STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0404

City of Duluth,
Appellant,

vs.

Duluth Police Union, Local No. 807,
Respondent.

Filed September 3, 2019
Affirmed
Smith, Tracy M., Judge

St. Louis County District Court
File No. 69DU-CV-18-1705

Susan K. Hansen, Madden Galanter Hansen, LLP, Bloomington, Minnesota; and

Steven B. Hanke, Deputy Duluth City Attorney, Duluth, Minnesota (for appellant)

James P. Michels, Alana Mosley, Rice, Michels & Walther, LLP, Minneapolis, Minnesota (for respondent)

Susan L. Naughton, League of Minnesota Cities, St. Paul, Minnesota (for amici curiae League of Minnesota Cities and Minnesota Chiefs of Police Association)

Joseph A. Kelly, Kevin M. Beck, Rebecca Duren, Kelly & Lemmons, P.A., St. Paul, Minnesota (for amici curiae Teamsers Local 320, Police Officers Federation of Minneapolis, and Bloomington Police Officers Federation)

Isaac Kaufman, Brooklyn Center, Minnesota (for amicus curiae Law Enforcement Labor Services, Inc.)

Christopher K. Wachtler, Wachtler Law Office, St. Paul, Minnesota (for amici curiae Woodbury Police Officers Association, Minnesota Conservation Officers Association, and St. Paul Police Federation)

Considered and decided by Reyes, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

U N P U B L I S H E D O P I N I O N

SMITH, TRACY M., Judge

Adam Huot, a Duluth police officer, was discharged from his employment following a use-of-force incident. Respondent Duluth Police Union challenged the termination, and the dispute was referred to arbitration. The arbitrator concluded that discipline was warranted, but that termination was not, and awarded Huot reinstatement without back pay or benefits. The city moved the district court for an order vacating the award of reinstatement, arguing that it was contrary to public policy. The district court denied the motion, and the city now appeals. We affirm.

FACTS

On the night of May 20, 2017, Adam Huot, a police officer in appellant City of Duluth's police department, responded, along with two fellow officers, to a pair of calls regarding two men in the Duluth skywalk system. While responding to the first call, the officers told the men to move along from a skywalk stairwell, and the men did so. The officers responded to the second call at a private parking ramp, where they discovered that the men had entered another part of the skywalk system. Huot, accompanied by the other two officers, told the men to find somewhere else to go and told them that they would be mailed tickets for trespassing. One of the men, B.H., responded, "What about disorderly conduct and all that s---?" Huot said that disorderly conduct did not apply and told the men

to walk away. B.H. then demanded, "I want to go to jail right f---ing now!" Huot and another officer cuffed B.H's hands behind his back, but, as the officers were walking him through the skywalk toward where the police cars were parked, B.H. fell to the ground and said, "I ain't gonna make it easy for you guys."

Within ten seconds and without saying anything to B.H., Huot grabbed the chain connecting B.H.'s handcuffs and dragged him along the floor for about 100 feet through the skywalk to an elevator. On the way to the elevator, Huot dragged B.H. through a doorway, where B.H.'s head struck the metal doorframe. One of the other officers then caught up with Huot and B.H. The officers helped B.H. to his feet and, for the remainder of the trip to the police cars, supported B.H. under his arms while he walked. Although Huot called the other two officers later that night to discuss the incident, he did not report, during his shift, the use of force to his supervisor.

The city concluded that Huot's conduct had violated the police department's use-of-force policy and its code of conduct. Based on those violations, Huot's employment with the police department was terminated. Huot is a member of respondent Duluth Police Union, and the union challenged the termination pursuant to procedures defined by the collective-bargaining agreement (CBA) between the city and the union. The dispute was ultimately referred to binding arbitration. The arbitrator issued his order in June 2018.

The arbitrator ruled that Huot's conduct was an unreasonable use of force that violated the department's use-of-force policy and that Huot's failure to promptly report the use of force violated the department's policy on reporting use of force. The arbitrator also found that Huot had been involved in a prior use-of-force incident in which he repeatedly

punched a man in the head in order to get the man to drop a shard of glass, even though other officers were restraining the man. Huot received a one-day disciplinary suspension for that incident. Huot was also involved in two other incidents that were deemed not to be use-of-force incidents. Huot received coaching, but not discipline, for those two incidents.

The arbitrator concluded that, though the incident at issue here was "serious," the use of force was relatively minor compared to the other use-of-force incident, for which Huot had received a one-day disciplinary suspension. The arbitrator observed that the one-day suspension was Huot's only prior discipline, and the arbitrator considered as mitigation Huot's nine years of service and the commendations he has received. The arbitrator stated that Huot's conduct in the incident at issue, in light of the fact that he had already been trained and coached about use of force, caused "command staff to speculate" that he would misuse force again if reinstated. The arbitrator continued, "The Arbitrator cannot find fault with this speculation. [Officer] Huot and his career as a police officer is at a crossroad: Either he takes control of his penchant for misusing vocal and physical force or he will be fired: A *third* use of force violation would be his last." While the arbitrator determined that discipline was warranted, he ruled that, because the CBA calls for progressive discipline, Huot's conduct did not justify termination under the agreement. The arbitrator awarded Huot "reinstatement but without back pay and benefits," effectively determining that the appropriate discipline was a 13-month unpaid suspension. The arbitrator wrote, "Termination revoked, the Arbitrator hopes to rivet in the Grievant's mind the seriousness of the matter and of his need to change. Another undersized suspension will not do the trick."

The city moved the district court for an order vacating the award of reinstatement, arguing that vacatur was required under the public-policy exception. The district court denied the motion, reasoning that, while Huot's conduct was contrary to public policy, the arbitrator's award did not violate any "well-defined public policy."

The city appeals, arguing that the district court erred because the arbitrator's award violates a well-defined public policy.

D E C I S I O N

Judicial review of an arbitrator's decision is "extremely narrow." *State, Office of State Auditor v. Minn. Ass'n of Prof'l Emps.*, 504 N.W.2d 751, 755 (Minn. 1993). The arbitrator "is the final judge of both fact and law, including the interpretation of the terms of any contract." *Id.* at 754 (quoting *Cournoyer v. Am. Tel. & Radio Co.*, 83 N.W.2d 409, 411 (Minn. 1957)). Courts thus lack the authority to review arbitrators' awards for mistakes of law or fact; review is only for fundamental flaws in the arbitration process. *Id.*; *see* Minn. Stat. § 572B.23(a) (2108) (allowing vacation based on "corruption, fraud, or other undue means," a corrupt or impartial arbitrator, a substantially prejudicial failure to allow one party to fully present their case, action in excess of the arbitrator's powers, absence of an agreement to arbitrate, or lack of notice).

The United States Supreme Court has identified an exception to the general principle against substantive review of an arbitrator's decision: the public-policy exception. That exception is based on the principle that, "[a]s with any contract, . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy." *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic*

Workers, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183 (1983). But the public policy "must be well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66, 65 S. Ct. 442, 451 (1945)). Further, the award itself must create an "explicit conflict" with that public policy to justify application of the exception. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43, 108 S. Ct. 364, 373 (1987). The Minnesota Supreme Court has emphasized that the analysis should focus not on whether an employee's conduct was contrary to public policy but on whether the award is contrary to public policy. *City of Richfield v. Law Enf't Labor Servs., Inc.*, 923 N.W.2d 36, 41 (Minn. 2019); *State Auditor*, 504 N.W.2d at 757.[1]

[1] There is some question about whether the public-policy exception applies in Minnesota. The Supreme Court's recognition of the power to vacate arbitration awards rests on the common-law doctrine that courts may not enforce contracts that require action that is inconsistent with public policy. *W.R. Grace*, 461 U.S. at 766, 103 S. Ct. at 2183. And federal common law is not binding on Minnesota courts. *See Hinckley Square Assocs. v. Cervene*, 871 N.W.2d 426, 430 (Minn. App. 2015) (finding the federal common-law rule requiring that artificial entities be represented by a licensed attorney persuasive, but not binding, when considering whether Minnesota caselaw requiring corporations to be represented by an attorney extended to limited partnerships). Though the Minnesota Supreme Court has twice considered whether to vacate an arbitrator's award under the public-policy exception, it has not determined whether the exception exists in Minnesota. *See City of Richfield*, 923 N.W.2d at 41 ("Assuming without deciding that a public-policy exception permits courts to vacate arbitration awards, the facts here do not support applying the exception."); *State Auditor*, 504 N.W.2d at 758 n.9 ("While we refuse to invoke a public policy exception in the present case, we express no opinion on whether we would adopt such a public policy exception on a different set of facts."). This court recognized the exception and applied it to vacate an arbitrator's award in *City of Brooklyn Center v. Law Enf't Labor Servs., Inc.*, 635 N.W.2d 236 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). But that case was decided before *City of Richfield*, so its continued validity with regard to the public-policy exception is somewhat unclear. Nonetheless, we need not determine whether the public-policy exception could allow for vacatur of an arbitrator's

A two-step process is used to evaluate whether an arbitrator's award violates public policy. First, courts determine whether the party challenging the award has identified a public policy that is "well defined and dominant" based on "laws and legal precedents." *See Misco*, 484 U.S. at 43-44, 108 S. Ct. at 373-74 (quotation omitted) (refusing to vacate an arbitrator's award because the public policy advanced by the challenger failed to meet that standard). Second, if the party has identified a policy that meets those standards, the court examines whether the award itself is contrary to the policy. *State Auditor*, 504 N.W.2d at 758 (refusing to vacate an arbitrator's award because the award was not contrary to the well-defined and dominant public policy that was identified). Failure on either of these steps defeats application of the public-policy exception.

In this case, the city has identified two public policies that it claims are violated by the award reinstating Officer Huot: a public policy against unnecessary use of force by police officers and a public policy against failure to report the use of force by police officers. We need not decide whether these public policies are well-defined and dominant under the first step of the analysis if the arbitrator's award is not contrary to the policies under the second step.[2] We turn to that question.

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award in Minnesota because we conclude that any such exception would not apply under these facts.

[2] There is no dispute that there is a well-defined and dominant public policy against the excessive use of force by police officers. Minn. Stat. § 609.06, subd. 1(1) (2018) (allowing, as an exception from the prohibitions of the criminal code, public officers to use reasonable force when officers reasonably believe it to be necessary in order to carry out their legal duties); Minn. Stat. §§ 609.224, subd. 1 (making it a misdemeanor to intentionally inflict bodily harm); .2231, subd. 8 (making it a gross misdemeanor to intentionally inflict demonstrable bodily harm on a vulnerable adult) (2018); *City of Minneapolis v. Police*

Unreasonable Use of Force

The city asserts that reinstating Huot would violate a public policy against the unreasonable use of force. Under *State Auditor*, the fact that an employee's past actions violated a public policy does not necessarily mean that reinstatement of the employee will violate that same public policy. 504 N.W.2d at 757-58. But the city argues that, in *State Auditor*, the arbitrator specifically determined that the employee's confession to misconduct "implied an intention to reform and eliminated the risk . . . of future similar misconduct," *id.* at 758, whereas, here, the arbitrator did not find that the risk of future similar misconduct had been eliminated. In fact, according to the city, the arbitrator's statements that he "cannot find fault with [the] speculation" of command staff that Huot would misuse force again, and the arbitrator's description of Huot as having a "penchant

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Officers' Fed'n of Minneapolis, 566 N.W.2d 83, 89 (Minn. App. 1997) ("It is axiomatic that there is a well-defined and dominant public policy against police officers using excessive force."); *see also* U.S. Const. amend. IV (prohibiting, among other things, unreasonable seizures); 42 U.S.C. § 1983 (2012) (creating a civil cause of action for deprivation of civil rights); *Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 1871 (1989) ("Where . . . [an] excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment . . . .").

Whether there is a well-defined and dominant public policy requiring police officers to report their use of force is less clear. The city's argument that there is such a public policy rests on two sources of law. The first is this court's opinion in *City of Richfield v. Law Enf't Labor Servs., Inc.*, which was reversed by the supreme court. 910 N.W.2d 465, 475 (Minn. App. 2018), *rev'd* 923 N.W.2d 36 (Minn. 2019). The second is a Minnesota Board of Peace Officer Standards and Training (POST) regulation that requires peace officers to demonstrate that they are capable of self-regulation. Minn. R. 6700.1500, subp. 3 (2017). It is not clear that a reversed case from this court and a single regulation requiring "self-regulation" constitute a well-defined and dominant public policy relating to the reporting of use of force. But we need not decide whether there is a well-defined and dominant public policy requiring the reporting of use of force. Even if there is, the arbitrator's award here does not violate it.

for misusing vocal and physical force," constitute a finding that Huot is likely to misuse force in the future. Thus, the city argues, reinstatement will violate public policy.

But the city overstates the arbitrator's findings. While the arbitrator recognized command staff's fear that Huot will misuse force again, he characterized it as "speculation." And, while the arbitrator did not find fault with such speculation, he also did not find that it was substantiated or that it was anything more than speculation. "A refusal to enforce an award must rest on more than speculation or assumption." *Misco*, 484 U.S. at 44, 108 S. Ct. at 374. Similarly, describing Huot as having a "penchant" does not constitute a prediction that he will continue to act accordingly; it merely recognizes Huot's past practices. Thus, the arbitrator's "penchant" comment similarly does not constitute a finding that officer Huot will misuse force in the future.

These plain-language interpretations of the arbitrator's findings are reinforced by their context. The arbitrator in this case was asked two questions: was Huot's termination for "just cause," and, "[i]f not, what is an appropriate remedy?" All of the statements relied upon by the city to argue that the arbitrator found that Huot will misuse force in the future appear in a section in which the arbitrator explains why he selected the disciplinary remedy that he did—effectively, a 13-month unpaid disciplinary suspension. Thus, the arbitrator's statements are best understood not as asserting that Huot will misuse force again, but as explaining why a 13-month unpaid suspension is necessary to ensure that he does not.

The city also analogizes to *City of Brooklyn Center* to argue that reinstating Huot would violate the public policy against misuse of force because it would give him a unique opportunity to continue to use unreasonable force. *See* 635 N.W.2d at 244. In *City of*

Brooklyn Center, the terminated police officer had engaged in a ten-year pattern of stalking and sexual harassment, shown by the complaints of more than 30 women and by the testimony of 15 women who had experienced the officer's conduct. *Id.* at 239-40. In addition, the officer had not changed his behavior despite having faced serious potential consequences for it. *Id.* at 244 (observing that the officer had repeatedly engaged in sexual harassment "despite attempted employment termination and a criminal prosecution"). The situation in this case is quite different. Here, the officer misused force on one prior occasion and, as discipline for it, received only a one-day paid suspension. Unlike the officer in *City of Brooklyn Center*, whose pattern of misconduct appears to have convinced this court that further misbehavior was almost certain, Huot has a much more limited history of unreasonable use of force.

In sum, even though Huot's use of force was contrary to a public policy against unreasonable use of force, the arbitrator's award of reinstatement without back pay is not.

Failure to Report Use of Force

The city also argues that reinstating Huot is contrary to a public policy against the failure to report use of force. At arbitration, Huot stated that he intended to file a written report the next day but had been put on administrative leave. The arbitrator credited this statement, finding that the only reporting policy that Huot violated was a requirement that he report the incident to his supervisor during the shift. And the arbitrator did not find that Huot had violated the reporting policy on any prior occasions. Thus, because this case involves only a single incident of failure to report use of force, it is distinguishable from *City of Brooklyn Center* and from this court's opinion in *City of Richfield* (later reversed

by the supreme court), both of which rely on the fact that the officer had previously failed to report use of force and had been warned about those failures. *City of Richfield*, 910 N.W.2d at 476-77; *City of Brooklyn Center*, 635 N.W.2d at 243-44. In the absence of an arbitral finding that an officer will continue to fail to meet reporting requirements or facts that are so egregious as to present a fair comparison to *City of Brooklyn Center*, an award of reinstatement does not violate a public policy favoring the reporting of use of force.

The arbitrator's award does not violate either of the public policies asserted to exist by the city.

Affirmed.