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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

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FOP V. COP

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Case No.: SA-23-000027. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. McVay, Jr., J. August 27, 2023

Pa.R.A.P. 1925(b) OPINION

FACTS AND PROCEDURAL HISTORY

On 8/16/2023, the Petitioner, City of Pittsburgh (the "COP") filed this appeal of my 7/18/2023 Order sustaining the Arbitrator's opinion and award upholding the Fraternal Order of Police, Fort Pitt Lodge No. 1 (the "FOP") grievance. Their grievance was filed on behalf of Thomas Mignogna ("Sgt. Mignogna"), a Sergeant employed by the COP, contending that the COP violated the parties' Collective Bargaining Agreement ("CBA") pursuant to the Pennsylvania Labor Relations Act and Act 111 of 1968 ("Act 111"), by terminating Sgt. Mignogna from employment without just cause. See, J. Ex. 2. (R.256a).[1]

Specifically, the COP charged Sgt. Mignogna with submitting overtimes cards for time he did not spend working, resulting in Sgt. Mignogna receiving a five (5) day suspension followed by termination of employment. See, J. Ex. 2. (R.258a). The FOP defended Sgt. Mignogna's conduct by asserting that he went home for lunch and while home, he had performed administrative duties for the Homeless Outreach Pilot Program Bicycle Detail (the "Program" or "Detail"). The COP denied the grievance and an arbitration before the Tripartite Board of Arbitrators was demanded. See, J. Ex. 2. (R.354a).

Two (2) Act 111 grievance arbitration hearings were held on 11/18/2022 and 12/12/2022, in which the parties presented both written and oral evidence with examination and cross examination of witnesses and compilation of a complete record. Afterwards, the Arbitrator issued his opinion and award, presented his findings of fact, applicable law, analysis, and sustained the FOP's grievance in part and denied in part. A majority of the arbitration panel determined that the COP did not establish just cause, in accordance with the CBA, to terminate Sgt. Mignogna's employment. However, the Arbitrator found that the COP had just cause to discipline Sgt. Mignogna for failing to properly account for all the time he worked. The Arbitrator reduced the discipline to a five (5) day suspension (which Sgt. Mignogna had already served) and directed the COP to reinstate Sgt. Mignogna's employment and make him whole for the difference in the benefits he received from Worker's Compensation and the Heart and Lung Act. See, J. Ex. 2. (R.353-355a).

The COP timely filed a Statutory Appeal of Local Agency/Award of Arbitrator, pursuant to 42 Pa. C.S.A. § 933(b). By Order entered on 7/18/2023, I denied the COP's Statutory Appeal/Petition for Review of Decision of an Arbitrator, finding that the Arbitrator did not exceed his authority by violating the terms of the CBA and Act 111. On 8/17/2023, after receiving the notice of appeal filed on 8/16/2023, I ordered the COP to file a concise statement of errors within twenty-one (21) days pursuant to Pa.R.A.P. 1925(b).[2]

STANDARD OF REVIEW

The standard of judicial review of an Act 111 grievance arbitration award is "narrow certiorari," which allows the court to review only four areas: (1) the question of jurisdiction of the arbitrator; (2) the regularity of the proceedings; (3) questions of excess in exercise of powers; and (4) constitutional questions. N. Berks Reg'l Police Comm'n v. Berks Cty. FOP, Lodge #71, 230 A.3d 1022, 1034 (Pa. 2020).

DISCUSSION

Under the applicable standard of review narrow certiorari test, I first find that the Arbitrator exercised proper authority and did not exceed his jurisdiction, and properly addressed the issues presented to him, i.e., whether Sgt. Mignogna's failure to document his time properly constituted "just cause" warranting termination of employment.

"To decide whether an arbitrator has jurisdiction, a court must determine whether the law empowers an arbitrator to adjudicate the general class of controversies, to which the subject of the dispute belongs." City of Arnold v. Wage Pol'y Comm. of City of Arnold Police Dep't, 171 A.3d 744, 749 (Pa. 2017). Section 1 of Act 111 states, "policemen…have the right to bargain collectively with their public employers concerning the terms and conditions of their employment…and shall have the right to an adjustment or settlement of their grievances or disputes in accordance with the terms of the act." Id. The Legislatures intended for the reviewing court to view the scope of collective bargaining broadly under Section 1 of Act 111, to encompass any subject that is rationally related to the 'terms and conditions of employment'. Id. at 749-750.

Further, the Pennsylvania Supreme Court has held that an arbitrator has jurisdiction when the grievant's issue is encompassed within the demand for arbitration. City of Philadelphia v. Fraternal Order of Police, Lodge No. 5, 768 A.2d 291, 298 (Pa. 2001). An arbitrator has jurisdiction to adjudicate the class of disputes arising out of a CBA between a public employer and…police employees, rationally related to the terms and conditions of their employment; an argument that an arbitrator mediated a dispute that is not of this general type presents a question of jurisdiction. Id. The Pennsylvania Supreme Court has recognized, in terms of the arbitrator's authority, an arbitrator's broad authority to address terms and conditions of employment. City of Pittsburgh v. Fraternal Ord. of Police, Fort Pitt Lodge No. 1, 224 A.3d 702, 712 (Pa. 2020). Act 111 defines "terms and conditions of employment" as including officer discipline. 43 P.S. § 217.1; Pennsylvania State Police v. Pennsylvania State Troopers' Ass'n, 656 A.2d 83, 90 (Pa. 1995). Awards concerning the termination or suspension of employment are related to the terms and conditions of employment. Id at 80.

After reviewing the reproduced record and the Arbitrator's opinion and award, I found that officer discipline was within the Arbitrator's jurisdiction and that he did not exceed his authority by violating the terms of the CBA and Act 111. At the time of the arbitration hearings, the COP submitted its issue as, "did the COP have just cause to terminate the grievant, Sgt. Mignogna, for submission of false and fraudulent overtime cards, in violation of General Order 16-01, Sections 3.6, 3.17, and 3.19?" However, the FOP did not stipulate to the COP's statement of the issue, and instead submitted its own issue as, "whether COP had just cause to

terminate Sgt. Mignogna, and if not, what shall the remedy be." See, R.5a. Thus, the parties did not have an agreed-upon issue.

Importantly, "just cause" is not specifically defined in the Police Civil Service Act ("PCSA"). Pennsylvania Game Comm'n v. State Civil Serv. Comm'n (Toth), 747 A.2d 887, 892 (Pa. 2000). However, courts have indicated that this standard "must be merit-related and the criteria must touch upon competency and ability in some rational and logical manner." Id. Section 4 of the CBA identifies the COP's rights regarding issuing disciplinary action, but it is limited by providing that discipline issued by the COP is subject to the "just cause" requirement of proof under the CBA, and the determination of sufficient evidence to merit "just cause" is itself subject to a grievance and to arbitration. See, R.30a, R.131a, R.144a, CBA Section 4 (B), and 53 P.S. § 23539.1(a). CBA Section 4 (B) and 53 P.S. § 23539.1(a) of the PCSA, states in pertinent part:

> "The parties recognize that the procedure for appointments, promotions, and reduction of force, suspensions, and discharges is as provided by the Police Civil Service Act for Cities of the Second Class as amended as of January 1, 1976 (53 P.S. § 23531, et seq.)…No employee in the competitive or non-competitive class in the bureau of police except any such employee who has been convicted of a felony and whose appellate remedies have been exhausted, shall be removed, discharged, suspended, demoted or placed on probation, except for just cause which shall not be religious or political…"

The CBA uses the term "just cause" throughout the agreement, but the PCSA has not specifically defined the "just cause" requirement, aside from excluding religious or political motive. Because officer discipline is recognized as a 'term and condition of employment,' it makes it subject to collective bargaining between the parties. Under CBA Section 5 (B)(3), the grievance procedure defines a grievance as, "any disciplinary resulting in discharge, suspension, written reprimand, or demotion. The employee may elect to grieve any such disciplinary action to arbitration before a tripartite arbitration panel selected in accordance with the police discipline appeals procedures of the contract." The record is clear that the parties followed the proper procedure and filed a grievance regarding Sgt. Mignogna's discipline and termination, which was ultimately resolved by a tripartite arbitration hearing and award. The arbitration panel had the authority and jurisdiction to hear this matter, which plainly arose out of the parties CBA.

Furthermore, it is obvious to me that "just cause" for discipline is a class of dispute explicitly arising out of the FOP's CBA under Act 111. The Arbitrator's consideration of whether the COP had just cause to discipline Sgt. Mignogna under the procedures of the PCSA, incorporated by reference into the CBA, was encompassed within the FOP's demand for arbitration. The COP is required to follow the "just cause" standard in matters related to employee discipline under 53 P.S. § 23539.1(a). The Arbitrator did not determine whether Sgt. Mignogna violated the specific sections of the CBA, but rather, decided that just cause did not fit the punishment of termination from employment that the COP imposed against him. The Arbitrator specifically found that Sgt. Mignogna failed to properly document administrative work he performed on duty, rather than steal time as the COP argued. The Arbitrator found that the Program was a self-directed overtime detail with essentially no standard operating procedures for the officers working the detail. The Arbitrator found that Sgt. Mignogna was not required to obtain approval for his thirty (30) minute lunch break, nor had a supervisor to report to during the shift. I found that discipline and just cause were correctly within the Arbitrator's jurisdiction and authority, and the award was rationally related to the terms of the CBA, specifically the discipline and termination of Sgt. Mignogna's employment.

Second, I find that the Arbitrator was within its' powers to determine the violation and remedy, including the rejection of the COP's asserted violations and mitigating discipline. Act 111 grievance arbitrators possess the full authority to require a municipality to take any action that it is voluntarily able to perform. City of Butler v. City of Butler Police Dept., Fraternal Order of Police Lodge No. 32, 780 A.2d 847 (Pa. Cmwlth. 2001). Under the limited review of an Act 111 grievance arbitration award, for a court to set aside a provision of an award, the arbitration panel must have either mandated an illegal act or granted an award which addresses issues outside of and beyond the terms and conditions of employment. Id. at 850. When arbitrators review a challenge to an award, every presumption is made in favor of the arbitrator's award pursuant to Act 111. 43 P.S. § 217.4(a); In re Arb. Award Between Yoder Twp. Police & Lower Yoder Twp., 654 A.2d 651 (Pa. Cmwlth. Ct. 1995). "Just cause" sufficient to support removal from employment has been consistently defined by the Commonwealth Court of Pennsylvania as conduct which is related to the employee's job performance and touches in some rational and logical manner upon the employee's competency and ability." State Correctional Instn. at Pittsburgh, Dept. of Corrections v. Adamson, 567 A.2d 763, 765 (Pa. Cmwlth. 1989), citing Doerr v. Pennsylvania Liquor Control Board, 491 A.2d 299 (Pa. 1985).

Under the limited review standard, I found that the Arbitrator's award did not mandate an illegal act, i.e., a five (5) day suspension and reinstatement of Sgt. Mignogna with back pay and benefits. In addition, the issues addressed by the Arbitrator, "the determination of just cause and the form of discipline" were not outside the terms and conditions of employment pursuant to the CBA.

Because the COP bears the burden of proof to show "just cause" for discipline of an officer, it must do so by presenting "substantial evidence" to merit just cause to discipline. State Correctional Instn. at Pittsburgh, Dept. of Corrections, 567 A.2d 763; Wagner v. Com., Dept. of Transp., 463 A.2d 492, 494 (Pa. Cmwlth. 1983). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Lewis v. Civ. Serv. Commn., City of Philadelphia, 542 A.2d 519, 522 (Pa. 1988), citing Clites v. Township of Upper Yoder, 485 A.2d 724, 726 (Pa. 1984). "Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established." Id., citing Pennsylvania State Board of Medical Education and Licensure v. Schireson, 61 A.2d 343, 346 (Pa. 1948).

I found that the Arbitrator properly determined, based on Sgt. Mignogna's job performance, competency, and ability, that the COP did not have sufficient support to remove him from employment. It is clear that the evidence submitted by the COP at best raised a suspicion that Sgt. Mignogna had intentionally submitted overtime cards for the time he did not work. The Arbitrator made specific findings that Sgt. Mignogna failed to properly document the administrative duties that he had performed during the detail and that this was unintentional. No direct evidence was submitted by the COP to prove that Sgt. Mignogna intentionally "stole time" from the COP. As stated above, the Arbitrator found that the Program was a voluntary, self-directed overtime detail with essentially no standard operating procedures for the officers working the detail. The Arbitrator found that Sgt. Mignogna was not required to report to anyone upon starting or ending the detail, he had no supervisor to report to during the shift, and he was not required to obtain approval for his thirty (30) minute lunch break. The Arbitrator's opinion did not specifically find that Sgt. Mignogna falsified his timecards on 3/17/2022 and 3/31/2022, and that he did not steal time, and thus concluded that the COP had just cause to discipline Sgt. Mignogna in the form of a five (5) day suspension only.

Under the narrow certiorari standard, the trial court may review questions of whether an arbitrator exceeded its exercise

of powers. Act 111 does not limit an arbitrator's authority to only accept or reject the proposed resolution of specific issues. Township of Wilkins v. Wage and Policy Comm. of the Wilkins Tp. Police Dept., 696 A.2d 917, 922 (Pa. Cmwlth. 1997). "Once an issue is properly placed in dispute, arbitrators are free to resolve that issue in a fair manner within the total context of the award." Id. An arbitrator has some flexibility to craft an award that addresses the issues raised by the parties. Wilkins Township v. Wage Policy Comm. of Wilkins Township Police Dept., 162 A.3d 581, 590 (Pa. Cmwlth. 2017), citing Board of Supervisors of Butler Township v. Butler Township Police Department, 621 A.2d 1061, 1064 (Pa. Cmwlth. 1993). Act 111 requires that an award must involve only terms and conditions of employment and may not address issues outside of that realm. Pennsylvania State Police, 54 A.3d at 133; 43 P.S. § 2171.1, et. seq. "It is clear that if an award bears no rational relationship to the terms or conditions of employment or acts solely on a managerial prerogative, the arbitration board has exceeded its statutory powers under Act 111 and the award must be set aside." City of Philadelphia v. Int'l Ass'n of Firefighters, Local 22, 999 A.2d 555, 570 (Pa. 2010).

It is apparent that the issue placed before the Arbitrator was whether Sgt. Mignogna's failure to properly document his overtime records warranted a just cause finding and whether termination was the proper discipline. I found that under both Township of Wilkins and Wilkins Township, the Arbitrator had flexibility and was free to make a determination in a fair manner within the total context of the award and I could not override his award. 696 A.2d at 922; 162 A.3d at 590.

Typically, an arbitrator's scope of authority is determined by the agreement or submission, and they usually hold the authority to decide questions of law and fact which arise in the matter. 6 C.J.S. Arbitration § 101. "An arbitrator's authority extends to only those issues that are actually presented by the parties, and an arbitrator exceeds his or her authority by reaching issues not raised by the parties." Id. Arbitrators must address the issues submitted within the context of the positions of the parties and effectuate the relief requested. Michael G. Lutz Lodge No. 5, of Fraternal Ord. of Police v. City of Philadelphia, 129 A.3d 1221, 1230 (Pa. 2015), citing Marple Twp. v. Delaware County FOP Lodge 27, 660 A.2d 211, 215 (Pa. Cmwlth. 1995). "As long as an award concerns terms and conditions of employment, and the arbitrator does not require the performance an illegal act, or one that a party could not do voluntarily, the authority prong of narrow certiorari review is generally met." City of Pittsburgh, 224 A.3d at 712.

A contract must be construed only as written and may not modify the plain meaning under the pretext of interpretation. Nevyas v. Morgan, 921 A.2d 8, 15 (Pa. Super. 2007). However, when a labor contract is silent or lacks language dealing specifically with an issue, an arbitrator is permitted to draw conclusions related to the issue. Sch. Dist. of City of Allentown v. Hotel and Rest. Employees Intern. Union, Loc. No. 391, AFL-CIO, 654 A.2d 86, 89 (Pa. Cmwlth. 1995). If a CBA fails to define a term, then it is within the arbitrator's sphere to interpret the provision. McKeesport Area Sch. Dist. v. McKeesport Sch. Serv. Personnel Ass'n, PSSPA/PSEA, 585 A.2d 544, 546 (Pa. Cmwlth. 1990), citing Am. Fedn. of State, Cnty. and Mun. Employees, Dist. Council 88, AFL-CIO v. City of Reading, 568 A.2d 1352, 1357 (Pa. Cmwlth. 1990).

As interpreted by both Sch. Dist. Of City of Allentown and McKeesport Area Sch. Dist., the parties' contract and Act 111 do not define "just cause," therefore the Arbitrator was within his authority to interpret the provision and draw conclusions as to what constituted just cause and whether the discipline issued was correct. 654 A.2d at 89; 585 A.2d at 546. I found that the parties placed Sgt. Mignogna's discipline and termination in dispute and the Arbitrator resolved the issue in a fair manner. The Arbitrator properly exercised his powers to craft the award addressing the just cause issue raised by both parties. I found that the lack of just cause determined by the Arbitrator was rationally related to the terms and conditions of Sgt. Mignogna's employment and the CBA, and that his termination was not solely a managerial prerogative.

Further, I found that the Arbitrator addressed the issues submitted within the context of the positions of the parties, specifically Sgt. Mignogna's discipline and termination, which falls under the terms and conditions of employment under the CBA. The Arbitrator was presented with issues regarding the disciplinary actions of Sgt. Mignogna's employment. Under Section 5(C)(3)(b), the CBA provided the limits placed upon the arbitrator's powers as, "the arbitrator shall not have the right to add to, subtract from, modify, or disregard any of the terms or provisions of the agreement." The Arbitrator did not modify the agreement; however, he simply exercised his flexibility to modify the issues presented by the parties. The Arbitrator did not require any performance of illegal acts, nor issue an award that a party could not do voluntarily. As stated earlier, the Arbitrator did not determine whether Sgt. Mignogna violated the specific sections of the CBA, but rather, decided that just cause did not fit the punishment of termination from employment that the COP imposed against him. The Arbitrator specifically found that Sgt. Mignogna failed to properly document administrative work he performed on duty, rather than steal time as the COP argued. I found that the Arbitrator did not exceed his authority because he did not reach issues that were not raised by the parties.

Additionally, Section 19 (I)(14) of the CBA expressly states that, "the arbitrator shall fashion a remedy in their sole discretion." I found that the Arbitrator properly concluded that the CBA was silent as to the meaning of "just cause." Because the PCSA has not defined the term "just cause" within the context of the CBA, I found that the Arbitrator did not exceed his exercise of powers and had the proper authority to draw conclusions regarding the interpretation of "just cause" based on the evidence presented to determine the appropriate award. Thus, the Arbitrator did not exceed his exercise of power in determining the "just cause" standard and his award issuing a five (5) day suspension only against Sgt. Mignogna.

Lastly, the COP has asked me to decide whether the judiciary in the Commonwealth of Pennsylvania should retire the narrow certiorari standard of review for arbitration awards under Act 111. This matter has never been raised before me and I am not inclined to overrule a standard of review that has been long established and applied by the higher courts of Pennsylvania.

CONCLUSION

For the foregoing reasons, and as previously stated, I denied the COP's Statutory Appeal/Petition for Review of Decision of an Arbitrator pursuant to 42 Pa. C.S.A § 933(b), and found that the Decision of the Arbitrator, Christopher Miles, had proper jurisdiction, followed the proper grievance/arbitration procedure, and did not exceed his authority by violating the terms of the CBA and Act 111.

BY THE COURT:
/s/The Hon. John T. McVay, Jr.

[1]All exhibit references are to the Reproduced Record. J.Ex. refers to Joint Arbitration Exhibits; (R.#) refers to Reproduced Record Exhibit No.

[2] For purposes of this opinion, I have adopted the FOP's procedural history of the case.

WEBER

Custody

Father petitioned to modify custody, wherein he sought an award of primary custody, which necessitated that the Child move back to Allegheny County. The trial court had previously granted Mother's request to relocate to North Carolina, with the Child, in 2019. The trial court denied Father's modification petition. The trial court further reduced Father's partial custody, finding that the prior arrangement was too disruptive, given that the Child was now school-age.

Case No.: FD-13-000236-008. Superior Court docket no. 1014 WDA 2023. In the Court of Common Pleas of Allegheny County, Pennsylvania. Family Division. Bubash, J. October 27, 2023.

PROCEDURAL AND FACTUAL BACKGROUND

Father, D.K. (hereinafter "Father") appeals from my July 12, 2023, Final Custody Order[1] which denied Father's Modification Petition. I also issued another order that day granting, in part, Father's Motion for Special Relief which Order directed that the exchanges would take place at a Sheetz service station in Beckley, West Virginia at 2:00 p.m. In all other respects, Father's Motion for Special Relief was denied.

My Order should be affirmed because it was within my discretion to deny Father's Modification Petition and the requests for relief raised in his subsequent Motion for Special Relief and those rulings were in the best interests of the parties 8-year-old child, L.K.

This is the second trial in which Father requested primary custody.[2] In the four years since the first Order was entered, the parties have continued to litigate various matters of dispute that have arisen. The docket reveals several "Emergency" custody petitions or motions, several requests for special relief as well as competing claims of contempt. The parties appeared several times before custody hearing officers to address the contempt claims. Pursuant to Motions presented by Mother, the 2019 custody order was modified twice. On July 2, 2020, I ordered that Mother would have one week of vacation time during Father's summer custody. In an Order dated December 13, 2019, Mother was granted custody from 2:00 p.m. through 6:00 p.m. on Thanksgiving, Christmas, and New Year's Day if she was Pittsburgh. The result of all of the Orders provided father with approximately 104 days of overnight custody per year.

In March 2023 Father presented this new Petition to relocate the Child to Pittsburgh and for Primary Custody. He claimed that Mother's new occupation as a firefighter, combined with her obligation to her youngest children, left her unable to provide appropriate care for their son, L. K. He argued that his flexible schedule permitted him to give their son that attention. He also referenced incidents he described as "domestic disturbances" between Mother and her Husband, Sean Bridges that caused him concern for his son's well-being. I then appointed a Guardian Ad Litem for L.K., Matthew Rogers, Esq., who submitted his written Report and Recommendation on July 5, 2023.

Rogers testified consistently with his report. Much of his report was based on what he was told by L.K. B. was not interviewed[3], and Mother was interviewed over the phone while father and son were interviewed in person. The GAL recounted the claims made by L.K. regarding the level of conflict in the house and believed that to be a "prominent issue". N.T. 72 I did not, however, given the credible testimony of B, give much credence to those claims. While I respect the GAL's opinion and appreciate his hard work, I had a more thorough record having heard live testimony from the parties and others with relevant information. I also reached different conclusions as to credibility. Those determinations led to my conclusions and my decision to deny the request to change custody.

A trial followed on July 12, 2023, at the conclusion of which I placed on the record my analysis of the Custody Factors and my decision to deny the Relocation and Modification requests. An Order setting forth the custody schedule was issued on July 12, 2023, but not immediately docketed. Father then presented, on August 2, 2023, a Motion for Special Relief that included a request that I reconsider my July 12, 2023, Order and, in the alternative, that I clarify aspects of the Order. As set forth above, that Motion was denied but for a provision setting a location for custody exchanges. The July 12, 2023, Order was docketed, and this appeal followed on August 29, 2023.

In his Concise Statement, Father has asserted the following errors:

1. In denying his Petition for Reconsideration, which sought permission to relocate L.K. to Pittsburgh.
2. In "significantly" changing the underlying custody order such that the child's custody time with Father was reduced from approximately 111 days per year to 59.
3. In finding that Father did not provide sufficient evidence to support the Petition for Modification.
4. In refusing to order psychological evaluations for the parties and child.
5. In finding that the evidence submitted supported the decision to deny the Petition for Modification.
6. In finding that the evidence submitted supported the decision to modify custody such that Father had 52 less days of custody.

DISCUSSION

These parties have historically had a very difficult time co-parenting Child due to their inability to properly communicate with each other. This was evident at the trial held four years ago and, unfortunately, has continued through the present. I found then and believe today that the fault for this lack of communication lies with both parties.

I do find, however, that Mother's testimony, and the other evidence she presented, was more credible than Father's. While Mother's antipathy towards Father is clear and her resulting conduct not appropriate and should stop, I believe she was truthful in her testimony regarding her interactions with her son and her description of life in her home with her children and her husband. This testimony was largely corroborated by her teenage daughter, B., who, in my view, was the most credible witness in these proceedings.

As I stated at the conclusion of the trial, I did not find the testimony of the Child, L.K., at all credible. I commented then, and still believe after reading the transcript, that L.K. was coached by Father as to what to tell me to an extent I have never observed in any other case. He is a lovely child; but one whose love for his Father makes him also very gullible and easily led by his Father to repeat claims that Father believes advance his legal position. Father and son often used the exact words to describe

events, both stating that they learned about an incident between Mother's husband and teenagers in their neighborhood because "it was all over the internet." Both also acknowledged that Father discussed these and other matters with L.K. at length in anticipation of this trial. When asked, "[A]nd did you talk to your dad today about what you should tell me just to make sure?", he responded, "A couple of days ago he was talking about stuff I have been telling him and— ". N.T. 19. I also asked him "What do you guys do, sit down and go over all of the issues?" and answered, "Uh-huh." N.T. 30. L.K then described how Father explained to him that Mother doesn't understand how her arguments with her husband affect him because Mother's parents were never separated but that he understands L.K. because his were. N.T. 30.

Father also told him that if he lived with him, "…he would learn more" than he does living with Mother and that he would "eat better" with him that with Mother. N.T. 33. L.K. said that Father talks to him about these matters every day in an "organized way." N.T. 33. He even described how Father rehearses what he would say, "Like, I tell him stuff and then he goes, okay, land then he kinds of thinks it in his head and then we go over more stuff and I just tell him that stuff and then he like tells me back to make sure that I remember all the stuff I am telling him." N.T. 33. L.K. also described the incident with the neighborhood teenagers mentioned above and said that he learned about it because Father found the story on the internet, showed it to him and talked to him about it. N.T. 48. Father later admitted that while he was "preparing his case" he was watching a video about the incident when L.K. asked him what he was doing. He proceeded to show his son the video and discuss it with him. N.T. 155.

It is clear to this Court that since the entry of the 2019 order, Father has been gathering evidence he believed would help him change custody. He mined any negative information about Mother he could from his son, intending to use it to eventually seek a change in custody. He also was preparing his son to testify regarding these incidents, going over them with him, having him repeat them, showing him the video of the incident with the teenagers and making an "organized" list of things L.K. would give as his reasons for wanting to live with Father.

In addition, Father told his son that when he moved in with him, they would get a "big house" in Mt. Lebanon, that he would attend Mt. Lebanon schools which were far superior to his school in North Carolina, that he would eventually attend Central Catholic and play football there. Father made a concerted effort to reinforce in L.K, how much better life would be with him both by pointing out the negatives about living with his North Carolina family and how much better life could be if it was just L.K. and Father. One exchange was particularly troubling to me. It occurred when Father was discussing emails Father sent to Mother after Father learned from L.K.'s school that he was upset one day. Father was told that L.K. told his teacher and principal that he missed his mother who was attending the fire academy to become a firefighter. I asked Father if L.K, was missing his mother and he said that he "…could not understand it." N.T. 140. When I then asked if his son would be upset and missing his mother if he lived in Pittsburgh, he responded "no because Child "… has a really good time here." N.T. 140. This showed a complete and utter lack of concern for the effect that taking L.K, away from his Mother and his half siblings would have on him.

I do not believe that there is any domestic violence in Mother's home as described by L.K. and Father. I don't doubt that Mother and her husband argue, but I find B.'s denials that the incidents described by L.K. took place credible. Unlike the clearly rehearsed and learned testimony from L.K., I saw no evidence that B. was told what to say. I also found Father's testimony regarding his consistent lateness in picking up and returning Child from his periods of custody not to be credible.

On issues of credibility and weight of the evidence, the Superior Court defers to "the findings of the trial judge who has had the opportunity to observe the proceedings and demeanor of the witnesses." Billhime v. Billhime, 869 A.2d 1031, 1036 (Pa.Super.2005) (citation omitted). In this case, I found that Father could see only his good qualities as a Father, but also artificially and negatively portrayed Mother and attempted to negate her very real role in the Child's life as his primary custodian. In short, Mother and B were credible while Father and L.K. were not.

1. PETITION TO RECONSIDER

In his first claim, set forth in Paragraph 2 in his 1925(b) Statement, Father alleges that I erred in denying his Petition to Reconsider which sought leave to have L.K relocate to Pennsylvania. However, Father did not challenge my decision to deny his relocation request in that portion of his Motion for Special Relief entitled "Request for Reconsideration." He only asked that I reconsider the change in his partial custody schedule that he contends reduced the number of days he would have custody of L.K. This claim was summarized in the closing paragraph of the Request for Reconsideration which states, "Father most respectfully submits that this drastic reduction in his visitation custody time was neither requested by Mother nor called for by the evidence submitted at trial and it not in the best interests of the child." Defendant's Motion for Special Relief, at ¶ 7. Because Father did not raise a specific challenge to my decision to deny his relocation request in either the Petition to Reconsider or his Concise Statement, this claim is waived and my decision on relocation could be affirmed on that basis alone. However, even if this challenge had been preserved properly, it has no merit.

When asked to permit a child to relocate with a parent in a custody matter, a Court must consider the factors found at 23 Pa. C.S.A. § 5337 (h), which are:

> (1) The nature, quality, extent of involvement and duration of the child's relationship with the party proposing to relocate and with the nonrelocating party, siblings and other significant persons in the child's life.
>
> (2) The age, developmental stage, needs of the child and the likely impact the relocation will have on the child's physical, educational and emotional development, taking into consideration any special needs of the child.
>
> (3) The feasibility of preserving the relationship between the nonrelocating party and the child through suitable custody arrangements, considering the logistics and financial circumstances of the parties.
>
> (4) The child's preference, taking into consideration the age and maturity of the child.
>
> (5) Whether there is an established pattern of conduct of either party to promote or thwart the relationship of the child and the other party.
>
> (6) Whether the relocation will enhance the general quality of life for the party seeking the relocation, including, but not limited to, financial or emotional benefit or educational opportunity.

> (7) Whether the relocation will enhance the general quality of life for the child, including, but not limited to, financial or emotional benefit or educational opportunity.
>
> (8) The reasons and motivation of each party for seeking or opposing the relocation.
>
> (9) The present and past abuse committed by a party or member of the party's household and whether there is a continued risk of harm to the child or an abused party.
>
> (10) Any other factor affecting the best interest of the child.

I found that the first three factors weigh heavily against the proposed relocation. The Child has been in Mother's primary care since birth. For over half of his life, he has lived with her, his older half-sister and stepfather in North Carolina. Two other half siblings joined the family over the last four years. He has attended all of his schooling in North Carolina. Clearly, he has strong relationships with his Mother and siblings; relationships that would be detrimentally affected were he to relocate to live with his Father in Pittsburgh. In North Carolina, he has school friends, he plays sports, and he engages in other activities with his siblings. I believe that allowing this relocation would be detrimental to his educational and emotional development. I also have profound concern that living with Father most of the time would be harmful to him physically. Father does not seem to understand that being overweight has harmful, physical effects. The Child gained an alarming amount of weight over the summer with his father and his father does not express any concern over that. He has also allowed his son to participate in weightlifting, a practice that is not suited for an 8-year-old. The child clearly has better eating habits and is overall healthier when in his Mother's care. It is evident that Factor 3 relating to preserving Father's relationship has been satisfied by the first Order of court.

As to Factor 5, I have concerns over whether Father would work to preserve his son's relationship with his mother. He has engaged in a course of conduct clearly intended to give him an advantage in these proceedings. I fear that would continue should he have L.K. in his custody for prolonged periods of time. Mother, on the other hand, despite her poorly hidden animosity towards Father, has made sure he spent time with his Father as provided for in the prior Order. Her mother took on sole responsibility for transporting L.K. back and forth between Pittsburgh and North Carolina, a trip of about 8 hours each way. She often did this on weekends, taking him to Pittsburgh Friday and returning him to his Mother's on Sunday. I have no doubt Mother would continue to facilitate a relationship between L.K. and his Father.

I gave little consideration to L.K.'s stated preference (Factor 4) due to Father's obvious efforts to enlist his son in his effort to secure custody. L.K.'s testimony was rehearsed and prepared with Father's help. L.K.'s young age and lack of maturity made him an ideal candidate to be influenced by his Father. These efforts constituted an established pattern of conduct by Father to thwart L.K.'s relationship with Mother and call into question Father's motivation or reasons for seeking the relocation.

Relocation will not enhance the quality of Father's life since he is not relocating. It will, however, negatively affect the Child's quality of life, taking him from his family, friends and school. accordingly, Father's claim that I erred in denying the Request for Reconsideration regarding the denial of the relocation request is waived.

I weighed these factors and concluded that they tipped the scales dramatically against allowing relocation. Accordingly, both because the claim was waived and because it was, regardless of waiver, meritless, my denial of the request to relocate should be affirmed.

In his second[4] claim father complains that I erred changing custody because he claims that the change in the change reduced his total days of overnight custody. I would note that this claim is identical to Father's sixth[5] claim which avers I committed legal error in reducing Father's days of custody. Moreover, in his third[5] and fifth[6] claims, he argues that the evidence was not sufficient to support Father's request for modification. All these claims raise the same challenge, albeit in different terminology, to my decision in this matter denying Father's Petition to Modify. And, although they lack specificity, I take them to mean that I failed to properly weigh and apply the statutory custody factors. As they raise the same essential claim, they will be addressed together.

Father does not specify how the Court erred. He makes general claims of "legal error", without explaining the basis for that claim. He does not identify which of the custody factors were determined against him in error. The lack of specificity, alone, would be a sufficient reason to find that these claims are waived and affirm my decision on that basis. Our Superior Court wrote:

> A concise statement of errors complained of on appeal must be specific enough for the trial court to identify and address the issues the appellant wishes to raise on appeal. Commonwealth v. Reeves, 907 A.2d 1, 2 (Pa. Super. 2006) (quoting Lineberger v. Wyeth, 894 A.2d 141, 148 (Pa. Super. 2006)). Pennsylvania Rule of Appellate Procedure 1925 provides that a Rule 1925(b) statement "shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge." Pa.R.A.P. 1925(b)(4)(ii). "Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived." Pa.R.A.P. 1925(b)(4)(vii). See also Commonwealth v. Lopata, 754 A.2d 685, 689 (Pa. Super. 2000) (stating that "[a] claim which has not been raised before the trial court cannot be raised for the first time on appeal").

S.S. v. T.J., 313 A.3d 1026, 1030-1031 (Pa. Super 2019). Although the Concise Statement lacks the specificity generally required by Rule 1925(b), it is apparent that Father is claiming that I failed to properly weigh and apply both the statutory custody factors of 23 Pa. C.S. §5328. When I announced my decision at the conclusion of the trial, I emphasized the factors which I found were entitled to the most weight in this case. I will assume that his Concise Statement, although poorly drafted, is a challenge to that analysis. I would begin by noting that "[I]t is within the trial court's purview as the finder of fact to determine which enumerated best interest factors are most salient and critical in each particular child custody case." M.J.M. v. M.L.G., 63 A.3d 331, (Pa. Super.2013); app. den. 68 A.3d 909. I will briefly review my findings regarding those factors.

2. CUSTODY FACTORS

a. 5328 (a) (1): I found in my 2019 decision that while both parents did a "fairly good job" of allowing frequent contact, Mother was more likely than Father to encourage a relationship with the other parent. The testimony I heard at this trial reinforces that belief. Father seemed intent on instilling in his son a negative view of Mother and her husband as part of his preparation for another custody trial. Driving this wedge between L.K. and Mother is inconsistent with "encouraging and permitting contact" with the child and Mother. Mother has been the sole provider of transportation for L.K. between Pittsburgh and North Carolina, largely because of maternal Grandmother's willingness to take on much of this burden. And Father has taken advantage of grandmother's kindness by keeping L.K. longer during his weekends, thereby delaying grandmother's departure and causing her to have to make the 8-hour drive to North Carolina at night. Father has done nothing to lift that burden by offering to occasionally provide transportation himself, offering to meet halfway or even visit his son in North Carolina, something he is permitted to do. His professed fear of Mother's new husband, a retired North Carolina State Trooper, is not a credible excuse for not traveling to see his son.

b. 5328 (a) (2): As set forth more fully above, I find that there was no abuse or domestic violence. There certainly may have been arguments that were not something L.K. experiences in his Father's home as Father lives alone. I credit the testimony of Mother and her daughter, B. in their adamant denial that the incidents L.K. described happened as he described them.

c. 5328 (a) (2.1): As there was no allegation of child abuse or involvement by child protective services, this factor was not considered

d. 5328 (a) 3: I find that both can provide the parental care necessary. Both are involved in L.K.'s school and other activities and he is not neglected in either home.

e. 5328 (a) (4): This factor weighs heavily in Mother's favor. The stability and continuity of his life has been established over the last four plus years he has lived in North Carolina. It is where he attends school, participates in out-of-school sports and where his two younger and one older sibling reside. I find that Father's conduct has contributed to whatever instability there is in L.K.'s life. Father convinced him that life would be better with Father. He has told him the schools are better here, they will live together in a "big house" in Mt. Lebanon, L.K. will hang out with high school athletes whom Father trains, will eat better, and have more attention from his parent. And he coached or "trained" his son to parrot those opinions in the trial. I firmly believe that, despite Father's claim otherwise, L.K. would miss his mother and the rest of his North Carolina family terribly were I to change custody. Such a change would create the opposite of the stability and continuity he requires.

f. 5328 (a) (5): The fact is that most of L.K.'s extended family do live in the Pittsburgh area. However, he has three siblings with whom he lives in North Carolina. And Father has proven that L.K. has been able to maintain his relationship with both sides of his extended family in Pittsburgh during his visits here and during the summer when he spends extended time with his Father. I don't think this factor weighs either way.

g. 5328 (a) (6): As pointed out, the Child lives in North Carolina with his only siblings. If he lived with Father in Pittsburgh, his relationships with his siblings would suffer greatly

h. 5328 (a) (7): Although L.K. clearly stated his preference, I do not find that it was well reasoned. His preference was a product of Father's long-term effort to get his son to say the "right things" to me when in Court. The reasoning, that the schools are better, he would eat better, he would have a parent's undivided attention and would get to live in a "Big House" with his Father, all flowed from Father. That was glaringly obvious from the testimony of both L.K. and Father. Just as the positives of living in Pittsburgh were drilled into L.K. by Father, so were the negatives of living with Mother. Father encouraged him to tell him all about any problems in Mother's household and then seemingly had him practice repeating them. The only reason L.K. knew so much about the incident involving his stepfather and some neighborhood kids was because Father showed him the video and talked with him about it. Everything that L.K. described regarding that incident came from the video his father showed him.

i. 5328 (a) (8): Closely related to the prior factor, is factor 8, whether a parent attempted to turn the child against the other parent. Father clearly engaged in a pattern of conduct designed to do just that. He did it both by painting a picture of how wonderful life would be if it were just L.K and Father living in Pittsburgh and by creating a narrative of how poorly he was treated in his Mother's home. Dad was the "fun dad", the summer vacation dad, the weekend dad. Mother, however, made him go to school, do chores, and consider the feelings of others in the home. She worked, leaving him alone with a stepfather who he could not accept without feeling disloyal to his Father. Mother had three other kids to care for, a husband to consider and a job that did not allow for the flexibility Father enjoyed on his weekends and summer visits. That did not make her an inattentive Mother to L.K. Father intentionally created a contrast in L.K.'s mind between the two homes that had to have been intended to turn L.K. against his Mother and in favor of his Father.

j. 5328 (a) (9): While I have no doubt that Father loves his child and could tend to his physical, emotional, developmental, and educational needs; I believe that he is harming him through his attempt to create these contrasting worlds that do not actually exist. Life in the custody of his father will not be the nirvana Father claims and life in the custody of his Mother is not the hell he portrays. Reinforcing these false narratives is harmful to L.K. now and will affect him as he matures. I am greatly concerned that this will not end if Father were granted custody as he requests, but would continue, and would damage the Child. Further, Father's denial that the child returned home overweight and that lifting weights is appropriate is concerning.

k. 5328 (a) 10: Proximity of residences is not an important factor in my decision. They have lived hours apart for over four years and have both managed to be active, involved parents.

l. 5328 (a) 11: The conflict between the parties is well established; both from the testimony I heard at trial and a perusal of the docket in this matter. These parties do not like one another and have a difficult time communicating with one another without rancor. Though they share the fault for this, I find that Father allows his desire to secure custody to color his actions. He sends long daily emails to his son's teacher. That is crossing a boundary. And while he professes that he does so to simply monitor his son's progress, he also uses these communications to undercut mother in the eyes of the school officials; to cause them to question to what is going on in Mother's home.

m. 5328 (a) (14) & (15): I heard no evidence regarding any party or other family member having a problem with drugs and/or alcohol or suffering from any mental or physical condition that would be relevant.

Finally, Father's complaint that I erred in modifying custody in a manner that I reduced his number of overnight custody days is without merit. When I crafted the custody order in 2019, the Child was four years old and at least a year or two away from mandatory school attendance. He is now 8 and attends school. Father's summer custody meant that the child would travel to Father only days after school ended and would return a day or so before school began in August. This created a problem that

resulted in an Emergency Motion last summer when Mother chose the last week of Father's custody for her vacation. She did so, according to her Motion, to use that time to get her son back to North Carolina and get him ready to return to school.

I believe that it is important that L.K. be back in Mother's custody well in advance of his return to school to get him ready for that; to buy clothes, school supplies and get him back on a school day schedule. For this past summer, according to the calendar for Johnson County Public schools, found at https://www.johnston.k12.nc.us/events, Father's custody began on June 10, two days after L.K.'s last day of classes, and ended on August 19th, 9 days before classes resumed. Mother's use of her vacation could push the beginning of custody one week later or the end one week sooner. As this caused problems in the past, I removed Mother's week of vacation and pushed the start of custody to the last Saturday in June and the end to the first Saturday in August. While it did reduce Father's period of summer custody by three weeks, I believed it was in the Child's best interest to do so.

I also found that the five weekends of custody I granted Father in my 2019 order, allowing one weekend in the months of September, October, February, March, and May, were too disrupting to the Child. Because of school, the earliest the Child can leave North Carolina for Pittsburgh is 4:00 p.m., meaning he does not arrive at his Father's until midnight.[8] He would then leave Pittsburgh at 2:00 p.m., arriving in North Carolina at 10:00 p.m. when he must be in school the next day. Accordingly, he would have approximately 24 waking hours with his Father on these weekends. Instead, I ordered that the Child spend his entire fall and entire spring break with Father in alternating years. I also ordered that Father would have custody the entire Christmas break in alternating years. While the overall number of periods of overnight custody may be less, depending on the year, Father will have longer periods of custody throughout the year. An additional reason for eliminating the five weekends is my concern for the Child's safety driving at night through the mountains of West Virginia and North Carolina.

CONCLUSION

Because I analyzed this case considering the relevant statutory factors and because my July 12, 2023, Custody Order is supported by the evidence and serves the best interests of Child, it should be affirmed.

BY THE COURT:
/s/The Hon. Cathleen Bubash

[1] The Order was not docketed until August 8, 2023. Accordingly, Father's appeal from the Final Order was timely.

[2] When the parties resided in Pittsburgh, Father had approximately 100 period of overnight custody per year. The first trial resulted in an August 12, 2019, Order permitting Mother to relocate with the Child to North Carolinas. Because of the structure of the order which provided father with nearly the entire summer, Father continued to have as many as 100 days of overnight custody after relocation. The appeal and my opinion are docketed at Sup. Court No. 1462 WDA 2019.

[3] B. was not interviewed at the request of Mother's counsel.

[4] Paragraph 3, Concise Statement.

[5] Paragraph 7, Concise Statement.

[6] Paragraph 4, Concise Statement.

[7] Paragraph 6, Concise Statement.

[8] The record established that the drive is 8 hours. N.T. 356.