**[J-234-1998]**
**IN THE SUPREME COURT OF PENNSYLVANIA**
**MIDDLE DISTRICT**

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| PENNSYLVANIA STATE POLICE, | : | No. 28 Middle District Appeal Docket 1998 |
| Appellant | : | Appeal from the order of the Commonwealth Court entered July 24, 1997 at No. 147 C.D. 1997, affirming a disciplinary grievance arbitration award. |
| v. | : | |
| | : | 698 A.2d 688 (Pa. Commw. 1997) |
| PENNSYLVANIA STATE TROOPERS ASSOCIATION (TROOPER RODNEY SMITH), | : | ARGUED: November 17, 1998 |
| Appellee | : | |
| PENNSYLVANIA STATE POLICE | : | No. 29 Middle District Appeal Docket 1998 |
| Appellant | : | Appeal from the order of the Commonwealth Court entered July 24, 1997 at No. 3028 C.D. 1996, affirming a disciplinary grievance arbitration award. |
| v. | : | |
| PENNSYLVANIA STATE TROOPERS ASSOCIATION (Trooper Robert K. Johnson) | : | 698 A.2d 686 (Pa. Commw. 1997) |
| | : | ARGUED: November 17, 1998 |

## DISSENTING OPINION

**MADAME JUSTICE NEWMAN** **DECIDED: November 30, 1999**

I respectfully dissent because in ordering that the State Police reinstate two troopers who are guilty of serious crimes (terroistic threats and shoplifting); the arbitrator exceeded the limits of his power. Further, in these limited circumstances where the public employer

is the State Police, responsible for enforcing the laws of this Commonwealth and protecting the safety of the citizens of this Commonwealth, the public policy of binding arbitration must cede to the public policy of insuring that the employees who are bound to carry out these duties are of the highest integrity and character.

This Court in Pennsylvania State Police v. Pennsylvania State Troopers' Association (Betancourt), 540 Pa. 66, 656 A.2d 83 (1995) adopted "narrow certiorari" to review a grievance arbitration award rendered pursuant to Act 111.[1] In doing so we relied primarily upon City of Washington v. Police Department of Washington, 436 Pa. 168, 259 A.2d 437 (1969), where this Court first determined that there was no right of appeal from the binding decision of an arbitration panel, but that review of the award was based upon the principles of common law certiorari. The scope of review set forth in City of Washington was as follows:

> If an appeal is prohibited by an Act, or the decision of the Agency is stated to be final or conclusive, the law is well settled that an appeal will lie to the Courts in the nature of a narrow certiorari and this Court will review only (1) the question of jurisdiction; (2) the regularity of the proceedings before the Agency; (3) questions of excess in exercise of powers; and (4) constitutional questions.

Id., 259 A.2d at 441.

In articulating these parameters for reviewing the decision of an arbitration panel, the City of Washington Court stated that:

> **No adjudicatory body has unlimited discretion.** At the very least, each and every adjudicator is bound by the Constitution of the United States; and most are bound by even tighter strictures. The restrictions **may** go to the nature of the controversies which they can decide, the parties who may

[1] This common law doctrine derives from this Court's constitutional power of certiorari to test the jurisdiction of subordinate tribunals. See e.g., In Re: 21st Senatorial District Nomination, 126 A. 566 (Pa. 1924).

> appear before them, the type of relief they may grant, or any other element in the adjudicatory process.

Id. (emphasis added)

In looking to the scope of the arbitrator's power pursuant to Act 111, the Court noted that:

> while the statute (Act 111) contains no express limitations on the power of the arbitrators, **neither could it fairly be interpreted to impliedly grant public employers the power to do whatever the arbitrators decree if such action is otherwise forbidden.** No one would argue, for instance, that a public employer could set up different wage scales for its black and its white employees just because the arbitrator so ordered.

City of Washington, 259 A.2d at 441, n.5 (emphasis added).

The City of Washington Court proceeded to determine that Act 111 arbitration panels may not order a public employer to do an act that was forbidden and looked to see whether a "higher authority" prevented the arbitrators from entering the award at issue.

> In spite of the fact that neither the relevant constitutional provision nor the enabling legislation clearly delineates the power of the arbitration panels, we are of the opinion that such panels may not mandate that a governing body carry out an illegal act. We reach this result by quite frankly reading into the enabling legislation the requirement that the scope of the submission to the arbitrators be limited to conflicts over legitimate terms and conditions of employment. Were this not so, virtually any issue could be submitted to the arbitrators under the guise of a labor conflict. **Further, we fully realize that there will be issues that would be fully legitimate in the context of a private sector labor dispute which will not be legitimate in the context of a public sector labor dispute. Public employers are in many respects more limited in what they may do vis-a-vis their employees, and those limitations must be maintained.** The essence of our decision is that an arbitration award may only require a public employer to do that which it could do voluntarily. We emphasize that this does not mean that a public employer may hide behind self-imposed legal restrictions. An arbitration

> award which deals only with proper terms and conditions of employment serves as a mandate to the legislative branch of the public employer, and if the terms of the award require affirmative action on the part of the Legislature, they must take such action, if it is within their power to do so.

Id., 259 A.2d at 442-43 (emphasis added).

Applying these above stated principles, I believe that the decision of the arbitrator in the cases of Trooper Smith and Trooper Johnson was beyond the scope of his powers. Pursuant to the section of the Administrative Code that governs the qualifications of its force, the State Police can appoint only those who possess certain physical and mental qualifications, and who are of "good moral character." 71 P.S. § 1193. The qualifications generally set forth in Section 1193 are to be "based upon the standard provided by the rules and regulations of the police force of the cities of the first class." Id. This provision, in conjunction with the standard set forth in the First Class Township Code and basic mandates of public policy, limits the power of the State Police to appoint virtually anyone to the police force.

Although the phrase "good moral character" is not defined, the term has widespread use in our jurisprudence and the lack of it has been defined in a court decision as "anything done knowingly contrary to justice, honesty or good morals." Gombach v. Department of Bureau of Commissions, Elections & Legislation, 692 A.2d 1127, 1130 (Pa. Cmwlth 1997). Also, "good moral character" in the context of determining professional employment must be assessed in connection with the particular occupation at issue. Here, the crime of shoplifting implicates dishonesty and theft, while the crime of terroistic threats has serious overtones of violence. Both of these crimes in my opinion involve moral turpitude and these officers, as criminal offenders to this degree, cannot hold the confidence of the public in the performance of their jobs as police. As such, I do not believe that these officers have "good moral character" because of the way that term is used within the Administrative Code's articulation of an officer's qualifications for the job.

Further, in looking to the standards set forth in the First Class Township Code as to Police Officers (the Code), as Section 1193 directs, the Code sets forth a specific provision calling for the removal of an officer if he has violated "any law of this Commonwealth which provides that such violation constitutes a misdemeanor or a felony." 53 P.S. § 55645. While the Administrative Code is unclear about which rules and regulations of the "police force of the cities of the first class" should guide basic qualifications for appointment to the State Police, I find no reason to exempt the State Police from the requirement that its ranks be free of serious criminal offenders. Indeed, it would appear a fundamental requirement of this Commonwealth that we not appoint felons to act as the enforcers of our criminal laws and the protectors of our citizens.

Moreover, the Pennsylvania State Police is granted statutory power to assist the Governor in the administration and enforcement of the laws of the Commonwealth. 71 P.S. § 250. This carries the concomitant duty to ensure the integrity of the force, and in my opinion, the State police could not bargain away this basic responsibility in a labor contract. See, e.g., Philadelphia Housing Authority v. Union of Security Officers #1, 500 Pa. 213, 455 A.2d 625 (1983)(where arbitrator found that security guard had defrauded elderly tenant arbitrator was without authority to overturn discharge of security guard). [2]

As set forth in City of Washington no adjudicatory body has unlimited discretion and in the case of Act 111 arbitration disputes, the "scope of the submission to the arbitrator [is] limited to conflicts over **legitimate** terms and conditions of employment." Id. at 442.

[2] I recognize that in Philadelphia Housing the court in dicta appeared to state a scope of review founded upon the "essence test." However, the Court vacated the arbitrator's award on the basis that the arbitrator had no authority to enter such an award because the Housing Authority could not bargain away its responsibility to ensure the integrity of its security officers. In other words, it was not a legitimate dispute about the terms and conditions of employment and thus could not be a proper scope of the arbitrator's review. This meets the scope of review articulated in City of Washington.

Where, as here, a state police officer is charged with felonious criminal conduct that impinges on his good moral character, and the arbitrator determines that the charges are in fact proven and true, I believe that the arbitrator does not have the power to order that the officer be reinstated. See, e.g., Philadelphia Housing Authority v. Union of Security Officers #1, supra.

In circumstances where an arbitrator finds that a trooper has committed felonious criminal conduct, the matter of the trooper's reinstatement to the police force is not a legitimate or proper dispute concerning the terms and conditions of employment with the State Police, because the State Police cannot appoint officers to the force who do not meet the statutory minimum qualifications as a State Trooper. See, e.g., DeToro v. City of Pittston, 344 Pa. 254, 25 A.2d 299 (1942)(appointment of municipal police officer in violation of legislative mandate for such appointment illegal even if done with approval of the civil service board).

A private employer, and maybe even other Departments of the Commonwealth, may be free voluntarily to hire personnel who have been convicted of serious crimes. However, neither the statute governing an officer's appointment, nor basic public policy, allows the State Police to appoint personnel to the State Police force unless they have "good moral character." 71 P.S. § 1193. As set forth in Detoro, supra,

> The legislature has declared in unmistakable terms that merit ascertained in a manner prescribed shall govern appointments to the police department and has formulated and announced the public policy of the state in that respect. An administrative officer is not permitted to violate such declared public policy and no court may sanction its violation. **An employment which in its inception violates such an act as this is illegal and against public policy and it is the duty of the administrative officers of the state or its civil subdivisions to discontinue any illegal employment…**

Id., 25 A.2d at 302.

Therefore, it is my opinion that the reinstatement to the police force of these two troopers would be in contravention to the letter and spirit of the minimum qualifications required of the State Police. The arbitrators exceeded their authority, and have made an award that the State Police could not voluntarily have done. I accordingly dissent.