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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2913-20**

CITY OF NEWARK,

Plaintiff-Appellant,

v.

**NEWARK SUPERIOR
OFFICERS' ASSOCIATION,**

Defendant-Respondent.

Argued March 14, 2023 – Decided August 24, 2023

Before Judges Gilson, Rose and Gummer.

On appeal from the Superior Court of New Jersey,
Chancery Division, Essex County, Docket No. C-
000017-21.

France H. Casseus, Assistant Corporation Counsel,
argued the cause for appellant (Kenyatta K. Stewart,
Corporation Counsel, City of Newark, attorney;
Courtney G. Durham, Assistant Corporation Counsel,
on the briefs).

Robert R. Cannan argued the cause for respondent (Law
Offices of Markman & Cannan, LLC, attorneys; Robert
R. Cannan, of counsel and on the brief).

PER CURIAM

Plaintiff City of Newark appeals from a June 4, 2021 Chancery Division order denying its motion to reconsider an April 23, 2021 order that denied its application to vacate an October 19, 2020 arbitration award and granted the counterclaim to confirm the award filed by defendant Newark Superior Officers' Association (SOA). The City also appeals from a June 17, 2021 order denying its oral application to stay the June 4, 2021 order. Because the arbitrator lacked jurisdiction to hear the matter pursuant to the terms of the parties' collective bargaining agreement (CBA), we reverse the orders under review and remand for entry of an order vacating the arbitration award.

I.

To give context to the issues presented on appeal, we begin by setting forth the pertinent provisions of the parties' CBA. Pursuant to Article IV, Section 3, an employee's grievance was subject to a six-step procedure, culminating in arbitration. Step 6 provided, in full:

Within two (2) weeks of the transmittal of the written answer [to an employee's grievance] by the Director, if the grievance is not settled to the satisfaction of both parties, either pa[r]ty to the [CBA] may request that the grievance be submitted to arbitration as hereinafter set forth.

However, no arbitration hearing shall be scheduled sooner than twenty-one (21) calendar days after the final decision is due or rendered by the Director of Police, whichever is sooner, except for emergent grievances. In the event the aggrieved elects to pursue Civil Service Procedures, the arbitration hearing shall be canceled and the matter withdrawn from arbitration. An employee who elects to proceed to arbitration shall be deemed to have waived the right to proceed under Civil Service Law, Rules, Regulations and Procedures.

[(Emphasis added).]

In addition, Article IV, Section 6 provided:

A grievance over minor disciplinary actions as this term is defined by Department of Personnel rules and regulations, shall proceed through the grievance arbitration procedure provided by Article IV. All major disciplinary actions shall proceed through the hearing procedures provided by Civil Service statutes, Merit System Board and Office of Administrative Law rules and regulations.

[(Emphasis added).]

The facts underpinning the arbitrator's award are straightforward and largely undisputed; the procedural history pertaining to the grievance at issue can best be described as convoluted. We unravel the pertinent events in chronological order from the record provided on appeal.

On January 18, 2020, between the hours of 1:30 p.m. and 6:45 p.m., Norberto Soares – a lieutenant with the Newark Police Department (NPD) –

patronized various bars in the City's downtown area accompanied by three other NPD officers. Soares was in full uniform while consuming alcohol on duty. The incident came to light when the officers drove the wrong way on University Avenue and struck a vehicle occupied by a woman and four children. The NPD claimed Soares thereafter falsified his log sheet concerning the five-hour drinking spree.

On January 24, 2020, the NPD issued Soares a Preliminary Notice of Disciplinary Action (PNDA), administratively charging neglect of duty, inefficiency or incompetence of a superior officer, and making a false statement. Soares was suspended without pay pending the filing of criminal charges.

That same day, in response to the PNDA, the SOA filed two separate actions. The SOA filed a grievance with the City's public safety director, Anthony F. Ambrose, pursuant to the parties CBA, demanding a hearing and immediate reinstatement with back pay.¹ The SOA also initiated arbitration proceedings "contesting the City's suspension without pay . . . prior to a disciplinary hearing" on the violations charged in the PNDA.

¹ The other three officers also were administratively charged and filed grievances in lockstep with Soares; they are not parties to this appeal. We therefore recite the events primarily as they apply to Soares.

On February 13, 2020, Ambrose denied the SOA's grievance. Following a limited purpose hearing conducted on February 21, 2020, the NPD sustained the charges and penalty. On February 28, 2020, a Final Notice of Disciplinary Action (FNDA) issued, setting forth the charges and penalty.

On March 3, 2020, Soares and the other officers petitioned the Civil Service Commission (CSC) for interim relief, contending their indefinite suspensions were contrary to the governing law. The CSC agreed. In a May 14, 2020 letter to the City, the CSC advised that the officers could not be suspended without pay because the FNDA did not specify that they were "subject to pending criminal charges." The CSC asked the City to "comply with the applicable administrative provisions." Accordingly, the City could "either immediately hold departmental hearings on the merits of the charges and issue new FNDAs indicating the disposition of the charges and the penalty, if applicable, or amend the FNDAs indicating that the suspensions were with pay and the reasons for the continued suspensions." The letter was emailed to the City's corporation counsel, Kenyatta K. Stewart, and appointing authority, Aondrette O. Williams. The City did not respond; Stewart later certified he did not learn about the officers' CSC action until September 25, 2020.

On March 5, 2020 – two days after Soares filed his action before the CSC – the parties selected an arbitrator. While both actions were pending, on April 9, 2020, the Essex County Prosecutor's Office issued a complaint-summons, charging Soares with third-degree tampering with public records, N.J.S.A. 2C:28-7(a)(1).²

On June 9, 2020, the SOA filed an amended grievance with Ambrose seeking to reinstate Soares pending disposition of the criminal charges. On June 17, 2020, the CSC ordered Soares reinstated or a departmental hearing on the administrative charges commenced within twenty days. Fines would issue if the City failed to comply. The decision was emailed to Stewart and Williams. Again, the City did not respond. As stated, Stewart later asserted he was not apprised of the CSC action until September 25, 2020.

When the City failed to hold a departmental hearing or issue an amended FNDA, Soares filed a request for enforcement on July 16, 2020, which was sent to Stewart via regular mail. In addition, on August 5, 2020, the CSC sent correspondence acknowledging Soares's request to Stewart and Williams,

² On September 9, 2021, a Criminal Division judge entered an order, admitting Soares into the pretrial intervention program and postponing the criminal proceedings for twelve months with certain conditions, including that Soares "maintain gainful employment."

neither of whom responded for the reason previously noted. Accordingly, on September 2, 2020, the CSC issued an order similar to its May 14, 2020 "request" and fined the City \$4,000 for non-compliance. The CSC emailed its decision to Stewart and Williams on September 7, 2020.

Delayed by pandemic-related closures of the State's mediation office, the arbitration hearing ultimately was held on September 9, 2020. The sole issue presented to the arbitrator was whether Soares should have been suspended with or without pay pending the disposition of criminal charges. The SOA recognized the City's authority under N.J.S.A. 40A:14-149.1 to suspend officers with or without pay pending criminal charges but argued the City was not required to do so. Claiming the City acted in a "disparate and inconsistent manner toward . . . Soares," the SOA cited "the City's past practice of suspending superior officers with pay under identical and substantially similar situations." The City disagreed, arguing its decision was consistent with the statute, the Attorney General Guidelines, NPD policy, and the parties' CBA. The City also contended the arbitrator "lack[ed] jurisdiction to make a determination concerning a major discipline pursuant to N.J.A.C. 4A:2-2.5 and the parties[' CBA]." Apparently unaware that Soares had instituted an action before the

CSC, the City did not contend the arbitrator lacked jurisdiction under Article IV, Section 3, Step 6 of the CBA.

The City called two witnesses: NPD's special assistant to the public safety director who had conducted Soares's departmental hearing, and an NPD captain who had investigated the charges. The SOA presented the testimony of its first vice president who testified that various officers had been charged with violations of criminal law and were suspended with pay. Soares, who was "not feeling well," did not attend the hearing. At the conclusion of the hearing, the arbitrator reserved decision, pending the parties' written summations.

Before the arbitrator rendered his decision, on October 8, 2020, the City moved for reconsideration of the CSC's decision. In his certification accompanying the City's application, Stewart asserted he had not received any emails from the CSC in his inbox and, as such, the City was unaware of the CSC proceedings. However, Stewart claimed that after "these matters were first brought to his attention on September 25, 2020," he discovered the emails in his "junk" folder. Stewart further stated criminal charges were filed against all four officers on April 9, 2020. In response, Soares attempted to withdraw his appeal before the CSC.

On October 19, 2020, the arbitrator issued a written decision sustaining the SOA's grievance. The arbitrator ordered the City to reimburse Soares for all "wages and benefits lost during the period of his suspension" and continue to pay him until the criminal charges were resolved. In reaching his decision, the arbitrator found "the City and the SOA had a custom or past practice of returning superior officers to duty with pay following suspension hearings where these officers had been earlier suspended indefinitely." There is no indication in the record that either party advised the arbitrator that Soares had filed an action before the CSC on March 3, 2020.

On November 27, 2020, the CSC granted the City's reconsideration application, in relevant part, noting all the officers failed to "provide the [CSC] with accurate information regarding their underlying status." The CSC awarded Soares and the other officers back pay up to April 9, 2020, when the criminal charges were filed, but determined that the City could suspend the officers without pay. Noting "Soares could have only 'withdrawn' prior to the [CSC]'s original decisions in these matters," the CSC also rejected Soares's request to withdraw his appeal in response to the City's motion to reconsider those decisions.

The City thereafter filed a two-count verified complaint in support of its application for an order to show cause in the Chancery Division, seeking to vacate the arbitration award. The City argued the arbitrator's award "was procured by undue means" because it was based on mistake of law or fact, and the award violated public policy. In response, the SOA filed a counterclaim, seeking to confirm the arbitration award.

In addition to the contentions set forth in its complaint, during oral argument before the motion judge the City argued that the arbitrator lacked jurisdiction because the SOA "ha[d] already submitted . . . to the jurisdiction of the [CSC]." The City also claimed the arbitrator lacked jurisdiction pursuant to Article IV, Section 3 of the CBA because the subject matter related to major discipline.

Citing the terms of the CBA, the SOA countered that the arbitrator's exercise of jurisdiction was proper because, by proceeding to arbitration, the parties had "waived the right to proceed under Civil Service Law, Rules, Regulations and Procedures." The SOA claimed "late in the process, it was realized the [CSC] shouldn't have even been involved here" and, as such, the SOA had "asked that the [CSC] matter be withdrawn." The SOA argued that the arbitrator correctly determined he had jurisdiction to hear this matter because

"[t]he interim relief sought was interlocutory" before the CSC. Further, had the City believed the matter could not proceed to arbitration, it should have "file[d] a scope of negotiations petition [before the Public Employment Relations Commission]."

At the conclusion of argument, the motion judge reserved decision. On April 7, 2021, the judge issued an oral decision denying the City's application to vacate the arbitration award and granting the relief sought in the SOA's counterclaim, thereby enforcing the award. In essence, the judge concluded the arbitrator's decision was "reasonably debatable" under the governing law and as such, she found no grounds to overturn it. The judge credited the arbitrator's decision that he had jurisdiction to hear this matter because he found "there was no issue concerning the suspension itself." Rather, "the only issue" he was asked to determine was whether Soares's "suspension pending the outcome of the criminal charges was to be with or without pay." The judge did not, however, consider the City's contention that the arbitrator lacked jurisdiction because the matter also was pending before the CSC. The judge issued a memorializing order on April 23, 2021.

The City thereafter moved for reconsideration, arguing the judge failed to consider its claim that the arbitrator lacked jurisdiction pursuant to Article IV,

Section 3, of the CBA. At the conclusion of oral argument, the judge issued an oral decision, denying the motion. Crediting the SOA's argument, the judge found the "only two parties" to the arbitration were the City and the SOA, whereas the parties to the "parallel proceeding in the [CSC] . . . were the individual officers." Further, "the record establishe[d] that the individual officer, Soares, himself, attempted to withdraw from the Civil Service process after having received some favorable rulings through that procedure. And he did so apparently because the arbitration process was going forward." The judge issued an accompanying order on June 4, 2021, and denied Newark's request for a stay of that order on June 17, 2021. This appeal followed.³

On appeal, the City challenges the motion judge's decision on three grounds. Initially, the City claims the judge failed to conclude the arbitrator lacked jurisdiction on two grounds: (1) he exceeded his powers under the CBA by considering the grievance after Soares moved for relief before the CSC; and (2) because the matter involved a major disciplinary action. Secondly, the City maintains the arbitrator impermissibly modified the terms of the CBA by finding the issue presented "[wa]s arbitrable until a final decision ha[d] been made on

³ We denied the City's ensuing emergent application to stay the judge's decision awarding back pay to Soares.

the discipline itself," and by concluding the City's decision was disparate and contrary to its "past practice." Finally, the City contends the award violated public policy. In view of the parallel CSC proceeding, we are persuaded that the arbitrator lacked jurisdiction to hear the grievance. Accordingly, we reverse the Chancery Division orders under review and remand for entry of an order vacating the arbitration award.

II.

Public policy in this state favors resolution of disputes through arbitration, especially in matters involving the public sector. For that reason, there is a "strong judicial presumption in favor of the validity of an arbitral award [and] the party seeking to vacate it bears a heavy burden." Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 372 N.J. Super. 503, 510 (App. Div. 2004). Thus, "arbitration awards are given a wide berth, with limited bases for a court's interference." Borough of E. Rutherford v. E. Rutherford PBA Loc. 275, 213 N.J. 190, 201 (2013). "[T]he party opposing confirmation ha[s] the burden of establishing that the award should be vacated pursuant to N.J.S.A. 2A:24-8." Twp. of Wyckoff v. PBA Local 261, 409 N.J. Super. 344, 354 (App. Div. 2009) (second alteration in original) (quoting Jersey City Educ. Ass'n v. Bd. of Educ., 218 N.J. Super. 177, 187 (App. Div. 1987)).

N.J.S.A. 2A:24-8 provides that an arbitrator's award shall be vacated in any of the following limited circumstances:

- 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.

In addition, the court may vacate an arbitration award for public policy reasons. Borough of E. Rutherford, 213 N.J. at 202. "However, '[r]eflecting the narrowness of the public policy exception, that standard for vacation will be met only in rare circumstances.'" Ibid.

Pertinent to this appeal, "When parties have agreed, through a contract, on a defined set of rules that are to govern the arbitration process, an arbitrator exceeds his [or her] powers when he [or she] ignores the limited authority that the contract confers." Port Auth. Police Sergeants Benevolent Ass'n of N.Y., N.J. v. Port Auth. of N.Y., N.J., 340 N.J. Super. 453, 458 (App. Div. 2001)

(quoting Cnty. Coll. of Morris Staff Ass'n v. Cnty. Coll. of Morris, 100 N.J. 383, 391-92 (1985)). Thus, an arbitrator exceeds his or her authority by ignoring "the clear and unambiguous language of the agreement." City Ass'n of Supervisors & Adm'rs v. State Operated Sch. Dist., 311 N.J. Super. 300, 312 (App. Div. 1998); see also Commc'ns Workers of Am., Local 1087 v. Monmouth Cnty. Bd. of Soc. Servs., 96 N.J. 442, 452-53 (1984) (holding an arbitrator may not exceed the power authorized under the parties' collectively negotiated agreement).

We review a trial court's decision to affirm or vacate an arbitration award de novo. Minkowitz v. Israeli, 433 N.J. Super. 111, 136 (App. Div. 2013). We owe no special deference to "[t]he 'trial court's interpretation of the law and the legal consequences that flow from the established facts.'" Town of Kearny v. Brandt, 214 N.J. 76, 92 (2013) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

A party may move for reconsideration of a court's decision pursuant to Rule 4:49-2, on the grounds that (1) the court based its decision on "a palpably incorrect or irrational basis," (2) the court either failed to consider or "appreciate the significance of probative, competent evidence," or (3) the moving party is presenting "new or additional information . . . which it could not have provided on the first application." D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div.

1990); see also Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).

We review a trial court's order on reconsideration under an abuse of discretion standard. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

In the present matter, the record reveals that on January 24, 2020, the SOA initiated arbitration proceedings challenging the City's suspension of Soares without pay. About six weeks later, on March 3, 2020, Soares sought relief before the CSC, challenging the same action. Pursuant to the plain terms of Article IV, Section 3, Step 6 of the CBA, because Soares, as the "aggrieved elect[ed] to pursue Civil Service Procedures, the arbitration hearing sh[ould have] be[en] canceled and the matter withdrawn from arbitration."

We recognize there is no indication in the record that the arbitrator was aware Soares had petitioned the CSC for relief on March 3, 2020 – two days before the parties selected him as arbitrator. Further, until September 25, 2020, the City was unaware of the pending CSC action. But the record is curiously silent as to why neither party informed the arbitrator prior to his October 19, 2020 decision that the action was pending before the CSC.

In her decision on reconsideration, the motion judge reasoned the arbitrator retained jurisdiction because the SOA – not Soares – filed for

arbitration. Accordingly, the judge determined Soares did not participate in simultaneous proceedings before the CSC and the arbitrator. We disagree.

Pursuant to Article IV, Section 2 of the CBA: "The term 'grievance' as used herein means any difference or dispute arising over the application or interpretation of the terms and conditions of this [CBA] and may be raised by an individual, the Association on behalf of an individual or group of individuals, or the City." According to the CBA's plain terms, the SOA cannot unilaterally raise a grievance, it must do so on behalf of an individual. We therefore conclude the SOA filed the arbitration on behalf of Soares pursuant to the terms of the CBA.

Having reviewed the City's contentions in view of the overlapping pendency of the grievance before the CSC and the arbitrator, the terms of the parties' CBA, and the governing legal principles, we are persuaded that the arbitrator lacked jurisdiction to hear the grievance. Because it is less than clear from the record that the arbitrator was aware of the action before the CSC, we do not fault the arbitrator. Nonetheless, after Soares elected to pursue his grievance before the CSC, the plain terms of the CBA dictated that the matter be withdrawn from arbitration. As such, the arbitrator exceeded his powers under the CBA. Commc'ns Workers of Am., 96 N.J. at 452.

Accordingly, we conclude the Chancery Division judge erroneously denied the City's application to vacate the award on jurisdictional grounds and the City's motion for reconsideration of that decision. In view of our decision, we need not reach the City's remaining contentions.

Reversed and remanded for further proceedings consistent with our 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