IN THE COMMONWEALTH COURT OF PENNSYLVANIA

County of Lebanon	:	
	:	
v.	:	No. 392 C.D. 2014
	:	Argued: September 11, 2014
American Federation of State, County, and Municipal Employees, District Council 89, Local Union 2732, Appellant	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED: September 23, 2014**

American Federation of State, County, and Municipal Employees, District Council 89, Local Union 2732 (AFSCME or Union), appeals from an order of the Court of Common Pleas of Lebanon County (trial court), dated February 24, 2014, granting County of Lebanon's (County) petition to vacate an arbitration award (Award). For the reasons discussed below, we affirm.

Cedar Haven is a County-owned and operated nursing home. (Reproduced Record (R.R.) 55a.) AFSCME is the exclusive bargaining agent for a group for Cedar Haven employees, including food service employees. (*Id.*) The County and Union are parties to a collective bargaining agreement (CBA), which "establishes the rates of pay, hours of work and other conditions of employment" for Cedar Haven employees. (R.R. 9a.)

Concerned with the rising operating costs of the nursing home, the County met with Union representatives in the Fall of 2011, to ask if they would "consider re-negotiating their [CBA] and making certain concessions." (R.R. 55a.) The Union's representative "chuckled" in response, and the County concluded that AFSCME was uninterested in re-negotiating the CBA. (R.R. 56a.) The County's cost concerns continued, and in 2012, the County began looking for ways to reduce the expenses associated with the dietary department, Cedar Haven's second most expensive department. (*Id.*)

Shortly thereafter, the County was contacted by a private third party, Culinary Services Group (CSG), about the possibility of CSG taking over Cedar Haven's dietary department. (*Id.*) The County concluded that allowing CSG to take over the dietary department would reduce operating costs by approximately $500,000, mainly through lower wage (-$125,000) and benefit (-$325,000) costs. (*Id.*) On December 3, 2012, the County delivered a letter to Union representatives, informing them that the County was "ceasing to provide food service at Cedar Haven effective February 1, 2013," and that it was "assigning and transferring that facility–food service–to [CSG]." (*Id.*) Three days later, the County Commissioners authorized a contract with CSG, under which CSG would assume operation of Cedar Haven's dietary department on February 1, 2013. (R.R. 57a.)

On December 28, 2012, the Union sent a letter to the County, requesting that it "take immediate steps to postpone the privatization" of the dietary department, noting that the Union had not been notified about the County's decision to contract with CSG before that decision was made. (*Id.*) The County responded in a letter dated January 31, 2013, informing AFSCME that it would "not postpone the transfer of the food services facilities at Cedar Haven," and

inviting the Union to "discuss alternatives to the steps Cedar Haven has undertaken." (*Id.*) Prior to the receipt of the County's letter, the Union filed a grievance on January 15, 2013, protesting the transfer to CSG. (*Id.*)

CSG assumed operations of Cedar Haven's dietary department on February 1, 2013. (*Id.*) The work performed by CSG is "largely the same" as the work previously done by Union members, and is done on Cedar Haven premises using Cedar Haven equipment. (*Id.*) Fewer than half of the dietary department employees became employed with CSG; the others are now either employed elsewhere at Cedar Haven or no longer employed by Cedar Haven. (*Id.*) After exchanging information about the costs of operating the dietary department, the Union and County held a meeting on May 7, 2013. (R.R. 58a.)

The matter proceeded to arbitration after the parties were unable to resolve the grievance, and a hearing was held on July 13, 2013, before a mutually-selected arbitrator, Jane Rigler (Arbitrator). (R.R. 169a.) After hearing testimony from both parties and examining the CBA, the Arbitrator issued a decision on July 15, 2013, in which she sustained the Union's grievance. Ultimately, she concluded that although the CBA did not explicitly prohibit the County from subcontracting the dietary department, the CBA's implied covenant of good faith and fair dealing barred the County from doing so "without first fully and fairly dealing with the Union." (R.R. 59a.)

In so doing, the Arbitrator first found that the CBA "imposes no explicit constraint on the County's ability to contract out Cedar Haven, dietary services, work. As a general matter, it may do so in accordance with its customary right to conduct . . . business." (R.R. 61a (alteration in original) (internal quotation

marks omitted).) The Arbitrator then concluded that the dietary department was a "facility" as used in Article XXXIII of the CBA (R.R. 62a), titled "Successors":

> In the event the Employer sells, leases, transfers, or assigns any of its facilities to other political subdivisions, corporations, or persons, and such sale, lease, transfer, or assignment would result in the lay-off, furlough or termination of employees covered by this [CBA], the Employer shall attempt in good faith to arrange for the placement of such employees with the new employer. The Employer shall notify the Union in writing at least thirty (30) days in advance of any such sale, lease, transfer, or assignment.

(R.R. 32a.) The Arbitrator then went on to reason:

> Regarding the dietary department as an Article XXXIII "facility" does not, however, establish that the parties agreed the County had *carte blanche* to contract out the work of bargaining unit members. Article XXXIII, by its terms, does not address whether the County may sell, lease, transfer, or assign any of its Cedar Haven operations. . . . Article XXXIII deals with what happens after the County has decided to contract out work but it is absolutely silent about anything else.
>
> No evidence was presented about when or why Article XXXIII came to be included in the [CBA]. It is exceedingly difficult to imagine that the Union would knowingly agree to give the County an unfettered right to eliminate the jobs of all bargaining unit members.

(R.R. 62a-63a.)

The Arbitrator then found that the CBA contained an "implied covenant of good faith and fair dealing" and concluded that it was

> fundamentally unfair of the County to fail to actively involve the Union in a consideration of whether to contract out work to CSG when the result would be that a significant number of bargaining unit positions would be

> eliminated, the work previously performed by bargaining unit members would still be performed, on the same premises and using the same equipment as were used by bargaining unit members, and when a primary factor in CSG's ability to perform dietary services work less expensively was lower labor costs. The cumulative effect of such fundamentally unfair behavior firmly establishes that the County breached the contract's [implied] covenant of good faith and fair dealing.

(R.R. 64a-66a.)

The Arbitrator thus sustained the Union's grievance, and ordered the County to resume operation of the Cedar Haven dietary department, including an offer of re-employment to all displaced employees, by September 15, 2013. (R.R. 67a.) The Award did not include back pay "because the Union made it clear it did not seek monetary compensation." (*Id.* at n.5.)

Following the Award, the County filed a petition to vacate in the trial court. Although the trial court "accept[ed] the Arbitrator's determination that the covenant of good faith and fair dealing is implicit in [CBAs]," it found that the Arbitrator "implied much more into the [CBA] than such a covenant would entail, and improperly added to and changed the terms which the parties bargained for and agreed upon." (R.R. 180a.) In rejecting the Arbitrator's conclusion that the implied covenant of good faith and fair dealing required the County to notify the Union before entering the contract with CSG, the trial court explained:

> While the Arbitrator found it "exceedingly difficult to imagine that the Union would knowingly agree to give the County an unfettered right to eliminate the jobs of all bargaining unit members" (as long as it complied with the requirement of attempting to place union members with the new entity), that is exactly what had been agreed upon. We find no basis, either in the express terms of the [CBA] or otherwise, to support any requirement that the County notify A[F]SCME that it was considering

> contracting the food services to a private entity, to involve AFSCME in that decision or to allow AFSCME to participate in negotiations with CSG regarding the takeover. . . . We find that the Arbitrator improperly imposed additional restrictions on the County's powers and conditions on its duties to which the parties never agreed and which are not rationally derived from the clear language of the [CBA].

(R.R. 181a-82a.) The trial court thus granted the County's petition and vacated the Award.

AFSCME appealed, arguing that the Award should be reinstated because it was rationally derived from the CBA. Prior to oral argument being heard on the merits, the County filed a petition to dismiss for mootness, based upon the upcoming sale of Cedar Haven to a third party. Following oral argument via telephone call, this Court issued an order deferring a ruling on the petition and directing it to be listed for oral argument with the merits. We have before us, therefore, two distinct issues. First, whether the appeal is moot, and second, whether the trial court committed an error of law when it concluded the Award was not rationally derived from the CBA.

Our Supreme Court has summarized the doctrine of mootness as follows:

> The cases presenting mootness problems involve litigants who clearly had standing to sue at the outset of the litigation. The problems arise from events occurring after the lawsuit has gotten under way—changes in the facts or in the law—which allegedly deprive the litigant of the necessary stake in the outcome. The mootness doctrine requires that an actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed.

Pap's A.M. v. City of Erie, 812 A.2d 591, 599-600 (Pa. 2002) (quoting *In re Gross*, 382 A.2d 116, 119 (Pa. 1978)). The courts generally will not decide a moot issue. *Id.* at 599. There are, however, two exceptions to the mootness doctrine: (1) matters of great public importance; and (2) matters capable of repetition but evading review. *Pilchesky v. Lackawanna Cnty.*, 88 A.3d 954, 964 (Pa. 2014).

Here, the County asserts that this case has become moot because it is planning to sell Cedar Haven. According to the County's petition, the County Commissioners have selected Complete Health Care Resources as the buyer for Cedar Haven and plan to make settlement on September 30, 2014. The County argues that once the sale is complete, it will be impossible for the County to comply with the Award, thus making any decision on the merits by this Court meaningless.

We reject the County's argument that its pending sale renders this case moot. First, we note that at the writing of this opinion the sale is, in fact, pending. By the County's own admission, settlement is not scheduled to occur until September 30, 2014, and nothing in the record suggests that any agreement of sale has been finalized. *See Sturgis v. Doe*, 963 A.2d 1291 (Pa. 2009) (per curiam) (reversing order of this Court because "the record does not with certainty establish that the matter is moot"). Second, we believe that the case is not moot because the Union, should it prevail before this Court, may still be entitled to some form of relief, even if the specific relief granted by the Arbitrator is no longer available. We, therefore, deny the County's petition to dismiss.

Having decided that the appeal is not moot, we now address the merits. When reviewing an arbitrator's interpretation of a CBA, the essence test is the proper standard of review. *Luzerne Intermediate Unit No. 18 v. Luzerne*

Intermediate Unit Educ. Ass'n, PSEA/NEA, 89 A.3d 319, 324 (Pa. Cmwlth. 2014). "The essence test is a two prong test under which an award should be upheld if (1) the issue as properly defined is within the terms of the [CBA] and (2) the arbitrator's award can be rationally derived from the [CBA]." *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) (citing *State Sys. of Higher Educ. (Cheyney Univ.) v. State Coll. Univ. Prof'l Ass'n (PSEA-NEA)*, 743 A.2d 405, 413 (Pa. 1999)), *appeal denied*, 989 A.2d 10 (2010). We are not required to agree with the arbitrator's interpretation of the CBA, but must "look at whether that interpretation and application of the agreement can be reconciled with the language of the agreement. We may vacate an award only if it indisputably and genuinely is without foundation in, or fails to logically flow from, the [CBA]." *Northumberland Cnty. Comm'rs v. Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO Local 2016, Council 86*, 71 A.3d 367, 375 (Pa. Cmwlth. 2013) (en banc) (citation omitted) (internal quotation marks omitted).

We apply this exceptionally deferential standard because binding arbitration is a highly favored method of dispute resolution. *Luzerne Intermediate Unit No. 18*, 89 A.3d at 324. Yet arbitration awards, while greatly favored, are not inviolate. *Cheyney Univ.*, 743 A.2d at 410. Deference has its limits:

> [A]n arbitrator is confined to interpretation and application of the [CBA]; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the [CBA]. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Id. (quoting *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)).

Here, it is undisputed that the grievance is within the terms of the CBA, thus satisfying the first prong of the essence test. As a result, we need only determine whether the Award meets the second prong–*i.e.*, that it can be rationally derived from the CBA. The County argues, and we agree, that the Arbitrator impermissibly added to the terms of the CBA.

In analyzing the CBA, the Arbitrator found that the dietary department was a "facility" as used in Article XXXIII. (R.R. 62a.) Article XXXIII is titled "Successors," and provides that "[i]n the event the [County] sells, leases, transfers, or assigns any of its facilities," it has two obligations to the Union: (1) to try and place displaced employees with the new employer; and (2) to notify the Union at least thirty days in advance of any such sale, lease, transfer or assignment.[1] (R.R. 32a.) Thus the Article, by its express terms, clearly contemplates that the County might transfer or assign a facility, such as the dietary department, to a third party, such as CSG. Article XXXIII, therefore, is applicable to the issue at hand and sets forth the *County's pre-transfer obligations to the Union*. The Arbitrator's analysis of Article XXXIII, however, focuses on the phrase "in the event," and whether the terms of the Article address *under what*

[1] The full text of Article XXXIII provides: "In the event the Employer sells, leases, transfers, or assigns any of its facilities to other political subdivisions, corporations, or persons, and such sale, lease, transfer, or assignment would result in the lay-off, furlough or termination of employees covered by this [CBA], the Employer shall attempt in good faith to arrange for the placement of such employees with the new employer. The Employer shall notify the Union in writing at least thirty (30) days in advance of any such sale, lease, transfer, or assignment." (R.R. 32a.)

circumstances the County may sell, lease, transfer, or assign the dietary department to CSG, and concluded that the terms of the Article did not address the circumstances under which the County may decide to transfer its dietary department. (R.R. 63a.) Notably, the Arbitrator also found that the CBA "impose[d] no explicit constraint on the County's ability to contract out Cedar Haven, dietary services, work." (R.R. 31a.) The Arbitrator then concluded that because the Article was silent as to the circumstances, the Article was also silent as to the County's pre-transfer obligations to the Union, and that such pre-transfer obligations should include participation by the Union in the decision-making process. Such a conclusion, however, is contrary to the plain language of Article XXXIII, which expressly lays out the County's dual pre-transfer obligations to the Union: (1) attempted placement of employees and (2) at least thirty days' notice. The arbitrator may not have liked the terms, or thought they offered the Union insufficient protection, but she was "confined to interpretation and application" of the CBA and was not free to "dispense [her] own brand of industrial justice." *See Cheyney Univ.*, 743 A.2d at 410. The Arbitrator, in other words, "was obliged to apply the agreement as written, without imposing additional terms that modify and limit what the parties expressed." *Delaware Cnty. v. Delaware Cnty. Prison Emps. Indep. Union*, 713 A.2d 1135, 1138 (Pa. 1998) (plurality opinion).

The Union argues that we should reverse the trial court and reinstate the Award because our courts have previously upheld arbitration awards based upon implied provisions. *See, e.g.*, *Midland Borough Sch. Dist. v. Midland Educ. Ass'n, PSEA*, 616 A.2d 633, 636 (Pa. 1992) (upholding arbitrator's interpretation that CBA implicitly regulated subcontracting where "subcontracting out bargaining unit work was not expressly addressed by the agreement"); *Pa. Turnpike Comm'n*

v. Teamsters Local Union No. 250, 639 A.2d 968, 973-74 (Pa. Cmwlth. 1994) (upholding arbitrator's award where arbitrator used evidence of past practices to interpret section addressing subcontracting, noting that award "neither adds to, subtracts from, nor modifies the provisions of the [a]greement"); *Dist. Council 83, Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO v. Hollidaysburg Area Sch. Dist.*, 432 A.2d 304, 306 (Pa. Cmwlth. 1981) (en banc) (holding that arbitrator "properly proceeded to examine the contract for implied effect" after finding no express language in CBA addressing issue at hand). All of these cases, however, are unpersuasive for one reason: in none of these cases did the arbitrator find that an article applied, refuse to apply the express terms of the applicable article as written, and instead insist that a party had additional obligations not provided for in the agreement.

Having determined that the terms of Article XXXIII apply, the Arbitrator was bound by the terms of the Article and could not impose additional duties on the County in the name of "fairness." *See Delaware Cnty.*, 713 A.2d at 1138 ("The arbitrator was obliged to apply the agreement as written, without imposing additional terms that modify and limit what the parties expressed."). Given that the CBA explicitly details the County's duties "[i]n the event the [County] sells, leases, transfers, or assigns any of its facilities," and those duties do not require notice to or participation by the Union, we cannot conclude that the Award is rationally derived or logically flows from the CBA.

For the reasons discussed above, we affirm.

P. KEVIN BROBSON, Judge

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O R D E R

AND NOW, this 23rd day of September, 2014, the County of Lebanon's petition to dismiss for mootness is DENIED, and the order of the Court of Common Pleas of Lebanon County, dated February 24, 2014, is hereby AFFIRMED.

P. KEVIN BROBSON, Judge