

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA  
CIVIL ACTION -- LAW

LODGED

JACK SOBERICK

MAY -1 2024

v.

NO. 23-CV-1457 PROTHONOTARY TIME

LANSFORD BOROUGH

3:38pm

Richard Todd Eagan, Esquire  
Michael McAuliffe Miller, Esquire

Counsel for Jack Soberick  
Counsel for Lansford Borough

**MEMORANDUM OPINION**

Nanovic, P.J. – May 1, 2024

Whether the arbitrator erred in excluding overtime pay in the computation of the Lansford Borough Chief of Police's average monthly salary for retirement benefits, and whether an error of this nature is subject to review by this court, are the issues we address below.

**PROCEDURAL AND FACTUAL BACKGROUND**

Between December 3, 1996, and April 13, 2016, Jack Soberick ("Soberick") was employed full-time as a police officer in the Borough of Lansford ("Borough"). Effective April 14, 2016, in accordance with an agreement of that same date between Soberick and the Borough ("Employment Contract"), Soberick was named as the Borough's Chief of Police and remained in this position until his retirement on May 7, 2022. During this time period, the Borough and the Fraternal Order of Police, Schuylkill-Carbon Lodge No. 13 -- the exclusive, recognized collective bargaining agent for all full-time police officers in

the Borough, excluding the Chief as a management level employee -- entered into a new Collective Bargaining Agreement dated March 1, 2018, for the period from January 1, 2018, through December 31 2022.

The March 1, 2018, Collective Bargaining Agreement contains the following pension provision under Article 9 relevant to these proceedings:

2(a). The pension ordinance shall be amended to include that each officer will receive fifty (50%) of the last 36 months average salary *to include all overtime.*

(Collective Bargaining Agreement, Article 9 (Pension), Paragraph 2(a) (emphasis added)). Although not a covered employee under the Collective Bargaining Agreement, Soberick claims that under his employment contract as Chief of Police for the Borough he likewise is entitled to have his overtime pay included in the computation of his average monthly salary for determining the amount of his retirement benefits. In doing so, Soberick relies on the following two provisions in the Employment Contract:

Any benefit or increase in benefits which is not specifically provided to the Chief in this Agreement, but which, is provided to the other members of the Police Department during the term of this Agreement, excluding shift differential, shall also be automatically and immediately provided to the Chief as well, and such benefits or increase in such benefits shall be part of this Agreement.

(Employment Contract, Article XIX (Additional Benefits), p. 7) (colloquially referred to by the parties as the "me-too" clause) and

1. The Chief shall participate in the Lansford Pension Plan of the Borough of Lansford and be subject to its provisions and be entitled to all benefits therein as allowed by Act 600.
2. All the provisions of Lansford Borough Ordinance No. 2004-08, amending, establishing, and continuing the Police Pension Plan pursuant

to Act 600, and any amendments thereto, either prior or subsequent to, shall be made a part of this Agreement.

3. Officers' Contribution to the Pension Plan: the Chief's contributions shall be 3.5%, or as is set in the Collective Bargaining Agreement.

(Employment Contract, Article IX (Pension Plan), p. 3).<sup>1</sup>

In opposing this claim, the Borough asserts its pension ordinance was never amended to include overtime pay in the definition of compensation for purposes of computing an officer's monthly retirement payments and that the full-time police officers in the Borough have to date not been provided this benefit. Further, the Collective Bargaining Agreement under Article 21 (Duration of Agreement) states that the Agreement "shall be in effect January 1, 2018, except for the implementation of any pension provisions which shall be effective upon adoption... ." That the Borough has not amended its ordinance – and consequently its Police Pension Plan – to include overtime pay in the computation of an officer's average monthly salary for retirement purposes is not in dispute, although the reason why this has not occurred is not disclosed in the record before us.

Following his retirement, Soberick was advised by letter dated May 31, 2022, that his pension benefit would be paid in the amount of \$2,758.64 per month commencing on June 1, 2022. In computing Soberick's average monthly salary for the last thirty-six months of his employment with the Borough, the Borough did not include his overtime pay. Had overtime pay been included, Soberick estimates this would add approximately \$550.00 to his monthly retirement payments. Consequently, on August 30, 2022, Soberick filed a grievance maintaining that the monthly pension benefit calculated by the

Borough was incorrect because it did not total fifty percent of his last thirty-six months average salary including all overtime. Pursuant to the Employment Contract this dispute was submitted to "final and binding" arbitration before a single arbitrator of the American Arbitration Association. (Employment Contract, Article XXIV (Grievance-Arbitration), Paragraph 3).

Soberick's grievance was denied by the arbitrator in a Grievance Arbitration Award dated July 10, 2023. In denying Soberick's grievance, the arbitrator stated the following:

Chief Soberick contests the Borough's calculation of his pension because the compensation component of the calculation did not include overtime. He estimates that the inclusion of overtime hours would boost his pension by approximately \$550 per month.

Article IX of the Employment Agreement incorporates the Borough's Pension Ordinance. Article 1.4 of the Ordinance defines "compensation" for pension calculation purposes as "base pay excluding overtime..." The Borough properly calculated the Chief's pension pursuant to the Pension Ordinance.

Chief Soberick notes, however, that Article 9, Section 2.(a) of the Borough-FOP collective bargaining agreement requires that the Ordinance be amended to include overtime in the pension benefit calculation. He argues that the "me-too" provision of his Employment Agreement also entitles him to the inclusion of overtime in his pension calculation. Chief Soberick concedes that the Borough has never amended the Pension Ordinance to comply with Article 9, Section 2.(a). He deems the Borough's inaction as irrelevant to his entitlement to the contractually-mandated method of calculation, i.e., the inclusion of overtime.

The parties did not explain why the Pension Ordinance was never amended to give officers the benefit of Article 9, Section 2.(a). That is an issue for the Borough and the FOP to resolve. As it stands now, Chief Soberick cannot get the benefit of the FOP's bargain under his "me-too" provision because the FOP does not currently have that benefit. Article 21 of the Borough-FOP contract provides that the CBA is in effect January 1, 2018 "except for the implementation of any pension provisions which shall be effective upon adoption." Article 9, Section 2.(a) is a pension provision that, for whatever

reason, has not yet been adopted. If the FOP officers have not received the benefit, Article XIX of the Chief's Employment Agreement does not grant that unrealized benefit to the Chief.

For these reasons, I find that the Borough properly excluded overtime from Chief Soberick's pension calculation.

(Grievance Arbitration Award, pp. 9-10).

On August 9, 2023, Soberick filed a Petition for Review of Grievance Arbitration Award with this court. Pursuant to our rule issued on August 10, 2023, the Borough filed a Reply to the Petition for Review on September 19, 2023. By Order dated September 28, 2023, we requested the parties brief three issues identified therein. Both parties timely complied with this request, and the matter was argued on April 16, 2024.

### **DISCUSSION**

The threshold, and ultimately dispositive issue, we first address is the standard under which we review the arbitrator's award. As to this issue, it is important to recognize that Soberick's pension grievance is premised upon his rights as they arise under the Employment Contract and not upon any claimed rights owed to full-time officers covered by the Collective Bargaining Agreement to which Soberick is not a party.<sup>2</sup> Further, it is the Employment Contract which defines a grievance as "a dispute concerning the meaning or application of terms and conditions of this Agreement..." (Employment Contract, Article XXIV (Grievance-Arbitration), Paragraph 1); which sets forth a four-step process for resolving a grievance, culminating in arbitration (Employment Contract, Article XXIV (Grievance-Arbitration), Paragraph 2); and which dictates that any grievance submitted to arbitration shall be heard by a single arbitrator and that the decision of the

arbitrator "shall be final and binding on both parties." (Employment Contract, Article XXIV (Grievance-Arbitration), Paragraph 3).

The right to arbitration in the Employment Contract is a privately agreed upon remedy whose review, both parties agree, is subject to the statutory provisions governing arbitration found at 42 Pa.C.S.A. §§7301-7362. As the Employment Contract does not expressly provide for arbitration pursuant to the Uniform Arbitration Act, 42 Pa.C.S.A. §§7301-7320 (Subchapter A – relating to statutory arbitration) or any other similar statute, the parties' contractual agreement to arbitrate their dispute is "conclusively presumed to be an agreement to arbitrate pursuant to Subchapter B (relating to common law arbitration)," 42 Pa.C.S.A. §§7341-7342. See 42 Pa.C.S.A. §7302(a) (General Rule); Bridges PBT v. Chatta, 821 A.2d 590, 592 n.3 (Pa.Super. 2003), appeal denied, 829 A.2d 310 (Pa. 2003).<sup>3</sup> Subchapter B dictates that the award of an arbitrator in a non-judicial or non-statutory arbitration is "binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award." 42 Pa.C.S.A. §7341.

Judicial review of a common law arbitration proceeding is prescribed by statute, under a provision of the Pennsylvania Judicial Code:

**§ 7341. Common law arbitration**

The award of an arbitrator in a nonjudicial arbitration . . . is binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.

42 Pa.C.S.A. § 7341. In accordance with this provision, our scope of review is extremely narrow. "The arbitrators are the final judges of both law and fact, and an arbitration award is not subject to a reversal for a mistake of either." Prudential Property and Cas. Ins. Co. v. Stein, 683 A.2d 683, 685 (Pa.Super. 1996). Neither we nor the trial court may retry the issues addressed in arbitration or review the tribunal's disposition of the merits of the case. Rather, we must confine our review to whether the appellant was deprived of a hearing or whether "fraud, misconduct, corruption or other irregularity" tainted the award. The appellant bears the burden to establish both the underlying irregularity and the resulting inequity by "clear, precise, and indubitable" evidence. Chervenak, Keane Co., Inc. v. Hotel Rittenhouse Assocs., Inc., 477 A.2d 482, 485 (Pa.Super. 1984). In this context, "irregularity refers to the process employed in reaching the result of the arbitration, not to the result itself." Id. A cognizable irregularity may appear in the conduct of either the arbitrators or the parties. Paugh v. Nationwide Ins. Co., 420 A.2d 452, 458 (Pa.Super. 1980).

McKenna v. Sossa, 745 A.2d 1, 4 (Pa.Super. 1999), appeal denied, 759 A.2d 924 (Pa. 2000). See also Com. ex rel Kane v. Philip Morris USA, Inc., 114 A.3d 37, 56, 58 (Pa.Cmwlth. 2015) (*en banc*) (holding that "irregularity" which requires reversal of a common law arbitration award refers to the process employed in reaching the results of the arbitration, not to the result itself; a reviewing court cannot address the merits for an error of law or fact), appeal denied, 129 A.3d 1244 (Pa. 2015). An "irregularity" will not be found simply upon a showing that an incorrect result was reached. Press v. Maryland Casualty Co., 324 A.2d 403, 404 (Pa.Super. 1974).

Under this standard, a reviewing court may not disregard an arbitrator's reasonable, or even unreasonable interpretation of the parties' agreement, even if the court finds it to be incorrect: the arbitrator's findings of fact and conclusions of law are not within the scope of review. See also McDevitt v. McDevitt, 73 A.2d 394, 396 (Pa.

1950) (holding that the decision of the arbitrator in a common law arbitration award will not be reviewed or set aside by the court for mistake in either law or fact; the arbitrator is the final judge of both the law and fact, unless the arbitration agreement provides otherwise); Snyder v. Cress, 791 A.2d 1198, 1201 (Pa.Super. 2002) (holding that only claims which assert some defect in the underlying arbitration process may be the subject of an appeal, to the exclusion of appeals which seek review of the merits). The burden as stated in McKenna is on Soberick to show by clear, precise and indubitable evidence the underlying irregularity or defect in the arbitration proceedings and the resulting inequity of the award. McKenna, 745 A.2d at 4. This, Soberick failed to show.

In addition to those benefits expressly granted to Soberick in the Employment Contract, under the “me-too” provision of this contract Soberick is to be provided the same benefits and increases in those benefits provided to other full-time police officers in the Borough. Regarding the Borough’s police pension plan specifically as it relates to Soberick under the Employment Contract, Soberick is to participate in the Borough’s pension plan and “be subject to its provisions and be entitled to all benefits therein as allowed by Act 600.” (Employment Contract, Article IX (Pension Plan), Paragraph 1). Article IX, Paragraph 2 of the Employment Contract further provides that “[a]ll the provisions of Lansford Borough Ordinance No. 2004-08, amending, establishing, and continuing the Police Pension Plan pursuant to Act 600, and any amendments thereto, ... shall be made a part of this Agreement.”

Act 600, 53 P.S. §§767-778, the enabling legislation pursuant to which the

Borough operates its police pension plan, requires that the Police Pension Plan be established by ordinance or resolution, 53 P.S. §767(a)(1), and that the Borough's ordinance set forth the amount of monthly retirement pension or retirement benefits to be paid in accordance with 53 P.S. §771. Having properly adopted its pension plan by ordinance, any amendments to that plan require the enactment of subsequent ordinances by the Borough. 8 Pa.C.S.A. §3301.1(a). Notwithstanding this requirement, as well as the provision in the Collective Bargaining Agreement that the pension ordinance be amended to include that each officer is to receive fifty percent of the last thirty-six months average salary to include all overtime, Article IX, Paragraph 2(a), this was never done.

At the time of the arbitration hearing, and as it stands today, compensation for purposes of computing an officer's average monthly compensation for retirement benefits is defined in the Police Pension Plan to mean the following:

- (b) For officers hired after June 5, 1991, compensation reportable as base pay **excluding** overtime and longevity pay, premiums, bonuses, severance payments, accrued vacation payment, accrued sick days payment, or similar non-recurring compensation. Compensation shall include only that compensation which is actually paid to the Participant during the applicable period.

(Lansford Police Pension Plan, Article I (Definitions), Section 1.4(b) (definition of the term "compensation") (emphasis added)).

Absent the requisite ordinance amendment, Soberick is not entitled to a benefit not yet in effect or enjoyed by the bargaining unit. Moreover, Article 21 of the Collective Bargaining Agreement specifically provides that while the Agreement is generally in effect as of January 1, 2018, excepted from this effective date is "the implementation of any

pension provisions which should be effective upon adoption." The condition precedent of an effective date – enactment of an amendment to the ordinance – has never been satisfied. It was on this basis that the arbitrator determined Soberick was not entitled to have overtime included in the computation of his average monthly salary under the Borough's police pension plan.<sup>4</sup>

### **CONCLUSION**

In accordance with the foregoing, since Soberick is only entitled to receive those additional benefits provided to the other full-time police officers employed by the Borough, and since the other members of the police department have not been provided the additional benefit Soberick seeks – inclusion of overtime pay in the computation of his average monthly salary – in that the Borough has never amended its Pension Ordinance to comply with Article 9, Paragraph 2(a) of the Collective Bargaining Agreement, the arbitrator's award is a reasonable interpretation of the relevant language in the Employment Contract within his contractually delegated authority. Soberick has no right to an unrealized amendment of the Borough's pension ordinance required in a contract to which he is not a party, the benefits of which have yet to be provided to the other members of the police department. Moreover, even if the arbitrator's decision on this issue were determined to constitute a mistake of law or fact, we are without jurisdiction on this basis to modify the award under the standard applicable to review of arbitration awards for binding common law arbitration. See 42 Pa.C.S.A. §7341; Runewicz v. Keystone Insurance Co., 383 A.2d 189, 193 (Pa. 1978).<sup>5</sup> Accordingly, Soberick's Petition

for Review requesting the issuance of an order directing the Borough to provide him with a monthly pension benefit totaling fifty percent of his last thirty-six months average salary including all overtime will be denied.

BY THE COURT:



P.J.

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<sup>1</sup> The Borough's Police Pension Plan was restated and amended via Brough Ordinance No. 2004-08.

<sup>2</sup> Soberick's Employment Contract with the Borough is distinct from the Collective Bargaining Agreement. As such, Soberick lacks privity of contract to the separate and distinct Collective Bargaining Agreement he really seeks to enforce. Nor is Soberick a third party beneficiary of the Collective Bargaining Agreement. Scarpitti v. Weborg, 609 A.2d 147, 150-151 (Pa. 1992) (holding that a person becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party and that intention is clearly stated in the contract itself).

In his position as Police Chief, a managerial position, Soberick is exempt from the collective bargaining unit. (Employment Contract, Article II (Duties of the Chief)). See also Act 111 of 1968, 43 P.S. §§217.1-217.12 (Policemen and Firemen Collective Bargaining Act); 43 P.S. §1101.301 (Definitions) (excluding management level employees from the definition of "public employee") of the Public Employee Relations Act, 43 P.S. §§1101.201-1101.2301.

<sup>3</sup> While agreeing that the standard of our review of the July 10, 2023, Grievance Arbitration Award is governed by Sections 7301-7342 of the Judicial Code, 42 Pa.C.S.A. §§7301-7342 (Chapter 73 (Arbitration), Subchapters A and B) Soberick contends review is that applicable to statutory arbitration pursuant to Subchapter A. Section 7302(d) of this Subchapter provides as an exception to the general rule that when "[a] political subdivision submits a controversy with an employee or a representative of employees to arbitration," 42 Pa.C.S.A. §7302(d)(1)(ii), "a court in reviewing an arbitration award... shall... modify or correct the award where the award is contrary to law and is such that had it been a verdict of a jury the court would have entered a different judgment or a judgment notwithstanding the verdict [(J.N.O.V.).]" 42 Pa.C.S.A. §7302(d)(2).

Section 501(b) of this same statute, the Act of October 5, 1980, P.L. 693, No. 142, provides that Section 7302(d)(2) is applicable to an agreement made prior to the effective date of the Uniform Arbitration Act (i.e., December 4, 1980) which expressly provides for statutory arbitration and that it should be interpreted pursuant to the law of this Commonwealth, or an agreement regardless of when entered which expressly provides for arbitration pursuant to the former provisions of the Act of April 25, 1927 (P.L. 381, No. 248) (5 P.S. §171(d)), relating to statutory arbitration. See also Sherman v. Amica Mut. Ins. Co., 782 A.2d 1006, 1009 (Pa.Super. 2001), appeal denied, 798 A.2d 1291 (Pa. 2002). Because the Employment Contract of April 14, 2016, was entered after the effective date of Section 7302(d)(2) and does not expressly provide for arbitration under the Act of 1927, Section 7302(d)(2) does not apply to the facts of this case. Sherman,

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782 A.2d at 1009. Additionally, whether Section 7302(d)(1)(ii) applies to an individual employment contract, as here, or only where the employee is one of several employees subject to a collective employment contract is unclear. See 42 Pa.C.S.A. §7302 Bar Association Comment.

As a practical matter whether our standard of review is that applicable to statutory arbitration or the narrower standard under the common law does not change the end result since under either standard the award may be vacated or corrected only where the arbitrator exceeds his scope of authority, Com. ex rel. Kane v. Philip Morris USA, Inc., 114 A.3d 37, 58 (Pa.Cmwlth. 2015) (*en banc*), appeal denied, 129 A.3d 1244 (Pa. 2015), and under both Subchapter A and Subchapter B, the reviewing court cannot address the merits for an error of law or fact. Kane, 114 A.3d at 58. By according extreme deference to an arbitrator's determinations and circumscribing the court's review of an arbitration award, both tests promote the policy of encouraging arbitration as a means of providing "an expeditious and inexpensive method of resolving disputes with the further winning attribute of helping to ease congested court calendars...." Kane, 114 A.3d at 55 (citation and quotation marks omitted).

As discussed in Kane, the J.N.O.V. standard of review is the same as the "essence test" formulated by the United States Supreme Court in the Steelworkers trilogy. Kane, 114 A.3d at 53 (citing Cnty. Coll. of Beaver Cnty. v. Soc'y of the Faculty (PSEA/NEA), 375 A.2d 1267, 1275 (Pa. 1977)).

Under the essence test, the court must accord great deference to an arbitrator's contract interpretation. State Sys. of Higher Ed. (Cheyney Univ.) v. State Coll. Univ. Prof'l Ass'n (PSEA-NEA), 560 Pa. 135, 743 A.2d 405 (1999). The interpretation may be set aside only where it is so indisputably contrary to the contract that it cannot rationally be derived from the agreement. Id. The court must make the distinction between an irrational award and one that merely chooses between differing interpretations of contract language. Id. An arbitrator's award must be upheld if it represents a reasonable interpretation of the parties' agreement. Id. In other words, "a court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement." Greater Nanticoke, 760 A.2d at 1217.

Kane, 114 A.3d at 54. "[O]nly where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction ... may a reviewing court disturb the award." Kane, 114 A.3d at 54-55 (citation and quotation marks omitted). "[A]n arbitration award that even arguably construes or applies the contract must stand, regardless of a court's view of its merits." Kane, 114 A.3d at 52.

As follows from our discussion of the common law standard of review in the text of this opinion, in rendering his award, the arbitrator did not exceed the scope of his authority which, as delineated in the Employment Contract, encompasses disputes over both the meaning and application of the terms and conditions of the Contract; moreover, the arbitrator's award represents a reasonable interpretation of the Employment Contract.

<sup>4</sup> On the premise that his right to have overtime pay included in the computation of his average monthly salary for purposes of pension benefits became fixed when he retired, Soberick claims he has been deprived of his constitutional rights under Article I, Section 17 of the Pennsylvania Constitution which states: "No *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed." Pa.Const. Art. I, §17. As argued by Soberick, pension benefits are contractual in nature, Catania v. State Employees' Retirement Board, 450 A.2d 1342, 1345 (Pa. 1982) (plurality opinion), and once conferred are subject to an absolute constitutional prohibition against diminishment. Association of State College and University Faculties v. State System of Higher Education, 479 A.2d 962, 966 (Pa. 1984).

Soberick's premise, however, is faulty in that the "me-too" clause of his employment contract only entitles him to those additional benefits not specifically granted to him in the Employment Contract, but which are provided to other members of the Police Department during the term of his agreement. As a matter of contractual interpretation, the arbitrator determined that the addition of overtime pay to the computation of average monthly salary for setting the amount of monthly retirement payments was a benefit not yet in

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effect or enjoyed by the bargaining unit and, in any event, not one Soberick was entitled to under the Borough's Act 600 pension ordinance as it then existed and which was incorporated into and made part of the Employment Contract.

As interpreted by the arbitrator, the Borough properly calculated Soberick's pension in accordance with the pension ordinance then in effect at the time of his retirement and Soberick received all benefits to which he was then entitled under the Employment Contract, inclusive of the "me-too" provision. As so interpreted, Soberick has sustained no diminishment in the pension benefits to which he was entitled and no impairment of constitutional rights under Article I, Section 17 of the Pennsylvania Constitution.

<sup>5</sup> As more fully discussed in Runewicz:

This is not our first case involving a common law arbitration award that was claimed to be blatantly at odds with the contract involved. Such variance, without more, cannot be a basis for a finding of such misconduct as would justify setting the award aside. There may have been an error of fact or law here. We do not decide whether there was since that is irrelevant. Such factual or legal error as may have occurred here cannot be a basis for setting aside the common law award. It must stand.

383 A.2d at 193. Noting as well that the conclusive effect of an arbitration award applies equally to whether conditions precedent for coverage have been met and whether a party claiming injury is included among those entitled to coverage under the contract under review. Id. at 192.