STATE OF NEW HAMPSHIRE
SUPREME COURT

2022 TERM

City of Portsmouth, New Hampshire Police Commission/Police Department

v.

Portsmouth Ranking Officers Association, NEPBA, LOCAL 220

No. 2021-0511

BRIEF OF PORTSMOUTH RANKING OFFICERS ASSOCIATION, NEPBA, LOCAL 220 IN SUPPORT OF CONFIRMATION OF THE ARBITRATOR'S AWARD

Respectfully submitted,
The Appellee,
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Dated: May 6, 2022

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STATEMENT OF THE CASE

The New England Police Benevolent Association (NEPBA) Local 220, the Portsmouth Ranking Officers Association ("the Union") requests that this Court reject the City of Portsmouth's plea for this Court substitute its view of the equities of this case in place of the Award written by an Arbitrator jointly chosen by the parties in this case. The record reveals that the Arbitrator was acting within the clear scope of her authority as conferred upon her by the parties' Collective Bargaining Agreement ("CBA") when she determined an appropriate remedy. Because, as the Superior Court concluded, there is no "'plain mistake'" of fact or law that would justify doing anything other than confirming the arbitrator's decision in full," the City's appeal should be denied and the Union's request that the Award be confirmed should be granted.

STATEMENT OF THE FACTS

The Union and the City are parties to a collective bargaining agreement ("CBA"), which provides for binding arbitration to resolve disputes. Supp. App. 1-40.[1] The CBA bestows upon an agreed-upon arbitrator broad authority to

[1] References to the Supplemental Appendix submitted with the Union's brief are denoted "Supp. App. at ___." References to the City's Appendix are denoted "App. 1 at ____" or "App. 2 at ____."

interpret and apply the provisions of the CBA and wide discretion to formulate appropriate remedies. Supp. App. at 15. More specifically, the agreement between the parties provides as follows:

> (Section 4) - The function of the Arbitrator is to determine the interpretation of specific provisions of this Agreement. There shall be no right in Arbitration to obtain and no Arbitrator shall have any power or authority to award or determine any change in, modification or alteration of, addition to, or detraction from any other provision of this Agreement. The Arbitrator may or may not make his/her award retroactive to the initial filing date of the grievance as the equities of the case may require.
>
> . . .
>
> (Section 6)- The Arbitrator shall furnish a written opinion specifying the reasons for [her] decision. The decision of the Arbitrator, if within the scope of [her] authority and power within this Agreement, shall be final and binding upon the ASSOCIATION and COMMISSION and the aggrieved employee who initiated the grievance.
>
> (Section 7) - the arbitration provisions of this Section shall be subject to the provisions of RSA 542 "Arbitration of Disputes."

Id.

The Task Force

Sergeant Aaron Goodwin, a member of the Union, was terminated from his employment by the City on June 24, 2015. His termination immediately followed the report of a "Task Force" appointed by the Portsmouth Police Commission

("Commission") in September 2014 to review the facts and circumstances surrounding Goodwin's relationship with a Portsmouth citizen, Geraldine Webber. App. 2 at 6; Supp. App. 42-99. The Task Force was organized and appointed after the City experienced a media onslaught when it became known outside of the Portsmouth Police Department that Webber bequeathed certain of her rather substantial assets to Goodwin in her estate plan. Supp.App. at 69.

Nearly a year after its formation, on June 1, 2015, the Task Force released a fifty-eight page report to the Commission. Supp. App. 42-99. The Task Force determined that Goodwin's failure to unequivocally refuse Webber's intention to provide for him in her estate violated police department Rule 50.01A (Gifts, loans or fees from the public), but that "[t]he command staff at the time should have immediately recognized that the intended Webber bequest would violate the policy" and did not. Supp.App. at 51. "With the benefit of hindsight," the Task Force found:

> that by failing to refuse any bequest while maintaining a predominantly off-duty friendship with Mrs. Webber, Sgt. Goodwin has, intentionally or not, and unfortunately *with the knowledge of the command staff*, also violated [52.27 (Conduct, whether on or off duty, tending to cause disrespect or disrepute on the department) and 52.30 (Any other act or omission contrary to good order and discipline].

Supp.App. at 52. The Task Force further emphasized:

> It bears repeating that the command staff should have recognized the potential for the conduct of Sgt. Goodwin to reflect adversely on the department as soon as the potential bequest was brought to their attention. At a minimum, upon the death of Mrs. Webber, Sgt. Goodwin should have been instructed to either formally disclaim the bequest or resign from the department.

Supp.App. at 52.[2]

While concluding that Goodwin's conduct was violative of certain rules of the Department, the Task Force also found that the development of his relationship with Webber was a result of "Goodwin's sincere belief in community policing and his upbringing and family commitment to vulnerable elderly people" as well as "poor command advice" from his supervisors in the police department. Supp.App. at 54. The Task Force concluded that "Goodwin was improperly supervised and advised by the former Chief and the command staff at the time (2011-2012) failed to

[2] The Task Force also found that Goodwin's potential receipt violated a Portsmouth City Ordinance, 1.802 Sections A, F, and I. Despite acknowledging that it was "a close point as to whether these particular provisions [were] applicable," the Task Force decided to include them as violations anyway. Supp.App. at 53. Rather incredibly, the Task Force suggested that if Goodwin was unsure of his ethical position, he could have requested an opinion from the "Board of Ethics," which Judge Roberts, the Chair of the Task Force, agreed had not been in existence for more than thirty years. Id.

recognize the risk of [the] Duty Manual or Code of Ethics violations and the community's outrage regarding this matter." Supp.App. at 56. The Task Force noted that it had "no explanation for why the PPD or the Police Commission did not intervene during the 2011-2012 time frame to alert Sgt. Goodwin of a concern with policy violations and/or recognize the adverse reflection upon the department that occurred due to his conduct." Supp.App. at 57. The Task Force also added:

> By all accounts Sgt. Goodwin was highly regarded by the Command Staff as a hard-working, results-producing officer, his promotion bears that out. It is unfortunate that the advice he received coupled with his continued attention for Mrs. Webber led directly to the current situation. We are reasonably confident that if he had initially been instructed to disclaim the intended bequest, he would have heeded that advice and avoided entanglement.

Supp.App. at 65. One day after reviewing the Task Force report, driven to satisfy a mob that had been fed by the local media and their own political ambitions, the Police Commission decided to immediately fire Goodwin and ordered then Chief Dubois, against his wishes, to sign a letter terminating Goodwin's employment. Supp.App. at 14. The sole basis for the termination was the information contained in the Task Force report. App. 2 at 13-14.

The Grievance and Arbitration Proceedings

The Union challenged Sergeant Goodwin's termination as unjust and, pursuant to the CBA, Arbitrator Bonnie McSpiritt ("Arbitrator") was appointed to hear the Union's grievance.

The arbitration proceeding was comprehensive, with the Arbitrator considering evidentiary disputes and hearing evidence over many months and issuing three separate opinions and awards. App. 2. The Arbitrator's first award dated January 13, 2017 ("First Award") concluded that an August 20, 2015 New Hampshire Probate Court decision ("Probate Decision")[3]--that the City now argues compels correction of the Arbitrator's final award--was not admissible on the paramount issue of whether the City had just cause to terminate Sergeant Goodwin in June of 2015. App. 2 at 15-17. In this regard, the Arbitrator stated as follows:

> The City's reliance on the US Supreme Court case McKennon v. Nashville Banner Publishing Company,[513 US 352 (1995)] (Nashville Banner), the NH Supreme Court case McDill v. Environamics Corporation [144 NH 635 (2000)] and the US

[3] The Union has, throughout these proceedings, disputed the City's characterizations of the Probate Decision. Nevertheless, because the parties painstakingly presented these arguments to the Arbitrator and because, in the Union's view, the substance of the Probate Decision is not dispositive to this Court's review of the Final Award, the Union does not restate such disputes herein.

> district Court of the District of NH case EEOC v. Freudenberg-NOK [2009 U.S. Dist. Lexis 33082 *3 2009] to support their argument that the Probate Decision can also be used to justify Officer Goodwin's termination is unfounded. The Nashville Banner Court case dealt with an at-will, private employment employee . . . with no property rights to her position and no due process rights of notice and the opportunity to be heard under a collective bargaining agreement.

Id. The Arbitrator also found that the facts of this case deviated materially from Nashville Banner because, in this case, the City did not timely notify Goodwin that he was (or even could be) terminated based upon the Probate Decision. Id. at 15-17. The Arbitrator ultimately concluded that while the Probate Decision was not admissible on the question of whether the City had just cause to terminate Goodwin, it could be considered in fashioning a remedy should the City fail to establish just cause for its June 2015 termination. Id. at 27. The City does not dispute the Arbitrator's First Award.

In the second award dated August 7, 2017 ("Second Award"), the Arbitrator concluded that the City did not have just cause to terminate Sergeant Goodwin's employment in June 2015 based on the Task Force report. App. 2 at 48-63. In so ruling, the Arbitrator comprehensively analyzed each and every rule violation alleged by the City. She concluded that the City, through the ranks of the command

staff, had understood and condoned every rule violation that the City then (after-the-fact) alleged required the termination of Goodwin's employment. App. 2 at 52-53. ("As a result of Chief Ferland's and Chief Dubois' failure to act, the Command Staff and the Police Commission, by not challenging both Chiefs' interpretation of the Rules, supported and/or condoned Officer Goodwin's misconduct."). The Arbitrator ultimately found that whatever technical rule violation Goodwin may have committed did not amount to just cause for termination because, notwithstanding knowledge by all involved, "[Goodwin] was not told by anyone he was violating the Rules and [that] he should refuse Ms. Webber's bequest." App. 2 at 53. The City does not challenge the Arbitrator's Second Award.

The parties thereafter extensively argued and briefed for the Arbitrator's consideration what remedy should issue to Goodwin and/or the Union as a result of the improper termination of Goodwin's employment. After due consideration of such arguments, the Arbitrator issued her third and final award on October 22, 2018 ("Final Award"). App. 2 at 64. The Arbitrator concluded that the Probate Decision could have provided cause for Goodwin's termination if the actions recited therein were known at the time of discharge. App. 2 at 113. Accordingly, the

Arbitrator found that Goodwin should not be reinstated to his position. App. 2 at 124.

The Arbitrator then wrote as follows:

> One question remains given that Officer Goodwin cannot be reinstated, is he due a financial remedy as a result of being unjustly terminated on June 24, 2015? The two (2) options available is he would receive two (2) months back pay from June 24, 2015 to the issuance of the Probate Decision on August 20, 2015, the only viable remedy argued by the City or back pay from June 24, 2015 to August 7, 2017 when the Grievant would have been disciplined or terminated if not for the mitigating circumstances of the Commission and the Command Staff incorrectly interpreting the Rules and Regulations and condoning his improper conduct. The Union argued a third option should be available -- back pay to the date of this Award; however, I do not find this a viable option based on the severity of Office[r] Goodwin's actions determined in Judge Cassavechia's Probate Decision.
>
> Having excluded the viability of the third option, I find the Grievant shall receive back pay from June 24, 2015 to August 7, 2017 minus compensation and benefits and/or unemployment received during the same period of time. I reached this conclusion based on the fact the City did not afford Office[r] Goodwin due process rights under the [CBA] and pre-termination rights of notice of hearing and an opportunity to be heard required under Cleveland Board of Education v. Loudermill[,] 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985) after the Probate Decision was issued and he was terminated from the Department[]. Specifically, the Department did not conduct an investigation, identify Rules and/or Regulations that were violated, hold a pre-termination hearing, present charges and Officer Goodwin's appeals right to arbitration did not occur.

App. 2 at 124-125.

The Arbitrator buttressed her weighing of the equities on a remedy by reference to her January 13, 2017 evidentiary Award in this case where she had differentiated the facts and relative equities of this case from McKennon v. Nashville Banner Publishing Company, 513 US 352 (1995)("Nashville Banner"):

> [T]he [Nashville Banner] Court case dealt with an at-will employee, private employee with no property rights to her position and no due process rights of notice and the opportunity to be heard under a collective bargaining agreement. In addition, while McKennon's pre-termination misconduct was discovered after she was discharged ... once the Employer learned of the misconduct they terminated McKennon a second time for the new misconduct. McKennon's termination letter also stated that had Nashville Banner known of the employee's "misconduct it would have terminated her at once for that reason.["]
>
> The facts of this case differentiate it from Nashville Banner. One, Officer Goodwin was not an at-will employeee and he had property rights and due process rights under Section 3-Employee Rights and Section 35-Grievance Procedure of the Agreement. The Supreme Court in Nashville Banner did not consider these rights for McKennon, an at-will employeee.... Two, when the Probate Decision was released and Judge Cassavechia ruled that Officer Goodwin failed to establish a lack of undue influence over Ms. Webber, the, the City did not notify the Grievant he was now terminated based on both the Task Force Report and the Probate Decision. Nor did the City inform the Grievant he was terminated a second time based solely on the Decision.... The City did not inform Officer Goodwin had they known about the issues and/or factual findings contained in the Probate Decision the City would have terminated the Grievant at once for those reasons.

App. 2 at 125(emphasis in original).

The City subsequently appealed that Award to the Superior Court. Following briefing and oral argument (App. 1 at 4) the Superior Court concluded as follows:

> For the reasons stated by the respondent union, the Court cannot find a "plain mistake" of fact or law that would justify doing anything other than confirming the arbitrator's decision in full. The arbitrator considered the facts, interpreted the applicable cases, and reached a decision that is consistent with the law and with the parties' collective bargaining agreement.

The Court thus Ordered that the Arbitrator's decision be "CONFIRMED." This appeal followed.

SUMMARY OF ARGUMENT

An Arbitrator's Award, especially on the issue of a property remedy is entitled to substantial deference. In this case that deference is buttressed by the fact that (1) the Nashville Banner decision relied on by the City expressly contemplates case-by-case equitable consideration of the unique circumstances of the case by the trier of fact; and (2) perhaps more importantly, the parties' CBA, which gave her the responsibility to weigh the equities and order a proper remedy. Neither party disputes at this point that the City fired Goodwin in June 2015 without proper cause and the Union is thus entitled to a remedy pursuant to the CBA. Further, the Arbitrator's ruling that

the Probate Decision precluded an award of reinstatement or front pay is also not contested in this Court. The only issue under dispute is the Arbitrator's weighing of the record evidence to fashion a remedy awarding back pay to August 7, 2017.

After due consideration of the undisputed evidence before her and both parties' arguments, the Arbitrator concluded that--in the circumstances of this case--the backpay remedy should not be cut off as of the date the Probate Decision was issued (August 20, 2015) as urged by the City. The Arbitrator's conclusion that the mitigating and aggravating circumstances for each side required the back pay award be cut off as of the date of her second decision is well-supported by the record and within her prerogative. Ultimately, that the City, the Union or even this Court may have come to different conclusions regarding the equites compelled by the record in this case is of no consequence. Discretion to fashion a remedy was conferred by the parties on the Arbitrator and should not be disturbed. Accordingly, the Award should be Confirmed.

ARGUMENT

A. THE STANDARD OF REVIEW CAUTIONS RESTRAINT BY THIS COURT IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE ARBITRATOR

It is well settled that "[j]udicial review of an arbitrator's decision is limited." Keene School District v. Keene Education Association, 2021-0061, 2022 WL 368338, *3 (N.H. 2022) citing Lebanon Hanger Assoc., Ltd. v. City of Lebanon, 163 N.H. 670, 673 (2012). Pursuant to RSA 542:8:

> At any time within one year after the award is made, any party to the arbitration may apply to the superior court for an order confirming the award, correcting or modifying the award for plain mistake, or vacating the award for fraud, corruption, or misconduct by the parties or by the arbitrators, or on the ground that the arbitrators have exceeded their powers.

Here, the City argues that the Award must be modified based upon plain mistake.[4] The City, however, is unable to bear the difficult burden required for the Court to grant its request.

A plain mistake is an error that "is apparent on the face of the record and which would have been corrected had it been called to the arbitrators' attention." Merrill Lynch Futures, Inc. v. Sands, 143 N.H. 507, 510 (1999).

[4] The City has not argued, nor could it, that the Award should be vacated for fraud, corruption, misconduct, or because the arbitrator exceeded her powers. As a result, the only issue before this Court is whether it should correct or modify the Award for "plain mistake."

"[G]reat deference to the arbitrator['s] decision," must be afforded when analyzing whether an arbitrator's award was clearly stained by a plain mistake of fact or law. Id. Under this deferential lens, "[i]t must be shown that the arbitrator[] manifestly fell into such error concerning the facts or law, and that the error prevented [her] free and fair exercise of judgment on the subject." Id. Ultimately, so long as the arbitration record reveals some evidence supporting the arbitrator's award, it should be deferred to. Id. This is particularly true where the remedy awarded by the arbitrator is challenged. "In the absence of clearly restrictive language, great latitude must be allowed in the framing of an award and fashioning of an appropriate remedy." Keene School District 2022 WL 368338, *3 (citing Lebanon Hangar Assocs., 163 N.H. at 677)); see also, John A. Cookson Co. v. New Hampshire Ball Bearings, Inc., 147 N.H. 352, 361 (2001).

B. THE ARBITRATOR ACTED WELL WITHIN THE DISCRETION CONFERRED UPON HER BY THE PARTIES' COLLECTIVE BARGAINING AGREEMENT AND WITHOUT ERROR - MUCH LESS PLAIN ERROR - IN WEIGHING THE EQUITIES AND CONSTRUCTING THE REMEDY IN THIS CASE

The City's pean at the alter of Nashville Banner and the after-acquired evidence doctrine ultimately cannot carry the day. It is the judgment of the arbitrator on the equities of the case and a proper remedy - and not the

judgment of this or any other Court - that should control. The fundamentals of Nashville Banner are not in dispute. After-acquired evidence may impact an employee's available remedies if the employer can demonstrate that the later-revealed misconduct "was so grave that [the employee's] immediate discharge would have followed its disclosure in any event." Nashville Banner, 513 U.S. at 356, 362-63 (1995)("[W]here an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."); Mohave Elec. Co-Op, Inc. v. N.L.R.B., 206 F.3d 1183, 1192 (D.C. Cir. 2000) ("[T]he employer has the burden of proving that the evidence reveals misconduct for which it '*would* have discharged any employee,' not simply for which it could have done so."(emphasis in original)).

If an employer meets this burden, however, the employee is not left without a remedy. Instead, the employee is precluded from obtaining the remedies of reinstatement or front pay. Nashville Banner, 513 U.S. at 361-362; Aghamehdi v. OSRAM Sylvania, Inc., No. 17-CV-700-JD, 2019 WL 919487, at *4 (D.N.H. Feb. 25, 2019). Most notably, an employee's entitlement to backpay is not

foreclosed by the doctrine and is instead to be guided by equitable principles. Nashville Banner, 513 U.S. at 361-362. (remedy of backpay determined by the "factual permutations and equitable considerations [which] vary from case to case").

In Nashville Banner, the Court recognized the difficulty in balancing "the duality" between the wronged employee's interest in a remedy and the employer's "corresponding equities" in an after-acquired evidence case. Id. at 361. To that end, the Nashville Banner court was clear that the balance of equities of a backpay award begins, but does not end, with the date that the employer learned of the employee's wrongdoing. Id. at 362 ("The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered."). "In determining the appropriate order for relief, the [trier of fact] can consider taking into further account extraordinary equitable circumstances that affect the legitimate interest of either party." Id.; see e.g., Ekadem v. District of Columbia, No. No. CIV.A. 91-1060-LFO, 1997 WL 361187 *7 (D.D.C. June 23, 1997) (in considering "extraordinary equitable circumstances" under Nashville Banner parties were ordered to brief arguments in

favor of "enlarging, narrowing, or eliminating any backpay award."); see also Travers v. Flight Serv. & Sys., Inc., 808 F.3d 525, 539 (1st Cir. 2015) (holding that it was not abuse of discretion for district court to "withhold[] th[e] equitable remedy" applying after-acquired evidence to cut off damages); Aghamehdi, 2019 WL 919487, at *4.

Here, as she was required and empowered to do by the terms of the CBA, the Arbitrator correctly weighed the duality of equities and interests in this case in rejecting the City's argument--the same then as it is now--that Goodwin's backpay award should be limited to the date the City learned of the Probate Decision. In doing so, she determined that there were unique factual circumstances in the record that required consideration.

First, the Arbitrator noted that Goodwin, unlike the employee in Nashville Banner, was not an at-will employee but, instead, a public employee with a constitutionally protected property interest in his employment. Accordingly, Goodwin could not be terminated without proper notice of the specific reasons for his termination and an opportunity to respond and be heard. See generally Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Board of Regents of the Univ. Sys. of Wisconsin v. State Personnel Comm'n, 646 N.W. 2d 759 (WI 2002)(holding that

public employees' Loudermill rights precluded application of after-acquired evidence doctrine).

The record evidence confirmed that the City understood its obligation--required by both the Constitution and the parties' established practice--to afford Goodwin a Loudermill hearing (just as it had done before his initial termination) before terminating him on new or different grounds. Indeed, on appeal, the City makes much of the fact that the Union waived the right to the Loudermill hearing after the initial (wrongful) June 2015 termination summarily ordered by the Police Commission. The fact that the parties - in the unique circumstances of the Commission's immediate action after the Task Force report and obvious disregard for any and all process due Goodwin - choose to move to arbitration as quickly as possible, is irrelevant to the analysis. The salient point - confirmed by the City's argument - is that the Union and Goodwin possessed the unilateral right and the prerogative to demand a hearing or waive it.

Nevertheless, the City never afforded Goodwin with a pre-termination notice or an opportunity to be heard prior to relying on the Probate Decision as a basis for termination and did not undertake a second termination proceeding related to the Probate Decision. Cf. Nashville

Banner, 513 U.S. at 355 (employer terminated employee "(again)" immediately after becoming aware of after-acquired evidence). As the Arbitrator noted, "the City did not notify [Goodwin] he was now terminated based on both the Task Force Report and the Probate Decision . . . [nor] did the City inform [Goodwin] he was terminated a second time based solely on the [Probate] Decision." App. 2 at 16.

More importantly, contrary to the City's assertions, the deprivation of Goodwin's so-called Loudermill rights was not the only factual circumstance supporting the Arbitrator's equitable determination of a proper back-pay remedy. The Arbitrator further determined that the CBA provided Goodwin with procedural "due process" rights (in addition to those afforded by the state or federal constitutions) that she had to recognize in her analysis of the proper application of the after-acquired evidence doctrine. Indeed, unlike the at-will plaintiff in Nashville Banner, Goodwin enjoys the benefit of a myriad of protections under the CBA. Notably, for example, that agreement provides as follows:

> No permanent employee shall be disciplined except for *just cause* and that [sic] any major disciplinary actions (i.e. written warning, suspension or dismissal) taken against any member

> . . . covered by this Agreement will be subject to the grievance procedure.

(Supp. App. at pg. 5 (emphasis added)). Similarly, the CBA also provides that "[e]ach grievance shall be separately processed at an Arbitration proceeding hereunder, unless the parties otherwise agree." (Supp. App. at pg. 14-15). Of course, by the express provisions of the agreement, the Arbitrator had no power to modify, alter, add or detract from the contractual provisions. Supp. App. at 15. Both the Union and Goodwin had a strong interest in the enforcement of the CBA's bargained-for provisions.

The CBA's requirements that there be just cause for any discipline and that each discipline be processed and considered separately obviously were violated by the City's summary use of the after-acquired evidence in this case.[5] Process and fair investigation form a fundamental component of the "just cause" analysis in any labor arbitration. In re Merrimack Cnty. (N.H. Pub. Emp. Labor Relations Bd.), 156 N.H. 35, 41 (2007) ("The United States Supreme Court has identified seven criteria for analyzing whether just cause exists: the reasonableness of the employer's position; (2) the notice given to the employee; (3) the

[5]Most obviously, a second termination would generate a second grievance and related arbitration proceeding - likely before a different arbitrator chosen by the parties.

timing of the investigation undertaken; (4) the fairness of the investigation; (5) the evidence against the employee; (6) the possibility of discrimination; and (7) the relation of the degree of discipline to the nature of the offense and the employee's past record.").

Ultimately the record supports the Arbitrator's refusal to robotically cut off back pay on the day - August 20, 2015 - that the Probate Decision was issued. Prior to honoring the parties' practice of recognizing the right to a Loundermill hearing, the City would have engaged in a multitude of activities to evaluate the propriety of any discipline. The City's witness, Chief Merner testified, as credited by the Arbitrator, that "[a]fter the [Probate] Decision was released he would have conducted an internal investigation to determine what Rules and Regulations of the Police Department were violated by the findings in the Decision. The Chief would have consider[ed] how other people were treated in similar situation[s] and what guidance Officer Goodwin received from his Command Staff." App. 2 at pp. 80-81, 121. Another City witness, Police Commissioner Howe, confirmed that prior to the imposition of any discipline, an investigation would have to be completed and the Commission would have to be briefed on its findings. App. 2 at 121. Moreover, the Union and

Goodwin would have had several levels of review available under the grievance process set forth in the CBA. App. 2 at 121.

Against, this factual backdrop, the Arbitrator weighed the equities to determine the appropriate remedy to award for the City's unjust termination of Sergeant Goodwin. In doing so, she first eliminated reinstatement and front-pay as appropriate remedies. She then, as instructed by Nashville Banner and its progeny, developed a remedy by analyzing the equities in the case using the time between the wrongful termination and the discovery of the misconduct as the beginning, but not ending, point.

The Arbitrator considered the arguments presented by the parties including the City's argument - repeated here - that back-pay should be cut off as of the date of the Probate Decision and the Union's contention that any back pay should continue to the date of her final order. App. 2 at 125. She rejected the Union's request for back-pay to the date of her final award because of the weight she afforded Goodwin's conduct as set forth in the Probate Decision. (App. 2 at 124). She rejected the City's requested cut-off date for at least two reasons. First, because the City denied Goodwin and the Union process rights due under the CBA and Loudermill and did not conduct

an investigation, identify rules or regulations, present charges to the Commission for consideration. In addition, however, the Arbitrator, as was her prerogative, considered and weighed as mitigating in Goodwin's and the Union's favor both the Commission's initial rush to termination and the Command Staff's improper interpreting of the rules of the Department and "condoning of [Goodwin's] improper conduct." App. 2 at 124.

Accordingly, there can be no meaningful dispute that in rendering the Final Award the Arbitrator carefully weighed all of the parties' interests. She then determined--as was her right and duty under the CBA--that a remedy of backpay to August 7, 2017 (the date of her Second Award) was appropriate.

C. THIS COURT SHOULD NOT DISTURB THE ARBITRATOR'S WEIGHING OF THE EQUITIES

The Arbitrator's consideration of the relative equities in this case and her construction of a remedy therefrom should not subject to recalculation by this Court. The fundamental flaw in the City's reasoning is that it does not move past the "beginning point" of backpay analysis required by Nashville Banner. 513 U.S. at 362 ("The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of

the unlawful discharge to the date the new information was discovered. In determining the appropriate order for relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interest of *either* party." (emphasis added)); Clemente v. Crane, 97 F.3d 1445 (1st Cir. 1996)(characterizing date of discovery cut off of back pay as a "general rule"). The Arbitrator properly began at the point the City now says she should have stopped. She had the discretion, however, to move the back-pay award retroactively to the date of the initial firing (and thus award no back pay) or to move it forward to the date of her final decision (an award of full back pay) or, of course, anything in-between. and judgment was inevitable. Harding v. Cianbro Corp., 498 F. Supp. 2d 337, 339 (D. Me. 2007)("back pay" runs until date of final judgment). The Arbitrator, however, weighed the relative equities and made a factual determination as to when the equities including the factors discussed above (and the Union's interest in enforcement of its agreement) compelled Goodwin's backpay to stop accruing. Nothing in the record of this case or the law governing the review of an arbitrator's decision justifies disturbance of her findings.

Under the CBA, the Arbitrator, and not this Court, is empowered to make the decision on the proper weighing of the equities regarding a remedy. The language of the parties' agreement provides that the *arbitrator* shall determine the duration of any remedy "as the equities of the case may require." (Supp. App. pg. 15) (emphasis added) ("The Arbitrator may or may not, make his/her award retroactive to the initial filing date of the grievance as the equities of the case may require."). The parties have further agreed in the CBA that, when acting within the scope of her authority, the arbitrator's decision "shall be final and binding upon the [Union] and the [City]." (Supp. App. pg. 15). The Court should reject the City's invitation to rewrite the CBA and conduct what is essentially a de novo review and interpretation on an issue that the parties mutually agreed to have an arbitrator decide. This conclusion is buttressed by the fact that an arbitrator's power is generally at its zenith when determining a remedy. See John A. Cookson Co., 147 N.H. at 361.

Ultimately, the City's attempt to contort this case into the narrow class of cases where an arbitrator's decision is subject to review must fail. It cannot demonstrate that there is some error that "would have been

corrected had it been called to the arbitrators' attention." Rand v. Aetna Life & Cas. Co., 132 N.H. 768, 771 (1990); Masse v. Commercial Union Ins. Co., 134 N.H. 523, 526 (1991).[6] Indeed, the City's only contention on appeal--that the Arbitrator should have further capped the award--was litigated extensively in the arbitration proceedings.

Nor does the record reveal that the Arbitrator's "free and fair exercise of judgment on the subject" was somehow corrupted. In the end, there was no error in her judgment at all, but even if this Court would weigh the equities of the appropriate remedy differently, the decision should not be disturbed. See Appeal of Merrimack Cnty., 156 N.H. 35, 40 (2007) ("As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of [her] authority, that a court is convinced [she] committed serious error does not suffice to overturn [her] decision. The court's task is thus ordinarily limited to

[6] The Court's decision in Finn v. Ballentine Partners, 169 N.H. 128 (2016) does not alter this conclusion. While discussing the standard of review, the Finn court noted that arbitration awards had been reversed in some situations "when the errors, although not subtle, were not so obvious as to satisfy the literal meaning of this language." Id. 169 N.H. at 146. The Court, however, has made imminently clear that a trial court may not disturb any of the arbitrator's findings of fact, and any "mistakes of law" must be clear and plain having no support in the arbitrator's factual findings. Id.

determining whether the arbitrator's construction of the [contract] is to any extent plausible." (citations and quotations omitted)). Where, as here, the review focuses on the propriety of a factual determination such as the balancing of the equities in a case, the reviewing Court must defer to the Arbitrator's decision. Keene School District, 2022 WL 368338, *3 (N.H. 2022): See Carroll Cnty. Comm'rs v. AFSCME Council 93, No. 212-2018-CV-173, 2019 WL 7598898, at *3 (N.H. Super. Aug. 21, 2019) ("The Superior Court is not entitled to substitute its own judgment for that of the arbitrator. Provided that an arbitrator's decision draws its essence from the CBA and the arbitrator is not fashioning [her] own brand of industrial justice[,] the award will stand. Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." (internal citations and quotations omitted)). Given this record, this Court must affirm the Superior Court's Confirmation of the arbitration Award.

CONCLUSION

For the foregoing reasons, the Portsmouth Ranking Officers Association, NEPBA Local 220 respectfully requests

that this Court AFFRIM the judgment and order of the Superior Court confirming the arbitration award.

CERTIFICATIONS

Undersigned counsel, to the best of his knowledge, information and belief, certifies the following:

1. The appealed decision is attached to the addendum of this brief.

2. The foregoing brief conforms to Supreme Court Rules 26(2) and (3).

3. The brief conforms to New Hampshire Supreme Court Rule 16(11) and contains 6,252 words according to MS Word.

4. The brief and supplemental appendix have been properly served upon opposing counsel, Thomas Closson, Esq.

REQUEST FOR ORAL ARGUMENT

The Union requests fifteen minutes of oral argument to be presented by Peter Perroni.

Respectfully submitted,
The Union,
By its lawyer,

/s/ Peter J. Perroni
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Dated: May 6, 2022

ADDENDUM
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218-2019-CV-01397

ORDER

This is an appeal of an arbitrator's ruling regarding the termination of Sergeant Aaron Goodwin's employment with the City of Portsmouth police department in 2017. The Court has reviewed the parties' memoranda and exhibits, including the arbitrator's three separate orders; and has considered counsel's arguments from the hearing. The Court has also reviewed much of the record that was made during the arbitration proceedings.

The Court finds that the parties' memoranda set forth the relevant facts, as well as the Court's limited standard of review and the law that governs the issues that were before the arbitrator.

Having now considered all of that information, an extended discussion is not necessary. For the reasons stated by the respondent union, the Court cannot find a "plain mistake" of fact or law that would justify doing anything other than confirming the arbitrator's decision in full. The arbitrator considered the facts, interpreted the applicable cases, and reached a decision that is consistent with the law and with the parties' collective bargaining agreement.

Accordingly, the arbitrator's decision is CONFIRMED.

So ordered.

October 4, 2021
Date

Judge Martin P. Honigberg

Clerk's Notice of Decision
Document Sent to Parties
on 10/05/2021