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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

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CITY OF PARMA, OHIO
Plaintiff

PARMA FIRE FIGHTERS ASSOCIATION LOCAL 639, ETC.
Defendant

Case No: CV-11-749123

Judge: KATHLEEN ANN SUTULA

JOURNAL ENTRY

96 DISP.OTHER - FINAL

ORDER CONFIRMING AND ENFORCING THE ARBITRATION AWARD. O.S.J.

FINAL.
COURT COST ASSESSED TO THE PLAINTIFF(S).

K A Sutula 9.1.11
Judge Signature Date

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STATE OF OHIO)
COUNTY OF CUYAHOGA COUNTY)

IN THE COURT OF COMMON PLEAS
SS.
CASE NO. CV 11 749123

CITY OF PARMA,

Applicant/Counter-Respondent,

v.

PARMA PROFESSIONAL FIRE FIGHTERS ASSOCIATION, IAFF LOCAL 639, AFL-CIO,

Respondent/Counter-Applicant,

ORDER CONFIRMING AND ENFORCING THE ARBITRATION AWARD

Kathleen Ann Sutula, J:

This matter is before the Court on the Applicant/Counter-Respondent's, the City of Parma, Motion to Vacate the Arbitration Award. Consistent with the foregoing, the Court denies the Applicant/Counter-Respondent's Motion to Vacate and grants the Respondent/Counter-Applicant's, Parma Professional Fire Fighters Association, counterclaim to confirm and enforce the Arbitration Award.

I. Factual Background

The court adopts and restates the pertinent facts found in the Arbitration Award. On October 14, 2009, Anthony DeCarlo, the grievant, and Patrick Taylor, another fire fighter, were the first employees to be selected for random alcohol and drug tests under a recently revised contract provision. The grievant and Taylor signed brief forms consenting to the collection and analysis of the urine samples and permitting the testing center to report their results to the city. On October 19, 2009, the testing facility notified the grievant and the City that he had tested positive for cocaine.

On October 20, 2009, the grievant and Lee Wester, the union vice president, met with John French, the Fire Chief, and Captain Ralph Meno, the grievant's supervisor. At the meeting, the grievant gave Chief French and Captain Meno copies of doctors' letters and information about false positives. Chief French testified that he concluded that that the grievant was denying he had used cocaine, but he acknowledged that he never asked grievant whether he had used cocaine and that the grievant never said that he had not used it.

At the conclusion of the meeting, Chief French placed the grievant on leave and referred him to the City's employee assistance program (EAP). The grievant then met with an EAP counselor and the grievant admitted to the counselor that he had use cocaine. The counselor then referred him to the outpatient drug treatment program at Southwest General Health Center.

A pre-disciplinary hearing scheduled for November 3, 2009 was continued to November 10, 2009 so the grievant could consult with legal counsel. When the hearing resumed on November 10, 2009, Chief French read the grievant his Garrity Rights and asked if he had used cocaine. The respondent testified that he had used cocaine in high school, on one occasion in January 2009 and on October 10, 2009, a few days before the drug test.

On November 13, 2009, Chief French sent his report to Elayne Siegfred, the City's Director of Human Resources, and recommended that the grievant be discharged. Chief French concluded that the grievant was not honest on October 20, 2009, about his drug use and he continued his deception on November 10, 2009, when describing the amount of cocaine he used on October 10, 2009.

Gregory Baeppler, the City's Safety Director, conducted a pre-deprivation hearing on December 2, 2009. Director Baeppler's determined that the charges related to the grievant's drug use and dishonesty were substantiated. The grievant was then dismissed and suggested that

he contact his union representative regarding his rights under the collective bargaining agreement.

On December 10, 2009, the union appealed the grievant's termination to step four of the grievance procedure. Pursuant to the collective bargaining agreement, Dean DePiero, the Mayor, conducted a hearing on December 21, 2009. He issued a report denying the grievance on January 5, 2010.

An arbitration hearing was conducted on August 20, 2010. On December 3, 2010 the Arbitrator issued his Opinion and Award, sustaining the grievance in part and finding the discharge lacked just cause. The Arbitrator ordered that DeCarlo, the grievant, be reinstated to his former position without back pay or benefits. Subsequently, the City of Parma filed an Application to Vacate the Arbitration Award and the Parma Professional Fire Fighters Association filed a counterclaim to confirm and enforce the Arbitration Award.

II. Argument

The Applicant/Counter-Respondent contends that the Arbitration Award should be vacated because: (1) the combination of cocaine abuse coupled with efforts to deceive the employer is just cause for termination; and (2) the Arbitrator abused his discretion in modifying the discipline issued by the employer because public policy demands termination.

The Respondent/Counter-Applicant asserts the Arbitration Award should be upheld and enforced since: (1) the Arbitration Award draws its essence from the collective bargaining agreement and is not unlawful, arbitrary, or capricious, and therefore, must be upheld; (2) the City's argument for vacating the arbitration award requires the Court to improperly overturn the Arbitrator's legal and factual determination and reverse the Arbitrator's interpretation of the

collective bargaining agreement; (3) the Arbitrator's decision is consistent with applicable precedent; and (4) the Award did not violate public policy.

III. Standard of Review of Arbitration Awards

Ohio Revised Code §2771.10 limits the Court's review of an arbitrator's decision and award providing that it "... shall make an order vacating the award upon the application of any party to the arbitration if: (A) the award was procured by corruption, fraud, or undue means; (B) There was evident partiality or corruption on the part of the arbitrator, or any of them; (C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; (D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

The Ohio Supreme Court has held that "a reviewing court is limited to determining whether the award draws its essence from the CBA and whether the award is unlawful, arbitrary or capricious. *Assn of Cleveland Fire Fighters, Local 93 of the Internatl. Assn. Of Fire Fighters v. City of* Cleveland, 99 Ohio St. 3d 476, 793 N.E.2d 484. In reaching its decision, a reviewing court is not to substitute its judgment or its view of the facts or law for that of the arbitrator. *Piqua v. Fraternal Order of Police*, 185 Ohio App.3d 496, 506, 924 N.E.2d 876 (2 Dist., 2009).

IV. Analysis

In the instant case, the Applicant/Counter-Respondent has put R.C. 2711.10(D) at issue by contending that the Arbitrator departed from clear contract language and dispensed his own brand of industrial justice. The Ohio Supreme Court, interpreting R.C. 2711.10(D) in *Findlay City School Dit. Bd. Of Edn. v. Findlay Edn. Assn.* (1990), 49 Ohio St.3d 129, 551 N.E. 2d 186,

held that if an arbitrator's award "draws its essence from the collective bargaining agreement and is not unlawful, arbitrary or capricious" it must be confirmed. "An arbitrator's award draws its essence from a collective bargaining agreement when there is a rational nexus between the agreement and the award, and where the award is not arbitrary, capricious or unlawful." *Mahoning Cty. Bd. Of Mental Retardation v. Mahoning Cty. TMR Edn. Assn.* (1986), 22 Ohio St.3d 80, 22 OBR 95, 488 N.E.2d 872, paragraph one of the syllabus.

Section 10 of Appendix B of the Collective Bargaining Agreement ("CBA") reads: "Any employee who tests positive for illegal drugs shall be medically evaluated, counseled and treated for rehabilitation as recommended by E.A.P. counselor." Section 10 then calls for an employee, who has been rehabilitated, to be randomly tested each quarter for twenty-four months after completing rehabilitation. It states that "if an employee tests positive during the twenty-four (24) month period, they shall be subject to disciplinary actions per the Department Rules and Regulations." Section 11 of Appendix B of the CBA reads, "that once an employee successfully completes rehabilitation, they shall be returned to their regular duty assignment once treatment and any follow-up care is completed, and if five years have passed since the employee has entered the program, the employee's personnel file shall be purged of any reference to his/her drug or alcohol problem."

Interpreting the CBA, Arbitrator Nelson stated "he does not believe that the drug and alcohol policy agreed to by the parties contemplates the automatic discharge of an employee after testing positive for the first time." In support of his opinion, Arbitrator Nelson cited to Section 1's use of eliminating drug use through "education" and "rehabilitation"; Section 10's rehabilitation requirements and random testing following a positive test; and Section 11's procedure to return

the employee to their regular duty assignment after completing rehabilitation. Furthermore, the Arbitrator recognized "that during the most recent negotiations, the parties agreed to drop from Section 2 of the policy the sentence prohibiting disciplinary action against an employee for a first offense unless the employee refuses rehabilitation or fails to complete it." The Arbitrator explains, " that dropping the prohibition against any discipline is not the same thing as establishing termination as the appropriate penalty for a first offense."

Based upon a review of the Arbitrator's decision in light of the language of the CBA this court cannot say the Arbitrator exceeded his authority in applying the terms of the CBA. The CBA does not state that an employee is automatically discharged upon a first offense. The language found in the Agreement supports the Arbitrator's decision and this Court cannot substitute its interpretation or judgment for that of the arbitrator where the award appears to be neither arbitrary nor capricious. Based on the foregoing the Arbitration Award is confirmed and to be enforced. This Court denies Respondent/Counter-Applicant's request for an award of interest, as the Award made by Arbitrator Nelson does not award the payment of money. Finally, Respondent/Counter-Applicant's request for a hearing to determine attorney's fees pursuant to R.C. 2323.51 is denied.

THIS IS SO ORDERED.

DATE: 9.1.11

KATHLEEN ANN SUTULA, JUDGE

CERTIFICATE OF SERVICE

A copy of the foregoing Order Confirming and Enforcing the Arbitration Award has been sent via regular U.S. mail on this 14 day of September 2011, to the following:

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