SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2405-20

NEWARK FIREFIGHTERS UNION, INC.,

Plaintiff-Respondent,

v.

CITY OF NEWARK,

Defendant-Appellant.

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Argued March 16, 2022 – Decided June 7, 2022

Before Judges Sumners and Vernoia.

On appeal from the Superior Court of New Jersey, Chancery Division, Essex County, Docket No. C-000035-21.

Angela G. Foster, First Assistant Corporation Counsel, argued the cause for appellant (Kenyatta K. Stewart, Corporation Counsel, attorney; Joyce Clayborne, on the briefs).

Craig S. Gumpel argued the cause for respondent.

PER CURIAM

Defendant City of Newark (City) appeals from an order granting plaintiff Newark Firefighters Union, Inc.'s (Union) motion for confirmation of an arbitration award and denying the City's motion to vacate the award. In the award, the arbitrator determined the City violated the parties' collective negotiations agreement (CNA) by unilaterally terminating a thirteen-year practice of paying firefighters a military leave pay differential during their military service. The award further directed the City to negotiate with the Union over any change in the practice. Having reviewed the record in light of the parties' arguments and the applicable legal principles, we are convinced the court correctly granted the Union's application to confirm the arbitration award and denied the City's application to vacate the award. We therefore affirm.

I.

The Union is the collective negotiations representative of "all Firefighters, Fire Alarm Operators, Lineworkers and Fire Signal Systems Repairer[s]" (collectively "firefighters") employed in the City's fire department. The Union and the City are parties to a CNA "covering the period January 1, 2013 through December 31, 2015 and a Memorandum of Agreement . . . covering the period January 1, 2016 to December 31, 2016." The CNA is the operative agreement between the parties during the time relevant to the issues on appeal.

N.J.S.A. 38:23-3, which was enacted in 1918, L. 1918, c. 16, § 1, authorizes "[a]ny officer, department, . . . or other body of" a municipality to "pay in his or its discretion the whole or a part of the salaries or compensation" of employees "during the time they are engaged in a branch of the military or naval service," in an amount that, when added to their military pay, does not exceed the salary paid to the employee by the municipality before the employee entered the military or naval service. In 2001, the City's then-mayor, Sharpe James, issued an executive order (the 2001 Executive Order) authorizing the City's payment of the military leave differential set forth in N.J.S.A. 38:23-3 to its municipal employees, including firefighters, "who are called to active duty during . . . operations precipitated by the September 11, 2001 attacks . . . for a total of up to [twenty-four] consecutive months." The 2001 Executive Order specifically provided that during this leave period, "a salary equal to the differential between the employee's municipal salary . . . and the employee's military pay following the exhaustion of statutory entitlements to full pay." The 2001 Executive Order also required the City provide "employees . . . health benefits and pension coverage during active duty service for which they receive differential salary."

Almost fourteen years later, in 2015, the City's Mayor Ras J. Baraka issued an executive order (the 2015 Executive Order) rescinding the 2001 Executive Order and providing "[t]he City shall continue to comport with all applicable federal and state statutory parameters that govern paid military leave as further specified under the City of Newark's Personnel & Procedures Policy, to wit: 'PDP-24.'" The 2015 rescission of the 2001 Executive Order took place without any negotiations or agreement with the Union.

The Union filed a grievance challenging the City's rescission of the military leave differential. More particularly, the Union's grievance claimed the City violated the CNA by denying certain named firefighters military differential pay, and the continuation of their health benefits and pension contributions, while on military leave. The grievance requested the City "make whole and pay any and all affected [Union] members in all respects inclusive of interest."

When the parties were unable to resolve the grievance, the Union submitted it to arbitration pursuant to the CNA, which provides "[t]he arbitrator shall have the authority to hear and determine the grievance, and his/her decision shall be final and binding on all parties. The arbitrator shall have no right to vary or modify the terms and conditions of the [a]greement." The New Jersey

Board of Mediation appointed an arbitrator, who framed the issue presented for resolution as follows: "Did the City violate the [CNA] when it failed to properly pay . . . for military leave? If so, what shall be the remedy?" The parties presented witnesses and evidence during a two-day hearing, and they submitted post-hearing briefs.[1]

In his written opinion and award, the arbitrator summarized various CNA provisions, statutes, and the 2001 and 2015 Executive Orders. The arbitrator found that under the 2001 Executive Order, firefighters on active-duty military service "received their statutory pay along with 'differential'" pay for a period of "over [thirteen years] from 2001 through 2014," when the 2015 Executive Order rescinded the benefit. The arbitrator found the City unilaterally rescinded the benefit because the 2015 Executive Order was not preceded by "negotiations on the topic between the City and the Union."

The arbitrator also summarized the parties' positions, explaining the Union argued the 2001 Executive Order was "a term and condition of employment that could not be unilaterally terminated by the City" because the military leave differential had become "a binding past practice and custom." The Union relied on a 2016 arbitration award, which had been confirmed by a court,

[1] The hearing was not recorded or transcribed.

in which it was determined the 2015 Executive Order violated the CNA and the City's past practice of paying the military leave differential established in the 2001 Executive Order by failing to pay the military leave differential to a firefighter. The Union also relied on a Public Employment Relations Commission (PERC) hearing examiner's determination that the 2015 Executive Order violated the New Jersey Employer-Employee Relations Act (NJEERA), N.J.S.A. 34:13A-1 to -64, by unilaterally modifying police officer compensation and benefits for military leave. The Union also argued the military leave differential is a binding past practice, and by discontinuing the policy pursuant to the 2015 Executive Order, the City exceeded its managements rights under the CNA.

The arbitrator summarized the City's arguments, first noting the City claimed, "there is no contractual provision requiring payments beyond [thirty] day's paid leave for Reservists, pursuant to N.J.S.A. 38:23-1, or [ninety] day's paid leave for National Guard members pursuant to N.J.S.A. 38A:4-4." It argued, based on testimony elicited from its witness, Colonel John E. Langston of the United States Department of Veteran Affairs Military Liaison, that differential pay is "entirely discretionary." It also argued the Union improperly

sought to "dictate the City's right to rescind an [e]xecutive [o]rder, and thus usurp the managerial prerogative of the Mayor."

In support of its arguments, the City relied on the management rights provision in Article XXIII of the CNA, "the general 'executive management and administrative control' rights of City government, and also the mayoral powers provision under the Faulkner Act, N.J.S.A. 40:69A-1, et seq." The City also relied on testimony from former Mayor James and the City Clerk that a mayor has "unbridled authority to issue and rescind executive orders." Relying on the testimony of former Mayor James, the City argued the military leave differential established in the 2001 Executive Order was not intended to bind subsequent mayors of the City.

The arbitrator found the military leave differential was established by the 2001 Executive Order and "remained intact and available for an extended period of time, until" rescinded on January 8, 2015, by the 2015 Executive Order. The arbitrator further found that "[p]aid and unpaid leaves of absences are mandatorily negotiable" under NJEERA "unless collective negotiations are preempted by statute or regulation." The arbitrator noted that in City of Newark and Fraternal Order of Police, Newark Lodge No. 12, 42 N.J.P.E.R. ¶ 91 (2015),

a PERC hearing officer determined the City violated NJEERA by unilaterally modifying military leave compensation by rescinding the 2001 Executive Order.

The arbitrator explained the 2001 Executive Order was properly implemented as an exercise of discretion under N.J.S.A. 38:23-3, which authorizes a municipal officer to pay a military leave differential without any time limitation. The arbitrator concluded the military leave differential constituted a term and condition of a firefighter's employment under the CNA upon the issuance of the 2001 Executive Order and, by 2015, had "also [become] a binding past practice that could not be unilaterally eliminated by the City." The arbitrator further reasoned that even assuming Mayor Baraka had the right to rescind the 2001 Executive Order, "the City was not permitted to unilaterally abolish" the military leave differential without negotiating with the Union.

The arbitrator observed his conclusion "should come as no surprise" because the identical issue was previously addressed in a prior arbitration proceeding between the parties, the arbitrator in that matter reached the identical conclusion, and the award was confirmed in the Superior Court. The arbitrator rejected the City's claim the prior case could be distinguished because Mayor James did not testify in that case, as he did here, that he did not intend the 2001 Executive Order to bind successor mayors. The arbitrator found the testimony

"of no relevance" because it ignored "the City[,] as the public employer[,] [could] not unilaterally eliminate any negotiable terms and conditions of employment that were established by the executive order."

The Union filed a verified complaint and order to show cause seeking confirmation of the arbitrator's award. The City filed an answer, and a verified cross-complaint and order to show cause seeking vacatur of the award. Following the submission of briefs and oral argument, the court issued a detailed decision from the bench finding "the arbitrator fully reviewed the issues and gave what was a very reasoned decision." The court noted the arbitrator did not "dispute that the executive order could be rescinded[, b]ut he found that . . . wasn't the issue in the case." The court explained the arbitrator found that although the military leave differential was established by executive order, the differential thereafter constituted a term and condition of employment requiring negotiation prior to rescission. The court found the arbitrator had "anchored that [conclusion] in precedent" by citing "regulations and cases."

The court concluded that "[e]ven if [it] didn't agree with the arbitrator [it did] find that his position and his reasoning were reasonably debatable." Citing Barcon Associates, Inc. v. Tri-County Asphalt Corp., 86 N.J. 179, 187 (1981), the court explained it was required "to indulge with favor an arbitration award"

which is "only subject to impeachment in a clear case." Because the court found "a very strong argument that [the] differential pay is a mandatorily negotiable element of employment," it confirmed the award. The court entered an order confirming the arbitration award and dismissing the City's cross-complaint requesting vacatur of the award. This appeal followed.

The City presents the following arguments for our consideration.

> POINT I.
>
> THE ARBITRATION AWARD WAS PROCURED BY UNDUE MEANS PURSUANT [TO] N.J.S.A. 2A:24-8[(a)] AS THE ARBITRATOR EXCEEDED HIS AUTHORITY BY DISREGARDING THE EXPRESS TERMS OF THE PARTIES' AGREEMENT.
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> POINT II.
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> THE ARB[]IT[R]ATION AWARD VIOLATES N.J.S.A. 40:69A[]-1, ET.[]SEQ., THE FAULKNER ACT, AS AN EXECUTIVE ORDER IS NOT NEGOTIABLE NOR ARBITRABLE.
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> POINT III.
>
> THE COURT IMPROPERLY CONFIRMED THE ARBITRATION AWARD AS THE ARBITRATION AWARD VIOLATED PUBLIC . . . POLICY[.]

II.

A court's "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 Loc. # 21 v. Town of Kearny, 81 N.J. 208, 221 (1979)). A decision to vacate or affirm an arbitration award constitutes the resolution of a legal issue that we review de novo. Minkowitz v. Israeli, 433 N.J. Super. 111, 136 (App. Div. 2013).

A court must afford an arbitrator's award "considerable deference" because "there exists a strong preference for judicial confirmation of arbitration awards." Borough of E. Rutherford v. E. Rutherford PBA Loc. 275, 213 N.J. 190, 201 (2013) (quoting Middletown Twp. PBA Loc. 124 v. Twp. of Middletown, 193 N.J. 1, 10 (2007)). Under a court's "extremely deferential review" of an arbitration award rendered pursuant to a collective negotiations agreement, the "award will be confirmed 'so long as the award is reasonably debatable.'" Policemen's Benevolent Ass'n, Loc. No. 11 v. City of Trenton, 205 N.J. 422, 428-29 (2011) (quoting Linden Bd. of Educ., 202 N.J. at 276). An arbitrator's interpretation of a collective negotiations agreement is reasonably

debatable, if it is "'justifiable' or 'fully supportable in the record.'" Id. at 431 (quoting Kearny PBA Loc. # 21, 81 N.J. at 223-24). "[I]f two or more interpretations of a labor agreement could be plausibly argued, the outcome is at least reasonably debatable." Borough of Carteret v. Firefighters Mut. Benevolent Ass'n, Loc. 67, 247 N.J. 202, 212 (2021).

"Under the 'reasonably debatable' standard, a court reviewing [a public-sector] arbitration award '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.'" E. Rutherford PBA Loc. 275, 213 N.J. at 201-02 (alteration in original) (quoting Middletown Twp., 193 N.J. at 11). "Courts are not to 'second-guess' an arbitrator's interpretation[.]" Id. at 202 (quoting State v. Int'l Fed'n of Pro. & Tech. Eng'rs, Loc. 195, 169 N.J. 505, 514 (2001)). "Thus, if the arbitrator's contractual interpretation is 'reasonably debatable,' [this court] must defer to that interpretation." Int'l Fed'n of Pro. & Tech. Eng'rs, Loc. 195, 169 N.J. at 514. This is because, "where a collective bargaining agreement provides for binding arbitration, 'it is the arbitrator's construction that is bargained for,' and not a court's construction." City of Trenton, 205 N.J. at 429 (quoting Linden Bd. of Educ., 202 N.J. at 276).

The New Jersey Arbitration Act provides four bases supporting vacatur of an arbitration award:

> 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;
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> c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence . . . 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.]

In addition to the statutory criteria, "a court, 'may vacate an award if it is contrary to existing law or public policy.'" E. Rutherford PBA Loc. 275, 213 N.J. at 202 (quoting Middletown Twp., 193 N.J. at 11).

The City argues the court should have vacated the arbitration award because it was procured through undue means, N.J.S.A. 2A:24-8(a), the arbitrator exceeded his authority, N.J.S.A. 2A:24-8(d), and the award violates public policy. We consider the arguments in turn.

A.

The City claims the arbitration award was obtained through undue means, see N.J.S.A. 2A:24-8(a), and exceeded the arbitrator's authority, see N.J.S.A. 2A:24-8(d), because the arbitrator disregarded the terms of the CNA and effectively amended the CNA by finding the past practice of paying the military leave differential constituted a legally binding contractual obligation. The City relies on Article IV of the CNA, which provides in part that "[t]he arbitrator shall have no right to vary or modify the terms and conditions of the [a]greement," and the City argues its obligations concerning military leave are limited in Article XXIX, which provides that "[e]mployees shall be granted military leave pursuant to N.J.S.A. 38:23-1 et. seq. and N.J.S.A. 38A:4-4, which are incorporated by reference, or as otherwise required by State or Federal Law." Thus, the City claims that under the CNA, it is obligated to pay a military leave differential only to reservists for thirty-days pursuant to N.J.S.A. 38:23-1, and for members of a militia for ninety days pursuant to N.J.S.A. 38A:4-4, and the arbitrator exceeded his authority by relying on a past practice to effectively amend the CNA by finding the City is obligated to pay the military leave differential set forth in the 2001 Executive Order.

"'[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 . . . ." E. Rutherford PBA Loc. 275, 213 N.J. at 203 (alteration in original) (quoting Off. of Emp. Rels. v. Commc'ns Workers of Am., 154 N.J. 98, 111 (1998)). Arbitrators exceed their authority where they ignore "the clear and unambiguous language of the agreement." City Ass'n of Supervisors & Adm'rs v. State Operated Sch. Dist. of Newark, 311 N.J. Super. 300, 312 (App. Div. 1998).

It is fundamental that "an arbitrator may not disregard the terms of the parties' agreement, nor may he [or she] rewrite the contract for the parties." Cnty. Coll. of Morris Staff Ass'n v. Cnty. Coll. of Morris, 100 N.J. 383, 391 (1985) (citation omitted). Furthermore, "the arbitrator may not contradict the express language of the contract." Linden Bd. of Educ., 202 N.J. at 276. "[W]here an arbitration award does not draw its essence from the bargaining agreement, it will not be enforced by the courts." Cnty. Coll. of Morris, 100 N.J. at 392 (quoting Belardinelli v. Werner Cont'l Inc., 128 N.J. Super. 1, 7 (App. Div. 1974)).

The City's claim the arbitrator improperly added terms to the CNA ignores the agreement's plain language. The military leave provision states the City shall grant "military leave pursuant to N.J.S.A. 38:23-1 et. seq. and N.J.S.A. 38A:4-4." Contrary to the City's implicit contention, the scope of the military

leave authorized under the provision is not limited to the military leaves authorized by N.J.S.A. 38:23-1 and N.J.S.A. 38A:4-4. The "et. seq." that follows "N.J.S.A. 38:23-1" in the CNA provision refers to the military leaves set forth in the statutes following N.J.S.A. 38:23-1, and including the military leave authorized in N.J.S.A. 38:23-3. See Black's Law Dictionary 695 (11th ed. 2019) (defining "et seq." as an abbreviation for the Latin "et sequentes" or "et sequentia" meaning "and the following ones," which is used to indicate "and those (pages or sections) that follow"); see, e.g., Darrah v. Evesham, 111 N.J. Super. 62, 64-65 (App. Div. 1970) (employing "et seq." to refer to the entirety of the Municipal and County Utilities Authorities Law, N.J.S.A. 40:14B-1 to -14B-78). Thus, the military leave and concomitant pay differential set forth in N.J.S.A. 38:23-3 is expressly authorized by the CNA's military leave provision.

The parties do not dispute the 2001 Executive Order directed payment of the military leave differential authorized by N.J.S.A. 38:23-3 or that the statute is incorporated by reference into the CNA's military leave provision. Thus, the arbitrator's determination the City is bound by the CNA to pay the military leave differential did not add a new term to the CNA or modify or amend the CNA in any way. Rather, the arbitrator gave effect to the military leave provision's plain language by finding the City became contractually bound to pay the military

leave differential when it issued the 2001 Executive Order granting military leave pursuant to N.J.S.A. 38:23-3 as expressly authorized by the CNA, and thereafter paid the differential in accordance with that contractual obligation during the subsequent thirteen years.

We therefore reject the claim the arbitrator exceeded his authority by finding the City had a contractual obligation under the CNA's military leave provision to pay the military leave differential pursuant to N.J.S.A. 38:21-3. The arbitrator's finding draws its essence from the military leave provision's plain language, County College of Morris, 100 N.J. at 392, authorizing the City's payment of the differential in accordance with N.J.S.A. 38:21-3.

The fact that the arbitrator also noted the City had a long-standing past practice of paying the military differential pursuant to N.J.S.A. 38:21-3, and as authorized by the CNA, does not require a different result. The arbitrator did not rely on the past practice as a means of adding a term to the CNA that otherwise finds no basis in the agreement. As noted, the CNA's military leave provision authorized the City's adoption of the military leave differential embodied in the 2001 Executive Order, which established the contractual obligation the arbitrator determined the City violated. As the court correctly determined, the City offers no basis to conclude the arbitrator's determination is

not reasonably debatable. See City of Trenton, 205 N.J. at 429. We therefore discern no basis to reverse the court's rejection of the City's claim the arbitration award should be vacated because the arbitrator exceeded his authority, or the award was procured through undue means.

We also reject the City's claim the award was obtained through undue means because the arbitrator found irrelevant former Mayor James's testimony he did not intend the 2001 Executive Order to be binding on his successors. The proffered testimony is clearly irrelevant to the legal issue upon which the arbitrator decided the matter—whether the City was contractually bound under the CNA to pay the military leave differential following the 2001 Executive Order. The City makes no showing Mayor James's intentions at the time he issued the 2001 Executive Order have any bearing on the proper determination of the legal issue decided by the arbitrator.

B.

The City also argues the court erred by confirming the award because it violates public policy. See E. Rutherford PBA Loc. 275, 213 N.J. at 202 (allowing vacatur of arbitration award that violated public policy); see also N.J. Tpk. Auth. v. Loc. 196, 190 N.J. 283, 293-94 (2007) (same). The grounds allowing vacatur of an arbitration award on public policy grounds are "narrow[]"

and "will be met only in rare circumstances." E. Rutherford PBA Loc. 275, 213 N.J. at 202 (quoting Loc. 196, 190 N.J. at 294).

The "first step in determining whether the public policy exception applies—i.e., whether the award violates a 'clear mandate of public policy'—is to define 'public policy.'" Loc. 196, 190 N.J. at 294. "Public policy is ascertained by 'reference to the laws and legal precedents and not from general considerations of supposed public interests.'" E. Rutherford PBA Loc. 275, 213 N.J. at 202-03 (quoting Weiss v. Carpenter, Bennett & Morrissey, 143 N.J. 420, 434-35 (1996)). Put differently, "for purposes of judicial review of labor arbitration awards, 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." Loc. 196, 190 N.J. at 295.

Where, as here, a party argues an arbitration award should be vacated on public policy grounds, we apply the "deferential 'reasonably debatable' standard." E. Rutherford PBA Loc. 275, 213 N.J. at 203. As a result, "[i]f the correctness of the award, including its resolution of the public-policy question, is reasonably debatable, judicial intervention is unwarranted." Ibid. (alteration in original) (quoting Weiss, 143 N.J. at 443). Thus, a court may not properly

vacate an award where the arbitrator "has identified, defined, and attempted to vindicate the pertinent public policy . . . 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. (quoting Weiss, 143 N.J. at 443).

The City argues the arbitrator's decision violates public policy because the payment of "[m]ilitary leave differential . . . beyond the statutory limits" provides the Union with "more than . . . it bargained for in the[] CNA," and it results in a "severe fiscal impact on the" City's citizens. The City claims that any requirement it pay the differential violates the public policy embodied in N.J.S.A. 38:23-1, which authorizes payment of full pay for up to thirty days for a municipal employee who is on a leave of absence serving "as a member of a reserve component of the Armed Forces of the United States," and in N.J.S.A. 38A:4-4, which authorizes payment of full pay for up to ninety days for a municipal employee serving as "a member of the organized militia." The City contends the arbitrator's award requiring payment of the military leave differential in excess of the minimum requirements in those statutes violates public policy by making discretionary payments mandatory.

The City's claim the arbitrator's award violates public policy is not grounded in any law or legal precedent, see Local 196, 190 N.J. at 294, and the City's payment of the military leave differential under the 2001 Executive Order does not exceed any statutory limits. As we have explained, payment of the military leave differential is expressly authorized by N.J.S.A. 38:23-3, which provides that a municipality may pay in "its discretion the whole or a part of the salaries or compensation of their employees . . . during the time they are engaged in a branch of the military or naval service of the national government or of this state." This statutory expression of public policy authorized the City's decision, embodied in the 2001 Executive Order and followed for over thirteen years, to pay the military leave differential authorized in N.J.S.A. 38:23-3.

Contrary to the City's claim, the arbitrator also did not violate public policy by mandating payment of the military leave differential or by ordering the City to do so. The arbitrator determined only that the City's decision to make military leave differential payments constituted a legally binding contractual obligation assumed by the City in accordance with the military leave provision of the CNA. The arbitrator's award merely gave legal effect to the City's contractual obligation to pay the military differential under N.J.S.A. 38:23-3 in

accordance with the CNA. The City points to no public policy that is violated by those determinations. Loc. 196, 190 N.J. at 294.

We are also not persuaded by the City's more generic claim that the arbitration award violates public policy because of its adverse financial impact. As noted, generally stated "considerations of supposed public interests" do not support vacatur on public policy grounds. E. Rutherford PBA Loc. 275, 213 N.J. at 202-03 (quoting Weiss, 143 N.J. at 443).

The Court has found the fact an arbitration award may be "financially burdensome," without more, is not a basis for vacatur; "an arbitration award's imposition of a make-whole financial damages remedy—not expressly contractually or statutorily prohibited—for a contract violation does not, in and of itself, justify the vacation of the award." Id. at 206-07. The Court has explained:

> If the imposition of an asserted "financially burdensome" damages remedy were to become a determinative factor when reviewing an arbitration award, the losing party in an arbitration imposing financial damages would almost invariably seek vacation of the award. The deferential standard of review is intended, in part, to deter such litigation.
>
> [Id. at 207.]

We recognize an arbitrator's consideration of the fiscal impact of an award on a public entity may be properly considered "in fashioning an appropriate remedy." S. Plainfield Bd. of Educ. v. Plainfield Educ. Ass'n ex rel. English, 320 N.J. Super. 281, 291 (App. Div. 1999). However, the City does not point to any requirement that an arbitrator consider the fiscal impact of an award when determining the merits of the underlying grievance. Thus, we reject the City's claim the arbitrator violated public policy by failing to consider the fiscal impact of the military leave differential in its determination the City is contractually obligated to pay the differential.

We also reject the City's argument the arbitrator failed to consider the fiscal impact of the payments he ordered the City make to seven firefighters who were entitled to the military leave differential. The City did not make the argument to the arbitrator in the first instance. By failing to do so, the City waived its right to assert it for the first time in its challenge to the award. See Loc. 196, 190 N.J. at 292 ("[A]rbitration is 'meant to be a substitute for and not a springboard for litigation.'" (quoting Loc. No. 153, Off. & Pro. Emps. Int'l Union v. Tr. Co. of N.J., 105 N.J. 442, 449 (1987))); E. Rutherford PBA Loc. 275, 213 N.J. at 209 ("Arbitration simply is not a mere gateway to the courthouse. The resolution of arbitrated disputes should ordinarily end with the

conclusion of the arbitration."). Moreover, the City's failure to raise the issue during the arbitration proceeding necessarily means it failed to present evidence concerning its newly minted claim of fiscal impact such that the arbitrator could have properly considered the issue, even in the determination of a remedy. See S. Plainfield Bd. of Educ., 320 N.J. Super. at 293-94.

In sum, the City fails to demonstrate the arbitration award contravenes any clearly stated public policy, and the applicable statutes incorporated by reference in the CNA expressly authorized the City's decision to pay, and practice of paying, the military leave differential to which the arbitrator gave proper legal effect. The City's attempt to seek refuge in a belated claim the award violates public policy by imposing a fiscal impact is unsupported by the applicable legal principles and otherwise fails because it was not raised during the arbitration and finds no support in the evidence.

C.

The City also argues the arbitration award should have been vacated because it violates the Faulkner Act, N.J.S.A. 40:69A-1 to -210. More particularly, the City claims the arbitrator's finding "[t]he Mayor cannot unilaterally abolish the [military leave] differential" usurps Mayor Baraka's

authority under the Faulkner Act, and the arbitrator erred by requiring negotiations over the City's putative recission of the military leave differential.

The City's argument attempts to elevate a mayor's executive orders into governmental fiats that have no legal effect beyond that which a mayor chooses to give them. The City does not cite to any provision of the Faulkner Act either establishing such a broad grant of authority or prohibiting enforcement of a binding and enforceable contractual obligation simply because its genesis was the issuance of an executive order. Although it argues the arbitration award violated the Faulkner Act by requiring that it negotiate over any change in the payment of the military leave differential, the City cites no legal authority supporting its claim. Stated differently, the City points to no provision of the Faulkner Act that permits a mayor to abandon a contractual obligation through the rescission of the executive order that established the obligation, in accordance with a collective negotiations agreement, in the first instance.

The City also does not identify which, if any, of the statutory grounds under N.J.S.A. 2A:24-8 for vacatur of an arbitration award upon which it relies in support of its argument. To the extent we may broadly read the City's argument as a claim the arbitration award's purported interference with the mayor's authority constitutes a "rare circumstance[]" providing a basis for

vacatur under the "narrow[] . . . public policy exception," Local 196, 190 N.J. at 294 (quoting Tretina Printing, Inc. v. Fitzpatrick & Associates, 135 N.J. 349, 364 (1994)), the City makes no showing the "award implicates 'a clear mandate of public policy,'" ibid. (quoting Weiss, 143 N.J. at 443). As noted, the City cites solely to the Faulkner Act as being violated by the arbitrator's award, but it fails to identify a single provision of the statute that is contravened by the award.

The City vaguely argues the arbitration award usurps the mayor's authority by requiring negotiations over a change in the payment of the military leave differential. However, the arbitrator's determination is wholly consistent with the public policy, found in applicable legal precedent, requiring that public employers negotiate with collective negotiations representatives over subjects that are deemed mandatorily negotiable. See Robbinsville Twp. Bd. of Educ. v. Washington Twp. Educ. Ass'n, 227 N.J. 192, 198 (2016) (explaining "the scope of public employment negotiation is divided . . . into two categories . . . comprised of mandatorily negotiable subjects and non-negotiable matters of government policy").

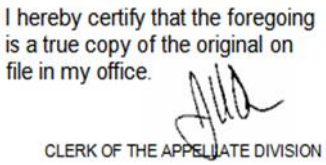
Our Supreme Court has explained that a subject is mandatorily negotiable where the following conditions are satisfied: "(1) the item intimately and

directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy." In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020) (quoting Robbinsville Twp. Bd. of Educ., 227 N.J. at 199). The City does not address these criteria, contend payment of the military leave differential is not a mandatorily negotiable subject of negotiations under them, or challenge the arbitrator's conclusion that payment of the military leave differential is mandatorily negotiable. As a result, the City offers no basis to conclude the arbitrator's award is either violative of the Faulkner Act or is founded on an erroneous determination that payment of the military leave differential is a mandatory subject of negotiations.[2] We reject any of the City's arguments that suggest a contrary result.

[2] To the extent the City's argument may be interpreted as an assertion the subject of military leave differential constitutes a "non-negotiable matter of governmental policy" by operation of some unidentified provision of the Faulkner Act, we note that the City should have filed a scope of negotiations petition, pursuant to N.J.A.C. 19:13-2.1, with the PERC before proceeding to arbitration and before the arbitrator rendered his award. See generally, Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 154-55 (1978) (explaining the process for obtaining a scope of negotiations determination from PERC). As the Court recently explained, "PERC is . . . the forum for the initial determination of whether a matter in dispute is within the

Any arguments made by the City we have not expressly addressed are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.



scope of collective negotiations." Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 614 (2020) (quoting State v. State Supervisory Emps. Ass'n, 78 N.J. 54, 83 (1978)). We also observe the City did not request, as it might have if it had claimed the subject of military leave differential is not a mandatory subject of negotiations, that the trial court refrain from addressing the issue of the arbitrability of the subject or for the trial court to transfer any negotiations issue to the PERC. See In re City of Newark v. Newark Council 21, 320 N.J. Super. 8, 17 (App. Div. 1999) (explaining a trial court should defer in the first instance to PERC's primary jurisdiction over whether a subject is mandatorily negotiable); Bd. of Educ. of Plainfield v. Plainfield Educ. Ass'n, 144 N.J. Super. 521, 525-27 (App. Div. 1976) (explaining PERC has "primary jurisdiction to determine scope questions," such as the "negotiability of a particular issue"). Indeed, on appeal, despite its vague and unsupported claim the arbitrator's award violated the Faulkner Act by requiring negotiations over any attempt to rescind the military leave differential, the City does not dispute the subject of paying the differential is mandatorily negotiable. We therefore find in unnecessary to address the merits of any such claim.