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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1323-22

ROSELLE BOROUGH BOARD OF EDUCATION,

Plaintiff-Respondent,

v.

LOVENA BATTS,

Defendant-Appellant,

and

DR. ANDRE MCKISSICK,

Defendant-Respondent.

Argued May 24, 2024 – Decided June 7, 2024

Before Judges Smith and Perez Friscia.

On appeal from the Superior Court of New Jersey, Chancery Division, Union County, Docket No. C-000090-22.

Nicholas A. Poberezhsky argued the cause for appellant (Caruso, Smith, Picini PC, attorneys; Nicholas Poberezhsky, of counsel and on the briefs).

Stephen Edelstein argued the cause for respondent Roselle Borough Board of Education (Weiner Law Group LLP, attorneys; Stephen J. Edelstein, of counsel and on the brief; Genesis Algaba, on the brief).

PER CURIAM

After a teacher-tenure arbitration was conducted pursuant to the Tenure Employees Hearing Law (TEHL), N.J.S.A. 18A:6-10 to -18.1,[1] an arbitrator dismissed tenure charges against defendant Lovena Batts (Batts). Plaintiff, Roselle Borough Board of Education (Board), moved in the Chancery Division

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[1] In Bound Brook Bd. of Educ. v. Ciripompa, 228 N.J. 4, 11-12 (2017) (alterations in original), our Supreme Court addressed arbitration proceedings under the TEHL:

> 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.

to vacate the award. The trial court found the arbitrator's prehearing rulings violated arbitration timelines under N.J.S.A. 18A:6-17.1(b)(3), and constituted "undue means," sufficient to vacate the award pursuant to N.J.S.A. 2A:24-8(a). Batts appealed, contending the trial court erred when it reached this conclusion. We reverse and reinstate the arbitrator's award for the reasons that follow.

I.

We incorporate the salient procedural and factual history from our opinion in Roselle Borough Bd. of Educ. v. Batts, No. A-2530-19 (App. Div. August 20, 2021) (slip op. at 5-7). (Batts I).

> [Batts], a tenured elementary school teacher, began working for the Board in September 2000. The Board filed certified tenure charges against respondent with the Commissioner of Education on April 9, 2019, alleging "incapacity, excessive absenteeism, and other just cause constituting grounds requiring her dismissal." More specifically, the Board alleged that [Batts] was absent forty-six days during the 2015-16 school year, thirty and one-half days during the 2016-17 school year, and was continuously absent since September 30, 2017, the day after she was involved in a car accident.
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> On May 11, 2019, the Commissioner of Education assigned Dr. Andree Y. McKissick as the arbitrator for the tenure hearing. . . . On May 17, and June 3, 2019, [Batts] timely served her pre-hearing disclosures. Dr. McKissick directed the parties to submit their witness lists and a written copy of their opening statements by June 20, 2019. The Board met

this deadline, but [Batts] did not; later that afternoon, Dr. McKissick conducted a telephone conference with the attorneys for the parties and set the next hearing date for July 10, 2019.

Approximately two weeks later, on July 3, 2019, [Batts's] attorney contacted Dr. McKissick and advised [her] that he would no longer be representing [Batts]; in addition, [Batts' attorney] requested a sixty-day adjournment of the arbitration hearing so that [Batts] could retain new counsel. Dr. McKissick granted this request, over the Board's objection. On July 12, Dr. McKissick contacted the Commissioner of Education and requested that the timeframe to continue the arbitration be extended until September 3, 2019. The Commissioner granted her request. On August 22, 2019, respondent hired new counsel. Thereafter, Dr. McKissick scheduled the hearing to reconvene on October 17, 2019.

Prior to the continuation of the arbitration, respondent supplemented her previous discovery disclosures; upon receipt, the Board moved to suppress the supplemental disclosures. On October 7, 2019, Dr. McKissick denied the Board's motion, finding that the June 20, 2019 conference call was "a preliminary hearing," noting "there was no sworn testimony, [no] exhibits, no direct or cross-examinations nor rebuttals heard" on that date. In addition, Dr. McKissick explained that "October 17th starts the true, evidentiary hearing" in this matter; thus, "October 7, 2019 should be the operative date to cure the outstanding discovery issues." [Dr. McKissick] then found that [Batts] "was in compliance" with her discovery obligations and denied the Board's motion to suppress.

Prior to the October 17, 2019 hearing date, the Board embarked upon two parallel courses of action. First, it sought an order from the Commissioner of Education removing Dr. McKissick as arbitrator, alleging "misconduct" regarding her handling of the hearing start date along with her "inability to be impartial and afford the Board a fair hearing." Before receiving a reply, the Board also sought an order from the Chancery Division: relieving Dr. McKissick as arbitrator for "misconduct"; enjoining the proceeding until appointment of a new arbitrator; establishing the start date for the arbitration as June 20, 2019; and for other relief. The trial court denied the Board's application and we affirmed. Batts I, (slip op. at 9-10). We stated:

> On appeal, the Board contends that the arbitrator did not follow the time limits set forth in N.J.S.A. 18A:6-10; thus, her decision was procured by "undue means" as she exceeded her powers. The Board further contends that, because of those errors, the arbitrator must be removed from this matter. Concluding these arguments lack merit, we affirm substantially for the reasons set forth in the court's statement of reasons attached to its January 15, 2020 order denying the Board's requests for relief.

The hearing took place virtually over three days: March 29, 31, and April 5, 2022. The Board called one witness. Batts called three witnesses, and testified.

On June 15, 2022, Dr. McKissick issued an arbitration award, accompanied by a twenty-page written decision which included findings. Among other things, the arbitrator concluded the Board failed to meet its burden of proof showing the impact Batts's absences had on "the continuity of instruction" during her absence and failed to provide her with a warning concerning the Board's dissatisfaction with her absences. Dr. McKissick's award: dismissed both counts of the tenure charges due to the Board's failure to meet its burden of proof; reinstated Batts; and restored her full salary and benefits retroactive to September 1, 2019.

On August 30, 2022, the Board filed a complaint and order to show cause in the Law Division seeking to vacate the arbitration award and remove Dr. McKissick as arbitrator. Batts answered and filed a cross-claim on September 14, 2022, seeking dismissal of the Board's complaint and confirmation of the award.

On October 20, 2022, the trial court issued an order and accompanying statement of reasons vacating the arbitration award. The court considered the record in the context of N.J.S.A. 2A:24-8, and it concluded that the award should be vacated. It found that "the [a]ward was procured by undue means," under subsection (a) of the statute as "Dr. McKissick made a clear mistake of law"

when she "violated the strict discovery timeline required by N.J.S.A. 18A:6-17.1(b)(3)." The court explained that Dr. McKissick's communications with the parties supported a finding that the hearing began on June 20, 2019, making all discovery due by June 10, 2019. The court also found Dr. McKissick's pre-arbitration ruling denying the Board's motion to suppress additional discovery was improper.

Batts moved for reconsideration, which the trial court denied by order and accompanying statement of reasons on December 16, 2022.

Batts appealed.

II.

"Judicial review of an arbitration award is very limited." Bound Brook Bd. of Educ. v. Ciripompa, 228 N.J. 4, 11 (2017) (quoting Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 276 (2010)). In the public sector, an "arbitrator's award will be confirmed 'so long as the award is reasonably debatable.'" Linden Bd. of Educ., 202 N.J. at 276 (quoting Middletown Twp. PBA Loc. 124 v. Twp. of Middletown, 193 N.J. 1, 11 (2007)).

In reviewing vacatur of an arbitration award, 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) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). Therefore, we review the trial court's decision on a motion to vacate an arbitration award de novo. Ibid. (citing Minkowitz v. Israeli, 433 N.J. Super. 111, 136 (App. Div. 2013)).

III.

We reject Batts's argument that res judicata applies to bar the trial court from considering the arbitrator's pre-hearing ruling in the context of the Board's motion to vacate. The doctrine of res judicata "refers broadly to the common-law doctrine barring re-litigation of claims or issues that have already been adjudicated." Velasquez v. Franz, 123 N.J. 498, 505 (1991). To be accorded res judicata effect, a judicial decision "must be a valid and final adjudication on the merits of the claim." Ibid.

In Batts I, we affirmed the trial court's order denying injunctive relief prior to issuance of an arbitration award. We did so based primarily on the procedural posture of the case, as the trial court concluded that it could not disturb the arbitrator's prehearing rulings in large part because no award had yet been made. Here, we consider the trial court's vacatur order following issuance of the arbitrator's award. Res judicata does not apply.

We turn to the merits of the trial court's undue means analysis. The relevant provisions of the TEHL follow.

N.J.S.A. 18A:6-17.1(b)(1) provides that "[t]he hearing shall begin within [forty-five] days of the assignment of the arbitrator to the case."

N.J.S.A. 18A:6-17.1(b)(3) states in pertinent part that,

> [a]t least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

N.J.S.A. 18A:6-17.1(f) states, the "[t]imelines set forth [in the statute] shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to."

N.J.S.A. 18A:6-17.1(g) references the Commissioner's discretion in extending the forty-five-day statutory timeline within which arbitrators must hold a hearing:

> An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval from the

> commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

N.J.S.A. 18A:6-17.1(h) references the Commissioner's power to remove a non-compliant arbitrator, stating:

> The commissioner may remove any arbitrator from an arbitration case or an arbitration panel if an arbitrator does not adhere to the timelines set forth herein without approval from the commissioner. If the commissioner removes an arbitrator from an arbitration case, the commissioner shall refer the case to a new arbitrator within five days. The newly assigned arbitrator shall convene a new hearing and then render a written decision within 45 days of being referred the case.

A plain reading of the relevant sections of N.J.S.A. 18A:6-17.1, particularly section (h), which gives the Commissioner the power to remove a non-compliant arbitrator, reveals that the Legislature has vested substantial authority in the commissioner to enforce or relax the timelines for the commencement of an arbitration hearing. Understanding this delegation of procedural authority, we turn to the Board's motion to vacate.

N.J.S.A. 2A:24-8(a) states that "[t]he court shall vacate the [arbitration] award . . . where the award was procured by fraud, corruption, or undue means." "'[U]ndue means' ordinarily encompasses 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 Loc. 275, 213 N.J. 190, 203 (2013) (alteration in original) (quoting Off. of Emp. Rels. v. Commc'ns Workers of Am., AFL-CIO, 154 N.J. 98, 111 (1998)). "[A]n arbitrator's failure to follow the substantive law may . . . constitute 'undue means' which would require the award to be vacated." In re City of Camden, 429 N.J. Super. 309, 332 (App. Div. 2013) (quoting Jersey City Educ. Ass'n v. Bd. of Educ. of Jersey City, 218 N.J. Super. 177, 188 (App. Div. 1987)).

In "rare circumstances," a court may overturn an arbitration decision if it violates "a clear mandate of public policy." N.J. Tpk. Auth., 190 N.J. at 294. Such a mandate "must be embodied in legislative enactments, administrative regulations, or legal precedents, rather than based on amorphous considerations of the common weal." Borough of Glassboro v. Fraternal Ord. of Police, Lodge No. 108, 197 N.J. 1, 10 (2008) (citation omitted).

The record shows that the arbitrator successfully obtained approval from the Commissioner of Education to extend time to conduct the arbitration hearing on at least one occasion. The record also shows that the Commissioner, vested with the power to do so, was silent when the Board sought removal of the arbitrator in October 2019. See N.J.S.A. 18A:6-17.1(h) (vesting discretion in the commissioner to remove an arbitrator who does not adhere to the mandated

timelines). When presented with an opportunity to take any corrective action it deemed proper concerning Dr. McKissick's scheduling and discovery rulings, including removal, the Commissioner declined to do so, effectively extending the relevant statutory timelines and permitting fulsome discovery.

The arbitrator's rulings did not result in any substantive prejudice to the Board. Under N.J.S.A. 18A:6-17.2(d), the Board bears the "ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met." Also, we perceive no procedural prejudice as the Board fully litigated its objections to the arbitrator's rulings before us, and it raised even more detailed objections before the Commissioner. The Board had adequate time to review Batts's June-October 2019 submissions and prepare for the March 2022 arbitration hearing. We cannot conclude that the scheduling and discovery rulings complained of by the Board constitute a "failure to follow the substantive law." In re City of Camden, 429 N.J. Super. at 332. Viewing this record through the lens of the Commissioner's statutory discretion on arbitration procedure and scheduling as well as our N.J.S.A. 2A:24-8(a) jurisprudence, we find no undue means. We conclude that the trial court erred when it found undue means and vacated the arbitrator's award.

We reverse the trial court's orders of October 20, 2022 and December 16, 2022, and reinstate the arbitration award in full.

Reversed.