IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, DEPARTMENT OF HEALTH AND HUMAN SERVICES,	**CASE NO. CI 20-4102**
Plaintiff,	**ORDER DENYING PLAINTIFF'S PETITION AND APPLICATION TO VACATE ARBITRATION AWARD**
vs.	
NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES, LOCAL #61 OF THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES,	
Defendant.	

THIS MATTER came before the Court on December 1, 2021, for a hearing on Plaintiff's Petition and Application to Vacate Arbitration Award, filed on November 10, 2020. Plaintiff State of Nebraska Department of Health and Human Services (hereafter, "Department" or "Employer") is represented by Grant K. Dugdale, Special Assistant Attorney General, Department of Health and Human Services. Defendant Nebraska Association of Public Employees, Local #61 of the American Federation of State, County, and Municipal Employees (hereafter, "NAPE" or "Union"), is represented by Dalton W. Tietjen, of Tietjen, Simon & Boyle. Both attorneys were present in the courtroom. Based upon the evidence presented and pleadings on file, together with the oral arguments and briefs submitted, the matter was taken under advisement.

For the reasons hereinafter set forth, the plaintiff's petition and application to vacate the arbitration award is denied, and the arbitration award is confirmed.

I. BACKGROUND AND PROCEDURAL HISTORY

On February 19, 2020, Christine Slaymaker, along with other grievants, filed a grievance challenging revisions by the Department to its dress code. *Ex. 1.* The revised dress code required all Department employees to wear business casual clothing Monday through Thursday; and jeans, t-shirts and sweatshirts would no longer be allowed. *Ex. 1.* The grievants alleged that the revisions to the dress code violated Articles 1.4 and 1.5 of the Labor Contract between the State of Nebraska and NAPE, effective July 1, 2019, through June 30, 2021 (hereafter, "Labor Contract" or "CBA"[1]). *Ex. 1*; *see Ex. 7*, at pp. 2-3, art. 1.4 and art. 1.5. Slaymaker elected to submit her grievance through voluntary and binding arbitration, pursuant to Articles 4.7 and 4.7.8 of the Labor Contract. *Ex. 1*; *see Ex. 7*, at pp. 9-11, art. 4.7 and art. 4.7.8. J.E. (Jim) Nash was selected to serve as the arbitrator. He conducted the arbitration hearing on August 10 and 20, 2020. *Petition and Application to Vacate Arbitration Award* (filed November 10, 2020), at ¶¶ 11-13.

Nash issued his arbitration decision on October 9, 2020. *Ex.* 6. He concluded that the Department violated Articles 1.4 and 1.5 of the Labor Contract in the following manner:

> **Article 1.4.**
> 1. Failure to properly advise the Union of a proposed change in a provision of the CBA on subjects of mandated negotiation and bargaining.
> 2. Failure to negotiate and bargain proposed changes in CBA on subjects of mandated negotiation and bargaining.
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> **Article 1.5**
> 1. Failure to properly or timely advise Union (at least seven calendars [*sic*] days in advance) of effective date of proposed establishment of new rule or amendment to existing rule.
> 2. Arbitrary, capricious, unreasonable, and unfair implementation of new rule or amendment.

[1] Collective Bargaining Agreement

Ex. 6, at p. 7 (emphasis in original). Having so concluded, Nash ruled in favor of Slaymaker *et al.* and NAPE, and against the Department. He directed the Department to implement the arbitration award by reactivating in its entirety the previous dress code which allowed jeans. *Id.* at p. 8.

On November 10, 2020, the Department filed a timely petition and application to vacate the arbitration award under the Nebraska Uniform Arbitration Act, Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 2016) (NUAA). The Department asks this Court to vacate the award under Neb. Rev. Stat. § 25-2613(a)(3), on the grounds that Nash exceeded his powers, and for the case to be remanded for rehearing before a different arbitrator to ensure the Department gets a fair rehearing. *Petition and Application to Vacate Arbitration Award*, at ¶¶ 15-16; *Department's Brief in Support of its Petition and Application to Vacate Arbitration Award*, at p. 30.

On December 11, 2020, NAPE filed an Answer, in which it makes the affirmative claim that under the Labor Contract and NUAA, the decision of the arbitrator may only be appealed on the limited grounds set forth in Neb. Rev. Stat. § 25-2613; that none of the grounds in § 25-2613 occurred or are found in this case; and that the Department's actions in this matter constitute a frivolous pleading under Neb. Rev. Stat. § 25-824 (Reissue 2016). *Answer* (filed December 11, 2020), at ¶¶ 11-13.

NAPE asks this Court to deny the relief requested by the Department and to confirm the arbitration award. It also asks this Court to find that the Petition and Application to Vacate Arbitration Award is a frivolous pleading and to award NAPE costs and attorney fees. *Id.* at p. 3.

II. STANDARD OF REVIEWAND BURDEN OF PROOF

"In reviewing a decision to vacate, modify, or confirm an arbitration award, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly

erroneous." *City of Omaha v. Prof'l Firefighters Ass'n, Local 385*, 309 Neb. 918, 927, 963 N.W.2d 1, 10 (2021) (citing *Garlock v. 3DS Properties*, 303 Neb. 521, 930 N.W.2d 503 (2019)).

"Appellate review of an arbitrator's award is necessarily limited because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all – the quick resolution of disputes and the avoidance of the expense and delay associated with litigation. Strong deference [is] due an arbitrative tribunal." *Jones v. Summit Ltd. P'ship Five*, 262 Neb. 793, 798, 635 N.W.2d 267, 271 (2001) (internal quotation marks and internal and end citations omitted).

"The burden of alleging and proving [an arbitration award's] invalidity rests upon the party seeking to set aside the decision." *Id.* at 799, 635 N.W.2d at 271-272 (2001) (quoting *Babb v. United Food & Commercial Workers Local 271*, 233 Neb. 826, 833, 448 N.W.2d 168, 172 (1989)).

III. ANALYSIS

A. The NUAA governs this action.

"Both the Federal Arbitration Act (FAA) and Nebraska's Uniform Arbitration Act (NUAA) authorize courts to vacate arbitration awards under certain, specified circumstances. *See*, 9 U.S.C. § 10 (2018); Neb. Rev. Stat. § 25-2613(a) (Reissue 2016)." *City of Omaha v. Prof'l Firefighters Ass'n, Local 385*, 309 Neb. 918, 928, 963 N.W.2d 1, 11 (2021). The Nebraska Supreme Court "ha[s] previously said that arbitration in Nebraska is governed by the FAA if it arises from a contract involving interstate commerce; otherwise, it is governed by the NUAA." *Id.*

This case does not involve interstate commerce, and both parties, in their respective pleadings, make claims for relief under the NUAA, not the FAA. Therefore, this Court finds that the NUAA, not the FAA, governs this case.

B. The Parties' Arguments

The Department argues that the arbitration award must be vacated under Neb. Rev. Stat. § 25-2613(a)(3), because Nash exceeded the powers given to him under the Labor Contract, first, by failing to include findings of fact and conclusions of law in his arbitration decision, as required by Article 4.7.11; second, by adding requirements to Article 1.5 that do not exist and that invade management's rights; and third, by deciding this case as impasse arbitration, not a grievance arbitration. Conversely, NAPE contends that the award must be confirmed, because Nash made his decision directly from the terms of the Labor Contract, with no modifications.

C. The arbitrator made sufficient findings of fact and conclusions of law in his decision.

Article 4.7.11 of the Labor Contract provides that "[t]he decision of the arbitrator … shall include findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact." *Ex. 7*, at p. 12, art. 4.7.11. The Department claims that "[n]othing in Arbitrator Nash's decision can be minimally considered 'findings of fact and conclusions of law.' Nor does the decision include a 'concise statement of conclusions upon each contested issue of fact.'" *Department's Brief in Support of its Petition and Application to Vacate Arbitration Award*, at p. 19. This Court disagrees.

In his decision, Nash states the contested issue of fact, as follows:

> The issue in controversy in the instant case involved the parties' interpretation of the variant – over time – in the Employer's Dress Code and whether it was mischaracterized as a change, rather than a mere extension of the Employer's inherent right to update the Dress Code for work place uniformity, professionalism, or improvement of attitude and job performance. …

Ex. 6, at p. 6. In the paragraph that follows, Nash states that in adjudicating the contested issue, he "relied on the clear and unambiguous language of the Dress Code effected in October of 2017

and cited by the Employer as the one to which it reverted after the proposed Dress Code of January 1, 2020, and February 1, 2020, were rescinded." *Id.* He then makes the following statements:

- "[T]he Dress Code of October 2017 included jeans as acceptable work place attire, while jeans were proscribed in the most recent iteration of the Dress Code – effective February 10, 2020." *Ex. 6*, at p. 6.
- "Evidence … revealed several occurrences in which the Employer advised its Employees that the Dress Code of October 2017 had been reinstated." *Id.* at pp. 6-7.
- "In the latest promulgation of the Dress Code … the Employer neither provided seven days advance notice of the proposed change nor did it reduce the proposed change to writing – as mandated by the CBA." *Id.*
- "[T[he rationale for disallowing jeans in the most recent restatement of the Dress Code had to do with ensuring Dress Code uniformity, and professionalism at the work facility." *Id.*
- "[S]ome employees who performed the same work, at the same location, and on the same shift were allowed to wear jeans, and some were not, imposing different and more onerous standards on similarly situated employees. Such implementation of the Dress Code policy, unfairly, and unreasonably increased the cost and burden of Dress Code compliance for some Employees, but not for others." *Id.*

Although Nash did not label them as such, the foregoing statements are findings of fact, which Nash indicates that he either took "judicial note" of, or determined based upon the evidence in the record. *Ex. 6*, at pp. 6-7. Nash then closes by saying that he "agrees with the Union that the Employer's arbitrary and capricious execution of its stated Dress Code policy is not a select way of achieving either uniformity, or fairness, and it is *ipso facto*, unreasonable." *Ex. 6*, at p. 7. This closing statement is a concise statement of Nash's conclusions upon the contested issue of fact.

For these reasons, this Court finds that Nash sufficiently complied with Article 4.7.11 of the Labor Contract by setting forth findings of fact and conclusions of law.

D. The Department did not meet its burden of proving that Nash exceeded his powers.

1. Legal Standard

The standard for determining whether an arbitrator exceeded his or her powers under Neb. Rev. Stat. § 25-2613(a)(3) is set forth by the Nebraska Supreme Court in *City of Omaha v. Prof'l Firefighters Ass'n, Local 385*, 309 Neb. 918, 963 N.W.2d 1 (2021), as follows:

> The City also argues that the district court should have vacated the arbitration award because the arbitrator exceeded her powers. We do not appear to have previously addressed what a party must show in order to demonstrate that an arbitrator exceeded his or her powers under § 25-2613(a)(3) of the NUAA. Again, however, there is an analogous, indeed, in this instance, identical, provision of the FAA. *See* 9 U.S.C. § 10(a)(4). And while we do not appear to have construed § 25-2613(a)(3)'s FAA counterpart, the U.S. Supreme Court has.
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> **In *Oxford Health Plans LLC*, 569 U.S. at 569,[2] the U.S. Supreme Court stated that a party attempting to vacate an arbitration award on the grounds that the arbitrator exceeded his or her powers "bears a heavy burden." It then went on to outline just how heavy that burden is. "It is not enough," the Court wrote, "to show that the [arbitrator] committed an error—or even a serious error."** *Id.* (internal quotation marks omitted). **Instead, "[b]ecause the parties bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits."** *Id.* (internal quotation marks omitted). **It is only when the arbitrator issues an award that simply reflects the arbitrator's personal "notions of . . . justice" rather than "draw[ing] its essence from the contract" that a court may find that the arbitrator exceeded his or her powers.** *Id.* (internal quotation marks omitted). Accordingly, the Court explained that the sole question presented when a party claims that an arbitrator exceeded his or her powers is whether the "arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." *Id.*
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> In interpreting provisions of the NUAA, we have previously taken guidance from federal court decisions interpreting similar provisions of the FAA. *See, e.g., Jones v. Summit Ltd. Partnership Five*, 262 Neb. 793, 635 N.W.2d 267 (2001). The parties in this case do not argue that we should interpret § 25-2613(a)(3) differently than the U.S. Supreme Court has interpreted 9 U.S.C. § 10(a)(4). And given the limited judicial role in reviewing arbitration awards under Nebraska law, we find **the narrow basis for finding that an arbitrator exceeded his or her powers under § 10(a)(4) of the FAA to be equally appropriate under § 25-2613(a)(3) of the NUAA. We will thus review the City's claim that the arbitrator exceeded her powers under the rubric outlined by the U.S. Supreme Court in *Oxford Health Plans LLC*.**

[2] *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 133 S. Ct. 2004 (2013).

Id. at 931-932, 963 N.W.2d at 12-13 (emphasis supplied).

2. Analysis

Article 1.5 of the Labor Contract provides, in relevant part:

> Newly established work rules or amendments to existing work rules shall be reduced to writing and furnished to the union at least seven calendar days prior to the effective date of the rule. **The Employer agrees to only establish or amend work rules in a reasonable manner. ...**

Ex. 7, at pp. 2-3, art. 1.5 (emphasis supplied).

The Department argues that "[n]either Article 1.5 nor Article 3.1[3] includes any substantive limitations—such as a requirement that any new rule or modification to an existing rule must not be arbitrary, capricious, unreasonable, or unfair—on the department's power to modify work rules." *Department's Brief in Support of its Petition and Application to Vacate Arbitration Award*, at pp. 23-24. This Court agrees. The Labor Contract *does not* include any requirement that a new rule or amendment must not be arbitrary, capricious, unreasonable, or unfair. Furthermore, that is not what the arbitrator decided, i.e., Nash did not conclude that the new dress code was "arbitrary, capricious, unreasonable, and unfair." *Ex. 6*, at p. 7. He did conclude that the manner in which the new dress code was *implemented* was "arbitrary, capricious, unreasonable, and unfair." *Id.*

Under *City of Omaha, supra*, "strong deference is due an arbitrative tribunal" and "an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits." 309 Neb. at 928, 932, 963 N.W.2d at 11, 13. Here, Nash made a finding that "some employees who performed the same work, at the same location, and on the same shift were allowed to wear jeans, and some were not," thus "imposing different and more

[3] Article 3.1 provides, in relevant part: "It is understood and agreed that the Employer possesses the right to operate and direct the employees of the State and its various agencies to the extent that such rights do not violate its legal authority, and to the extent such rights are not modified by this Contract. ..." *Ex. 7*, at p. 5, art. 3.1.

onerous standards on similarly situated employees," *Ex. 6*, at p. 7. Based upon that finding, Nash came to the conclusion that the Department's *implementation* of the new dress code was arbitrary, capricious, unreasonable, and unfair, in violation of Article 1.5. This Court finds that this conclusion by Nash is a permissible interpretation or application of Article 1.5's requirement that the Department establish or amend work rules "in a reasonable manner." *Ex. 7*, at pp. 2-3, art. 1.5. Therefore, the Department has failed to meet its heavy burden under Neb. Rev. Stat. § 25-2613(a)(3), of proving that Nash exceeded the powers given to him under the Labor Contract.

It is important to note, however, that the Department retains the right to establish any work rule, including dress code standards, even if the Union and its members feel the rule is unreasonable or unfair. The October 9, 2020, arbitration decision merely precludes the new dress code relative to jeans form being implemented as sought by the Department. For instance, nothing in Nash's decision prevents the Department from a future change to the existing dress code to prohibit the wearing of jeans. What the Department cannot do is implement those changes unreasonably, as detailed by Nash. Accordingly, if a new dress code prohibits jeans, flip flops or shorts, the prohibition must be implemented reasonably.

E. Nash did not decide this matter as impasse arbitration.

In his decision, Nash gives an overview of alternative dispute resolution, explaining the difference between "*Interest* impasse disputes ... where there is a controversy over an issue where no agreement exists" and "'Rights' disputes ... where ... a Collective Bargaining Agreement (CBA) has already been concluded." *Ex. 6*, at p. 6 (emphasis in original). Nash follows that explanation by making clear that this case falls into the latter category of a "rights" dispute, stating:

> From the outset, during its oral presentation and in its post arbitration brief; the Employer maintained its right to control, modify, or otherwise regulate the behavior and operation of its Employees and facilities, and that such authority is unfettered and flows from its managerial prerogatives. The Managerial Rights

> Doctrine, in general, is written in very broad terms and is always subordinate, **as here**, to specific CBA language that applies to specific situations in dispute, ...

Ex. 6, at p. 6 (emphasis supplied). Accordingly, based on the clear language of his decision, this Court finds that Nash did not decide this case as impasse arbitration.

F. NAPE is not entitled to attorney fees and costs.

NAPE requests that this Court find the Department's Petition and Application to Vacate Arbitration Award to be a frivolous pleading and award costs and attorney fees in favor of NAPE, under Neb. Rev. Stat. § 25-824(2), which provides for the award of "reasonable attorney's fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense which a court determines is frivolous or made in bad faith."

"Frivolous for the purposes of § 25-824 is defined as being a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit. It connotes an improper motive or legal position so wholly without merit as to be ridiculous. Any doubt whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question." *Korth v. Luther*, 304 Neb. 450, 485, 935 N.W.2d 220, 243 (2019) (footnotes omitted). "On appeal, ... a lower court's decision allowing or disallowing attorney fees for frivolous or bad faith litigation [will be upheld] in the absence of an abuse of discretion." *Id.* at 484-485, 935 N.W.2d 220, 243 (footnote omitted).

This Court, upon consideration and resolving any doubts in favor of the Department, does not find the legal positions advanced by the Department to be so wholly without merit as to be ridiculous, nor does the Court find those positions were made in bad faith. For that reason, this Court, in its discretion, disallows NAPE's request for costs and attorney fees.

IV. CONCLUSION AND ORDER

NOW, THEREFORE, based on the foregoing, and pursuant to Neb. Rev. Stat. § 25-2613(d). IT IS HEREBY ORDERED that Plaintiff's Petition and Application to Vacate Arbitration Award is DENIED, and the arbitration award issued on October 9, 2020, is CONFIRMED.

IT IS FURTHER ORDERED that Defendant's request for an award of attorney fees and costs under Neb. Rev. Stat. § 25-824 is DENIED.

IT IS SO ORDERED.

DATED this 26th day of January, 2022.

RR Otte

Honorable Robert R. Otte
District Judge