2014 IL App (1st) 131044-U

FIFTH DIVISION
June 13, 2014

No. 1-13-1044

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE NILES TOWNSHIP SUPPORT STAFF, LOCAL 1274, IFT/AFT, AFL-CIO,	)	Petition for Review of Opinion and Order of the Illinois Educational Labor Relations Board.
Petitioner,	)	
v.	)	No. 2013-CA-0001-C
THE NILES TOWNSHIP HIGH SCHOOL DISTRICT NUMBER 219 and THE ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD,	)	
Respondents.	)	

JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: The Illinois Educational Labor Relations Board did not err in dismissing the Union's unfair labor practice charge against the District because the grievant waived her right to the grievance procedure and the matter is procedurally inarbitrable.

¶ 2 Petitioner, the Niles Township Support Staff, Local 1274, IFT/AFT, AFL/CIO (the Union), argues that the respondent, the Illinois Educational Labor Relations Board (the IELRB or the Board), erred in dismissing its unfair labor practice charge against the respondent, the

Niles Township High School District Number 219 (the District), finding that an arbitrator's conclusion that the dispute was substantively inarbitrable was binding on the parties.

¶ 3 In August 2011, the Union filed a grievance with the superintendent of the District pertaining to an employee's termination of employment by the District. In September 2011, the Union notified the superintendent that it was referring the grievance to arbitration, as provided in the grievance procedure in the collective bargaining agreement. In December 2011, the employee filed a claim with the federal Equal Employment Opportunity Commission (EEOC) regarding her termination, claiming that the District had discriminated against her based on age, race and gender and that she had been retaliated against for opposing the District's discrimination against her and harassment of her.

¶ 4 At the February 2012 arbitration hearing, the District moved to dismiss the grievance based on the grievant's filing of her EEOC claim. The District relied on the following language contained in the collective bargaining agreement.

"**ARTICLE III**

EMPLOYEES' INDIVIDUAL RIGHTS

> **Section 1. No Discrimination.** In accordance with applicable federal and state law, neither the BOARD [the Board of Education of Niles Township District 219] nor the UNION shall discriminate on the basis of an employee's race, creed, color, sex, national origin, religion, age or handicap unrelated to ability to perform the particular work involved. *If an employee files a lawsuit and/or a charge with a federal or state agency alleging that he/she has been discriminated against contrary to the provisions of this section,*

> *said employee shall waive his/her right to use or continue to use the grievance procedure set forth in this agreement."* (Emphasis added.)

¶ 5 In ruling on the District's motion, the arbitrator also had to consider another section of the collective bargaining agreement.

> "**ARTICLE VII**
>
> **GRIEVANCE PROCEDURE**
>
> **Section 4. Limitation on Authority of Arbitrator.** The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. The arbitrator shall consider and decide only whether there has been a violation, misinterpretation or misapplication of the specific provisions of this Agreement based on the specific issue(s) raised by the grievance and shall have no authority to make a decision on any issue not so submitted or raised. If the arbitrator determines that there has been such a violation, he/she shall have the authority, consistent with the terms of this Agreement, to provide for appropriate relief. The decision of the arbitrator shall be final and binding on the BOARD, the UNION, and the grievant."

¶ 6 The arbitrator asked the parties to file memorandums addressing whether the arbitrator had authority to determine substantive arbitrability and if so, whether the grievance was substantively arbitrable.

¶ 7 In his June 2012 ruling, the arbitrator concluded that he had the authority to determine substantive arbitrability and that the grievance was substantively inarbitrable, granting the District's motion. The arbitrator found that "in order to determine whether 'specific issues of this Agreement' have been violated [he] may have to examine contract provisions beyond those alleged to have been violated." As to the merits, the arbitrator reasoned,

> "Absent waiver, the discharge of a bargaining unit employee is arbitrable. By filing and refusing to withdraw with prejudice an EEOC charge challenging her discharge, the grievant has elected not to participate in the contractually established remedy of arbitration. Pursuant to Article III, Section 1, she has chosen her forum.
>
> ***
>
> In the end, I have no choice. The grievant has elected her remedy and her forum and remained loyal to it. It's immaterial whether she was familiar with the election-of-remedies language of Article III, Section 1. Like all bargaining unit employees, she is bound by it."

¶ 8 In July 2012, the Union filed an unfair labor practice charge with the IELRB against the District based on subsection 14(a)(1) of the Illinois Educational Labor Relations Act (Act) (115 ILCS 5/14(a)(1) (West 2010)), alleging that the District "refused to arbitrate a grievance protesting the discharge of the [employee] on the ground that it is inarbitrable. Arbitrator Herbert Berman has erroneously dismissed the grievance on this ground." The relief sought was to vacate the award and direct the District to submit to arbitration on the merits. Section 14(a)(1) prohibits educational employers, their agents or representatives from "[i]nterfering, restraining or

coercing employees in the exercise of the rights guaranteed under this Act." 115 ILCS 5/14(a)(1) (West 2010).

¶ 9 In September 2012, the executive director of the IELRB issued a complaint and notice of hearing on the Union's unfair labor practice charge. In October 2012, the Union filed a motion for summary judgment, arguing that the IELRB has exclusive primary jurisdiction over the arbitrability issue in the case and was authorized to decide substantive arbitrability issues, and the arbitrator erred when deciding that the grievance was inarbitrable. In January 2013, the administrative law judge issued an order finding that there were no determinative issues of fact requiring an order and removed the case to the IELRB for a decision.

¶ 10 In March 2013, the IELRB filed its opinion and order in the matter. The Board held that the District did not violate the Act. The IELRB found that it had the authority to review the arbitrator's decision to determine whether the District violated section 14(a)(1) of the Act. In considering whether the Board was bound by the arbitrator's decision that the grievance was substantively inarbitrable, the Board reasoned that "insofar as it concerns the interpretation of the collective bargaining agreement, substantive arbitrability is a matter for the arbitrator to decide." Further, the IELRB found that "the arbitrator in this case confined himself to interpreting the collective bargaining agreement."

¶ 11 Additionally, the IELRB pointed out that it had previously "decided that a provision in a collective bargaining agreement under which an employee may choose to use either the contractual grievance and arbitration procedure or the statutory Civil Service Merit Board process, but not both, is permissible." See *General Service Employees Union v. University of Illinois at Chicago*, 8 PERI 1014 (1991). The IELRB also noted that the arbitrator's decision was entitled to great deference and "the Board has a limited scope of review in arbitration cases."

> "The arbitrator's decision in this case was strictly based on the collective bargaining agreement and, thus, drew its essence from the collective bargaining agreement. *See* [*Griggsville-Perry Community Unit School District No. 4 v. the Illinois Educational Labor Relations Board*, 2103 IL 113721.] Because the arbitrator's award finding that the grievance involved in this case was substantively inarbitrable drew its essence from the collective bargaining agreement and was not contrary to the Act, it is binding. *See Griggsville-Perry*. Therefore, the District did not violate Section 14(a)(1) of the Act."

¶ 12 This appeal followed.

¶ 13 On appeal, the Union argues that the IELRB erred when it refused to review the arbitrator's erroneous application of the controlling legal standard for deciding substantive arbitration issues.

¶ 14 The Administrative Review Law provides that judicial review of an administrative agency decision "shall extend to all questions of law and fact presented by the entire record before the court." 735 ILCS 5/3-110 (West 2010). "The standard of review, 'which determines the degree of deference given to the agency's decision,' turns on whether the issue presented is a question of fact, a question of law, or a mixed question of law and fact." *Comprehensive Community Solutions, Inc. v. Rockford School Dist. No. 205*, 216 Ill. 2d 455, 471 (2005) (quoting *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 390 (2001)). We review an agency's conclusion on a question of law *de novo*, but we are not bound by the agency's interpretation of a statute. *Id*. A decision involving a question of fact is afforded

deference and will not be reversed unless it is against the manifest weight of the evidence. *Id.* at 471-72. "A mixed question of law and fact asks the legal effect of a given set of facts." *Id.* at 472. "An agency's conclusion on a mixed question of law and fact is reviewed for clear error." *Id*. Here, the administrative law judge found that there were no determinative issues of fact and the IELRB agreed with that conclusion and only considered legal issues. Accordingly, we review the legal issues *de novo*.

¶ 15 In this case, the arbitrator concluded that the grievance was substantively inarbitrable because under the collective bargaining agreement's election of remedy clause, the employee waived her right to pursue a contractual grievance after she filed an EEOC claim. The Union contends that the arbitrator erred by considering provisions in the collective bargaining agreement, specifically the election of remedy provision, in determining whether the grievance was arbitrable. The Union further asserts that the question of substantive arbitrability should be determined by the IELRB, not the arbitrator.

¶ 16 Although we find the arbitrator correctly concluded that he had the authority to decide whether the grievance was arbitrable, we find that the question he decided was one of procedural arbitrability rather than substantive arbitrability. The fact that the language used by the arbitrator did not accurately address the procedural issue before him does not change the result. Since the question of waiver does not involve the substance of the grievance, we conclude that it raises a procedural issue as to arbitrability.

> "However, the trial court's role in determining the arbitrability of a dispute does not apply to gateway procedural issues. Procedural questions arising from the dispute and affecting its final disposition are presumptively for the arbitrator, rather than the judge, to

> decide. That is, the arbitrator presumptively should decide allegations of waiver, delay, or similar defenses to arbitrability." *Ford Motor Credit Co. v. Cornfield*, 395 Ill. App. 3d 896, 906 (2009) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)).

¶ 17 The Second District in *Cornfield*, relying on several federal appellate decisions, clarified that *Howsam's* use of the term "waiver" refers to "a party's lack of compliance with contractual conditions precedent to arbitration, rather than waiver based on prior litigation or conduct inconsistent with the right to arbitrate, which has traditionally been ruled upon by the court." *Cornfield*, 395 Ill. App. 3d at 911 (citing *JPD, Inc. v. Chronimed Holdings, Inc.*, 539 F.3d 388, 393–94 (6th Cir. 2008); *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 217–19 (3d Cir. 2007); *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 14 (1st Cir. 2005)).

¶ 18 " '[A] court's review of an arbitrator's award is extremely limited.' " *Griggsville-Perry Community Unit School Dist. No. 4 v. Illinois Educational Labor Relations Board*, 2013 IL 113721, ¶ 18 (2013) (quoting *American Federation of State, County & Municipal Employees (AFSCME) v. State*, 124 Ill. 2d 246, 254 (1988)). "An arbitrator's award may be vacated only (1) if the award was procured by fraud, corruption, or other undue means, (2) when partiality or misconduct by the arbitrator is evident, (3) when the arbitrator exceeded his or her powers, or (4) when the arbitrator improperly refused to postpone a hearing or hear material evidence to a party's prejudice." *Decatur Police Benevolent and Protective Ass'n Labor Committee v. City of Decatur*, 2012 IL App (4th) 110764, ¶ 20.

¶ 19 "Where ' "the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the

contract that they have agreed to accept." ' " *Griggsville-Perry*, ¶ 18 (quoting *AFSCME*, 124 Ill. 2d at 255, quoting *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987)).

> " ' "Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." ' " *Id.* ¶ 19 (quoting *AFSCME*, 124 Ill.2d at 254-55, quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

¶ 20 "Establishing that an arbitrator has failed to interpret the collective-bargaining agreement but has, instead, imposed his own personal views of right and wrong on an employment dispute is 'a high hurdle.' " *Id.* ¶ 20 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 671 (2010)). "Whether an arbitrator has exceeded the scope of his authority and has reached a decision that fails to draw its essence from the collective-bargaining agreement is a question of law." *Id.*

¶ 21 The Union asserts that the analysis in *Griggsville-Perry* is inapplicable to the instant case because it is limited to an arbitrator's consideration of the merits of the grievance. In support, the Union cites *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960). While *Enterprise*, as quoted above, did set forth the principle that an arbitrator's award is

legitimate as long as its "essence" comes from the collective bargaining agreement, the Supreme Court did not explicitly limit this consideration to a review of the merits. *Enterprise*, 363 U.S. at 597. The Union has cited no authority that requires a different analysis when an arbitrator reviews the collective bargaining agreement to determine arbitrability.

¶ 22 Here, the grievant failed to comply with the conditions precedent to arbitration. This case presents a unique situation, the facts of which are undisputed. The Union filed a grievance with the District superintendent and when the grievance was not resolved, it removed the matter to arbitration, as provided in the grievance procedure of the collection bargaining agreement. In the interim, the employee filed an EEOC claim of discrimination in her discharge by the District. At the arbitration hearing, the District sought to dismiss the grievance because the election of remedy provision of the collective bargaining agreement did not allow for an employee to pursue two different remedies and the filing of a federal or state claim waived the application of the grievance procedure. At the time of arbitration, nothing had been filed with IELRB.

¶ 23 The arbitrator's decision was confined to a consideration of the collective bargaining agreement and the issues raised by the parties. There is nothing in the arbitrator's decision to imply that he considered anything other than the language of the collective bargaining agreement. Rather, the Union seems to want the arbitrator to have ignored the question of arbitrability and the election of remedy provision and simply consider the employee's termination without regard to the collective bargaining agreement, but only after the arbitrator's award could the question of arbitrability be considered by the IELRB. This seems illogical and a waste of resources when the facts were undisputed. Moreover, we note that the IELRB in its decision stated it had previously decided that provision in a collective bargaining agreement that offered an employee the choice of either an contractual grievance procedure or a statutory

process was permissible, finding that the "the contractual provision in his case is also permissible." Therefore, the same conclusion would have been reached had the IELRB been tasked with determining the procedural arbitrability of this case.

¶ 24 The grievant's decision to file an EEOC claim established a lack of compliance with conditions precedent to arbitration in the grievance procedure. As the arbitrator observed, "[a]bsent waiver, the discharge of a bargaining unit employee is arbitrable. By filing and refusing to withdraw with prejudice an EEOC charge challenging her discharge, the grievant has elected not to participate in the contractually established remedy of arbitration." The "essence" of this conclusion came directly from the collective bargaining agreement and had the employee not filed the EEOC claim, her discharge would have been arbitrable. However, the grievant failed to adhere to the procedural requirements for her claim to be arbitrable and she waived her remedy under the collective bargaining agreement. Thus, the arbitrator properly concluded that the grievant's actions waived her right to proceed with arbitration. In its limited review of the arbitrator's award, the IELRB correctly reached the same conclusion where the arbitrator's decision "drew its essence from the collective bargaining agreement" and properly dismissed the Union's unfair labor practice charge.

¶ 25 Based on the foregoing reasons, we affirm the decision of the Illinois Educational Labor Relations Board.

¶ 26 Affirmed.