IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Temple University Hospital	:	
	:	
v.	:	No. 327 C.D. 2010
	:	
Temple University Hospital Allied Health Professionals/PASNAP,	:	Argued: October 12, 2010
	:	
	:	
Appellant	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: November 9, 2010**

Temple University Hospital Allied Health Professionals/PASNAP (Union) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court) that granted Temple University Hospital's (Employer) petition to vacate an American Arbitration Association Opinion & Award (Arbitration Award) that sustained, in part, the grievance filed by the Union and ordered Employer to reinstate Robert Freda (Freda), a Physician Assistant (PA), whom Employer terminated with full back pay, less mitigation for the earnings he received from the time he was discharged to the date of the Arbitration Award, if Freda complied with certain conditions. On appeal to this Court, the Union, on behalf of Freda, contends that the trial court erred because the Arbitration Award: (1) drew its essence from the Collective Bargaining Agreement (CBA) in finding that

Employer failed to show just cause for terminating Freda; and (2) did not violate any public policy.

Freda, a PA and member of the Union, was employed with Employer since 2002 to work in Employer's operating rooms and on the Burn Service Unit in Employer's ICU. As a result of a vehicular accident in 2006, Freda has suffered from chronic pain. On Friday, November 9, 2007, Freda sought to obtain Percocet by writing for himself a prescription for 60 tablets on an old prescription form. When Freda attempted to fill the prescription at a New Jersey pharmacy, the police were called, and Freda was subsequently arrested and charged with attempting to obtain a prescription drug by means of forgery or deception. Freda entered into a non-trial disposition program, which required his participation in a drug treatment program. If successfully completed, the criminal charges would be withdrawn and the record of his arrest expunged.

Because Freda is licensed by the Commonwealth, Bureau of Professional and Occupational Affairs (Bureau), he reported his arrest to the Bureau on January 4, 2008, and requested to be enrolled in the Professional Health Monitory Programs (PHMP) Voluntary Recovery Program (VRP), which is a drug treatment program. The Bureau sent a letter to Freda on January 7, 2008, approving his enrollment and advising Freda that he "may not practice until [the Physicians' Health Program] and the VRP Case[]manager approve you to do so." (Letter from Bureau to Freda (January 7, 2008) at 2, R.R. at 251a.)

On January 14, 2008, Freda called Richard West, Employer's Human Resources (HR) Director, notified him of his arrest, the circumstances surrounding the arrest, and that he was enrolled in a drug treatment program. Mr. West spoke with colleagues in the HR Department and Employer suspended Freda without pay.

In January 2008, Freda also spoke with Mary Suter, Clinical Director of Cardiac and Thoracic surgery and Freda's immediate supervisor. Freda indicated to her that he had already spoken to Mr. West about being enrolled in VRP and that, upon completion, the charges against him would be dismissed and he would be able to keep his PA license.[1]

On March 11, 2008, Freda was notified via telephone by Ms. Suter that he was terminated due to behavior unbecoming professional staff.[2] Freda was unable

[1] There is no dispute that Employer's Bylaws required Freda to inform Employer of any criminal conviction within five days of a conviction, and of any arrest within *thirty* days of the incident. Although Freda signed a form when he began working for Employer acknowledging receipt of the Bylaws, Freda claims he never received a copy of the Bylaws.

[2] Temple University Health System Administrative Policies and Procedures, which was adopted in accordance with Employer's broad management rights set forth in Article 24 of the CBA, states:

> Behavior Warranting Immediate Discharge:
>
> A. Some infractions are serious and may warrant immediate discharge. Examples of these offenses include but are not limited to the following:
>
> . . .
>
> 9. Conduct unbecoming an employee including but not limited to: Actions such as violent acts against any person; threats and intimidation of others; engaging in illegal activity; viewing, displaying, distributing or any other activity involving pornography; sexual, racial, gender or other forms of harassment of employees, patients, family members or others.

(Continued…)

to attend the meeting arranged by Ms. Suter and accepted the telephone call in which he was terminated. Ms. Suter followed up that telephone conversation with a letter, dated March 12, 2008, indicating that Freda was terminated because his actions "were unbecoming to professional staff." (Letter from Suter to Freda (March 12, 2008), R.R. at 253a.)

The Union filed a grievance on behalf of Freda, alleging that Employer had terminated Freda without just cause. The grievance was unsuccessful and, pursuant to the CBA, Freda requested arbitration. A hearing before an Arbitrator was conducted on January 22, 2009. The Arbitrator issued an opinion and order on February 23, 2009, sustaining the grievance in part, requiring Freda to complete the VRP and retain his license as a PA, and if those conditions were met, the Arbitrator ordered Employer to reinstate Freda's employment with full back pay less mitigation for any earnings he received between the time he was terminated and the date of the Arbitration Award. Although the Arbitrator recognized the gravity of Freda's attempt to fraudulently obtain narcotics, he still found that Employer did not show "just cause" for the termination because Employer did not conduct an investigation before terminating Freda.[3]

(Temple University Health System Administrative Policies and Procedures No. 950.544, October 3, 2004 at 3-4, R.R. at 108a-109a.)

[3] On April 7, 2009, the Arbitrator conducted a conference call between representatives of both parties to consider the question of remedy. On April 16, 2009, the Arbitrator issued a letter to the parties clarifying that, in order for Freda to return to work for Employer, Employer must receive copies of the following documents during the Physicians' Health Program's (PHP) five-year advocacy agreement with Freda, which terminates on April 2, 2013: all random, observed body fluid screens; attendance records at a 12-Step support group; and "quarterly reports from treatment providers, PHP and workplace monitors." (Letter from Arbitrator to Parties (April 16, 2009) at 1-2, R.R. at 32a-33a.) Moreover, as to the issue of back pay, the Arbitrator explained:

(Continued…)

Employer filed a petition to vacate the Arbitration Award to the trial court. Applying the "essence test" articulated in State System of Higher Education (Cheyney University) v. State College University Professional Association (PSEA-NEA), 560 Pa. 135, 743 A.2d 405 (1999), the trial court vacated the Arbitration Award, finding that the "Arbitrator exceeded his authority [under the CBA] by imposing 'his own brand of industrial justice' . . . by finding an investigation was required" before Employer had just cause to terminate Freda, even though the facts of Freda's misconduct were admitted and not in dispute by Employer or the Union. (Trial Ct. Op. at 5.) The trial court held that, because a "per se rule" that always requires an investigation to establish just cause for disciplinary action did not draw its essence from the CBA, it vacated the Arbitration Award. Further, the trial court found that the Arbitration Award violated clear mandates of public policy because it directed Employer "to pay back pay to Freda even during the period he was precluded from practice by the Commonwealth." (Trial Ct. Op. at 6.) The Union now appeals to this Court.

> The issue of back pay is a more vexing matter. [Employer's counsel] questioned why the Hospital should pay Mr. Freda for a period of time when he was not working as a physician's assistant. The letter from Dr. Martyniuk (see paragraph 1, lines 1-4) clearly references that upon successfully completing treatment at Marworth Treatment Center, Mr. Freda could safely return to work 2-4 weeks from that completion date or April 2, 2008.
>
> My Award does not reference work limited to only a physician's assistant. Therefore, all of Mr. Freda's earnings from the day of his discharge to the date of my Award must be mitigated against back pay owed to him. I will also retain jurisdiction on the issue of back pay.
>
> While I respect the Hospital's right to challenge Mr. Freda's earnings that challenge cannot be used as a means to prevent him from returning to work as quickly as possibly provided he complies with my determinations.

(Letter from Arbitrator to Parties (April 16, 2009) at 2, R.R. at 33a.)

On appeal, the Union argues that the trial court erred in vacating the Arbitration Award because: (1) the Arbitration Award, which granted reinstatement and back pay to Freda because Employer failed to demonstrate cause for Freda's discharge due to its failure to conduct an investigation into the circumstances that resulted in his termination, drew its essence from the CBA; and, (2) the Arbitration Award did not violate any public policy of the Commonwealth.

With regard to the first issue, the Union argues that the trial court erred in vacating the Arbitration Award and concluding that conducting an investigation does not draw its essence from the CBA. Relying on the Supreme Court's decision in Office of the Attorney General v. Council 13, American Federation of State, County Municipal Employees, 577 Pa. 257, 844 A.2d 1217 (2004) (OAG), the Union contends that, in the absence of a definition of "just cause" in the CBA, labor arbitrators may look to the entire set of circumstances surrounding a discharge in order to determine whether it was for cause, and that an employer's investigation is one of the factors that is appropriate for consideration in making that determination. Moreover, contrary to the trial court's holding, the Arbitrator did not make a "per se rule" but, rather, found that in the circumstances of this case, where Freda's own supervisor felt there were unresolved questions, the failure to confront Freda with those issues was inappropriate, as was the failure to schedule Freda's discharge notification at a time when Freda was available to meet in person. (Arbitration Award at 27-29, R.R. at 71a-73a.)

In United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), the United States Supreme Court stated that an arbitrator is not to

dispense "his own brand of industrial justice" and that an "award is legitimate only so long as it draws its essence from the collective bargaining agreement." Id. at 597. In Cheyney University, the Pennsylvania Supreme Court noted, *inter alia*, that "in light of the . . . strong presumption that the Legislature and the parties intended for an arbitrator to be the judge[,] courts must accord great deference to the award of the arbitrator," whose decision in most cases will be final. Cheyney University, 560 Pa. at 149-50, 743 A.2d at 413. An exception exists where the award does not draw its essence from the parties' agreement. Id. at 150, 743 A.2d at 413. A reviewing court will determine first "if the issue as properly defined is within the terms of the collective bargaining agreement." Id. If so, the award will be upheld "if the arbitrator's interpretation can rationally be derived from the collective bargaining agreement. That is to say, a court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement." Id.

In determining whether the Arbitration Award drew its essence from the CBA, we must initially review the terms of the CBA. Article 24 of the CBA, entitled "Management Rights," provides in pertinent part that "[t]he management of Temple's operations and the direction of its working forces including, but not limited to . . . the right to hire, discipline or discharge employees for cause . . . is vested exclusively in Temple." (CBA, Art. 24, R.R. at 91a.) Additionally, Article 20 of the CBA, entitled "Arbitration," provides that if a grievance goes unresolved, the grievance can be referred to an arbitrator who "shall have jurisdiction only over grievances after completion of the grievance procedure and he shall have no power

to *add* to, subtract from, or modify in any way any of the terms of this Agreement." (CBA, Art. 20, R.R. at 90a (emphasis added).)

With the terms of the CBA in mind, we note that the first prong of the essence test is undisputedly satisfied – that the issue submitted to arbitration was encompassed within the terms of the CBA. The question before the Arbitrator was whether "[Employer] ha[d] cause to terminate the grievant, Robert Freda? If not, what shall be the remedy?" (Arbitration Award at 2, R.R. at 46a.), and, based upon the clear terms of the CBA that permits Employer to terminate for cause, the issue was certainly encompassed within the terms of the CBA. As to the second prong of the essence test—whether the Arbitrator's Award can be rationally derived from the CBA—we agree with the trial court that it cannot.

Although it is true that the term "cause" is undefined in the CBA and the Arbitrator's role is to resolve disputes arising under the CBA, such as the interpretation of undefined terms, OAG, 577 Pa. at 268-69, 844 A.2d at 1224, we agree with Employer and the trial court that the Arbitrator exceeded his authority by making a "per se rule" that an investigation is necessary before cause can be shown. The Supreme Court, in OAG, gave examples of "*some of the factors* that may be considered in determining whether there is just cause for discharge or discipline," which include an investigation. Id. at 269, 844 A.2d at 1224-25 (emphasis added). However, the Supreme Court in OAG did not *require* an investigation to commence before cause for termination can be shown, and there is no indication in the CBA that an investigation must be performed before disciplinary action can be taken. This is especially true in a case like this where

Freda admitted his misconduct to Employer and said misconduct was never in dispute. Article 20, Section 4 of the CBA, clearly provides that an arbitrator may not add terms to a CBA, (CBA, Art. 20, § 4, R.R. at 90a), which is exactly what the Arbitrator did in this case by requiring an investigation before cause can be shown. (Arbitration Award at 27, R.R. at 71a ("one of the basic tenants of just cause is that the Employer must conduct a fair, honest, objective investigation. Here . . . there was no investigation"); Arbitration Award at 29, R.R. at 73a ("it was incumbent upon the Hospital to review all of the facts in evidence and discuss the circumstances that led Mr. Freda to take the action that he did on November 9, 2007. The Hospital then could make a reasoned determination based upon all of the facts presented to them").) Moreover, although the Union maintains that an investigation was necessary because there were unresolved questions in the mind of Ms. Suter,[4] it is unclear how an investigation would have changed Employer's decision to terminate Freda where Freda admitted to: forging a prescription for narcotics for personal use; being arrested for attempting to obtain a prescription drug by means of forgery or deception; and entering into the VRP, two months *after* the incident took place. In fact, the Union asserted in its argument to the Arbitrator that "Mr. Freda shared *everything* with Mr. West." (Arbitration Award at 14, R.R. at 58a (emphasis added).) As such, the trial court did not err in vacating the Arbitration Award under the essence test.

[4] The Union is referencing the Arbitration Award, which states that Ms. Suter "testified at the hearing that there were inconsistencies in Mr. Freda's story that occurred after their conversation, during which she felt he was sincere and her first concern was for his welfare, she asked him no questions." (Arbitration Award at 15, R.R. at 59a.)

Accordingly, the trial court's order vacating the Arbitration Award because it did not draw its essence from the CBA is affirmed.[5]

RENÉE COHN JUBELIRER, Judge

[5] Because of our disposition, we need not reach the issue of whether the Arbitration Award violates public policy.

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	:	
Appellant	:	

O R D E R

NOW, November 9, 2010, the order of the Court of Common Pleas of Philadelphia County vacating the Arbitration Award in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge