

[Cite as *Lima v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 2003-Ohio-6983.]

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
ALLEN COUNTY**

**THE CITY OF LIMA, OHIO**

**CASE NUMBER 1-02-88**

**PLAINTIFF-APPELLANT**

**O P I N I O N**

**v.**

**FRATERNAL ORDER OF POLICE,  
OHIO LABOR COUNCIL, INC.**

**DEFENDANT-APPELLEE**

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**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.**

**JUDGMENT: Judgment affirmed.**

**DATE OF JUDGMENT ENTRY: December 22, 2003.**

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**ATTORNEYS:**

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**CUPP, J.**

{¶1} The plaintiff-appellant, the city of Lima (“the City”), appeals from a decision of the Allen County Court of Common Pleas which upheld an arbitration award in favor of the defendant-appellee, Fraternal Order of Police, Ohio Labor Council, Inc (“FOP”). The arbitration award reinstated the employment of Officer Mark Frysinger to the Lima Police Department (“LPD”).

#### FACTUAL BACKGROUND

{¶2} On December 20, 2000, the City informed Frysinger in writing that it was conducting an investigation into whether he unlawfully entered the residence of Harold and Cheryl Bradford. The investigation arose out of a citizen’s complaint lodged by Cheryl, who alleged that Frysinger entered her home without permission and without a warrant.

{¶3} Frysinger was investigating a domestic violence incident on the evening of December 6, 2000. The incident involved an acquaintance of the Bradfords. After questioning Harold and Cheryl at the door of their home as to the whereabouts of the domestic violence suspect, Frysinger entered the home without permission and arrested Harold for obstructing official business. Another officer entered the home after Harold’s arrest in search of Harold and Cheryl’s son, Tyler. This fact would later weigh significantly in the mind of the arbitrator. Tyler was arrested and charged with two counts of disorderly conduct.

{¶4} Pursuant to the investigation, an extensive interview was conducted of Frysinger during which he presented his account of the December 6, 2000 events. Other witnesses were also interviewed including Cheryl and Harold Bradford, their children, and a visitor to the home.

{¶5} After conducting additional pre-disciplinary interviews, the City terminated Frysinger's employment on March 26, 2001. The next day, Frysinger filed a grievance in accordance with the procedure set forth in Article 8 of the Collective Bargaining Agreement ("CBA") between the FOP and the City. Through the grievance filing, Frysinger protested his termination and sought reinstatement of his position with full back pay and benefits.

{¶6} An arbitrator was selected by the City and the FOP pursuant to the CBA. The arbitrator conducted an arbitration hearing on October 9, 2001 and November 13, 2001. In his decision subsequent to those hearings, the arbitrator found that the City did have cause to dismiss Frysinger from the police force. However, the arbitrator ruled that, because the City did not pursue a similar action against the officer who entered the Bradford home in search of Tyler, any disciplinary action against Frysinger would not meet the CBA's standard of "just cause" for such discipline. As a result, the arbitrator issued his decision and award on April 22, 2002 which ordered the City to reinstate Frysinger.

{¶7} Thereafter, the City filed a timely motion with the Allen County Court of Common Pleas to vacate the arbitration award, and the FOP filed an application with that court to confirm the award. Deciding the matter on the

briefs, the common pleas court denied the City's motion to vacate the award and ordered Frysinger's reinstatement in accordance with the arbitration award.

{¶8} Appellant now appeals asserting three assignments of error for our review.

#### **ASSIGNMENT OF ERROR NO. I**

**The trial court erred in concluding the arbitrator was not guilty of misbehavior by which the rights of the city have been prejudiced.**

#### **ASSIGNMENT OF ERROR NO. II**

**The trial court erred in concluding the arbitrator did not exceed his power.**

#### **ASSIGNMENT OF ERROR NO. III**

**The trial court erred in concluding the arbitrator's ruling did not violate public policy**

#### **ANALYSIS**

{¶9} For purposes of clarity and brevity, we will address the City's assignments of error together. The City argues that the trial court erred when it ruled that there was a rational nexus between the CBA and the award granted by the arbitrator. The City also maintains that the arbitration award violates public policy.

{¶10} Generally, Ohio courts must give deference to an arbitrator’s award and presume the validity thereof.<sup>1</sup> A challenge to an arbitration award can be made only through the procedure set forth in R.C. 2711.13 and only for the reasons enumerated in R.C. 2711.10 and 2711.11.<sup>2</sup> A court’s jurisdiction to review arbitration awards is thus statutorily restricted; it is narrow and limited.<sup>3</sup>

{¶11} R.C. 2711.13 provides:

**After an award in an arbitration proceeding is made, any party to the arbitration may file a motion in the court of common pleas for an order vacating, modifying, or correcting the award as prescribed in sections 2711.10 and 2711.11 of the Revised Code.**

{¶12} R.C. 2711.10 provides in part:

**In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if:**

**(C) The arbitrators were guilty of misconduct in \* \* \* any other misbehavior by which the rights of any party have been prejudiced.**

**(D) The arbitrators exceeded their powers \* \* \* [.]**

{¶13} In reflecting on these statutory directives, the Supreme Court of Ohio has stated that “[i]t is the policy of the law to favor and encourage arbitration and every reasonable intendment will be indulged to give effect to such proceedings and to favor the regularity and integrity of the arbitrator’s acts.”<sup>4</sup>

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<sup>1</sup> *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.* (1990), 49 Ohio St.3d 129, paragraph one of the syllabus, superseded by statute on other grounds (1991), 61 Ohio St.3d 658.

<sup>2</sup> *Miller v. Gunckle* 96 Ohio St.3d 359, [2002-Ohio-4932](#), ¶ 10.

<sup>3</sup> *Id.*

<sup>4</sup> *Campbell v. Automatic Die & Products Co.* (1954), 162 Ohio St. 321, 329.

{¶14} Although the City alleged arbitrator misconduct under R.C. 2711.10(C) as part of its argument, the common pleas court based its decision on whether the arbitrator exceeded his authority under R.C. 2711.10(D). An arbitrator exceeds his or her power when the award fails to draw its essence from the CBA.<sup>5</sup> An arbitrator’s award draws its essence from the CBA when there is a rational nexus between the agreement and the award and where the award is not unlawful, arbitrary or capricious.<sup>6</sup> “An arbitrator’s award departs from the essence of a collective bargaining agreement when: (1) the award conflicts with the express terms of the agreement, and/or (2) the award is without rational support or cannot be rationally derived from the terms of the agreement.”<sup>7</sup>

{¶15} Courts will also not enforce arbitration awards that are contrary to public policy.<sup>8</sup> Where a court uses public policy to overturn an arbitrator’s award, that public policy “must be well defined and dominant, and is to be ascertained ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”<sup>9</sup> For instance, the dictates of Ohio’s criminal statutes

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<sup>5</sup> *Board of Edn. of the Findlay City School Dist. v. Findlay Edn. Assn.* (1990), 49 Ohio St.3d 129, paragraph two of the syllabus, superseded by statute on other grounds (1991), 61 Ohio St.3d 658.

<sup>6</sup> *Internatl. Assn. of Firefighters, Local 67 v. Columbus*, 95 Ohio St.3d 101, 102, [2002-Ohio-1936](#).

<sup>7</sup> *Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Employees Assn., Local 11, AFSCME, AFL-CIO* (1991), 59 Ohio St.3d 177, syllabus.

<sup>8</sup> *Southwest Ohio Regional Transit Auth. v. Amalgamated Transit Union, Local 627* (2001), 91 Ohio St.3d 108, 112, [2001-Ohio-294](#), citing *W.R. Grace & Co. v. Local 759 Internatl. Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.* (1983), 461 U.S. 757.

<sup>9</sup> *W.R. Grace*, supra, at 766, quoting *Muschany v. United States* (1945), 324 U.S. 49, 66; accord *Southwest Ohio Regional Transit Auth.*, 91 Ohio St.3d at 112.

constitute public policy decisions made by the General Assembly, and may be used in some instances as a guide to Ohio’s public policy in civil litigation.<sup>10</sup>

{¶16} For the City to succeed in its appeal under the statutory framework that guides our decision, it must be shown that either of the reasons relied upon by the common pleas court to affirm the award were faulty. Thus, the City must show that the arbitrator: (1) departed from the essence of the contract; or (2) violated public policy in fashioning a remedy.

{¶17} The arbitrator’s decision on the matter was specifically guided by the “just cause” provision in Section 12.2(A) of the CBA.<sup>11</sup> Pursuant to the CBA, the City has the right to terminate an employee for just cause. The City is permitted to take such corrective measures as deemed necessary on a case-by-case basis.<sup>12</sup> However, unless otherwise restricted by the parties’ agreement contained in the CBA, an arbitrator is permitted to review and modify the “just cause” finding used to support both the employer’s disciplinary action and the appropriateness of the discipline to be imposed.<sup>13</sup>

{¶18} The parties’ contract in the case before us provides no definition for the term “just cause.” In such an event, “[a]n arbitrator is confined to interpreting

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<sup>10</sup> See *Collins v. Rizkana* (1995), 73 Ohio St.3d 65, 70-71.

<sup>11</sup> Section 12.2(A) of the CBA provides: “No employee shall be disciplined, except for just cause.”

<sup>12</sup> Section 12.2(C) of the CBA.

<sup>13</sup> *Miami Twp. Bd. of Trustees v. Fraternal Order of Police, Ohio Labor Council, Inc.* (1998), 81 Ohio St.3d 269, 273.

the provisions of a CBA as written and to construe the terms used in the agreement according to their plain and ordinary meaning.”<sup>14</sup>

{¶19} In establishing a definition of “just cause,” the arbitrator stated:

**The concept of just cause, which limits the City’s right to discipline members of the bargaining unit, requires more than just that the Employer be able to establish by the requisite burden of proof that an employee violated a rule which the Employer had a right to make. It also means that in disciplining the employee the City afford that individual all of the due process rights to which he is entitled as well as that the rule must be even handedly applied.**

{¶20} In his analysis, the arbitrator reasoned that “inherent in the concept of just cause is the principal that similarly situated employees will be treated in the same fashion.” By the City not pursuing a disciplinary investigation against another officer whom the arbitrator viewed as equally culpable, the arbitrator found that the City failed the second branch of the “just cause” requirement which he determined to be inherent in the CBA.

{¶21} The City vigorously objects to the arbitrator’s interpretation that “just cause” for discharge allows a comparative analysis between the actions of the discharged employee and other uninvestigated and undisciplined employees. By bringing the analysis of another officer’s actions into play, the City contends that the arbitrator violated R.C. 2711.10(C) and (D). The City argues that the notion of “even-handedness” read into the CBA by the arbitrator infringed upon the express terms of the contract. The City notes that the terms of the CBA required

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<sup>14</sup> *International Assn. of Firefighters, Local 67*, 95 Ohio St.3d at 103, [2002-Ohio-1936](#).

corrective action to be taken on a “case-by-case basis” and that, because the arbitrator considered a matter beyond the scope of the Frysinger arbitration, the arbitrator’s decision was other than a “case by case basis” and should be vacated.

{¶22} In essence, the City’s argument for vacating the arbitrator’s decision is more properly placed under R.C. 2711.10(D), that the arbitrator exceeded his powers, rather than misconduct under R.C. 2711.10(C). The City claims that the CBA does not give the arbitrator the authority to decide the propriety of the conduct of another officer who was not a party to the grievance at issue. However, the City cites us to no applicable authority supporting that argument.

{¶23} The City asks us to consider the Ninth District case *Williams v. Akron*<sup>15</sup> in which a police officer, who was dismissed for testing positive on a drug screen, sought to introduce evidence of other officers who also tested positive for drugs and, yet, were punished less severely.<sup>16</sup> In *Williams*, the unpersuaded court noted that “it is well established that ‘[a]n employee’s discipline must stand or fall on its own merits.’”<sup>17</sup> The *Williams* case, however, dealt with the admission of additional evidence before the common pleas court on appeal from the Akron Civil Service Commission and, therefore, is distinguishable from the present case.

{¶24} Clearly, the phrase “just cause” is open to more than one reasonable interpretation. In *Hillsboro v. Fraternal Order of Police*, the Supreme Court of Ohio instructed:

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<sup>15</sup> (2001), 141 Ohio App.3d 724.

<sup>16</sup> Id. at 731.

<sup>17</sup> Id., quoting *Green v. W. Reserve Psych. Hab. Ctr.* (1981), 3 Ohio App.3d 218, 219.

**When a provision in a collective bargaining agreement is subject to more than one reasonable interpretation and the parties to the contract have agreed to submit their contract interpretation disputes to final and binding arbitration, the arbitrator's interpretation of the contract, and not the interpretation of a reviewing court, governs the rights of the parties thereto. This is so because the arbitrator's interpretation of the contract is what the parties bargained for in agreeing to submit their disputes to final and binding arbitration. The arbitrator's interpretation must prevail regardless of whether his or her interpretation is the most reasonable under the circumstances.<sup>18</sup>**

{¶25} Therefore, our analysis of the issue before us is limited to the question of whether there is a rational nexus between the terms of the collective bargaining agreement and the award.

{¶26} While the terms of the agreement forbade the arbitrator from adding to, detracting from, modifying or amending the agreement, the CBA did not prohibit the arbitrator from interpreting its provisions.<sup>19</sup> As part of his interpretation, the arbitrator determined that an element of “just cause” included a consideration of the disparate treatment afforded Frysinger relative to another officer in a similar situation. It appears that the arbitrator engaged in a two step process. First, he found that Frysinger did engage in improper conduct and behavior. Then, he considered whether the discipline was appropriate. In doing so, the arbitrator utilized the broad authority and discretion given to him by the CBA. Finding the discipline imposed by the City to be not evenhanded, the arbitrator modified Frysinger's discipline to be commensurate with that of other

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<sup>18</sup> (1990), 52 Ohio St.3d 174, 177-178. See, also, *Miami Twp. Bd. of Trustees* (1998), 81 Ohio St.3d at 272.

<sup>19</sup> CBA Section 8.6, Step 4(C).

actors in the situation. The CBA’s provisions regarding the arbitrator’s authority, and limitations on that authority are skeletal. Accordingly, the CBA does not restrict the arbitrator from thus proceeding.

{¶27} Consequently, we cannot say that the arbitrator exceeded his authority by considering all of the information that was before him and awarding Frysinger’s reinstatement based upon that information. We conclude that the essence of the arbitration award was drawn from the CBA insofar as the award was based upon the “just cause” language of CBA Section 12.2(A).

{¶28} If this were a matter for us to decide de novo on the facts before the arbitrator, we might be inclined to decide differently than did the arbitrator. Indeed, the City’s concern about the conduct and integrity of the law enforcement officers it employs—and the resulting effect upon public confidence in the police department overall—is not to be lightly disregarded. We do not disregard it. However, we are not free to interject our own interpretation of the contract in matters such as this.

{¶29} Finally, we consider whether the award contravenes any clearly defined public policy. The City asserts that under R.C. 737.11 the police are required to obey and uphold the law, and the arbitrator’s conclusion that Frysinger unlawfully entered a residence without a search warrant is in violation of this doctrine. The City maintains that retaining such an individual as a law enforcement officer disregards the clear public policy of this state. The City also

cites *Jones v. Franklin Cty. Sheriff*<sup>20</sup> for the premise that police officers are to be held to a higher standard of conduct than the general public.<sup>21</sup> The arbitrator agreed that police officers are to be held to a higher standard than ordinary citizens but determined that Fryinger should not be subject to a standard higher than that applied to other officers.

{¶30} We do not believe that R.C. 737.11, or *Jones*, establishes a “dominant and well-defined” public policy either mandating dismissal or prohibiting an arbitrator from using his broad authority to modify a discipline of dismissal under the CBA.<sup>22</sup> The public policy concerns asserted by the City have not been clearly defined and are not supported by statute or other legal precedents, and generally do not satisfy the requirements of *W.R. Grace* and *Southwest Ohio Regional Transit Auth.* Therefore, the City’s public policy concerns, while understandable, cannot be a basis for this court to vacate the arbitration award.

{¶31} Based on the language of the CBA, which confers broad discretionary powers to the arbitrator to review and modify disciplinary determinations, and given the confines of R.C. 2711.10(D), the record does not reflect that the arbitrator exceeded his powers or issued an award which contravenes a clear public policy. We, therefore, overrule all three of the City’s assignments of error.

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<sup>20</sup> (1990), 52 Ohio St.3d 40.

<sup>21</sup> Id. at 43.

<sup>22</sup> See *Southwest Ohio Regional Transit Auth.*, 91 Ohio St.3d at 112 (“ \* \* \* we find that this statute does not indicate that public policy precludes reinstatement of a ‘safety sensitive’ employee \* \* \*.”); and *W.R. Grace*, 461 U.S. 757.

{¶32} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the decision of the trial court.

Judgment affirmed.

BRYANT, P.J. concurs.

SHAW, J., dissents.

SHAW, J., dissenting.

{¶33} I concur with the majority in principle that in the proper case, an arbitrator could incorporate the concept of proportionality of discipline into the term “just cause” if that term exists without further definition as it does in this collective bargaining agreement (“CBA”). A “proper case” might be where the record established that the *City* had determined two officers with similar service records were guilty of identical misconduct but acted to discipline only one officer. That did not happen here.

{¶34} In this case, the Arbitrator expressly found that just cause existed for the City’s termination of the officer/Grievant for misconduct and lying about a job-related case investigation. This finding was made *prior* to any discussion of proportionality of discipline.<sup>23</sup> Next, based upon a series of convoluted credibility

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<sup>23</sup> The Arbitrator concludes at page 51 of his report that “[h]is record notwithstanding, if the Grievant committed the acts which the Bradfords maintain that he did then the City would have just cause to terminate him.” The sum of these alleged “acts” was that the Grievant had illegally entered the home and falsified the circumstances in his report. In subsequent discussion, it is clear that the Arbitrator does not accept *in toto* the Bradford’s version of what happened and even accepts the Grievant’s credibility on a number of disputed issues with the Bradfords and the City. Nevertheless, the Arbitrator ultimately concludes at page 57 of his report that the Grievant was “not credible”, gave “false testimony and statements” and was otherwise “untruthful” about his entry into the house. This was based not upon the

calls and questionable inferences extending well beyond the scope of the case before him, the *Arbitrator* essentially conducted his own “trial” and determined: (1) that a second police officer, not a party to the case, was guilty of identical misconduct in a related but separate incident and (2) that the City had apparently not taken notice of this fact or taken any steps to discipline the second officer.

{¶35} The Arbitrator, in effect, then proceeded to sanction the *City* for failing to take action against the second officer, by ordering reinstatement of the Grievant. As a result, the reputation of the second officer is tarnished and the City is now encumbered with *two* police officers whose effectiveness on the job and as courtroom witnesses is largely destroyed for having been branded by the Arbitrator as liars worthy of termination by their employer.

{¶36} There are a number of reasons why permitting this kind of latitude in an arbitration award seems inadvisable, if not unlawful. At the outset, the record in this case is not adequate for the Arbitrator to reach a firm conclusion about either the conduct of the second officer or the appropriate response by the City. For example, prior service records and factors unknown to the Arbitrator, (i.e. not

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Bradford's original allegations so much as the Arbitrator's independent determination that the Grievant must have lied about Cheryl Bradford giving him permission to enter the house, which in the Arbitrator's opinion, invalidated the purported arrest and pursuit into the home of Harold Bradford for obstructing the claimed “permitted entry” given by Cheryl. Thus, the Arbitrator's conclusion that the City would have just cause to terminate the Grievant if he illegally entered the home and lied about it, stands, albeit based upon a slightly different lie than the Bradfords and the City had originally alleged.

Only after this discussion does the Arbitrator make another independent determination that the second officer also must have lied (by omitting from his report) about chasing Tyler Bradford into the home in a separate incident shortly after the one involving the Grievant. Finding that the City had not disciplined the second officer for what the Arbitrator determined was the same conduct, the Arbitrator then purports to incorporate the principle of equal treatment into the consideration of just cause regarding the Grievant – ultimately deciding that Grievant should be reinstated despite engaging in conduct which would otherwise warrant termination.

in the record) may or may not justify disparate treatment by the City for similar conduct in a given instance. Thus, it could be that one officer might have had numerous prior reprimands over several years while the second officer could have been new to the force and merely following the more experienced officer's lead.

{¶37} Moreover, in this case the Arbitrator determined that the Grievant affirmatively made false statements in his report and gave untruthful testimony. In contrast, the second officer's "misconduct" was largely inferred by the Arbitrator based upon what was not in his police report and the decision of the Arbitrator to weigh the credibility of certain witnesses against the second officer – all of which might warrant a different response from the City. Finally, it is not likely to be clear to the Arbitrator in a case such as this, whether the City has failed to take action against the second officer, or has simply failed to take action *yet*.

{¶38} However, even assuming *arguendo* that the Arbitrator had sufficient evidence and discretion to evaluate the conduct of the second officer and the City's response thereto, the decision to reinstate the Grievant as the remedy for finding both officers guilty of misconduct is irrational, arbitrary and inflicts a capricious, if not unlawful, result upon the City, the second officer, and by potential application, all other members of the CBA. As noted earlier, the decision is plainly harmful to the City's interest in maintaining a viable police force capable of testifying effectively in criminal prosecutions and it unfairly tarnishes the professional reputation of the second officer. However, the decision also places in jeopardy the professional reputation of every other member of the CBA

who has not been charged by the employer with any misconduct but who can nevertheless be tried, convicted and branded as a “liar” without benefit of due process, by any arbitrator deciding any case under the arbitration clause of the CBA.

{¶39} For these reasons, I respectfully dissent. In these circumstances I believe the arbitration award constitutes an abuse of discretion on its face. I cannot concur with the majority that such a decision has the necessary rational support or is rationally derived from the CBA as required by the Supreme Court of Ohio. See *Bd. of Edn. of the Findlay City School District v. Findlay Edn. Assn*, *supra*; *Internatl. Assn. of Firefighters, Local 67 v. Columbus*, *supra*; *Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Employees Assn, Local 11, AFSCME, AFL-CIO*, *supra*. Furthermore, I believe a case could be made that the action of the Arbitrator in this case both exceeds his statutory authority and violates public policy – the due process rights of the second officer and other members of the CBA being at least one such consideration.

{¶40} Accordingly, I would sustain the assignments of error, reverse and remand this matter to the trial court with instructions to vacate the award, and based upon the arbitrator’s own findings of just cause for termination of the Grievant discussed in footnote one, *supra*, enter judgment in favor of the appellant city of Lima.