SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0497-16T1

POLICEMEN'S BENEVOLENT ASSOCIATION, LOCAL 277,

Plaintiff-Appellant,

v.

CAMDEN COUNTY BOARD OF CHOSEN FREEHOLDERS AND SHERIFF,

Defendants-Respondents.

Argued December 20, 2017 – Decided April 24, 2018

Before Judges Alvarez, Nugent, and Geiger.

On appeal from Superior Court of New Jersey, Chancery Division, Camden County, Docket No. C-000077-16.

James M. Mets argued the cause for appellant (Mets Schiro & McGovern, LLP, attorneys; James M. Mets, of counsel and on the briefs; David M. Bander, on the briefs).

Howard L. Goldberg, First Assistant County Counsel, argued the cause for respondents (Christopher A. Orlando, County Counsel, attorney; Howard L. Goldberg and Catherine Binowski, Assistant County Counsel, on the brief).

PER CURIAM

Plaintiff Policemen's Benevolent Association, Local 277 (PBA), appeals from a Chancery Division August 19, 2016 order dismissing its complaint and confirming a labor arbitration decision. After consideration of the record and relevant precedent, we affirm.

The PBA entered into a collective negotiations agreement (CNA) with their joint employers, defendants, the Camden County Board of Chosen Freeholders (County) and Sheriff. During the relevant time period, Article XIV, "Sick Leave With Pay," Section 5, Paragraph 1, of the CNA provided:

> employees who do not use sick time in any calendar quarter of the year shall earn one (1) additional vacation day for each quarter where there is no sick time used. Employees who use no sick time at all during any calendar year shall earn a total of five (5) additional vacation days for that year.

For some indefinite time period including the 2014 calendar year, the Sheriff's Department had awarded vacation bonus time under that paragraph even if an employee had taken paid time under the Family Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654. In January 2015, however, the County Finance Department, which had recently assumed the calculation function, reversed the award.

The PBA filed a grievance after the County's reversal of the vacation bonus time award. At the PBA's grievance hearing, Steve

Williams, the County's comptroller since 2013, explained that prior to 2014, the County Prosecutor's Office, Sheriff, Corrections Department, and Public Safety Department maintained separate records regarding vacation time bonuses. For the remaining County employees, the Comptroller's Office maintained the records, and the County did not extend perfect attendance bonuses to those other employees if FMLA time was taken.

After assuming the responsibility to maintain bonus award records for all County subdivisions, Williams learned that the Sheriff awarded bonuses even to those who used FMLA leave. Williams believed that under those circumstances bonuses should not be granted, and he developed a computer program that tracked them. The program automatically disqualified employees from bonus vacation time awards when they took sick leave, including FMLA leave. Once Williams realized in March 2015 that the Sheriff's employees had again been awarded bonus vacation days, despite taking FMLA leave, he corrected the records and rescinded the bonuses.

The PBA submitted a request for arbitration to the Public Employment Relations Commission (PERC) after unsuccessfully pursuing the grievance process. For arbitration, the parties stipulated the issue as follows: "Did the County violate Article XIV, §5 of the [CNA] by failing to pay 'VS time' bonus to PBA members

who used sick time on approved FMLA [leave] during 2014? If so, what shall be the remedy?"

The arbitrator did not find that defendants violated the CNA. In rendering his decision, the arbitrator stated:

> In examining Section 5, I do not find any language that is ambiguous. Either an employee uses sick leave and is disqualified for at least one quarterly bonus day and the annual bonus as well, or he or she does not use sick leave and receives the bonus.
>
> . . . .
>
> In the present case, the parties submitted the following issues in dispute . . . . A FMLA violation is not included in the phrasing of the issue.
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> Additionally, under Article XX, Section 2 (a), "the term 'grievance' means a complaint that there has been an improper application, interpretation, or violation of this Agreement, any County policy governing the PBA, or any administrative decision affecting any member or members of the PBA, including all minor discipline, up to and including five (5) days suspension but excluding counseling notices." Thus, the parties' definition of a grievance does not encompass a statutory violation. Finally, I observe, no contractual provision, including Article XIV, substantively incorporates the provisions of the FMLA.
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> In light of the foregoing, I cannot conclude that I have the jurisdiction to issue a binding arbitration award involving an interpretation and application of the FMLA.

In dismissing the PBA complaint seeking to vacate the arbitration award, the judge stated:

> Counsel for the plaintiff points to the past practice of the parties, but the arbitrator, really he acknowledged the past practice. He says okay, I get it, however, it's not contained here. It's not in writing anywhere, so it's not incumbent upon him to enforce it and in doing so, he would have been adding stuff into a contract that's already been negotiated and written and that everybody's been following.
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> Is it unfortunate that the County didn't pick up on it sooner and realize that it was being done? Yeah, it's unfortunate because without that error, we wouldn't have the past practice, which is what they're hanging their hat on, because it would have been done away with the first year that it was discovered . . . .
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> But the County didn't pick up on it and, in fact, this went on for a period of 15 years with the people who were members of the plaintiff union getting the benefit of that.
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> So I don't think the arbitrator was obligated to modify the contract by adding in the past practice. . . . The issue was very simple and narrow, that is if you use up your sick time, paid sick time during your Family Medical Leave Act Time, are you then still entitled to accrue bonus days? The arbitrator made a clear finding, no, you're not. If you get a paid sick day somewhere along the way, wether [sic] it's inside or outside the Family Medical Leave Act time, you forfeit the extra bonus days.

In its appeal of that decision, the PBA now raises the following points:

POINT I
THE TRIAL COURT'S DECISION CONFIRMED AN AWARD THAT FAILED TO ADDRESS A CLEAR QUESTION OF PUBL[I]C POLICY: DID THE COUNTY VIOLATE THE FMLA BY ITS ACTIONS?

POINT II
THE TRIAL COURT'S DECISION RATIFIED THE ARBITRATOR'S FAILURE TO RENDER A DECISION ON AN ISSUE OF SUBSTANTIVE LAW GOVERNING THE MATTER, THE FAMILY AND MEDICAL LEAVE ACT.

POINT III
THE TRIAL COURT'S DECISION APPROVED THE ARBITRATOR'S REWRITING OF THE CONTRACT

I.

There is "a strong preference for judicial confirmation of arbitration awards." Middletown Twp. PBA Local 124 v. Twp. of Middletown, 193 N.J. 1, 10 (2007) (citation omitted). "[A]n arbitrator's award will be confirmed 'so long as the award is reasonably debatable.'" Policemen's Benevolent Ass'n v. City of Trenton, 205 N.J. 422, 429 (2011) (quoting Linden Bd. of Educ. v. Linden, 202 N.J. 268, 276 (2010)). Our courts have emphasized the importance of arbitration to public sector employees. State v. Int'l Fed'n of Prof'l & Tech. Eng'rs, Local 195, 169 N.J. 505, 514 (2001). Because courts favor the settlement of labor-management disputes through arbitration, our "role . . . in reviewing arbitration awards is extremely limited and an arbitrator's award is not to be set aside lightly." Id. at 513.

The New Jersey Arbitration Act provides four statutory grounds for vacating 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;
> c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;
> d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.
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> [N.J.S.A. 2A:24-8.]

The United States Supreme Court has also articulated a public policy exception in holding that courts may not enforce collective bargaining agreements that are contrary to "well defined and dominant" public policy. W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, 461 U.S. 757, 766 (1983). New Jersey's public policy exception requires "heightened judicial scrutiny" when an arbitration award implicates "a clear mandate of public policy." Weiss v. Carpenter, 143 N.J. 420, 443 (1996). "A court may vacate such an award provided that the 'resolution of the public-policy question' 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) (quoting Weiss, 143 N.J. at 443). Usage of this public policy exception should

be limited to "rare circumstances." Tretina v. Fitzpatrick & Assocs., 135 N.J. 349 (1994).

The scope of an arbitrator's authority is based on the terms of the contract between the parties. Cty. Coll. of Morris Staff Asso. v. Cty. Coll. of Morris, 100 N.J. 383, 391 (1985) (citations omitted). "When parties have agreed, through a contract, on a defined set of rules that are to govern the arbitration process, an arbitrator exceeds his powers when he ignores the limited authority that the contract confers." Ibid.

When the parties have an agreement that includes certain terms and conditions, "the arbitrator may not disregard those terms," and "may not rewrite the contract terms for the parties." Grover v. Universal Underwriters Ins. Co., 80 N.J. 221, 230 (1979). "In the absence of directions to the contrary his award should be consonant with the matter submitted." Id. at 230-31.

II.

The arbitration provision of the CNA, Article XX, Section 7, Paragraph f, states:

> The arbitrator will be bound by the provisions of this Agreement and the Constitution and the Laws of the State of New Jersey and of the United States of America and be restricted to the application of facts and issues submitted to him/her involving the grievance and shall consider it and nothing else. The arbitrator shall not have the authority to add to, modify, subtract from or alter in any way the

> provisions of this Agreement or any amendment or supplement thereto.
>
> [(Emphasis added).]

In its first point, the PBA contends the arbitrator's award should be vacated because it is contrary to public policy. It bears noting before we begin our discussion of the issue, that the arbitrator was not presented with the public policy issue in the stipulated question, as the judge also observed.

In any event, the public policy exception for vacating arbitration awards is very narrow. N.J. Tpk. Auth., 190 N.J. at 294. "[P]ublic 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." Id. at 295.

The PBA fails to support its claim that not awarding bonus vacation days for FMLA leave violates public policy. There is neither precedent for the proposition nor any compelling logic behind it. The PBA takes the contention a step further, asserting that the award was procured by "undue means" because it violated public policy. We conclude that the County's policy regarding bonus vacation days does not violate public policy and thus the decision was not the product of undue means.

The only relevant case cited by either party is Chubb v. City of Omaha, Nebraska, 424 F.3d 831 (8th Cir. 2005). In that case, a police officer was denied an annual leave bonus offered to employees taking less than forty hours of sick leave in a given year. The officer appealed the denial of the bonus, as his paid sick leave was taken concurrent to unpaid FMLA leave. He argued that the employer's failure to give him the bonus days penalized him for his exercise of the FMLA.

As the court stated in dismissing the claim, the FMLA only mandates that the employer allow the leave, and bans the employer from punishing the employee for taking it. It does not require payment of his or her salary. That the officer took sick leave moved him into the category of persons excluded from the bonus time. The court said that it "decline[d] to punish [the employer] for putting [the officer] in a better position than he would have enjoyed had Omaha fulfilled only its minimum duties under the FMLA." Chubb, 424 F.3d at 833. In other words, although the City did not prevent the employee from gaining the benefit of collecting his salary while enjoying concurrent sick leave and FMLA leave, neither could the employer be required to do more than federal law mandated.

Furthermore, under federal law, the County can require that employees elect concurrent paid sick leave under the FMLA, or

allow the employee to make such an election. 29 U.S.C. § 2612(d)(2)(B).

Additionally, the applicable federal regulation states that when a bonus

> is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave.
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> [29 C.F.R. § 825.215(c)(2).]

The PBA suggests that other types of paid leave, such as for jury duty, are equivalent to the FMLA leave, however, those are entitlements that would not require concurrent use of accumulated sick time.

Nothing that the PBA suggests falls within that narrow scope of a clear public policy exception that allows for an arbitration award to be vacated. Indeed, the arguments appear to be based on "amorphous considerations of the common weal." N.J. Tpk. Auth., 190 N.J. at 294. Therefore, the arbitrator's decision did not ignore or violate public policy.

A decision reached by "undue means" is "a situation in which the arbitrator has made an acknowledged mistake of fact or law or a mistake that is apparent on the face of the record." Borough of E. Rutherford v. E. Rutherford PBA Local 275, 213 N.J. 190, 203

(2013); see N.J.S.A. 2A:24-8(a). The arbitrator's decision, which excluded a specific discussion of the FMLA, was therefore not reached by undue means.

Finally, the PBA contends that the arbitrator rewrote the contract. The PBA argues that defendant's past practice means the language in the CNA has been interpreted as excluding FMLA leave from its provisions. The arbitrator concluded that the contract language was clear and unequivocal, meaning he could not entertain past practice or parole evidence in order to interpret it. We agree——the language in Section 5 is clear and unambiguous regarding the use of sick leave. Therefore, past practice does not dictate the result. Id. at 204; Hall v. Bd. of Educ. of Jefferson, 125 N.J. 299, 306 (1991).

To allow the practice to continue would also mean that PBA members who used FMLA leave gain an additional benefit not available to other employees who use their sick time for another reason. There is no basis for doing so. This practice, an extra-employment contract benefit for Sheriff's employees, is not legally justified.

The arbitrator allowed those employees who took FMLA time in 2014 to retain their bonus vacation days, despite his decision, on the theory that they would otherwise suffer unanticipated loss of benefits. This was a reasonable and pragmatic means of

addressing the past practice. It does not, however, justify a rewriting of the contract.

Affirmed.