IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania Turnpike Commission, Petitioner	:	
v.	:	
Teamsters Local 250, Respondent	:	No. 1011 C.D. 2014
	:	Argued: October 7, 2014

BEFORE: HONORABLE ROBERT SIMPSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE COVEY FILED: October 24, 2014

The Pennsylvania Turnpike Commission (Commission) petitions this Court for review of Arbitrator Marc A. Winters' (Arbitrator) May 20, 2014 Opinion and Award (Award) granting Gary Pedicone's (Grievant) grievance. There are two issues for this Court's review: (1) whether the Arbitrator's Award that Grievant is entitled to accrue retirement accreditation during his unpaid union leave of absence from the Commission is rationally derived from the plain language of the collective bargaining agreement (CBA); and, (2) whether the Arbitrator's conclusion that the Commission should have made State Employees Retirement System (SERS) contributions on Grievant's behalf during his unpaid union leave of absence contravenes the laws of the Commonwealth and, therefore, violates public policy, as well as constitutes the imposition of unearned benefits as a form of punitive damages. After review, we affirm.

Grievant worked for the Commission as a toll collector for approximately eight years and eight months when he was elected Secretary-Treasurer and Principal Officer of Teamsters Local 250 (Union). Because his Union Officer

position was full-time, Grievant took an unpaid leave from the Commission as expressly permitted by the CBA. At the time of the arbitration hearing, Grievant had served as a Union Officer for eight years and three months and the parties were operating under the terms of an expired CBA.

On November 20, 2013, Grievant submitted a grievance seeking credit for retiree medical and prescription coverage under Appendix A, Section 9 of the CBA. Specifically, the grievance stated that the Commission had informed Grievant that his time spent as a full-time Union Officer did not count as retirement accreditation for the purpose of this benefit. A Step 2 grievance hearing did not resolve the issue; thus, the Union proceeded to arbitration. The Arbitrator issued an Award in Grievant's favor and the Commission appealed to this Court.[1]

Initially, we recognize that our "review of a labor arbitration award is extremely narrow." *Pennsylvania Tpk. Comm'n v. Teamsters Local 250*, 988 A.2d 789, 795 (Pa. Cmwlth. 2010) (*Local 250*). "[A] court may vacate an arbitrator's award only if it violates the essence test." *Marion Ctr. Area Sch. Dist. v. Marion Ctr. Area Educ. Ass'n*, 982 A.2d 1041, 1045 (Pa. Cmwlth. 2009). "The essence test is a two-pronged test under which an award must be upheld if (1) the issue as properly defined is within the terms of the CBA and, (2) the arbitrator's award can be

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[1] Appellate review of an appeal from an arbitration award issued under the Public Employe Relations Act[, Act of July 23, 1970, P.L. 563, *as amended*, 43 P.S. §§ 1101.101–1101.2301,] (PERA) is governed by the highly deferential 'essence test' subject to a 'public policy exception.' Under the essence test, a reviewing court may vacate a PERA arbitration award only where the award is indisputably and genuinely without foundation in, or fails to logically flow from, the underlying CBA. If the arbitration award satisfies the essence test, the court may nevertheless consider whether the award violates a well-defined and dominant public policy.

Snyder Cnty. Prison v. Teamsters Local Union 764, 95 A.3d 957, 961 (Pa. Cmwlth. 2014) (citations and footnote omitted).

rationally derived from the CBA." *Snyder Cnty. Prison v. Teamsters Local Union 764*, 95 A.3d 957, 962 (Pa. Cmwlth. 2014).

> '[A] court should not engage in merits review of the matter. Indeed, after our reaffirmation of the circumscribed essence test we made it eminently clear that 'the essence test does not permit an appellate court to intrude into the domain of the arbitrator and determine whether an award is 'manifestly unreasonable'.' (Citation omitted.) [sic] This [C]ourt may not substitute its own judgment for that of the arbitrator even if our interpretation of the CBA differs from that of the arbitrator.

Local 250, 988 A.2d at 796 (citation omitted).

The issue before the Arbitrator in the instant matter was whether Grievant who was "on full-time Union leave from the [Commission] is entitled to paid medical and prescription coverage under Appendix A, Section 9 of the parties[']s [CBA] when he retires after termination of his unpaid Union leave." Award at 4. Appendix A, Section 9 of the CBA states in relevant part:

> **PAID MEDICAL AND PRESCRIPTION COVERAGE FOR VOLUNTARY RETIREES**
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> **Eligibility:**
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> All employees who retire on or after February 1, 2005:
>
> . . . .
>
> Over age 60: Ten (10) years retirement accreditation, the last five (5) of which must be service with the Commission.

Reproduced Record (R.R.) at 53a. The issue before the Arbitrator is clearly within the CBA's terms and the Commission acknowledges the same. *See* Commission Br. at 12. Accordingly, the first prong of the essence test is satisfied.

With respect to the second prong of the essence test, the Commission argues that the Arbitrator's Award disregards the plain language of the CBA and violates fundamental principles of contract construction; therefore, it is not rationally

derived from the CBA. The Union maintains that the Commission urged the Arbitrator to rely on external documents which he refused to do. The Union asserts that the Arbitrator relied on Appendix A, Section 9 of the CBA, in conjunction with Article XV, Section 5 of the CBA to decide the issue before him; hence, the Award meets the second prong of the essence test.

Article XV, Section 5(A) of the CBA provides:

> **UNION LEAVE.**
>
> A. Any employee who is elected or appointed as a Union Official or representative shall, at the written request of said employee, be granted a leave without pay for the maximum term of office. It is understood and agreed that any employee on leave for Union Office or Union Representative will be eligible, at the discretion of the Union, for appointment or assignment to duty at the national, state or local level as required by the Union's affiliation with labor or political organizations at such levels. The seniority of said employee shall accumulate during said term of office and, upon return at the expiration of said term, he will maintain all prior years of service. It is understood and agreed that any employee on leave for Union Office will only accrue seniority rights during the term of office and shall not be entitled employer-paid benefits, rights or entitlements in the event the Union Leave exceeds thirty (30) days. In this event, the affected employee or his Local Union shall have the option to pay the cost of said benefits.

R.R. at 33a. The Arbitrator opined:

> Looking at the language at Appendix A, Section 9 [of the CBA], the parties expressly provided that the requirement is ten (10) years of retirement accreditation and then indicated that the last five (5) 'of which' must be 'service' with the Commission.
>
> The use of the terms or phrases 'Retirement Accreditation' and 'Service' by the Authors of that language could only mean and represent a balance or correlation whereby those phrases are synonymous with one and other [sic].

> When you read Article 15, Section 5 [of the CBA], in conjunction with Appendix A, Section 9 [of the CBA], it is very clear that the parties intended for employees on Union leave could [sic] accrue seniority for the purpose of earning retirement accreditation.
>
> The [Commission] already acknowledged that [Grievant] satisfies the last five (5) years of service with the Commission requirement. They now cannot deny that he qualifies for the benefit simply because **other documents not part of the parties[' CBA]** state otherwise.

Award at 10 (emphasis added). In *Bethel Park School District v. Bethel Park Federation of Teachers, Local 1607*, 55 A.3d 154 (Pa. Cmwlth. 2012), this Court vacated an arbitrator's award because it did "not meet the second prong of the essence test." *Id.* at 159. Specifically, the *Bethel Park* Court held that

> since the CBA did not set forth a due process procedure for responding to sexual harassment claims, the Arbitrator considered the procedure outlined in the District's Unlawful Harassment Policy. In doing so **the Arbitrator went outside the CBA to make his determination. Thus, the Arbitrator's award was not rationally derived from the CBA.**

Id. at 158-59 (citation omitted; emphasis added). Similarly, in *Pennsylvania Turnpike Commission v. Teamsters Local Union No. 77*, 45 A.3d 1159 (Pa. Cmwlth. 2012) (*Local Union No. 77*), this Court vacated an arbitrator's award because the arbitrator based his ruling upon a term not contained in the CBA. The *Local Union No. 77* Court stated: "[T]he Award is not based solely on the Arbitrator's construction of the CBA. Instead, it is the Arbitrator's interpretation of the phrase 'pursuant to the CBA' that is most at issue. **That phrase is not in the CBA; rather, the phrase is in the Settlement Agreement**." *Id.* at 1167 (emphasis added). Thus, the Court concluded: "[T]he Arbitrator's Award is not rationally derived from the CBA." *Id.*

Here, the Arbitrator rejected the Commission's external documents and relied on Appendix A, Section 9 of the CBA in conjunction with Article XV, Section 5 of the CBA in resolving the parties' disagreement. However, the Commission argues that the Arbitrator erroneously relied on a July 30, 2013 letter (July 30, 2013 letter) the Commission's chief counsel wrote to Grievant in concluding that the Commission acknowledged Grievant's satisfaction of the five-year service requirement set forth in Appendix A, Section 9 of the CBA. A review of the July 30, 2013 letter reveals that there is no mention of the five-year requirement therein. R.R. at 60a. Moreover, the first time the Commission referred to the Grievant's non-compliance with the five-year service requirement is in its brief to this Court, and only in the context of this specific argument. *See* Commission Br. at 18-19. In its arbitration post-hearing brief, the Commission specifically stated: "The issue is whether the Grievant has satisfied the eligibility requirements of Appendix A-9 [of the CBA]; over the age of 60 **with 10 years credited service**." Commission Post-Hearing Br. at 3 (emphasis added); R.R. at 148a (emphasis added). Because the July 30, 2013 letter makes no mention of the five-year service requirement, and it appears that the Commission only presented the ten-year requirement argument before the Arbitrator, this Court cannot conclude the Arbitrator's statement that "[t]he [Commission] already acknowledges that [Grievant] satisfies the last five (5) years of service with the Commission requirement" was based on the July 30, 2013 letter.[2] Thus, we conclude that the Arbitrator's Award was rationally derived from the CBA, and accordingly met the second prong of the essence test.

[2] Notably, the Commission relied on Grievant's July 22, 2013 letter, and the Commission's chief counsel's "response" thereto, in its arbitration post-hearing brief. *See* Commission Post-Hearing Br. at 4; R.R. at 149a. The "response," in fact, is the Commission's aforementioned July 30, 2013 letter.

The Commission also asserts that the Arbitrator erred in rejecting the statutory language of SERS and related documents discussing SERS benefits for the purpose of interpreting the CBA. Conversely, in the above-stated argument, the Commission properly maintained: "It is well established that when an arbitrator goes outside the terms of a collective bargaining agreement to render an award, the award is not rationally derived from the collective bargaining agreement and should be vacated." Commission Br. at 20. *See Bethel Park*; *Local Union No. 77*. Consequently, the Arbitrator did not err in rejecting the outside documents.

The Commission further avers that the Arbitrator erred in finding the terms "service" and "retirement accreditation" synonymous. Specifically, the Commission contends that "[t]his conclusion does not comport with the actual language of the CBA or standard principles of contract construction. Accordingly, it is not rationally derived from the CBA." Commission Br. at 24. Essentially, the Commission is arguing that because it does not agree with the Arbitrator's interpretation, the Award is not rationally derived from the CBA. "An arbitrator's findings of fact are **not** reviewable by an appellate court, 'and as long as he has arguably construed or applied the collective bargaining agreement, an appellate court may **not** second-guess his findings of fact or **interpretation.**'" *Luzerne Intermediate Unit No. 18 v. Luzerne Intermediate Unit Educ. Ass'n, PSEA/NEA*, 89 A.3d 319, 324 (Pa. Cmwlth. 2014) (emphasis added) (quoting *Coatesville Area Sch. Dist. v. Coatesville Area Teachers' Ass'n/Pa State Educ. Ass'n*, 978 A.2d 413, 415 n.2 (Pa. Cmwlth. 2009)).

Even if this Court were to find the Arbitrator's interpretation unreasonable, it could not vacate the Award. As our Supreme Court explained:

> [I]n the context of review of an Act 195 labor arbitration award, determining an award to rationally be derived from a collective bargaining agreement connotes a more deferential view of the award than the inquiry into whether the award is

> reasonable. An analysis of the 'reasonableness' of an award too easily invites a reviewing court to ignore its deferential standard of review and substitute its own interpretation of the contract language for that of the arbitrator. Thus, we find that in this very limited context, a review of the 'reasonableness' of an award is not the proper focus.

State Sys. of Higher Educ. (Cheyney Univ.) v. State Coll. Univ. Prof'l Ass'n (PSEA-NEA), 743 A.2d 405, 413-14 n.8 (Pa. 1999). Here, the Arbitrator has clearly decided the issue by construing and applying the terms provided in the CBA. Thus, we will not second-guess the Arbitrator's interpretation of those terms.

The Commission next argues that the Arbitrator's Award violates public policy because the Arbitrator opined that the required SERS contributions should have been made by the Commission while Grievant was on unpaid leave of absence. The Commission maintains that this provision contradicts the provisions of SERS and thus, constitutes impermissible punitive damages assessed against the Commission. Specifically, the Commission contends that SERS requires a public employee be a "full-time salaried" employee in order to receive retirement accreditation. 71 Pa.C.S. § 5302(a). It further asserts that in order for a public employee to receive retirement accreditation for service as a union officer, he must continue to be paid by the employer (and the Union reimburses the employer). *See* 71 Pa.C.S. § 5302(b)(2). As Grievant was on unpaid leave as a Union Officer, he is not entitled to credit for service. The Union rejoins that the Arbitrator's statement concerning pension payments was not contained in the Award, was dicta and is not enforceable. The Union further maintains that the grievance made no reference to nor did it ever request that the Commission make SERS payments on behalf of Grievant.

> The public policy exception . . . represents **the current state of the law. It is a narrow exception prohibiting a court from enforcing an arbitrator's award that contravenes public policy.** As explained by our Supreme Court, 'a court should not enforce a grievance arbitration award that contravenes public policy. Such public policy,

> however, must be well-defined, dominant, and ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.' *Westmoreland* [*Intermediate Unit # 7 v. Westmoreland Intermediate Unit # 7 Classroom Assistants Educ. Support Pers. Ass'n, PSEA/NEA*], . . . 939 A.2d [855], 865–66 [(Pa. 2007)].

Bethel Park, 55 A.3d at 161 (emphasis in original) (quoting *Shamokin Area Sch. Dist. v. Am. Fed'n of State, Cnty., & Mun. Emps. Dist. Council 86*, 20 A.3d 579 (Pa. Cmwlth. 2011)). Further,

> [o]n the issue of punitive damages imposed upon a Commonwealth agency, this Court has explained:
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> Citing federal cases, in *City of Philadelphia Office of Housing and Community Development v. American Federation of State, County and Municipal Employees, Local Union No. 1971*, . . . 876 A.2d 375 [([Pa.] 2005)], our Supreme Court held that under the essence test, an arbitrator could not award punitive damages because government agencies have long been exempt from the imposition of punitive damages. . . .
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> . . . .
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> In holding that the award of damages was punitive, the Court first stated that it had defined punitive damages as 'compensation awarded to punish a party for actions 'of such an outrageous nature as to demonstrate intentional, willful, wanton or reckless conduct,'' *Id.*, … 876 A.2d at 376–[]77, and that it had not found punitive damages to be a proper award by an arbitrator for the breach of a collective bargaining agreement. . . .
>
> *Phila. Hous. Auth. v. Am. Fed'n of State, Cnty. & Mun. Emps., Dist. Council 47, Local 2187, AFL–CIO*, 945 A.2d 796, 800–01 (Pa.[]Cmwlth.[]2008).

Pennsylvania Turnpike Comm'n v. Teamsters Local Union No. 77, 87 A.3d 904, 912-14 (Pa. Cmwlth. 2014).

Black's Law Dictionary defines "obiter dictum" as follows:

> A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). . . .
>
> > 'Strictly speaking an 'obiter dictum' is a remark made or opinion expressed by a judge, in his decision upon a cause, 'by the way' - that is, incidentally or collaterally, and not directly upon the question before the court; or it is any statement of law enunciated by the judge or court merely by way of illustration, argument, analogy, or suggestion. . . . In the common speech of lawyers, all such extrajudicial expressions of legal opinion are referred to as 'dicta,' or 'obiter dicta,' these two terms being used interchangeably.' William M. Lile et al., *Brief Making and the Use of Law books* 304 (3d ed. 1914).

Black's Law Dictionary 1177 (9th ed. 2009).

The "DISCUSSION AND FINDINGS" section of the Arbitrator's Award reads in relevant part:

> The required SERS contributions **should have been made** by the [Commission], while the Grievant was on leave and based on his seniority while on leave or the [Commisssion] could have taken the option to negotiate and have the Grievant's Union make those contributions. No such agreement[] to that effect[] exists.

Award at 10 (emphasis added). However, the "AWARD" section contains no similar language. The "AWARD" section states in its entirety:

> Based on the reasoning and discussion above, this grievance is granted. The Grievant is entitled to accrue retirement accreditation within the meaning of Appendix A, Section 9 [of the CBA], during his Union leave of absence. **Grievant . . . is eligible for medical and prescription benefits, when he retires, upon expiration of his Union Leave.**

Award at 11 (emphasis added).

Here, the Arbitrator's discussion relative to SERS contributions "was *obiter dictum*[,]" and "did not affect the outcome[.]" *Am. Fed'n of State, Cnty., and Mun. Emps., Dist. Council 87 v. Cnty. of Lackawanna*, ___ A.3d ___ (Pa. Cmwlth. No. 202 C.D. 2014, filed October 24, 2014), slip op. at 10. The Arbitrator made no reference in his Award that the Commission was to make SERS contributions on Grievant's behalf. As the "AWARD" exclusively grants the grievance which **is limited to** whether "Grievant . . . is eligible for medical and prescription benefits, when he retires, upon expiration of his Union Leave[,]" it does not violate public policy. Award at 11.

For all of the above reasons, the Award is affirmed.

ANNE E. COVEY, Judge

Judge Leadbetter did not participate in the decision in this matter.

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O R D E R

AND NOW, this 24th day of October, 2014, Arbitrator Marc A. Winters' May 20, 2014 Opinion and Award is affirmed.

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ANNE E. COVEY, Judge