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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4365-13T2

RISCO, INC., a New Jersey corporation,

Plaintiff-Appellant,

v.

NEW JERSEY NATURAL GAS COMPANY,

Defendant-Respondent.

Submitted March 24, 2015 – Decided July 24, 2015

Before Judges Ostrer and Hayden.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-0045-11.

Messina Law Firm, P.C., attorneys for appellant (Gil D. Messina and Timothy A.C. May, on the brief).

Marino, Tortorella & Boyle, P.C., attorneys for respondent (Kevin H. Marino and John A. Boyle, on the brief).

PER CURIAM

Plaintiff Risco, Inc. (Risco) appeals from the trial court's order confirming an arbitration award of $21,446.65 to defendant New Jersey Natural Gas Company (NJNG). Risco argues

the court should have vacated the award for two principal reasons.

First, Risco claims the arbitrator exceeded his powers, N.J.S.A. 2A:23B-23(a)(4). Risco argues the arbitrator requested and considered supplemental evidentiary submissions from NJNG, which Risco claims violated the terms of the arbitration agreement. Risco also contends the arbitrator exceeded his powers by resolving issues after he rendered what Risco claims was his final decision.

Second, Risco claims the arbitrator was partial, and engaged in prejudicial misconduct, N.J.S.A. 2A:23B-23(a)(2). Risco complains that the arbitrator participated in ex parte communications with NJNG's counsel, and refused to permit Risco to respond to NJNG's last submission to the arbitrator.

Having reviewed Risco's arguments in light of the record and the applicable legal principles, we affirm.

I.

The dispute between the parties arose when NJNG, pursuant to an administrative consent order with the New Jersey Department of Environmental Protection, sought to enter Risco's property to perform remediation. Risco repairs and refurbishes motor homes on property leased from Sodon Realty, LLC (Sodon).

The property was once the site of a coal gasification facility operated by a NJNG predecessor.

Risco refused to let NJNG proceed until it satisfied certain conditions. NJNG argued Risco lacked authority to bar entry because NJNG was empowered by a prior court order — entered in a case involving NJNG and Sodon — to enter the property to perform the remediation.

NJNG ultimately gained access to perform its work, but claimed it suffered damages as a result of delays Risco caused. On the other hand, Risco claimed it suffered damages when it was forced to relocate during the remediation. Risco filed a complaint against NJNG in late 2010, and, according to Risco, reached a settlement that NJNG thereafter breached. Risco filed an amended complaint in early 2011, asserting various tort and contract claims. NJNG filed an answer and a counterclaim.

The parties eventually proceeded to mediation. In the course of mediation, the parties opted to submit their claims to binding arbitration, pursuant to a November 12, 2012 agreement. They dismissed the pending lawsuit without prejudice, subject to reinstatement for the purpose of confirming or vacating the arbitration award. They selected the mediator to serve as arbitrator.

Relevant to Risco's argument that the arbitrator exceeded his powers, the parties agreed the arbitrator would render his decision based on the parties' previously tendered mediation submissions, optional simultaneous supplemental submissions, and oral argument if the arbitrator requested it. The agreement stated:

> 3. Upon execution and delivery of this Agreement, the Parties will immediately exchange the confidential mediation submissions ("the Mediation Submissions") that each party previously submitted . . . , so that [the arbitrator] does not have in his possession any document that the Parties have not also shared with one another.
>
> 4. The Parties may submit to [the arbitrator] and simultaneously exchange with each other supplemental submissions (the "Supplemental Submissions") for use in the arbitration on or before November 30, 2012.
>
> 5. [The arbitrator] shall render an opinion fully and finally resolving the Parties' claims and counterclaims based upon their Mediation Submissions and Supplemental Submissions unless he, in his sole discretion, wishes to entertain oral argument by counsel. If [the arbitrator] desires oral argument, he shall so advise the Parties and they will make themselves available to present argument.

Consistent with the agreement, the parties exchanged the Mediation Submissions and served Supplemental Submissions on the arbitrator.

On February 15, 2013, the arbitrator issued a detailed opinion. Relying on the access order issued in the related litigation pursuant to N.J.S.A. 58:10B-16, the arbitrator concluded that "NJNG did not need Risco's permission to access the Property." The access order required Sodon to execute a site access agreement with NJNG, which in turn required NJNG to relocate Risco and other tenants off the property, and to enter into agreements with them to address potential business interruption caused by the remediation work.

The arbitrator determined Risco was entitled to the cost of renting a van to shuttle employees and customers from its shop on the remediation site to the lot where operations were relocated. The arbitrator concluded NJNG was liable to Risco for $13,000, as the fair rental cost of a van for thirteen months. NJNG was also responsible for $5000 in Risco's lost revenue when Risco shut down its operations for most of one day because NJNG's equipment caused excessive noise and vibration. The arbitrator also awarded Risco $23,920 to reimburse it for the roughly twenty hours a month that its executive spent attending to administrative tasks associated with the remediation. The arbitrator used an hourly rate amounting to less than half of what Risco proposed.

The arbitrator recognized that "Risco's largest claim is for the additional time spent by its technicians in traveling back and forth from the relocation [site] to the Risco office," which Risco calculated as five hours per day per employee. Risco sought $110,624.36 based on 1202.33 hours and an hourly rate of $92, which is the rate Risco billed its customers for technicians' time.

The arbitrator concluded, "[T]here is no competent evidence to support the assertion that NJNG should pay Risco 92 dollars per hour for this lost time." The arbitrator determined that Risco was, instead, entitled to reimbursement at the rate it paid its technicians. Notwithstanding that the arbitration agreement apparently limited the record to the Mediation Submissions and Supplemental Submissions, the arbitrator ordered, "NJNG shall pay Risco the technician's hourly wage and not the billable hourly rate Risco charges its customers. Risco shall submit its invoice to NJNG for this claim within (30) days of the date of this decision."

The arbitrator also determined that Risco was entitled to partial reimbursement of its attorney's fees for a defined time period. Consistent with its partial award, the arbitrator ordered Risco to submit "a certification to the Arbitrator and opposing counsel for legal services rendered to Risco during the

relevant time period within 30 days of the date of this decision."

Turning to NJNG's counterclaim, the arbitrator found that Risco delayed remediation work by NJNG's contractors when Risco failed to remove its vehicles from the site from December 17, 2010 until January 7, 2011, when the initial settlement agreement was reached. NJNG contended it was entitled to recover $125,858.10 in additional charges imposed by its contractor, Enviro-Air Technologies, Inc. (EAT); and $13,500 that it paid to another firm, Master Shipwrights, Inc., because remediation was not completed.

The arbitrator concluded that the $13,500 claim was undisputed. Risco was also required to pay $25,000 to reimburse NJNG for administrative charges at $1250 a day. However, regarding delay charges related to the cost of idle workers and equipment, the arbitrator analyzed argument from Risco's expert; considered weather, holidays and other independent reasons for suspension of work; expressly rejected reimbursement for four identified days; and concluded EAT was entitled to a total of twelve workdays of delay-related costs. The arbitrator did not calculate the amount due for the reduced period, and instead noted it was "[t]o be determined." The arbitrator also

concluded that NJNG was entitled to counsel fees for the period from December 17, 2010 to January 7, 2011.

Thus, the arbitrator granted Risco: $13,000 for van use; $5000 for one day's shut down; and $23,920 for its administrator's time; and listed "[t]echnicians' time" and attorney's fees as "[t]o be determined." The arbitrator granted NJNG $25,000 in administrative costs; $13,500 for payments to Master Shipwrights, Inc.; and listed as "[t]o be determined" "12 days of delay costs," "12 days for equipment and personnel on site," and attorney's fees.

On March 6, 2013, Risco submitted to the arbitrator a document entitled "Request for Clarification of Arbitrator's Opinion or, Alternatively, for Reconsideration and Supplementation of the Record" (Reconsideration Request). Risco raised four issues. First, regarding technicians' time, Risco argued that the arbitrator should have awarded the billable rates of its technicians, to compensate it for its lost revenue. Risco inquired whether the arbitrator intended that Risco only invoice NJNG for its labor costs. Risco argued that the arbitrator's final award should include that amount. Second, Risco asked the arbitrator to reconsider its partial denial of attorney's fees. Third, regarding NJNG's claim for reimbursement of EAT's delay-related costs, Risco "request[ed]

the opportunity to supplement the record either before or after NJNG's submission to show the correct amount of those costs." Alternatively, Risco sought a brief evidentiary hearing — in person or by telephone — to offer testimony from the parties' experts. Lastly, Risco argued the arbitrator completely overlooked its claim for $6221.04 for insurance costs related to the relocation lot.

Risco later filed its papers on April 18, 2013 — pursuant to a deadline extension — to respond to the open issues of its technicians' hourly rates, and its attorney's fees (Third Submission). NJNG did not file any papers before a May 31, 2013 conference call initiated by the arbitrator.

The call was preceded by an ex parte telephone conversation between the arbitrator and NJNG's counsel. After Risco's counsel learned of the ex parte conversation — based on comments made in the May 31 conference call — he sought an explanation from NJNG's counsel, and the arbitrator.

NJNG's counsel asserted in an email to Risco's counsel that the arbitrator called him to inquire about his late submissions. However, the arbitrator explained in a separate email that it was NJNG's counsel who initiated a call, to object to Risco's Reconsideration Request, and the arbitrator said he told NJNG's counsel to include any objection in his submission responsive to

the opinion. The arbitrator added that he scheduled the May 31, conference call after NJNG failed to submit papers. In oral argument before the trial court, NJNG's counsel conceded that he addressed Risco's Reconsideration Request in the conversation, but only to discuss procedure. He also admitted he engaged in other conversations with the arbitrator. He stated, "[I]t was my understanding throughout that there was not a problem with either one of us speaking on nonsubstantive matters to the arbitrator."

After the May 31 conference call,[1] the arbitrator declined to reconsider his determination on reimbursement for Risco's technicians. He also denied Risco's request to submit additional information on NJNG's delay damage claim. However, the arbitrator apparently agreed to consider Risco's insurance claim.

A week after the conference, NJNG finally provided supplemental information to the arbitrator in response to his opinion, in the form of a certification and supporting documents from an executive in the purchasing department of NJNG's corporate parent (Third Submission). NJNG also responded to Risco's Reconsideration Request. NJNG did not object to reimbursement of Risco's insurance costs, but asserted they were

[1] The call was apparently not recorded or transcribed.

not adequately proven. In addition to submitting documentation to enable the court to calculate the delay charges for the reduced period of twelve days, NJNG essentially sought reconsideration, suggesting the arbitrator erred and should have awarded compensation for sixteen days. NJNG provided a certification of services in support of its attorney's fees claim, but contended that attorney-client privilege shielded explanations of time spent, which were not disclosed to Risco. NJNG also opposed Risco's Reconsideration Request, arguing that an additional round of submissions would contravene the parties' arbitration agreement, which was designed to control litigation costs.

In a letter dated June 17, 2013, Risco formally requested the arbitrator recuse himself based on the ex parte communications with NJNG's counsel. He also objected to NJNG's assertion of privilege over its time entries.

On June 27, 2013, the arbitrator issued a "Decision on Motions" (Motions Decision), which addressed the various issues that arose since the February 2013 decision. The arbitrator denied Risco's request for reconsideration of the technician pay issue. Although he stated he was unaware of "any process through which a party to binding arbitration may request reconsideration of the arbitrator's decision," the arbitrator

nonetheless addressed the merits of his decision and reaffirmed it. Based on Risco's Third Submission, the arbitrator awarded Risco $26,796.01 for technicians' hourly wages; $2935 for attorney's fees; and $6221.04 for increased insurance costs.

As for NJNG's claim, the arbitrator concluded that NJNG waived its attorney's fees claim by failing to disclose its explanation of time entries, which the arbitrator found were not privileged. The arbitrator also rejected NJNG's argument that it was entitled to sixteen days of delay damages, finding that a report from Risco's expert was persuasive. The arbitrator then rejected some, and approved other cost items, set forth in NJNG's Third Submission, and determined that NJNG was entitled to $60,998.70. The arbitrator then summarized his award to each party, including the specific amounts previously determined in February, plus the newly established amounts set forth in his Motions Decision.

NJNG thereafter applied to the trial court for an order confirming the arbitration award. Risco opposed, and sought an order vacating the award for the reasons we set forth at the outset of our opinion.

In orders entered on April 25, 2014, the trial court confirmed the arbitration award, denied vacatur, and entered a judgment of $21,446.65, in favor of NJNG. The court held that

its authority to set aside an arbitration award was limited, relying on Tretina Printing, Inc. v. Fitzpatrick and Assocs., 135 N.J. 349 (1994). The court rejected Risco's argument that the arbitrator exceeded his powers under N.J.S.A. 2A:23B-23(a)(4). The court acknowledged that the arbitrator relied on submissions beyond those identified in the arbitration agreement. However, the court reasoned, "[I]t would be inconsistent with the . . . intent of arbitration to find that an arbitrator is foreclosed from requesting additional information in order to calculate the damages to which he has found a party to be legally entitled."

With respect to the ex parte communications, the court noted "[t]here is nothing in the record . . . which even remotely suggests that [the arbitrator's] decision was influenced in any way by such a conversation." The court also rejected Risco's argument that the arbitrator favored NJNG in the manner in which it permitted the Third Submission by NJNG.

This appeal followed.

II.

We begin by restating fundamental principles governing our review of an arbitration award. We review the trial court's decision to confirm or vacate an arbitration award de novo as a question of law. Manger v. Manger, 417 N.J. Super. 370, 376

(App. Div. 2010); Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 372 N.J. Super. 503, 507 (App. Div. 2004), appeal dismissed, 195 N.J. 512 (2005). "This review is informed by the authority bestowed on the arbitrator by the Arbitration Act." Manger, supra, 417 N.J. Super. at 376.

Arbitration is a favored means of resolving disputes. Martindale v. Sandvik, Inc., 173 N.J. 76, 84 (2002). "Our courts have long noted our public policy that encourages the use of arbitration proceedings as an alternative forum." Wein v. Morris, 194 N.J. 364, 375-76 (2008) (internal quotation marks and citation omitted). As a result, the scope of review of the award itself is narrow; "[o]therwise, the purpose of the arbitration contract, which is to provide an effective, expedient, and fair resolution of disputes, would be severely undermined." Fawzy v. Fawzy, 199 N.J. 456, 470 (2009); see also Perini Corp. v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479, 519 (1992) (Wilentz, C.J., concurring) (stating that people choose arbitration to avoid litigation and judicial involvement, and "the role that the judiciary should aim at is to have no role at all").[2]

[2] In Tretina Printing, supra, 135 N.J. at 352, the Supreme Court adopted Chief Justice Wilentz's concurrence. "[T]he Court adopts as a rule governing judicial review of private-contract arbitration awards the standard set forth in the Chief Justice's (continued)

On the other hand, the scope of an arbitrator's powers, as well as the scope of arbitration, is defined in the arbitration agreement. Kimm v. Blisset, LLC, 388 N.J. Super. 14, 25 (App. Div. 2006) (stating that the obligation to arbitrate, and the scope of arbitration, depend on the parties' agreement), certif. denied, 189 N.J. 428 (2007); see also Young v. Prudential Ins. Co. of Am., 297 N.J. Super. 605, 617 (App. Div.), certif. denied, 149 N.J. 408 (1997). "An arbitration agreement . . . is subject, in general, to the legal rules governing the construction of contracts." Wein, supra, 194 N.J. at 376 (internal quotation marks and citation omitted); see also Kimm, supra, 388 N.J. Super. at 25 (stating that arbitration "is, at its heart, a creature of contract"). We exercise plenary review of the applicability and scope of an arbitration agreement. EPIX Holdings Corp. v. Marsh & McLennan Cos., 410 N.J. Super. 453, 472 (App. Div. 2009), overruled in part on other grounds, Hirsch v. Amper Fin. Servs., 215 N.J. 174 (2013).

III.

We consider first Risco's argument that the trial court should have vacated the arbitration award because the arbitrator considered submissions in addition to those described in the

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(continued)
concurring opinion in Perini v. Greate Bay Hotel & Casino, Inc., 129 N.J. 479 (1992)." Tretina Printing, supra, 135 N.J. at 352.

arbitration agreement, refused to permit Risco to respond to NJNG's Third Submission, and the arbitrator amended what Risco claims was a final award. Risco relies on N.J.S.A. 2A:23B-23(a)(4), which states that "the court shall vacate an award made in the arbitration proceeding if . . . an arbitrator exceeded the arbitrator's powers."

An arbitrator is granted broad discretion to determine the appropriate procedure for resolving a dispute, including determining the admissibility of evidence. N.J.S.A. 2A:23B-15(a) ("An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding."); see, e.g., Minkowitz v. Israeli, 433 N.J. Super. 111, 144 (App. Div. 2013). While vacatur may be appropriate if the arbitrator "refused to consider evidence material to the controversy," N.J.S.A. 2A:23B-23(a)(3), that provision is narrowly applied. See Perini, supra, 129 N.J. at 540, 542 (Wilentz, C.J., concurring) (referring to N.J.S.A. 2A:24-8, stating that the evidentiary error must rise to the level of misconduct, and be so obvious that resort to the record, which often does not exist in arbitration, is unnecessary).

Parties to an arbitration agreement reached at arm's length are empowered to agree to the nature of the process that the

arbitrator shall follow. See Unif. Arbitration Act (2000) § 15 comment 1, 7 U.L.A. 57 (2015) (stating that section 15 of the uniform law — which was adopted in New Jersey as N.J.S.A. 2A:23B-15 — "is a default provision and . . . is subject to the agreement of the parties"). Cf. Mt. Hope Dev. Assocs. v. Mt. Hope Waterpower Project, L.P., 154 N.J. 141, 149 (1998) (stating, in reference to the Alternative Procedure for Dispute Resolution Act, that "parties are free to invoke its procedure in toto or subject to agreed upon modifications").

Here, the parties agreed to limit the proofs provided to the arbitrator. They agreed that the arbitrator would decide the dispute based on the Mediation Submissions, Supplemental Submissions, and oral argument if the arbitrator decided to request it. The apparent purpose of these agreed upon limitations was to control litigation costs, and perhaps avoid delay. We question whether an arbitrator is free to ignore explicit agreements on procedure. See Cnty. Coll. of Morris Staff Ass'n v. Cnty. Coll. of Morris, 100 N.J. 383, 391 (1985) ("When parties have agreed, through a contract, on a defined set of rules that are to govern the arbitration process, an arbitrator exceeds his powers when he ignores the limited authority that the contract confers.").

Nonetheless, vacatur is inappropriate in this case because Risco did not object to the expansion of the record. Rather, contrary to the limitation in the arbitration agreement, Risco filed its Reconsideration Request, in which it presented additional arguments in support of its position; raised the issue of the omission of its insurance costs; sought the opportunity to provide a response to NJNG's anticipated Third Submission; and proposed a telephonic evidentiary hearing. In apparent reliance on the Reconsideration Request, the arbitrator then added insurance costs to Risco's award. Risco also responded without objection to the arbitrator's request for additional information by providing its Third Submission regarding technicians' pay and attorney's fees.

In sum, Risco is barred from contending that the arbitrator exceeded its powers by requesting additional submissions from the parties, inasmuch as it secured relief — the insurance costs award — based on the arbitrator's reliance on Risco's own additional submission. See N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 340-41 (2010) (discussing invited error doctrine); Ali v. Rutgers, the State Univ. of N.J., 166 N.J. 280, 287-88 (2000) (discussing elements of judicial estoppel).

Moreover, given the arbitrator's broad authority over procedure, N.J.S.A. 2A:23B-15(a), the arbitrator did not exceed his powers when he refused to permit Risco to respond to NJNG's Third Submission.

We are also unpersuaded by Risco's argument that vacatur was mandated because the arbitrator inappropriately amended his award. We recognize that "arbitrators exhaust their power when they make a final determination on the matters submitted to them. They have no power after having made an award to alter it; the authority conferred on them is then at an end." Kimm, supra, 388 N.J. Super. at 26 (internal quotation marks and citation omitted).

However, it is apparent the arbitrator's February 2013 decision was not a final determination of all issues. Also, an arbitrator may "adjudicate an issue which has been submitted but not decided." Id. at 27 (internal quotation marks and citation omitted). In this case, the arbitrator, in his February 2013 decision, specifically left certain costs and expenses "to be determined."

IV.

Risco also argues the trial court should have vacated the arbitration award because the arbitrator demonstrated "evident partiality" and engaged in "misconduct." Risco relies on

N.J.S.A. 2A:23B-23(a)(2), which directs a trial court to vacate an award if "the court finds evident partiality by an arbitrator . . . or misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding." Risco argues that the arbitrator's refusal to permit it to respond to NJNG's Third Submission demonstrated evident partiality, as did the arbitrator's ex parte communications with NJNG's counsel.

Risco's argument that the arbitrator's procedural ruling demonstrated "evident partiality" lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). As discussed above, the arbitrator exercises broad authority over procedure. N.J.S.A. 2A:23B-15(a). Moreover, the arbitrator even-handedly requested that each side provide him with Third Submissions, without affording either side a right to respond.

More problematic is the admitted ex parte contacts between NJNG's counsel and the arbitrator. Our Court has recognized the necessity for impartiality on the part of arbitrators. "A necessary corollary of the fact that arbitrators function with the support, encouragement and enforcement power of the state is the requirement that they adhere to high standards of honesty, fairness and impartiality." Barcon Assocs. v. Tri-County Asphalt Corp., 86 N.J. 179, 188 (1981). "Because of the

confidentiality in which arbitrators conduct their deliberations, the goal of ensuring that they will adhere to high standards will best be attained by requiring them to avoid not only actual partiality but also the appearance of partiality." Id. at 189. Even party-designated arbitrators must "not permit outside pressure to affect their decision." Id. at 190 (internal quotation marks and citation omitted). The Uniform Law Commissioners have noted that the strict limits on judicial review of arbitrators' awards place "greater significance" on the impartiality and neutrality of arbitrators. Unif. Arbitration Act (2000) § 12 comment 1, 7 U.L.A. 46-47 (2015).

Ex parte communications between one party's attorney and the arbitrator may undermine confidence in the arbitrator's neutrality, and the fairness of the process. Rules governing attorney ethics generally prohibit ex parte communications with judicial officers. "A lawyer shall not . . . communicate ex parte with" "a judge, juror, prospective juror or other official" "except as permitted by law . . . ." R.P.C. 3.5 (emphasis added). "The reference to 'other official' presumably is limited to judicial officers with decisional powers in roles similar to that of judge." Restatement (Third) of the Law Governing Lawyers, § 113, Reporter's Notes to comment c (2015).

The Restatement's prohibition on ex parte communications expressly applies to arbitrators. Id. § 113 comment d.

The prohibition "applies to communications about the merits of the cause and to communications about a procedural matter the resolution of which will provide the party making the communication substantial tactical or strategic advantage." Id. § 113 comment c. On the other hand, "The prohibition does not apply to routine and customary communications for the purpose of scheduling a hearing or similar communications." Ibid.

Nonetheless, we believe it is incumbent upon both the attorney and the arbitrator to notify the non-participating party of an ex parte conversation regarding a routine scheduling or administrative matter.

> An arbitrator . . . should not discuss a proceeding with any party in the absence of any other party, except . . . (5) Discussions may be had with a party concerning such logistical matters as setting the time and place of hearings or making other arrangements for the conduct of the proceedings. However, the arbitrator should promptly inform each other party of the discussion and should not make any final determination concerning the matter discussed before giving each absent party an opportunity to express the party's views . . . .

> [The Code of Ethics for Arbitrators in Commercial Disputes, Canon III(B) (2004) (emphasis added).][3]

Cf. Shore v. Groom Law Group, 877 A.2d 86, 95 (D.C. 2005) (stating parties may agree to disregard arbitration rules barring ex parte contacts).

As noted, the statute provides for vacatur in the case of "evident partiality" or misconduct. Proof of prejudice is required in the latter instance:

> As to misconduct, before courts will vacate an award on this ground, objecting parties must demonstrate that the misconduct actually prejudiced their rights. Courts have not required a showing of prejudice when parties challenge an arbitration award on grounds of evident partiality of the neutral arbitrator . . . .
>
> [Unif. Arbitration Act (2000) § 23 comment A(1), 7 U.L.A. 78 (2015).]

[3] The ABA Model Code of Judicial Conduct, Canon 2.9(A)(1) (2011) authorizes, "[w]hen circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which do not address substantive matters" provided that the judge "reasonably believes that no party will gain a procedural, substantive, or tactical advantage" and "the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond." We note that New Jersey's version of the Code of Judicial Conduct provides no explicit exception for ex parte communications regarding scheduling or administrative matters, but it does permit ex parte communications "as authorized by law." N.J. Code of Judicial Conduct, Canon 3(A)(6). Of course, the Code of Judicial Conduct applies only to judges and not arbitrators.

The mere appearance of impartiality does not suffice as "evident partiality." Remmey v. PaineWebber, Inc., 32 F.3d 143, 148 (4th Cir. 1994) ("It is well established that a mere appearance of bias is insufficient to demonstrate evident partiality. Arbitrators are not held to the ethical standards required of Article III judges.") (internal quotation marks and citation omitted), cert. denied, 513 U.S. 1112, 115 S. Ct. 903, 130 L. Ed. 2d 786 (1995).

Other jurisdictions have apparently viewed ex parte communications as a form of alleged misconduct, and consequently have required a showing of prejudice. See Remmey, supra, 32 F.3d at 149 (stating vacatur unwarranted where appellant failed to demonstrate that alleged ex parte communication between arbitrator and counsel regarding seating arrangements "influenced the outcome of the arbitration") (internal quotation marks and citation omitted); M & A Elec. Power Coop. v. Local Union No. 702, 977 F.2d 1235, 1237-38 (8th Cir. 1992) (stating that party seeking vacatur must demonstrate that ex parte communications deprived party of a fair hearing and influenced the outcome of the arbitration); Mut. Fire, Marine & Inland Ins. Co. v. Norad Reinsurance Co., 868 F.2d 52, 57 (3d Cir. 1989) (declining to vacate arbitration award because "appellants have failed to carry their burden of showing how these [ex parte]

contacts prejudiced them"); Global Gold Mining LLC v. Caldera Res., Inc., 941 F. Supp. 2d 374, 386 (S.D.N.Y. 2013) (stating that to vacate an arbitration award on the basis of ex parte communications, the movant must show "the ex parte conversation . . . deprived the movant of a fair hearing and influenced the outcome of the arbitration" and "the subject matter of the conversation went to the heart of the dispute's merits") (internal quotation marks and citation omitted); City of Manitowoc v. Manitowoc Police Dep't, 236 N.W.2d 231, 239 (Wis. 1975) ("Contacts between the arbitrator and one party, outside the presence of the opponent, in themselves do not justify vacating an award to the party involved. This is so where there appears to be either no improper intent or influence was not shown.").

Applying these principles, we are satisfied that Risco has failed to make a sufficient showing to justify vacating the arbitration award. We recognize that participation in ex parte communications, even on administrative matters, can undermine parties' confidence in the arbitration process, particularly where neither counsel nor the arbitrator provides prompt notice of the conversation and an opportunity to respond. That is the case here, where NJNG's counsel conceded that he conducted numerous ex parte conversations concerning what he characterized

as "non-substantive matters," and NJNG's counsel and the arbitrator provided different versions of the conversation that preceded the May 31 conference.

Nonetheless, the record before us does not establish that the communications influenced the outcome of the arbitration or deprived Risco of a fair resolution. The arbitrator's detailed opinions evidence an in-depth review of the parties' submissions. The arbitrator approved in part and rejected in part claims of both parties, demonstrating apparent even-handedness in his approach to the case. Therefore, Risco has failed to meet its burden to demonstrate "misconduct by [the] arbitrator prejudicing [its] rights" as required by N.J.S.A. 2A:23B-23(a)(2).

Affirmed.