IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Pittsburgh, Appellant	:	
v.	:	No. 89 C.D. 2011
	:	Argued: November 15, 2011
Fraternal Order of Police Fort Pitt Lodge No. 1 (Eugene Hlavac, Grievant)	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FRIEDMAN FILED: December 28, 2011

The City of Pittsburgh (City) appeals from the January 7, 2011, order of the Allegheny County Court of Common Pleas (trial court), denying with prejudice the City's appeal seeking vacation and/or remand of a grievance arbitration award under Act 111[1] and affirming the award in all respects. We affirm.

On December 18, 2009, Eugene Hlavac (Grievant) was arrested and charged with aggravated assault following a physical altercation with his then-girlfriend, Lauren Maughan, while he was off duty. On December 22, 2009, the City suspended Grievant from his position as a police officer. On January 4, 2010, the trial court entered a protection from abuse (PFA) order against Grievant, concluding that Grievant caused the victim's injury and prohibiting Grievant from carrying a

[1] Act of June 24, 1968, P.L. 237, *as amended*, 43 P.S. §§217.1–217.10. Act 111 governs collective bargaining between public employers and their police and fire departments.

firearm. The PFA order was later amended to allow Grievant to carry a firearm while on duty. On January 7, 2010, the City formally discharged Grievant from his employment as a police officer. Grievant was eventually acquitted of all criminal charges.

The first grievance arbitration hearing was held on September 10, 2010. The City presented no evidence to establish that Grievant was precluded from possessing a firearm, and Maughan failed to appear. Therefore, the arbitrators issued a subpoena to secure Maughan's presence at the next hearing. At the second arbitration hearing on September 20, 2010, Maughan again failed to appear. The only evidence the City sought to introduce was the January 4, 2010, PFA order. Grievant, on the other hand, testified on his own behalf and presented two eyewitnesses to the incident whose testimony supported his claim of self-defense. The arbitrators credited Grievant's evidence and concluded that the City failed to meet its burden that it had just cause to terminate Grievant. Thus, the arbitration panel ordered that Grievant be reinstated and made whole.

The City filed a timely petition to appeal the arbitration award with the trial court. On January 7, 2011, the trial court denied the City's appeal with prejudice and affirmed the award in all respects. In its opinion, the trial court concluded that, although the arbitrators probably should have admitted the PFA order into evidence, its error was harmless because, "[w]hile [the PFA] Order had some evidentiary value, it could certainly not carry the City's burden of proof by clear and convincing evidence by itself." (Trial Ct. Op., 2/14/11, at 4.) The trial court further explained that "[t]he City had the opportunity to present the testimony of the alleged victim and

failed to do so even after a continuance was granted in order for the City to secure this witness' appearance." (*Id.*) The City now appeals from that decision.

The City first argues that the arbitrators' exclusion of the PFA order violated its due process rights by precluding the City from presenting its case-in-chief. We disagree.[2]

Typically, an arbitrator's ruling on an evidentiary matter does not fall within the limits of narrow certiorari. The City, however, relies on *City of Philadelphia v. Fraternal Order of Police Lodge No. 5 (Breary)*, 604 Pa. 267, 985 A.2d 1259 (2009), in which the Pennsylvania Supreme Court held that an employer's appeal from a grievance arbitration award implicated procedural due process, thereby permitting judicial review. In *Breary*, as a sanction for the employer's failure to comply with discovery requests, the arbitrators precluded the employer from presenting certain evidence at the hearing. The evidence that was excluded amounted to the employer's entire case against the police union. The Supreme Court determined that, by imposing such a harsh discovery sanction, the arbitrators constructively precluded the employer from presenting its case-in-chief on the merits of the police officer's termination, which was a violation of the employer's due process rights. *Id.* at 282-83, 985 A.2d at 1268-69. Thus, the Supreme Court affirmed this court's reversal of the arbitration award.

[2] The scope of review of a grievance arbitration award is narrow certiorari, which limits judicial review to the following issues: (1) the jurisdiction of the arbitrators; (2) the regularity of the proceedings; (3) an excess of the arbitrator's powers; and (4) the deprivation of constitutional rights. *Pennsylvania State Police v. Pennsylvania State Troopers' Association (Betancourt)*, 540 Pa. 66, 79, 656 A.2d 83, 89-90 (1995).

We conclude that *Breary* is distinguishable on its facts. The City here was not completely precluded from presenting any evidence as a result of the arbitrator's ruling, as was the case in *Breary*.[3] In fact, when the City appeared at the first hearing with no witnesses, the arbitrators gave the City additional time to secure the alleged victim by postponing the hearing and issuing a subpoena. At the second hearing, however, the City again appeared with no witnesses and only one piece of documentary evidence.

In any event, as the trial court correctly concluded, even if the arbitrators had admitted the PFA order, it would have been insufficient, in and of itself, to sustain the City's burden of proof. The City's failure to take any steps to enforce the subpoena and secure the victim's presence was its own choice. On the other hand, Grievant appeared, testified on his own behalf, and presented two eyewitnesses to the incident whose testimony the arbitrators ultimately believed. Therefore, any error in failing to admit the PFA order was harmless and would not have affected the outcome of the case.

The City also argues that the arbitrators violated the coordinate jurisdiction rule and the doctrine of *res judicata* by excluding the PFA order. However, neither the coordinate jurisdiction rule nor the doctrine of *res judicata* applies here. This case was not transferred between trial judges within the same court, so the coordinate jurisdiction rule is inapplicable. *See Zane v. Friends*

[3] The *Breary* Court noted that the arbitrators' ruling was "not merely an order that prohibited the [employer] from presenting an expert witness or a piece of evidence, which would most certainly fail to implicate the due process concerns raised herein." 604 Pa. at 282 n.10, 985 A.2d at 1268 n.10.

Hospital, 575 Pa. 236, 243, 836 A.2d 25, 29 (2003) ("[U]pon transfer of a matter between trial judges of coordinate jurisdiction, a transferee trial judge may not alter [the] resolution of a legal question previously decided by a transferor trial judge."); *Yamulla Trucking & Excavating Company v. Justofin*, 771 A.2d 782, 784 (Pa. Super. 2001) ("Judges of coordinate jurisdictions sitting in the same court and in the same case should not overrule the decisions of each other."). Moreover, the PFA hearing and the grievance arbitration were two distinct legal proceedings involving different causes of action and different parties. Therefore, *res judicata* also does not apply. *See Yamulla Trucking*, 771 A.2d at 784.

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge

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O R D E R

AND NOW, this 28th day of December, 2011, we hereby affirm the January 7, 2011, order of the Allegheny County Court of Common Pleas.

ROCHELLE S. FRIEDMAN, Senior Judge