CASE NO. A 24-487

IN THE NEBRASKA COURT OF APPEALS

KATHERINE BELCASTRO-GONZALEZ,
Appellant,

v.

CITY OF OMAHA a Municipal Corporation,
Appellees.

APPEAL FROM THE DISTRICT COURT OF DOUGLAS COUNTY

Hon. Kimberly Miller Pankonin, District Court Judge

# BRIEF OF APPELLEE CITY OF OMAHA

Prepared and Submitted by:
BERNARD J. in den BOSCH, No. 20329
Deputy City Attorney
City of Omaha Law Department
Omaha/Douglas Civic Center
1819 Farnam Street, Suite 804
Omaha, Nebraska 68183
(402) 444-5115
Bernard.Bosch@cityofomaha.org
*Attorney for Appellee City of Omaha*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases Cited:**



**Statutes Cited:**

## I. JURISDICTIONAL STATEMENT

The District Court entered an Order denying Appellant's Petition to Modify or Correct Arbitration Award Entered in Favor of Petitioner or Alternatively to Partially Vacate a Portion of Award Exceeding Arbitrator's Powers and granting Appellee's Motion for Confirmation of Arbitration Award on May 31, 2024. (T25-32). The Appellant filed a Notice of Appeal on June 28, 2024. (T33-35). Jurisdiction is granted to the Court of Appeals for appeals properly perfected pursuant to NEB. REV. STAT. § 25-1911, *et seq*.

## II. STATEMENT OF THE CASE

### A. Nature of the Case

The Appellant filed a Petition to Modify or Correct Arbitration Award Entered in Favor of Petitioner or Alternatively to Partially Vacate a Portion of Award Exceeding Arbitrator's Powers in the District Court of Douglas County. (T1-8). In responding to the Petition, Appellee sought Confirmation of the Arbitration Award. (T9-24).

### B. Issue Presented to the Court Below

The District Court considered whether to modify or vacate a portion of an arbitration award, or alternatively, whether to confirm the arbitration award.

### C. How the Issues were Decided and what Judgement was Entered

After a hearing which was held on January 29, 2024, the District Court denied the Appellant's Petition to modify or vacate the

award and instead entered an order confirming the award. (T25-32).

**D. Scope of Review**

"In reviewing a decision to vacate, modify, or confirm an arbitration award, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous. *Garlock v. 3DS Properties*, 303 Neb. 521, 930 N.W.2d 503 (2019)." *City of Omaha v. Professional Firefighters Association of Omaha, Local 385*, 309 Neb. 918, 927, 963 N.W.2d 1 (2021).

## III. PROPOSITIONS OF LAW

1. "In reviewing a decision to vacate, modify, or confirm an arbitration award, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous." *City of Omaha v. Professional Firefighters Association of Omaha, Local 385*, 309 Neb. 918, 927, 963 N.W.2d 1 (2021).

2. Judicial review of arbitration decisions is severely limited by the terms of the Nebraska Uniform Arbitration Act. NEB. REV. STAT. §25-2613.

3. "When parties agree to have an arbitrator resolve a dispute, the law provides little room for a court to undo the arbitrator's decision." *City of Omaha v. Professional Firefighters Association of Omaha, Local 385*, 309 Neb. 918, 927-8, 963 N.W.2d 1 (2021).

4. Arbitration decisions are entitled to strong deference and a

Court should not overrule an arbitrator's decision because they believe that their interpretation of the labor agreement or the facts would be a better one. *City of Omaha v. Professional Firefighters Association of Omaha, Local 385*, 309 Neb. 918, 928, 963 N.W.2d 1 (2021).

5. When a collective bargaining agreement provides for arbitration to remedy a dispute and the parties provide the arbitrator discretion to fashion a remedy, that remedy shall not be disturbed unless the remedy was expressly prohibited by the collective bargaining agreement. *Midwest Division – LSH, LLC v. Nurses United for Improved Patient Care*, 720 F.3d 648, 650-1 (2013) and *Amalgamated Transit Union Local No. 1498 v. Jefferson Partners*, 229 F.3d 1198, 1200–01 (8th Cir.2000).

6. A Court shall defer to the remedy in an arbitration award if it draws its essence from the collective bargaining agreement and is not merely an arbitrator dispensing their own view of industrial justice. *Amalgamated Transit Union Local No. 1498 v. Jefferson Partners*, 229 F.3d 1198, 1201 (8th Cir.2000).

7. The ability of an appellate court to vacate an arbitration award is limited because of the strong policy favoring the resolution of grievances through binding arbitration. *United Steel Workers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) and *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

8. In determining whether to vacate an arbitration award on the grounds that the arbitrator exceeded his authority, the party attempting to vacate the award bears a heavy burden and should only succeed if they can establish that the arbitrator issued an award that reflects on their personal notions of justice rather than drawing its

essence from a collective bargaining agreement. *City of Omaha v. Professional Firefighters Association of Omaha, Local 385*, 309 Neb. 918, 931-32, 963 N.W.2d 1 (2021) and *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569, 133 S.Ct. 2064(2013).

## IV. STATEMENT OF THE FACTS

Though the Appellant's Statement of the Facts contains some of the relevant facts, it appears to be more of an argument and includes a number of "facts" that are not relevant to the matter before the Court, as a result, Appellee is submitting its own Statement of the Facts.

Katherine Belcastro-Gonzalez, (hereinafter "Appellant"), was employed by the City of Omaha as a Captain in the Omaha Police Department. (3:9-20). This matter originates from a disciplinary investigation that was initiated against Appellant relative to her employment with the City of Omaha Police Department. (E1, p. 4, E2., p. 3). As part of that investigation, Appellant was interviewed twice. (E1, p.4, E2, p. 3). Appellant brought a Grievance which challenged whether the notice provided to Appellant was sufficiently descriptive and whether the notice was deficient in failing to disclose one of the parties who was present during her interview. (E1, p. 4-5, E2, p 3-4).

After a hearing, the arbitrator determined that the City violated the Collective Bargaining Agreement in both the notice provided for the interview and the notification of who was to be present. (E1, p. 13, E2, p. 12). The City is not challenging the arbitrator's finding and accepts the results of the arbitration as contemplated by the Collective Bargaining Agreement to which the parties are subject. Appellant objects to the arbitrator's remedy.

The evidence established that Appellant had a lawsuit against the City. (E10, p 2). During the Deposition of Appellant's husband, Deputy Police Chief Greg Gonzalez, the City became aware that he had sent certain e-mails to her that contained information that she would not have been privy due to her rank and assignment. (E5, p. 2). This testimony resulted in a search of Deputy Chief Gonzalez's e-mails. The information discovered during the search of Deputy Chief

Gonzalez's e-mails led to a search of Appellant's e-mails. Ultimately, the search into Appellant's e-mails led to a review of over 1,200 of her e-mails of which 800 appeared to contain confidential information. (E3, p. 44:6-13).

The Police Chief was made aware that Appellant was sharing confidential information. As a result, the Chief initiated an internal investigation. (E3, p. 61:7-61:19). Simultaneous to the initiation of the investigation into Appellant's e-mails, Appellant was placed on administrative leave on January 18, 2022. (E7, p. 4).

On February 25, 2022, Appellant's attorney filed a Grievance on her behalf alleging a number of violations of the Collective Bargaining Agreement (CBA) to which she was subject. (E5, p. 1). The Grievance alleged contractual violations related to two disciplinary interviews. There were several statements in the Grievance which are not subject to the Grievance process and were not part of the case presented to the arbitrator. (E3, p. 12:6-19). Exhibits 5, 6, 7, and 8 illustrate that the various steps of the City's Grievance process had been followed. (E5, E6, E7, E9). The Arbitration process is detailed in the CBA. Ultimately, the Appellant's employment with the City was terminated and that the termination was under appeal and would be heard at some point in the future by a different arbitrator. (E3, 44:23-45:9).

Both Appellant and the City provided the arbitrator with a proposed statement of issues and the parties held a pre-hearing conference which led to the identification of two issues. (E1, p. 3, E2, p. 3, E3, p. 12:6-2). The grievance procedure for individuals subject to the CBA between the City of Omaha and the Omaha Police Officers Association is described in Article 8. (E4, p. 23). Article 8, Section 1 defines a grievance as,

> "Grievance" as defined in this Agreement is a claim of an employee arising during the term of this Agreement which is limited to matters of interpretation or application of the express provisions of this Agreement and excluding discharge and disciplinary action as provided in Article 6 hereof which action shall be processed in accordance with appeal procedure as set forth in Article 7 of this Agreement. The Association shall have the right to file a grievance in accordance with Article 8.
> (E4, p. 23).

Based on this language, the only issue that was for consideration by the arbitrator was whether or not the provisions of this Agreement were violated. Article 8, Section 2 of the CBA details the procedure for submission of a grievance. (E4, p. 23). Article 8, Section 2, Step 3 details the process by which an arbitrator is selected. Article 8, Section 2 further provides,

> There shall be no appeal from the arbitrator's decision. It shall be final and binding on the Association, if the Association is a party to the arbitration, the City, and on all bargaining unit employees who take part in or are represented in arbitration in the arbitration proceeding. Where an employee elects to process a grievance without Association representation or assistance, the Association shall have the right after the arbitrator has been selected to intervene and become a party to the proceeding.
> (Exhibit 4, p. 24).

This language confirms that the parties agreed during negotiations of the CBA that arbitration decisions would be binding on all parties. Article 8, Section 2 further provides,

> Authority of the arbitrator is defined and limited by Article 7 and Article 8 of the Agreement. In the event the arbitrator finds that he has no authority or power to rule in the case, the matter shall be referred back to the parties without decision or recommendation on the merits of the case.
> (E4, p. 24).

This language clarifies that an arbitration may be held in two (2) instances: (1) based on Article 7 to appeal disciplinary matters; and, (2) based on Article 8 to appeal grievances which are "Limited to matters of interpretation or application of express provisions of this Agreement." Article 8 does not address potential remedies or in any way limit potential remedies that an arbitrator may consider.

## V. SUMMARY OF ARGUMENT

The Order of the District Court which denied Plaintiff's Petition to Modify or Correct Arbitration Award Entered in Favor of Petitioner or Alternatively to Partially Vacate a Portion of Award Exceeding Arbitrator's Powers and granting Defendant's Motion for Confirmation of Arbitration Award should be affirmed in its entirety. (T25-33).

In the arbitration proceeding which is the subject of this action, the parties stipulated to the two issues to be decided by the arbitrator and provided the arbitrator the authority to fashion a remedy. The remedy determined by the arbitrator was within his authority and consistent with the collective bargaining agreement which authorized arbitration and was fair to all parties to the litigation.

The arbitrator did not exceed the authority granted to him under the Nebraska Arbitration Act and instead, acted within that

authority. The arbitration process is entitled to great deference and should not be disturbed unless an arbitrator clearly acted in excess of his authority.

## VI. ARGUMENT

### A. Arbitrator's decisions must be confirmed absent certain very limited circumstances.

The Nebraska Supreme Court has repeatedly emphasized that Courts should not intervene in disputes involving arbitration matters or the purpose of arbitration would be undermined,

> The City and the union agreed, however, that a dispute like this would be decided by an arbitrator. When parties agree to have an arbitrator resolve a dispute, the law provides little room for a court to undo the arbitrator's decision.
>
> If courts reviewed the decisions of arbitrators as if they were decisions of lower courts, the parties' agreement to arbitrate would be upset and the purpose of arbitration would be frustrated. The parties' agreement would be upset because parties to an arbitration agreement have agreed to accept the arbitrator's view of the facts and the meaning of the contract rather than that of a court. See *State v. Henderson*, 277 Neb. 240, 762 N.W.2d 1 (2009), disapproved on other grounds, *Seldin v. Estate of Silverman*, 305 Neb. 185, 939 N.W.2d 768 (2020). As we have previously explained, "[w]hen ... parties [agree] to arbitration, they [agree] to accept whatever reasonable uncertainties might arise from the process." *Jones v. Summit Ltd. Partnership Five*, 262 Neb. 793, 798, 635

N.W.2d 267, 271 (2001) (internal quotation marks omitted).
*City of Omaha v. Professional Firefighters Association of Omaha*, 309 Neb. at 927-8.

Based on these concerns, the Court stated,

For these reasons, we have emphasized the strong deference is due an arbitrative tribunal. *Henderson, supra.* More specifically, courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. A court may not overrule an arbitrator's decision simply because the court believes that its own interpretation of the contract, or the facts, would be a better one.
*City of Omaha v. Professional Firefighters Association of Omaha*, 309 Neb. at 928.

**B. The District Court did not error in determining that the Arbitrator acted within the discretion authorized in the Collective Bargaining Agreement and as agreed to be the parties.**

The arbitrator and the parties established the following issues which were to be decided as a result of Appellant's February 25, 2022 Grievance:

1. Did the City of Omaha violate Article 6, Section 8 of the Collective Bargaining Agreement between the City of Omaha and the Omaha Police Officers' Association in its February 15, 2022 notice to Captain Katherine Belcastro-Gonzalez to appear for an interview in the Professional Oversight Bureau of the Internal Affairs Unit? If so, what

is the remedy?

2. Did the City of Omaha violate Article 18a, Item #F of the Collective Bargaining Agreement between the City of Omaha and the Omaha Police Officers' Association during its interviews of Captain Katherine Belcastro-Gonzalez on February 17, 2022 and February 23, 2022? If so, what is the remedy?

(E1, p.3, E2, p.2, E3, p. 12:6-20).

This matter is not about whether the disciplinary timeline was violated, but the issue is relevant to the City's ability to issue discipline for these alleged violations in the future. Though Appellant referred to Article 6, Section 7 in her grievance, it was not part of the issues before the arbitrator. Ultimately, the arbitrator did determine that Article 6, Section 8 of the Collective Bargaining Agreement was violated by the notice and that Article 18(a), Section F were violated by the failure to notify the parties of David Grauman's presence during the disciplinary interview. (E1, p. 13, E2, p. 12). Article 6, Section 8 provides a remedy for violation of that Section – dismissal without prejudice. Article 18(a), Section F, the Contract does establish a remedy in Article 18(a), Section J which provides, "In the event that the court procedures set forth in this Section and Article, (excluding subsection I), are not followed the charges against the employee be dismissed without prejudice". There is nothing in the two contractual sections identified by the parties as issues in this case which require dismissal of any pending disciplinary action as a remedy. The CBA requires that the City must start over and in this case, the disciplinary interview was the first substantive part of each investigation.

Rather, the parties through the agreed upon issues for the arbitrator's determination provided the arbitrator the authority to issue a remedy. (E1, p. 3, E2, p. 2, E3, p. 12:6-20). Although there is no case law in the State of Nebraska as to what authority an arbitrator

might have to issue a remedy; there is certainly law within the Eighth Circuit as it applies to the ability of an arbitrator to fashion a remedy.

In *Midwest Division – LSH, LLC v. Nurses United for Improved Patient Care*, 720 F.3d 648 (2013), the Eighth Circuit recognized that the United States Supreme Court has provided some background on what remedies may be fashioned,

> An arbitrator's authority derives from and is limited by the CBA. "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). Beyond question, an arbitrator may award reinstatement and back-pay that includes a period after the governing CBA expired, so long as the arbitrator in fashioning this remedy was interpreting and applying the CBA, and not simply "dispens[ing] his own brand of industrial justice." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); see *Van Waters & Rogers, Inc. v. Int'l Bhd. of Teamsters*, 56 F.3d 1132, 1136–37 (9th Cir.1995).
> *Midwest Division – LSH*, 720 at 650.

As the Eighth Circuit considered its decision in this matter, they noted that the CBA authorized arbitration. However, the matter before the Court was a challenge to the remedy fashioned by the arbitrator. The Court determined as follows,

> The CBA expressly granted authority to make that decision. Moreover, the parties submitted the dispute for

> final determination by the arbitrator after the Union was decertified, stipulating that the issues to be resolved were whether the Hospital had just cause to terminate, and if not, what the appropriate remedy would be. "[W]e will not give credence to [the Hospital's] argument that the arbitrator had no authority to decide an issue it agreed to submit." *Homestake Mining Co. v. United Steelworkers*, 153 F.3d 678, 680 (8th Cir.1998) (quotations omitted). And when the parties stipulated that the issues submitted to an arbitrator included, "what shall the remedy be," the Hospital can hardly argue that the arbitrator "acted outside his authority" in fashioning a remedy, unless that remedy was expressly prohibited by the CBA. *Amalgamated Transit Union Local No. 1498 v. Jefferson Partners*, 229 F.3d 1198, 1200–01 (8th Cir.2000). *Midwest Division – LSH*, 720 at 650-651

As the Court noted, an arbitrator may not ignore evidence that a particular remedy was explicitly rejected by a CBA; however, that is not the case here. In this instance, much like the *Midwest Division* case, the parties provided the arbitrator the ability to fashion a remedy as he believed appropriate. The issues identified for the arbitrator's consideration made that explicit. Thus it becomes the Appellant's burden to establish that a certain remedy was explicitly prohibited by the CBA and Appellant cannot do so. The remedies discussed in the CBA concern a dismissal with prejudice, BUT do not address disciplinary timelines.

In *Amalgamated Transit Union Local No. 1498 v. Jefferson Partners*, 229 F.3d 1198, 1200–01 (8th Cir.2000), the Eighth Circuit also addressed this issue. In *Amalgamated Transit Union*, the arbitrator determined that the appropriate remedy was to award a wage increase for employees in the highest tier even though that was

not specifically authorized by the Collective Bargaining Agreement. When the Union sought to enforce the arbitrator's award, the Defendant asserted that the arbitrator amended the Labor Agreement and thus exceeded his authority under the Collective Bargaining Agreement. As the Court noted,

> A federal court reviews an arbitration award only to see whether the " 'award draws its essence from the collective bargaining agreement,' and is not merely [the arbitrator's] own brand of industrial justice," *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29, 36, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987) (quoting *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)). The arbitrator, however, "is not free to ignore or abandon the plain language of the CBA, which would in effect amend or alter the agreement without authority." *Excel Corp. v.* **1201 United Food & Commercial Workers Int'l Union, Local 431*, 102 F.3d 1464, 1468 (8th Cir.1996). "In determining whether an arbitrator has exceeded his authority, the agreement must be broadly construed with all doubts being resolved in favor of the arbitrator's authority." *Lackawanna Leather Co. v. United Food & Commercial Workers International Union, Dist.* 271, 706 F.2d 228, 230–31 (8th Cir.1983) (en banc).
> *Amalgamated Transit Union,* 229 F.3d at 1200

The Court then held,

> Even if this is true, the fact remains that it was the arbitrator's job to fashion a remedy. The courts must defer to his choice, within very broad limits. It is true that the remedy—raising the top tier a proportionate amount in order to preserve the spacing among the tiers

> contemplated by the labor agreement—is not expressly provided for in the agreement. But contracts often lack explicit provisions for specific kinds of remedies. The company's breach (which it does not now dispute) had already disturbed the contractual wage scale. The arbitrator's choice of remedy is one way to restore the balance. Nothing in the contract prohibits this choice. *Amalgamated Transit Union,* 229 F.3d at 1201

and ultimately stated as follows,

> Next, Jefferson argues that the arbitrator's award did not draw its essence from the agreement but instead arose from the arbitrator's own sense of fairness. Jefferson points to the arbitrator's use of the word "fair" in his description of the award. Although "the arbitrator's decision must draw its essence from the agreement, he 'is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies.' " *Misco, Inc.*, 484 U.S. at 41, 108 S.Ct. 364 (quoting *Enterprise Wheel & Car Corp.*, 363 U.S. at 597, 80 S.Ct. 1358). We agree with the District Court that the arbitrator's use of the word "fair" reflected his concern to fashion a remedy consistent with the Act and with the parties' past practices and expectations. See *United Elec., Radio & Machine Workers, Local 1139 v. Litton Microwave Cooking Products*, 704 F.2d 393, 402 (8th Cir.1983) (dissenting opinion) ("absent express limitations, and as long as the remedy is not clearly unfair, courts should enforce the arbitrator's award"), cited with approval in *United Elec., Radio & Machine Workers, Local 1139 v. Litton Microwave Cooking Products*, 728 F.2d 970, 972 (8th Cir.1984) (en

banc). Likewise, it is desirable that an arbitrator be mindful of the mandates and protections of the NLRA when designing an award. *Amalgamated Transit Union,* 229 F.3d at 1201.

The United States Supreme Court and the Eighth Circuit Court of Appeals have both recognized that an arbitrator has substantial authority to fashion a remedy within the parameters of the CBA. However, the parameters allow for a remedy to be fashioned as long as it is not directly contradictory to the language in the CBA. That is what happened here. There is no language in the CBA to which Appellant is subject that explicitly prescribed the remedy entered here. The arbitrator made clear that the City had to start over, consistent with a dismissal without prejudice, and that he wanted to be fair to both parties. The statement that the arbitrator wanted to be fair to both parties certainly should not be viewed negatively.

The Courts emphasized in both cases that the parties stipulated that the arbitrator had authority to determine the appropriate remedy; that is the case here. The arbitrator determined that, notwithstanding the violation of the provisions of the CBA, rather than foreclose the ability for discipline to be issued, he stayed the time period from when the breach has occurred by the delay due to the grievance process allowing the City to move forward. (E1, p. 3, E2, p. 2). This was certainly within the authority provided to the arbitrator and was consistent with the issues stipulated by the parties. (E1, p. 3, E2, p. 2, E3, p. 12:6-20). The result of the relief sought by the Appellant would be a dismissal with prejudice.

The Appellant has attempted to compare the authority of this arbitrator to fashion a remedy to a Court exercising equitable jurisdiction where exercising equitable jurisdiction was not permitted. There are several reasons why this is an invalid comparison. The

jurisdiction of Courts are a creature of Statute and very little flexibility is provided to the Court. In comparison, arbitration is a remedy agreed to by the parties subject to a CBA. As a review of the law previously discussed indicates, arbitrators have significant flexibility to act within the CBA that they are working in. As the Courts have made clear, arbitrators do have the equitable right to fashion remedies to be fair to all parties to the proceeding. (see Argument above).

There can be little question that Article 6, Section 8 and Article 18a, Section F contemplate that a dismissal without prejudice is a remedy for violation of those provisions. (E4, p. 19 and 58). There is nothing in the CBA that limits the authority of the arbitrator to fashion additional remedies and the parties provided for it. The Appellant relies on language in Article 8, Section 2 which references that the authority of an arbitrator is limited to Articles 7 and 8. (E4, p. 23). This is true; that language limits the authority of an arbitrator to hear disciplinary appeals and grievances. In no way does that language address potential remedies. The parties could have limited or specifically identified the remedies, but choose not to.

Appellant would have you ignore Article 6, Section 7 of the CBA when it is to their advantage. Appellant conceded that her counsel made reference to Article 6, Section 7 of the Collective Bargaining Agreement and its 100 day provision in the grievance. (12:16-20, E5, p. 1). Why? Because ultimately the Appellant 's desire was to have this matter dismissed as being untimely. Article 6, Section 7 provides that the City has 100 days from the day of an event to institute discipline unless it is the subject of a criminal investigation. The Appellant knows that and wants to eliminate any possibility of an investigation. (E4, p. 19). Appellant would have you believe that the arbitrator somehow recklessly opened the door for the City to do a number of improper things. This could not be further from the truth. In this case, the arbitrator's remedy merely allows the City to move

forward with the investigation that was stopped as a result of the sustaining of this grievance. The City is still limited to the 100-day provision in Article 6, Section 7.

An amount of time passed from the date of the incident to February 15, 2022. Those days are already counted towards the 100-day time period in this matter. If the remedy portion of the arbitration decision is struck, then there can be no question that more than 100 days will have run from any incident that could have been investigated on February 15, 2022. The Appellant exercised her right to challenge the process. (E5, p. 1). That is certainly within her right and the parties moved forward with consideration of the grievance. The transcript of the arbitration hearing confirms that the Appellant was represented by counsel at all times, had an opportunity to read and review all e-mails that were the subject of the investigation, and though Grauman was present, he did not ask substantive questions in this process. (E3, p. 135). Further, the record does establish the Appellant's counsel did not raise these objections until the second interview, nor did he request that Grauman remove himself. (E3, p. 128). This information was presented to the arbitrator and as the arbitrator had the authority to do, determined that the grievance was sustained.

The Appellant's response is that the City should have restarted the investigation once the grievance was filed. Keep in mind the grievance raised numerous other issues as well. Even if the City had "started over" after getting the grievance, there is no saying that the investigation would have moved forward because presumably the Appellant could have continued to file grievance after grievance thereby inhibiting the ability of the City to move forward if the City were to start over every time a potential grievance was made. Just as the Appellant has a right to pursue this grievance, the City has a right to defend it. That occurred and the arbitrator decided in favor of the

Appellant.

The arbitrator recognized that the CBA required that the investigation be started over as a result of the dismissal without prejudice. The arbitrator knew there were two (2) alternatives. If the arbitrator did not address Article 6, Section 7, the matter would act as a dismissal with prejudice. By the time of the hearing, 100 days had passed from February 15, 2022 and it was clear that the language of Article 6, Section 7 was implicated. Appellant has argued that that issue could have been raised at a subsequent hearing. Though that is certainly possible, it is not logical. In this case, the arbitrator was asked to analyze a challenge to the process that occurred in the investigation. It is logical that the arbitrator would then consider how that investigation could be restarted. Ultimately, the alleged misconduct that led to the investigation occurred and the date is fixed.

The second alternative that the arbitrator had was to address the language in Article 6, Section 7. That is what the arbitrator did. This was a relatively limited remedy. The City is not permitted to go back indefinitely to investigate the matter. It can only continue the investigation on items that were within 100 days from the date of the incident to February 15, 2022 and any days subsequent to the arbitration award necessary to complete a new investigation. The arbitrator was asked to fashion a remedy by the parties, was asked specifically by one of the parties to address the language in Article 6, Section 7 and the arbitrator did so.

The arbitrator's decision to address the issue in his remedy is not speculative or unnecessary. The 100-day time line in Article 6, Section 7 is relevant; both parties were aware of it, and the Appellant raised it in their grievance. (E7, p. 3). This was a grievance in the middle of a disciplinary process and after the arbitrator determined that the process needed to be restarted, he appropriately addressed the

issue of what period could be addressed in any subsequent new investigation. The result of taking Appellant's position is that the City would have to concede when a grievance is filed or lose the ability to pursue an investigation into the potentially inappropriate behavior by an employee. That is not the purpose of the CBA.

The Appellant has relied on cases addressing the statutes of limitations which the City does not believe are relevant. Even if one were to look at some of the Nebraska Statutes addressing the statues of limitations, NEB. REV. STAT. § 25-201.02 does allow for an amendment of pleading after the statute has run if,

> (1) An amendment of a pleading that does not change the party or the name of the party against whom the claim is asserted relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

The Nebraska Legislature recognized that in instances where a statute of limitations exists, that at times it is necessary to amend pleadings and complaints and that is permissible when it "arose out of" what was originally set forth. That is exactly what the City wants here. The City wanted the ability to move forward and conduct the investigation into the same events that were subject of the original investigation. Absent the remedy offered by the arbitrator, it is extremely unlikely this would have occurred. Though the issue could certainly be raised in a subsequent arbitration on a disciplinary matter, it makes little sense that you would have to rehash the arguments made in front of this particular arbitrator and relitigate that very issue a second time in order to get consideration for extension of the time line to impose discipline.

**C. Any reliance on NEB. REV. STAT. § 25-2614 is misplaced.**

Appellant references NEB. REV. STAT. § 25-2614 in her application for relief and further references it in Appellant's Brief. (Appellant's Brief p. 23). Appellant asserted a violation of 25-2614(a)(3), "The award is imperfect in matter of form, not affecting the merits of the controversy." (T5). Appellee would submit that this assertion does not make sense. The parties agreed on two (2) issues before the hearing and they agreed that the arbitrator would have the ability to fashion a remedy. (E1, p. 3, E2, p. 2, E3, p. 12:6-20).

In looking at decisions within the State of Nebraska, there is one case that addresses this statutory provision and it does provide some direction as to what the Legislature intended. In *Hartman v. City of Grand Island*, 265 Neb. 433(2003), the City of Grand Island had agreed to go to arbitration with the Appellant and the parties agreed that three (3) arbitrators would hear the matter. Further, they agreed that the arbitration would be binding on all of them. However, it appears that only one of the three arbitrators actually executed the award. Though the City did not assert a violation under §25-2614(a), the Nebraska Supreme Court did reference this as a case where such an allegation may have been asserted. In *Hartman*, the Court indicated an instance where only one of the three arbitrators executed the award would be an instance where the award would be imperfect in form, not affecting the merits of controversy.

Though this case is not dispositive on the issue, it does provide an example of when the Courts has determined this particular statute may be applicable to the facts. The City would submit that this Statute and the Court decision discussing it make clear that this statute is not relevant to the facts of the case. In fact, the arbitrator makes clear that the City requested this relief be entered. Since that

is the case, the decision was clearly not a mistake to be corrected.

### D. The District Court did not err in determining that the Arbitrator did not exceed his authority in violation of NEB. REV. STAT. § 25-2613.

Though not cited directly by Appellant in the Complaint, Appellant did assert that the arbitrator exceeded his powers. (T1-8).

NEB. REV. STAT. § 25-2613 provides the limited basis upon which a District Court may vacate an arbitration award. The six bases established by the legislature appear in 25-2613:

> (a) Upon application of a party, the court shall vacate an award when:
>
> > (1) The award was procured by corruption, fraud, or other undue means;
> > (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
> > (3) The arbitrators exceeded their powers;
> > (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor, refused to hear evidence material to the controversy, or otherwise so conducted the hearing, contrary to the provisions of section 25-2606, as to prejudice substantially the rights of a party;
> > (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under section 25-2603, and the party did not participate in the arbitration hearing without raising the objection; or
> > (6) An arbitrator was subject to disqualification

> pursuant to section 25-2604.01 and failed, upon receipt of timely demand, to disqualify himself or herself as required by such section.
>
> The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

The Courts have recognized that the ability of an appellate court to vacate an arbitration award is limited because of the strong policy favoring the resolution of grievances through binding arbitration. This principle has been the subject of numerous United States Supreme Court decisions, including the Steel Workers Trilogy. *United Steel Workers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) and *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

The Uniform Arbitration Act was adopted by the State of Nebraska in 1987 as NEB. REV. STAT. §25-2601 et seq. The law upon which it is based has been in existence in excess of one hundred years. In *McDowell v. Thomas*, 4 Neb. 542 (1876), the Supreme Court cites its approval the following language from another case,

> In general, arbitrators have full power to decide upon questions of law in fact which directly or incidentally arrives in considering and deciding questions embraced in the submission. As incident to the questions of fact, they have power to decide all questions as to the admission and rejection of evidence, as well as the credit due to evidence, and the inferences of facts to be drawn from it. *McDowell*, 4 Neb. 542, citing the *Boston Water Power Co. v. Gray*, 6 Met. 131.

In *Hughes et al. v. Sarpy County*, 97 Neb. 90, 140 N.W. 309 (1914), the Nebraska Supreme Court determined,

> In the absence of fraud or mistake an award, whether in common law or under the statute, when regularly made and published, is prima facie binding upon the parties thereto, and the burden of alleging and proving to the contrary is upon the party seeking to impeach it. Right to revoke a common flaw submission must be exercised before the making and publication of the award. *Bentley v. Davis*, 21 Neb. 685, 33 N.W. 473; *Fox, Canfield & Co. v. Graves*, 46 Neb. 812, 65 N.W. 887; *Connecticut Fire Ins. Co. v. O'Fallon*, 49 Neb. 740, 69 N.W. 118. We conclude that there is no evidence to show any invalidity in the arbitration.
> *Hughes et al. v. Sarpy County*, 140 N.W. at 310.

In order to satisfy the test of §25-2613(a)(3), Appellant must demonstrate that the arbitrator exceeded his authority. A review of the award makes clear that the arbitrator's sole purpose was to determine the appropriateness of the City's actions as required by the CBA to which Appellant was subject. (E1, p. 3, E2, p. 2) The arbitrator then fashioned a remedy as directed by the parties. Further, that remedy does not violate any of the provisions of the CBA. This tenet of law was also recently discussed in *City of Omaha v. Professional Firefighters Association of Omaha*, 309 Neb. 918 (2021) in which the City argued that the District Court should have vacated an arbitration award because the arbitrator exceeded their powers. In that case, the Court provided,

> The City also argues that the district court should have vacated the arbitration award because the arbitrator exceeded her powers. We do not appear to have previously

addressed what a party must show in order to demonstrate that an arbitrator exceeded his or her powers under § 25-2613(a)(3) of the NUAA. Again, however, there is an analogous, indeed, in this instance, identical, provision of the FAA. See 9 U.S.C. § 10(a)(4). And while we do not appear to have construed § 25-2613(a)(3)'s FAA counterpart, the U.S. Supreme Court has.

In *Oxford Health Plans LLC*, 569 U.S. at 569, 133 S.Ct. 2064, the U.S. Supreme Court stated that a party attempting to vacate an arbitration award on the grounds that the arbitrator exceeded his or her powers "bears a heavy burden." It then went on to outline just how heavy that burden is. "It is not enough," the Court wrote, "to show that the [arbitrator] committed an error—or even a serious error." Id. (internal quotation marks omitted). Instead, "[b]ecause the parties bargained for the arbitrator's construction of their agreement, an arbitral decision even arguably construing or applying the contract must stand, regardless of a court's view of its (de)merits." Id. (internal quotation marks omitted). It is only when the arbitrator issues an award that simply reflects the arbitrator's personal "notions of ... justice" rather than "draw[ing] its essence from the contract" that a court may find that the arbitrator exceeded his or her powers. Id. (internal quotation marks omitted). Accordingly, the Court explained that the sole question presented when a party claims that an arbitrator exceeded his or her powers is whether the "arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong." Id. *City of Omaha v. Professional Firefighters Association of Omaha*, 309 Neb. at 931-932.

Ultimately, the Court concluded,

> As we have discussed above, an arbitrator does not exceed his or her powers merely by interpreting a contract differently than a court would. When it is claimed that an arbitrator acted in excess of his or her powers, the inquiry is not whether the arbitrator's interpretation is correct or whether the arbitrator's arguably interpreting the contract at all.
> *City of Omaha v. Professional Firefighters Association of Omaha*, 309 Neb. at 934.

In this case, there is little question that the arbitrator did determine that the City violated Article 6, Section 8 and Article 18(a), Section F. (E1, p. 13-14, E2, p. 12-13). The only remedy detailed in the CBA for those specific violations and merely requires that a case be dismissed without prejudice. A dismissal without prejudice allows a case to be reconsidered. The CBA does not in any way address whether an arbitrator can fashion a remedy like the one fashioned here. The arbitrator had to weigh the facts and fashion a remedy that the arbitrator felt was appropriate and fair to all parties. That obviously could include consideration of any timeline in the CBA, but it could also include whether or not it would be appropriate for an employee to not be disciplined for misconduct or the potential consequence of any violation of a CBA which is relatively minimal in cases where the Grievant is represented by counsel and has an opportunity to review evidence in question.

## VII. CONCLUSION

For the foregoing reasons the decision of the District Court denying Plaintiff's Petition to Modify or Correct Arbitration Award entered in favor of Petitioner or Alternatively to Partially Vacate Portion of Award Exceeding Arbitrator's Powers and confirming the arbitration award should be affirmed.

Respectfully submitted this 27th day of November, 2024.

CITY OF OMAHA, Appellee

BY: */s/ Bernard J. in den Bosch*

BERNARD J. in den BOSCH, No. 20329
Deputy City Attorney
City of Omaha Law Department
Omaha/Douglas Civic Center
1819 Farnam Street, Suite 804
Omaha, Nebraska 68183-0804
Phone: (402) 444-5115
Bernard.Bosch@cityofomaha.org

Attorney for Appellee City of Omaha

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Neb. R. App. P. § 2-103(C)(3)(a) because this brief, inclusive of all pertinent parts, contains 7,736 words, using the word count of the word-processing system used to prepare the brief, Microsoft Word 2019, which is an amount no more than the 15,000 words permitted by the Rule.

2. This brief complies with the typeface and type style requirements of Neb. R. App. P. § 2-103(A)(4) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019, 12 pt. Century Schoolbook Font.

*/s/Bernard J. in den Bosch*
Bernard J. in den Bosch, #20329

## CERTIFICATE OF SERVICE

I hereby certify that on November 27th, 2024, I electronically filed the foregoing **BRIEF OF APPELLEE** with the Clerk of the Court which sent notification of such filing to Theodore R. Boecker, Jr, Boecker Law, P.C., L.L.O., 1045 N. 115th Street, Suite 125, Omaha, NE 68154.

*/s/Bernard J. in den Bosch*

# Certificate of Service

I hereby certify that on Wednesday, November 27, 2024 I provided a true and correct copy of this *Brief of Appellee City of Omaha* to the following:

Katherine Belcastro-Gonzalez represented by Theodore R Boecker Jr (20346) service method: Electronic Service to **boeckerlaw@msn.com**

Signature: /s/ Bernard in den Bosch (20329)