IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CITY OF WILLIAMSPORT, Petitioner,	: CV-19-1812 :
vs.	: CIVIL ACTION – Law
FRATERNAL ORDER OF POLICE LODGE 29, Respondent.	: : *Petition to Vacate* : *Arbitration Award*

OPINION & ORDER

AND NOW, following argument held January 13, 2020 on the City of Williamsport's Petition to Vacate Arbitration Award, the Court hereby issues the following OPINION & ORDER.

Background

On or about December 14, 2018, the Fraternal Order of Police Lodge 29 ("FOP") filed a grievance contesting the City of Williamsport's ("City") method of calculating the Cost-of-Living Adjustment ("COLA") included for beneficiaries of the City's Police Pension Fund. The maximum COLA is included within a Collective Bargaining Agreement ("CBA") entered into by the parties in 1998. Article 22, Section 8 of the Agreement ("Section 8") provides:

> Pension will be subject to a cost-of-living adjustment based on increases in the CPI-W for the year prior to the request in question. Cost-of-living adjustments will be based on the CPI-W index for the prior year, October to October, if available, or the nearest available month, if not, subject to an annual cap of 3.5% and a lifetime cap of 35%. . . .[1]

Since the inception of the Agreement, the City has calculated the 35% lifetime cap by multiplying the starting pension benefit by 1.35, which results in an amount 35% greater than the starting pension benefit. In 2018, Fire Fighters Union, IAFF Local 736 ("Local 736") filed a grievance challenging identical language in its current labor contract. The City and Local 736 reached a Settlement Agreement on December 5,

[1] Petition to Vacate Arbitration Award (Ex. A at 2) (Nov. 14, 2019) (emphasis added) ("Petition").

2018, pursuant to which the parties agreed that the 35% lifetime cap is reached when the sum of the individually added annual COLA percentages equals 35%, which results in a greater maximum pension amount.[2] The FOP thereafter filed its grievance, asserting that the 35% lifetime cap contained in the CBA should be calculated in an identical manner. The City countered that the 1.35 maximum COLA computation method, which had been in effect without challenge for twenty (20) years, should be upheld as consistent with the plain language of the CBA. Alternately, the City argued that if the Arbitrator were to find Section 8 ambiguous as drafted, then the 1.35 computation method should be affirmed as consistent with "past practices."[3]

Following a grievance arbitration hearing held July 1, 2019, the Arbitrator issued a Decision and Award ("Award") on September 30, 2019. In this Award, the Arbitrator concluded that the pertinent language of Section 8 was not clear. However, he determined that the City's Settlement Agreement with Local 736 constituted a concession that the Local 736's interpretation, now advocated by the FOP, was correct. The Arbitrator therefore sustained the FOP's grievance and directed the City to begin calculating the COLA pension benefits in the manner advocated by the FOP.

The City consequently filed its Petition to Vacate Arbitration Award ("Petition") on October 30, 2019. The City argues in its Petition that the Arbitrator's reliance on the Settlement Agreement in determining the Award violates the Pennsylvania Rules of Evidence Rule 408 ("Rule 408")[4] and is contrary to long-established public policy favoring settlement of litigated disputes. The Court scheduled hearing on the Petition for January 13, 2020, and required that both parties file briefs. In its Brief of Respondent, and as further expounded at argument, the FOP asserts that the City's

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[2] Petition (Ex. A at 10) ("The lifetime COLA cap of 35% is reached when the sum of the individually added annual COLA percentages equals 35%. For example: if an annual COLA percentage of 3.5% is calculated for ten years the 35% lifetime cap is reached; if an annual COLA percentage of 1% is calculated for thirty five years the 35% lifetime cap is reached.").

[3] *See Penns Manor Area Sch. Dist. v. Penns Manor Area Educ. Support Pers. Ass'n*, 953 A.2d 614, 617 (Pa. Commw. 2008) ("Evidence of 'past practices' is used in arbitrations in four situations: (1) to clarify ambiguous language; (2) to implement contract language which sets forth only a general rule; (3) to modify or amend apparently unambiguous language which has arguably been waived by the parties; and (4) to create or prove a separate, enforceable condition of employment which cannot be derived from the express language of the CBA.")

[4] Pa.R.E., Rule 408(a)(1) ("Evidence of the following is not admissible--on behalf of any party--either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: (1) furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim[.]"").

Petition should be denied on the basis that the Act Governing Collective Bargaining by Police or Firemen ("Act 111")[5] grants a narrow certiorari scope of review, which is not inclusive of the instant matter. The City's Brief in Support of Petitioner's Petition to Vacate Arbitration Award asserts that the relevant standard of review is the "essence test" for arbitration awards issued under the Public Employe [sic] Relations Act ("Act 195").[6]

However, "[a]ll public employees are subject to the provisions of Act 195, with the exception of police officers and firemen, who are governed by the provisions of Act 111."[7] The Pennsylvania Courts have repeatedly rejected advocacy by public employers to expand a narrow certiorari scope of review under Act 111 to a more liberal standard, such as the "essence test."[8] The Court will therefore need to address whether this appeal falls within the narrow certiorari scope of review under Act 111 before addressing the merits of the City's Petition.

Act 111

When reviewing an appeal of a grievance arbitration, "our scope of review will be limited to narrow certiorari, which permits an appellate court to consider 1) the arbitrator's jurisdiction; 2) the regularity of the proceedings; 3) an excess of the arbitrator's powers; or 4) deprivation of constitutional rights."[9] If the appeal does not fall within the narrow certiorari scope of review, the Court will not overturn the arbitrator's

[5] Act of June 24, 1968, P.L. 237, No. 111 (as amended, 43 P.S. §§ 217.1–217.10).
[6] Act of July 23, 1970 P.L. 563, No. 195 (as amended, 43 P.S. §§ 1101.101—1101.2301).
[7] *Philadelphia Hous. Auth. v. Fraternal Order of Hous. Police*, 811 A.2d 625, 628 (Pa. Commw. 2002) (emphasis added).
[8] *See Pennsylvania State Troopers Ass'n (Smith & Johnson)*, 741 A.2d 1248, 1253 (Pa. 1999) ("We emphasize that these matters are not, as the State Police implies, about whether this court finds the reinstatement of these troopers to be repugnant. Rather, they concern the application of existing legislation. If we were to broaden the narrow certiorari scope of review to the extent propounded by the State Police, we would not be interpreting Act 111 but rather would be rewriting it. Clearly, such a legislative function is denied to the judiciary."); *Pennsylvania State Police v. Pennsylvania State Troopers Ass'n*, 902 A.2d 599, 603 (Pa. Commw. 2006).
[9] *City of Pittsburgh v. Fraternal Order of Police Fort Pitt Lodge No. 1*, 764 A.2d 101, 103 (Pa. Commw. 2000) (citing *Pennsylvania State Police v. Pennsylvania State Troopers Ass'n (Smith & Johnson)*, 741 A.2d 1248 (Pa. 1999)).

decision even if the Court determines that the decision was "manifestly unreasonable,"[10] or a misinterpretation of the law.[11]

1. Jurisdiction

"[A]n arbitrator has jurisdiction to adjudicate the class of disputes arising out of a CBA between a public employer and its firefighters or police employees, rationally related to the terms and conditions of their employment."[12] The City does not assert, nor does the Court find, that the Arbitrator exceeded his jurisdiction in interpreting Section 8 of the CBA.

2. Regularity of Proceedings

The regularity of the proceedings references procedural irregularities, specifically instances where the arbitrator's administration of the proceeding violates due process.[13] The City does not allege that the Arbitrator prevented the parties from presenting their full case by introducing evidence, calling and cross-examining witnesses, entering exhibits, or making arguments in support of their respective positions.[14] Nor does the Award of the Arbitrator otherwise present an irregularity on its face.[15] While the Arbitrator's failure to credit the City's argument that the Settlement Agreement

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[10] *Pennsylvania State Police v. Pennsylvania State Troopers Ass'n (Smith)*, 698 A.2d 688, 690 (Pa. Commw. 1997), aff'd, 741 A.2d 1248 (Pa. 1999) (affirming arbitrator's award reinstating state trooper, even while acknowledging that the arbitrator's decision was "manifestly unreasonable").

[11] *Pennsylvania State Police v. Pennsylvania State Troopers' Ass'n (Winesburg)*, 992 A.2d 969, 974 (Pa. Commw. 2010) (citing *City of Philadelphia v. Fraternal Order of Police, Lodge No. 5*, 768 A.2d 291 (Pa. 2001) ("An error of law alone will not support a finding that an arbitrator exceeded his or her powers.").

[12] *City of Arnold v. Wage Policy Comm. of City of Arnold Police Dep't*, 171 A.3d 744, 750 (Pa. 2017).

[13] *See e.g.*, *City of Philadelphia v. Fraternal Order of Police Lodge No. 5*, 932 A.2d 274, 284 (Pa. Commw. 2007), aff'd sub nom. 985 A.2d 1259 (Pa. 2009) (holding that arbitrator's failure to conduct proceeding in accordance with the mandates of due process created a procedural irregularity); Fraternal Order of Police, Fort Pitt Lodge No. 1 v. City of Pittsburgh, No. 221 C.D. 2018, 2019 WL 1500929, at *4 (Pa. Commw. Apr. 4, 2019).

[14] Pennsylvania State Police v. Pennsylvania State Troopers Ass'n (Acord), 49 PPER ¶ 55, 2018 WL 703582 (Pa. Commw. Jan. 5, 2018) ("Likely due to the phrase's self-defining nature, there is a paucity of cases actually addressing what makes a proceeding and/or process 'regular' or 'irregular' for purpose of narrow certiorari review. Whether or not that proceeding and/or process is 'regular' largely turns on if the decision was issued in accordance with prescribed practice.").

[15] *City of Wilkes-Barre v. Wilkes-Barre Fire Fighters Ass'n Local 104*, 992 A.2d 246, 251–52 (Pa. Commw. 2010) ("[C]ourts should make every presumption in favor of regularity so long as such presumptions are consistent with the record made before the arbitrator. . . . [O]nly questions such as (1) whether there actually were proceedings, (2) whether the parties had notice of the proceedings, and (3) whether the process of the entity or individual conducting the proceedings was regular, subject an award to review for 'regularity' challenges."); *see also Borough of Montoursville v. Montoursville Police Bargaining Unit*, 958 A.2d 1084, 1089 (Pa. Commw. 2008) (citations omitted) ("In reviewing an arbitration award for such irregularities, the trial court is limited only to a review of the record presented to it.").

constituted a separate contract may have been in error, that did not in itself constitute a procedural irregularity.

3. Excess of Powers

An arbitrator will have been found to have acted in excess of his or her powers in three instances: (1) the arbitrator mandates that an illegal act be carried out; (2) the arbitrator's award addresses issues outside of the terms and conditions of employment; (3) the arbitrator's award resolves an issue that the parties have not identified as disputed.[16] In this instance, while the Arbitrator's consideration of the Settlement Agreement in determining his Award may have violated Rule 408 and contravened public policy, the Award itself does not require the City to perform any illegal act. Additionally, the issue under dispute, the calculation of the maximum COLA under the CBA, relates to the terms and conditions of employment. The City proposed at argument that the Arbitrator acted in excess of his powers by requiring the Police's Pension Board to accept his interpretation of Section 8 of the CBA, in contravention of statute and the Pension Board's twenty (20) year implementation of the CBA. However, the Pennsylvania Supreme Court has plainly established that an arbitrator is empowered to interpret the disputed terms of a CBA in the context of grievance arbitration.[17] That such an interpretation may be a misinterpretation of the law or contrary to long-standing practice does not constitute an excess of powers.

4. Deprivation of Constitutional Rights

Lastly, the City asserts that the Arbitrator's Award violates the contracts clauses within the Pennsylvania and United States Constitutions, by contravening the City's ability to contract freely with distinct entities and to set individualized terms in each

[16] *Pennsylvania State Troopers' Ass'n (Winesburg)*, 992 A.2d at 974 (citations omitted) ("The definition of what constitutes an excess of an arbitrator's powers is far from expansive. An arbitrator may not mandate that an illegal act be carried out; he or she may only require a public employer to do that which the employer could do voluntarily. Furthermore, the award must encompass only terms and conditions of employment and may not address issues outside of that realm. 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 his or her authority."); *City of Philadelphia v. Int'l Ass'n of Firefighters, Local 22*, 999 A.2d 555, 565 (Pa. 2010) ("[S]everal provisions in Act 111 make clear that the authority an arbitration board is given to resolve disputes in the interest arbitration process extends to only those issues that the parties identify as disputed.").

[17] *Pennsylvania State Police v. Pennsylvania State Troopers Ass'n (Betancourt)*, 656 A.2d 83 (Pa. 1995) (affirming *Chirico v. Bd. of Supervisors for Newton Twp.*, 470 A.2d 470, 474 (Pa. 1983)) (holding that Act 111 authorized grievance arbitration).

contract. However, "the impairment of contracts clause is not violated by a judicial determination, but only be an enactment of the legislature."[18] Therefore, as a threshold matter the Arbitrator's Award could not impinge the contracts clause of either the federal or the Pennsylvania Constitution.

Conclusion

Therefore, pursuant to the foregoing, the arbitration Award sustaining the FOP's grievance in the above captioned matter is hereby AFFIRMED.

IT IS SO ORDERED this 4th day of March 2020.

BY THE COURT,

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Eric R. Linhardt, Judge

ERL/cp
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[18] *Int'l Ass'n of Firefighters Local 1400, Chester City Firefighters v. City of Chester*, 991 A.2d 1001, 1012 (Pa. Commw. 2010) (quoting *Burns v. Pub. Sch. Employees' Retirement Bd.*, 853 A.2d 1146, 1154 (Pa. Commw. 2004)). Both Pennsylvania and federal Constitutions prohibit that passage of any law impairing the obligation of contracts.