STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(Filed: September 18, 2019)

WEST WARWICK HOUSING AUTHORITY, **Plaintiff** **VS.** **RI COUNCIL 94, AFSCME, AFL-CIO,** **Defendant**	: : : : : : :	**C.A. No. KM-2016-0747**
WEST WARWICK HOUSING AUTHORITY, **Plaintiff** **VS.** **RI COUNCIL 94, AFSCME, AFL-CIO,** **Defendant**	: : : : : : :	**C.A. No. KM-2016-1267**

DECISION

I

Introduction

LICHT, J. West Warwick Housing Authority (the Authority) has moved in two separate motions to vacate an arbitration award; RI Council 94, AFSCME, AFL-CIO (RI Council 94) also filed two corresponding motions to confirm an arbitration award. The awards reinstated employees of the Authority who were both terminated in April of 2016. RI Council 94 is a labor organization that represents certain state and municipal employees for the purposes of a collective bargaining agreement. One of RI Council 94's bargaining units is Local 2405 which is comprised of members employed by the Authority (collectively, the Union). This Court is addressing both

cases as they involve substantially similar issues as to whether the grievances were arbitrable. The Court will then address separately in this Decision the award of the arbitrator in each case. This Court's jurisdiction is pursuant to G.L. 1956 §§ 28-9-14 and 28-9-18.

For the reasons stated below, the Court grants the Union's motions to confirm the labor arbitration awards and denies the Authority's motions to vacate the labor arbitration awards.

II

Facts and Travel

The Authority is a small agency that operates public housing for the Town of West Warwick, Rhode Island. The first case arises out of a labor arbitration award that was issued on July 8, 2016. The award ordered the reinstatement of an employee, Deborah Tellier, of the Authority who was terminated from her job together with the payment of back pay, less earnings and unemployment benefits she received. (Arbitrator's Award 1, July 8, 2016.) Ms. Tellier was hired by the Authority in May of 2011 as a Senior Housing Specialist. *Id.* at 5. Ms. Tellier's duties included processing rent checks for Section 8 landlords; collecting, posting, and depositing rents and security deposits; organizing files for auditors; and other recordkeeping duties. *Id.* In September 2014, the Authority was audited by the United States Department of Housing and Urban Development (HUD), and several violations and problems were discovered. *Id.*; Authority's Br. 2. As a result of the audit, a consulting management company was hired to address the deficiencies of the Authority and to find a new executive director. (Authority's Br. 2-3.) In January of 2015, Kathleen Fagan was hired by the consulting company to assist in its efforts, and she was appointed as Acting Executive Director in April of 2015. *Id.* at 3.

The Authority contends that Ms. Tellier was fired for multiple incidents that occurred between April 21, 2015 and April 24, 2015. Ms. Tellier allegedly was spying on Ms. Fagan,

recorded conversations she had with Ms. Fagan, and attempted to intimidate Ms. Fagan. *Id.* at 3; Arbitrator's Award 19, July 8, 2016. On April 27, 2015, the Authority suspended Ms. Tellier and notified Ms. Tellier that it was contemplating termination. (Arbitrator's Award 2, July 8, 2016.) On April 29, 2015, Ms. Fagan sent a letter to Ms. Tellier notifying her that she intended to recommend her termination to the Authority's Board of Commissioners. (Authority's Br. 3.) Then, on April 30, 2015, Ms. Fagan received Ms. Tellier's test results for the Housing Choice Voucher and Public Housing Rental Calculation online course which Ms. Tellier failed. *Id.* at 3-4. Ms. Tellier was given the opportunity to address her termination on May 11, 2015, and the Authority's Board of Commissioners confirmed her termination. *Id.* at 4.

On June 5, 2015, the Union demanded arbitration over Ms. Tellier's termination. (Arbitrator's Award 14, July 8, 2016.) The arbitration hearings were held on March 1, 2016 and March 31, 2016. *Id.* at 2. In his July 8, 2016 award, the arbitrator addressed the issue of whether the grievance was substantively arbitrable. The arbitrator found that the Collective Bargaining Agreement (the CBA) submitted at arbitration was valid even if it did not have HUD approval, because it was the duty of the Authority to obtain HUD approval and the Authority had acted under the CBA and now could not repudiate it. *Id.* at 9-10. Next, the arbitrator found that the CBA had not expired because it automatically renewed under the terms of the CBA and extended to at least December 31, 2015. *Id.* at 10. Finally, the arbitrator found that Ms. Tellier, as a Senior Housing Specialist, was a bargaining unit employee because Article 1 of the CBA does not exclude this position. *Id.* at 12-13. The arbitrator then addressed the merits of the grievance and found that the Authority did not have just cause to terminate Ms. Tellier. *Id.* at 13-15.

The second case arises out of a labor arbitration award that was issued on September 30, 2016. The award ordered the reinstatement of an employee of the Authority, Rose-Marie Coates,

as a Receptionist who had been terminated from her job together with the payment to Ms. Coates of back pay, less earnings and unemployment benefits she received. (Arbitrator's Award 1, Sept. 30, 2016.) Ms. Coates was hired by the Authority as a Receptionist but was acting in the capacity of a Housing Specialist at the time of her termination. *Id.* at 5.

Ms. Fagan recommended the termination of Ms. Coates after a series of events occurred on April 9, 2015. *Id.* The Authority contends that Ms. Coates refused to allow Ms. Fagan to assist her in answering the phones and refused to assist with leasing a unit because these were tasks only specific union employees could perform. *Id.* at 17-18. Ms. Coates also refused to pack up boxes that were left out in the office. *Id.* at 18. Ms. Coates was treated as a party under the same CBA that governed Ms. Tellier's dispute and was given the opportunity to address her termination at a special meeting on April 14, 2015. *Id.* at 17. The Authority's Board of Commissioners confirmed her termination. *Id.* at 13.

On April 16, 2015, the Union demanded arbitration over the termination. *Id.* Arbitration began on October 7, 2015, but it was held in abeyance. (Authority's Br. 3.) The hearing was conducted on July 29, 2016. (Arbitrator's Award 2, Sept. 30, 2016.) In his September 30, 2016 award, the arbitrator addressed the issue of whether the grievance was substantively arbitrable. The arbitrator considered the same three issues that he examined in Ms. Tellier's grievance and found that the dispute was arbitrable. *Id.* at 13-15. The arbitrator then addressed the merits of the grievance and determined that the Authority did not have just cause to terminate Ms. Coates. *Id.* at 15-17.

III

Parties' Arguments

A

The Authority's Argument

The Authority first contends that both grievances were not substantively arbitrable. In support of this contention, the Authority argues that the CBA submitted at arbitration was never ratified by HUD as required under its own terms. The Authority alleges that there is no evidence that the CBA was approved by HUD and this approval is a precondition to the CBA's validity. The Authority further asserts that the grievance was not substantively arbitrable because the positions of Senior Housing Specialist and Housing Specialist were never properly part of the bargaining unit and, therefore, Ms. Tellier and Ms. Coates could not be protected by the CBA. The original certification of the bargaining unit was only for maintenance employees. The Authority asserts that no proper accretion petition was filed by the Authority or the Union to add additional positions to the bargaining unit. The Authority also asserts that even if the positions were accreted by consent of both parties, a consent agreement must be submitted to the Rhode Island State Labor Relations Board (the Labor Board). Moreover, the Authority argues that the CBA submitted at arbitration expired prior to Ms. Tellier's and Ms. Coates' termination. The CBA has a contract term from January 1, 2012 to December 31, 2014, which is automatically renewed yearly unless either party gives 120 days' notice prior to the CBA's expiration that it desires to negotiate changes to the CBA. The Authority contends that the CBA expired on December 31, 2014.

The Authority then addressed the merits of each arbitration decision. First, as to Ms. Tellier, the Authority asserts that there was more than sufficient cause to terminate Ms. Tellier;

therefore, the arbitrator's award was clearly irrational. The Authority states that Ms. Tellier was incompetent in her position, she made no attempt to improve at her position, and she treated her boss with contempt. Additionally, the Authority states that even if there was no just cause for termination, the position of Senior Housing Specialist is no longer a position and the arbitrator's award reinstating this position creates an obligation that goes beyond the CBA.

Next, as to Ms. Coates, the Authority asserts that there was more than sufficient cause to terminate Ms. Coates; therefore, the arbitrator's award was irrational. The Authority contends that the arbitrator's award was completely irrational because it imposed a progressive discipline standard for behavior that was grossly insubordinate. The Authority further asserts that the arbitrator made an irrational decision by not admitting relevant evidence of Ms. Coates' and Ms. Fagan's prior testimony. Additionally, the Authority states that even if there was no just cause for termination, the position of Housing Specialist is no longer a position and the arbitrator's award creates an obligation that goes beyond the CBA.

B

The Union's Argument

The Union asserts that the grievance is arbitrable. The Union contends that the Authority's three arguments to vacate the arbitrator's award simply represent a disagreement with the arbitrator's award and fall short of the standard necessary to vacate an award. It appears that the Union is arguing that the *de novo* standard used by this Court to determine arbitrability is not applicable to these three arguments. The Union first contends that the arbitrator found it was the Authority's responsibility to submit the agreement to HUD and the Authority cannot now use its failure to do so as a defense. The Union then asserts that the CBA had not expired at the time the grievance was filed because the arbitrator found that neither party notified each other 120 days

prior to the expiration of the CBA of an intention to change the terms of the CBA. Finally, the Union contends that the Authority did not provide a basis to vacate the award when arguing that the positions at issue were not in the CBA.

The Union then addressed the merits of each arbitration decision. First, as to Ms. Tellier, the Union asserts that this Court's standard of review for arbitration decisions is limited and the arbitrator extensively reviewed the facts of the case and the positions of the parties against the principle of just cause required by the CBA. The Union then contends that the arbitrator properly determined that the Authority had not put Ms. Tellier on notice of her deficiencies and failed to give her an opportunity to improve, which is required under the CBA. Additionally, the Union addressed the removal of Senior Housing Specialist as a position at the Authority, and the Union contends that the arbitrator has great discretion in determining a remedy. Thus, the Union argues that while the Authority may disagree with the arbitrator's award, this is an insufficient basis upon which to vacate the award.

Next, as to Ms. Coates, the Union again asserts that this Court's standard of review for arbitration decisions is limited. The Union contends that the arbitrator properly found that the Authority failed to meet its burden of proving the allegations of insubordination of Ms. Coates. Thus, while the Authority may disagree with the arbitrator's award, the Union argues that this is an insufficient basis upon which to vacate the award.

IV

Standard of Review

This Court's authority to review or vacate an arbitration award is statutorily prescribed and very limited. *Purvis Sys., Inc. v. Am. Sys. Corp.*, 788 A.2d 1112, 1114 (R.I. 2002); *Rhode Island Council 94, AFSCME, AFL-CIO v. State*, 714 A.2d 584, 587 (R.I. 1998). An arbitration

award may be vacated only if: 1) it was "procured by fraud," 2) the arbitrator exceeded his or her powers or "so imperfectly executed them, that a mutual, final, and definite award upon the subject matter submitted was not made," or 3) "there was no valid submission or contract." Sec. 28-9-18(a)(1)-(3). Additionally, '"[e]very reasonable presumption in favor of the award will be made"' due to the strong public policy favoring the finality of arbitration awards in Rhode Island. *Berkshire Wilton Partners, LLC v. Bilray Demolition Co., Inc.*, 91 A.3d 830, 835 (R.I. 2014) (quoting *Feibelman v. F.O., Inc.*, 604 A.2d 344, 345 (R.I. 1992)). "A party claiming that an arbitrator exceeded his or her authority bears the burden of proving that contention." *Berkshire Wilton Partners, LLC*, 91 A.3d at 835 (citing *Coventry Teachers' All. v. Coventry Sch. Comm.*, 417 A.2d 886, 888 (R.I. 1980)).

An arbitrator's powers are exceeded if the arbitrator's award failed to "'draw its essence'" from the contract, "'reached an irrational result,'" "'manifestly disregarded a contractual provision,'" or was not based on a "'passably plausible'" interpretation of the contract. *Woonsocket Teachers' Guild, Local 951, AFT v. Woonsocket Sch. Comm.*, 770 A.2d 834, 837 (R.I. 2001) (quoting *State, Dep't of Children, Youth and Families v. Rhode Island Council 94, Am. Fed'n of State, Cty., and Mun. Emps., AFL-CIO*, 713 A.2d 1250, 1253 (R.I. 1998)). An arbitrator may also exceed his or her powers by resolving a dispute that is not arbitrable. *Id.* Determining "'if a dispute is arbitrable concerns a question of law and is subject to a broader standard of review than is the arbitrator's decision on the merits.'" *Providence Teachers Union v. Providence Sch. Bd.*, 725 A.2d 282, 283 (R.I. 1999) (quoting *State, Dep't. of Mental Health, Retardation, and Hospitals v. Rhode Island Council 94, A.F.S.C.M.E., AFL-CIO*, 692 A.2d 318, 323 (R.I. 1997)).

V

Analysis

A

Arbitrability

For this Court to be able to review the merits of the arbitration decisions, it must first determine if the arbitrator had the power to arbitrate these two grievances at the outset. "[A]n arbitration award will be vacated if . . . the issue determined was not arbitrable in the first place." *Rhode Island Bhd. of Corr. Officers v. State, Dep't of Corr.*, 707 A.2d 1229, 1234 (R.I. 1998). The court, rather than the arbitrators, determines whether a dispute is arbitrable. *Radiation Oncology Assocs., Inc. v. Roger Williams Hosp*., 899 A.2d 511, 514 (R.I. 2006) (citing *AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 649 (1986)). "'The issue of whether a dispute is arbitrable is a question of law . . . .'" *Id.* (quoting *State, Dep't. of Corr. v. Rhode Island Bhd. of Corr. Officers*, 866 A.2d 1241, 1247 (R.I. 2005)). "Courts should not equate the issue of arbitrability with the deference due the arbitrator's interpretation of the contract . . . Rather, a reviewing court must decide the question of arbitrability de novo." *State, Dep't of Mental Health, Retardation, and Hospitals*, 692 A.2d at 323. "When uncertainty exists about whether a dispute is arbitrable, th[e Rhode Island Supreme] Court, like the United States Supreme Court, 'has enunciated a policy in favor of resolving any doubt in favor of arbitration.'" *Sch. Comm. of Town of N. Kingstown v. Crouch*, 808 A.2d 1074, 1078 (R.I. 2002) (quoting *Brown v. Amaral*, 460 A.2d 7, 10 (R.I. 1983)).

The three issues of arbitrability raised during the arbitration hearing now before this Court are subject to a *de novo* standard. The questions of whether the CBA was void and unenforceable and if Ms. Tellier and Ms. Coates were a party to the CBA are both issues that the Rhode Island

Supreme Court addressed as issues of arbitrability and applied the *de novo* standard of review. *See Providence Teachers Union*, 725 A.2d at 283 (holding that "[s]ince the parties . . . submitted their dispute to an arbitrator pursuant to a 'void and unenforceable' agreement . . . the arbitrator was without subject-matter jurisdiction to pass upon [the] matter.'"); *City of Newport v. Local 1080, Int'l Ass'n of Firefighters, AFL-CIO*, 54 A.3d 976, 980 (R.I. 2012). Thus, this Court will conduct a *de novo* review of the issues of arbitrability raised by the Authority.

1

Ratification of CBA by HUD

The CBA provides that the agreement "is conditional upon the approval of the U.S. Department of Housing and Urban Development. Should this contract not be approved by H.U.D., both parties will seek, in good faith, to have a determination in the appropriate forum." (Agreement Between West Warwick Housing Authority and Rhode Island Council 94, AFSCME, AFL-CIO on Behalf of West Warwick Housing Authority Employees, Local 2045 (hereinafter CBA) 1.) Neither party disputes that for the CBA to be enforceable it must be submitted to HUD for ratification.

The question regarding whether the CBA's condition to be ratified by HUD has been satisfied was previously addressed by this Court. In *West Warwick Housing Auth. v. Rhode Island State Labor Relations Bd.*, this Court affirmed a decision by the Labor Board involving an unfair labor practice dispute with Ms. Coates. No. KC-2015-1242, 2016 WL 4494150, at *4 (R.I. Super. Aug. 23, 2016). In that matter, the Labor Board determined that Ms. Coates was a member of the bargaining unit, a valid CBA was in place, and Ms. Coates' Weingarten rights were violated. *Id.*, at *1. While the underlying issue regarding Ms. Coates' and Ms. Tellier's grievances are different than what was at issue in this previous decision, the question of whether the CBA was binding

because it was conditioned on approval by HUD is the same. The Labor Board and this Court on appeal both found (1) that the CBA at issue in the appeals currently before this Court was valid and (2) the position of Housing Specialist had properly been added to the bargaining agreement.[1] The Court finds the reasoning from the prior decision on point and persuasive. This Court determined in *Rhode Island State Labor Relations Board* that the Authority did not submit any evidence indicating that HUD rejected or otherwise failed to ratify the CBA and the Authority failed to meet its burden of proof. 2016 WL 4494150, at *3.

Here, the Authority also failed to meet its burden of proof by failing to present evidence that the CBA was not ratified. The only shred of evidence provided to this Court are unsupported statements by the Authority in its briefs that there is no evidence that the CBA was submitted to HUD. It also does not appear that any evidence of ratification was submitted to the arbitrator. In the arbitration decisions, the arbitrator determined that it was the Authority's obligation to submit the CBA to HUD for ratification. (Arbitrator's Award 5, July 8, 2016; Arbitrator's Award 6, Sept. 30, 2016.) The arbitrator did not make any factual findings if the CBA was submitted to

[1] At oral argument, the Court raised the issue of collateral estoppel. "The doctrine of collateral estoppel provides that 'when an issue of ultimate fact has once been determined by a *valid and final judgment*, that issue cannot again be litigated between the same parties in any future lawsuit.'" *State v. Gautier*, 871 A.2d 347, 358 (R.I. 2005) (emphasis in original) (quoting *State v. Werner*, 865 A.2d 1049, 1055 (R.I. 2005)). For collateral estoppel to apply there must be: "(1) an identity of issues, (2) the previous proceeding must have resulted in a final judgment on the merits, and (3) the party against whom collateral estoppel is asserted must be the same or in privity with a party in the previous proceeding." *State v. Pacheco*, 161 A.3d 1166, 1172 (R.I. 2017). Here, the previous proceeding resulted in a final judgment as it was decided by this Court and not appealed; the party who collateral estoppel would be asserted against is the Authority who was the same party in the previous proceeding; and there is an identity of issues which is whether there was a valid CBA in place that was ratified by HUD. However, there is some indication that the doctrine of collateral estoppel cannot be raised *sua sponte*, so this Court will not decide these issues on that basis. *See Rodriques v. Santos*, 466 A.2d 306, 312 (R.I. 1983); *Perez v. Pawtucket Redevelopment Agency*, 111 R.I. 327, 336, 302 A.2d 785, 791 (1973).

HUD for ratification. However, the evidence demonstrates that both parties acted under the CBA while it was in effect, which could be viewed as evidence that the contract was ratified and binding. Since no evidence has been submitted to this Court to support the Authority's assertion that the CBA was not ratified by HUD and "[w]hen uncertainty exists about whether a dispute is arbitrable, th[e Rhode Island Supreme] Court, like the United States Supreme Court, 'has enunciated a policy in favor of resolving any doubt in favor of arbitration,'" this Court finds that the CBA was binding. *See Sch. Comm. of Town of N. Kingstown*, 808 A.2d at 1078.

2

Accretion of Positions

Next, the Authority contends that the positions of Senior Housing Specialist and Housing Specialist were not properly accreted and are not positions within the bargaining unit; therefore, Ms. Tellier and Ms. Coates were not members of the bargaining unit and subject to the CBA. The question of whether Ms. Coates was a member of the bargaining unit was also previously addressed by this Court. In *Rhode Island State Labor Relations Board*, this Court affirmed the decision of the Labor Board which also determined that Ms. Coates was a member of the bargaining unit. 2016 WL 4494150, at *1. This Court held in *Rhode Island State Labor Relations Board* that simply because the Labor Board promogulated rules regarding accretion of positions of bargaining units it does not make sense that there would be no other manner which a position may be accreted. 2016 WL 4494150, *2. This Court found that there was nothing in the Labor Board rules which "requires a petition to accrete a position" and that it was quite evident that the Authority treated Ms. Coates as an employee.[2] *Id.*, at *3.

[2] After reviewing *Rhode Island State Labor Relations Board*, this Court finds that it would also likely apply the doctrine of collateral estoppel, specifically to Ms. Coates's appeal, if the affirmative defense had been raised. *See* 2016 WL 4494150, at *1.

This Court once again finds the earlier holding in *Rhode Island State Labor Relations Board* to be very persuasive. Additionally, while this Court recognizes that Ms. Coates and Ms. Tellier hold two separate and distinct positions at the Authority, Housing Specialist and Senior Housing Specialist, the facts presented to determine if their positions were in the bargaining unit are almost identical.

The record discloses that the CBA contains a recognition clause, which states, "[t]he bargaining unit consists of all Authority employees excluding the Executive Director[,] Assistant Director, and part-time employees who work less than twenty (20) hours per week." CBA Art. 1.2. Additionally, Article 36 of the CBA, Salary Schedule and Classification, provides that "[a]ll employees covered by this agreement shall receive the following weekly rate of pay . . ." and Senior Housing Specialist and Housing Specialist are listed in the employees' pay schedule. CBA Art. 36.1. There is no evidence in the record as to when other positions were added to the bargaining unit or the process that was followed in accreting them. The only evidence that has been presented to this Court is the CBA which provides strong evidence that the positions were included in the bargaining unit because they are included in the CBA.

While the Authority provided this Court with a copy of the original bargaining unit certification which includes only maintenance positions, this Court was also provided with a copy of the Labor Board's General Rules & Regulations (Labor Board Rules). As held previously, this Court now also finds that the Labor Board Rules do not require a formal petition for accretion: "Either a union or an employer may, at any time, file a request to add or 'accrete' a position(s) to an existing bargaining unit." Labor Board Rules § 8.04.1. Furthermore, the record discloses that the Labor Board Rules provide a formal process for the employer and the union to submit a

"Consent Agreement and Affidavit in lieu of the Petition for Unit Clarification and/or Accretion" if both parties reach an agreement on an inclusion of any position. Labor Board Rules § 8.04.9.

As determined earlier by this Court, there is no requirement under the Labor Board Rules that a petition for accretion be filed or a consent agreement be entered; therefore, "[v]oluntary accretion by employer action" would be permissible. *See Rhode Island State Labor Relations Board*, 2016 WL 4494150, at *3. Therefore, when resolving this dispute in favor of arbitration, this Court finds that the position of Senior Housing Specialist and Housing Specialist were positions under the CBA and the CBA is applicable to Ms. Tellier's and Ms. Coates' grievances. *See Sch. Comm. of Town of N. Kingstown*, 808 A.2d at 1078.

3

The Term of the CBA

The final argument regarding the arbitrability of the grievance is if the CBA was expired at the time of the grievance and, therefore, the CBA and the arbitration clause within the CBA were inapplicable. Article 40 of the CBA provides that:

> "[t]his contract shall take effect on this day 27th of July, 2012 and shall remain in effect until December 31, 2014. This contract shall be automatically renewed yearly thereafter unless either party shall give written notice to the other one hundred-twenty (120) days prior to its expiration that it desires to negotiate changes in the contract." CBA Art. 40.1.

The Authority contends that the CBA expired on December 31, 2014 prior to Ms. Tellier's and Ms. Coates' terminations; thus, their terminations were not governed by the terms of the CBA submitted at arbitration.

For the CBA to have expired on December 31, 2014 and not have automatically renewed, one of the parties must have given the other notice 120 days before December 31, 2014 that they wished to negotiate provisions within the CBA. *See id.* While there was evidence that

negotiations were occurring in 2015, the arbitrator found that there was no evidence submitted by either party showing that this 120 days' notice was given. After reviewing the evidence submitted on the motion to vacate and the arbitrator's award, this Court holds in accordance with the arbitrator's award and finds that there is no evidence showing that 120 days' notice was given before December 31, 2014. Thus, the CBA was renewed until December 31, 2015. *See id.*

Moreover, the Authority argues that even if the CBA was renewed until December 31, 2015, the arbitration hearings were not held until March of 2016 and July of 2016 when the CBA was no longer binding on the parties. These dates are of no consequence to this Court's Decision. "[T]ypically . . . arbitration may be compelled after termination of a contract if the dispute itself arose prior to termination or if the dispute was 'over an obligation arguably created by the expired agreement.'" *Providence Teachers Union v. Providence Sch. Bd.*, 689 A.2d 388, 393 (R.I. 1997). Ms. Tellier was terminated on April 29, 2015 and the Union demanded arbitration on June 5, 2015. Ms. Coates was terminated on April 14, 2015 and the Union demanded arbitration on April 16, 2015. Not only were Ms. Tellier and Ms. Coates terminated when the CBA was in effect, but the demands for arbitration were also made when the contract was in effect. Thus, while it is possible the CBA expired by the time the parties actually arbitrated their grievances, the CBA still governs the grievances. *See id.*

B

The Merits

After determining that the grievances were in fact arbitrable, this Court now must address the merits of the arbitrator's awards and if there are grounds to vacate the awards. The merits of the employees' grievances are based upon different facts and as such, this Court shall review them separately.

1

Ms. Tellier

The Authority first asserts that it had just cause to terminate Ms. Tellier and the arbitrator acted irrationally when determining otherwise. It is well-settled that "except for complete irrationality, arbitrators are free to determine the facts before them without having their award become subject to judicial revision." *Romano v. Allstate Ins. Co.*, 458 A.2d 339, 341-42 (R.I. 1983). As a factfinder, the arbitrator is '"in the best position to observe the appearance of a witness, his or her demeanor, and the manner in which he or she answers questions."' *Poisson v. Comtec Info. Sys., Inc.*, 713 A.2d 230, 233 (R.I. 1998) (quoting *Blecha v. Wells Fargo Guard-Company Serv.*, 610 A.2d 98, 103 (R.I. 1992)).

Here, the CBA requires that any discipline of an employee must be made only for just cause. CBA Art. 32.3. When examining whether there was just cause to terminate Ms. Tellier, the arbitrator found that it is *not* more likely than not that Ms. Tellier engaged in much of the particular conduct asserted in the termination letter. (Arbitrator's Award 19, July 8, 2016.) The termination letter notified Ms. Tellier that she was terminated for eavesdropping on Ms. Fagan; political intimidation; inappropriate recording of the grievant's conversation with Ms. Fagan; and online class failure. *Id.* First, as to the allegation of eavesdropping, the arbitrator found that it is not more likely than not that Ms. Tellier was eavesdropping on Ms. Fagan. *Id.* The arbitrator relied on the evidence that Ms. Fagan did not actually see Ms. Tellier eavesdropping and the employee who told Ms. Fagan of this behavior did not get along with Ms. Tellier. *Id.*

Next, the arbitrator addressed the allegation of political intimidation. Ms. Tellier testified that she did show Ms. Fagan her father's memorial Mass bulletin to confirm using a personal day. *Id.* She then stated she was going to leave it in her office in case Ms. Fagan needed it as she

knows "how things are going around here." *Id.* at 18. Ms. Fagan testified that Ms. Tellier was referring to the number of recent terminations. *Id.* at 19-20. Ms. Tellier then testified that she did not tell Ms. Fagan that Mr. Alves was a relative. *Id.* at 20. While Ms. Fagan thought Ms. Tellier was trying to intimidate her with her political connections, the arbitrator found that Ms. Tellier did not threaten Ms. Fagan. *Id.*

Moreover, the arbitrator found Ms. Tellier credible when she testified that she had not recorded her conversation with Ms. Fagan. *Id.* Furthermore, the arbitrator found that Ms. Tellier was not insubordinate because there was no evidence that she refused to obey a work order from Ms. Fagan. *Id.* Specifically, Ms. Tellier informed Ms. Fagan that she would retake the online test she failed. *Id.* Finally, the arbitrator found that Ms. Tellier's low test score was not only her fault but the fault of the employer for not providing her with proper training. *Id.* at 21-22.

Here, the arbitrator had the opportunity to listen to the witnesses and examine the evidence surrounding Ms. Tellier's termination and made sound conclusions based upon his findings. *See Romano*, 458 A.2d at 341. The facts surrounding the incidents leading up to Ms. Tellier's termination are in dispute and it was not irrational for the arbitrator to determine that the facts were in favor of Ms. Tellier and not the Authority. *See id.*

Additionally, the arbitrator held that progressive discipline approach under the CBA was not followed by the employer. (Arbitrator's Award 20, July 8, 2016.) Under Article 32 of the CBA, the Authority agreed to use progressive discipline when appropriate. Article 32 of the CBA provides that "[t]o avoid arbitrary firings when a department head is not satisfied with the performance of work of an employee, the employee shall first be counseled in the presence of his/her Union Representative in order to help him improve the employee's performance of work." CBA Art. 32.1. The arbitrator found that no efforts had been made to counsel Ms. Tellier to

improve upon her work. (Arbitrator's Award 24, July 18, 2016.) The arbitrator examined the evidence and found that Ms. Tellier was not given an opportunity to address the Authority's concerns about her performance. *Id.* The arbitrator found that no actions were taken prior to Ms. Tellier's termination to allow her an opportunity to improve upon any problems and this was a violation of the just cause standard's due process requirements. *Id.* The arbitrator made sound conclusions based upon his findings. *See Romano*, 458 A.2d at 341. Thus, this Court finds that the arbitrator's decision was rational and drew from the essence of the progressive discipline provision of the CBA.

Finally, the Authority argues that there is no longer a Senior Housing Specialist position at the Authority and it was irrational for the arbitrator to award reinstatement of Ms. Tellier's position. The position of Senior Housing Specialist is no longer a position at the Authority because the Authority went under a complete reorganization in September of 2015. The Union objects to the Authority's argument and asserts that the award granted by the arbitrator was within the bounds of the arbitrator's authority.

The Rhode Island Supreme Court has held that:

> "an arbitrator's broad authority to interpret the agreement between the parties and fashion an appropriate remedy is not unbridled. His or her authority is contractual in nature and is limited to the powers conferred in the parties' [contractual agreement]. The arbitrator is confined to interpret the terms of the agreement so as to effectuate the intentions of the parties to the contract." *Rhode Island Council 94, AFSCME, AFL-CIO*, 714 A.2d at 588.

This Court determined that Ms. Tellier was a member of the CBA and, therefore, the CBA was binding on the grievance between the two parties. The arbitrator found that under the CBA the grievant must be reinstated if exonerated. (Arbitrator's Award 27, July 8, 2016.) The arbitrator interpreted the terms of the operative CBA and determined that Ms. Tellier must be

reinstated under the terms of the CBA. *See Rhode Island Council 94, AFSCME, AFL–CIO*, 714 A.2d at 588. This decision was within the bounds of the arbitrator's authority and was not irrational; therefore, this Court upholds the arbitrator's decision to reinstate Ms. Tellier. *See id.*

2

Ms. Coates

The Authority first asserts that it had just cause to terminate Ms. Coates. The Authority contends that the arbitrator acted irrationally when it imposed a progressive discipline standard for behavior that was grossly insubordinate. It is well-settled that "except for complete irrationality, arbitrators are free to determine the facts before them without having their award become subject to judicial revision." *Romano*, 458 A.2d at 341-42. As a factfinder, the arbitrator is '"in the best position to observe the appearance of a witness, his or her demeanor, and the manner in which he or she answers questions."' *Poisson*, 713 A.2d at 233 (quoting *Blecha*, 610 A.2d at 103).

As discussed earlier, the CBA requires just cause to discipline an employee. CBA Art. 32.3. When examining whether there was just cause to terminate Ms. Coates, the arbitrator found the incidents at issue in the grievance did not display insubordinate behavior and, therefore, there was not just cause. (Arbitrator's Award 19, 22, Sept. 30, 2016.) The arbitrator found that the description of Ms. Coates' conduct in the termination letter issued by Ms. Fagan did not support the charge of insubordination as there was no claim that Ms. Coates failed to comply with a work order. *Id.* at 19. The termination letter provides that Ms. Coates told Ms. Fagan that she could not lease a unit because only Ms. Tellier could lease units, and Ms. Coates would not show an apartment to a potential tenant until another union employee returned who could answer the phones. *Id.* at 17. The letter further asserts that Ms. Coates told Ms. Fagan that Ms. Fagan cannot

pack up files in the office or bring paperwork to tenants because it was union work. *Id.* at 18. The arbitrator found that Ms. Coates was not acting in an insubordinate manner but instead, Ms. Coates described the nature and scope of bargaining unit work which she felt Ms. Fagan was not allowed to perform. *Id.* The arbitrator examined the facts before him and made a determination about the incidents. The arbitrator had the opportunity to examine the evidence surrounding Ms. Coates' termination and determined that these events did not provide just cause to terminate Ms. Coates under the CBA. The arbitrator did not reach an "irrational" result when making his decision and, therefore, this Court will not vacate the decision on these grounds. *See Prudential Property and Casualty Insurance Company v. Flynn*, 687 A.2d 440, 442 (R.I. 1996).

Additionally, the arbitrator found that no efforts had been made to counsel Ms. Coates to improve upon her work. (Arbitrator's Award 23, Sept. 30, 2016.) Under Article 32 of the CBA, the Authority agreed to use progressive discipline when appropriate. Article 32 of the CBA also provides that "[t]o avoid arbitrary firings when a department head is not satisfied with the performance of work of an employee, the employee shall first be counseled in the presence of his/her Union Representative in order to help him improve the employee's performance of work." CBA Art. 32.1. The arbitrator found that the incidents that occurred on April 9, 2015 were not dealt with in a progressive discipline approach. (Arbitrator's Award 23, Sept. 30, 2016.) The CBA requires a progressive discipline approach to be used on employees when appropriate; and the arbitrator found that because Ms. Coates was not acting in a directly insubordinate manner, the Authority should have used progressive discipline. *Id.* This Court finds that the arbitrator's decision was rational and drew from the essence of the progressive discipline provision of the CBA. *See Woonsocket Teachers' Guild, Local 951, AFT*, 770 A.2d at 837.

Next, the Authority contends that the arbitrator made an irrational decision when he refused to admit into evidence the sworn testimony of Ms. Coates and Ms. Fagan from the unemployment compensation hearing. "The defining feature of the arbitral forum is the absence of the strictures—and the protections—of formal procedural and evidentiary rules." *Purvis Sys., Inc.*, 788 A.2d at 1118. "[T]he fact that the arbitration panel may fail to follow the strict legal rules of procedure and evidence is no ground for striking down their award." *Belanger v. Matteson*, 115 R.I. 332, 355, 346 A.2d 124, 138 (1975). "Except for complete irrationality, arbitrators are free to fashion applicable rules and determine the facts of a dispute before them without their award being subject to judicial revision." *Id.* at 356, 346 A.2d at 138.

The arbitrator decided not to admit the testimony of Ms. Coates and Ms. Fagan from the Labor Board unemployment hearing. (Arbitrator's Award 20, Sept. 30, 2016.) The arbitrator did not believe that Ms. Fagan's testimony from the unemployment hearing would be the same as if she were to testify at the arbitration hearing because of the different legal standards between the two forums. *Id.* The arbitrator found that while the Union had the ability to cross-examine Ms. Fagan in the unemployment hearing, the issues in the arbitration were different and thus, the Union did not have the opportunity to properly cross-examine the witness for the purposes of the arbitration. *Id.* The arbitrator requested that Ms. Fagan testify at the arbitration hearing. *Id.* The arbitrator was not bound to follow the rules of evidence when making this evidentiary ruling. *See Purvis Sys., Inc.*, 788 A.2d at 1118. The evidentiary ruling was made within the powers of the arbitrator and was not an irrational decision; thus, this Court will not vacate the Arbitrator's Award because of this evidentiary ruling.

Finally, the Authority argues that there is no longer a Housing Specialist position at the Authority and it was irrational for the arbitrator to award reinstatement of Ms. Coates' position.

The position of Housing Specialist is no longer a position at the Authority because of the Authority's reorganization in September of 2015. The Union objects to the Authority's argument and asserts that the award granted by the arbitrator was within the bounds of the arbitrator's authority.

The Rhode Island Supreme Court has held that:

> "an arbitrator's broad authority to interpret the agreement between the parties and fashion an appropriate remedy is not unbridled. His or her authority is contractual in nature and is limited to the powers conferred in the parties' [contractual agreement]. The arbitrator is confined to interpret the terms of the agreement so as to effectuate the intentions of the parties to the contract." *Rhode Island Council 94, AFSCME, AFL-CIO*, 714 A.2d at 588.

The Court has determined that the CBA submitted at arbitration was the CBA which was binding on the grievance between the two parties. The arbitrator found that under the CBA the grievant must be reinstated if exonerated. (Arbitrator's Award 24, Sept. 30, 2016.) The arbitrator then reinstated Ms. Coates to her original position as a Receptionist, which is still a position under the CBA. *Id.* This decision was clearly within the bounds of the arbitrator's authority and was not irrational; therefore, this Court upholds the arbitrator's decision to reinstate Ms. Coates. *See Rhode Island Council 94, AFSCME, AFL–CIO*, 714 A.2d at 588.

VI

Conclusion

For the foregoing reasons, this Court denies the Authority's motions to vacate an arbitration award and grants the Union's motions to confirm an arbitration award. Counsel shall prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	West Warwick Housing Authority v. RI Council 94, AFSCME, AFL-CIO
CASE NO:	KM-2016-0747
COURT:	Kent Superior Court
DATE DECISION FILED:	September 18, 2019
JUSTICE/MAGISTRATE:	Licht, J.

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