LABOR LAW—ARBITRATION—ARBITRATOR EXCEEDS AUTHORITY BY READING REQUIREMENTS FOR PROGRESSIVE DISCIPLINE INTO LABOR AGREEMENT—*County College of Morris Staff Association v. County College of Morris*, 100 N.J. 383, 495 A.2d 865 (1985).

Arbitration is a widely accepted method of alternate dispute resolution.[1] In the area of labor law, particularly, it is a well established principle that the arbitrator derives his power from, and is bound by, the terms of the collective bargaining agreement.[2] Nevertheless, in order to preserve the function of arbitration as a viable alternative to courtroom litigation, some latitude must be afforded the arbitrator in interpreting the language of the collective bargaining agreement when adjudicating disputes.[3] This conflict between granting arbitrators flexibility in order to achieve the desired benefits of arbitration, while simultaneously ensuring that they avoid overreaching, is not easily resolved.[4]

---

[1] Salem, *The Alternative Dispute Resolution Movement: An Overview*, 40 ARB. J. 3 (1985). "[T]he realization that there are viable alternatives to the traditional legal and court structure is now spreading to virtually all segments of our society." *Id.* at 4.

[2] *See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). The Court noted that:

> an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

Id. at 597.

[3] *Id.* Arbitrators have been recognized as requiring a degree of flexibility in order to enable them to deal with a "wide variety of situations." *Id.* "When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem." *Id.*

The collective bargaining agreement is a unique instrument that requires different rules of law and different methods of construction. *See* Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1489 (1959). The collective bargaining agreement must encompass a wide variety of subjects such as wages, hours, discipline, insurance, and benefits while at the same time maintain brevity and clarity so that the average worker can read and comprehend its content. *Id.* at 1490. Consequently, "[v]erbal incompleteness is inevitable," and "[t]he details must be filled in" by the arbitrator. *Id.*

[4] *See* Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955) [hereinafter Shulman]. Referring to arbitration, the author stated:

> When [the collective bargaining system] works fairly well, it does not need the sanction of the law of contracts or the law of arbitration. It is only when the system breaks down completely that the courts' aid in these respects is invoked. But the courts cannot, by occasional sporadic decisions restore the parties' continuing relationship; and their inter-

Recently, in *County College of Morris Staff Association v. County College of Morris*,[5] the New Jersey Supreme Court attempted to identify, under at least one set of circumstances, what would be considered an inappropriate contractual interpretation by an arbitrator.[6]

Victor Muller, the plaintiff and a member of the County College of Morris Staff Association (Association), was employed by the County College of Morris (College) as an automotive maintenance mechanic.[7] Muller was dismissed on October 8, 1982, prior to the expiration of his employment term.[8] Under the terms of the contract between the College and the Association, an employee could only be dismissed for "just cause" prior to the expiration of the yearly term.[9] The College noted the reasons for Muller's discharge in a Memorandum of Record.[10] A contractual grievance was then filed on behalf of Muller by the Association,[11] which stated that the College had violated the discharge provisions of the collectively negotiated agreement by firing him with-

---

vention in such cases may seriously affect the going systems of self-government.

Id. at 1024.

5 100 N.J. 383, 495 A.2d 865 (1985).

6 *See id.* at 398-99, 495 A.2d at 873.

7 *Id.* at 386, 495 A.2d at 866.

8 *Id.* Employees of County College of Morris worked on a yearly basis. After they completed a six month probationary period, their employment was subject to the discretion of the College's Board of Trustees. *Id.*

9 *Id.* at 387, 495 A.2d at 867. Article X of the contract stated in pertinent part: "[a]fter completing six months of employment, the College may dismiss an employee prior to the expiration of such employee's current employment term, for just cause only and such dismissal shall be grievable." *Id.*

10 *Id.* at 386-87, 495 A.2d at 866-67. The Memorandum of Record listed Muller's infractions as follows:

1. falsification of time records (five occasions between 8/26/82 and 9/29/82);
2. insubordination (verbal exchange with superior when confronted with inaccurate time sheet entries);
3. neglect of duty and College property in his care (left tools and equipment unattended after leaving the campus early on 9/24/82);
4. unauthorized use of college property for personal use (drove college vehicle off premises and used College garage to repair fellow employee's car);
5. attempt and threat of personal harm to his supervisor (began to lower a vehicle lift, with vehicle on it, on the supervisor who was standing directly underneath it).

Id. at 387, 495 A.2d at 867.

11 *Id.* Pursuant to Article III of the contract, a contractual grievance is "an alleged misinterpretation, misapplication or violation of the express terms of [the] Agreement." *Id.*

out just cause.[12] Thereafter, the matter was submitted to binding arbitration because the initial grievance procedures failed to resolve the dispute.[13]

After two days of hearings, the arbitrator found Muller guilty of four of the five charges listed in the Memorandum of Record;[14] however, the arbitrator determined that dismissal was not warranted.[15] The arbitrator concluded that the discharge was in-

---

[12] *Id.* Article X of the contract stated that the "cause for which employees may be discharged shall include but not be limited to violation of rules, regulations and policies of the College." *Id.*

[13] *Id.* Specific limitations were placed on the arbitration provisions in the contract, including a clause restricting the arbitrator's "authority to add to, alter, amend or modify the terms of" the agreement. *Id.* The agreement further prohibited the arbitrator from making any decisions proscribed by law, and bound the arbitrator to the laws of the United States, New Jersey, the Chancellor of Higher Education and the State Board of Higher Education. *Id.* at 387-88, 495 A.2d at 867. Article III also provided that:

> The arbitrator's decision shall be in writing and shall set forth his findings of fact, reasoning and conclusions on the issues submitted. *The arbitrator shall be without power or authority to add to, alter, amend or modify the terms of this Agreement* and without authority to make any decision which requires the commission of an act prohibited by law.

Id. (emphasis in original).

In addition to these limitations on the arbitrator's powers, the contract contained a clause stating that the agreement was "fully bargained for" by all the parties, and set forth the particular conditions under which the agreement could be changed. *Id.* at 388, 495 A.2d at 867. The contract stated:

> A. This Agreement represents and incorporates the complete and final understanding and settlement by the parties of all issues for the term of this Agreement. During the term of this agreement, neither party will be required to negotiate with respect to any such matter, whether or not covered by this Agreement, and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.
>
> B. By mutual consent only, the parties may enter into negotiations during the term of this Agreement for the purpose of amending same. This Agreement shall not be modified in whole or in part except by mutual agreement of the parties. Mutually acceptable amendments shall be reduced to writing and submitted for ratification by the Board of Trustees and the Association.

Id.

[14] *Id.* at 388-89, 495 A.2d at 867-68. The arbitrator found Muller not guilty of the charge of unauthorized repair of a vehicle on College property. Moreover, he concluded that Muller did not actually lower a lift over his supervisor, but rather only threatened such action. *Id.*

[15] *Id.* The arbitrator's opinion as reproduced by the supreme court in the text of its opinion stated in pertinent part:

> Grievant's total conduct in the normal context of his responsibilities to the Employer, merits discharge for cause.
>
> Normal[,] however, must include minimally, warnings by employer and a measure of progressive discipline. An employer, including the College, may not stand idly by while an employee accumulates a suffi-

appropriate since the College failed to criticize, warn, or discipline Muller before firing him.[16] The arbitrator also determined that the College erred in delaying Muller's dismissal until three weeks after he committed his most serious act of misconduct.[17] Consequently, the arbitrator determined that this delay constituted a tacit approval of the employee's prior conduct; therefore, the arbitrator reduced Muller's penalty of discharge to an eight month suspension without pay.[18]

The Association sought confirmation of the arbitrator's award pursuant to state statutory law in the Chancery Division of the Superior Court of New Jersey.[19] That court vacated the award, reasoning that the arbitrator had exceeded his authority by both adding to the terms of the contract and "reading in" to the collectively negotiated agreement the requirements for progressive discipline and immediate action by the College.[20] Upon finding Muller guilty of infractions that constituted proper

---

cient number of demerits to earn his walking papers. While in some CBA's or CNA's, progressive discipline as a prerequisite to industrial capital punishment is spelled out, same is also a standard which is read in by triers of fact/Arbitrators, absent facts and circumstances which can ill afford a warmup prior to discharge. A case in point is the September 16 or 17 contact under the lift, which reflects totally unacceptable conduct by Grievant, rating immediate discharge but nullified herein by College inaction until October 4, 1982, when Grievant was suspended. In the labor-management process, the employer may not quietly warehouse violations and then act, without prior warning. The inaction of the employer while the worker operates by rules contrary to standards, projects a sense of tacit approval, a license to do as one pleases without regard to job responsibility. In that sense, the employer contributed to ongoing breach by the worker, projecting false security to the latter.

Thus, in the instant proceeding the Grievant moved from one transgression to another, without fear or concern. The Management silence became an invitation to the next act of disregard for the worker obligation to the employer. While not meriting discharge on the succession of facts herein, Grievant must be penalized and also warned thereby, that his job is on the line.

Id.

16 *Id.* at 388, 495 A.2d at 868.

17 *Id.*

18 *Id.* at 388-89, 495 A.2d at 868.

19 *Id.* at 389, 495 A.2d at 868. The Association acted pursuant to N.J. STAT. ANN. § 2A:24-7 (West Supp. 1986) which states in pertinent part:

A party to the arbitration may, within 3 months after the award is delivered to him, unless the parties shall extend the time in writing, commence a summary action in the court aforesaid for the confirmation of the award or for its vacation, modification or correction. Such confirmation shall be granted unless the award is vacated, modified or corrected.

Id.

20 *County College of Morris*, 100 N.J. at 389, 495 A.2d at 868.

grounds for discharge, the chancery division held that the arbitrator was powerless to alter the contract to include terms which were not expressly part of the collective bargaining agreement.[21]

The appellate division reversed the trial court and found that the arbitrator "reviewed the entire employment relationship and balanced the degree of fault of the employee against the degree of fault of the employer" in deciding whether just cause was present to discharge Muller.[22] As a result, the appellate division, in a per curiam opinion, viewed the arbitrator's decision as a justified balancing of the equities.[23] According to the appellate division, although the arbitrator found that under normal circumstances Muller's conduct would warrant discharge, the fact that no progressive discipline was employed brought this matter out of the context of normal circumstances.[24] The appellate court's decision was based on the arbitrator's review of the employment relationship, the employer's failure to utilize progressive discipline, and the delay in Muller's discharge.[25] Therefore, the appellate division concluded that it was proper for the arbitrator to hold that dismissal was not an appropriate penalty.[26] The New Jersey Supreme Court reversed the appellate division's holding, and reasoned that because the contract specifically allowed dismissal for cause, prohibited modification of its terms, and expressly represented the complete bargain between the parties, the award should be vacated.[27] Progressive discipline and timely discharge were not required by the agreement itself, and the court thus determined that the arbitrator exceeded his authority.[28]

Arbitration is the process of placing disputes in the hands of an impartial, mutually agreed upon third party for a final, binding resolution.[29] Where provisions have been made to submit

---

21 *Id.* N.J. STAT. ANN. § 2A:24-8(d) (West Supp. 1986), states that a court may vacate the award of arbitrators "[w]here the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made." *Id.*

22 *County College of Morris*, 100 N.J. at 389-90, 495 A.2d at 868-69.

23 County College of Morris Staff Assoc. v. County College of Morris, No. A-215-83T2, slip op. at 6 (N.J. Super. Ct. App. Div. May 24, 1984), *rev'd*, 100 N.J. 383, 495 A.2d 865 (1985).

24 *Id.* at 3-4.

25 *See id.*

26 *See id.* at 6.

27 *County College of Morris*, 100 N.J. at 398-99, 495 A.2d at 873.

28 *Id.* at 390, 495 A.2d at 869.

29 Arbitration is defined as "[t]he reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the

disputes to an arbitrator, either in a collective bargaining agreement[30] or in another contract between employee and employer, the parties have made an affirmative choice to circumvent adjudication of the case or controversy in a court of law.[31] They have, therefore, determined to exchange the forum of the court with its established procedures and safeguards for a more informal tribunal.[32] In substituting for a trial judge, an arbitrator has the power to decide both matters of fact and law.[33]

The objective of arbitration is to expeditiously and inexpensively settle the differences of the parties thereto, as well as render an end to the dispute.[34] In labor industries, the benefits of arbitration are particularly significant, and as a result, arbitration clauses are common in labor agreements.[35] Collective bargaining agreements, as contracts which are designed to encompass all rights, duties, and obligations of employees and management, cannot foreseeably include provisions which antici-

---

arbitrator's award issued after a hearing at which both parties had an opportunity to be heard." BLACK'S LAW DICTIONARY 96 (5th ed. 1979).

30 A collective bargaining agreement is defined as an "[a]greement between an employer and a labor union which regulates terms and conditions of employment." BLACK'S LAW DICTIONARY 239 (5th ed. 1979). *See* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), wherein the United States Supreme Court described the collective bargaining agreement as a contract which does more than state the parties' rights and duties. *Id.* at 578. In the Court's view, "it is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Id.*

31 *See* Scheinholtz, *The Arbitrator as Judge and Jury: Another Look at Statutory Law In Arbitration*, 40 ARB. J. 55, 57-58 (1985) [hereinafter Scheinholtz]. Arbitration is procedurally different from a trial in its informality, and therefore, it tends to be expedient and inexpensive; however, due to this informality, the parties may not be afforded the same procedural due process as in a court. *Id. See also* Shulman, *supra* note 4, at 1016 where the author states that the role of the arbitrator is not identical to that of a trial court in that the parties choose the process and often the actual arbitrator, and the only authority of the arbitrator is that which the parties themselves granted to him in order to oversee their "system of self-government." *Id.*

32 *See* Shulman, *supra* note 4, at 1016; *see also* Daly v. Komline-Sanderson Eng'g Corp., 40 N.J. 175, 178, 191 A.2d 37, 38 (1963) (arbitrators review both law and facts); Ukranian Nat'l Urban Renewal Corp. v. Muscarelle, Inc., 151 N.J. Super. 386, 396, 376 A.2d 1299, 1304 (App. Div. 1977) (judicial review of arbitration awards limited).

33 *See supra* note 31.

34 *See, e.g.*, Timken Co. v. United Steelworkers of Am., 492 F.2d 1178, 1180 (6th Cir. 1974) (arbitration contributes to labor peace by being expeditious, inexpensive manner of settling disputes); Barcon Assoc. v. Tri-County Asphalt Corp., 86 N.J. 179, 187, 430 A.2d 214, 217-18 (1981) (object of arbitration is speedy and inexpensive disposition of controversial differences).

35 *See* United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) ("A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.").

pate every situation or contingency likely to arise in the workplace.[36] Accordingly, arbitration is intrinsically suited to resolving conflicts which arise from collective bargaining agreements not merely because of its expediency and informality, but also due to the flexibility accorded to arbitrators in their interpretations of agreements.[37]

Arbitration is further desirable because arbitrators are likely to have expertise in the particular industries that their respective disputes concern, as well as an awareness of the realities of the workplace.[38] Importance has traditionally been placed on the fact that arbitrators are able to apply their familiarity of the customs and practices of an industry, known as the "common law of the shop," to justly resolve grievances.[39] The ultimate goal of an arbitrator is to elicit the underlying intent of the negotiating parties regarding the particular conflict at hand from the language of the agreement, customary usage, equity, and an intuitive knowledge of the common law of the shop.[40] Consequently, the arbi-

---

[36] *See* Shulman, *supra* note 4, at 1004. The author noted that:

> No matter how much time is allowed for the negotiation, there is never time enough to think every issue through in all its possible applications, and never ingenuity enough to anticipate all that does later show up. . . .
>
> Though the subject matter is complex and the provisions intricate, the language must nevertheless be directed to laymen whose occupation is not interpretation—the workers in the plant, the foremen, the clerks in the payroll office.

Id.

[37] *Id.* at 1004-05.

[38] *See* Scheinholtz, *supra* note 31, at 57. The author stated:

> [a]s any industrial relations practitioner knows, an awareness of plant-level reality is essential to an informed arbitration decision. In fact, because of the importance of this factor on the outcome of arbitrated disputes, the parties generally expend a great deal of effort investigating the qualifications of potential arbitrators with a view toward ensuring a maximum degree of industrial awareness.

Id.

[39] *Id. See Warrior & Gulf Navigation Co.*, 363 U.S. at 579-80. Since the collective bargaining agreement is intended to govern the employment relationship as a whole, "[i]t calls into being a new common law—the common law of a particular industry or of a particular plant." *Id.* at 579. *See also* Mistletoe Express Serv. v. Motor Expressmen's Union, 566 F.2d 692, 695 (10th Cir. 1977) (in certain cases, it may be proper to rely on custom or usage to construe just cause provision as including requirement of progressive discipline).

[40] *See Warrior & Gulf Navigation Co.*, 363 U.S. at 581-82 ("The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.").

The New Jersey Supreme Court has also stated that an arbitrator can use several devices to discover the underlying intent of the parties including "consideration of the particular contractual provision, an overview of all the terms, the

trator is not always strictly bound by the literal terms of the contract.[41]

Despite the latitude traditionally accorded arbitrators in construing the language of an agreement, it is undisputed that they must adhere to what has been termed the essence of the contract in reaching their decisions.[42] The landmark case of *United Steel-*

---

circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct." Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208, 221, 405 A.2d 393, 400 (1979).

[41] *See* Rosa v. Transport Operators Co., 45 N.J. Super. 438, 442, 133 A.2d 24, 27 (App. Div. 1957) ("[A]n arbitrator does not always decide a case according to strict legal principles, but sometimes according to his own concept of what is just and right."). *But cf.* Public Util. Workers v. Public Serv. Co., 35 N.J. Super. 414, 114 A.2d 443 (App. Div.), *cert. denied*, 19 N.J. 333, 116 A.2d 828 (1955) (noting "primary rule is to ascertain intention of parties from entire instrument and effect a construction most equitable to the parties"). *Id.* at 419, 114 A.2d at 445.

In determining whether an arbitrator's award adheres to the essence of an agreement, a court must consider a number of factors. General principles of contractual interpretation, for example, are of substantial importance. *See, e.g.*, Brick Township Mun. Util. Auth. v. Diversified R.B. & T. Constr. Co., 171 N.J. Super. 397, 402, 409 A.2d 806, 808 (App. Div. 1979) (usual methods of contractual interpretation applicable to arbitration agreements giving maximum effect to parties' intentions).

When a contract is silent as to a particular situation, attempting to interpret an arbitral award as conforming to the terms of the agreement becomes more difficult. It is in these instances that arbitrators are frequently said to be dispensing their "own brand of industrial justice." *See* Buckeye Cellulose Corp. v. District 65, United Auto Workers, 689 F.2d 629, 631 (6th Cir. 1982). In *Buckeye*, an employee was discharged for vandalizing property. *Id.* The collective bargaining agreement permitted the employer to discharge employees for cause. The arbitrator found that the employee had caused the damage and the employer did not violate any rules by dismissing the employee. Relying on his own conception of fairness, the arbitrator reinstated the employee stating that the employer acted unfairly by withholding the name of a witness to the vandalism from the employee. *Id.* at 629-30. The court of appeals held that the arbitrator did not draw his reasoning from the "essence" of the contract since there was no express provision requiring the employer to divulge the names of any such witnesses. *Id.* at 631.

In the case of North Hudson Jointure Comm'n Educ. Assoc. v. North Hudson Jointure Comm'n. Bd. of Ed., A-3044-82T2 (N.J. App. Div. Jan. 25, 1984) (per curiam), the appellate division determined that an arbitrator did not adhere to the given principles of contract interpretation in awarding accumulated sick leave pay to employees of between ten and fifteen years when the school was being closed down. *Id.* at 9-10. The collective bargaining agreement provided that "teachers, upon retirement or when leaving the system after fifteen (15) years of service or upon death, shall receive terminal leave pay. . . ." *Id.* at 2. The court held that the arbitrator was without authority to include the closing of the school in the term "retirement" and therefore incorrectly made that section of the agreement applicable when he admittedly pointed out that the agreement was silent regarding the specific situation at hand. *Id.* at 10-11.

[42] *See infra* notes 43-50 and accompanying text (discussion of "essence" of an agreement).

workers v. Enterprise Wheel & Car Corp.,[43] defined the general scope of arbitrators' authority to resolve disputes in terms of the essence of the agreement.[44] In *Enterprise*, employees were fired for striking over the discharge of a co-worker.[45] The arbitrator decided to reinstate the employees and award back pay and held that, although their conduct was improper, discharge was not warranted.[46] The United States Supreme Court upheld the arbitrator's decision and concluded that where an award could be read as conforming with any possible interpretation of the agreement, it would not be set aside.[47] The Court stressed, however, that arbitrators were limited to an analysis of the terms of the agreement in rendering their decisions.[48] The Court further explained that the award should be derived in reason or fact from the agreement.[49]

---

[43] 363 U.S. 593 (1960).

[44] *Id.* In *Enterprise*, the Supreme Court enunciated the basic rules that arbitrators are to follow:

> an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet, his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Id. at 597.

[45] *Id.* at 595. The district court ordered the enforcement of the arbitration provision required under the contract's grievance procedures. *Id.*

[46] *Id.* The collective bargaining agreement provided that when employees were unjustly discharged, they had to be reinstated and paid full compensation. *Id.*

[47] *Id.* at 597-98. The Supreme Court recognized that while one interpretation of the arbitrator's award was that he looked to enacted legislation which was not within his authority per the submission of the parties, the award could nonetheless be read as a possible construction of the actual contract. *Id.* at 598. Moreover, the Court noted that "[m]ere ambiguity in the opinion" is not justification for a court to overturn the award. *Id.*

Many lower courts have advocated the principle that all possible interpretations of agreements must be considered when reviewing arbitral awards. *See, e.g.*, F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union, Local No. 781, 629 F.2d 1204, 1215 (7th Cir. 1980); Mistletoe Express Serv. v. Motor Expressmen's Union, 566 F.2d 692, 694 (10th Cir. 1977); Amanda Bent Bolt Co. v. International Union, United Auto, Aerospace, Agricultural Implement Workers, Local 1549, 451 F.2d 1277, 1280 (6th Cir. 1971); Adams v. Crompton & Knowles Corp., 587 F. Supp. 561, 563 (D.N.J. 1982); Litvak Packing Co. v. Amalgamated Butcher Workmen, Local No. 641, 455 F. Supp. 1180, 1181 (D. Colo. 1978).

[48] *Enterprise*, 363 U.S. at 597. According to the Court, the arbitrator had no alternative but to reinstate the employees because the plain, unambiguous language of the agreement, while capable of being supplemented, could not be ignored. *Id.* at 597-98.

[49] *Id. See also* Brotherhood of R.R. Trainmen v. Central of Ga. Ry. Co., 415 F.2d 403, 411-12 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970), where the court ex-

Courts are frequently faced with attempts by the drafters of labor agreements to limit the authority of arbitrators through the use of narrowly drawn arbitration clauses.[50] Two United States court of appeals cases illustrate the opposite results which can be reached depending on the presence of restrictive clauses.[51] In *Truck Drivers & Helpers Union Local 784 v. Ulry-Talbert Co.*,[52] the issue before the court was whether the arbitrator exceeded his authority by reinstating an employee who had been discharged.[53] The collective bargaining agreement empowered management with the right to discharge an employee for cause and vested the determination of what constituted cause entirely in the company.[54] It also specifically stated that dishonesty was a ground for discharge.[55] Additionally, the narrowly drawn arbitration clause stated that the arbitration board could not "add to, subtract from or in any way modify the terms of" the agreement and that it could not substitute its judgment for that of management.[56] The Eighth Circuit concluded that once the arbitrator had found the employee guilty of dishonesty, it was not within the essence of the agreement to permit the arbitrator to determine that discharge was too harsh a punishment due to the narrow constraints of this authority.[57]

---

plained the "essence test" through a reiteration of the requirement that the award must at least have a rationally inferable basis in the purpose or the language of the agreement. *Id.* at 412. "The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his authority. When he is no longer carrying out the agreement or when his position cannot be considered in any way rational, he has exceeded his jurisdiction." *Id.*

50 A narrowly drawn arbitration clause is one which generally denies the arbitrator the right to add, alter, modify or in any way change the agreement. F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 65-66 (3d ed. 1973). These restrictive clauses have been described as necessary and wise safeguards that protect the parties as well as elicit a confidence in the system of dispute resolution they have established. One author has expressed the opinion that arbitrators should respect such limitations on their authority in order to do justice to the parties' intent and to promote their own trustworthiness. Shulman, *supra* note 4, at 1008-09. *Contra* Philips, *Their Own Brand of Industrial Justice: Arbitrator's Excesses in Discharge Cases*, 10 EMPLOYEE REL. L.J. 48, 55-57 (1985) (discussing difficulty of obtaining restrictive arbitration clauses and fact that they are of little assistance in curbing the arbitrators' discretion).

51 *See infra* notes 52-62 and accompanying text.

52 330 F.2d 562 (8th Cir. 1964).

53 *Id.* at 563. Roy Owings was an employee of Ulry-Talbert Company and a member of the Truck Drivers & Helpers Union. He was discharged for dishonesty in falsifying his time sheets as to work hours. *Id.*

54 *Id.*

55 *Id.* at 563-64.

56 *Id.* at 564.

57 *See id.* at 564-66.

Alternatively, a broadly drafted arbitration agreement may provide an arbitrator with more flexibility to render an opinion as to the propriety of discharge, as demonstrated in the case of *Arco-Polymers, Inc. v. Local 8-74*.[58] In that case, the arbitrator was confronted with a collective bargaining agreement which contained two relevant clauses: one requiring just cause prior to dismissal of an employee, and another subjecting to discharge those employees missing over four days of work without providing satisfactory excuses.[59] The arbitration award ordered the reinstatement of a discharged employee even though the arbitrator concluded he had in fact unexcusedly missed over four days of work, and that such actions constituted just cause for dismissal.[60] The arbitrator reasoned that contrary to the employer's prior practices, progressive discipline had not been implemented with respect to the employee's absences during the preceding eleven months.[61] Thereafter, the Third Circuit upheld the agreement, and concluded that it was not beyond the arbitrator's authority to consider all the surrounding facts and circumstances in interpreting the agreement.[62]

In New Jersey, the legislature has statutorily promulgated the exclusive grounds upon which a court may review and vacate an arbitrator's award.[63] State law also provides that if the arbitra-

---

58 671 F.2d 752 (3d Cir. 1982).

59 *Id.* at 752-53.

60 *Id.*

61 *Id.* at 753.

62 *Id.* at 758.

63 *See* N.J. STAT. ANN. § 2A:24-8 (West Supp. 1987), which states in pertinent part:

> The court shall vacate the award in any of the following cases:
>
> a. Where the award was procured by corruption, fraud or undue means;
>
> b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
>
> c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;
>
> d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

Id. For examples of cases implementing the statute, see Barcon Assoc. v. Tri-County Asphalt Corp., 86 N.J. 179, 430 A.2d 214 (1981); Daly v. Komline-Sanderson Eng'g Corp., 40 N.J. 175, 191 A.2d 37 (1963); Local Union 560 v. Eazor Express Inc., 95 N.J. Super. 219, 230 A.2d 521 (App. Div. 1967). In *Barcon*, the court held that prior to the proceedings an arbitrator has a duty to disclose any substantial relationship or any prior transactions he may have had with any of the parties or

tor adheres to the essence of the contract, an award will be unimpeachable absent fraud, corruption, undue means, or an excess of authority.[64] When an arbitrator adjudicates a matter according to law and clearly misinterprets law, or decides the matter based on incorrect facts, the award may be overturned as one derived through undue means.[65] In the case of *Collingswood Hosiery Mills v. American Federation of Hosiery Workers*,[66] the New Jersey Supreme Court recognized that where such mistakes of fact or law are present, the award is invalid since, had the mistake been brought to the attention of the arbitrator, he would have admitted it and the justification upon which the award was based would have been nullified.[67] The court also noted that where an arbitrator did not intend to be bound by legal principles, but by "his own concepts of what is just and right," the court would not overturn the award due to a mistake of law.[68]

The *Collingswood* court further elaborated on the other various limitations which apply when the arbitrator purports to make his decision based on principles of law.[69] In the court's view, several factors must be established to justify vacating the award for a mistake of law: that the arbitrator was using principles of law in rendering the award; that the mistake of law was on some palpa-

---

else it is grounds for vacating the award pursuant to N.J. STAT. ANN.§ 2A:24-8(b) (West Supp. 1987). *Barcon*, 86 N.J. at 192, 430 A.2d at 220-21.

64 *See* Anco Prods. v. TV Prods. Corp., 23 N.J. Super. 116, 123-24, 92 A.2d 625, 629 (App. Div. 1952) ("every intendment is to be indulged in favor of" arbitral award and it will not be set aside absent dishonesty, misconduct, corruption, fraud, or undue means); International Assoc. of Machinists v. Bergen Ave. Business Owners Ass'n, 3 N.J. Super. 558, 565, 67 A.2d 362, 366 (Law Div. 1949) (award impeachable if "procured by corruption, fraud, or undue means"); West Jersey R.R. Co. v. Thomas, 23 N.J. Eq. 431, 433 (N.J. Ch. 1873), *aff'd*, 24 N.J. Eq. 567 (N.J. 1874). The *West Jersey R.R. Co.* court stated that "[a]n award cannot be reviewed and corrected or set aside . . . because it is erroneous, or because it is plainly excessive, unless the excess is clearly demonstrated, and is so great that it is not possible to account for it except by corruption or dishonesty of the arbitrators." *Id.*; *see also* Ruckman v. Ransom, 23 N.J. Eq. 118, 120 (N.J. Ch. 1872) (courts will only overturn an award upon very cogent reasons); Veghte v. Hoagland, 10 N.J. Eq. 45, 50 (N.J. Ch. 1854) (court should not interfere with arbitration award merely because arbitrator made error in judgment on merits).

65 *See* Held v. Comfort Bus Line, Inc., 136 N.J.L. 640, 641-42, 57 A.2d 20, 22 (N.J. 1948); *Local Union 560*, 95 N.J. Super. at 226-28, 230 A.2d at 524-25 (fact that arbitrator determined order of witnesses presented was not grounds for "undue means" argument, where there was no interference with introduction of all desired testimony); *Anco Prods.*, 23 N.J. Super. at 124, 92 A.2d at 629 (apparently inadequate or excessive award is not included within term "undue means").

66 31 N.J. Super. 466, 107 A.2d 43 (App. Div. 1954).

67 *Id.* at 470, 107 A.2d at 45.

68 *Id.* at 471, 107 A.2d at 45.

69 *Id.*

ble point; that the mistake was definite; and, that the arbitrator undoubtedly misapplied the law.[70] The court concluded that since the arbitrator clearly intended to decide the dispute based on his own notions of equity, the award could not be vacated for a mistake of law under the statute.[71]

New Jersey statutory law also provides for the setting aside of an arbitration award if an arbitrator exceeds his power or imperfectly executes it so that a "mutual, final and definite award" cannot be rendered.[72] The rationale behind the statute resembles the essence test, because in order to find that an arbitrator has exceeded his authority, the court must determine if the arbitrator's interpretation of the agreement's language would be "reasonably debatable in the minds of the ordinary laymen."[73] As with the essence test, the intent of the parties and the language of the agreement are still of paramount importance.[74] Factors such as the conditions which existed when the contract was negotiated, as well as the common law of the shop, are also to be considered.[75]

The New Jersey Supreme Court examined the circumstances under which an arbitrator exceeds his authority in *Communications Workers of America v. Monmouth County Board of Social Services.*[76] In that case, employees whose names were improperly removed from an employment promotion list sought retroactive pay for time lost from work.[77] The arbitrator granted back pay.[78] The

---

[70] *Id.* at 471-72, 107 A.2d at 45-46. In addition, the court noted that "the rule should be confined to case[s] where it appears that the arbitrator intended to leave his findings on the law open to revision" and "where the sole question submitted to arbitration is one of law—as, for example, a matter such as we have here, a question of construction where the facts are undisputed." *Id.* at 472, 107 A.2d at 45-46.

[71] *Id.* at 473, 107 A.2d at 46. The court, in deciding whether time served by an employee for a company which was taken over by the present owner could be included as time on the payroll for the purposes of a contract provision granting vacation pay after a specific period of service, held that the arbitrator did not *clearly* rely on legal principles. *Id.* (emphasis added). Accordingly, there were no grounds to vacate the award. *Id. Cf.* Carpenter v. Bloomer, 54 N.J. Super. 157, 168-69, 148 A.2d 497, 503 (App. Div. 1969) (award upheld when arbitrator's decision was based on principles of law and no mistake of law was apparent).

[72] *See supra* note 63 (text of N.J. STAT. ANN. § 2A:24-8(d) (West Supp. 1982)).

[73] Standard Oil Dev. Co. Employees Union v. Esso Research and Eng'g Co., 38 N.J. Super. 106, 119, 118 A.2d 70, 77 (App. Div.), *aff'd on reh.*, 38 N.J. Super. 293, 118 A.2d 712 (App. Div. 1955).

[74] *See* Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208, 221, 405 A.2d 393, 400 (1979).

[75] *See id.*

[76] 96 N.J. 442, 476 A.2d 777 (1984).

[77] *Id.* at 445, 476 A.2d at 778.

[78] *Id.* at 447, 476 A.2d at 779. The trial court vacated the arbitrator's award of

New Jersey Supreme Court addressed whether the contract limited the arbitrator's authority, and if so, to what extent.[79]

In evaluating whether the arbitrator had exceeded his power, the court first stated that his authority was limited, both in the procedure to be followed and in the substantive issues he might decide, by the delegated terms in the contract.[80] The court also noted that the agreement between the parties contained a narrowly drawn arbitration clause,[81] as well as specific restrictions with regard to granting back pay.[82] Furthermore, the court found that there was no evidence that at the time the parties entered into the contract their intent was anything other than that expressed.[83] In light of these factors, the court held that the arbitrator exceeded his statutory authority.[84]

Similarly, in *County College of Morris Staff Association v. County College of Morris*,[85] the New Jersey Supreme Court held that an arbitrator cannot read in terms which are not realistically within the body of a collective bargaining agreement.[86] Writing for the majority, Justice Clifford opined that the arbitrator had in fact found just cause sufficient to discharge the employee, and therefore, specific contractual limitations required that the arbitrator enforce his dismissal.[87] Specifically, the court noted three collectively bargained limitations on the arbitrator's interpretive powers: grievances were "confined to a misinterpretation of the express terms of the contract;" there was a "fully bargained for" clause; and the arbitrator was prohibited from altering or modifying the parties' agreement.[88] In order to overcome the contractual constraints, the court concluded that the arbitrator had read

---

retroactive back pay and reasoned that the employees were public officers and as such the "no work-no pay" rule applied. *Id.* Therefore, the officers could not be compensated for services not rendered. *Id.* The appellate division reinstated the arbitrator's award after determining that the employees were not officers and therefore were not subject to the "no work-no pay" rule. *Id.* at 448, 476 A.2d at 779.

79 *Id.*

80 *Id.* at 448-49, 476 A.2d at 779-80.

81 *See supra* note 50 for an explanation of a narrowly drawn arbitration clause.

82 *See Communications Workers*, 96 N.J. at 451-52, 476 A.2d at 781. The agreement did not expressly provide for retroactive back pay when an employee was denied a promotion. *See id.*

83 *Id.* at 452, 476 A.2d at 781.

84 *Id.*

85 100 N.J. 383, 495 A.2d 865 (1985).

86 *Id.* at 398, 495 A.2d at 873.

87 *Id.* at 392, 495 A.2d at 870. According to the court, in order to uphold the validity of the discharge, the arbitrator was bound by the express terms of the agreement. *Id.*

88 *Id.* at 392-93, 495 A.2d at 870.

the requirements of progressive discipline or prior warnings by the employer into the contract as a condition of discharge for just cause.[89] Accordingly, the court held that the arbitrator had exceeded his authority by reading these requirements into the contract.[90]

In analyzing the award, the court maintained that the arbitrator had erred in refusing to sustain the College's discharge of the employee on the basis of progressive discipline.[91] Consequently, the court determined that the award did not draw its essence from the agreement, since it neither expressly nor impliedly required such action by the College.[92] Because other labor contracts specifically included provisions for prior warnings, the court concluded that the decision to use these measures were terms for negotiation.[93] According to the majority, progressive discipline and warnings prior to discharge were terms for which the employer would expect some *quid pro quo* or which would be derived through the bargaining process.[94]

---

89 *Id.* at 393, 495 A.2d at 870.

90 *Id.*

91 *Id.* at 393-94, 495 A.2d at 870-71.

92 *See id.* at 394-95, 495 A.2d at 871. The court noted that various options were available to the arbitrator which would have justified his finding that the discharge was inappropriate. *Id.* at 393-94, 495 A.2d at 871. For example, had the circumstances warranted, the arbitrator could have found the employee not guilty of the charges. *Id.* Alternatively, he could have found that even though the infractions were committed by the employee, they were insufficient to uphold discharging the employee. *Id.*

93 *Id.* at 395, 495 A.2d at 871-72. The court reviewed several cases in which the collective bargaining agreement expressly included either conditions which specifically constituted grounds for discharge or situations where progressive discipline was to be employed. *See id.* For example, the court cited Mistletoe Express Serv. v. Motor Expressmen's Union, 566 F.2d 692 (10th Cir. 1977), where the agreement provided that the employer could discharge an employee for "just cause." *Id.* at 694. The court further listed the infractions which would constitute "just cause" for dismissal. *See id.* The list included the situation involved in the case before the court, namely, the failure on the part of the employee (a driver/salesman) to collect the money for deliveries within 24 hours. *Id.* The circuit court held that since the failure to settle bills was an infraction within the agreement sufficient for immediate dismissal, the arbitrator exceeded his authority by holding that due to the lack of progressive discipline by the employer there was no "just cause" to warrant discharge. *Id.* at 694-95. The *Mistletoe* court also emphasized the fact that there was neither evidence concerning the parties' intent at the time the contract was negotiated respecting the use of progressive discipline, nor any showing of such custom and usage in the industry. *Id.* at 695. In light of the fact that the contract contained language expressly contrary to the decision of the arbitrator, the court concluded that his reasoning was not drawn from the "essence" of the agreement. *Id.*

94 *County College of Morris*, 100 N.J. at 394-95, 495 A.2d at 871-72. Upon determining that progressive discipline is generally made part of the agreement, the court noted that further determinations must be made by the parties. *Id.* at 395,

The plaintiff maintained that the arbitrator did not actually find just cause for dismissal, but reasoned that since progressive discipline was not implemented, there was no just cause to warrant the employee's permanent removal.[95] The majority, however, refused to tolerate such a reading of the requirements of progressive discipline or prior warnings by the arbitrator.[96] The court found no showing that similar industries have adopted such incremental discipline as a matter of custom and usage.[97] Additionally, the court expressly recognized that although arbitrators do have the authority to balance the equities in a case by reviewing the actions of the employer, the arbitrator's authority "to decide what is fair and just is at all times limited by the intent of the parties as manifested by the terms of their contract."[98] Upon finding that just cause existed to warrant dismissal, the arbitrator in the present case was prohibited by the terms of the contract from requiring further disciplinary measures.[99]

The majority also criticized the arbitrator's conclusion that the College waived its right to discharge the employee because of its delay.[100] In its view, such a conclusion would lead to two irreconcilable situations: if the employer's delay was necessary to investigate the facts surrounding the charges, he would lose the power to later dismiss the employee; on the other hand, if the employee was discharged immediately after an alleged infraction, the employer would be subject to scrutiny for having possibly acted in haste without sufficient information to substantiate the charges.[101] While the court acknowledged that the employer must act within a reasonable time after the employee's conduct, in this case it found no manifestation of prejudice or unfairness.[102]

In a dissenting opinion, Chief Justice Wilentz interpreted the

---

495 A.2d at 871-72. These include an agreement as to which acts will require progressive discipline, the extent it is to be employed, and which acts will not require the incremental disciplinary measures. *Id.* "Typically, it is left to the parties to specify in the contract the answers to these questions, if progressive discipline is to be resorted to at all." *Id.* at 395, 495 A.2d at 872.

95 *Id.* at 392, 495 A.2d at 870.

96 *Id.* at 396, 495 A.2d at 872. The majority relied not only on the lack of express terms in the agreement, but also on the fact that the arbitrator gave no authority which would support his action of "reading in." *Id.*

97 *Id.*

98 *Id.* at 397, 495 A.2d at 873.

99 *Id.*

100 *Id.* at 398, 495 A.2d at 873.

101 *Id.*

102 *Id.*

decision of the arbitrator as finding that just cause did not exist.[103] As such, the dissent did not read the award as literally as the majority. Rather, Chief Justice Wilentz interpreted the arbitrator's award as stating that while this employee's conduct would, under ordinary circumstances of his employment, be sufficient grounds for discharge, just cause did not exist given the conditions of this particular employer/employee relationship.[104]

The dissent also criticized the majority's finding that, as a matter of law and absent some specific terms in the contract, custom, or usage in the industry, an arbitrator may not consider the lack of incremental discipline in its determination of just cause.[105] To support its opinion, the dissent referred to the numerous extra-contractual factors upon which an arbitrator may rely when rendering his decision, such as the employer/employee relationship, the length of employment, and prior similar acts by the employee.[106] Furthermore, Chief Justice Wilentz placed great emphasis on the importance of using pro-

---

103 *Id.* at 399, 495 A.2d at 873 (Wilentz, C.J., dissenting).

104 *Id.* at 400, 495 A.2d at 874 (Wilentz, C.J., dissenting). The chief justice stated his view as follows:

> Noting that the arbitrator has said that "grievant's total conduct . . . merits discharge for cause," the Court disregards the intervening clause ("grievant's total conduct *in the normal context of his responsibilities to the Employer* merits discharge for cause") and its obvious meaning—made clear beyond doubt by the succeeding paragraphs of the arbitrator's opinion. The arbitrator is saying that if what happened here was in the "normal context" of plaintiff's work, there would be just cause for discharge; but since it was *not* normal (no prior warnings, no prior lesser discipline, instead employer inaction conveying to the employee a sense of tacit approval) there was *no* just cause, i.e., the succession of facts did not merit[] discharge. This interpretation by the Court drains the arbitrator's opinion of its true meaning, and, having thus drained it, the Court can go on to conclude that the arbitrator's award does not draw its essence from the parties' agreement.

Id. (emphasis in original).

105 *Id.* at 400-01, 495 A.2d at 874-75 (Wilentz, C.J., dissenting).

106 *Id.* at 402-03, 495 A.2d at 875-76 (Wilentz, C.J., dissenting). The dissent noted the following factors:

> [t]he extent of prior similar acts, without warning or discipline by the employer; the tacit approval of such conduct by the employer; the employer's general dealings with the employee, and with all employees; the kind of employment; the number of years of service—these and innumerable other factors, including, not in the least, the impact of discharge or lesser discipline on labor relations—all of these play a legitimate and important part in the arbitrator's "just cause" determination. It cannot be seriously contended that a collective bargaining agreement must *explicitly* allow for their consideration in order for the arbitrator to weigh them in determining just cause.

Id. (emphasis in original).

gressive discipline and warnings in the industrial workplace.[107] Moreover, he noted that a determination of just cause would necessarily include such considerations because employees must have reason to believe that certain acts or conduct will constitute grounds for dismissal.[108] Relying on this rationale, the dissent deduced that unless expressly stated to the contrary, an arbitrator has the implied power to consider "any and all circumstances that he deems relevant" in determining just cause.[109]

Finally, the dissent stated that, in addition to progressive discipline, the employer's actions after the occurrence of alleged misconduct also play an important role in the arbitrator's determination of just cause.[110] Therefore, the dissent concluded that given the employer's tacit approval of the employee's conduct and its delay in action, the failure of the arbitrator to find just cause for dismissal was justified.[111] In Chief Justice Wilentz's view, what occurred both before and after the employee's infrac-

---

107 *Id.*

108 *Id.* at 403, 495 A.2d at 876 (Wilentz, C.J., dissenting). The dissent noted that while some acts, such as failure to return a hammer to the proper tool rack, may not be sufficient to constitute just cause for dismissal, they may warrant discharge if, after prior warnings or lesser discipline, the infractions continue. *Id.* at 402-03, 495 A.2d at 875-76 (Wilentz, C.J., dissenting). On the other hand, some acts, such as stealing the employer's property, so threaten the workforce or the employer that they are obviously grounds for immediate discharge. *Id.*

109 *Id.* at 403, 495 A.2d at 876 (Wilentz, C.J., dissenting). In reaching this conclusion, the dissent reasoned that an arbitrator has the undisputed capacity to impose lesser discipline than discharge where the circumstances provide. *Id.* In fact he can implement a system of progressive discipline through his decision. *Id.* Therefore, he has the implicit authority to declare that progressive discipline should have been used when making his just cause determination. *Id.*

110 *Id.*

111 *Id.* at 404-05, 495 A.2d 876-77 (Wilentz, C.J., dissenting). The arbitrator's conclusion could be deemed reasonable in light of the "chronology of events" surrounding the employee's repeated conduct and the employer's failure to either discipline or warn the employee. The dissent concluded that an examination of the employee's infractions and the employer's subsequent inaction would place the rationale behind the award in the proper perspective. The dissent also stated that:

> on August 26 [the employee] falsified time records—no warning, no discipline; September 14, falsified time records and was insubordinate concerning such records—no warning, no discipline; the same day, September 14, used College property for personal purposes without authorization—no warning, no discipline; September 16, threatened to lower lift on supervisor—no warning, no discipline; September 17, falsified time records—no warning, no discipline; September 24, falsified time records—no warning, no discipline; the same day (September 24) left College equipment (welding equipment and tools) unattended after leaving early—no warning, no discipline; September 29, falsified time records—no warning, no discipline; October 8, discharged.

Id. at 404, 495 A.2d at 876 (Wilentz, C.J., dissenting).

tions and the significance of those occurrences were factors for the arbitrator, and not for the court to decide.[112]

The majority's holding in *County College of Morris* is extremely limited. Essentially, the case stands for the proposition that the failure of an employer to institute a system of progressive discipline, where the labor contract does not explicitly require it, cannot be considered by the arbitrator in adjudicating what constitutes just cause for dismissal.[113] In drafting the majority opinion, Justice Clifford appears to have intentionally avoided language restricting the powers of an arbitrator to use his own notions of equity, fairness, industry practices, or the common law of the shop in formulating an award.[114] The court also emphasized that other circumstances may exist by which an arbitrator might look to the use of progressive discipline and timely action.[115] In so doing, the court ensured that its decision would not be considered judicial overreaching. Nevertheless, the court enforced the constraints on arbitral authority which were expressed in the agreement itself.[116] Such restrictions, coupled with the silence of the agreement as to the implementation of incremental discipline, required the arbitrator to uphold the dismissal once he found the employee guilty of the charges.[117]

The majority interpreted the arbitrator's opinion literally[118]

---

112 *Id.* at 405, 495 A.2d at 876-77 (Wilentz, C.J., dissenting).

113 The court noted that:

> Even after finding the employee was guilty of the specified charges of misconduct, the arbitrator was free to apply his special expertise and determine that these offenses do not rise to a level of misconduct that constitutes just cause for discharge. Had the arbitrator so concluded, we assume that the proper remedy would have been a disciplinary penalty less severe than that of discharge.

Id. at 394, 495 A.2d at 871.

114 In particular, the court stated "[w]e emphasize that our conclusion that it was improper for the arbitrator in this case to have added a requirement of progressive discipline to the parties' contract carries with it no implication that an arbitrator is powerless to balance the equities." *Id.* at 397, 495 A.2d at 872.

115 *Id.* at 392, 495 A.2d at 870. However, the court did not elaborate any further as to what circumstances might properly require an employer to use progressive discipline. *See id.*

116 *Id.*

117 *Id.* The court read the words used by the arbitrator in his opinion and asserted that he "specifically and unmistakably determined there was just cause to dismiss the employee." *Id.*

118 *Id.* at 388-89, 495 A.2d at 868. The court reviewed the arbitrator's conclusions that the employee's "total conduct in the normal context" of his employment mandated discharge for cause, but that "normal . . . must include . . . warnings by an employer and a measure of progressive discipline." *Id.*

and it specifically analyzed the determination of the arbitrator.[119] The court construed the arbitrator's decision as attempting to require that progressive discipline be considered prior to a determination of just cause.[120] In comparing the agreement to its interpretation of the arbitrator's words, the majority found that no contractual interpretation could support the arbitrator's reasoning.[121] The court thereby avoided undermining the principle that all possible constructions of an award must be considered and an award must be upheld if it can be rationally drawn from the agreement.[122] Rather, the court relied on the principle that if an agreement is unambiguous in its terms, the arbitrator does not have the power to circumvent the inevitable conclusions resulting from adherence to the agreement.[123]

The majority's opinion implies that although an arbitrator's decision will be reviewed to give credence to any possible interpretations of the contract, the plain words of the arbitrator may not be manipulated in an attempt to have them comport with the terms of an unambiguous agreement.[124] Such reasoning simultaneously recognizes that collective bargaining agreements are unique contracts, much like constitutions, because they form the basis of self-government in particular industries.[125] In fact, such literal readings of arbitrators' opinions seem to reaffirm the judiciary's limited role in reviewing arbitral decisions to determine if the intent of the parties to the agreement has been fulfilled.[126]

---

119 *Id.* at 393, 495 A.2d at 870.

120 *Id.*

121 *Id.*

122 *See, e.g.*, Buckeye Cellulose Corp. v. District 65, Div. 19, United Auto Workers, 689 F.2d 629, 631 (6th Cir. 1982) (where arbitrator based conclusions on grounds of fundamental fairness and not on violation of the terms of agreement, court held that award was not drawn from essence of contract and arbitrator exceeded scope of his authority).

123 *See* Grand Rapids Die Casting Corp. v. Local Union No. 159, United Auto., Aerospace and Agricultural Implement Workers, 684 F.2d 413, 416 (6th Cir. 1982). After reading the arbitrator's decision, the court held that "the only reasonable conclusion to draw from the arbitrator's opinion is that the basis for the decision was his disapproval of the procedures" promulgated in the collective bargaining agreement. *Id.*

124 In *County College of Morris*, the majority did not derogate the viewpoint that when a collective bargaining agreement does not specifically state what acts constitute just cause, the question is properly left to an arbitrator. The court, however, reaffirmed the principle that the arbitrator's decision must be sufficiently explanatory so that a court can clearly identify the foundation and basis of the award. *See, e.g.*, Ballwin-Washington, Inc. v. International Assoc. of Machinists and Aerospace Workers, District No. 9, 615 F. Supp. 865, 870 (E.D. Mo. 1985).

125 *See* Cox, *supra* note 3, at 1492.

126 *See County College of Morris*, 100 N.J. at 392, 495 A.2d at 870.

Clearly the court could not as easily have set aside the award had the arbitrator justified the requirement of progressive discipline, either by references to some express terms of the agreement or to past conduct or industry practices.

Despite the majority's reiteration that "it is clear that the arbitrator found that Muller's conduct was sufficiently improper as to merit discharge for cause,"[127] the court failed to consider that just cause can be interpreted to require both substantive cause and a degree of procedural fairness. Other courts have determined that, when an arbitrator is deciding just cause, he is free to look at both the substantive nature of the employee's conduct as well as the procedure undertaken by the employer in the process of dismissal, even if the agreement is silent as to such matters.[128] Courts which have adopted such an approach have rationalized their decisions by concluding that the arbitrators legitimately resolved ambiguities caused by contractual silence and had not made unauthorized modifications of labor agreements.[129] With such a two-tiered definition of just cause, an arbitrator may conceivably find that an employee's commission of an infraction which substantively warrants dismissal may in turn be mitigated by an employer's unfairness in implementing the discharge. An arbitrator may therefore determine that the actions may not conjunctively rise to the level of just cause.[130]

---

127 *Id.*

128 *Id.* *See* Chauffeurs, Teamsters and Helpers Local Union No. 878 v. Coca-Cola Bottling Co., 613 F.2d 716 (8th Cir.), *cert. denied*, 446 U.S. 988 (1980), where the arbitrator reinstated an employee who had been discharged based on a single act of dishonesty without being given an opportunity to explain his version of the incident. *Id.* at 721. Although the agreement permitted discharges for "just cause" and no provisions were made as to the requirement on the part of the employer to follow certain procedures, the court upheld the arbitrator's award. *Id.* at 717. In effect, the arbitrator determined that there was "just cause" providing that "due process was followed in handling the discharge." *Id.* Due to the fact that there was no procedural fairness on the part of the employer, the employee's dismissal fell "short of the just cause standard." *Id.* Interestingly, in *Chauffeurs*, the arbitrator was faced not only with a narrowly drawn arbitration clause limiting his power to alter the agreement, but the agreement also explicitly permitted discharge for even one act of dishonesty without any prior warning. *Id.* at 718-19. *See also* Commissioners of Middlesex Cty. v. American Fed'n of State, Cty. & Mun. Employees, AFL-CIO, Local 414, 372 Mass. 466, 362 N.E.2d 523 (1977) (arbitrator considered fact that prior warnings were not used previous to dismissal of employee in determining just cause for discharge did not exist); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 500 (1976) ("on the bare words 'just cause' arbitrators have built a comprehensive and relatively stable body of both substantive and procedural law."). *Id.*

129 *Chauffeurs*, 613 F.2d at 718.

130 *Id.* at 719-20. The court stated that the term "just cause" is ambiguous in its

Ultimately, the majority's position finds its greatest support not in the mere existence of a narrowly drawn arbitration clause, but from additional restrictions placed on the arbitrator's authority found elsewhere in the agreement.[131] These restrictions, including the "fully bargained for" language and the fact that contractual grievances were limited to a "misinterpretation of the express terms of the contract," severely limit the arbitrator's capacity to interpret the agreement.[132] Perhaps the majority's decision would have been more comprehensible if the agreement had expressly provided for progressive discipline and timely action, and the arbitrator had nevertheless upheld the employee's discharge. In so doing, the arbitrator would clearly have exceeded his authority by ignoring the terms of the contract. Similarly, the majority would not have been as amenable to an agreement which did not manifest an intent to restrict the arbitrator's powers.

The overturning of an arbitrator's award which could be justified by the terms of the agreement tends to nullify the bargain and is contrary to the public policy which favors private resolu-

---

procedural implications, and as such, it is quite proper for an arbitrator to apply his own interpretation as to what constitutes "just cause." *Id.* at 719. The *Chauffeurs* decision specifically distinguished the case of Mistletoe Express Serv. v. Motor Expressmen's Union, 566 F.2d 692 (10th Cir. 1977). *See id.* at 720; *see also supra* note 93 for a discussion of *Mistletoe*. The *Chauffeurs* court implied that *Mistletoe* solely deals with the substantive aspect of "just cause" and, therefore, does not stand for the proposition that an arbitrator cannot look at the procedural fairness involved to determine if indeed "just cause" is present for dismissal. *Chauffeurs*, 613 F.2d at 720. The majority in *County College of Morris*, however, relied on the *Mistletoe* decision and held that "[o]nce the arbitrator had applied his special expertise and found the plaintiff guilty of misconduct sufficient to warrant discharge, then the limits on his power required that the employee be dismissed." *County College of Morris*, 100 N.J. at 392, 495 A.2d at 870. The difference, according to the *Chauffeurs* court, is that the arbitrator in *Mistletoe* concluded that substantively there was just cause and the arbitrator's opinion did not concern the procedural aspects of the employee's discharge. *Chauffeurs*, 613 F.2d at 720.

The majority in *County College of Morris* did not seem to consider that the procedures followed by an employer in disciplining an employee might be an element of "just cause." Even if the majority had taken this theory into consideration, it apparently would require the progressive discipline procedure to be expressly stated in the contract. The court acknowledged the "rule that the employer has a duty to abide by principles of procedural fairness when imposing discipline, and in disciplinary matters management is required to judge all employees by the same standards," but then stated that the power of an arbitrator to decide what is fair is at all times limited to the intent of the parties as manifested in the agreement. *County College of Morris*, 100 N.J. at 397, 495 A.2d at 872-73.

[131] *See supra* notes 50-62 and accompanying text for a discussion of narrowly drawn arbitration clauses.

[132] *County College of Morris*, 100 N.J. at 387-89, 495 A.2d at 867-68.

tion of labor disputes.[133] Courts should not look to the merits of an arbitrator's opinion, but should only ensure that he remains within the parameters set forth in the agreement. Had the *County College of Morris* majority merely relied on the narrowly drawn arbitration clause, the court might have appeared to have been reviewing the merits of the arbitrator's decision.[134] Such rulings have met with criticism.[135] Certainly a court cannot camouflage its disagreement with an arbitrator's determination of what constitutes just cause under the guise of calling it an addition or modification of the agreement resulting in an excess of authority. Thus, the straightforward approach to both the terms of the agreement and the words of the arbitrator was unavoidable.

The *County College of Morris* decision appears to be most applicable in those situations in which there are abundant constraints on the arbitrator's authority. The court has provided a framework for future interpretation of labor agreements as well as arbitral awards. If an arbitrator faced with such constraints intends to rely on his capacity to interpret agreements by utilizing his own knowledge, experience, industry practices, and the common law of the shop, his opinion should clearly and unambiguously set forth its sources and justification for their use, including any foundation in the agreement itself. Furthermore, the court specifically stated that it viewed progressive discipline as a subject for negotiating parties to consider when agreements are created.[136] Reserved for future determination, however, is whether an arbitrator will be held to have read in to the agreement such terms as progressive discipline, either where the agreement itself is void of restrictive arbitration clauses or where—despite restrictions in the agreement—the arbitrator can support such a determination by references to industry practices or the past conduct of the employer.

Bettyann Babjak

---

133 *See supra* notes 52-57 and accompanying text. *See also* Jacinto v. Egan, 391 A.2d 1173 (R.I. 1978) ("[I]f the loser in arbitration has even modest prospects of winning in court, litigation is encouraged and the essence of arbitration—the conclusiveness of the award—is thereby defeated."). *Id.* at 1178.

134 The dissent in fact read the majority's opinion in just that manner stating: "[t]he majority is obviously convinced that this employee should have been fired." *County College of Morris*, 100 N.J. at 399, 495 A.2d at 873 (Wilentz, C.J., dissenting).

135 *See generally* R. GORMAN, LABOR LAW 589-90 (1976).

136 *County College of Morris*, 100 N.J. at 395, 495 A.2d at 871.