IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
DEC 28 2011
Wendy F Jones

THE CITY OF ALBUQUERQUE,
RICHARD J. BERRY, MAYOR OF
CITY OF ALBUQUERQUE,

Appellant.

vs.

No. 31,075
Bernalillo County
CV-2010-04302

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
AFL-CIO, LOCAL 3022,

Appellee,

DEFENDANT-APPELLANT'S
BRIEF IN CHIEF

Appeal from a Bench Trial before the
Honorable Nan Nash
Bernalillo County District Court

Respectfully submitted:

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STATEMENT REGARDING ORAL ARGUMENT

Respondent-Appellant requests oral argument pursuant to Rule 12-214(B)(1) NMRA. Oral argument would be helpful to the resolution of this case because the issues involve matters of public importance which have the potential to affect the operation of the largest City in the state as well as public bargaining throughout the state.

I. Nature of the Case.

This case arose as a petition for injunctive relief based on the collective bargaining agreement (CBA) between the petitioner union (AFSCME) and the City of Albuquerque. AFSCME filed its Verified Petition for Temporary Restraining Order, Preliminary Injunction or, in the Alternative, Writ of Mandamus, April 8, 2010. **RP 1** The district court held a lengthy evidentiary hearing April 12, 2010, in which witnesses were called and examined and cross-examined; the court reviewed exhibits; and the court heard argument of the parties. *Transcript of Hearing, April 12, 2010.*

II. Facts and Procedural Background.

The Albuquerque Recovery Program (ARP) was run by the City of Albuquerque's Family and Community Services Department. Its purpose was to assist individuals who had been addicted to drugs, but by Spring of 2010 was being closed due to city-wide budget issues and a low success rate. As a result of the closure, some of the work would be contracted out. Also, some city employees faced possible layoffs if the City were unable to locate equivalent positions for them in other departments. **RP 32-33**

Representing its members who were potentially affected by the closure, AFSCME asked the district court to enjoin the City from (1) shutting down its Albuquerque Recovery Program where some of its

members worked until the City bargained regarding outsourcing of the work, and (2) to reinstate the laid-off employees. **RP 7, ¶ A** Notably, AFSCME took the position at the hearing that arbitration or administrative process was not an adequate remedy when it was seeking injunctive relief. **RP 6, ¶¶ 27-28** The district court granted part of the relief AFSCME sought and denied part in its Temporary Restraining Order and Preliminary Injunction issued April 16, 2010. The court found that the City did not comply with Sections 38.1.1 through 38.1.4 of the CBA concerning the closure of the Program and outsourcing. **RP 62, ¶¶ 1-2** However, the court found no violation of Section 35.1.2 concerning the layoffs, after hearing testimony and evidence on the issue. **RP 62, ¶ 2** The district court therefore denied AFSCME an injunction that mandated reinstatement of the laid-off employees.

The district court held a hearing on the petition for injunctive relief April 12, 2010. Concerning layoffs under Section 35.1.2 of the CBA, the court said at the conclusion of the hearing, "[T]he Court cannot find that petitioners are entitled to a restraining order or a preliminary injunction under the Collective Bargaining Agreement provision 35.1.2, although I believe it's close, but I believe the City did comply." *Transcript of Proceedings, April 12, 2010, p. 62, lines 1-7.*

Section 35.1.2 provides in part, and relevant to the issue at hand:

> The Chief Administrative Officer (CAO) and the Director of Human Resources, or their designee, shall be responsible for approving all layoffs and offering transfers or placement offers to employees facing layoff. Prior to implementation of a layoff or transfers resulting from reductions-in-force (RIF), the CAO, Human Resources Director or their designee shall meet with the Union to discuss the reason(s) for the RIFs, possible alternatives to a layoff, the positions impacted by the RIFs, employees affected, transfer opportunities and employees who will be laid off, if any. ... **RP 10**

Before issuing its ruling on this point the court heard testimony and saw evidence that the layoff provision required 30-days written notice, and that the City had complied with it. *Transcript of Proceedings, April 12, 2010, p. 62, lines 1-7.* The district court itself said it did not view 35.1.2 as requiring numerous meetings with the union. *Transcript of Proceedings, April 12, 2010, p. 25, lines 18-24.* AFSCME's union official Andrew Padilla admitted under oath that his members had received written notices and had showed them to him. Mr. Padilla also testified that a meeting had occurred with Human Resources Director Gene Moser in which the layoffs were discussed, though he disputed the extent. *Transcript of Proceedings, April 12, 2010, p. 31, line, though p. 37, line 22.* Mr. Moser testified as well that anticipated layoffs at the ARP were discussed at the meeting with the Union April 1, 2010, and identified the program; what efforts were being made in placing the affected employees; that Human Resources had been hopeful

they would place them all; which bargaining unit positions were affected; and that no layoffs had taken place yet. *Transcript of Proceedings, April 12, 2010, p. 40, line18 though p.42, line 15;* **RP 32-53** (Affidavit of Human Resources Director and Accompanying Notices of Layoff). Nothing in Section 35.1.2 required the City to do more to be in compliance, and the district court found that the City "did comply."

Subsequently, AFSCME moved the court for an Order to Show Cause June 8, 2010, asking the court to hold the City in contempt, and requesting reinstatement of laid-off employees. **RP 64** The court denied that motion in an Order July 9, 2010 and held that the City was "not required to reopen the Albuquerque Recovery Program or to reinstate any of its employees…." **RP 92.** That Order dissolved the Temporary Restraining Order and Preliminary Injunction.

AFSCME then filed a Motion to Compel Arbitration September 20, 2010, asking the district court to compel arbitration concerning the layoffs, which the court had already ruled upon in the Temporary Restraining Order and Preliminary Injunction, as well as in the Motion for Order to Show Cause. **RP 94** The City opposed the Motion on the ground that AFSCME had waived the right to arbitrate the issue by invoking the court's discretion on it, **RP 112-17**, but the district court disagreed, and granted the motion in

its Judgment on Order Granting Motion to Compel Arbitration December 10, 2010, with its accompanying Order fully disposing of the case before the court. **RP 125-28** This is a final order that by its terms fully disposes of all issues that were before the district court. The City timely filed its notice of appeal January 3, 2011. **RP 129**

III. Discussion.

A. Standard of Review.

"The appropriate standard of review for a district court's grant of a motion to compel arbitration is *de novo*." Alexander v. Calton and Associates, Inc., 2005-NMCA-34, ¶ 8, 137 N.M. 293, (citing Santa Fe Techs, Inc. v. Argus Networks, Inc., 2002-NMCA-30, ¶51, 131 N.M. 772)).

B. Issue.

> The district court erred in compelling arbitration of layoffs under the Collective Bargain Agreement, where AFSCME twice previously invoked the discretionary powers of the district court, including on the issue of layoff, both in the Verified Petition for Temporary Restraining Order and for Injunctive Relief, and in its Motion for Order to Show Cause, thereby waiving the right to arbitrate it, and though the district court denied AFSCME's requested relief on this issue, because it had decided the City complied with the Section 35.1.2 of the CBA, after taking testimony, evidence, and argument on the issue.

AFSCME invoked the district court discretionary powers on two occasions prior to asking the district court to compel arbitration of the same

issues. In doing so, AFSCME waived its right to have the matters arbitrated, and an ordinary understanding of fairness shows why the City should not have to be subjected to yet a third attempt by AFSCME to obtain a different result.

A lengthy hearing was held April 12, 2010, on AFSCME's petition for a TRO in which witnesses were called, examined and cross-examined, and in which exhibits were reviewed by the district court. AFSCME expressly asked the court to enjoin the City from shutting down the ARP until the City bargained regarding the layoffs, and to reinstate the employees. **RP 7, ¶¶A, B**

The court granted part of the relief Petitioner sought, and denied part in a Temporary Restraining Order and Preliminary Injunction April 16, 2010. The court found the City did not comply with Sections 38.1.1 through 38.1.4 of the CBA (concerning outsourcing), and ordered the Program reopened. Nevertheless, and specific to the issue here, the district court found no violation of Section 35.1.2, and therefore denied AFSCME's request for an injunction on this subject. *Transcript of Proceeding, April 12, 2010, lines 1-7.* The reason was that the City had done nothing wrong on this point.

AFSCME then moved the district court for an Order to Show Cause June 3, 2010, asking the court to hold the City in contempt. The district court denied that Motion in an Order July 9, 2010, and held that the City was "not required to reopen the Albuquerque Recovery Program or to reinstate any of its employees . . . ." That Order also dissolved the Temporary Restraining Order and Preliminary Injunction and dismissed it. **RP 92**

In these proceedings, AFSCME invoked the district court's discretionary powers as to the injunctive relief concerning closure of the ARP and, especially relevant here, concerning layoffs, and as to its request for contempt sanctions against the City. By doing so, however, AFSCME waived its right to arbitration:

> The mere instigation of legal action is not determinative for purposes of whether a party has waived arbitration. The point of no return is reached with the party seeking to compel arbitration invokes the court's discretionary power, prior to demanding arbitration, on a question other than its demand for arbitration. . . . To hold otherwise would permit a party to resort to court action until an unfavorable result is reached and then switch to arbitration. We cannot sanction such a procedure.

Wood v. Millers National Ins. Co., 96 N.M. 525, 527-28, 632 P.2d 1163, 1165-66 (1981). Further to the point, asking the court for injunctive relief is an act that invokes the Court's *discretionary* powers. Insure New Mexico, LLC, v. McGonigle, 2000-NMCA-018, ¶ 7, 128 N.M. 611, 615, 995 P.2d

1053, 1057 ("The granting of an injunction is an equitable remedy, and whether to grant equitable relief lies within the sound *discretion* of the trial court.") (italics added)(citation omitted). Petitioner invoked the same discretionary powers by asking for contempt sanctions. Chavez v. Lovelace Sandia Health System, Inc., 2008-NMCA-104, ¶ 25, 144 N.M. 578 ("Likewise, we review a contempt order for abuse of *discretion*.") (italics added)(citation omitted). The district court, moreover, exercised that same discretion when it refused to grant the TRO on the issue of layoffs, and when it refused to find the City in contempt on the same and related issues.

To the extent AFSCME would argue that somehow arbitration would address something different than what it brought before the district court, that argument would be unavailing. As noted above, the district court both refused to find that the City violated Section 35.1.2, and to enjoin the layoffs. The district court flatly stated that the City was not required to reinstate any of its employees, though AFSCME squarely raised those issues to the court. AFSCME invoked the district court's discretion twice. After it was unsuccessful with the court proceedings, it then attempted to "switch to arbitration" in hope that the arbitrator would give a different result. As Wood established, our Courts "cannot sanction such a procedure." 96 N.M. at 528.

Even if the matters were not the same ones, the result would still be the same. Petitioner has repeatedly invoked the Court's discretionary powers on the same general subject matter. Moreover, Wood holds that invoking the court's discretion on a matter "other than [a] demand arbitration" has the same effect of "testing the judicial waters." Id. At 527-28 (quoting Bernalillo Cty. Med. Center Emp. v. Cancelosi, 92 N.M. 37, 587 P.2d 960 (1978)). Having tested the waters before filing the motion for arbitration, AFSCME has chosen its remedy and cannot now attempt to do it over in what it deems a more favorable forum, the right to which it has waived.

If AFSCME had been successful in obtaining an injunction ordering the City not to lay off any employees, or to reinstate ones who had been laid off, AFSCME certainly would not have sought to compel arbitration on the issue it had won in court. Nor would it have soon agreed to an attempt by the City, if the City had tried, to use arbitration as a tool for reversing the district court's ruling. This illustrates the fairness of the rule preventing a party from compelling arbitration, when the party first attempted the same relief in court.

As the City argued below, legal doctrines of preclusion further illustrate the justification for this rule. For example, res judicata bars

reconsideration in a subsequent lawsuit of claims that were, or could have been raised, in the prior case. Collateral estoppel bars consideration of issues that were actually litigated. Blea v. Sandoval, 107 N.M. 554, 557, 761 P.2d 432, 435 (Ct. App. 1988). AFSCME's attempt to have layoffs reviewed by an arbitrator, after raising the issue before a trial court, should fail on both accounts. Whatever aspect of the issue AFSCME did not raise before the district court, it certainly could have. But in reality, the issues were all raised. The testimony of Director of Human Resources, Gene Moser, AFSCME President Andrew Padilla's testimony, and the documentary evidence, all illustrate that this issue was squarely before the district court.

Notably, the testimony and evidence brought before the district court would have been more or less the same evidence, and from the same witnesses, as what would have been presented to an arbitrator hearing this matter of the City's compliance with the CBA. The City recognizes that res judicata and collateral estoppel are defenses that would be raised in a separate forum, and that they do not apply within this present appeal. The fact that they would apply in a subsequent litigation—an arbitration, for example—illustrates vividly why it would be improper for AFSCME to be allowed multiple, vexatious legal actions to get elsewhere what it could not

get before the district court. See also, e.g., Three Rivers Land Co., Inc., v. Maddoux, 98 N.M. 690,693, 652 P.2d 240, 243 (1982) (The doctrine of election of remedies pertains to the choice or adoption of one of two or more existing remedies where the use of one remedy precludes the pursuing the other; its purpose is to prevent vexatious and multiple litigation of causes of action arising out of the same subject matter.) (citations and internal quotations omitted) (overruled on other grounds by Universal Life Church v. Coxon, 105 N.M. 57, P.2d 467 (1986).

Finally, certain legal questions concerning whether issues are arbitrable are questions for courts to decide. See, e.g., Granite Rock Co. v. International Broth. of Teamsters, 130 S.Ct. 2847 (2010) (the parties' dispute over the ratification date of a CBA was for the district court to resolve, not an arbitrator). Furthermore, "...a court may order arbitration of a dispute only where it is satisfied that the parties agreed to arbitrate that dispute." Id. at 2856 (italics original). Thus the question whether this case should be arbitrated is for this Court, not for an arbitrator, to decide. The City should not have to be subjected to the waste of time and money of multiple attacks on the same issue. Accordingly, the Court should reverse the district court's ruling.

This issue was preserved by the City's Response in Opposition to Motion to Compel Arbitration and by argument of counsel at the hearing on it. **RP 112-17**; *Transcript of Proceedings, November 3, 2010.*

IV. Conclusion.

For the foregoing reasons, the City respectfully asks the Court to reverse the decision of the district court compelling arbitration.

V. Certificate of Compliance.

The Brief contains fewer than the permitted 35 pages. Counsel used Microsoft Word 2010 with a proportionally spaced Times New Roman font. The body of the brief consists of 2,669 words total.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 2011, a true copy of the foregoing pleading was mailed to:

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