IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Temple University Hospital, Appellant	:	
v.	:	No. 1994 C.D. 2007
	:	Argued: June 9, 2008
Temple University Hospital Nurses' Association/PASNAP	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SMITH-RIBNER FILED: August 7, 2008

Temple University Hospital (Temple) appeals from an order of the Court of Common Pleas of Philadelphia County that denied Temple's motion to set aside an arbitration award that sustained the grievance filed by Temple University Hospital Nurses' Association/PASNAP (Association) and ordered Temple to reinstate nurse Richard Baldwin, whom Temple had terminated, and to make him whole in terms of income and lost benefits. Baldwin was terminated for allegedly having sexual intercourse with a patient under his care and providing false information about the incident to his supervisors.

Temple questions whether the trial court abused its discretion and committed legal error when it failed to apply the proper standard of review, where the Abitrator's award is indisputably and genuinely without foundation in and not rationally derived from the collective bargaining agreement (CBA) and where the award violates the public policy of this Commonwealth. The Association has filed a motion to dismiss Temple's appeal for failure to preserve issues or, alternatively, to strike parts of reproduced record and brief.

I

Temple terminated Baldwin on July 19, 2006. The Association filed a grievance and after denial the Association demanded arbitration with the American Arbitration Association (AAA). The matter was heard by the Arbitrator on January 24 and April 26, 2007. Temple's Corrective Action/Discipline Report of July 19, 2006 referred to policies including prohibiting verbal or physical abuse of patients, visitors or staff or other significant unprofessional conduct, falsification of records, gross neglect of duties and conduct unbecoming an employee, including sexual harassment. It stated further:

> Richard Baldwin RN violated the Pennsylvania State Board of Nursing Standards of nursing and above [Temple] policy by engaging [in] conduct defined as a sexual violation or sexual impropriety in the course of a professional relationship with a patient in his care on the CICU unit during his 7pm 7/14/06 through -7am 7/15/06 shift. Richard provided false information to his Nurse Manager/Nurse Director on 7/18/06 in regards to this matter.

Arbitrator's Decision, p. 2; Reproduced Record (R.R.) R0072. The Arbitrator was charged with determining whether Temple had "just cause" to terminate Baldwin as required by Section 15 of the CBA.[1]

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[1]The Association's motion states that attached as exhibits to Temple's petition to vacate the arbitration award were the CBA, the arbitration award and the post-arbitration briefs of the parties; no other exhibits submitted at the arbitration hearing were appended. Temple has included in the Reproduced Record submitted to this Court all of the exhibits submitted to the Arbitrator in claimed violation of Pa. R.A.P. 2152(a), which limits the Reproduced Record to relevant docket entries and related matter, relevant portions of the pleadings, charge or findings and any other relevant part of the record to which the parties wish to direct the attention of the appellate court. The Association asserts that the exhibits are not part of the record because they were not submitted to the trial court and that they were included without consultation with the Association as required by Pa. R.A.P. 2154. Temple responds that Rule 2152(a) allows for reproduction of any parts of the record to which the parties wish to direct the attention of the

(Footnote continued on next page…)

As described by the Arbitrator, Carol Ploucher (Patient) was admitted to Temple on July 13, 2006 and underwent heart double bypass surgery the same day. Lydia Hasan, a Nursing Supervisor, was asked to speak to the Patient on July 17. The Patient indicated that she had engaged in unprotected sex with her nurse and that she did not wish to press charges. Hasan contacted a supervisor and the Risk Management Department; Dr. Ryan Fogg was paged, and University

(continued…)

Court and that the included exhibits all relate to the issues before the Court and therefore may be reproduced. The Court observes that the exhibits were accepted by the Arbitrator and are referenced throughout his decision; some of them are quoted at length. The exhibits are part of the record of this case. Accordingly, the Court denies the motion to strike portions of reproduced record and brief, although it shall direct that Temple arrange for the exhibits or certified copies to be submitted to supplement the certified record.

The Association also moves for dismissal for failure to preserve issues, stating that Temple's petition to vacate raised grounds that the Arbitrator (1) improperly excluded admissible testimony related to statements by a patient; (2) improperly excluded admissible testimony relating to admissions against interest by the employee; and (3) utilized an unreasonable burden of proof. The Association states that Temple did not previously argue that the weight of the evidence mandated a result contrary to that reached by the Arbitrator or that the evidence was insufficient to support the Arbitrator's conclusion that Temple failed to prove that Baldwin had sexual intercourse with the Patient. Pa. R.A.P. 302(a) provides that issues not raised in the lower court are waived and cannot be raised for the first time on appeal. Temple responds that in its petition and brief to the trial court it argued that the Arbitrator erroneously ignored the significant evidence before him and that the Arbitrator departed from the essence of the CBA in part by characterizing the Patient's statements as hearsay, although statements in a verified complaint are not and statements made to medical providers while seeking treatment are subject to an exception. Further, in briefs below and here, Temple argues that the heightened standard of proof imposed by the Arbitrator undercut the newly articulated public policy exception to the "essence test" review of arbitration awards, stated in *Westmoreland Intermediate Unit # 7 v. Westmoreland Intermediate Unit # 7 Classroom Assistants Educ. Support Pers. Ass'n*, 595 Pa. 648, 939 A.2d 855 (2007). Temple raised public policy concerns below, including violation of Temple's work rules and state law regarding nursing. The law in effect at the time of an appellate decision generally applies. *Blackwell v. State Ethics Commission*, 527 Pa. 172, 589 A.2d 1094 (1991). The Court agrees that Temple's arguments concerning the weight of the evidence and public policy concerns implicated by the award are not new issues but were stated or subsumed in arguments advanced earlier. For this reason, the motion is denied.

detectives were contacted. Dr. Fogg, a first-year surgical intern, examined the Patient and found her to be oriented and all right as to vital signs. She stated that she was depressed as her partner had died and that she had become friendly with a nurse and had had sex but she wished to be examined because it was unprotected.

Alan Hulmes, a long-serving detective at Temple, testified that he and Detective Santiago were notified by Hasan and that they spoke to the Patient and her son and daughter-in-law. The Patient indicated that she had an attraction to her nurse and that she had sex with him Friday night to Saturday morning; she finally identified him as Baldwin. When asked, she stated that medications had nothing to do with it and that she chose to have sex. Hulmes checked her medications and found that none would cause hallucinations. There was no allegation of rape so he did not contact the Philadelphia Police. The next day Hulmes and Santiago met Baldwin, Dawn Romano, Director of Nursing for the Cardio/Vascular Line, and another employee. Hulmes advised Baldwin that the detectives were investigating a rape allegation. Hulmes stated that the Patient related that she had unprotected consensual sex, and Baldwin responded that it was not rape and that he did have unprotected consensual sex. Baldwin asserted that she was "coming on to him," that she wanted to have sex with him and that after he asked whether she was sure they had sex around 4:00 a.m. He did not ask for a union representative but did ask if he should get an attorney and was informed that it was his decision. Baldwin stated that he had made a big mistake but that the detectives could not tell Dawn, *i.e.* Romano, because he would lose his job and his license, but Hulmes advised Baldwin to tell the truth. On redirect examination, Hulmes testified that records showed that the Patient was administered morphine at 2:00 a.m. and 4:00 a.m. on July 14 and at 6:45 a.m. on July 15. His report is contained in Employer's Ex. 5.

Dr. Marna Smith, a resident in anesthesiology, testified that the Patient was receiving a special anesthetic delivery system, a "Q pump," attached to two tiny catheters under the skin. Pillars blocked a view of the Patient's room from the nurses' station. Dr. Smith provided a report, Employer's Ex. 9, stating that she checked on the Patient hourly in the evening of July 14, 2006; she changed a device, which took about one-half hour; she spoke with the attending nurse many times; and she examined the Patient around 5:00 or 5:30 a.m. on July 15. Also the Patient was attached to monitors set to alarm if anything unusual happened, and Dr. Smith thought that any unusual occurrence would have been noticed.

On the morning of July 18 Romano visited with the Patient, who was sitting up in a chair with chest tubes disconnected. Later the daughter-in-law suggested that a rape kit be performed, but the Patient indicated that the sex was consensual and produced a piece of paper with Baldwin's phone number on it. Romano asked Robert Burke, Nurse Manager of the Intensive Care Unit, to question the charge nurse; Burke learned of nothing unusual. The detectives interviewed Baldwin alone, and thereafter Romano and Burke met with Baldwin. Romano told Baldwin about the claim of sexual intercourse, and he stated he did not rape the Patient. He stated that she was coming on to him, then he asked the question "Did I have sex?" and he answered "No." Arbitrator's Decision, p. 16; R.R. R0086. Romano then received the Temple Police report, Employer's Ex. 13, which was consistent with Hulmes' later testimony. She contacted Burke, and they decided to terminate Baldwin. A meeting was arranged for 4:00 p.m. on July 19 with Burke, Baldwin and Nurse Patty Bebbington, the Association representative. When Baldwin was told of termination he stated: "But it was consensual sex" and also "this is wrong, she came on to me." Arbitrator's Decision, p. 18; R.R. R0088.

Burke testified that he contacted nine staff members of the unit who worked on the night in question, and none of them noticed anything unusual. He met with Baldwin on July 18, and he denied sexual intercourse. At the July 19 meeting Baldwin became upset and stated: "I'm being terminated for consensual sex," and also: "Bob, this is wrong, she was coming on to me for days." Arbitrator's Decision, p. 6; R.R. R0091. Burke did not speak to the nurse who was assisting Baldwin that night.

Bebbington is a staff nurse at the Cardio Intensive Care Unit. She testified that at the July 19 meeting there were no questions, just an announcement to Baldwin based on what the administrators had discovered, and that Baldwin was shaking and wringing his hands and stated a couple of times that something "was not what I said." Arbitrator's Decision, p. 25; R.R. R0095. She was informed that the falsification of records charge was due to Baldwin's false report that he did not administer morphine. In her opinion sexual intercourse with the Patient was a remote possibility because of pain and the extent to which monitors would reflect movements. On redirect examination she mentioned a button that one can depress to disarm the cardiac alarm but stated that the alarm can be silenced for only two minutes at a time. Dr. Juan Diaz, a second-year resident, did the gynecological consult. The Patient informed him that she had unprotected sex with a nurse and wished to be tested. He found no abnormalities in the vagina or secretions, but he did not perform a swab test for semen as he was not asked to do so.

Baldwin testified that the Patient was up all night after her surgery. Certain tubes were present including chest tubes, EKG leads, a Foley catheter, an IV and other appurtenances and bandages. Baldwin administered morphine the first night. The Patient was up all night the second night, and Baldwin removed

the Foley catheter around 6:00 a.m. Because she asked for his telephone number so many times he finally gave it to her. When he met with the detectives, one pointed to him and accused him of rape. He offered to take a lie detector test and to provide samples and asked that the Patient be brought to the room. Baldwin, who is black, testified that he was very nervous with a white female accusing him of rape. Santiago suggested that the sex was consensual, and Baldwin nodded. He thought he would be arrested if he tried to leave the interview and nodded because he thought it would create a rapport with Santiago. At the July 19 termination meeting Baldwin stated that he should not get fired for consensual sex, and he realized at the time that the police had fooled him into admitting to something that he had not done. On redirect examination he denied telling the detectives that he had sex with the Patient and stated that he was never directly asked if he did.

II

The Arbitrator first noted that the burden of proof is on the employer in a discipline case. He concluded that, although "clear and convincing evidence" is the standard applied by most arbitrators, because of the "thread of criminality in the fabric of the charges," Arbitrator's Decision, p. 42; R.R. R0112, he would apply a somewhat higher standard in this case. Concerning the claim of consensual sex, the Arbitrator quoted at length from Employer's Exhibit 13, the Temple Police report. As the Patient did not testify, the Arbitrator determined that her claims consisted only of hearsay. He quoted with added emphasis the phrase from Hulmes' report that the Patient "***eventually*** consented to having sexual intercourse" then noted Baldwin's denial and statement that the Patient was coming on to him. The Arbitrator observed: "Thus, the question arises, even if one were to conclude that there was inappropriate sexual contact, as to who initiated the encounter." *Id.*

at p. 45; R.R. R0115. Between the Hulmes report and the Patient's allegations in a civil suit that Baldwin decided to seduce, the Arbitrator noted a "contradiction" that could not be resolved because the Patient did not testify.

With regard to the investigation, the Arbitrator found that it was not as rigorous and thorough as required. The interviews with the Patient and Baldwin were of relatively short duration, and Romano's interview with the Patient was tainted by the presence of her daughter-in-law, who also did not testify. The highly charged claim of rape might predispose administrators to find guilt of a lesser offense, such as consensual sex. The Arbitrator reviewed the circumstance of Baldwin's nodding and stated that one might infer from Hulmes' report that Baldwin was credible in testifying that he was initially accused of rape. The Arbitrator found the circumstances of the nod coercive, with an accusation of rape and a threat of being removed in handcuffs, and he concluded that the nod could be construed as choosing the lesser of two evils and that Temple's reliance on this alleged admission of guilt lacked sufficient probity.

As regards the circumstantial evidence, the Arbitrator acknowledged Bebbington's testimony that it would be virtually impossible for the Patient to have engaged in sexual intercourse. The staff members interviewed by Burke observed nothing unusual, as was true for Dr. Smith. There was evidence that the cardiac alarm system could be turned off only for two minutes at a time, which reduced the likelihood of an occurrence, and Dr. Diaz found no physical evidence of sexual intercourse. The Arbitrator emphasized the first paragraph of the Temple Police report stating that campus police were notified on July 17, 2006 that a patient informed nursing administration that she had consensual intercourse with a male nurse in her room on either Saturday July 15 or Sunday July 16. From this the

Arbitrator found that when the detectives interviewed the Patient on July 18 she was not sure whether the act occurred on Saturday or Sunday. Finally, giving the Patient his telephone number and calling her did not prove Baldwin's involvement in a romantic liaison. The Arbitrator concluded that Temple failed to prove by clear and convincing evidence that the alleged misconduct occurred.

The trial court indicated that Temple sought to vacate the award under the statutory arbitration standards listed in Section 7314(a)(1)(iii) - (iv) of the Uniform Arbitration Act, 42 Pa. C.S. §7314(a)(1)(iii) - (iv), on the grounds that the Arbitrator exceeded his power and that he conducted the hearing in a manner that prejudiced Temple. It argued that the Arbitrator *sua sponte* excluded testimony that is not hearsay, although it maintained that under "essence test" review an arbitrator must follow the Pennsylvania Rules of Evidence. The trial court noted that Article 17, §1(a) of the CBA specifies that arbitration will be conducted under the Voluntary Labor Arbitration Rules of the AAA (AAA Rules), and it quoted Section 28 of those Rules as stating: "The arbitrator shall be the judge of the relevance and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary." The trial court rejected Temple's argument based on the prohibition in Section 18 of the CBA against any violation of Pennsylvania law, stating that applying Section 17 to arbitration did not violate that law.

The trial court likewise discounted the argument that the Arbitrator improperly excluded relevant testimony from consideration, stating that he found the Patient not credible because, among other things, she did not testify and spoke only briefly to Temple's witnesses who did testify. Temple was not prohibited from examining the Patient or any other witness, *see Smaligo v. Fireman's Fund Ins. Co.*, 432 Pa. 133, 247 A.2d 577 (1968) (vacating award for denial of full and

fair hearing where arbitrator denied plaintiffs the opportunity to present crucial evidence as to the decedent's likely future earnings), and there is no duty on an arbitrator to advise a party that its case is weak without the testimony of certain witnesses. In *Smaligo* the arbitrator refused to hear testimony said to be "of great import" to the issue of damages, thereby denying a full and fair hearing. *Id.*, 432 Pa. at 137, 247 A.2d at 579. Here the Arbitrator heard the evidence proffered but decided to give it little weight, which is within his authority under AAA Rules Section 28. In connection with the standard of proof, the trial court concluded that the Arbitrator in fact applied the clear and convincing standard and that Temple did not claim prejudice or make arguments relating to application of that standard.

III

Temple initially argues that the Arbitrator's award does not meet the essence test. In *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), the court stated that an arbitrator does not sit 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. In *State System of Higher Education (Cheyney University) v. State College University Professional Ass'n (PSEA-NEA)*, 560 Pa. 135, 743 A.2d 405 (1999), the 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. An exception exists where the award does not draw its essence from the parties' agreement. A reviewing court will determine first if the issue as properly defined is within terms of the agreement. 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." *Cheyney University*, 560 Pa. at 150, 743 A.2d at 413.

Temple stresses that under Section 7302(d)(2) of the Uniform Arbitration Act, 42 Pa. C.S. §7302(d)(2), where that paragraph (2) applies, a court in reviewing an arbitration award pursuant to that act "shall, notwithstanding any other provision of this subchapter, modify or correct the award 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." In reviewing an award under the j.n.o.v. standard, courts may not disturb findings of the arbitration panel unless they are against the clear weight of the evidence. *Sun Co., Inc. (R&M) v. Pennsylvania Turnpike Commission*, 708 A.2d 875, 878 (Pa. Cmwlth. 1998). Applying these rules, Temple argues that the Arbitrator's findings are against the weight of the evidence and are genuinely without foundation.

While crediting Hulmes' report concerning continued investigation of whether the sexual activity was consensual, the Arbitrator discredited the same report and concluded that the rape charge was made to coerce a confession. The Arbitrator referred only to Baldwin's nodding, but he ignored completely other evidence of the sexual encounter and Baldwin's own admissions, specifically, his testimony that at the July 19 meeting he stated: "I shouldn't get fired for consensual sex." The Arbitrator dismissed the Patient's statements as hearsay, although many fell within the well-established exception in Pa. R.E. 803(4) for statements made to medical providers while seeking treatment. He questioned her reliability based on the entirely irrelevant, red-herring issue of whether it was she or Baldwin who initiated the encounter. The only relevant question was whether the act occurred,

and both participants said that it did. The Arbitrator completely mischaracterized the evidence in stating that the detectives' report quoted no words of admission and that they interpreted Baldwin's nod as an acknowledgement.

As for the evidence of possibility, the Arbitrator acknowledged that no witness testified that undetected sexual intercourse would have been impossible based upon the Patient's condition, the location of her room and frequency of her checkups. He referred to Dr. Diaz' testimony that there was no physical evidence of intercourse, when in fact the doctor testified that he did not perform a swab test for semen. The Arbitrator's assigning great weight to the uncertainty as to the date in a single report not directly attributed to the Patient, when all other reports show the correct date, to find a discrepancy is a blatant mischaracterization of the record.

Next Temple invokes the "public policy" exception to the essence test review and the deference accorded the arbitrator. As announced in *Westmoreland Intermediate Unit # 7 v. Westmoreland Intermediate Unit # 7 Classroom Assistants Educ. Support Pers. Ass'n*, 595 Pa. 648, 939 A.2d 855, 865 - 866 (2007): "[U]pon appropriate challenge by a party, a court should not enforce a grievance arbitration award that contravenes public policy. Such public policy, however, must be well-defined, dominant, and ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." The public policy meets that standard here. According to the applicable regulations, a registered nurse may not "[e]ngage in conduct defined as a sexual violation or sexual impropriety in the course of a professional relationship." 49 Pa. Code §21.18(b)(9). The term "sexual violation" includes "[s]exual intercourse between a registered nurse and a patient during the professional relationship." 49 Pa. Code §21.1. Also "[t]he consent of the patient to any sexual impropriety or violation is

not a defense to any disciplinary charge for violation of the [applicable statute] or this subchapter." 49 Pa. Code §21.4a(a).

The Association argues that the essence test applies, quoting *Cheyney University* and the rule that the parties bargained for the arbitrator's interpretation of the agreement, and a court has no business overruling the arbitrator because of a different interpretation. In *Office of Attorney General v. Council 13, American Federation of State, County & Municipal Employees*, 577 Pa. 257, 844 A.2d 1217 (2004), the Supreme Court reviewed an award that reduced the sanction there from discharge to suspension without pay and imposition of last-chance conditions. The court noted that where parties leave undefined the term "just cause" for discipline, they intend for the arbitrator to interpret the term: arbitrators generally have considered such factors as whether there was an investigation; pre-discharge and post-discharge misconduct; past employment record; post-discharge rehabilitation; and unequal treatment of others for similar misconduct. The Association quotes *Scholastic Technical Serv. Employees v. Pennsylvania State University*, 391 A.2d 1097, 1099 (Pa. Cmwlth. 1978), where this Court explained that an arbitrator's factual findings, like those of a jury, "will not be disturbed if they are supported by the evidence, *i.e.*, by the language of the agreement, its context, and any other indicia of the parties' intentions…. If two conclusions can reasonably be drawn from the evidence, the conclusion of the factfinder will prevail."

According to the Association, the gravamen of the offense was that Baldwin engaged in voluntary sexual intercourse with a patient, and the Arbitrator concluded that Temple's evidence failed to establish that any sexual activity had occurred. The Association argues that Temple asks the Court to make credibility determinations that conflict with those of the Arbitrator and to weigh the evidence.

The Arbitrator explained why he did not believe that Baldwin's nod constituted an admission. Because there was no testimonial basis for Temple's assertions, the Arbitrator reviewed the circumstantial evidence. The Association sees minor and inconsequential distinctions between the Arbitrator's characterization and Dr. Diaz' testimony, and it maintains that the Patient would have been the original source for the notice to the campus police of an incident on either July 15 or 16.

The Court is very troubled by serious and fundamental errors in the Arbitrator's decision. The trial court stated that Temple's reliance on *Smaligo* was misplaced because in that case the arbitrator refused to hear crucial evidence whereas here the Arbitrator heard all of the evidence offered but decided to give it little weight. That statement is not completely correct. Under *Smaligo* a party is entitled to a full and fair hearing before an arbitrator. In this case that standard was not met on several points. Although an arbitrator as the fact finder is free to credit or to discredit testimony, no finder of fact in any setting is free to misrepresent the evidence and to decide a case on the basis of such misrepresentation.

The Arbitrator accepted Baldwin's account of his having nodded at the suggestion of consensual sex to build a rapport with the detective who made it in the context of an allegation of rape. The Arbitrator then indicated: "There is no transcript of the interview, and Detective Hulmes' report does not quote any words of admission." Arbitrator's Decision, p. 48; R.R. R0118. This is a grave misrepresentation. Hulmes' report states that after Baldwin calmed down, Hulmes asked if he had sex with the Patient (her name blacked out) and that "Baldwin took a moment and then answered by saying, 'yes.' " Employer's Ex. 5; R.R. R0241. When asked, he described their interaction leading up to the incident, then "Baldwin said that the sexual intercourse occurred around 4:00am Saturday

7/15/06." *Id.* He stated that during the night she twice asked him to make love to her and he put her off, but "[f]inally, around 4:00am [Patient] asked him again and he then had sexual intercourse with her. Baldwin said, before he penetrated her, he asked [the Patient] if she was sure. According to Baldwin, she said she was sure. Baldwin said he then had vaginal sex with [the Patient]." *Id.* The Arbitrator did not discredit these statements; rather, he falsely stated that Hulmes' report quoted no words of admission and then failed to address this evidence at all.

There was additional, highly relevant evidence that the Arbitrator failed to address. The Arbitrator pointed out Romano's description of Baldwin's statements at the July 19 meeting: "But it was consensual sex", "this is wrong, she came on to me." Arbitrator's Decision, p. 18; R.R. R0088. Burke testified that Baldwin stated: "I'm being terminated for consensual sex" and "Bob, this is wrong, she was coming on to me for days". *Id.* at p. 21; R.R. R0091. In addition, Baldwin himself testified that he claimed "I shouldn't get fired for consensual sex" and that he realized at the time that the police had fooled him into admitting that he had done something that he had not done. *Id.* at p. 32; R.R. R0102. The Arbitrator did not discredit this testimony; again, he completely ignored it.

Another significant error concerns the Arbitrator's viewing as relevant a matter of no relevance whatsoever. The Arbitrator emphasized that he found a contradiction as to who initiated the sexual encounter, which could not be resolved because the Patient did not testify. As the applicable regulations make plain, and as should be immediately obvious, the question of who initiated the encounter has no bearing at all on whether Baldwin violated the regulations. Temple points out that the Arbitrator never considered that according to Baldwin's own testimony, in the course of a formal investigation of this matter, either he lied when he nodded

acknowledgment of consensual sex or he lied when he denied it to administrators. Except for the inexplicable suggestion that who initiated the encounter might have some relevance to any matter involved, the Arbitrator appeared to understand that proof of the misconduct alleged would constitute just cause for dismissal, and to that extent this interpretation of the CBA is not involved. The Arbitrator failed to provide the full and fair hearing contemplated under the essence test. *Smaligo*.

At bottom, the case concerns the manner of the Arbitrator's evaluation of the evidence, and for that purpose the j.n.o.v. standard is better suited. The Supreme Court has stated that there are two bases upon which a j.n.o.v. can be entered: " 'one, the movant is entitled to judgment as a matter of law, and/or two, the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant,' " and that to uphold j.n.o.v. on the first basis, the court must review the record and conclude " 'that even with all the factual inferences decided adverse to the movant the law nonetheless requires a verdict in his favor, whereas with the second [the court] review[s] the evidentiary record and [concludes] that the evidence was such that a verdict for the movant was beyond peradventure.' " *Rohm & Haas Co. v. Continental Cas. Co.*, 566 Pa. 464, 471 - 472, 781 A.2d 1172, 1176 (2001) (plurality opinion) (quoting *Moure v. Raeuchle*, 529 Pa. 394, 402 - 403, 604 A.2d 1003, 1007 (1992) (citations omitted)).

The Arbitrator did not discredit the detectives' reports, which were consistent with each other and with the reports of the Patient through medical personnel. That evidence includes a clear oral admission by Baldwin that he engaged in consensual sex with the Patient, as well as detailed information concerning matters leading up to the incident and his conduct following it. This

reported admission was reinforced by Baldwin's own testimony that he expressed at the July 19 meeting that he should not get fired for having consensual sex and similar testimony from others in attendance. The Court concludes that it is beyond peradventure that the evidence including Baldwin's admissions shows that a verdict in favor of Temple was required because Baldwin engaged in consensual sex with the Patient under his care, which constitutes just cause for dismissal and thus precludes the Court from enforcing the award. *Westmoreland Intermediate Unit # 7*; *Moure*. The trial court's order is reversed, and the award is vacated.

DORIS A. SMITH-RIBNER, Judge

Judge Butler did not participate in the decision in this case.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Temple University Hospital, Appellant	:	
v.	:	No. 1994 C.D. 2007
Temple University Hospital Nurses' Association/PASNAP	:	

O R D E R

AND NOW, this 7th day of August, 2008, the order of the Court of Common Pleas of Philadelphia County is reversed, and the arbitration award issued in this matter is vacated. The motion of Temple University Hospital Nurses' Association/PASNAP to dismiss the appeal for failure to preserve issues or, alternatively, to strike portions of the reproduced record and brief is denied. Temple University is ordered within thirty days to provide the originals or certified copies of all of the exhibits accepted by the Arbitrator and included in the Reproduced Record filed with this Court as a supplement to the Certified Record.

DORIS A. SMITH-RIBNER, Judge