SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0328-15T4

COUNTY OF HUDSON,

Plaintiff-Appellant,

v.

PBA LOCAL 109,

Defendant-Respondent.

Submitted March 29, 2017 – Decided May 8, 2017

Before Judges Manahan and Lisa.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2618-14.

Scarinci & Hollenbeck, LLC, attorneys for appellant (Sean D. Dias, of counsel; Allison N. Zsamba, on the briefs).

William D. Sayers, attorney for respondent.

PER CURIAM

County of Hudson (County) appeals from the trial court's order confirming an arbitration award, which denied in part and sustained in part, the grievance of PBA Local 109 (PBA). In light

of our highly deferential standard of review, we conclude that the arbitrator's award was reasonably debatable and affirm.

The County and the PBA are parties to a series of collective bargaining agreements (CBA), inclusive of the timeframe when this dispute arose. Pursuant to Article XIV, Section 6 of the CBA:

> The PBA President shall be assigned to a day tour, and to a duty assignment where he will be reasonably accessible to bargaining unit members.
>
> The PBA President shall be granted reasonable release time from work duties to attend to union business during work time, provided that such release time shall in no way interfere with the operation or normal routine of the correctional facility or any other County department, office or function, and provided further that the PBA President first secures permission from Director or his designee to utilize such release time, which permission shall not be unreasonably denied.

Commencing in 1995, the PBA President was afforded full release time from work duties to attend to union business. In conformance with that practice, Luis Ocasio, President of the PBA, was assigned to the 9 a.m. to 5 p.m. tour, Monday through Friday, and was afforded full release time to engage in PBA activities.

On July 19, 2012, Kirk Eady, Deputy Director of the County's Department of Corrections, issued a memorandum to Ocasio titled "Shift Schedule," which abolished "[t]he practice of the PBA President having full release time[.]" It further stated that:

> Based upon Article XIV Section 6, effective Monday, July 23, 2012, you will be assigned to the 6-2 tour, Unit 2, Monday [through] Friday with Saturday[s] and Sundays off. You will report to duty in full uniform.
>
> In accordance with the article listed above any request for union release time will be directed to my office [forty-eight] hours prior to release time.

In response, on July 29, 2012, the PBA filed a grievance with the County, alleging that the July 19, 2012 memorandum violated the CBA and the past practice of the parties, and seeking a return to the status quo ante.[1] The grievance noted "[t]his has been the practice in order to protect the [t]axpayer from paying overtime for the position since [o]ur [p]resident oversees [three] shifts on [seven] days of the week including holidays."

On August 13, 2012, the PBA filed an unfair practice charge against the County regarding its contention that the July 19, 2012 memorandum constituted an unfair labor practice, including an application for interim relief seeking temporary restraints. The Public Employment Relations Commission (PERC) denied the PBA's application for interim relief on October 9, 2012, finding the PBA had not established a substantial likelihood of prevailing in a

[1] Based on the timeline of the events, the grievance is incorrectly dated July 29, 2011.

final PERC decision. The matter was transferred to the Director of Unfair Practices for further processing.

The CBA provided for arbitration should a grievance arise concerning its terms. Article X, Section 6 of the CBA provides that "[t]he arbitrator shall have full power to hear the dispute and make a final determination, which shall be binding on both parties. The arbitrator does not have the right to add to, subtract from, or modify this [a]greement in any manner."

The grievance proceeded through the grievance procedure without resolution. On August 15, 2012, the PBA filed a request for a submission of a panel of arbitrators. After the arbitrator was selected, hearings were held on four separate dates. At the conclusion of the hearings, the parties submitted briefs upon which the record was deemed closed. The parties stipulated to the issue to be determined by the arbitrator i.e., whether Eady's memorandum violated the CBA and, if so, what was the appropriate remedy.

On March 8, 2014, the arbitrator issued his decision, denying in part, and sustaining in part, the PBA's grievance. In reaching his decision, the arbitrator held:

> The grievance is denied in part and sustained in part. Although Article XIV, Section 6 clearly refers to a duty assignment and work duties for the Local 109 president, Deputy Director Eady's memorandum of July 19,

2012, failed to also consider the clause's granting of reasonable release time, the guaranteed accessibility of the president to his members, or his assignment to a tour established through practice. Therefore, effective April 1, 2014, or as soon after the issuance of this Award as is practical:

1. The PBA president will be reassigned back to the [9 a.m. – 5 p.m.] administrative tour, Monday through Friday. He will be given a normal C/O duty assignment, other than Unit 2 Intake Control, and he will operate on that assignment during the remaining concurrency of the [6 a.m. – 2 p.m.] shift; i.e., he will work within his duty assignment from his report-for-duty at [9 a.m.] until the commencement of his contractual lunch at 1:20 p.m. (scheduled to end at [2 p.m.] daily).

2. Any release time during his C/O duty assignment hours of [9 a.m.] until lunch will be subject to the provisions of Article XIV, Section 6, with forty-eight hours notice to remain as a general guideline with reasonable expectations allowed by the County.

3. From [2 p.m.] until the close of the administrative shift at [5 p.m.] his assignment will be the PBA office on premises, and he will have access to his members during those hours subject only to the appropriate supervisor's determination that such access does not interfere with the operation or normal routine of the facility. If he needs to leave the facility for Union business during his [2 p.m. – 5 p.m.] unassigned release time, the president will notify his superior and comply without routine sign-out requirements. Should the Union business extend beyond [5 p.m.], he will not need to sign back into the facility on that day.

> 4. While he is within the facility between [9 a.m. and 5 p.m.] the president will be subject to all emergencies and codes.
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> 5. Except while on duty between [9 a.m.] and the commencement of his lunch, the president will have access to the PBA office and all unit work sites during all tours and will have to report only that he is present within the relevant facility.
>
> 6. The president will report-in and wear the uniform applicable for his C/O duty assignment, but may change into civilian clothing at the commencement of his lunch or the close of his C/O duty at [2 p.m.]
>
> 7. The president will be exempt from mandatory overtime following the close of his [9 a.m. — 5 p.m.] shift, except in the case of an emergency, and he will not be assigned to C/O duties after 1:20 p.m., except in the case of an emergency.
>
> Finally, Officer Ocasio will be made whole for any use of vacation, compensatory or personal time that he utilized in order to attend hearings in the instant matter.

On June 19, 2015, upon remand by this court, the County's previously vacated order to show cause was reinstated.[2] See Cty. of Hudson v. PBA Local 109, No. A-5569-13 (App. Div. May 29, 2015). In opposition, the PBA moved to confirm in part and vacate in part the arbitration award.[3] After conducting oral argument, on August

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[2] The June 6, 2014 order to show cause to vacate the arbitrator's award and the subsequent June 17, 2014 Law Division denial of the order to show cause for lack of jurisdiction are not part of the record on appeal.

[3] The PBA's opposition is not part of the appellate record.

28, 2015, the Law Division issued an oral decision confirming the award predicated upon the court's finding that there was no evidence that the arbitrator procured the award by undue means, exceeded his authority or issued an award that was not reasonably debatable. The court held that the award was based upon the evidence presented, the language of Article XIV of the CBA and the past practices of the parties. An accompanying order was entered. This appeal followed.

The County raises the following points on appeal:

POINT I

> THE ARBITRATION AWARD IMPROPERLY DIVESTS THE COUNTY OF ITS MANAGERIAL PREROGRATIVE IN DETERMINING STAFFING NEEDS AND STRUCTURING ASSIGNMENTS ACCORDINGLY.

POINT II

> THE ARBITRATOR AND LAW DIVISION INACCURATELY IDENTIFIED, DEFINED, AND ATTEMPTED TO VINDICATE THE PERTINENT PUBLIC POLICIES: NAMELY, (A) THE SAFETY AND SECURITY OF CORRECTION OFFICERS, VISITORS AND INMATES; AND (B) THAT THE ARBITRATION AWARD EFFECTUATES SIGNFICANT WASTE OF [TAXPAYER] MONIES.
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> 1. County's Managerial Prerogative In Structuring Its Employee Assignments Directly Relates To The Safety And Security Interests Of Corrections Officer[s], Visitors, Inmates And The Public At Large, That The Arbitrator's Public Policy Determinations Were Impermissible And Not Reasonably Debatable.

2. The County's Managerial Prerogative In Structuring Its Employee Assignments Is So Intimately Intertwined With The County's Essential Duty To Spend [Taxpayer] Funds Wisely That The Arbitrator's Award Was Impressible And The Identification [A]nd Execution Of This Public Policy Was Not Reasonably Debatable.

POINT III

THE ARBITRATOR IMPERFECTLY EXECUTED HIS AUTHORITY, AS PROSCRIBED BY N.J.S.A. 2A:24-8(D), AND PROCURED AN ARBITRATION AWARD BY "UNDUE MEANS" CONTRARY TO N.J.S.A. 2A:24-8(A) AND IGNORED THE PLAIN LANGUAGE OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT, WHEN HE IMPROPERLY CHANGED THE COUNTY'S ASSIGNMENT OF THE PBA PRESIDENT TO WORK DUTIES.

In the County's reply brief, it also raises the additional point:[4]

POINT I

THE COUNTY'S MANAGERIAL PREROGATIVE WAS IMPLICATED BY THE ARBITRATOR'S AWARD — THE ARBIRTRATOR IMPERMISSIBLY DISREGARDED THE SCOPE OF HIS AUTHROITY BY DICTATED CONTRACT TERMS.

On appeal, the County argues the arbitrator exceeded his authority, the award was procured by undue means, and the award violated public policy. Furthermore, the County argues that the arbitrator's award contradicts the County's managerial prerogative to determine staffing assignments. We disagree.

[4] Points II and III in both the County's brief and reply brief are identical. We remove the latter to avoid repetition.

We engage "in an extremely deferential review when a party to a collective bargaining agreement has sought to vacate an arbitrator's award." Policemen's Benevolent Ass'n, Local No. 11 v. City of Trenton, 205 N.J. 422, 428 (2011). "Generally, when a court reviews an arbitration award, it does so mindful of the fact that the arbitrator's interpretation of the contract controls." Borough of E. Rutherford v. E. Rutherford PBA Local 275, 213 N.J. 190, 201 (2013). "That high level of deference springs from the strong public policy favoring 'the use of arbitration to resolve labor-management disputes.'" Policemen's Benevolent Ass'n, supra, 205 N.J. at 429 (quoting Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 275-76 (2010)). Our role "in reviewing arbitration awards is extremely limited and an arbitrator's award is not . . . set aside lightly." State v. Int'l Fed'n of Prof'l & Tech. Eng'rs, Local 195, 169 N.J. 505, 513 (2001) (citing Kearny PBA Local # 21 v. Town of Kearny, 81 N.J. 208, 221 (1979)).

Thus, "[our] review of an arbitrator's interpretation is confined to determining whether the interpretation of the contractual language is 'reasonably debatable.'" N.J. Transit Bus Operations, Inc. v. Amalgamated Transit Union, 187 N.J. 546, 553-54 (2006) (citations omitted). "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.'" Borough of E. Rutherford, supra, 213 N.J. at 201-02 (alteration in original) (quoting Middletown Twp. PBA Local 124 v. Twp. of Middletown, 193 N.J. 1, 11 (2007)). "Reasonably debatable" means fairly arguable in the minds of ordinary laymen. See Standard Oil Dev. Co. Emps. Union v. Esso Research & Eng'g Co., 38 N.J. Super. 106, 119 (App. Div.), sustained on reh'g, 38 N.J. Super. 293 (App. Div. 1955).

Four statutory bases exist for vacating an arbitration award. N.J.S.A. 2A:24-8. Pursuant to the New Jersey Arbitration Act, N.J.S.A. 2A:24-1 to -11, which now governs collectively negotiated agreements, a court shall vacate an award:

> 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 . . . ; [or]
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> 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.
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> [N.J.S.A. 2A:24-8(a)-(d).]

Moreover, "a court 'may vacate an award if it is contrary to existing law or public policy.'" Borough of E. Rutherford, supra, 213 N.J. at 202 (quoting Middletown Twp., supra, 193 N.J. at 11).

Whether the arbitrator exceeded his authority "entails a two-part inquiry: (1) whether the agreement authorized the award, and (2) whether the arbitrator's action is consistent with applicable law." Id. at 212. "Indeed, it is axiomatic that an arbitrator's 'award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.'" Policemen's Benevolent Ass'n, supra, 205 N.J. at 429 (quoting United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 597, 80 S. Ct. 1358, 1361, 4 L. Ed. 2d 1424, 1428 (1960)).

The arbitrator acknowledged that, while the language of the CBA provided some clarity on the issue of release time, it lacked specificity regarding the duration of the release time. In pertinent part, the arbitrator found:

> With a single memorandum issued on July 19, 2012, Deputy Director Eady removed the president of PBA Local 109 from his [9 a.m. to 5 p.m.] full release assignment, ordered him to report in full uniform to a restrictive assignment on the [6 a.m. to 2 p.m.] tour, made any personal interaction with his members during that shift subject to management approval, and instituted a forty-eight hour

notice requirement before such approval would be granted. . . . The central issue before me is whether those changes were allowed under the clear language of the parties' CBA or precluded through a long-standing practice.

The [PBA] relies in this case upon that practice, which it claims gives meaning to and illuminates the relevant language of the parties' [CBA], specifically Article XIV, Section 6. The County does not dispute the existence of the practice. Indeed, Eady's [July 19, 2012] memorandum states that the "practice" of the PBA president having full release from duty is abolished, and the County did not produce or refer to one past president who did not operate with full release. Both the relevant contract language and the practice have survived unaltered over a period of some seventeen years during which several negotiating events have transpired, the most recent culminating in interest arbitration. Thus, there is no doubt that providing the Local 109 president with relief from all regularly assigned corrections officer duties in order to pursue [PBA] business meets all the recognized criteria for binding practice.

. . . .

What is clear about [the Article XIV, Section 6] language is that the president is to be assigned to a day tour with a duty assignment that renders him reasonably accessible to his members. It also grants him reasonable release from those work duties to attend to [PBA] business if he first obtains permission from management. The definition of "day tour," the parameters of "reasonably accessible," "reasonable release time" and the mechanism of "permission," however, all remain ambiguous. So even through the clear language of the [CBA] may provide some answers to the issue at hand, we have to look to the parties'

practice to illuminate and give meaning to those questions that remain unanswered.

The practice has allowed the [PBA] to believe that the phrase "reasonable release time from work duties" now means "full release time with no regularly assigned duties." I disagree. For its part, the County believes the language is so clear that it means on its face that the president is to have no release time from full corrections officer duty unless such time is granted on a case-by-case basis. I disagree with them as well.

It is not unusual for an arbitrator to be asked to provide meaning for the adjective "reasonable" when negotiators have left it in contract clauses where more specificity is warranted. In the instant case, the practice has set the standard that the "reasonable release time from work duties" specified in Section 6 involves some measure of unassigned time during which the president does not need management approval to conduct on-site [PBA] business. Furthermore, I am convinced by the evidence and testimony that the president's current assignment to Intake Control does not meet the threshold of his being "reasonably accessible" to his members.

The provision that the president must secure prior permission when utilizing release time should obtain in two circumstances. First, if he has a need to conduct [PBA] business during his assigned corrections officers duty, his release would be subject to the granting of permission from his superiors, and he would be required to give some notice in order that the administration can ensure that his absence will not "interfere with the operation or normal routine of the correctional facility." Secondly, should he need to leave the premises on [PBA] business during the non-duty portion of his tour, prior notification of his

whereabouts would be required. It should be noted that since July 2012, during which time Ocasio has had no unassigned [PBA] release time, the administration's definition of "reasonable release time" has been decidedly one[-]sided. The four hearings in the instant matter had been scheduled far in advance, and yet the president could not get permission to attend. Also, having to file an incident report to explain his presence at the facility while he was unassigned cannot serve but to have a chilling effect on unit members who may need to confer with the president during their tours. These actions together with refusing to release him from the possibility of mandatory overtime following his shift so that he could attend to [PBA] affairs bespeak a management agenda beyond contract interpretation or staffing needs.

. . . Even if no other corrections officers are assigned to the 9-5 tour, they are certainly working during it, and it is the [timeframe] during which Internal Affairs interviews take place, as do negotiations and arbitrations. All of these require the attention of the local president, and his presence at these events is in the best interest of the County as well as the [PBA]. In addition, Article XI, Section 2 allows for officers to have a PBA presence at disciplinary hearings, and these no doubt take place during the 9-5 workday when the administrators and most supervisors are present. It stands to reason, then, that the president's assignment and his unassigned release time should take place during this tour. PBA presidents seem to have been functioning on this tour for seventeen years in an effective arrangement for the County and in the best interests of their taxpayers[].

Assigning the Local 109 president to C/O duty for part of his tour and giving the remainder of his workday over to use for

> unassigned [PBA] business meets the clearer dictates of Article XIV, Section 6, with its more ambiguous terminology made clear through a continuation of the parties' long-standing practice in these areas.

As noted in the arbitrator's decision, several terms of the CBA were ambiguous, which resulted in his consideration of the parties' past practices. By his consideration of these practices, the arbitrator did not exceed his authority. Our Supreme Court has held that where there is an apparent ambiguity, consideration of extrinsic proofs may "shed light on the mutual understanding of the parties." Hall v. Bd. of Educ. of Jefferson, 125 N.J. 299, 305 (1991). "The past practice of the contracting parties is entitled to 'great weight' in determining the meaning of ambiguous or doubtful contractual terms." Id. at 306 (quoting Kennedy v. Westinghouse Elec. Corp., 16 N.J. 280, 294 (1954)).

Although the arbitrator is not free to contradict the express language of the contract, an arbitrator may fill gaps in the contract so as to give meaning to a undefined term and "weave together . . . provisions that bear on the relevant question in coming to a final conclusion." Policemen's Benevolent Ass'n, supra, 205 N.J. at 430 (brackets and internal quotation marks omitted) (quoting N.J. Transit Bus Operations, supra, 187 N.J. at 555). "When that occurs, even if the arbitrator's decision appears to conflict with the direct language of one clause of an agreement,

so long as the contract, as a whole, supports the arbitrator's interpretation, the award will be upheld." Ibid.

Predicated upon our review of the record, we conclude that there was ample support for the arbitrator's decision. The arbitrator's construction of Article XIV, Section 6 was a "justifiable interpretation of the [CBA]." Policemen's Benevolent Ass'n, supra, 205 N.J. at 431. In light thereof and consistent with our standard of review, we decline to substitute our "own judgment for that of the arbitrator[.]" Borough of E. Rutherford, supra, 213 N.J. at 201 (citation omitted).

The County next argues that the arbitrator's award was procured by "undue means" in violation of N.J.S.A. 2A:24-8(a). "[U]ndue means encompasses a situation in which the arbitrator has made a mistake of law, whereas an arbitrator exceeds his or her authority by disregarding the terms of the parties' agreement." Borough of E. Rutherford, supra, 213 N.J. at 203 (quoting Office of Emp. Relations v. Commc'ns Workers of Am., 154 N.J. 98, 111-12 (1998)) (internal quotation marks omitted). In application of the statute's definitional language and the controlling decisions of law to the record before us, we conclude the County's argument to be wholly without merit. R. 2:11-3(e)(1)(E).

We next turn to the County's argument that the arbitrator's award is contrary to public policy. In addition to the grounds

to vacate an arbitration award set forth in N.J.S.A. 2A:24-8, a court may vacate an award if "the award is contrary to public policy." Policemen's Benevolent Ass'n, supra, 158 N.J. at 400. Under this exception, however, an award will be vacated only when it "plainly violates a clear mandate of public policy." N.J. Tpk. Auth. v. Local 196, I.F.P.T.E., 190 N.J. 283, 294 (2007) (citation omitted). Our Supreme Court has held:

> Assuming 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. If the correctness of the award, including its resolution of the public-policy question, is reasonably debatable, judicial intervention is unwarranted. The judiciary's duty to provide an enhanced level of review of such arbitration awards is discharged by a careful scrutiny of the award, in the context of the underlying public policy, to verify that the interests and objectives to be served by the public policy are not frustrated and thwarted by the arbitral award.
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> [Weiss v. Carpenter, 143 N.J. 420, 443 (1996).]

The County argues that the award violated public policy because the arbitrator and the trial court did not consider public policy, namely the safety and security of correction officers and the conservation and efficient allocation of taxpayer monies.

Here, the award permits one officer, in a collective bargaining unit consisting of approximately 450 officers, release time for part of his work day to attend to PBA activities. Given the limitation of release time to one officer for only a part of the work day, it is inconceivable that the award could involve an issue of safety or security or the inefficient use of taxpayer monies such as to "frustrate and thwart" public policy.

Finally, the County merges its public policy argument with its position that staffing decisions are a managerial prerogative such that the arbitrator divested PERC of its primary jurisdiction to determine if the issue was mandatorily negotiable. This argument fails in that the County did not file the required scope of negotiations petition.

N.J.S.A. 34:13A-5.4(d) states that PERC "shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations." This gives PERC primary jurisdiction to resolve the inquiry. Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 154 (1978) (citing N.J.S.A. 34:13A-5.4(d)).

"Absent a pre-arbitration scope petition asserting that negotiations are not permitted on a subject, the parties are deemed to have agreed to arbitrate all unresolved issues." Twp. of

Teaneck v. Teaneck Firemen's Mut. Benevolent Ass'n Local No. 42, 353 N.J. Super. 289, 299 (App. Div. 2002) (citing N.J.A.C. 19:16-5.5(b) and (c)), aff'd o.b., 177 N.J. 560 (2003). Moreover, "[a] party cannot go through the negotiations process and then argue it was not required to engage in that process because the subject was not mandatorily negotiable." Ibid. Furthermore, "[t]he PERC regulations specifically provide that when a party contends that an unresolved issue is not within the required scope of negotiations, and the other party disagrees, the party seeking to exclude the issue from negotiations 'shall file with [PERC] a petition for scope of negotiations determination.'" Ibid. (quoting N.J.A.C. 19:16-5.5(c)). Despite that the County cloaks the scope of negotiations issue in terms of "public policy" to elicit our review, its failure to file a scope of negotiations petition before PERC, constitutes a waiver of that argument. See N.J.A.C. 19:16-5.5.

In sum, we hold that the arbitrator adopted a construction of the parties' CBA, which was reasonably debatable and not contrary to law or public policy. Accordingly, the award is entitled to our deference.

Affirmed.