

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1943-09T1

STEVEN FLEMING,

Plaintiff-Appellant,

v.

STATE OF NEW JERSEY,
COLLEGE OF NEW JERSEY,

Defendant-Respondent.

Telephonically Argued January 6, 2011 –
Decided March 24, 2011

Before Judges Carchman and Messano.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2377-08.

Clifford D. Bidlingmaier, III, of the Pennsylvania Bar, admitted pro hac vice, argued the cause for appellant (Kardos, Rickles, Bidlingmaier & Bidlingmaier, attorneys; Frank M. Crivelli, on the brief).

Geri Benedetto, Deputy Attorney General, argued the cause for respondent (Paula T. Dow, Attorney General, attorney; Lewis A. Scheindlin, Assistant Attorney General, of counsel; Ms. Benedetto, on the brief).

PER CURIAM

Plaintiff Steven Fleming appeals from the Law Division's order that granted defendant, the State of New Jersey/The

College of New Jersey (TCNJ), summary judgment and confirmed an arbitration award previously entered in defendant's favor. We have considered the arguments raised in light of the record and applicable legal standards. We affirm.

Plaintiff was employed as a sergeant in the campus police force at TCNJ. On April 5, 2007, TCNJ served plaintiff with a "Preliminary Notice of Disciplinary Action" seeking his removal from office based upon charges of "Conduct Unbecoming a Public Employee," N.J.A.C. 4A:2-2.3(a)(6), and "Other Sufficient Cause," N.J.A.C. 4A:2-2.3(a)(11). The notice was accompanied by a letter advising plaintiff that this action was "based on information contained in a report prepared by the Mercer County Prosecutor's Office [the MCPO]," and further telling plaintiff that termination would be recommended "upon final disciplinary action."

The MCPO report included plaintiff's admission that he had "inject[ed] steroids on two occasions, January 9, 2007, and January 17, 2007." Plaintiff also refused "to identify the person who sold [him] the steroids."

A departmental hearing was held on May 31, at which plaintiff was present and accompanied by his union representative. See N.J.A.C. 4A:2-2.6 ("Hearings before the appointing authority"). By letter to Vivian Fernandez, TCNJ's

Associate Vice President of Human Resources, dated June 15, the hearing officer, Matthew Manfra, sustained the preliminary decision to remove plaintiff. Manfra specifically noted that plaintiff contended the disciplinary charges were not brought "within forty-five days." However, Manfra advised Fernandez "that the appointing authority . . . was not made reasonably aware of [plaintiff's] potential infraction until March 29, 2007. That was the date of the letter sent from the [MCPO] to [TCNJ]."

On June 18, Fernandez advised plaintiff in writing that she concurred with Manfra's recommendations. She enclosed a "Final Notice of Disciplinary Action" that sustained both charges contained in the specifications and removed plaintiff from office effective April 5, 2007. Fernandez further advised plaintiff to review the matter with his union representative since the collective bargaining agreement "contain[ed] a provision regarding disciplinary matters."

On June 19, 2007, the union filed a grievance on plaintiff's behalf and requested the matter be scheduled for arbitration under the terms of the collective bargaining agreement. Plaintiff presented only one issue in the grievance, specifically that the union contract required that "all disciplinary charges shall be brought within 45 days of the

appointing authority reasonably becoming aware of the offense." Plaintiff contended that TCNJ did not comply with this requirement and the charges should be dismissed.

An arbitrator was mutually chosen by the parties, and hearings were held on January 17 and 31, 2008, at which a number of witnesses testified. On June 6, 2008, the arbitrator issued an extensive, written opinion and entered an award in TCNJ's favor. We recite some of the factual findings and legal conclusions reached by the arbitrator because they place plaintiff's arguments in the proper context.

TCNJ adopted a mandatory drug testing policy to which plaintiff was subject. The policy complied with the Attorney General's and the MCPO's guidelines on random drug testing for law enforcement officers.

On January 14, 2007, TCNJ Patrol Officer Claude Mastrosimone and Detective Carlos Santiago were reviewing videotape footage of a traffic stop that occurred on campus that day. At some point, they rewound the tape back to January 10. Although they were unable to see plaintiff on the tape because it was after nightfall, Mastrosimone and Santiago heard a conversation between plaintiff and a campus security guard. Plaintiff stated "that he had received a shot from his friend," and that "he ha[d] to do a total of ten . . . shots."

Mastrosimone and Santiago believed plaintiff was referring to steroids.

On January 15, they spoke to Lt. James Lopez, the ranking officer of TCNJ's police force, who indicated that he would bring the matter to the attention of the MCPO. Lopez instructed the officers to maintain confidentiality in the matter, that he intended to treat it as an internal affairs investigation, and that he would be interviewing them. Lopez apparently tried to contact an assistant prosecutor at the MCPO on two occasions, but was unsuccessful, leaving only voice-mails.

By February 7, 2007, Mastrosimone, who had become concerned since Lopez had not interviewed him, decided to contact his brother-in-law, who worked at the MCPO. Mastrosimone was told to contact Assistant Prosecutor William Zarling. Mastrosimone spoke with Zarling on February 12, 2007, and both he and Santiago met with Zarling and Lieutenant Robert Dispoto at the MCPO on February 15 to discuss the incident. Dispoto took statements from both officers on February 17.

On February 21, Zarling called Lopez "to discuss generic internal affairs issues." During that conversation, Lopez advised Zarling of the videotape, and Zarling told Lopez that he should have involved the MCPO in the investigation. Lopez

indicated that he had tried to contact an assistant prosecutor earlier, but was unsuccessful.

Dispoto continued the investigation over the next several weeks. The County Prosecutor issued an order compelling plaintiff to submit a urine sample. On March 1, 2007, plaintiff was interviewed at TCNJ by Lopez and Dispoto.

After executing a "[u]se [i]mmunity" form prepared by the MCPO, plaintiff admitted receiving two injections of steroids, the last on January 17, and purchasing additional steroids from a person whose name he would not divulge. A urine sample plaintiff submitted was analyzed on March 19 as negative.

On March 29, in a letter to TCNJ's Vice President for Facilities Management, Construction and Campus Safety, Zarling advised that although "there [wa]s no doubt that Sergeant Fleming illegally purchased, possessed and used a controlled dangerous substance," the MCPO would not pursue criminal prosecution. He referred the matter to TCNJ "for appropriate administrative action aimed at the termination of [Fleming's] employment." That initiated the series of events outlined above.

Before the arbitrator, plaintiff contended that TCNJ violated Article XI, Section L(4) of the collective bargaining agreement, which provides: "All disciplinary charges shall be

brought within 45 days of the appointing authority reasonably becoming aware of the offense. In the absence of the institution of the charge within the 45 day time period, the charge shall be dismissed." Plaintiff also claimed that TCNJ violated N.J.S.A. 40A:14-147, which requires that disciplinary charges alleging a violation of a law enforcement agency's rules and regulations be filed within forty-five days of "the date on which the person filing the complaint obtained sufficient information to file [the charge]." Plaintiff further contended that Lopez, as the highest-ranking officer in the TCNJ police department, was the "appointing authority," and that he had sufficient information to file disciplinary charges as of January 15, 2007. TCNJ argued that Fernandez was the appointing authority and the charges were filed within 45 days of her receipt of the results of the MCPO investigation.

The arbitrator concluded that Lopez "cannot be considered the appointing authority at TCNJ," and that Fernandez was the appointing authority, defined in N.J.A.C. 4A:1-1.3 as "a person or group of persons having power of appointment or removal." The arbitrator discounted Lopez's testimony that he was the "[a]cting [c]hief," noting Lopez "was overwhelmed since becoming a Lieutenant in December of 2006, and offered no insight into the Appointing Authority position." The arbitrator further

noted that while Lopez might be empowered to impose discipline, it was undisputed that he lacked "the power to appoint or remove any employee." The arbitrator cited the Department of Personnel certification sent to plaintiff at the time of his appointment; it clearly indicated Fernandez was "the appointing authority." He concluded that TCNJ had not violated the collective bargaining agreement.

Plaintiff filed a complaint in the Law Division seeking to vacate the award; TCNJ filed an answer and counterclaimed seeking to confirm the award. Approximately one year later, TCNJ moved for summary judgment. After considering oral argument, the judge entered summary judgment in favor of TCNJ, dismissing plaintiff's complaint and affirming the arbitration award in its entirety. This appeal followed.

On appeal, plaintiff argues that the trial court erred in granting summary judgment and confirming the arbitral award because the arbitrator's decision as to who was the "appointing authority" was incorrect and violated public policy. As a result, since the charges were filed more than 45 days after Lopez became aware of plaintiff's misconduct, the award should have been vacated by the Law Division.

Our Supreme Court recently reiterated the general principles that guide our review.

New Jersey jurisprudence favors the use of arbitration to resolve labor-management disputes. . . . We have emphasized that [r]esolution through arbitration should be the end of the labor dispute, not a way-station on route to the courthouse. . . .

. . . .

In promoting a sense of finality, there is a strong preference for judicial confirmation of arbitration awards. Judicial review of an arbitration award is very limited, and the arbitrator's decision is not to be cast aside lightly. In the public sector, an arbitrator's award will be confirmed so long as the award is reasonably debatable. Consistent with the reasonably debatable standard, a reviewing court may not substitute its own judgment for that of the arbitrator, regardless of the court's view of the correctness of the arbitrator's interpretation.

[Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 275-77 (2010) (alteration in original) (citations and quotations omitted).]

A reviewing court may vacate an arbitration award for one of the four reasons set forth in N.J.S.A. 2A:24-8(a)-(d).¹ Id. at 277.

¹ N.J.S.A. 2A:24-8 provides:

The court shall vacate the award in any of the following cases:

- a. Where the award was procured by corruption, fraud or undue means;
- b. Where there was either evident partiality or corruption in the arbitrators . . . ;

(continued)

"In addition, . . . a court 'may vacate an award if it is contrary to existing law or public policy.'" Middletown Twp. PBA Local 124 v. Twp. of Middletown, 193 N.J. 1, 11 (2007) (quoting N.J. Tpk. Auth. v. Local 196, 190 N.J. 283, 294 (2007)). "'For purposes of judicial review of labor arbitration awards, public policy sufficient to vacate an award must be embodied in legislative enactments, administrative regulations, or legal precedents,' and may not be 'based on amorphous considerations of the common weal.'" Ibid. (quoting N.J. Tpk. Auth. v. Local 196, supra, 190 N.J. at 295). "[T]he public policy exception is triggered when 'a labor arbitration award -- not the grievant's conduct -- violates a clear mandate of public policy'" Ibid. (emphasis added) (quoting N.J. Tpk. Auth. v. Local 196, supra, 190 N.J. at 300).

(continued)

c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;

d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

"Reflecting the narrowness of the public policy exception, that standard for vacation will be met only in 'rare circumstances.'" N.J. Tpk. Auth. v. Local 196, supra, 190 N.J. at 294 (quoting Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc., 135 N.J. 349, 364 (1994)). "Assuming that the arbitrator's award accurately has identified, defined, and attempted to vindicate the pertinent public policy, courts should not disturb the award merely because of disagreements with arbitral fact findings or because the arbitrator's application of the public-policy principles to the underlying facts is imperfect." Weiss v. Carpenter, 143 N.J. 420, 443 (1996).

Applying these principles to this case, we conclude that plaintiff's argument lacks sufficient merit to warrant extensive discussion. R. 2:11-3(e)(1)(E). We add only the following.

N.J.A.C. 4A:1-1.3 defines "[a]ppointing authority" as "a person or group of persons having power of appointment or removal," and applies to "[a]ll appointing authorities and employees subject to title Title 11A," which governs state employees. N.J.A.C. 4A:1-1.2(a); N.J.S.A. 11A:1-2.

In support of the proposition that Lopez was the de facto appointing authority because he was the highest ranking officer in TCNJ's police force, plaintiff relies upon the Law Division's

decisions in Aristizibal v. Atl. City, 380 N.J. Super. 405 (Law Div. 2005), and Grubb v. Borough of Hightstown, 331 N.J. Super. 398 (Law Div. 2000), aff'd, 353 N.J. Super. 333 (App. Div. 2002). Both are inapposite to the issue presented.

In Aristizibal, supra, 380 N.J. Super. at 428-29, the judge premised her conclusion upon the interpretation of N.J.S.A. 40A:14-118, which provides that the "governing body of any municipality, by ordinance, may create . . . a police force" to be headed by "the chief of police, if such position is established." The statute, thereafter, sets forth the powers of the chief of police.

The court concluded that under the specific organizational scheme adopted by Atlantic City, the chief was in a position to initiate disciplinary charges against the plaintiffs/officers, and his failure to do so within the 45-day timeframe contained in N.J.S.A. 40A:14-147 required dismissal of the disciplinary charges.² Aristizibal, supra, 380 N.J. Super. at 433-35. In

² N.J.S.A. 40A:14-147 provides, in part:

A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. The 45-day time limit shall not apply if an investigation of a law

(continued)

this case, there is nothing to indicate that Lopez was designated by TCNJ to initiate disciplinary proceedings that could result in an officer's removal. In fact, the evidence before the arbitrator was to the contrary, and he so found.

The court in Grubb, supra, 331 N.J. Super. at 407, held:

N.J.S.A. 40A:14-147 requires a reasonable outcome. If there is a pending criminal prosecution or investigation of a police officer, the statute tolls the time in which the governing body must initiate administrative charges against that officer. By doing so, the statute permits the completion of the criminal prosecution, including grand jury and all appeals, before the governing body is required to initiate and file administrative charges.

The issue of who was the "appointing authority" was not before the Grubb court.³

(continued)

enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State. The 45-day limit shall begin on the day after the disposition of the criminal investigation.

(emphasis added).

³ TCNJ correctly notes that the MCPO was conducting a criminal investigation until it notified the school that it was declining prosecution. During that time, the statutory 45-day time frame contained in N.J.S.A. 40A:14-147 was tolled. See Grubb, supra, 331 N.J. Super. at 407. Thus, even if Lopez should have acted

(continued)

In short, the arbitrator's conclusion that Fernandez, not Lopez, possessed the "power of appointment or removal" over plaintiff, N.J.A.C. 4A:1-1.3, was not "contrary to existing law or public policy." Middletown Twp. PBA Local 124, supra, 193 N.J. at 11 (citation and quotation omitted). Pursuant to the collective bargaining agreement in place, the "disciplinary charges [were] brought within 45 days of the appointing authority reasonably becoming aware of the offense." The judge correctly granted TCNJ summary judgment and affirmed the arbitral decision.

Affirmed.⁴

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

(continued)

sooner, the public policy goals of the statute were not subverted.

⁴ In a separate point in his brief, plaintiff notes that the charge of "insubordination," based upon his failure to divulge the name of his supplier during the Disputo interview, was not substantiated. He claims this demonstrates that TCNJ was aware that the 45-day clock was running and that it needed to file this charge to forestall dismissal. There is nothing in the record to substantiate the argument.