

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3741-09T2

POLICEMAN'S BENEVOLENT
ASSOCIATION, LOCAL 124,

Plaintiff-Appellant,

v.

TOWNSHIP OF MIDDLETOWN,

Defendant-Respondent.

Submitted December 14, 2010 - Decided May 6, 2011

By Judges Parrillo, Espinosa and Skillman.

On appeal from the Superior Court of New
Jersey, Law Division, Monmouth County, Docket
No. L-4343-09.

Mets Schiro & McGovern, LLP, attorneys for
appellant (Kevin P. McGovern, of counsel and
on the brief).

Bernard M. Reilly, LLC, attorneys for
respondent (Mr. Reilly, on the brief).

PER CURIAM

An arbitrator found defendant Township of Middletown (the
Township) violated the terms of a collective bargaining
agreement by failing to pay overtime to police officers who
appeared, without notice to the Township, at a colleague's

disciplinary hearing. However, the arbitrator also reached an apparently inconsistent conclusion that the Township was not required to pay the officers overtime. Plaintiff Policemen's Benevolent Association, Local 124 (PBA) appeals from the latter conclusion in the arbitration decision and an order confirming the arbitration award, arguing the arbitrator exceeded his authority. For the reasons that follow, we affirm.

The Township served Sergeant William Colangelo with preliminary notice for a minor disciplinary action, seeking to impose a minor discipline that included a fine of approximately \$250, the estimated cost to the Township for reimbursing the towing costs of a motorist whose vehicle was ordered towed in violation of Middletown Police Department (the Department) rules. Sergeant Colangelo requested an internal hearing before the Township Administrator. Sergeant Colangelo asked four other officers, Bernard Chenoweth, Kimberly Best, Adam Colfer and Larry Schachtel (collectively, the grievants), to testify on his behalf at the hearing at the Township Municipal Building on April 25, 2007. Sergeant Colangelo told the grievants, each of whom was scheduled to be off-duty that day, that the Superior Officers' Association (SOA) attorney would have subpoenas available for them on the morning of the hearing.

The grievants appeared as requested but the SOA attorney did not have subpoenas for them. They were told that subpoenas would be faxed to them that afternoon after the attorney returned to his office. The grievants waited in the officers' room to be called as witnesses but their testimony was not needed because the Township and Sergeant Colangelo settled the disciplinary matter. They received the subpoenas that afternoon and submitted them in support of requests for overtime.

Relevant provisions of the collective bargaining agreement between the Township and the PBA (the Agreement) state in pertinent part:

ARTICLE XI - OVERTIME

B. Employees shall not be paid overtime for hours of work in excess of the normal day unless such overtime is authorized by the Chief of police or the officer in charge of the shift.

. . .

F. Any employee, including detectives, whose presence shall be required in any court, including Municipal, County, Superior or any Administrative hearing in the Department of Motor Vehicles, at a time other than when they are on duty, shall be paid for that time at the rate of time-and-one-half (1 1/2). This shall include officers responding to their own complaints, as witnesses at the direction of their superior officers or the Chief Of Police, and in response to subpoenas from any court, on call attendance in court, in lieu of subpoenas, arraigned either by the

Prosecutor's Office, Superior Officers of the Department, the Chief of Police or attorneys representing parties in civil litigation, criminal prosecution or defense or administrative hearings. For court time, no less than four (4) hours. If called in, employees shall be paid no less than four (4) hours.

The Township denied the grievants any payment for their attendance. The PBA filed a grievance on behalf of the four officers, alleging a violation of Article XI - Overtime, ¶ F, and demanding payment of four hours pay at overtime rates for responding to Sergeant Colangelo's request. After the grievances were denied by the Township in the internal steps of the contractual grievance procedure, the PBA filed for binding arbitration pursuant to the Agreement.

In his opinion, the arbitrator summarized the testimony at the hearing. The Chief of Police, Robert Oches, testified the grievants failed to comply with the requirement of Department Rules and Regulations, 4.12.7, to notify him immediately regarding the subpoena.¹ According to Chief Oches, his office

¹ Department Rules and Regulations, 4.12.7 states:

Employees shall not volunteer to testify in civil actions arising out of department employment and shall not testify unless subpoenaed. If the subpoena arises out of department employment or if employees are informed that they are a party to a civil action arising out of department employment,

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frequently communicated with an attorney concerning the necessity for subpoenaed officers to appear to testify. Because a settlement of the proposed discipline had already been discussed prior to the hearing date, the Chief did not believe a hearing would be necessary. If he had received prior notice of the request for the officers to appear, he believed his office would have contacted the SOA attorney to inquire regarding the need for their appearance and that it was likely the SOA attorney would have agreed their appearance was unnecessary. Chief Oches testified the applications for overtime were denied because the grievants did not submit the subpoenas or request overtime in advance.

PBA President Chenoweth testified that the practice in the department was that officers subpoenaed for an appearance on a day on which they were scheduled to be off-duty were not required to give advance notice of the appearance.

The arbitrator found the matter governed by Article XI, ¶ F of the Agreement, and concluded that the Township was contractually obligated to honor subpoenas by attorneys in administrative disciplinary proceedings pursuant to the second

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they shall notify immediately, the Chief of Police.

sentence, which requires overtime to be paid for a "response to subpoenas from any court, on call attendance in court, in lieu of subpoena arraigned (i.e., called before the court) by . . . attorneys representing parties on civil litigation, criminal prosecution or defense or administrative hearing." The arbitrator rejected the Township's argument that the subpoenas issued for a police disciplinary hearing are not binding because the agreement did not limit the payment of overtime to responses to lawful subpoenas. The arbitrator also discounted the fact that no subpoenas were served prior to the settlement of the matter, finding it a common practice for witnesses to be advised that subpoenas would be served on the day of a hearing and the failure to so serve was not due to any fault of the officers.

Although the arbitrator found the Township had violated the Agreement by failing to pay overtime to the grievants, the arbitrator also concluded that such violation did not warrant the remedy sought. The arbitrator found it significant that the subpoenas were not for a routine court matter but for a matter arising out of department employment, which triggered the requirement under ¶ 4.12.7 of the Department's Rules and Regulations that officers immediately notify the Chief of Police if subpoenaed in such matters. The arbitrator stated the Chief had the right to know who was subpoenaed and found credible his

testimony that it was likely an agreement would have been reached, obviating the need for the grievants to appear, if he had notice of the subpoenas. The arbitrator concluded he would not order the Township to pay the grievants overtime because they failed to notify the department of the subpoenas.

The PBA filed a complaint, seeking to vacate the arbitration award. The Township filed an answer and counterclaim, seeking to confirm and/or modify the award. Both parties filed motions for summary judgment. The trial court granted the Township's motion to confirm the award and denied the PBA's motion.

In this appeal, the PBA presents the following issues for our consideration:

POINT I

ARBITRATOR GERBER'S AWARD OF JUNE 6, 2009 MUST BE VACATED BECAUSE HE EXCEEDED THE AUTHORITY DELEGATED TO HIM BY THE PARTIES IN VIOLATION OF N.J.S.A. 2A:24-8

(a) BY THE LOOKING BEYOND THE "FOUR CORNERS OF THE CONTRACT" IN RENDERING HIS AWARD, ARBITRATOR GERBER EXCEEDED HIS AUTHORITY IN VIOLATION OF N.J.S.A. 2A:24-8(d)

(b) ARBITRATOR GERBER EXCEEDED HIS AUTHORITY PURSUANT TO N.J.S.A. 2A:24-8(d) BY AMENDING THE AGREEMENT TO INCORPORATE RULE 4.12.7 WITHIN ARTICLE XI, SECTION F

POINT II

THE TRIAL COURT COMMITTED
REVERSIBLE ERROR BY SUBSTITUTING
ITS OWN JUDGMENT FOR THAT OF THE
ARBITRATOR WITH RESPECT TO THE
INTERPRETATION OF THE UNDERLYING
CONTRACT

Our review of an arbitration award is very limited. There is "a strong preference for judicial confirmation of arbitration awards," Middletown Twp. PBA Local 124 v. Twp. of Middletown, 193 N.J. 1, 10 (2007) (citation and internal quotation marks omitted), and "the arbitrator's decision is not to be cast aside lightly." Bd. of Educ. of Alpha v. Alpha Educ. Ass'n., 190 N.J. 34, 42 (2006). In the public sector, an arbitrator's award will be confirmed "so long as the award is reasonably debatable." Linden Bd of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 276 (2010); Middletown Twp. PBA Local 124, supra, 193 N.J. at 11.

The statutory grounds upon which a reviewing court may vacate an arbitration award are set forth in N.J.S.A. 2A:24-8:

- 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.

The PBA asserts the arbitration award should be vacated pursuant to N.J.S.A. 2A:24-8(d) because the arbitrator exceeded the authority granted to him by the Agreement. The Agreement provides the source and limits of the arbitrator's authority:

When parties have agreed, through a contract, on a defined set of rules that are to govern the arbitration process, an arbitrator exceeds his powers when he ignores the limited authority that the contract confers. The scope of an arbitrator's authority depends on the terms of the contract between the parties.

[Cnty. College of Morris Staff Assoc. v. Cnty. College of Morris, 100 N.J. 383, 391 (1985).]

An arbitrator may not, therefore, "disregard the terms of the parties' agreement" or "rewrite the contract for the parties." Ibid.; see also Commc'ns Workers of Am. v. Monmouth Cnty. Bd. of Soc. Servs., 96 N.J. 442, 448 (1984) (noting that when contractual limits on arbitral authority are not heeded, arbitrator exceeds his powers). To be enforced, the award must "draw[] its essence from the collective bargaining agreement." United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363

U.S. 593, 597, 80 S. Ct. 1358, 1361, 4 L. Ed. 2d 1424, 1428 (1960); Cnty. College of Morris Staff Assoc., supra, 100 N.J. at 391-92; Belardinelli v. Werner Cont'l., Inc., 128 N.J. Super. 1, 7 (App. Div. 1974).

Article XXII, ¶ C of the Agreement describes the authority granted to the arbitrator here as follows:

The arbitrator shall be bound by the provisions of this agreement and restricted to the application of the facts presented to him involving the grievance. The arbitrator shall also be bound by applicable Federal and State law in cases. He shall have no authority to add to, modify, detract from, or alter in any way the provisions of this agreement or any amendment or supplement thereto.

The PBA argues the arbitrator exceeded his authority in two ways: by looking beyond the four corners of the Agreement to the departmental rules and by rewriting the Agreement to make compliance with departmental rules a pre-condition to the payment of overtime.

The PBA² does not challenge that part of the arbitrator's decision that concluded:

Nothing in Article XI states that officers must, as a pre-condition to the payment of overtime, notify the Chief of Police if they are subpoenaed. When the Township failed to

² Although the Township's brief includes arguments regarding the validity and service of the subpoenas, the Township has not appealed and so, those issues are not before us.

pay overtime to the grievants it violated the Agreement.

As a result, we need not review this conclusion to determine whether it is a reasonably debatable interpretation of the agreement. The PBA's challenge is directed to the arbitrator's later, seemingly inconsistent, conclusion:

Although the Township was contractually obligated to honor the subpoenas, the grievants were also obligated to notify the department of the subpoenas. In light of the officers' failure to follow the established rules and regulations of the department, I will not order the Township to pay the grievants overtime.

Our review is therefore limited to whether this conclusion represents a reasonably debatable interpretation of the Agreement.

Although the arbitrator may not contradict unambiguous language in the Agreement, he is not limited to a perfunctory application of Article XI, ¶ F, in isolation and without consideration of other provisions in the Agreement. It is his construction of the Agreement as a whole that is bargained for by the parties. Policemen's Benevolent Ass'n. Local No. 11 v. City of Trenton, ___ N.J. ___, ___ (2011) (slip op. at 10); Linden Bd. of Educ., supra, 202 N.J. at 276. Moreover, where a term is not defined, an arbitrator may "fill in the gap and give meaning to that term." Id. at 277.

The arbitrator identified two paragraphs of Article XI as pertinent to the issues to be decided. Paragraph B explicitly subjects the right to receive overtime payment to the authorization of the Chief of Police as it states unambiguously, "Employees shall not be paid overtime . . . unless such overtime is authorized by the Chief of Police or the officer in charge of the shift." Paragraph F establishes that any employee whose presence is required in court when not on duty shall be paid at the rate of time and a half. As the arbitrator noted, Paragraph F does not explicitly state that the employee must obtain the authorization of the Chief before appearing in court. However, more important, there is nothing in this paragraph that exempts the employee from the limitation imposed by Paragraph B, that no overtime will be paid unless authorized by the Chief of Police or officer in charge. And, obviously, there can be no authorization without notice.

To read Paragraph F as the PBA argues, to the exclusion of Paragraph B, would effectively cede a significant management prerogative, the control of overtime payments, to the individual officer without any recourse for management. This interpretation conflicts not only with Paragraph B but also with Article XXIX, ¶ A2 of the Management Rights Clause, which recognizes that the Township has retained and reserved the right

To make rules of procedure and conduct, to use approved methods and equipment; to determine work schedules and shifts, as well as duties; to decide the number of employees needed for any particular time; and to be in sole charge of the quality and quantity of the work required.

There is nothing in Paragraph F or any other provision of the Agreement to support a conclusion that Paragraph F was intended to exclude overtime payments for court appearances from the management rights retained by the Township. Thus, while Paragraph F provides a mechanism for defining the availability and calculating the payment of overtime for court appearances, the "essence" of the Agreement firmly establishes the Township's right to control such costs by requiring authorization before overtime may be paid.

Plainly, the mandate in Paragraph B that no overtime be paid without authorization cannot be implemented unless notice is provided. The arbitrator's reference to the departmental rules does not, therefore, constitute a re-writing of the Agreement to include requirements not agreed-upon by the parties but merely a reference to the rules known to the parties.³

³ Article III, ¶F of the Agreement states:

The association shall be furnished with copies of all directives, general orders, special orders, personnel orders, rules and regulations and procedures which are in

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Even the limited record here demonstrates the potential havoc the PBA's construction would pose to the right of the Township to manage its budgetary considerations. The minor disciplinary action here concerned a fine of approximately \$250, an amount commensurate with the cost of reimbursing a motorist's towing costs. Four officers applied for overtime for coming to the Municipal Building in the event their testimony was required by Sergeant Colangelo. The record does not reflect the experience level or salary of the grievants. However, Article XXIII of the Agreement sets forth the annual base salary ranges for officers from the "academy rate" of \$30,000 to \$89,001, salaries that are also subject to longevity increments after five years of service. Focusing only on the annual base salary ranges, the overtime the Township would be required to pay for the grievants' attendance on April 27 for four hours at time and one-half their regular salary would be a minimum of approximately \$90 each for an "academy" level officer to \$240 each for officers at the high end of the base salary range. As a result, the Township's overtime costs would exceed, perhaps

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writing for employees covered by this contract. Said copies of the above shall be furnished to the Association within approximately seven (7) calendar days of the promulgation.

even grossly, the amount of reimbursement sought in the disciplinary hearing. Nonetheless, the construction urged by the PBA would require the Township to bear that burden as an unanticipated and unmanageable expense.

The arbitrator's conclusions that "the grievants were . . . obligated to notify the department of the subpoenas" and "the Chief [of Police] had the right to know who was subpoenaed" reflects his interpretation of the provisions of the Agreement he identified as pertinent.

[A]n arbitrator may "weav[e] together" all those provisions that bear on the relevant question in coming to a final conclusion. When that occurs, even if the arbitrator's decision appears to conflict with the direct language of one clause of an agreement, so long as the contract, as a whole, supports the arbitrator's interpretation, the award will be upheld.

[PBA Local No. 11, supra, ___ N.J. at ___ (slip op. at 7-8) (internal citations omitted).]

Although the arbitrator's conclusion may appear to be inconsistent with the language of Article XI, Paragraph F, the contract as a whole supports his interpretation. His construction of the Agreement preserves the rights of management expressly reserved in the Agreement in a manner consistent with the apparent intent of the parties. We are satisfied that, notwithstanding the references to the departmental rules and the

apparent inconsistency within the arbitration decision, the award is drawn from the "essence" of the Agreement and, because the arbitrator's interpretation is "justifiable," it meets the "reasonably debatable" standard. Ibid.; see also Kearny PBA Local # 21 v. Town of Kearny, 81 N.J. 208, 223-24 (1979).

We are satisfied the trial court properly affirmed the arbitration award and that the argument presented in Point II of plaintiff's brief lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION