NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5039-09T1

CITY OF NEWARK,

Plaintiff-Appellant,

v.

SERVICE EMPLOYEES'
INTERNATIONAL UNION (LOCAL 617),

Defendant-Respondent.

Argued March 15, 2011 – Decided May 2, 2011

Before Judges Carchman and Waugh.

On appeal from the Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C-55-10.

Steven F. Olivo, Assistant Corporation Counsel, argued the cause for appellant (Anna Pereira, Corporation Counsel, attorney; Mr. Olivo and Angela G. Foster, on the brief).

Arnold S. Cohen argued the cause for respondent (Oxfeld Cohen, P.C., attorneys; Mr. Cohen, of counsel and on the brief).

PER CURIAM

Plaintiff City of Newark appeals from an order of the Chancery Division denying its claim for relief seeking to vacate

an arbitration award. Specifically, the arbitrator concluded that plaintiff was in violation of the collective bargaining agreement (CBA), entered into with defendant Service Employees International Union 617, by failing to render a disciplinary decision within the timeframe set forth in CBA. Judge Harriet Klein in the Chancery Division confirmed and enforced the award. We affirm substantially for the reasons set forth in Judge Klein's thorough and thoughtful oral opinion of April 20, 2010.

These are the relevant facts in what appears to be an ongoing dispute between plaintiff and defendant regarding this contract provision. Plaintiff and defendant entered into a CBA covering the period from January 1, 2008 through December 31, 2011. Included in the CBA was a framework for disciplining employees. Under Article VIII, "work performance problem[s] or misconduct" may be addressed by a conference between the parties, a "[w]ritten [r]eprimand[,]" or resolved through a hearing. The CBA further provides:

> In the event an employee is given an immediate suspension, that employee has five (5) business days after receipt of such notice to request a hearing. Where such a request is made, the City shall have ten (10) business days to schedule a hearing.
>
> All major disciplinary actions shall proceed through the hearing procedures provided by Civil Service Statutes, Merit System Board and the Office of Administrative Law Rules and Regulations. Arbitration of a grievance

> or Civil Service hearing procedure shall not operate as a stay of the suspension or discharge except as provided by Civil Service Rules and Regulations.
>
> <u>If any employee has a major disciplinary action hearing, the decision of the Hearing Officer shall be rendered within thirty (30) days.</u>
>
> [Emphasis added.]

In addition to the formal process for disciplinary matters, the CBA also delineates a method for filing "grievance[s]" between plaintiff and defendant. Article VII defines a grievance as a "controversy arising over the interpretation or adherence to the terms and conditions of th[e] [a]greement" and mandates procedural "steps" prior to filing a formal grievance. Should the described procedure prove unavailing to resolve the dispute, the parties "may . . . request arbitration." The contract also "bound" the arbitrator to "the provisions of th[e] [a]greement" and denied the arbitrator "the authority to add to, modify, detract from or alter in any way th[ose] provisions . . . ." The parties further agreed to designate the CBA as a "complete and final understanding . . . of all bargainable issues . . . ."

Soon after the CBA was signed, two events involving alleged misconduct by employees triggered the CBA's provisions governing disciplinary action. On August 6, 2008, Kim Greene, manager of

the Division of Sanitation, observed a laborer, Ernest Manning, "driving . . . a refuse truck" even though "he had not completed his CDL requirement[s] [for a driving license]." Greene then organized a disciplinary meeting with Manning to discuss this alleged unauthorized driving; however, Manning informed another supervisor that he "w[ould] not [be] showing up to the meeting" unless his "union representative" accompanied him. Manning did not attend the scheduled meetings.

The City then filed a "[p]reliminary [n]otice of [d]isciplinary [a]ction" against Manning and charged him with "[c]onduct unbecoming a public employee"; '[m]isuse of public property, including [a] motor vehicle"; and "[o]ther sufficient cause[s]," N.J.A.C. 4A:2-2.3. On September 23, the City sent a letter to Manning advising that a hearing had been scheduled for a week later and informing him that he had the right to bring his "union for representation [to] the hearing." On September 30, a hearing was held before a hearing officer appointed by plaintiff. Plaintiff's counsel and several division employees attended. Testimony was received, and the issues were submitted to the hearing officer.[1]

[1] We need not discuss in any detail the merits of the respective disciplinary proceedings.

At the same time as Manning's violations, plaintiff began investigating the misconduct of another employee, James Walker. On October 6 and October 7, 2008, Walker allegedly "failed to notify his supervisor that he would not be at work" and had not "call[ed] in." A week later, Walker refused to stay late and "help finish another area[]," noting instead that "[n]obody help[ed] [him]." On October 6, plaintiff filed a preliminary notice of disciplinary action against Walker and charged him with "[i]nsubordination"; "excessive absenteeism or lateness"; and "[n]eglect of duty." Walker requested a hearing.

On December 10, 2008, a disciplinary hearing was held for Walker before a hearing officer appointed by plaintiff. Testimony was received, and the hearing was concluded that day.

Although Manning's hearing concluded on September 30, 2008 and Walker's on December 10, 2008, the presiding hearing officers did not issue their decisions until January 26, 2009 as to Manning and January 30, 2009 as to Walker. In the first instance, the hearing officer recommended a ten-day suspension as to Manning, and the hearing officer recommended a two-day suspension as to Walker. On January 30 and February 6, final notices of disciplinary actions were instituted for Walker and Manning, respectively, with plaintiff opting to increase Walker's suspension time from two to ten days.

After the final notices were issued, defendant filed a grievance alleging that plaintiff had breached the collective bargaining agreement. Specifically, defendant alleged the City "[v]iolated the . . . [a]greement by not rend[er]ing a decision" within thirty days, as prescribed by the contract, for both Manning and Walker, and demanded that "all charges . . . be dismissed . . . ." The parties agreed to submit the matter to arbitration to resolve the dispute.

A hearing was held before Arbitrator Frances S. Dunham to evaluate the merits of the breach of contract grievance. According to the limited record created by the arbitrator, Dunham heard testimony and rendered her decision that the plaintiff had breached the CBA. In her opinion, the arbitrator first articulated the two issues before her: whether there was a contractual breach and, if so, "[w]hat [would] [b]e [t]he [r]emedy, if [a]ny[.]" The arbitrator concluded that plaintiff had violated the agreement and further concluded that absent any definitive remedy set forth in the CBA, the remedy would be dismissal of the charges.

Plaintiff then filed a complaint in the Chancery Division alleging the arbitrator had "exceeded [her] power" and demanded her decision be vacated. Plaintiff argued that there was no jurisdiction and the remedy had been "pulled . . . out of thin

air." As to jurisdiction, plaintiff claimed that defendant cannot "short circuit . . . the Civil Service Commission" by taking a disciplinary action straight to arbitration. As to remedy, plaintiff asserted that because the "four corners of the contract" "d[id]n't set forth a remedy for either a late hearing officer's decision or a late file notice for disciplinary action," the arbitrator should not be able to "make up a remedy, especially not one this harsh . . . ."

In her decision, Judge Klein first noted that an "arbitration award carries a strong judicial presumption of validity," and the challenging party has a "heavy burden to demonstrate its inappropriateness." She then underscored the few exceptions under N.J.S.A. 2A:24-8, in which an arbitrator's award may be vacated and determined that none of them applied, especially considering it was undisputed by either party that the decisions were "rendered more than 30 days after the hearing[s]." The judge concluded:

> [T]he parties [had] engaged the arbitrator in this case . . . to do an interpretation of the collective bargaining agreement. That is certainly part and parcel of an arbitrator's function and it has to be said that it is the arbitrator's construction of the language that is bargained for when you insert language in a collective bargaining agreement that allows for this type of procedure.

> The arbitrator, although not engaging in any lengthy explanation, did certainly refer to the relevant contract provisions . . . and she issued an award that was consistent with the language of the . . . agreement.

The judge further supported the arbitrator's decision to "seize[]" upon the mandatory usage of the word "shall" in the agreement that explicitly meant the City had to render a decision within thirty days. The judge concluded that the arbitrator had the authority to fashion a remedy and noted that if the arbitrator had not, the "violation would [have] be[en] irrelevant and . . . nugatory language" and the arbitrator correctly filled a gap in the words of the agreement. As to jurisdiction, the judge concluded that the award "really wasn't a decision on the merits of the discipline itself," and emphasized that previous Public Employment Relations Commissions (PERC) cases had deemed this an appropriate issue for arbitration. The judge dismissed the complaint and confirmed the award.

This appeal followed.

On appeal, plaintiff renews its arguments and asserts that the arbitrator had no authority to review the dispute or fashion a remedy. We have carefully reviewed the record and conclude that plaintiff's arguments are without merit. As we previously

noted, we affirm substantially for the reasons set forth by Judge Klein in her oral opinion. We add the following comments.

As both we and the judge observed, the issues in dispute are not new to these parties. In at least two scope of negotiations decisions, PERC has determined that the procedural issue of the hearing officers' obligation to render a decision in a major disciplinary matter within 30 days was a negotiable issue. See City of Newark v. Serv. Emps. Int'l Union, Local 617, P.E.R.C. No. SN-2006-090 (September 28, 2006) (holding that the time frames for disciplinary determinations are negotiable); City of Newark v. Serv. Emps. Int'l Union, Local 617, P.E.R.C. No. SN-2008-064 (August 7, 2008) (holding that a civil penalty did not preempt an alleged procedural violation, and was therefore arbitrable).

In both instances, PERC and the parties recognized that the issue of the mandate to render a decision within 30 days was procedural, and it was inappropriate for an arbitration to address the merits of the discipline. This is consistent with statutory and case law. While binding arbitration is generally prohibited for "disputes involving the major discipline of any public employee" unless expressly agreed upon by the parties, N.J.S.A. 34:13A-5.3, the arbitration of "'procedures related to the timeliness of disciplinary charges . . . are mandatorily

negotiable.'" Cnty. of Monmouth v. Comm'ns Workers of Am., 300 N.J. Super. 272, 296 (App. Div. 1997) (quoting City of E. Orange & PBA Local 16, P.E.R.C. No. 97-85 (January 31, 1997)). See also Camden Bd. of Educ. v. Alexander, 181 N.J. 187, 217 (2004) (supporting "arbitration [on] a claim which on its face is governed by the [collective bargaining agreement]" and is not necessarily on "the merits of the actual dispute").

The thrust of plaintiff's argument is that the arbitrator did not have the authority to fashion a remedy, and she exceeded her powers by doing so.

In this regard, we restate certain basic principles applying to arbitration proceedings. "New Jersey jurisprudence favors 'the use of arbitration to resolve labor-management disputes.'" Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 275-76 (2010) (quoting N.J. Tpk. Auth. v. Local 196, I.F.P.T.E., 190 N.J. 283, 291 (2007)). Courts "have emphasized that [r]esolution through arbitration should be the end of the labor dispute, not a way-station on route to the courthouse." Id. at 276 (alteration in original) (citation and quotations omitted). "Arbitration is viewed favorably by [the] courts," Ukrainian Nat'l Urban Renewal Corp. v. Joseph L. Muscarelle, Inc., 151 N.J. Super. 386, 396 (App. Div.), certif. denied, 75 N.J. 529 (1977), and "there is 'a strong preference

for judicial confirmation of arbitration awards.'" Linden Bd. of Educ., supra, 202 N.J. at 276 (quoting Middletown Twp. PBA Local 124 v. Twp. of Middletown, 193 N.J. 1, 10 (2007)).

Consequently, "[j]udicial review of an [arbitration] award is extremely narrow," Daly v. Komline-Sanderson Eng'g Corp., 40 N.J. 175, 178 (1963), and may only be set aside if the award meets one of the four reasons articulated in N.J.S.A. 2A:24-8(a)-(d). Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208, 220 (1979). Those exceptions are:

> a. Where the award was procured by corruption, fraud or undue means;
>
> b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
>
> 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.
>
> [N.J.S.A. 2A:24-8(a)-(d).]

"[A] party seeking to vacate [an arbitration award] bears a heavy burden" given the "presumption in favor of . . . validity." Del Piano v. Merrill Lynch, Pierce, Fenner & Smith,

Inc., 372 N.J. Super. 503, 510 (App. Div. 2004), certif. granted, 183 N.J. 218, appeal dismissed, 195 N.J. 512 (2005).

Where the interpretation of an agreement is at issue, "the scope of judicial review is limited to determining whether or not the interpretation of the contractual language is reasonably debatable." Kearny PBA Local #21, supra, 81 N.J. at 221. "Under [this] 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." N.J. Transit Bus Operations, Inc. v. Amalgamated Transit Union, 187 N.J. 546, 554 (2006). In applying this "deferential standard of review," in the event an "arbitrator's interpretation . . . is reasonably debatable, a reviewing court is duty-bound to enforce it." Id. at 548 (internal quotation marks and citations omitted). See Carpenter v. Bloomer, 54 N.J. Super. 157, 168 (App. Div. 1959) (discouraging courts from "set[ting] aside [an award] merely because the court would have decided the facts or construed the law differently"); State of N.J. Dep't of Corr. v. Int'l Fed'n of Prof'l & Technical Eng'rs, Local 195, 169 N.J. 505, 514 (2001) (quoting W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum Plastic Workers, 461 U.S. 757, 764, 103 S. Ct. 2177, 2182, 76 L. Ed. 2d 298, 306 (1983))

(internal quotation marks omitted) (instructing a court to "enforce the award" where "the arbitral decision . . . dra[ws] its essence from the collective bargaining agreement").

Here, plaintiff contends the arbitrator overstepped her authority by devising a remedy that was not expressly defined in the CBA. As Judge Klein noted, Dunham "referr[ed] to the relevant contract provisions, . . . and issued an award that was consistent with the [CBA's] language . . . ." Specifically, Dunham framed her written opinion by applying the following provision:

> The arbitrator shall be bound by the provisions of th[e] [a]greement and restricted to the applications of the facts involved in the grievance as presented to him/her. The arbitrator shall not have the authority to add to, modify, detract from or alter in any the provisions of the [a]greement or any amendment or supplement thereto.

She then referenced the agreement's requirement that, where a hearing is held for a "major disciplinary action[,]" "the decision of the Hearing Officer <u>shall</u> be rendered within thirty (30) days." (Emphasis added.) Here, there was no issue that the hearing officers violated this provision, and plaintiff does not dispute that fact. But because the CBA did not set forth a remedy for untimely hearings, Dunham fashioned a remedy that was

consistent with the parties' intent and gave substance to the failure to adhere to the CBA's mandates.

While courts uniformly discourage an arbitrator from altering or "contradict[ing] the express language of the [CBA,]" Local No. 153, Office & Prof'ls Emps. Int'l Union v. Trust Co. of N.J., 105 N.J. 442, 452 (1987), they do delegate arbitrators with the power to "fill in . . . gap[s] and give meaning to [vague] term[s]." Linden Bd. of Educ., supra, 202 N.J. at 277 (noting that it is within an arbitrator's powers to "fashion and impose an appropriate remedy," especially where "the parties [have] asked" the arbitrator to do so). As the Court articulated in Local No. 153, supra, 105 N.J. at 452 (emphasis added), "a rigid rule that an arbitrator's remedy must be expressly authorized by the bargaining agreement would subvert the purposes of arbitration." Moreover, if "an arbitrator performs this gap-filling function, he is [not] impermissibly adding to the terms of the agreement" because it is the "arbitrator's construction that is bargained for in the collective bargaining process." Ibid. (citation and quotations omitted).

Dunham did not exceed her authority by imposing a remedy for the plaintiff's failure to render a timely decision. As Judge Klein stated, if Dunham had not nullified the suspension

orders, then the provision at issue "would be irrelevant and . . . nugatory language." The parties bargained for a timely resolution of these issues. There is little point to bargain for a provision that demands time-sensitive hearings but offers no other recourse to an employee should the plaintiff delay in issuing a final decision on disciplinary actions, knowing that the employee's "fate is hanging in the balance." Plaintiff's excuse of "unartful drafting" cannot preclude the arbitrator from discerning the parties' intent when incorporating this provision into the contract. The arbitrator did not step outside the "four corners of the contract" to do so. Rather, she "dr[ew] [from the agreement's] essence," State of N.J. Dep't of Corr., supra, 169 N.J. at 514 (citation and quotations omitted), and concluded that the provision was written was to ensure employees would only have to wait a finite timeframe for any disciplinary decisions. Her conclusion is both sound and "reasonably debatable."[2]

We conclude that there is no basis for our intervention, and we affirm.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION

[2] Plaintiff dwells on the fact that another arbitrator in another case reached a different conclusion. We afford that conflict little weight and suggest that it validates that the conclusions were "reasonably debatable."