COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2023-SC-0322

FRATERNAL ORDER OF POLICE, BLUEGRASS LODGE #4 AND CHRISTOPHER MORROW — **APPELLANTS**

On Discretionary Review
Kentucky Court of Appeals Case No. 2022-CA-185-MR
v. Appeal From Fayette Circuit Court, Hon. Thomas L. Travis
Civil Action No. 20-CI-01368

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT — **APPELLEE**

APPELLANTS' REPLY BRIEF

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Appellants have, this 22nd day of May, 2024, e-filed with the Clerk of the Kentucky Supreme Court, State Capital, 700 Capitol Avenue, Room 235, Frankfort, Kentucky 40601, this Reply Brief, and that true and accurate copies have been served by first-class mail, postage prepaid, upon, (i) **Hon. Kate Morgan**, Clerk, Kentucky Court of Appeals, (ii) **Hon. Thomas L. Travis**, Fayette Circuit Court, 120 North Limestone, Lexington, Kentucky 40507, and (iii) **Hon. Barbara A. Kriz**, 200 West Vine Street, Suite 710, P.O. Box 499, Lexington, Kentucky 40507. The undersigned further certifies that Appellants have not withdrawn the Record on Appeal.

Respectfully Submitted,

MATTMILLER CROSBIE, PLLC

/s/ Eric C. Eaton
Hon. Scott A. Crosbie
Hon. Eric C. Eaton
Hon. Nicholas Oleson
201 East Main Street, Suite 800
Lexington, Kentucky 40507
Telephone: (859) 287-2400
Facsimile: (859) 287-2401
scrosbie@mattmillercrosbie.com
eric.eaton@mattmillercrosbie.com
noleson@mattmillercrosbie.com
COUNSEL FOR APPELLANTS

INTRODUCTION

Chris Morrow ("**Morrow**") and the Fraternal Order of Police, Bluegrass Lodge #4 ("**Lodge**") submitted a grievance ("**Grievance**") to Lexington-Fayette Urban County Government ("**LFUCG**") pursuant to the parties' collective bargaining agreement ("**CBA**"). The Grievance raised a dispute about the meaning and interpretation of substantive provisions of the CBA. The CBA required LFUCG to negotiate and arbitrate the Grievance, but LFUCG refused to do so. The Fayette Circuit Court entered judgment against Appellants' claims seeking to compel LFUCG to negotiate and arbitrate the Grievance. LFUCG's Brief advances three main arguments to defend the judgment against the Appellants. These arguments misconstrue the CBA, the relevant law, and the lower courts' proceedings.

First, LFUCG claims that it did not agree to bargain over coverage disputes involving off-duty conduct. This argument is unpersuasive, because LFUCG agreed to collectively bargain *all matters* concerning the "meaning and application" of the CBA. LFUCG improperly seeks to avoid its obligation to negotiate disputes about the CBA through the grievance procedure by arguing the CBA's coverage provisions do not apply to Morrow. However, LFUCG's contention that its coverage obligations under the CBA do not apply to Morrow *is the dispute that should have been negotiated through the grievance procedure, not a reason to exempt the dispute from the grievance procedure*. Whether Morrow is entitled to coverage under Article 19 of the CBA is a matter concerning the "meaning and application" of the CBA. Therefore, this dispute is subject to the grievance procedure. The Court's analysis on this issue ends there.

Second, LFUCG argues it properly pursued its Counterclaims to adjudicate the impact of the Self-Insurance Policy on its coverage obligations under the CBA. LFUCG's argument interprets its obligations under the CBA too narrowly. LFUCG agreed to negotiate disputes about the impact (if any) of LFUCG's Self-Insurance Policy on its obligations under the CBA though the grievance procedure. The "actual controversy" LFUCG sought to adjudicate through its Counterclaims *is part of the dispute raised in the Grievance and should have been resolved through the grievance procedure*. The Fayette Circuit Court erred by failing to dismiss the Counterclaims, or at least stay them while the Grievance remained unnegotiated.

Third, LFUCG's argument that the Fayette Circuit Court erred in failing to dismiss Appellants' Complaint for lack of jurisdiction is confounding. First, LFUCG did not file a Motion to Dismiss the Complaint, contrary to the representations in its Brief. It filed an Answer and Counterclaims. In its Answer and Counterclaims, it specifically alleged an "actual controversy" existed between the parties as it related to the parties' rights and obligations under the CBA and Self-Insurance Policy.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

I. LFUCG AGREED TO SUBMIT THE SUBJECT MATTER OF THE GRIEVANCE TO THE GRIEVANCE PROCEDURE.

LFUCG's argument that "LFUCG never agreed to the grievance process for allegations involving off-duty conduct of its police officers"[1] inaccurately frames the dispute presented in the Grievance. The Complaint in the *Bell* litigation specifically alleged Morrow committed torts against her "while in the scope and course of his employment with LFUCG."[2] LFUCG acknowledges this allegation was "demonstrably false at its inception."[3] In fact, there is no evidence in the record that Morrow committed any tort against Bell.[4] LFUCG argues it properly defended Morrow subject to a reservation of its rights under an unnegotiated Self-Insurance Policy predating the CBA. Appellants disagree and argue Article 19 obligates LFUCG to defend officers against false allegations of on-duty misconduct without the reservation of any rights. Article 19 of the CBA obligates LFUCG to provide a defense to Morrow for "any action in tort arising out of an act or omission occurring within the scope of his employment."[5] Article 19 does not authorize LFUCG to defend an action under a reservation of rights. Article 19 authorizes LFUCG to seek reimbursement of its costs to defend only if the tort it defended occurred "outside the actual or apparent scope of his employment." Based on these points of contention, the

[1] LFUCG Appellee Brief, pg. 7 (May 7, 2024).
[2] ROA, pg. 121.
[3] LFUCG Appellee Brief, pg. 10 (May 7, 2024).
[4] Morrow entered a guilty plea to Official Misconduct, 2nd degree, for an *unrelated, on-duty instance arising from different factual circumstances* than alleged in the Bell litigation. ***The Fayette Circuit Court expressly noted his guilty plea pertained to unrelated, on-duty conduct and thus was unrelated to Bell's litigation***. *See* ROA, pg. 615. LFUCG never challenged this finding, and it remains undisputed.
[5] ROA, pg. 51-52.

dispute in the Grievance is actually ***whether LFUCG has an obligation to provide a legal defense, without a reservation of rights, to an officer that is falsely alleged to have engaged in on-duty tortious activity, when no tortious activity has occurred.*** The parties' dispute confronts the meaning and application of substantive provisions of the CBA and is thus subject to the grievance procedure.

LFUCG cites *AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986) in support of its argument that it did not agree to negotiate the Grievance. LFUCG misapplies the holding in *AT&T.* However, *AT&T* provides an analytical framework that compels a conclusion that the Grievance must be negotiated under the CBA's grievance procedure. In *AT&T*, the employer laid off 79 employees. Article 20 of its collective bargaining agreement authorized the employer to lay off employees "when lack of work necessitates Layoff." *Id.* at 643. The union submitted a grievance contesting the layoffs, arguing there was not a lack of work. *Id.* at 646. The parties' collective bargaining agreement required resolution of grievances about "differences arising with respect to the interpretation" of the CBA. *Id.* at 643. However, the collective bargaining expressly exempted issues about the "the termination of employment" from the grievance procedure. *Id.* Citing this exception, the employer refused to negotiate the grievance, arguing that the employer's decision to lay off workers was exempted from the grievance procedure. *Id.* at 646. In reversing the Court of Appeals, the Supreme Court held that "it is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicted on a 'lack of work' determination by the Company." *Id.* at 651. The Court continued, "***if the court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties'***

substantive interpretations of the agreement." *Id*. (Emphasis added). Under this ruling, the Court sharply distinguished two analytical questions from each other: (i) whether a collective bargaining agreement requires a dispute to be submitted to the grievance procedure, and (ii) the merits of the dispute itself. Writing in concurrence, Justice Brennan underscored this distinction:

> ***The Court of Appeals was mistaken insofar as it thought that determining arbitrability required resolution of the parties' dispute with respect to the meaning of…the collective bargaining agreement***…The parties dispute concerns whether…the collective bargaining agreement limits management's authority to order layoffs for reasons other than lack of work. ***The question for the court is strictly confined to whether the parties agreed to submit disputes over the meaning of Article 20 to arbitration***. Because the collective bargaining agreement contains a standard arbitration clause, ***the answer must be affirmative unless the contract contains explicit language stating that disputes respecting Article 20 are not subject to arbitration***, or unless the party opposing arbitration…adduces the most forceful evidence to this effect from the bargaining history…***[D]etermining arbitration does not require the court even to consider which party is correct with respect to the meaning of Article 20***.

Id. 652-654 (concurring, J. Brennan) (internal citations omitted).

LFUCG misapplies *AT&T* to argue the language of Article 19 of the CBA demonstrates that it did not agree to arbitrate the subject matter of the Grievance. LFUCG makes arguments about the merits of the Grievance, *i.e.*, Morrow is not entitled to coverage under Article 19, to argue that the Grievance is not subject to the grievance procedure. In so doing, LFUCG commits the same analytical error that was reversed by *AT&T* (just as the lower courts in this case did). In *AT&T*, the Supreme Court stated that blurring the question of arbitrability with the merits of the dispute to be arbitrated is erroneous and violates the long-recognized principal 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." *See id*. at 649 (emphasis added). Under these principles, LFUCG's argument that the grievance procedure is inapplicable to the Grievance due to its contention that Morrow was not entitled to coverage under the CBA misapplies the law. ***The correct analysis is limited to whether LFUCG agreed to negotiate "any controversy" about the "meaning and application" of the CBA through the grievance procedure, and whether the disputes raised in the Grievance raised such controversies.*** LFUCG agreed to a broad grievance procedure, and the Grievance fits squarely within it. Unlike the grievance procedure in *AT&T,* the CBA's grievance procedure contains no exceptions. ***The analysis on the issue of arbitrability ends there.***

LFUCG also cites *Commc'ns Workers of Am., Loc. 3372 v. LFUCG*, 2010-CA-001495-MR, 2011 WL 6146203 (Ky. App. 2011) in support of its argument. *Communications Workers* correctly applied *AT&T* to hold that fifteen grievances LFUCG "summarily categorize[d]" as "non-grievable" were grievable under the collective bargaining agreement at issue.[6] The facts in that case are similar to the ones here. The collective bargaining agreement in *Communications Workers* required disputes about "the meaning, interpretation, or application" of the collective bargaining agreement to be resolved through its grievance procedure. *Id.* at *1. LFUCG refused to negotiate them. *Id*. The Court of Appeals reasoned each grievance "asserted that LFUCG's conduct…was not authorized under the collective bargaining agreement." *Id.*, at *2. The court determined the grievances were subject to the broad grievance procedure at issue, since the grievances

[6] This case is unreported. It is attached as **APPENDIX 1** pursuant to RAP 41.

sought negotiation of "conflicting interpretations of the rights afforded by the CBA." *Id.* at 3.

Communications Workers is directly on point. Here, the Grievance argues LFUCG took action inconsistent with its coverage obligations under Article 19. The Court should employ the analysis of *Communications Workers* to find the parties have "conflicting interpretations of the rights afforded by the CBA." *Id.,* at *3. The CBA requires the parties to resolve their conflicting interpretations through the grievance procedure. LFUCG is entitled to argue Morrow was not entitled to a defense under its Self-Insurance Policy through the grievance procedure, and Appellants are entitled to contest this point. But, the parties' respective arguments as to the merits of the dispute is irrelevant to the determination that LFUCG had an obligation to negotiate the Grievance through the grievance procedure. *See AT & T*, 475 U.S. at 649 ("***[I]n 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***.") (emphasis added).

II. THE "ACTUAL CONTROVERSY" ALLEGED IN THE COUNTERCLAIMS MUST BE NEGOTIATED THROUGH THE GRIEVANCE PROCEDURE.

LFUCG incorrectly argues Appellants "ignored Appellee's Counter-Claim, and in so doing have misled the Court that the only issue before the lower courts related to the CBA."[7] LFUCG's Counterclaims alleged an "actual controversy" existed between the parties regarding whether it had an obligation to defend Morrow in the *Bell* litigation based on the Self-Insurance Policy or the CBA or, alternatively, whether it could defend Morrow subject to a reservation of its rights under the Self-Insurance Policy. ***The*** "***actual***

[7] LFUCG Appellee Brief, pg. 8 (May 7, 2024).

controversy*" *alleged in LFUCG's Counterclaims is inherent in the dispute raised in the Grievance. This litigation seeks to enforce LFUCG's obligation under Article 11 of the CBA to negotiate this dispute through the grievance procedure.

The Counterclaims sought an adjudication about the effect of the Self-Insurance Policy on LFUCG's coverage obligations owed to Morrow. The effect of the Self-Insurance Policy on LFUCG's coverage obligations owed to Morrow affects the "meaning and application" of its coverage obligations under Article 19 of the CBA. LFUCG's threat to pursue judicial relief in place of the grievance procedure also violated its contractual obligations under Article 11 of the CBA.[8] The Grievance sought negotiation of these very issues, but LFUCG refused to negotiate them through the grievance procedure. Where resolution of a dispute under a collective bargaining agreement "will require an interpretation of the provisions of the agreement," "***federal substantive law requires that that interpretation be made by an arbitrator*[.]" *United Brick & Clay Workers of Am., Local No. 486 v. Lee Clay Prods. Co.*, 488 S.W.2d 331, 335 (Ky. 1972). The parties' disputes about their rights under Articles 11 and 19 of the CBA cannot be resolved without interpretation of the CBA. An arbitrator is the proper (and agreed upon) authority to interpret the CBA in the context of the parties' dispute.

LFUCG sought to avoid negotiating the Grievance through the grievance procedure by filing its Counterclaims instead. The Counterclaims should have been dismissed. The CBA's grievance procedure is the "sole and exclusive means of resolving all grievances

[8] LFUCG makes no argument in its Brief as to why this dispute is not subject to the grievance procedure.

arising under the CBA."[9] The parties made the process mandatory.[10] The Kentucky Court of Appeals has equated similar, mandatory grievance procedures to "exhaustion-of-administrative-remedies provisions." *Lexington-Fayette Urb. Cnty. Gov't v. Lowe*, 2019-CA-1815-MR, 2020 WL 7090833, at *8 (Ky. App. Dec. 4, 2020) (emphasis in original).[11] At the time LFUCG filed its Counterclaims, LFUCG had refused to negotiate the Grievance and thus failed to exhaust its administrative remedies to negotiate the subject matter of its Counterclaims through the grievance procedure. Therefore, LFUCG's Counterclaims were premature. At a minimum, adjudication of LFUCG's Counterclaims should have been stayed pending negotiation of the Grievance.

LFUCG misquotes *River City Fraternal Ord. of Police Lodge 614, Inc. v. Louisville/Jefferson Cnty. Metro. Gov't*, 585 S.W.3d 258, 265 (Ky. App. 2019) to argue the grievance procedure "WAS NOT REQUIRED" because it culminates in advisory arbitration.[12] *River City* does not stand for this proposition. *River City* limitedly held that "advisory arbitration" means "nonbinding arbitration resulting in a recommendation the parties are free to consider but not required to adopt." *Id. River City* did not rule that "advisory arbitration" means the grievance procedure is optional.

III. THE COURT HAS SUBJECT MATTER JURISDICTION OVER THIS ACTION.

LFUCG argues that the Fayette Circuit Court erred in failing to dismiss Appellants' Complaint when it was filed. This argument is confounding. In its recitation of procedural

[9] ROA, pg. 40.
[10] ROA, pg. 37 (requiring that any controversy "***shall be adjusted in the manner set out below***") (emphasis added).
[11] This case is unreported. It is attached as **APPENDIX 2** pursuant to RAP 41.
[12] LFUCG Appellee Brief, pg. 14 (May 7, 2024).

history, LFUCG states it filed a "Motion to Dismiss Appellants' Complaint based on lack of jurisdiction."[13] *LFUCG did not file a Motion to Dismiss the Complaint*. It filed an Answer and Counterclaims on May 18, 2020.

Even if it had filed a Motion to Dismiss Appellants' Complaint for a lack of jurisdiction, this argument would have failed. The Court has jurisdiction to adjudicate Appellants' Complaint. Appellants sued LFUCG under KRS 67A.6908(3), which provides, "Suits for violation of agreements between an urban-county government and a labor organization representing police officers, firefighter personnel, firefighters, or corrections personnel may be brought by the parties to the agreement in the Circuit Court of the urban-county government." In numerical paragraph 4 of Appellants' Complaint, Appellants alleged: "The Court holds subject matter jurisdiction of this matter pursuant to KRS 67A.6908(3)."[14] In support, Appellants alleged (i) "The parties have a dispute regarding the interpretation and application of Article 19 of the CBA," (ii) "the Lodge and LFUCG agreed all disputes regarding the interpretation and application of the CBA are subject to the mandatory grievance procedure identified in the CBA," (iii) LFUCG refused to arbitrate Sgt. Morrow's Grievance, contrary to the CBA's requirements, and (iv) LFUCG violated and materially breached the CBA by refusing to arbitrate Sgt. Morrow's Grievance.[15]

LFUCG's Answer and Counterclaim admitted numerical paragraph 4 of Appellants' Complaint, thus admitting "The Court holds subject matter jurisdiction of

[13] LFUCG Appellee Brief, pg. 4 (May 7, 2024).
[14] ROA, pg. 3-107.
[15] ROA, pg. 3-107.

this matter pursuant to KRS 67A.6908(3)."[16] Moreover, LFUCG alleged an "actual controversy" existed between the parties as it related to the parties' rights and obligations under the CBA and Self-Insurance Policy.[17] The "actual controversy" identified in LFUCG's Answer and Counterclaims *in inherent to the parties' disputes identified in the Grievance*.

LFUCG's argument that "no case or controversy existed between" the parties at the time Appellants filed their Complaint[18] should be rejected. It is undercut by LFUCG's express admissions and averments to the contrary. Moreover, it is wrong. An actual controversy existed between the parties at the time of Appellants' Complaint. The CBA requires LFUCG to negotiate grievances. Appellants submitted a Grievance, which raised disputes about the parties' obligations under the CBA. LFUCG breached its contractual obligation to negotiate such grievances through the grievance procedure, culminating in advisory arbitration. Appellants sued to enforce the CBA following LFUCG's refusal to negotiate the Grievance. The Court has jurisdiction to enforce the CBA under KRS 67A.6908(3).

CONCLUSION

The CBA is a contract. It requires LFUCG to negotiate all disputes about the contract through a grievance procedure. A dispute arose about the CBA. However, LFUCG did not follow its obligations to negotiate the dispute through the grievance procedure. The

[16] ROA, pg. 110-18. LFUCG also alleged in numerical paragraph 4 of its Counterclaims that the Court "holds subject matter jurisdiction of this matter pursuant to KRS 418.040 and KRS 67A.6908(3)."
[17] Appellants' Reply to Counterclaims admitted this allegation in numerical paragraph 27. ROA, pg. 309-14.
[18] LFUCG Appellee Brief, pg. 21 (May 7, 2024).

Court should vacate the Fayette Circuit Court's judgment against Appellants and remand this case for judgment in favor of Appellants with an order compelling the parties to negotiate the Grievance under the CBA.

Respectfully submitted,

MATTMILLER CROSBIE, PLLC

/s/ Eric C. Eaton
Hon. Scott A. Crosbie
Hon. Eric C. Eaton
Hon. Nicholas A. Oleson
COUNSEL FOR APPELLANTS

WORD-COUNT CERTIFICATE

The undersigned hereby certifies, pursuant to RAP 15(C), that this document complies with the word limit of RAP 31(G)(3)(b) because, excluding the parts of the document exempted by RAP 15(C), this document contains three thousand one hundred hundred thirty (3,130) words.

MATTMILLER CROSBIE, PLLC

/s/ Eric C. Eaton
Hon. Scott A. Crosbie
Hon. Eric C. Eaton
Hon. Nicholas A. Oleson
COUNSEL FOR APPELLANTS