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

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

OPINION

MR. JUSTICE CAPPY **DECIDED: November 30, 1999**

These matters involve the narrow certiorari scope of review, applicable to appeals from Act 111[1] grievance arbitration awards[2], as defined by this court's recent unanimous

[1] Act of June 24, 1968, P.L. 237, as amended, 43 P.S. §§ 217.1-217.10. Act 111 applies to police and fire personnel only.

decision of Pennsylvania State Police v. Pennsylvania State Troopers Association (Betancourt), 656 A.2d 83 (Pa. 1995). For the reasons that follow, we decline the invitation of the Pennsylvania State Police to expand our Betancourt holding and therefore affirm the orders of the Commonwealth Court below.

Each of these matters involves the imposition of discipline on a state trooper who committed acts of misconduct. The facts of the first matter are not in dispute. On May 19, 1995, Trooper Rodney Smith ("Smith"), while off-duty, spent the afternoon drinking at a bar. Upon driving away from the bar, he happened to see Tammy Mathis ("Mathis"), an ex-girlfriend of his, sitting in her car which was parked on the side of the road. Smith pulled over his car to speak with Mathis. An argument ensued concerning money Smith claimed Mathis owed him. The argument culminated in Smith jamming his loaded, police-issued weapon into Mathis' mouth and threatening to kill her. At that point, Smith abruptly ceased terrorizing Mathis and drove away to continue drinking. Mathis promptly called the police. Smith later returned to the scene where the police who had been summoned by Mathis arrested him. Smith was charged with three counts of driving under the influence and one count each of simple assault and making terroristic threats; he subsequently pled guilty to all five charges.

The Pennsylvania State Police ("State Police") later notified Smith that because of his actions of May 19, 1995, he was dismissed from the force. Smith filed a grievance arguing that his dismissal was improper. The arbitrator concluded that although Smith had committed the acts in question, the discipline of dismissal was excessive. The arbitrator

---

(…continued)

[2] The term "grievance arbitration" refers to arbitration "which occurs when the parties disagree as to the interpretation of an existing collective bargaining agreement." Betancourt, 656 A.2d at 85 n. 2. The term "interest arbitration," on the other hand, refers to arbitration "which occurs when the employer and employee are unable to agree on the terms of a collective bargaining agreement." Id.

noted that prior to May 19, 1995, Smith's thirteen years of service had been exemplary and that Smith had been under a great deal of stress prior to the incident as a result of his working at the crash site of the USAir jet near Pittsburgh in the fall months of 1994. Yet, the arbitrator stated that these mitigating factors had only a "minimal" impact on his decision. Arbitrator's decision, dated 1/3/97, at 5. Rather, the arbitrator focused on how the discipline the State Police meted out to Smith compared to discipline imposed on other troopers. The arbitrator concluded that since Smith's actions were less egregious than actions committed by troopers whom the State Police had merely suspended, then dismissal of Smith was inappropriate. Id. at 6-9. The arbitrator thus sustained the grievance in part and denied it in part, ordering the State Police to reinstate Smith immediately but without back pay.

As with the Smith matter, the facts concerning Trooper Robert Johnson's ("Johnson") misconduct are not in dispute. On December 18, 1995, Johnson attempted to leave a Clover Department Store ("Clover") with $27.58 worth of merchandise for which he had not paid. He was subsequently arrested by the Cheltenham Township police on a charge of retail theft, a summary offense. An agreement was subsequently reached between Clover and Johnson by which Clover withdrew the charges and Johnson agreed to pay Clover the sum of $177.00 as restitution and a civil recovery penalty.

On June 27, 1996, Johnson was notified that he would be dismissed from his job. Johnson filed a grievance. The arbitrator determined that Johnson had indeed committed the retail theft. Yet, he determined that there was not just cause to dismiss Johnson. The arbitrator reasoned that dismissal was not warranted since other troopers had committed more serious crimes but had received discipline less severe than dismissal. Arbitrator's decision, dated 9/21/96, at 22. The arbitrator also found that dismissal was contraindicated since Johnson had given sixteen years of exemplary service to the State Police prior to this incident and that Johnson had expressed great remorse over his actions. Id.

The State Police filed appeals from both determinations. In both matters, the Commonwealth Court affirmed, citing this court's recent unanimous decision in Pennsylvania State Police v. Pennsylvania State Troopers' Association (Betancourt), 656 A.2d 83 (Pa. 1995). The Commonwealth Court stated that a court reviewing an Act 111 grievance arbitration award has an extremely limited scope of review and that in these two matters, there was no basis upon which it could disturb the decisions of the arbitrators.[3]

The State Police filed petitions for allowance of appeal in both matters and we granted allocatur.

The question confronting us in these matters is what is the proper scope of review of an appeal from an Act 111 grievance arbitration award. We had the opportunity to consider this self same point four years ago in Betancourt. In that decision, we determined that the narrow certiorari scope of review applied. This scope of review, true to its name, is quite limited. It allows an appellate court to inquire into only four areas: (1) the jurisdiction of the arbitrators; (2) the regularity of the proceedings; (3) an excess of the arbitrator's powers; or (4) deprivation of constitutional rights. Betancourt, 656 A.2d at 85.

---

[3] Although voting to affirm the decisions of the arbitrators, Judge Pellegrini expressed the view (as the author of the majority opinion in Smith and the author of the concurring opinion in Johnson) that adherence to the narrow certiorari scope of review was ill advised when it allowed troopers such as Smith and Johnson to remain on the force. Pennsylvania State Police v. Pennsylvania State Troopers Association (Smith), 698 A.2d 688, 689-90 (Pa. Cmwlth. Ct. 1997); Pennsylvania State Police v. Pennsylvania State Troopers Association (Johnson), 698 A.2d 686, 688 (Pa. Cmwlth. Ct. 1997). The position taken by the learned Judge Pellegrini is not surprising since it was he who wrote the majority opinion for the Commonwealth Court in Betancourt advocating a broad scope of review of Act 111 arbitration awards, a position which this court declined to adopt on appeal. As shall be discussed more fully infra, we rejected this position in Betancourt as we found that the legislature had placed severe limits on our ability to act in this arena; thus we are prevented from interfering with an Act 111 arbitration award merely because the arbitrator's determination is unpalatable, or even extremely distasteful, to us.

These severe limits placed on our appellate authority were not self-imposed. Rather, they were dictated by the legislature as part of a carefully crafted plan of remediation to correct flaws in the act which was the predecessor to Act 111. That defunct act, which was commonly known as the Act of 1947,[4] caused severe and socially destabilizing problems as it prohibited police and fire personnel not only from striking but also from engaging in collective bargaining. This double denial of rights to police and fire personnel fueled the growing tension between labor and management, tension which culminated in "illegal strikes and a general breakdown in communication between public employers and their employees." Id. at 89.

In creating Act 111, the legislature focused on making the division of rights and powers between management and labor more equitable. Specifically, police and fire personnel were still denied the right to strike, but this disability was offset by the granting of the right to collectively bargain. The legislature also included another provision which was meant to dissipate tensions prior to their building to a point where labor-management relations would break down and the public safety would be jeopardized. Specifically, the legislature dictated a restraint on judicial activity in this arena, and forbad appeals from an arbitration award. 43 P.S. § 217.7(a). By ensuring the "swift resolution of disputes, [the legislature] decreased the chance that the workforce would be destabilized by protracted litigation, a state harmful to all parties." Betancourt, 656 A.2d at 89.

A year after Act 111 was enacted, we had our first opportunity to interpret 43 P.S. § 217.7(a). Washington Arbitration Case, 259 A.2d 437, 440 (Pa. 1969). We noted that Act 111's prohibition on appeals from an arbitration award was tempered by Supreme Court Rules R. 68 ½, a rule which was in existence at the time Act 111 was crafted. That rule

[4] The full citation for the Act of 1947 is Act of June 30, 1947, P.L. 1183, 43 P.S. § 215.1 et seq.

stated that "[i]f an appeal is prohibited by an Act . . . the law is well settled that an appeal will lie to the Courts in the nature of a narrow certiorari . . . ." Id. at 441 (citing Supreme Court Rules R. 68 ½). We stated that not only did application of the narrow certiorari scope of review satisfy the requirements of Rule 68 ½, but it also had the salutary effect of acting as an adequate safeguard for any constitutional rights to an appeal that parties might have. Id. at 440. [5]

The State Police apparently agrees that appeals from Act 111 grievance arbitration awards are subject to the narrow certiorari scope of review. Yet, it expresses the opinion that the arbitrators below exceeded their powers. Thus, the State Police contends, we can reverse these awards on that basis without exceeding our scope of review.

In Betancourt, we discussed at length this third prong of the narrow certiorari test. Our definition of what constitutes "an excess of an arbitrator's powers" was far from expansive. We commenced our analysis by noting that "[a]n arbitrator's powers are limited. He or she may not mandate that an illegal act be carried out; he or she may only require a public employer to do that which the employer could do voluntarily." Betancourt, 656 A.2d at 90 (citing Washington Arbitration, supra, and Appeal of Upper Providence Police, 526 A.2d 315 (Pa. 1987)). Furthermore, we stated that the arbitrator's award "must encompass only terms and conditions of employment and may not address issues outside of that realm." Id. Finally, we stressed that a mere error of law would be insufficient to support a court's decision to reverse an Act 111 arbitrator's award. Id.

We hold that pursuant to Betancourt, the arbitrators in the instant matters did not exceed their powers. First, ordering that these troopers be reinstated did not mandate that

---

[5] Although Rule 68 ½ was rescinded in 1972, this court has made it clear that the narrow certiorari scope of review is still applicable to appeals from Act 111 arbitration awards. See, e.g., Township of Moon v. Police Officers of Township of Moon, 498 A.2d 1305 (Pa. 1985).

the State Police perform an illegal act.[6] Furthermore, the arbitrators' orders to reinstate the troopers clearly related to the terms and conditions of employment.

The State Police, however, contends that the Betancourt definition of "an excess of the arbitrator's powers" is incomplete. It argues that an arbitrator can exceed his or her powers not only by ordering an illegal act or an act which does not relate to the terms and conditions of employment, but also by issuing an order which contravenes "public policy". We are unable to accept this position. Broadening the narrow certiorari scope of review to include a provision which would allow the courts to interfere with an arbitrator's award whenever that award could be deemed to be violative of "public policy" - however that nebulous concept may be defined by a particular appellate court - would greatly expand the scope of review in these matters. If we were to adopt the State Police's recommendation to include this ill-defined term within the narrow certiorari scope of review, we would markedly increase the judiciary's role in Act 111 arbitration awards. This would undercut the legislature's intent of preventing protracted litigation in this arena.[7]

---

[6] While members of municipal police departments are dismissed from service where they have been convicted of a felony or serious misdemeanor, 53 Pa.C.S. § 2164, there is apparently no similar proscription applicable to troopers serving in the State Police force. The decision to add such a similar provision applicable to members of the State Police is one for the legislature, and not this court, to make.

[7] In support of its argument that an arbitrator exceeds his powers not only when he orders an illegal act but also when his order violates "public policy," the State Police relies heavily on United Paperworkers International Union v. Misco, Inc., 484 U.S. 29 (1987). We find this reliance to be inapt for a couple of reasons. First, the Court in Misco was not concerned with interpreting an act such as Act 111, where the legislature, in response to shockingly severe labor unrest in two key sectors of public servants, sharply curtailed judicial review of arbitration awards. Thus, the appeal of Misco is superficial at best. Second, even if we were to employ Misco for a limited purpose in determining this appeal, it would seem to cut against the State Police's position as the Misco Court equated a violation of public policy with the ordering an illegal act. The Court stated that in determining whether an arbitrator's award violates public policy, an appellate court is to examine whether the award creates an "explicit conflict with other 'laws and legal precedents'"; the Court emphasized that the examination was not to focus on the nebulous "' general considerations of supposed public interests.'" Id. at 43. Thus, contrary to the (continued…)

We emphasize that these matters are not, as the State Police implies, about whether this court finds the reinstatement of these troopers to be repugnant.[8] Rather, they concern the application of existing legislation. If we were to broaden the narrow certiorari scope of review to the extent propounded by the State Police, we would not be interpreting Act 111 but rather would be rewriting it. Clearly, such a legislative function is denied to the judiciary. Pap's A.M. v. City of Erie, 719 A.2d 273, 281 (Pa. 1998).[9]

For the reasons stated herein, the orders of the Commonwealth Court are affirmed.

Mr. Justice Castille files a concurring opinion.

Mr. Justice Nigro files a concurring opinion.

Madame Justice Newman files a dissenting opinion.

(…continued)
assertion of the State Police, the public policy theory espoused by the Misco is not some wide-ranging concept, but rather appears to parallel our accepted definition of an excess of an arbitrator's powers.

[8] We stress that in rendering this decision, we are certainly not condoning the actions of these troopers.

[9] The State Police also claims that we should reconsider our decision in Commonwealth v. State Conference of Police Lodges of the Fraternal Order of Police, 575 A.2d 94 (Pa. 1990), wherein we stated that an arbitrator may compel parties in an Act 111 interest arbitration to insert a provision in their collective bargaining agreement which would allow troopers to avoid court-martial proceedings by instead electing to proceed to binding grievance arbitration. We will not review this claim as it was not preserved below. Furthermore, we are skeptical whether this issue, which concerns the interest arbitration process, could properly be raised in matters which concern grievance arbitration.