

ARBITRATORS RETAIN AUTHORITY TO MODIFY DISCIPLINE

By

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Employers often overreach when it comes to disciplining employees. Employees may be terminated or given other severe discipline for what most people might consider to be relatively minor misconduct. If the collective bargaining agreement between the employer and the employee's union requires some concept of cause for discipline (just cause, good cause, etc.), arbitrators reviewing the discipline often reduce the penalty to something more appropriate given the circumstances of the case. Of course, employers typically do not appreciate an arbitrator's reduction of the discipline, sometimes arguing that arbitrators have no authority to modify the discipline made by the employer.

The Ohio Supreme Court on May 17, 2017, issued an opinion upholding the authority of an arbitrator reviewing the discipline of an employee to determine the appropriate level of discipline for an employee's misconduct. The arbitrator retains the authority to modify the discipline imposed by an employer even if the employer had in place a rule specifying the range of discipline for certain misconduct and giving an official with the employer the discretion to determine what exact level of discipline should be imposed for the misconduct.

In *Ohio Patrolmen's Benevolent Assn. v. Findlay*, 2017-Ohio-2804, the Court dealt with a police sergeant who was charged with misconduct and who, under the City's personnel rules, was subject to termination. The misconduct included a number of allegations, including one that he referred to a female police officer, whose first name was Morgan, as "Whoregan." The police chief determined that termination was appropriate, and the sergeant was in fact terminated.

The termination was arbitrated. The arbitrator found that the sergeant had committed some, but not all, of the charges against him, held that there might be just cause for discipline short of termination, and ruled that the sergeant would be reinstated, but without backpay.

The Union filed an action to confirm the arbitration award, and the City filed an action to vacate the award. The City argued that, once the arbitrator found that the sergeant had committed some misconduct, the City had the discretion, under its rules, to determine the level of discipline that would be imposed. Therefore, according to the City, the arbitrator exceeded his authority when he substituted his judgment for that of the City and ruled that, while there was just cause for a lengthy suspension, there was no just cause for termination.

Despite numerous cases holding that it is within an arbitrator's power to modify the discipline meted out to an employee, the Common Pleas Court and the Court of Appeals agreed with the City, ruling that the arbitrator exceeded his authority when he imposed a level of discipline that was contrary to what was permitted under the City's rules.

The Ohio Supreme Court, in a 6 to 1 opinion, reversed, stating that:

“the city’s right to develop rules is not a right to determine what particular form of discipline it has just cause to impose for a violation of those rules. Stated differently, the city’s right to develop rules is not the right to unilaterally define the meaning of the phrase ‘just cause’ for purposes of the CBA.”

The Court also noted that “Any limitation on the arbitrator’s authority to modify disciplinary action pursuant to a CBA provision requiring that discipline be imposed only for just cause must be specifically bargained for by the parties and incorporated into the CBA.”

Because the agreement between the Ohio Patrolmen's Benevolent Assn. and the City of Findlay placed no limitations on the arbitrator’s authority to review the disciplinary actions imposed and to fashion a remedy under the just cause requirement, the Supreme Court ruled that the lower courts erred in vacating the award. The award was reinstated by the Supreme Court.

Public employers often try to have arbitration awards vacated, believing that they will find a more favorable reception in front of the hometown judge than in front of a neutral arbitrator. This case, like many others, reiterates the fact that arbitration awards are entitled to a great amount of deference and cannot be vacated simply because the award is contrary to the employer’s disciplinary rules or policies establishing what level of discipline can be imposed for an employee’s misconduct.

That brings us to a final point. Employers may pick up on the Court’s language in *Ohio Patrolmen’s Benevolent Assn. v. Findlay* and may now try to negotiate language into a collective bargaining agreement giving them, not arbitrators, the right to decide what level of punishment is to be imposed. Locals should *never* agree to such proposals. No matter what, locals should make sure that an arbitrator’s authority to modify discipline is maintained.