[J-106-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

WESTMORELAND INTERMEDIATE UNIT #7,	:	No. 51 WAP 2005
Appellee	:	Appeal from the Order of the Commonwealth Court entered June 22, 2005, at No. 1782 C.D. 2004, affirming the Order of the Court of Common Pleas of Westmoreland County entered August 3, 2004, at No. 4799 of 2003.
v.	:	
WESTMORELAND INTERMEDIATE UNIT #7 CLASSROOM ASSISTANTS EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, PSEA/NEA,	:	ARGUED: September 11, 2006
Appellant	:	

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: DECEMBER 27, 2007**

I agree with the plurality opinion with respect to its affirmation of the essence test recognized in Community College of Beaver County v. Community College of Beaver County, Society of Faculty (PSEA/NEA), 375 A.2d 1267 (Pa. 1977) and reaffirmed in State System of Higher Education (Cheyney University) v. State College University Professional Association (PSEA-NEA), 743 A.2d 405, 413 (Pa. 1999). Additionally, I have no fixed opposition to the plurality's rejection of the core functions "exception" to the essence test. I do not agree, however, with the plurality's *sua sponte* invocation of a public policy exception to the essence test and I would not remand this matter for further consideration of the newly recognized exception by the Court of Common Pleas. Instead, I would find that the arbitrator's award here comported with the essence test and that the award was

not manifestly unreasonable. I therefore would reverse the Commonwealth Court decision and reinstate the arbitrator's ruling. Because the plurality remands for interpretation of its new exception, I respectfully dissent.

There has been no intervening legislation since this Court's last examination of the essence test, and the parties do not advocate a public policy exception. Stepping into the void, the plurality issues a judicially-created public policy exception.[1] The plurality's new standard not only creates an unnecessary delay in the resolution of the present matter, but does so via adopting a public policy exception in a vacuum -- as the Legislature might do. The plurality's caveat that 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," Slip Op. at 16, does not offer the lower courts sufficient guidance. The plurality's public policy exception will only create further uncertainty and produce more litigation in a field where certainty and predictability are paramount.[2]

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[1] While Cheyney University may have "suggested the possibility" of a public policy exception to the essence test, Slip Op. at 13, the parties were not put on notice that this matter would be the vehicle for a judicially-created rule initially mentioned in a footnote in a case almost a decade old. See Cheyney University, 743 A.2d at 416 n.14. Contrary to the assertion by the plurality, Slip Op. at 18-19 n.3, the Court in City of Philadelphia Office of Housing and Community Development v. AFSCME, Local Union No. 1971, 876 A.2d 375 (Pa. 2005) never purported to adopt a public policy exception to the essence test. Indeed, interestingly enough, Mr. Justice Saylor's Concurring Opinion in the City of Philadelphia case noted that in that case, as in certain other public sector labor cases, it appeared to him that the Court had effectively been applying a "manifest unreasonable" standard. Id. at 378-79 (Saylor, J., concurring).

[2] It is true, as the plurality notes, that this Court has deemed it useful to employ a public policy standard in other areas of law, *e.g.*, review of automobile insurance policies, see Eichelman v. Nationwide Ins. Co., 711 A.2d 1006 (Pa. 1998), Burstein v. Prudential Prop. & Cas. Ins. Co., 809 A.2d 204 (Pa. 2002). Although a public policy analysis has been embraced by the U.S. Supreme Court in this area, for the reasons set forth below, I believe that a test for manifest unreasonableness is more firmly rooted in our experience.
(continued…)

I realize that the plurality ventures into public policy only because of the void it creates when it "rejects the core function exception to the essence test." Slip Op. at 16. The plurality presents cogent argument in questioning the validity of that exception. I agree that our experience in this arena has made plain that there must necessarily be some limits on the power of arbitrators. It would be unreasonable to enforce an arbitral award, for example, if it contravened the law. A safety-valve is needed that will not swallow the essence test, as the core functions test had the potential to do, but instead will maintain the proper balance between arbitral deference and judicial review. Our continuing experience in this area reaffirms my long-held belief that an arbitrator's decision should be reviewed for manifest unreasonableness as part of an application of the essence test. In my Concurring and Dissenting Opinion in Cheyney University I described the "manifestly unreasonable" test I would apply, as follows:

> I concur in the result reached by the majority; however, I would espouse a further standard of review than that set forth by the majority. Initially, I approve of the majority's two-pronged approach and agree with the notion that the first prong should encompass the essence test. However, once a reviewing court has found, as required by the majority, that the issue before it falls within the terms of the collective bargaining agreement, then the second prong should, in my view, include further review to determine if the decision of the arbitrator is manifestly unreasonable.
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> Indeed, I believe that the majority alludes to this further review but fails to specifically adopt this as an appropriate approach. In its discussion of Leechburg Area School District v. Dale, 492 Pa. 515, 424 A.2d 1309 (1981) (Leechburg II), the majority terms the holding therein as one evidencing "extreme deference" to an arbitrator's decision. The majority then correctly points out the drawbacks of an extreme deference approach by noting that "it

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(…continued)

Additionally, if application of its public policy exception is so clear and certain as the plurality asserts, perhaps it should identify the dominant policy that could remotely serve as a basis to overturn the decision here, so as to warrant the delay the remand entails.

> allows an arbitration award to be upheld where the award is so without support or is so illogical, that the parties could not have possibly intended to be so bound." [Cheyney University, 743 A.2d] at 413. I believe that this language is, in essence, an acknowledgment that arbitration decisions are subject to judicial review where they are manifestly unreasonable. To allow review only where the arbitrator's decision cannot be rationally derived from the collective bargaining agreement is too limiting and places unbridled discretion in the hands of individual arbitrators. The majority's standard of review would allow an arbitrator's decision to stand if it could be made under the terms of the collective bargaining agreement even if the decision was manifestly unreasonable under the facts of the case. I am in accord with the majority that a straight reasonableness standard permits more judicial review than is desirable. Thus, I would have the second prong of the test include that the arbitrator's award will be upheld if the arbitrator's interpretation can be rationally derived from the collective bargaining agreement and the decision is not manifestly unreasonable.

Cheyney University, 743 A.2d at 417-18 (Castille, J., concurring and dissenting). Thus, if the Court is intent on reconsidering our approach, I believe that application of the essence test should include an examination of whether the decision of the arbitrator was manifestly unreasonable.

I realize that the plurality quickly dismisses review for manifest unreasonableness, and cites Cheyney University to support that dismissal. Slip Op. at 12 n.1.[3] Cheyney University described the essence test as a "standard of review that has been stated using differing verbiage and that has signified various degrees of judicial deference," but declined to embrace an interpretation of the essence test which would utilize any form of reasonableness review. 743 A.2d at 412-13. However, Cheyney University seemed to ignore that, from its adoption, the essence test incorporated a reasonableness standard of

[3] It passes strange that the plurality deems it beyond the pale to advocate for the manifest unreasonableness standard in a case where the Court jettisons an existing standard, and *sua sponte* adopts a new one. Every case that the plurality cites which failed to approve manifest unreasonableness, of course, also failed *sub silentio* to adopt the plurality's public policy exception.

review as one of its central features. See Cmty. Coll. of Beaver County, 375 A.2d 1274; see also Pa. Liquor Control Bd. v. Indep. State Stores Union, 553 A.2d 948, 953-54 (Pa. 1989) (applying a "manifestly unreasonable" standard); County of Centre v. Musser, 548 A.2d 1194 (Pa. 1988) (applying a reasonableness review standard as part of the essence test); Phila. Hous. Auth. v. Union of Sec. Officers No. 1, 455 A.2d 625 (Pa. 1983) (applying a "manifestly unreasonable" standard). Furthermore, it is notable that the Cheyney University case rightly described Community College of Beaver County as the "seminal case" in this area, 743 A.2d at 410, and yet failed to appreciate that, after announcing its adoption of the essence test set forth in Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123 (3d Cir. 1969), the Court in Community College of Beaver County immediately noted that the essence test squared with the standard of review in existing case law, which stated that "the arbitrator's interpretation of the contract must be upheld if it is a reasonable one." 375 A.2d at 1275 (quoting Int'l Brotherhood of Firemen & Oilers, AFL-CIO Local 1201 v. Sch. Dist. of Phila., 350 A.2d 804, 809 (Pa. 1976)). Implicit in that recognition, of course, is that manifestly unreasonable interpretations need not be upheld. Although I agree that a simple reasonableness standard of review could possibly allow a court to substitute its judgment for that of the arbitrator, a "manifestly unreasonable" standard serves as an adequate check on arbitrator discretion, while preventing judicial overreaching. Indeed, if standards premised upon assessment of reasonableness truly may be deemed inadequate, as the plurality seems to believe, much of the common law would collapse.

I believe that the standard also easily accounts for our case decisions. Manifestly unreasonable review would not allow an arbitral decision to prevent a municipality from terminating the employment of an employee who steals from the municipality, as the core functions exception achieved in City of Easton v. AFSCME, Local 447, 756 A.2d 1107, 1111-12 (Pa. 2000); or from terminating an employee whose repeated, serious misconduct and shortcomings threatens the safety of children, as the core functions exception also

achieved in Greene County v. District 2, United Mine Workers of America, 852 A.2d 299, (Pa. 2004). While taking the role and responsibility of the public employer into account, review for manifest unreasonableness, unlike the core functions exception, does not threaten to swallow the essence test. Because it is grounded in reasonableness, the test does not have the breadth of the core functions exception.

Furthermore, review for manifest unreasonableness is not as unwieldy as a public policy exception, while it can easily achieve the same desired results. For example, it would be manifestly unreasonable for an arbitral award to order a result that is unlawful. Additionally, depending on the public policy at issue, it could also be manifestly unreasonable for a court to enforce an award that contravenes that policy. The difference is, with the manifestly unreasonable review standard, courts are not left to fashion policy as they please when a case involves an issue that lies at the fringe of some cognizable "public policy." Additionally, a public policy exception has a greater tendency to embolden a court to become a "superarbitrator," which the Cheyney University majority was fearful of, see Cheyney University, 743 A.2d at 413, than the manifestly unreasonable standard I proposed in my concurring and dissenting posture in that case. In my judgment, review for manifest unreasonableness strikes the better balance between deference and meaningful judicial review.

As the award in the matter *sub judice* (1) satisfies the essence test, and (2) is not manifestly unreasonable, I would not remand to the Court of Common Pleas for further proceedings. Instead, I would reverse and reinstate the arbitrator's decision.