[J-7-2000 - MO: NIGRO,J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CITY OF EASTON,	:	No. 123 M.D. Appeal Dkt. 1999
	:	
Appellant	:	Appeal from the order and opinion of the
	:	Commonwealth Court dated December 3,
	:	1998 at No. 882 C.D. 1998 affirming the
v.	:	order of the Court of Common Pleas of
	:	Northampton County dated February 27,
	:	1998 at C-7872.
AMERICAN FEDERATION OF STATE,	:	
COUNTY AND MUNICIPAL	:	722 A.2d 1111 (Pa. Cmwlth 1998).
EMPLOYEES, AFL-CIO, LOCAL 447,	:	
	:	SUBMITTED: January 31,2000
Appellee	:	
	:	
	:	

DISSENTING OPINION

MR. JUSTICE CAPPY **DECIDED: AUGUST 21, 2000**

Oftentimes, questionable decisions by lower tribunals present the greatest challenge to an appellate court. They tempt the court to stray from the sound jurisprudential foundation of limited appellate review and entice the court to engage in de novo review. This is especially true in the area of a court's consideration of labor arbitration awards. Labor arbitrators often render decisions that are most curious to those both inside and outside the labor arena, including those of us in the judiciary. However, if this court is to remain true to its deferential standard of review of labor arbitration awards, it must resist the pull to vacate an award with which the court disagrees, but which is nevertheless rationally derived from the parties' collective bargaining agreement.

Unfortunately, in this case, the majority has been lured into substituting its own interpretation of the collective bargaining agreement for that of the arbitration panel selected by the parties, and in doing so, vacates the arbitrators' award. Simply stated, I believe that the arbitration award in this case passes the essence test. First, the issue of whether just cause existed for the grievant's termination is contained within the collective bargaining agreement. Furthermore, the arbitrators' interpretation can be rationally derived from the language and context of the agreement. Thus, I respectfully dissent.

Of greater concern than the majority's failure to adhere to the essence test is the route by which the majority vacates the arbitration panel's award. The majority bases its opinion upon three cases decided in the 1980's which utilized the concept of "manifest unreasonableness" or "reasonableness" to vacate arbitrators' awards and which, for the first time, devised the concept that a government agency does not have the freedom to "bargain away" matters, such as the discipline or dismissal of employees for certain conduct. Pennsylvania Liquor Control Board v. Independent State Stores Union, 553 A.2d 948 (Pa. 1989); County of Center v. Musser, 548 A.2d 1194 (Pa. 1988); and Philadelphia Housing Authority v. Union of Security Officers #1, 455 A.2d 625 (Pa. 1983). Reliance upon these cases is misplaced for a number of reasons.

First, these three cases, which all relied upon the concept of reviewing an award for "manifest unreasonableness" or "reasonableness," were rejected in our recent decision in State System as being inconsistent with the deferential nature of the essence test. State System of Higher Education (Cheyney University) v. State College University Professional Association, 743 A.2d 405, 412-13 (Pa. 1999); see also Danville Area School District v. Danville Area Education Association, 2000 WL 990312 (Pa.)(reviewing court will not consider whether an arbitrator's award was "manifestly unreasonable"); Pennsylvania Game Commission v. Civil Service Commission (Toth), 747 A.2d 887,891 n.7 (Pa. 2000). Thus, because these cases which serve as the foundation of the majority opinion were

based upon an iteration of a standard that is no longer valid, I question their value as precedent.

Second, the premise upon which the majority opinion is based, i.e., that a governmental entity may not bargain away those powers that are essential to the proper discharge of its function, is also suspect. The majority contends that the City of Easton (City) in this case did not have the freedom to relinquish its absolute right to terminate an employee who stole from a third party while he was working for the City, i.e., bargain away the ultimate determination of the appropriate discipline for theft.

The origin of this legal proposition is found in Philadelphia Housing Authority, supra. In vacating an arbitrator's award, the Philadelphia Housing Authority court stated, "however, it is manifestly unreasonable to conclude that the Housing Authority could have intended to bargain away its absolute responsibility to ensure the integrity of its housing security force by discharging an officer who has defrauded one of the very people whom he is paid to protect." Id. at 627.[1] Similar language was used to vacate an arbitrator's award in Independent State Stores Union, 553 A.2d at 953.

Preliminarily, the use of the limitations on bargaining principle, in the context of the now rejected "manifestly unreasonable" standard, renders this legal proposition fatally flawed. This aside, close scrutiny of the statute on which public employee grievance arbitration is based, the Pennsylvania Employee Relations Act (Act),[2] casts serious doubt upon the validity of such a legal principle. Specifically, Section 701 of the Act sets forth the matters that are subject to collective bargaining. 43 P.S. §1101.701. These include wages, hours, and others terms and conditions of employment. Conversely, Section 702

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[1] It is interesting to note that the Philadelphia Housing Authority court failed to cite to any legal authority in support of this unique proposition.

[2] 43 P.S. §1101.101 et seq.

of the Act sets forth what matters are not subject to collective bargaining. 43 P.S. §1101.702. These are matters of inherent managerial policy. They include areas of discretion or policy such as the functions and programs of the public employer, standards of services, budget, utilization of technology, organizational structure, and selection and direction of personnel. Notably, discipline and discharge are not specifically prohibited as subjects of bargaining and at least one case from our court has come to the conclusion that the "dismissal" of employees is a matter subject to collective bargaining. See PLRB v. Mars Area School Dist., 389 A.2d 1073, 1074-75 (1978).

Additionally, the proposition that a public employer does not have the freedom to bargain away discipline or dismissal for certain conduct appears to be at odds with the test articulated by our court used to determine whether a matter is, or is not, a subject of bargaining. In PLRB v. State College Area School Dist., 337 A.2d 262, 268 (1975), this court proclaimed that "where an item of dispute is a matter of fundamental concern to the employes' interest in wages, hours and other terms and conditions of employment, it is not removed as a matter subject to good faith bargaining . . . ." Obviously, the parameters of discipline or dismissal are at the core of the employment relationship, and clearly fall into the category of terms and conditions of employment, and thus, are a proper subject of collective bargaining. Mars Area School Dist., 389 A.2d at 1075; see also Pennsylvania State Police v. Pennsylvania State Police Troopers' Assoc. (Betancourt), 656 A.2d 83, 90 (Pa. 1995)(discharge is related to the terms and conditions of employment under Act 111). As cogently noted by Justice Zappala in his dissent in Independent State Stores Union, while there may be strong policy reasons why the legislature, or the Governor, may seek to impose limitations upon agencies with respect to bargaining over discipline for, inter alia, theft, they have not done so. Thus, in the absence of any such dictate, or any limitation found in a collective bargaining agreement, it appears that the rights and obligations

regarding discipline and dismissal remain matters subject to collective bargaining and may be interpreted and reviewed by an arbitrator.[3]

Finally, even assuming the viability of the legal proposition created in Philadelphia Housing Authority regarding the lack of freedom to bargain away the power to discipline or dismiss employees for certain conduct, this principle of law is inapplicable to the facts in this case. In each of the three prior cases in which this doctrine was utilized, the employee's conduct was both illegal and directly related to the employee's role in carrying out the employing agency's function. For example, in Philadelphia Housing Authority, a security officer was discharged after committing fraud against one of the elderly patients with whom he was entrusted to protect. Likewise, in Musser, two prison guards were terminated for their repeated assault on an inmate under their vigil. Finally, in Independent State Stores Union, a liquor store manager was fired for theft of store proceeds over which he had responsibility. Thus, in each of these cases, the illegal act on the part of the employee was inextricably linked to the on-the-job conduct of the employee and the function of the agency.

Conversely, the facts of this case are devoid of a similar nexus. The grievant was a laborer at the City's water treatment plant. His charge was to aid in ensuring the quality of the City's water supply. The gravamen of the charge against the employee was that he collected wages from either the City or another employer while actually working for the other. Discipline of the grievant for this type of objectionable, yet indirect, affront to the City is simply not akin to discipline for conduct which is directly related to the employee's role with respect to the function of the agency or which impacts upon the integrity of the agency.

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[3] Contrary to the majority's assertion, it is not that the government agency lacks the power to discipline or to discharge an employee. It is just not an unfettered power. It is simply that the discipline and discharge of employees is subject to bargaining between the parties and that a decision to discipline or discharge an employee may be subject to review by an arbitrator.

Furthermore, it is critical to note that the City failed to prove against which employer the theft of time occurred or that the City was in fact harmed. Thus, application of the principle regarding limitations on the freedom to bargain over discipline or dismissal under the facts in this case is simply misplaced.

For all of the foregoing reasons, I respectfully dissent and would affirm the decision of the Commonwealth Court which upheld the arbitrators' award.

Messrs. Justice Zappala and Saylor join this Dissenting Opinion.