Court Decision on Arbitrator's Ruling Based on Progressive Discipline

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On September 23, 2020, the Hamilton County Court of Appeals considered a case in which the city of Reading, Ohio, attempted to overturn an arbitrator's decision to convert a termination to a five day suspension. While the court's decision in this case ultimately set good precedent in terms of an arbitrator's authority and progressive discipline, it also highlighted the importance of contractual language for public employees.

In *Reading v. Fraternal Order of Police*, 2020-Ohio-4558, the City terminated a police officer whose performance, year after year, was consistently rated as substandard or failing. Yet the only discipline he had received for his performance, before being fired In February, 2018, was a reprimand in October, 2017.

The CBA provided the following on discipline and progressive discipline:

"The principles of progressive corrective action, as recognized and defined by the City of Reading, will normally be followed with respect to conduct which could not be a violation of law or classified as gross misconduct. The progression normally includes a verbal reprimand before a written reprimand, a written reprimand before a suspension, and a suspension before a dismissal for the same related offense. The Chief of Police or the Safety Service Director may determine that a different sequence is required."

The termination was submitted to arbitration. The arbitrator (Jerry Sellman) acknowledged the dismal performance of the officer, but ruled that the concept of progressive discipline required a suspension before the officer could be terminated. Accordingly, he reversed the termination, instead ruling that a five day suspension should be imposed.

Public employers often feel that a local judge will be more receptive to their arguments than an independent arbitrator, and so they decide to take the case into the courts if they are dissatisfied with the arbitrator's ruling. The City of Reading was no exception to this; it filed an action to vacate the arbitrator's award. The City contended that the arbitrator exceeded his authority by requiring progressive discipline and ignoring the language in the CBA authorizing the chief of police to use his discretion to determine that a different sequence of discipline was required. According to the City, if it decided to bypass progressive discipline, an arbitrator had no right to overturn that decision.

Unfortunately for the City, the Hamilton County Court of Common Pleas and the Court of Appeals rejected the City's argument. The Court of Appeals stated the following:

"While CBA Section 10.2 provides that the chief of police "may" determine that a different sequence of discipline is required, it is silent as to under what circumstances such a determination would be warranted or supported. Because the CBA did not address this issue, the arbitrator determined that there must be a reasonable, nonarbitrary basis for doing so. It is within the arbitrator's authority to interpret the parties' contract, as he did in this case."

The *Reading* decision is a good precedent to support the authority of an arbitrator to reduce the penalty issued by an employer. But we do have a word of caution. Had the contractual language been more explicit in giving the City the right to bypass the normal progressive discipline sequence, Reading might very well have won the arbitration or the court action to vacate the award. For that reason, when a union is negotiating its CBA, the union really needs to avoid language giving the employer too much discretion or power to circumvent a requirement for progressive discipline.