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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1324-16T2

CITY OF MILLVILLE,

Plaintiff-Appellant,

v.

NEW JERSEY CIVIL SERVICE
ASSOCIATION, CUMBERLAND
COUNCIL 18,

Defendant-Respondent.

Argued December 5, 2017 – Decided January 3, 2018

Before Judges Reisner and Mayer.

On appeal from Superior Court of New Jersey,
Law Division, Cumberland County, Docket No.
L-0500-16.

Kyle D. Weinberg argued the cause for
appellant (Blaney & Karavan, PC, attorneys;
John R. Dominy, on the briefs).

Kevin D. Jarvis argued the cause for
respondent (O'Brien, Belland & Bushinsky, LLC,
attorneys; Kevin D. Jarvis, of counsel and on
the brief).

PER CURIAM

Plaintiff City of Millville (City) appeals from an October 24, 2016 order of the Law Division denying the City's order to show cause to vacate an arbitration award and dismissing its complaint against defendant NJ Civil Service Association Cumberland Council 18 (Union). We affirm.

Lynne Porreca Compari was elected to the City's Board of Commissioners. As part of her elected duties, she supervised the City's Department of Consumer Affairs, which included the Division of Inspections (Division). The Division processed property rental applications and construction permits. Compari noticed a backlog in processing paperwork for the Division. Despite the backlog, Compari terminated a clerk in the Division who was responsible for processing the property rental applications. Compari was not permitted to hire a replacement clerk until the terminated clerk's appeal process was complete. In the interim, Compari attempted to assign the terminated clerk's work to other workers until the workload became too much for the remaining office staff. Compari requested permission from the City to pay the staff overtime to complete the work, but the request was denied.

To reduce the backlog, Compari unilaterally decided to pay her private secretary from her personal business to work in the Division. Compari's private secretary worked a few days in July

2015, and a few hours on a Saturday in September 2015, processing the City's rental renewal applications.

In September 2015, members of the City's construction office learned that a non-unit employee performed work that Union members would have completed. As a result, the Union filed a grievance alleging a breach of the parties' Collective Negotiations Agreement (CNA). The Union's grievance asserted that the City hired a non-union member to perform work specified in the CNA to be done by Union members. The CNA contained a "recognition" clause that provided as follows:

The Employer recognizes the Council as the designated representative for the purpose of collective negotiations, according to law for all full time Millville City Employees, but excluding policemen, firemen, confidential employees, managerial executives, and supervisors within the meaning of the Act. The part time employees covered by this Agreement shall be those employees who are permanently employed working a full calendar year with a minimum of 21 hours per week as their scheduled work period. This does not include seasonal employees, summer employees, temporary emergency employees and newly hired employees working through a test period. It is agreed that upon the creation of any new titles, which are appropriate to this unit of employees, these new titles shall be covered by this Agreement.

In accordance with the CNA, the New Jersey Public Employment Relations Commission (PERC) designated Susan Osborn as the

grievance arbitrator. The arbitrator took testimony and documentary evidence during an arbitration hearing.

Based on the evidence at the hearing, the arbitrator concluded that the City violated the CNA by using a non-Union individual to perform work that Union members performed exclusively. The arbitrator found that the CNA's "recognition clause is fundamental to all other rights in a collective negotiations agreement. The Union is always entitled to enforce the recognition clause."

In addition, the arbitrator rejected the City's argument that the Union waived its right to object to the work in September 2015 "by tacitly agreeing to [the non-union individual's] work earlier in July 2015." The arbitrator found that no Union member was aware of Compari's use of her private secretary to perform Union work on behalf of the City prior to filing the grievance.

The arbitrator also dismissed the City's argument that the Union had failed to object to the City's use of volunteers in other situations, including the City's use of students to clean up City parks, work that otherwise would have been performed by Union members. The arbitrator reasoned that the City failed to "demonstrate that the amount of work performed by these volunteers is other than part-time, and from the scant description in the testimony, it appears likely these volunteers work[ed] well below the part-time threshold in the recognition clause."

The arbitrator directed the City "to cease and desist from using non-unit employees or volunteers to perform [Union] work, especially in the rental registrations office, without first notifying [the Union] and obtaining [the Union]'s agreement." However, the arbitrator declined to award monetary damages to the Union.

Thereafter, the City filed a summary action and order to show cause in the Law Division, seeking to vacate the arbitrator's award. The Union responded to the pleading and filed a cross-motion seeking to confirm the award.

The motion judge heard the matter and issued a written decision on October 24, 2016, dismissing the City's complaint and confirming the arbitrator's award. The judge found that the City failed to satisfy any of the statutory requirements under N.J.S.A. 2A:24-8 to vacate the arbitrator's award or N.J.S.A. 2A:24-9 to modify the arbitrator's award.

The judge expressly rejected the City's argument that the matter be remanded to PERC for a scope of negotiations determination.¹ The judge found that the City was "equitably

¹ The City did not raise the PERC scope of negotiations issue until oral argument. The motion judge invited the parties to submit supplemental briefing, which he reviewed prior to making his determination. Thus, we find no abuse of discretion in the motion judge's consideration and rejection of the City's scope argument

estopped" from pursuing a scope of negotiations determination with PERC because the City elected to proceed by way of arbitration. The judge reasoned that the City "should [not] be permitted to forego a challenge to the Scope, and then resurrect the arbitrability issue when its gamble fails."

The City appealed the judge's order confirming the arbitrator's award and denying its motion to vacate the decision.

New Jersey recognizes a "strong preference for judicial confirmation of arbitration awards." Weiss v. Carpenter, Bennett & Morrissey, 143 N.J. 420, 442 (1996). A court shall accept an arbitrator's award as long as it is "reasonably debatable." 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, 292 (2007)). According to the "reasonably debatable" standard, a court reviewing an arbitration decision "may not substitute its own judgment for that of the arbitrator, regardless of the court's view of the correctness of the arbitrator's position." Borough of E. Rutherford v. E. Rutherford PBA Local 275, 213 N.J. 190, 201-02 (2013) (quoting Middletown Twp. PBA Local 124, 193 N.J. at 11).

for the reasons stated in his memorandum opinion. See R. 1:6-2(a); Enourato v. N.J. Bldg. Auth., 182 N.J. Super. 58, 64-65 (App. Div. 1981) (acknowledging trial court's discretion to allow oral motions), aff'd, 90 N.J. 396 (1982).

A court may overturn an arbitration decision if it is against public policy, but this standard will only be met in "rare circumstances." N.J. Tpk. Auth., 190 N.J. at 294. The "public policy sufficient to vacate an award must be embodied in legislative enactments, administrative regulations, or legal precedents, rather than based on amorphous considerations of the common weal." Borough of Glassboro v. Fraternal Order of Police, Lodge No. 108, 197 N.J. 1, 10 (2008) (quoting N.J. Tpk. Auth., 190 N.J. at 295).

On appeal, the City argues that it is appropriate to challenge the scope of negotiations after an arbitration decision, and that the motion judge erred in declining to refer the matter to PERC. In the context of an arbitration, "[a]bsent a pre-arbitration scope petition asserting that negotiations are not permitted on a subject, the parties are deemed to have agreed to arbitrate all unresolved issues." Twp. of Teaneck v. Teaneck Firemen's Mutual Benevolent Assoc. Local No. 42, 353 N.J. Super. 289, 299 (App. Div. 2002) (finding that a party cannot petition PERC for a scope determination after the parties go to interest arbitration), aff'd, 177 N.J. 560 (2003).

We determine that there is a clear preference for PERC to make scope determinations before arbitration. In Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78

N.J. 144, 155 (1978) the Court concluded that the proper process for a scope petition is to file the petition before arbitration. To allow parties to raise scope of negotiations issues after arbitration would defeat the purpose of arbitration and foster litigation. "Arbitration should spell litigation's conclusion, rather than its beginning." N.J. Tpk. Auth., 190 N.J. at 292. We agree with the motion judge that the proper procedure was for the City to file a scope petition prior to arbitration. To allow otherwise would give the City an improper "second bite at the apple."

The City also argues that it has an inherent managerial right to subcontract work, and that right cannot be bargained away. The City contends that the decision to use Compari's personal secretary was a form of subcontracting. A public employer's decision to subcontract is "a non-negotiable matter of managerial prerogative." In re Local 195, 88 N.J. 393, 408 (1982).

We reject the City's argument on this point. The work performed by Compari's personal secretary was not sent out to bid either as a contractual temporary replacement for the terminated Union employee or as a subcontract for temporary staffing to reduce the Division's backlog. Nor did the municipal governing body otherwise authorize any subcontracting of the work. Thus, the City's subcontract argument fails.

We further find that the judge correctly affirmed the arbitrator's award as "reasonably debatable." See N.J. Tpk. Auth., 190 N.J. at 292. There was sufficient, credible evidence in the record to support the judge's deference to the arbitrator's award as "reasonable debatable."

The City also argues that the arbitrator failed to consider public policy implications in her decision, including the City's ability to use volunteers in the future. We reject the argument that the arbitrator's award has such far-reaching consequences. Our decision has no precedential value as to the City's ability to use volunteers in the future provided the use of volunteers does not violate the CNA's recognition clause. Volunteers who clean up City parks or organize senior citizen events are not performing Union work. The City is only prohibited from using volunteers, like Compari's secretary, to perform work done exclusively by Union members. Nor did the municipal governing body otherwise authorize any subcontracting of the work.

The City further contends that the arbitrator failed to consider the public interest in her decision. We reject the City's argument on this point. The arbitrator specifically stated:

I acknowledge Commissioner Compari's dilemma and her authority to do what is necessary, generally, to ensure the efficient operations of the department. She was responsible for overseeing the reduction of the backlog of

rental registration clerical work, but could not obtain approvals from City officials to hire new staff or offer overtime to unit employees willing to perform the work. However, the City cannot solve these difficult problems by violating the recognition clause of the agreement with Council 18.

. . . .

One measure Compari might have taken instead of bringing in outside help, would have been to assign the construction technical assistants overtime for compensatory time off rather than cash overtime.

We concur with the motion judge that the arbitrator properly considered the impact her decision would have on the City as well as the public. Further, the arbitrator did not award any money to the Union that could have had a "potentially catastrophic" effect on the City. S. Plainfield Bd. of Educ. v. S. Plainfield Educ. Assoc., 320 N.J. Super. 281, 286 (App. Div. 1999).

Lastly, the City argues that the judge erred in confirming the arbitrator's decision because the Union sought confirmation more than three months after the award was issued contrary to N.J.S.A. 2A:24-7.

Rule 4:67 governing summary actions allows a court to adjudicate a matter where "it is likely that the matter may be completely disposed of in a summary manner." R. 4:67-1(b). To proceed summarily, the court must be "satisfied that the matter

may be completely disposed of on the record." Ibid. In Heffner v. Jacobson, our Supreme Court held that

the prevailing party in an arbitration proceeding does not lose his right to judicial enforcement of the award once the statutory three-month period has run. Although such party may no longer automatically avail himself of the remedy set forth in N.J.S.A. 2A:24-7, i.e., a summary action for confirmation brought pursuant to R. 4:67-1(a) and R. 4:67-2(a), he may nonetheless bring a new action by summons and complaint to enforce the award, and may file a motion under R. 4:67-2(b) to proceed summarily.

[100 N.J. 550, 555 (1985) (quoting Heffner v. Jacobson, 185 N.J. Super 524, 528 (1982)).]

We find that the judge properly confirmed the arbitration award despite the Union's counterclaim being filed after the expiration of the three-month statutory period.² It would have been inefficient for the judge to adjudicate the City's order to show cause in the absence of his simultaneous consideration of the Union's counterclaim seeking to confirm the award. To return the matter to the court to be litigated would have wasted judicial resources and imposed significant additional costs on both the City and the Union.

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 The City's summary action was filed within the three-month statutory timeframe.