SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1747-21

INTERNATIONAL ASSOCIATION
OF FIRE FIGHTERS, LOCAL 1197,

Petitioner-Appellant,

v.

TOWNSHIP OF EDISON,

Respondent-Respondent.

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Submitted September 14, 2023 – Decided October 10, 2023

Before Judges Vernoia and Gummer.

On appeal from the Superior Court of New Jersey, Chancery Division, Middlesex County, Docket No. C-000146-20.

Kroll, Heineman, Ptasiewicz & Parsons, LLC, attorneys for appellant (Raymond G. Heineman, on the briefs).

Cleary Giacobbe Alfieri & Jacobs, LLC, attorneys for respondent (Matthew J. Giacobbe, of counsel and on the brief; Gregory J. Franklin, on the brief).

PER CURIAM

Petitioner International Association of Fire Fighters, Local 1197, appeals from a February 1, 2022 order denying its motion to vacate a July 15, 2020 arbitration award in which the arbitrator denied petitioner's grievance against respondent Township of Edison (the Township). In its grievance, petitioner claimed the Township had violated their most recent collective negotiations agreement (CNA) and a 2018 memorandum of agreement by dispatching firefighters to emergency medical services (EMS) calls. Because the arbitrator had erred in excluding pertinent and material testimony, the judge erred in denying petitioner's motion to vacate the arbitration award. Accordingly, we reverse.

I.

Petitioner and the Township are parties to a series of CNAs and addenda to those CNAs. In 1989, the parties agreed that firefighters who were also certified as emergency medical technicians (EMTs) would be paid an additional sixty-three cents per hour when assigned to a fire rescue vehicle or for every time they were sent on an EMS call while assigned to fire-suppression duty.

In a September 25, 1991 addendum to the CNA then in place, the parties agreed to extend the terms and conditions of employment for employees who were both firefighters and EMTs. As a result of that addendum, the parties

added the classification of "Firefighter/EMT" to the description of the negotiations unit represented by petitioner and "Emergency Medical response" as a new duty. Pursuant to the addendum, two licensed EMTs would be assigned on a voluntary basis to respond to emergency medical calls when no volunteer first aid squads were available on weekdays between 7:00 a.m. and 4:00 p.m. The sixty-three cent pay differential for EMT-qualified firefighters remained in place, and the parties agreed to "re-open the collective bargaining agreement for the purpose of negotiating these NEW duties on the subject of Salary, Benefits and working conditions to commence January 1, 1991."

In an April 19, 1998 opinion and award issued in an interest arbitration between the parties, an arbitrator found the September 25, 1991 addendum had been incorporated into the parties 1992 to 1995 CNA pursuant to the "prevailing rights" clause of the agreement. The January 1, 1996 through December 31, 2000 CNA contained non-economic terms and conditions of employment for the firefighter/EMTs. In the April 19, 1998 opinion and award, the arbitrator awarded a pay differential ranging from three percent to six percent of base salary payable to firefighter/EMTs "when assigned to fire rescue or when performing EMS work while assigned to fire suppression," retroactive to January 1, 1996.

In the January 1, 2001 through December 31, 2004 CNA, the parties agreed to increase the pay differential to a range of six to seven percent of base pay and to apply it to all firefighter/EMTs who bid to be part of "a rotation." In a 2007 interest arbitration proceeding concerning the terms and conditions of the parties' January 1, 2005 through December 31, 2009 CNA, the Township sought to again limit the EMT pay differential to firefighter/EMTs assigned to emergency medical response duty, but the arbitrator rejected the Township's proposal and the EMT pay differential continued.

In a February 14, 2014 award, an arbitrator addressed a grievance pertaining to the parties' January 1, 2010 through December 31, 2013 CNA and found the Township had violated the agreement by unilaterally deciding to discontinue a pay differential for the job title firefighter/EMT as of January 25, 2011. The arbitrator ordered the Township to reinstate the pay differential and to compensate affected firefighter/EMTs retroactively.

On March 13, 2018, the parties entered into a memorandum of agreement (MOA) "to set forth the terms of a successor collective negotiations agreement . . . and to resolve the pending Interest Arbitration Proceeding . . . ." The parties agreed to modify the January 1, 2010 to December 31, 2013 CNA by, among other things, eliminating the "Firefighter/ EMT" and "Firefighter/EMTs" titles

and "all EMT language" from the agreement, including language about additional pay and training benefits for firefighters who were also EMTs. The parties also agreed that firefighters who were then certified as EMTs would have two percent of their base salary added to their pensionable salary and would not be required to maintain an EMT certification. In the MOA, the parties referenced a "Side Letter Agreement," in which they agreed the EMT pay differential "would be restored and become operable if . . . a determination is made by the Township to operate a transport-capable vehicle or ambulance which includes a horizontal bed."

On July 31, 2019, the parties executed a CNA (the 2019 CNA), which was effective from January 1, 2019, to December 31, 2022. The parties did not include EMT language in the duties of the firefighters, and they incorporated into the 2019 CNA parts of the MOA, including that current firefighters who were certified as EMTs would receive a one-time addition to their pensionable salary equal to two percent of their base salary and that the current firefighters who were also EMTs would not be required to maintain EMT certification.

On September 11, 2019, petitioner filed a grievance contending the Township had violated Articles one, thirteen, and forty-nine of the MOA and the 2019 CNA. Article one of the 2019 CNA describes petitioner as the

"Exclusive Bargaining Agent . . . for collective negotiations concerning salaries, hours and other terms and conditions of employment for all FIREFIGHTERS" and does not reference EMTs or firefighter/EMTs. Article thirteen of the 2019 CNA provides that "[a]ny employee covered by this agreement who is required to accept the responsibility and carries out the duties of a position or rank above that which he normally holds, shall be paid at the rate for that position or rank while so acting." Article forty-nine of the MOA eliminated all EMT language from the parties' prior agreement; Article forty-nine of the MOA and the 2019 CNA provided for the one-time increase in the pensionable salary of firefighters who were certified as EMTs.

Specifically, petitioner contended in the grievance that firefighters were working outside the scope of their classification because they were being dispatched to EMS calls:

> On December 1, 2018[,] EMS response was to cease, as per the [MOA]. The Township[']s Business Administrator stated at that time the Fire Department was no long[er] needed for EMS response due [to] the police department responding to all 911 calls.
>
> The Fire Department has not stopped being dispatched to EMS calls and in fact the number of responses [h]as escalated.

In a September 19, 2019 letter, Brian Latham, who was the chief of the Fire Department, denied the grievance, stating that as a part of the "settlement" of the 2014 to 2018 CNA, the parties had executed a "Side Letter Agreement" in which they addressed compensation and other items regarding the firefighters who were certified EMTs, including "the elimination of all EMT language from the CNA" and that the firefighters certified as EMTs would receive a one time "pensionable stipend of two percent . . . to the[ir] base salary." He also asserted: "[t]here is no provision in the Side Letter Agreement which prohibits firefighters from providing medical assistance when called upon."

Petitioner submitted a grievance to the Public Employment Relations Commission (PERC) for arbitration. The parties stipulated the arbitrator was to decide:

> Whether the Township violated Article 1, 13 and 49 of the 2019 through 2022 collective negotiations agreement and/or the [MOA] by assigning firefighters to EMS response as of December 1, 2018. If so, what shall be the remedy?

During the first day of the arbitration, petitioner sought to introduce testimony in support of its assertion in the grievance that the Township business administrator stated before the parties had entered into the MOA that "the Fire Department was no longer needed for EMS response due to the police

department responding to all 911 calls." The Township objected, asserting the testimony was inadmissible, and the arbitrator allowed the parties to brief the issue. Petitioner contended it was "not seeking to introduce offers of compromise. Rather, [it was] seeking to introduce statements made during negotiations that induced [petitioner] to accept the Township's position on the elimination of the Firefighter/EMT classification."

In a March 6, 2020 written decision, the arbitrator sustained the Township's objection, finding:

> While this proceeding does not fall under the authority of PERC (except for the process of appointment), the issue of admissibility arises as a result of alleged discussions that took place in the presence of an interest arbitrator who was an observer or participant in those discussions conducted under PERC authority. The PERC Rules and Regulations specifically address confidentiality in all of its dispute settlement process, including interest arbitration. See N.J.A.C. §19:12-3.4, §19:12-4.3(c), §19:12-4.4(f), §19:16-5.7(c) & (d). [Petitioner] seeks to differentiate between the clear confidentiality requirements placed on the neutral and statements allegedly made by the parties to each other, in the presence of the neutral.
>
> The clear intent of the PERC Rules is to protect the confidentiality of settlement negotiations when the neutral is a direct observer or participant in those negotiations. While I note that [petitioner] urges that testimony from party representatives, unlike testimony from the neutral, should not be protected and be admissible, I decide to the contrary given the clear

> thrust and intent of the PERC Rules. This conclusion is supported by reference to N.J.R.E. 408 "Settlement Offers and Negotiations" which is clearly designed to prevent the consideration of statements allegedly made during settlement discussions[.]

Petitioner called two witnesses during the arbitration: Jim Walsh and Robert Yackel. Walsh was a firefighter and EMT who had signed the Side Letter Agreement and the CNA and had been involved in the discussions at the interest arbitration session that culminated in the MOA. He testified he understood the MOA to mean the Fire Department would no longer be sent on EMS calls. Yackel was petitioner's president since 1986; attended the March 13, 2018 interest arbitration; executed the MOA, the 2019 CNA, and the Side Letter Agreement; and prepared and executed the grievance on petitioner's behalf. He testified he had filed the grievance because the Township continued to assign EMS calls to the Fire Department and that his statement in the grievance was accurate. During Yackel's testimony, petitioner's counsel indicated Yackel was "prepared to testify as to the events of March 13" and two other witnesses could testify about "the March 13 joint session," but the arbitrator had ruled that testimony was "inadmissible." Latham, who was the Township's only witness, testified Township police officers provided "first responder services."

The arbitrator denied petitioner's grievance. He found "EMS has been part of the firefighters' duties since 1988/1989" and that "firefighters continue to be dispatched by the Township to provide EMS." Recognizing the parties had agreed in the MOA to remove all EMT language from their collective negotiations agreements, the arbitrator focused on the absence of language in the MOA and the 2019 CNA expressly relieving firefighters of their duty to provide EMS in denying petitioner's grievance.

> Neither the Agreement nor the MOA make an express reference to the cessation of EMS duties that all firefighters have performed since 1988/1989. Neither of the negotiated documents include express language that slices or dices the inseparable components of the parties' prior agreement on the Firefighter/EMT differential. Nor do they expressly indicate that the performance of EMS [] going forward would be compensable as out of classification work pursuant to Article 13 of the Agreement. Moreover, it is undisputed that the Township is no longer operating a transport-capable vehicle and/or ambulance which includes a horizontal bed. Contrary to [petitioner's] assertions, there is no ambiguity in the pertinent provisions of the Agreement or the MOA, including Article 4 that no longer references the classification of "Firefighter/EMT." Having considered the totality of the evidence presented, I conclude that the record does not support [petitioner's] claim that the Township violated the Agreement or the March 13, 2018 MOA by continuing to assign firefighters to EMS response.

In rendering his decision, the arbitrator discussed what he believed had led to the MOA.

> It is undisputed that the March 13, 2018 MOA was the product of discussions that took place between the parties during the course of interest arbitration proceedings in which Arbitrator Ira Cure served as the Interest Arbitrator.
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> . . . .
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> During negotiations for a successor agreement, the parties reached an impasse that was submitted to interest arbitration. As part of the [March 13, 2018] MOA that the parties executed in lieu of requiring the issuance of an interest arbitration award, the parties agreed to remove all EMT language from the collective negotiations agreement, including the [pay] differential within Article 49 . . . .

The arbitrator quoted Arbitrator Cure "as to [the] derivation of the MOA":

> In this Interest Arbitration proceeding the parties have reached an agreement today regarding the terms and conditions of the Collective Bargaining Agreement which will be in effect from the term which will be January 1, 2014 to December 31, 2018. . . . . I am putting on the record the agreements that have been reached pursuant to negotiations and mediation, eliminating the need for an Interest Arbitration hearing. After I read this into the record I will then draft the terms of the agreement and circulate it to the parties and have them approve it or disapprove it and give me their comments on a written draft and . . . we will finalize the draft and then send it out for ratification by both the Town[ship] and [petitioner].

Petitioner filed in Superior Court a verified petition to vacate the arbitration award pursuant to N.J.S.A. 2A:24-7. Petitioner asserted the court had to vacate the arbitration award because the arbitrator had engaged in misconduct by "refusing to hear evidence, pertinent and material to the controversy," specifically the testimony regarding the Township business administrator's statement. See N.J.S.A. 2A:24-8(c). Petitioner also contended vacation was proper because the arbitrator's interpretation of the 2019 CNA was "not a reasonably debatable construction of the [2019] CNA" and the arbitrator had "impl[ied] terms neither contained in the clause nor intended by the parties." See N.J.S.A. 2A:24-8(d). Petitioner faulted the arbitrator for:

> interpret[ing] the CNA to provide for the continued assignment of EMS duties to firefighters and EMTs, even though the CNA had been modified to eliminate the terms and conditions of firefighter/EMTs and to return to the contractual language in existence prior to 1989, when firefighters were not assigned to emergency medical response.

During oral argument, petitioner's counsel asserted that "in support of a final offer," the Township business administrator on March 13, 2018, had stated "in front of everybody" that "the Fire Department was no longer needed for EMS response due to the Police Department responding to all 9-1-1 calls." He argued the testimony about the Township business administrator's statement was

admissible because it was made "in support of a final offer, not a mediator settlement."

After hearing argument, the court denied the petition to vacate the arbitration award. Citing the wide latitude afforded to arbitrators in making evidentiary decisions, the court found the arbitrator's decision sustaining the Township's objection to the admission of testimony about the Township business administrator's statement "did not constitute misconduct, as [the arbitrator had] properly considered written submissions and made a finding that was in his authority to make." The court also found the arbitrator's interpretation of the 2019 CNA was "reasonably debatable" because his finding that "the MOA and [the 2019] CNA did not mention cessation of EMS duties by the firefighters" was "based on the relevant contractual terms and [the arbitrator] did not engraft his own terms into the agreement, but rather abided by the strict terms of the CNA."

On appeal, petitioner argues the arbitration award should be vacated because the court erred in failing to find: inherently ambiguous the language of the 2019 CNA regarding the EMS response; the arbitrator had engaged in misconduct by refusing to hear pertinent and material evidence; and the arbitration award was not reasonably debatable and does not represent a rational

interpretation of the parties' agreement. Because the court erred in failing to find the arbitrator had erroneously excluded the testimony about the Township's business administrator's statement, we reverse the denial of the petition to vacate the arbitration award and remand for proceeding consistent with the opinion.

II.

"[J]udicial review of an arbitration award is very limited." Strickland v. Foulke Mgmt. Corp., 475 N.J. Super. 27, 38 (App. Div. 2023) (quoting Bound Brook Bd. of Educ. v. Ciripompa, 228 N.J. 4, 11 (2017)). "An arbitrator's award . . . will be accepted so long as the award is 'reasonably debatable.'" Borough of Carteret v. Firefighters Mut. Benevolent Ass'n Loc. 67, 247 N.J. 202, 211 (2021) (quoting Borough of E. Rutherford v. E. Rutherford PBA Loc. 275, 213 N.J. 190, 201-02 (2013)). We defer to arbitration awards and vacate them "only '. . . when it has been shown that a statutory basis justifies that action.'" Ibid. (quoting Kearny PBA Loc. No. 21 v. Town of Kearny, 81 N.J. 208, 221 (1979)). However, we owe "no special deference to the trial court's interpretation of the law and the legal consequences that flow from the established facts." Yarborough v. State Operated Sch. Dist. of City of Newark, 455 N.J. Super. 136, 139 (App. Div. 2018). Thus, we "review the court's decision on a motion to vacate an arbitration award de novo." Ibid.

N.J.S.A. 2A:24-8 provides four bases to vacate an arbitration award. Petitioner contends two of those statutory bases require vacation of the arbitration award in this case: N.J.S.A. 2A:24-8(c) and (d).

A court "shall vacate" an arbitration award "[w]here the arbitrators were guilty of misconduct in refusing to . . . hear evidence, pertinent and material to the controversy." N.J.S.A. 2A:24-8(c); see also Fox v. Morris Cnty. Policemen's Ass'n, P.B.A., 266 N.J. Super. 501, 515 n.7 (App. Div. 1993) (affirming vacation of arbitration award pursuant to N.J.S.A. 2A:24-8(c) when arbitrator had refused to accept pertinent and material evidence); Harris v. Sec. Ins. Grp., 140 N.J. Super. 10, 14 (App. Div. 1979) ("an award will be vacated because of an error of law, when it clearly appears from the award or a statement of the arbitrator that he meant to decide the case according to the law") (quoting Collingswood Hosiery Mills v. Am. Fed. of Hosiery Workers, 31 N.J. Super. 466, 469 (App. Div. 1954)); N.J.S.A. 2A:23B-23(a)(3) (court shall vacate arbitration award if "arbitrator refused . . . to consider evidence material to the controversy . . . so as to substantially prejudice the rights of a party to the arbitration"). A court also "shall vacate" an arbitration award "[w]here 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(d).

"[A] party to an arbitration proceeding has a right . . . to present evidence material to the controversy . . . ." N.J.S.A. 2A:23B-15(d); see also State Farm Gaur. Ins. Co. v. Hereford Ins. Co., 454 N.J. Super. 1, 6 (App. Div. 2018) (confirming an arbitration participant's right to present material evidence). An arbitrator's authority "includes the power to . . . determine the admissibility, relevance, materiality, and weight of any evidence." N.J.S.A. 2A:23B-15(a); see also Minkowitz v. Israeli, 433 N.J. Super. 111, 134 (App. Div. 2013) (confirming arbitrator's authority to determine admissibility of evidence). However, in exercising that authority, an arbitrator should keep in mind that "[t]he [r]ules of [e]vidence are not . . . strictly applied in arbitration proceedings." Fox, 266 N.J. Super. at 515 n.7 (finding arbitrator's refusal to accept pertinent and material documentary evidence based on a party's inability to cross-examine the author of the evidence constituted misconduct under N.J.S.A. 2A:24-8(c)). The Township does not challenge the materiality of the excluded evidence.

In support of his decision to exclude the testimony regarding the Township business administrator's statement, the arbitrator relied on the "PERC Rules and Regulations [that] specifically address confidentiality in all of its dispute settlement process, including interest arbitration," which he identified

as N.J.A.C. 19:12-3.4, 19:12-4.3(c), 19:12-4.4(f), and 19:16-5.7(c) and (d). None of those regulations support the exclusion of testimony regarding the Township business administrator's statement.

N.J.A.C. 19:12-3.4 provides:

> Information disclosed by a party to a mediator in the performance of mediation functions shall not be divulged voluntarily or by compulsion. All files, records, reports, documents or other papers received or prepared by a mediator while serving in such capacity shall be classified as confidential. The mediator shall not produce any confidential records of, or testify in regard to, any mediation conducted by him or her, on behalf of any party in any type of proceeding, under the New Jersey Employer-Employee Relations Act, as amended, including, but not limited to, unfair practice proceedings under N.J.A.C. 19:14.

N.J.A.C. 19:12-4.3(c) and 19:16-5.7(d) contain similar language but apply respectively to "[i]nformation disclosed by a party to a fact-finder while functioning in a mediatory capacity" and "[i]nformation disclosed by a party to an arbitrator while functioning in a mediatory capacity." The evidence at issue is not "[i]nformation disclosed by a party to a mediator," N.J.A.C. 19:12-3.4, or to a fact-finder or arbitrator "while functioning in a mediatory capacity," N.J.A.C. 19:12-4.3(c) and 19:16-5.7(d). The evidence at issue is testimony about a statement made by a representative of one party purportedly to induce

another party. Thus, on their face, N.J.A.C. 19:12-3.4 and -4.3(c) and 19:16-5.7(d) do not apply.

Moreover, we have held N.J.A.C. 19:12-3.4 does not prevent a union from obtaining access to a board of education's special counsel's file containing "notes and writings made during the negotiations" between the board and the union. See Newark Bd. of Ed. v. Newark Tchrs. Union, Loc. 481, AFT, AFL-CIO, 152 N.J. Super. 51, 57 (App. Div. 1977). In that case, we agreed with the hearing officer's finding that the union should have access to a file containing "evidence of agreement" and should not be prevented access simply because the file contained:

> counterproposals . . . prepared by the negotiator during across-the-table negotiations with the other party in the presence of the mediator. . . . Such counter-proposals lose any confidentiality by virtue of the fact that the charging party intended that they be weighed on their merits by the respondent in an effort to arrive at an agreement.
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> [Id. at 61.]

N.J.A.C. 19:12-4.4(f) provides:

> The super conciliator, while functioning in a mediatory capacity, shall not be required to disclose any files, records, reports, documents, or other papers classified as confidential which are received or prepared by him or her or to testify with regard to mediation conducted under the Act. Nothing contained in this section shall

> exempt an individual from disclosing information relating to the commission of a crime.

Petitioner is not asking the arbitrator to disclose any files or to testify. Thus, N.J.A.C. 19:12-4.4 (f) does not apply.

N.J.A.C. 19:16-5.7(c) provides:

> The appointed arbitrator shall conduct an initial meeting as a mediation session to effect a voluntary resolution of the impasse. In addition, the appointed arbitrator, throughout formal arbitration proceedings, may mediate or assist the parties in reaching a mutually agreeable settlement.

Nothing in that regulation renders inadmissible testimony about a statement made by a representative of one party to representatives of another party.

Finally, the arbitrator relied on N.J.R.E. 408 to exclude the proffered testimony. N.J.R.E. 408 provides:

> When a claim is disputed as to validity or amount, evidence of statements or conduct by parties or their attorneys in settlement negotiations, with or without a mediator present, including offers of compromise or any payment in settlement of a related claim is not admissible either to prove or disprove the liability for, or invalidity of, or amount of the disputed claim. Such evidence shall not be excluded when offered for another purpose; and evidence otherwise admissible shall not be excluded merely because it was disclosed during settlement negotiations.

The testimony at issue was not offered as evidence of the Township's "liability" or to resolve a dispute about the validity or amount of a claim. Ibid. Rather, it was offered as evidence of what the Township allegedly had said to induce petitioner to enter the MOA, the language of which the parties incorporated in large part in the 2019 CNA, and of what petitioner calls its "central factual predicate": it agreed to give up its members' entitlement to the EMT pay differential because the Township had told them they would no longer perform EMS duties. The arbitrator's exclusion of that undisputed pertinent and material evidence constituted misconduct under N.J.S.A. 2A:24-8(c), and the court erred in not vacating the arbitration award on that basis.

Because we conclude the court erred in not vacating the award pursuant to N.J.S.A. 2A:24-8(c), we do not reach petitioner's other arguments, including its argument based on N.J.S.A. 2A:24-8(d). We direct that on remand, the trial court issue an order vacating the arbitration award and remanding the matter to PERC with directions to appoint a new arbitrator. See Manchester Twp. Bd. of Educ. v. Thomas P. Carney, Inc., 199 N.J. Super. 266, 282 (App. Div. 1985) (vacating arbitration award because arbitrators had refused to hear certain evidence and holding new arbitrators had to be impaneled on remand because

original arbitrators had "weighed the evidence and reached a conclusion before all the evidence was heard").

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION