



(Arbitrator's Opinion and Award, January 24, 2011, at 4-5). Article 5.13 contains the three-day rule, which is intended to encompass Rhode Island Personnel Rule 4.0217. Id. at 5. The rule addresses issues of out of grade pay. The three-day rule provides that whenever correctional officers are required to work in a class of position higher than their own for more than three consecutive days, they “shall receive the lowest salary rate of that higher class which will provide a pay increase of at least one step over [their] present base rate. . .” Agreement Between RIBCO and State of Rhode Island, July 1, 2006-June 30, 2009, July 1, 2009-June 30, 2012, at 11. Article 5.13 does not impose any durational limitations on temporary appointments; it merely addresses salary issues. Id.

The DOC filled vacant Lieutenant positions using three-day rule appointments without regard to the seniority provisions of Article 10. Id. at 12. The use of three-day appointments in this regard is the primary reason for RIBCO's grievance.

RIBCO and the DOC followed a multi-tiered grievance procedure, which proceeded to a third level grievance hearing before Hearing Officer Belinda McLaughlin. A written decision denying the grievance was issued on May 19, 2010.

The parties proceeded to arbitration on October 14, 2010 before Arbitrator Timothy Buckalew. The specific issue submitted to arbitration was: “[w]hether the State ha[d] violated the collective bargaining agreement as alleged in this grievance by using the Three-Day Rule to fill vacancies in permanent positions? If so, what shall be the remedy?” Arbitrator's Opinion and Award, January 24, 2011, at 2 (emphasis added).

The language in the grievance specifically referenced the promotion of correctional officers into Lieutenant positions utilizing the three-day rule. RIBCO

Grievance Form, February 23, 2009, at 1. The arbitrator therefore should have limited his decision to Lieutenant positions.

The arbitrator focused on Articles 10.1, 10.2, and 10.3. Id. at 2-3. Article 10.1 provides that RIBCO and the DOC agree to recognize “the principle of seniority within a class of position in all cases of shift preference, transfer, vacation time, days off, job and location assignment, holiday time, layoffs and recalls.” Agreement Between RIBCO and State of Rhode Island, July 1, 2006-June 30, 2009, July 1, 2009-June 30, 2012, at 19.

Article 10.2 provides,

“[v]acancies or new positions shall be posted and bid according to seniority within seven (7) days of the date on which the vacancies or new positions occur in accordance with the following procedure:

Vacancies or new positions shall first be posted and bid according to seniority at the security at which the vacancy exists. If the vacancy or new position is not filled within seven (7) days, it shall be posted and bid according to seniority at all other securities simultaneously.

An employee who has been assigned to a particular facility shall not be allowed to bid for any ‘in house’ postings until such time as the individual has properly bid into the facility through the Department-wide bidding process.

Consistent with the provisions of the Merit System and other applicable law, vacancies or new positions shall be filled from within the bargaining unit.” Id. at 20.

Article 10.3 then addresses the posting of temporary vacancies,

[t]he Department agrees that it shall post temporary vacancies that are reasonably expected to be vacant for not less than seventy-five (75) days. An employee who bids for such a vacancy shall retain his/her bid days off except when bidding to a five-day post.

The Department shall not be required to post for bid the days off that result from the temporary vacancy. The Department shall not be required to post any temporary vacancy for a Captain, Lieutenant, Steward or Correctional Officer-Hospital Assignment.

All such temporary post vacancies that are posted for bid shall be restricted to the same shift and facility wherein the temporary post assignment occurs.” Id. at 20 (emphasis added).

At the arbitration, RIBCO looked to prior arbitration awards to advance its argument. Although Article 5.13 and Rhode Island Personnel Rule 4.0217 are silent on the role of seniority, RIBCO argued that the DOC was required to comply with the seniority provisions of Article 10 when making temporary appointments. Arbitrator’s Opinion and Award, January 24, 2011, at 9-10. According to RIBCO, the DOC complies with the seniority provisions when making three-day rule appointments if a civil service list exists by choosing “from the six ‘highest reachable employees practical’ on” the existing list.<sup>1</sup> Id. at 10. However, RIBCO maintained that when there is no civil service list in place, the DOC acts as if it has “a free hand to act.” Id.

In response, the DOC argued that Article 10 does not address the application of Article 5.13. With the exception of Lieutenant and Captain positions, the parties agreed in Article 10.3 to post temporary vacancies expected to last for more than 75 days. Id. at 11-12. Under the DOC’s theory, the parties would not have needed to negotiate this clause unless there was an understanding that the DOC would have no restrictions in making temporary Captain and Lieutenant assignments without it. Id. at 12.

The DOC did not gain a financial advantage from using these appointments. Id. The Department used the three-day rule appointments in order to maintain a continuity of supervision in the state’s prisons. Id. The advantage the DOC realized from using the

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<sup>1</sup> The requirement that the DOC choose from the six highest reachable candidates on a then existing civil service list stems from a decision issued against the Department by Arbitrator Higgins in 2008. RIBCO contended before the arbitrator in this case that the DOC has complied with Arbitrator Higgins’ award when a list exists, but they have disobeyed it when there is no list. Arbitrator’s Opinion and Award, January 24, 2011, at 10.

successive three-day rule appointments was being able to avoid excessive overtime for the Department's correctional officers.<sup>2</sup> Id. at 7-8.

On January 24, 2011, the arbitrator issued his award rejecting the DOC's argument. The arbitrator found that Article 10.3 applied to situations in which a position is vacated on a temporary basis, for example, officers on military or maternity leave. The article does not apply in situations where the employee is not expected to return to his or her post in the foreseeable future. Id. at 13. He then found that Article 10.2 fills a gap created by Article 10.3. Id. The arbitrator concluded that this rule barred the DOC from making three-day rule appointments without regard to seniority. However, he did not believe a rule barring the use of successive appointments to fill permanent vacancies was justified. Id. at 15. The arbitrator's award allows the DOC to fill permanent vacancies using three-day rule appointments drawing officers from among the six highest reachable employees practical on a then-existing civil service list, and, if a list does not exist, to request one or post the position for bidding under Article 10.2. Temporary vacancies must be filled in accordance with Article 10.3. Id. at 17.

The DOC moved to vacate the arbitrator's award or in the alternative modify it in this Court on April 19, 2011. RIBCO responded with a counterclaim to confirm the arbitrator's decision on May 2, 2011. The Court will now consider the parties' competing motions.

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<sup>2</sup> Anne Marie Hamilton a Human Resources Analyst and Nancy Bailey the Assistant Director of Institutions and Operations also testified on behalf of the state. Their testimony established that three-day rule appointments are used to fill vacant Lieutenant and Captain positions up to the "FTE" allowed by the Department of Administration. Arbitrator's Opinion and Award, January 24, 2011, at 7-8. The DOC will fill from the top six on any available civil service list if one exists. Id. at 8. The DOC uses the successive temporary appointments to avoid overtime costs.

## II.

### Standard of Review

It is well settled that “the role of the judiciary in the arbitration process is ‘extremely limited.’” Aponik v. Lauricella, 844 A.2d 698, 703 (R.I. 2004) (citing Purvis Sys., Inc. v. Am. Sys. Corp., 788 A.2d 1112, 1114 (R.I. 2002)). This is not an action where the Court is asked to consider whether the issue presented to the arbitrator was arbitral. Rather, the Court must determine whether the arbitration award exceeded the arbitrator’s power because he decided issues beyond the issue framed. A strong policy in favor of arbitrability is recognized in Rhode Island. R.I. Court Reporters Alliance v. R.I., 591 A.2d 376, 378 (R.I. 1991). When this Court considers the merits of an arbitration award, its authority to review the award is very limited. R.I. Bhd. of Corr. Officers v. State Dep’t of Corr., 707 A.2d 1229, 1241 (R.I. 1998). The general rule in our state is that “[a]bsent a manifest disregard of a contractual provision or a completely irrational result, [an] award will be upheld.” Id. (citing Town of Coventry v. Turco, 574 A.2d 143, 146 (R.I. 1990)). Therefore, judicial intervention is not warranted unless “an award is so tainted by impropriety or irrationality that the integrity of the [arbitration] process is compromised.” Prudential Prop. & Cas. Ins. Co. v. Flynn, 687 A.2d 440, 441 (R.I. 1996).

This policy in favor of the finality of arbitration awards is not absolute, and the Legislature has delineated specific grounds for the vacation of arbitration awards. The three grounds that will require vacation of an award are found in G.L. 1956 § 28-9-18, which provides:

“(a) In any of the following cases the court must make an order vacating the award, upon the application of any party to the controversy which was arbitrated:

- (1) When the award was procured by fraud.
- (2) Where the arbitrator or arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made.
- (3) If there was no valid submission or contract, and the objection has been raised under the conditions set forth in § 28-9-13.” (Emphasis added).

This Court is also required to modify an award if any of the three grounds set forth in G.L. 1956 § 28-9-20 are present. The statutory grounds in § 28-9-20 are:

- “(1) Where there was an evident miscalculation of figures or an evident mistake in the description of any persons, thing, or property referred to in the award.
- (2) Where the arbitrator or arbitrators have awarded upon a matter not submitted to them not affecting the merits of the decision upon the matters submitted.
- (3) Where the award is imperfect in a matter of form not affecting the merits of the controversy, and, if it had been a master's report, the defect could have been amended or disregarded by the court.” (Emphasis added).

An arbitrator will be viewed as exceeding his or her powers under § 28-9-18(a)(2) if the arbitrator “‘resolv[es] a non-arbitrable dispute or if the award fails to draw its essence from the agreement, if it was not based on a ‘passably plausible’ interpretation thereof, if it manifestly disregarded a contractual provision, or it reached an irrational result. . . .” City of East Providence v. USW Local 15509, 925 A.2d 246, 252 (R.I. 2007) (internal citations omitted). Arbitration awards may also be vacated if a party is prevented from arguing or presenting evidence on an issue the arbitrator decides because such a denial undermines the fairness of the entire arbitration process. Hoteles Condado Beach, La Concha Convention Ctr. v. Union de Tronquistas, 763 F.2d 34, 39 (1st Cir. 1985). If an arbitrator decides an issue without allowing a party to present evidence on that issue, the arbitrator’s decision will essentially constitute an un-negotiated

amendment to the parties' collective bargaining agreement. See State of R.I. v. R.I. Empl'y't Security Alliance, 840 A.2d 1093, 1096 (R.I. 2003).

In this instance, the Court must decide whether the arbitrator exceeded his authority by deciding an issue not submitted to him. The Court's inquiry must "[focus] on whether the arbitrator had the power, based on the parties' submission or arbitration agreement, to reach certain issues, not whether [he] correctly decided those matters." R.I. v. Nat'l Ass'n of Gov't Emps., No. PM 08-1050, 2008 WL 4176773, at 6 (R.I. Super. August 13, 2008). This inquiry stems from the principle that parties are only obligated to arbitrate issues they have consented to arbitrate. Bush v. Nationwide Mut. Ins. Co., 448 A.2d 782, 784 (R.I. 1982). Furthermore, arbitrators may only decide issues that are actually put before them by the parties. Matteson v. Ryder Sys., Inc., 99 F.3d 108, 113 (3d Cir. 1996).

The initial responsibility for interpreting the scope of the issues submitted to arbitration by the parties falls on the arbitrator; however, a reviewing court has the power to review the arbitrator's interpretation. Mobil Oil Corp. v. Independent Oil Workers Union, 679 F.2d 299, 302 (3d Cir. 1982). When a court reviews an arbitrator's interpretation of the submitted issues, it must afford the same level of deference the court would afford the arbitrator's interpretation of the collective bargaining agreement. Ryder, 99 F.3d at 113; Mobil Oil, 679 F.2d at 302. However, this deferential treatment does not mean that a reviewing court should merely "rubber stamp" the arbitrator's interpretation of the submitted issues. Ryder, 99 F.3d at 113.



### III.

#### Analysis

As a preliminary matter, the Court finds that the arbitrator's interpretation of the relevant provisions of the CBA in this case is rational and draws its essence from the contract. See City of East Providence, 925 A.2d at 252 (holding that an arbitrator exceeds his or her authority when it is irrational and does not draw its essence from the contract). The arbitrator found that the provisions of Article 10.3 of the agreement apply to temporary vacancies that are expected to be vacant for more than 75 days. Arbitrator's Opinion and Award, January 24, 2011, at 13. After reviewing the CBA, this Court is satisfied that this is a reasonable reading of Article 10.3. Article 10.3 provides that management will post "temporary vacancies that are reasonably expected to be vacant for not less than seventy five days." The article further states that the "Department shall not be required to post any vacancy for a captain, Lieutenant, Steward or Correctional Officer – Hospital assignment."

The arbitrator then found that whenever there is a permanent vacancy, the DOC is required to abide by the seniority provisions of Article 10.2 Id. at 17. However, he also held that the DOC could, in accordance with prior arbitration awards, choose candidates for temporary three-day rule appointments from the six highest and practical candidates on a civil service list, or request such a list if one did not exist for the position. Id. The arbitrator did not find that the agreement barred the use of successive three-day rule appointments to fill permanent vacancies until a permanent replacement was hired through the conventional merit system. Id.

The arbitrator's conclusion is consistent with the prior arbitration awards, namely the Higgins Award,<sup>3</sup> and the contractual language. Therefore, the Court holds the arbitrator did not exceed his authority by reaching a result that "fails to draw its essence from the agreement, . . . was not based on a 'passably plausible' interpretation thereof, . . . [was in manifest disregard of] a contractual provision, or . . . [was] an irrational result. . ." City of East Providence, 925 A.2d at 252. The award is therefore reasonable and drawn from the essence of the contract.

The DOC contends, however, that the arbitrator exceeded his authority under § 28-9-18 by deciding an issue not submitted to him and as a result, denying the Department an opportunity to present evidence on this issue. The Court will now review the parties' arbitration agreement. Nat'l Ass'n of Gov't Emps., 2008 WL 4176773, at 6.

Article 18.3 of the CBA allows the submission of all grievances "arising out of the provisions of [the agreement] relating to the application or interpretation thereof" to arbitration. Agreement Between RIBCO and State of Rhode Island, July 1, 2006-June 30, 2009, July 1, 2009-June 30, 2012, at 40. In this case, the parties agreed that the question presented to the arbitrator would be "[w]hether the State ha[d] violated the collective bargaining agreement as alleged in this grievance by using the Three-Day Rule to fill vacancies in permanent positions? If so, what shall be the remedy?" Arbitrator's Opinion and Award, January 24, 2011, at 2 (emphasis added). The grievance referred to in the question posed, clearly states that "[t]he DOC is illegally promoting Correctional

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<sup>3</sup> The Higgins Award refers to an award issued by Arbitrator Richard Higgins in LRC #036-07, G5358. Arbitrator's Opinion and Award, January 24, 2011, at 5. In this award, Arbitrator Higgins ordered DOC to make all three-day rule appointments from the six highest reachable employees on an existing civil service list for any given position. Id. at 10. The Higgins Award left open the question of how DOC was required to proceed if a civil service list did not exist. Id.

Officers into three-day rule Lieutenant positions.” RIBCO Grievance Form, February 23, 2009, at 1.

The DOC specifically addressed the use of the three-day rule to fill lieutenant positions and the importance of having a continuity of supervision in these positions in its arbitration brief. Br. of the State of Rhode Island, at 5, 7, 9, 10, 11. Furthermore, the evidence presented at the arbitration hearing specifically related to the use of the three-day rule to fill lieutenant positions and the DOC’s reasoning for using temporary appointments to fill these positions. The DOC called three witnesses at the arbitration hearing, Ellen Armstrong, Anne Marie Hamilton, and Nancy Bailey.

Armstrong testified that the DOC was having trouble filling captain and lieutenant positions due to vacancies within the DOC and the Department of Administration. Arbitrator’s Opinion and Award, January 24, 2011, at 5-6. Armstrong testified that DOC’s motive in using the successive temporary appointments was to maintain a continuity of supervision in the state’s prisons. Id. at 6. Armstrong also testified that DOC gained no financial advantage from using the three-day rule appointments, but that using them did allow the Department to avoid excessive overtime costs for lieutenants and captains.

Hamilton testified that the DOC does not attempt to fill the oldest vacated position first, but that it instead seeks to fill vacant lieutenant and captain positions with three-day rule appointments until a permanent replacement is hired. Id. at 7-8. Bailey testified that the DOC uses three-day rule appointments to fill vacant lieutenant and captain positions up to the “FTE” allowed by the Department of administration. Id. at 8. According to Bailey if there is an eligible civil service list, the DOC will fill from the top

six employees on the list. Id. Bailey also testified that not using the three-day rule appointments to fill vacant lieutenant positions would result in mandatory overtime, which would increase costs and cut inmate programs and services. Id. She explained that any reduction in inmate services and programs would likely result in increased inmate hostility toward correctional officers. Id.

After reviewing the record, the Court agrees with the DOC that the issue submitted to the arbitrator was the narrow question of whether the DOC's practice of using the three-day rule to fill vacant lieutenant positions violated the CBA. The arbitrator was never asked to issue an opinion regarding the practice in relation to all members of the RIBCO bargaining unit. Notwithstanding, this Court cannot hold that the arbitrator "exceeded [his] powers, or so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made." § 28-9-18.

Arbitrator's interpretations of the issues submitted to them are entitled to great deference when they come under the scrutiny of a reviewing court. Ryder, 99 F.3d at 113; Mobil Oil, 679 F.2d at 302. Although the arbitrator's final award can clearly be read as exceeding the scope of the narrow issue submitted to him, a review of his entire decision does not show that he interpreted the issue as going beyond the question of whether three-day rule appointments to lieutenant positions violated the agreement.

Throughout his decision, the arbitrator repeatedly refers to the question of temporary appointments in the context of lieutenant positions. Arbitrator's Opinion and Award, January 24, 2011, at 6, 9, 11-12, 13, 14, 16. The bulk of the arbitrator's analysis relates to the distinction between temporary and permanent vacancies in the context of lieutenant positions. He specifically references the provisions of Article 10.3, which

requires posting and bidding for temporary vacancies in correctional officer positions, but not for captain and lieutenant positions. Id. at 11. The arbitrator then notes that Article 10.3 is not “controlling on whether the parties have agreed how to fill vacancies in Lieutenant Positions when there is no civil service eligibility list in effect and when there is no likelihood of the employee vacating the position returning.” Id. at 13 (emphasis added). The arbitrator ultimately holds that Article 10.2 fills the gap left by Article 10.3 and requires the use of the merit system when making three-day rule appointments. Id. at 17.

Given that the arbitrator properly framed the issue in his analysis and provided the DOC with a meaningful opportunity to present evidence on the issue, this Court holds that he did not exceed his “powers, or so imperfectly execut[e] them, that a mutual, final, and definite award upon the subject matter submitted was not made” under sec. 28-9-18. Therefore, the Court denies the motion to vacate the arbitrator’s award. At the same time, the language of the arbitrator’s award may be interpreted as applying to all positions within the DOC rather than being limited to the position of lieutenant. The Court does agree with the DOC that the award may be read as going beyond the limited issue presented to the arbitrator.

The arbitrator’s interpretation of the CBA is sound as he considered all relevant arguments concerning the interpretation of the agreement. Notwithstanding, the Court finds the award violates the provisions of § 28-9-20(2) because it constitutes an award “upon a matter not submitted [to the arbitrator] not affecting the merits of the decision upon the matters submitted.” The Court will deny RIBCO’s motion to confirm the

arbitration award and grant DOC's request to modify the award. The award is therefore limited to the context of Lieutenant positions.

**IV.**  
**Conclusion**

For all the reasons set forth in this Decision, the DOC's petition to vacate the award is denied and the alternative motion to modify is granted. RIBCO's motion to confirm the arbitration award is denied.

Counsel shall confer and submit to this Court for entry, a form of order and judgment that is consistent with this Decision.