IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

JERSEY SHORE AREA SCHOOL DISTRICT, Petitioner,	:	No. CV 24-00,700
vs.	:	CIVIL ACTION – LAW
JERSEY SHORE AREA EDUCATION ASSOCIATION, Respondent.	:	

OPINION AND ORDER

AND NOW, this 2nd day of December, 2024, upon consideration of the Petition to Vacate and/or Modify Arbitration Award filed by Petitioner Jersey Shore Area School District,[1] the Response filed by Respondent Jersey Shore Area Education Association,[2] and the briefs[3] and arguments[4] of the parties, it is hereby ORDERED and DIRECTED that the Petition is GRANTED in part and DENIED in part, as explained at length below.

I. BACKGROUND.

Petitioner is the Jersey Shore Area School District (the "District"), a political subdivision of the Commonwealth of Pennsylvania located in Lycoming County, Respondent is the Jersey Shore Area Education Association (the "Association").[5] The District and the Association entered into a Collective Bargaining Agreement (the "CBA") for the period of July 1, 2019 through June 30, 2023, pursuant to which, *inter*

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[1] Petitioner's "Petition to Vacate and/or Modify Arbitration Award," filed June 28, 2024 (the "Petition").
[2] "[Respondent] Jersey Shore Area Education Association's Answer to Petition to Vacate Arbitration Award," filed July 22, 2024 (the "Response").
[3] The parties filed the following briefs: (1) Petitioner's "Brief in Support of Petition to Vacate and/or Modify Arbitration Award," filed August 12, 2024 ("Petitioner's Brief"), and (2) Respondent's "Brief in Opposition to Petition to Vacate Arbitration Award," filed August 20, 2024 ("Respondent's Brief").
[4] The Court heard argument on the Petition on August 27, 2024. Scheduling Order dated July 5, 2024 and entered July 8, 2024. Christopher Kenyon, Esq. argued for the Petitioner and Anne K. Leete, Esq. argued for the Respondent.
[5] Petition, ¶¶ 1-2.

alia, the Association was appointed as "the exclusive bargaining agent for wages, hours, and other terms and conditions of employment ... for all full-time [District] teachers and other professional employees under regular contract."[6]

The CBA[7] contains a grievance procedure that requires, as its ultimate step, that a dispute be submitted to arbitration. The Association submitted a grievance to arbitration on behalf of one of its members, Dr. Jennifer McKee (the "Employee"), who was involved in an employment dispute with the District which resulted in the District suspending her without pay with the intent to terminate her employment.[8] An arbitration was held on March 6, 2024 before John C. Alfano, NAA (the "Arbitrator"),[9] who rendered his "Opinion and Award" on May 31, 2024 (the "Decision").[10] In his Decision, the Arbitrator upheld the grievance, finding that the District did not have just cause to suspend the Employee without pay with the intent to terminate her employment. Accordingly, he directed that (1) the Employee is reinstated

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[6] *Id.*, ¶ 3 and Exh. A, Section 1.01.
[7] A copy of the CBA is attached to the Petition as Exhibit A.
[8] Petition, ¶¶ 4-6.
[9] *Id.*, ¶ 7. The District charged the Employee with violating three policies, pertaining to harassment of students, harassment of staff, and inappropriate/unprofessional behavior. Decision, Petition Exh. B, at 4-5 (quoting Board Exh. 3 (letter of January 3, 2023 summarizing the Employee's *Loudermill* hearing before the Board of the District on December 19, 2022). The District also highlighted prior instances in which the District disciplined the Employee, including (1) a letter of reprimand issued on October 2, 2008 (unprofessional behavior and negative interactions with staff), (2) a letter of reprimand issued on November 18, 2008 (unprofessional behavior, negative interactions with staff, and insubordination), and (3) a letter of reprimand issued on September 26, 2013 (not following established schedule, not delivering services to students), (4) an unsatisfactory evaluation on November 11, 2013 (which included an improvement plan relating to following the established schedule and interactions with colleagues), (5) a one day suspension on January 17, 2014 for insubordination, (6) a three day suspension (later reduced to a warning) for unprofessional conduct, (7) an unsatisfactory evaluation on June 13, 2014 (pertaining to unprofessional and insubordinate behavior), (8) a School Board hearing and subsequent dismissal on June 25, 2014 for the foregoing (the Employee was later reinstated after arbitration), (9) a letter of reprimand for unprofessional behavior and false reports on October 26, 2015, (10) a letter of reprimand for unprofessional and inappropriate behavior toward faculty, staff, students and administration, (11) a formal written warning on April 8, 2021 for not following established schedule, and unprofessional conduct toward students and staff, (12) a letter of reprimand on May 18, 2021 for unprofessional conduct, and (13) suspension without pay on November 22, 2022 for insubordination, unprofessional conduct toward students, and failing to follow the established schedule. *Id.*, at 6-7.
[10] Petition, ¶ 8 and Exh. B. Exh. B to the Petition is a copy of the Decision.

immediately; (2) the suspension without pay is rescinded and reference to it is expunged from the Employee's personnel file; (3) the Employee shall receive back pay; (4) the Employee otherwise shall be made whole; and (5) the District is estopped from further pursuing termination of the Employee's employment.[11]

The District takes issue with the Decision. It contends that the Arbitrator failed to consider and/or misinterpreted the law regarding: (i) whether the Employee waived her due process rights conferred by Section 1127 of the Pennsylvania School Code;[12] (ii) whether the District had just cause to suspend the Employee without pay with the intent to terminate; (iii) whether the District's failure to comply with Section 1127 constitutes just cause; (iv) whether the actions of the Employee constituted a breach of the moral law, making her unfit to teach and rendering suspension appropriate under the circumstances; and (v) whether the Arbitrator had jurisdiction to estop the District from further pursuing termination of the Employee.[13] The District argues (1) that the Decision (a) "manifestly disregarded" the terms of the CBA, (b) was arbitrary and capricious, (c) does not draw its essence from the CBA, (d) was not rationally derived from the CBA, and (e) is not consistent with the case law of the Commonwealth and (2) that the Arbitrator did not have jurisdiction to estop the District from further pursuing the Employee's termination.[14]

In opposition, the Association maintains (i) that the Arbitrator accurately considered and applied the School Code and associated case law: (ii) that the District did not raise the issue of the Employees waiver of her due process rights at

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[11] Decision, Petition Exh. B, at 21.
[12] 24 P.S. § 11-1127 (setting for the procedure under the School Code for termination of a professional employee). The "School Code" is the "Public School Code of 1949," which is codified at 24 P.S. §§ 1-101, *et seq.*
[13] *Id.*, ¶ 9.
[14] *Id.*, ¶ 10.

arbitration, thereby waiving the same; (iii) that the Arbitrator's award was well-reasoned based upon the evidence adduced at the arbitration; (iv) that the Decision draws its essence from the CBA; (v) that the Decision is rationally derived from the Agreement and entirely consistent with the laws of this Commonwealth as applied by courts and arbitrators; and (vi) that the Arbitrator did possess jurisdiction to estop the District from continuing to take adverse employment action against the Employee based upon the gross violations of her due process rights.[15]

II. LAW AND ANALYSIS.

A. Standard of review.

The standard of review for a grievance arbitration award is the "essence test," which is met when the arbitration award draws its essence from the CBA.[16] Pursuant to the essence test,

> a reviewing court will conduct a two-prong analysis. First, the court shall 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.[17]

The arbitrator's award should "be respected by the judiciary if 'the interpretation can in any rational way be derived from the agreement, viewed in light of its language, its

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[15] Response, ¶¶ 9-10.

[16] *Shamokin Area Sch. Dist. v. AFSCME Dist. Council 86*, 20 A.3d 579, 581 (Pa. Commw. 2011) (citations omitted).

[17] *State System of Higher Educ. (Cheyney University) v. State College University Professional Ass'n (PSEA-NEA)*, 743 A.2d 405, 413 (Pa. 2004). "An arbitrator's findings of fact are not reviewable on appeal, 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. A reviewing court may only vacate an award when it is indisputably without foundation or fails to logically flow from the agreement." *Coatesville Area School Dist. v. Coatesville Area Teachers' Ass'n/Pennsylvania State Educ. Ass'n*, 978 A.2d 413, 415 n.2 (Pa. Commw. 2009) (citations omitted).

context, and any other indicia of the parties' intention.'"[18] However, "[an arbitrator's] power is not limitless. An award that changes the language of a CBA or that adds new or additional provisions to the agreement fails the essence test."[19] "[W]here the arbitrator's words exhibit an infidelity to the agreement, courts have no choice but to refuse enforcement of the award."[20]

B. Is the issue within the terms of the CBA?

The issue before the Arbitrator was whether the District properly disciplined the Employee, a member of the Association. The CBA reserves to the District certain management rights, such as the right to hire, discipline and terminate employees,[21] while preserving some rights for the employees relating to job security, job progression, and just cause as a requirement for discipline or termination.[22] Accordingly, the issue of employee discipline was within the terms of the CBA and was properly before the arbitrator. The District does not appear to dispute this.

C. Is the arbitrator's interpretation rationally derived from the CBA?

1. Rescission of Employee's suspension and reinstatement of the Employee with back pay.

The crux of the Arbitrator's award is that the District violated the Employee's due process rights by its failure to follow the procedures outlined in Section 1127 of the School Code. As a result of that deprivation of due process, the Arbitrator found that the Employee's discipline was without just cause and ordered that her suspension without pay is rescinded and that she is entitled to reinstatement with

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[18] *Community College of Beaver Cnty. v. Community College of Beaver Cnty., Soc. of the Faculty (PSEA/NEA)*, 375 A.2d 1267, 1275 (Pa. 1977) (quoting *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969)).
[19] *Pennsylvania State System of Higher Educ., Lock Haven Univ. v. Ass'n of Pennsylvania State College and Univ. Faculties*, 193 A.3d 486, 496 (Pa. Commw. 2018).
[20] *Cheyney University, supra*, 743 A.2d at 422.
[21] CBA, Art. IV, §§ 4.01, 4.04, 4.05.
[22] CBA, Art. XV, §§ 15.06, 15.08.

back pay. He further found that the District does not have authority under law and just cause, primarily as a result of the passage of time, to cure the due process defects; as such, he further ordered that the District is "estopped from further pursuing the termination of [the Employee's] employment."[23]

The CBA contains a statutory savings clause that, *inter alia*, specifically reserves to members of the bargaining unit all rights given them under the School Code.[24] Section 1127 of the School Code provides, among other things, that, before any professional school employee with tenure can be dismissed from her job, the board of school directors must present her with a detailed written statement of the charges upon which her proposed dismissal is based and shall conduct a hearing. The notice must be signed by the president and attested by the secretary of the board and forwarded by registered mail to the employee setting forth the time and place when and where she will be given an opportunity to be heard either in person or by counsel concerning the charges.[25] Section 1127 falls within the statutory savings clause of the CBA, and the parties do not dispute that the District did not follow its procedure in this instance.

The District contends, however, that it is relieved from following Section 1127 by virtue of the Superintendent's letter to the Employee suspending her without pay with the intent to terminate and offering her the option to proceed either before the school board or *via* grievance arbitration. Since she elected to proceed to

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[23] Decision, at 20-21.
[24] CBA, Art. II, § 2.02 ("Nothing contained herein shall be construed to deny or restrict to any member of the bargaining unit such rights as the bargaining unit member may have under the Public School Code of 1949, as amended or the Public Employee Relations Act, Act 195 of 1970, or Act 88 of 1992, or other applicable laws and regulations").
[25] 24 P.S. § 11-1127.

arbitration, the District contends that it need not have followed Section 1127. The Association contends that Section 1127 is mandatory.

Our courts have held that the statutory procedures for dismissal of a tenured teacher set forth in Section 1127 of the School Code must be strictly followed and that any material deviation from these procedures is not permissible and constitutes a denial of due process.[26] Because the procedures preceding termination of a school employee fall within the scope of a grievance concerning employee discipline, the Arbitrator had the authority to compel the District to comply with Section 1127 prior to disciplining the Employee.[27] As such, the arbitrator could properly determine that the District's failure to follow Section 1127 deprived the Employee of due process and, thereafter, order that her suspension be rescinded and that she be reinstated with back pay.

Accordingly, the portion of the Decision rescinding the Employee's suspension and reinstating her with back pay is rationally derived from the CBA, and the Motion is DENIED to the extent it seeks to vacate this portion of the Decision.

2. *Estoppel of the District from further pursuing Employee's termination.*

The CBA specifically reserves the District's rights to hire, fire and otherwise discipline its employees,[28] although those rights are limited by applicable law and other provisions of the CBA. The Arbitrator found that the District violated the Employee's due process rights by improperly terminating her in violation of Section

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[26] *Vladimirsky v. Sch. Dist. of Philadelphia*, 144 A.3d 986, 994-98 (Pa. Commw. 2016).
[27] *New Kensington-Arnold Sch. Dist. v. New Kensington-Arnold Educ. Ass'n*, 140 A.3d 726 (Pa. Commw. 2016) (rejecting the school district's argument that the procedures of Section 1127 became irrelevant when a teacher suspended with intent to terminate decided to pursue grievance arbitration, where the CBA contained a statutory savings clause and a provision that precluded employee discipline without just cause).
[28] CBA, Art. IV.

1127 of the School Code and ordered that, as a consequence, the District is estopped from further pursuing the Employee's termination. As the District points out, however, the proper remedy for violation of procedural due process is to cure the defect by having a "do over."[29]

> When a governmental body fails to give the required due process or statutory hearing, the remedy is not to dismiss the charges against the individual but to rescind the action and then give the employee any due hearing and statutory hearings required.[30]

Instead of ordering that the Employee be given due process, however, the Arbitrator estopped the District from further pursuing her termination. In so doing, he rendered a decision that is not rationally derived from the CBA. This portion of his Decision "indisputably and genuinely is without foundation in, or fails to logically flow from, the [CBA]," in that the District retains the right to hire, fire and discipline its employees, provided that it does so according to law and the CBA.

The Arbitrator found that the Employee will be prejudiced by the delay since her suspension and, on that basis, estopped the District from any further attempt to pursue termination of her employment. Mere delay does not cause prejudice,[31] however, particularly where, as here, the employee will receive back pay from the date of her suspension until the District properly pursues her termination, if it chooses to do so. As the Commonwealth Court directed in similar circumstances:

> **Due to the District's violation of Section 1127 of the School Code, and its consequential denial of [the employee's] due process**

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[29] District's Brief, at 8-9.

[30] *New Kensington-Arnold Sch. Dist.*, *supra*, 140 A.3d at 732 (quoting *Flickinger v. Lebanon Sch. Dist.*, 898 A.2d 62, 66 (Pa. Commw.2006) (citations omitted)).

[31] *Vladimirsky*, *supra*, 144 A.3d at 998; *see also Williams v. Joint Operating Comm. of the Clearfield Cnty. Voc.-Tech. Sch.*, 824 A.2d 1233, 1238-39 (Pa. Commw. 2003) (holding that a delay of almost two years between hearing before hearing officer and Secretary of Education's decision affirming termination of employment of school district professional employee did not violate due process where employee failed to show prejudice caused by the delay); *Ritter v. Cohen*, 797 F.2d 119, 124 (3d Cir. 1986) (holding that a delay of 20 months for holding a hearing on termination of physician's participation in medicaid program did not alone violate procedural due process where physician was not indigent).

> **rights, this Court is duty-bound to reverse the Acting Secretary's** November 19, 2014 order discharging [the employee] as of March 15, 2012. Accordingly, **[the employee] is reinstated to his position as a professional employee until the District properly terminates his employment in accordance with the School Code** and shall be entitled to the amount of compensation he is due as a result of his dismissal.[32]

Accordingly, the Motion is GRANTED, and the Arbitrator's Decision is VACATED, to the extent that the Decision estops the District from further pursuing termination of the Employee's employment. Should the District further pursue the Employee's termination, she may raise the issue of prejudice in that proceeding, provided, however, that she bears "the burden of proving that some harm or prejudice to ... her interests was caused by the delay."[33]

III. CONCLUSION AND ORDER.

For the reasons explained at length above, the District's Petition to Vacate and/or Modify Arbitration Award is GRANTED in part and DENIED in part. The Arbitration Award is VACATED to the extent that it estops the District from further pursuing termination of Dr. Jennifer McKee. Otherwise, the Arbitration Award is affirmed, including that portion of the award rescinding Dr. McKee's suspension and reinstating her with back pay, until such time, if any, as the District properly acts to discipline her.

IT IS SO ORDERED.

BY THE COURT,

Eric R. Linhardt, Judge

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[32] *Id.*, at 1003-04 (emphasis in original).

[33] *Id.*, at 998 (quoting *Kinniry v. Abington Sch. Dist.*, 673 A.2d 429, 433 (Pa. Commw.1996). *See also Com., Dep't of Transp., Bureau of Driver Licensing v. Middaugh* (244 A.3d 426, 435-39 (Pa. 2023) (holding that a driver's license suspension imposed after an unreasonably long delay can violate driver's due process rights; however, the driver must "demonstrate ... she suffered prejudice from the delay").

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