

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

CITY OF MT. HEALTHY,	:	APPEAL NO. C-160765
	:	TRIAL NO. A-1604437
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
FRATERNAL ORDER OF POLICE,	:	
OHIO LABOR COUNCIL, INC.,	:	
	:	
Defendant-Appellant.	:	
	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

The Fraternal Order of Police, Ohio Labor Council, Inc., (“FOP”) appeals the judgment of the Hamilton County Common Pleas Court vacating an arbitration award in its favor against the city of Mt. Healthy, Ohio.

On July 15, 2015, the city fired David Scott, a part-time police officer with the Mt. Healthy Police Department, after he allegedly engaged in improper conduct with four different women. One woman alleged that Scott, while in uniform, had forced her to perform oral sex upon him against her will.

On July 22, 2015, Scott presented a grievance to the city, and the FOP later submitted the grievance to arbitration. Following an evidentiary hearing, the arbitrator concluded that the city did not have just cause to discipline Scott and sustained the grievance. The arbitrator rescinded Scott’s discharge and ordered that he be reinstated

to his former position with the police department, with back pay to the date of his discharge.

The city filed a motion in the common pleas court to vacate the arbitration award, and the FOP filed a motion to confirm the award. The trial court concluded that the arbitrator had exceeded his authority under the parties' collective-bargaining agreement by: (1) issuing an award that exceeded the monetary award expressly allowed under the agreement; and (2) applying a burden of proof not provided for in the agreement. The FOP now appeals.

In six assignments of error, the FOP argues that the trial court erred by (1) determining that the arbitrator exceeded his authority in determining the quantum of proof necessary for the city to prevail; (2) determining that the arbitrator imperfectly performed his duties in interpreting the just-cause standard in the agreement; (3) misapplying the test for overturning an arbitrator's award; (4) concluding that the arbitrator's ruling violated public policy; (5) failing to confirm the award; and (6) failing to award interest on all monies due and payable.

In its first assignment of error, the FOP argues that the trial court erred by determining that the arbitrator exceeded his authority. Specifically, it challenges the court's finding that the arbitrator used the wrong burden of proof in concluding that the city lacked just cause to discharge Scott.

R.C. 2711.10 provides limited circumstances when an arbitration award must be vacated, including when an arbitrator exceeds his authority. *See Ohio Patrolmen's Benevolent Assn. v. Findlay*, 149 Ohio St.3d 718, 2017-Ohio-2804, 77 N.E.3d 969, ¶ 15. An arbitrator's authority is derived from the terms of the collective-bargaining agreement. *Fostoria v. Ohio Patrolmen's Benevolent Assn.*, 106 Ohio St.3d 194, 2005-Ohio-4558, 833 N.E.2d 720, ¶ 11. As long as an arbitrator acts within the scope of the agreement, the arbitrator has great latitude in issuing a decision. *See Cedar Fair, L.P., v. Falfas*, 140 Ohio St.3d 447, 2014-Ohio-3943, 19 N.E.3d 893, ¶ 6.

However, the arbitrator's authority is not unlimited. *Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emps. Assn., Local 11 AFSCME, AFL-CIO*, 59 Ohio St.3d 177, 180, 572 N.E.2d 71 (1991). An arbitrator acts outside his authority when the award fails to draw its essence from the agreement—that is, when there is no rational nexus between the agreement and the award, or where the award is arbitrary, capricious, or unlawful. *See Mahoning Cty. Bd. of Mental Retardation and Dev. Disabilities v. Mahoning Cty. TMR Edn. Assn.*, 22 Ohio St.3d 80, 488 N.E.2d 872 (1986), paragraph one of the syllabus.

In this case, the collective-bargaining agreement between the city and the FOP did not set forth a burden of proof to be applied to a determination of just cause. With respect to the arbitrator's authority, Section 13.7 of the agreement stated in relevant part:

The arbitrator shall limit his decisions strictly to the interpretation, application, or enforcement of the specific Articles and Sections of the Agreement, and shall be without power or authority to make any decision:

1. Contrary to, or inconsistent with, or modifying or varying in any way the terms of this Agreement or applicable laws;
2. Contrary to, or inconsistent with, changing, altering, limiting, or modifying any practice, policy, rules, or regulations, established by the Employer so long as such practice, policy, or regulations do not conflict with this Agreement.

In his decision, the arbitrator acknowledged that the rape complaint against Scott was serious enough on its own to warrant Scott's termination. In assessing whether the city had just cause to terminate Scott, the arbitrator indicated that there were various levels of proof required to determine "just cause," based upon the nature

of the case and depending on the level of “seriousness.” He then applied a heightened burden of proof, not because Scott was terminated, but because his termination resulted from complaints of moral turpitude. The arbitrator stated:

While all terminations are serious matters there are *degrees of seriousness.*

* * *

It is one thing to be terminated for poor job performance and quite another to be terminated for dishonesty or moral turpitude. A dishonest person has demonstrated that he/she is untrustworthy. Prospective employers would be very reluctant to hire someone who was charged for any kind of dishonesty. *A person who was terminated for moral turpitude especially if it was of a sexual nature will have great difficulty getting any kind of a job that involves personal contact with people.*

* * *

[B]efore a police officer is terminated for misconduct that will end his/her career in law enforcement the decision maker(s) *must be quite certain* that the individual(s) is/are *guilty of the charge(s)* levied.

In the Arbitrator’s opinion, given the very serious nature of the complaint made against the Grievant, which resulted in his being terminated, the *proof must be overwhelming* that he did the things he was accused of having done.

* * *

[B]ecause of the nature of this case Management had to meet a *heavy burden of proof* to have the discharge upheld by the Arbitrator. In view of all of the aforementioned the Arbitrator

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has determined that Management's case fell far short of meeting
the necessary burden of proof.

(Emphasis added.)

We recognize that by not setting forth a burden of proof to be used by an arbitrator in a just-cause determination, the city agreed to allow the arbitrator to determine the necessary measure of proof. However, under the agreement, the arbitrator was prohibited from making a decision contrary to, or inconsistent with, its terms. One of the terms of the agreement was that the city had the right to discipline its employees for just cause. There is no graduated standard of proof for just cause depending on the nature of the complaint.

The arbitrator made clear that the burden of proof he applied to a just-cause determination involving a termination was dependent upon the level of seriousness and his perception of the effect of the termination on the employee. By holding the city to an arbitrary burden of proof, the arbitrator effectively deprived the city of its bargained-for right. Therefore, the arbitrator exceeded his authority under the agreement.

Consequently, we hold that the trial court did not err by vacating the arbitrator's award on this basis. We overrule the first assignment of error. Our disposition of the first assignment of error renders the remaining assignments of error moot. The judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

MOCK, P.J., MYERS and MILLER, J.J.

To the clerk:

Enter upon the journal of the court on August 25, 2017

per order of the court _____
Presiding Judge