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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4869-15T1

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF JERSEY CITY,

Plaintiff-Appellant,

v.

GILDA NICOLE HARRIS,

Defendant-Respondent.

Argued April 26, 2018 – Decided May 9, 2018

Before Judges Simonelli, Haas and Rothstadt.

On appeal from Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. C-000195-15.

Adam S. Herman argued the cause for appellant (Adams Gutierrez & Lattiboudere, LLC, attorneys; Derlys M. Guitierrez and Adam S. Herman, on the brief).

Respondent has not filed a brief.

PER CURIAM

Plaintiff State-Operated School District of the City of Jersey City (District) appeals from the June 1, 2016 Law Division order confirming an arbitration award rendered pursuant to the

Tenure Employees Hearing Law (TEHL), N.J.S.A. 18A:6-10 to -18.1. The award found defendant Gilda Harris, a tenured teacher in the District, culpable of eleven charges of conduct unbecoming, and suspended her for 262 days. On appeal, the District alleges the arbitrator should have terminated defendant's employment and, therefore, the trial court erred by denying its request for a modification of the penalty. We affirm.

The procedural history and facts of this case are set forth at length in the arbitrator's sixty-one page opinion and award and, for the limited purposes of this appeal, need not be repeated here in the same level of detail. Defendant began working for the District as a teacher assistant in 1997. At the time of the events pertinent to this appeal, she was a tenured elementary school teacher teaching a fourth-grade class.

On September 23, 2014, the District served defendant with the first of two sets of tenure charges. The first group of ten charges primarily concerned defendant's conduct on April 4, 2014. On that date, defendant directed any student who was receiving failing grades to stand in front of the class. She then asked "students with dark skin" to line up on one side of the room, and "other students with light skin" to line up on the other side of the room. Defendant told the students in the first line that unlike the students in the second line, they would not pass the

fourth grade. Earlier in the school year, defendant had grouped the students into "four specific seating tables" based on the grades they were receiving in the class.

The District also asserted in this set of charges that during the seven-year period between 2007 and 2014, defendant was absent from school on 118 occasions. Although the District had not previously cited defendant for excessive absenteeism,[1] it now asserted that her absences from school "had a profoundly negative impact upon" her school and the District community. On November 18, 2014, the District certified the charges to the Commissioner of Education (Commissioner), and suspended defendant from work without pay beginning on November 19, 2014.

On November 21, 2014, the District issued a set of seven additional tenure charges against defendant. Among other things, the District asserted that defendant improperly included confidential information about her students in her written response to the first set of charges. In addition, the District alleged that on February 15, 2013, defendant encouraged her students to write letters to school officials about the conduct of an art teacher, who had disparaged defendant in front of the students.

[1] Defendant had an unblemished disciplinary record prior to the District's presentment of the charges involved in this appeal.

The District was also critical of a homework assignment defendant gave the class on January 8, 2014. On that date, defendant asked the students to explain their study habits at home in a written report. In response, a number of the students revealed private and personal information about their families. The District asserted that the assignment "was not part of the curriculum or any lesson plan approved by the District[,]" and violated District policy that prohibited the solicitation of such information. On December 16, 2014, the District certified the second set of tenure charges to the Commissioner.

The Commissioner consolidated the two sets of charges, and referred the matter to arbitration pursuant to N.J.S.A. 18A:6-16. Following a six-day hearing, the arbitrator[2] issued an opinion and award upholding eleven of the seventeen charges of conduct unbecoming a teacher, but he imposed a lengthy suspension without pay instead of the termination of employment sought by the District.

[2] A different arbitrator presided at the first day of the hearing but, after he recused himself, the Commissioner appointed a second arbitrator who conducted the rest of the hearing and rendered the opinion and order involved in this appeal.

The arbitrator made the following findings concerning the charges he sustained.[3] Beginning with defendant's actions on April 4, 2014, the arbitrator found that defendant made the students who were failing stand in front of the classroom, and she then separated the students into two lines based on their skin color. Earlier in the school year, she had also assigned the students to one of four different seating tables based on their grades.

The arbitrator found that defendant's "conduct was inappropriate and demonstrated exceptionally poor judgment." The children were hurt and confused, and their self-esteem was adversely affected. He further found that defendant's conduct violated District policies prohibiting discrimination in any activity, and "protect[ing] students' right to privacy regarding grades." Therefore, he found defendant culpable of unbecoming conduct under charges one, two, four, seven, and eight of the September 23, 2014 set of charges.

However, the arbitrator stated he could not find that defendant's actions were "intentionally cruel and abusive or that she intended to create racial animus. Rather[, the arbitrator was convinced defendant] wanted students to feel the sting of

[3] We again note that the parties are fully familiar with the arbitrator's rulings concerning each of the seventeen charges. Therefore, we need only briefly summarize his most pertinent findings here.

discrimination so they would know how to act in potentially racially charged situations." The arbitrator further explained:

> Teachers often attempt to impart an understanding to their students concerning racial issues. [Defendant] testified that simply because a person's complexion or skin color is brown does not make him or her black. The fact a person is fair-skinned complexion does not make him or her white. . . . [Defendant] stated this was a theme she had to teach students in an urban school many times and she reiterated it that day. Every student in her Fourth Grade 2013/14 classroom was a person of color. . . . [Defendant], an African American teacher, apparently was attempting to teach her students a lesson concerning race, but should have chosen a more suitable methodology.

The arbitrator also found defendant culpable of unbecoming conduct under charge nine because of excessive absenteeism over a seven-year period. The arbitrator found defendant not culpable of charges three, five, six, and ten.

Turning to the second set of charges, the arbitrator concluded that defendant used students' personal information in responding to the first set of allegations and, therefore, she was culpable of charge one. However, he found that defendant did not "intentionally [misappropriate or] disclose[]" this information because she "believed that these proceedings [were] private and the use of the documents would be permissible."

The arbitrator also found that defendant "acted unprofessionally and failed to exercise the restrain[t] that is expected by a professional by using her students for her own devices[,]" namely, encouraging them to write letters criticizing an art teacher who had earlier disparaged her to the students. Although the arbitrator therefore found defendant culpable of charge two of unbecoming conduct, he stated that "the record does not reveal that [defendant's] conduct in having the students write these letters [rose] to a level of placing the students at risk of harm or cause[d] her to be unfit to be a teacher."

The arbitrator next found defendant culpable of charges three, five, and six, which concerned the homework assignment where the children revealed private information about their families in the course of discussing their study habits at home. The arbitrator stated:

> I concur with the District's position that this writing assignment caused students to disclose private and personal information about their families and that this information was often negative. However, there has been no showing that students were placed at a risk of harm from these letters or were humiliated because of them. The record does not demonstrate that the letters were punitive in nature, that [defendant] failed to exercise self-restraint and control behavior, or that the assignment made the students feel humiliated and embarrassed.

The arbitrator found defendant not culpable of charges four and seven of the second set of charges.

The arbitrator then turned to the issue of the appropriate penalty. The District argued that defendant must be terminated and that her conduct was "sufficiently egregious that even one incident in the charges [was] sufficient to warrant termination."

However, the arbitrator disagreed based on his independent review of the matter. The arbitrator stated:

> While I find a significant penalty is warranted, [defendant's] termination is not. [Defendant] is a long-term employee who has no prior discipline. The record demonstrates that [defendant] is a highly credentialed instructor and, prior to the instant matter, had participated in a myriad of positive school and community activities. The record does reveal she exercised poor judgment in her actions and is culpable of the charges to the extent discussed above.

Nevertheless, the arbitrator concluded that termination was not an appropriate penalty under the circumstances of this case. The arbitrator continued:

> [Defendant] did not act in a manner that was willful, vindictive, or with malicious intent. The record does not support the allegation that [defendant] is not capable of returning to her position as a teacher. There is testimony that parents are pleased [defendant] taught children and that when entering [defendant's] classroom, the students were always engaged and working and that the students seem[ed] well mannered. I believe

> [defendant] is aware of her mistakes and will conform to the District's rules and standards.

The arbitrator also did not believe that defendant's absenteeism over the course of seven years warranted her removal. Instead, he concluded that "[a] lengthy suspension should sufficiently place [defendant] on notice concerning her need to improve her attendance."

For these reasons, the arbitrator restored defendant to her teaching position effective September 8, 2015. He held that defendant's "record shall reflect a 'time served' suspension from the period when she was first suspended on November 19, 2014 until her restoration to the payroll on September 8, 2015," a period of 293 days. From this figure, the arbitrator subtracted thirty-one days, representing the period between April 28, 2015 and May 29, 2015 "for which she was [previously] awarded back pay" by the arbitrator. Thus, the arbitrator suspended defendant for a total of 262 days, or 8.6 months.

The District subsequently filed a complaint in the Law Division in which it sought to vacate or modify the arbitrator's decision to impose a suspension rather than terminate defendant from employment. The District argued that: (1) the arbitrator's award was procured by undue means in violation of N.J.S.A. 2A:24-8(a); (2) the arbitrator exceeded his powers within the meaning

of N.J.S.A. 2A:24-8(d); and the award was contrary to public policy.

In a June 1, 2016 order and written opinion, the trial judge confirmed the arbitration award. The judge rejected the District's arguments, finding it merely wanted him to substitute his own judgment as to an appropriate penalty for that of the arbitrator. While the judge stated that he found defendant's conduct "distasteful[,]" he found no basis for disturbing the arbitrator's determination that a lengthy suspension without pay, rather than termination, was the appropriate penalty under the circumstances of this case. In this regard, the judge noted that the District "fail[ed] to cite to a single legal authority, statute[,] or case[] which stands for the proposition that if conduct unbecoming is found, an arbitrator must terminate a teacher." This appeal followed.

On appeal, the District raises the same contentions it unsuccessfully pursued before the trial court. It again asserts that the arbitrator's award violated N.J.S.A. 2A:24-8(a) and (d), and was contrary to public policy. We disagree.

"Judicial review of an arbitration award is very limited." Bound Brook Bd. of Educ. v. Ciripompa, 228 N.J. 4, 11 (2017) (quoting Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 276 (2010)). "An arbitrator's award is

not to be cast aside lightly. It is subject to being vacated only when it has been shown that a statutory basis justifies that action." Ibid. (quoting Kearny PBA Local # 21 v. Town of Kearny, 81 N.J. 208, 221 (1979)). "As the decision to vacate an arbitration award is a decision of law, [we] review[] the denial of a motion to vacate an arbitration award de novo." Minkowitz v. Israeli, 433 N.J. Super. 111, 136 (App. Div. 2013) (quoting Manger v. Manger, 417 N.J. Super. 370, 376 (App. Div. 2010)).

Under the TEHL, "[t]he arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to [N.J.S.A.] 2A:24-7 through [N.J.S.A.] 2A:24-10." N.J.S.A. 18A:6-17.1(e). The court may vacate an arbitration award only in these limited circumstances:

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

The claim of error in this case implicates subsections (a) and (d) of the statute. N.J.S.A. 2A:24-8(a) provides for vacation of an arbitration award "[w]here the award was procured by corruption, fraud or undue means." "'[U]ndue means' ordinarily encompasses a situation in which the arbitrator has made an acknowledged mistake of fact or law or a mistake that is apparent on the face of the record[.]" Borough of E. Rutherford v. E. Rutherford PBA Local 275, 213 N.J. 190, 203 (2013) (first alteration in original) (quoting Office of Emp. Relations v. Commc'ns Workers of Am., 154 N.J. 98, 111-12 (1998)). "[A]n arbitrator's failure to follow the substantive law may . . . constitute 'undue means' which would require the award to be vacated." In re City of Camden, 429 N.J. Super. 309, 332 (App. Div. 2013) (quoting Jersey City Educ. Ass'n, Inc. v. Bd. of Educ., 218 N.J. Super. 177, 188 (App. Div. 1987)).

N.J.S.A. 2A:24-8(d) permits the vacation of an arbitration award in cases where the arbitrator exceeded the scope of his or her 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 [or her] powers when he [or she] ignores the limited authority that the contract confers." Port Auth. Police Sergeants Benevolent Ass'n of N.Y., N.J. v. Port Auth. of N.Y., N.J., 340 N.J. Super. 453, 458 (App. Div. 2001) (quoting Cty. Coll. of Morris Staff Ass'n v. Cty. Coll. of Morris, 100 N.J. 383, 391-92 (1985)).

In addition, a court may vacate an arbitration award for public policy reasons. Borough of E. Rutherford, 213 N.J. at 202. "However, '[r]eflecting the narrowness of the public policy exception, that standard for vacation will be met only in rare circumstances.'" Ibid. (alteration in original) (quoting N.J. Tpk. Auth. v. Local 196, I.F.P.T.E., 190 N.J. 283, 294 (2007)). "Public policy is ascertained by 'reference to the laws and legal precedents and not from general considerations of supposed public interests.'" Id. at 202-03 (quoting Weiss v. Carpenter, Bennett & Morrissey, 143 N.J. 420, 434-35 (1996)). "And, even when the award implicates a clear mandate of public policy, the deferential 'reasonably debatable' standard still governs. Thus, '[i]f the correctness of the award, including its resolution of the public-policy question, is reasonably debatable, judicial intervention is unwarranted.'" Id. at 203 (alteration in original) (quoting Weiss, 143 N.J. at 443). As our Supreme Court explained, "[a]ssuming 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." Ibid. (alteration in original) quoting Weiss, 143 N.J. at 443).

Applying these principles in light of our very limited standard of review, we conclude that the arbitrator's award must stand. N.J.S.A. 2A:24-9 provides that an arbitration award may only be modified:

> a. Where there was an evident miscalculation of figures or an evident mistake in the description of a person, thing or property referred to therein;
>
> b. Where the arbitrators awarded upon a matter not submitted to them unless it affects the merit of the decision upon the matter submitted; and
>
> c. Where the award is imperfect in a matter of form not affecting the merits of the controversy.

The District does not specify which prong of the three prongs of N.J.S.A. 2A:24-9 warrants modification of the arbitrator's penalty. Nevertheless, none of the prongs apply. There was no miscalculation of figures or mistake in a description of a person; the arbitrator did not base his award on an argument or evidence

not submitted to him; and the award was not imperfect in a matter of form.

Contrary to the District's contention, the arbitrator did not use "undue means" to produce the award. While, like the trial judge, we may have reached a different result had we been in the arbitrator's place in the first instance, nothing in the award indicates it was based on a clearly mistaken view of fact or law within the intendment of N.J.S.A. 2A:24-8(a).

The District does not question any of the arbitrator's findings in connection with the charges for which he found defendant culpable. Its only disagreement is with the arbitrator's decision to impose a lengthy suspension rather than to remove defendant from employment. However, it is well established that "[e]ven after finding [an] employee guilty of the specified charges of misconduct, [an] arbitrator [is] free to apply his [or her] special expertise and determine that these offenses do not rise to a level of misconduct that constitutes just cause for discharge." Cty. Coll. of Morris, 100 N.J. at 394. In those instances, the arbitrator may impose "a disciplinary penalty less severe than that of discharge." Ibid.

The District argues the arbitrator improperly ruled that unless it demonstrated that defendant "act[ed] in a manner that was willful, vindictive, or with malicious intent," he was

powerless to remove her from employment. However, that is a misreading of the arbitrator's decision. In explaining his decision that a long suspension was the appropriate sanction for her misconduct, the arbitrator did note that defendant did not intentionally attempt to harm the children. However, he also pointed, among other things, to her unblemished disciplinary record, "positive school and community activities[,]" and good relationship with a number of the parents of children in her classroom, as circumstances further supporting his determination of the penalty. Thus, the arbitrator considered a number of relevant factors before concluding that a penalty less severe than termination was warranted.

The arbitrator also did not violate N.J.S.A. 2A:24-8(d) or violate public policy by suspending defendant for 262 days. The District has not pointed to anything in its collective bargaining agreement with the teacher, or any law, regulation, or court decision that prevented the arbitrator from considering the imposition of a penalty other than termination if he sustained the charges against her. Thus, it is clear that the arbitrator acted within the scope of his authority and the public policy embodied in our arbitration laws.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION