

[Cite as *Assn. of Cleveland Firefighters, Local 93 I.A.F.F. v. Cleveland*, 2015-Ohio-1538.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101369

**ASSOCIATION OF CLEVELAND
FIREFIGHTERS, LOCAL 93 I.A.F.F.**

PLAINTIFF-APPELLANT
and CROSS-APPELLEE

vs.

CITY OF CLEVELAND, ET AL.

DEFENDANTS-APPELLEES
and CROSS-APPELLANTS

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-823955

BEFORE: Kilbane, P.J., E.T. Gallagher, J., and Boyle, J.

RELEASED AND JOURNALIZED: April 23, 2015

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MARY EILEEN KILBANE, P.J.:

{¶1} Plaintiff-appellant/cross-appellee, Association of Cleveland Firefighters, Local 93 I.A.F.F. (“Local 93”), and defendant-appellee/cross-appellant, the city of Cleveland (“the City”), both appeal from the trial court’s judgment dismissing Local 93’s complaint for lack of subject matter jurisdiction. For the reasons set forth below, we reverse and remand.

{¶2} On March 20, 2014, Local 93 filed a complaint for declaratory judgment and injunctive relief, along with a motion for a temporary restraining order and preliminary injunction, seeking to enjoin the City from administering a noncompetitive examination for the positions of assistant chief and battalion chief. Local 93 brought its complaint under the Ohio Constitution Article XV, Section 10, R.C. Chapter 124, Cleveland Charter Chapter 27, and the Rules of the Civil Service Commission for the city of Cleveland.¹

{¶3} Local 93 is the sole certified bargaining representative for all the City’s Division of Fire members holding rank of firefighter through assistant chief and represents its members with regard to all terms and conditions of employment. In its complaint, Local 93 alleges that each current member of the Division of Fire, including the current fire chief, achieved their original appointment and any subsequent promotions through competitive civil service examinations. On March 14, 2014, the City, via an

¹The City’s Civil Service Commission oversees the administration of civil service examinations within the City and certifies the results of those examinations to the respective appointing authorities for each City department.

order issued by the fire chief, issued a bulletin announcing that noncompetitive promotional examinations for assistant chief and battalion chief. The bulletin detailed the positions, salary, application filing requirements, examination information, duties of the positions, and minimum qualifications. The application filing period was from March 17, 2014 through March 22, 2014. The bulletin described the promotional examination for assistant chief and battalion chief as “noncompetitive.”

{¶4} Local 93 sought a declaration that the March 14, 2014 order was in violation of Article XV, Section 10 of the Ohio Constitution, R.C. Chapter 124, Cleveland Charter Sections 126 and 128, and Civil Service Rule 4.70. It also sought a temporary restraining order, a preliminary injunction, and permanent injunction against the City maintaining the status quo and prohibiting the administration of noncompetitive promotional exams.

{¶5} Additionally, the City and Local 93 are parties to an April 1, 2010 to March 31, 2013 collective-bargaining agreement (“CBA”) that remained in effect during the time period of the job posting and the application filing period (and is in effect to date). Included in the CBA is Article VII — “Vacancies-Promotions,” which states:

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. However, it is the intent of the parties to this Contract that where alternatives or discretion exists on the part of the appointing authority, that such discretion, choice or selection shall be governed by objective standards and rules of reason. Disqualification on any promotion may constitute a grievance and shall be processed in accordance with the Grievance Procedure, and the Grievance Procedure shall be the sole avenue of appeal for questions regarding disqualification.

{¶6} On the same day of the filing of Local 93's complaint, the trial court entered an order allowing the City to continue to accept applications only through the set deadline and scheduled a hearing on April 7, 2014, for Local 93's motions. The City filed an answer in response to Local 93's complaint and a brief opposing Local 93's motion for a preliminary injunction.

{¶7} At the hearing on Local 93's motion for preliminary injunction, the trial court heard testimony from the fire chief, an assistant fire chief, and several battalion chiefs, the City's Civil Service Commission secretary, and the City's assistant safety director regarding competitive exams, the testing process, and the change in testing methods from competitive to noncompetitive.

{¶8} Thereafter, the trial court requested that the parties return for oral argument on the issue of subject matter jurisdiction, an issue that was raised, sua sponte, by the trial court. The court held a hearing on April 17, 2014, regarding this issue. At the hearing, the trial court noted that it asked the parties to return because the trial court had a question about jurisdiction. The court stated: "[s]o we are here on a narrow topic of why the

Court has jurisdiction versus why the CBA would not prevail through a grievance procedure, then on to arbitration.” Both parties argued that the trial court has proper jurisdiction, because the issue of noncompetitive exams is not addressed in the CBA.

{¶9} Local 93 argued that there is no allegation in the complaint that the CBA was breached by the announcement of the Civil Service Commission to hold a noncompetitive examination and the CBA between Local 93 and the City does not specifically require competitive exams. Counsel stated:

The disputes at issue, of course, is the Civil Service Commission’s decision to administer a noncompetitive exam for promotion to the ranks of assistant chief, battalion chief, in compliance with A, the Ohio Constitution; B, the Ohio Revised Code; three, the City Charter; and four, the Civil Service Commission’s own rules.

There’s no allegation in the Complaint that the CBA was breached by the announcement of the Civil Service Commission to hold a noncompetitive examination.

* * *

The arbitrator can’t resolve conflicts between the Ohio Constitution, the Ohio Revised Code, the Charter, and the Civil Service Rules.

{¶10} The City agreed with Local 93’s argument, stating:

[T]here’s no clear and unmistakable language in the collective bargaining agreement that permits this issue to the grievance process. * * * There’s nothing in the collective bargaining agreement that addresses the method of testing for examination[.]

{¶11} On April 25, 2014, the trial court issued a decision finding that it lacked jurisdiction to hear the matter and ordered, sua sponte, that Local 93’s claims be dismissed as a matter of law. The court found that R.C. Chapter 4117 and the CBA

provide “the exclusive remedy for Local 93’s claims and the failure to initiate these proceedings pursuant to the grievance and arbitration procedure set forth in the Collective Bargaining Agreement, prevent this court from proceeding to address the merits of Local 93’s claim.” In reaching its decision, the trial court relied on *Mayfield Hts. Fire Fighters Assn., Local 1500, I.A.F.F. v. DeJohn*, 87 Ohio App.3d 358, 622 N.E.2d 380 (8th Dist.1993).

{¶12} It is from this order that Local 93 appeals and the City cross-appeals raising the following assignments of error for review, which shall be discussed together where appropriate.

Assignment of Error One by Local 93

The trial court erred in sua sponte dismissing the complaint for lack of subject matter jurisdiction.

Assignment of Error Two by Local 93

The trial court erred in denying Local 93’s motion for a preliminary injunction.

Assignment of Error by the City

The trial court erred to the prejudice of both parties in dismissing the case for lack of subject matter jurisdiction.

Subject Matter Jurisdiction

{¶13} In Local 93’s first assignment of error and the City’s cross-assignment of error, both parties argue that the trial court erred when it dismissed Local 93’s complaint for lack of subject matter jurisdiction.

{¶14} We recognize that the lack of subject matter jurisdiction may be raised sua

sponte by the court at any stage of the proceedings *Fox v. Eaton Corp.*, 48 Ohio St.2d 236, 238, 358 N.E.2d 536 (1976). Civ.R. 12(H)(3) provides that “whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” We review an order dismissing a complaint for lack of subject matter jurisdiction de novo. *Bank of Am. v. Macho*, 8th Dist. Cuyahoga No. 96124, 2011-Ohio-5495, ¶ 7, citing *Crestmont Cleveland Partnership v. Ohio Dept. of Health*, 139 Ohio App.3d 928, 936, 746 N.E.2d 222 (10th Dist.2000). In order to dismiss a complaint for lack of subject matter jurisdiction, the court must determine whether a plaintiff has alleged any cause of action that the court has authority to decide. *Crestmont* at 936. When making this determination, the trial court is not confined to the allegations of the complaint and may consider material pertinent to such inquiry. *Southgate Dev. Corp. v. Columbia Gas Transm. Corp.*, 48 Ohio St.2d 211, 358 N.E.2d 526 (1976), paragraph one of the syllabus.

{¶15} In the instant case, the trial court dismissed Local 93’s complaint on the premise that Article VII of the CBA between the City and Local 93 adopts the Civil Service Rules outlining promotions. Thus, the court concluded that the parties are bound by the grievance procedure outlined in the CBA. The court specifically focused on the following language in Article VII of the CBA, which provides that “[d]isqualification on any promotion may constitute a grievance and shall be processed in accordance with the Grievance Procedure, and the Grievance Procedure shall be the sole avenue of appeal for questions regarding disqualification.” However, Local 93 and the City both argue that the issue in this case is not related to “disqualification on a promotion.” Rather, they contend that the issue is related to the process by which a promotional vacancy is to be filled, which is not addressed in the CBA. We agree.

{¶16} Here, both parties formulated an agreed upon statement of intent relative to Article VII to provide guidance to this court in resolving the issues presented on appeal.

The agreed upon statement provides:

This provision [Article VII] was negotiated by the parties and incorporated into their CBA in 1999. All subsequent agreements between the City and Local 93 have contained identical language. Prior to 1999, the parties’ CBA did not contain any language relative to promotions outside of the “Management Rights” clause found in CBA Article II. The purpose and intent of Article VII is and always has been considered to be three-fold. 1) With two exceptions, issues regarding the procedures for the promotion of fire fighters, shall be governed by the rules of the City of Cleveland’s Civil Service Commission (Commission) or the Ohio Revised Code (ORC) or the Ohio Constitution as applicable. 2) The first exception to the procedures for promotion stated in the rules of the Commission or in the ORC or the Ohio Constitution, is an extension of the time period in which the City must fill a vacancy in the promoted ranks from the statutorily mandated 10 days under ORC 124.48 to a contractually agreed-upon 30 days. 3) The second

exception to the rules for promotion stated in the rules of the Commission or in the ORC or the Ohio Constitution, Article VII allows for a contractual grievance should any promotional candidate be disqualified for promotion by the appointing authority, and limits the appeal of any such disqualification to the contractual grievance procedure set forth in the CBA.

The language in CBA Art. VII relied upon by the trial court — “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” — does not and was never intended to subject the application of the procedures for promotion stated in the rules of the Commission or in the ORC or in the Ohio Constitution to the CBA’s grievance procedure.

{¶17} Therefore, Local 93’s claims exist independent of Article VII of the CBA because the CBA makes no specification regarding the testing procedure for promotions. Both parties agree that Local 93’s claims are premised on alleged statutory violations of the Ohio Constitution, the Cleveland City Charter, and the Civil Service Commission Rules, none of which are specified in the CBA in the context of this case.

{¶18} The language in Article VII that the trial court interpreted as an adoption of the Civil Service Commission Rules outlining promotions — “[d]isqualification on any promotion may constitute a grievance and shall be processed in accordance with the Grievance Procedure, and the Grievance Procedure shall be the sole avenue of appeal for questions regarding disqualification” — was not intended by Local 93 and the City to subject the application of the procedures for promotion stated in the rules of the Commission to the CBA’s grievance procedure.

{¶19} In reaching its decision, the trial court relied on *DeJohn*. In *DeJohn*, this court upheld the trial court’s dismissal for lack of subject matter jurisdiction when the

mayor of Mayfield Heights bypassed the examination process and appointed a new fire lieutenant. The city and its firefighters were parties to a CBA, which provided in pertinent part:

“Section 14.1. All promotions in the Fire Department shall be made by competitive examination which shall be impartial and shall be handled in the manner provided for by the Civil Service Commission through its rules and regulations as provided in the City Charter.”

Id. at 360. If a bargaining unit employee determined that there has been ““a breach, misinterpretation or improper application of [the] Agreement,”” he has access to the grievance procedure provided at Article IX. *Id.* This procedure set forth a detailed four-step process for peaceful resolution of grievances and culminates in binding arbitration. *Id.*

{¶20} The firefighters claimed that the mayor’s promotion of a firefighter to the rank of lieutenant in disregard of a civil service competitive examination and eligibility list was illegal and improper. The city maintained that the matter was subject to the grievance procedures in the CBA between the firefighter’s union and the city. We found that the grievance procedure outlined in the CBA was plaintiff’s exclusive remedy. *Id.* at 364. Therefore, we held the trial court did not err in dismissing the case for lack subject matter jurisdiction. *Id.*

{¶21} *DeJohn*, however, is distinguishable. The CBA between the city and the firefighters in *DeJohn* unequivocally addressed the subject of competitive exams and promotions in Article IX. It required that all promotions be made by competitive examination. Whereas, the CBA in the instant case does not address the subject of

competitive examinations and promotions. Here, both parties are clear that Article VII “does not and was never intended to subject the application of the procedures for promotion stated in the rules of the Commission or in the ORC or in the Ohio Constitution to the CBA’s grievance procedure.”

{¶22} Based on the foregoing, we find that Article VII of the CBA is inapplicable to the facts of the instant case. Furthermore, because Local 93 is asserting rights independent of the CBA in its complaint, the grievance procedure outlined in the CBA is not Local 93’s exclusive remedy. Therefore, the trial court has jurisdiction over the matter.

{¶23} Accordingly, Local 93’s first assignment of error and the City’s cross-assignment of error are sustained.

Preliminary Injunction

{¶24} In Local 93’s second assignment of error, it challenges the trial court’s denial of its motion for preliminary injunction. This challenge is based on the presumption that motions not ruled upon by the trial court are implicitly denied on appeal.

However, based on our finding that the trial court has subject matter jurisdiction over Local 93’s complaint, we remand the matter to the trial court for adjudication on the complaint and injunction motions. Thus, Local 93’s argument is premature, and this issue is not ripe for our review.

{¶25} Accordingly, the second assignment of error is overruled.

{¶26} Judgment is reversed and the matter is remanded for further proceedings

consistent with this opinion.

It is ordered that appellant and appellees share the 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 common pleas court 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.

MARY EILEEN KILBANE, PRESIDING JUDGE

EILEEN T. GALLAGHER, J., and
MARY J. BOYLE J., CONCUR