IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Colonial Intermediate Unit #20, Appellant	:	
v.	:	No. 839 C.D. 2014
	:	Argued: December 8, 2014
Colonial Intermediate Unit #20 Education Association, PSEA/NEA	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: February 9, 2015**

In this appeal from a grievance arbitration award issued under the Public Employe Relations Act (PERA),[1] Colonial Intermediate Unit #20 (Employer) seeks review of an order of the Court of Common Pleas of Northampton County (trial court)[2] that denied Employer's petition to vacate an arbitration award and reinstate the termination of a special education teacher, Bruce Millheim (Grievant). Review of an arbitration award issued under PERA is governed by the highly deferential "essence test" subject to a "public policy exception." See Phila. Hous. Auth. v. Am. Fed. of State, Cnty. & Mun. Emp., Dist. Council 33, Local 934, 52 A.3d 1117, 1120 n.5. (Pa. 2012); Pa. Turnpike Comm'n v. Teamsters Local Union No. 77 (Teamsters Local 77), 87 A.3d 904 (Pa.

[1] Act of July 23, 1970, P.L. 563, as amended, 43 P.S. §§1101.101-1101.2301.

[2] The Honorable Jennifer R. Sletvold presided.

Cmwlth. 2014). 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 essence test is satisfied, the court may further consider whether the award violates a well-defined and dominant public policy. Id. Discerning no error in the trial court's determinations that Arbitrator's award was rationally derived from the CBA, and that the award did not violate a well-defined, dominant public policy, we affirm.

I. Background

A. October 2011 Sign Incident; Investigation and Charges

Employer employed Grievant as a life skills special education teacher at the Colonial Academy (Academy), which accepts children with disabilities, behavioral problems, or who otherwise struggle in the traditional middle and high school settings (grades 6-12). A life skills teacher provides the students with an appropriate academic program and teaches them skills they will need after leaving school. Prior to working as a teacher, Grievant worked at the Academy as a mental health worker for approximately eight years.

In October 2011, a group of Academy students went on a school trip to Mazezilla, a farm with a seasonal corn maze and petting zoo. At the petting zoo, D.L. (Student), a 14-year-old autistic student with special needs, repeatedly lured a goat with food and then hit it on the nose. Back at school several days later, Grievant learned of the incident. Grievant then hung a sign with yarn around Student's neck, which read "I Abuse Animals." See Arbitrator's Op., 12/11/13, at

2. Further, Grievant texted a picture of Student wearing the sign to an associate teacher who owned Mazezilla and brought the incident to Student's attention.

After Student became visibly upset and apologized for hitting the goat, the associate teacher and another staff member calmed Student. They also altered the sign to read "I love Animals" and returned Student to Grievant's classroom. Arbitrator's Op. at 16-17. In response, Grievant created a second sign that read "I Abuse Animals," which he placed on Student's back. Id. Wearing both signs, Student again became visibly upset. Ultimately, an associate teacher from Grievant's classroom reported the incident to the Academy's principal, who proceeded to the classroom and viewed Student wearing the signs. Principal immediately took the signs and gave them to Employer's human resources director.

Shortly thereafter, Employer placed Grievant on leave with pay while Employer's administrators investigated the incident. Employer directed Grievant to attend a "Loudermill"[3] hearing to address matters of concern. Grievant failed to appear at the hearing.

As a result of the October 2011 incident with Student, Employer investigated Grievant's conduct during previous years. Following its investigation,

[3] In Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), the U.S. Supreme Court determined that a public employee with a constitutionally protected interest in his employment was entitled to a pre-termination hearing to receive notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

Employer issued a notice of charges to Grievant and placed him on suspension without pay pending a hearing before Employer's board of directors. Employer charged Grievant with the following violations of Section 1122 of the School Code of 1949 (School Code):[4]

> (1) immorality, (2) cruelty, (3) persistent negligence in the performance of duties, (4) willful neglect of duties, (5) persistent and willful violation of or failure to comply with the school laws of the Commonwealth (including official directives and established policy of [Employer's] Board of Directors) as contemplated by the [School Code], growing out of your alleged commission of the following:
>
> 1. You've referred to and addressed students as 'loser, sissy, liar, knucklehead, crybaby and chubby butt.'
>
> 2. You've forcefully placed students in the corner for extensive periods of time, sometimes up to three (3) days.
>
> 3. You've issued excessive force with students, twisting their arms behind their backs, and pushing their heads, hurting them sometimes to the point of tears.
>
> 4. You've used students' trigger words, without educational purpose, in order to incite a reaction for your own benefit.
>
> 5. You embarrassed a disabled student by placing a sign around his neck for the duration of class and used the student's phobias to upset him.
>
> 6. You humiliated students and engaged in acts of extreme discipline which offended the morals of the community and set a bad example for the youth.

[4] Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §§11-1122.

> 7. You engaged in conduct evidencing a constant failure or refusal to adhere to generally accepted techniques for behavior control and modification.
>
> 8. You engaged in conduct evidencing a persistent and willful violation of school laws by failing to adhere to behavioral plans in place for student discipline.

Tr. Ct., Slip Op., 5/1/14, at 2-3 (citation omitted).

Employer advised Grievant of his right to challenge the charges at a public or private hearing. Grievant, however, elected to pursue the matter through arbitration. In December 2011, Employer's board of directors passed a resolution terminating Grievant's employment. The Association filed a timely grievance challenging Grievant's dismissal. Attempts to resolve the grievance failed, and the matter proceeded to arbitration.

B. Arbitrator's Award

In December 2013, following three hearings, Arbitrator Rochelle K. Kaplan (Arbitrator) issued an opinion and award that sustained the grievance in part and denied it in part. After discussing the evidence presented, Arbitrator determined Grievant's conduct did not constitute immorality, cruelty, persistent negligence, willful violation of Employer's directives, or willful neglect of duties as contemplated by Section 1122 of the School Code and applicable case law. See Arbitrator's Op. at 31-35. Therefore, Arbitrator determined Employer terminated Grievant's employment without just cause under the School Code. Id. at 36.

Nevertheless, Arbitrator determined Grievant engaged in improper behavior that demonstrated a lack of good judgment and professionalism. Arbitrator's Op. at 35-36. Arbitrator concluded Grievant took action that essentially lacked any rational justification when he made Student wear the "I Abuse Animals" sign in the classroom. Id. at 36. Grievant should have known this action would humiliate Student and subject him to ridicule by the other students. Id. What is more, Arbitrator observed, Grievant had no valid reason for putting the second sign on Student after he apologized for hitting the goats, and the associate teacher, who owned the farm with the goats, revised the first sign to read "I love Animals." Id.

Further, Arbitrator concluded Grievant's conduct during the 2011-2012 school year, which included calling students derogatory names and using trigger words, demonstrated a lack of professionalism. Arbitrator's Op. at 35-36. Also, Arbitrator noted, short of some extreme situation, Grievant acted improperly by pushing and grabbing students, and by using extended time outs. Id.

Ultimately, Arbitrator converted Grievant's termination to a 53-day suspension without pay running "from the date of his suspension in October 2011 to January 2, 2012 or the first day of school in January 2012." Arbitrator's Op. at 36. Arbitrator also awarded Grievant back pay subject to a deduction for any earnings or unemployment compensation he received during that period. Id. However, Arbitrator conditioned Grievant's reinstatement upon his participation in an improvement plan created by Employer. Accordingly, Arbitrator directed:

> The Grievant shall be reinstated as soon as possible conditioned on his submission to an improvement plan

> created by [Employer]. [Employer] has the sole discretion to determine the length of the improvement plan, the regularity of the classroom observations and the specific expectations of employment. The Arbitrator recommends inclusion of specific expectations of performance including but not limited to the use of time out, boundaries for appropriate physical contact or horseplay; TACT-2 training; use of positive behavioral supports as opposed to aversive techniques; and proper communication with students. If the Grievant is not willing to submit to the improvement plan he will not be reinstated. If the Grievant does not successfully complete the plan he will be subject to discipline up to and including termination.

Arbitrator's Op. at 37 (emphasis added).

C. Denial of Petition to Vacate Award

In response to Arbitrator's award, Employer filed a petition in the trial court to vacate the award and reinstate Grievant's dismissal. In denying Employer's petition, the trial court determined the parties' CBA included an implied just cause provision granting Arbitrator jurisdiction to determine whether just cause existed for disciplining Grievant. See Hanover Sch. Dist. v. Hanover Educ. Ass'n, 814 A.2d 292 (Pa. Cmwlth. 2003) (holding that absent a CBA term expressly excluding employee discipline from the grievance process, a teacher's suspension was arbitrable under an implied just cause provision in the CBA).

The trial court further determined Arbitrator's award was rationally derived from the CBA. See State Sys. of Higher Educ. (Cheyney Univ.) v. State College & Univ. Prof'l Ass'n (PSEA-NEA), 743 A.2d 405 (Pa. 1999) (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 rationally derived from the CBA). The trial court reasoned that the parties bargained for Arbitrator's interpretation of just cause in this case and that the issues before Arbitrator focused on whether Grievant engaged in conduct constituting just cause for his dismissal under the School Code. Because these issues fell within Arbitrator's jurisdiction under the CBA, Arbitrator's award was rationally derived from the CBA. Id.

The trial court also rejected Employer's argument that Arbitrator's award violated public policy. The trial court recognized the public policy exception to the essence test is narrow. Bethel Park Sch. Dist. v. Bethel Park Fed'n of Teachers, Local 1607, 55 A.3d 154 (Pa. Cmwlth. 2012). The reviewing court must first identify the nature of conduct leading to the discipline. Second, the court must determine "if that conduct implicates a public policy which is well-defined, dominant and ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." City of Bradford v. Teamsters Local Union No. 110, 25 A.3d 408, 414 (Pa. Cmwlth. 2011). Third, the court must determine whether the arbitrator's award poses an unacceptable risk that will undermine the implicated policy. Id. Here, the trial court reasoned, Arbitrator's award did not pose an unacceptable risk to any well-defined, dominant public policy. The award imposed a substantial, unpaid suspension and reinstated Grievant subject to an improvement plan designed and controlled by Employer to remediate Grievant's improper behavior.

Consequently, the trial court denied Employer's petition to vacate. Employer appeals.

II. Discussion

A. Award Rationally Derived CBA

1. Argument

Employer first contends the trial court erred in determining Arbitrator's Award stemmed or flowed from the parties' CBA. As noted above, the essence test is the appropriate standard to review labor arbitration awards under PERA. Cheyney Univ. As discussed above, 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 rationally derived from the CBA. Phila. Hous. Auth.; Cheyney Univ. To fail the essence test, the reviewing court must determine that the award is indisputably and genuinely without foundation in, or fails to logically flow from, the CBA. Id. An arbitrator's award must also be vacated even if it passes the essence test where it specifically conflicts with a well-defined, dominant public policy. Westmoreland Intermediate Unit #7 v. Westmoreland Intermediate Unit #7 Classroom Assistants Educ. Support Pers. Ass'n, 939 A.2d 855 (Pa. 2007); City of Bradford.

Further, in labor disputes involving school districts, the CBA must be interpreted in light of the School Code. Actions taken pursuant to a CBA may not violate the School Code. Mifflinburg Area Educ. Ass'n ex rel. Ulrich v. Mifflinburg Area Sch. Dist., 724 A.2d 339 (Pa. 1999). In addition, Section 703 of PERA, 43 P.S. §1101.703, prohibits the implementation of a CBA that would

violate any law. Therefore, the School Code must be incorporated into the CBA. See Mifflinburg (an arbitration award that failed to grant teachers credit for past years of service following a break in service violated School Code and CBA).

Here, Employer asserts Grievant's heinous conduct and utilization of humiliating disciplinary techniques on a special needs child were not bargained-for rights under the terms of the CBA. In other words, Employer contends the parties could not have agreed to the use of prohibited teaching methods and disciplinary techniques. Therefore, Arbitrator's reinstatement of Grievant could not be rationally derived from the CBA.

More particularly, Employer asserts, the CBA did not touch upon instructional techniques, the ability of Employer's board of directors to define public policy, or the ability of Employer's board of directors to interpret and enforce the provisions of the School Code. Thus, Employer maintains it did not abdicate its responsibility under the School Code to enforce school policy violations and implement harsh discipline if warranted.

Further, Employer argues, Pennsylvania case law firmly establishes that a CBA's just cause provisions do not limit a school district's power to dismiss a teacher who implemented teaching techniques that the school district disapproved. See Forest Hills Sch. Dist. v. Forest Hills Educ. Ass'n, (Pa. Cmwlth., No. 2105 C.D. 2003, filed September 24, 2004) (unreported), 2004 WL 2435846. Employer asserts the Forest Hills opinion recognizes that a school district's exclusive authority to establish a curriculum renders it incapable of bargaining

away its unfettered authority to fire a teacher who knowingly disregards the district's policies. In Forest Hills, this Court determined the teacher's headstrong behavior in continuing to use controversial classroom material and instructional methods, despite warnings from the school district, struck at the school district's core functions in controlling the curriculum. Thus, because the arbitrator interpreted the CBA in a manner in which the school never would have agreed to those terms in the first place, the arbitrator's award was not rationally derived from the CBA.

Here, Employer argues, neither Arbitrator, nor the trial court, cite to any provision of the CBA that precluded Employer's efforts to have its employees comply with state-mandated teaching techniques. As such, Employer urges, the CBA, and, in particular, the implied just cause provision, do not provide Grievant with a basis for overturning his dismissal.

2. Analysis

As Employer acknowledges, 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 rationally derived from the CBA. Cheyney Univ. To fail the essence test, the reviewing court must determine that the award is indisputably and genuinely without foundation in, or fails to logically flow from, the CBA. Id.

Here, as the trial court recognized, the CBA included an implied just cause provision. Hanover Sch. Dist. Moreover, in Hanover School District we

recognized that an employer's absolute right to discipline is utterly incongruous with the existence of a CBA. Thus, absent a clear provision in the CBA to the contrary, a just cause basis for consideration of disciplinary action is implied. Id. In short, a just cause provision is basic and vital to the functioning of a modern CBA. Id.

Citing Hanover, the trial court determined the implied just cause provision granted Arbitrator jurisdiction to determine whether Employer terminated Grievant for just cause. Additionally, we note, in Juniata-Mifflin Counties Area Vocational-Technical School v. Corbin, 691 A.2d 924 (Pa. 1997), this Court upheld an arbitrator's decision reinstating a terminated employee in the absence of an express just cause provision because the award derived its essence from the CBA where the parties bargained for the arbitrator's interpretation, and the CBA incorporated the provisions of the School Code.

As Employer acknowledges, the provisions of the School Code are incorporated by law into all teacher CBAs. Mifflinburg Area Sch. Dist. Consequently, Arbitrator had jurisdiction to interpret and apply the relevant provisions of the School Code in determining whether Employer established just cause to dismiss Grievant. Id.

Further, in Office of the Attorney General v. Council 13, American Federation of State, County and Municipal Employees, AFL-CIO (Council 13), 844 A.2d 1217 (Pa. 2004), our Supreme Court concluded that an arbitrator's award, which reinstated a discharged state employee based on a determination that

just cause for dismissal did not exist, derived its essence from the CBA. In light of a grievance procedure for settling disputes arising under the CBA, it was beyond dispute that the issue of whether the grievant's conduct provided just cause for termination fell within the terms of the CBA. Therefore, the Council 13 Court found the reinstatement award satisfied the first prong of the essence test.

Turning to the second prong of the essence test -- whether the arbitrator's interpretation of the implied just cause provision, which permitted consideration of mitigating circumstances, could be rationally derived from the CBA, the Council 13 Court determined "it is clear that the parties intended for the arbitrator to have the authority to interpret the terms of the agreement including the undefined term 'just cause' and to determine whether there was just cause for discharge in this particular case." Id. at 1224 (emphasis added). To that end, the Supreme Court reasoned (with emphasis added):

> Likewise, as a general proposition, the concept of just cause as it is used in labor relations, is not capable of easy and concrete definition. A just cause provision, in its most basic terms, is a negotiated form of limited job security that to a degree restricts the employer's otherwise unfettered right to discharge and discipline employees. Although there is no exact definition, there is a general consensus as to some of the factors that may be considered in determining whether there is just cause for discharge or discipline, and in evaluating the penalty imposed. Arbitrators have considered such factors as … whether there was any investigation; post-discharge misconduct and pre-discharge misconduct; a grievant's past employment record, length of service, post-discharge rehabilitation; and unequal treatment of other employees for similar misconduct.

> Based upon the undefined just cause provision contained in the [CBA], the role of the arbitrator to interpret the terms of the [CBA], and the general understanding of the concept of just cause, it becomes clear that the parties received the benefit of their bargain, i.e., the arbitrator was asked to interpret the 'just cause' provision and did so consistent with how that term is generally understood. By equating the undefined just cause provision with the acts of misconduct engaged in by [the grievant], the Commonwealth Court vitiated the bargained-for role of the arbitrator and discounted the general understanding of the concept of just cause. As noted above, the role of the arbitrator was to interpret the terms of the [CBA] to resolve disputes. Because the concept of just cause, as generally understood, may be more than a simple determination of whether the employee engaged in the misconduct, it was for the arbitrator to interpret the terms of the [CBA] and not the courts. See [Cheyney Univ].

Council 13, 844 A.2d at 1224-25. Consequently, in Council 13, the Supreme Court determined that the arbitrator's award satisfied both prongs of the essence test.

Similarly, in Abington School District v. Abington School Service Personnel Association, 744 A.2d 367 (Pa. Cmwlth. 2000), this Court recognized that where the CBA does not have language reserving the imposition of discipline solely to the school district, it does not preclude the arbitrator from modifying the discipline. See also Blue Mountain Sch. Dist. v. Soister, 758 A.2d 742 (Pa. Cmwlth. 2000) (where CBA neither explicitly reserved to school district power as to penalty imposed, nor precluded an arbitrator from making that determination, the arbitrator could set aside the employee's termination and impose the penalty he thought appropriate).

Here, nothing in the CBA provided Employer with sole authority to determine whether Grievant's conduct constituted just cause for his dismissal. Consequently, the trial court did not err or abuse its discretion in determining Arbitrator's Award had its foundation in, and logically flowed from the CBA. Council 13; Mifflinburg Area Sch. Dist.; Blue Mountain Sch. Dist.; Abington Sch. Dist.

Rather, similar to the case in Westmoreland Intermediate Unit, Arbitrator determined Employer had just cause to impose a suspension and require Grievant's submission to an Employer-designed improvement plan comprised of numerous conditions for a probationary period. In Westmoreland Intermediate Unit, the Supreme Court determined such an award was rationally derived from the CBA and must be upheld. Similarly, in the present case, the trial court properly determined Arbitrator's Award was rationally derived from the CBA and thus satisfied the essence test. Id.

Further, Employer's reliance on our memorandum opinion in Forest Hills, which applied the "core functions" test as an exception to the essence test, is problematic. The "core functions" test -- whether the teacher's conduct interfered with a core function of the employer, such as control of the curriculum -- was replaced by the public policy exception to the essence test. In City of Bradford, we explained (with emphasis added):

> In [Westmoreland Intermediate Unit], our Supreme Court reaffirmed that the proper standard to be employed by courts in reviewing grievance arbitration awards under PERA is the highly circumscribed 'essence test' as articulated in [Cheyney University]. However, the Court

> determined the previously applied 'core functions' exception to the essence test was insufficiently precise and prone to unwarranted expansion. Thus, the Court expressly rejected it. In its place, the Court recognized and adopted the narrow public policy exception to the essence test similar to that applied in federal courts. Specifically, the Court stated that an arbitrator's award will be upheld under the highly deferential essence test unless it contravenes public policy.
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> [The Westmoreland Court] began its analysis by noting that the clear intent of the legislature in enacting PERA was to favor resolution of labor disputes by binding arbitration. To effectuate this goal, judicial review of arbitration awards must necessarily be limited in scope. The Court affirmed that the essence test is consistent with the goals of PERA because it is deferential and does not reach the merits of the arbitrator's decision. However, the Court criticized the core functions exception as exceptionally broad. Our Supreme Court, citing Judge Pellegrini's dissenting opinion before this court, opined that the core functions exception risked swallowing the essence test. The Court concluded that 'the core functions exception is insufficiently precise, and raises serious questions regarding the jurisdiction to utilize arbitration as well as concerns regarding the limitless reach of the exception.' [Westmoreland, 939 A.2d at 865]. Thus the Court concluded that the core functions exception was inappropriate, and replaced it with a new exception.

City of Bradford, 25 A.3d at 412.

In short, the Supreme Court abandoned the core functions test as an exception to the essence test and replaced it with the public policy exception. Therefore, our rationale in Forest Hills, which applied the potentially overbroad

core functions exception to the essence test, is no longer appropriate in PERA arbitration cases.[5]

B. Public Policy Exception

1. Argument

Employer next contends the trial court erred in failing to determine Arbitrator's award violates the public policy exception to the essence test adopted by the Supreme Court in Westmoreland Intermediate Unit. In that case, the Court reasoned:

> [L]ike our adoption of the federal essence test for purposes of PERA, we conclude that the federal public policy exception is appropriately applied to arbitrator's awards arising under PERA as well. We believe that such a public policy exception constitutes a reasonable accommodation of the sometimes competing goals of dispute resolution by final and binding arbitration and protection of the public weal …. Thus, we reject the core functions exception to the essence test and supplant it with the public policy exception to the essence test.
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> More specifically, we hold that upon an appropriate challenge by a party, 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.

[5] In addition, we note Forest Hills School District v. Forest Hills Education Associaiton, (Pa. Cmwlth., No. 2105 C.D. 2003, filed September 24, 2004), 2004 WL 2435846, is an unreported 2004 panel decision. As such, it cannot be cited as persuasive. See Commonwealth Court Internal Operating Procedure 414, 210 Pa. Code §69.414 (an unreported panel decision of the Commonwealth Court, issued after January 15, 2008, may be cited for its persuasive value).

Westmoreland Intermediate Unit, 939 A.2d at 865-66 (citations omitted) (emphasis added).

Here, Employer contends Grievant's consistent use of aversive behavior techniques violated clearly established school and community policies. Employer asserts a school district shall have the right to remove an employee for a violation of any school laws or other improper conduct. Bd. of Educ. of the Sch. Dist. of Phila. v. Phila. Fed'n of Teachers, AFL-CIO, 610 A.2d 506 (Pa. Cmwlth. 1992). Improper conduct under the School Code is defined as conduct not in accord with propriety, modesty, good taste or good manners. Rice v. Bd. of Dirs. of the Easton Area Sch. Dist., 495 A.2d 984 (Pa. Cmwlth. 1985). Further, a school board is vested with the authority to determine what conduct is improper for its employees. Sch. Dist. of Phila. v. Puljer, 500 A.2d 905 (Pa. Cmwlth. 1985). Moreover, the requirement of just cause for termination does not infringe on the school district's prerogative to adopt and enforce regulations regarding the conduct of its employees. Bd. of Educ. of the Sch. Dist. of Phila. v. Phila. Fed'n of Teachers Local No. 3, AFL-CIO, 346 A.2d 35 (Pa. 1975). In short, Employer argues Grievant's conduct violated the board of directors' expressed policy disfavoring the use of aversive behavioral techniques.

Employer also cites to a Pennsylvania Department of Education regulation dealing with positive behavioral support, 22 Pa. Code §14.133, an introductory provision of the Individuals with Disabilities Act, 20 U.S.C. §1400(c)(F)(5), U.S. Department of Education material, and court decisions in Maine, California, and Hawaii, which generally deal with aversive techniques. As

discussed below, it is unclear the extent to which these arguments were made to Arbitrator.

In sum, Employer asserts its board of directors' policies, state law and federal law prohibit the use of aversive and humiliating techniques. As such, Employer argues Arbitrator's award, which overturned Employer's termination of Grievant, violated the public policy exception to the essence test.

2. Analysis

In City of Bradford, we observed that the public policy exception to the essence test is extremely narrow. The reviewing court must first identify the nature of conduct leading to the discipline. Second, the court must determine whether that conduct implicates a public policy which is well-defined, dominant and ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. Id. Third, the court must determine the award poses an unacceptable risk that will undermine the implicated policy and cause the public employer to breach its lawful obligations or public duty. Id.

Here, Employer contends Grievant's conduct in the classroom, including the use of aversive behavior techniques, violated clearly established school and community policies. Employer asserts a school district possesses the right under the School Code to remove an employee for a violation of any school laws or other improper conduct. In other words, Employer essentially argues the public policy exception to the essence test applies here because Grievant's conduct violated school policies.

We disagree. In City of Bradford, we explained that the third prong of the public policy exception focused on the award of the arbitrator and not on the conduct of the grievant. In distinguishing the public policy exception from the core functions test, this Court reasoned (with emphasis added):

> These earlier tests generally examined the conduct at issue to determine whether it was acceptable in a public employment setting. This led to viewing the conduct in a categorical or abstract way that placed little, if any, weight on the particular facts of the case. Certainly, no theft, no sexual or racial harassment, no ill treatment of prisoners, however slight, can be said to be permissible.
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> The public policy exception, however, requires a further step and makes the third prong of the analysis ultimately determinative: Does the arbitrator's award pose an unacceptable risk that a clear public policy will be undermined if the award is implemented? This question allows for consideration of the particular circumstances of the case and attendant aggravating or mitigating factors. In short, the three prong test to determine the public policy exception draws the necessary balance between the public employer's duty to protect the health, welfare and safety of the citizens it serves, the fair treatment of public employees and salutary goal of PERA to insure the prompt resolution of labor disputes in binding arbitration.

City of Bradford, 25 A.3d at 415.

Here, Arbitrator, based on the record, determined Employer did not establish cause for Grievant's dismissal under Section 1122 of the School Code. See Arbitrator's Op. at 31. As discussed above, Employer failed to establish Grievant engaged in (1) immoral conduct; (2) persistent negligence in the

performance of duties; (3) persistent and willful violation of school directives and policies; or (4) cruelty. To that end, Arbitrator reasoned (with emphasis added):

> The evidence showed that placing the sign on [Student] was not a proper educational technique to use, however, this incident is not the same as a teacher using drugs, accessing porn on a school website or sexually or physically abusing students. There was no evidence to suggest that placing a sign on [Student] violated a morality norm in an educational setting or that it offended the morals of the community.
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> * * * *
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> The Grievant was not charged with nor was there evidence of physical abuse. The Grievant certainly upset [Student] while he was wearing the sign, but this was not the same as willful infliction of pain upon his emotions or feelings. There was no testimony that the Grievant had any malicious or willful intent to upset or harm [Student]. The undisputed testimony from the Grievant was that he thought he was using a proper educational technique.
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> There was testimony … that with three students, the Grievant 'forced,' 'grabbed' or 'pushed' the student[s] into the corner when the students did not comply with the directive to go to the corner. There was also testimony that on one occasion, the Grievant put a student in a restraint over a desk and the student cried that it hurt. According to [a witness], the Grievant did not stop as soon as the student said this.
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> It was not clear that the physical contact by the Grievant was actually excessive. There was no evidence of twisting arms or pushing heads as charged by [Employer]. The [teacher's aides] failure to report these incidents undermines [Employer's] claim that the Grievant was using excessive force and abusing these students.

> The students involved reported no injuries. All of the students involved were physically large and had misbehaved prior to being 'forced' into the corner or placed in a restraint. The students were not cooperating with the Grievant's directive to go to the corner on their own. By pointing this out, the Arbitrator is not condoning cruelty or excessive force on a misbehaving student. Rather, there was simply no evidence that the Grievant was excessive, malicious or wanton. Thus, the charge of cruelty is not sustained.
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> [Employer] believes in 'positive behavior supports' and prohibits 'aversive techniques.' The Grievant was aware of the principle of 'positive behavior supports.' However, what those concepts mean in practical terms and implementation appear to be subjective. Thus, in order for Grievant to have willfully violated these policies, there had to be some showing that the Grievant was trained on the principles and was aware that the techniques he was using were in clear derogation of the directives. Thus, [Employer] failed to prove that the Grievant willfully violated the school's directives.
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> The Arbitrator concludes that the Grievant's conduct did not constitute immorality, cruelty, persistent negligence, willful violation of [Employer's] directive, or willful neglect of duties. Thus the dismissal on those grounds cannot stand.

Arbitrator's Op. at 31-35.

With respect to the first prong of the public policy exception, Arbitrator determined Employer failed to establish Grievant's conduct rose to the level of just cause for a termination under the grounds set forth in Section 1122 of

the School Code. Further, Arbitrator determined Grievant did not willfully or intentionally violate Employer's policies prohibiting the use of aversive techniques. It is well settled that a reviewing court in a PERA arbitration case may not intrude into the domain of the arbitrator and become embroiled in a review of the merits. Cheyney Univ.; City of Bradford.

As to the second prong of public policy exception, Arbitrator acknowledged testimony by Employer's Behavioral Health Director as to the banning of aversive techniques by Employer and by the State. Arbitrator's Op. at 34. However, Arbitrator continued, "there was no policy, regulation or statute presented that defined an aversive technique and prohibited the use of such techniques. In fact, [Behavioral Health Director's] testimony was confusing." Id. This discussion is contrary to Employer's current argument.

Moreover, Arbitrator specifically concluded that determinations about what qualified as an aversive technique "are made on a case-by-case basis and there simply is no hard and fast rule or policy that the Grievant violated." Arbitrator's Op. at 34. Thus, under the circumstances presented to Arbitrator, we discern no error in a determination that any public policy regarding aversive techniques was not so well-defined and ascertainable by reference to the laws and legal precedents as to qualify for the narrow exception to the essence test.

With respect to the third prong of the public policy exception, Arbitrator found, "Nor was there any evidence that the Grievant ever received training on aversive techniques." Id. As part of the award, Arbitrator conditioned

Grievant's reinstatement upon his submission to and successful completion of an improvement plan created by Employer to address Employer's specific expectations of Grievant's employment, including the use of positive behavioral supports as opposed to aversive techniques, the use of time outs, proper communication with students, and the boundaries for appropriate physical contact or horseplay. Id. at 37. Further, Arbitrator provided Employer with sole discretion to determine the length of the improvement plan and the regularity of classroom observation. Id.

In light of the conditions imposed by Arbitrator, which address Employer's concerns in this case, Arbitrator's award does not pose an unacceptable risk to any well-defined or dominant school law or policy. Westmoreland Intermediate Unit; City of Bradford. Accordingly, we reject Employer's contention that the trial court erred in failing to determine Arbitrator's award violates the public policy exception. Id.

III. Conclusion

For the above reasons, we discern no error or abuse of discretion in the trial court's order denying Employer's petition to vacate Arbitrator's award. Accordingly, we affirm.

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Colonial Intermediate Unit #20, Appellant	:	
v.	:	No. 839 C.D. 2014
Colonial Intermediate Unit #20 Education Association, PSEA/NEA	:	

O R D E R

AND NOW, this 9th day of February, 2015, for the reasons stated in the foregoing opinion, the order of the Court of Common Pleas of Northampton County is **AFFIRMED**.

ROBERT SIMPSON, Judge