CITY OF NEW BEDFORD VS. NEW BEDFORD POLICE UNION

Docket:	19-P-277
Dates:	December 10, 2019 - May 27, 2020
Present:	Wolohojian, Agnes, & Neyman, JJ[1]
County:	Bristol
Keywords:	Arbitration, Authority of arbitrator, Collective bargaining, Police. Labor, Arbitration, Collective bargaining, Police. Police, Collective bargaining, Authority of police chief, Assignment of duties. Public Employment, Collective bargaining.

Civil action commenced in the Superior Court Department on November 13, 2017.

The case was heard by Raffi N. Yessayan, J., on a motion for judgment on the pleadings.

Luke G. Liacos for the defendant.

John C. Foskett for the plaintiff.

NEYMAN, J. In this case, we consider whether a Superior Court judge erred in vacating an arbitration award that found the city of New Bedford (city) in breach of a provision of a collective bargaining agreement (agreement) with the New Bedford Police Union (union) "when it assigned officers to perform background investigations during their normal work hours in addition to their typical duties." Controlling precedent compels the conclusion that the agreement provision, and thus the arbitration award, infringe on the nondelegable exclusive assignment authority of the city's chief of police. Accordingly, we affirm.

Background. The parties do not dispute the relevant facts. The union and the city were parties to the agreement, which provides, at article 28, for final and binding arbitration of grievances. On August 5, 2016, the union filed a grievance contending that the city was "assigning officers" from various units "to perform

background investigations along with their normal duties and during their normal work hours . . . in violation of Article 21, Sec. 9" of the agreement. The city denied the grievance, stating, in relevant part, that "Section 9 does not preclude the Chief from assigning these investigations as part of their regular duties." The parties referred the dispute to arbitration.

The arbitration centered on article 21, § 9, which provides, in relevant part,[2] as follows:

"Section 9. Background Investigations.

"A. Whenever there is a requirement that background investigations are to be conducted on police officer applicants, police cadets and civilian police dispatchers the Chief of Police may assign up to five (5) police officers to conduct said investigations.

"B. No police officer exceeding the rank of sergeant may be assigned to conduct background investigations.

"C. Police officers assigned to conduct background investigations shall work a five and two (5 & 2) work schedule, Monday through Friday from 8:00 a.m.-4:00 p.m.

"D. Police officers assigned to conduct background investigations may be assigned up to ninety (90) days to conduct said background investigations. Further extensions may be granted to the police officer assigned to conduct background investigations so he/she can conclude the background investigations he/she has been previously assigned. If an extension is required the Chief of Police shall contact the Union President. As a rule police officers assigned to conduct background investigations should not exceed one hundred (100) days doing so.

"E. Police officers with less than three years of service shall not be assigned to conduct background investigations unless no one with three years of service applies."

Following a hearing, the arbitrator issued a comprehensive written opinion and an award in favor of the union. He found that "[t]he case on the merits is relatively straightforward, but the case on substantive arbitrability is far more muddled." He

noted that "[t]here is no doubt that the New Bedford police department needs more sworn and civilian personnel," and that a "shortage of thirteen police officers clearly puts the City in a hole, and the forced overtime of the 911 Dispatchers leaves the City in dire need of civilians who can provide this service." However, he determined that the situation did not "create a public safety issue for the citizens of New Bedford for which the City may declare a provision of its . . . agreement with the Union null and void." He further concluded, in relevant part, as follows:

"The provisions of Article 21, Section 9 make it very clear that the City has an unfettered opportunity to complete background checks using up to five officers for up to one hundred days per officer. There is no evidence that the availability of this workforce could not complete the required background investigations in the swiftness of time. [The] Chief . . . declined to exercise his right to complete these direly needed background investigations using this approach. Instead he parceled out these investigations in piecemeal fashion, not because they could be done any more quickly than if he had directly assigned such officers per Article 21, Section 9, but because he could interweave these investigations with the officers regularly assigned duties. The Chief's thought process clearly comes from a time management perspective; he could get the officer to perform both his regularly assigned duties and the background checks with little or no disruption of the Department's ongoing manpower needs. While I agree that this is a terrific idea and an excellent use of manpower, it is not related to the safety needs of the City. The Chief's design prevents the need for using additional overtime, if required by following Article 21, Section 9, but that is not a reason for foregoing a contractual obligation unless the savings of all overtime could be viewed as reason for voiding the parties' Agreement.

"Currently there is tension between what arbitrators find as violations of collective bargaining agreements and what the Courts find as an intrusion on a Chief's inherent authority to take such actions as are necessary to protect the public safety. . . . Public safety usually comes into play when there is an immediate need for police intervention . . . but it is far less obvious when the need is somewhat removed . . . . The problem is where is this line drawn?

"It is my opinion that this case is closer to an avoidance of overtime than an incursion on the chief's inherent authority. [The] Chief . . . could have achieved his very same policy goals (i.e. speedier completion of background investigations)

using the terms of the agreed upon . . . agreement than simply ignoring the Agreement altogether. To find otherwise would mean that the Chief could ignore the Agreement without consequence, as long as he was able to demonstrate that it was a more efficient use of his resources. For these reasons I find the dispute substantively arbitrable."

Having determined that the grievance was arbitrable, the arbitrator then concluded that the city violated article 21, § 9, "when it assigned officers to perform background investigations during their normal work hours in addition to their typical duties." The city subsequently filed a complaint in the Superior Court, seeking an order pursuant to G. L. c. 150C, § 11 (a), to vacate the award. The union filed a counterclaim seeking to confirm the award. A judge granted the city's motion for judgment on the pleadings, and vacated the award on grounds that "the arbitrator exceeded his authority by substituting his judgment and decision making for that of the Police Chief."

Discussion. Pursuant to G. L. c. 150C, § 11 (a) (3), "[u]pon application of a party, the superior court shall vacate an award if . . . the arbitrator[] exceeded [his or her] powers." The Union contends that the arbitrator did not exceed his power because he did not intrude on the chief's right to assign or deploy personnel. Rather, "the Union . . . successfully challenge[d] . . . the City's unilateral decision to disregard clear and unambiguous contract language dictating the terms and conditions the City agreed to follow in implementing the Chief's assignment." According to the union, the present case hinges on ancillary issues regarding the means of implementing a managerial decision, which, as the arbitrator found, did not implicate public safety. Thus, the union argues, because its grievance did not concern the assignment of background investigations itself, but the means of effecting such assignments, the city was obligated to follow the binding terms of the agreement.[3]

The city responds that article 21, § 9, of the agreement is not a mere procedural prerequisite and does not reserve to the chief the ultimate discretion to assign officers to background checks as he deems appropriate. To the contrary, the city argues, § 9 dictates who can and cannot be assigned to perform background checks, the permissible duration of such assignments, and the specific qualifications for those who may be so assigned. The city further asserts that the provision requires the chief to pull officers from other public safety functions into

full-time duty to perform background investigations, specifies a minimum service requirement for assigned officers, mandates when officers are to be returned to their prior assignment, and limits the rank of officers to be so assigned. The city has the better argument.

The public policy of the Commonwealth strongly encourages both collective bargaining and arbitration. See School Comm. of Pittsfield v. United Educators of Pittsfield, 438 Mass. 753, 758 (2003). See also G. L. c. 150E, § 7 (d). A court may therefore "vacate arbitration awards only in rare, statutorily enumerated circumstances." Pittsfield v. Local 447 Int'l Bhd. of Police Officers, 480 Mass. 634, 637 (2018). See G. L. c. 150C, § 11. This case presents one such circumstance.

At first glance, the union's argument has a measure of persuasiveness. Indeed, the union cites to various cases in which arbitrable disputes stemmed from a public employer's managerial decision regarding the assignment or transfer of an employee. See, e.g., Chief Justice for Admin. & Mgt. of the Trial Court v. Office & Professional Employees Int'l Union, Local 6, AFL-CIO, 441 Mass. 620, 628-629 (2004); Burlington v. Labor Relations Comm'n, 390 Mass. 157, 164-167 (1983); School Comm. of W. Springfield v. Korbut, 373 Mass. 788, 796 (1977). These cases, however, are distinguishable. As the city argues, in all of these cases, the courts drew a distinction between the bargained-for procedural requirements and the employer's ultimate decision, leaving no doubt that the latter must remain immune from bargaining and arbitration. See Chief Justice for Admin. & Mgt. of the Trial Court, supra; Korbut, supra at 795-796. Here, by contrast, article 21, § 9, of the agreement -- in particular § 9A, as interpreted by the arbitrator -- impermissibly dictates whom the chief may or may not assign, the duration of such assignments, and the conditions under which such assignments must be performed, as discussed above. Therefore, the cases relied on by the union do not mandate the result it seeks. See Selectmen of Ayer v. Sullivan, 29 Mass. App. Ct. 931, 932-933 (1990) ("This is not a case where the board failed to follow notice, hearing, evaluation procedures and the like . . .").

Moreover, the above-cited cases did not involve the same public safety concerns at issue in the present case and did not involve a police chief's authority to allocate and deploy law enforcement resources; thus, they are inapposite. Contrary to the arbitrator's finding, a "police chief's authority to assign his officers to particular duties is a matter that concerns the public safety." Taunton v. Taunton Branch of

the Mass. Police Ass'n., 10 Mass. App. Ct. 237, 243 (1980). "[P]olice chiefs are inherently vested with general managerial authority over employees 'where matters of public safety are concerned.'" Framingham v. Framingham Police Officers Union, 93 Mass. App. Ct. 537, 542 (2018), quoting Saugus v. Saugus Pub. Safety Dispatchers Union, 65 Mass. App. Ct. 901, 902 (2005). "The protection of a public employer's management prerogative is particularly strong where, as here, the prerogative concerns policy judgments in the allocation and deployment of law enforcement resources." Saugus Pub. Safety Dispatchers Union, supra at 901-902. As discussed above, portions of article 21, § 9, restrict the chief's ability to allocate and deploy officers to conduct background investigations as he sees fit. These restrictions squarely implicate the chief's "policy judgments in the allocation and deployment of law enforcement resources." Id. at 902. The assignment of officers was within the exclusive managerial prerogative of the chief, and was neither subject to collective bargaining, nor delegable to arbitration. See Framingham Police Officers Union, supra at 543; Saugus v. Saugus Police Superior Officers Union, 64 Mass. App. Ct. 916, 916-917 (2005). Thus, the arbitrator's "finding" that article 21, § 9, did not implicate public safety cannot stand. Binding precedent holds that an arbitrator, however well intentioned, exceeds his or her authority by substituting his or her judgment for that of a chief of police in assigning and deploying police officers. Accordingly, we conclude that "the arbitrator[] exceeded [his] powers," G. L. c. 150C, § 11 (a) (3), and thus the judge did not err in vacating the arbitration award. The judgment on the pleadings is affirmed.[4]

So ordered.

footnotes

[1] Justice Agnes participated in the deliberation on this case prior to his retirement.

[2] We do not address additional subparagraphs of article 21, § 9, which are neither implicated by the arbitrator's opinion and award, nor material to our analysis.

[3] We note that our analysis and holding are limited to the issue of nondelegability, which was the central issue before the arbitrator and the Superior Court. To the extent that the union contends on appeal that the language in the

agreement represented a lawful exercise in negotiating the manner of implementing the chief's exercise of his authority -- i.e., "impact bargaining" -- the record before us does not reflect that this argument was sufficiently advanced before the arbitrator and in the Superior Court.

[4] The union's argument suggests, in part, that even if portions of article 21, § 9, purport to delegate the chief's nondelegable authority, the city consented to the provision and thus should be bound thereby. This argument is likewise unavailing. See Boston v. Boston Police Superior Officers Fed'n, 466 Mass. 210, 216 (2013) ("a nondelegable authority may not be delegated to an arbitrator, even with the parties' consent").