

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL DIVISION

PANTHER VALLEY SCHOOL DISTRICT, :
Appellant :
 :
v. : NO. 09-0206
 :
PANTHER VALLEY EDUCATION :
ASSOCIATION and ROBERT JAY THOMAS, :
Appellees :

Robert T. Yurchak, Esquire Counsel for Appellant
A. Martin Herring, Esquire Counsel for Appellee

Civil Law - Public School Code - Grievance Arbitration -
Temporary Professional Employee - Non-renewal of
Employment Contract - Right to Recall - Remedy

1. To be enforceable under the Public School Code, an arbitrator's award must both involve an issue encompassed by the collective bargaining agreement and rationally draw its essence from that agreement.
2. As a temporary professional employee hired to teach in the School District's alternative education program, the grievant was within the bargaining unit as defined in the Collective Bargaining Agreement and entitled to invoke its protections.
3. Under both Section 11-1108 of the Public School Code and the Collective Bargaining Agreement, with the exception of tenure, a temporary professional employee is to be viewed the same as a full-time employee, with all of the rights and privileges which accompany full-time employment, including the right to file a grievance.
4. Under the parties' Collective Bargaining Agreement, a temporary professional employee who has been furloughed, not terminated, as concluded by the arbitrator appointed in this case, is entitled to have his name placed on the District's active recall list and to be recalled for any future vacancies in accordance with the provisions of the Collective Bargaining Agreement.
5. The District violated the Collective Bargaining Agreement by failing to place the grievant's name on the active

recall list and recalling him to an open position for which he was qualified.

6. A temporary professional employee who should have been recalled, but wasn't, is entitled to be reinstated, with back pay and all other emoluments for the period for which he should have been recalled, less monies earned by him during such period.

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Robert T. Yurchak, Esquire	Counsel for Appellant
A. Martin Herring, Esquire	Counsel for Appellee

MEMORANDUM OPINION

Nanovic, P.J. - December 11, 2009

The Panther Valley School District ("District") appeals from an arbitrator's decision which awarded the grievant, a non-tenured teacher, the right to be recalled and reinstated to another teaching position after the program in which he was teaching was terminated by the District.

FACTUAL AND PROCEDURAL BACKGROUND¹

¹ Our statement of the facts relies upon the undisputed facts as admitted by the parties, the facts as found and stated by the Arbitrator in his Opinion

For almost two years, between November 12, 2004, and August 10, 2006, Robert J. Thomas was employed by the District as a sixth grade teacher in its alternative education program. Pursuant to his employment contract, Thomas' status for his position was that of a temporary professional employee within the meaning of the Public School Code of 1949 ("Code"), 24 P.S. §§ 1-101 to 27-2702.² As such, for all purposes, except tenure status, he was considered to be a full-time employee, entitled to all the rights and privileges of regular full-time employees. See 24 P.S. § 11-1108(d) and Exhibit "J2" (Temporary Professional Employee's Contract, Paragraph III).

During the summer of 2006, the Panther Valley School Board ("Board") decided to discontinue the alternative education program for economic reasons - "the grant to finance it was decreasing and the District determined that it could not provide the program within the District." Arbitrator's Award, p.3. In

and Award dated December 22, 2008, and the exhibits presented and referred to by the Arbitrator in that Opinion. No stenographic record of the proceedings before the Arbitrator was prepared and we understand that the parties have agreed to the foregoing upon which to base our decision.

² Under the Code, a "temporary professional employee" is defined as "any individual who has been employed to perform, for a limited time, the duties of a newly created position or of a regular professional employee whose services have been terminated by death, resignation, suspension or removal." 24 P.S. § 11-1101. The term "professional employee" includes "those who are certificated as teachers." Id. At the time of his employment in the alternative education program, Thomas was certified as a health and physical education teacher; however, his certificate for this area of instruction was not permanent because of his lack of teaching experience. Arbitrator's Award, p.4. In contrast, a "substitute" means "any individual who has been employed to perform the duties of a regular professional employee during such period of time as the regular professional employee is absent on sabbatical leave or for other legal cause authorized and approved by the board of school directors or to perform the duties of a temporary professional employee who is absent." Id.

consequence, the then-superintendent for the District, J. Christopher West, advised Thomas, by letter dated August 11, 2006, that the Board, at its meeting held on August 10, 2006, had elected not to renew Thomas' employment contract because of the "change in status" of the District's alternative education program. Exhibit "J1A".³

On September 13, 2006, the Panther Valley Education Association ("Association") filed a grievance on behalf of Thomas over the District's failure to recall him for an open teaching position in his area of certification, health and physical education. Specifically, in describing the date and nature of the alleged violation, the grievance states:

September 7, 2006 Robert Jay Thomas was placed on Panther Valley Layoff and Recall List. Failure

³ The District's superintendent at the time of the arbitration hearing, Rosemary Porembo, testified that the true reason for the Board's decision was that Thomas' most recent performance rating was unsatisfactory. Thomas was given a satisfactory rating for both semesters of the 2004-05 year and for the first semester of the 2005-06 year. However, his rating for the second semester of the latter year, for the period between January 23, 2006, and June 9, 2006, was unsatisfactory. The evaluation for this second semester is dated August 1, 2006, and was received by Thomas that same date, nine days before the Board's meeting of August 10, 2006. Exhibit "J3".

Porembo attributed the discrepancy between the true reason for the Board's action and the reason disclosed in the superintendent's August 11, 2006, letter as being to preserve the integrity of Thomas. Notwithstanding what may have been the ulterior motive of the Board's decision, it is significant that the actual motion of the Board, as quoted verbatim in the August 11, 2006, letter, was not to dismiss Thomas because of an unsatisfactory rating but to not renew his contract because of a discontinuance of the District's alternative education program.

This is consistent with the provisions of the Code. See 24 P.S. § 11-1108(a) ("no temporary professional employe shall be dismissed unless rated unsatisfactory"). Had Thomas been dismissed, such action would be grievable. In contrast, an unsatisfactory rating of a temporary professional employee for any period except the last four months of his third or of any subsequent year of service as a temporary employee, not followed by dismissal, is incontestable. See Young v. Littlestown Area School District, 358 A.2d 120, 126 (Pa.Cmwlt. 1976), as modified by 24 P.S. § 11-1108(c) (2).

of the District to recall furloughed employee according to the PVEA contract in order of area of certification in Health and Physical Education.

Exhibit "J1A".

The grievance further identified Article X, Layoff and Recall, Sections 2 and 3 of the Collective Bargaining Agreement between the District and Association as the applicable contract provisions. The District's response to this grievance provided:

The employee's contract was not renewed by the Board of Education upon the recommendation of the Superintendent and the Solicitor. The employee was a temporary employee and was non-tenured. The employee received an unsatisfactory evaluation. These factors resulted in the termination from employment with the Panther Valley School District. The individual was granted an interview for the position in question.

Exhibit "J1A".

The matter later proceeded to mandatory arbitration in accordance with Article XIII, Grievance Procedure, Section 1, Step IV, of the Collective Bargaining Agreement. Before the Arbitrator, the District contended that Thomas was dismissed by the District as a temporary professional employee because of an unsatisfactory rating and that he failed to grieve either his unsatisfactory rating or his dismissal, and had waived the right to do so. The Arbitrator found the District misunderstood the grievance. Thomas was not grieving his unsatisfactory evaluation or his discharge as an untenured employee. Instead,

Thomas contended that after his contract was not renewed, the District placed his name on its active recall list and, when it failed to recall him to an open position for which he was qualified to teach, it violated his rights under the Collective Bargaining Agreement and the Code.

The Arbitrator accepted Thomas' position and held:

AWARD

The Grievance is sustained. The Grievant's name should be placed on the recall list. The Grievant is to be reinstated to a position he is qualified to teach in the District. In addition the Grievant shall be made whole for all wages, seniority and benefits from the date of August 11, 2006 and until the date of reinstatement. The Arbitrator will retain jurisdiction of this matter until compliance with the Award is completed.

Arbitrator's Award, p.11.

The District has appealed the Arbitrator's Award and asked that it be vacated. In its brief in support of its appeal, the District raises the following five issues⁴:

1. Where the arbitrator relied upon interpreting Section 11-1108 of the Pennsylvania School Code, 24 Pa.C.S. Section 11-1108, to determine that Robert Thomas was an "employee" and therefore eligible to pursue the grievance rights for professional employees under the collective bargaining agreement, is his decision based upon the "essence" of the collective bargaining when there are no grievance rights for temporary professional employees contained in the collective bargaining agreement?

Suggested Answer: NO

⁴ These issues are stated verbatim from the District's brief in support of its appeal.

2. Where the arbitrator relied upon interpreting Section 11-1108 of the Pa. School Code, 24 Pa. C.S. Section 11-1108, to determine that Robert Thomas was an "employee" and therefore eligible to pursue the grievance rights for professional employees under the collective bargaining agreement, did the arbitrator err as a matter of law when there are no grievance rights for temporary professional employees contained in the collective bargaining agreement?

Suggested Answer: YES

3. Whether, Robert Thomas, a Temporary Professional Employee, who had not achieved tenure status, and who was given an unsatisfactory rating for his performance as a temporary professional employee for the Spring semester of 2006 on August 1, 2006, had his contract with the Panther Valley School District "non-renewed" in accordance with the Pennsylvania Law?

Suggested Answer: YES

4. Are there any grievance rights for challenging an unsatisfactory rating or a dismissal for a Temporary Professional Employee either under the law of Pennsylvania or under the Collective Bargaining Agreement?

Suggested Answer: NO

5. Whether the remedy fashioned by the arbitrator in ordering the Panther Valley School District to reinstate Robert Thomas, the grievant, to a full-time teaching position, despite an unsatisfactory evaluation and despite the non-renewal of his contract with the school district, is outside the contract and in excess of any remedy to which Thomas would be entitled?

Suggested Answer: YES

For the reasons which follow, these issues are without merit.

DISCUSSION

Arbitrability of Dispute

In reviewing the propriety of a grievance arbitration award, we apply a two-pronged standard of review:

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.

Westmoreland Intermediate Unit #7 v. Westmoreland Intermediate

Unit #7 Classroom Assistants Educational Support Personnel

Association, 939 A.2d 855, 863 (Pa. 2007). The first prong

deals with whether the dispute is arbitrable, that is, whether

the terms of the collective bargaining agreement encompass the

subject matter of the dispute; the second is whether the

arbitrator's interpretation and application of the collective

bargaining agreement to the dispute rationally draws its essence

from the 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." Id. An arbitrator's award

must be respected by the judiciary which is barred from

substituting its judgment for that of the arbitrator if the

arbitrator's "interpretation can in any rational way be derived

from the agreement, viewed in light of its language, its

context, and other indicia of the parties' intention." Id. at

862.⁵

⁵ Under this standard, "a court reviewing an arbitration award shall modify or correct the award where the award is contrary to law and is such that had it been a verdict of a jury, the court would have entered a different judgment

For all intents and purposes, the District's first two issues are identical. In each the District questions Thomas' right to file a grievance.

Whether the dispute between [furloughed professional employees] and [the School District] is in fact a grievance that can be arbitrated under the collective bargaining agreement must, at least initially, be left to an arbitrator to decide. We have consistently held that the question of the scope of the grievance arbitration procedure is for the arbitrator, at least in the first instance. Thus, pursuant to the [Public Employee Relations Act], all questions of whether a matter is arbitrable must be decided in the first instance by an arbitrator, not a trial court.

Davis v. Chester Upland School District, 786 A.2d 186, 188-89 (Pa. 2001) (citation omitted, emphasis supplied).

The Collective Bargaining Agreement provides that the Association is the bargaining agent "for those Elementary, Middle and High School Teachers, Librarians, Guidance Counselors and Nurses, full and regular part-time para professionals, health room aides, nurse assistants, hereinafter called the Bargaining Unit, and for the employees properly included in collective bargaining for public employees." Exhibit "J1" (Collective Bargaining Agreement, Article II, Recognition, p.3). As a temporary professional employee hired to teach in the District's alternative education program, Thomas is clearly

or judgment notwithstanding the verdict. 42 Pa.C.S.A. § 7302(d)(2)." Upper Merion Area School District v. Upper Merion Area Education Association, 555 A.2d 292, 293 n.4 (Pa.Cmwlth. 1989).

within the Bargaining Unit. Cf. Phillippi v. School District of Springfield Township, 367 A.2d 1133, 1140 (Pa.Cmwlth. 1977) (although the Code contains distinct definitions for professional employees and temporary professional employees, 24 P.S. § 11-1101, when the Legislature intended that particular provisions of Article XI apply to both professional and temporary professional employees, it so stated, or used the term "teacher"). The Collective Bargaining Agreement addresses recall rights in Article X and further provides that any grievance arising out of the interpretation of the terms of the Collective Bargaining Agreement is subject to a four-step grievance process culminating in arbitration. Exhibit "J1" (Collective Bargaining Agreement, Article XIII, Grievance Procedure, Section 1, p.29); see also Danville Area School District v. Danville Area Education Association, 754 A.2d 1255, 1262 (Pa. 2000) (an arbitrator's determination which addresses an issue within the terms of a collective bargaining agreement and resolves the issue by applying the terms of the agreement, is rationally derived from the agreement); Appeal of Chester Upland School District, 423 A.2d 437, 440 (Pa.Cmwlth. 1980) (noting that "[i]n the absence of any express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail").

Both the Code as well as Thomas' employment contract provide that a temporary professional employee such as Thomas "shall for all purposes, except tenure status, be viewed in law as full-time employees, and shall enjoy all the rights and privileges of regular full-time employees." 24 P.S. § 11-1108(d); Exhibit "J2" (Temporary Professional Employee's Contract, Paragraph III). Under these circumstances we have no difficulty in finding that Thomas is a member of the bargaining unit covered by the Collective Bargaining Agreement, and that the subject of the dispute, a teacher's right to be recalled, is encompassed within Article X of this Agreement. Exhibit "J1" (Collective Bargaining Agreement, Article X, Layoff and Recall, pp.24-26).⁶

⁶ Sections 1 and 2 of Article X state the following:

Section 1

The Pennsylvania School Code includes certain job security provisions, certification, and other regulatory provisions associated with various classes of employees. The parties hereby aver that such provisions of the School Code represent their complete agreement and that said provisions shall govern the manner in which the job security, job progression, and reduction in force practices shall be effected with respect to members of the Bargaining Unit, except suspensions and furloughs which shall be on the basis of district wide seniority in the field of one's certification and if a reduction in staff becomes necessary, notice of such reduction will be made to the teacher and the Panther Valley Education Association by July 1 for the succeeding school year. In all cases, the Board shall attempt by the process of attrition to avoid employee furloughs.

Section 2

Whenever the Board deems it necessary to reduce the number of teaching staff due to declining enrollments teachers shall be furloughed in the reverse order of seniority in their areas of certification. Furloughed teachers holding professional certification shall be placed on a recall list for any future vacancies in their areas of certification.

Should a vacancy occur, the district will offer the position to teachers on the recall list in writing. The teacher must notify the

Issues in Dispute

In the District's third issue, the District appears to believe that a factual dispute exists as to whether Thomas' contract was "non-renewed" in accordance with Pennsylvania law. In issue four, the District contends that Thomas has no grievance rights to challenge an unsatisfactory rating or a dismissal due to his status as a temporary professional employee.

We believe this third issue, as stated by the District, is unfounded. As an underlying fact we believe all parties are in agreement that Thomas' employment contract was not renewed because the District's alternative education program was eliminated. Thomas does not dispute that the alternative education program was properly curtailed.⁷ Nor does he argue that the non-renewal of his contract is contrary to law. We do not read the Arbitrator's opinion otherwise. What is in dispute is the legal consequences of that non-renewal.⁸

district within ten (10) calendar days of acceptance of the position.
Failure to do so will result in removal from the recall list.

In effect, Section 1 incorporates by reference the job security provisions, certification, and other regulatory provisions associated with classes of employees of the Code into the Collective Bargaining Agreement. Cf. Southern Tioga Education Association v. Southern Tioga School District, 668 A.2d 260, 262-63 (Pa.Cmwlt. 1995) (discussing a similar clause), *appeal denied*, 676 A.2d 1203 (Pa. 1996).

⁷ A presumption of regularity accompanies decisions of the School Board. See Young, 358 A.2d at 126; see also, 24 P.S. § 11-1124(2) (Public School Code provision authorizing suspension of tenured professional employees based on curtailment of an educational program).

⁸ Before the Arbitrator, the District argued that Thomas was dismissed due to his unsatisfactory rating on August 1, 2006. As previously noted, the

As to the fourth issue presented by the District, it is irrelevant: Thomas has not challenged his unsatisfactory rating and he was not dismissed as a temporary professional employee. See footnote 3, *supra*, citing Young v. Littlestown Area School District, 358 A.2d 120, 126 (Pa.Cmwlth. 1976). As stated by the Arbitrator:

It is evident from the recitation of the violation grieved by [Thomas] that he believed that his name was on the recall list and that the failure of the District to recall him was a violation of his rights under the Contract and the Code. He was not grieving his unsatisfactory evaluation. He was not grieving his discharge as a non-tenured employee.

Arbitrator's Award, pp.6-7. Nor has the Arbitrator decided these issues.

To the contrary, Thomas claims that following the non-renewal of his contract, his name was to be placed on the District's active recall list and the District failed to recall him contrary to his rights under the Collective Bargaining Agreement. It is this issue which the Arbitrator decided, accepting Thomas' premise that he was entitled to have his name placed on the active recall list, then finding that because

District never formally dismissed Thomas because of an unsatisfactory rating. See footnote 3, *supra*. Instead, his contract was not renewed. Whether this non-renewal entitled Thomas to recall rights or whether the District's School Board by its conduct was bound to placing Thomas on its active recall list became the focal point of the Arbitrator's decision finding that the District violated the Collective Bargaining Agreement in not recalling Thomas to employment.

Thomas was not recalled to an open position for which he was qualified, the District violated the Agreement.

Specifically, the Arbitrator stated:

The Grievant testified that both Superintendent West and Karen Heffelfinger, President of the Union, said that he was to be put on the recall list of teachers. The District never listed him. Regardless of this, Article X, Section 2 of the Contract provides that furloughed teachers are to be placed on the recall list. The District erred in not placing his name on the list and in not recalling him to employment.

Arbitrator's Award, p.11.⁹ Whether the District was bound by the conduct of its Board and former superintendent and whether

⁹ According to the Arbitrator, Thomas testified that on August 2, 2006, prior to the Board's decision not to renew his contract, the District's then-superintendent of schools, J. Christopher West, advised him that his contract would not be renewed and, in response to a question posed by Thomas, further stated that "his name would have to be added to the active recall list." Arbitrator's Award, p.4. Thomas also testified, according to the Arbitrator's Opinion, that Karen Heffelfinger, President of the Union, told him that "at the Board of Directors' meeting it was approved that his name be placed on the active recall list." Arbitrator's Award, p.4.

As to whether the non-renewal of Thomas' contract constituted or was the equivalent of a furlough, the Arbitrator reasoned as follows:

The Board did not dismiss [Thomas] for unsatisfactory rating . . . or for no stated reason as a non-tenured teacher. . . . It [the Board] failed to renew a contract because of a terminated program. Its action resulted in the reduction in "the number of teaching staff due to declining enrollment." (Article X of the Contract). [Thomas] became a furloughed employee.

Arbitrator's Award, p.10.

In light of the Arbitrator's findings and reasoning, and with no other record before us, under our limited scope of review we have no authority to find that Thomas was not entitled to recall. This conclusion, based on evidence heard and findings made by the Arbitrator, draws its essence from the Collective Bargaining Agreement, specifically Article X, Section 2. The Arbitrator's interpretation is rationally derived from the Agreement, "viewed in light of its language, its context, and any other indicia of the parties' intention." Danville Area School District v. Danville Area Education Association, 754 A.2d 1255, 1260 (Pa. 2000). Cf. Upper Merion Area School District, 555 A.2d at 292, 294 (holding that notwithstanding a claim that Section 1125.1 of the Code does not grant continuing seniority to a temporary professional employee during periods of "suspension," where the employee's contract, as here, specifically provided that he "would be viewed for all purposes, except tenure status, as a full-time employee and would enjoy all the rights and privileges of regular full-time employees" and where the

Thomas was furloughed,¹⁰ the basis for the Arbitrator's penultimate conclusion that Thomas was entitled to have his name placed on the District's recall list, are both valid issues, but they have not been raised by the District. Accordingly, they are waived. See Danville Area School District, 754 A.2d at 1259-60 (holding that a court may not decide a case on an issue not raised and preserved by the parties "even if the disposition [below] was fundamentally wrong").

Remedy

In its discussion of its fifth issue, the District proceeds from the premise that a temporary professional employee has no right to be recalled when his contract is not renewed based on declining enrollment or an unsatisfactory rating. Because this premise is contrary to the facts, as determined by the Arbitrator, the District's starting point is misplaced.

president of the school district wrote letters to the employee advising him that his seniority would continue to accrue during the periods of suspension, an arbitrator's determination that nothing contained in the Code prohibited the accumulation of seniority by a temporary professional employee and consequent award upholding the previous grant of seniority by the school board rationally derived its essence from the terms of the parties' agreement and was not violative of or inconsistent with Section 1125.1 of the Code). Consequently, under the unusual procedural posture of this case, Thomas, a temporary professional employee whose contract was not renewed, is entitled to reinstatement rights as provided under Article X, Section 2 of the Collective Bargaining Agreement.

¹⁰ As appears in footnote 9, *supra*, the Arbitrator equates the non-renewal of a non-tenured teacher's employment contract with the suspension or furloughing of an employee because of declining enrollment. The latter is in the nature of an impermanent separation. See Filoon v. Middle Bucks Area Vocational-Technical School, 634 A.2d 726, 729 (Pa.Cmwlt. 1993), *appeal denied*, 651 A.2d 544 (Pa. 1994). In contrast, the non-renewal or termination of an employment contract signifies greater permanence.

The Arbitrator found from the facts that Thomas was entitled to have his name placed on the recall list and to be recalled. Therefore, the more appropriate question is what relief an employee who should have been recalled is entitled to when his name is not placed on the recall list. When this occurs, the employee is entitled to be recalled and is also entitled to back pay and all other financial emoluments for the period for which he should have been recalled, less monies earned by him during that period. See Colonial Education Association v. Colonial School District, 644 A.2d 211, 212 (Pa.Cmwlth. 1994). To the extent the Arbitrator's Award differs from this standard, it will be modified.

CONCLUSION

In accordance with the foregoing, we find that the findings and conclusions of the Arbitrator are binding upon the District and will be affirmed, with the Award modified as indicated below.

BY THE COURT:

P.J.

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ORDER OF COURT

AND NOW, this 11th day of December, 2009, upon consideration of the Petition for Review and Application to Vacate the Arbitrator's Award filed by the Panther Valley School District, the response of the Panther Valley Education Association and Robert Jay Thomas, the briefs of the parties, and after argument thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the School District's petition is denied and the Arbitrator's Opinion and Award is affirmed with the qualification that the award is hereby modified to make clear that any wages, seniority and benefits the Grievant is due under the Arbitrator's Award shall be reduced by any monies earned by him during the period between August 11, 2006 and his date of reinstatement.

BY THE COURT:

P. J.