IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Fraternal Order of Transit Police, Appellant	:	
v.	:	No. 1066 C.D. 2014
	:	Argued: February 9, 2015
Southeastern Pennsylvania Transit Authority	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION BY JUDGE LEADBETTER **FILED: April 28, 2015**

Appellant, Fraternal Order of Transit Police (Union), appeals from the order of the Court of Common Pleas of Philadelphia County, which denied the Union's petition to vacate an arbitration award addressing the paid sick leave of transit police officers covered under the relevant collective bargaining agreement (CBA) between the Union and the Southeastern Pennsylvania Transit Authority (SEPTA).[1] In the underlying grievance, the Union sought relief on behalf of all transit officers covered by the CBA. Based upon the evidence presented, the arbitrator awarded relief to only three officers. After review, we affirm.

[1] While the Union's brief refers to Appellee as the "Southeastern Pennsylvania *Transit* Authority," the Appellee refers to itself in its brief as the "Southeastern Pennsylvania *Transportation* Authority."

Relevant to the instant dispute, sick pay[2] is payable to an officer who is absent from work due to sickness or a non-work-related injury. *See* CBA Article XXIV, Reproduced Record (R.R.) at 42. In order to receive sick pay, an officer must notify his Department at least one-half hour before the start of the scheduled work day. *Id.* In general, non-probationary officers earn sick pay at the rate of one day per each month of service. *Id.* An officer may accrue up to 200 days of unused sick pay. *Id.*

In June 2005, the Union filed a grievance on behalf of all officers essentially challenging "the paid 'sick time' amounts being given at this time by the [administration]." R.R. at 203. The grievance, filed by the union president, Salvatore Perpetua, averred that the then-chief of police, Chief Evans, had stated in a prior arbitration that 2004 established a "ground zero" regarding paid sick leave and implied that SEPTA had failed to accurately account for officers' sick day usage post-2004.[3] The grievance sought the following remedy:

> For purposes of this grievance I [Union President Perpetua] will use my own personal sick time as an example. Date of hire: April 6, 1992 to the present (158 months of employment). 158 sick days earned minus any sick time used from January 1, 2004 to the present. Total sick time accrued minus any sick time used

[2] The parties also refer to "sick pay" as "paid sick leave." An absence from work due to sickness or injury is classified by the CBA as sick leave. CBA Art. XXIII, Reproduced Record at 41.

[3] While this statement is not clarified in the grievance, the Union's position as understood by the arbitrator, common pleas and this court, indicates that the Union believed that Chief Evans established a policy, which provided that any sick time taken by an officer before 2004 would be disregarded and not charged against the officer's accumulated sick leave balance. Thus, according to the Union, beginning in 2004 all officers would have available paid sick leave equal to the number of months that they had been employed. The period pre-dating 2004, when sick leave use was to be disregarded, is also referred to as the "amnesty period."

> beginning in 2004 will establish the total sick time. This formula to be applied for all police officers. This is based on the administration's inability to calculate the police officers [sic] "sick time" correctly.

Id. (emphasis in original omitted).

Although the subsequent arbitration proceedings were not transcribed, the arbitrator's decision indicates that the Union offered evidence pertaining to SEPTA's history of failing to keep accurate records of its officers' paid sick leave accrual and use, and SEPTA's inconsistent enforcement of its sick leave policies. Evidence was apparently offered demonstrating that in 2004, one particular officer was informed that he did not need to reimburse SEPTA for receiving 51.5 unearned paid sick days, which resulted from an administrative oversight, while another officer was required to reimburse SEPTA for days of paid leave that exceeded the amount SEPTA believed she had accrued. In addition, the Union offered evidence regarding sick leave accrual and use for four specific officers, Charles Brown, Soyinka Ogunbusola, Salvatore Perpetua and Edward Kaiser, to demonstrate the nature of SEPTA's sick leave accounting problems.

According to the arbitrator, SEPTA denied that Chief Evans agreed to disregard sick leave used before January 1, 2004, or that each officer's sick leave balance at the beginning of January 2004 was deemed to equal the number of months of employment. Rather, SEPTA maintained that while Chief Evans agreed to forgive officers for any sick leave paid in excess of the officer's contractual entitlement, "the Chief intended to withhold pay for sick time use until officers who had negative sick leave balances accumulated enough days to cover the excess paid sick leave they had already received."[4] Arbitrator's Decision and Award at 6,

[4] Chief Evans testified before the arbitrator.

R.R. at 185. SEPTA also maintained that its documentary evidence demonstrated that officers were paid for sick days they had accrued and taken, and that its payroll records did not demonstrate widespread discrepancies. Finally, SEPTA addressed the purported inaccuracies in the sick leave records for the four officers focused on at the hearing.

In resolving the dispute, the arbitrator focused on whether: "SEPTA, through mistaken record keeping, did not keep faith with its covenant to grant each officer, without favoritism, one day of paid sick leave for each month of employment up to 200 days." *Id.* at 8, R.R. at 187. While the arbitrator credited Chief Evans' testimony that he did not grant a general amnesty regarding sick time used prior to January 1, 2004, but instead decided that he would not recoup money from those officers who had taken more paid leave time than they had accrued, he found that all of the documents relied on in the case were of questionable accuracy and that he was left without "authoritative employer records as to how many sick days officers actually took or the number of sick days for which they received pay." *Id.* at 9, R.R. at 188. According to the arbitrator, the evidence was convincing that SEPTA did not follow the CBA. The arbitrator opined:

> In Officer Brown's case, his December 23, 2004 pay stub showed he had sick time available. However, by February 12, 2005, he had had pay withheld for two days of sick time which he had allegedly used but for which he allegedly had no accumulated paid sick leave. There is no trustworthy indication of record that [O]fficer Brown used any sick time between December 23, 2004 and February 12, 2005. How therefore could SEPTA have docked him sick pay?
>
> Officer Ogunbusola was told she had three days of sick time as of October 15, 2004. Yet, as of January 1, 2005, she was informed she "owed" 608 hours or 76 days

of sick time for which she had been paid but which she had not accrued. Obviously, there were not enough work days between those dates for Officer Ogunbusola to have developed that kind of negative balance.

There is no doubt in my mind that SEPTA did not adhere to the Agreement in its treatment of these two officers. As for Officer Brown, I will direct that he be made whole for the two days for which he had pay withheld in 2005. Similarly, Officer Ogunbusola could not have had three days of sick time, as of October 15, 2004 yet owe 76 days of sick time by January 1, 2005. I will direct that her sick leave accumulation be adjusted by awarding her sick leave for whatever number of sick days she took for 2005 forward but for which she was denied pay because of her alleged "debt." I will further direct that the remaining portion of the January 15, 2005 "debt" total be eliminated from her record.

Regarding Officer Kaiser, SEPTA's grant to him of 12 sick days in 2004 after he complained about being docked 15 sick days convinces me that the 15 day total docking SEPTA imposed after its 2004 audit was invalid as to him. I will direct that his sick leave accumulation be adjusted by awarding him sick leave for whatever number of sick days he took in 2004 and forward for which he was denied pay because of his remaining alleged "debt" of three sick days. I will further direct that any remaining portion of the three day "debt" total be eliminated from his record.

I am without sufficient evidence to sustain the Union's grievance further. Specifically, I do not find there was the kind of "amnesty" Officer Perpetua believed was granted in regard to a blanket discounting of all sick leave taken before 2004. I also do not find sufficient evidence that SEPTA did not treat officers equally with any degree of intention or that other officers, aside from those specifically mentioned above were denied their contractually guaranteed sick leave benefits. . . . . I am not free to order liquidated amounts of sick leave balances, either positive or negative,

> without a convincing body of proof that such amounts are justified.

Id. at 10-11, R.R. at 189-90. The arbitrator then entered an award granting relief consistent with the above and the Union petitioned to vacate the award.

Applying the oft-cited essence test,[5] common pleas denied the petition. The court noted that the issue of sick leave accrual and pay clearly fell within the terms of the CBA and that the award was rationally derived therefrom. In doing so, the court noted that the arbitrator concluded that SEPTA's failure to keep accurate records was not in and of itself a violation of the CBA. The court further observed that SEPTA's failure to keep accurate records did not necessarily mean that Union members were denied the amount of paid sick leave to which they were contractually entitled. Thus, rather than direct that every record-keeping error be corrected, the court observed that the award was limited to reimbursing individual officers for pay that had been improperly withheld, and adjusting sick leave balances to preclude pay from being withheld in the future. This appeal followed.

On appeal, the Union's arguments are very general. The primary arguments are that the award deprives members of the right to uniform application of the CBA's "sick time" provisions, that SEPTA's failure to keep accurate records of employee sick leave violates the CBA, and that SEPTA failed to uniformly apply the amnesty period imposed by Chief Evans such that some officers are still being held accountable for sick time excesses while others are not. Finally, the Union maintains that the arbitrator's award is "vague and unenforceable because it

[5] While the parties did not initially agree that review was governed by the essence test, they did essentially stipulate to its application during oral argument before common pleas on the petition to vacate the award.

fails to state a specific number of days to be granted to officers Ogunbusola and Kaiser but instead requires that the time be calculated using the same manifestly inaccurate records." Brief at 24. A frustrated tone underlies the arguments and a recurring theme throughout the brief is that officers continue to be deprived of their contractual benefits regarding paid sick time and are often treated differently regarding perceived sick time overages. According to the Union, the award is not rationally derived from the CBA, it is against the weight of the evidence, and it fails to satisfy the judgment notwithstanding the verdict (j.n.o.v.) standard set forth in Section 7302(d)(2) of the Uniform Arbitration Act (UAA), 42 Pa. C.S. § 7302(d)(2). While sympathetic to the situation grieved, our standard of review precludes appellate relief.

While SEPTA may not be considered a Commonwealth agency for all purposes, *see Southeastern Pennsylvania Transportation Authority (SEPTA) v. City of Philadelphia*, 101 A.3d 79 (Pa. 2014), it is clearly a public employer under the Public Employe Relations Act (PERA),[6] and PERA governs the arbitration of grievances filed by the Union. *See* Section 301, 43 P.S. § 1101.301; *see generally SEPTA v. Pa. Labor Rels. Bd.*, 654 A.2d 159 (Pa. Cmwlth. 1995); *SEPTA v. Transp. Workers' Union of Am.*, 525 A.2d 1 (Pa. Cmwlth. 1987). Grievance awards under PERA are reviewed under the deferential essence test, which requires an award to be confirmed if: (1) the issue as properly defined is within the terms of the agreement, and (2) the award can be rationally derived from the agreement. *Luzerne Intermed. Unit No. 18 v. Luzerne Intermed. Unit Educ. Ass'n*, 89 A.3d 319, 324 (Pa. Cmwlth. 2014). As long as the arbitrator has arguably construed or applied the CBA, an appellate court may not second-guess the

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

arbitrator's fact-finding or interpretation. *Id.* As the court has often noted, the essence test has been equated with "the judgment n.o.v./error of law concept set forth in [Section 7302(d)(2) of the Uniform Arbitration Act, 42 Pa. C.S. § 7302(d)(2)]." *Tunkhannock Area Sch. Dist. v. Tunkhannock Area Educ. Ass'n*, 992 A.2d 956, 958 (Pa. Cmwlth. 2010).[7]

Here, the award is clearly rationally derived from the CBA. The arbitrator acknowledged the contractual right to paid sick leave and awarded relief where the evidence demonstrated that SEPTA denied specific officers paid sick leave to which they were entitled. The Union's contention that the award results in an unequal or non-uniform application of the amnesty period is simply without merit; the arbitrator specifically rejected the claim that Chief Evans established an amnesty period such that all sick leave used before January 2004 was forgiven or discounted, leaving officers with their entire accumulated paid sick leave available

[7] Section 7302(d)(2) of the UAA provides, in pertinent part, that a court in reviewing an arbitration award shall "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." Judgment n.o.v. "may be entered where (1) the moving party is entitled to judgment as a matter of law or (2) the evidence is such that no two reasonable minds could disagree that judgment was due to the moving party." *White v. City of Philadelphia*, 102 A.3d 1053, 1057 (Pa. Cmwlth. 2014).

Although our appellate courts have equated the essence test with the j.n.o.v./error of law concept set forth in subsection (d)(2), that standard would apply to most grievance arbitration awards between a public employer and its union under the express provisions of the UAA. The UAA expressly provides that Section 7302(d)(2) applies where: "(i) [t]he Commonwealth government submits a controversy to arbitration[;] (ii) [a] political subdivision submits a controversy with an employee or a representative of employees to arbitration[;] or (iii) any person has been required by law to submit or to agree to submit a controversy to arbitration pursuant to [the UAA.]" Section 7302(d)(2). SEPTA is considered part of the Commonwealth government for purposes of the UAA. *See generally* Section 102 of the Judicial Code, 42 Pa. C.S. § 102 (defining "Commonwealth government" to include authorities and agencies of the Commonwealth).

at the beginning of 2004. While the arbitrator's award is not as comprehensive as the Union desired, the arbitrator's failure to award Officer Perpetua any relief supports the conclusion that he found that SEPTA's failure to keep accurate sick leave records did not itself constitute a violation of the CBA or require immediate relief. Even though a different arbitrator may have concluded otherwise, this interpretation is not reviewable on appeal because the award is rationally derived from the terms of the CBA.[8] Finally, it is clear that the arbitrator found that the evidence was insufficient to enable the arbitrator to award global relief to all officers/members of the Union. The lack of global relief, however, does not preclude any other officer who feels that he or she has been denied sick pay due to inaccurate record-keeping from pursuing an individual grievance.

Common pleas's order is affirmed.

BONNIE BRIGANCE LEADBETTER,
Judge

[8] The arbitrator's decision also suggests, however, that the evidence adduced was generally insufficient to determine the amount of sick leave available to individual officers. As the arbitrator concluded, he was not free "to order liquidated amounts of sick leave balances, either positive or negative, without a convincing body of proof that such amounts are justified." R.R. at 190.

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O R D E R

AND NOW, this 28th day of April, 2015, the order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
Judge