IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pocono Mountain School District	:	
	:	
v.	:	No. 700 C.D. 2010
	:	Argued: December 6, 2010
Hussein Abou-Mousa,	:	
Appellant	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: July 27, 2011**

Appellant, Hussein Abou-Mousa, appeals from the order of the Court of Common Pleas of Monroe County (common pleas), which granted Pocono Mountain School District's (the District) motion for review of arbitration award, vacated the award and, thereby, reinstated Appellant's termination. We reverse.

Appellant was employed by the District as a bus driver. During the 2005-2006 school year, Appellant was assigned runs which included both high school and elementary students. Appellant drove bus #79, which was equipped with a video camera. The video camera was mounted in a bracket at the front of the bus. The camera recorded activity behind the bus driver's seat. The camera's videotape was capable of recording for six hours. After six hours, the camera re-recorded over the existing material. The camera began recording when the bus'

ignition was engaged and continued to record until approximately fifteen minutes after the bus engine was shut off.

In February 2006, the District received complaints regarding student behavior on the bus. Parents complained that Appellant was allowing high school students to smoke on the bus and one parent alleged that her son "C" was being picked on while riding on the bus. Appellant's dispatcher questioned him regarding the complaints. Appellant responded that he had no knowledge of the events reported by the parents. Kevin Aul, the District's transportation director, checked the camera on bus #79 to determine whether it was operable and adjusted correctly. Aul found that the camera was loose in the bracket, but was not loose enough to bounce up and down. Aul tightened the screws on the camera bracket. On February 16, 2006, student C's mother contacted Aul and informed him that Appellant had called C off the bus, called him a "cry baby" and suggested that C was trying to get him in trouble.

Aul reviewed the video tape from February 16. Aul observed C being called off the bus by an unidentified person and thereafter re-entering the bus. Aul observed a second event on the February 16 videotape. Aul observed a high school student "A" speaking to someone unseen at the front of the bus, following which the videotape went "white" for approximately 40 to 45 minutes. When the picture reappeared, elementary school students were boarding the bus. Aul also reviewed portions of the videotape recorded prior to the afternoon of February 16. Aul noted that the camera alternated between being aimed at the ceiling and at the bus seats.

Aul then interviewed Appellant. Appellant denied any knowledge of students smoking, picking on C or tampering with the bus camera. Thereafter, student A was interviewed. A stated that on February 16, he brought a picture to

hang in the front of the bus and that Appellant told him to place it over the camera. A also stated that he had seen Appellant tilting the camera up on numerous occasions. A also revealed that Appellant had called him at home and had spoken to him that morning about the February 16 incident. The District obtained a written statement from A dated February 24, 2006.

The District met with Appellant a second time on March 2. At first, Appellant again denied any knowledge of the incidents. However, Appellant later admitted that he knew that A had tampered with the camera, but had not reported the incident because he did not want to get any students in trouble. Appellant also admitted calling A at home, but stated that he only contacted A to encourage him to tell the truth. Appellant requested that the District interview other students on the bus to determine what happened. The District declined to interview other students.

On March 15, 2006, Edward Battisfore, director of support services, informed Appellant via letter that, as a result of the District's investigation, he was recommending Appellant's termination. By letter dated March 16, 2006, Dwight Pfennig, superintendent of schools, advised Appellant that he would recommend to the District's Board of School Directors that he be terminated. The superintendent's letter stated:

> You are being charged by the PMSD Administration with improper conduct growing out of your alleged commission of the following:
> 1. Violation of School Board Policy 810.1; tampering with your bus camera.
> 2. Allowing a student to tamper with your bus camera.
> 3. Misrepresenting or concealing your behavior and the facts resulting in a breach of trust.

4. Attempting to obstruct the investigation with a student.
5. Tampering with your camera so as to avoid detection of what is happening on your bus.

Arbitrator's Opinion at 7. The District formally terminated Appellant's employment by letter dated April 20, 2006. The District offered Appellant a hearing before the District's Board of Directors. However, Appellant informed the District that he intended to file a grievance under the parties' collective bargaining agreement (CBA). Scott E. Buchheit was selected as the arbitrator. An arbitration hearing was held on September 13, 2007.

The arbitrator rendered an opinion and award dated March 19, 2008. The arbitrator dismissed charges one, two and five relating to tampering with the camera. The arbitrator determined that there was a conflict of evidence between Appellant and student A regarding this issue. He found that neither Appellant's testimony nor student A's testimony was more credible than the other's testimony. The arbitrator went on to reason that the District was obligated by the principles of just cause inherent in the parties' CBA to conduct a full and fair investigation and obtain adequate evidence of an employee's guilt before acting. The arbitrator concluded that the District had failed to conduct a full and fair investigation because it had refused to interview additional students, and, therefore, the charges must be dismissed. Regarding the third charge, "[m]isrepresenting or concealing your behavior and the facts resulting in a breach of trust," the arbitrator concluded that Appellant's conduct constituted disciplinable misconduct. Regarding the fourth charge relating to obstruction of the investigation, the arbitrator found insufficient evidence to support this exact charge. Rather, the arbitrator found that it was inappropriate for Appellant to contact student A because the contact gave

the appearance that he was attempting to obstruct the District's investigation. The arbitrator then went on to consider whether termination was the appropriate punishment. The arbitrator concluded that while Appellant's misconduct was serious, the principles of just cause required that he find that the misconduct was not a terminable offense. The arbitrator reasoned that the most serious charges were not proven, that Appellant was an employee with ten years of good service and, that, no harm resulted to either the students or the District as a result of Appellant's conduct. The arbitrator determined that Appellant should be reinstated to his position without back pay. This decision resulted in Appellant's serving a two year suspension without pay. The arbitrator reasoned that such a long suspension without pay would impress upon Appellant the seriousness of his misconduct.

The District appealed the arbitrator's award to common pleas by filing a motion for review of arbitration adjudication. Common pleas granted the District's motion and vacated the arbitrator's March 19, 2008 award. Relying upon the public policy exception to the essence test, common pleas determined that Appellant's misconduct violated Section 514 of the Public School Code of 1949 (School Code),[1] 24 P.S. § 5-514, which allows for termination of public school employees "for incompetence, intemperance, neglect of duty, violation of any of the school laws of this Commonwealth, or other improper conduct." Common pleas reasoned that because Appellant's conduct violated the School Code, the arbitrator's award "contravenes a well defined, dominant public policy that is ascertained by reference to the law and legal precedent and not from mere consideration of public interests." Common pleas' Opinion at 11 [quoting

[1] Act of March 10, 1943, P.L. 30, *as amended.*

Westmoreland Intermediate Unit #7 v. Westmoreland Intermediate Unit #7 Classroom Assistants Educ. Support Pers. Ass'n, 595 Pa. 648, 939 A.2d 855 (2007) (*Westmoreland I*)]. Common pleas concluded that the arbitrator's award reinstating Appellant ran counter to the conduct permitted by the School Code and was contrary to public policy and the fundamental precepts of the justice system. This appeal followed.

Appellant asserts that common pleas erred in vacating the award and reinstating his termination. Appellant's arguments can be divided into two categories. First, Appellant argues that common pleas erred in finding that the arbitration award violated public policy. Second, Appellant contends that common pleas exceeded its limited jurisdiction by substituting its own factfinding and judgment for that of the arbitrator.

We review grievance arbitration awards under the Public Employe Relations Act[2] [PERA] under the standard known as the "essence test," pursuant to which the courts must defer to the factfinding and judgments of the arbitrator unless they are indisputably and genuinely without foundation or fail to logically flow from the parties' collective bargaining agreement.[3] The parties do not dispute that the award in this case passes the essence test, but whether in this case it may

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[2] Act of July 23, 1970, P.L. 563, *as amended*, 43 P.S. §§ 1101.101 – 1101.2301

[3] Pursuant to the Uniform Arbitration Act, a court reviewing a grievance arbitration award under PERA may "modify or correct the award [only] where the award is contrary to law and is such that had it been a verdict of a jury the court would have entered a different judgment or a judgment notwithstanding the verdict." *See* 42 Pa. C.S. § 7302(d)(2). *See also State Sys. of Higher Educ. (Cheyney Univ.) v. State Coll. Univ. Prof'l Ass'n (PSEA-NEA)*, 560 Pa. 135, 743 A.2d 405 (1999); *Northwest Area School District v. Northwest Area Educ. Ass'n*, 954 A.2d 111, 115 n.9 (Pa. Cmwlth. 2008). Moreover, as we recently noted, "our Supreme Court has held that the judgment n.o.v./error of law concept set forth in Section 7301(d)(2) is the same as the 'essence test.'" *Tunkhannock Area Sch. Dist. v. Tunkhannock Area Educ. Ass'n*, 992 A.2d 956, 958 (Pa. Cmwlth. 2010) and cases cited therein.

be vacated under the narrow exception set forth in *Westmoreland I*, to wit, an arbitrator's award that passes the essence test can be vacated only if it is violative of a public policy of the Commonwealth. 595 Pa. at 666, 939 A.2d at 865-66. As the trial court noted, the public policy "must be well-defined, dominant, and ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Id*. A court cannot enforce an arbitration award if the remedy requires the employer to take some action that would violate such clear public policy. *Phila. Hous. Auth. v. Am. Fed'n of State, County & Mun. Employees*, 956 A.2d 477 (Pa. Cmwlth. 2008), *pet. for appeal granted*, 601 Pa. 313, 972 A.2d 482 (2009) [citing *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757 (1983)]. A court must determine whether an arbitrator's award contravenes public policy, not whether the grievant's misconduct violated public policy. *Westmoreland Intermediate Unit #7 v. Westmoreland Intermediate Unit #7 Classroom Assistants Educ. Support Pers. Ass'n*, 977 A.2d 1025, 1207 n.5 (Pa. Cmwlth. 2009) (*Westmoreland II*).

This Court recently addressed application of the public policy exception in *City of Bradford v. Teamsters Local Union No. 110*, ___ A.3d ___ (Pa. Cmwlth. No. 1804 C.D. 2009, filed June 23, 2011). This Court stated:

> In our view, application of the public policy exception requires a three step analysis. First, the nature of the conduct leading to the discipline must be identified. Second, we must determine if that conduct implicates a public policy which is "well-defined, dominant, and ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Westmoreland I*, 595 Pa. at 666, 939 A.2d at 866. Third, we must determine if the arbitrator's award

> poses an unacceptable risk that it will undermine the implicated policy and cause the public employer to breach its lawful obligations or public duty, given the particular circumstances at hand and the factual findings of the arbitrator.

Id. ___ A.3d at ___, slip op. at 11 (footnote omitted). In this case, the arbitrator found that the disciplinable conduct in which Appellant engaged involved misrepresenting or concealing his behavior resulting in a breach of trust and improperly contacting student A. Common pleas determined that Appellant's conduct violated the fundamental precepts of truth and fairness and Section 514 of the School Code, 24 P.S. § 5-514, and, thus, his reinstatement violated public policy. As discussed below, we reject common pleas' conclusion that Appellant's reinstatement violated a well-defined public policy.

First we note that it is not our role, or more precisely, the role of the courts, to substitute our view of the facts for that of the arbitrator. Here, the arbitrator discredited the evidence concerning tampering with the camera because of his view that the District's investigation was insufficient and thus its evidence was unpersuasive. The arbitrator also found unpersuasive the evidence that Appellant had attempted to obstruct the investigation. The only charge which he found proven, other than improper contact with a student, was Appellant's misrepresenting his behavior or concealing the true facts, while finding that although he had initially lied, he was ultimately truthful. Further, he found that no harm resulted from Appellant's misconduct. While we might have found the facts differently, it is based upon these findings that we are required to base our analysis of the public policy exception. *County of Mercer v. Teamsters Local 250,* 946 A.2d 174, 183 (Pa. Cmwlth. 2008).

Section 514 of the School Code permits, but does not mandate, that a school district dismiss an employee "for incompetence, intemperance, neglect of duty, violation of any of the school laws of this Commonwealth, or other improper conduct." 24 P.S. § 5-514. While the misconduct found by the arbitrator certainly falls within the category of "improper conduct," it does not violate any specific provision of the School Code, so it is highly questionable whether it implicates a policy that is well defined by reference to laws and legal precedents rather than simply offending general considerations of the public interest.

Union City Area School District v. Union City Area Education Association, 951 A.2d 416 (Pa. Cmwlth. 2008) is instructive. In *Union City*, the school district terminated a teacher for unsatisfactory work performance, incompetence, and persistent negligence in the performance of his teaching duty.[4] The arbitrator examined the allegations against the teacher and found no serious misconduct that would justify termination and that the school district had failed to establish just cause for termination. The trial court vacated the arbitration award and reinstated the teacher's termination. Before this Court, the school district argued that reinstatement of the teacher would violate the Commonwealth's well-defined public policy in favor of establishing a strong public school system since his continued teaching would negatively affect the general welfare of students. This Court refused to classify the teacher's reinstatement as an action that would violate public policy. *Id*. at 422. In a concurring opinion, Judge Cohn Jubelirer noted:

[4] Under the School Code, the termination of tenured teachers is governed by Section 1122, 24 P.S. §11-1122. Actions which are terminable under Section 514 and Section 1122 are quite similar.

> Although there is, or should be, a strong public policy in favor of the proper supervision and education of the children of the Commonwealth, it appears, in this case, not to have been shown to be sufficiently "well-defined, dominant and ascertain[able] by reference to . . . laws and legal precedents and not from general considerations of supposed public interests," as required by the Supreme Court's decision in *Westmoreland Intermediate Unit # 7 v. Westmoreland Intermediate Unit # 7 Classroom Assistants Educational Support Personnel Association*, 595 Pa. 648, 666, 939 A.2d 855, 866 (2007). The Supreme Court, in *Westmoreland*, set a high and exacting standard to show a public policy that can provide an exception to the essence test. In this case, however, the District did not articulate a policy sufficient to meet the requirements set out in *Westmoreland*.

Union City, 951 A.2d at 422.

Even if we accepted the proposition that a well-defined public policy was implicated by Appellant's misconduct, we could not agree that the third requirement of the public policy exception was met. Generally, where a CBA contains a just cause provision, the arbitrator is permitted to consider mitigating circumstances when setting aside a discharge and imposing an appropriate penalty. *Wattsburg Area Sch. Dist. v. Wattsburg Educ. Ass'n*, 884 A.2d 934, 939-40 (Pa. Cmwlth. 2005). Similarly, in reviewing the third prong of the public policy exception, we must take into account the mitigating factors considered by the arbitrator. Here, given the finding that Appellant had a ten year unblemished record and was guilty of only minor misconduct which caused no harm, we cannot conclude that the award—vacating the termination in favor of a two year

suspension without pay—was such as to undermine the policies of the School Code or cause the District to breach its lawful obligations to the public.[5]

For all of the foregoing reasons, we reverse.

BONNIE BRIGANCE LEADBETTER,
President Judge

[5] Common pleas found that student safety was implicated and would be undermined by Appellant's reinstatement. However, while this conclusion can be drawn from the evidence presented by the District, it cannot be drawn from the facts as found by the arbitrator. Were we bound by common pleas' view of the facts rather than those of the arbitrator, this would be a different case.

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O R D E R

AND NOW, this 27th day of July, 2011, the order of Court of Common Pleas of Monroe County is hereby REVERSED.

BONNIE BRIGANCE LEADBETTER,
President Judge