

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

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| CITY OF CINCINNATI, | : | APPEAL NO. C-070062 |
| | : | TRIAL NO. A-0607369 |
| Plaintiff-Appellant, | : | |
| | : | |
| vs. | : | <i>JUDGMENT ENTRY.</i> |
| | : | |
| QUEEN CITY LODGE, NO. 69, | : | |
| FRATERNAL ORDER OF POLICE, | : | |
| | : | |
| Defendant-Appellee. | : | |

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

The city of Cincinnati (“the city”) appeals the denial of its request for declaratory and injunctive relief. The city sought judicial intervention to avoid arbitrating a grievance of appellee Queen City Lodge No. 69, Fraternal Order of Police (“the union”) pertaining to the employment of one of its members, Cincinnati Police Department Assistant Police Chief Vincent Demasi. Despite the complicated legal landscape that forms the backdrop of this appeal, the issue to be decided by this court is whether the trial court erred in denying the city’s request for declaratory and injunctive relief.

Demasi was promoted to his current position of assistant police chief as the result of a court-approved settlement agreement that ended Demasi’s 2005 lawsuit against the city. Demasi’s complaint against the city had solely involved promotion under the civil

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

service laws. But as part of the settlement agreement adopted by the trial court, Demasi and the city had entered into an employment contract based upon an “offer sheet” that contained the terms and conditions of his employment. The union, who was not a named party in the Demasi lawsuit or alleged to be a necessary and indispensable party, then filed a grievance against the city. Initially, the union challenged Demasi’s promotion as improper and also alleged that the agreement between Demasi and the city conflicted with the terms of the collective-bargaining agreement (“CBA”) governing supervisors, including assistant police chiefs. Later the union retracted its challenge to Demasi’s promotion but proceeded with the remainder of the grievance. Ultimately the union sought to arbitrate the amended grievance.

The city filed this action in August 2006, on the eve of the scheduled Demasi grievance arbitration, seeking a declaration that the union could not arbitrate the grievance because the dispute implicated issues already determined by the court that had approved the settlement agreement that had ended Demasi’s lawsuit. The city also sought a temporary and a permanent injunction to prevent arbitration.

The trial court granted a preliminary injunction to maintain the status quo. Subsequently, the court held an evidentiary hearing and allowed both parties to submit exhibits. William Gustavson, Demasi’s private counsel in his lawsuit against the city, testified at the hearing. Gustavson unequivocally stated that the union had not been a part of the settlement negotiations involving the terms and conditions of Demasi’s employment. Further, he testified that the city had not disclosed to him or to the court, any conflict between Demasi’s individual contract and the CBA.

Ultimately, the trial court denied the city’s request for relief, allowing the grievance to proceed to arbitration. The court did not provide any explanation for its denial of

declaratory relief. But the court did state that it was denying injunctive relief in part because the city had “unclean hands.”

In its sole assignment of error, the city now argues that the “trial court erred by concluding that the union’s challenge to a court order is arbitrable.” We uphold the trial court’s judgment that allowed the grievance to proceed to arbitration.

First, we address whether the collateral-attack doctrine prevented arbitration of the union’s grievance. The city argued that, as a matter of law, an arbitrator was without the authority to modify the court’s entry approving the settlement agreement that had ended Demasi’s lawsuit. The union countered by asserting that the Demasi court was without authority to approve the settlement agreement because it conflicted with the CBA and was entered into without the knowledge or approval of the union, a party to the CBA. Also, the union claimed that the city was obligated to inform the trial court of this defect in the settlement agreement and that it had failed to do so. Further, the union noted that Demasi had only sought the remedy of appointment in his statutory-based claim against the city. The union emphasized that only the union had the authority to negotiate and enforce the CBA on behalf of the city’s police officers.

Although the law disfavors the collateral attack of judgments, exceptions to the rule do exist. The Ohio Supreme Court has recently held that a collateral attack is proper “where the issuing court lacked subject-matter jurisdiction or when the order was the product of fraud.² A collateral attack may also be appropriate where the court acts in a manner contrary to due process, rendering its judgment void.³

² *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, at ¶23.

³ *See Plant Equip., Inc. v. Nationwide Control Serv., Inc.*, 155 Ohio App.3d 46, 2003-Ohio-5395, 798 N.E.2d 1202, at ¶14-15, citing *AMCA Internatl. Corp. v. Carlton* (1984), 10 Ohio St.3d 88, 461 N.E.2d 1282.

The term “subject-matter jurisdiction” refers to “[j]urisdiction over the nature of the case and the type of relief sought.”⁴ The union successfully demonstrated to the trial court that Demasi’s complaint had not requested relief beyond his promotion; that only the union had the authority to negotiate and enforce the CBA on behalf of the city’s police officers; that the union was not a party to the Demasi litigation; that the union had not negotiated Demasi’s individual contract; and that the terms of Demasi’s individual contract conflicted with the terms of the CBA. Thus, the union established that the Demasi court had exceeded its jurisdiction when it approved the parts of the settlement agreement that extended beyond the issue of Demasi’s appointment to assistant police chief under the civil service laws. In view of this, we decline to address whether the union established an alternative ground for a collateral attack.

For similar reasons, claim and issue preclusion could not have barred arbitration of the union’s amended grievance. The union was not a party to the Demasi litigation, the union and Demasi were not in “privity” such that Demasi could waive the union’s contractual right to arbitrate, and the subject of the amended grievance—whether the CBA had been violated—was not at issue in the Demasi litigation.⁵ Further, the city had failed to pursue a defense in the Demasi lawsuit that the union was a necessary and indispensable party. By failing to do so, the city had waived claim and issue preclusion as a bar to arbitration.⁶

Thus, the trial court did not error in denying the city’s request for declaratory relief. And where the city was not entitled to prevail on its claim for declaratory relief,

⁴ Black’s Law Dictionary (8 Ed.2004) 870.

⁵ See *Fraternal Order of Police, Akron Lodge No. 7 v. Akron*, 9th Dist. No. 23332, 2007-Ohio-958, at ¶11-21.

⁶ See, generally, *Nationwide Mut. Fire Ins. Co. v. Logan*, 12th Dist. No. 2005-07-206, 2006-Ohio-2512.

there was no basis for injunctive relief. Thus, we overrule the city's assignment of error and affirm the trial court's judgment.

In the final sentence of its appellate brief, the union has requested attorney fees and costs due to "bad faith." But the union has not filed a proper App.R. 15 motion stating with particularity the basis for the request and the order or relief sought. This court declines to address the issue without a proper motion.

Further, a certified copy of this Judgment Entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R.24.

PAINTER, P.J., CUNNINGHAM and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on December 26, 2007

per order of the Court _____.

Presiding Judge