SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1152-16T1

JAMES DUNCKLEY,

Plaintiff-Appellant,

v.

BOARD OF EDUCATION,
ROCKAWAY TOWNSHIP, MORRIS COUNTY,

Defendant-Respondent.

Argued February 27, 2018 - Decided March 19, 2018

Before Judges Yannotti, Carroll and DeAlmeida.

On appeal from Superior Court of New Jersey, Chancery Division, Morris County, Docket No. C-000089-16.

Sanford R. Oxfeld argued the cause for appellant (Oxfeld Cohen, PC, attorneys; Sanford R. Oxfeld, of counsel and on the brief).

John G. Geppert, Jr. argued the cause for respondent (Scarinci & Hollenbeck, LLC, attorneys; John G. Geppert, Jr., of counsel and on the brief; Laura M. Miller, on the brief).

PER CURIAM

This appeal concerns a teacher-tenure arbitration conducted pursuant to the Tenure Employees Hearing Law (TEHL), N.J.S.A. 18A:6-10 to -18.1. Plaintiff James Dunckley, a tenured teacher employed by the Rockaway Township School District (District), appeals from an October 31, 2016 Chancery Division order confirming an arbitration award rendered pursuant to the TEHL. The award revoked Dunckley's tenure and terminated his employment with the District based on his unbecoming conduct arising from his inappropriate touching of two of his teenage, female special needs students. For the reasons that follow, we affirm.

I.

We begin with a brief review of the relevant authority, as recently stated by our Supreme Court in Bound Brook Board of Education v. Ciripompa, 228 N.J. 4, 11-12 (2017):

> New Jersey's TEHL provides tenured public school teachers with certain procedural and substantive protections from termination. N.J.S.A. 18A:6-10 provides that no tenured employee of the public school system "shall be dismissed or reduced in compensation . . . except for inefficiency, incapacity, unbecoming conduct, or other just cause." If the charges are substantiated, they are submitted for review by the Commissioner. N.J.S.A. 18A:6-11. If the Commissioner determines the tenure charges merit termination, the case is referred to an arbitrator. N.J.S.A. 18A:6-16. "The arbitrator's determination shall be final and binding," but "shall be subject to judicial review and enforcement as provided pursuant

> to N.J.S.[A.] 2A:24-7 through N.J.S.[A.] 2A:24-10." N.J.S.A. 18A:6-17.1. Pursuant to the cross-referenced statutes, there are four bases upon which a court may vacate an arbitral 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 was not made.
>
> [N.J.S.A. 2A:24-8.]

II.

Dunckley first became employed as a teacher with the Rockaway Township Board of Education (Board) during the 1976-1977 school year. He subsequently obtained tenure in his position. Since 1996, he has been assigned to instruct special needs students at the Copeland Middle School.

During the 2009-2010 school year, Dunckley was accused of inappropriately touching two female students, J.W. and A.R., on their shoulders, arms, back and hair. Although Dunckley was not formally disciplined, both students were ultimately removed from his classroom and placed in alternate special education programs at Copeland after experiencing "severe distress." Dunckley was "counseled about appropriate parent/teacher interaction" and remained in the classroom, despite findings by the school psychologist that he was exhibiting "behavior towards female students that appears designed to impose [his] will, gratify [his] perverse impulses, humiliate the student, and sexualize the student-teacher relationship."

During the 2014-15 school year, Dunckley was again accused of inappropriately making contact with two female students, T.A. and A.L.R. Specifically, T.A. reported to her mother that Dunckley "had been touching her [on] several different occasions on her shoulder, arm and knee, and that this had made her feel very uncomfortable with him and being in his class." T.A.'s mother later telephoned Dunckley, who allegedly told her T.A. was "so nice," "very mature," and his "buddy." Dunckley also allegedly stated T.A. makes him feel like he "can be [him]self." T.A.'s mother found those comments "very odd" and "felt very uncomfortable" as a result.

Similarly, A.L.R. reported to a school counselor that Dunckley "touches [her] knees and shoulders . . . [and] often asks if she is okay at that time." A.L.R. believed this conduct "may be a little sexual in nature." A.L.R. also reported Dunckley frequently exclaimed "I don't touch kids." A.L.R. found this "weird" because plaintiff "does touch kids, but . . . says that he doesn't . . . ."

Upon learning of the students' complaints, the matter was referred to the Department of Children and Families, Institutional Abuse Investigation Unit (IAIU), to conduct an investigation. The IAIU interviewed several of Dunckley's students, past and present. In June 2015, the IAIU investigation concluded with a finding that T.A. and A.L.R. were not subject to sexual abuse.

On August 27, 2015, the Board filed tenure charges against Dunckley alleging unbecoming conduct and other just cause warranting dismissal. The three tenure charges alleged that Dunckley engaged in: (1) inappropriate conduct toward T.A.; (2) inappropriate conduct toward A.L.R.; and (3) a recurrent pattern of misconduct. On August 31, 2015, the Board suspended Dunckley with pay. On September 21, 2015, the Board certified the tenure charges and forwarded them to the Commissioner of Education (Commissioner). On October 19, 2015, the Commissioner referred the charges for arbitration.

The arbitration hearing was conducted over four non-consecutive dates in December 2015 and January 2016. The Board presented fifteen witnesses and Dunckley presented ten witnesses, although he elected not to testify on his own behalf.

On June 13, 2016, in a twenty-six page written opinion, the arbitrator determined Dunckley engaged in all the acts of unbecoming conduct alleged in the tenure charges. The arbitrator rejected Dunckley's contention that T.A. and A.L.R. were not credible witnesses. Citing State v. Clawans, 38 N.J. 162, 170-71 (1962), the arbitrator further found that "[s]ince . . . Dunckley chose not to testify, it is fair to make a legitimate inference that he likely fears exposure to adverse facts which would be unfavorable to his case." Relying on similar cases involving inappropriate behavior with minor female students, and noting Dunckley had previously "been warned to cease such misconduct," the arbitrator concluded "the penalty of removal was appropriate."

Dunckley filed a complaint in the Chancery Division seeking to vacate the arbitration award. He argued there was not "substantial evidence" to support the award, and that the award was procured by "undue means." In response, the Board filed a motion to dismiss the complaint.

On October 31, 2016, the Chancery Division judge granted the Board's motion to dismiss the complaint with prejudice, and

confirmed the arbitration award. In his written statement of reasons, the judge rejected Dunckley's arguments that the award was procured by undue means because the arbitrator: (1) failed to consider testimony of many of Dunckley's witnesses; (2) erroneously relied on Dunckley's prior record in reaching her decision; (3) violated applicable law and public policy; and (4) failed to consider the results of the IAIU investigation. The judge elaborated:

> With respect to IAIU's investigation that found no sexual abuse . . ., [the Board] argues the legal standard [governing] IAIU's determination is significantly higher than the legal standard governing whether a teacher may be removed for unbecoming conduct. . . . "Just cause" is the legal standard to remove a teacher from his position, and inappropriate touching constitutes just cause pursuant to N.J.S.A. 18A:2[8]-5(b). The [c]ourt is satisfied that the [a]rbitrator's determination was made properly under the "just cause" standard. That plaintiff was not charged with sexual abuse does not mean his conduct of inappropriate touching was [an] [in]sufficient basis to terminate him.
>
> . . . .
>
> Further, [the Board] argues the [a]rbitrator correctly relied on [Dunckley's] prior record in determining the penalty because past record is inherently relevant to determine the penalty for a current offense. [West New York v. Bock, 38 N.J. 500, 523 (1962)] specifically provides that a public employee's past record cannot be used to prove a present charge unless it's one of "habitual misconduct;" but it may be used to determine

the penalty for a present offense. . . . Following the Bock holding, the [c]ourt is satisfied that the [a]rbitrator correctly relied on [Dunckley's] prior record to determine [the] penalty for Charge III "[conduct] unbecoming a teaching staff member, and/or other just cause for dismissal related to [Dunckley's] recurrent pattern of misconduct" as it is a present charge and is one of habitual misconduct. [Dunckley] was not charged in the prior incident. However, action was taken as a result of [h]is inappropriate conduct. The students were moved from his class and he was warned not to touch students. That is sufficient conduct under Bock to be considered as to penalty now.

The [c]ourt agrees with [the Board's] position. The [a]rbitrator properly considered the totality of the evidence presented and [Dunckley's] prior record to determine the appropriate penalty. The [c]ourt finds no public policy violation in the arbitrator's award. . . . The [c]ourt is not to substitute its own judgment for that of the [a]rbitrator, and finds the arbitration award reasonably debatable. . . .

The [c]ourt notes that the decision was not as carefully drafted as one would hope. Stating that [Dunckley] put forth "approximately eight witnesses" when, in fact, there were ten, is a mistake. [The arbitrator] made no mention of some of the witnesses from which it is clear that these witnesses were not considered as offering relevant information or cumulative information. Neither provides a basis to set aside the decision. The evidence was clear that inappropriate touching took place after [Dunckley] had been warned.[1]

[1] Additionally, the judge found Dunckley's verified complaint improperly set forth "legal conclusions, as opposed to facts

III.

On appeal, Dunckley argues that the trial court erred in applying the "reasonably debatable" standard of review, rather than the heightened scrutiny of "substantial credible evidence," to confirm the arbitration award. Dunckley also argues the court erred by finding the arbitrator properly considered the 2009-2010 allegations when determining his penalty for the 2014-2015 tenure charges. Finally, Dunckley contends the arbitrator ignored certain testimony and evidence without making specific findings or credibility determinations as to why the evidence was not considered. We do not find these arguments persuasive.

In Pugliese v. State-Operated School District of City of Newark, 440 N.J. Super. 501, 510 (App. Div. 2015), we noted that, prior to its amendment in 2012, N.J.S.A. 18A:6-16 provided:

> [I]f the [C]ommissioner determined that [tenure] charges, if sufficient, warranted dismissal, the matter was referred to an administrative law judge (ALJ). The ALJ issued a recommended decision, which the Commissioner could adopt, modify or reject. Thus, the agency, using its expertise, reviewed the ALJ's decision. Thereafter, an agency determination could be appealed directly to the Appellate Division. [That] agency review process no longer exists.

---

supporting such legal conclusions," which provided an additional basis to dismiss the complaint. Because we conclude there is sufficient evidence in the record to support the arbitration award, we find it unnecessary to address this issue.

[(Citations omitted).]

Under the prior statutory framework, our standard of review of public sector arbitration awards required that we uphold the arbitrator's decision so long as it was "reasonably debatable." Linden Bd. of Educ. v. Linden Educ. Ass'n, 202 N.J. 268, 276 (2010).

Following the 2012 amendment to N.J.S.A. 18A:6-16, "[i]f [the Commissioner] determine[s] that such charge is sufficient to warrant dismissal . . ., he shall refer the case to an arbitrator" pursuant to N.J.S.A. 18A:6-17.1 for a hearing. Under this revised statutory rubric, because the arbitration is compelled by statute, "judicial review should extend to consideration of whether the [arbitration] award is supported by substantial credible evidence present in the record." Amalgamated Transit Union v. Mercer City Improvement Auth., 76 N.J. 245, 254 (1978).

Consequently, we conclude the trial judge erred in applying the previously-applicable "reasonably debatable" standard of review, rather than the "substantial credible evidence" test, in confirming the arbitrator's award. Nonetheless, having reviewed the record, we conclude the arbitrator's findings are supported by "substantial credible evidence," and we find no basis to disturb them.

Specifically, the arbitrator's findings with respect to the first two charges relating to T.A. and A.L.R. are supported by: (1) handwritten comments by T.A. and A.L.R. about Dunckley's conduct toward them; (2) T.A.'s mother's conversation with Dunckley, during which he made inappropriate remarks about T.A.; (3) T.A.'s mother's conversation with the school guidance counselor discussing T.A.'s anxiety about the inappropriate touching; (4) the school psychologist's alarming evaluation of Dunckley's behavior; (5) statements from two of T.A.'s former teachers, corroborating T.A.'s reports of inappropriate touching and/or her heightened anxiety levels; and (6) A.L.R.'s conversation with the school guidance counselor about Dunckley's inappropriate touching.

Substantial credible evidence also exists to support the third charge that Dunkley engaged in a recurrent pattern of conduct unbecoming a teaching staff member. In reaching this determination, the arbitrator cited the similarity between the current charges and Dunckley's conduct in the 2009-2010 school year involving two other minor female students, J.W. and A.R. The arbitrator also noted the school psychologist's assessment that these incidents exhibited the "same pattern of abusive behavior . . . ," and a memorandum written by the school principal detailing the allegations of inappropriate touching in 2009-2010, as a result

of which the two students were removed from "Dunckley's classes to eliminate the possibility of future issues." In short, the evidence sufficiently established that, from 2009 to 2015, Dunckley inappropriately touched four classified female students and engaged in conduct unbecoming a special education teacher.

The trial judge correctly concluded that the IAIU's investigation that found no sexual abuse is not dispositive of whether Dunckley engaged in unbecoming conduct.

> The Court has made it clear that the failure of a school board to prove a different offense does not preclude a finding of unbecoming conduct. In [In re Young, 202 N.J. 50, 68-69 (2010)], for example, [the] Court permitted tenure charges of unbecoming conduct based on a student's allegations of sexual abuse that were deemed unfounded by the Department of Children and Families (DCF). [The Court] explained that although the "DCF might conclude that sexual contact between a student and his former teacher does not constitute abuse or neglect under N.J.S.A. 9:6-8.21(c)," that determination "is a far cry from suggesting that it is not conduct unbecoming a school employee." Id. at 69-70.
>
> [Bound Brook, 228 N.J. at 14.]

Finally, neither the arbitrator nor the trial judge misapplied Bock in considering Dunckley's history of inappropriate touching as it related to the pattern of conduct charge and in determining the appropriate penalty. Although Dunckley is correct that no formal disciplinary action was taken against him as a

result of the 2009-2010 complaints, it is undisputed that two female students were removed from his classroom based on their fear of his actions and "to eliminate the possibility of future issues." Dunckley was subsequently counselled and warned about inappropriate student-teacher interaction. We agree with the trial judge's conclusion that this was "sufficient conduct under Bock to be considered as to penalty now."

To the extent we have not specifically addressed any of Dunckley's remaining claims, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.