STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: September 19, 2017]

THE CITY OF CRANSTON, *Plaintiff,*	:	
v.	:	**C.A. No. PC-2017-2840**
INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 301 and DANIEL W. NUEY, SR., *Defendants.*	:	

DECISION

LICHT, J. Three pending motions compel the Court to determine who will decide whether the City of Cranston (the City or Cranston) must arbitrate an employment dispute with defendants Daniel W. Nuey, Sr. (Nuey), and the International Brotherhood of Police Officers, Local 301 (the Union). Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13 and 9-30-1.

I

Facts and Travel

Nuey was once an active sergeant in the Cranston police force. On June 25, 2013, he left work early, and filed for injured-on-duty (IOD) benefits. These benefits, provided by statute and the collective-bargaining agreement (CBA) between the Union and the City, "provide greater work-related-injury benefits to certain public employees whose jobs require them to serve the state or its municipalities, often in dangerous situations." Labbadia v. State, 513 A.2d 18, 21 (R.I. 1986).

On July 19, 2016, Nuey completed and submitted an application to the Employees' Retirement System of Rhode Island (ERSRI) seeking ordinary and accidental disability retirement under the Municipal Employees' Retirement System.[1] On March 15, 2017, ERSRI granted Nuey's ordinary disability retirement application, but denied his accidental disability retirement application. See Ex. 2 to Pl.'s Mot. Stay 4.

On March 21, 2017, Nuey sent a letter to Cranston Mayor Allan W. Fung and the City Council (the Letter). In relevant part, the Letter read:

> "On March 15, 2017, I was awarded an 'Ordinary Disability' after being denied an 'Accidental Disability' by the RI State Retirement Board. As a result, I am requesting the City to award the difference in pension benefits equaling 66 2/3% as stated in the City of Cranston Municipal Code section 2.20.080, entitled 'Injured on Duty Pension Disability Entitlement.'
>
> "Therefore, I respectfully request to be put on the City's pension roll effective end of day immediately upon the passage of this request, in accordance with the Police Department Pension Ordinance and contract language.
>
> "With these terms in mind, please let this serve as notice of my retirement from the Cranston Police Department as of end of day immediately following the passage of this request and ask to be placed on the City Council Docket for the March 27th date of council meeting PRIOR to requested retirement meeting. Thank you." Ex. 3 to Pl.'s Mot. Stay.

[1] In Rhode Island, there are two forms of disability retirement: ordinary disability and accidental disability. Accidental disability payments are greater than ordinary disability benefits. "When an injury is not work-related or if it is not the result of a specific accident, an employee may nevertheless qualify for an ordinary disability pension. Although the conditions for this form of disability pension are less onerous, the payout is typically less." Rossi v. Emps.' Ret. Sys., 895 A.2d 106, 111 (R.I. 2006). IOD recipients are required to apply for accidental disability "not later than the later of eighteen (18) months after the date of the person's injury that resulted in said person's injured on duty status or sixty (60) days from the date on which the treating physician certifies that the person has reached maximum medical improvement." Sec. 45-19-1(j).

Cranston Municipal Code section 2.20.080, as referenced in the Letter, provides a disabled police officer awarded an ordinary disability pension but not an accidental disability pension a monetary benefit to the officer equal to the difference between the two pensions.

II

Standard of Review

"Arbitration is a desirable method of dispute resolution that long has been favored by the courts." Soprano v. Am. Hardware Mut. Ins. Co., 491 A.2d 1008, 1011 (R.I. 1985). "Nevertheless, '[n]o one is under a duty to arbitrate unless with clear language he [or she] has agreed to do so.'" School Comm. of Town of N. Kingstown v. Crouch, 808 A.2d 1074, 1078 (R.I. 2002) (quoting Stanley-Bostitch, Inc. v. Regenerative Envtl. Equip. Co., Inc., 697 A.2d 323, 326 (R.I. 1997) (citation omitted)).

III

Analysis

Mr. Nuey is most concerned about what income he will receive—namely, IOD, an ordinary disability pension, or an ordinary disability pension with Cranston making up the difference between the ordinary and accidental payments. However, the only question currently before this Court is a tricky one: who gets to decide whether Nuey is retired? Once that is determined, Mr. Nuey will have his "day in court"—either before an arbitrator if he is deemed not to have retired, or before the Superior Court in a pending companion lawsuit, Nuey v. Fung, PC-2017-2910, if the conclusion is that he is retired. The jurisprudence is replete with cases discussing arbitrability, and both parties have pointed to precedent supporting leaving the choice to their preferred decision maker. The City contends the contract contemplates only full-time police officers filing grievances, and that because the matter is not arbitrable, the Court has

jurisdiction. The Union and Nuey point to the American Arbitration Association (AAA) rules, which they claim are incorporated by reference into the CBA. They argue that this Court should hold, similar to numerous federal courts, that by incorporating the AAA rules, the CBA vests the arbitrator with jurisdiction to decide the question of arbitrability in all cases.

While arbitrability can be complicated, there are some "basic principles" our Supreme Court has elucidated. Sch. Comm. of N. Kingstown, 808 A.2d at 1078. "'[A]rbitration 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.'" Id. (quoting AT & T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 (1986) (citation omitted)).

The question of whether a matter is arbitrable covers a wide range of situations. Generally, questions of arbitrability are either "procedural" or "substantive." Sch. Comm. of Pawtucket v. Pawtucket Teachers Alliance AFT Local 930, 120 R.I. 810, 816, 390 A.2d 386, 390 (1978). A "procedural" question could "grow out of the dispute," John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964). These include issues of time limits, notice, laches, or other prerequisites to arbitration. See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85 (2002) (quoting the Revised Uniform Arbitration Act of 2000). These issues are left to the arbitrator to decide. See Sch. Comm. of Pawtucket, 120 R.I. at 816, 390 A.2d at 390. None of the procedural categories apply to the matter at bar.

All other questions of arbitrability are considered "substantive." See id. However, this broad label belies an important distinction within the category. One type of substantive matter is "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy." Howsam, 537 U.S. at 85. Another question of substantive arbitrability is whether the parties have an agreement to arbitrate in the first place. This includes situations where the

underlying contract may be void, see Providence Teachers Union v. Providence Sch. Bd., 725 A.2d 282, 283 (R.I. 1999), or where one party has no standing to force the other into arbitration, see Providence Sch. Bd. v. Providence Teachers Union, Local 958, AFT, AFL-CIO, 68 A.3d 505, 509 (R.I. 2013). Deciding matters of substantive arbitrability have traditionally been left to the courts. However, under federal jurisprudence, parties can "agree to submit the arbitrability question itself to arbitration." First Options of Chicago Inc. v. Kaplan, 514 U.S. 938, 943 (1995). The Union and Nuey point to jurisprudence in several Federal Circuits, as well as the United States District Court for the District of Massachusetts, holding that by incorporating the AAA rules, the parties "clearly and unmistakably agreed to permit the arbitrator to decide the arbitrability question." Defs.' Mem. 17. Defendants contend that Section 22 of the CBA addresses the grievance and arbitration procedure. It provides that "arbitration proceedings shall be governed by the A.A.A.'s Voluntary Labor Arbitration Rules." CBA § 22(f). These rules grant the arbitrator authority to decide issues of arbitrability.

While the Rhode Island Supreme Court often looks to federal jurisprudence for guidance in arbitration and labor law matters. See, e.g., Town of N. Kingstown v. Int'l Ass'n of Firefighters, Local 1651, AFL-CIO, 107 A.3d 304, 313 n.6 (R.I. 2015). State jurisprudence can diverge from federal jurisprudence in significant ways. See Stanley-Bostitch, Inc., 697 A.2d at 326 n.4; compare Weeks v. 735 Putnam Pike Operations, LLC, 85 A.3d 1147, 1151 n.8 (R.I. 2014) ("Notably, we apply a 'more searching standard of judicial review [with respect to] the issue of arbitrability than our limited review of [a] substantive arbitration award.'" (quoting State Dep't of Corr. v. R.I. Bhd. of Corr. Officers, 866 A.2d 1241, 1247 (R.I. 2005))) with First Options of Chicago, Inc., 514 U.S. at 943 ("Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's

decision about that matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate."). Our Supreme Court has yet to adopt the federal line of cases which allows the parties to agree in the contract to permit the arbitrator to resolve substantive issues of arbitrability.

This Court need not decide, however, whether the parties can agree to let the arbitrator determine substantive arbitrability or that providing for AAA arbitration is evidence of such agreement. Even assuming that Defendants are correct in asserting that the parties to the CBA can and have delegated such authority to the arbitrator, this authority means nothing unless parties with standing can pursue the grievance. Herein lies the rub. If Nuey is retired, "neither the CBA nor our case law permits the [U]nion to pursue a grievance on behalf of retirees." Providence Sch. Bd., 68 A.3d at 509.

The authority for municipal police officers to arbitrate with their towns or cities is derived from G.L. 1956 §§ 28-9.2-1 et seq., the Municipal Police Arbitration Act (MPAA). In Arena v. City of Providence, 919 A.2d 379 (R.I. 2007), the Rhode Island Supreme Court examined the Firefighters' Arbitration Act (FFAA) and held that under those facts, retirees "cannot be treated as employees." Id. at 389. The Court found that the FFAA could not "reasonably be construed to include retirees" because "[r]etired firefighters . . . no longer are 'permanent uniformed members' of the fire department." Id. Similarly, the MPAA defines "police officer" as "a full-time police officer," and cannot therefore encompass retirees. Sec. 28-9.2-3(2). The Court also observed that "the sound public policy underlying the FFAA's enactment does not apply to retirees in the same compelling way that it applies to current employees." Arena, 919 A.2d at 389. The Court's reasoning in Arena is predicated on § 28-9.1-2, which is functionally identical to the corresponding provision in the MPAA, § 28-9.2-2.

Finally, the Court held that retirees of the fire department lacked a "community of interest" with current employees. Id. This community of interest is similarly missing between police retirees and current employees. Altogether, then, the logic and holding of Arena is applicable to the MPAA equally as to the FFAA.

Five years later, the Court held that the CBA between the City of Newport and their firefighters' union "draws its authority from the FFAA—as do all collective-bargaining agreements between firefighters' unions and Rhode Island municipalities." City of Newport v. Local 1080, Int'l Ass'n of Firefighters, AFL-CIO, 54 A.3d 976, 980 (R.I. 2012). The portions of the FFAA cited for this proposition—§§ 28-9.1-4 to -6—are in all relevant ways identical to the corresponding sections of the MPAA, §§ 28-9.2-4 to -6. Similarly, therefore, the CBA at bar draws its authority from the MPAA.

The CBA at issue in City of Newport specifically excluded retirees. While the CBA at issue in the instant case does not have such explicit language, it only covers "full time police officers of the Cranston Police Department." CBA § 1. Furthermore, the Union is recognized under the CBA only as representing full-time officers. Id. Next, the Court in City of Newport looked to the definition of grievance in the CBA. The Union's CBA with Cranston states:

> "A grievance is a dispute between the member (or the Union) and the City which involves (1) the application, meaning or interpretation of the express provisions of this Agreement, or (2) a complaint or allegation that an employee has been treated unfairly or inequitably hereunder, or, (3) a complaint or allegation that a member's health, safety or liability is jeopardized." CBA § 22(a).

Under the CBA, "member" is a defined term applying only to "all full time police officers of the Cranston Police Department." This forecloses application of the CBA to retirees: grievances are disputes involving the City and either members or the Union, but members must be full-time employees, and the Union only represents full-time police officers.

Therefore, just as "grievances involving retired firefighters [we]re not arbitrable under the CBA" between Newport and its firefighters, grievances involving retired police officers are not arbitrable under the CBA between Cranston and the Union. City of Newport, 54 A.3d at 981.[2] If Nuey has retired, therefore, his dispute is not arbitrable, as both Nuey and the Union lack standing under the CBA to file a grievance. Of course, if Nuey has not retired, the preceding analysis does not apply—he is still a full-time police officer and is entitled to the full panoply of protections offered to him by the CBA and Union representation.

As this Court has previously observed, '"a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."' Sch. Comm. of N. Kingstown, 808 A.2d at 1078 (quoting AT & T Techs., Inc., 475 U.S. at 648 (citation omitted)). This Court understands that our Supreme Court has "acknowledged the propriety" of the Supreme Court's "admonition" 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.'" Radiation Oncology Assocs., Inc. v. Roger Williams Hosp., 899 A.2d 511, 515 (R.I. 2006) (quoting AT & T Techs., Inc., 475 U.S. at 649). However, the instant inquiry goes beyond determining whether the subject matter at issue is one the parties have agreed to arbitrate. Instead, the issue at bar is better described as one of standing, which "is an access barrier that calls for the assessment of one's credentials to bring suit." Blackstone Valley Chamber of Commerce v. Pub. Utils. Comm'n, 452 A.2d 931, 933 (R.I. 1982). As such, before the Court can order arbitration, it must

[2] At oral argument, the Union's counsel claimed that retirees have engaged in arbitration, and cited as an example the question of how to interpret certain post-retirement benefits provided for in a CBA. However, no Rhode Island Court has decided that the parties could be compelled to arbitrate such issues as opposed to the parties voluntarily agreeing to arbitrate the matter. Moreover, such a case addresses the interpretation of the contract, unlike the case at bar, which requires analysis of the specific facts of Mr. Nuey's purported retirement.

determine whether either the Union or Nuey has the power to compel the City to come to the table.

IV

Conclusion

The arbitrability of the instant dispute hinges not on whether the parties agreed to arbitrate the subject matter, but whether the parties are subject to the CBA in the first place. Therefore, this Court must have a trial on the issue of whether Nuey has retired, as contemplated by § 28-9-6. Until then, Plaintiff's Motions to Stay Arbitration and for Injunctive Relief are granted, and Defendants' Motion to Compel Arbitration is denied. Counsel shall prepare the appropriate order for entry and the Court will conference with the parties on Monday October 2, 2017 at 9:00 a.m. to set a date for the trial.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	The City of Cranston v. International Brotherhood of Police Officers, Local 301 and Daniel W. Nuey, Sr.
CASE NO:	PC-2017-2840
COURT:	Providence County Superior Court
DATE DECISION FILED:	September 19, 2017
JUSTICE/MAGISTRATE:	Licht, J.
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