs from the essence of the agreement if the award " 'conflicts with the express terms of the agreement' " or " 'is without rational support or cannot be rationally derived from the terms of the agreement.'" *Id.*, quoting *Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emps. Assn., Local 11, AFSCME, AFL-CIO*, 59 Ohio St.3d 177, 572 N.E.2d 71 (1991), syllabus.

{¶ 10} The IAFF contends that there is a rational relationship between the arbitrator's award and the parties' agreement and that the trial court improperly substituted its judgment or interpretation of the agreement for that of the arbitrator.

{¶ 11} Article 35, Section 10, of the agreement, in its entirety, provides:

Management shall make a determination regarding whether to fill a

> promotional vacancy within forth-five [sic] (45) days of the position vacancy. The City will provide notice to the IAFF whether the City intends to fill or abolish the vacancy during this forty-five (45) day period. If the City intends to fill a vacancy, it will do so within thirty (30) calendar days after notice to the IAFF. If a promotional eligibility list has expired and the City elects to fill a vacancy, the vacancy will be filled within thirty (30) calendar days after the promulgation of a new promotional eligibility list. A vacancy in the promoted position that will trigger this notice requirement occurs on the date of promotion, retirement, resignation, demotion, termination, or death of the incumbent duly appointed to said position. A vacancy will also occur upon the effective date a newly promoted position is created and funded.

{¶ 12} The arbitrator concluded Christian should have been promoted to the lieutenant position filled by Monaghan. According to the arbitrator, "District Chief Bowers's oral statement to Firefighter Christian in early October 2012 constitutes notice under Article 35 § 10 (second sentence) that the City intended to fill the vacancy created by Lieutenant Monaghan's discharge." (*Opinion and Award*, 7). "There is nothing in the [agreement]," says the arbitrator, "indicating that such notice must be in writing, or that it cannot be rescinded, or that it can come only from Human Resources, or that it only can be given to the Union President, or that it cannot be given until the City Manager has signed off on an internal City document not provided to the Union." (*Id*. at 6). Thus, the arbitrator concluded, "notice * * * may come from any City employee with actual or apparent authority to give it." (*Id*. at 7).

{¶ 13} There is no dispute that the human resource director's letter to the IAFF

president stating that the City intended to abolish Lieutenant Monaghan's position constituted, as the arbitrator put it, "written and unambiguous notice that the City would abolish T.O. #6351." (*Id.* at 6). Thus the letter satisfied the City's notification duty under the terms of Article 35, Section 10. The City cannot be held responsible for what a higher ranking union member later tells a subordinate.

{¶ 14} On the P-2 drafted by Assistant Chief Payne, the "Establishment of new position(s)" and "Fill vacant position(s)" boxes are both checked. The arbitrator found this inconsistent and said that it "seems to have resulted from the mutually inconsistent facts that Lieutenant Monaghan's position (T.O. #6351) had been abolished by the City, but that Chief Redden nonetheless wanted to create a new position (T.O. #6623) to replace Lieutenant Monaghan." (*Opinion and Award*, 3). It appeared to the arbitrator that Redden was attempting "to circumvent the City Manager's decision to abolish the position." (*Id*.). The human resources director testified that each city position has a T.O. number, a "table of organization within [the City's] Banner payroll system." (Tr. 154-155). T.O. #6351, Monaghan's position, was abolished, said the human resources director, around September 12, 2012. So the P-2 drafted by Payne sought to establish a new lieutenant position, T.O. #6623, not to fill a vacancy in T.O. #6351.

{¶ 15} The last sentence of Article 35, Section 10, states that a new position is also considered a "vacancy." But the provision provides that such a vacancy does not "occur" until "the effective date a newly promoted position is created and funded." A new position cannot reasonably be said to be created until the city manager signs the position's P-2, because under the City Charter only the city manager has the power to appoint employees. City of Dayton Charter, Section 48(B) ("The powers and duties of the City

Manager shall be: * * * [t]o appoint * * * all directors of the departments and all subordinate officers and employees in the departments in both the classified and unclassified service."). The city manager did not sign the P-2 for T.O. #6623 until after the promotional eligible list expired. The City is thus correct that at the expiration there was no "vacancy" to fill.

{¶ 16} District Chief Bowers's oral statement to Christian cannot constitute notice under the terms of Article 35, Section 10. The provision states that "*[t]he City* will provide notice to the IAFF whether the City intends to fill or abolish the vacancy." (Emphasis added.). So notice must come from someone who represents the City, or "Management." District Chiefs are members of the IAFF, or "Union." District Chief Bowers, then, could not have provided notice of the City's intent with respect to any promotional vacancy.

{¶ 17} The arbitrator's award departs from the essence of the parties' agreement. The trial court determined that the award is without rational support and there was no rational nexus between the award and the agreement. We agree. In our view, the award conflicts with express terms of the agreement. Therefore we agree that the arbitrator exceeded his powers, and the trial court was right to vacate the award.

{¶ 18} The sole assignment of error is overruled.

{¶ 19} The trial court's judgment is affirmed.

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DONOVAN, J., concurs.

FAIN, J., dissenting:

{¶ 20} I would sustain the IAFF's sole assignment of error, and reverse the order of the trial court vacating the arbitrator's award.

{¶ 21} The arbitrator construed Article 10, Section 35 of the collective bargaining agreement as providing that once the City provides notice of its intent to fill a vacancy, it must do so within 30 days. Arbitrator's decision, pp. 5-6. The arbitrator also construed "notice," as used in the collective bargaining agreement, to be broad enough to have included District Chief Bowers' statement to Firefighter Christian in the first week of October, 2012, more than 30 days before the expiration of the 2010-2012 promotional list, that Christian was to be promoted. *Id.*, pp. 6-7. Finally, the arbitrator construed the collective bargaining agreement as allowing that the City's notice of intent to abolish the position to which Christian seeks promotion was capable of being rescinded by the City's notice of intent to promote Christian to that position. *Id.,* p. 6.

{¶ 22} I would construe the collective bargaining agreement differently. Like my colleagues, I would construe Article 10, Section 35 as pertaining only to promotions to positions that have not already been the subject of a notice of abolition, I would construe "notice" under the agreement more narrowly, and I would not construe the agreement to provide that notice of an intent to abolish a position may be rescinded by the mere notice of an intent to promote to that position.

{¶ 23} But the parties have elected to have an arbitrator, not a court, construe the collective bargaining agreement. "An arbitrator's improper determination of the facts *or misinterpretation of the contract* does not provide a basis for reversal of an award by a reviewing court, because '[i]t is not enough * * * to show that the [arbitrator] committed an error – *or even a serious error*.' *Stolt-Nielsen, S.A. v. Animal Feeds Internatl. Corp.*, 559 U.S. 662, 671, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010)." *Cedar Fair, L.P. v. Falfas*, 140

Ohio St.3d 447, 2014-Ohio-3943, 19 N.E.3d 893, ¶ 6. (Emphasis added.)

{¶ 24} An award may be set aside if the award conflicts with the express terms of the agreement, or if the award is without rational support or cannot be rationally derived from the terms of the agreement. *Id.*, ¶ 7. In my view, the award in this case does not conflict with the express terms of the agreement, and the arbitrator's construction of the agreement, although it is a construction with which I do not agree, is not irrational; that is, his derivation of that construction from the terms of the agreement is rational, even if erroneous (or, indeed, even if it constitutes a "serious" error).

{¶ 25} I recognize, and the arbitrator did, also (Arbitrator's decision, p. 7), that his liberal interpretation of what may constitute notice of an intent to promote under the contract may be a source of genuine concern on the part of the City. As the arbitrator noted, that may be a subject of negotiation in the next collective bargaining agreement between the City and the IAFF.

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