

[Cite as *Fraternal Order of Police Lodge 8 v. Cleveland*, 2015-Ohio-4188.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102565

**FRATERNAL ORDER OF POLICE,
LODGE 8**

PLAINTIFF-APPELLEE

vs.

CITY OF CLEVELAND

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-828692

BEFORE: Boyle, P.J., Blackmon, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: October 8, 2015

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MARY J. BOYLE, P.J.:

{¶1} Appellant, city of Cleveland, appeals from an order that denied its motion to vacate and granted appellee’s, Fraternal Order of Police, Lodge 8’s (“FOP”), motion to confirm an arbitrator’s decision modifying the discipline imposed upon the FOP’s members, Captain Ulrich Zouhar, Lieutenant Paul Wilson, and Sergeant Michael Donegan (also collectively referred to as “grievants”). The arbitrator found that the city had just cause to discipline Zouhar, Wilson, and Donegan as a result of their failure to fully perform their supervisory duties during a police pursuit, but further found that the penalties imposed by the city were too severe and modified the disciplinary action. We affirm.

Procedural History and Factual Background

{¶2} The city and the FOP are parties to a collective bargaining agreement (“CBA”). Under the agreement, disputes between the city and FOP concerning the application or interpretation of the CBA or disputes concerning the disciplining of an employee must be resolved through the agreement’s grievance procedure, which includes arbitration.

{¶3} The underlying case stems from a police pursuit occurring on November 29, 2012, involving a suspect vehicle driven by Timothy Russell and occupied by Malissa Williams. We summarize the relevant facts as set forth in the arbitrator’s decision as follows.

{¶4} The suspect vehicle was first stopped at 10:26 p.m. on East 118th Street between Rockwell Avenue and Superior Avenue by Patrolman John Jordan. When Jordan approached the vehicle, it fled west on Superior Avenue, prompting Jordan to pursue the vehicle. Jordan, however, ultimately stopped the chase after he lost sight of the vehicle. Jordan did not broadcast his traffic stop or his pursuit.

{¶5} A few minutes later, the suspect vehicle drove past the city of Cleveland's mobile services unit located next to the Cuyahoga County Justice Center, where Patrolman Vasile Nan was located, having the computer in his car serviced. When Patrolman Nan heard what he thought was a gunshot, he took cover behind his vehicle. Once the vehicle passed, Patrolman Nan "gave chase" and broadcasted that a vehicle with two occupants had "just popped a round" and was heading westbound on St. Clair Avenue. Sergeant Randolph Daley, Nan's immediate supervisor in the Second District community services unit, began monitoring the pursuit. Shortly thereafter, Patrolman Nan broadcasted that he had lost sight of the suspect car.

{¶6} At 10:35 p.m., Second District Patrolmen David Siefer and James Hummel encountered the suspect vehicle heading westbound on the Detroit-Superior Bridge. They pursued the vehicle, which was joined by other police vehicles. The pursuit continued for approximately 22 minutes, passed through four of the city's five police districts, and involved 105 Cleveland police officers and at least 62 police cars, including ones from Cleveland, Bratenahl, East Cleveland, the Cuyahoga County Sheriff's Department, the Ohio Highway Patrol, and the Regional Transit Authority. The pursuit

ended at Heritage Elementary School in East Cleveland where 13 officers fired 137 shots and killed the two occupants, who turned out to be unarmed.

{¶7} There were two investigations of the events of November 29, 2012. First, the Bureau of Criminal Investigation, a division of the Ohio Attorney General's Office, investigated the events and ultimately forwarded its report to the Cuyahoga County prosecutor on February 3, 2013. On the same day, Mike DeWine, the Ohio Attorney General, offered a prepared statement regarding the investigation and suggested that the events reflected a "systemic failure."

{¶8} Second, Michael McGrath, city of Cleveland Chief of Police, appointed a critical incident review committee to investigate the events of November 29, 2012, and to identify possible policy and procedural violations for the purpose of administrative disciplinary process. On February 21, 2013, Sergeant Monroe Goins, an investigator in the internal affairs unit and one of ten members of the critical incident review committee, issued investigative reports for (1) Captain Zouhar, the highest ranking officer on duty in the Second District; (2) Lieutenant Wilson, the highest ranking officer on duty in the Third District; and (3) Sergeant Michael Donegan, a sector supervisor in the Second District. In each case, he listed six alleged violations of department rules and procedures and recommended that the reports be sent up through the chain of command for review.

{¶9} On May 10, 2013, Martin Flask, city of Cleveland's director of the Department of Public Safety, notified Zouhar, Wilson, and Donegan that the city would be holding pre-disciplinary hearings on May 20, 2013 and May 22, 2013. Following the

hearings, on June 11, 2013, Flask demoted Zouhar to lieutenant, demoted Wilson to sergeant, and terminated Donegan's employment.

{¶10} Two days later, the FOP filed grievances on behalf of its three members — Zouhar, Wilson, and Donegan, which were ultimately appealed to arbitration. In accordance with the parties' CBA, an arbitrator was appointed by the American Arbitration Association. The parties agreed to combine the three grievances for arbitration, and the matter was heard for three days in February 2014. The parties stipulated that the case was both procedurally and substantively arbitrable and that the arbitrator had jurisdiction to resolve the grievances.

{¶11} On June 12, 2014, the arbitrator issued his decision in a detailed 45-page opinion, finding that the city had just cause to discipline Zouhar, Wilson, and Donegan, but that the penalties imposed were too severe. The arbitrator provided four separate grounds in support of his conclusion that the penalties imposed were improper: (1) some of the city's stated reasons for discipline were not supported in the record; (2) the penalties imposed were excessive and disproportionate to the offenses; (3) the penalties imposed were more severe than the penalties imposed on other superior officers who committed similar offenses; and (4) each of the officer's employment record mitigated the penalties imposed given that they had no prior discipline and excellent performance evaluations.¹ Specifically, the arbitrator modified the city's discipline, making the following findings with respect to each officer.

¹ The arbitrator specifically noted that "since all of the grievants were experienced officers

Captain Ulrich Zouhar

The arbitrator believes that the proper penalty is to demote Zouhar to the rank of Lieutenant from June 11, 2013 until July 11, 2014, at which time he should be restored to the rank of Captain. The reduction in Zouhar's penalty reflects the nature of his shortcomings on November 29, 2012; the factors generally taken into account in just cause cases; and the fact that the city bears some responsibility for the events of November 29, 2012. The severity of his penalty, including his substantial loss of pay, reflects the responsibility Zouhar bore as the highest ranking officer on duty on November 29, 2012, and the impact his failure to take a more active role in the pursuit may have had on the events of that day.

Lieutenant Paul Wilson

The arbitrator believes that the proper penalty is to demote Wilson to the rank of Sergeant from June 11, 2013 until July 11, 2014, at which time he should be restored to the rank of Lieutenant. The reduction in Wilson's penalty reflects the nature of his shortcomings on November 29, 2012; the factors generally taken into account in just cause cases; and the fact that the city bears some responsibility for the events of November 29, 2012. The severity of his penalty, including his substantial loss in pay, reflects the responsibility he bore as the highest ranking officer on duty in the Third District and the impact his failure to fully perform his duties may have had on the events of that day.

and had excellent job performance ratings, it would have been difficult to argue that they had to be removed from their positions because they were unable to do their jobs." At the time of the arbitrator's decision, Captain Zouhar had been a police officer for 27 years — 21 years as a superior officer, including ten years as a captain. At the time of Lieutenant Wilson's demotion, he had worked as a Cleveland police officer for 22 years, including ten years as a superior officer. Similarly, Donegan had been a police officer for 15 years and a sergeant for four years.

Sergeant Michael Donegan

While the arbitrator concludes that there is not just cause to discharge Donegan, he believes that Donegan deserves a more severe penalty than Zouhar or Wilson. Donegan, like Zouhar and Wilson, failed to fully meet his supervisory responsibilities, which may have contributed to the events of November 29, 2012. However, as a Sergeant, he had more operational responsibilities than Zouhar and Wilson yet he took himself out of action by parking along a city street and remaining there for five minutes.

The proper penalty is clear. Donegan's termination should be reversed and he should be reinstated as a Patrolman and paid the base wages for a Patrolman and made whole for any lost benefits. However, because he not only failed to properly perform his supervisory duties but also chose to sit idle for a number of minutes as the pursuit continued, he should remain a Patrolman until July 11, 2015. On that date, he should be restored to the rank of Sergeant.

{¶12} Following the arbitrator's decision and award, the FOP moved to confirm the award, and the city moved to vacate or modify the award in the court of common pleas. After full briefing, the trial court denied the city's request to vacate the arbitration award, stating, in relevant part, as follows:

Based upon a review of the parties' briefs and the record, this court does not find: * * * (4) that the Arbitrator exceeded his powers, or so imperfectly executed his powers that a mutual, final, and definite award upon the subject matter submitted was not made. R.C. 2711.10.

{¶13} From this decision, the city appeals, raising a single assignment of error:

The trial court erred to the prejudice of the city in denying the city's motion to vacate the arbitration award and in granting the union's motion to confirm.

Standard of Review

{¶14} Public policy favors and encourages arbitration, and courts are indulged to favor the regularity and integrity of proceedings before the arbitrator. *Mahoning Cty. Bd. of Mental Retardation v. Mahoning Cty. TMR Edn. Assn.*, 22 Ohio St.3d 80, 84, 488 N.E.2d 872 (1986). Arbitration provides the parties with “a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets.” *Id.* at 83. “The whole purpose of arbitration would be undermined if courts had broad authority to vacate an arbitrator’s award.” *Id.* at 83-84.

{¶15} R.C. 2711.10(D) provides that courts may vacate arbitrators’ award if “[t]he arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”

{¶16} Because of the strong public policy favoring arbitration, the Ohio Supreme Court has placed restrictions on a reviewing court’s authority to vacate an arbitrator’s award so as not to undermine the integrity and purposes of the arbitration system. *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.*, 49 Ohio St.3d 129, 131-132, 551 N.E.2d 186 (1990).

{¶17} In *Findlay City School Dist.*, the Ohio Supreme Court held in paragraphs one and two of the syllabus:

1. Given the presumed validity of an arbitrator’s award, a reviewing court’s inquiry into whether the arbitrator exceeded his authority, within the meaning of R.C. 2711.10(D), is limited.
2. Once it is determined that the arbitrator’s award draws its essence from the collective bargaining agreement and is not unlawful, arbitrary or

capricious, a reviewing court's inquiry for purposes of vacating an arbitrator's award pursuant to R.C. 2711.10(D) is at an end.

{¶18} When the parties have agreed in a collective-bargaining agreement to settle their disputes by using a mutually acceptable arbitrator rather than a judge, they have bargained for and agreed to accept the arbitrator's findings of fact and interpretation of the contract. *S.W. Ohio Regional Transit Auth. v. Amalgamated Transit Union, Local 627*, 91 Ohio St.3d 108, 109, 742 N.E.2d 630 (2001). A reviewing court cannot reject an arbitrator's findings of fact or interpretation of the contract simply because it disagrees with them. *Id.* at 110.

{¶19} To determine whether an arbitrator has exceeded his or her powers, a trial court must determine whether the arbitrator's award draws its essence from the collective bargaining agreement. *See Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emps. Assn., Local 11, AFSCME, AFL-CIO*, 59 Ohio St.3d 177, 572 N.E.2d 71 (1991). "An arbitrator's award draws its essence from a collective bargaining agreement when there is a rational nexus between the agreement and the award, and where the award is not arbitrary, capricious, or unlawful." *Findlay City School Dist.* at 132, citing *Mahoning*, 22 Ohio St.3d 80, 488 N.E.2d 872, at paragraph one of the syllabus. Conversely, an arbitration award "'departs from the essence'" of an 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.'" *Cedar Fair, L.P. v. Falfas*, 140 Ohio St.3d, 447, 2014-Ohio-3943, 19 N.E.3d 893, ¶ 7, quoting *Ohio Office of Collective Bargaining* at syllabus.

{¶20} In reviewing an arbitrator’s award, “the court must distinguish between an arbitrator’s act in excess of his powers and an error merely in the way the arbitrator executed his powers. The former is grounds to vacate, the latter is not.” *Piqua v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 185 Ohio App.3d 496, 2009-Ohio-6591, 924 N.E.2d 876, ¶ 18 (2d Dist.).

Incomplete and Flawed Award

{¶21} The city first argues that the arbitrator “so imperfectly executed his arbitrable powers, regarding all three grievants, in completely failing to rule upon some of the administrative disciplinary charges submitted to him for determination.” Specifically, the city argues that the arbitrator failed to assess the merits of *all* of the underlying disciplinary charges lodged against all three grievants, rendering the arbitrator’s decision on the proper penalty imposed to be “incomplete and flawed.” The city further contends that the arbitrator’s failure to adjudicate each of the disciplinary charges rendered his final decision on the proper penalty “arbitrary” and “capricious.” We disagree.

{¶22} Our review of the record reflects that the arbitrator’s award draws its essence from the CBA and is not arbitrary or capricious. At the outset of his decision, the arbitrator set forth the relevant contract provision at issue, Article II, Section 2(e), of the CBA, which sets forth the city’s management rights to “suspend, discipline, demote or discharge for just cause[.]” The arbitrator was charged with resolving the specific issues of (1) whether there was just cause for the city’s respective discipline, namely, demoting

Zouhar and Wilson and firing Donegan; and (2) if not, what is the proper remedy. As recognized by the arbitrator, the resolution of these issues required the arbitrator to make two determinations: ““(1) whether a cause for discipline exists and (2) whether the amount of discipline was proper under the circumstances.”” *Bd. of Trustees of Miami Twp. v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 81 Ohio St.3d 269, 272, 690 N.E.2d 1262 (1998), quoting Schoonhoven, *Fairweather’s Practice and Procedure in Labor Arbitration* (3d Ed.1991). And here, in his detailed, 45-page opinion, the arbitrator decided these issues, after setting forth the facts and evidence presented by the parties at arbitration, including *all* the policy and procedure violations relied on by the city in support of its discipline imposed.

{¶23} To the extent that the arbitrator’s analysis of “just cause” discussed the city’s charges more broadly, we find that insufficient to vacate the arbitrator’s award. Here, the arbitrator considered all the necessary issues to reach a determination on the ultimate issues presented in the grievance. *See Princeton City School Dist. Bd. of Edn. v. Princeton Assn. of Classroom Educators, OEA/NEA*, 134 Ohio App.3d 330, 334, 731 N.E.2d 186 (1st Dist.1999), *appeal not allowed*, 86 Ohio St.3d 1467, 714 N.E.2d 569 (1999) (arbitrator’s failure to make specific determinations on employer’s charges against employee is not grounds to vacate an award when the arbitrator made a reasoned decision on the ultimate issue of whether the employer had just cause to discipline); *see also N. Royalton v. Urich*, 8th Dist. Cuyahoga No. 99276, 2013-Ohio-2206, ¶ 20 (trial court’s failure to specifically address all of the administrative charges relied upon the city in

disciplining grievant was not grounds to vacate award). Thus, based on the record before us, we find no basis to conclude that the arbitrator so imperfectly executed his arbitrable powers to warrant vacation under R.C. 2711.10(D).

Public Policy

{¶24} The city also argues that the arbitrator’s decision regarding Donegan must be reversed on public policy grounds. The city contends that this aspect of the arbitration award is against public policy because it reinstates an officer who “effectively stopped being a police officer for five minutes during a dangerous, lengthy, ultimately deadly, high-speed pursuit.”

{¶25} The Ohio Supreme Court has recognized that, if an arbitrator’s interpretation of a CBA violates public policy, the resulting award is unenforceable. *S.W. Ohio Regional Transit Auth.*, 91 Ohio St.3d at 112, 742 N.E.2d 630, citing *W.R. Grace & Co. v. Local Union 759, Internatl. Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983). But vacating an arbitration award pursuant to public policy is “a narrow exception to the ‘hands off’ policy that courts employ in reviewing arbitration awards and ‘does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy.’” *Id.*, quoting *United Paperworkers Internatl. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 43, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). Therefore, the 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.”

Id., quoting *W.R. Grace & Co.* at 766.

{¶26} We further emphasize that the issue is not whether the officer’s conduct violated some public policy, but whether the arbitrator’s reinstatement order did so. *Dayton v. AFSCME, Ohio Council 8*, 2d Dist. Montgomery No. 21092, 2005-Ohio-6393, ¶ 23, citing *S.W. Ohio Regional Transit Auth.* at 112-113, and *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62-63, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000) (“The question to be answered is not whether [grievant’s] drug use itself violates public policy, but whether the agreement to reinstate him does so.”).

{¶27} The city argues that the arbitrator’s reinstatement of Donegan violates public policy embodied in R.C. 737.11, which governs the general duties of police departments and provides in relevant part as follows:

The police force of a municipal corporation shall preserve the peace, protect persons and property, and obey and enforce all ordinances of the legislative authority of the municipal corporation, all criminal laws of the state and the United States * * *.

{¶28} In support of its claim, the city relies on *Ironton v. Rist*, 4th Dist. Lawrence No. 10CA10, 2010-Ohio-5292, wherein an arbitrator reinstated a police officer who had been terminated for falsifying a police report. The trial court vacated the arbitration award on public policy grounds, relying on R.C. 737.11. In upholding the trial court’s decision, the Fourth District recognized that Ohio has “a dominant, well-defined public

policy against the reinstatement of an officer who falsifies a police report.” *Id.* at ¶ 20. In addition to R.C. 737.11, the Fourth District further relied on Ohio case law recognizing that “honesty is vital to the effective performance of these duties and to ensuring public trust and confidence in the police force.” *Id.* at ¶ 20. The court reasoned as follows in support of its conclusion:

Rist violated the law and comported herself in a manner that could not bring anything but disrepute upon the department. Contrary to Rist’s assertions, the fact that she did not gain anything from her dishonesty in this case does not make her conduct any less egregious. Given Rist’s willingness to lie and break the law for an apparent stranger and without profit, how can the public expect her to react if presented with an opportunity to use her position for financial gain or to benefit friends or relatives? Rist’s continued employment as a sergeant with the IPD can only serve to erode public trust and confidence in the department. And because of her vulnerability to impeachment, the department would face a serious problem if it had to rely upon Rist’s testimony in legal proceedings.

Id. at ¶ 21.

{¶29} We find *Rist*, however, distinguishable from the instant case. The arbitrator did not find that Donegan was dishonest in this case. Donegan’s actions do not equate with an act of deliberate untruthfulness. Notably, while the city had charged Donegan with falsifying his duty report by “failing to note that you responded to a vehicle pursuit,” the arbitrator expressly rejected this claim and exonerated Donegan on the charge. And although the arbitrator found that Donegan failed to fully meet his supervisory responsibilities and further “took himself out of action by parking along a street and remaining there for five minutes,” the arbitrator reasonably imposed a more

severe penalty upon Donegan for his actions. We find no authority that justifies vacating the arbitration's award on public policy grounds.

{¶30} The city's sole assignment of error is overruled.

{¶31} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
ANITA LASTER MAYS, J., CONCUR