IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Panther Valley School District, Appellant	:	
	:	No. 679 C.D. 2010
v.	:	
	:	Argued: September 14, 2010
Panther Valley Education Association and Robert Thomas	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: November 24, 2010

The Panther Valley School District (District) appeals from the December 11, 2009, order of the Court of Common Pleas of Carbon County (trial court) denying the District's petition to vacate an arbitrator's award sustaining a grievance filed by the Panther Valley Education Association (PVEA) on behalf of Robert Thomas and directing that Thomas be placed on the recall list, that he be reinstated to a position he is qualified to teach, and that he be made whole for all wages, seniority, and benefits from August 11, 2006, until the date of reinstatement. We affirm.

Thomas was a certified health and physical education teacher and had worked for the District as a substitute teacher. (R.R. at 55a.) Effective November 12, 2004, Thomas was hired by the District as an alternative education teacher, at which time he signed a temporary professional employee contract. (R.R. at 73a-74a.)

Thomas worked in this position through the 2005-2006 school year, after which the District discontinued the alternative education program. Id.

By letter dated August 11, 2006, J. Christopher West, the District's superintendent, notified Thomas that, at its August 10, 2006, meeting, the Panther Valley Board of Education (Board) voted to approve the nonrenewal of his contract due to a change in the status of the District's alternative education program. (R.R. at 74a-75a.) During his time with the program, Thomas received four performance evaluation reviews, three of which were satisfactory and the last, dated August 1, 2006, being unsatisfactory. (R.R. at 75a.)

On September 13, 2006, PVEA filed a grievance on behalf of Thomas indicating that, despite its belief that Thomas' name had been placed on a recall list,[1] the District failed to recall him to a health and physical education position in violation of the parties' collective bargaining agreement (CBA). Id. PVEA sought corrective action in the nature of recalling Thomas and making him whole for any and all losses. The grievance was forwarded to West, who responded that Thomas was a non-tenured, temporary employee who had received an unsatisfactory rating and that these factors resulted in Thomas' termination from employment. (R.R. at 57a.) The matter then proceeded to mandatory arbitration in accordance with the CBA.

Rosemary Porembo, the District's current superintendent, testified before the arbitrator that Thomas' contract was not renewed because of his unsatisfactory rating of August 1, 2006, not because of the District's termination of its alternative education program. Id. Porembo indicated that the explanation set

[1] PVEA's belief was premised upon representations by West, as well as Karen Heffelfinger, PVEA president, that Thomas' name would be placed on the recall list following his non-renewal. (R.R. at 63a.)

forth in the former superintendent's August 11, 2006, letter was not the true reason for the non-renewal and that the Board was simply trying to preserve Thomas' integrity by not citing to his unsatisfactory rating. Id. Porembo further testified that Thomas' name was not put on the recall list because he was dismissed, not furloughed. (R.R. at 63a.) Porembo noted that Thomas did apply for other teaching positions with the District, and that, for some positions, he was eliminated by the administrative team before a personal interview. Id.

Thomas testified that he had applied for six different positions with the District but was only interviewed for three and was not hired. Id. Thomas also indicated that West, the former superintendent, and Heffelfinger, PVEA president, both had informed him that his name would be added to the recall list following his non-renewal.[2] Id.

The arbitrator sustained the grievance and directed the District to place Thomas on the recall list. Additionally, the arbitrator directed the District to reinstate Thomas to a position he is qualified to teach and to make him whole for all wages, seniority, and benefits from August 11, 2006, until his reinstatement. In rendering his decision, the arbitrator noted that Thomas did not have tenure and his status was that of a temporary professional employee. However, the arbitrator noted that, pursuant to section 1108(d) of the Public School Code of 1949 (Code),[3] temporary professional employees are to be viewed as full-time employees and are to enjoy all the rights and privileges of regular full-time employees. The arbitrator further noted that, as an

[2] Article X, Section 2 of the CBA provides that furloughed teachers holding professional certification shall be placed on a recall list for any future vacancies in their areas of certification. (R.R. at 34a.)

[3] Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §11-1108(d).

employee, Thomas could avail himself of the rights of employment negotiated in the CBA, including the layoff and recall provisions under Article X and the grievance procedure under Article XIII.

The arbitrator focused his decision on West's August 11, 2006, letter to Thomas regarding the non-renewal of his contract. The arbitrator noted that the letter cited the change in the status of the District's alternative education program as the sole reason for the non-renewal. The arbitrator indicated that the only testimony regarding a change in status of the program was Porembo's testimony regarding a reduction in grant monies which had funded the program. The arbitrator also noted that the minutes of the Board meeting held on August 10, 2006, do not reflect the reasons underlying each member's vote of non-renewal. Thus, the arbitrator concluded that Thomas was a furloughed employee and that Article X, Section 2 of the CBA provides that furloughed teachers are to be placed on the recall list. (R.R. at 34a.)

The District filed a petition for review and application to vacate the arbitrator's award with the trial court, reiterating its allegation that Thomas was not furloughed, but was terminated because of his unsatisfactory rating, and, therefore, not subject to the recall provisions of the CBA. Additionally, the District argued that Thomas had no right to grieve his dismissal, alleging that the CBA contains no provision affording grievance or recall rights to temporary professional employees and that the arbitrator went outside the CBA, to section 1108(d) of the Code, to find the existence of such rights. Thomas filed a reply denying these allegations and asserting that the arbitrator's award derived its essence from the CBA.

By opinion and order dated December 11, 2009, the trial court denied the petition and affirmed the arbitrator's award.[4] In its opinion, the trial court first recognized Thomas' right to file a grievance, noting that, as a temporary professional employee hired to teach in the District's alternative education program, Thomas was clearly within the bargaining unit and entitled to the protections of the CBA. Like the arbitrator, the trial court cited section 1108(d) of the Code in support of its decision. The trial court then concluded that the subject of the dispute, i.e., a teacher's right to recall, is encompassed within Article X of the CBA.

Contrary to the District's assertion, the trial court determined that Thomas was not grieving his unsatisfactory rating or a dismissal due to his status as a temporary professional employee. Rather, according to the trial court, the only issue before the trial court was whether Thomas was entitled to have his name placed on the active recall list. Finally, the trial court concluded that the arbitrator imposed the proper remedy, i.e., placement on the District's recall list.

On appeal to this Court,[5] the District argues that the arbitrator's award is not based upon the essence of the CBA, because the CBA provides no grievance or

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[4] The trial court did, however, modify the arbitrator's award such that any wages, seniority, or benefits due under the award are to be reduced by any monies earned by Thomas during the period from August 11, 2006, to the date of his reinstatement.

[5] It is well settled that an appellate court's scope of review of a grievance arbitration award is the "essence test." City of Johnstown/Redevelopment Authority v. United Steelworkers of America, Local 14354, 725 A.2d 248 (Pa. Cmwlth. 1999). We are limited under this test to determining whether the arbitrator's award can in any way be rationally derived from the CBA in light of the language of the agreement, its context and any other indicia of the parties' intention. Id. This Court may not review the merits of the arbitrator's decision, nor may we substitute our judgment for that of the arbitrator, even if our interpretation of the CBA would differ from that of the arbitrator. Id.

Moreover, our Supreme Court has indicated that the role for a court reviewing a challenge to a labor arbitration award is one of deference. See State System of Higher Education (Cheyney University) v. State College and University Professional Association (PVEA-NEA), 560 Pa. 135,

(Footnote continued on next page…)

recall rights for temporary professional employees who are dismissed following an unsatisfactory performance rating and the arbitrator improperly relied upon certain provisions of the Code, which exceeded the four corners of the CBA, to establish such rights. We disagree.

Even under the Code, the District asserts that temporary professional employees such as Thomas have no recall rights. The District cites to Pookman v. School District of the Township of Upper St. Clair, 506 Pa. 74, 483 A.2d 1371 (1984) and Phillippi v. School District of Springfield Township, 367 A.2d 1133 (Pa. Cmwlth. 1977), in support of this assertion. However, Pookman and Phillippi are distinguishable from the present case.

In Pookman, our Supreme Court addressed whether certain temporary professional employees, all of whom received notices of non-renewal of their contracts effective June 12, 1981, the last day of their second full year of teaching, satisfied the two-year qualification for tenure under section 1108(b) of the Code, 24 P.S. §11-1108(b).[6] The Court concluded that the temporary professional employees had not met this qualification and, therefore, were not tenured. In Phillippi, this Court concluded that several temporary professional employees, all of whom had been notified of the non-renewal of their contracts following a substantial decrease in student enrollment, were not professional employees and, hence, the school district

(continued…)

743 A.2d 405 (1999). The Court in Cheyney University further stated that an arbitrator's award would only be vacated where such award is indisputably and genuinely without foundation in, or fails to logically flow from, the collective bargaining agreement.

[6] Section 1108(b) provides that a non-tenured employee whose work has been certified as satisfactory by the district superintendent to the secretary of the school district during the last four months of the second year of such service shall attain the status of a tenured employee.

was not limited to suspending such employees in accordance with sections 1124 and 1125 of the Code, 24 P.S. §§11-1124, 11-1125.[7] We noted that the statutory language specifically limited application of these sections to professional employees and we focused on the lack of tenure as the feature distinguishing temporary professional and professional employees. However, the present case does not involve the issue of tenure or the remedies available to a school district facing declining enrollment. Instead, it involves an interpretation of the parties' CBA, Thomas' rights thereunder, and the reasons underlying the non-renewal of Thomas' contract.

Article II of the CBA recognizes the PVEA as the bargaining unit for all elementary, middle, and high school teachers. (R.R. at 12a.) The CBA herein does not differentiate between tenured and non-tenured teachers. Article X, Section 1 of the CBA, the layoff and recall provision, states that the Code provides certain job security provisions, certification, and other regulatory provisions associated with various classes of employees and that the same shall govern the manner in which the job security, job progression, and reduction in force practices shall be effected with respect to members of the bargaining unit. (R.R. at 34a.) In other words, this provision essentially incorporates the Code into the CBA. As noted by the arbitrator and the trial court, section 1108(d) of the Code provides that temporary professional employees shall be viewed as full-time employees and shall enjoy all the rights and privileges of regular full-time employees.

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[7] Section 1124 provides that a board of school directors may suspend the necessary number of professional employees as a result of a substantial decrease in student enrollment. Section 1125 sets forth the procedure for such suspensions, including a review of the ratings of the affected professional employees and a determination of seniority rights. Neither section provides for the termination or non-renewal of a professional employee in a situation involving a decline in student enrollment.

Moreover, West's August 11, 2006, letter to Thomas never referenced the unsatisfactory rating as a basis for the non-renewal of Thomas' contract. Instead, this letter merely referred to a change in the status of the District's alternative education program. The arbitrator credited Thomas' testimony that both West and Heffelfinger had informed him that his name would be added to the recall list following his non-renewal. Hence, the evidence of record supports the conclusion that Thomas was furloughed, not terminated.

Article X, Section 2 of the CBA provides that furloughed teachers holding professional certification shall be placed on a recall list for any future vacancies in their areas of certification. Id. Article X, Section 2A indicates that a furloughed employee shall remain in the preferred recall list for a period of one year, with an employee option for an additional year. (R.R. at 35a.) Article XIII of the CBA addresses the grievance procedure afforded parties to the CBA. (R.R. at 39a.) Thus, the arbitrator's award was based upon the essence of the CBA.

Next, the District argues that the remedy fashioned by the arbitrator exceeds the scope of his authority and the four corners of the CBA. Again, we disagree.

The District reiterates its contention that it had the absolute right not to renew the contract of Thomas, a temporary professional employee, for an unsatisfactory rating. We do not disagree with the District that it may opt to not renew the contract of a temporary professional employee for such a rating. Again, however, the District did not decline to renew Thomas' contract on this basis. Instead, as discussed above, the non-renewal was premised upon a reduction in funding for the alternative education program. Following the non-renewal, Thomas' name was not placed on the recall list.

The arbitrator's remedy herein simply directed the District to place Thomas' name on this list and reinstate him to a position he is qualified to teach. Such a remedy is clearly encompassed within Article X of the CBA as well as prior decisions of this Court. See, e.g., Colonial Education Association v. Colonial School District, 644 A.2d 211 (Pa. Cmwlth.), appeal denied, 539 Pa. 670, 652 A.2d 840 (1994) (affirming trial court order directing that a teacher be reinstated with back pay and all other emoluments after a school district failed to recall the teacher to a position for which he was qualified).

Accordingly, the order of the trial court is affirmed.

PATRICIA A. McCULLOUGH, Judge

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ORDER

AND NOW, this 24th day of November, 2010, the December 11, 2009, order of the Court of Common Pleas of Carbon County is hereby affirmed.

PATRICIA A. McCULLOUGH, Judge