[Cite as *In re Hamilton v. Intl. Union of Operating Engineers, Local 20*, 2016-Ohio-5565.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

IN THE MATTER OF THE ARBITRATION BETWEEN:	:	
	:	CASE NO. CA2016-03-054
CITY OF HAMILTON,	:	O P I N I O N
Relator-Appellee,	:	8/29/2016
- vs -	:	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 20,	:	
Respondent-Appellant.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2015-11-2730

Letitia S. Block, Hamilton City Assistant Law Director, 345 High Street, Suite 520, Hamilton, Ohio 45011, for relator-appellee

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PIPER, J.

{¶ 1} Respondent-appellant, International Union of Operating Engineers Local 20, appeals a decision of the Butler County Court of Common Pleas vacating an arbitration award.

{¶ 2} The Union represented an employee who worked for appellee, the city of

Hamilton. The employee was involved in an incident where he possibly observed another employee bring a gun to work in violation of the City's rules against having weapons at work. The employee was informed that an investigation into the gun incident was active, and that as part of the investigation, he was expected to submit to a polygraph test. The employee was given a written notice that failure to participate and answer all questions truthfully and fully would be considered insubordination, "which is a disciplinary infraction for which you may receive discipline, up to and including your dismissal from employment with the [City]."

{¶ 3} The employee was terminated for insubordination after he refused to submit to the polygraph test. The terminated employee filed a grievance, and the Union sought to have the employee's termination overturned. Pursuant to the Collective Bargaining Agreement ("CBA") between the Union and the City, the matter was eventually referred to an arbitrator.

{¶ 4} The arbitrator issued a decision in which he recognized the serious nature of the investigation because the underlying issue was specific to an employee bringing a gun to work. The arbitrator also found that the discharged employee should have submitted to the polygraph test as part of his employment with the City, and filed a grievance later *if* the employee suffered any discipline as a result of his answers given during the test. Thus, the arbitrator determined that the City was within its authority to find that the terminated employee committed insubordination by not participating in the polygraph test. However, the arbitrator concluded that the terminated employee's insubordination was not "gross insubordination" and therefore termination was not a possible sanction. The arbitrator reduced the termination to a suspension, reinstated the terminated employee, and awarded back pay.

{¶ 5} The City appealed the arbitrator's award to the common pleas court, and argued that the arbitrator exceeded his authority because the CBA did not provide "gross

insubordination" as a standard for termination. The common pleas court agreed with the City, and vacated the arbitrator's award. The Union now appeals the common pleas court's decision, raising two assignments of error. Because the two assignments of error are interrelated, we will address them together.

{¶ 6} Assignment of Error No. 1:

{¶ 7} THE TRIAL COURT ERRED IN VACATING THE ARBITRATION AWARD.

{¶ 8} Assignment of Error No. 2:

{¶ 9} THE TRIAL COURT ERRED IN FAILING TO CONFIRM THE ARBITRATION AWARD.

{¶ 10} The Union argues in its two assignments of error that the common pleas court erred by vacating and not confirming the arbitration award.

{¶ 11} Arbitration is a favored method of dispute resolution due to its relatively speedy and inexpensive nature, as well as its ability to unburden crowded court dockets. *Buchholz v. W. Chester Dental Group*, 12th Dist. Butler No. CA2007-11-292, 2008-Ohio-5299, ¶ 14. As such, a strong presumption favors upholding arbitration awards. *Id.* Therefore, "the courts have limited authority to review an arbitration award." *Ohio Patrolmen's Benevolent Assn. v. Trenton*, 12th Dist. Butler No. CA2012-11-238, 2013-Ohio-3311, ¶ 18. In the common pleas court, the review is limited to determining whether the party challenging the award has established a ground set forth in R.C. 2711.09 through 2711.14. *Id*. According to R.C. 2711.10(D), a common pleas court can vacate a binding arbitration award where the arbitrator "exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

{¶ 12} An appellate court's review of the common pleas court's arbitration order is confined to the order issued by the common pleas court confirming, modifying, vacating or

enforcing the award. *Id*. "An appellate court will review the common pleas court's decision to confirm, modify, vacate or enforce the arbitration award based on abuse of discretion." *Buchholz*, 2008-Ohio-5299 at ¶ 22. An abuse of discretion is more than an error of law or judgment, and requires a finding that the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 13} After reviewing the record, we find that the common pleas court did not abuse its discretion in vacating the arbitration award. As previously stated, the common pleas court vacated the award because the arbitrator utilized a "gross insubordination" standard not found in the CBA. The standard is actually found in a secondary source reference publication. In finding termination is not a possible sanction unless the misconduct is "gross insubordination," the arbitrator noted in his written decision that "serious discipline for a first offense, referred to as a 'capital offense' would include offenses such as theft, physical attacks, willful and serious safety breaches, or *gross insubordination*." (Emphasis sic.) The arbitrator took this principle from The Common Law of the Workplace, the View of Arbitrators, 2nd Ed.

{¶ 14} The principle, however, is not quoted or cited from case law or any pertinent statutes—nor it is included in the CBA. Instead, the CBA sets forth the rules for discipline and states that a "progressive manner" is preferred when issuing discipline "except when the misconduct is of such a serious nature that a more severe penalty would be appropriate." Nowhere in the CBA does it state that the actions justifying termination must be "gross" or that a finding of gross insubordination is required before the more severe penalty of termination would apply.

{¶ 15} Even if the arbitrator somehow found the term "insubordination" ambiguous, the arbitrator was "confined to interpret[] the provisions of a CBA as written and to construe the terms used in the agreement according to their plain and ordinary meaning," rather than

apply an alternative definition. *Internatl. Assn. of Firefighters, Local 67 v. Columbus*, 95 Ohio St.3d 101, 103 (2002). Rather than give insubordination its ordinary meaning, the arbitrator incorrectly inserted a requirement of "gross insubordination" into his reading of the CBA and its disciplinary requirements.

{¶ 16} Despite the arbitrator's inclusion of "gross insubordination" as the measure to determine whether discharge was appropriate, we note that gross insubordination is not necessarily the same measure as misconduct that is of "such a serious nature," as stated in the CBA. The CBA requires only misconduct of a serious nature, while "gross insubordination" is a different standard with a different, higher, standard of proof. The degree of misconduct necessary for "gross insubordination" is referenced by the arbitrator as a "capital offense." Moreover, the "act" of serious conduct is different than the serious "nature" of the circumstances created by the conduct. Therefore, the arbitrator's inclusion of a "gross insubordination" standard to support termination upon a first offense was an attempt to rewrite or modify the standard set forth in the CBA.

{¶ 17} According to the grievance process set forth in the CBA, the arbitrator had authority to decide the dispute between the Union and the City. However, the agreement specifically stated, "the arbitrator shall not have the power to add to, subtract from or modify any of the terms of this Agreement." A reading of the discipline section, as quoted above, clearly indicates that the standard for issuing discipline other than in a progressive manner is appropriate when the conduct is of a serious nature and the more severe penalty would be appropriate.[1] At no time did the arbitrator find that the "nature" of insubordination was

1. Conversely, if a CBA includes express reference to gross insubordination, the arbitrator is within his authority to determine that termination is unwarranted if the disciplined employee's conduct did not rise to the level of gross misconduct. *See Bellevue v. Am. Fedn. of State, Cty. & Mun. Emp., AFL CIO, Ohio Council 8 & Local 2571*, 6th Dist. Sandusky No. S-02-038, 2003-Ohio-7259, ¶ 34 (finding that the arbitrator's order to reinstate a terminated employee was proper because the arbitrator found that the employee's misconduct was not gross where the CBA included an express provision that progressive discipline would be utilized unless a major infraction occurred and the agreement provided that a "major infraction shall be considered as

not serious, as would be required by the CBA to overturn an employee's termination.[2] Instead, the arbitrator determined specifically that the terminated employee's insubordination was not *gross* because of the terminated employee's "justified concern that he could have been disciplined for a poor test result and found to be untruthful, with no other supporting or corroborative evidence."

{¶ 18} However, the arbitrator's reasoning is contradictory to his prior finding that the terminated employee was required to submit to the polygraph and could later "grieve" any disciplinary action implemented by the City. The fact that the City did not provide immunity to the terminated employee did not in any way, shape, or form alleviate the terminated employee's duty to submit to the polygraph, and in no way eliminated the fact that the terminated employee committed insubordination by refusing to cooperate in the City's investigation as ordered by his superiors.

{¶ 19} As such, we agree with the common pleas court that the arbitrator's reliance on a principle stated in an arbitration book "adds" to the language of the CBA, where no such language otherwise exists. Again, and of significance, the arbitrator never made a finding that the member was not insubordinate or that the City should not have required the polygraph.[3] Instead, the arbitrator added a new standard of "gross insubordination" to the CBA and then applied the facts accordingly to find that the employee's termination was not

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follows: offenses of theft, embezzlement of public funds, being under the influence of alcoholic beverages or abusive drugs during work hours, physical violence, offenses involving gross misconduct or gross insubordination * * *").

2. The arbitrator, in finding that the City had authority to require the terminated employee to take the polygraph, noted the safety issues inherent in the underlying gun-related investigation. "Management may implement policies to protect employees from physical harm and threats of harm. It follows that management may discipline employees for failing to abide by these rules." The arbitrator went to on state, "in this case, management was exercising its right to investigate a weapons policy violation that if unenforced would expose its employees to possible dangers, violence, injuries or death."

3. The arbitrator's written decision provides, "the Grievant should have obeyed the order, taken the polygraph examination, and grieved later if the City attempted to discipline him for being untruthful without any other supporting or corroborative evidence."

a possible sanction.

{¶ 20} We are aware of Ohio Supreme Court precedent that an arbitrator, after determining that there is just cause to discipline an employee, has the authority to review the appropriateness of the type of discipline imposed. *Bd. of Trustees of Miami Twp. v. Fraternal Order of Police*, 81 Ohio St.3d 269 (1998). Similar to the case sub judice, the supreme court recognized in *Miami Township* that the CBA involved did not prevent the arbitrator from reviewing the appropriateness of the type of discipline imposed, but rather only provided that the "arbitrator shall have no power to add to, subtract from, or change any of the provisions of this Agreement." *Id*. at 272. However, the issue in that case was specific to an employee who committed theft and was discharged for dishonesty issues. The arbitrator found that the discharged employee was dishonest and was subject to discipline, but not termination. However, in so finding that termination was not the proper discipline, the arbitrator did not add a different or higher standard than that set forth in the applicable CBA.

{¶ 21} Nor did the arbitrator in *Miami Township* rely on extrinsic "rules" or principles taken from non-binding precedent that were in direct conflict to the express terms of the applicable CBA. In fact, the only issue presented in *Miami Township* was whether an arbitrator can review the appropriateness of discipline. The case does not, however, provide that in so reviewing the appropriateness of discipline, the arbitrator may implement an unsuitable standard that conflicts with the terms of the CBA. In fact, the supreme court reviewed the exact wording of the CBA in *Miami Township* as compared to the arbitrator's order and determined that the arbitrator did not exceed his power because the arbitrator's decision was "based on the language and requirements of the collective bargaining agreement itself." *Id*. at 273. We cannot say the same in the case sub judice.

{¶ 22} The rule of law set forth in *Miami Township* that an arbitrator can review the

appropriateness of discipline has not been ignored, however, here, the arbitrator directly violated the CBA provision that arbitrators were not permitted to "add" terms that were not expressly provided therein. *Miami Township* does not stand for the proposition that an arbitrator has the authority to depart from the clear language of a CBA, and instead supply its own language. As well-settled as the proposition that an arbitrator has the ability to determine the appropriate discipline, is the rule that arbitrators may not depart from the terms of the CBA. *See Internatl. Assn. of Firefighters, Local 67 v. Columbus*, 95 Ohio St.3d 101, 103 (2002) (where the Ohio Supreme Court reversed the lower court and vacated the arbitrator's award because the arbitrator exceeded its authority in determining the essence of the CBA by imposing language not bargained for nor expressly found in the CBA). An arbitrator is "without authority to disregard or modify plain and unambiguous language." *Chardon Local School Dist. Bd. of Edn. v. Chardon Edn. Assn.*, 11th Dist. Geauga No. 2012-G-3110, 2013-Ohio-4547, ¶ 22.

{¶ 23} The record is undisputed that the CBA required "just cause" for termination, and that a proper basis for just cause includes insubordination. *See also* R.C. 124.34 (listing insubordination as a proper basis for termination of "every officer or employee in the classified service of the state and the counties"). Neither the CBA nor R.C. 124.34 require a finding of *gross* insubordination, and instead expressly provide that insubordination is a valid reason for termination.[4] Any requirement of finding "gross insubordination" is therefore in direct conflict to both the CBA and R.C. 124.34, and is separate from an arbitrator's ability

4. While it is not a required aspect of the legal standard, we nonetheless note the prejudicial impact of imposing a different/higher standard on the parties. Neither the Union, nor the City, were able to present any evidence or information to address whether the insubordination was gross without knowing that the arbitrator planned on using his own standard—a standard that was articulated only in the arbitrator's written decision. For example, if the City would have known of the different standard, perhaps it could have presented additional evidence or information regarding why the terminated employee's conduct rose above the ordinary meaning of insubordination and was gross in nature. Or, should the Union try a case before a different arbitrator in the future, must it present evidence that any insubordination by its member was not gross?

to determine what discipline is proper.

{¶ 24} Simply stated, the common pleas court found the arbitrator exceeded the scope of his authority and departed from the essence of the CBA by imposing a standard other than that given in the CBA or statute in regard to insubordination being a proper basis for termination upon a first offense. The common pleas court's determination is not an abuse of discretion.[5] The arbitrator could not supply his own legal standard when determining whether termination as a sanction was possible, but rather was confined to the terms of the CBA. Proceeding upon this fundamental understanding of Ohio law, the common pleas court correctly determined that an arbitrator exceeds his or her authority in supplying new wording to the CBA and by not confining its analysis to the language as plainly stated in a CBA. *See Summit Cty. Children Servs. Bd. v. Communication Workers of Am., Local 4546*, 113 Ohio St.3d 291, 2007-Ohio-1949, ¶ 13 (noting that a "CBA is limited to the provisions bargained for and * * * an arbitrator may not apply extraneous rules to the agreement, where those rules were not bargained for and are contrary to the plain terms of the agreement itself").

{¶ 25} We do not contend the arbitrator lacked authority to review the appropriateness of the degree of discipline imposed, as stated in *Miami Township*. Instead, our decision simply recognizes that the common pleas court's determination that the arbitrator acted outside the scope of his authority by imposing a different or higher standard than that set forth in the pertinent statute and CBA was not an abuse of discretion. Given the insertion of a higher standard than that given in the CBA, we cannot say that the

5. While the dissent expresses a contrary view point than that of the common pleas court in interpreting the arbitrator's language within its opinion, we note an appellate court is confined to an abuse of discretion standard and cannot merely substitute its judgment for that of the lower court. In applying R.C. 2711.10(D) and protecting the essence of the collective bargaining agreement as existing between the parties, the common pleas court was not unreasonable, arbitrary, or unconscionable simply because it did not interpret the arbitrator's opinion in accord with that of the dissent.

common pleas court abused its discretion by finding that the arbitrator's decision exceeded the scope of the arbitrator's authority. As such, we overrule the Union's first and second assignments of error.

{¶ 26} Judgment affirmed.

S. POWELL, J., concurs.

M. POWELL, P.J., dissents.

M. POWELL, P.J., dissenting.

{¶ 27} Because the arbitrator acted within his authority and the common pleas court misconstrued the authority of the arbitrator under Ohio law, I dissent.

I. The Authority of Arbitrators to Determine Appropriate Discipline.

{¶ 28} In *Miami Twp. Bd. of Trustees v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 81 Ohio St.3d 269 (1998), the Ohio Supreme Court reversed the court of appeals and reinstated the common pleas court's confirmation of an arbitration award reducing a discharge from employment to a 30-day suspension. Based upon the provisions in the collective bargaining agreement requiring discipline to satisfy the burden of "just cause" and to reflect a consideration of the "nature of the violation, the employee's record of discipline and the employee's record of performance and conduct," the supreme court held that arbitrators are authorized "to make two determinations: (1) whether a cause for discipline exists and (2) whether the amount of discipline was proper under the circumstances." *Id.* at 271-72. The supreme court observed that

> [t]he parties to a collective bargaining agreement can not anticipate every possible breach of the agreement that may occur during its life and then write an appropriate remedy for each such situation into the agreement. This fact does not, however, preclude an arbitrator from awarding a remedy. * * * Accordingly, we hold that where an arbitrator's decision draws

> its essence from the collective bargaining agreement, and in the absence of language in the agreement that would restrict such review, the arbitrator, after determining that there was just cause to discipline an employee, has the authority to review the appropriateness of the type of discipline imposed.

(Emphasis added.) *Id.* at 272.

{¶ 29} The supreme court also considered whether the restriction in the collective bargaining agreement that the arbitrator not "add to, subtract from or change" the agreement, rendered the arbitrator's consideration of whether a particular discipline was appropriate beyond the "essence [of] the collective bargaining agreement." In finding that it did not, the supreme court held,

> In the case *sub judice,* the collective bargaining agreement does not prevent the arbitrator from reviewing the appropriateness of the type of discipline imposed. The only stated restriction is that "[t]he arbitrator shall have no power to add to, subtract from, or change any of the provisions of this Agreement." In fact, the agreement invites review by stating that "[d]iscipline shall take into account the nature of the violation, the employee[']s record of discipline and the employee's record of performance and conduct." Under this provision, the type of discipline is not automatic for a particular offense.

Id. at 272.

II. Application of *Miami Twp. Bd. of Trustees*

{¶ 30} The CBA in the case at bar contains provisions remarkably similar to the provisions relied upon by the supreme court in *Miami Twp. Bd. of Trustees* in finding the arbitrator was authorized to reduce discipline he determined to be excessive.

{¶ 31} Article XVI of the CBA provides that "All discipline must meet the burden of just cause and subject to the grievance procedure. Discipline shall be issued in a progressive manner, except when the misconduct is of such a serious nature that a more severe penalty would be appropriate." City Administrative Directive #314 additionally provides, in pertinent part, that "with respect to any given offense, consideration will be

given to the severity, cost involved, the time between violations, the length and quality of the employee's service record, and the ability of the employee involved." Finally, Article IV, Section 11 of Appendix A to the CBA restricts the arbitrator's authority only as follows: "The arbitrator shall not have the power to add to, subtract or modify any terms of this [A]greement."

{¶ 32} The logic of the supreme court's opinion in *Miami Twp*. *Bd. of Trustees* applies equally to this case. The CBA in the case at bar required that discipline be for "just cause." The CBA required that discipline be in consideration of not only the infraction, but also of the employee's work record. The CBA required that a progressive discipline policy be adhered to unless the infraction was so serious as to warrant a more severe penalty. The only restriction on the arbitrator's authority was that he may not "add to, subtract or modify any terms" of the CBA. The foregoing provisions, like those in *Miami Twp. Bd. of Trustees*, "invite" the arbitrator to review the appropriateness of the discipline and in doing so, do not contravene the restriction against adding to, subtracting from or changing the CBA.

III. The Common Pleas Court Incorrectly Applies the Law.

{¶ 33} In this case, instead of adhering to the principle recognized in *Miami Twp. Bd. of Trustees* that an arbitrator may reduce excessive discipline absent a restriction on that authority, the common pleas court applied an antithetical version of the law that the arbitrator lacked authority to reduce excessive discipline unless specifically authorized by the CBA. The common pleas court ruled that the arbitrator was confined to determining only whether there was cause for discipline, while discipline itself was committed to the sole discretion of the employer. The common pleas court ruled that

> The CBA specifies the requirement of cause that is stated in the section 124.34 of the Ohio Revised Code. That section specifies "insubordination" as one of the requirements of cause

> for disciplinary action. The Union's position is that the arbitrator is the one who assesses the degree of insubordination that will determine the discipline imposed for the infraction, yet neither the CBA nor Ohio law grants that authority to the arbitrator. The City must determine what discipline is required for the conduct committed or omitted.

{¶ 34} Contrary to the common pleas court's finding, Ohio law does grant the arbitrator the authority to determine if particular discipline is appropriate unless such authority is denied by the CBA.

{¶ 35} Proceeding upon this fundamental misapprehension of the controlling law, the common pleas court held that the arbitrator's finding that the terminated employee was insubordinate established a cause for discipline, thus concluding the arbitrator's inquiry and leaving the discipline itself to the absolute discretion of the City.

{¶ 36} The common pleas court abused its discretion by denying the arbitrator the authority pursuant to Ohio law and the CBA to decide not only whether there was "cause" for discipline, but also whether the discipline imposed by the City was for "just cause." Despite the majority's suggestion, this is not an expression of a "contrary view than that of the common pleas court in interpreting the arbitrator's language." Rather, it is an expression of a contrary view of the law than that of the common pleas court as to the authority of the arbitrator to consider the degree of misconduct in determining whether the discharge of the terminated employee was discipline for "just cause."

IV. The Arbitrator's Award.

{¶ 37} The arbitrator recognized the scope of his authority and acted accordingly. The arbitrator stated that

> The issue for resolution is whether the above facts and circumstances warrant a finding of insubordination on the Grievant's part * * *. A subordinate issue is whether the decision to discharge the Grievant was for just cause, even if it is found that he was insubordinate, since the arbitral principal of "just cause" requires both a finding of the alleged infraction, and a

> determination that the City's imposed penalty was "just" and not excessive.

(Emphasis added.)

{¶ 38} The arbitrator did not find that "gross insubordination" was necessary to discipline. This is apparent simply from the fact the arbitrator found that the terminated employee was not "grossly" insubordinate, but upheld the City's right to discipline him for his failure to submit to the polygraph examination. The arbitrator's reference to "gross insubordination" was nothing more than a characterization of the severity of misconduct necessary to bypass the progressive discipline policy and impose a discharge for a first offense. As stated by the arbitrator,

> The finding of serious misconduct sufficient to by-pass the progressive discipline process requires proof beyond a polygraph examiner's determination of the probability or truthfulness, or that an employee's score is inconclusive. Serious discipline for a first offense, referred to as a "capital offense" would include offenses such as theft, physical attacks, willful and serious safety breaches, or *gross insubordination.*

(Emphasis sic.)

{¶ 39} The arbitrator specifically recognized that discharge would have been an appropriate disciplinary measure but for the mitigating factor that the refusal of the terminated employee to submit to the polygraph was based upon his belief that he could be terminated from employment based upon a polygraph score indicating deception with nothing more. The arbitrator stated,

> Administrative Directive #314 requires consideration [of] the severity of the offense as well as any mitigating factors such as length and quality of the Grievant's service record. I find, based upon the above analysis, that the City's failure to provide Grievant with immunity with the possibility that he could have been disciplined solely for a poor test result is a mitigating factor sufficient enough to overturn the City's discharge decision.

V. The Scope of Appellate Review.

{¶ 40} Judicial review of arbitration proceedings is confined within strict parameters. The Ohio Supreme Court has described the scope of judicial review of arbitration proceedings as follows:

> R.C. 2711.10(D) guides us, because that statute allows an arbitrator's award to be vacated when the arbitrator has exceeded his or her powers. For our purposes, the converse is also true—if the arbitrator has *not* exceeded his or her powers, the award should not be vacated or modified, absent any of the other circumstances in R.C. 2711.10 and 2711.11 (such as corruption, fraud, misconduct, partiality, or material mistake).
>
> An arbitrator has broad authority to fashion a remedy, even if the remedy contemplated is not explicitly mentioned in the labor agreement. [citations omitted]. Once the arbitrator has made an award, that award will not be easily overturned or modified. It is only when the arbitrator has overstepped the bounds of his or her authority that a reviewing court will vacate or modify an award.

Queen City Lodge No. 69, Fraternal Order of Police, Hamilton Cty., Ohio, Inc. v. Cincinnati, 63 Ohio St.3d 403, 407 (1992).

{¶ 41} We have recognized that the scope of judicial review does not include the substance of the arbitration award:

> When parties agree to submit their dispute to binding arbitration, they agree to accept the result, even if it is legally or factually wrong. [citation omitted]. An arbitration award will not be reversed on the basis that the award was based on the arbitrator's incorrect legal analysis. *Samber v. Mullinax Ford East,* 11th Dist. Lake No. 2007-L-032, 2007-Ohio-5779, ¶ 46; *see also Stehli v. Action Custom Homes, Inc.*, 144 Ohio App.3d 679, 682 (11th Dist.2000), citing *Cleveland v. Fraternal Order of Police, Lodge No. 8*, 76 Ohio App.3d 755, 758 (8th Dist.1991) (finding that a court may not vacate an arbitration award based on legal or factual inaccuracy).

Buchholz v. W. Chester Dental Group, 12th Dist. Butler No. CA2007-11-292, 2008-Ohio-5299, ¶ 34.

{¶ 42} The arbitrator found that the terminated employee was insubordinate in failing to submit to the polygraph examination, but that his culpability was mitigated by his

belief he could be discharged solely upon the basis of a poor polygraph test result. Consequently, the arbitrator determined that the insubordination of the terminated employee did not rise to a level justifying departure from the policy for progressive discipline. This is a factual determination not subject to review by the common pleas court or this court.

VI. The Majority Opinion.

{¶ 43} The majority takes pains to differentiate between "gross insubordination" and the "misconduct of a serious nature" required by the CBA for departure from the progressive discipline scheme. However, the common pleas court never mentioned, much less considered, the progressive discipline clause of the CBA and thus, never had occasion to address whether "gross insubordination" was something different from "misconduct of a serious nature." As discussed above, the common pleas court's focus was upon the difference between "simple insubordination" and "gross insubordination" as a "cause" for discipline. Due to the common pleas court's misconception of the law, it failed to recognize that separate and apart from whether there is "cause" for discipline, the degree of misconduct involved is a mandatory consideration in determining whether the form of discipline that is imposed is for "just cause." Because of its failure to recognize this distinction, the common pleas court did not consider the issue which is the gist of the majority opinion, to wit: whether "gross insubordination" offends the "misconduct of a serious nature" standard set forth in the CBA's progressive discipline cause. In essence, the majority affirms a ruling which was never made by the common pleas court.

{¶ 44} Neither does the arbitrator's reference to The Common Law of the Workplace, the View of Arbitrators, 2d Ed., in observing that "[s]erious discipline for a first offense, referred to as a 'capital offense' would include * * * *gross insubordination,*" add to or subtract from the CBA. There is nothing about this reference that is inconsistent with the CBA's requirement that "misconduct of a serious nature" is necessary to justify bypassing

progressive discipline to discharge an employee for a first offense. Obviously, by providing for progressive discipline, the CBA would not sanction imposition of the most serious penalty, i.e., discharge from employment, for a first offense unless the employee misconduct involved is egregious.

VII. Conclusion.

{¶ 45} Make no mistake, this dissent is not about agreeing with the arbitrator's determination that the misconduct of the terminated employee was not serious enough to warrant discharge. On the contrary, this dissent is about respecting the limitations upon judicial review of arbitration proceedings and Ohio's public policy favoring alternative dispute resolution as embodied by the General Assembly in R.C. 2711.10. As stated by the Ohio Supreme Court,

> Were the arbitrator's decision to be subject to reversal because a reviewing court disagreed with findings of fact or with an interpretation of the contract, arbitration would become only an added proceeding and expense prior to final judicial determination. This would defeat the bargain made by the parties and would defeat as well the strong public policy favoring private settlement of grievance disputes arising from collective bargaining agreements.

Goodyear v. Local Union No. 200, 42 Ohio St.2d 516, 520 (1975).

{¶ 46} Our inquiry is not whether the arbitrator's award is correct, but whether it is ultra vires. An after the fact determination that an arbitration award is wrong does not retrospectively deprive the arbitrator of the authority to make the award. Jurisdiction to decide is distinct from determining whether the decision itself is factually supported and legally correct. The question before us is whether the arbitrator had authority to reduce the terminated employee's discharge from employment to a suspension from employment. The arbitrator unequivocally had such authority.

{¶ 47} Pursuant to the Ohio Supreme Court's opinion in *Miami Twp. Bd. of Trustees*,

the arbitrator was authorized to consider what discipline is "just cause discipline" and fashion a remedy. The common pleas court erred in finding otherwise.

{¶ 48} In holding, contrary to Ohio law, that the arbitrator was limited to determining whether the terminated employee was insubordinate, and was without authority to determine whether discharge was "just cause" discipline based upon his finding as to the degree of the terminated employee's insubordination, the common pleas court abused its discretion. I would reverse and remand for the common pleas court to consider the matter upon the record, applying the law as recognized in *Miami Twp. Bd. of Trustees*. With regard and respect for my colleagues in the majority, I dissent.