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CHAMBERSBURG AREA SCHOOL DISTRICT vs. CHAMBERSBURG AREA EDUCATION ASSOCIATION, C.P. Franklin County Branch, Civil Action-Law, No. A.D. 1998-222

Chambersburg Area School District v. Chambersburg Area Education Ass'n

Factual Background *- Collective bargaining agreement ("CBA") established a working schedule for classroom teachers of 187 days per year. CBA contained a broad integration clause. District permitted teacher to continue to work 247 days as he had been doing since he was hired in 1981. District permitted this practice to continue into the first year of the CBA. District attempted to reduce the number of days that teacher would work from 247 to 242 in the second year of the contract. The Association filed a grievance on behalf of the teacher asserting that a past practice has been established that has effectively waived the provisions in the CBA. Arbitrator, relying upon the past practices of the parties, sustained the grievance. Award affirmed.*

1. Standard of review for an arbitrator's award is the so called "essence test." If the arbitrator's award can in anyway be drawn from the essence of the CBA that award must stand.

2. Generally, an award relying on past practices cannot be said to draw its essence from the CBA where that CBA includes a broad integration clause.

3. However, an arbitrator can rely upon past practices that continue after the effective date of a CBA to assist in his interpretation of a CBA.

4. Specifically, past practices can be relied upon:

A. to clarify ambiguous language in the collective bargaining agreement;

B. to implement general contract language; or

C. to show that a specific provision in the contract has been waived by the parties.

5. Arbitrator's award was affirmed because it could be drawn from the essence of the CBA despite the fact that it relied upon the past practices of the parties.

6. It was proper to rely upon past practices that existed after the execution of the CBA.

Jan G. Sulcove, Esquire, Attorney for the Petitioner
Joseph A. Sabadash, Esquire, Attorney for the Respondent

OPINION AND ORDER

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This matter is before the Court on a Petition to Vacate Award of Arbitrator pursuant to 42 Pa.C.S.A. § 7314 (1980) filed by the Chambersburg Area School District ("District"). The facts of this case are essentially undisputed.

Blaine May ("May") is a vocational-agricultural classroom teacher and has been employed as such by the District since July 22, 1981. For a period of time, June 30, 1993 through October 16, 1996, he held the title of department head; thereafter, he voluntarily resigned from this position and returned full-time to the classroom. May's present employment with the District is governed by a collective bargaining agreement ("CBA") ("Agreement") [1] executed on April 30, 1997, by and between the District and the Chambersburg Area Education Association ("Association").[2] This grievance arises from a decision made by the Board of Directors for the District ("Board") reducing the number of days that May would work for the school year 1997-98 by five (5); rather than work two hundred and forty-seven (247), he would only work two hundred and forty-two (242).

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[1] The Agreement sets forth the following pertinent clauses:

> 1.2 Bargaining Unit: The members of the bargaining unit shall be hereinafter referred to as "professional employees", and shall consist of those employees of District holding the following positions and otherwise included within the definition of "temporary professional employee" and "professional employee" as contained in the Public School Code of the Commonwealth, and as set forth in the aforementioned order of the Pennsylvania Labor Relations Board.
>
> A. *Classroom teachers* (including half-time teachers).
>
> ********
>
> 5.1 Work Year: *The work year shall be established by the Board of School Directors except that it shall not exceed one hundred eighty-seven (187) days.* Modifications may be made in the school calendar by the Board of School Directors, provided that no such modification shall require any professional employee to work more than one hundred eighty-seven (187) days without receiving payment as provided for in paragraph 5.2. Such school calendars are hereby incorporated into this clause by reference and made a part hereof as fully as though herein set forth, whether or not the same be attached hereto.
>
> 5.2 Services in Addition to Established Days: Those professional employees who were employed before July 1, 1997 and are scheduled to work beyond 187 days, will be paid their per diem rate established in 1995-96 for each additional day. Those hired on or after July 1, 1997 and requested to work in excess of one hundred eighty-seven (187) days, shall receive additional pay at the rate of one hundred fifty dollars ($150.00) per day if they accept the offer of extended employment. If they decline the offer, the opportunity shall be made available to others.
>
> 6.1 Established by District: *The District has the right to establish the duties of professional employee [sic], and may change the same from time to time.* It is understood that duties inherent to the teaching profession such as the grading of papers or examinations and so forth will normally be accomplished during periods when classes are not scheduled during the aforesaid workday, but that on occasion professional employees will perform such duties at other times. It is agreed that no additional compensation will be paid for any such duties.
>
> 14.9 Finality: The parties acknowledge that during the negotiations which resulted in this agreement each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter within collective bargaining and that the understandings arrived at after the exercise of that right are set forth in this agreement.
>
> Therefore, the District and the Association for the life of this agreement each voluntarily waives the right to bargain collectively with respect to any subject or matter referred to or covered in this agreement, or with respect to any subject or matter not specifically referred to or covered in this agreement. *The express provisions of this agreement for its duration, therefore, constitute the complete and total contract between the District and the [Association with respect to rate of pay, wages, hours or work and other conditions of employment.* Nothing herein contained shall prevent negotiations concerning future contract during the life of this contract, which negotiations shall be as provided in Act 195, the Public Employees Labor Relations Act.

(Emphasis added).

[2] It is recognized that the Association is the collective bargaining agent for the classroom teachers employed by the District including May. *See* Agreement Section 1.1.

The Board's overall plan was to reduce May's total number of working days by fifty (50) per year; the plan envisioned a reduction of five (5) days per year over a ten (10) year period. The Board initiated this plan under the guise of Sections 5.1 and 6.1 of the Agreement.

In pursuing his grievance, May went through the proper channels outlined in the Agreement culminating with an arbitration hearing on February 19, 1998. In his award, the Arbitrator sided with May and held that "[t]he District may not unilaterally alter, change or eliminate [May's] 247 day work year during the term of the parties' agreement, without the mutual consent of the Association." *See* Opinion and Award of Arbitrator, May 6, 1998. The Arbitrator's Opinion is largely grounded on the premise that a past practice (that practice continuing into the effective date of the Agreement) had been established between the parties requiring the District to maintain May's two hundred and forty-seven (247) day work schedule. The District disagrees and urges that the Award be vacated.

DISCUSSION

The appropriate standard for reviewing an arbitrator's award is as follows:

> Under the "essence test" standard applicable in public labor disputes, the court's review of an arbitrator's award is extremely narrow and is limited to a determination of whether the arbitrator's decision could rationally be derived from the collective bargaining agreement, viewed in light of its language, its context, and any other indicia of the parties' intention. As long as the arbitration award represents a reasonable interpretation of the CBA, or draws its "essence" from the agreement, it is to be respected by the courts.

Williamsport Area Sch. Dist. v. Williamsport Educ. Ass'n, Pa. Commw. , , 686 A.2d 885, 887 (1996) (citations omitted) *allocatur denied* 548 Pa. 623, 693 A.2d 591 (1997); *see also Allegheny County v. Allegheny County Prison Emp. Indep. Union*, 476 Pa. 27, 381 A.2d 849 (1977). Plainly stated, if the arbitrator's award cannot rationally be drawn from a CBA then a court has no option but to vacate it. Clearly, a reviewing court is neither to act as super-arbitrator nor is it to substitute its judgment in place of an arbitrator's. *See Allegheny County*, *supra*. It is clear that a

arbitrator's interpretation of a CBA should be afforded great deference by this Court. *See Greater Johnstown Area Vocational-Technical Sch. v. Greater Johnston Area Vocational-Technical Educ. Ass'n*, 520 Pa. 197, 553 A.2d 913 (1989). It is only when an arbitrator's award cannot be drawn from the "essence" of a CBA that his decision must be set aside. *See Williamsport, supra; Crawford County v. AFSCME Dist. Council 85 Local Union No. 2643*, Pa. Commw. , 693 A.2d 1385 (1997) *allocatur denied* 550 Pa. 693, 704 A.2d 1383 (1997).

The District asserts that Arbitrator Talarico's decision cannot rationally be drawn from the essence of the Agreement. It advances this position on the heels of the *Allegheny County* decision and the broad integration clause found in Section 14.9 of the Agreement.[3] In *Allegheny County*, prison employees filed a grievance seeking a broader meal selection during lunch and a secured eating facility. Despite the fact that their CBA included a broad integration clause,[4] the arbitrator sustained their grievance based upon past practices that *predated* the execution of the CBA by the parties. In concluding, the Court wrote:

> In deciding as we do, we hold only that where a collective bargaining agreement not only makes no mention whatever of past practices but does include a broad integration clause, an award which incorporates into the agreement, as separately enforceable conditions of the employment relationship, past practices which antedate the effective date of that agreement cannot be said to "draw its essence from the collective bargaining" agreement.

Allegheny County at 37, 381 A.2d at 854.

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[3] *See* Footnote No. 1, *supra*.

[4] Article XXIV

> 1. The parties mutually agree that the terms and conditions expressly set forth in this Agreement represent the full and complete agreement and commitment between the parties thereto.

Allegheny County at 36, n. 15, 381 A.2d at 854, n. 15.

The Association asserts that this Court cannot blindly rely upon the portions of the *Allegheny County* opinion cited by the District. Rather, the Association has directed the Court to the following language found in *dicta* from that same opinion:

> What we have said, of course, is not to suggest that in another case the evidence may not justify a contrary conclusion. Nor do we intend to say that *an arbitrator's reliance on past practices* to clarify ambiguous language in the collective bargaining agreement, to implement general contract language or *to show that a specific provision in the contract has been waived by the parties*, would be improper although the agreement in question included an integration clause.

Id. at 39, 381 A.2d at 854 (emphasis added). With this, the Association advances the theory that the District has *waived* the right to reduce May's work year by continuing to permit him to work two hundred and forty-seven (247) days for the 1996-1997 school year; this practice continued despite the execution of an agreement encompassing the years 1996 - 2000. This Court believes that in continuing the two hundred and forty-seven (247) day schedule for May, the District has brought itself out from under the rubric and protection of *Allegheny County*.

These parties specifically bargained for and arrived at a compromised agreement. In that Agreement, the parties specifically *negotiated* the length of the work year. *See* Agreement § 5.1. Although the Agreement had an effective date of July 1, 1996, the District permitted May to work two hundred and forty-seven (247) days until the commencement of 1997-98 school year.

Certainly, this is one situation where the arbitrator may rely upon the past practices to assist his decision making and interpretation of a CBA. Specifically, an arbitrator may rely upon the past practices of the parties "to show that a specific provision in the contract has been *waived* by the parties..." *Allegheny County*, *supra*. During argument, counsel for the District cited *Commonwealth v. Commonwealth, Pennsylvania Labor Relations Bd.* ("Commonwealth"), Pa. Commw. , , 465 A.2d 116, 118 (1983) *aff'd on reh'g* 82 Pa. Commw. 330, 474 A.2d 1213 (1984), for the proposition that a waiver cannot be inferred lightly but rather

it must be shown to have been "consciously and clearly" waived. Of significance, however, the discussion of waiver found in the Commonwealth case was in the context of waiving the right to bargain.[5] More specifically, in *Pennsylvania Labor Relations Bd. v. Commonwealth (Venango County Board of Assistance)*, 11 PPER ¶¶ 11223 (1980), a case cited in the *Commonwealth* case for the waiver standard, it was noted that "[a] zipper [integration] clause, standing alone....is not enough to constitute a waiver of bargaining." *Venango County*, 11 PPER ¶¶ 11223 at 389. This grievance does not involve a claim by the District that it did not have the opportunity to negotiate with the Association; to the contrary, the terms were negotiated and an agreement was reached. The school year for classroom teachers was set at one hundred and eight-seven (187) days yet May was permitted to maintain the past practice of working two hundred and forty-seven (247). The authority relied upon by the District cannot be construed to control a situation involving the *waiver of a provision in a bargained for agreement*. The District could have, and upon reflection clearly has, waived this provision in dealing with May.

The law is clear that there are established exceptions permitting an arbitrator to rely upon the parties' past practices occurring after the execution of a CBA. Two cases of significance in this field of jurisprudence are *Erie County v. American Fed'n of State, County and Mun. Employees, Dist. 85, on behalf of Local Union No. 26666*, 72 Pa. Commw. 24, 455 A.2d 779 (1983) and *Central Susquehanna Intermediate Unit Educ. Ass'n v. Central Susquehanna Intermediate Unit #16*, 74 Pa. Commw. 248, 459 A.2d 889 (1983).

In *Erie County*, deputy sheriffs filed a grievance requesting to reinstate the past practices of the parties. The practice that existed

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[5] The Court was directed to the following language:

> The Commonwealth asserts, and the Board agrees, however, that an effective waiver may be found where an examination of the negotiations leading to the waiver clause's adoption shows that the union *consciously and clearly* waived its right to bargain. *See Pennsylvania Labor Relations Board v. Commonwealth (Venango County Board of Assistance)*, 11 PPER ¶ 11223 (1980).

Commonwealth at , 465 A.2d at 118 (emphasis added).

prior to the execution of a CBA permitted sheriffs to receive a flat fee reimbursement if they used their own vehicle on county business. The CBA sought to alter this arrangement by incorporating the following language:

> Employees who are authorized to use their personal automobile for official County business shall be reimbursed at the rate of fifteen cents ($.15) per mile. The present form used to verify mileage expenses shall continue.

Erie County at 26, 455 A.2d at 780. Despite the inclusion of a reimbursement schedule, the county continued to reimburse the deputies with a flat fee. The grievance was sustained by the arbitrator on the basis of the past practices occurring *after* the execution of the CBA; this award was affirmed by the trial court. Just as in the case *sub judice*, the county made the argument that the inclusion of a broad integration clause in the CBA precluded the arbitrator's reliance upon any past practices existing between the parties. *Id.* at 28, n. 3, 455 A.2d at 781, n. 3. The Commonwealth Court was not persuaded by this argument, and in affirming the grievance it cited the exceptions permitting the consideration of past practices enumerated in the *Allegheny County* opinion.

In a second case of significance, *Central Susquehanna*, an arbitrator relied upon past practices to "give meaning and define the scope of the contract..." *Central Susquehanna* at 252, 459 A.2d at 891. Michael Thew, a special education teacher, sought reimbursement from Central Susquehanna Intermediate Unit ("CSIU") for a class he took entitled "School Law and Finance." The collective bargaining agreement provided that "a professional employee was entitled to reimbursement....'for pre-approved courses only.'" *Id.* at 249, 459 A.2d at 889. Following CSIU's denial for reimbursement, Thew filed a grievance which was ultimately sustained by an arbitrator based upon the past practices of the parties. The arbitrator noted that the same course had been consistently approved eight times over the past four years. In reversing the arbitrator's award, "the [trial] court determined that the arbitrator's use of past practices was improper due to the existence of an integration clause." *Id.* at 250, 459 A.2d at 890. Again in affirming an arbitrator's award and reversing the trial court, the

Commonwealth Court relied upon those exceptions outlined in the *Allegheny County* opinion.

It can fairly be said that the District has impliedly waived provisions of the Agreement because of its past practices. "An *implied waiver exists* when there is either an unexpressed intention to waive, which may be clearly inferred from the circumstances, *or no such intention in fact to waive, but conduct which misleads one of the parties into a reasonable belief that a provision of the contract has been waived.*" *Den-Tal-Ez, Inc. v. Siemens Capital Corp.*, 389 Pa. Super. 219, 238, 566 A.2d 1214, 1223 (1989) (emphasis added).

Based upon the forgoing analysis, the arbitrator's award can rationally be drawn from the essence of the Agreement despite its inclusion of a broad integration clause and as such, this Court has no option but to affirm the award even if the arbitrator "failed to properly perceive the question presented or erroneously resolved it..." *See Leechburg Area School District v. Dale*, 492 Pa. 515, 521, 424 A.2d 1309, 1313 (1981). This Court will issue an appropriate Order.

ORDER OF COURT

November 17, 1998, after reviewing the briefs and hearing argument from both parties on the Petition to Vacate Award of Arbitrator,

IT IS HEREBY ORDERED that the Petition is **DENIED** and the award of the Arbitrator is **AFFIRMED**.