[J-147-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, GREENSPAN, JJ.

CITY OF PHILADELPHIA,	: No. 38 EAP 2007
	:
	: Appeal from the Order of the
	: Commonwealth Court dated July 30, 2007
	: at No. 44 CD 2007, vacating and
v.	: remanding the Order entered on
	: December 16, 2006 in the Court of
	: Common Pleas of Philadelphia County,
FRATERNAL ORDER OF POLICE	: Civil Division, at No. 4908 October Term
LODGE NO. 5 (JASON BREARY)	: 2006
	:
APPEAL OF: MICHAEL G. LUTZ	: ARGUED: October 21, 2008

OPINION

MR. JUSTICE BAER **DECIDED: December 29, 2009**

We granted allowance of appeal in this case to consider whether the Commonwealth Court expanded improperly the limited scope of review applicable to an Act 111[1] grievance

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[1] Act of June 24, 1968, P.L. 237, as amended, 43 P.S. §§ 217.1 - 217.10. As discussed further, infra, Act 111 applies to grievances filed by unionized police officers and firefighters in the Commonwealth. While Act 111 precludes such police officers and firefighters from striking, the act was designed to guarantee swift resolution of grievances by establishing the ability of police officers and firefighters to bring their complaints before a neutral arbitrator, but permitting an appeal of an arbitration award (or denial thereof) pursuant only to the limited standard of narrow *certiorari*, i.e., an appeal will only lie to examine (1) a question of jurisdiction; (2) the regularity of the arbitration proceeding; (3) questions of excess in the exercise of an arbitrator's powers; and (4) constitutional questions. See e.g. Pa. State Police v. Pa. State Troopers' Ass'n (Betancourt), 656 A.2d 83 (Pa. 1995).

arbitration by holding that an arbitrator violated the City of Philadelphia's procedural due process rights when the arbitrator precluded the City from presenting any evidence because of the City's failure to comply with a duly issued subpoena. After careful consideration, we agree with the Commonwealth Court that the arbitrator violated the City's due process rights. Thus, the Commonwealth Court did not err when it overturned the Act 111 award at issue herein, and accordingly, we affirm.

This case involves a male police officer for the City of Philadelphia, Jason Breary (Grievant). In June of 2001, a female police officer reported to the department that Grievant had sexually assaulted her. After the female officer reported the incident, the Philadelphia Police Department Internal Affairs Division (IAD) commenced an investigation into the accusations and, in the course of doing so, interviewed several members of the police department. At the conclusion of the investigation, IAD referred the matter to the Philadelphia District Attorney's office, which subsequently filed criminal charges against Grievant.

Concurrent with the filing of the criminal charges, the police department formally notified Grievant of the charges against him, gave him an opportunity to respond (which he declined to do), informed him that he was suspended without pay for thirty days, and that the department intended to terminate his employment. This notification was provided in the presence of Grievant's immediate superiors, the IAD investigator, and a representative from Appellant, the Fraternal Order of Police Lodge Number 5 (FOP). Consistent therewith, Grievant was terminated on December 13, 2002. The FOP, on behalf of Grievant, and pursuant to the Collective Bargaining Agreement (CBA) between the City and the FOP, appealed the termination to a neutral arbitrator from the American Arbitration Association (AAA). The FOP contended that the termination was without cause and thus violative of the CBA. The grievance was then held in abeyance, pending final disposition of the criminal charges filed against Grievant.

The Philadelphia Municipal Court convicted Grievant of all charges filed against him on September 2, 2003. Grievant filed an appeal demanding a trial *de novo* in the Philadelphia County Court of Common Pleas. That court, on July 28, 2005, found Grievant not guilty on all charges, thus terminating all criminal action against him. Subsequently, a notice of hearing before the AAA was issued to both the FOP and City, setting the grievance arbitration hearing for July 10, 2006.[2] On May 18, 2006, the arbitrator, pursuant to a request by the FOP, issued a subpoena requiring the City to provide:

> [A]ny and all documents relating to the discipline imposed upon [Grievant], including but not limited to, Forms 75-18, investigation reports, citizen complaints, witness statements, Notices of Disciplinary Action (Suspension, Intent to Dismiss and Dismissal), documents reflecting actions taken by and recommendations made by the Police Board of Inquiry ("PBI"), transcripts or tape recordings of proceedings before the PBI, and all other documents that refer or relate in any way to the aforementioned discipline.

The FOP demanded that the subpoenaed documents be produced by the July 10 hearing.[3]

The City arrived at the hearing with eight witnesses to present during its case-in-chief, but without the demanded documents. Counsel for the FOP informed the arbitrator of the City's failure to honor the FOP's subpoena. The deputy City Solicitor representing the City responded that he was unaware of the document requests. The FOP then orally

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[2] Act 111 provides for two different types of arbitration: "interest arbitration" and "grievance arbitration." "Interest arbitration is the arbitration which occurs when the employer and employee are unable to agree on the terms of a collective bargaining agreement. In contrast, grievance arbitration is the arbitration which occurs when the parties disagree as to the interpretation of an existing collective bargaining agreement." City of Pittsburgh v. Fraternal Order of Police, Fort Pitt Lodge No. 1, 938 A.2d 225, 227 n.1 (Pa. 2007) (internal citations and quotations omitted).

[3] Pursuant to 43 P.S. § 217.6, Act 111 arbitrators "have the power . . . to compel the attendance of witnesses and physical evidence by subpoena."

petitioned the arbitrator to sanction the City by precluding the presentation of any evidence that would have been provided pursuant to the subpoena.

The arbitrator *sua sponte* continued the matter until July 25, 2006, and indicated that he would hear oral arguments on the record, concerning the sanctions when the hearing resumed.[4] Meanwhile, counsel for the City discovered that the subpoena had not been complied with due to a clerical error, and immediately transmitted all of the subpoenaed documents in the City's possession to Grievant.[5] When the arbitration resumed on July 25, the arbitrator first heard oral arguments, on the record, concerning the FOP's motion for sanctions.

During arguments, the FOP averred that, given the internal nature of disciplinary proceedings in the Philadelphia Police Department, when a grievance is filed to challenge an officer's termination or suspension, the City, at least initially, retains sole and exclusive possession of the relevant documents, reports, and transcripts. The FOP submitted that, while prior practice had formerly been to request documents and the like informally through correspondence addressed to the City, the City had recently changed its stance regarding arbitration discovery, and was requiring subpoenas for all information. Despite the City's change in position, the FOP contended that, in this case, as well as other Act 111 arbitrations between the parties, the City had continuously refused to comply with formal discovery requests.

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[4] It appears that Act 111 arbitration hearings between the City and FOP are normally conducted without the presence of a stenographer. In fact, the initial July 10 hearing was not transcribed. Thus, this Court was constrained to rely upon the briefs and opinions below in construing this history. However, by specific order of the arbitrator, the July 25 hearing was transcribed, and we have the benefit of that transcription.

[5] Thus, the FOP had the subpoenaed documents for approximately two weeks prior to the hearing's resumption on July 25.

The FOP then argued that, given the finality of Act 111 arbitration, "it is absolutely and positively critical that the City comply with requests for documentation." Notes of Testimony (N.T.), Jul. 25, 2006, at 8. The FOP contended that its members suffer extreme prejudice when the FOP is forced to defend them without the discovery that is their right as a matter of basic due process. To stop these abuses from happening repeatedly, the FOP asserted, the arbitrator should preclude the City from presenting any testimony or evidence based on materials subject to the subpoena.

The City countered that, based upon the clerical error,[6] counsel had no knowledge of the subpoena until the July 10 hearing, and upon being told of it, immediately corrected the problem. The City further stated that there had been settlement negotiations in the weeks leading up to the July 10 hearing, and the FOP's counsel made no mention of the failure to comply with the subpoena. Moreover, the City argued the FOP could have filed a motion to enforce the subpoena with the Philadelphia Court of Common Pleas prior to the hearing, rather than waiting, then asserting prejudice, and requesting the imposition of severe sanctions. The City then noted that neither the FOP nor Grievant had been prejudiced by the error given that the FOP received the documents two weeks before the July 25 merits hearing, rather than on July 10, as it had originally requested. Accordingly, while acknowledging the error, the City contended that preclusion of all evidence subject to the subpoena would amount to a constructive dismissal of the arbitration, and was not a proper remedy.

The arbitrator disagreed and granted the FOP's request that the City be precluded from presenting any evidence that was subject to disclosure under the subpoena. While recognizing that the deputy City Solicitor was unaware of the subpoena until the July 10

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[6] It is undisputed that the "clerical error" consisted of an administrative professional in the City Solicitor's office misplacing the subpoena after it had been served on the City.

hearing and that counsel diligently cured the problem immediately thereafter, the arbitrator found that the Grievant had sustained prejudice because he was seeking reinstatement to the police force and the delay in the proceedings had slowed this quest. Moreover and importantly, the arbitrator further faulted the City for alleged noncompliance in other Act 111 arbitrations before different arbitrators and involving different attorneys from the City Solicitor's office. The arbitrator did not find any bad faith on the City's part specific to this case, but nevertheless stated that in his experience, the FOP has had significant compliance problems with the City in the past, and that the City should not be permitted to ignore subpoenas, regardless of its good or bad faith. N.T., Jul. 25, 2006, at 30.

Prohibited from presenting any evidence that had been sought through the subpoena, the City had no case and was forced to rest. Grievant then rested, and the arbitrator, in a written opinion issued October 2, 2006, sustained the grievance and reinstated Grievant to the police force with all back pay, holding that the City had not met its burden of proving just cause for dismissal.

The City filed a Petition to Vacate Arbitration Award with the Philadelphia County Court of Common Pleas. In a one-sentence order, the court denied the petition. In a footnote to the order, the court indicated that because the arbitrator had not exceeded his authority, it possessed no authority to disturb the sanction order against the City, or the resulting arbitration award. Tr. Ct. Slip Op. at 1-2 n.1 (citing Pa. State Police v. Pa. State Troopers' Ass'n (Betancourt), 656 A.2d 83 (Pa. 1995), supra note 1). The City then appealed to the Commonwealth Court.

In a published opinion, City of Philadelphia v. Fraternal Order of Police Lodge No. 5 (Jason Breary), 932 A.2d 274 (Pa. Cmwlth. 2007), a panel of the Commonwealth Court unanimously vacated the order of the Court of Common Pleas and remanded for a full arbitration. Initially, the court determined that the ability of the arbitrator constructively to dismiss the City's case by precluding the subject evidence raised due process concerns,

permitting substantive review within the limited confines of narrow *certiorari*. Id. at 280 (citing Betancourt, supra note 1). The court then examined whether a procedural due process violation actually occurred. In so doing, it found "troubling" that the arbitrator denied a full merits hearing, "in large measure, because of violations that have occurred in other cases." Id. at 286 (emphasis in original). Moreover, the court noted that, while Grievant (and the FOP) sustained some prejudice, it had been cured when the City provided the requested documents immediately following the July 10 hearing, providing Grievant and FOP two weeks to study the documents and prepare for the hearing, when the FOP had only sought the documents on the day of the originally scheduled hearing. In the end, the Commonwealth Court found that the sanction of complete preclusion of evidence equating to a dismissal of the City's case, was a violation of due process, and thus ordered the remand for a full arbitration hearing.

The FOP filed for allowance of appeal to this Court, requesting that we resolve whether the Commonwealth Court improperly expanded the limited scope of review in Act 111 grievance arbitrations, as articulated in Betancourt, when it vacated the arbitrator's determination and remanded for a hearing below. We granted review to decide this question, and concomitantly directed the parties to address whether Act 111 arbitrators, in the first instance, "can award such sanctions, and, if so, what is a reviewing court's role in reviewing sanctions under the Act 111 narrow *certiorari* scope of review?" See City of Phila. v. Fraternal Order of Police Lodge No. 5 (Jason Breary), 938 A.2d 986 (Pa. 2007) (*per curiam*).

Prior to 1968, police officers and firefighters in the Commonwealth had no legal ability to unionize or collectively bargain. In response to a number of illegal strikes throughout the Commonwealth, the General Assembly enacted Act 111 of 1968, see supra note 1, which gave police officers and firefighters the ability to unionize and collectively bargain, but at a price: the newly permitted unions would continue to possess no power to

strike. The Legislature assured, however, that labor disputes between political subdivisions and the police and fire unions would be resolved quickly and with finality by providing no right of appeal from final disposition of an Act 111 arbitration. 43 P.S. § 217.7(a).

We have since recognized, however, that all decision-making tribunals, including arbitrators, must conduct proceedings in accordance with the mandates of due process under the Pennsylvania and United States Constitutions. The Washington Arbitration Case, 259 A.2d 437, 440 (Pa. 1969). Act 111 arbitration panels, however, are not administrative agencies or courts. Id. Rather, they are bodies of temporary jurisdiction convened to respond quickly and with absolute finality to a specific labor conflict, and then disperse. Id. Like trial courts, however, arbitration panels have the potential to affect the substantive and fundamental rights of parties. Thus, and notwithstanding Section 217.7(a), in an Act 111 interest arbitration case, an appeal of an award will lie in the nature of narrow *certiorari*, only to review: (1) a question of jurisdiction; (2) the regularity of the proceedings; (3) questions of excess in the exercise of powers; and (4) constitutional questions. Betancourt, 656 A.2d at 79-80; Washington Arbitration Case, 259 A.2d at 441. "Generally speaking, a plenary standard of review should govern the preliminary determination of whether the issue involved implicates one of the four areas of inquiry encompassed by narrow *certiorari*, thus allowing for non-deferential review." Town of McCandless v. McCandless Police Officers' Ass'n, 901 A.2d 991, 1000 (Pa. 2006). We are bound, however, by all determinations of fact and issues of law not encompassed by the standard of narrow *certiorari*, even if incorrect. Id. Only if we first determine that narrow *certiorari* is implicated, may we then examine the viability of the issued sanction.

Instantly, the FOP claims that the arbitrator's decision to preclude the City from presenting any evidence subject to the subpoena cannot be assailed on appeal because the decision constitutes a mere evidentiary ruling, not encompassed by narrow *certiorari* under Betancourt. Citing to Betancourt, The Washington Arbitration Case, and Act 111

itself, the FOP emphasizes that these arbitration hearings are to be swift, and result in the final resolution of all grievances. Thus, the FOP argues that to enable the City to challenge simple "evidentiary rulings," and, further, to permit the Commonwealth Court to overturn those rulings, disrupts the clear deference that Act 111 arbitrators are due. Indeed, the FOP argues that if the evidentiary decision of the arbitrator in this case is assailable, then any mundane, procedural decision of an arbitrator will be impermissibly subject to judicial scrutiny. In support of this point, the FOP points to a multitude of federal cases, including decisions from the National Labor Relations Board, for the proposition that an "arbitrator . . . has the responsibility and the authority to control the conduct of the proceedings and the admission of evidence." Brief of the FOP at 26 (quoting Int'l Union, United Automobile, Aerospace & Agric. Implement Workers of America v. Kraft Foods, 409 F.Supp. 559, 562 (E.D. Pa. 1976)). The FOP contends that, similar to federal arbitration proceedings, Act 111 arbitrators must inherently make certain evidentiary rulings, i.e., relevancy, hearsay, and the like, during the course of a hearing. It avers that the arbitrator's preclusion of the City from presenting evidence due to the discovery violation is no different. Therefore, the FOP argues that the arbitrator's imposition of the discovery sanction is not reviewable via narrow *certiorari*.

Should we find the imposition of the sanction reviewable, the FOP alternatively contends that the arbitrator's decision to prohibit the City from presenting the subject evidence fell within all bounds of due process, as all that transpired was that the City ignored a duly issued subpoena, and was sanctioned for the transgression. Further, the FOP avers that it and Grievant were significantly prejudiced by the City's noncompliance, in light of the inability to prepare for the July 10 hearing, and because any further delay in the proceedings delayed Grievant, whose criminal conviction had been overturned, from reclaiming his position on the police force. Indeed, the FOP and Grievant contend that

such prejudice outweighed the prejudice the City suffered when it was precluded from adducing evidence, resulting in the constructive dismissal.[7]

The City counters that by completely precluding it from presenting any argument or evidence at the July 25 hearing, the arbitrator unconstitutionally deprived it of its due process rights under the Pennsylvania and United States Constitutions, as well as the rules promulgated by the AAA.[8] The City takes umbrage with the FOP characterizing what occurred here as an evidentiary question, pointing out that within the context of the sanction, the arbitrator precluded the City from putting on the witness stand the eight witnesses it had prepared and brought to the hearing, and forced the dismissal of the City's case against the Grievant. The City protests that the hallmark of due process is a full and fair opportunity to be heard, and the dismissal of a case is such an extreme sanction as to violate due process. The City argues that the arbitrator should have "balance[d] the equities carefully and dismiss[ed] only when the violation of the discovery rules is willful and the opposing party has been prejudiced." Brief of the City at 34 (quoting Stewart v. Rossi, 681 A.2d 214, 217 (Pa. Super. 1996)). To that end, the City contends that the arbitrator did not find any willful misconduct on its part. The City further strongly objects to the FOP's

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[7] The FOP further contends that the City's claim that its case was constructively dismissed through the preclusion of evidence is incorrect. Rather, according to the FOP, the City could have presented the IAD investigator to testify concerning what he concluded from his investigation, as well as Grievant. This contention, however, is belied by the plain language of the subpoena, which instructed the City to turn over to the FOP "[a]ny and all documents relating to the discipline imposed upon [Grievant]," and the arbitrator's ruling to preclude all evidence subject to that subpoena. As the City states, the IAD investigator's report, as well as any statements made by Grievant to IAD, clearly fall within the auspices of both the subpoena and subsequent sanction.

[8] See AAA Rule 26 ("The arbitrator may vary the normal procedure under which the initiating party first presents its claim, but in any case shall afford full and equal opportunity to all parties for the presentation of relevant proofs."); Rule 28 (providing for the opportunity for all parties to present all evidence deemed relevant by the arbitrator).

and Grievant's contention that they were prejudiced. As noted above, the City believes that by receiving the subpoenaed materials two weeks prior to the hearing, Grievant and FOP were, in fact, benefitted. Thus, the City contends it properly raised a due process question cognizable under narrow *certiorari*, and that there was, in fact, a violation of due process. Thus, the City avers the Commonwealth Court properly reversed and remanded for a full hearing, and this Court should affirm.

First regarding the threshold inquiry of narrow *certiorari*, our review of the record reveals that the issue presently before us is one involving procedural due process such that Betancourt is satisfied, as this is a properly reviewable constitutional matter.[9] As discussed above, the FOP attempts to characterize the arbitrator's decision as nothing more than an "evidentiary ruling to exclude certain evidence," akin to a ruling concerning hearsay or relevancy. Brief of the FOP at 21. Moreover, the FOP continues, should we affirm the Commonwealth Court, we would be subjecting every Act 111 arbitrator's decisions and rulings to unfettered judicial review, in clear violation of Betancourt and narrow *certiorari*.

Initially, we recognize the FOP's concern: arbitrators must decide evidentiary questions such as hearsay and relevancy; and, the exclusion of evidence pursuant to such a ruling does not typically involve notions of due process. However, the instant case does not concern a simple "evidentiary ruling." Indeed, the FOP's characterization of the subject ruling as one involving evidence is inaccurate; the arbitrator did not rule upon a relevancy, best evidence, or hearsay objection. Rather, the arbitrator decided a technical discovery

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[9] As noted previously, a plenary standard of review governs this preliminary determination of whether an issue implicates the four areas of review pursuant to narrow *certiorari*. Town of McCandless, 901 A.2d at 1000. Moreover, as the thrust of both parties' arguments sound exclusively in procedural due process, we do not examine whether the other three areas of narrow *certiorari*, jurisdiction, regularity of the proceedings, and excess of use of powers, are present.

issue, and in the process, constructively precluded[10] the City from presenting a case-in-chief concerning the merits of Grievant's termination. While we recognize that dismissal of a civil action is, at times, a remedy available to rebuke those who violate discovery orders, see Fox v. Gabler, 626 A.2d 1141 (Pa. 1993),[11] here, the arbitrator found no willful misconduct or bad faith on the City's part, and further seemingly relied on evidence not of record in this specific arbitration to support his ruling. In our view, then, this posture raises a question in our minds as to whether the City was afforded a fair opportunity to be heard. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982) (holding that while due process is accorded when litigation is terminated for a party's "failure to comply with a reasonable procedural or evidentiary rule," procedural due process still "does require, however, . . . an opportunity granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case.") (internal citations and quotations omitted).

Accordingly, while we agree with the FOP that review of a simple "evidentiary question" would run far afield of narrow *certiorari*, the heart of this matter concerns the propriety of an extreme discovery sanction precluding further action in this case, and, therefore, a valid constitutional claim involving the most basic of rights: due process of law. Thus, pursuant to Betancourt, we find that we may examine whether the arbitrator's

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[10] We use the phrases "constructively precluded" and "constructively dismissed" throughout the body of this opinion because we recognize that the arbitrator's ruling did not mandate actual dismissal of the arbitration. As has already been discussed, and will be further examined, however, we conclude that this ruling left the City with no case to present following the arbitrator's ruling. In that vein, and contrary to the view espoused by Mr. Justice McCaffery, we perceive this order to be all-encompassing as concerns the City's case-in-chief, and not merely an order that prohibited the City from presenting an expert witness or a piece of evidence, which would most certainly fail to implicate the due process concerns raised herein.

[11] The decision in Fox is discussed more fully, infra.

discovery sanction, which constructively precluded the City from presenting a case-in-chief, violated the City's right to procedural due process.[12] [13]

Generally, courts[14] are afforded great discretion in fashioning remedies or sanctions for violations of discovery rules and orders. See e.g. Fox, 626 A.2d at 1143 (Pa. 1993); Pa. R.C.P. No. 4019 (setting forth circumstances when discovery sanctions may be imposed and the type of sanction orders available to a court). Indeed, even where a trial court "imposes a judgment by default . . . as a sanction for failure to respond adequately to discovery requests, it is acting well within its discretion and the latitude given it by our Rules of Civil Procedure to enter a judgment by default against the disobedient party." Fox, 626 A.2d at 1143 (internal quotations omitted); see also Pa. R.C.P. No. 4019(c)(3) (allowing for

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[12] Mr. Justice McCaffery, in disagreeing with this initial finding, declares that our review under narrow *certiorari* cannot be implicated in a situation where a party "forfeited its opportunity" to a fair hearing "through its own action." Dissenting Slip Op. at 5 (McCaffery, J.). This viewpoint, however, incorrectly requires a party, like the City (or, indeed, an aggrieved police officer) first to prove a constitutional violation in order for an appellate court then to review a case under Betancourt. Such a requirement is wholly improper under our Act 111 jurisprudence, as review of an Act 111 arbitration involves a two-step process: (1) using plenary review (while simultaneously accepting any findings of fact by an arbitrator) to determine whether one of the four areas of law, which comprise narrow *certiorari*, exist within the case; and (2) if such a question exists, then examining the record in the proper light to answer that question so implicated (in this case, whether the arbitrator violated the City's constitutional rights). Indeed, we could certainly review an arbitration award where we find a properly raised constitutional question, such that our review is proper under Betancourt, while ultimately holding that no constitutional violation occurred.

[13] Having determined that this case presents a constitutional question, we note that our standard of review of constitutional questions is *de novo*, and our scope of review plenary. See Pocono Manor Investors, LP v. Pa. Gaming Control Bd., 927 A.2d 209, 219 (Pa. 2007).

[14] Again, we recognize that, "whatever else it is, an arbitration panel certainly is not a court." Washington Arbitration Case, 259 A.2d at 440 n.3. Regardless, and like trial courts, arbitrators must adhere to the doctrines of procedural due process when fashioning Act 111 awards. Id. at 440. Thus, we find the precedent concerning review of a trial court's discovery sanction order to be instructive to the circumstances presented instantly.

an order "entering a judgment of non pros or by default against the disobedient party or party advising the disobedience" of a discovery order). Notwithstanding those general propositions, we highly disfavor dismissal of an action, whether express or constructive, as a sanction for discovery violations absent the most extreme of circumstances. Calderaio v. Ross, 150 A.2d 110, 112 (Pa. 1959); see also Pride Contracting, Inc. v. Biehn Constr., Inc., 553 A.2d 82, 84 (Pa. Super. 1989) (citing Calderaio).

Of course, considerations of due process foster this Court's hesitancy to endorse complete preclusion of a party's evidence or litigation in light of a discovery violation. As the Supreme Court of the United States has oft-stated, parties are technically deprived of their procedural due process rights under the Fourteenth Amendment when they are not afforded full opportunities to present evidence before a court. See e.g. Logan; Butler Bros. v. McColgan, 315 U.S. 501 (1942); Saunders v. Shaw, 244 U.S. 317 (1917). Identical considerations must be given under Article I, Section 1 of the Pennsylvania Constitution as well. See Nixon v. Commonwealth, 839 A.2d 277 (Pa. 2003); Pa. Game Com'n v. Marich, 666 A.2d 253 (Pa. 1995). Accordingly, all tribunals, whether trial courts, administrative agencies, or Act 111 arbitrators, must carefully weigh multiple aspects of a case before concluding that dismissal of an action, whether explicitly or constructively through the exclusion of evidence, is a proper remedy for a discovery violation.

This Court has never opined upon the specific factors that a trial court (or, for that matter, appellate courts on review) should consider before concluding that dismissal of a case for a discovery violation constitutes a proper remedy. Nevertheless, in considering sanctions for noncompliance with other pre-trial procedural rules, we have "noted that enforcement of procedural rules is governed by the facts and circumstances of each particular case." Miller v. Brass Rail Tavern, Inc., 664 A.2d 525, 532 n.5 (Pa. 1995) (citing Feingold v. Southeastern Pa. Transp. Auth., 517 A.2d 1270 (Pa. 1986)). Specifically, in Feingold, a case involving the exclusion of expert testimony for a party's failure to name the

expert in its pre-trial statement, we delineated the principal considerations a trial court should examine when deciding whether exclusion of the expert's testimony would be proper:

> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith [or] willfulness in failing to comply with the court's order.

Feingold, 517 A.2d at 1273.

While our jurisprudence in this area is somewhat limited, the Superior Court has had the opportunity to develop and apply four similar factors that it concludes trial and appellate courts alike should examine before determining the general severity and vitality of a discovery sanction: (1) the prejudice, if any, endured by the non-offending party and the ability of the opposing party to cure any prejudice; (2) the noncomplying party's willfulness or bad faith in failing to provide the requested discovery materials; (3) the importance of the excluded evidence in light of the failure to provide the discovery; and (4) the number of discovery violations by the offending party. See e.g. Pioneer Commercial Funding Corp. v. Amer. Financial Mortg. Corp., 797 A.2d 269 (Pa. Super. 2002), rev'd on other grounds, 855 A.2d 818 (Pa. 2004); Steinfurth v. LaManna, 590 A.2d 1286, 1288-89 (Pa. Super. 1991); see also Wolloch v. Aiken, 815 A.2d 594, 597 n.3 (Pa. 2002) (citing Steinfurth as setting forth factors a trial court should consider when responding to a motion for sanctions under Pa. R.C.P. No. 4019.). In applying these factors to appeals where a trial court dismissed an action for noncompliance with a discovery order, the Superior Court has consistently placed greater emphasis on the first two factors: (1) the prejudice to the non-offending party and the ability to cure that prejudice; and (2) the willfulness of the offending party's conduct. See e.g. Stewart v. Rossi, 681 A.2d 214, 217 (Pa. Super. 1996) (holding that because

"dismissal is the most severe sanction, it should be imposed only in extreme circumstances, and a trial court is required to balance the equities carefully and dismiss only when the violation of the discovery rules is willful and the opposing party has been prejudiced.").

We find the jurisprudence of the Superior Court in this area to be consistent with the precedent of this Court. Accordingly, we adopt the aforementioned four factors as the proper standard for evaluation of the severity and, ultimately, the vitality, of a discovery sanction. We thus proceed to examine the arbitrator's constructive dismissal of the City's case under these four factors.[15]

First, we examine what prejudice, if any, the FOP suffered because of the City's noncompliance, and if the City cured that prejudice. Initially, we note that there is no doubt that a discovery violation by the City occurred; the City concedes as much. As already established, the arbitrator issued a subpoena, and the City failed to produce the duly requested materials by the July 10 deadline for providing them. As a result of this noncompliance, the arbitrator found that the FOP and Grievant were prejudiced by the violation in two ways. First, the City prevented Grievant and the FOP from preparing their case for the July 10 arbitration hearing by failing to turn over the requested materials, reasoning that until the City turns over such evidence, it remains in exclusive control thereof. Moreover, the arbitrator concluded that Grievant and the FOP sustained prejudice due to the "substantial backlog of well over 200 grievances pending before arbitration. Therefore[,] to grant additional time in order to prepare and eventually reschedule a hearing would further prejudice [Grievant] by forcing him to encounter more . . . delays in resolving this matter." Arbitration Award Op. at 6.

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[15] While we recognize this appeal involves an arbitration award issued pursuant to Act 111, once we accept consideration of an issue pursuant to Betancourt, the posture of the appeal becomes identical to that of an appeal from a trial or intermediate appellate court.

Nevertheless, as ably observed by the Commonwealth Court, the City cured any prejudice that arguably may have occurred immediately following conclusion of the July 10 hearing. As discussed supra, the subpoena contained a compliance date of July 10 and, accordingly, the City could have fully complied with the subpoena by simply providing the requested items to the FOP in the moments prior to the commencement of the hearing. Upon being informed of its inadvertent noncompliance, the City immediately provided the requested documents to the FOP. With the hearing continued until July 25, the FOP had an additional two weeks to prepare its case. The FOP thus received more time to prepare its case than it would have received had the City provided the documents on the subpoena's due date. The FOP's second averment of prejudice is that Grievant's ultimate return to this police officer position was delayed by the continuance. However, that continuance was two weeks, and obviously of no significance in the scheme of this case. Thus, we conclude that no real prejudice resulted from the City's discovery violation.

Next, we consider whether the City willfully, or in bad faith, withheld the requested documents from the FOP. On that point, while the FOP attempts on numerous occasions in its brief to characterize the City's actions as "willful," the arbitrator declined to make such a finding. Our independent review of the record fully supports the arbitrator's conclusion that the City did not act willfully, or in bad faith, in failing to provide the requested discovery. Indeed, there is ample support for the arbitrator's holding in this regard: the FOP conceded that the subpoena inadvertently "sat on a secretary's desk," N.T., Jul. 25, 2006, at 11, and that the noncompliance was the result of a "clerical error." Id. at 23. Further, the deputy City Solicitor supplied the subpoenaed documents promptly upon being informed of the inadvertent noncompliance. Thus, we find no willful misconduct on the City's part.

Third, we examine the importance of the excluded evidence (which constituted the City's entire case) in light of the failure to provide the requested materials. There is no question that the evidence at issue was vitally important to both the City and the FOP. We

further recognize the arbitrator's finding that the FOP was hampered in the preparation of its case for the July 10 hearing because of the City's noncompliance. Notwithstanding this, the City, which bore the burden of proving just cause for Grievant's termination, clearly had no other alternative but to rest its case once the arbitrator precluded the entry of any evidence or testimony subject to the terms of the subpoena. While the FOP argues that the City had other options to present its case - namely calling the IAD investigator and Grievant - as already noted, this contention is contradicted by the very language of the subpoena and the sanction imposed by the arbitrator. See supra note 7. The subpoena requested all documents subject to the investigation; surely, the IAD investigator and Grievant would both have testified to matters covered by the subpoena and subsequent sanction. Thus, we conclude that the evidence that was excluded was critical to the City's ability to present a case.

Finally, we analyze the number of discovery violations by the City. To that end, the FOP contends that the City has violated discovery orders in other Act 111 cases, and we should draw upon such alleged misconduct to reinstate the sanctions imposed by the arbitrator instantly. Indeed, the arbitrator seemingly used these prior violations as a basis for his decision: "For quite some time there was a controversy which it was alleged that the City had failed to turn over customary documents and evidence. As a result six prior arbitrators have at least expressed their displeasure or have ruled against the City." Arbitration Award Op. at 4 (emphasis added). The City counters, however, that such supposed noncompliance by it in other Act 111 arbitrations, involving different counsel, arbitrators, grievants, facts, and circumstances, has no relevance here.

While the test we adopt today recognizes the importance of not condoning repeated misconduct, see Steinfurth, 590 A.2d at 1288 ("[W]e consider the number of discovery violations. Repeated discovery abuses are disapproved."), we agree with the City that we cannot take into account alleged violations from other cases and circumstances here for

several reasons. First, our independent review of the record reveals that the FOP referenced these alleged incidents of noncompliance baldly to the arbitrator during the arguments over the motion for sanctions. The FOP, however, did not introduce testimony or other evidence supporting the substance or circumstances of these alleged violations. Moreover, as noted above, Act 111 arbitrations are normally conducted without the benefit of transcription and, with the FOP entering no substantive evidence to support its claims in this case, there is simply no record or evidence for this Court to review.

Moreover, we cannot fault the City for not being prepared to counter the accusations of misconduct from unrelated arbitrations during the July 25 hearing. Analogous to this circumstance, in the Staff Inspector Appeal, 768 A.2d 291 (Pa. 2001), an Act 111 arbitration case involving these same parties, we found error on an arbitrator's part for placing the City "on notice" concerning a specific argument merely because that argument had been raised by the FOP against the City in prior arbitrations. There, the FOP filed for arbitration concerning the City's elimination by attrition the position of staff inspector.[16] On the date of the hearing, the FOP then attempted to litigate whether the captains who had been performing the staff inspector duties were entitled to an "out-of-class" pay award, an issue that supposedly had been litigated in previous arbitrations. The arbitrator permitted the issue to be litigated, but we reversed, rejecting

> the notion that the City was somehow 'on notice' that the out-of-class pay claim was at issue in this matter simply because the FOP had specifically raised such a claim in earlier demands for arbitration which were separate from and unconsolidated with the instant matter. […] It would be illogical to conclude that the City was somehow on notice not only as to those claims

[16] A staff inspector was an officer with a rank higher than captain, but below inspector, who investigated special and important claims of misconduct against fellow officers. Through attrition, the City had begun to eliminate the staff inspector position, and captains within the department had been forced to perform the investigations formerly conducted by staff inspectors.

> actually raised in the demand for arbitration, but also as to any other claims that the FOP has raised in the past.

Id. at 295 n.3.

We find that the same logic, or perhaps better stated, "illogic," applies here. While it may certainly be true that discovery disputes between the City and the FOP have existed in the past and may continue into the future, we again cannot expect the City to have been prepared to litigate fully discovery violations that have occurred in past arbitrations at the July 25 hearing. Thus, under this fourth prong of the above noted test, as to this arbitration, it is undisputed that only a single discovery violation occurred, rather than a number of violations over the course of the entire litigation. Cf. Stewart, 681 A.2d at 217-218 (finding a litigant's actions constituted "egregious" violations of the rules of discovery when the litigant failed to provide adequate responses to discovery requests over a period of several years).[17]

Thus, for the reasons set forth herein, given application of the four-factor test, we agree with the Commonwealth Court that the arbitrator, under the circumstances of this case, violated the procedural due process rights of the City. In particular, regarding the prongs of prejudice and willful misconduct, while the FOP and Grievant arguably suffered prejudice by the City's failure to comply with the subpoena, we find of great import that such prejudice was sufficiently cured by the City's subsequent actions and that no willful

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[17] The FOP may not, however, be without a remedy to counteract the City's alleged management of document requests. If there is any basis to the allegations of repeated misconduct (and we reiterate that we hold no opinion on the veracity of such allegations, as no record in this regard was developed), and further if the CBA between the parties so provides, it may well be that the FOP can file a separate grievance arbitration to litigate the City's failure to comply with requests for documents, whether informal or formal. Certainly, then, the parties would be on full notice concerning the FOP's allegations of repeated contractual violations, and the issue may be fully resolved. Additionally, should there not be a basis for such grievance in the agreement between the FOP and the City, the FOP could make this the subject of collective bargaining.

misconduct occurred on the part of the City. See Stewart, 681 A.2d at 217. Again, the FOP was afforded an additional two weeks to prepare for the arbitration once the subpoena was complied with, and the arbitrator, despite the FOP's assertions to the contrary, did not find any willful misconduct or bad faith on the City's part. Further, the excluded evidence consisted of the City's entire case-in-chief, thus the arbitrator's action constructively dismissed the grievance entirely. Finally, the City did not repeatedly violate discovery orders as they pertained to this arbitration. Rather, a sole transgression occurred, which the City immediately cured after recognizing the mistake. Accordingly, we agree with the Commonwealth Court that the City was improperly denied due process.

In so holding, we reiterate, however, that we in no way approve of a challenge to sundry rulings by an arbitrator on due process grounds. To be sure, the unique circumstances of this case epitomize the very reason narrow *certiorari* review in Act 111 cases is permitted: to remedy a clear procedural due process violation. The opinion and order of the Commonwealth Court are affirmed.[18]

Jurisdiction relinquished.

Mr. Chief Justice Castille, Mr. Justice Saylor and Mesdames Justice Todd and Greenspan join the opinion.

Mr. Justice Eakin files a dissenting opinion in which Mr. Justice McCaffery joins.

Mr. Justice McCaffery files a dissenting opinion.

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[18] In light of our disposition of this appeal on constitutional grounds, we need not address the ancillary question of whether Act 111 arbitrators may, in the first instance, impose discovery sanctions.