

Tuscarora School District v. Tuscarora Education Association

TUSCARORA SCHOOL DISTRICT, Petitioner,  
v. TUSCARORA EDUCATION ASSOCIATION, Respondent  
Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Franklin County Branch  
Civil Action — Law, No. 2005-374

*Public Employee Relations Act; Scope of Review of Arbitration Award;  
Arbitrable Grievances; Essence Test; Just Cause Termination*

1. The Public Employee Relations Act, 43 Pa.C.S.A. §§ 1101.101-1101.2301, governs the labor relations between public agencies and public employees, such as teachers.
2. The Act affords a narrow scope of review of an arbitration award, requiring the award to be upheld if it can, in any way, be rationally derived from the collective bargaining agreement considering the parties' language, the context, and other indicia of the parties' intentions.
3. This is known as the essence test and applies to the arbitrator's decision that the grievance is arbitrable and to his or her ultimate arbitration award.
4. The core functions test constitutes an exception to the essence test and applies when employee misconduct impacts on the agency's ability to carry out its public duties.
5. Employee misconduct must exist before the core functions test applies.
6. Dismissal for just cause requires consideration aggravating and mitigating circumstances, including the employee's past performance record, his or her length of service, any post-discharge rehabilitation, and any unequal treatment of other employees for similar conduct.

Appearances:

Michael J. O'Connor, Esq., *Counsel for Petitioner*

Stephen S. Russell, Esq., *Counsel for Respondent*

OPINION

Walsh, J., November 27, 2007

Facts

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The Petitioner, Tuscarora School District, hereafter TSD, has appealed an arbitration award pursuant to 42 Pa.C.S.A. § 933(b).<sup>[1]</sup> The Respondent in this matter is Tuscarora Education Association, hereafter TEA, and it represents Dawn Reasner under a collective bargaining agreement between TEA and TSD. The dispute concerns Ms. Reasner's dismissal and whether it constitutes an arbitrable matter, as the arbitrator found it did. TSD also contends that the arbitrator's award is not drawn from the collective bargaining agreement. The facts follow.

TSD and TEA signed a collective bargaining agreement effective July 1, 2000. The agreement provides for mandatory arbitration of disputes arising out of its interpretation. Reasner was hired in August 1999 as a temporary professional employee to fill a position labeled as "District-Wide Elementary Librarian." In Reasner's letter of acceptance, she pledged to take any necessary classes to become certified in library science. The superintendent of TSD secured emergency certifications for Reasner for the school years of 1999-2000, 2000-2001, and 2002-2003. TSD did not request emergency certification for 2001-2002, and, as a result, Ms. Reasner was not certified as a librarian for that year. Nonetheless, on August 12, 2002, after she had completed three years of satisfactory work as a librarian, Reasner signed a professional employee contract with the school district. Also, true to her pledge, Reasner completed all required coursework for certification as a librarian before the end of the 2002-2003 school year. Still, Reasner worked the 2003-2004 school year without certification as a librarian. At this time, she failed to take the PRAXIS exam because she was not aware that it was required for certification. Finally, in 2003-2004, after TSD applied for professional certification of Reasner, certification was denied since Reasner had failed to take the PRAXIS. Up through her firing, although she was employed as a librarian, Reasner possessed her certification as an elementary teacher.

In April 2004, Reasner took and failed the PRAXIS exam. Reasner informed the superintendent of her failure on the PRAXIS, and she finished the school year employed as a librarian. On June 8, 2004, following the conclusion of the 2003-2004 school year, Reasner learned that she had been terminated for having not obtained her library certification. At no time prior to Reasner's termination was she warned that she would be fired if she had not been certified in library sciences by a certain date. TSD terminated her after the Pennsylvania Department of Education had penalized it for allowing her to teach library sciences without certification in that subject. Reasner's job performance remained satisfactory throughout her employment, and she obtained her certification as a librarian in July of 2004, before TSD had hired her successor. Also, TSD did not consider her for any open elementary teaching positions.

TEA filed a grievance on behalf of Reasner seeking her reinstatement as a professional employee under the collective bargaining agreement. Article 14.3 of the agreement excluded the arbitration of disputes over the firing of temporary professional employees.[2] With regard to the firing of professional employees, Section 4.7 of the agreement precluded any discipline, written reprimand, rank or compensation reduction or dismissal without just cause.[3] Also, the agreement denied to arbitrators the "power to add to, subtract from, or modify any of the terms of this Agreement." Section 10.3 CBA. However, under Section 10.4, the arbitrator could award back pay based on lost income. The grievance was processed under the agreement, and an arbitration hearing occurred on November 18, 2004, before Louis Imundo. Imundo held that the case was arbitrable and issued an award in Reasner's favor. He ordered reinstatement as a full-time professional employee and awarded her back pay and other expenses.

TSD brought a timely appeal of this award pursuant to 42 Pa.C.S.A. § 933(b). First, TSD argues that the grievance is not arbitrable, since Reasner was not a professional employee under the collective bargaining agreement or, alternatively, the core function test protects TSD's ability to provide the best education for its students. Second, TSD contended that the award was not drawn from the essence of the terms of the agreement. The Court has reviewed the arbitrator's report and award, TSD's petition, TEA's answer, the parties' briefs and oral arguments, and the law. The case is ripe for decision.

### Discussion

Before embarking on its analysis, the Court notes the generally applicable narrow standard of review concerning all aspects of an arbitrator's award under the Public Employee Relations Act. 43 Pa.C.S.A. §§ 1101.101-1101.2301. "The award must be upheld if it can, in any rational way, be derived from the collective bargaining agreement considering the language of the agreement, context, and other indicia of the parties' intentions." Pennsylvania Housing Authority v. The Fraternal Order of Housing Police, 811 A.2d 625, 629-630 (Pa. Commw. Ct. 2002). The decision of the arbitrator is final and binding on the parties provided his award "draws its essence from the collective bargaining agreement." Id. at 629. This is a two part test. Id. First, the properly defined issue for arbitration must lie within the terms of the collective bargaining agreement. Id. Second, if the issue is embraced by the agreement and properly before the arbitrator, his award will be upheld if his interpretation or application of the agreement can be rationally derived from the agreement. Id. "A court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from the collective bargaining agreement." Id. This extremely deferential test applies to all aspects of an arbitrator's award. Id. Thus, the Court must compare the facts of the case to the terms of the collective bargaining agreement and

determine if the arbitrator erred.

Finally, the law recognizes a narrow exception to the normally deferential standard of review under the essence test; this is known as the core function test. City of Pittsburgh v. Brentley, 925 A.2d 188, 194-196 (Pa. Commw. Ct. 2007). This test also applies to arbitration awards under the Public Employee Relations Act. 43 Pa.C.S.A. §§ 1101.101-1101.2301. The core function exception reduces the deference accorded to an arbitrator's award in an instance of "egregious conduct that strikes at the very core function of the public enterprise." Id. at 194-195. To activate the core functions test, though, the employee must engage in misconduct. Allegheny County Airport Authority v. Construction General Laborers and Material Handlers Union 1058, 2007 WL 3225399 (Pa. Commw. Ct. 2007). Using this framework, the Court resolves the issues.

#### I. Is the grievance arbitrable?

Reasner's grievance concerned whether TSD fired her for just cause. The arbitrator has sole jurisdiction to decide the arbitrability of an issue in the first instance. Wattsburg Area School District v. Wattsburg Education Association, 884 A.2d 934 (Pa. Commw. Ct. 2005). In this case, the arbitrator determined that Reasner's grievance was arbitrable, because she was a professional employee. TSD urges that certification as a librarian is required under state law in order to become a professional employee and, since Reasner was not certified for the school year of 2001-2002, she was not a professional employee. But, the Court's review of the agreement and the applicable statutes reveals that the dispute is arbitrable.

The collective bargaining agreement applies only to professional employees. Article 14.3 CBA. However, since the agreement fails to define the term "professional employee," apparently, the Pennsylvania School Code governs and defines "professional employee." 24 Pa.C.S.A. § 11-1101 *et seq.*

The text of the Code embraces Ms. Reasner. First, the term "professional employee" includes "those who are certified as teachers." 24 Pa.C.S.A. § 11-1101. Throughout her period of employment, Reasner was certified as an elementary school teacher. She worked as a librarian, but the statute does not require that the certification be related to the job actually performed. TSD made Reasner a professional employee when it gave her a professional employee contract in August 2002. TSD did this even though it was aware that she was not certified as a librarian. Under 24 Pa.C.S.A. § 11-1101, apparently, a school district may choose to treat employees as professional employees even if they are certified in one qualifying field and are actually employed in another qualifying field. School District of Philadelphia v. Brockington, 511 A.2d 944 (Pa. Commw. Ct. 1986).

TSD asserts that this is not true and relies heavily on a case in which a teacher, who had lost her certification in the only field in which she had been certified, was found to not be a professional employee. Occhipinti v. Board of School Directors of the Old Forge School District, 464 A.2d 631 (Pa. Commw. Ct. 1983). But, Occhipinti is distinguishable from this case, because Reasner was certified as a teacher throughout her tenure at Tuscarora and Occhipinti had no certification in any field. Reasner's elementary certification never lapsed, and, when TSD made her a professional employee under the statute and the agreement, she became a professional employee, under Brockington. TSD may grant professional employee status, but, once granted, it may not unilaterally revoke the status, since Reasner's rights have vested.

Further, TSD urges that Brockington and 24 Pa.C.S.A. § 11-1101 absolutely preclude a school district from making a person a professional employee unless she is certified in the subject area in which she is employed. But, TSD misstates Brockington, which held only that the statute did not mandate that a school district make someone a professional employee when they were certified in one area under 24 Pa.C.S.A. § 11-1101, but that area was not the area in which they actually worked. Id. at 946. Implicitly, Brockington allows the school district to determine whether or not it will grant professional employee status to an employee who is certified to work in one area as a professional employee, but actually works in another professional field for which the employee is not certified. Id. Indeed, such an interpretation comports with the policy behind Brockington, which grants wide discretion to school districts with respect to their background operations. Id. at 946.

In his Opinion, the arbitrator found that TSD had granted Reasner professional employee status by signing her to a professional employee contract following her third satisfactory year. Indeed, a temporary professional employee becomes a "professional employee" when her "work has been certified . . . , during the last four months of the third year of such service as being satisfactory." 24 Pa. C.S.A. § 11-1108 (b)(2). Ms. Reasner achieved this, and TSD made her a professional employee in the August 2002 contract. Once Ms. Reasner attained professional employee status, the collective bargaining agreement applied to her, and any grievance she had became arbitrable. Thus, the arbitrator's conclusion that Ms. Reasner was a

professional employee from the moment that she signed the professional employee contract has a factual basis, and it places his decision to arbitrate the grievance within the essence of the agreement. The applicable law comports with this finding.

Finally, TSD argues that the core function test precludes the arbitrability of this grievance, notwithstanding its derivation from the collective bargaining agreement. TSD contends that the ability to employ only employees who are certified for their tasks constitutes a core function of a school district. TSD stresses that this is particularly true where the education of young people is concerned, as it is in Reasner's case. Finally, TSD urges that Reasner's failure to become certified constitutes misconduct. However, an inspection of the core function test reveals that it does not apply in Reasner's case.

The core function test exists as an exception to the normally deferential standard of review under the essence test. Brentley, 925 A.2d 188. As noted earlier, this test covers arbitration awards under the Public Employee Relations Act. The test differentiates between misconduct that has a direct impact on a core government function and misconduct that has an indirect or potential impact on the agency's public duties. Philadelphia Housing Authority v. American Federation of State, County, and Municipal Employees, 900 A.2d 1043, 1051 (Pa. Commw. Ct. 2006). A direct impact is found when the misconduct preys upon or puts at risk "those persons the agency is charged to serve." Id. In cases of misconduct leading to indirect or potential problems the wrongdoing must be work-related and "egregious." Id. "The core functions test requires not an analysis of the employee's job duties, but of the type of misconduct. Allegheny County Airport Authority v. Construction General Laborers and Material Handlers Union, 874 A.2d 1250, 1257 (Pa. Commw. Ct. 2005). Clearly, a predicate finding of employee misconduct is required to activate the core functions test. See also Greene County v. District 2, United Mine Workers of America, 852 A.2d 299 (Pa. 2004); Philadelphia Housing Authority v. American Federation of State, County and Municipal Employees, District Council 33, 900 A.2d 1043 (Pa. Commw. Ct. 2006); Allegheny County Airport Authority v. Construction General Laborers and Material Handlers Union 1058, 2007 WL 3225399 (Pa. Commw. Ct. 2007); Brentley, 925 A.2d 1188.

In Reasner's case, the arbitrator specifically found that Reasner had not engaged in misconduct by failing to be certified as a librarian. Indeed, arbitrator Imundo goes into this in some depth in his analysis concerning whether TSD had just cause to fire her on June 8, 2004. To begin, Imundo found that Reasner had obtained her educational credits in a timely fashion. Also the arbitrator found that Reasner had acted properly and promptly upon discovering her need to take the PRAXIS, and the arbitrator concluded that any delay had largely come from the actions of TSD in failing to tell Reasner of the testing requirement for certification. The arbitrator also stressed Reasner's workload as a factor in the certification delay that worked to exonerate her of any wrongdoing. The Court sees no reason to disturb these findings. Thus, the Court concludes that Reasner did not engage in any misconduct that would serve to activate the core functions test. Accordingly, the Court holds that the essence test applies, and the arbitrator properly determined the dispute to be arbitrable.

## II. Is the award drawn from the essence of the agreement?

TSD takes issue with several aspects of the award. First, TSD contends that it had just cause to fire Reasner on June 8, 2004, since she lacked her library sciences certification on the date of her termination. Second, TSD states that the arbitrator erred by holding that certification over the summer was unnecessary and, thus, precluded Reasner's termination for not having been certified. Third, TSD argues that the arbitrator could not reinstate Reasner with full back pay. Finally, TSD argues that the arbitrator could not find that Reasner was subject to disparate treatment since it was not an issue being grieved. The second prong of the essence test applies to these contentions and the Court will uphold the award as long as the arbitrator's interpretation or application of the agreement can be rationally derived from the agreement. Pennsylvania Housing Authority, 811 A.2d at 629-630 (Pa. Commw. Ct. 2002).

First, the agreement rationally supports the arbitrator's conclusion that TSD lacked just cause to fire Reasner over the summer school break for not having her library sciences certification. The agreement precludes, among other things, the dismissal without cause of a professional employee.<sup>[4]</sup> The agreement does not define just cause, but case law indicates that the term includes consideration of mitigating and aggravating circumstances such as the "employee's past performance record, length of service, post-discharge rehabilitation, and unequal treatment of other employees for similar conduct." Greene County, 852 A.2d at 307. (Pa. 2004). The parties are considered to have bargained for the arbitrator's interpretation. Id.

Here, the arbitrator looked at all of the Greene County factors and found a lack of just cause. He concluded that Reasner had a uniformly satisfactory work record. He also noted that Reasner had worked for TSD for approximately five years. Additionally, he found that Reasner had become fully certified before

the librarian opening was filled and before several elementary teacher positions were filled. Finally, the arbitrator noted that TSD had allowed another teacher, David Ressler, to teach courses for which he had no certification for a period of six years without any negative repercussions.

Furthermore, the arbitrator cited three additional reasons for his finding of no just cause. First, TSD was chiefly responsible for any delay since it had failed to inform Reasner of the PRAXIS requirement and its desire to fire her if she failed to become certified by a certain date. Second, Reasner's professional contract did not require her to serve as a professional employee during the summer months; so, certification was not required at the time of her firing. Third, Reasner had passed all required educational credits prior to her termination, was scheduled to take the PRAXIS in June, and passed the PRAXIS before the next school year began. In the absence of fault by Reasner and any contractual requirement for her to teach library science over the summer, the Court finds that the arbitrator's award stems from the contract's essence.

Second, the Court addresses TSD's argument that the arbitrator erred by holding that certification over the summer was unnecessary and, thus, precluded Reasner's termination for not having been certified. Once again, the Court applies the essence test. Here, Reasner's personal employment contract did not require her to teach over the summer. As such, the arbitrator had a basis for concluding that, since teaching was not required, the attendant certification was not mandated either. The parties bargained for the arbitrator's interpretation, and now they are bound by it. The arbitrator did not err, under the essence test, in holding that certification over the summer was not necessary for Reasner to fulfill her contractual obligation.

Third, TSD contends that the arbitrator could not reinstate Reasner with full back pay. But, arbitrators have wide latitude in the area of remedies in order to further the intended essence of the contract. Neshaminy School Service Personnel Ass'n v. Neshaminy School District, 417 A.2d 837, 839-840 (Pa. Commw. Ct. 1980). Indeed, here the collective bargaining agreement clearly anticipates the award of back pay equal to the amount of lost income less income from other sources and unemployment. Section 10.4, CBA. Preliminarily, the Court notes that the collective bargaining agreement does not specifically deny the arbitrator this very standard power. Moreover, the tenure system affords professionals job security, and a reinstatement furthers this contractual goal. Accordingly, the Court concludes that the award of back pay and damages is drawn from the essence of the collective bargaining agreement.

Finally, TSD argues that the arbitrator could not find that Reasner was subject to disparate treatment since it was not an issue being grieved. Indeed, disparate treatment was not a separate issue submitted to arbitration. However, under the analysis of just cause, the Pennsylvania Supreme Court encourages arbitrators to evaluate how other similarly situated employees have been treated in order to determine just cause. Greene County, 852 A.2d at 307. The arbitrator did precisely this when he compared TSD's firing of Reasner with its prior reassignment of Mr. Ressler, and it is in this context in which the arbitrator's references to disparate treatment must be viewed.

Clearly, the arbitrator did not make an independent finding of disparate treatment and then act upon it. Rather, he merely used the term "disparate treatment" as a shorthand reference indicating that TSD could not rely on a lack of certification as just cause to terminate Reasner when it did not do so in Mr. Ressler's very similar case.<sup>[5]</sup> The Court's inference is further substantiated by the fact that disparate treatment is only referred to within the section of the arbitrator's award which addresses just cause. Disparate treatment was not an issue to be decided in this case, and the arbitrator made no such independent determination. Accordingly, the arbitrator committed no error by commenting that Ms. Reasner received disparate treatment.

Thus, finding no errors in the arbitrator's award, the Court affirms it in its entirety.

### Conclusion

In conclusion, the Court affirms the arbitrator's award. Under the essence test, the arbitrator properly found that Ms. Reasner was a professional employee and covered by the grievance process of the collective bargaining agreement. Moreover, the core functions test does not apply in Reasner's case, because she engaged in no misconduct of any type, let alone that significant enough to trigger the exception. Finally, the Court concludes that the arbitrator properly found that Reasner was terminated without just cause and that her reinstatement with back pay was appropriately drawn from the essence of the contract.

## ORDER OF COURT

November 27, 2007, this matter having come before the Court on Petitioner's Petition For Review and Application to Vacate Arbitrator's Award, and the Court having reviewed the arbitrator's award, the petition, Petitioner's and Respondent's briefs, the parties' arguments, and the law, it is hereby ordered that Petitioner's Petition for Review and Application to Vacate Arbitrator's Award is denied.

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[1] "Each court of common pleas shall have jurisdiction of petitions for review of an award of arbitrators appointed in conformity with statute to arbitrate a dispute between a government agency and an employee of such agency. 42 Pa.C.S.A. §933(b).

[2] "The grievance procedure of this Agreement shall not apply to disputes over the retention or non-retention of temporary employees. Such disputes shall be resolved in accordance with statutory and common law." Article 14.3.

[3] "No professional employee shall be disciplined, reprimanded in writing, reduced in rank or compensation or dismissed without just cause." Section 4.7. CBA.

[4] "No professional employee shall be disciplined, reprimanded in writing, reduced in rank or compensation or dismissed without just cause." Section 4.7.

[5] In the Arbitrator's opinion disparate treatment was demonstrated in comparing Mr. Ressler's situation with Ms. Reasner's situation.