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OF THE COMMITTEE ON OPINIONS

DAVID PETRELLA, Plaintiff, v. THE HACKENSACK BOARD OF EDUCATION, BERGEN COUNTY, Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: BERGEN COUNTY DOCKET No. C-222-19 **OPINION** Argued: October 25, 2019 Decided: December 20, 2019

Appearances: Robert M. Schwartz, (Schwartz Law Group, LLC, attorneys) for Plaintiff

John G. Geppert, Jr., (Scarinci & Hollenbeck, LLC, attorneys) for Defendant

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HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter comes before the Court by way of an Order to Show Cause and Verified Complaint for an Order to Vacate the arbitration award, pursuant to R. 4:67-1(a) and N.J.S.A. 2A:24-7, filed on August 16, 2019 by Plaintiff David Petrella, by and through counsel Schwartz Law Group LLC. On September 4, 2019, Defendant Hackensack Board of Education, by and through counsel Scarinci & Hollenbeck, LLC, filed a Motion to Dismiss the Complaint and to Confirm the arbitration award. On September 12, 2019, Plaintiff filed a reply brief/opposition to Defendant's Motion to Dismiss and Confirm the arbitration award. The Court heard oral argument on October 25, 2019.

BACKGROUND

The underlying dispute concerns a series of Tenure Charges brought by District Acting Superintendent Rosemary Marks ("Superintendent Marks") against David Petrella ("Plaintiff") on November 12, 2018. The following nine Tenure Charges were filed against Plaintiff : (1) Failing to Enforce Snow Day Protocol and Failure to Punch-In; (2) Falsifying Time Records/Theft of Time; (3) Failing to Ensure Coaches had Current CPR/First Aid Certifications; (4) Making a Highly Inappropriate Comment about Teachers dating Students; (5) Failing to Properly Schedule Transportation for Athletic Events; (6) Failure to Properly Schedule H-Cops; (7) Failure to Ensure Supervision of Concession Stand leading to Injury of a Student; (8) Misrepresentation during Investigation of a Student Injury; and (9) Pattern of Unbecoming Conduct and Other Just Cause.

On November 27, 2018, the Hackensack Board of Education ("Defendant" or the "Board") found probable cause to support Plaintiff's dismissal, resulting in the charges being certified to the Commissioner of Education and Plaintiff's suspension without pay for 120 days.

In response to the Charges, Plaintiff submitted an Answer, and the matter was ultimately transferred to arbitration before Robert J. Simmelkjaer (the "Arbitrator").

The parties arbitrated between February 20, 2019 and April 8, 2019. The Arbitrator issued his decision on May 18, 2019, finding that the Tenure Charges of Conduct Unbecoming and Other Just Cause were supported by credible evidence provided by Defendant.

Following the May 18, 2019 arbitration decision, Plaintiff's counsel sought clarification of the decision. In response, the Arbitrator noted that the finding of unbecoming conduct against Plaintiff was limited to Plaintiff's actions as Athletic Director. However, after both parties sought further clarification of the Arbitrator's decision on June 21, 2019, the Arbitrator stated that Plaintiff was dismissed from all of his tenured positions with the Hackensack School District.

Subsequently, Plaintiff filed the Order to Show Cause seeking an Order to Vacate the arbitration award and Defendant filed a Motion to Dismiss the Complaint and to Confirm the Arbitrator's award.

LEGAL STANDARD

Arbitration can attain the goal of providing "final, speedy and inexpensive settlement of disputes only if judicial interference with the process is minimized." Barcon Assocs. v. Tri-Cnty. Asphalt Corp., 86 N.J. 179, 187 (1981). Accordingly, arbitration is meant to be "a substitute" for litigation, and not a "springboard" to it. See id. (internal citations omitted). A court may vacate an arbitration award only if it is "wholly bereft of evidential support." McHue Inc. v. Soldo Const. Co., 238 N.J. Super 141, 147-48 (App. Div. 1990).

The Arbitration Act was designed to grant arbitrators extremely broad power and "extends judicial support to the arbitration process subject only to limited review." Barcon Assocs., 86 N.J. at 187. As a result, arbitration awards are generally presumed valid. See Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 372 N.J. Super 503 (App. Div. 2004).

As a matter of public policy, it is well settled that "every intendment is indulged in favor of an arbitration award and that it is subject to impeachment only in a *clear* case." Barcon, 86 N.J. at 187 (internal citations omitted) (emphasis added). Courts will not overturn an arbitrator's determination of a legal issue so long as the determination was "reasonably debatable." See Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 489, 492-93 (1991). In short, the Court is obligated to summarily uphold the award if the arbitrator offers even a barely colorable justification for the outcome, and will not set aside an award "merely because the court would have decided the facts or construed the law differently." Carpenter v. Bloomer, 54 N.J. Super. 157, 168 (A.D. 1959).

N.J.S.A. 2A:23B-23 provides the grounds for vacating an arbitration award under the New Jersey Uniform Arbitration Act. The statute provides that, upon the filing of a summary action with the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

> (1) the award was procured by corruption, fraud, or other undue means; (2) the court finds evident partiality by an arbitrator, corruption by an arbitrator, or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding; (3) an arbitrator refused to postpone the hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding; (4) an arbitrator exceeded the arbitrator's powers; (5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c of section 15 of this act not later than the beginning of the arbitration hearing; or (6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding. (emphasis added).

ANALYSIS

Plaintiff argues that the arbitration award (the "Award") was procured by "undue means." Moreover, Plaintiff also argues that the Arbitrator's decision exceeded, and the Arbitrator imperfectly executed, the Arbitrator's authority. N.J.S.A. 2A:24-8(a),(d); N.J.S.A. 2A:23B-23. In addition, Plaintiff alleges that the decision consists of mistakes of both fact and law, that the

Arbitrator fails to sufficiently weigh or consider in his decision the mitigating circumstances that the Arbitrator noted, and lastly that the Arbitrator misapplies the standard for making a finding of unbecoming conduct.

As to "undue means," Plaintiff notes that this term "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." Office of Employment Relations v. Communications Workers of America, AFL-CIO, 154 N.J. 98, 111 (1998). Thus, Plaintiff alleges that the undue means prong for vacating an arbitration award has been met because the Arbitrator disregarded the limitations outlined in N.J.S.A. 18A:6-17.1(b)(3) and N.J.A.C. 6A:3-5.1(b)(3), which sets forth proscriptions against introducing evidence after a matter is already referred to the arbitrator. Accordingly, Plaintiff argues that the Arbitrator's actions "adversely affected the Plaintiff's ability to defend."

Moreover, as to Plaintiff's claim that the Arbitrator "imperfectly executed his powers," Plaintiff contends that the Arbitrator came to the conclusion that any form of infraction, regardless of the magnitude or how it was considered or handled at the time, amounted to "conduct unbecoming." Thus, Plaintiff claims that the Arbitrator failed to consider, and was required to consider, "the gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuating, or aggravation," and "any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system." In re Fulcomer, 93 N.J. Super. 404, 402 (App. Div. 1967).

In addition, Plaintiff also alleges that the Arbitrator "exhibited confusion" regarding the law and the facts in this matter by at first stating that Plaintiff maintained his employment rights in all of his positions other than Athletic Director, but then changed course in the clarification letter sent on June 21, 2019.

Defendant argues Plaintiff is unable to satisfy the heightened burden of vacating an arbitration award and is also unable to show that the award lacked support of substantive credible evidence. As to Plaintiff's claim that evidence was improperly introduced after the matter was referred to the Arbitrator, Defendant contends that Plaintiff also improperly submitted exhibits and documentation during the course of the hearing. Defendant also emphasizes that the Arbitrator's decision was made pursuant to the whole record. Moreover, Defendant argues that it has met its burden of proving that Plaintiff's tenure should be revoked and Plaintiff should be terminated from his employment based on unbecoming conduct amounting to: (1) failing to enforce protocols in place to protect student health; (2) engaging in insubordination deriving from a failure to "punch in"; (3) making inappropriate comments to new staff members regarding the relationship of teachers and students; (4) failing to ensure a concession stand was supervised when a student suffered severe burns; and (5) failing to take appropriate action and failing to reveal critical information regarding the subsequent investigation.

Ultimately, Defendant argues that the Arbitrator's clarification of his decision, dismissing Plaintiff from all positions and not just Athletic Director, was the appropriate finding and that a mere demotion would be both improper and not in accordance with any case law.

TENURE CHARGES

Charge One

Counts 1-3:

> **Plaintiff failed to supervise or failed to arrange for supervision of the women's basketball team's use of school facilities for practice on a day that school was closed due to snow.**

Here, Plaintiff contends that Defendant never provided documentary evidence to support the notion that it was the school district's protocol to have extra-curricular activities canceled on

snow days. Furthermore, Plaintiff argues that there is nothing in the record showing that Plaintiff was connected to the decision to have practice during the snow day on February 3, 2014. Rather, Plaintiff asserts that it was the coach who decided to have practice that day, although the coach never testified, and the fact that a practice was being held was not brought to Plaintiff's attention until after it had already occurred. In the aftermath of the practice, Plaintiff wrote both himself and the coach up, and Plaintiff blamed himself for not telling the coach practice was prohibited on snow days.

Ultimately, the Arbitrator found that this occurrence constituted conduct unbecoming of Plaintiff for creating a safety hazard for the students and parents traveling that day.

Plaintiff argues that the Arbitrator, in making his decision, never highlighted any specific alleged conduct by Plaintiff that led to a safety-hazard. Moreover, Plaintiff notes that there was no testimony in the record stemming from that particular day as to the weather conditions, any complaints filed, nor any grievances from the parents traveling that day. Plaintiff also notes that the Arbitrator mentioned in his decision that "this type of incident only occurred once," and that as a result there was "no negative consequence," which served to "minimize its significance." As such, Plaintiff argues the Arbitrator's finding of this one incident being enough to satisfy the standard for "unbecoming conduct" is a mistake of fact and law.

On the other hand, Defendant asserts that the Arbitrator properly considered evidence such as Plaintiff's own admission of wrongdoing and testimony from James Montesano, the principal, ("Principal Montesano") that it was Plaintiff's responsibility to enforce District protocols such as the snow-day rule.

Count 4:

Plaintiff failed to use the time clock punch system from May 1 to May 31, 2014.

As to Count 4, Plaintiff argues that, unlike the other administrators who were also reprimanded in the form of a letter for not using the time clock punch system, Plaintiff was excused from using the system by the prior Superintendent, Joseph Abate ("Superintendent Abate"). Plaintiff also contends that there was never any directive from Superintendent Karen Lewis ("Superintendent Lewis") after the June 6, 2014 memo/warning sent to Plaintiff and that there was no evidence of Plaintiff violating any directives.

In addition, Plaintiff takes issue with the Arbitrator's finding that Plaintiff's conduct amounted to insubordination, when there was no directive in place and the Arbitrator noted that there was a lack of evidence of any noncompliance with the June 6, 2014 memo.

However, Defendant highlights that the Arbitrator found that Plaintiff misconstrued the waiver Superintendent Abate gave him and disregarded the directive of two superiors. In support of this notion, Defendant points to Plaintiff's admission that he received a warning from Superintendent Lewis regarding not using the time clock punch system. Moreover, Defendant contends that Plaintiff was only exempt from using the system in a limited fashion when Plaintiff was traveling between buildings throughout the day and while Superintendent Abate was in charge. Nevertheless, Plaintiff continued to disregard Superintendent Lewis' directive based on Plaintiff's own admission that he did not punch-in after receiving the warning letter from Superintendent Lewis.

Charge Three

Counts 3-8:

Several coaches under Plaintiff did not have current/updated safety certifications.

Plaintiff contends that the only evidence provided by Defendant regarding these counts is an April 29, 2016 memo from Superintendent Lewis. This memo addressed an incident on March 31, 2016, when Superintendent Lewis asked Plaintiff for the coach's certificates and Plaintiff did not have them. As a result of this incident, it became apparent that twenty-three out of forty-four coaches had expired CPR certificates. Moreover, Plaintiff highlights the fact that Superintendent Lewis was never called as a witness in the arbitration hearing.

In addition, Plaintiff argues that the Arbitrator allowed for Exhibit D-24 to come into evidence in violation of N.J.S.A. 18A:6-17.1(b)(3) and N.J.A.C. 6A:3-5.1(b). Furthermore, the Arbitrator admitted that this evidence adversely impacted Plaintiff's defense to the charges, but allowed the evidence to be admitted anyway.

Defendant argues that the Arbitrator correctly concluded Plaintiff's lack of updated certifications for the coaches constituted conduct unbecoming. Defendant points to the fact that even though a student was never injured due to the lapsed certifications of coaches, this was not a necessary occurrence to establish unbecoming conduct because these actions still placed others at risk of injury.

Charge Four

Counts 1-3:

Plaintiff's comments to a group of new teachers concerning teacher-student relationships.

Plaintiff points out that the Arbitrator said in his decision, in reference to Plaintiff's comments to a group of new teachers, that there was no bad motive on behalf of the Plaintiff in

making the comment and that Plaintiff "intended to impart good advice by injecting humor in his presentation."

In addition, Plaintiff argues that other than Principal Montesano's testimony, which stated that six teachers approached him after Plaintiff's comment, there was a lack of competent evidence put forth as to who actually complained about the statement. As such, Plaintiff contends that the Arbitrator made his finding with a lack of testimony to support the notion that teachers took issue with Plaintiff's comment.

To the contrary, Defendant highlights that the Arbitrator's decision finding that Plaintiff's statement constituted unbecoming conduct was in accordance with other arbitrators' decisions. Furthermore, other arbitrators have held that sexual comments with a colleague or jokes pertaining to student relationships are inappropriate behavior. See I/M/O Glenn Ciripompa and School District of Bound Brook, Agency Dkt. No. #177-7/14 (De Treux, 2017); I/M/O Dennis Miguel and Mahwah Township Board of Education, Agency Dkt. No. #373-18 (Denenberg, 2018).

Charge Seven

Count 1:

> **Plaintiff's responsibility includes supervision of the snack bar, which is traditionally supervised by assistant coaches, and Plaintiff failed to or refused to secure a replacement to supervise the snack bar during girls' basketball games after promoting Coach Hammond-Dudley from assistant coach to head coach.**

Count 2:

> **Because of Plaintiff's failure to secure a replacement supervisor of the snack bar during girls' basketball games, the snack bar was allowed to operate without appropriate staff supervision.**

Count 3:

> **On or about January 9, 2018, now head coach Hammond-Dudley opened the snack bar before a girls' basketball game and had her niece, student K.D. ("K.D."), assist**

her. Coach Hammond-Dudley left the snack bar to coach the team, which left the snack bar without a replacement supervisor and with K.D. unsupervised.

Count 6:

Plaintiff's failure to protect K.D. from injury was a violation of Principle 1, Paragraph 4 of Policy 3211 (Code of Ethics).

Count 7:

Plaintiff failed to ensure that K.D. was given prompt and appropriate medical assistance in violation of Policy 8441 (care of injured and all persons).

Count 8:

Plaintiff failed to notify Principal Montesano of the incident until after Plaintiff was contacted by Central Office on January 12, 2018.

Count 9:

Plaintiff did not submit, and did not instruct a subordinate to submit, any accident report until after the superintendent told Plaintiff to do so.

Count 10:

Plaintiff did not ensure that his staff promptly reported the injury.

Count 11:

The accident report was not submitted until after January 16, 2018, which was one week after the incident involving K.D. occurred.

Count 12:

Plaintiff's failure to assure that the incident was properly reported violated Board Policy 8442.

Plaintiff contests that his job responsibilities included supervising concession stands. Moreover, Plaintiff alleges that he never reviewed the current job description in Exhibit D-1, which Superintendent Marks testified was the most up to date version of the Athletic Director's job description. Furthermore, Plaintiff points out that no one ever met with him to review his job description.

In addition, Plaintiff also takes issue with the Arbitrator's consideration of Principal Montesano's testimony that part of the Athletic Director's job was to ensure protocols were followed. Plaintiff argues that this consideration is improper given the lack of testimony as to what the protocols entailed. Moreover, the Arbitrator similarly noted that Principal Montesano never discussed the protocols with Plaintiff, yet still found against Plaintiff here, which Plaintiff points to as another error in the Arbitrator's findings.

Plaintiff also contends the Arbitrator misinterpreted the testimony of Ralph Dass ("Mr. Dass"). Here, the Arbitrator stated that Mr. Dass testified that the duty of supervising concession stands was delegated to coaches. However, Plaintiff claims this testimony was out of place because the Arbitrator's conclusion that the delegation of this duty to coaches was a longstanding practice cannot coincide with Mr. Dass' testimony that he never imparted this duty to the coaches. As such, Plaintiff argues that the record does not comport with the Arbitrator's conclusion that the responsibility of delegating supervision duties for the concession stand fell within Plaintiff's responsibilities.

Defendant highlights that Plaintiff admitted in his testimony and interrogatories that he saw the job description in Exhibit D-1 multiple times. Moreover, Defendant argues that the Arbitrator is not bound by the traditional rules of evidence and thus use of this exhibit was proper.

Moreover, Defendant contends that multiple witnesses testified that they knew the school board had adopted the job description in question before the injury to K.D. occurred. As such, Defendant argues that this was permissible hearsay, and that the Arbitrator's determination that Plaintiff knew about the job description and its responsibilities establishes that Plaintiff was properly convicted of Counts 1 through 3.

On the other hand, Plaintiff argues that if the Arbitrator dismissed Counts 4 and 5 because the events were "outside of his view and direct supervision," then this same rationale should be applied to Counts 1 through 3 and 6.

As to Counts 7 through 12, Plaintiff notes that he was not informed of the incident until the evening of January 9th and then not fully informed until January 15th. In addition, Plaintiff also contests the notion that he failed to inform Principal Montesano about what transpired. Rather, Plaintiff highlights that he did in fact attempt to inform Principal Montesano on three occasions between January 10th and January 11th, but that Principal Montesano did not call back. Moreover, Plaintiff points to Principal Montesano's own acknowledgement in his testimony that he received missed calls from Plaintiff.

Defendant argues that although the Arbitrator did not find Plaintiff at fault for both the trainer's misdiagnosis and the boiling water causing K.D.'s injury, Plaintiff was, however, at fault for how the injury was handled in the aftermath of the incident. More specifically, Defendant contends that Plaintiff failed to investigate the matter and also that Plaintiff failed to contact the student, the student's mother, the trainer, or the coach for days after the fact. Thus, Defendant argues the Arbitrator properly concluded that these various instances of Plaintiff's failure to act violated certain Board Policies, and that it was imperative to hold Plaintiff to a higher standard due to his higher position of authority.

Charge Eight

Count 2:

> **Plaintiff knew that the concession stand was unsupervised by an adult because supervision by assistant coaches was his policy and he promoted Coach Hammond-Dudley to head coach without securing a replacement to supervise the concession stand**.

Although Count 1 was dismissed by the Arbitrator, Count 2 was sustained. Here, Plaintiff contends that the same rationale for the Arbitrator's dismissal of Counts 4 and 5 of Charge Seven should also be applied to Count 2 of Charge Eight, based on the notion that Plaintiff never saw the concession stand on January 9th, the day of the incident.

Charge Nine

> **Pattern of unbecoming conduct or other just cause.**

Plaintiff argues that all of the charges and counts the Arbitrator found Plaintiff guilty of were intertwined with "significant" mistakes of fact and law. Moreover, Plaintiff emphasizes that the Arbitrator's citations to mitigating facts were also not reflected in the charges or counts that Plaintiff was ultimately found guilty of. Moreover, Plaintiff claims that these mitigating factors should have led to a dismissal of the charges or a determination that Plaintiff was entitled to maintain his employment.

Defendant, however, points to the Arbitrator's finding that Plaintiff "collectively and individually committed conduct unbecoming of a staff member. . . [and] violated District Policy #3281 which states, *inter alia*, that 'inappropriate conduct and conduct unbecoming of a staff member will not be tolerated.'" Thus, Defendant further notes that the Arbitrator's finding of a pattern of conduct unbecoming, over the course of six (6) years, warranted Plaintiff's dismissal from his tenured position. In addition, Defendant highlights the higher standard that Plaintiff is held to given his position, and that Plaintiff's behavior fell short of this standard.

RULING

At the conclusion of the arbitration hearings, the Arbitrator ultimately found that Plaintiff was guilty of Charge One, Counts 1 through 4; Charge Three, Counts 3 through 8; Charge Four; Charge Seven, Counts 1-3, 6-9, and 11-12; Charge Eight, Count 2; and Charge 9.

As to Charge One, Counts 1 through 3, the Arbitrator found that the Board met its burden of proof by a preponderance of the credible evidence. Moreover, the Arbitrator noted that the standard of unbecoming conduct was satisfied by Plaintiff's "oversight" of the snow day protocol, which put students and their parents traveling that day in a clear safety hazard. In addition, the Arbitrator also found that if the unbecoming conduct standard included the notion of "destroying public respect for government employees and competence in the operation of public services," then Plaintiff also committed unbecoming conduct in this context by allowing students to attend basketball practice during inclement weather.

As to Charge One, Count 4, the Arbitrator found that Plaintiff's actions also amounted to unbecoming conduct because the failure to use the punch in system constituted both a violation and insubordination, notwithstanding the testimony of Superintendent Abate regarding the waiver that was given to Plaintiff. As to the waiver, the Arbitrator found that Plaintiff misconstrued the parameters of the waiver, which served to demonstrate Plaintiff's guilt on Count 4.

In Charge Three, Counts 3-8, the Arbitrator found that regardless of his failure to exclude Exhibit D-24, and regardless of the merits surrounding Plaintiff's denial that twenty-three coaches had expired CPR certifications, Plaintiff still admitted that eight of the certifications were in fact expired. Furthermore, the Arbitrator pointed out that Plaintiff's "Updated Coaches Certification" spreadsheet noted that more than eight coaches did not complete the Frist Aid

training course as of April 29, 2016 for the spring sports season, which constituted a violation of NJSIAA regulations. Thus, the Arbitrator found that even if Exhibit D-24 had been excluded, the Board provided a preponderance of evidence that Plaintiff engaged in unbecoming conduct by endangering the health and welfare of students due to Plaintiff's violation of state statute, NJSIAA regulations, and Board policy.

The Arbitrator's opinion regarding Charge Four ultimately found that Plaintiff's inappropriate remarks to a new group of teachers established conduct unbecoming. In furtherance of this finding, the Arbitrator noted that Plaintiff's comments "could have the tendency to affect the morale of new teachers or the school district staff at large." Accordingly, the Arbitrator noted that these comments could negatively impact public respect for public school employees, and thus constituted conduct unbecoming.

The Arbitrator also sustained Charge Seven Counts 1-3, 6-9, and 11-12. In regards to Count 1, the Arbitrator noted that the school leadership's failure to review the Athletic Director job description with Plaintiff mitigated Plaintiff's responsibility. In addition, the Arbitrator also noted the overall ambiguities surrounding policy or protocol for operating concession stands. Nevertheless, the Arbitrator sustained Count 1 based on the fact that Coach Hammond-Dudley, who Plaintiff delegated concession stand responsibilities to, opened the concession stand and then left her niece, K.D., unattended at the stand and in charge. The Arbitrator also found Plaintiff guilty of Count 2 because Plaintiff allowed the concession stand to operate and use cooking appliances without the necessary supervision in place. With this, the Arbitrator highlighted that as soon as concession stand operations were delegated to Coach Hammond-Dudley, Plaintiff's responsibilities further included ensuring that the concession stands were operated in a safe manner, such as establishing adult supervision at all times. Similarly, the

Arbitrator found Plaintiff guilty of Count 3 given that Coach Hammond-Dudley, the head coach, was allowed to leave her supervision of the concession stand without another adult supervisor put in place. Furthermore, the Arbitrator found that although Plaintiff was in accordance with the past practice of delegating concession stand supervision to a head coach, Plaintiff nonetheless had the responsibility for assuring that supervision of the stand never lapsed.

As to Charge Seven, Count 6, the Arbitrator noted that Plaintiff violated Board Policy 3211 (Code of Ethics) for allowing the concession stand to go unsupervised. As such, this violation constituted a failure to make a reasonable effort to protect the students from harmful conditions. In addition, the Arbitrator also found Plaintiff guilty of Count 7 because after Plaintiff found out about K.D.'s injury from Coach Hammond-Dudley and Coach Hodge, Plaintiff did not reach out to either K.D. or K.D.'s mother. The Arbitrator further noted that Plaintiff was guilty of Count 7, despite Coach Hammond-Dudley's comment to Plaintiff that served to diminish the severity of the accident, because Plaintiff was still required to corroborate the information he received about K.D and failed to do so.

In Count 8, the Arbitrator found Plaintiff guilty for his failure to notify Principal Montesano about K.D.'s injury on January 10th after Plaintiff spoke with Coaches Hodge and Hammond-Dudley. The Arbitrator found Plaintiff guilty of Count 8, despite the fact that Principal Montesano had the same information about the injury as Plaintiff and did not report this information to the Central Office. The Arbitrator found that Principal Montesano's similar knowledge of the accident and failure to report this information mitigated Plaintiff's violations. Nevertheless, the Arbitrator determined that Plaintiff was under an independent obligation to report the injury; and the failures of Principal Montesano, Coach Hammond-Dudley, and Hernan Castano (the part time athletic trainer who treated K.D.'s injury right after the incident) in

reporting this information did not impact Plaintiff's own duty. In his ruling on Count 8, the Arbitrator considered evidence from Plaintiff's testimony that Plaintiff had called Principal Montesano on three separate occasions to alert him as to K.D.'s injury, but never received a response/call back from Principal Montesano. However, the Arbitrator also pointed out that Plaintiff never called Principal Montesano on his cell phone, nor via text message, nor through an email. Ultimately, the Arbitrator found Plaintiff guilty of Count 8, despite the fact that other employees were also errant as to their responsibilities to this incident, because Plaintiff had his own responsibilities that he failed to uphold.

The Arbitrator found Plaintiff guilty of Count 9 as well. In this Count, the Arbitrator emphasized the fact that, based on the evidence, Plaintiff had failed to direct Coach Hodge or Coach Hammond-Dudley to submit an accident report once he found out about the incident. The Arbitrator found Plaintiff guilty of Count 9 despite testimony from Mr. Dass that the Athletic Director's responsibilities did not include submitting an accident report. Nevertheless, although Plaintiff did not have the duty to submit an accident report, the Arbitrator found that Plaintiff maintained an obligation to ensure that the responsibility of submitting an accident report was carried out by Plaintiff's subordinates. Moreover, the Arbitrator highlights the fact that once Plaintiff found out a report had never been submitted, Plaintiff should have taken the initiative to ensure that a report would be submitted.

Similarly, as to Counts 11 and 12 of Charge Seven, the Arbitrator held that Plaintiff was guilty because of a failure to ensure sufficient reporting of the incident, despite this obligation not being Plaintiff's primary responsibility. Ultimately, as the Arbitrator notes, Plaintiff received information from Coach Hodge on January 10th, and it was not until direction from the Superintendent that a report was submitted on January 16th.

The Arbitrator also sustained Count 2 of Charge Eight against Plaintiff. Here, the Arbitrator found that regardless of Plaintiff's delegation of concession stand supervision to the coach, Plaintiff still maintained a responsibility to ensure that the concession stand was safe and properly supervised. The Arbitrator also noted that Plaintiff was not entirely candid about when he found out about the incident and whether he saw K.D. injured during the game. Thus, the Arbitrator found Plaintiff guilty of Count 2.

Lastly, the Arbitrator addressed Charge Nine, which was an "omnibus charge" that states the following:

> [e]ven if any of the foregoing charges individually does not constitute unbecoming conduct, all of the foregoing charges considered as a whole demonstrate a pattern of inappropriate behavior which cannot continue in a public school setting and constitute conduct unbecoming of a teaching staff member precluding Respondent from performing the functions of a teaching staff member and/or other just cause for termination.

In other words, Charge Nine is an inclusion of the prior charges, by reference, and looks to the totality of the circumstances to discern whether Plaintiff engaged in a pattern of unbecoming conduct. Here, the Arbitrator found Plaintiff guilty of Charge Nine, due to "collectively and individually" committing unbecoming conduct. Furthermore, the Arbitrator also held that Plaintiff was charged with constructive knowledge of any and all of the District policies pursuant to his position. Thus, Plaintiff was accountable for the violation of District Policy #3281 concerning the unacceptability of inappropriate and unbecoming conduct in the school district.

Ultimately, in finding Plaintiff guilty of the above Charges and Counts, the Arbitrator emphasized that Defendant had satisfied its burden of proof by a preponderance of the credible evidence of conduct unbecoming of an administrator. Moreover, the Arbitrator further noted that

Plaintiff had on several occasions engaged in conduct unbecoming that served as just cause for Plaintiff's dismissal from employment. In this determination, the Arbitrator also reiterated that there were instances of mitigating factors that were considered, but in balancing the mitigating factors with the conduct unbecoming, the evidence against Plaintiff was sufficient to uphold Plaintiff's dismissal from employment.

In review of the Arbitrator's decision, as aforementioned, the Arbitration Act imparts extremely broad power to arbitrators and limited review from the judiciary. See Barcon Assocs., 86 N.J. at 187. As a result, arbitration awards are generally presumed valid. See Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 372 N.J. Super 503 (App. Div. 2004).

Moreover, this Court is bound by the fact that arbitration awards are subject to impeachment only in *clear* cases. Barcon, 86 N.J. at 187 (internal citations omitted) (emphasis added). Ultimately, as long as an arbitrator's finding as to a legal issue was "reasonably debatable," then courts will not overturn that Arbitrator's determination. See Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 489, 492-93 (1991).

In other words, as the court found in Carpenter, a court is obligated to summarily uphold an arbitrator's award if the arbitrator provided even a barely colorable justification for the outcome; a court will not set aside an award "merely because the court would have decided the facts or construed the law differently." Carpenter v. Bloomer, 54 N.J. Super. 157, 168 (A.D. 1959).

Here, the Arbitrator's decision and findings are undoubtedly "reasonably debatable," where even if the Court were to decide certain issues differently, the Arbitrator's award should still be confirmed.

In Charge One, Counts 1 through 3, Plaintiff argued that the Arbitrator made mistakes of both fact and law by finding that the one incident of practice on a snow day constituted unbecoming

conduct. However, the Arbitrator also noted that this standard of unbecoming conduct is satisfied by an oversight of an employee, and that here, Plaintiff certainly engaged in oversight. This explanation by the Arbitrator is sufficient to ground the Arbitrator's finding of unbecoming conduct. It is clear that an athletic event was held on a snow day and that this activity falls under Plaintiff's responsibility. Plaintiff may not have expressly allowed for the practice to be held, nonetheless Plaintiff served as Athletic Director, a practice was held during inclement weather, this violated snow day protocol, and both students and parents were put at risk traveling that day. Regardless of if this protocol violation happened only once, it is more than reasonably debatable that Plaintiff engaged in an oversight of the snow day protocol when this practice occurred during Plaintiff's supervision of the athletic department.

Furthermore, the Arbitrator's finding of guilt for Count 4 of Charge One also cannot be overturned. Even considering the waiver that Plaintiff attained, relieving him of the duty to punch in and out of school buildings, the Arbitrator's determination also included a consideration of evidence that this waiver was limited in scope, was taken advantage of, and was ultimately misconstrued by Plaintiff as to its parameters. Plaintiff's own admission highlights the fact that Superintendent Lewis gave Plaintiff a warning for not using the punch system but continued to disregard Superintendent Lewis' directive. Given Plaintiff's acknowledgment, the limited scope of the waiver, and the continued disregard for the time clock punch system, the evidence concerning Plaintiff's fault for Count 4 is certainly sufficient to confirm the Arbitrator's determination. Count 4, and Charge One as a whole, do not fall into the category of a clear case that is subject to impeachment. Rather, even if Charge One could be considered a close call when weighing the evidence, the Arbitrator still would have had enough evidence before him to support a reasonably debatable finding of guilt.

One of the main issues alleged with Charge Three, and in the Arbitrator's decision in general, was the inclusion of Exhibit D-24, which the Arbitrator admitted should not have been allowed into evidence. However, as the Arbitrator notes, even without this exhibit, the evidence was still enough to justify a finding of unbecoming conduct. This is true not only to the Arbitrator's finding of guilt for Charge Three, but also as to the Arbitrator's decision as a whole. In regards to Charge Three, even if Exhibit D-24 was excluded, the evidence still contains both Plaintiff's own admission and Plaintiff's Updated Coaches Certification spreadsheet, which establishes that eight coaches' certifications had expired. Accordingly, the Arbitrator's determination that this evidence was sufficient to find, by a preponderance of the evidence, unbecoming conduct is certainly enough to establish a barely colorable justification. The evidence is clear that eight coaches did not have updated certifications, and this Court is not in a position to vacate the Arbitrator's determination that this posed a danger to the health and welfare of students. Here, NJSIAA regulations and Board policy were violated, and the Arbitrator's justification was adequate under the laws and doctrine for upholding an arbitration award.

Plaintiff also points out some valid concerns with the Arbitrator's determinations in Charge Seven; there are certainly ambiguities surrounding the Athletic Director's job description and knowledge of responsibilities for the concession stand, which the Arbitrator noted as well. However, it is certainly reasonably debatable that, despite these mitigating factors, Plaintiff maintained a responsibility over the concession stand. First, Plaintiff delegated supervision of the concession stand to Coach Hammond-Dudley. Then Coach Hammond-Dudley left the concession stand unsupervised to coach the basketball game. Plaintiff not only knew that Coach Hammond-Dudley served the role as head coach of the basketball team, but he also was the individual who promoted her to the head coach position. Nonetheless, Plaintiff never found a replacement

supervisor for the concession stand when the head coach he hired left the stand to coach the actual game.

Moreover, the facts surrounding this incident to the student at the concession stand show that Plaintiff failed to handle the aftermath of the incident appropriately, even if Plaintiff did not find out about what happened until after the fact. Plaintiff failed to reach out to K.D. or K.D.'s mother. Plaintiff failed to seek out and gather additional information about what had transpired. Plaintiff did not submit a report about the incident, nor did he direct his subordinates to do so until days later after the Superintendent directed that a report be submitted. The facts surrounding Principal Montesano's role in this incident, such as Plaintiff having called Principal Montesano three times and receiving no call back, or that Principal Montesano had the same information about the incident as Plaintiff but also did not submit a report to the Central Office, certainly demonstrate a mitigation of Plaintiff's fault. However, as the Arbitrator points out, Plaintiff did not attempt to contact the Arbitrator through any other mediums of communication other than a work phone. One could reasonably conclude that an individual in Plaintiff's position would send, at the very least, a follow up email or text message to the missed calls placed about an injury to a student. More importantly, the Arbitrator's rejection of Plaintiff's argument that other employees' transgressions should be considered in exonerating Plaintiff from the same infractions, is also an adequate determination. Under the scope of a limited review, and in the backdrop of a reasonably debatable justification, a conclusion that despite the transgressions of other employees Plaintiff held responsibilities and obligations independent of his colleagues, certainly suffices for this Court to uphold. This Court does not disagree with the Arbitrator in his finding that Plaintiff should have taken more of an initiative in the aftermath of this incident; this is further emphasized by the fact

that once Plaintiff learned a report had not been submitted, Plaintiff still failed to take the necessary actions to ensure one ultimately would be submitted.

As to Charge Eight, even if Plaintiff was found to not be responsible for K.D.'s injury, nor for Hernan Castano's initial treatment of the injury, the Arbitrator's finding that Plaintiff still maintained a responsibility to ensure the concession stand was safe should be upheld. Although Plaintiff may not have *directly* contributed to K.D.'s injury or to the concession stand's lack of supervision, Plaintiff's indirect actions, or inactions, did ultimately contribute to K.D.'s injury. Plaintiff was responsible for the management of coaches and assistant coaches. In addition, Plaintiff delegated concession stand duties to Coach Hammond-Dudley and appointed her head coach knowing that this would entail greater job responsibilities as a coach. The Arbitrator's finding that Plaintiff still maintained a responsibility to ensure supervision and safety of the concession stand, is far from a clear case of impeachment to overturn the Award; it is not unreasonable to find that Plaintiff should have known that the concession stand would ultimately be in need of additional supervision and thus should have acted to find a replacement supervisor.

In addition, this Court also finds that Plaintiff has failed to establish any circumstances in which the Arbitrator violated N.J.S.A. 2A:23B-23 by exceeding his powers as arbitrator or by issuing an award through undue means. Throughout the Arbitrator's decision, the Arbitrator acknowledged various missteps, such as the inclusion of Exhibit D-24, but was still able to reasonably justify his findings. At each turn, the Arbitrator acknowledged mitigating factors, considered those circumstances, and still found that the evidence weighed against Plaintiff. This demonstrates a careful consideration of the facts and evidence put forth and is bolstered by justifications that this Court would be hard-pressed to find do not amount to reasonably debatable

conclusions. Thus, Plaintiff's allegations do not amount to enough of an oversight by the Arbitrator to find a violation of the New Jersey Uniform Arbitration Act.

Lastly, even if some of the Arbitrator's findings warrant reconsideration, or ultimately could be overturned, the array of violations that Plaintiff accrued demonstrate a pattern of unbecoming conduct. Although some of these transgressions may not be solely the fault of Plaintiff, or may even fall outside of Plaintiff's direct control, ultimately, the Charges and Counts that Plaintiff did clearly violate paint enough of a picture to suggest the Arbitrator's finding that Plaintiff was guilty of Charge Nine, the omnibus charge, and overall findings of guilt, should be upheld. Moreover, under the standard for vacating an arbitration award, even a barely colorable justification is sufficient and demands that a court uphold an arbitrator's finding. Thus, here, it would be an overstep of this Court to vacate the Arbitrator's reasonably debatable findings. Ultimately, the Arbitrator had adequate evidence in front of him to conclude that Plaintiff's termination should be upheld, and those findings were sufficiently justified to withstand a limited review by this Court.

Therefore, Plaintiff's Order to Show Cause for an Order to Vacate the arbitration award is denied and the Arbitrator's decision is hereby confirmed. An order accompanies this decision.