IN THE NEBRASKA COURT OF APPEALS

Case No. A-24-487

KATHERINE BELCASTRO GONZALEZ

Appellant,

v.

CITY OF OMAHA, a Municipal Corporation,

Appellee.

BRIEF OF APPELLANT

APPEAL FROM THE DOUGLAS COUNTY DISTRICT COURT

The Honorable Kimberly Miller Pankonin
Case No. CI 23-422

Prepared and Submitted by:

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STATEMENT OF THE BASIS OF JURISDICTION

On January 5, 2023, an Arbitrator issued an undated Arbitration Award finding that the City of Omaha had violated the rights of Katherine Belcastro-Gonzalez, a member of the Omaha Police Department (herein sometimes "Gonzalez") (Ex. 1). On January 17, 2023, the Arbitrator emailed a dated Arbitration Award that mirrored the undated Arbitration Award sent on January 5, 2023 (Ex. 2). On January 17, 2023, Gonzalez filed a "Petition to Modify or Correct Arbitration Award Entered in favor of Petitioner or Alternatively to Partially Vacate Portion of Award Exceeding Arbitrator's Powers". (T1-8). The District Court entered a final Order dated May 31, 2024 denying Gonzalez's Petition. (T25-31). The Appellant filed a Notice of Appeal and deposited the docket fee on June 28, 2024. (T33-35) The Notice of Appeal was filed within thirty days of the final order and judgment dated. This Court has jurisdiction over this matter because it is an appeal from a "final order" by virtue of the District Court's final disposition of the lawsuit. *See* Neb. Rev. Stat. §25-1902.

STATEMENT OF THE CASE:

This case is an appeal from the denial of a request to reverse or modify an Arbitration ruling. The issues tried below were whether the Arbitration ruling should be reversed, modified or affirmed. The Judge affirmed the arbitration ruling in its entirety.

THE NATURE OF THE CASE

This case is based upon Petition to vacate or modify an arbitration award. The Petitioner accepts that the arbitrator correctly ruled that the City violated her rights. However, the arbitrator went too far and unilaterally commented and ruled upon a matter not presented to the arbitrator and beyond the scope of his authority to rule upon.

THE ISSUES ACTUALLY TRIED IN THE COURT BELOW:

Whether the District Court would vacate, modify or affirm the arbitration award.

HOW THE ISSUES WERE DECIDED

The District Court denied the Petition and granted the City's motion to confirm the Arbitration Award, which had found that the City violated the rights of the Petitioner. (T25-31).

SCOPE OF REVIEW

Arbitration decisions are generally afforded deference in the Courts. However, that does not mean that an arbitration decision cannot be contested. "Although arbitration decisions are given great deference, they are not sacrosanct." *State v. Henderson*, 277 Neb. 240, 265, 762 N.W.2d 1, 18 (2009) *disapproved on other grounds*, *Seldin v. Estate of Silverman*, 305 Neb. 185, 939 N.W.2d 768 (2009); *see also City of Omaha v. Prof'l Firefighters Ass'n, Local 385*, 309 Neb. 918, 928, 963 N.W.2d 1, 11 (2021)(Although judicial review of arbitration decisions is limited, it is

not nonexistent.). Specifically, case law confirms that if an Arbitrator exceeded his authority and was influenced by his personal notions of justice rather than drawing his decision from the contract, then a Court can certainly examine whether an Arbitrator exceeded his authority. *See, e.g., City of Omaha v. Prof'l Firefighters Ass'n, Local 385*, 309 Neb. 918, 932, 963 N.W.2d 1, 13 (2021)

ASSIGNMENTS OF ERROR

1. THE DISTRICT COURT ERRED IN FAILING TO MODIFY THE ARBITRATION AWARD OR TO VACATE THE PORTION OF THE ARBITRATION AWARD AS EXCEEDING THE ARBITRATOR'S POWERS.

2. THE DISTRICT COURT ERRED IN FAILING TO FIND THAT THE ARBITRATOR EXCEEDED HIS POWERS BY RULING THAT THE 100 DAY TIME LIMIT TO FILE A CHARGE AGAISNT KATHERINE BELCASTRO GONZALEZ WAS EXTENDED FROM THE DATE OF THE ARBITRATOR'S ORDER.

3. THE DISTRICT COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR CONFIRMATION OF ARBITRATION AWARD TO THE EXTENT THAT IT AFFIRMED THAT PORTION OF THE AWARD THAT PURPORTED TO GRANT THE CITY AN EXTENSION OF TIME TO FILE CHARGES AGAINST KATHERINE BELCASTRO GONZALEZ FROM THE DATE OF THE ARBITRATOR'S AWARD.

PROPOSITIONS OF LAW:

1. The Court has the authority to modify the decision of the Arbitrator when the Arbitrator has exceeded his lawful authority. Nebraska Revised Statute Section 25-2613.

2. The Court has authority to modify and correct an award, without effecting the merits of the decision, when the Arbitrator ruled upon a matter not submitted to them or where it is imperfect in form. Neb. Rev. Stat. Sec. 25-2614.

3. Although arbitration decisions are given great deference, they are not sacrosanct." *State v. Henderson*, 277 Neb. 240, 265, 762 N.W.2d 1, 18 (2009) *disapproved on other grounds*, *Seldin v. Estate of Silverman*, 305 Neb. 185, 939 N.W.2d 768 (2009).

4. A contract "must be construed as a whole" and "effect must be given to every part of the contract." *See, e.g., Acklie v. Greater Omaha Packing Co.,* 306 Neb. 108, 117, 944 N.W.2d 297, 305 (2020).

5. Advisory opinions or conditional orders are generally frowned upon by courts, especially where there are issues not ripe for determination and adjudication at that time. *See, e.g., U.S. Specialty Ins. Co. v. D S Avionics Unlimited LLC*, 301 Neb. 388, 400, 918 N.W.2d 589, 597 (2018) and *Cent. Neb. Pub. Power & Irrigation Dist. v. Jeffrey Lake Dev., Inc.,* 267 Neb. 997, 1004, 679 N.W.2d 235, 242 (2004).

STATEMENT OF FACTS

At times relevant to the Petition, Katherine Belcastro-Gonzalez (sometimes "Petitioner" or "Gonzalez") was employed by the City of Omaha Police Department. (3:9-20). The City of Omaha has been the employer of Gonzalez, as the Omaha Police Department is a department serving as part of and under the control of the City. (T1).

The City of Omaha is a party to a collective bargaining agreement with the Omaha Police Officers Association. (3:21-4:1 and 8:8-16) Gonzalez is a beneficiary of the CBA and is entitled to protection of rights guaranteed to her under the CBA. (T1). Gonzalez has alleged that in retaliation for a complaint initiated by Gonzalez regarding his prior discriminatory and retaliatory treatment of her, Omaha Police Chief Todd Schmaderer initiated a so-called "investigation" of Gonzalez. Gonzalez contends that the so-called "investigation" was mere pre-text for Schmaderer's efforts to silence and retaliate against Gonzalez for the filing complaints regarding Schmaderer's conduct, which ultimately resulted in a jury verdict in favor of Gonzalez awarding her damages against Schmaderer and the City of Omaha. (T1-T2).

In connection with the so-called investigation, Schmaderer caused Deputy Chief Anna Colòn ("Colòn") to inform Gonzalez of a hearing related to the investigation initiated by Schmaderer in the form of a writing labeled "Appointment for Internal Affairs Interview". (T2 and 8:17-19). Based upon Colon's letter, Gonzalez was subjected to an interview by Colon, which was to be used as part of the justification by Schmaderer to terminate Gonzalez from the Omaha Police Department, which was undertaken, at least in part, in an effort to undermine Gonzalez's efforts to pursue her civil rights claims then pending in the United States District Court for the District of Omaha, and to further retaliate against her for pursuit of such claims. (T2).

The letter providing notification of the interview and the interview itself were conducted contrary to the CBA. (E2, p. 11). The CBA guaranteed Gonzalez and other Omaha Police Officers with various rights, including the right to specific notice of any alleged offense prior to interview and notice of any individuals that would participate in the interview. (E2, p. 6 and 11)

The CBA provides for a "Grievance Procedure" under Article 8 of the CBA. The CBA provides for the selection of an Arbitrator to determine the validity of a Grievance in the event the parties are not able to settle the Grievance between themselves. (E4, p. 23-25) In accordance with Article 8 of the CBA, Gonzalez provided notice of the City's violation of the CBA and submitted a written grievance based upon the violation of rights guaranteed to Gonzalez by the actions of Schmaderer and the City. (E5) Within her Grievance, Gonzalez noted the violation of her rights including the rights guaranteed under Article 6 and Article 18a of the CBA. (E5, p. 1-2)

Article 6 of the CBA provides, in relevant part, that in the event the procedures set forth within Article 6 are not followed "the charges against the officer will be dismissed without prejudice." (E4, p. 19-20).

Article 8 of the CBA applicable to the City and Petitioner also provides, in relevant part, that: "Authority of the arbitrator is defined and limited by Article 7 and Article 8 of this Agreement." (E4, p. 24).

Separately, the CBA provided a limitation period of one hundred (100) days for the City to initiate any discipline from any misconduct. In relevant part, the CBA provides at Section 7 of Article 6: "Any disciplinary action must be imposed and received by the officer within 100 calendar days from the date following the date the alleged violation occurred." (E4, p. 19).

As noted above, Gonzalez gave notice of the violation of her rights within the Grievance, including the rights guaranteed under Article 6, Article 8 and Article 18a, but she did not request that the CBA be modified or altered in any way, including any modification of the one hundred (100) day time limitation period within the CBA for imposition of any discipline. (E5).

In accordance with the CBA, Gonzalez's Grievance was heard by a third-party Arbitrator. (E3) The City of Omaha participated in an arbitration hearing upon Petitioner's Grievance. (E3) After hearing, the Arbitrator issued an Award to Gonzalez finding that the City violated the CBA in its treatment of Gonzalez, including specifically Article 6, 8 and Article 18a. (E1 and E2).

The Arbitrator correctly determined that the City violated the CBA.

Among other findings to support his award in favor of the Petitioner, the Arbitrator observed:

"After reviewing this matter at great length, including all of the documents presented into evidence, including the CBA, and the review of the transcript, I can come to no other conclusion that the City violated Articles 6 and 8 and Article 18a, Item #F of the CBA." (E2, p. 11)

The Arbitrator further found:

"The City was totally remiss in their notice to the Grievant as outlined by Articles 6 and 8. They basically only obtained basic provisions that they allege the Grievant violated. There was nothing specific in the notice. Consequently, their failure to be specific violates Articles 6 and 8 and voids the whole interview process." (E2, p. 11)

As a consequence of the violations which were subject of Petitioner's Grievance, the Arbitrator concluded:

"the interview never happened and the Grievant did not waive any of her rights by participating in the two interviews in February." (E2, p. 11)

The Arbitrator further concluded: "the City must start over in their investigation." (E2, p. 11-12).

By declaring that the "City must start over", the Arbitrator was effectuating the result mandated in Article 6, Section 8 which directed that any charges against the officer "will be dismissed" without prejudice.

However, the Arbitrator went beyond the Grievance filed by the Petitioner and awarded relief to the City of Omaha on a matter outside of the contract and beyond the power of the Arbitrator to award. Specifically, after concluding that the City violated Petitioner's rights and the CBA, the Arbitrator granted the City's request to amend the contract and re-start the 100 day contractual limitation on any investigations.

In committing error, the Arbitrator noted:

The City asks the Arbitrator to stay the 100 day time period from February 17th until the award date. I believe that this is the fairest thing to do and the 100 day period does not start until the date of this award. (E2, p. 12)

The Arbitrator's declaration that the "100 day period does not start until the date of this award" is directly contrary to the plain language of the CBA which expressly provides that "disciplinary action must be imposed and received by the officer within 100 calendar days from the date following the date the alleged violation occurred."

The CBA does not confer any power upon the Arbitrator to amend the 100 day time limitation in Article 6 for any discipline and the CBA specifically indicates that the Arbitrator's power is limited by the CBA and nothing within the CBA allows the Arbitrator to amend or rewrite the 100 day time limit if there is a violation, rather the Arbitrator simply dismisses the charge against the officer or the charges are dismissed by operation of law (under the terms of the contract) upon the finding of a violation of the CBA.

By virtue of giving additional relief to the City to change the starting date of the 100 day time limit in the CBA, that portion of the award simply reflects the arbitrator's personal notion of justice, confirmed by his characterization of what he thought was "the fairest thing to do", rather than drawing its essence from the contract which only empowered a dismissal of the charges upon the Arbitrator finding a violation of the CBA.

Based upon the evidence presented to the Court it is apparent that Katherine Belcastro-Gonzalez was provided with a notice of investigation that set forth certain charges against her, which she would be examined upon for disciplinary purposes. Katherine Belcastro-Gonzalez' counsel timely sent a grievance, in accordance with the Collective Bargaining Agreement, on February 25, 2022 advising of Gonzalez' position that the charges were inadequately stated and were in violation of her rights under the Collective Bargaining Agreement (CBA). (E5). Within her February 25th letter, Appellant specifically cited to Article 6, Section 8 and Article 18a, Subpart J and argued that because the CBA procedures were not followed "the charges must be dismissed without prejudice." (E5, p. 1-2) It is clear that this notice was received by the City, as Omaha Police Department Chief Todd Schmaderer wrote back to Gonzalez' counsel on March 8, 2022 and denied Katherine Belcastro-Gonzalez' February 25th grievance. (E6).

Katherine Belcastro-Gonzalez then appealed Chief Schmaderer's denial of her grievance that the charges did not provide adequate information to allow her to defend herself and that other CBA procedures were violated via her counsel's further communication dated March 23, 2022. (E7). Within the March 23rd correspondence, Appellant's counsel stated "Captain Belcastro-Gonzalez requests the denial issued by Chief Schmaderer of her formal grievance be overturned and the investigation be dismissed without prejudice, as legally required." (E7, p. 3)

Again, the City denied this grievance, as reflected in the communication issued by David Grauman on behalf of the City of Omaha dated April 4, 2022. (E8).

In accordance with her rights under the Collective Bargaining Agreement, Katherine Belcastro-Gonzalez thereafter sought arbitration of the issue of whether or not the notice was adequate and whether her rights under the CBA were violated. (E3). Katherine Belcastro-Gonzalez, through counsel,

filed a request for arbitration on May 22, 2022, and, specifically, requested a finding that her rights under the CBA were violated by the inadequate notice of the charges giving rise to the disciplinary investigation against her. (E9). Gonzalez then requested that the denial of her formal grievance by Chief Schmaderer be overturned and to "dismiss the investigation without prejudice, as legally required." (E9, p. 3)

Thereafter, the matter proceeded to arbitration. An arbitration hearing was conducted. (E3) The Arbitrator heard testimony and received evidence, as more fully reflected in the transcript of the arbitration proceedings dated October 25, 2022. (E3) On January 5, 2023, the Arbitrator sent an initial Opinion and Award that was unsigned. (E1) Thereafter, on January 17, 2023, the Arbitrator issued a signed copy of his Opinion and Award. (E2) As noted above, the Arbitrator found that after reviewing the "matter at great length" he could "come to no other conclusion that the City violated Articles 6 and 8 and Article 18a, Item #F of the CBA." The Arbitrator noted that the City "was totally remiss in their notice" and that the City's "failure to be specific violates Articles 6 and 8 and voids the whole interview process." (E2, p. 11).

The Arbitrator further recognized at page 11 of his Opinion and Award, however, that the City was requesting the Arbitrator to "fashion a remedy" and that the City argued "the appropriate remedy would be to issue a decision to stay the 100 day time period from February 17, 2022, until the date of the award." (E2, p. 12)

There is nothing in the Arbitrator's Opinion and Award to suggest that Gonzalez ever agreed that the Arbitrator could decide issues beyond the simple issue submitted to him by Gonzalez requesting a dismissal without prejudice, nor is there any other evidence that Gonzalez ever did anything but ask that the charge be dismissed without prejudice. To the contrary, the Arbitrator goes out of his way at pages 10 and 11 of his Opinion and Award to state that it was the City's request (not that of Gonzalez, who filed the Arbitration request) that the arbitrator fashion some remedy if the City was found to have violated the CBA. (E2, p. 10-12) The evidence before the Court is that Appellant Gonzalez and her counsel were consistent that the remedy should be a dismissal of the investigatory charges without prejudice. (E5, E7, and E9).

On January 17, 2023, Katherine Belcastro-Gonzalez timely filed a Petition to contest the arbitration decision and within her Petition she requested that the arbitration decision be vacated or modified in accordance with applicable Nebraska Revised Statute. (T1-8).

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILIN TO FIND THAT THE ARBITRATOR EXCEEDED HIS AUTHORITY BY GRANTING THE CITY UNREQUESTED EQUITABLE RELIEF BEYOND THAT ALLOWED BY THE CBA.

Summary of the Argument

After he found a violation of Gonzalez's rights, the Arbitrator was limited (and required) to dismiss the charges against Gonzalez without prejudice. Nothing more was requested by Gonzalez in her arbitration submissions and nothing else was allowed under the terms of the CBA.

The CBA expressly states within Article 8, under "step 3" found at page 18 of the CBA (page 24 of the actual exhibit):

"Authority of the arbitrator is defined and **limited** by Article 7 and Article 8 of this Agreement." (E4, p. 24) Nowhere in Article 7 or Article 8 is it indicated that the arbitrator has any authority to grant equitable relief.

As it relates to findings that an officer's rights have been violated, the CBA further expressly provides in two separate provisions that the remedy is dismissal of charges without prejudice.

Article 6, Section 8 governs the notice required to be provided to an officer as part of the disciplinary process. This notice includes specifics as to the allegations being made against the officer. The Section further provides: "In the event that the procedures set forth above are not followed, the charges against the officer will be dismissed without prejudice." (E4, p. 20).

Similarly, the CBA contains an Officer's "Bill of Rights" at Section 18a. Section 18a(j) provides in relevant part: "In the event that the procedures set forth in this Section and Article…are not followed, the charges against the employee will be dismissed without prejudice." (E4, p. 58)

When considering the provisions of the CBA, this Court must keep in mind that the Arbitrator made the following findings in favor of Kathy Gonzalez:

"After reviewing this matter at great length, including all of the documents presented into evidence, including the CBA, and the review of the transcript, I can come to no other conclusion that the City violated Articles 6 and 8 and Article 18a, Item #F of the CBA." (E2, p. 11).

The plain language of the above factual finding, by the arbitrator, leads to the inescapable conclusion that under the CBA the arbitrator was to find that "the charges against the employee will be dismissed without prejudice." (E4, p. 20, p. 58).

Although the Arbitrator found a violation of Kathy Gonzalez's rights, he went beyond the CBA and his "limited" authority and suggested that a separate provision which imposed a 100 day time limit for bringing charges would be tolled. This action was beyond the Arbitrator's authority.

Appellant Katherine Belcastro Gonzalez contends that the arbitrator exceeded his authority when he entered an award purporting to staying the time period for the imposition of discipline from the date of the arbitrator's award. As noted by the District Court, neither party was contesting the arbitrator's finding that the City violated [Appellant's] rights under the Collective Bargaining Agreement in connection with its investigation of [Appellant] for discipline. (T26). As noted by the District Court, the "dispute lies in the arbitrator's finding that he would extend the one hundred day limitation period under the CBA for the City bringing any disciplinary action against [Appellant] in the future". (T26).

The Appellant submits that as a matter of law, the arbitrator exceeded his authority by finding that the one hundred (100) day time limit for bringing disciplinary action in the future should be tolled based upon his sustaining Appellant's original grievances. Appellant's position is that the Collective

Bargaining Agreement provides a clear and unambiguous remedy when a finding is made in favor of the Appellant, namely, that the charges are dismissed without prejudice. There is no authority to grant a one hundred (100) day extension. Without the granting of a one hundred (100) day extension there would have been no basis for the initiation of a subsequent claim, investigation, and disciplinary charge against Katherine Belcastro Gonzalez and the Court should have found that the arbitrator exceeded his authority. Under Nebraska law a basis for modifying or vacating an arbitrator's decision, under Neb. Rev. Stat. §25-2613(a) is a finding that the arbitrator exceeded their powers.

In denying the Appellant relief, the District Court relied upon the case of *Midwest Division – LSH, LLC vs. Nurses United*, 720 F.3d 648, 650 (8th Cir. 2013). This 8th Circuit case stated the general proposition that arbitrators have broad authority to fashion a remedy. However, the District Court ignored that portion of the decision which makes it clear that an arbitrator's authority derives from and is limited by the CBA. An arbitrator may not simply dispense his own brand of justice. Another significant difference in the 8th Circuit case is that the parties stipulated that the issue submitted to the arbitrator included "what shall be the remedy". In this case, the continuing request is for a dismissal of the charge, which is precisely what is contemplated by the CBA. The District Court is simply flatly wrong when it states "There is no language in the CBA before the Court which limits the remedy that was determined in this matter.". *See* Page 6 of the District Court's decision. (T30). In its submissions to the District Court and its arguments at trial the Appellant continually argued that the language of the CBA did in fact limit the remedy and it cited, with specificity, to the language. Namely, that provision of the CBA that unambiguously states that upon a finding that a grievance should be sustained the remedy is a dismissal "without prejudice". (44:19-50:17).

In addition, that the District Court is allowing, is a de facto advisory opinion by the arbitrator, notwithstanding the express limitation upon his authority within the CBA. The fact that Court condemn advisory opinions is all the more reason to conclude that the action taken by the arbitrator was beyond his authority. *See, e.g., U.S. Specialty Ins. Co. v. D S Avionics Unlimited LLC*, 301 Neb. 388, 400, 918 N.W.2d 589, 597 (2018) and *Cent. Neb. Pub. Power & Irrigation Dist. v. Jeffrey Lake Dev., Inc.,* 267

Neb. 997, 1004, 679 N.W.2d 235, 242 (2004)(indicating that advisory opinions or conditional orders are generally frowned upon by courts, especially where there are issues not ripe for determination and adjudication at that time).

There is also a general proposition suggested by the District Court that "the parties gave the arbitrator the ability to fashion a remedy". (T30). This is simply false as well. There is no pleading, whatsoever, where Katherine Belcastro Gonzalez asks for anything other than a dismissal of the charges against her due to the rules violation. At no juncture, did Katherine Belcastro Gonzalez ask the arbitrator to fashion a remedy. To the contrary, the argument was clear and succinct, namely, there has been a violation of the Collective Bargaining Agreements and therefore a violation of Katherine Belcastro Gonzalez' rights. The remedy for such a violation is a dismissal of the charges without prejudice. There are literally three (3) separate written notices spelling out the requested remedy of a "dismissal" without prejudice of the charges. (E5, E7, and E9). How much clearer could it be that Kathy Gonzalez was not asking the Arbitrator to fashion a remedy?!

The District Court further errs when she recognizes that the CBA actually does state "In the event that the procedures set forth are not followed, the charges against the officer will be dismissed without prejudice", but then makes a leap of logic when it asserts that the contract fails to say anything about how the one hundred (100) day requirement works when notice procedures are not complied with and that it is a plausible interpretation to require the one hundred (100) day to restart if the notice provisions are not complied with. (T30)

The Court is reading an ambiguity into the CBA that simply does not exist.

Indeed, why would it be necessary to spell out "how the 100-day requirement works when the notice procedures aren't complied with"? (Compare T30).

Why would that be the case? If that was the case, and if that was the intent of the parties to provide a remedy, the parties could have negotiated that and said so. Rather, they said that there is a dismissal without prejudice

when there is a violation of rights. The only logical conclusion is that this means that if it is acknowledged that the errors occurred and the one hundred (100) days has not lapsed then the charges can be re-brought, but, if the one hundred (100) days have passed, the charges cannot be brought. As explained to the District Court at trial, it is no different than the effect of a dismissal without prejudice under those Nebraska statutes that require service within one hundred eighty (180) days (or six (6) months) of the filing of a suit. (49:16-50:20 and 45:17-47:10).

This Court knows quite well that the remedy is automatic and applied without even the necessity of further order. If there is no service, the action stands dismissed without prejudice. There is no inherent authority to restart or toll the statute of limitations simply because there is "without prejudice language" in the statutes and the caselaw interpreting the statutes. What occurs is that one looks to the actual statutory limitation period (in this case, the analogous one hundred (100) days), and if the dismissal without prejudice is time barred then it bars a future action. If a party is still within the statute they can bring it. The same logical rule and interpretation applies in this case. If an acknowledgement of the rule violation occurs within the one hundred (100) days then the party can re-initiate the investigation within one hundred (100) days, but if they are outside the one hundred (100) days, just as would apply in the automatic dismissal under 25-217, if the claim is time barred it is time barred and it does not matter if the original dismissal was stated to be without prejudice. Granting a dismissal without prejudice does not mean that it is logical or "plausible" to restart the limitation period if notice provisions are not complied with.

Extending the District Court's logic to those cases where service is not effectuated within one hundred eighty (180) days, under the District Court's interpretation and its logic, those dismissals without prejudice would mean that the statute of limitations is tolled from the date the dismissed lawsuit was originally filed, because that is a plausible interpretation of what should occur if there is truly a dismissal without prejudice. But as this Court knows, that is not how the law interprets that situation. It is not for the Court dismissing the action to attempt to make future predictions or prognostications as to what may occur and to toll the statute of limitations under hypothetical scenarios that may arise.

Think about what the District Court is saying. The District Court is saying that by virtue of granting the toll the arbitrator was trying to "read some harmony into the holes between these provisions" and he "fashioned a remedy that allowed the City to correct its error and move forward with an investigation". That is akin to saying that the statutes that require an automatic dismissal, without prejudice, when a party fails to timely serve a complaint within one hundred eighty (180) days of filing, that in those situations where the complaint would otherwise be time barred the without prejudice language must mean that in those situations there needs to be a relation back or a tolling back to the date of the filing of the original lawsuit from the dismissal. Of course, that is not how Nebraska appellate courts interpret the law and there is no legitimate basis for the District Court's analysis. In fact, the District Court is not only inventing a remedy where it does not exist, but the District Court is ignoring the limitations that the parties themselves placed in the Collective Bargaining Agreement.

The District Court is presuming that there is a hole in the provisions of the Collective Bargaining Agreement when there is a violation of rules, but there is nothing to support that conclusion in the record. In fact, given the specific exceptions spelled out to the one hundred (100) day limitation, a party should not interpret it as a hole but, rather, as a mere automatic consequence of a violation of the rules.

This Court should also think about this from a pragmatic aspect. In this case everyone acknowledges that the notice was deficient and Katherine Belcastro Gonzalez' rights were violated. That finding by the arbitrator is not distributed by the District Court and was not challenged by the City. Thus, this Court must assume that the notice issued to Katherine Belcastro Gonzalez that resulted in the first disciplinary charges against her violated her rights under the Collective Bargaining Agreement. Literally, within days of the commencement of the investigation, a grievance was presented to Chief Todd Schmaderer. (E5). In fact, under the record, the grievances actually technically presented before the conclusion of the investigatory interview of Katherine Belcastro Gonzalez. If the party receiving the grievance had timely recognized and acknowledged the error and the violations of the rights there was ample time for the City to correct its violation of the Collective Bargaining Agreement. It could have refiled. There would have been a dismissal of the original charges and charges could have been refiled on February 25, 26, 27, etc., up until passage of

the one hundred (100) days. But, by simply rejecting and ignoring the grievance and forcing Katherine Belcastro Gonzalez to go the additional step to have an arbitrator find that her grievance should have been sustained, the City is rewarded for its breach and its intentional failure to correct the breach when that breach was called to its attention. How is it logical to interpret in that situation that the parties intended to allow the arbitrator to fashion a remedy?

To the contrary, Katherine Belcastro Gonzalez submits that it is logical to conclude that because there was no exception to the one hundred (100) day requirement in such situations that the City was left with whatever time was presented when the arbitrator finally issued his decision. If the City failed to correct its error upon presentation of the initial grievance, that is not the fault of the officer, that is the fault of the City. The City should not be rewarded from compounding its errors in its notice by an improper denial of a grievance when the notice deficiency is brought to its attention. It is not logical to assume that the Union contemplated or would have agreed in such a situation that the arbitrator could fashion a remedy. Indeed, to the contrary, the only logical conclusion is that if the parties had intended to allow the arbitrator to fashion a remedy in those situations where the notice was deficient and violated someone's rights under the Collective Bargaining Agreement, they would have said so. They would have included a line that said upon a finding of a violation the arbitrator is allowed to fashion a remedy. The parties did not.

As a consequence, under the plain and unambiguous language of the contract, there was indisputably evidence that the arbitrator exceeded the authority delegated to him under the Collective Bargaining Agreement. The arbitrator's award has been and remains deficient. It exceeded his authority.

The CBA states that "Authority of the arbitrator is defined and **limited** by Article 7 and Article 8 of this Agreement." The City's argument (and the District Court's ruling) also ignores a basic rule of construction of a contract – which the CBA is – namely that: it "must be construed as a whole" and "effect must be given to every part of the contract." *See, e.g.,* Acklie v. Greater Omaha Packing Co., 306 Neb. 108, 117, 944 N.W.2d 297, 305 (2020).

Kathy Gonzalez acknowledges that appellate courts are hesitant to reverse arbitration awards. It is also recognized, however, that:

"Although arbitration decisions are given great deference, they are not sacrosanct." *State v. Henderson,* 277 Neb. 240, 265, 762 N.W.2d 1, 18 (2009)

Appellant is simply arguing in this case that the Arbitrator had no basis to do what he did. Once he made the factual finding that the City violated Kathy Gonzalez's rights his responsibility was to dismiss the charges without prejudice. He was not granted any authority to modify the collective bargaining agreement between the City and the Union – which, is effectively what he did, by purporting to declare that the 100 day time limit would not run on new charges.

In the case of *City of Omaha v. Professional Firefighters Association of Omaha*, the Supreme Court commences its analysis with the following observation:
Although judicial review of arbitration decisions is limited, it is not nonexistent.
City of Omaha v. Prof'l Firefighters Ass'n, Local 385, 309 Neb. 918, 928, 963 N.W.2d 1, 11 (2021)

In the *Professional Firefighters* case the City was trying to contest an arbitrators decisions. Although the Court recognized it was a heavy burden, it also approvingly cited to U.S. Supreme Court decisions are acknowledged:

when the arbitrator issues an award that simply reflects the arbitrator's personal "notions of . . . justice" rather than "draw[ing] its essence from the contract" that a court may find that the arbitrator exceeded his or her powers. Id. (internal quotation marks omitted). Accordingly, the Court explained that the sole question presented when a party claims that an arbitrator exceeded his or her powers is whether the "arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." Id.

City of Omaha v. Prof'l Firefighters Ass'n, Local 385, 309 Neb. 918, 932, 963 N.W.2d 1, 13 (2021)

This is precisely what is occurring in the present case. The CBA does not give the arbitrator the power to issue an equitable decision. The CBA does not give the arbitrator the power to vacate or nullify certain provisions of the CBA. The CBA does not give the arbitrator the power to suspend applicable statutes of limitations. To the contrary, the CBA specifically states that the arbitrator's power is "limited by" the CBA and the CBA states, unambiguously, that the arbitrator is to dismiss a charge without prejudice if it finds a violation of the employee's rights.

Against this backdrop, it is evident that the arbitrator did exceed his authority. Rather than follow the contract, the arbitrator departed from the contract and did what he thought was "fairest" to everyone. The word "fair" or any variation thereof appears nowhere in the provisions governing the authority of the arbitrator. As a consequence, by virtue of what the arbitrator did in the Gonzalez case he dispensed relief based upon his "personal notions of . . . justice" (which is wrong under the case law) and the arbitrator did not "even arguably" interpret the contract. This Court will note that there is no citation to any provision of the contract in connection with the arbitrator's verbiage about tolling the 100 day time limit, he simply basis it upon his concept of "fairness". That is neither interpreting nor applying the contract. The decision simply ignores the contract. That is what renders the decision erroneous and subject to attack in this case.

In the case of *Midwest Division v. Nurses United,* the 8th Circuit acknowledged the United States Supreme Court's recognition of limits upon arbitrators:

"His task is limited to construing the meaning of the collective-bargaining agreement so as to effectuate the collective intent of the parties." *Barrentine v. Ark.-Best Freight Sys., Inc.,* 450 U.S. 728, 744, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981), citing *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 53, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974).

Midwest Div. - LSH, LLC v. Nurses United for Improved Patient Care, 720 F.3d 648, 650 (8th Cir. 2013)

As Gonzalez argued to the District Court, the error of this arbitrator is that he did not bother to construe the meaning of the collective bargaining agreement. Rather, upon finding that Gonzalez's rights were violated, instead of simply dismissing the charges as forth in the CBA, he went down a path of deciding what he personally thought was "fair" without any reference to any authority in the CBA for his modification of the terms of the CBA.

As noted by the 8th Circuit in the *Midwest Division* case, the Supreme Court made clear that an arbitrator cannot depart form the CBA to fashion a remedy he thinks is appropriate:

An arbitrator's power is both derived from, and limited by, the collective-bargaining agreement. *Gardner-Denver*, 415 U.S., at 53. He "has no general authority to invoke public laws that conflict with the bargain between the parties." *Ibid*. **His task is limited to construing the meaning of the collective-bargaining agreement so as to effectuate the collective intent of the parties.** Accordingly,

"[if] an arbitral decision is based 'solely upon the arbitrator's view of the requirements of enacted legislation,' rather than on an interpretation of the collective-bargaining agreement, the arbitrator has 'exceeded the scope of the submission,' and the award will not be enforced." *Ibid*., quoting *Steelworkers* v. *Enterprise Wheel & Car Corp*., 363 U.S., at 597.

Barrentine v. Ark.-Best Freight Sys., 450 U.S. 728, 744, 101 S. Ct. 1437, 1446-47 (1981)

Arbitrators do not have broad authority to fashion remedies outside of the CBA. The Supreme Court stated in *Barrentine*:
"arbitrators very often are powerless to grant the aggrieved employees as broad a range of relief. Under the FLSA, courts can award actual and liquidated damages, reasonable attorney's fees, and costs. 29 U. S. C. § 216 (b). **An arbitrator, by contrast, can award only that compensation**

authorized by the wage provision of the collective-bargaining agreement. **He "is confined to interpretation and application of the collective bargaining agreement**" and his "award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Steelworkers v. Enterprise Wheel & Car Corp.,* supra, at 597. It is most unlikely that he will be authorized to award liquidated damages, costs, or attorney's fees.

Barrentine v. Ark.-Best Freight Sys., 450 U.S. 728, 745, 101 S. Ct. 1437, 1447 (1981)

Applying that principle to this case, leads to the conclusion that the arbitrator exceeded his authority, as the tolling of the 100 day limitation period did not draw its essence from the collective bargaining agreement and was nowhere authorized by the terms of the collective bargaining agreement.

The case before the Arbitrator was simple. The question is whether the City violated Kathy Gonzalez's rights relative to notice of charges against her. The arbitrator concluded those rights had been violated. The CBA provided only one remedy: a dismissal without prejudice of the charges against Kathy Gonzalez.

In *Excel Corp. v. United Food,* the 8th Circuit recognized the following principal which is directly implicated in Kathy Gonzalez's case:

Although an arbitrator's award is given great deference by a reviewing court, the arbitrator is not free to ignore or abandon the plain language of the CBA, which would in effect amend or alter the agreement without authority. *See, e.g., Inter-City Gas Corp. v. Boise Cascade Corp*., 845 F.2d 184, 187-88 (8th Cir. 1988).

Excel Corp. v. United Food & Commer. Workers Int'l Union, Local 431, 102 F.3d 1464, 1468 (8th Cir. 1996)

In the present case, the arbitrator violated the foundation principle recognized in *Excel Corp.* The arbitrator ignored the plain language of the CBA and he "in effect" amended or altered the CBA, without authority, by suspending the 100 day limit for bringing charges in the future.

II. THIS COURT HAS AUTHORITY TO MODIFY THE ARBITRATOR'S AWARD.

Summary of Argument: An arbitration decision may be modified when an arbitrator has exceeded his authority and/or when the arbitrator ruled upon a matter not submitted to them, both of which occurred in this case.

This Court has the authority to modify the arbitration decision when the Arbitrator has exceeded his lawful authority. *See* Neb. Rev. Stat. §25-2613. This Court also has the authority to modify and correct an award, without affecting the merits of a decision, when the Arbitrator ruled upon a matter not submitted to them or where it is imperfect in form. *See* Neb. Rev. Stat. §25-2614.

The contract (i.e. the CBA) limits the remedy to a dismissal without prejudice. By virtue of inserting superfluous language about a tolling of the one hundred (100) day limitation period, the arbitrator is rewriting the Collective Bargaining Agreement to effectuate what he "believes is fair". The arbitrator is not empowered to do that. In fact, when the arbitrator attempts to go beyond that, that is precisely when the arbitrator is not interpreting the contract at all. The contract language is plain and unambiguous as to what the remedy is if there is a violation. The plain and unambiguous language of the contract is that the arbitrator is to dismiss the charges without prejudice. Taking any other action is ignoring and rewriting the Collective Bargaining Agreement. Taking any other action reflects that the arbitrator is not interpreting the contract but, rather, attempting to impose his own form of justice. Even if there is a heavy burden imposed upon Gonzalez in demonstrating the arbitrator exceeded his authority, Gonzalez has met that heavy burden in this case. Gonzalez has met that burden precisely because the contract is so crystal clear as to what the remedy is if there is a violation and that is the very same remedy Gonzalez requested at each and every step of the way during the grievance and the arbitration appeal process; namely, a dismissal of charges without prejudice, nothing more and nothing less. That was all the arbitrator had

the right to do. By going beyond that authority the arbitrator committed clear error.

CONCLUSION

The District Court ignored the principal and primary underlying argument of the Appellant. Namely, the arbitrator exceeded its contractual authority. When the arbitrator was presented with the request to dismiss the charges because of a violation of the CBA he had quite literally two (2) choices: (1) affirm the decision on the Grievance and find no violation or (2) dismiss the charges against Kathy Gonzalez without prejudice. There is nothing negotiated between the parties which contemplates that the arbitrator was granted any further authority. In her filings during the Grievance and Arbitration process, Gonzalez continually referenced in her filings that the remedy was a dismissal.

The District Court attempts to sidestep this fact with references to cases which talk about arbitrators having broad authority. However, a review of those cases cited by the District Court reflects that in none of those cases is there the similar specific language limiting the authority of the arbitrator, such as exists in this case. When the parties negotiate a provision for review and they spell out the sole remedy available, that does not inherently grant an arbitrator authority to undertake action to grant other and additional relief. In effect, the arbitrator would be rewriting the CBA contract, which must be subject of negotiation and consideration.

Also, consider for the moment the ramifications on the contract and other members protected under this contract. There is specific negotiated provisions regarding the timeliness of charges and how far the agency in question can look back for discipline; significantly, one hundred (100) days. That was clearly an item of significance since the parties chose to specifically identify an exact time period. The parties make no provision for equitable extensions or other justifications to extend, except in limited spelled out circumstances that are clearly defined in the arbitration agreement. By virtue of allowing the arbitrator to impose this de facto equitable toll, the District Court has rewritten the Collective Bargaining Agreement and created a new exception.

Consider for a moment the facts of this case. The deficiency was noted to the Chief of Police, within days of the violation of Kathy Gonzalez's rights. The Chief would have had an opportunity within those first ten (10) days of the charges to rectify the error, which the arbitrator concluded clearly existed at that time. Of course, this would have allowed time for an appropriately specified charges to be refiled in a timely manner. The City (and the Chief) chose to ignore that option. The City disregarded the Collective Bargaining Agreement and its obligations. The City thumbed its nose at the contentions made by Kathy Gonzalez (as to a violation of her rights) which ultimately bore to be true and, yet, under the arbitrator's decision the arbitrator is effectively allowing the City to benefit from its own breach of contract and breach of duty. That is preposterous. There is nothing within the framework of allowing an arbitrator to formulate relief that allows a party that has breached its obligations to benefit from its own breach and circumvent the very contract that is negotiated to protect a law enforcement officer such as Kathy Gonzalez.

The District Court basically ignored Kathy Gonzalez' arguments and rested its decision on the concept of an arbitrator's general authority. However, in this case, that general authority was limited by contract. The Appellant recognizes that there is deference granted in arbitration proceedings and there are limited circumstances in which an appellate court will review the arbitrator's decision. One of those clearly defined situations, where the Court does review the arbitrator's decision and, in fact, has an obligation to review and correct the arbitrator's decision, is where the arbitrator has exceeded his or her authority. In this case, there is nothing in the Collective Bargaining Agreement that allows the arbitrator to rewrite the terms of the Collective Bargaining Agreement and give a de facto equitable extension of deadlines.

There is an unambiguous negotiated restriction on the arbitrator's authority, which is: if there is a violation then the remedy is to dismiss the charges without prejudice. For all this Court knows that could have been the specific intent of the Union negotiators in negotiating for the limitation on the arbitrator's authority; to only dismiss. For all this Court knows that was a trap set up for the City by the Union's negotiators knowing that the City would undoubtedly, as it did in this case, ignore the officer's complaints for greater specificity, force the officer to pursue arbitration and from the Association's perspective, if they won in arbitration and the charging

documents were deemed insufficient and inadequate, the Association very well could project and know that by that time the one hundred (100) day limitation on discipline, which is effectively a statute of limitations, would have expired and the City would be out of luck in pursing discipline. It is entirely logical to assume that the negotiators for the Police Officer's Association knew of that possibility and specifically negotiated and engineered this scenario under the terms of the Collective Bargaining Agreement. The arbitrator and the Court were certainly not authorized to allow a de facto amendment to the Collective Bargaining Agreement to circumvent that result dictated by the plain and unambiguous language of the contract.

The problem with the District Court's Order is that the District Court is too focused on those cases where the Courts have said deference is granted to arbitrators to make decisions on arbitration matters. That general deference is not denied by this Appellant, but there are limits on that. This is precisely why courts have said one legitimate basis to challenge an arbitrator's decision is if they exceed the authority granted to them under the underlying contract. In this case, it is clear that the arbitrator exceeded his authority under the contract (i.e. the CBA). There is not a single word or sentence anywhere in the Collective Bargaining Agreement that suggests that the arbitrator is allowed to fashion some sort of equitable remedy to avoid the de facto statute of limitations created by the contract. This is not a case where this Court should regurgitate the line of cases talking about broad deference to arbitrations. This is one of those cases where this Court is duty bound to observe that there are limitations on arbitrator's authority and that parties can negotiate provisions and limitations on arbitrator's authority. This Court should also observe and recognize that neither it nor the District Court is authorized to rewrite a party's contract, even if it feels that an inequitable result would arise from a literal reading of the contract.

This Court is duty bound to uphold the contract as written and as written the remedy was to dismiss the charges against Kathy Gonzalez without prejudice, the parties were then left to go back to the status quo, and when that status quo arose Kathy Gonzalez could assert the one hundred (100) day contractual limitation period as a defense and obtain a dismissal if any further charge/complaint was brought. By virtue of his actions, the arbitrator improperly exposed Kathy Gonzalez to a further charge, further expenses

in defending unnecessary subsequent complaint motivated by ill will and malice of the Chief of Police.

For the foregoing reasons, this Court should vacate the District Court's ruling and remand with directions to amend the arbitrator's decision and remove the verbiage purporting to toll the 100 day time limitation established by the CBA.

KATHERINE BELCASTRO-GONZALEZ,
APPELLANT,

By: */s/ Theodore R. Boecker, Jr.*
_____

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Certificate of Service

The undersigned hereby certifies that a true and correct copy of the foregoing instrument was served via electronic filing on this the 30th day of October 20204, to the following:

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/s/ *Theodore R. Boecker, Jr.*
_____

Certificate of Compliance

This document complies was prepared using Microsoft Word 2016. The Brief complies with the typeface requirements of Rule Section 2-103 and the limitation on words, because it contains 8869 words.

/s/ *Theodore R. Boecker, Jr.*
_____

Certificate of Service

I hereby certify that on Wednesday, October 30, 2024 I provided a true and correct copy of this *Brief of Appellant Belcastro-Gonzalez* to the following:

City of Omaha represented by Bernard J in den Bosch (20329) service method: Electronic Service to **bernard.bosch@cityofomaha.org**

Signature: /s/ Theodore Boecker (20346)