[Cite as *Lorain v. Fraternal Order of Police, Lodge No. 3*, 2023-Ohio-2431.]

STATE OF OHIO) IN THE COURT OF APPEALS
)ss: NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN)

CITY OF LORAIN Appellee v. FRATERNAL ORDER OF POLICE, LODGE NO. 3 Appellant	C.A. No. 22CA011903 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 22 CV 205555

DECISION AND JOURNAL ENTRY

Dated: July 17, 2023

FLAGG LANZINGER, Judge.

{¶1} The Fraternal Order of Police, Lodge No. 3 ("FOP"), appeals from the judgment of the Lorain County Court of Common Pleas that vacated the award of the arbitrator in the underlying employment dispute. For the following reasons, this Court affirms.

I.

{¶2} The FOP and the City of Lorain (the "City") were parties to a collective bargaining agreement ("CBA") in effect from January 1, 2020, through December 31, 2022. The City employed Michael Schenek as a police officer with the Lorain Police Department. In 2021, Mr. Schenek applied for a lateral police officer position with the City of North Olmstead. By that time, Mr. Schenek had worked for the City for about three years.

{¶3} The City of North Olmstead offered Mr. Schenek a position as a police officer conditioned upon his successful completion of a physical agility test. Mr. Schenek failed the physical agility test. He then submitted a forged certificate to the City of North Olmstead indicating

that he passed the physical agility test. The City of North Olmstead discovered the forgery and contacted Mr. Schenek. Mr. Schenek immediately admitted to forging the certificate and explained that he did so because he was embarrassed and desperate. The City of North Olmstead rescinded its conditional offer of employment and informed Mr. Schenek that it would be contacting his current employer (i.e., the Lorain Police Department) regarding the incident. Mr. Schenek then contacted the Lorain Police Department before the City of North Olmstead did. Mr. Schenek explained the situation, acknowledged the forgery, and expressed his remorse. The City conducted an investigation and ultimately terminated Mr. Schenek's employment on July 26, 2021.

{¶4} After the City terminated Mr. Schenek's employment, the FOP filed a grievance on Mr. Schenek's behalf, challenging whether the City had just cause to terminate him. The grievance was denied, and the matter proceeded to arbitration in accordance with the CBA.

{¶5} At the arbitration hearing, the City argued that just cause existed to terminate Mr. Schenek's employment because Mr. Schenek committed the crime of forgery, and he violated the Standards of Conduct and the Law Enforcement Code of Ethics applicable to police officers. Relevant to this appeal, the Standards of Conduct provide, in part:

> Members shall conduct themselves, *whether on- or off-duty*, in accordance with the United States and Ohio constitutions and all applicable laws, ordinances, and rules enacted or established pursuant to legal authority.
>
> * * *
>
> Members shall hold their positions during good behavior and efficient service, but may be removed for the following reasons, as listed in the Ohio Revised Code, Section 124.34: "Incompetency, Inefficiency, Dishonesty, Drunkenness, Immoral Conduct, Insubordination, Discourteous Treatment of the Public, Neglect of Duty, Violation of the Civil Service Laws, or the Rules of the Civil Service Commission, or any other failure of good behavior, or any other acts of Misfeasance, Malfeasance, or Nonfeasance in Office.["]

(Emphasis added.) “Causes for Discipline” under the Standards of Conduct include “[c]riminal, dishonest, or disgraceful conduct, *whether on- or off-duty*, that adversely affects the member’s relationship with this department.” (Emphasis added.) The Law Enforcement Code of Ethics provides, in relevant part:

> I will keep my private life unsullied as an example to all and will behave in a manner that does not bring discredit to me or my agency. * * * Honest in thought and deed both in my personal and official life, I will be exemplary in obeying the law and the regulations of my department.

{¶6} The Safety Service Director for the City testified that he has authority to discharge employees for just cause under the CBA. The Safety Service Director testified that Mr. Schenek violated the Law Enforcement Code of Ethics and the Standards of Conduct, which–under the CBA–warranted Mr. Schenek’s termination.

{¶7} The FOP president testified on Mr. Schenek’s behalf. He testified that he confirmed with the North Olmstead Police Department that they had no intention of pursuing criminal charges against Mr. Schenek related to the forgery. The FOP president acknowledged that the Standards of Conduct apply to off-duty behavior, and that dishonest conduct harms the reputation of the police department.

{¶8} Mr. Schenek testified on his own behalf. Mr. Schenek did not dispute that he violated the Standards of Conduct and the Law Enforcement Code of Ethics by forging the certificate. Instead, he expressed his remorse and asked for leniency. Mr. Schenek also did not dispute that he had a prior disciplinary history with the City stemming from an incident that occurred in 2020, which resulted in the City suspending Mr. Schenek for gross misconduct. That incident involved Mr. Schenek sitting in one area of town for an extended period of time with other police officers while on duty. Mr. Schenek’s superior ordered him not to do that again, but Mr. Schenek repeated that conduct with another officer a few weeks later.

{¶9} After the hearing, the arbitrator issued his award, concluding that: (1) Mr. Schenek engaged in serious misconduct that violated the Standards of Conduct, the Law Enforcement Code of Ethics, and the Oath of Office for police officers; and (2) given the mitigating factors and circumstances present, the City's termination of Mr. Schenek was too severe of a penalty.

{¶10} Regarding the mitigating factors and circumstances, the arbitrator found that: (1) Mr. Schenek was a dedicated police officer; (2) the forgery was an off-duty, isolated incident that was unrelated to Mr. Schenek's employment with the City and not likely to be repeated; (3) the incident would not preclude Mr. Schenek from continuing to perform his duties as a police officer for the City; (4) Mr. Schenek's prior disciplinary history was unrelated to the underlying incident; and (5) Mr. Schenek "voluntarily disclosed the incident to [the City] and notified [his superior] that he had acted improperly" and expressed remorse. Elsewhere in his award, the arbitrator noted that the FOP president testified that the City of North Olmstead had no interest in pursuing criminal charges against Mr. Schenek for his actions. The arbitrator ultimately concluded that Mr. Schenek's conduct did not amount to just cause to warrant his termination. The arbitrator then concluded that the City should immediately reinstate Mr. Schenek to his position as a police officer, but that the City was not required to pay Mr. Schenek back wages.

{¶11} The City filed a complaint with the Lorain County Court of Common Pleas, requesting that the trial court vacate the arbitrator's award. The FOP then filed an application for the trial court to confirm the arbitrator's award. The trial court vacated the arbitrator's award for two independent reasons, which this Court will address in turn.

{¶12} First, the trial court concluded that the arbitrator's award violated public policy because a well-defined, dominant public policy exists in Ohio to terminate police officers who commit a criminal act of dishonesty. The trial court relied upon R.C. 737.11 (requiring police

officers to obey all criminal laws), R.C. 2913.31(A)(1)-(3) (criminalizing forgery), and case law to support its conclusion in this regard.

{¶13} Second, the trial court concluded that R.C. 2711.10(D) provided an independent basis for vacating the arbitrator's award because the arbitrator in this case exceeded his authority. In support of this conclusion, the trial court determined that the arbitrator's award did not draw its essence from the CBA because the arbitrator used his own conception and definition of "just cause" instead of the statutory definition under R.C. 124.34 provided for in Section 11.5 of the CBA. The trial court noted that the arbitrator did not mention let alone analyze R.C. 124.34 or Section 11.5 of the CBA in his award. The trial court then noted that several bases existed within R.C. 124.34(A) that justified the City's termination of Mr. Schenek. For example, the trial court indicated that the forgery amounted to dishonest conduct and a failure of good behavior, which are bases for termination under R.C. 124.34. The trial court, therefore, concluded that the arbitrator violated the limits of his authority as set forth in Section 9.7 the CBA.

{¶14} The trial court also determined that the arbitrator's conclusory statements regarding the nature of Mr. Schenek's misconduct gave the award an appearance of arbitrariness. To that end, the trial court addressed five specific findings from the arbitrator. In doing so, the trial court noted that it was highlighting these findings not to indicate its disagreement with the findings, but to demonstrate their lack of connection to R.C. 124.34 and the text of the CBA. This Court will address the trial court's analysis of the arbitrator's findings in turn.

{¶15} First, the trial court addressed the arbitrator's finding that Mr. Schenek's conduct was an isolated incident that was not likely to be repeated. The trial court noted that this incident was only "isolated" in the sense that it was the only misconduct that happened to be at issue in Mr. Schenek's termination. The trial court then noted that honesty is a character trait, and that "nothing

about [Mr.] Schenek's forgery and dishonest[y] permits tossing it off as 'not likely to be repeated.'" The trial court also noted that nothing in the CBA indicates that repetition of conduct is a necessary or relevant factor in just-cause determination. To the contrary, it noted, under R.C. 124.34 (cited in Section 11.5 in the CBA), dishonesty and insubordination are both grounds for termination.

{¶16} Second, the trial court addressed the arbitrator's finding that Mr. Schenek's prior disciplinary history was unrelated to the forgery. The trial court noted that nothing in the CBA made relation or similarity between disciplinary events a factor in just-cause determinations. The trial court noted that, to the contrary, the CBA provided that the City should apply discipline in a corrective and progressive manner, except for instances of gross misconduct. Thus, the trial court concluded that Mr. Schenek's prior misconduct was, in fact, relevant.

{¶17} Third, the trial court addressed the arbitrator's finding that Mr. Schenek's conduct would not impact his ability to carry out his duties as a police officer with the City. The trial court noted that this conclusion ignored the City's obligation to disclose Mr. Schenek's dishonesty to the prosecutor, and the prosecutor's correlating obligation to disclose it to criminal defendants should Mr. Schenek be called as a witness in a criminal case. The trial court also determined that the arbitrator's finding in this regard contradicted the Law Enforcement Code of Ethics and the Standards of Conduct. Additionally, the trial court determined that the arbitrator's finding "flies in the face" of Ohio Supreme Court precedent, stating that "[l]aw 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." *Jones v. Franklin Cty. Sheriff*, 52 Ohio St.3d 40, 43 (1990).

{¶18} Fourth, the trial court addressed the arbitrator's finding that Mr. Schenek voluntarily disclosed the incident to the City. The trial court noted that the City of North Olmstead discovered the forgery, and that it informed Mr. Schenek that it would be contacting the City regarding the incident. The trial court, therefore, determined that Mr. Schenek's disclosure to his supervisor before the City of North Olmstead contacted the City "cannot fairly be termed 'voluntary[.]'"

{¶19} Fifth, the trial court addressed the arbitrator's finding that Mr. Schenek's dishonest behavior occurred while he was off-duty and was unrelated to his employment with the City. The trial court noted that Mr. Schenek's conduct reflected poorly on the City and brought discredit to it. The trial court also noted that the City of North Olmstead deemed it related considering the fact that the City of North Olmstead reported Mr. Schenek's forgery to the City.

{¶20} The trial court ultimately vacated the arbitrator's award, denied the FOP's application to confirm the arbitrator's award, and reinstated Mr. Schenek's termination. The FOP now appeals, raising two assignments of error for this Court's review. Because it is dispositive, this Court will address the FOP's second assignment of error first.

II.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DENIED APPELLANT, THE FRATERNAL ORDER OF POLICE, LORAIN LODGE NO. 3'S APPLICATION TO CONFIRM THE ARBITRATION AWARD.

{¶21} In its second assignment of error, the FOP argues that the trial court erred by not confirming the arbitration award. For the following reasons, this Court disagrees.

{¶22} Ohio's public policy strongly favors arbitration, as expressed in the Ohio Arbitration Act codified in R.C. 2711. *Taylor v. Ernst & Young, L.L.P.*, 130 Ohio St.3d 411, 2011-

Ohio-5262, ¶ 18. Consistent with this policy, R.C. 2711 limits the jurisdiction of trial courts once arbitration has been conducted. *See State ex rel. R.W. Sidley, Inc. v. Crawford*, 100 Ohio St.3d 113, 2003-Ohio-5101, ¶ 22. "At any time within one year after an award in an arbitration proceeding is made, any party to the arbitration may apply to the court of common pleas for an order confirming the award." R.C. 2711.09. Additionally, "[a]fter an award in an arbitration proceeding is made, any party to the arbitration may file a motion in the court of common pleas for an order vacating, modifying, or correcting the award as prescribed in sections 2711.10 and 2711.11 of the Revised Code." R.C. 2711.13. In applying R.C. 2711, Ohio courts defer to arbitration awards and presume their validity. *Lauro v. Twinsburg*, 9th Dist. Summit No. 23711, 2007-Ohio-6613, ¶ 5.

{¶23} R.C. 2711.10(D) provides that an award may be vacated if "[t]he arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the matter submitted to them was not made." Reviewing courts are thus limited in their role to a determination of whether an award draws its essence from the relevant contract or whether the award is unlawful, arbitrary, or capricious. *Assn. of Cleveland Fire Fighters, Local 93 of the Internatl. Assn. of Fire Fighters v. Cleveland*, 99 Ohio St.3d 476, 2003-Ohio-4278, ¶ 13, citing *Bd. of Edn. of the Findlay City School Dist. v. Findlay Edn. Assn.*, 49 Ohio St.3d 129 (1990), paragraph two of the syllabus. If there is a good-faith argument that an arbitrator's award is authorized by the contract that provides the arbitrator's authority, the award is within the arbitrator's power. *Lorain v. IAFF Local 267*, 9th Dist. Lorain No. 14CA010717, 2016-Ohio-978, ¶ 7.

{¶24} "An arbitrator exceeds his power when an award fails to draw its essence from the agreement of the parties." *Lowe v. Oster Homes*, 9th Dist. Lorain No. 05CA008825, 2006-Ohio-

4927, ¶ 7. "This occurs when there is an absence of 'a rational nexus between the agreement and the award,' or when the award is 'arbitrary, capricious, or unlawful.'" *Id.*, quoting *Gingrich v. Wooster*, 9th Dist. Wayne No. 00CA0032, 2001 WL 22256, *5 (Jan. 10, 2001). An award thus departs from the essence of a contract when: (1) the award conflicts with the express terms of the agreement; or (2) the award is without rational support by the agreement or cannot be rationally derived from the terms of the agreement. *IAFF Local 267* at ¶ 7. "Generally, if the arbitrator's award is based on the language and requirements of the agreement, the arbitrator has not exceeded his powers." *Stow Firefighters, IAFF Local 16622 v. Stow*, 193 Ohio App.3d 148, 2011-Ohio-1559, ¶ 26 (9th Dist.), quoting *Piqua v. Fraternal Order of Police*, 185 Ohio App.3d 496, 2009-Ohio-6591, ¶ 22 (2d Dist.).

{¶25} "Reviewing courts cannot review claims of factual or legal error with respect to the exercise of an arbitrator's powers." *IAFF Local 267* at ¶ 8, citing *Martins Ferry City School Dist. Bd. of Edn. v. Ohio Assn. of Pub. School Emps.*, 7th Dist. Belmont No. 12 BE 15, 2013-Ohio-2954, ¶ 18. As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed error does not suffice to overturn the decision. *Id.* citing *Summit Cty. Bd. of Mental Retardation and Dev. Disabilities v. Am. Fedn. of State, Cty. and Mun. Emps.*, 39 Ohio App.3d 175, 176 (9th Dist.1988); *see also Lowe* at ¶ 7, quoting *Automated Tracking Sys., Inc. v. Great Am. Ins. Co.*, 130 Ohio App.3d 238, 244 (9th Dist.1998) (stating that "[m]ere error in the interpretation or application of the law will not suffice to vacate an arbitration award"; the decision must "'fly in the face of clearly established legal precedent' to support a vacation of the award."). "Once it is determined that the arbitrator's award draws its essence from the [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." *Id.*, quoting *Bd. of Edn. of the Findlay City School Dist.* at paragraph two of the syllabus.

{¶26} As noted, the FOP argues that the trial court erred by holding that–in addition to violating public policy–an independent basis existed for vacating the award because the arbitrator exceeded his authority under R.C. 2711.10. The FOP argues that the arbitrator applied the CBA and correctly determined that the City lacked just cause to terminate Mr. Schenek's employment. The FOP argues that R.C. 124.34 does not define just cause, nor does it mandate any particular penalty. The FOP also argues that the arbitrator acted within his discretion in fashioning a penalty, and that his award was consistent with the terms of the CBA.

{¶27} In response, the City argues that the trial court correctly determined that the arbitrator exceeded his authority. The City argues that the arbitrator's award did not draw its essence from the CBA because the award was contrary to, inconsistent with, and not rationally supported by the CBA, including the CBA's definition (through its citation to R.C. 124.34) of "just cause." The City also argues that the FOP's repeated emphasis on the fact that Mr. Schenek committed the forgery while off-duty is misplaced because the Standards of Conduct and Law Enforcement Code of ethics apply to off-duty conduct. The City further argues that the trial court did not err by vacating the arbitrator's award because the trial court correctly concluded that the arbitrator erroneously relied upon mitigating factors–and not the terms of the CBA–to justify his award.

{¶28} Having summarized the parties' arguments on appeal, this Court now turns to the relevant portions of the CBA, as well as the applicable law. Section 9.7 of the CBA provides, in relevant part:

> The arbitrator shall limit his decisions strictly to the interpretation, application, or enforcement of the [CBA] and shall be without power or authority to make any decision:
>
> (1) Contrary to or inconsistent with or modifying or varying in any way the terms of [the CBA] or of applicable laws * * *.
>
> (2) Limiting or interfering in any way the powers, duties or responsibilities of [the City] under [the CBA] or applicable law * * *.
>
> * * *
>
> (4) Contrary to, inconsistent with, changing, altering, limiting or modifying any practice, policy, rules or regulations presently or in the future established by the [City] so long as such practice, policy or regulations do not conflict with, are not covered by, or are not superseded by [the CBA].

Section 11.5 of the CBA provides that the Safety Service Director has the sole authority to "[d]ischarge an employee, for just cause as defined in [R.C.] 124.34." R.C. 124.34(A) provides, in relevant part, that an officer shall not be terminated except for:

> incompetency, inefficiency, unsatisfactory performance, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of this chapter or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office * * *.

{¶29} Applying the express terms of the CBA, there can be no dispute that just cause existed under R.C. 124.34(A) to terminate Mr. Schenek's employment because he committed an act of dishonesty. *See Brink v. Wadsworth*, 9th Dist. Medina No. 1728, 1988 WL 134279, *2 (Dec. 14, 1988) ("Although not required, R.C. 124.34 permits the city to remove an employee for dishonesty."). This Court's review of the record indicates that the trial court did not err when it determined that the arbitrator in this case exceeded his authority under the CBA because his award did not draw its essence from the CBA. *See Lowe*, 2006-Ohio-4927, at ¶ 7. Instead of relying upon the express terms of the CBA, the arbitrator went to great lengths to discuss mitigating factors,

some of which directly contradicted the Law Enforcement Code of Ethics and Standards of Conduct. For example, the arbitrator relied upon the fact that Mr. Schenek committed the forgery while off duty. There was no dispute, however, that the Law Enforcement Code of Ethics and the Standards of Conduct apply to off-duty conduct. Additionally, as the trial court pointed out, the arbitrator relied upon the fact that Mr. Schenek "voluntarily" disclosed the forgery to the City before the City of North Olmstead did. Yet Mr. Schenek only disclosed the forgery to the City after the City of North Olmstead told Mr. Schenek that it would be disclosing the incident to the City. Like the trial court, this Court fails to see how Mr. Schenek's "voluntary" disclosure should serve as a mitigating factor in this case.

{¶30} Importantly, as the City points out, the arbitrator failed to mention let alone discuss Section 11.5 of the CBA or just cause under R.C. 124.34 in its award. Under Section 9.7 of the CBA, the arbitrator was required to limit his award strictly to the interpretation, application, or enforcement of the CBA, and he had no authority to render an award that was contrary to or inconsistent with the terms of the CBA. Yet the arbitrator failed to analyze the relevant portions of the CBA, and instead relied upon an erroneous application of mitigating factors to justify his award. Reviewing the arbitrator's award as a whole, this Court fails to see a rational nexus between the CBA and the award. *See Lowe*, 2006-Ohio-4927, at ¶ 7. Moreover, as the trial court concluded, the arbitrator's conclusory statements regarding the nature of Mr. Schenek's misconduct gave the award an appearance of arbitrariness. *See Assn. of Cleveland Fire Fighters,* 2003-Ohio-4278, at ¶ 13. For all of these reasons, this Court concludes that the trial court did not err by determining that the arbitrator exceeded his authority, warranting the vacation of his award. The FOP's second assignment of error is overruled.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED AS A MATTER OF LAW IN VACATING THE ARBITRATION AWARD BY FINDING THAT THE AWARD VIOLATED PUBLIC POLICY.

{¶31} In its first assignment of error, the FOP argues that the trial court erred by vacating the arbitrator's award on the basis that it violated public policy. Because this Court's resolution of the FOP's second assignment of error is an independent basis for affirming the trial court's decision, the FOP's second assignment of error is moot and is overruled on that basis. *See* App.R. 12(A)(1)(c).

III.

{¶32} The FOP's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JILL FLAGG LANZINGER
FOR THE COURT

CARR, P. J.
STEVENSON, J.
CONCUR.

APPEARANCES:

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