RENDERED: DECEMBER 9, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001495-MR

COMMUNICATIONS WORKERS OF AMERICA,
CWA LOCAL 3372, BY AND THROUGH OFFICERS
ROISEWELL MCCOY (SUBSTITUTED FOR
KEVIN JOHNSON) AND SHAWN CAMPBELL
AS CLASS REPRESENTATIVES — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 09-CI-01492

LEXINGTON-FAYETTE URBAN
COUNTY GOVERNMENT — APPELLEE

OPINION
REVERSING AND
REMANDING

** ** ** ** **

BEFORE: DIXON, KELLER AND VANMETER, JUDGES.

DIXON, JUDGE: Communications Workers of America ("the Union") appeals a summary judgment of the Fayette Circuit Court in favor of Lexington-Fayette

Urban County Government ("LFUCG"), finding fifteen Union grievances non-arbitrable. We reverse and remand.

Within its Department of Community Corrections, LFUCG employs certain corrections officers who are members of the Union. LFUCG and the Union executed a lengthy collective bargaining agreement ("CBA"), which was effective July 1, 2007 – June 30, 2010. Article 11 of the CBA set forth the grievance procedure, stating in relevant part:

> Section 1. A grievance is a difference or dispute between an employee and L.F.U.C.G. regarding the meaning, interpretation or application of the express terms of this Agreement, a violation of the County Charter, other applicable law regarding employment, or a disciplinary action. Only discipline greater than a written reprimand shall be grievable. For those non-grievable disciplines a letter of disagreement may be filed by the Union with L.F.U.C.G. and placed in the employee's file within thirty (30) days from the date of the disciplinary action.
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> Any grievance shall be adjusted in the manner set out below. Only the Union may file a grievance as the representative of any member(s) of the bargaining unit.

Article 11 further outlined a four-step grievance process, which provided the Union seven days to appeal adverse decisions to the Director of Community Corrections, and thereafter, to the Chief Administrative Officer ("CAO"). Pursuant to the final step, if the Union was dissatisfied by the CAO's response, it could refer the dispute to arbitration.

The Union filed a complaint in Fayette Circuit Court against LFUCG, seeking to compel arbitration of certain grievances LFUCG had refused as procedurally or substantively defective. After LFUCG filed its answer, the parties ultimately submitted cross-motions for summary judgment. In July 2010, the trial court rendered an order granting summary judgment in favor of LFUCG, concluding that it had properly refused each of the grievances and had no duty to arbitrate.

On appeal of a summary judgment, we undertake a *de novo* review of the legal questions presented, and we owe no deference to the decision of the trial court. *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). After careful review, we believe the trial court failed to apply the correct legal analysis to determine whether the Union's grievances were arbitrable, and therefore reverse and remand.

In *United Brick and Clay Workers of America, Local No. 486 v. Lee Clay Products Co., Inc.*, 488 S.W.2d 331 (Ky. 1972), Kentucky's then-highest court addressed an employer's refusal to arbitrate a union dispute pursuant to the terms of a CBA. Noting that federal labor law was controlling on the issue, the Court advised, "Federal substantive law has established a policy of judicial deference to arbitration and judicial restraint, prior to arbitration, from intervention into the interpretation of the provisions of collective bargaining agreements which provide for arbitration." *Id*. at 334, *citing United Steel Workers of America v. American Mfg. Co.*, 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); *United*

Steel Workers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960), and *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960) (collectively "The Steelworkers Trilogy").

In *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986), the United States Supreme Court summarized the principles established by the Steelworkers Trilogy as follows:

> The first principle gleaned from the Trilogy is that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.
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> The second rule, which follows inexorably from the first, is that the question of arbitrability - whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance - is undeniably an issue for judicial determination.
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> The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims.
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> Finally, it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Id. at 648-50, 106 S. Ct. at 1418-19 (internal citations, quotation marks, and brackets omitted).

The Union contends the trial court erred when it failed to apply the legal analysis set forth in the Steelworkers Trilogy and its progeny; consequently, it asserts the grievances must be deemed arbitrable and referred to arbitration for a resolution on the merits.

In the case at bar, the fifteen grievances submitted by the Union addressed: 1) promotions; 2) suspension/discipline; 3) interference with employee attendance at Union meetings; 4) failure to recognize Union grievances; 5) failure to recognize Union as bargaining agent; 6) gender discrimination in acceptance of grievances; 7) interference with Union business; 8) failure to have employee appreciation day; 9) requiring Union members to use time-clocks as a retaliatory tactic; 10) failure to notify Union of job vacancies; 11) discrimination in transferring employee to new department; 12) wrongful termination; 13) failure to follow involuntary transfer procedure; 14) disparity in providing salary stipend to certain employees; and 15) failure to arbitrate grievances pursuant to CBA.

We reiterate that the language of Article 11 states: "A grievance is a difference or dispute between an employee and LFUCG regarding the meaning, interpretation or application of the express terms of this Agreement, a violation of the County Charter, other applicable law regarding employment, or a disciplinary action. Only discipline greater than a written reprimand shall be grievable." After filing a grievance, the four-step process culminates in arbitration if the Union is

dissatisfied with LFUCG's response. In light of the broad language utilized by the parties in the grievance clause, we bear in mind the presumption favoring arbitration unless there is an "express exclusion or other forceful evidence" the parties did not intend for the arbitration clause to apply to the subject matter of the dispute. *Id*. at 652, 106 S. Ct. at 1420.

In determining arbitrability, "[i]t is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate" the issues raised by the grievances. *Id*. at 651, 106 S. Ct. at 1420. If the issues are arbitrable, the court must defer to the arbitrator for a determination of the merits of the parties' conflicting interpretations of the agreement. *Id*. Here, LFUCG summarily categorizes several of the grievances as "non-grievable" under the CBA. We disagree.

The CBA contains thirty-six articles covering a variety of topics, including LFUCG rights, non-discrimination, Union business, promotional vacancies, disciplinary procedures, and salary schedules. The fifteen grievances indicate a specific employee, or the Union on behalf of its members, asserted that LFUCG's conduct in each instance was not authorized under the CBA. We view such challenges as disputes "regarding the meaning, interpretation or application of the express terms of the agreement," as the Union and LFUCG obviously have conflicting interpretations of the rights afforded by the CBA. LFUCG specifically points to the grievances relating to the use of time clocks and the cessation of employee appreciation day as non-arbitrable because the employer-rights clause of

Article 3 provides LFUCG the authority to make those types of decisions. We are not persuaded by LFUCG's argument, as it clearly indicates the parties have conflicting interpretations of the rights afforded LFUCG under Article 3; consequently, the issue is appropriate for arbitration. *See Id*.

We are mindful that courts must resolve all doubts in favor of arbitration, even if a claim appears "patently baseless" or the contract language is capable of only one interpretation. *United Brick and Clay Workers*, 488 S.W.2d at 334-35. A review of the record does not reveal any evidence to rebut the presumption favoring arbitration. After careful consideration, we conclude the grievances presented by the Union are arbitrable pursuant to Article 11 of the CBA; consequently, the trial court erred by granting summary judgment in favor of LFUCG.

In addition to its assertion that many of the grievances were simply "non-grievable," LFUCG opines it properly rejected all of the grievances because the Union failed to timely comply with the sequential four-step grievance process delineated in Article 11. Nine of the grievances failed to name a specific employee-grievant and instead named Local 3372 as the grievant. LFUCG contends that the Union cannot be the "grievant" pursuant to its interpretation of Article 11 because Section 1 defines a grievance as a dispute between an "employee" and LFUCG. Finally, LFUCG asserts it unilaterally resolved two of the grievances.

The arguments raised by LFUCG do not relate to substantive arbitrability. In *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 592, 154 L. Ed. 2d 491 (2002), the United States Supreme Court explained:

> [P]rocedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator . . . .
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> [I]n the absence of an agreement to the contrary, issues of substantive arbitrability . . . are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.

Id. at 84, 123 S. Ct. at 592 (internal citations and quotation marks omitted).

We conclude LFUCG's allegations the Union failed to comply with the grievance procedure constitute procedural defenses that must be considered by the arbitrator.

For the reasons stated herein, we reverse the order of summary judgment and remand this case to the Fayette Circuit Court for additional proceedings consistent with this opinion.

KELLER, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
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