IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

LOYALSOCK TOWNSHIP AREA SCHOOL DISTRICT,	:	**NO. 05-02,269**
vs.	:	
LOYALSOCK CUSTODIAL MAINTENANCE, SECRETARIAL AND AID ASSOCIATION a/k/a LOYALSOCK TOWNSHIP EDUCATION SUPPORT COURT PROFESSIONALS, PSEA/NEA, Defendants	:	**LOWER COURTS OPINION ON REMAND AS ORDERED ON SEPTEMBER 24, 2008, BY THE PENNSYLVANIA SUPREME COURT**

OPINION AND ORDER

This matter was remanded to this Court by Order of the Pennsylvania Supreme Court of September 24, 2008, which Order granted the Petition for Allowance of Appeal filed by the Petitioner, Loyalsock township School District. The Supreme Court's Order of September 24, 2008 vacated the prior Order of the Pennsylvania Commonwealth Court and remanded the matter to the Commonwealth Court "to remand to the Court of Common Pleas of Lycoming County for further consideration in light of Westmoreland Intermediate Unit #7 v. Association, PSEA/NEA, 939 A.2d 855 (Pa. 2007)."

Pursuant to the remand this Court held a conference with counsel for the school district and counsel for the association on January 12, 2009. Since this was not a matter requiring new testimony as the record was made in front of the arbitrator, the Court entered a briefing schedule for the parties and the Court heard argument by the parties on March 26, 2009.

This Court recently received the record of this matter from the Pennsylvania Commonwealth Court so the matter is now ripe for decision by this Court.

For reference for any possible review of this decision the Court will hereby restate the basic facts of the case which we referenced in our original opinion and order of June 15, 2006. We will use quotation marks to denote the content of this Court's original opinion and order.

"On January 14, 2005, Connie Hamilton was employed by the Loyalsock Township School District as a custodian at the Schick Elementary School located at 2800 Four Mile Drive, Montoursville, Pennsylvania. The Schick elementary School has approximately 600 students in grades kindergarten through fifth grade. Ms. Hamilton is a member of the Loyalsock Custodial Maintenance, Secretarial and Aides Association Bargaining Unit.

On January 14, 2005, Ms. Hamilton was injured during work hours at Schick elementary School when a piece of equipment fell and hit her face below her eye. Ms. Hamilton went to the Susquehanna Health System Emergency room for treatment. She was advised by hospital employees that post-accident drug and alcohol screening would be conducted because her injury was a worker's compensation matter. Ms. Hamilton then left the hospital emergency room without submitting to the testing indicating she would pay for medical care on her own and would not seek worker's compensation benefits.

On January 18, 2005, Gerald McLaughlin, Petitioner's business manager, met with Ms. Hamilton and informed her she must report to the Susquehanna Health System for drug and alcohol screening in conjunction with her injury. Ms. Hamilton advised she would pay the hospital bills and cancel her worker's compensation claim.

On January 18, 19, 20, and 21 and 24, 2005, Ms. Hamilton was directed to report to the hospital for a drug and alcohol screening. She did not report.

On January 25 and 26, 2005, Ms. Hamilton called in sick and did not report to work at the Schick Elementary School. On January 26, 2005, at approximately 8:00 p.m. Ms. Hamilton reported to the hospital for the drug and alcohol screening.

On January 31, 2005, the Susquehanna Health System reported to the school district that Ms. Hamilton's drug and alcohol was positive for the use of marijuana. On January 31, 2005, Ms. Hamilton was suspended without pay from her custodial duties at the Schick Elementary School. Ms. Hamilton was advised of her right to have a hearing before the school board.

On February 15, 2005 a hearing was convened before the Board of School Directors of the Loyalsock Township School District to consider Ms. Hamilton further employment with the district. The School Board Directors voted unanimously in public session on February 15, 2005 to dismiss Ms. Hamilton from employment with school district. By letter dated February 16, 2005, the Board Secretary notified Ms. Hamilton that her employment with school district was terminated.

Ms. Hamilton admitted to the School District Business Manager that she had used marijuana while off duty and off school property after her injury on January 14, 2005. Thus, Ms. Hamilton did not deny the use of marijuana nor that the same was in her system while working in the elementary school, but she maintained that she did not physically ingest marijuana on school property during hours of employment.

Pursuant to the authority of the school code, the Board of School Directors, adopted board policy 551 relating to drug and substance abuse in 1989, which was subsequently revised in May 1995.

On August 19, 1995, Ms. Hamilton signed an acknowledgement of the "Drug Free Workplace Policy Requirement" of the Loyalsock Township School District.

On February 23, 2006, the Bargaining Unit on behalf of Ms. Hamilton filed a grievance indicating that Ms. Hamilton's discharge was without just cause and without due process. Pursuant to the Collective Bargaining Agreement between the parties, an arbitrator was appointed to hear the grievance. The hearing was held on September 20, 2005. On November 18, 2005, the arbitrator found that Ms. Hamilton's conduct was serious but ruled that she should be reinstated to her custodial position at Schick Elementary School and that the period between her dismissal date, February 15, 2005, and the date of the award, November 18, 2005, should be considered a suspension without pay. Thus, the arbitrator's ruling reinstated Ms. Hamilton to her position in the Schick Elementary School as of November 18, 2005.

On or about December 15, 2005, the Loyalsock Township School District filed a Petition for Review of Grievance Arbitration Award before the Court of Common Pleas of Lycoming County. The Court of Common Pleas jurisdiction has over the Petition for Review of Awards of Arbitrators pursuant to 42 Pa.C.S. §933 (b)."

Before going further the Court would like to clarify some of the facts as found by the arbitrator. We are basing these findings on Exhibit L to the record of this case which is the written decision entered by Arbitrator Louis R. Martin. The Court is not aware of an actual transcript of the testimony given before the arbitrator but Exhibit L contains the arbitrator's "Discussion and Findings" of the matter heard by him.

The Court notes the arbitrator found that Ms. Hamilton went to the emergency room on the day following the school injury, Saturday, January 15, 2005.

When the district manager confronted Ms. Hamilton about the test result she first denied using marijuana but then admitted on the Friday night following the injury she ran into friends and "took a few puffs on a marijuana cigarette." She stated she was not a regular user of marijuana but would submit to rehab treatment if it would save her job. At that point the business manager indicated he would recommend that she be terminated from her position. *See* Discussion and Findings, Exhibit L, pp. 5-7.

The arbitrator appeared to accept Ms. Hamilton's testimony that her usage of marijuana occurred on Friday evening, January 14th, after work and that her use "was a one time occurrence brought on by a meeting with friends and that she was not a regular user of marijuana." Exhibit L, p. 7. This Court is bound by the credibility findings of fact made by the arbitrator.

In its Opinion and Order of June 15, 2006, this Court granted the petition for review filed by the school district and vacated the award of the arbitrator as being beyond the scope of his authority. The Court reinstated the decision of the Board of School Directors of February 15, 2005, to discharge Ms. Hamilton from her employment with the Loyalsock Township School District.[1]

The Association appealed the Court's finding to the Pennsylvania Commonwealth Court. The Pennsylvania Commonwealth Court in an Opinion filed July 17, 2007, with a written dissenting opinion by Judge Cohn Jubelirer, reversed the lower court's decision in support of the school district and found that the school district's agreement with the union and the appointment

1 The Court's decision to grant the School District's Petition for Review was premised on the "core functions" test which indicates where a government employer is involved, a collective bargaining agreement may not be interpreted to allow a public employer to relinquish powers that are essential to the proper discharge of their core functions. The Court found that the power to discharge in this case went to a core function of the school district.

of the arbitrator reflected the parties' intent to have the arbitrator interpret the meaning of "just cause." The Commonwealth Court went on to find that since the arbitrator found the district lacked just cause to terminate Ms. Hamilton and because the record contained no evidence that Ms. Hamilton's off-duty conduct violated Policy 551 or had any effect on a district function, the arbitrator's decision was rationally derived from the labor agreement.

The school district then took allocatur from the Pennsylvania Commonwealth Court decision to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court, by per curiam order of September 24, 2008, granted the petition for Allowance of Appeal and vacated the order of the Commonwealth Court. The Pennsylvania Supreme Court remanded the matter to the Commonwealth Court to remand the matter back to the Lycoming County Court of Common Pleas for further consideration in light of the case of ***Westmoreland Int. Unit v. Westmoreland Unit #7 Classroom Assistant Support Personnel Association, PSCA/NEA,*** 939 A.2d 855 (Pa. 2007).

Accordingly, this Court will review the decision in the ***Westmoreland*** case. The facts of the ***Westmoreland*** case have some similarity to this case because they concern a teacher's aide using a controlled substance. However, the facts in ***Westmoreland*** are more extreme because the conduct in question occurred on school grounds during work hours and affected the employee's actual work performance on a given day.

In the ***Westmoreland*** case, the school employee in question was a classroom

assistant who worked for 23 years without any disciplinary incidents. On March 18, 2002 the employee was assisting in an emotional support classroom with eleven emotionally disturbed children in grades 3 through 5. The employee complained she was not feeling well. Subsequently, the employee advised she was getting worse and that she was going to call a substitute to work for her for the rest of the day. The teacher in the classroom advised the employee this was okay but she should inform her of what arrangements were made before she left for the day. The employee advised she would retrieve some materials from the copy room, and she would call for a substitute.

The employee failed to return to the classroom and after 45 minutes efforts were made to find her. Eventually, the employee was found moaning in a locked stall of the school restroom. The employee would not respond to efforts to have her come out of the restroom. The school principal came to the restroom but could not get a response from the employee. They called 911. During this period of time the principal placed the school under a code blue security code, where the school was essentially locked down; all classroom doors were locked and students were not permitted to leave the rooms.

The police then responded and an EMS unit was sent to the school. A screwdriver had to be used to open the restroom stall door and the employee was found unconscious and partially nude, seated on a toilet. The employee was transported to a hospital.

Police investigation discovered that there was a Fentenyl patch on the employee's back and that the patch caused a drug overdose. Criminal charges were filed for possession of a controlled substance and disorderly conduct. The employee entered into a plea agreement whereby she entered a probation without verdict program for possession of a controlled

substance, which placed her on a term of probation. *See* 35 P.S. §780-117 Probation Without Verdict. This program requires an individual to enter a plea of guilty and to show he is drug dependent. Upon fulfillment of the terms and conditions of probation the Court then discharges the person and dismisses the charges against him. *See* 35 P.S. §780-117(3).

The school district's investigation of the matter revealed that the employee had been taking several medications and on the Sunday before the occurrence at school a friend gave her a Fentenyl patch which she placed on her back prior to coming to school. Evidently, the patch precipitated an adverse reaction with the other drugs taken, which resulted in the employee's condition at the school.

As a result of this incident, the school district terminated the employment of the employee. The association filed a grievance alleging the school district did not have just cause for her discharge. The grievance was submitted to arbitration pursuant to the collective bargaining agreement. The arbitrator found that while the employee's conduct was "foolish" and "irresponsible," it did not rise to the level of just cause for termination of an employee with a spotless 23 year work career. In light of the gravity of the employee's conduct the arbitrator determined that she was not entitled to any back pay and made her reinstatement conditional upon a one-year probation period and participation in a drug and alcohol program. The employee was also required to submit to unannounced drug screening tests.

The school district appealed the decision to the Westmoreland County Court of Common Pleas, and the Court reversed the arbitrator's decision based on the core functions exception to collective bargaining.

The association appealed this decision and the Commonwealth Court in an unpublished opinion upheld the Court of Common Pleas decision. The association appealed to the Pennsylvania Supreme Court which granted allowance of appeal.

The Pennsylvania Supreme Court in ***Westmoreland Int Unit v. Westmoreland Classroom Assistants Association,*** *supra,* abrogated the core functions exception for governmental entities to collective bargaining agreements. In making its decision, the Court noted the value of limited judicial review of the arbitration process and adopted the essence test for judicial review of arbitrations. The essence test contains a two-prong approach to judicial review of grievance arbitration awards. The Court, citing prior case law stated:

> First, the court must determine if the issue as properly defined is within the terms of the collective bargaining agreement. Second, if the issue is embraced by the agreement, and thus, appropriately before the arbitrator, the arbitrator's award will be upheld if the arbitrator's interpretation can rationally be derived from the collective bargaining agreement. That is to say, 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.

939 A.2d at 863 (citation omitted). While recognizing the highly differential standard of review to grievance arbitrators' decisions, the Supreme Court in ***Westmoreland,*** *supra,* recognized that courts should not enforce an arbitration award that contravenes public policy. ***Ibid***. The Court thus, while a adopting the two-prong essence test concluded that the essence test should be subject to "a narrow exception" by which an arbitrator's decision will be vacated if it violates the public policy of the Commonwealth. ***Ibid,*** at 865. The Supreme Court noted, however, that the public policy "must be well defined, dominant, and ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests." ***Ibid,*** at 866.

Applying this test to the facts in ***Westmoreland,*** the Supreme Court found that the issue of just cause to terminate employees' employment was within the terms of the collective bargaining agreement. The ***Westmoreland*** court likewise found that the second prong of the essence test was satisfied as the arbitrator's decision to suspend the employee with numerous conditions for reinstatement, was rationally derived form the agreement. The court stated:

> . . . the essence test is highly deferential and it admonishes that courts should not become embroiled in the merits of an arbitration, but rather, must only determine if the award is indisputably and genuinely without foundation in or fails to logically flow from the collective bargaining agreement.

Ibid, at 866. While finding the essence test to be satisfied, the Pennsylvania Supreme Court in ***Westmoreland*** did not feel that the parties had an opportunity to offer specific argument as to the applicability of the narrow public policy exception to the essence test. Thus, they remanded the case to the Westmoreland County Court for additional proceedings to consider whether the arbitrator's award violated the public policy of the Commonwealth. The Court stated:

> . . . the Court should consider whether the arbitrator's award violates the public policy of the Commonwealth. That is, to reiterate, the court should consider the issue of whether Ms. Vrablil's reinstatement contravenes a well defined, dominant public policy that is ascertained by reference to the laws and legal precedents and not from mere general considerations of supposed public interests.

Ibid, at 867.

With all the above in mind this Court will now review this case in light of the standard enunciated in the ***Westmoreland*** case as instructed by the Pennsylvania Supreme Court's Order of September 24, 2008.

Remand Consideration in Accordance with the Order of September 24, 2008

The Court finds the decision of the arbitrator to be consistent with the two prongs of the essence test.

First, the issue of whether the termination of Ms. Hamilton is with just cause is clearly within the terms of the collective bargaining agreement. Article III of the agreement, "Management Prerogatives" includes the right to discharge employees for just cause. However, the provision is limited by language that indicates that the provision applies "except as limited by the specific terms of this agreement." Article XXVIII of the Agreement, entitled, "Employee Rights" in Section 2 specifically indicates that the employer shall not discharge or take disciplinary action against an employee without just cause. Article XXVIII further allows an employee to appeal a discharge through the arbitration grievance procedure. It is clear that the issue of termination with just cause is firmly within the terms of the collective bargaining agreement in Article XXVIII.

The second prong of the essence test is whether the arbitrator's interpretation and award can rationally be derived from the collective bargaining agreement. Article XXVIII "Employee Rights," of the Collective Bargaining Agreement speaks to termination and the taking of disciplinary action against an employee without just cause. Thus, an arbitrator's decision that there was not just cause to terminate and to then impose a suspension would be rationally derived from the agreement. The ***Westmoreland*** decision notes that courts should not engage in a merits review of the matter. ***Ibid***. at p. 863. Likewise, the Pennsylvania Supreme Court in ***Westmoreland*** states that the essence test does not permit a court to intrude into the domain of arbitration and determines whether an award is "manifestly unreasonable." ***Ibid.***, at p. 863. The

Court cannot say that the arbitrator's decision is not rationally derived from the Collective Bargaining Agreement.

The remaining question and issue for this Court is whether the decision of the arbitrator violates public policy of the Commonwealth. The Court thus must determine if Ms. Hamilton's reinstatement contravenes a well defined, dominant public policy that is ascertained by reference to the laws and legal precedents and not from mere general consideration of supposed public interests.

The school district carries the burden of proving that the arbitrator's decision is in violation of an established public policy

The school district in its brief to the Court states the issue as follows:

> Whether a grievance arbitrator's award reinstating an admitted illegal drug user to employment as an elementary school custodian violated the public policy of the Commonwealth of PA.

Brief, p. 6. The school district cites to a number of statutes and policies as showing a violation of public policy by Ms. Hamilton's conduct.

Recently, the Commonwealth Court, in applying the public policy exception noted that the exception only applies where the **remedy** provided in the arbitrator's award would require an illegal act or be against clear public policy. In ***Phila. Housing Auth. v. AFSCME***, 945 A.2d 796, 800 (Pa. Cmwlth. 2006), the Court noted:

> Under the Federal public policy exception, for a court to refuse to enforce an arbitration award, the remedy that the arbitrator orders must require that the employer or the union take some other action that would violate the law or be against clear public policy. However, if the award simply does not punish an illegal act, it does not fall within the exception, and a federal court would enforce the award. This exception does not go to the correctness of the resolution of the underlying merits where the federal courts still

defer, but only to the legality of the remedy.[2]

In the case of ***Pa. Turnpike Comm'n v. Teamsters Local Union No. 250,*** 948 A.2d 196 (Pa. Cmwlth. 2008), the Turnpike Commission terminated an employee toll collector who the commission claimed made an extraordinary amount of errors, including falsification of records. The employee did not have an explanation for the high number of errors. The employee was terminated from employment and she filed for grievance arbitration as to just cause for termination.

The arbitrator, after hearing, found that the evidence showed the employee was failing to properly perform her work duties but did not find willful misconduct. Therefore, he ordered reinstatement of the employee with back pay and benefits. He also required her to undergo additional training.

The Turnpike Commission argued to the Commonwealth Court that the arbitrator's award violated public policy in that it compromised the integrity of the commission's toll collection system. In rejecting this argument, the Commonwealth Court noted that it was not enough that the employee's actions violated policy or rules of the commission; rather, the question was whether the arbitrator's award violated a public policy of the Commonwealth of Pennsylvania. The Court noted: "There is no public policy that mandates the discharge of all employees who are alleged to have committed acts of misconduct." ***Ibid,*** at 207.

Here, the school district in its public policy argument cites to the criminal statute found in the Drug Device and Cosmetic Code, 35 P.S. §780-101 and the Crimes Code establishing

[2] In ***Phila. Housing Auth. v. AFSCME,*** *supra,* an arbitrator found the Housing Authority did not fully comply with the terms of a settlement agreement and the arbitrator awarded the employee's back pay and attorney fees. The

penalties for criminal offenders who deliver drugs or possess drugs in proximity to schools and public parks. 18 Pa. C.S. §6317. The school district also cites to the Safe and Drug Free Schools and Communities Act of 1994, 20 U.S.C. §7114(d)(6) (2000 Supp. IV), which requires "schools receiving federal funds" under the Act to "convey a clear and consistent message that . . . illegal use of drugs [is] wrong and harmful."

However, Ms. Hamilton has neither been convicted of nor charged with any crime, including any drug related crime. Based on the findings of the arbitrator she took a puff or puffs on a marijuana cigarette the Friday evening after her school workday. Unlike the facts of the ***Westmoreland*** case, her ingestion of marijuana did not cause an incident at work or affect the school students in any way. It is thus hard to see how the criminal and federal statute cited by the district indicates the remedy of the arbitrator violates any clear policy.

The Court agrees with the association's contention that the closest pronouncement of public policy applicable to this case is contained in Section 527 of the School Code. This section provides:

> Any employe, professional or otherwise, of a school district . . . who is convicted of delivery of a controlled substance or convicted of possession of a controlled substance with the intent to deliver, as prohibited by the Act of April 14, 1972 (PL 233, No. 64) known as 'The Controlled Substance Drug, Drug and Cosmetic Act' shall be terminated from his or her employment with the school entity.

24 P.S. §5-527. Ms. Hamilton has never been charged with or convicted of delivery or intent to deliver a controlled substance. In fact, she has not been charged with possessing a controlled substance. Therefore, the public policy expressed by the School Code would not apply to this case.

Commonwealth Court upheld the remedy of back pay but held that the award of attorney fees was punitive in nature

Finally, in argument before the court there was much discussion by the school district of the district's own written policy, Policy 551. *See,* Exhibit I of the Record containing the Loyalsock School District's Drug and Substance Abuse Policy, adopted April 12, 1989, Revised May 10, 1995. Certainly, if the policy or rules of the Pennsylvania Turnpike Commission were insufficient to be considered a public policy of the Commonwealth of Pennsylvania in ***Pa. Turnpike Comm'n v. Teamsters Local Union No. 250***, 948 A.2d 196, 207 (Pa. Cmwlth. 2008), a policy of a local school district also would not be considered a public policy of the Commonwealth of Pennsylvania.

Even assuming arguendo that Policy 551 could constitute a public policy of the Commonwealth of Pennsylvania, it would not preclude or render unlawful Ms. Hamilton's continued employment with the school district. Policy 551 recognizes the serious concern caused by misuse of drugs and notes the concern of the school board about this problem that may be caused by drug use by employees; "especially as it relates to the safety, efficiency and productivity of employes." It defines a "Drug-Free Workplace" and indicates employees shall not distribute, dispense, possess or use controlled substances in the workplace. The policy requires that employees be notified of the drug-free workplace policy and that all employees, as a condition of employment, abide by the policy. The policy indicates that if an employee is convicted of a drug offense the district shall take appropriate personnel action against the employee, up to and including termination within 30 days of receiving notice with respect to a convicted employee. The policy in the same paragraph indicates that the action of the district may be to require the employee to participate in an approved drug abuse program or face

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and did not draw its essence from the Collective Bargaining Agreement.

proceedings leading to termination. Provision 4 of the policy lists different counseling agencies to which an employee may go. Each employee of the district signs a form affidavit confirming they have received a copy of the policy and agree to abide by the policy. Exhibit J in the record is the signed affidavit from Ms. Hamilton, dated August 30, 1995, indicating her receipt of this policy.

While the policy is appropriate and laudable, it is not a public policy that would overturn the arbitrator's decision in this case. Ms. Hamilton has not suffered a "conviction" as defined by the policy.

An additional issue concerning Policy 551 is the question of whether use of a controlled substance as contained in the policy definition of "Drug Free Workplace" includes a use of a controlled substance on a weekend away from school property or whether such use must in some way affect the employee's performance at work. The arbitrator found the use of marijuana occurred away from the work site and consisted of a few puffs of a marijuana cigarette. He found Ms. Hamilton was not a regular user of marijuana and that she was an employee of 27 years with a prior unblemished record.

Even accepting the school district's interpretation that this conduct would constitute a possession or use of a drug in the workplace in violation of the policy,[3] Policy 551 does not clearly call for termination but rather indicates the district's personnel action may be to require the employee to undergo counseling. It thus does not appear that policy 551 clearly sets out a public policy basis for dismissal of Ms. Hamilton.[4]

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[3] The arbitrator did not find this conduct constituted use in the workplace. *See* Exhibit L, pp. 7-8.

[4] The Court is mindful that in all likelihood, as acknowledged by the arbitrator, Ms. Hamilton's failure to report for a blood test for approximately 10 days was seen as insubordination by the school district and was most probably a factor in their decision to terminate her. However, this does not seem in and of itself to raise a public

In conclusion, applying the standard as required by ***Westmoreland***, *supra*, the Court must deny the school district's appeal from the arbitrator's decision, because the arbitrator's decision satisfies the essences test and his remedy of reinstating Ms. Hamilton does not violate any clear public policy of the Commonwealth of Pennsylvania.

ORDER

AND NOW, this ____ day of June 2009, the Court DENIES the school district's appeal from the arbitrator's decision.

By The Court,

_____
Kenneth D. Brown,

cc: Benjamin Landon, Esquire
James T. Rague, Esquire
17 Central Avenue, Wellsboro, PA 16901
Work File
Gary L. Weber, Esquire (Lycoming Reporter)

policy exception to overturn an arbitrator's finding.