

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

CITY OF YORK, PENNSYLVANIA,	:	
APPELLANT	:	No. 2020-SU-1897
	:	
	:	
Vs.	:	CIVIL ACTION - LAW
	:	
	:	
CLAYTON SWARTZ,	:	
RESPONDENT	:	

AFFIDAVIT PURSUANT TO Pa.R.Civ.P.1035.4

1. I, Edward A. Paskey, Esq, am co-counsel for Respondent, Clayton Swartz.
2. On April 22, 2021, Clayton Swartz filed Preliminary Objections to the Appellant's 2nd Petition for Review based, in part, on Pa.R.Civ.P. 1028 (b)(6) pendency of a prior action or agreement for alternative dispute resolution.
3. Paragraphs 14, 25 and 26 of the Preliminary Objections reference two (2) grievances that were pending disposition by arbitration before the American Arbitration Association with Thomas P. Leonard, Esquire serving as arbitrator.

4. A redacted Award issued by Arbitrator Leonard dated July 16, 2021 relating to the two (2) grievances is attached to this affidavit.

FURTHER, AFFIANT SAYETH NAUGHT.

DATE: July 19, 2021

/s/ Edward A. Paskey

Edward A. Paskey, Esquire
Attorney ID Number 80304
2675 Eastern Boulevard
York, Pennsylvania 17402
T: 717.757.4565
F: 717.755.4708
E: epaskey@yorklaw.com
Counsel for Clayton Swartz

AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration between

White Rose Lodge #15
Fraternal Order of Police

Case Number: 01-20-0015-5559

and

City of York

Grievance: Officer Clayton Swartz
Reinstatement

OPINION AND AWARD

Hearing Date: April 27, 2021

Briefs Received: June 4, 2021

Arbitrator: Thomas P. Leonard, Esquire

For Lodge #15:

Edward A. Paskey, Esquire
France Paskey, PC

For City of York:

Joseph C. Rudolf, Esquire
Clark Hill, PLC

Procedural History

The City of York (City) and White Rose Lodge #15 Fraternal Order of Police (FOP) are parties to a collective bargaining agreement covering the wages, hours and terms and conditions of employment of the paid police officers of the City of York. The CBA contains a grievance procedure at Article V and a provision for arbitration/mediation at Article VI that sets forth a binding arbitration of unresolved grievances to be conducted in accordance with the Labor Arbitration Rules of the American Arbitration Association.

On September 11, 2020, the FOP filed a grievance on behalf of Officer Clayton Swartz alleging the Police Commissioner refused to take Swartz off unpaid leave despite a Trial Board finding him not guilty on all three counts for which he had earlier been suspended. (Grievance 2020-003)

The grievance proceeded to arbitration. On November 20, 2020, the American Arbitration Association notified the undersigned that the parties had selected him as the arbitrator to hear this grievance.

On December 16, 2020, the AAA notified the parties that an arbitration hearing would be held on March 26, 2021. On February 25, 2021 the Court of Common Pleas ordered the appeal that the City had taken of Trial Board's Findings be remanded to the Trial Board to provide findings of fact and reasons for its decision. The parties agreed to continue this arbitration hearing to April 27, 2021.

On March 8, 2021, the FOP filed a second grievance on behalf of Officer Swartz alleging that the City refused to reinstate Swartz following the remanded Trial Board decision which included findings of fact and reasons for its decision but and still found him not guilty on all three counts for which he had earlier been suspended. (Grievance 2021-001).

On April 5, 2021, the parties agreed to consolidate Grievance 2021-001 for hearing with this grievance. The hearing was held as scheduled, as a virtual hearing on the Zoom platform. The hearing was transcribed by a court reporter.

At this arbitration hearing the parties presented testimony, cross-examined witnesses and introduced documentary evidence. The parties submitted post-hearing briefs, which were forwarded to the arbitrator on June 4, 2021. The parties agreed to the arbitrator's request to extend the date for the issuance of this Award to July 16, 2021.

Issues

Are these grievances arbitrable? If so, did the City violate Article XVIII of the CBA when it refused to accept as final and binding the decision of the Trial Boards' finding Clayton Swartz not guilty when it refused to reinstate him? If so, what shall be the remedy?

Relevant Contract Provision

Article XVIII – Discipline

In the event an employee is suspended, he may request a hearing by the Board of Appeals by presenting his request in writing to the Police Commissioner or Chief of Police within two (2) working days from the date he receives notification of the suspension.

It is understood that an aggrieved officer under the provisions of this Article shall have the right to elect to grieve his suspension through the formal grievance procedure outlined in Article V of this Agreement; however, should an officer

elect one of these two alternatives available to him, he shall be unable to subsequently elect the other alternative to grieve the same suspension.

It is further understood that this Article pertains to suspensions only. The Board of Appeals shall consist of:

- The Police Commissioner or Chief of Police or appointee.
- President of Fraternal Order of Police or appointee.
- Disinterested party.

Each member of the Board's vote shall carry equal weight in the final decision. A written decision shall be given to the employee within five (5) working days after the meeting. *The decision of the Board shall be final and binding on both parties.* Expenses and fees of the disinterested member shall be borne equally by said parties.

(Emphasis added by Arbitrator)

Facts

Clayton Swartz is a police officer for the City of York. On July 16, 2020, the City issued Swartz a Notice of Charges against him based on a complaint from three complainants. These three individuals complained that on May 30, 2020, at a May 30, 2020 graduation party for Swartz' fiancée's sister he engaged in a mock reenactment of George Floyd's death. The charges against Swartz allege that he violated three provisions of the York City Police Department Rules - Unbecoming Conduct, Use of Alcohol off Duty and Truthfulness.

On June 4, 2020 the City placed him on paid administrative leave. In mid July, the City converted the leave to unpaid administrative leave.

The Notice of Charges stated that "[p]ursuant to General Order 2.3 you have the right to a Trial Board hearing or a hearing before the Police Commissioner. "

Swartz elected a hearing before a Trial Board, which held a hearing on August 19, 2020. On September 10, the Trial Board issued its one page "Trial Board Findings." The Board found Swartz "Not Guilty" on all three charges.

On September 10, Police Commissioner Osborne Robinson stated that despite the Not Guilty findings, he was not going to take Swartz off unpaid administrative leave. On September 11, 2020, the FOP filed a grievance on the grounds that the Trial Board found Swartz not guilty on all charges and that Article XVIII of the CBA states that a decision of the Trial Board "shall be final and binding on both parties." (Grievance 2020-003 or "First Grievance")

On September 15, the Police Commissioner formalized his September 10 statement by issuing a letter approving the Trial Board's finding of "Not Guilty" on the charge of Use of Alcohol, but disapproving the Board's findings on Conduct Unbecoming and Truthfulness.

On September 15, the City filed a Petition for Review of the Trial Board Findings (First Petition) with the York County Court of Common Pleas. The Petition sought to overturn the "Not Guilty" findings by way of a Local Agency Law appeal, 2 Pa. C.S. § 751 et seq. The City's appeal had two grounds: (1) that the Trial Board Findings failed to comply with the statutory requirement of the Local Agency Law that the decision be supported by written findings of facts and a reasoned adjudication; and (2) they were not supported by "substantial evidence" in the record, as is required by the Local Agency Law.

On October 14, 2020, the appeal was assigned to Hon. Kathleen J. Prendergast. On February 25, 2021, Judge Prendergast issued a Memorandum Opinion and Order that granted the First Petition, in part, and also dismissed it in part, without prejudice. The Court determined that it had subject matter jurisdiction over the First Petition and that "decisions made by a police disciplinary trial board are subject to appeal under the Local Agency Law." The Court further

held that the Trial Board Findings were defective because they lacked written findings of fact and reasons for the adjudication. The Court struck down the Trial Board findings and remanded the matter back to the Swartz Trial Board so that it “may issue an adjudication that complies with [the Local Agency Law].” The Court additionally held that “[a]ll other issues raised by the parties are moot at this time and dismissed without prejudice.”

On March 4, 2021, the Trial Board issued the Revised Trial Board Findings. The Revised Trial Board Findings, like their predecessor, found Swartz “Not Guilty” on all three charges, but now contained findings of fact and reasons for adjudication.

On March 18, 2021, after the Revised Trial Board Findings were issued following the remand, the FOP filed grievance 2021-001 seeking Swartz’s reinstatement based upon the “Not Guilty” findings and the language of the CBA (Grievance 2021-001 or “Second Grievance”) The Second Grievance similarly contends that Article XVIII of the CBA requires the City to reinstate Swartz to duty based upon language which states the “decision of the Board shall be final and binding on both parties.”

On March 30, 2021, Police Commissioner Michael Muldrow (who succeeded Commissioner Robinson) notified Swartz by letter that he disapproved of the March 4 Revised Trial Board Findings.

On April 2, 2021, the City filed its Second Petition for Review under the Sunshine Act and Local Agency Law (the “Second Petition”) seeking to void the Trial Board’s Revised Findings on the grounds that it violated the Sunshine Act and that the Revised Trial Board Findings remained unsupported by “substantial evidence” in the Reproduced Record, as is required under the Local Agency Law. Swartz filed Preliminary Objections to the Second Petition, which the City answered, and which are not yet fully briefed as of June 3, 2021.

On April 5, 2021, upon the request of the City, the FOP agreed to consolidate the First and Second Grievances into a single matter for the arbitration.

On April 9, 2021, Swartz filed a motion to compel this arbitration and to stay all judicial proceedings on the City's Second Petition because of this grievance arbitration. The City opposed the motion. On April 15, 2021, Judge Matthew Menges, ruling from the bench, ordered that the arbitration could move forward at the Arbitrator's discretion but denied Swartz's motion to stay the Second Petition. In issuing his ruling, Judge Menges specifically stated that "there is no reason that the judicial proceeding cannot continue to move forward in a parallel track to the arbitration proceeding."

Discussion

Counsel could not stipulate to the issues in dispute. Accordingly, the issues set forth above are what I have derived from counsel's respective statements at the beginning of the arbitration hearing.

Arbitrability

The first issue is whether the grievances are arbitrable. In any agreement containing an arbitration clause, there is a presumption of arbitrability. The United States Supreme Court discussed this presumption of arbitration in the Steelworker's Trilogy case of United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960). "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation. Doubts should be resolved in favor of coverage." Id at 582-583. Pennsylvania public sector labor law has adopted a similar

presumption of arbitrability. This presumption is applied in cases arising out of Act 111, the Police and Fireman's Collective Bargaining Law, 43 P.S. 217.1 et seq. which governs this case. See, Pennsylvania State Police v. Pennsylvania State Troopers Association (Betancourt), 540 Pa. 66, 656 A. 2d 83 (1995).

Our Supreme Court has held that Act 111 recognizes the importance of the swift resolution of disputes in the police and firefighter work settings and the importance to avoid protracted litigation. See Chirico v Board of Supervisors for Newton Township, 504 Pa. 71, 78-79, 470 and Appeal of Upper Providence, 514 Pa. 501, 511, 526 A. 2d 315, 320 (1987) and Guthrie v. Borough of Wilkinsburg, 509 Pa. 590, 499 A. 2d 570 (1985)

In light of this presumption of arbitrability, it is the burden of the party contesting arbitrability to establish that a dispute does not fall within the definition of a grievance subject to arbitration.

The City contends that the grievances are not arbitrable, since the arbitrator has no jurisdiction to dissolve the automatic stay granted to the City as a matter of law under the Judicial Code, 42 Pa. C.S. 101, et seq especially §5105 (Right to Appellate Review) as well as the Pennsylvania Local Agency Law, 2 Pa. C.S. § 751 et seq.

The City argues that the pending appeal of the Trial Board's decision by the City under the Local Agency Law divests the arbitrator of jurisdiction because the appeal is outside the scope of the provisions of the CBA. The City relies on the Judicial Code, specifically that there is a "right to appeal" from the final order of every government unit. See 42 Pa. C.S. § 5105(a)(2). The City points out that subsection (e) of such provision states that an "appeal shall operate as a supersedeas to the extent and upon the conditions provided or prescribed by law."

42 Pa. C.S. § 5105(e). It argues that this provision means that when the City filed its appeal of the Trial Board's Findings, it operated as an automatic supersedeas that stayed the status quo pending the City's appeal.

The City also argues that the relief that the FOP seeks in the First and Second Grievances is the exact same relief for Swartz that he pursues in his Preliminary Objections seeking dismissal of the Second Petition by the City. These arguments are simply seeking the removal of the automatic supersedeas under Pennsylvania law and must be made in the Court of Common Pleas where the Local Agency Law appeal is pending, and has no relation to the contents of the parties' CBA. The argument is not arbitrable before an arbitrator but is rather a question of law for the court.

The FOP argues that the City failed to cite to case authority for the proposition that its appeal under the Local Agency Law to the Court of Common Pleas serves as an automatic supersedeas of the arbitration or serves as a basis to dismiss the grievance because it is not an arbitrable grievance. The FOP argues that the administration of this grievance arbitration hearing is not governed by the Judicial Code (Title 42). It is governed by the terms of the CBA and the rules of the American Arbitration Association. Even if this grievance arbitration was governed by Title 42, 42 Pa. C.S.A. § 5105 (e) states that "an appeal shall operate as a supersedeas to the extent and upon the conditions provided or prescribed by law." The City has not identified any "extent" or "conditions provided or prescribed by law" that would authorize a lawful supersedeas in a contractual grievance arbitration under Act 111.

Additionally, the FOP has cited to Supreme Court precedent on a similar case where the employer was arguing that another statute removed the arbitrability of a grievance. In City of Arnold v. Wage Policy Comm. Of Arnold Police Dep't, 643 Pa. 28, 717 A.3rd 744 (Pa. 2017)

our Supreme Court held that an arbitrator had subject matter jurisdiction to adjudicate a dispute between a police union and city over a widow's pension benefit because the statute at question regarding the payment of the benefit was incorporated into the CBA between the parties. The ruling reversed a decision of the Commonwealth Court concluding that the arbitrator did not have subject matter jurisdiction over the dispute because it involved the decision of a police pension board, which it characterized as a local agency. City of Arnold v. Wage Policy Comm. of City of Arnold Police Dep't, 138 A.3d 719, 726 (Pa. Cmwlth. 2016). In overturning the ruling of the Commonwealth Court, the Supreme Court stated that the lower court failed to consider that specific circumstances of the case, in which the pension benefits at issue were incorporated into the CBA and both Act 111 and the CBA provided that any disputes would be resolved through arbitration.

The FOP argues that the present case is analogous to the City of Arnold. The FOP argues that the effect of the trial board's verdict obviously relates to the terms and conditions of employment for Swartz (i.e. compensation, hours, working conditions, and discipline); and that the right to a trial board (and its final and binding nature) is contained within the express terms of the CBA. Therefore, subject matter jurisdiction properly lies with this Arbitrator to decide the dispute between the parties regarding Officer Swartz.

Having reviewed the arguments on the automatic stay, I must conclude that the City has not rebutted the presumption that the grievances are arbitrable. There is nothing from the Court directing me to stay the arbitration. Judge Menges' bench order states that the arbitration could proceed. The City has not set forth how the appeal meets the conditions of Section 5105 (e). The City does not cite to a specific statute granting the City an automatic stay for an appeal of a police trial board finding. Finally, I am guided by City of Arnold, where the Supreme

Court has explained the right to arbitrate a grievance even when another administrative agency could address an issue related to the grievance. Accordingly, I will address the merits of the grievances.

The Merits

Initially, I will address the City's request that an order in the arbitration be held in abeyance while the Local Agency Law Appeal runs its course. It argues that the Court should be allowed to rule upon the Second Petition for Review so that the City, should it lose in the arbitration case but win in the Local Agency Appeal, is not put in the position of having to recoup money paid in error to the Swartz.

I am not going to hold this arbitration case in abeyance. It is inconsistent with the role for which the parties have retained my services, to determine whether the City violated the CBA. Also, holding the case in abeyance would impact Swartz's interests more than the City's interests. During the pendency of the Local Agency Appeal, no matter how long it takes, he would be without City employment and the wages and benefits from the employment. (I do note that the City asserts that it has maintained his medical benefits during this time.)

Turning to the merits, the FOP alleges that the City has violated the CBA by failing to follow the Trial Board's finding Swartz Not Guilty on the three charges and reinstating him from unpaid administrative leave. The FOP has the burden of proving that the City is acting in violation of the CBA. The FOP argues that it has met its burden by pointing to the clear language of CBA, at Article XVIII, that the decision of the Trial Board is "final and binding on both parties."

The City responds that the FOP's argument ignores the Court's ruling that the Local Agency Appeal could proceed. The Court of Common Pleas has twice upheld the City's right to file a Local Agency Law appeal of the Trial Board. If the arbitrator sustained the FOP's appeal and reinstated Swartz before the Court has disposed of the Second Petition, this would demand an interpretation of Article XVIII that is both (1) contrary to law because it violates the City's now-settled legal right of appeal and (2) "harsh, absurd or nonsensical" because it permits an arbitrator to effectively decide the City's lawful appeal before the Court of Common Pleas.

The FOP's argument is simple and straightforward. First, the language in Article XVIII is clear that the Trial Board decision is final and binding. For the City to refuse to follow the Trial Board findings ignores this clear language that the parties have bargained. For this reason alone, the grievances should be sustained.

Second, in addition to the clear language, the FOP introduced testimony from four witnesses as to how the parties have applied the language. The language at issue in Article XVIII, that the findings of the Trial Board are "final and binding," has been in the parties CBAs since 1976. Retired Officer Dennis Smith, who was on the bargaining team when the clause was made part of the CBA, testified that its purpose was to avoid costly and time consuming arbitration of discipline. To his knowledge, since 1976, neither the City nor the FOP has appealed a decision of the Trial Board directly to the Court of Common Pleas until the Swartz case. Lt. Timothy Clymer, who is the FOP's Recording Secretary, corroborated Smith's testimony. He testified that his review of all the Trial Board decisions involving FOP members came up with no cases where the City or the FOP directly appealed a Trial Board decision to court. Inspector Michael Davis and former Chief of Police Tony Bankert gave similar testimony on this issue.

The City presented no witnesses to rebut the FOP's witnesses' testimony on this point. The City did attempt to use the cases of officers REDACTED (20^{REDACTED}) and REDACTED (20^{REDACTED}) to contradict the FOP's argument. However, the cases are easily distinguishable in their procedural posture and history from the present case. In neither of these cases did the FOP appeal the Trial Boards' findings directly to court or file a grievance directly against the Trial Boards findings.

Third, the FOP argues that if the City's position on the merits prevailed, it would nullify a longstanding provision of the CBA that has been in place for 45 years and that has provided for the expeditious and efficient resolution of police officer discipline disputes. It would replace it with lengthy and costly court appeals. This change would be disruptive to the harmonious labor relations that is the purpose of Act 111.

Upon review of all of the evidence and the parties' arguments, I must conclude that the FOP has made a persuasive argument for finding that the City violated Article XVIII of the CBA when it refused to accept as final and binding both decisions of the Trial Board finding Clayton Swartz not guilty when it refused to reinstate him.

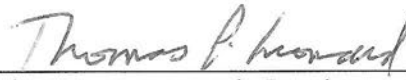
Accordingly, the following Award will be entered.

Award

Grievance 2020-003 and Grievance 2021-001 are sustained. The City should reinstate Officer Clayton Swartz to full duty and make him whole for the wages lost as a result of the City placing him on unpaid administrative leave, and for any lost seniority, benefits, and other emoluments of employment due to him under the CBA that may have resulted from the City's refusal to accept the Not Guilty verdicts in the Trial Board Findings of September 10, 2020 and March 4, 2021.

The Arbitrator will retain jurisdiction for sixty (60) days to resolve any disputes over the implementation of the Award.

July 16, 2021
Harrisburg, Pennsylvania


Thomas P. Leonard, Esquire

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

FrancePaskey

Date: July 19, 2021

/s/Edward A. Paskey

Edward A. Paskey, Esquire

PA Atty. ID No. 80304

2675 Eastern Boulevard

York, PA 17402

Attorney for Respondent, Clayton Swartz

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

CITY OF YORK, PENNSYLVANIA,	:	
APPELLANT	:	No. 2020-SU-1897
	:	
	:	
Vs.	:	CIVIL ACTION - LAW
	:	
	:	
CLAYTON SWARTZ,	:	
RESPONDENT	:	

CERTIFICATE OF SERVICE

AND NOW, to wit, this 19th day of July, 2021, I Edward A. Paskey, Esquire, do hereby certify that I have this date served a copy of the foregoing Affidavit by E-mail and United States, First Class, Postage Prepaid, addressed as follows:

Mr. Joseph Rudolf, Esq.
Clark Hill
Two Commerce Square
2001 Market Street
Suite 2620
Philadelphia, PA 19103

Respectfully Submitted:

FRANCEPASKEY

/s/Edward A. Paskey

Edward A. Paskey, Esquire
Attorney ID No. PA 80304
2675 Eastern Blvd.
York, PA 17402-2905
Phone: (717) 757-4565