

[Cite as *Cleveland v. Cleveland Police Patrolmen's Assn.*, 2016-Ohio-702.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103010

CITY OF CLEVELAND

PLAINTIFF-APPELLANT

vs.

CLEVELAND POLICE PATROLMEN'S ASSOCIATION

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-820833

BEFORE: E.A. Gallagher, P.J., Kilbane, J., and McCormack, J.

RELEASED AND JOURNALIZED: February 25, 2016

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EILEEN A. GALLAGHER, P.J.:

{¶1} Plaintiff-appellant the city of Cleveland (the “city”) appeals the decision of the Cuyahoga County Court of Common Pleas denying the city’s application to vacate an arbitration award under R.C. 2711.10(D) and granting defendant-appellee the Cleveland Police Patrolmen’s Association’s (the “CPPA”) motion to confirm the arbitration award.

The city contends that the arbitrator exceeded the powers delegated to him under the parties’ collective bargaining agreement by modifying the disciplinary sanction imposed against Vincent Lucarelli, a detective with the Cleveland Police Department, from termination to a lengthy suspension without pay after concluding that the city had just cause to discipline him for on duty “sexting” and other violations of the Cleveland Police Department’s rules. The city further contends that the arbitration award should have been vacated because (1) the arbitration award included a requirement that Detective Lucarelli receive unspecified counseling following his return to work and, therefore, was not “final and definite,” and (2) the arbitrator’s reinstatement of Detective Lucarelli violated public policy. For the reasons that follow, we affirm the trial court’s judgment.

Factual Background and Procedural History

{¶2} In 2001, Vincent Lucarelli was hired by the city of Cleveland as a patrol officer in the Division of Police. In 2009, he became a detective in the Fifth District. In May 2012, the police department’s Internal Affairs Unit (“IAU”) commenced an investigation into Detective Lucarelli’s conduct (the “IAU investigation”) after cell phone records, which had been subpoenaed for a criminal case involving private investigator

Brenda Bickerstaff, revealed that during his shifts, Detective Lucarelli had been inappropriately texting or “sexting” women, including the victims in several criminal cases on which he had worked and which had been disposed or on which he was currently working. The IAU investigation into Detective Lucarelli’s sexting covered the time period January 2012 through May 2012.

{¶3} As part of the IAU investigation, statements were taken from seven women Detective Lucarelli had texted or sexted while on duty and with whom he either had a romantic relationship or sought to have a romantic relationship. Two of the women, H.S. and B.N.W., were victims in criminal investigations Detective Lucarelli had handled two to three years earlier. The investigation revealed that, after their cases had been resolved, Detective Lucarelli came into contact with H.S. and B.N.W. while working as a security guard at a neighborhood liquor store. Detective Lucarelli admitted using an unmarked police car to transport H.S. and B.N.W. within his district and to pick up groceries and other items for them. He also admitted stopping at B.N.W.’s home while on duty and staying there for periods of time, collecting pay for time he had not worked, and to touching women in an “affectionate manner” while they were in his police car.

{¶4} Detective Lucarelli also engaged in on duty “flirtatious texting” with a neighbor, E.S., with whom he had a sexual relationship. Detective Lucarelli admitted to once leaving the city and using a city vehicle to pick her up in Beachwood during a snowstorm. Although he claimed to have received permission from an unnamed sergeant to make this trip, there was no evidence corroborating his claim.

{¶5} Another woman Detective Lucarelli texted, B.E., was a felonious assault victim. Her case was originally assigned to Detective Lucarelli but was reassigned after it was alleged that Detective Lucarelli knew her. B.E. acknowledged receiving text messages from Detective Lucarelli but regarded them as “harmless flirting.” Detective Lucarelli also texted M.B., a suspect in a criminal investigation, and attempted to flirt with her via text message. She did not respond to his advances and no relationship ensued.

{¶6} The two most serious cases involved V.R. and J.H., victims in two active criminal investigations to which Detective Lucarelli was assigned. According to V.R., while the case in which she was named as a victim was pending, she received text messages from Detective Lucarelli stating that her baby’s father was a loser and that she needed someone like Detective Lucarelli to protect her. V.R. rejected his advances and told him to “just handle your case.”

{¶7} J.H. also received and responded to various “sexts” from Detective Lucarelli while the criminal case in which she was named as a victim was pending. Detective Lucarelli sent J.H. texts about the status of her case and his desire to come over to her house and perform sex acts with her. When asked by the IAU investigator whether she was intimidated by Detective Lucarelli’s sexting, J.H. replied “kind of,” but that she “didn’t want anything to jeopardize her case” but she ultimately felt that her case was handled properly by Detective Lucarelli regardless of their sexting relationship. There was no evidence that the sexting led to a sexual relationship with J.H.

{¶8} There was no dispute that all of the sexual relationships in which Detective Lucarelli was alleged to have been involved during the time period at issue were consensual. None of the women complained about Detective Lucarelli's conduct before being contacted by the IAU, and none of the women sought to have any action taken against Detective Lucarelli after being contacted by the IAU. No criminal charges were filed against him. Although the IAU investigation revealed extensive unprofessional and inappropriate conduct by Detective Lucarelli, there was no evidence that he had used or abused his position as a police officer to influence the criminal cases in which any of these women were involved or that any of those cases was compromised because of his interactions with these women.

{¶9} Detective Lucarelli accepted responsibility for and expressed remorse regarding his misconduct. He claimed that following the end of his marriage, his "personal issues * * * clouded [his] professional judgment" until "it just got out of control." He explained: "Ego. Things bad at home. You know, some guys turn to alcohol, some guys turn to drugs, some guys gamble and I found women."

{¶10} The investigation led to the discovery of other transgressions by Detective Lucarelli as well. First, Detective Lucarelli failed to appear for a *Garrity* interview¹ scheduled for June 28, 2012. He claimed to have inadvertently missed the interview because he had worked an 8:00 p.m. to 4:00 a.m. shift the morning before the interview

¹A *Garrity* interview emanates from *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967).

and fell asleep. He admitted this was no excuse for missing the interview and appeared for the interview the following morning. In addition, Detective Lucarelli had failed to obtain the necessary authorization prior to working a second job as a security guard at a local liquor store.

{¶11} The city and the CPPA are parties to a collective bargaining agreement (the “CBA”). Article IV of the CBA, Management Rights, provides in relevant part:

(4) Except as expressly limited by the terms of this Contract, any and all rights concerned with the management of the Division of Police are the exclusive and sole responsibility of the employer. It is further recognized that the City has the right to:

* * *

(e) Suspend, discipline, demote or *discharge for just cause*, layoff, transfer, assign, schedule, promote, or retain employees; * * *.

(Emphasis added.)

{¶12} On January 18, 2013, the city terminated Detective Lucarelli based on the following specifications:

1. Insubordination for failing to appear for an investigatory interview;
2. Working secondary employment without authorization;
3. Sending sexually explicit and inappropriate messages to crime victims and attempting to enter into relationships with seven women between January 1, 2012 and May 5, 2012 (the period of the investigation);
4. Utilizing an undercover police vehicle to transport individuals without legitimate law enforcement purpose during the same period of investigation;
5. Leaving the City to pick up his neighbor in the City of Beachwood during this same period of investigation;

6. Hugging, kissing, and touching females while inside an unmarked police vehicle during this same period of investigation; and
7. Having personal visits with females while on duty without authorization during this same period of investigation.

{¶13} Article XXII of the CBA requires that “any dispute arising out of or connected with the subject matter of [the CBA] or the interpretation, application or enforcement of any of its terms,” including disputes involving disciplinary action, be resolved through the CBA’s grievance procedure. The CPPA challenged Detective Lucarelli’s termination and the issue was submitted to binding arbitration in accordance with the grievance procedure. As agreed to by the parties, the issues to be resolved by the arbitrator were: (1) “Was the Grievant discharged for just cause in accordance with the labor agreement?” and (2) “If not, what remedy is appropriate?” Detective Lucarelli and the CPPA conceded that the city had just cause to take some form of disciplinary action against him but argued that termination was excessive and not an appropriate sanction under the circumstances.

{¶14} On November 7, 2013, after a hearing on the matter, the arbitrator issued his decision, upholding the grievance in part and concluding that although discipline was warranted, Detective Lucarelli’s “discharge” was not “for just cause” under the CBA. The arbitrator found that the city “had established its case with respect to all seven of the specifications against Grievant” and that “[w]hen all these offenses are taken into account, they certainly create a mountain of misconduct demanding harsh discipline.” He also found, however, that “[n]umerous mitigating factors” exist, which the city failed

to properly consider when determining what level of discipline was appropriate, that “erode this mountain and lead to a conclusion that significant discipline less than discharge is warranted.”

{¶15} With respect to the missed *Garrity* interview, the arbitrator noted that while the failure to follow a directive to attend a meeting could be a proper ground for discipline, in this case, where it was “not necessarily intentional,” it did not constitute insubordination under the police department rules. With respect to Detective Lucarelli’s unauthorized secondary employment, the arbitrator noted that Detective Lucarelli had admitted this conduct “from the outset” and that the normal discipline issued by the city for this type of rule violation was a one- or two-day suspension. The arbitrator indicated that while it was “not improper” for the city to take these transgressions into account in determining the appropriate discipline to be imposed, they should not be given “great weight.”

{¶16} With respect to Detective Lucarelli’s pattern of sexting and other related misconduct, the arbitrator reasoned that while “[i]t is completely understandable why it found a sufficient basis to discharge him as a result of this serious misconduct,” discharge was not an appropriate sanction in this case. In reaching this conclusion, the arbitrator highlighted Detective Lucarelli’s “acknowledgment of his wrongdoing from the outset,” his “commendable and lengthy record of service” and the “compelling” testimony of his direct supervisors who “convincingly asked for a second chance for this officer.” The arbitrator noted that although his supervisors recognized and disapproved of his “lapse in

‘work ethic’” and “horrible actions,” they testified that he was still a productive officer during this time period, that he was “salvageable” and “trustworthy” and that they believed that he “could turn things around.” The arbitrator also noted that “even when he was spiraling out of control,” Detective Lucarelli “stayed within some boundaries,” e.g., none of his sexual overtures went so far as to result in a complaint by any of the women involved and his actions were not shown to have adversely affected any criminal investigations or prosecutions in any “demonstrable or concrete way.” The arbitrator indicated that although these mitigating factors did not “absolve” Detective Lucarelli from his conduct, they “give it context and help put it in perspective.” He concluded that although Detective Lucarelli’s conduct was “wrongful and reprehensible,” he “deserves a second and last chance.” The arbitrator noted, however, that his decision was based on this “unusual, one of a kind case” and cautioned that the decision should not be used as “precedent to sanction future conduct of this sort.”

{¶17} The arbitrator, therefore, reduced the disciplinary sanction imposed against Detective Lucarelli from discharge to a suspension without pay beginning January 18, 2013 until he was cleared to return to work.² The arbitrator further required that Detective Lucarelli “obtain or maintain a counseling program” for at least one year following his return to work and provide documentation, verifying his compliance with

²The arbitrator indicated that the city could require a “full fitness for duty examination (including physical, drug testing, and psychological components)” before Detective Lucarelli returned to work.

this requirement, to the city upon request. The arbitrator “retained jurisdiction to resolve any disputes regarding these requirements.”

{¶18} On January 27, 2014, the city filed an application to vacate or, in the alternative, to modify the arbitration award in the Cuyahoga County Court of Common Pleas. The city argued that, in modifying the disciplinary sanction imposed against Detective Lucarelli, the arbitrator exceeded his authority under the CBA. The city also argued that the arbitration award was not final and definite, was contrary to law and violated public policy. The CPPA opposed the city’s application and filed an application to confirm the arbitration award.

{¶19} On April 10, 2015, the trial court denied the city’s application to vacate or, in the alternative, to modify the arbitration award and granted the CPPA’s application to confirm the arbitration award. The trial court held that the arbitrator “properly applied the just cause standard to the facts and circumstances of this case” and that the arbitration award “draws its essence from the collective bargaining agreement between the parties.”

{¶20} The city appealed the trial court’s decision, raising the following single assignment of error for review:

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

Law and Analysis

{¶21} Voluntary termination of legal disputes by binding arbitration is favored under the law. *Cleveland v. Internatl. Bhd. of Elec. Workers Local 38*, 8th Dist. Cuyahoga No. 92982, 2009-Ohio-6223, ¶ 16, citing *Kelm v. Kelm*, 68 Ohio St.3d 26, 27, 623 N.E.2d 39 (1993). Arbitration “provides the parties with a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets.” *Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities v. Mahoning Cty. TMR Edn. Assn.*, 22 Ohio St.3d 80, 83, 488 N.E.2d 872 (1986). “The whole purpose of arbitration would be undermined if courts had broad authority to vacate an arbitrator’s award.” *Id.* at 83-84.

{¶22} As a result, the authority of courts to vacate an arbitration award is “extremely limited.” *Cedar Fair, L.P. v. Falfas*, 140 Ohio St.3d 447, 2014-Ohio-3943, 19 N.E.3d 893, ¶ 5. Courts must accord “substantial deference” to an arbitrator’s decision. *N. Royalton v. Urich*, 8th Dist. Cuyahoga No. 99276, 2013-Ohio-2206, ¶ 14, quoting *Cuyahoga Metro. Hous. Auth. v. SEIU Local 47*, 8th Dist. Cuyahoga No. 88893, 2007-Ohio-4292. Arbitration awards are generally presumed to be valid, and a common pleas court reviewing an arbitrator’s decision may not substitute its judgment for that of the arbitrator. *Urich* at ¶ 14, citing *Bowden v. Weickert*, 6th Dist. Sandusky No. S-05-009, 2006-Ohio-471, ¶ 50. An appellate court’s review of an arbitration award is similarly limited, confined to an evaluation of the trial court’s order confirming, modifying or vacating the arbitration award. *Miller v. Mgt. Recruiters Internatl., Inc.*, 180 Ohio App.3d 645, 2009-Ohio-236, 906 N.E.2d 1162, ¶ 9 (8th Dist.), citing *Lynch v.*

Halcomb, 16 Ohio App.3d 223, 475 N.E.2d 181 (12th Dist.), paragraph two of the syllabus; *Orwell Natural Gas Co. v. PCC Airfoils, L.L.C.*, 189 Ohio App.3d 90, 2010-Ohio-3093, 937 N.E.2d 609, ¶ 8 (8th Dist.). Appellate review does not extend to the merits of an arbitration award absent evidence of material mistake or extensive impropriety — which has not been alleged here. *Id.*

{¶23} As this court explained in *Motor Wheel Corp. v. Goodyear Tire & Rubber Co.*, 98 Ohio App.3d 45, 647 N.E.2d 844 (8th Dist.1994):

The limited scope of judicial review of arbitration decisions comes from the fact that arbitration is a creature of contract. Contracting parties who agree to submit disputes to an arbitrator for final decision have chosen to bypass the normal litigation process. If parties cannot rely on the arbitrator's decision (if a court may overrule that decision because it perceives factual or legal error in the decision), the parties have lost the benefit of their bargain. Arbitration, which is intended to avoid litigation, would instead become merely a system of "junior varsity trial courts" offering the losing party complete and rigorous de novo review. *See Natl. Wrecking Co. v. Internatl. Bhd. of Teamsters, Local 731*, 990 F.2d 957 (7th Cir.1993).

Id. at 52. Parties who agree to resolve their disputes through binding arbitration have bargained for and agreed to accept the arbitrator's findings of fact and interpretation of the agreement, even if the arbitrator's decision is based on factual errors or an incorrect legal analysis:

"Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract."

S.W. Ohio Regional Transit Auth. v. Amalgamated Transit Union, Local 627, 91 Ohio St.3d 108, 110, 742 N.E.2d 630 (2001), quoting *United Paperworkers Internatl. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987); see also *Cedar Fair* at ¶ 6 (“So long as arbitrators act within the scope of the contract, they have great latitude in issuing a decision. An arbitrator’s improper determination of the facts or misinterpretation of the contract does not provide a basis for reversal of an award by a reviewing court, because “[i]t is not enough * * * to show that the [arbitrator] committed an error — or even a serious error.””), quoting *Stolt-Nielsen, S.A. v. AnimalFeeds Internatl. Corp.*, 559 U.S. 662, 671, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). Thus, a reviewing court cannot reject an arbitrator’s findings of fact or interpretation of the agreement simply because it disagrees with them. *S.W. Ohio Regional Transit Auth.* at 110.

{¶24} However, an arbitrator can exceed his or her powers by going beyond the authority bargained for in the agreement. *Cedar Fair* at ¶ 7. Under R.C. 2711.10(D), “the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration 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.”

{¶25} Where, as here, a challenge is made to an arbitration award under R.C. 2711.10(D), the trial court must determine whether the arbitration award “draws its essence from the agreement” and is not unlawful, arbitrary or capricious. *Findlay City*

School Dist. Bd. of Edn. v. Findlay Edn. Assn., 49 Ohio St.3d 129, 132-133, 551 N.E.2d 186 (1990) (“[A] a reviewing court’s inquiry * * * [pursuant to R.C. 2711.10(D)], is limited. 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.”); *Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities*, 22 Ohio St.3d 80, 488 N.E.2d 872, at paragraph one of the syllabus.

{¶26} An arbitration award “draws its essence” from an agreement where there is a “rational nexus” between the agreement and the award. *Cleveland v. Cleveland Assn. of Rescue Emps.*, 8th Dist. Cuyahoga No. 96325, 2011-Ohio-4263, ¶ 9, citing *Assn. of Cleveland Fire Fighters, Local 93 of the Internatl. Assn. of Fire Fighters v. Cleveland*, 99 Ohio St.3d 476, 2003-Ohio-4278, 793 N.E.2d 484, ¶ 13. 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* at ¶ 7, quoting *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), syllabus. The arbitrator must apply the contract agreed to by the parties, not “create[], in effect, a contract of his own.” *Ohio Office of Collective Bargaining* at 183. The arbitrator ““does not sit to dispense his own brand of industrial justice.”” *Id.* at 180, quoting *United Steelworkers of Am. v. Ent. Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960) (“[A]n arbitrator

is confined to interpretation and application of the collective bargaining agreement * * *. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.”).

{¶27} In reviewing an arbitration award, the court must, therefore, “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.).

{¶28} Whether the city had “just cause” to discharge Detective Lucarelli was a factual determination to be made by the arbitrator in accordance with the terms of the CBA. Unless the collective bargaining agreement contains language precluding such a review, a “just cause” determination typically involves two inquiries: “(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); see also *Summit Cty. Children Servs. Bd. v. Communication Workers of Am., Local 4546*, 113 Ohio St.3d 291, 2007-Ohio-1949, 865 N.E.2d 31, ¶ 21 (“[A]n arbitrator's inquiry into whether there is “good cause” is one that almost always involves two factors — whether

the misconduct alleged has been proven and whether the discipline imposed for the misconduct was reasonable.”). The fact that an arbitrator may review the appropriateness of the type of discipline imposed after determining that just cause exists for discipline does not mean, however, that the arbitrator can issue an arbitration award, modifying the discipline imposed, that conflicts with the express terms of the agreement. Where the collective bargaining agreement sets forth “predetermined” levels of discipline or otherwise limits the authority of the arbitrator to review the discipline imposed, those limitations will be enforced. *See, e.g., Ohio Office of Collective Bargaining.*

{¶29} Article XXII(51) of the CBA, sets forth the scope of the arbitrator’s authority, as agreed to by the parties, as follows:

In the event a grievance goes to arbitration, the arbitrator shall have jurisdiction only over disputes arising out of grievances as to the interpretation and/or application and/or compliance with the provisions of this Contract, including all disciplinary actions and in reaching his decision, the arbitrator shall have no authority (1) to add or subtract from or modify in any way any of the provisions of this Contract; (2) to pass upon issues governed by law[; or] (3) to make an award in conflict with law. * * *

The Grievance procedure set forth in this Contract shall be the exclusive method of reviewing and settling disputes between the City and the Union and/or between the City and a member (or members), and all decision of arbitrators shall be final, conclusive, and binding on the City, the Union, and the members. * * *

{¶30} In this case, the parties do not dispute that the city had just cause to discipline Detective Lucarelli under the CBA. Rather, the parties disagree as to whether the arbitrator’s determination that termination was too severe a sanction drew its essence from the CBA.

{¶31} Relying on the Ninth District’s decision in *Cuyahoga Falls v. Fraternal Order of Police, Ohio Labor Council*, 9th Dist. Summit No. 22170, 2004-Ohio-6739, the city contends that the arbitrator exceeded his authority under the CBA because he, in effect, read a “progressive discipline requirement” into the CBA that does not exist in the CBA. The city argues that because the CBA gives the city the right to “discharge for just cause,” the arbitrator did not have the right to determine that Detective Lucarelli could not be properly discharged — despite his “misuse of authority,” “obvious abuse of his position” and “egregious,” “wrongful and reprehensible” misconduct — due to his “commendable and lengthy record of service.”

{¶32} In *Cuyahoga Falls*, the Ninth District held that an arbitrator exceeded her authority when she required the city to reinstate a police officer because he had not been previously disciplined and, therefore, had not been warned that his misconduct could result in termination. In that case, the city fired a police sergeant for gross neglect of duty, theft, conduct unbecoming an officer, sexual harassment and improper use of city equipment. *Id.* at ¶ 2. Although the arbitrator confirmed the city’s factual findings regarding the officer’s “continuing and cumulative” misconduct, he determined that progressive discipline was “a necessary element to a finding of just cause” and that

because the officer had not been previously disciplined, ordered the officer to be reinstated at a demoted level and to receive back pay minus a four-month suspension. *Id.* at ¶ 3. The city filed a petition to vacate the arbitration award pursuant to R.C. 2711.10, and the trial court granted the petition, concluding that because the collective bargaining agreement contained no language regarding progressive discipline, the arbitrator exceeded her authority by imposing progressive discipline. *Id.* at ¶ 4. Citing the Ohio Supreme Court’s decision in *Internatl. Assn. of Firefighters, Local 67 v. Columbus*, 95 Ohio St.3d 101, 766 N.E.2d 139 (2002),³ the Ninth District affirmed the trial court’s ruling, concluding that the arbitrator erred in applying “such an expansive definition of ‘just cause’ and exceeded her authority by imposing progressive discipline.” *Id.* at ¶ 7-10. The city maintains that *Cuyahoga Falls* is “very similar” to this case and should control the result here. We disagree. This is not a case in which the arbitrator “unilaterally adopted” a progressive discipline requirement that was not part of the CBA or any other provision extraneous to the CBA when rendering his decision.

{¶33} “Just cause” is not defined in the CBA. Therefore, in arbitrating the parties’ dispute, the arbitrator was required to construe that term according to its “plain and ordinary meaning.” *Summit Cty. Children Servs. Bd.*, 113 Ohio St.3d 291,

³In *Internatl. Assn. of Firefighters, Local 67*, the Ohio Supreme Court held that an arbitrator exceeded his authority where he applied a definition of “disability” taken from rules promulgated by the city’s board of industrial relations to interpret the undefined term “other disabilities” used in the collective bargaining agreement. The court held that by applying this extraneous definition of “disability,” the arbitrator imposed an additional requirement on injured employees seeking paid injury leave that was not provided for in the collective bargaining agreement and, therefore, the arbitration award was not rationally derived from the terms of the agreement. *Id.* at 104-105.

2007-Ohio-1949, 865 N.E.2d 31, ¶ 15; *Internatl. Assn. of Firefighters, Local 67* at 103 (“An arbitrator is confined to interpreting the provisions of a CBA as written and to construe the terms used in the agreement according to their plain and ordinary meaning.”).

{¶34} In this case, the arbitrator interpreted the CBA’s “just cause” provision as requiring consideration of not only the nature and frequency of Detective Lucarelli’s misconduct but also various potential mitigating circumstances, including the opinions of his supervisors, the fact that none of the women had complained about his conduct and the fact that his inappropriate conduct was not shown to have any “demonstrable” or “concrete” impact on any criminal investigation or prosecution.⁴ In *Summit Cty. Children Servs. Bd.*, 113 Ohio St.3d 291, 2007-Ohio-1949, 865 N.E.2d 31, the Ohio Supreme Court expressly approved of such a practice, holding that where “good cause” was not defined in the collective bargaining agreement, an arbitrator could employ a test for “good cause” that considered the employee’s “record of service or other mitigating circumstances relating to the appropriateness of the discipline imposed.” *Id.* at ¶ 20. In doing so, it distinguished its prior decision in *Internatl. Assn. of Firefighters, Local 67*, 95 Ohio St.3d 101, 766 N.E.2d 139, in which the court held that the arbitrator exceeded his powers under the collective bargaining agreement where he defined a term (that was not

⁴ Our conclusion that it was the unique mitigating circumstances of this case — and not the city’s failure to employ progressive discipline — that led the arbitrator to modify the disciplinary action taken against Detective Lucarelli is further supported by the arbitrator’s statement in his decision that if some or all of these mitigating circumstances had not been present, “this would have tipped the balance to discharge.”

defined in the agreement) by using a definition that had been used by the employer in another context but which “did not comport with the ordinary definition” of the term. *Id.* at ¶ 14. Accordingly, the arbitrator did not exceed his powers under the CBA by considering mitigating circumstances as part of his “just cause” analysis in this case. *See also Dayton v. Fraternal Order of Police, Captain John C. Post Lodge No. 44*, 2d Dist. Montgomery No. 18158, 2000 Ohio App. LEXIS 2313, *11-12 (June 2, 2000) (where “just cause” was not defined in the collective bargaining agreement, arbitrator did not exceed her powers in determining whether city had just cause to discharge police officer based on the weighing of aggravating and mitigating factors).

{¶35} The city also argues that the trial court erred in denying its application to vacate the arbitration decision because the city speculates it “will encounter problems” due to Detective Lucarelli’s reputation and the media attention his case had garnered if it were to allow Detective Lucarelli to serve in any capacity “back on the street * * * [where] he has contact with the public.” The city maintains that if the trial court’s decision is upheld, it will be “saddled” with a police officer who can “never work the streets” because he cannot have contact with females and cannot testify in court because his testimony is “tainted.” The arbitrator heard and considered these arguments in rendering his decision. However, he also heard from three of Detective Lucarelli’s direct supervisors who offered a contrary view that Detective Lucarelli was a productive, laudable, “go to” officer and that he was “salvageable,” “trustworthy” and “could turn things around.”

{¶36} Under the CBA, the arbitrator had the authority to interpret and apply the provision of the agreement authorizing the city to “discharge” employees for “just cause.”

This is not a case in which the arbitrator created a “contract of his own” by imposing additional or different requirements not expressly provided for in the CBA. The city’s argument that the arbitrator added to, subtracted from or otherwise modified the provisions of the CBA by considering Detective Lucarelli’s service history and other factors in determining that the city lacked just cause to discharge him amounts to nothing more than a claim that the arbitrator misinterpreted or misapplied that provision which does not constitute grounds for vacating the award under R.C. 2711.10(D). Even if we, or the trial court, disagreed with (1) the arbitrator’s interpretation that a “just cause” analysis required a consideration of the mitigating circumstances, (2) the particular mitigating circumstances the arbitrator considered in determining whether Detective Lucarelli’s discharge was supported by “just cause” or (3) the conclusion the arbitrator reached after consideration of those mitigating circumstances, this would not be grounds to vacate the arbitration award under R.C. 2711.10(D). *See, e.g., S.W. Ohio Regional Transit Auth.*, 91 Ohio St.3d at 110, 742 N.E.2d 630.

{¶37} There is no language in the CBA expressly limiting the arbitrator’s ability to consider mitigating circumstances in determining the appropriateness of an employee’s discharge or precluding the arbitrator from modifying the discipline imposed based on his “just cause” analysis. Had the city wished to preclude an arbitrator from modifying the discipline imposed by the city under these circumstances (or any other circumstances), it

certainly could have bargained for that right. *Compare Ohio Patrolmen's Benevolent Assn. v. Findlay*, 8th Dist. Cuyahoga No. 102282, 2015-Ohio-3234, ¶ 41-43 (where the plain and unambiguous language of discipline matrix, which the arbitrator determined controlled under the collective bargaining agreement, gave the police chief sole discretion to determine which of two discipline levels was appropriate following certain rule violations, arbitrator had no authority to disregard that requirement and modify the discipline level selected by the police chief); *see also Ohio Office of Collective Bargaining*, 59 Ohio St.3d at 182-183, 572 N.E.2d 71 (arbitrator exceeded his authority in reinstating hospital aide who had been terminated for patient abuse where the collective bargaining agreement specifically prohibited the arbitrator from modifying any termination for abuse).

Final and Definite Award

{¶38} The city also claims that the arbitration award is not a “final and definite award” and should have, therefore, been vacated because it requires Detective Lucarelli to “obtain or maintain a counseling program for at least one year following his return” without identifying the “specific kind of counseling” required and without providing a “way for the [c]ity to know what the desired outcome of the counseling is supposed to be” or whether the counseling is “successful.”

{¶39} R.C. 2711.10(D) requires a trial court to vacate an arbitration award where an arbitrator “so imperfectly executed [his powers] that a mutual, final, and definite award upon the subject matter submitted was not made.” In considering whether an

arbitrator's decision was so imperfect that did not render a final and definite award upon the subject matter submitted, "it is vital to ascertain the issue submitted to the arbitrator to determine if he exceeded his power, or, in the alternative, if he decided the issue." *Ohio Council 8, Am. Fedn. of State, Cty. & Mun. Emps., AFL-CIO v. Cent. State Univ.*, 16 Ohio App.3d 84, 474 N.E.2d 647 (2d Dist.1984), paragraph two of the syllabus. Only where the award rendered by the arbitrator is so imperfect that there was no award on the issue before the arbitrator does this provision of R.C. 2711.01(D) apply. *See id.* at 86; *Resource Realty Exchange Corp. v. Schaney*, 8th Dist. Cuyahoga No. 85972, 2005-Ohio-4131, ¶ 17; *see also Technigraphics, Inc. v. MIT, L.L.C.*, 9th Dist. Wayne No. 09CA0005, 2010-Ohio-2946, ¶ 11. In this case, the two issues submitted to the arbitrator were: (1) "Was the Grievant discharged for just cause in accordance with the labor agreement?" and (2) "If not, what remedy is appropriate?" Both of these issues were fully addressed in the arbitrator's opinion and award. The city cites no authority in support of its contention that an arbitrator's inclusion of this type of counseling requirement as part of an arbitration award rendered the arbitration award not "final and definite" on the issues presented or otherwise warranted vacating the arbitration award under R.C. 2711.10(D).

{¶40} As the Ohio Supreme Court has stated, an arbitrator "has broad authority to fashion an appropriate remedy" even if the remedy is not expressly mentioned in the collective bargaining agreement. *Queen City Lodge No. 69, Fraternal Order of Police, Hamilton Cty., Ohio, Inc. v. Cincinnati*, 63 Ohio St.3d 403, 407, 588 N.E.2d 802 (1992).

“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.” *Id.* There is nothing in the collective bargaining agreement that precluded the arbitrator from imposing a remedy of this type. Based on our review of the record, we cannot say that the arbitrator’s award was “so imperfect” as to constitute “no award” on the issues presented to the arbitrator or that the arbitrator otherwise exceeded his authority by awarding the remedy he did in this case.

Public Policy

{¶41} As its final argument, the city asserts that the trial court should have vacated the arbitration award because the arbitrator’s reinstatement of Detective Lucarelli violates “well-established Ohio public policy.”

{¶42} The Ohio Supreme Court has recognized that, if an arbitrator’s interpretation of a collective bargaining agreement 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); *see also Fraternal Order of Police, Lodge 8 v. Cleveland*, 8th Dist. Cuyahoga No. 102565, 2015-Ohio-4188, ¶ 25. Vacating an arbitration award on public policy grounds 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.” *S.W. Ohio Regional Transit Auth.* at 112, quoting *United Paperworkers Internatl. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. at 43, 108 S.Ct. 364, 98 L.Ed.2d 286. To vacate an arbitration award as being contrary to public policy, 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; see also *FOP, Lodge 8* at ¶ 25.

{¶43} The city does not identify any well-defined, dominant public policy “ascertained by laws and legal precedents and not from general considerations of supposed public interests” that it contends Detective Lucarelli’s reinstatement violates. Instead, it references various general police department policies regarding officer integrity, honesty and adherence to “the highest standards of moral and ethical conduct” that it contends Detective Lucarelli’s conduct violated. The city also cites *Jones v. Franklin Cty. Sheriff*, 52 Ohio St.3d 40, 43, 555 N.E.2d 940 (1990), for the proposition that police officers are held to a higher standard of conduct than the general public, and *Ironton v. Rist*, 4th Dist. Lawrence No. 10CA10, 2010-Ohio-5292, as acknowledging the importance of honesty in the performance of police duties.

{¶44} To vacate the arbitration award on public policy grounds, it is not Detective Lucarelli’s conduct that must be shown to have violated public policy but rather the arbitrator’s decision to reinstate him. See *S.W. Ohio Regional Transit Auth.* at 113, citing *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 531 U.S. 57,

121 S.Ct. 462, 148 L.Ed.2d 354 (2000); *FOP, Lodge 8* at ¶ 26. The “cloak of public policy” cannot be used “to seek a review of the merits” of an arbitration award. *Akron v. Akron Firefighters Assn.*, 9th Dist. Summit No. 27119, 2015-Ohio-994, ¶ 20 (“In determining whether an award should be vacated on public policy grounds, the inquiry is focused on the face of the award, and ‘[a] court is not authorized to revisit or question the fact-finding or the reasoning which produced the award.’”), quoting *Aramark Facility Servs. v. Serv. Emps. Internatl. Union, Local 1877, AFL CIO*, 530 F.3d 817, 823 (9th Cir.2008).

{¶45} In *Rist*, an arbitrator reinstated a police officer who had been terminated for falsifying a traffic ticket. *Id.* at ¶ 5-6. As a result of the incident, the officer pled guilty to one count of falsification, a first-degree misdemeanor. *Id.* at ¶ 19. The trial court vacated the arbitration award on public policy grounds, and the Fourth District affirmed the trial court’s decision. *Id.* at ¶ 1, 3, 7-8, 22.

{¶46} Based on R.C. 737.11, which provides, in relevant part, that “[t]he police force of a municipal corporation shall preserve the peace, protect persons and property, and obey and enforce * * * all criminal laws of the state and the United States * * *” and 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,” the Fourth District concluded that Ohio has “a dominant, well-defined public policy against the reinstatement of an officer who falsifies a police report.” *Id.* at ¶ 20-21. Given that there was no

dispute that the officer had falsified a police report, the Fourth District concluded that the trial court did not err when it vacated the arbitration award. *Id.* at ¶ 21-22.

{¶47} *Rist* is, however, distinguishable from this case. Detective Lucarelli was not terminated for falsifying a police report. Detective Lucarelli was terminated for inappropriate “sexting” of victims in criminal cases on which he had worked or on which he was currently working. There was no evidence that Detective Lucarelli falsified information in any of the cases or investigated any of his cases differently based upon his inappropriate interactions with these women and the arbitrator specifically found that his actions “did not adversely affect investigations or criminal prosecutions in a demonstrable or concrete way.” Accordingly, the public policy recognized in *Rist* does not preclude the reinstatement of Detective Lucarelli in this case. *See FOP, Lodge 8, 2015-Ohio-4188*, at ¶ 24-29 (rejecting city’s claim based on *Rist* that arbitration award was against public policy because it reinstated an officer who “effectively stopped being a police officer for five minutes during a dangerous, lengthy, ultimately deadly, high-speed pursuit”).

{¶48} In *Jones*, a Franklin County sheriff’s deputy became involved in the pursuit of a woman whom the deputy’s sister suspected of having stolen her purse. Without authorization, the deputy participated in a car chase and the search of a private residence in an attempt to retrieve the purse and never reported the incident to police. *Jones, 52 Ohio St.3d at 40-41, 555 N.E.2d 940*. During its investigation of the incident, the police department’s internal affairs division attempted to interview the deputy but she refused to

answer any questions even after she was informed that her answers could not be used against her in a criminal prosecution. *Id.* at 43-44. The sheriff dismissed the deputy. *Id.* at 40-41. The deputy appealed her dismissal to the state personnel board of review (“review board”) and the administrative law judge (“ALJ”) recommended affirmance of the dismissal for conduct unbecoming a deputy sheriff, neglect of duty and insubordination. *Id.* The review board issued an order in which it accepted the ALJ’s factual conclusions but nevertheless reinstated the deputy. *Id.* The sheriff appealed the decision to the Franklin County Court of Common Pleas. The common pleas court found the review board’s decision to be inconsistent with the evidence presented to the ALJ and affirmed the sheriff’s dismissal of the deputy. *Id.* at 43. The Tenth District reversed. In reinstating the common pleas court’s ruling affirming dismissal of the deputy, the Ohio Supreme Court held that although the review board had “the authority to modify the judgment of an appointing authority where it acts arbitrarily, unreasonably, or unlawfully or where its decision is improper or unnecessary, * * * due deference must be accorded to the findings and recommendation of the referee.” *Id.* at 43. The court indicated that because “it is settled public policy * * * that police officers are held to a higher standard of conduct than the general public” and the evidence “indisputably revealed that the deputy’s vigilante activities could not bring anything but disrepute upon the sheriff’s department,” the common pleas court properly reversed the order of the review board and affirmed the removal of the deputy. *Id.* The court also held that the trial court had

correctly concluded that the deputy's refusal to answer the investigators' questions constituted insubordination. *Id.* at 44-45.

{¶49} Contrary to the city's argument, neither *Jones* nor any of the other authorities cited by the city supports the proposition that a city must be permitted, as a matter of public policy, to dismiss a police officer, or that an arbitrator must be prohibited from using broad, discretionary authority to modify a disciplinary sanction of dismissal under a collective bargaining agreement, whenever a city concludes that an officer's conduct falls below the "higher standard of conduct" to which police officers are held and "diminish[es] the esteem" of the police department and its personnel. *See, e.g., Lima v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 3d Dist. Allen No. 1-02-88, 2003-Ohio-6983, ¶ 29-31 (arbitrator's reinstatement of police officer who unlawfully entered a residence without a search warrant did not violate public policy where neither R.C. 737.11 nor *Jones, supra*, upon which the city relied for its public policy argument, established a "dominant and well-defined" public policy prohibiting arbitrator from reinstating officer and city's public policy concerns were not otherwise "clearly defined" or supported "by statute or other legal precedents"); *FOP, Captain John C. Post Lodge No. 44*, 2000 Ohio App. LEXIS 2313, at *14 (rejecting city's argument that "any limitation on its ability to discharge police officers for misconduct is against public policy because it has the 'right to expect the highest degree of respect and fairness from its police officers'"; "public policy * * * does not demand that the city have unbridled authority to terminate its employees for their misconduct"); *Lancaster v. Fraternal Order*

of Police, 5th Dist. Fairfield No. 05 CA 103, 2006-Ohio-1380, ¶ 17-21 (neither statute that required driver of an emergency vehicle to proceed cautiously when approaching stop signs and stop lights nor the existence of a cause of action for negligent retention established a public policy precluding reinstatement of a police officer who violated department policy regarding high-speed pursuits); *see also S.W. Ohio Regional Transit Auth.*, 91 Ohio St.3d at 112, 114, 742 N.E.2d 630 (concluding that “Ohio has no dominant and well-defined public policy that renders unlawful an arbitration award reinstating a safety-sensitive employee who was terminated for testing positive for a controlled substance, assuming that the award is otherwise reasonable in its terms for reinstatement” and that Ohio law prohibiting the use of alcohol or controlled substances by transportation employees “does not dictate a public policy that precludes a person who tests positive for a controlled substance from having a second chance”); *Urich*, 2013-Ohio-2206, at ¶ 30-34 (trial court did not err in failing to vacate arbitration award reinstating firefighter-paramedic, who was terminated after he allegedly mishandled and removed heroin found at the scene during an emergency call and made various misstatements to police regarding the incident, as being against public policy where no clear public policy was found to exist that precluded reinstatement of a firefighter-paramedic who provided inaccurate written reports or a false witness statement to police).

{¶50} While we certainly do not condone Detective Lucarelli’s misconduct and agree that it is “unbecoming an officer” — to say the very least — we find no authority

that justifies vacating the arbitrator's award on public policy grounds. Although the city's public policy concerns are understandable, the city has not established that a well-defined, dominant public policy "ascertained by laws and legal precedents and not from general considerations of supposed public interests" exists that precludes Detective Lucarelli's reinstatement here.

Conclusion

{¶51} Following a thorough review of the record, we find no error in the trial court's determination that the arbitrator did not exceed his authority under the CBA in reinstating Detective Lucarelli. The record reflects that the arbitration award drew its essence from the CBA and was not arbitrary, capricious or unlawful. We recognize the city's concerns regarding ensuring the integrity of its police department and maintaining public confidence and trust in its police officers. However, "[o]nce it is determined that the arbitrator's award draws its essence from the collective bargaining agreement and is not unlawful, arbitrary or capricious," our inquiry with respect to whether there is a basis for vacating the arbitration award under R.C. 2711.10(D) — like that of the trial court before us — "is at an end." *Hillsboro v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 52 Ohio St.3d 174, 176, 556 N.E.2d 1186 (1990), quoting *Board of Edn. of the Findlay City School Dist.*, 49 Ohio St.3d 129, 551 N.E.2d 186, at paragraph two of the syllabus. We are not free to interpose our own view of the facts or our own interpretation of what constitutes "just cause" to discharge an employee in a case such as this. Accordingly, the trial court properly denied the city's application to vacate the

arbitration award under R.C. 2711.10(D) and properly granted the CPPA's application to confirm the arbitration award. The city's assignment of error is overruled.

{¶52} Judgment affirmed.

It is ordered that appellee recover from appellant the 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.

EILEEN A. GALLAGHER, PRESIDING JUDGE

MARY EILEEN KILBANE, J., CONCURS;
TIM McCORMACK, J., DISSENTS WITH SEPARATE OPINION

TIM McCORMACK, J., DISSENTING:

{¶53} "We've been clear about expectations for our players on and off the field. [This player's] continual involvement in incidents that run counter to those expectations undermines the hard work of his teammates and the reputation of our organization." Sashi Brown, Executive Vice President of Football Operations, Cleveland, Browns.

{¶54} The above reflects how the Cleveland Browns football organization has just dealt with an especially intractable personnel issue. What follows below reflects how a

large Ohio city government was thwarted after issuing a very similar statement in taking steps to sever one of its employees.

{¶55} I understand the reasoning adopted by the majority. I know that the law affords deference to a rational arbitrator's decision where the parties have agreed in a collective-bargaining agreement ("CBA") to settle their disputes by using an arbitrator rather than a judge.

{¶56} Affording deference to an arbitrator's decision, though, presupposes that the original decision is soundly based in law, that it is meritorious in its nature. In order to give due deference, we must presuppose that this arbitrator's ruling flows from a pure, free-running stream of fact and law rather than from a stagnant pool of rancid, stenchful waste.

{¶57} Here we are under no duty to extend deference where the arbitrator so far exceeds his authority by an arbitrary decision.

{¶58} I will not assent to this arbitrator's decision, because this decision so clearly exceeds the authority of this or any arbitrator. It clearly violates public policy. It is difficult to imagine a worse outcome for a large, diverse community than that which this arbitrator's decision represents. This decision, in a dangerous way, denigrates the reputations, standing, and viability of the men and women who serve as Cleveland police officers.

{¶59} I have too much inherent respect for Cleveland police officers, both the persons and the duty to which they have sworn allegiance, to allow the arbitrator's

decision in this case to besmirch their names by associating such an ungrounded, unsavory decision with them. This arbitrator's decision, at the end of the day, makes allowances for the illicit behavior of the detective and does away with appropriate consequences of his egregious violations of trust.

{¶60} This arbitrator's decision is a combined trumpet and tuba blast sounding that law does not equally apply. The arbitrator's decision stands for the on-the-street reality that when a woman is victimized by violent crime in Cleveland, and reports it, she may also risk becoming sexual prey of a responder who, instead of protecting the injured, pursues sexual conquest.

{¶61} A primal question comes to mind as a result of the consequences that flow from this decision. When the very next class of Cleveland police cadets report for their first day of training; when the over 1,500 active duty Cleveland officers report for their lineup at shift change; when the proud, silver-haired retired officers meet for a retirees' luncheon and discuss a police officer's duty on the streets of Cleveland — what will the teaching and understanding be following this decision? What community standard does the arbitrator's decision in this *Cleveland v. CPPA* announce? What precedent for others is set by this arbitrator's decision? What mutated community values are introduced as a result of this decision? What rational nexus is there to be found here when we stand a police officer's duty side by side with the record in this case?

{¶62} Based upon the analysis provided below, I assert that this decision should not, and cannot, stand.

{¶63} Where this CBA makes provisions for Cleveland to discharge employees for just cause, and the evidence supports discharge, as nearly conceded by the arbitrator, the arbitrator's decision to lessen the disciplinary action taken against the detective by reversing the termination is not rationally derived from the terms of the agreement. The arbitrator's rationale of mitigation is glaringly insufficient. The arbitrator's award violates public policy. The detective's repeated egregious conduct are violations of the laws and a police officer's general duties to protect the public and obey the laws as outlined in R.C. 737.11. An arbitrator's reinstatement of a police officer who acknowledges engaging in such practices therefore makes a mockery of and contravenes public policy.

{¶64} It is well established that parties may, in a CBA, agree to settle their disputes by means of arbitration, where the parties use a mutually acceptable arbitrator rather than a judge, and the parties agree to accept the arbitrator's findings of fact and interpretation of the contract. However, where an arbitrator exceeds his or her powers, the court must vacate the arbitrator's award. *See* R.C. 2711.10(D).

{¶65} In order to determine whether an arbitrator has exceeded his or her powers, a trial court shall determine whether the arbitrator's award draws its essence from the CBA. *FOP, Lodge 8 v. Cleveland*, 8th Dist. Cuyahoga No. 102565, 2015-Ohio-4188, ¶ 19. An arbitrator's award "draws its essence" from a CBA 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. Bd. of Edn. v. Findlay Edn. Assn.*,

49 Ohio St.3d 129, 132, 551 N.E.2d 186 (1990), citing *Mahoning Cty. Bd. of Mental Retardation v. Mahoning Cty. TMR Edn. Assn.*, 22 Ohio St.3d 80, 488 N.E.2d 872 (1986), 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 v. Ohio Civ. Serv. Emps. Assn., Local 11, AFSCME, AFL-CIO*, 59 Ohio St.3d 177, 572 N.E.2d 71 (1991), syllabus. An arbitrator may not “dispense his own brand of industrial justice.” *United Steelworkers of Am. v. Ent. Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

{¶66} The city and the CPPA are parties to a CBA. According to Article IV of the CBA, entitled “Management Rights,” the city has the right to “suspend, discipline, demote or discharge for just cause, layoff, transfer, assign, schedule, promote, or retain employees.” The parties conceded that the city had just cause to discipline the detective in this case. The parties disagreed only on the level of discipline.

{¶67} Here, the detective’s actions, which formed the bases for which he was discharged by the city, were sickeningly egregious. Some of the most egregious of these actions include: sending over 8,000 sexually explicit and inappropriate text messages to several victims of crime over a six-month period, two of the victims were involved as victims in cases with ongoing investigations; attempting to enter into sexual relationships

with the female victims; transporting women in his patrol car while on duty; engaging in physically “affectionate” acts with the women in the patrol car, such as holding hands; and staying in the women’s homes for 30 minutes to three hours at a time, while on duty.

{¶68} There is no doubt that the detective’s actions constituted a violation of the General Police Orders, the Police Manual of Rules and Regulations, and the Rules of the Civil Service Commission. In fact, the arbitrator found that, in the context of at least one of the investigations, “[i]t can only be construed that [the detective] was trying to build upon his authority as a police officer to pursue a sexual relationship with a victim in an ongoing investigation.” Acknowledging the detective’s “misuse of authority” was a “significant transgression,” the arbitrator determined that the detective violated his professional responsibilities established by the city’s mission statement as well as the Police Manual of Rules and Regulations.

{¶69} In determining that the city had established its case with respect to all of the specifications against the detective, the arbitrator stated as follows:

It is completely understandable why [the city] found a sufficient basis to discharge [the detective] as a result of this serious misconduct. [The detective] was distracted with compulsive texting and negligent in performing his duties, he left his assigned district and repeatedly used a city vehicle for personal purposes.

He took pay for time visiting with a girlfriend. He sought to turn professional relationships into romantic encounters, and in so doing, misused his authority. He missed a meeting he was directed to attend and worked a second job without authorization.

The arbitrator found that when all of the above offenses are considered, “they certainly create a mountain of misconduct demanding harsh discipline.”

{¶70} Finally, before concluding, the arbitrator made it clear that it found the detective’s actions more than unprofessional, stating, “Make no mistake, this arbitrator finds the grievant’s conduct to be wrongful and reprehensible.” In fact, the arbitrator all but agreed that discharge was the appropriate discipline. It concluded that had the victims in the criminal investigations raised complaints of sexual harassment, “this would have tipped the balance to discharge.”

{¶71} In an effort to mitigate the detective’s actions, the arbitrator attempts to downplay the detective’s predatory pursuit of the two crime victims, stating that the detective “stayed within some boundaries even while spiraling out of control” and that his sexual “overtures” did not give rise to complaints of sexual harassment. The arbitrator further notes that one of the victims raised no concern about the detective’s advances “until Sergeant Maruniak asked her the leading question as to whether she was intimidated by the detective’s sexting.”

{¶72} In dismissing the egregious behavior of the detective’s sexual pursuit of the victims because they did not complain, the arbitrator ignores a widely recognized fact: female victims are often intimidated and therefore reluctant to report sexual harassment. Women who are victims of sexual harassment often do not officially complain of such harassment out of fear of not being believed, embarrassment about making it known, and/or fear of reprisals or repercussions. The very nature of sexual harassment inhibits

its victims from coming forward out of fear. And in this case, the evidence showed that one of the female crime victims whom the detective targeted was, in fact, intimidated by the detective, “but she didn’t want anything to jeopardize her case.”

{¶73} In this case, there is the most compelling additional factor of all: the victim’s aggressor was a police officer, a detective. Here, a victim of crime called upon her local police department for assistance, out of fear and in a need of protection, at a time when she was most vulnerable. And the very person who is charged with the duty to protect and serve the public violated that duty, grossly abused his authority, and violated the victim’s trust. A community cannot survive if it willingly overlooks behavior that results in its citizens being fearful of calling the police for help, out of fear of becoming sexual prey to a predatory responder. Moreover, we cannot further ratify a decision that strips the city of its most vital, rudimentary enforcement tool to maintain its authority to enforce basic minimum standards required of its officers. We have far too much respect for our police officers to embrace and facilitate the adoption of the despicable standard this arbitration decision represents to all 1,500 of them.

{¶74} Accordingly, where the CBA allows the city to discharge its employees for just cause, and the evidence supports discharge, as nearly conceded by the arbitrator, the arbitrator’s award in overturning the disciplinary action taken against the detective is not rationally derived from the terms of the agreement. The arbitrator’s mathematics of mitigation is wholly insufficient. The testimony of fellow officers, the detective’s own expression of remorse, and the fact that the detective’s actions “stayed within some

boundaries” by not resulting in complaints of sexual harassment does not change the fact that the detective’s repeated egregious actions were an abuse of authority and a violation of a police officer’s rules and regulations. The CBA does not prevent the city from upholding its right to discharge this detective for just cause. The CBA encompasses such a provision.

{¶75} Further, I find that the arbitrator’s award violates public policy. The Ohio Supreme Court has prudently recognized that if an arbitrator’s interpretation of a CBA violates public policy, the resulting award is unenforceable. *S.W. Ohio Regional Transit Auth. v. Amalgamated Transit Union, Local 627*, 91 Ohio St.3d 108, 2001-Ohio-294, 742 N.E.2d 630 (2001), 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). 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.’” *W.R. Grace & Co.* at 766, quoting *Muschany v. United States*, 324 U.S. 49, 66, 65 S.Ct. 442, 451, 89 L.Ed. 744 (1945).

{¶76} R.C. 737.11, which outlines the general duties of police officers and firefighters, provides that “[t]he 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, [and] all criminal laws of the state and the United States * * *.” Additionally, in fulfilling the duties as outlined in R.C. 737.11, the honesty of a police officer “is vital to the effective performance of these duties and to

ensuring public trust and confidence in the police force.” *Ironton v. Rist*, 4th Dist. Lawrence No. 10CA10, 2010-Ohio-5292, ¶ 20 (finding a dominant public policy against the reinstatement of a police officer who falsifies a police report). And according to the Ohio Supreme Court, as a matter of public policy, police officers are held to a higher standard of conduct:

[I]t is settled public policy * * * that police officers are held to a higher standard of conduct than the general public. * * * Law enforcement officials carry upon their shoulders the cloak of authority of the state. For them to command the respect of the public, it is necessary then for these officers even when off duty to comport themselves in a manner that brings credit, not disrespect, upon their department.

(Citations omitted). *Jones v. Franklin Cty. Sheriff*, 52 Ohio St.3d 40, 43, 555 N.E.2d 940 (1990).

{¶77} Here, without question, all of the parties acknowledge the detective abused his position of authority. His thousands of actions in engaging in compulsive sexting, leaving his assigned district without authority to do so, and repeatedly using a city vehicle for personal purposes and sexual escapades while on duty are, at the very least, acts of dishonesty. They fall well below the higher standard of conduct required of a police officer. Effective public safety requires respect on both sides of the badge. The detective’s more egregious conduct, such as the sexual pursuit of a crime victim during the pendency of an investigation, is a violation of the laws. The intimidation of a crime

victim/witness or the apparent obstruction of justice directly violates a police officer's general duties as outlined in R.C. 737.11. The well-established public policy is that a police officer must protect the public and obey the laws. An arbitrator's reinstatement of a police officer who engages in such practices as outlined above therefore violates this public policy.