

BOROUGH OF MONTOURSVILLE,

Plaintiff

vs.

MONTOURSVILLE POLICE
BARGAINING UNIT,

Defendant

: IN THE COURT OF COMMON PLEAS OF
: LYCOMING COUNTY, PENNSYLVANIA

: NO. 07-01529

: PETITION FOR REVIEW OF GRIEVANCE
: ARBITRATOR’S AWARD

Date: September 26, 2007

OPINION and ORDER

Before the court for determination is the Petition for Review of Grievance Arbitrator’s Award of the Borough of Montoursville filed August 20, 2007. The motion will be denied.

I. BACKGROUND

A. Procedural History/Facts Asserted

The parties in this matter are the Montoursville Police Bargaining Unit (hereafter “Union”) and the Borough of Montoursville (hereafter “Borough”). The Borough is a municipal corporation and a public employer. The Borough employs individuals as police officers for the Borough. These police officers are represented by the Montoursville Police Bargaining Unit with the exception of the Chief of Police. The terms and conditions of employment for the police officers are covered by the collective bargaining agreements between the Borough and the Union.

The Union and the Borough were parties to a collective bargaining agreement from January 2000 through December 31, 2002 (“2000 CBA”). This agreement provided for the titles and pay classification for the officers as well as the salary rates. The parties then attempted to negotiate a collective bargaining agreement for the period of January 1, 2003 through December 1, 2007 (“2003 CBA”). This agreement was signed by the Borough Council President, Borough Council Secretary/Treasurer, and the Mayor. The agreement was not signed, however, by Union representatives. To reach an agreement, the parties entered into and signed a Memorandum of Understanding, (“MOU”), dated February 26, 2003.

In March of 2003, the Borough determined that there was an error in the calculation of some of the officers’ pay rates, and attempted to adjust those pay rates. The Union disagreed with the Borough’s findings of error and subsequent attempt to adjust the pay rates and as a result brought the issue up for arbitration. A hearing on the issue was held on November 21, 2003. On February 20, 2004, the arbitrator directed the Borough to reinstate the wage rates for the three grievants in that matter “as negotiated in the February 26, 2003 MOU.” (Arbitrator’s Award, pg. 2). This Award is referred to by the parties as the “*Skonier Award*.”

In September 2003, the parties again went to arbitration over an issue regarding the post-retirement medical benefits. The arbitration award following that hearing states that all disputes between the parties except the post-retirement health insurance were resolved in the *Skonier Award* of February 26, 2003.

The grievant to the patrolman salary rate who initiated the arbitration at issue in this case was initially employed as a Patrolman by the Borough on August 18, 2001. He progressed through the various ranks of Patrolman, reaching the status of Patrolman First Class on August 18, 2006. In June of 2006, the Grievant informed the Chief of Police that he was applying for a

mortgage and therefore needed to know what his rate of pay would be when he reached five years of employment in August 18, 2006. The Chief of Police provided the Grievant with a written statement, dated June 27, 2006, that the Grievant would begin receiving \$19.61 per hour or \$40, 792.97 per year effective August 18, 2006. On August 25, 2006, the Chief of Police submitted a classification raise for the Grievant acting under the belief that classification raises are automatic and, in this case, based on the Grievant completing five years of service. As submitted by the Chief, the increase was \$3.21 per hour, bringing the Grievant from \$16.40 per hour to \$19.61 per hour.

The Borough's Secretary/Treasurer reviewed the requested increase and determined that it was incorrect. It was his opinion that the correct increase should have been 35 cents per hour, bringing the Grievant from \$16.40 per hour to \$16.75 per hour. The Secretary/Treasurer based his conclusion on contract language which states that such increases should be 2.5 % of the base pay of the Patrolman Third Class. The Secretary/Treasurer then adjusted the Grievant's pay rate according to his calculations notifying the Borough Council, Mayor and Solicitor of his actions.

On August 31, 2006, the Grievant received his paycheck and made the discovery that he was not being paid at the rate of \$19.61 per hour pursuant to the Chief's estimation. On September 1, 2006, he filed a grievance on this matter. The parties were unable to resolve the difference and the matter was taken to arbitration.

Arbitrator Thomas DiLauro, ("Arbitrator"), provided through the American Arbitration Association, ("AAA"), heard the case on April 27, 2007. At the hearing the parties provided exhibits, testimony and argument in support of their respective positions. The parties then submitted their post-hearing briefs to AAA and the record was subsequently closed. The parties submitted their post-hearing briefs to AAA to be exchanged and redistributed to each opposing

party. Upon receiving a copy of the Union's post-hearing brief, the Borough alleged that the Union's brief contains six factual assertions that were not testified during the hearing. The Borough subsequently filed a motion with AAA on June 20, 2007 to reopen the record.

On June 22, 2007 the Arbitrator issued an award in the case and forwarded the Award to AAA for distribution to the parties. On June 25, 2007, AAA received the Award from the Arbitrator who then issued it to the parties. On July 11, 2007 the Union filed an objection to the Borough's motion to reopen the record. No official action has been taken on the part of AAA to reopen the record.

On July 20, 2007, the Borough filed a Petition for Review of the Award. An answer was filed by the Union on August 31, 2007. The case was argued before this court on September 11, 2007.

C. Borough's Argument for Review of the Award

The Borough argues that the Award issued by the Arbitrator should be disregarded because in forming his determination the Arbitrator exceeded his scope of authority. The Borough alleges that the Arbitrator's Award conflicts with the express terms of the collective bargaining agreement. Specifically the Borough alleges that the contract terms clearly and unambiguously provide that officers reaching Patrolman First Class status receive a pay increase by an amount equal to 2.5% of the Patrolman Third Class salary as provided in Article XIV, Section A of the 2000 and 2003 CBA's and the MOU. According to the Borough, this pay rate has been in effect and unaltered since its adoption within the 2000 CBA. The Borough argues that the Arbitrator impermissibly altered the terms of the bargaining agreement by finding that all police officers within a particular classification receive the same rate of pay, instead of the 2.5% increase described above. Moreover, the Borough states that such an alteration of the

terms violates the parole evidence rule by looking outside of the four corners of a document to reform the contract when the terms are clear and unambiguous.

In reviewing the Arbitrator's Award, the Borough contends that this Court should employ a plenary standard of review and as such the Arbitrator's decision should be afforded no deference. (Plaintiff's Brief, pg. 12-16).

The Borough also argues that the Arbitrator's Award should be vacated due to several irregularities in the arbitration process that deprived the Borough of its fundamental rights to due process. First, the Borough claims that because the Union incorporated factual assertions into its post-hearing brief that were not first presented at the hearing, the Borough was not afforded an opportunity to respond with countervailing evidence and to cross examine witnesses. It is this alleged irregularity in the presentation of facts that deprived the Borough of a full and fair hearing before the Arbitrator. The Borough surmises that the assertions made in the Union's post-hearing brief caused the Arbitrator to base his Award on improper evidence or in the alternative impermissibly influenced the Arbitrator's decision.

Secondly, the Borough argues that AAA failed to properly process the Borough's Motion to Reopen the Record for the purpose of striking portions of the Union's post-hearing brief, and this inaction by AAA constituted an irregularity. The Borough contends that issuing the Award without first responding or adhering to the Borough's Motion to Reopen the Record resulted in an Award based on improper statements made in the Union's post-hearing brief.

D. Union's Argument in Opposition to Review of the Award

The Union claims that the Arbitrator did not exceed his authority in issuing the Award. The Union alleges that the pay raise terms of the contractual agreement are neither clear nor unambiguous. Instead, the Union asserts that the terms and conditions for the Grievant's pay

rates were confused by the adoption of the MOU and were then altered by the subsequent *Skonier Award*. The Union contends that by applying the disputed facts presented at the hearing and utilizing contract interpretation principles, the Arbitrator was within his authority to resolve the ambiguities in the CBA's, MOU and the *Skonier Award* to arrive at the salary rate provided in the Award. Therefore the Arbitrator's Award finding that the MOU called for a Patrolman First Class to be paid at a higher rate was not an act outside of his authority, but an order for the Borough to comply with the contract as it had already been interpreted per the *Skonier Award*.

The Union also contends that because the Arbitrator's award was issued as a result of his interpretation of ambiguous terms and disputed facts, the extreme standard of deference applicable to Act 111 awards applies. Under this standard the Arbitrator's determinations cannot be disturbed for inquiries into correctness of interpretation or reasonableness of award.

The Union further alleges that there were no irregularities in the arbitration process and that it did not insert facts not of record into its post-hearing brief. The Union argues that because there is no record of the testimony introduced from the hearing, the Borough's argument that the Union presented factual assertions not of record cannot be confirmed. The Union reasons that the Borough waived any contention as to an evidentiary deficiency in the record because the burden was on the Borough to ensure a record was maintained and filed.

The Union states that there was no irregularity by the Arbitrator or AAA in refusing to reopen the record in response to the Borough's motion because AAA's Voluntary Rules do not place an affirmative obligation on either one to do so.

Finally, the Union argues that the statements contained in its post-hearing brief were not evidence for the Arbitrator to base his decision upon, but were the Union's argumentative characterization of evidence actually of record. The Union states that the Arbitrator is to base

his Award on the evidence of record, and without a record in this case, it cannot be presumed by the Court that he based his Award on anything outside of the evidence presented at the hearing.

II. ISSUES

There are three main issues in this case. They are as follows:

- 1) Whether the standard of review of the Arbitrator's Award precludes the Court from disturbing his interpretation of the collective bargaining agreement terms and conditions?
- 2) Whether the Arbitrator exceeded his authority in issuing an award that directed the Borough to pay the Grievant at the prevailing Patrolman First Class rate?
- 3) Whether there were irregularities in the Arbitration proceeding necessitating that the Award be vacated?

III. DISCUSSION

A. Scope of Review

The collective bargaining relationship between the Borough and the Union is governed by the statutes referred to as Act 111. (43 P.S. §217.1 et. seq.). "The Legislature designed Act 111 arbitration to be swift and final; it allowed judicial intervention in the Act 111 context in only the rarest circumstances." *Pennsylvania State Police v. Pennsylvania State Trooper's Assoc. (Betancourt)*, 656 A.2d 83, 89 (Pa. 1995). The scope of review in an appeal of an Act 111 grievance arbitration award is limited to that of narrow certiorari. *Town of McCandless v. McCandless Police Officers Association*, 901 A.2d 991, 996 (Pa. 2006). The scope of review permits inquiry into the following four areas: (1) the jurisdiction of the arbitrator; (2) the regularity of the proceedings; (3) whether the arbitrator exceeded his powers; and (4) whether there has been a deprivation of constitutional rights. *Id.* at 995.

1.) Standard of Review

The Pennsylvania Supreme Court has determined that a dual standard applies regarding the standard of review depending on the nature of the issue in the case. *Pennsylvania State Police v. Pennsylvania State Troopers Assoc.*, 840 A.2d 1059, 1063 (2004).

Where resolution of the issue turns on a pure question of law, or the application of law to undisputed facts, our review is plenary. However, where it depends upon fact-finding or upon interpretation of the collective bargaining agreement, we apply the extreme standard of deference applicable to Act 111 awards; that is, we are bound by the arbitrator's determination of these matters even though we may find them to be incorrect.

Id. In *Pennsylvania State Police*, the court stated that “[i]n this case it is clear that the arbitrator's determination of arbitrability was based upon both contract interpretation and factual findings, to which this court is bound to defer.” *Id.* In *City of Philadelphia v. FOP, Lodge No. 5*, 768 A.2d 291 (2001), the Court applied a plenary review to the legal question of jurisdiction. *Id.* at 294. The Court in that case, however, deferred to the arbitrator's determination on the issue of how she interpreted the terms of the CBA. *Id.*

In this case, the standard of review should be one of extreme deference to the Arbitrator's Award because the Award was based on the Arbitrator's findings of fact and interpretation of the contract terms and conditions. It is evident that there were disputed facts and differing interpretations of the CBA's before the Arbitrator because both parties disagree in their briefs as to which documents control the wage rates and whether certain terms in previous CBA's had been modified by the MOU and *Skonier Award*. For example, the Borough contends that the 2.5% of the Patrolman Third Class as a wage increase for a change in classification was clearly unaltered by the MOU and was placed directly into the 2003 CBA making it the controlling condition in the current agreement. Conversely, the Union claims that there was some ambiguity after the adoption of the MOU as to the method for determining wage rates

from the period of January 1, 2003 on. The Union points to the *Skonier Award* as proof of this ambiguity as it was an effort to interpret the state of wage rates after the adoption of the MOU.

The fact the two parties disagreed as to whether “mistakes” had been made by Borough representatives regarding the application and calculation of Patrolman First Class wage rates is evidence that there were indeed factual issues before the Arbitrator. (Award, pg. 20-23).

Furthermore, it is evident that Arbitrator himself did not view the case as one of pure law and undisputed facts when he stated the general need to “carefully consider the testimony presented to determine the facts” and that “[d]iffering perceptions of the same incident are often presented.” (Award, pg. 20).

The Borough contends that a singular issue of law was put forth to the Arbitrator for his decision. That issue was:

[w]hether the Borough properly granted the Grievant a raise upon reaching Patrolman First Class status by increasing his wages by an amount equal to 2.5% of the Patrolman Third Class salary which is provided in Article XIV, Section A, of the collective bargaining agreement? If not, what should be the remedy?

(Award, pg. 4). The Borough argues that this is a pure question of law applied to undisputed facts as it only required the Arbitrator to render an award in accordance with the terms and conditions of the contract documents. As can be seen by the parties’ conflicting factual assertions, however, it is apparent the Arbitrator was required to interpret the terms of the contract documents, consider the parties’ disputed facts, and decide which documents and terms controlled the wage rates. Therefore, in accordance with the rule in *Pennsylvania State Police*, because this case presents a scenario where the Arbitrator was required to make factual findings and interpret collective bargaining terms, the standard of review of extreme deference to the Arbitrator’s Award applies.

2.) Whether the Arbitrator Exceeded his Authority

The Arbitrator did not exceed the scope of his authority in the issuance of his Award because: (a) the interpretation of the wage rate increase contract provisions was properly within the powers of the Arbitrator to determine under case law and Article XV, Section E of both the 2000 and 2003 CBA; and (b) the limited standard of review does not allow for the Arbitrator's interpretation to be disturbed.

The "definition of what constitutes 'an excess of an arbitrator's powers' [is] far from expansive. Essentially, if the acts the arbitrator mandates the employer to perform are legal and relate to the terms and conditions of employment, then the arbitrator did not exceed her authority." *City of Philadelphia*, 768 A.2d at 296-97. (quoting *Pennsylvania State Police v. Pennsylvania State Trooper's Association* 741 A.2d 1248, 1251 (Pa. 1999)) (internal quotations omitted). "Terms and conditions of employment" include compensation, hours, working conditions, retirement, pensions and other benefits." Section 1 of Act 111, 43 P.S. 217.1; *City of Philadelphia*, 768 A.2d at 297. "[t]he arbitrator's authority is restricted to the powers the parties have granted them in the arbitration agreement..." *Boulevard Assoc. v. Seltzer Partnership*, 664 A.2d 983, 987 (Pa. Super 1995). "The arbitrators are the final judges of both law and fact, and an arbitration award is not subject to reversal for mistake of either." *Gargano v. Terminix International Co.*, 784 A.2d 188, 193 (Pa. Super. 2001) See also *City of Philadelphia*, 768 A.2d at 300-301 (Court refused to disturb an arbitrator's award upon Plaintiff's argument that the arbitrator misinterpreted a clause of the CBA and misapplied decisional law); *Richmond v. Prudential Property & Casualty Insurance*, 856 A.2d 1260, 1264 (Pa. Super. 2004) (reiterating that a common law arbitration award is not reviewable for an error of law).

Pursuant to the above mentioned cases *Gargano, Richmond, and City of Philadelphia*, this Court is precluded from disturbing the Arbitrator's findings of fact and conclusions of law because: (1) the Arbitrator's award did not mandate that the City carry out an illegal act; (2) as an issue of compensation, the Award's pay rate increases for Patrolman First Class classification changes concerns the terms and conditions of employment as defined in Act 111; and (3) it is apparent from the Arbitrator's Award as well as the exhibits filed by both parties that there were issues of disputed fact and law in the form of ambiguous contract terms before the Arbitrator.

The Borough argues that the terms of the contractual provisions are clear and unambiguous and no issues of law or fact were before the Arbitrator. Thus for the Arbitrator to formulate an Award different from the terms contained in the 2000 CBA which it alleges have remained static and steadily enforced up to the present, the Arbitrator exceeded his authority. In its brief in support of its Petition for Review of Grievance Arbitration Award, the Borough implies that the Arbitrator himself believed the terms to be clear and unambiguous by evidence of the language in his Award on page 19. (P.B., pg. 15-16). After review of the cited page from the Arbitrator's Award, it is evident that the Arbitrator is not making an assertion one way or another that the contract provisions are clear, he is simply restating the basic rules for contract interpretation in a neutral fashion. (Award, pg. 19-20).

Other language within the Award, however, supports a finding that the Arbitrator found the contract provisions to be neither clear nor unambiguous. (Award, pg. 20-24). Within his Award the Arbitrator examined both parties' positions and factual allegations and ultimately found the facts supporting the Union's position to be the proper interpretation of the contract. In finding the contractual provisions supported the Union's interpretation of the wage rate rather than the Borough's, the Arbitrator based his award on two crucial findings of fact: (1) the chart

included with the MOU reflected that patrolman in the same classification were earning the same rate at the time the MOU was entered despite length of service; and (2) the fact that the Chief submitted a budget that reflected a substantial increase for the Grievant which would make him equal to other Patrolman First Class beginning in August of 2006.

The Arbitrator acknowledges in his Award the Borough's claim that the chart was miscalculated. The Arbitrator dismissed this argument, however, in favor of the Union's interpretation because the miscalculation issue had been arbitrated previously in the *Skonier Award* and resolved in favor of the grievant in that case. The Arbitrator also acknowledged the Borough's claim that the Chief made a mistake in his calculations and preparation of the Grievant's wage rate letter. The fact the Arbitrator discussed this claim made by the Borough proves that he considered the facts but decided in favor of the Union's interpretation that the Chief properly calculated a wage rate based on the MOU and *Skonier Award*.

Finally, the Arbitrator did not exceed the scope of his authority as enumerated in either the 2000 or 2003 CBA, Article XV, Section E which states: "[t]he arbitrator selected shall only have the authority **to interpret** and apply the provisions of this agreement. It shall have no authority to add to, detract from or alter its terms." (emphasis added). According to both CBA's, the Arbitrator has the authority to interpret the terms of the agreement. The process of interpretation is exactly what the Arbitrator engaged in when he evaluated the conflicting evidence produced by both parties in light of the terms of the various contract documents. Therefore, under both CBA's the Arbitrator did not exceed the power granted to him by the parties of the arbitration in interpreting the provisions of the agreement.

The foregoing discussion of the parties' claims and factual allegations establishes that the Arbitrator made findings of fact and subsequently applied these facts to the terms of the contract

to properly interpret them within his powers under Article XV, Section E of the CBA's. The discussion set forth in the Award supports the arbitrator's conclusion that the terms of the contract provision were not clear and unambiguous but were in need of interpretation. As the Arbitrator properly made determinations of fact and interpreted the contract provisions accordingly within his powers under Article XV, Section E of the CBA's, the deferential standard of review under Article 111 precludes this Court from disturbing his Award.

3.) Irregularities in the Arbitration Proceedings

There were no irregularities in the Arbitration process which would mandate that the Award be vacated because the Borough failed to carry its burden of proof. The Borough failed to prove that: (a) the Borough was deprived of its due process right to a full and fair hearing; and (b) that the Arbitrator impermissibly based his Award on facts not presented at the hearing. Pursuant to the AAA Voluntary Rules it was also not an irregularity for the Arbitrator to issue an award without complying to the Borough's Motion to Reopen the Record.

An appellant "bears the burden to establish both the underlying irregularity and resulting inequity by 'clear, precise and indubitable evidence.'" *Gargano*, 784 A.2d at 193. "In this context, irregularity refers to the process employed in reaching the result of the arbitration, not the result itself." *Id.* A cognizable irregularity may appear in the conduct of either the arbitrators or the parties. *McKenna v. Sosso*, 745 A.2d 1, 4 (Pa. Super. 1999). The Pennsylvania Supreme Court has stated that the phrase "other irregularity" in the process employed can mean "such bad faith, ignorance of the law and indifference to the justice of the result as would cause a court to vacate an arbitration award." *Allstate Insurance Company v. Fioravanti*, 299 A.2d 585, 589 (Pa. 1973). In the course of reviewing an interest arbitration award for such irregularities, the trial court is "limited only to a review of the record presented to

it.” *W. Pottsgrove Twp. v. W. Pottsgrove Police Officers’ Ass’n*, 791 A.2d 452, 458 (Pa. Commw. Ct. 2002).

In this case, the Borough as the appellant of the Award carries the burden of establishing by clear, precise and indubitable evidence that there were irregularities in the arbitration proceeding that deprived the Borough of a full and fair hearing. The Borough alleges that the Union submitted six factual assertions to the Arbitrator in its post-hearing brief that were not first presented at the hearing. (P.B. pg. 8, Referred to as “The Contested Statements”). The Borough argues that because these factual assertions were raised for the first time by the Union in their post-hearing brief, the Borough was deprived of the opportunity to present counter evidence and cross examine the witnesses.

The Borough’s argument fails for want of record evidence. The trial court is confined to the contents of the record in making its determination as to whether there were irregularities in the proceeding. *W. Pottsgrove Twp.*, 791 A.2d at 458. In this case, there is no record of the hearing testimony for the court to consider and compare against the alleged irregularities. Therefore, whether or not the Union improperly submitted facts in its post-hearing brief that were not presented at trial cannot be confirmed. The only evidence of what may have been presented at the arbitration proceeding is what is reflected in the Arbitrator’s Award. Upon careful review of the Award, this court can find no evidence that the Arbitrator based his Award on the six Contested Statements.

The Borough also claims that the Arbitrator’s failure to respond to its Motion to Reopen the Record to strike the Contested Statements constitutes an irregularity in the proceeding. Yet the AAA “Voluntary Rule 34: Reopening of Hearing” places no absolute obligation on the Arbitrator to reopen the record. The rule provides:

The hearings may for good cause shown be reopened by the arbitrator at will or on the motion of either party at any time before the award is made but, if the reopening of the hearings would prevent the making of the award within the specific time agreed upon by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless both parties agree to extend the time. When no specific date is fixed in the contract, the arbitrator may reopen the hearings and shall have 30 days from the closing of the reopened hearings within which to make an award.¹

The use of the term “may” in the above rule indicates that the Arbitrator is not mandated under the AAA Voluntary Rule 34 to reopen the record. The term “may” applies to both instances were the record is able to be reopened: (1) by the Arbitrator’s own will; or (2) on the motion of either party before the award is made. The rule does not state that if the record is not reopened upon such a motion that an error has occurred. Therefore because the AAA Voluntary Rules do not absolutely command that a record be reopened upon a party’s motion, no irregularity is caused in the proceeding if the Arbitrator elects to refrain from reopening the record.

IV. CONCLUSION

The Borough’s petition seeking to vacate the Arbitrator’s Award must be denied.

¹ American Arbitration Association, Employment Arbitration and Mediation Rules; Amended and Effective September 1, 2007: <http://www.adr.org/sp.asp?id=28481>. The parties in their briefs refer to the AAA Voluntary Rule regarding reopening of the record as “Rule 32.” Upon review of the rules, this Court takes notice that they have since been amended and the applicable rule number has been changed to “Rule 34.” The language of the rule remains unchanged from that represented by the parties in their briefs and the amendment has no effect on the case.

ORDER

It is hereby ORDERED that the Borough's Petition for Review and Reversal of the Arbitrator's Award filed September, 2007 is DENIED. The Arbitrator's Award is upheld.

BY THE COURT:

William S. Kieser, Judge

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