STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
Thomas Yarcheski,	)	
	)	
Charging Party,	)	
	)	
and	)	Case No. 2005-CA-0044-C
	)	
Governors State University,	)	
	)	
Respondent.	)	

OPINION AND ORDER

This case arose out of a charge filed by Thomas Yarcheski alleging that Governors State University ("University") had violated Section 14(a)(8) of the Illinois Educational Labor Relations Act, 115 ILCS 5/1 et seq. ("Act").[1] On June 14, 2005, the Executive Director issued a Recommended Decision and Order. He determined that Governors State University ("University") had not refused to comply with the provisions of a binding arbitration award. Therefore, he recommended that the charge be dismissed in its entirety.

Yarcheski filed timely exceptions to the Executive Director's Recommended Decision and Order.[2] The University filed a timely response to those exceptions.

We have considered Yarcheski's exceptions and the University's response. We have also considered the investigative record and applicable precedents. For the reasons in this Opinion and Order, we affirm the Executive Director's Recommended Decision and Order.

I.

The facts in this case are as follows.

---

[1] Section 14(a)(8) of the Act prohibits educational employers and their agents or representatives from "[r]efusing to comply with the provisions of a binding arbitration award."

[2] Yarcheski also filed a motion for expedited and de novo review. The University opposes the motion. We grant Yarcheski's motion for expedited review, and have considered this case on an expedited basis. However, we do not grant Yarcheski's motion for de novo review. The standard in our Rules for review of an Executive Director's dismissal of a charge is "whether the Executive Director's decision is consistent with the Act and this Part and whether there has been an abuse of discretion," 80 Ill. Adm. Code 1120.30(c). We have not found any reason to depart from that standard in this case.

In addition, Yarcheski has filed certain other documents that we do not consider on the basis that they were not filed within the 14-day period for filing exceptions. *See* 80 Ill. Adm. Code 1120.30(c).

At all relevant times, the University was an educational employer within the meaning of Section 2(a) of the Act, and Yarcheski was an educational employee within the meaning of Section 2(b) of the Act. Yarcheski was represented by the University Professionals of Illinois, Local 4100, IFT-AFT ("Union").

In Fall 2001, the University hired Yarcheski as a probationary faculty member for a term of one year. On March 28, 2002, the University President notified Yarcheski that he would not be retained for the following academic year. On April 5, 2002, Yarcheski filed a grievance contesting his non-renewal.

An arbitration hearing on the grievance took place on March 5, 2003. At the hearing, the University and the Union stipulated that the following issues were before the arbitrator:

> Did the Employer, in the process of reaching a decision not to retain the grievant, misapply or breach the Agreement? If so, what is the appropriate remedy?

In its opening statement at the hearing, the University stated, in connection with the issue of remedy, that it had discovered while preparing for the hearing that Yarcheski had misrepresented his employment experience in applying for his appointment with the University. The Union objected to consideration of the issue of Yarcheski's alleged misrepresentation on the basis that it had not previously been raised and was not the issue to be decided by the arbitrator. The arbitrator reserved resolution of the remedial issue and restricted evidence and arguments on that issue at that point.

The arbitrator issued his award on May 8, 2004. The arbitrator determined that the University "failed to meet its basic contractual obligation to evaluate [Yarcheski's] 'teaching/performance of primary duties' on the basis, at least in part, of a classroom visitation." Because the arbitrator found that the University's decision not to retain Yarcheski for the 2002-2003 academic year violated Yarcheski's contractual rights, he sustained the grievance. The arbitrator directed the University to reinstate Yarcheski and to make him whole for the salary and benefits he had lost as a result of the University's decision not to retain him for the 2002-2003 academic year. The arbitrator retained jurisdiction for 60 days "[f]or the purpose of reopening the record and, if necessary, convening a supplemental hearing to resolve any dispute regarding application of the remedy."

In a letter to the arbitrator dated May 17, 2004, the University's attorney sought to reopen the record for a supplemental hearing on the remedy because of the misrepresentation issue that the University had first raised at the beginning of the arbitration hearing. In its letter, the University argued that Yarcheski's misrepresentations on the curriculum vitae he had submitted in support of his application for

employment were grounds for the University to refuse to implement the arbitrator's award. In a letter dated May 18, 2004, the Union's attorney opposed the University's motion to reopen the record, on the ground that the University was raising a new factual allegation as a basis for terminating Yarcheski.

During a conference call with the parties on May 24, 2004, the arbitrator asked the University to present its position in writing. The arbitrator stated that he was taking the Union's motion to dismiss the University's motion under consideration, and set a briefing schedule on the University's motion and the Union's cross-motion. He informed the parties that, unless material issues of fact were in dispute and unresolved, he would issue a supplemental award, and that he would otherwise convene an evidentiary hearing.

The University submitted evidence and case citations in support of its position in a letter to the arbitrator dated June 4, 2004. The University's evidence included the resume Yarcheski submitted in support of his application for employment at the University, as well as sworn testimony given by Yarcheski in earlier, unrelated legal proceedings. The Union replied to the University in a letter dated June 9, 2004, which responded to the University's case citations, and a letter dated June 14, 2004, which accompanied evidence addressing the factual allegations of the University's position. The Union's evidence included two affidavits from Yarcheski.

The Executive Director found that the Union agreed to the process by which the arbitrator took evidence on the misrepresentation issue. Yarcheski objects to that finding. We find that, during the investigation, the University asserted that the Union agreed to that process and Yarcheski did not state that that assertion was inaccurate. We adopt the Executive Director's finding.[3]

On September 7, 2004, the arbitrator issued a "Supplemental Opinion and Award on Remedy." He determined that the material facts described by the parties in their written submissions were undisputed, permitting him to make factual findings and draw inferences without conducting an additional hearing. He

[3] This does not mean, however, that the Union agreed that the arbitrator could properly consider the effect of Yarcheski's claimed misrepresentation on the remedy or that evidence on that issue would be properly submitted. In the June 9, 2004 letter from the Union's attorney to the arbitrator, the Union's attorney stated:

> In sum, there is no arbitration case known to me or cited by [the University's attorney] which would support the consideration of the misrepresentation charge in this case with respect to the remedy. To do so would evade the contract which, if respected, would require the College to discharge Yarcheski for cause followed by a grievance being processed through the grievance procedure and culminating in a possible settlement between the parties or an arbitration.

concluded that "[t]he best rule, and the one analogous to that enunciated in *McKennon* [*McKennon v. Nashville Publishing Company*, 513 U.S. 352 (1995)] with respect to 'broad equitable relief [that serves] important national policies'…is that evidence on pre-discharge misconduct may have a bearing on remedy." (Footnote omitted). Accordingly, the arbitrator stated that he would:

> consider evidence regarding [Yarcheski's] alleged falsification of an employment application only for the purpose of reexamining the Employer's remedial obligations. I have found that the Employer violated [Yarcheski's] contractual rights, and I shall not revisit that issue.

The arbitrator then reviewed the evidence submitted by the parties on the issue of Yarcheski's alleged misrepresentation in his employment application.

The arbitrator concluded:

> We have here a double wrong—an employer who breached the grievant's contractual rights and a grievant who concealed his dismissal from a similar job nine years earlier. The Employer erred, and I shall not reconsider the remedy of compensatory pay for breach of contract….
>
> I may be foreclosed from reexamining the basis for the grievant's discharge, but I'm not foreclosed from reconsidering the Employer's remedial obligation. The grievant has forfeited any right to a remedy that would restore him to a job he secured by questionable means.

The arbitrator amended his earlier award to state that the University would not be required to reinstate Yarcheski. However, he required the University to make Yarcheski whole for all salary and benefits he lost during the 2002-2003 academic year because of the University's decision not to renew his appointment.

II.

In his exceptions, Yarcheski asserts that the response to his charge that the University submitted during the investigation was untimely. However, the Board Agent conducting the investigation gave the University an extension of time for filing its response. Accordingly, we do not strike the University's response on the ground of untimeliness.

III.

In his exceptions, Yarcheski also questions the impartiality of the Executive Director and the Board Agent investigating the case. The University responds that Yarcheski has not shown that the Executive Director or any other individual at the Illinois Educational Labor Relations Board ("Board") acted with bias.

Yarcheski asserts that, during a conversation with the Board Agent on November 22, 2004, the Board Agent stated that she knew the University's attorney and that she had just spoken with him about the case. Yarcheski also asserts that the Executive Director relied on the University's allegedly untimely response and stated that the Union had agreed to the process used by the arbitrator in issuing his second award.

These assertions do not show that the Board Agent or the Executive Director was biased. In order to establish that an administrative decision maker was biased, more than a mere possibility of bias must be demonstrated. *Comito v. Police Board*, 317 Ill.App.3d 677, 686, 739 N.E.2d 942, 949 (1st Dist. 2000); *see Collura v. Board of Police Commissioners*, 113 Ill.2d 361, 498 N.E.2d 1148 (1986). "Administrative officials are presumed to be objective and capable of fairly judging a particular controversy," *Comito*, 317 Ill.App.3d at 686, 739 N.E.2d at 949; *see Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill.2d 76, 606 N.E.2d 1111 (1992).

Yarcheski has not rebutted this presumption or established more than a mere possibility of bias. At most, his assertions indicate that the Board Agent was acquainted with the University's attorney, that she spoke with the University's attorney about the case, and that the Executive Director made rulings with which Yarcheski disagrees. Mere acquaintance with a party or that party's representative is insufficient to demonstrate bias. *See NEA, IEA, DuQuoin Education Ass'n (Bosecker)*, 4 PERI 1064, Case Nos. 85-FS-0002-S et al. (IELRB, April 8, 1988), *aff'd on other grounds sub nom. Antry v. IELRB*, 195 Ill.App.3d 221, 552 N.E.2d 313 (4th Dist. 1990). Speaking with the University's attorney about the case was not a reflection of bias, but was, rather, a part of the Board Agent's duties in conducting the investigation. With respect to Yarcheski's claim of bias on the part of the Executive Director, an adverse ruling, standing alone, is not evidence of bias. *See People v. Hall*, 157 Ill.2d 324, 626 N.E.2d 131 (1993), *cert. denied sub nom. Hall v. Illinois*, 513 U.S. 999 (1994); *Anderson v. Alberto-Culver USA, Inc.*, 337 Ill.App.3d 643, 789 N.E.2d 304 (1st Dist. 2003), *appeal denied sub nom. Anderson v. Aon Corp.*, 205 Ill.2d 576, 803 N.E.2d 479 (2003). We conclude that it has not been shown that the Executive Director and the Board Agent were anything other than objective and impartial.

IV.

With respect to the merits, Yarcheski argues that the original award was final and binding and that the supplemental award is invalid. Thus, presumably, he would argue that the University violated Section 14(a)(8) of the Act by refusing to comply with the original award. The University argues that an arbitrator's award must be enforced if the arbitrator acts within the scope of his/her authority and the award draws its essence from the collective bargaining agreement, and that the supplemental award meets those requirements. We find that the supplemental award is a valid and binding award.

Review of arbitration awards is extremely limited. *AFSCME v. Department of Central Management Services*, 173 Ill.2d 299, 671 N.E.2d 668 (1996); *AFSCME v. State*, 124 Ill.2d 246, 529 N.E.2d 534 (1988). Arbitration awards must, if possible, be construed as valid. *AFSCME v. State*. There are public policies in favor of resolving collective bargaining disputes by arbitration and in favor of finality in arbitration awards. *AFSCME v. State*; *Board of Trustees of Community College District No. 508 v. Cook County College Teachers Union*, 74 Ill.2d 412, 386 N.E.2d 47 (1979); *Local 786 v. Glenview Material Co.*, 204 Ill.App.3d 447, 562 N.E.2d 289 (1st Dist. 1990).

In *United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 36-38 (1987), the United States Supreme Court stated:

> Collective-bargaining agreements commonly provide grievance procedures to settle disputes between union and employer with respect to the interpretation and application of the agreement and require binding arbitration for unsettled grievances. In such cases…the Court made clear almost 30 years ago that the courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to review the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. "The refusal of the courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 80 S.Ct. 1358, 1360, 4 L.Ed.2d 1424 (1960).
>
> ….
>
> Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

Illinois courts have recognized similar limitations on the review of the merits of arbitration awards. *Board of Trustees, supra*; *Local 786, supra*. In *Board of Trustees*, 74 Ill.2d at 421, 386 N.E.2d at 51, the court stated that "[w]e inquire into the merits of the arbitrator's interpretation in an effort to

determine only if the arbitrator's award drew its essence from the agreement so as to prevent a manifest disregard of the agreement between the parties." In *AFSCME v. Department of Central Management Services*, 173 Ill.2d at 304-05, 671 N.E.2d at 672 (1996), the court further stated that "a court is duty bound to enforce a labor-arbitration award if the arbitrator acts within the scope of his or her authority and the award draws its essence from the parties' collective-bargaining agreement."

The same limits on the review of arbitration awards as apply to the courts apply to the Board. In *Chicago Board of Education*, 2 PERI 1089 at VII-256, Case No. 84-CA-0087-C (IELRB, June 24, 1986), *aff'd in part, rev'd in part on other grounds*, 170 Ill.App.3d 490, 524 N.E.2d 711 (4th Dist. 1988), the Board stated:

> In determining whether there is a binding arbitration award, we will consider such factors as whether the award was rendered in accordance with the applicable grievance procedure, whether the procedures were fair and impartial, whether the award conflicts with other statutes, whether the award is patently repugnant to the purposes and policies of the Act, and any other basic challenge to the legitimacy of the Award. Otherwise, we shall not redetermine the merits or redetermine the issues presented to the arbitrator.

(Footnotes omitted). The Board has also stated that an arbitration award must be enforced if the arbitrator acts within the scope of his/her authority and the award draws its essence from the collective bargaining agreement. *Chicago School Reform Board of Trustees*, 13 PERI 1110, Case No. 96-CA-0047-C (IELRB, August 22, 1997).

Under this standard, the supplemental award is binding. There is no evidence that the award was not rendered in accordance with the applicable grievance procedure. Yarcheski contends that, in the supplemental award, the arbitrator improperly considered the issue of his alleged misrepresentation in his application for employment with the University, because that issue was not processed through the lower steps of the grievance procedure. However, the arbitrator did not rule on whether Yarcheski would have been properly dismissed for his alleged misrepresentation, but only considered the alleged misrepresentation as part of his consideration of the issue of the appropriate remedy. The parties stipulated at the arbitration hearing, and Yarcheski does not dispute, that the issue of the appropriate remedy was before the arbitrator. Thus, the supplemental award was rendered in accordance with the applicable grievance procedure.

In addition, the procedures used by the arbitrator in rendering the supplemental award were fair and impartial. The Union was aware that the issue of Yarcheski's alleged misrepresentation had been

raised before the arbitrator, and the arbitrator provided both the University and the Union the opportunity to present evidence and arguments on the issue. The Union agreed to the process by which the arbitrator took evidence on the misrepresentation issue.

Furthermore, we are not aware of any statute with which the award conflicts. The award is also not patently repugnant to the purposes and policies of the Act. There is no provision in the Act that prohibits supplemental awards such as the one that issued in this case. Rather, finding the supplemental award to be valid is consistent with the strong policy in favor of arbitration expressed in Section 10(c) of the Act, which requires collective bargaining agreements to contain a grievance arbitration procedure. *See Crete-Monee School District 201-U*, 19 PERI 145, Case No. 2004-CA-0009-C (IELRB, August 20, 2003).

The supplemental award is also not invalid on the basis that it does not draw its essence from the collective bargaining agreement. Yarcheski does not raise this issue in his exceptions. Moreover, the supplemental award does draw its essence from the collective bargaining agreement. In *Chicago Board of Education*, 11 PERI 1041 at X-150, Case No. 93-CA-0027-C (IELRB, April 19, 1995), *quoting Amoco Oil Co. v. Oil, Chemical and Atomic Workers*, 548 F.2d 1288 (7th Cir. 1977), *cert. denied*, 431 U.S. 905, the Board applied the following standard for determining whether an award draws its essence from a collective bargaining agreement:

> An arbitrator's award does "draw its essence from the collective bargaining agreement" so long as the interpretation can in some rational manner be derived from the agreement, "viewed in the light of its language, its context, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award." [citation omitted] Neither the correctness of the arbitrator's conclusion nor the propriety of his reasoning is relevant to a reviewing court, so long as his award complies with the aforementioned standards to be applied by the reviewing court in exercising its limited function. [citation omitted]

See also Ethyl Corp. v. United Steelworkers, 768 F.2d 180 (7th Cir. 1985), *cert. denied*, 475 U.S. 1010 (1986) (stating that any reasonable doubt as to whether the arbitrator has interpreted the contract or relied on some private notion of equity must be resolved in favor of enforcing the award). Under this standard, the supplemental award here draws its essence from the collective bargaining agreement.

In addition, the arbitrator acted within the scope of his authority. The Union and the University stipulated at the arbitration hearing that the issue of the appropriate remedy was before the arbitrator. In issuing his supplemental award, the arbitrator merely ruled on that issue.

Yarcheski argues that the arbitrator did not have the authority to change the substance of his original award, and that the arbitrator retained jurisdiction only over the application of the award. However, an arbitrator has the authority to "complete an arbitration that is not complete," *Federal Signal Corp. v. SLC Technologies, Inc.*, 318 Ill.App.3d 1101, 1111, 743 N.E.2d 1066, 1074 (1st Dist. 2001). Here, the arbitrator's original award was not complete as to the application of the remedy. In his original award, the arbitrator retained jurisdiction for 60 days "[f]or the purpose of reopening the record and, if necessary, convening a supplemental hearing to resolve any dispute regarding application of the remedy." When, at the beginning of the arbitration hearing, the University raised the issue of the effect of Yarcheski's alleged misrepresentation on the remedy, the arbitrator reserved resolution of the remedial issue and restricted evidence and arguments on that issue at that point. In this context, the arbitrator's retained jurisdiction over "application of the remedy" included considering the effect of Yarcheski's claimed misrepresentation on his employment application on the remedy for the University's contractual violation. We conclude that the difference in the remedy between the arbitrator's original award and the supplemental award does not invalidate the supplemental award.

Yarcheski also argues that the arbitrator improperly relied on the doctrine of after-acquired evidence. We reject this argument. An evaluation of whether the arbitrator properly employed the doctrine of after-acquired evidence would involve a redetermination of the merits of the supplemental award, which is impermissible under the standard of *Chicago Board of Education, supra*. As noted above, the United States Supreme Court and the Illinois Supreme Court have also recognized limitations on the review of the merits of arbitration awards. *Misco, supra; United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Board of Trustees, supra*.[4]

[4] If we were to consider the merits of Yarcheski's argument that the arbitrator improperly relied on the doctrine of after-acquired evidence, we would not find a basis for invalidating the supplemental award. Yarcheski argues that the doctrine of after-acquired evidence was rejected in *Valentino v. Hilquist*, 337 Ill.App.3d 461, 785 N.E.2d 891 (1st Dist. 2003), *appeal denied*, 204 Ill.2d 684, 792 N.E.2d 314 and 204 Ill.2d 650, 803 N.E.2d 502, and that the arbitrator invented the doctrine. The University contests these arguments. We find that the portion of *Valentino* that dealt with after-acquired evidence was unpublished under Supreme Court Rule 23. Under Supreme Court Rule 23, "[a]n unpublished order of the court is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case." This case does not involve "contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case," and, therefore, *Valentino* cannot be relied on with respect to the doctrine of after-acquired evidence. In addition, the arbitrator did not invent the doctrine. *See McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995); Elkouri & Elkouri, How Arbitration Works 403-407 (A. Ruben 6th ed. 2003).

For the above reasons, we conclude that the supplemental award is binding. The University was not required to comply with the remedy in the original award insofar as it was altered by the supplemental award. Accordingly, the University did not violate Section 14(a)(8) and, derivatively, Section 14(a)(1) of the Act.

V.

Yarcheski has filed a motion for sanctions against the University and the arbitrator. The University opposes the motion, and requests sanctions against Yarcheski. We deny both parties' motions for sanctions.

Section 15 of the Act provides:

> The Board's order may in its discretion also include an appropriate sanction, based on the Board's rules and regulations, and the sanction may include an order to pay the other party or parties' reasonable expenses including costs and reasonable attorney's fee, if the other party has made allegations or denials without reasonable cause and found to be untrue or has engaged in frivolous litigation for the purpose of delay or needless increase in the cost of litigation….

This provision gives us discretion over whether to award sanctions.

We deny Yarcheski's motion for sanctions against the University and the arbitrator. There is no showing that the University has "made allegations or denials without reasonable cause and found to be untrue" or has "engaged in frivolous litigation for the purpose of delay or needless increase in the cost of litigation." "'Frivolous' has been defined as 'of little weight or importance; having no basis in law or fact'…and '[l]acking a legal basis or legal merit,'" *Cannon v. Quinley*, 351 Ill.App.3d 1120, 1127, 815 N.E.2d 443, 449 (4th Dist. 2004) (citations omitted). Legal points that are "arguable on their merits" are not frivolous. *Anders v. State of California*, 386 U.S. 738, 744 (1967), *quoted in Cannon*. With respect to Yarcheski's request for sanctions against the arbitrator, we have no authority to issue sanctions against an arbitrator.

We also deny the University's request for sanctions against Yarcheski. We find that Yarcheski has not "made allegations or denials without reasonable cause and found to be untrue" and that Yarcheski's arguments are not so frivolous that we choose to issue sanctions. As noted above, sanctions are a matter within our discretion.

VI.

The Executive Director's Recommended Decision and Order is affirmed. The unfair labor practice charge is dismissed.

VII. Right to Appeal

This is a final order of the Illinois Educational Labor Relations Board. Aggrieved parties may seek judicial review of this Order in accordance with the provisions of the Administrative Review Law, except that, pursuant to Section 16(a) of the Act, such review must be taken directly to the appellate court of the judicial district in which the Board maintains an office (Chicago or Springfield). "Any direct appealto the Appellate Court shall be filed within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision," 115 ILCS 5/16(a).

Decided: October 11, 2005
Issued: October 13, 2005
Chicago, Illinois

/s/ Lynne O. Sered
Lynne O. Sered, Chairman

/s/ Ronald F. Ettinger
Ronald F. Ettinger, Member

/s/ Bridget L. Lamont
Bridget L. Lamont, Member

/s/ Michael H. Prueter
Michael H. Prueter, Member

/s/ Jimmie E. Robinson
Jimmie E. Robinson, Member

Illinois Educational Labor Relations Board
160 North LaSalle Street, Suite N-400
Chicago, Illinois 60601
Telephone: (312) 793-3170