COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-360

CITY OF LAWRENCE

vs.

LAWRENCE FIREFIGHTERS, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 146.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The city of Lawrence (city) brought an action in Superior Court seeking to vacate an arbitrator's decision construing the collective bargaining agreement (CBA) between the city and the Lawrence Firefighters, International Association of Firefighters, Local 146 (union). The city moved for judgment on the pleadings, which was allowed.[1] The union has appealed. Our review of a motion for judgment on the pleadings is de novo. Wheatley v. Massachusetts Insurers Insolvency Fund, 456 Mass. 594, 600 (2010).

The CBA between the parties provides that the city must require a fire watch detail at the site of any demolition work in the city. The CBA contains provisions requiring the city to

[1] The judge's order is titled as an order on the city's "motion for summary judgment," but the body of the decision correctly addresses the city's motion for judgment on the pleadings.

"act as custodian of the funds collected as a result of Fire Watch Duty" and to create an escrow account "for payment of all detail compensation to which members of the Lawrence Fire Department are entitled."

This case arose when an off-duty firefighter discovered that demolition was being done by the United States Environmental Protection Agency (EPA) at the Merrimack Paper Mill, a "Superfund" cleanup site. The firefighter informed the union president, who brought the matter to the attention of the city's fire chief. At some point the city's fire chief asked the EPA to hire a fire watch detail, but was informed by the EPA's on-site coordinator that a city could not require the EPA to do so and that it would not do so in this case. The union grieved the failure to utilize a fire watch detail at the demolition site, and eventually its claim was addressed in arbitration.

The arbitrator read the CBA to require the city to utilize fire watch details at every site of demolition work in the city. If the contractor would not agree to pay for the fire watch detail, the city itself had to pay for it. Specifically the arbitrator concluded that,

> "contrary to the City's contention, the mutually agreed-upon language does not condition the requirement of a fire watch detail upon a contractor's willingness to pay. The contract does not contain any language that [makes] fire watch detail activities contingent upon collected, or

> anticipated, funds. . . . The City's argument . . . overlooks a central element of Article XVII [of the CBA] -- the parties' mutual recognition of a public safety consideration. To address that concern, the City, 'in the interest of public safety' agreed it 'shall require fire watch details at all demolition activities . . . .' The contract language contains no caveats about, or conditions precedent with respect to, contractors' agreeing to pay for fire watch details. Instead, the contract reflects that the City has an enforceable contractual obligation to have fire watch details at all demolition activities."

As the arbitrator's remedy makes clear, she read the CBA to require the city to hire the detail itself if the demolishing entity refused to pay.

The arbitration statute provides for a very limited scope of judicial review: "An arbitrator's award may not be vacated" because of either "error of law or [an] error of fact." School Comm. of Waltham v. Waltham Educators Ass'n, 398 Mass. 703, 705 (1986). "Absent fraud, the court's inquiry is confined to the question whether the arbitrator exceeded the scope of his reference or awarded relief in excess of his authority." Id. "An arbitrator exceeds his or her authority by granting relief that is beyond the scope of the arbitration agreement, beyond that to which the parties bound themselves, or prohibited by law." Katz, Nannis & Solomon, P.C. v. Levine, 473 Mass. 784, 795 (2016). Thus, to begin, regardless of how we might have construed the CBA, it is clear that the arbitrator's conclusions of law, such as this authoritative construction of the CBA, are not subject to review for error by this court and we must accept

them for purposes of our decision. See School Comm. of Lexington v. Zagaeski, 469 Mass. 104, 110 (2014).

The city's primary argument is that the award must be vacated because it requires something that is prohibited by law. The city's argument, however, proceeds from the incorrect premise that "the Arbitrator issued a decision that determined that the City had violated the CBA because it failed to require EPA to hire a fire detail" (emphasis added). The city asserts that requiring the EPA to hire a fire watch detail amounts to requiring the EPA to obtain a permit to undertake its remediation project, and that this violates the Federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which provides in part that "[n]o Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section." 42 U.S.C. § 9621(e)(1) (2012).

We may assume without deciding that the city is correct that, as a matter of Federal law, the city is unable to require the EPA to hire fire watch details as a precondition to engaging in its remediation work. However, the arbitrator did not conclude that the city was required under the CBA to order the EPA to hire anyone. She construed the contract to require the

city to "have fire watch details at all demolition activities," even if the city had to pay for them itself. The city explicitly argues that that construction is wrong, and that by its terms the CBA binds the city to require the contractor to hire the fire watch details. Regardless of how we might have construed the CBA, the arbitrator's conclusions of law are not subject to review for error by this court, and we must accept them for purposes of our decision, even were we to disagree with them. See School Comm. of Lexington, 469 Mass. at 110.

The city does not argue that the mere posting of city firefighters, at the city's expense, in the form of a fire watch detail at, or adjacent to, the site of an EPA's demolition work, is prohibited by Federal law, nor did it argue this below.[2] Consequently we need not resolve the issue. And, as the facts found by the arbitrator and confirmed by counsel at oral argument make clear, the city never asked EPA officials at the site whether the city might post a fire watch detail at or adjacent to the site at the city's own expense. Consequently, the city's claim that the CBA as authoritatively construed by

[2] This is the only argument based on Federal law that the city made below, where it argued "the Award must be vacated because it purports to require the City to engage in an act prohibited to by law, that is, to 'require' the EPA to retain and pay for fire watch details during demolition activities at a superfund site where those activities are governed by CERCLA."

the arbitrator required the city to do something that it is prevented from doing as a matter of Federal law must fail.[3]

The city argues in the alternative, and the judge below found, that the expiration of a sixty-day period during which the arbitrator retained jurisdiction "for the sole purpose of resolving any remedial dispute" means that it is now impossible for any remedy to be ordered. The arbitrator, however, already ordered the remedy -- a make-whole remedy. The award requires the parties to agree on the amount. The parties are bound to comply with the arbitrator's order. Her retention of jurisdiction to resolve disputes as to amount does not render a make-whole award unenforceable.

To be sure, the parties have not yet agreed on an amount. They have not even discussed an amount. Rather, the city brought the instant action seeking to vacate the arbitrator's award ten days after it was issued. Should the parties ultimately be unable to agree upon an amount, the arbitrator will have to decide whether, as the union contends, the sixty-day period was stayed by the filing of this action and its pendency, or if she otherwise has jurisdiction to resolve any remaining issues between the parties. These are, however,

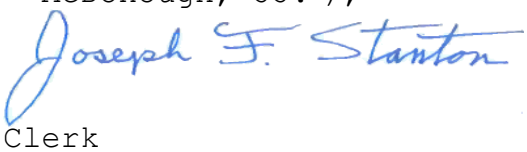
[3] This disposes as well of the city's argument that the award violates public policy.

questions for the arbitrator, not for this court.[4]

We reverse the judgment of the Superior Court vacating the arbitration award, and remand the case to the Superior Court for entry of a judgment confirming the arbitration award.

So ordered.

By the Court (Rubin, Milkey & McDonough, JJ.[5]),



Clerk

Entered: April 30, 2019.

[4] The city also argues that no funds have been appropriated to pay for such details. We are, however, reviewing a motion for judgment on the pleadings. Assuming without deciding that this panel may consider such an argument even when it could have been "determined conclusively by the arbitrator," Boston Teachers Union, Local 66 v. School Comm. of Boston, 370 Mass. 455, 465 (1976) -- and the city has not argued that it could not have been -- the amended complaint does not allege as a fact that there is a lack of uncommitted appropriated funds sufficient to pay for the remedy in this matter.

[5] The panelists are listed in order of seniority.