[Cite as *Assn. of Cleveland Fire Fighters, Local 93 of Internatl. Assn. of Fire Fighters v. Cleveland*, 2010-Ohio-5597.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94361

ASSOCIATION OF CLEVELAND FIRE FIGHTERS, LOCAL 93 OF THE INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

PLAINTIFF-APPELLANT

vs.

CITY OF CLEVELAND

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-681030

BEFORE: Stewart, J., Rocco, P.J., and Dyke, J.

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MELODY J. STEWART, J.:

{¶ 1} Appellant, Association of Cleveland Fire Fighters, Local 93 of the International Association of Fire Fighters (the "union"), appeals from a court order that refused to vacate or modify an arbitration award in favor of

appellee, city of Cleveland. The union claims that the arbitrator exceeded his authority by finding that the city did not violate a collective bargaining agreement term requiring promotions of bargaining unit members within 30 days of a vacancy because a federal court order in related litigation barred the city from filling the vacancies, thus making compliance with the agreement impossible.

I

{¶ 2} Arbitration is a favored method of resolving disputes, *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 1998-Ohio-294, 700 N.E.2d 859, so the scope of judicial review of the arbitration proceedings is limited by statute and construing case law. *Goodyear Tire & Rubber Co. v. Local Union No. 200, United Rubber, Cork, Linoleum & Plastic Workers of Am.* (1975), 42 Ohio St.2d 516, 520, 71 O.O.2d 509, 330 N.E.2d 703.

{¶ 3} Under R.C. 2711.10, a court can vacate an arbitration award for one of four reasons, all of which relate to the conduct of the arbitrator: fraud, corruption, misconduct, or exceeded powers. The union's basis for seeking reversal is the fourth ground of R.C. 2711.10(D) — that the arbitrator so imperfectly executed his powers that a mutual, final, and definite award upon the subject matter submitted was not made. It argues that the arbitrator exceeded his authority by conceding that the city violated the

collective bargaining agreement by not making promotions within 30 days as required, but that the violation was excused on grounds of impossibility.

{¶ 4} In *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.* (1990), 49 Ohio St.3d 129, 132-133, 551 N.E.2d 186, the supreme court stated the applicable standard of review under R.C. 2711.10(D):

{¶ 5} "Therefore, given the presumed validity of an arbitrator's award, a reviewing court's inquiry into whether the arbitrator exceeded his authority, within the meaning of R.C. 2711.10(D), is limited. Once it is determined that the arbitrator's award draws its essence from the collective bargaining agreement and is not unlawful, arbitrary, or capricious, a reviewing court's inquiry for purposes of vacating an arbitrator's award pursuant to R.C. 2711.10(D) is at an end."

II

{¶ 6} Neither party disputes the procedural background of the case. In June 2002, the city's civil service commission announced that promotional examinations for fire fighters would be administered because prior eligibility lists had expired. Article VII of the collective bargaining agreement in force at the time of this litigation stated: "All promotions shall be made as outlined in the Civil Service Commission as mandated by the Civil Service rules and nothing herein shall be deemed to be repugnant to the Civil Service

rules except that any promotion must be made within thirty (30) days of the creation of a vacancy * * *."

{¶ 7} Just three days prior to the promotional examination being administered, a group of 11 minority firefighters and officers filed suit in federal court challenging the validity of promotional examinations given in 1996, 2000, and 2002, claiming that the city's promotional system was biased against minorities. The federal court allowed the 2002 promotional examinations to go forward, but ordered that "no certification of the eligibility list shall occur nor appointments for promotions from the eligibility list are to be made unless ordered by the Court." *Luke v. City of Cleveland* (Oct. 21, 2002), N.D.Ohio E.D. No. 1:02 CV 01225. The city filled the positions with temporary appointments. It then made three different requests to have the court lift the promotion ban: in March 2003, April 2003, and July 2005. All three requests were denied. The *Luke* case went to trial in late 2006, with the court making a finding for the *Luke* plaintiffs on their claim relating to the 1996 testing, but denying relief on the 2000 and 2002 tests. By prevailing on the 1996 test claims, the *Luke* plaintiffs were in a position to demand promotion and back pay. These promotions would have lowered the number of openings available for the 2002 test, so the city settled with the *Luke* plaintiffs, agreeing to promote 15 of those plaintiffs. These promotions were in addition to the 29 vacancies open to the 2002 promotional candidates.

The settlement was finalized in February 2007 and the court lifted its promotional ban. The remaining openings were then filled based on the results of the 2002 testing.

{¶ 8} The arbitrator stated the issue before him as: "Did the City violate the Agreement by failing to make the intended promotions within thirty (30) days of the announcement or creation of vacancies in June 2002? If so, what shall the remedy be?" He found that "[a]lthough the arbitrator does not dispute the evidence and arguments clearly demonstrating that the City did not comply with the terms of Article VII, it is also beyond question or doubt that the [sic] their compliance, in timely effecting the promotions at issue here, was legally impossible."

III

{¶ 9} The union's position is that the arbitrator exceeded the scope of his authority by finding that there were legal justifications for the city's breach of the collective bargaining agreement. It argues that the arbitrator was limited solely to the question of whether a breach occurred and, having determined that breach did occur, could not consider any possible justifications for the breach because those justifications were beyond the scope of the matter submitted.

{¶ 10} The arbitrator did not exceed his authority by considering contract defenses that would potentially discharge performance. In *Prima*

Paint Corp. v. Flood & Conklin Mfg. Co. (1967), 388 U.S. 395, 402-404, 87 S.Ct. 1801, the United States Supreme Court held that where a contract contains an arbitration clause, the court may only consider defenses relating to the arbitration provision; defenses addressed to the contract itself must be decided by the arbitrator. The union's position in this appeal ignores well-established law that applies principles of contract construction to the arbitration of promises contained in collective bargaining agreements. See *Alexander v. Wells Fargo Fin. Ohio 1, Inc.*, 8th Dist. No. 82977, 2009-Ohio-4873, at ¶10. Without question, issues relating to performance and non-performance under the collective bargaining agreement were within the arbitrator's authority.

{¶ 11} The union makes a number of arguments that claim that the arbitrator erred in his substantive application of contract law and the impossibility doctrine of contract law, claiming, for example, that the court order banning promotions during the *Luke* litigation was not only foreseeable but was caused by the city. This is not a proper basis for vacating an arbitrator's decision under R.C. 2711.10(D). An arbitrator's award will not be vacated because of an error of law or fact. *Goodyear*, 42 Ohio St.2d at 522. In fact, we recently reiterated our rejection of the "manifest disregard of the law" standard used by some federal courts, holding that the standard was incompatible with the very limited grounds for review set forth in R.C.

2711.10. See *Cleveland v. Internatl. Bhd. of Elec. Workers Local 38*, 8th Dist. No. 92982, 2009-Ohio-6223, at ¶18-23. The union's arguments relating to the arbitrator's application of impossibility as excusing the city's performance under Article VII are not a basis for vacating the arbitrator's decision. The court did not err by refusing to vacate the arbitrator's decision.

{¶ 12} If we were to consider whether the arbitrator made any errors of law in accepting the city's impossibility defense, we would find no error.

{¶ 13} "Impossibility of performance is an affirmative defense to a breach of contract claim. Impossibility of performance occurs where, after the contract is entered into, an unforeseen event arises rendering impossible the performance of one of the contracting parties." *Skilton v. Perry Local School Dist. Bd. of Edn.*, 11th Dist. No. 2001-L-140, 2002-Ohio-6702, at ¶26. In *Glickman v. Coakley* (1984), 2 Ohio App.3d 49, 52, 488 N.E.2d 906, we held that "a contracting party can avoid the contract when government orders render its performance impracticable * * *." We reached this conclusion by noting that courts will not enforce an agreement to perform an illegal act, so the parties presumably condition their contract on the legality of its performance. Id.; see, also, Restatement of the Law 2d, Contracts (1981), Section 261 ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was

made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.")

{¶ 14} There is no dispute that the federal court barred the city from making appointments or promotions from the 2002 eligibility list. There is likewise no dispute with the arbitrator's finding that the city made "repeated and good-faith efforts to oppose the imposition of an order delaying the actual promotions[.]" Finally, there was nothing to show that the court's order banning appointments was foreseeable. Under the doctrine of "impossibility," the *Luke* court's decision to grant a court order of indefinite duration made it legally impossible for the city to actually comply with Article VII of the collective bargaining agreement and promote from the eligibility list within 30 days.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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MELODY J. STEWART, JUDGE

KENNETH A. ROCCO, P.J., and
ANN DYKE, J., CONCUR