2015 IL App (4th) 140192-U

NO. 4-14-0192

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 8, 2015
Carla Bender
4th District Appellate
Court, IL

THE CITY OF BLOOMINGTON, Plaintiff-Appellee, v. THE POLICEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, UNIT NO. 21, Defendant-Appellant.	)	Appeal from Circuit Court of McLean County No. 13MR153 Honorable Rebecca Simmons Foley, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed the trial court's judgment, concluding the arbitrator's interpretation of the contract, as reflected by her award, did not violate public policy.

¶ 2 In May 2011, defendant, the Policemen's Benevolent and Protective Association, Unit No. 21 (Union), filed a grievance on behalf of its member, Officer Scott Oglesby (grievant), contesting his discharge from the Bloomington police department (Department) after he allegedly used excessive force on a seven-year-old student at Stevenson Elementary School (Stevenson) in Bloomington, Illinois. The matter proceeded to arbitration and, after a hearing, the arbitrator sustained the grievance in part. As part of her decision, the arbitrator reduced grievant's discipline from termination to a one-day suspension and awarded back pay.

¶ 3 In March 2013, plaintiff, the City of Bloomington (City), filed a motion to vacate the arbitration award, asserting the award could not be enforced as it was against public policy.

In February 2014, the trial court granted the City's motion and entered an order vacating the arbitration award.

¶ 4 The Union appeals, arguing the trial court erred (1) by making and distinguishing factual findings appearing on the face of the award; (2) when it determined the award violated public policy; and (3) when it failed to recuse itself following its receipt of *ex parte* communications. We reverse.

¶ 5 I. BACKGROUND

¶ 6 At the time of the incident in question, grievant had been employed at the Department for over 15 years. Throughout his employment, grievant had been disciplined (suspended) for "attendance issues" and falling asleep while on duty. However, grievant had never been disciplined for improper use of force or failure to complete required reports. Additionally, he had nine written commendations in his personnel file.

¶ 7 A. The Notice of Termination

¶ 8 On May 13, 2011, the Department issued grievant a written notification of disciplinary action, informing him he was to be terminated from his employment with the Department. The notification indicated the disciplinary action was taken based on the following conduct:

> "On [December 21, 2010], you responded to an incident at Stevenson ***. Specifically, this was to address an issue with a student that was out of control. Shortly after arriving you were in contact with a student who was in a behavior disorder classroom. You made physical contact with that student. Further you took physical control of the student and later took him to the office of

the school principal. Several witnesses made claims that you were overly aggressive in your handling of this student during this incident."

¶ 9 The written notification stated grievant's actions during the incident involving N.A. were found to have violated certain rules, regulations, and standard operating procedures of the Department. Specifically, the Department found grievant's conduct violated (1) Article III, Rule 1-1, which is entitled "Attention to Duties"; (2) Article III, Rule 1-3, which is entitled "Conduct Unbecoming an Officer"; and (3) Standard Operating Procedure 6.01, which is entitled "Response to Aggression."

¶ 10 Department Rule 1-1 states:

"Police personnel, while on duty, shall devote their full attention to performance of their duties, exercise their best judgment at all times, and shall perform their duties in the most efficient manner possible. Attention to duty includes carrying out, but not limited to, all duties in the Police Officer's job description."

¶ 11 Department Rule 1-3 states:

"Police personnel shall not engage in conduct, on or off duty, which would place their integrity in question or would reflect adversely upon them, the *** Department, or the City ***, although such conduct may not be specifically mentioned and set forth in the Rules and Regulations."

¶ 12 Standard Operating Procedure 6.01 is a four-page document which sets forth the Department's response-to-aggression policy. The policy requires an officer to use "only that

amount of force reasonably required to achieve a lawful objective." Further, an officer should not use more force than is "reasonably required to overcome resistance being offered by an offender or person the officer is trying to control." The policy also states an officer is legally justified to use force that is necessary to protect the life or safety of individuals, including the officer, and public and private property. Additionally, the policy requires an officer to report "all instances where the officer's use of force exceeds his issuance of verbal directions."

¶ 13 The policy sets forth a continuum of the levels of control or force an officer may exert in response to varying levels of resistance or aggression from the subject. These levels of control or force include, *inter alia*, (1) officer presence, (2) verbal commands, and (3) empty-hand controls. The empty-hand controls include "soft-empty-hand" techniques, which pose a "minimal or nonexistent possibility of injury" and are "primarily used to control lower levels of resistance," and "hard-empty-hand" techniques, which pose a "greater probability of injury" and are used to control higher levels of resistance or aggression.

¶ 14 B. The Grievance and Arbitration

¶ 15 On May 17, 2011, the Union filed a grievance on behalf of grievant, challenging his termination. Pursuant to the collective-bargaining agreement in place between the Union and the City, the matter proceeded to arbitration. The arbitration hearing took place over two days in January and March 2012. The issue to be determined by arbitration was whether the termination of grievant violated section 5.1 of the collective-bargaining agreement and, if so, what the proper remedy was. Section 5.1 of the collective-bargaining agreement provided, in pertinent part, "[a] termination will be upheld if a substantial shortcoming of the officer is proved, which is defined as that which renders the officer's continuance in office in some way detrimental to the discipline

and efficiency of the service and which the law and sound public opinion recognize as good cause for his no longer being in the position."

¶ 16 1. *The Evidence Presented at the Arbitration Hearing*

¶ 17 The following is gleaned from the arbitrator's 57-page written decision, in which she summarized the evidence and her findings. On December 21, 2011, the police were called to Stevenson because a student, identified as "Z" in the record, had struck a teacher in the face. The school-resource officer assigned to Stevenson, Officer Brian Evans, was not available to immediately respond because he had been called to another school in the district. Officer Evans told the dispatcher he would proceed to Stevenson and let a different officer handle the situation at the other school. Grievant overheard the radio traffic concerning Stevenson and volunteered to respond and assist Officer Evans.

¶ 18 When grievant arrived at Stevenson, he reported to the principal's office and was directed to the "time-out room." According to grievant, he was not given any information about the situation or the fact it involved children in a behavior-disorders classroom. There, grievant observed the school psychologist, Dr. Brian Corley, restraining "Z" in a "basket hold," a technique which is taught by the Crisis Prevention Institute and involves "standing or sitting closely behind the student holding his arms, which are crossed in front of the student" until the student deescalates to the point he or she can respond rationally to questions. By the time grievant entered the time-out room, "Z" had substantially deescalated. Dr. Corley did not ask for grievant's assistance; however, he relinquished control of "Z" and allowed grievant to take over because protocol required him to do so when a police officer becomes involved. Grievant spoke with "Z" in a "loud way that sounded like an interrogation." According to Dr. Corley, grievant's

tone was "irritating" but was "not anything that would cause the student to become agitated again."

¶ 19 By the time Officer Evans arrived at Stevenson, the incident with "Z" had been resolved. Officer Evans asked grievant whether he knew Meg Johnson, a teacher at Stevenson who taught in a behavior-disorders classroom and was married to a detective in the Department. Officer Evans and grievant walked toward Johnson's classroom and encountered her leaving the classroom. Johnson had left her classroom because Dr. Corley had arrived to take over a situation with another student, seven-year-old N.A, who was severely agitated.

¶ 20 According to Johnson, when N.A. becomes upset, "he behaves like a two-year-old having a temper tantrum, where he becomes irrational and can become aggressive." On the day in question, N.A. was set off by being told it was time to get ready to go home. N.A. began "destroying [her] classroom" by ripping items off the walls, throwing things, kicking over chairs and easels, and acting in a destructive manner. Johnson and her assistant, Terese Marinelli, repeatedly attempted to restrain N.A. in a "basket hold" but were unsuccessful. According to the school counselor, Jaclyn Orton, N.A. had these "tantrums" several times a week and it would take as long as 30 minutes to calm him down.

¶ 21 When Dr. Corley arrived in Johnson's classroom, he witnessed N.A. engaging in destructive behavior and observed the staff already present were fatigued. Dr. Corley asked the staff if they needed his assistance, and they replied in the affirmative. Dr. Corley then placed N.A. in a "basket hold" in the corner of the classroom. Dr. Corley explained his Crisis Prevention Institute training had taught him to restrain students in this manner until their adrenaline wears off "so that they become available for rational thought again." Dr. Corley noted N.A. was a danger to himself and others and a risk to property when he was in this state.

¶ 22 At some point during the conversation with Johnson, grievant heard "loud screaming and a thumping sound coming from [the classroom]. He thought that the thumping sound was kicking and that the screaming was coming from where he had seen the child being restrained." At this point, grievant decided to enter the classroom and investigate. Johnson did not ask grievant or Officer Evans to intervene and described grievant's entry into the classroom as "abrupt." Grievant did not ask Officer Evans anything before entering. According to Officer Evans, he rarely intervened with a child as young as N.A. and instead allowed the staff to handle such situations.

¶ 23 Dr. Corley became aware of grievant's presence when he heard grievant behind him telling N.A., in a "loud and firm" tone, to "be quiet" because his screaming was "giving [grievant] a headache." As with "Z," Dr. Corley immediately relinquished control of N.A. to grievant as a matter of protocol. According to grievant, as soon as Dr. Corley saw him enter the room, he let N.A. out of the "basket hold," then "threw his arms up in the air and walked away." Grievant testified Dr. Corley was sweating and appeared to be out of breath. Grievant observed nothing about N.A. that identified him as a special-needs student, and he did not know N.A. had a behavior disorder.

¶ 24 As Dr. Corley was leaving the classroom, grievant approached N.A. and lifted him up by the front of his coat. Dr. Corley turned around and saw grievant had picked up N.A. and pinned him against the wall. According to Dr. Corley, grievant lifted N.A. by the throat and N.A.'s feet were dangling, which prompted him to ask Officer Evans and Johnson to intervene. Dr. Corley noted N.A. looked terrorized and his face was turning red, which made it seem like he was not able to breathe correctly. However, Marinelli refuted Dr. Corley's statement that grievant had N.A. by the throat; rather, she reported grievant was holding him around his

collarbone. Orton corroborated Marinelli's account, stating grievant was holding N.A. up in his "collar bone [*sic*] area." According to both Marinelli and Orton, it did not appear grievant was trying to strangle or otherwise harm N.A.

¶ 25 Grievant explained he did not attempt verbal commands because of N.A.'s screaming. He believed he needed to stop the screaming before he could effectively communicate with N.A. Grievant began his response to aggression with physical control because he observed that response being used by Dr. Corley. Grievant grabbed N.A. by the front of his coat and lifted him straight off the ground. He believed this technique would be "psychologically effective enough" to get N.A. to stop screaming. He also noted the techniques he observed staff using had not been effective, so he took it one step further.

¶ 26 Grievant was never trained to pick up a child by his or her coat. In fact, grievant was never trained in the proper use of force or response to aggression with regard to students. Grievant testified he never intended to harm N.A. or cause pain. He admitted telling N.A. to "shut up" because N.A. was giving him a headache.

¶ 27 By the time Officer Evans and Johnson entered the room, grievant had set N.A. back down on the floor. N.A. was screaming at grievant, stating, "I hate you" and "you hurt me." Officer Evans directed N.A. to sit in a chair, but before N.A. had a chance to comply, grievant "very intently" placed N.A. in a nearby chair but did not throw him. Officer Evans stood between grievant and N.A. and began to speak with N.A. to calm him down.

¶ 28 Officer Evans directed N.A. to go to the principal's office so he could have a quiet place to calm down. When N.A. refused to comply with Officer Evans' direction, grievant reached around Evans and grabbed N.A. by the arm and pulled him into the hallway. Grievant explained he was left with "no recourse but to physically get [N.A.] up and moving." Once out

in the hall, N.A. sat on the ground, which prompted grievant to lift N.A., place him in a "fireman's carry," and carry him to the principal's office. According to Officer Evans, this was not the normal procedure for handling such a situation.

¶ 29 Upon their arrival at the principal's office, grievant placed N.A. into a chair "very roughly." Some dispute existed over whether grievant did so with such force as to cause the chair and N.A.'s head and back to hit the wall. Two witnesses, office assistant Glenda Lowry and administrative secretary Jan Jumper, did not think grievant hurt N.A. or intended to do so. Grievant explained he lowered N.A. into the chair quickly, with one hand on N.A.'s legs and the other on his back, while telling him to sit down. Grievant lowered N.A. quickly so he could avoid being kicked. He disagreed that he set N.A. down with enough force to cause the chair and N.A.'s head to hit the wall.

¶ 30 Once N.A. was in the chair, Officer Evans told grievant, "that's all I need," because he needed no further assistance from grievant. At no point did Officer Evans believe grievant committed a policy violation during his interaction with N.A. According to Officer Evans, if he had witnessed a policy violation, he would have "stepped in and taken action." Grievant returned to Johnson's classroom and asked if she had "anyone else" in need of police intervention.

¶ 31 Officer Evans remained with N.A. in the principal's office until his father arrived. At this time, the principal, Tina Fogel, told N.A.'s father her staff were reporting grievant had N.A. by the throat, with his feet off the ground, and was yelling at him. N.A.'s father told Officer Evans his son reported that grievant hurt him. Additionally, N.A.'s father told Officer Evans "he (the father) wanted something done about it." Officer Evans immediately relayed

N.A.'s father's complaint to his commanding officer, and an investigation into the incident commenced.

¶ 32 According to grievant, he wished he had been given more information about N.A.'s behavioral problems and history. He stated if he had known more about N.A.'s history, he never would have intervened in this situation. Finally, grievant admitted he did not prepare a use-of-force report because he did not make an arrest—typically, a use-of-force report accompanied an arrest report.

¶ 33 Officer Evans testified he did not receive instruction on special use-of-force tactics to be used with students as part of his training to be a school-resource officer. However, as part of his training, he was informed school personnel have their own policies with regard to the physical restraint of students.

¶ 34 Jeffrey Elston, formerly of the McLean County sheriff's department, testified he trains law-enforcement officers in the use of pressure-point control tactics (PPCT), which are "designed for police officers in dealing with different types of resistant behavior." He stated he instructs his trainees that any technique which applies direct pressure to a subject's trachea would be considered deadly force. The only PPCT technique involving the neck is called a "shoulder pin," which is designed to quickly render a subject unconscious by slowing blood flow to the head. Additionally, officers are not trained, as grievant did here, to approach subjects straight on.

¶ 35 Elston testified, however, that PPCT are not the only techniques available to an officer who encounters aggression. Because PPCT are best "from a civil liability standpoint," they are the only techniques he teaches. Additionally, more restrictive techniques are used depending on the level of aggression and resistance the subject exhibits.

¶ 36 Former Bloomington police chief Randall McKinley testified grievant was trained in PPCT and crisis intervention and has received juvenile-court-officer training. Chief McKinley did not find relevant the fact grievant was not trained as a school-resource officer, because police officers respond to situations involving juveniles and troubled people in places other than schools. Ultimately, Chief McKinley concluded grievant displayed a severe lack of judgment on the day in question, despite having been given proper training prior to the incident.

¶ 37 Additionally, Chief McKinley cited five actions by grievant that violated Department policies: (1) lifting N.A. off the ground by his throat or neck and pinning him against a classroom wall; (2) tossing or throwing N.A. into a chair in the classroom; (3) reaching around the school-resource officer, Evans, to grab N.A. and lead him out of the classroom; (4) picking N.A. up and carrying him over his shoulder to the principal's office; and (5) tossing or throwing N.A. into a chair in the principal's office lobby.

¶ 38 2. *The Arbitrator's Findings*

¶ 39 Following the hearing, the arbitrator issued a written decision, in which she made the following findings.

¶ 40 The arbitrator found grievant lifted N.A. off the floor and pinned him against the wall for at least five to eight seconds but found the evidence insufficient to establish grievant held N.A. by his throat or neck or restricted his breathing in any way. With regard to this conduct, the arbitrator found grievant "moved swiftly and his conduct was understandably upsetting and frightening to the child and somewhat shocking to the staff who witnessed it," but, unlike grievant, school staff knew about N.A.'s behavior problems and had been trained to deal with them in a "very different" manner. Because grievant did not lift N.A. by his throat or neck,

the arbitrator found grievant's conduct did not constitute the use of deadly force. Additionally, the arbitrator found grievant used a "soft-empty-hand" technique.

¶ 41 Based on these findings, the arbitrator analyzed whether grievant's initial interaction with N.A. violated the Department's response-to-aggression policy and concluded it did not. In support of her finding, the arbitrator noted this case did not represent a typical situation in which an officer applies the response-to-aggression policy. The arbitrator found grievant reasonably (1) believed N.A. needed to be physically restrained when he entered Johnson's classroom, and (2) concluded N.A. was still posing a danger to himself and others. While grievant undoubtedly engaged in tactics in which he had not been trained, the evidence showed the techniques in which he was trained, PPCT, were not formulated to be used on juveniles as young as N.A. Despite the fact grievant had not been trained specifically in dealing with aggressive juveniles, he relied on his training by quickly responding and establishing physical control over N.A by employing a tactic "one step higher" than that which had already been unsuccessfully attempted by school personnel.

¶ 42 The arbitrator noted grievant's conduct must be reviewed under an objective-reasonableness standard, as proclaimed by the Supreme Court in *Graham v. Connor,* 490 U.S. 386 (1989), and embodied in the Department's response-to-aggression policy. The arbitrator concluded grievant's conduct was objectively reasonable given the fact he was not given any specific information about why police had been called to the school in the first place or N.A.'s needs or behavioral issues. According to the arbitrator, it would have made sense, in retrospect, for grievant to ask questions and obtain more information before entering the room; however, grievant followed his training and acted quickly and instinctively in taking control of N.A. Additionally, the arbitrator found it would have been prudent for Dr. Corley to continue his

restraint over N.A. while providing information to grievant about the situation instead of relinquishing control over N.A. immediately after he became aware of grievant's presence. This was especially true, the arbitrator determined, given the fact Dr. Corley had already witnessed an interaction between grievant and "Z" which he found inappropriate.

¶ 43 The arbitrator found this case was the result of "significant miscommunications, and to some extent, a clash of cultures." On one hand, the staff at Stevenson were trained in a range of techniques to deal with young students with behavioral disorders, such as N.A. The staff are trained to exercise patience and allow a child to deescalate, rather than to quickly resolve the situation. On the other hand, a police officer, who is not trained in these techniques and who has little information regarding the student, may respond in a way that is jarring and offensive to school staff.

¶ 44 With regard to grievant's other conduct inside Johnson's classroom, the arbitrator found the evidence did not support a conclusion that grievant threw N.A. into a chair; rather, he placed him in the chair "very intently." The arbitrator found grievant grabbed N.A. by his arm and pulled him from the chair, then guided him into the hallway. Grievant reached around Officer Evans to do so.

¶ 45 Based on these findings, the arbitrator analyzed whether grievant's other conduct inside Johnson's classroom violated the Department's response-to-aggression policy and concluded it did not. In support of this finding, the arbitrator found grievant's act of placing N.A. into the chair "very intently" was reasonable given the fact he was unaware N.A. "might need more time to absorb his request and respond than the average child" who does not have special needs.

¶ 46 The arbitrator also found grievant acted reasonably when he grabbed N.A. by the arm and led him into the hallway. Grievant employed a "soft-empty-hand" technique to establish control after the child had defied the verbal commands of the officers to go to the principal's office. While grievant's actions were "swift," they were not likely to cause any harm to N.A.

¶ 47 The arbitrator also found the evidence supported the conclusion grievant picked up N.A. in the hallway and carried him over his shoulder to the principal's office. However, because the City failed to raise this allegation prior to the arbitration hearing, the arbitrator did not consider the allegation as part of the grounds for termination.

¶ 48 With regard to grievant's conduct inside the principal's office, the arbitrator found grievant placed N.A. in the chair forcefully. However, she did not find the evidence sufficient to support a finding grievant caused N.A.'s head or back to hit the wall, given the lack of evidence showing N.A. sustained injury.

¶ 49 Based on these findings, the arbitrator analyzed whether grievant's conduct in the principal's office violated the Department's response-to-aggression policy and concluded it did not. In support of her finding, the arbitrator noted grievant acted reasonably when he "roughly" placed N.A. in the chair in the principal's office lobby. Contrary to the Department's conclusion, the arbitrator found grievant's conduct constituted a "soft-empty-hand" technique because it was not likely to cause injury. The arbitrator found grievant's decision to lower N.A. directly into the chair from his shoulder was reasonable given N.A.'s "continuing verbal and physical resistance." While grievant's actions may have caused N.A. to hit the chair harder than he intended, grievant did so because he was trying to avoid being kicked by N.A.

¶ 50 Overall, the arbitrator found significant the fact Officer Evans never intervened during grievant's interaction with N.A. If Officer Evans believed grievant was using

unreasonable force, he had many opportunities to intervene but did not do so. The arbitrator found Officer Evan's testimony on this point important in determining whether grievant used excessive force "because it help[ed] to form a judgment about what a reasonable officer would have done in the situation in which [grievant] found himself."

¶ 51 However, the arbitrator determined grievant violated the response-to-aggression policy by failing to immediately report his use of force to his supervisor. The arbitrator found, while use-of-force reports are usually completed in conjunction with arrest reports, the rule requires reporting in "all instances" where force in excess of verbal commands is used. Because grievant admitted he failed to complete a use-of-force report despite the fact he used force in excess of verbal commands, he violated the policy.

¶ 52 The arbitrator also found grievant did not violate Department Rule 1-1. In support of her finding, the arbitrator noted grievant's conduct concerned his "duty not to use excessive force." Because grievant did not use excessive force, the arbitrator concluded he did not violate Department Rule 1-1 ("Attention to Duty").

¶ 53 Finally, the arbitrator found grievant did not violate Department Rule 1-3. In support of her finding, the arbitrator noted the rule was a catch-all rule which applies to conduct not encompassed by other departmental rules. The arbitrator found the basis for this alleged infraction was the fact grievant had been placed on the "watch list" by the Department of Children and Family Services (DCFS). However, the fact grievant was on DCFS' "watch list" was not sufficient to demonstrate grievant deliberately engaged in conduct reflecting adversely on the Department. (We note this court, in *Oglesby v. Department of Children & Family Services*, 2014 IL App (4th) 130722, 13 N.E.3d 1267, ordered DCFS to expunge the indicated finding of abuse against grievant.) Additionally, the arbitrator noted school staff were shocked

to see grievant handling N.A. in the manner in which he did; however, the shock resulted "from a perception of the facts that the evidence has not established are true"—including the fact Fogel reported to Officer Evans and N.A.'s father that grievant had lifted N.A. up by his throat and neck.

¶ 54 3. *The Arbitral Award*

¶ 55 The arbitrator ultimately concluded grievant's interaction with N.A. did not warrant termination. The arbitrator concluded the only work rule violated by grievant was his failure to report his use of force on N.A. Accordingly, the arbitrator determined grievant should be reinstated with back pay, less a one-day, unpaid suspension for his failure to complete a use-of-force report. In making this award, the arbitrator noted grievant's "long good record with no evidence of other significant misconduct."

¶ 56 C. Plaintiff's Motion To Vacate the Award

¶ 57 In March 2013, the City filed a motion seeking to vacate the arbitral award, asserting (1) the arbitrator committed a gross mistake of law by holding it to a "heavy burden" of proof, similar to a clear-and-convincing standard; and (2) the award violated the well-defined and dominant public policies of protecting the safety of school-aged children and preventing the use of excessive force by police officers.

¶ 58 D. The Trial Court's Memorandum and Order

¶ 59 On February 7, 2014, following a hearing at which oral argument was presented, the trial court issued a memorandum opinion granting the City's motion to vacate the arbitral award. Prior to announcing its findings, the court disclosed it had received *ex parte* communications in relation to this case, stating;

"I was in attendance at the Judicial Education Conference and out of my office during the week of January 27, 2014. I returned to my office on Saturday, February 1[,] and found several e-mail messages in my inbox. As my e-mail messages are currently displayed, the subject line is not visible. As I reviewed my messages, I came upon three (3) messages relating to this case from persons unknown to me. I did not read the messages in their entirety. Once I determined the subject matter, I stopped reading, printed and copied the messages. I placed a copy in an envelope which is now sealed and part of the court file. On Monday, February 3, I discovered a fourth e-mail message in my inbox related to this case. I followed the same procedure with respect to that message. I have enclosed copies for each of you with this correspondence.

I have blocked the senders from forwarding any further correspondence. I have not read, nor do I intend to read, the messages as they are impermissible *ex parte* communications under Illinois Supreme Court Rule 63. Accordingly, these messages have in no way impacted upon the decision rendered by the Court."

¶ 60 After disclosing the *ex parte* communications, the trial court set forth its reasoning for granting the City's motion to vacate the award. The court found a "well-defined and dominant public policy in favor of protecting school-aged children" existed. The court then

determined the arbitral award violated the public policy of ensuring the welfare and protection of minors, noting "the decision effectively condones the actions taken by [grievant] in response to [N.A.'s] temper tantrum, and indirectly encourages similar behavior in the future."

¶ 61 On February 20, 2014, the trial court entered an order granting the City's motion to vacate the award, noting its reasons for doing so were set forth in its February 7, 2014, memorandum opinion, which was incorporated by reference.

¶ 62 This appeal followed.

¶ 63 II. ANALYSIS

¶ 64 On appeal, the Union argues the trial court erred (1) by making and distinguishing factual findings appearing on the face of the award; (2) when it determined the arbitral award violated public policy; and (3) when it failed to recuse itself after receiving *ex parte* communications.

¶ 65 A. Applicable Law and the Standard of Review

¶ 66 The Uniform Arbitration Act (710 ILCS 5/1 to 23 (West 2012)) "provides for very limited judicial review of an arbitrator's award." *Hawrelak v. Marine Bank, Springfield*, 316 Ill. App. 3d 175, 178, 735 N.E.2d 1066, 1068-69 (2000). If possible, we must construe the award to uphold its validity. *Id.* at 179, 735 N.E.2d at 1069. "Such deference is accorded because the parties have chosen in their contract how their dispute is to be decided, and judicial modification of an arbitrator's decision deprives the parties of that choice." *Id.* A court may not set aside an arbitration award because of judgment errors or mistakes of law or fact. *Decatur Police Benevolent & Protective Ass'n Labor Committee v. City of Decatur*, 2012 IL App (4th) 110764, ¶ 21, 968 N.E.2d 749.

¶ 67 However, "[c]ourts have crafted a public[-]policy exception to vacate arbitral awards which otherwise derive their essence from a collective-bargaining agreement." *American Federation of State, County, and Municipal Employees, AFL-CIO v. Department of Central Management Services*, 173 Ill. 2d 299, 306, 671 N.E.2d 668, 673 (1996) (hereinafter, *AFSCME*). Under this exception, this court will not enforce a collective-bargaining agreement when its enforcement is repugnant to established norms of public policy. *City of Decatur*, 2012 IL App (4th) 110764, ¶ 22, 968 N.E.2d 749.

¶ 68 The public-policy exception is narrow and is to be invoked "only when a party clearly shows enforcement of the contract, as interpreted by the arbitrator, contravenes some explicit public policy." *Id.* ¶ 23, 968 N.E.2d 749. When determining whether the public-policy exception applies, courts perform a two-step analysis. *Id.* ¶ 24, 968 N.E.2d 749. First, the court determines " 'whether a well-defined and dominant public policy can be identified.' " *Id.* (quoting *AFSCME*, 173 Ill. 2d at 307, 671 N.E.2d at 674). To ascertain whether a public policy exists, the court may not rely on " 'general considerations of supposed public interests.' " *Id.* ¶ 23, 968 N.E.2d 749. Rather, we look first to our constitution and statutes and, when those are silent, to judicial decisions. *Id.* Second, the court determines whether the arbitral award, resulting from the arbitrator's interpretation of the agreement, violates public policy. *Id.* ¶ 24, 968 N.E.2d 749. Because our inquiry is whether the arbitrator's construction of the collective-bargaining agreement, as reflected in her award, is unenforceable due to a predominating public policy, which is a question of law, our review is *de novo*. See *Country Preferred Insurance Co. v. Whitehead*, 2012 IL 113365, ¶ 27, 979 N.E.2d 35.

¶ 69 B. The Trial Court's Factual Findings

¶ 70 The Union argues the trial court "must have misunderstood its role" in this case because it made and distinguished factual findings appearing on the face of the award. According to the Union, the trial court "made several findings of fact which are inaccurate, or, which are only half-correct."

¶ 71 We decline to parse the trial court's written opinion to determine whether it made inaccurate findings of fact. In this *de novo* review, we are bound by the arbitrator's view of the facts. *County of De Witt v. American Federation of State, County, and Municipal Employees, Council 31*, 298 Ill. App. 3d 634, 639, 699 N.E.2d 163, 167 (1998). Based on the facts as found by the arbitrator, we perform the same analysis as did the trial court. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578, 948 N.E.2d 132, 146 (2011). Accordingly, we give no deference to the court. Our focus is the relevant inquiry on appeal: whether the arbitral award violates some well-defined and predominant public policy of this state.

¶ 72 C. The Public-Policy Exception

¶ 73 1. *Whether a Well-Defined and Predominant Public Policy Exists*

¶ 74 The supreme court has recognized "the welfare and protection of minors has always been considered one of the State's most fundamental interests." *AFSCME*, 173 Ill. 2d at 311, 671 N.E.2d at 675. The supreme court noted this policy's predominance, stating, "[t]his public policy has led our courts to recognize that even parents' rights are secondary to the State's strong interest in protecting children when the potential for abuse or neglect exists." *Id.* at 312, 671 N.E.2d at 676.

¶ 75 In *Central Community Unit School District No. 4 v. Illinois Educational Labor Relations Board*, 388 Ill. App. 3d 1060, 1069, 904 N.E.2d 640, 648 (2009), this court found a "general public policy" concerning the safety of schoolchildren existed in Illinois. We found

support for our conclusion in both statutes and case law. *Id.* at 1069-71, 904 N.E.2d at 648-49. Specifically, we examined section 24-24 of the School Code, finding it placed " 'teachers, other certificated educational employees, and any other person, whether or not a certificated employee, providing a related service for or with respect to a student' " in the relation of parent and guardian to the students. *Id.* at 1071, 904 N.E.2d at 649 (quoting 105 ILCS 5/24-24 (West 2006)). This relationship "may be exercised at any time for the *safety* *** of the [students] in the absence of their parents or guardians." (Emphasis in original.) *Id.* (citing 105 ILCS 5/24-24 (West 2006)).

¶ 76 In *Department of Central Management Services v. American Federation of State, County, and Municipal Employees* (*AFSCME*), *AFL-CIO*, 245 Ill. App. 3d 87, 614 N.E.2d 513 (1993), we observed "a 'well-defined and dominant' public policy exists in Illinois favoring the protection of children, including protecting children from abuse." *Id.* at 94, 614 N.E.2d at 517. We found "[t]his public policy is evidenced by the numerous statutes enacted by the legislature with a dominant purpose of protecting children." *Id.*

¶ 77 Section 34-18.20 of the School Code also evidences a public policy in favor protecting the safety of school-aged children even when the child can potentially harm himself, others, or property; it authorizes the use of physical restraint when dealing with a child who is endangering the safety of other students, school employees, and school property provided "no medical contraindication to its use" exists and "the staff applying the restraint have been trained in its safe application." 105 ILCS 5/34-18.20 (West 2012). Section 34-18.20 also permits "momentary periods of physical restriction by direct person-to-person contact" that are accomplished with limited force and designed to prevent a student from completing a destructive or harmful act to himself or others. 105 ILCS 5/34-18.20 (West 2012).

¶ 78 Additionally, the Abused and Neglected Child Reporting Act (325 ILCS 5/1 to 11.8 (West 2012)) imposes a duty to report child abuse and neglect upon certain classes of Illinois citizens. Police officers, like the grievant here, are one such class. 325 ILCS 5/4 (West 2012); see 89 Ill. Adm. Code 300.30(b)(1)(Y) (eff. Dec. 31, 2013) (requiring "law enforcement officers" to report child abuse or neglect).

¶ 79 Further, the Illinois Police Training Act (Training Act) (50 ILCS 705/1 to 12 (West 2012)) also demonstrates a public policy in favor of protecting the safety of school-aged children in relation to interactions with law enforcement. Section 7(a) of the Training Act requires police academies to include the handling of juvenile offenders in their curriculum. 50 ILCS 705/7(a) (West 2012).

¶ 80 In light of the authority cited above, we conclude a public policy in favor of protecting school-aged children exists in this State. The Union contends the public policy in favor of protecting school-aged children is not "well-defined" or "dominant," as is required for the public-policy exception to apply. Specifically, the Union argues the trial court erred by relying on "a vague policy which yields under certain circumstances." The Union argues the policy often yields to "less admirable goals" such as school-locker searches, drug testing for student athletes, and corporal punishment.

¶ 81 Regardless of whether the policy in favor of protecting school-aged children yields under certain circumstances, we fail to see how this makes the policy any less "predominant." Further, locker searches and drug testing for student athletes can arguably be considered further demonstrations of policies supportive of the public policy in favor of protecting the safety of school-aged children. Also, the policy of protecting minors often dominates over otherwise important state interests. *AFSCME*, 173 Ill. 2d at 312, 671 N.E.2d at

676 (noting a parent's rights toward his or her children often yield to the state's interest in protecting minors).

¶ 82 Accordingly, we conclude the trial court properly found a well-defined and dominant public policy in favor of protecting the safety of school-aged children exists in Illinois.

¶ 83 2. *Whether the Arbitral Award Violates the Public Policy*

¶ 84 Having found a well-defined and dominant public policy in favor of protecting the safety of school-aged children exists in Illinois, we must next consider whether the arbitrator's decision to reinstate grievant violates the policy.

¶ 85 In this case, the arbitrator interpreted the collective-bargaining agreement to hold the use of force on a juvenile, described by some witnesses as excessive or overly aggressive, does not warrant termination where no misconduct or violation of police-department policies occurred and no injury to the juvenile results. The City contends the arbitrator's award reinstating grievant violates the public policy in favor of protecting school-aged children because the arbitrator's interpretation of the contract essentially condones grievant's risky behavior and indirectly encourages similar behavior in the future. In other words, "the arbitrator's award reinstating grievant without any discipline for his actions vis-à-vis [N.A.] will encourage the Grievant and other Bloomington Police Officers to aggressively lay hands on apparently normal seven-year[-]old children in order to stop them from screaming." We disagree.

¶ 86 In this case, the arbitral award does not condone future violations of the Department's policies on the use of force, employee conduct, and attention to duties because, as the arbitrator found, *no violation of these policies occurred*. Additionally, the award does not condone risky behavior in handling juveniles, because the arbitrator made no finding that grievant's conduct was risky or inherently dangerous. In fact, the arbitrator noted "[t]he City

[did] not identify what danger of injury [N.A.] faced from [grievant's] technique, if [N.A.] was not being held at the throat."

¶ 87 The City argues we can take judicial notice "that any number of unexpected and dangerous things could have occurred while [grievant] pinned [N.A.] against a wall at eye-level, with his legs and feet dangling in the air." See *People v. Tassone*, 41 Ill. 2d 7, 12, 241 N.E.2d 419, 422 (1968) (courts are "presumed to be no more ignorant than the public generally, and will take judicial notice of that which everyone knows to be true"). Unlike in *Tassone*, where the reviewing court took judicial notice that a large tractor and trailer were worth in excess of $150.00, this matter is not so obvious. We decline to speculate and instead rely upon the factual findings of the arbitrator

¶ 88 The City also argues the reinstatement of grievant violates the public policy in favor of protecting children because the arbitrator failed to make any findings regarding the likelihood grievant would repeat his actions or offer any reassurance that grievant posed no risk to the welfare and protection of minors. See *AFSCME*, 173 Ill. 2d at 322-23, 671 N.E.2d at 680-81. The Union responds this argument is illogical given the fact the arbitrator found no misconduct occurred. The City's argument fails to persuade.

¶ 89 Here, no finding regarding grievant's remorse or likelihood to reoffend could be made because no misconduct was found in the first place. Additionally, the arbitrator found (1) grievant would not have intervened had he known more about N.A.'s needs and behavioral issues; (2) Bloomington police officers would rarely encounter an "out-of-control, combative [seven-year-old]," similar to this child; and (3) this incident was largely the result of a "clash of cultures" where, on one hand, school personnel are trained to passively wait for a student to deescalate and, on the other, police officers are trained to act quickly and efficiently to dispel any

possible threat to the safety of others and property. Based on these findings, the arbitrator concluded the staff at Stevenson and the Department should reevaluate their policies to make sure an incident such as this one does not recur. By encouraging the two entities to develop better policies for handling disruptive juveniles, the arbitrator provided the reassurance called for under *AFSCME*, and we are obliged to affirm the award. See *id*.

¶ 90 D. The Trial Court's Receipt of *Ex Parte* Communications Did Not Require Recusal

¶ 91 The Union also asserts the trial judge erred by failing to recuse herself following her receipt of *ex parte* communications. Specifically, the Union argues reversal is required because the judge failed to notify the parties and afford them an opportunity to respond before rendering her decision. Although we have determined the trial court erred by finding the arbitral award violated public policy and reversed on that basis, we wish to address this issue for the parties' and court's benefit.

¶ 92 Generally, *ex parte* communications are prohibited. *Korunka v. Department of Children and Family Services*, 259 Ill. App. 3d 527, 530, 631 N.E.2d 759, 761 (1994). Rule 63 provides judges shall not "initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding." Ill. S. Ct. R. 63(A)(5) (eff. July 1, 2013). Black's Law Dictionary defines "*ex parte*" as something "[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested." Black's Law Dictionary 616 (8th ed. 2004). "Furthermore, *ex parte* proceedings are proceedings brought for the benefit of one party only and without notice to the other party." *Waste Management of Illinois, Inc. v. Pollution Control Board*, 175 Ill. App. 3d 1023, 1042, 530 N.E.2d 682, 697 (1988).

¶ 93 In this case, the e-mails received by the judge were sent directly to the judge and were outside the presence of the Union. Further, the e-mails were clearly in support of the position held by the City—grievant should not be allowed to continue in his employment as a police officer. Accordingly, the e-mails received by the trial court were *ex parte* communications.

¶ 94 While the trial judge's receipt of the *ex parte* communications did not mandate recusal (see *In re Marriage of Wheatley*, 297 Ill. App. 3d 854, 858, 697 N.E.2d 938, 941 (1998) (the mere fact the judge received an *ex parte* communication did not require the judge to recuse himself)), Rule 63 requires a judge to disclose *ex parte* communications to the parties as soon as is practicable and then allow the parties to respond. *Kamelgard v. American College of Surgeons*, 385 Ill. App. 3d 675, 680, 895 N.E.2d 997, 1002 (2008).

¶ 95 Here, the trial judge did not disclose her receipt of the *ex parte* communications to the parties immediately but, rather, kept them in her office during her consideration of the case and while drafting her written decision. In addition, the parties were deprived of an opportunity to respond. Only after making and issuing her decision did the trial judge disclose receipt of the improper communications. Although the trial judge stated in her written order the e-mails played no role in her decision (and we have no reason to disbelieve this statement), pursuant to Rule 63, the trial judge should have promptly informed the parties of the *ex parte* communications and permitted each party to an opportunity to respond before issuing her decision.

¶ 96 III. CONCLUSION

¶ 97 For the reasons stated, we reverse the trial court's judgment.

¶ 98 Reversed.