IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

CITY OF WILMINGTON,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 395-N**
	:	
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 1102, and RAYMOND J. DONAHUE,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION

Date Submitted: December 8, 2004
Date Decided: April 4, 2005

Kathleen Furey McDonough, Esquire and Sarah E. DiLuzio, Esquire of Potter Anderson & Corroon LLP, Wilmington, Delaware, and John R. Sheridan, Esquire and Martin C. Meltzer, Esquire of City of Wilmington Law Department, Wilmington, Delaware, Attorneys for Plaintiff.

Perry F. Goldlust, Esquire and Joanne A. Shallcross, Esquire of Aber, Goldlust, Baker & Over, Wilmington, Delaware, Attorneys of Defendants.

NOBLE, Vice Chancellor

Plaintiff City of Wilmington (the "City") again seeks the vacation or modification of an arbitration award restoring Defendant Raymond J. Donahue ("Donahue") to his position as a code enforcement officer in the City's Department of Licenses and Inspections. Donahue is a member of the bargaining unit represented by Defendant American Federation of State, County, and Municipal Employees, Council 81, Local Union 1102 (the "Union"). The City contends that the arbitration award must be vacated because it does not claim its essence from the Collective Bargaining Agreement (the "CBA") between the City and the Union that governs Donahue's employment with the City. Donahue and the Union seek confirmation of the award. The parties have moved for summary judgment.

For the reasons set forth below, I conclude that the Defendants are entitled to summary judgment and, accordingly, confirm the arbitration award.

I. Background[1]

While employed by the City as a probationary code enforcement officer, Donahue, on September 23, 1999, impersonated a police officer, made discriminatory comments, and engaged in other improper conduct. His actions resulted in the City's taking disciplinary action, including issuance of the "September 30 letter," which he acknowledged by signing and which provided in pertinent part: "If in the future . . . your conduct prevents or adversely impacts on your ability to handle any aspect of your responsibilities, you will be dismissed from City employment."[2]

By February 12, 2000, Donahue had completed his probationary period and had become a member of the bargaining unit represented by the Union. On that date, he was involved in another fracas. He kicked, and sprayed pepper spray into, the face of the individual who had recently assaulted him. He did this, however, after his assailant had been apprehended by the police. Again, he made offensive racial comments.

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[1] A more thorough factual and procedural background may be found at *City of Wilmington v. Am. Fed'n of State, County & Mun. Employees, Council 81, Local 1102*, 2003 WL 1530503 (Del. Ch. Mar. 21, 2003) ("*Donahue I*") & 2003 WL 21730641 (Del. Ch. July 18, 2003) ("*Donahue II*"). *Donahue I* and *Donahue II* were issued in a separate civil action (Civil Action 19561-NC). The parties have agreed that the record of that action may be used here. Pertinent excerpts from the CBA may be found at pages A024-A031 of the Appendix to Opening Brief in Support of Plaintiff's Motion for Summary Judgment (the "Appendix") filed in Civil Action No. 19561-NC.

[2] Appendix A054-A055.

The City saw fit to terminate him for his actions. In accordance with the CBA, the termination decision was submitted to arbitration. The arbitrator, recognizing that Donahue's conduct was inappropriate, concluded that a substantial suspension, but not termination, was warranted.[3] The City sought to vacate the arbitrator's award. This Court vacated the award and remanded the matter for additional proceedings in the arbitration forum. Specifically, through *Donahue I*, the arbitrator was tasked with the responsibility of evaluating "the meaning and applicability of the September 30 letter in light of Donahue's subsequent conduct during the February 12 incident."[4]

The parties were unable to agree upon implementation of the Court's ruling.[5] Thus, the Court instructed[6] the parties to submit to the same arbitrator the issue of "the import of the September 30 letter and the consequences that it carries as the result of Donahue's actions in the February 12 incident."[7] This is the standard by which the arbitrator's compliance with the Court's remand must be measured.

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[3] Arbitration Opinion and Award, dated March 18, 2002 ("Arbitration Opinion"). A copy appears at Appendix A002.
[4] *Donahue I*, at *7.
[5] *See Donahue II*.
[6] *Id*.
[7] This directive is set forth in a Stipulated Order, dated September 8, 2003.

On remand, the arbitrator confronted the City's argument that the September 30 letter constituted an outcome determinative "last chance agreement." Nevertheless, the arbitrator reiterated his decision to reinstate Donahue; he explained his conclusion:

> First, the September 30 letter did not frame the standard by which Donahue's conduct during the February 12 incident was to be judged and consequences imposed. Rather, the issue placed before me at the arbitration hearing was the traditional issue of whether good and sufficient cause, i.e. just cause, existed for Donahue's termination. It was never contended that the issue before me was limited to whether Donahue had violated the terms of the September 30 letter.
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> Second, the September 30 letter did not establish an enforceable "last chance agreement" pursuant to which Donahue was subject to discharge automatically if his conduct on February 12 prevented or adversely impacted on his ability to handle any aspect of his responsibilities. Section 4.18 of the Collective Bargaining Agreement, negotiated between the City and Union, requires that there be good and sufficient cause, i.e. just cause, for any disciplinary measures taken against an employee and that "the extent of the disciplinary action taken shall be commensurate with the offense, provided that the prior employment history of the employee may also be considered pertinent". This contractual protection could not be forever removed from Donahue without meaningful involvement by the Union which negotiated this protection. The evidence did not establish that the Union had such involvement in the creation or signing of the letter of September 30.
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> Third, Donahue's conduct on February 12, and the consequences flowing therefrom, therefore could not be judged within the context of Donahue being under a valid "last chance agreement". In this regard, he was similarly situated to License and Inspection employee Newton, who also was not under a "last chance agreement" when criminal charges were brought

> against him for assault, but rather had received discipline for past misconduct and a warning about future misconduct.[8]

The City again sought judicial intervention to relieve it and the public of the risks that it reasonably foresees from returning Donahue to a position of authority that frequently requires personal interaction with the populace in sometimes stressful circumstances.

II. CONTENTIONS

The City argues that the arbitration award must be set aside because the arbitrator's decision does not draw its essence from the CBA.[9] The City asserts that the arbitrator ignored the Court's statement that the "September 30 letter as a disciplinary action accepted by Donahue with specific potential consequences, together with the CBA, defines his contractual rights and duties as a City employee."[10] The City takes that statement to be conclusive as to the weight of the September 30 letter and, therefore, considers the

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[8] Arbitrator's Letter of March 2, 2004. ("Arbitration Letter"). A copy may be found as Ex. B to the Opening Brief in Support of Plaintiff's Motion for Summary Judgment, filed in this action. This supplemented his initial decision of March 2002 in which he found that, although Donahue's February 12, 2000, conduct constituted a serious offense, Donahue had suffered disparate treatment and therefore his dismissal was unreasonable, capricious, or arbitrary and did not satisfy the just cause standard that governs discipline of all members of the bargaining unit under the CBA. The arbitrator also determined that, when applying the just cause standard to Donahue, while there was just cause to discipline him, there was no just cause to terminate him. Arbitration Opinion at 18, 20.

[9] Op. Br. in Support of Pl. Motion for Summary Judgment Seeking Vacating or Modifying of the Arbitrator's Award, at 6.

[10] *Id.* at 7-8 (quoting *Donahue I*, at 6).

arbitrator's conclusion that the September 30 letter "did not frame the standard by which Donahue's conduct during the February 12 incident was to be judged"[11] as contrary to the law of the case. The City further argues that the arbitrator exceeded his mandate by determining the validity of prior discipline and by altering the CBA.[12] Lastly, the City asserts that the arbitrator ignored the plain language of the CBA and engaged in an irrational disparate treatment analysis between Donahue and another City employee by the name of Newton.[13] The City contends that the comparison between Donahue and Newton is irrational because the arbitrator did not take the September 30 letter, considered by the City to be a last chance agreement, into account when comparing the two employees.[14] Donahue and the Union oppose the City's challenges to the arbitrator's actions and ask that the Court confirm the award.

III. ANALYSIS

A. *Applicable Standards*

A party may obtain summary judgment under Court of Chancery Rule 56 if it can show that no material facts are in dispute and that it is

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[11] Arbitration Letter, at 2.
[12] Rep. Br. in Support of Pl. Motion For Summary Judgment Seeking to Vacate or Modify the Arbitrator's Award, at 3.
[13] Op. Br. in Support of Pl. Motion for Summary Judgment Seeking Vacating or Modifying of the Arbitrator's Award, at 8-11.
[14] *Id.* at 9-11.

entitled to judgment as a matter of law.[15] "[S]ummary judgment is an 'appropriate judicial mechanism for reviewing an arbitration award, because the complete record is before the court and no *de novo* hearing is permitted to determine whether [the award should be vacated.]'"[16] Delaware has a public policy that supports resolution of labor disputes through arbitration.[17] Accordingly, "[t]his Court will not disturb a labor arbitration award unless . . . the award does not claim its essence from the CBA."[18] The Court, however, may take appropriate steps if the arbitrator's actions are "in direct contradiction to the express terms of the agreement of the parties" because, then, "he has exceeded his authority."[19]

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[15] *Motorola, Inc. v. Amkor Tech., Inc.*, 849 A.2d 931, 935 (Del. 2004).
[16] *Custom Decorative Moldings, Inc. v. Innovative Plastics Tech., Inc.*, 2000 WL 1273301, at *2 (Del. Ch. Aug. 30, 2000) (quoting *E.I. duPont de Nemours & Co. v. Custom Blending Int'l, Inc*., 1998 WL 842289, at *3 (Del. Ch. Nov. 24, 1998)).
[17] *See Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 911 (Del. 1989); *see also New Castle County v. Fraternal Order of Police*, 1996 WL 757237 (Del. Ch. Dec. 17, 1996) (citing *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1441 (3d Cir. 1992), *cert. denied*, 113 S.Ct. 655 (1992) (detailing the benefits of arbitration and judicial deference thereto)).
[18] *Meades v. Wilmington Hous. Auth.*, 2003 WL 939863, at *7 (Del. Ch. Mar. 6, 2003); *see also New Castle County*, 1996 WL 757237, at *1 ("The legal standard by which labor arbitration awards are reviewed is a stringent one. . . .").
[19] *Malekzadek v. Wyshock*, 611 A.2d 18, 21 (Del. Ch. 1992).

B. *Whether the Arbitration Award "Draws its Essence" from the Collective Bargaining Agreement*

An arbitration award "must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice."[20] The City focuses upon this fundamental premise. The Collective Bargaining Agreement reads in part:

> The arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying, or amending, or adding to, or eliminating, or varying in any way, the terms of this Agreement, or of applicable law or rules and regulations having the force and effect of law. In no event shall the scope of the arbitration exceed the interpretation and application of this Agreement and will be limited to the specific subject matter jointly submitted.[21]

To conclude that an arbitration award does not draw its essence from the CBA, the Court must be persuaded that the award is without rational support, cannot be rationally derived from the terms of the agreement, or bears no reasonable relationship to the underlying contract from which it is derived.[22] "If there is a rational construction that will support the arbitrator's

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[20] *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987); *see also Del. State College v. Del. State College Chapter of the Am. Assoc. of Univ. Professors*, 1987 WL 25370, at *2 (Del. Ch. Nov. 24, 1987); *State Dept. of Correction v. Del. Pub. Employees Council 82*, 1987 WL 5179, at *3 (Del. Ch. Jan. 7, 1987).
[21] CBA, § 4.13.
[22] *See Meades*, 2003 WL 939863, at *4; *New Castle County*, 1996 WL 757237, at *3.

award it will be upheld regardless of whether this Court or others might interpret the same provisions differently."[23]

1. Whether the Arbitrator Ignored the Court's Instructions with Respect to the September 30 Letter

The City first argues that the arbitrator's award is not drawn from the essence of the CBA because the arbitrator's decision is contrary to the law of the case. The City interprets the Court's statement that "the September 30 letter as a disciplinary action accepted by Donahue with specific potential consequences, together with the CBA defines his contractual rights and duties as a City employee"[24] as law of the case. The City views that statement as dispositive of the weight to be assigned to the September 30 letter and, therefore, as instructing the arbitrator to consider the September 30 letter as a valid last chance agreement. Furthermore, the City argues that, because the arbitrator assigned the September 30 letter very little weight, the arbitrator did not follow the Court's directive. However the City may choose to interpret it, the Court instructed the arbitrator, as the parties' designated finder of fact and law, to determine "the meaning and effect of

[23] *New Castle County*, 1996 WL 757237, at *3; *see also State v. Council No. 81, AFL-CIO, Local 640*, 1981 WL 88254 (Del. Ch. Feb. 20, 1981), *aff'd*, 440 A.2d 3 (Del. 1981).
[24] *Donahue I*, at *6.

the September 30 letter in light of the February 12 incident."[25] The arbitrator, pursuant to this mandate and the powers assigned to him by the CBA, was free to make any rationally supported determination. The CBA and the September 30 letter, as recognized by the arbitrator, defined Donahue's rights. The Court did not conclude that one controlled the other or the relative significance of either.

The arbitrator determined that the September 30 letter did not constitute a valid last chance agreement and therefore did not supplant the just cause standard for the evaluation of Donahue's termination. Although the arbitrator considered the September 30 letter as part of Donahue's employment history, he applied the traditional just cause standard (*i.e.*, the standard set forth in the CBA) to evaluate Donahue's dismissal (the same standard he applied in his prior decision reinstating Donahue) and again concluded that because of disparate treatment, Donahue's termination was arbitrary and without just cause.

While the City, and this Court for that matter, may be dissatisfied with the weight the arbitrator assigned to the September 30 letter, the arbitrator followed the Court's instructions by considering the import of the September 30 letter and coming to a rational conclusion based upon his

[25] *Id.* at *7.

interpretation of the facts and law applicable to this case.[26] The arbitrator's decision is clearly not against controlling law, as the arbitrator, not the Court, was assigned the task of determining the weight to be given to the September 30 letter. Likewise, the arbitrator's decision is drawn from the essence of the CBA. The arbitrator was forced to confront a difficult problem in this case because the September 30 letter and the CBA both allocate a different set of rights and burdens to Donahue. The September 30 letter could be read to provide that Donahue would be fired if any subsequent conduct interfered with his job performance. However, the CBA provides that Donahue could not be fired without just cause. When this case was presented to the arbitrator, it was presented under the auspices of the CBA, and the arbitrator concluded that it was his task to evaluate Donahue's termination under the CBA's just cause standard, not solely under the September 30 letter's terms. The arbitrator reasoned that while the September 30 letter may have been effective discipline at the time it was issued, new circumstances, namely Donahue's union membership and concurrent CBA protection, affected how the September 30 letter was to be

[26] The arbitrator's role on remand was not limited to resolving the question of whether the September 30 letter constituted a continuing and binding last chance agreement. If he had reached that conclusion, then the September 30 letter, presumably, would have been dispositive. His task was not that circumscribed. To the contrary, his job was to figure out how the September 30 letter, the CBA, the facts, and perhaps other relevant factors all fit together. The Arbitration Letter demonstrates that he did just that.

applied and it could no longer be interpreted as a last chance letter (if it ever could have been). The arbitrator chose to rely on the CBA provisions which require just cause for a termination, and although he considered the September 30 letter and the events surrounding it, he discounted its last chance aspect because at that time Donahue did not have the protection of the Union that now represents him. Essentially, the arbitrator balanced the September 30 letter against the CBA and found that the September 30 letter could not trump binding, stand-alone protections afforded Donahue by the CBA and, therefore, did not constitute a last chance provision that survived Donahue's entry into the bargaining unit.

Of course, the arbitrator was the designated finder of both fact and law. When he was faced with a conflict of authority, it was his mandate to determine which rule to apply, and he rationally chose to apply the CBA's just cause standard and only to take the September 30 letter into account as a factor in his just cause analysis. Because the arbitrator followed this Court's instructions and because the arbitrator came to a rational conclusion regarding the import of the September 30 letter, the arbitrator's decision to reinstate Donahue cannot be challenged as having failed to "draw its essence" from the CBA.

2. Whether the Arbitrator Exceeded His Authority By Altering Prior Disciplinary Actions or Adding to the CBA

The City asserts that in coming to the conclusion that the September 30 letter did not constitute a valid last chance agreement with Donahue (or otherwise failing to give it appropriate weight), the arbitrator exceeded his authority by addressing and altering prior disciplinary actions and by altering the CBA by allowing Donahue a right that the CBA did not provide to him.[27]

The CBA clearly establishes that the arbitrator may only address those issues presented to him, and therefore, the arbitrator does not have the power to address prior discipline. The City argues that the arbitrator both addressed and altered prior discipline by determining that the September 30

[27] Another way to look at the City's argument would be to treat the arbitrator's refusal to sustain termination as the appropriate sanction as an action outside of the standards prescribed for his conduct by the CBA. The parties to the CBA negotiated the standards to be applied by the arbitrator in his review of the City's disciplinary actions. Discipline could be set aside because of a lack of substantial evidence supporting the need for discipline, a meaningful procedural failure, or discriminatory motives, all standards not pertinent to this matter. Instead, the arbitrator exercised his authority under a standard that necessarily required him to conclude that Donahue's termination "was unreasonable, capricious or arbitrary in view of the offense, the circumstances surrounding the offense and the past record of the Employee." CBA, § 4.18(g). The City argues that the arbitrator failed to comply with this standard because he failed to give sufficient weight to Donahue's "past record," including, of course, the September 30 letter. The arbitrator, however, squarely addressed both the September letter and the conduct of September 23, which resulted in the September 30 letter. The City's criticism of the arbitrator ultimately reaches nothing more than a disagreement as to the weight to be given to the September 30 letter. The arbitrator considered it and, as was his function, determined the weight or import that it deserved.

letter was not a valid last chance agreement and, therefore, the arbitrator exceeded his power by addressing an issue not before him. However, the arbitrator did not in fact address issues that were not presented to him. The arbitrator's role, as expressly mandated by the CBA, was to determine whether there was just cause for Donahue's termination in light of both the February 2000 incident and Donahue's employment history. As part of his just cause determination, the arbitrator needed to assess the significance of the September 30 letter. By determining the weight of the letter, the arbitrator did not address issues that were not presented to him because a necessary part of his just cause determination was consideration of the employee's employment record.

Likewise, the arbitrator did not alter the prior discipline. Instead, he declined to accept the September 30 letter as mandating termination because the circumstances had changed. The arbitrator did not provide Donahue with retroactive rights with respect to the September 30 letter. Finding that Donahue was, by February 12, 2000, a member of the Union with additional protections (and no longer a probationary employee), the arbitrator acknowledged this change in circumstances, and, based on this change, he determined that the September 30 letter was no longer binding (if it ever had been) as a last chance agreement. Additionally, the September 30 letter was

not part of the CBA and was therefore not expressly protected by the provision of the CBA which prohibits the arbitrator from "modifying, or amending, or adding to, or eliminating, or varying in any way, the terms of [the CBA]."[28]

The City also contends that, by allowing Donahue's Union membership and CBA protection to balance against the September 30 letter, the arbitrator altered the CBA by creating rights that did not exist at the time of the September 30 letter. Namely, it argues that the arbitrator gave Donahue, at the time not a member of the Union, an implicit, retroactive right to Union representation during his probationary period. However, this is not the case. The arbitrator was presented with conflicting authority regarding the standard by which Donahue could be terminated. When balancing these standards against one another, the arbitrator was justified in examining the differences between the standards, including the just cause termination standard resulting from Union membership and the CBA. The arbitrator did not conclude that Donahue was entitled to Union representation at the time of the September 30 letter. Nor did he reason that, because Donahue was not then in the Union, the September 30 letter was invalid. Instead, the arbitrator concluded that, when determining which

[28] CBA, § 4.13.

standard to apply to evaluate Donahue's termination, Union membership was a factor that weighed in favor of applying the CBA's standard. Therefore the arbitrator did not exceed his authority by adding to or altering rights granted by the CBA. Indeed, he applied the just cause standard expressly set forth in the CBA.

C. *Whether the Arbitrator's Disparate Treatment Analysis was Irrational*

The arbitrator's decision to reinstate Donahue is grounded upon his disparate treatment analysis of Donahue's circumstances in contrast with the circumstances surrounding discipline imposed on Newton, another City employee.[29] The City's flawed disparate treatment argument arises out of the arbitrator's decision not to recognize the September 30 letter as a last chance agreement. The City points out, that Newton, the comparator, was never subject to a last chance agreement. Thus, it argues any comparison between Newton and Donahue is unwarranted. However, because the September 30 letter was not recognized by the arbitrator as a valid last chance agreement as of February 12, 2000, the arbitrator could justifiably, if not persuasively, compare Donahue to Newton. After finding that the conditions in the September 30 letter were no longer preclusive because of

[29] Arbitration Opinion, at 19-20.

the interplay with the CBA, the arbitrator could, within the ambit of his responsibilities and in light of the standards by which his judgment may be judicially reviewed, conclude that Donahue and Newton, both City employees with disciplinary records, had been treated differently in otherwise substantially similar circumstances, and, therefore, come to the conclusion that there was disparate treatment. While the Court may disagree with the arbitrator's finding that Donahue and Newton were similarly situated employees, the arbitrator, as the finder of fact, is permitted to come to this conclusion as long as it is rational. Because the arbitrator's conclusion with respect to the disparate treatment analysis was not irrational, the arbitrator's decision cannot be set aside.[30]

IV. CONCLUSION

For the foregoing reasons, summary judgment is granted in favor of Donahue and the Union and against the City, and the arbitrator's award is confirmed. The City's motion for summary judgment is denied.

IT IS SO ORDERED.

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[30] "Mere error of law or fact is, however, not sufficient grounds to vacate an award. It is recognized that inaccuracies as to the law or facts are possible and their existence is accepted implicitly by an agreement to submit the dispute to arbitration. A court, however, should not attempt to enforce an . . . irrational award." *Falcon Steel Co. Inc. v. HCB Contractors, Inc.*, 1991 WL 50139, at *7 (Del. Ch. Apr. 4, 1991) (citations omitted).