

How Can You Fire an Employee and Make Sure They Stay Fired?

Appealing a grievance arbitration award reinstating an employee who engaged in misconduct.

By: Michael A. Palombo, Esquire

Public employers in Pennsylvania have often expressed outrage at the level of deference appellate courts afford grievance arbitration decisions, particularly those reinstating union employees fired for egregious conduct. Generally courts will enforce an arbitrator's ruling so long as the award "draws its essence" from the collective bargaining agreement. This narrow scope of review requires the court to determine first whether the issue, as properly defined, is within the terms of the collective bargaining agreement. In matters relating to discipline and discharge, the agreement almost always includes a provision requiring "just cause" for the action taken. Next, the court determines whether the arbitrator's award can rationally be derived from the collective bargaining agreement language. If so, the award is upheld. Despite this long-standing policy of deference to the awards of arbitrators, the Pennsylvania Supreme Court has consistently recognized an exception to the rule favoring finality of arbitration awards. Although this exception has been labeled differently by the courts, the rationale is the same – there are just some things for which an employee must be fired even when an arbitrator has ruled otherwise.

As early as 1983, the Pennsylvania Supreme Court reversed an arbitration award reinstating an employee employed by the Philadelphia Housing Authority who was discharged for using his position to defraud an elderly resident of the property where he was assigned to work. Although the arbitrator concluded that the employee had indeed defrauded the tenant, he ordered reinstatement converting the employee's termination to an eight-month suspension without pay. The Pennsylvania Supreme Court concluded that the Housing Authority did not and could not have bargained away its absolute responsibility to ensure the integrity of its housing security force. Philadelphia Housing Authority v. Union of Security Officers #1, 455 A.2d 625 (Pa. 1983).

The Pennsylvania Supreme Court further confirmed this narrow exception to the general rule of deference to arbitration awards in cases decided in 1988 and 1989. First, in County of Centre v. Musser, 548 A.2d 1194 (Pa. 1988), the Pennsylvania Supreme Court overturned an arbitration award reinstating corrections officers who had been terminated under a "just cause" provision in the parties' collective bargaining agreement for physical abuse of a prisoner. Once again, the arbitrator had found that the employees committed the acts alleged, that the employees' conduct constituted a clear violation of applicable professional standards, and that the employees probably also violated state regulations. Despite these findings, the arbitrator determined that just cause for discharge did not exist and instead reinstated the employees. Once again, the Pennsylvania Supreme Court held that the decision to reinstate corrections officers found to have physically abused inmates could not rationally be derived from a just cause provision in a collective bargaining agreement. The Court noted that the prison's statutory responsibility to provide for inmate safety would be impaired by an interpretation of the collective bargaining agreement which precluded the termination of employees for physical abuse of those very inmates.

Subsequently, in Commonwealth, Pennsylvania Liquor Control Board v. Independent State Stores Union (ISSU), 553 A.2d 948 (Pa. 1989), the Pennsylvania Supreme Court refused to affirm reinstatement of an employee who had falsified state store business records and misappropriated funds. The arbitrator in that case found that the employee had engaged in misconduct as alleged, but decided that termination was too severe a penalty. Upon review, the Pennsylvania Supreme Court confirmed that a public employer “must be able to maintain honesty and integrity” among employees who have access to its funds and merchandise. The Court further confirmed that the authority to discharge an employee who is proven to have stolen property is presumptively retained by management. The Court concluded that “[A] governmental agency does not have the freedom of a private enterprise to relinquish powers inherently essential to the proper discharge of its function.” Accordingly, the decision of the arbitrator was reversed.

In 1999, the essence test, and particularly its application to cases involving discharge of employees for serious misconduct, was called into question. In State System of Higher Education (Cheyney University) v. State College University Professional Association (PSEA-NEA), 743 A.2d 405 (Pa. 1999), a divided Pennsylvania Supreme Court appeared to have expanded the authority of an arbitrator to interpret “just cause” provisions of collective bargaining agreements. The Court appeared to favor granting arbitrators greater authority to consider mitigating factors, and to revise disciplinary penalties imposed by the public employer. The court’s decision in Cheyney University initially seemed to substantially limit a public employer’s ability to overturn arbitration awards reinstating terminated employees. However, the court has recently decided two additional cases which, when read together, do provide some guidance to employers and arbitrators alike concerning a public employer’s inherent right to fire employees for certain types of misconduct.

In City of Easton vs. AFSCME, Local 447, 756 A.2d 1107 (Pa. 2000), a city employee was discharged for receiving pay for hours not worked, falsifying records and neglecting his duties. It was discovered that he employee, who was also employed by a private security company, had received pay for the same hours from both the City of Easton and his private employer. The employee was discharged and filed for arbitration asserting that his discharge was without cause under the applicable collective bargaining agreement. An arbitration panel reinstated the employee, citing the City’s failure to conclusively establish that it was the City (as opposed to the private security company) that was the true victim of the theft.

On appeal, the Supreme Court reaffirmed its 1989 ruling in ISSU, *supra*, and noted that the “City did not and could not relinquish those powers which were essential to its ability to properly discharge its various functions, including the power to terminate those employees who steal from the City itself, or steal from others while working for the City.”

In 2004, however, the Pennsylvania Supreme Court refused to reverse an arbitration award reinstating an employee who was terminated for off-duty misconduct, including operation of an official vehicle while intoxicated. In Office of the Attorney General (OAG) v. Council 13, American Federation of State, County, Municipal Employees, AFL-CIO, 844 A.2d 1217 (Pa. 2004), the court found that it was entirely rational for the arbitrator to rely on mitigating circumstances in awarding reinstatement. The court distinguished the holding in this case from its prior decisions in ISSU, and City of Easton. Focusing primarily on the off-duty nature of the

misconduct, the Pennsylvania Supreme Court affirmed reinstatement and refused to find that the arbitration award required the governmental employer to bargain away control over its core powers. However, the court in OAG, citing its prior decisions in Philadelphia Housing, ISSU, and Musser, also expressly confirmed that the “core functions” analysis is still appropriate.

In the wake of the Supreme Court’s holding in OAG, some confusion arose regarding the authority of arbitrators to reinstate public employees who had been discharged under the just cause provision of a CBA. Just how far an arbitrator could go in overturning discipline was unclear. Two subsequent cases decided by the Commonwealth Court on the same day, have shed additional light on what this case law means for public employers.

First, in City of Pittsburgh v. Pittsburgh Joint Collective Bargaining Committee, 852 A.2d 452 (Pa. Commw. 2004), the Commonwealth Court was called upon to review an arbitrator’s award which reinstated a City employee who, while traveling with co-workers on a work assignment, asked his co-workers to drop him off. The employee then proceeded to steal three DVDs from a local store, and he did not return to work that day or the next. The employee was ultimately discharged based upon this conduct, pursuant to the “just cause” provision in the parties’ CBA. The Court began its review of the Award by employing the two-pronged analysis under the “essence test.” Because the parties and the Court agreed that the “just cause” provision of the agreement satisfied the first prong, the only issue was whether the reinstatement was rationally derived from the terms of the CBA. In order to resolve this issue, the Court conducted a full review of the cases discussed above to determine “whether, as a matter of law, the City always retains the unfettered right to fire an employee who commits a crime during work hours.” Id.

First, the Court recognized that Philadelphia Housing Authority, Musser, and ISSU were still viable for the proposition that “a public employer retains absolute authority to fire an employee for conduct that undermines the employer’s discharge of its public function and duties.” The Court in City of Pittsburgh, also read OAG, as a judicial reaffirmation of the continued vitality of the same principles, just with a different result. The Court distinguished OAG from the cases in which reinstatement was overturned because in OAG, the misconduct was off-duty, and was neither directed toward the public employer, nor toward someone to whom the employer, as an essential element of its governmental function, owed a duty of care. As such, there was no legal incapacity on the part of the public employer in OAG to bargain with respect to the circumstances justifying the termination.

The Court in City of Pittsburgh ultimately found that the misconduct of the City of Pittsburgh employee was analogous to the misconduct of the employee in OAG, because the employee did not commit a crime directly against his employer as in ISSU, nor did he commit a crime against a third party while working, as in City of Easton (the court concluded that the employee had effectively removed himself from the workplace when he asked to be dropped off and failed to return to work). Furthermore, his theft did not impact a third party whom his employer was charged with protecting, nor did it otherwise impair the city’s ability to perform its essential functions. As such, the reinstatement was upheld. More importantly, however, the continuing validity of a public employer’s right to discharge an employee whose misconduct strikes at the employer’s essential governmental functions was reaffirmed.

In another case decided by the Commonwealth Court on the same day, Port Authority of Allegheny County v. Amalgamated Transit Union Local 85, 853 A.2d 1090 (Pa. Commw. 2004), the Court applied the very same principles discussed above in order to overturn an arbitrator's reinstatement of a male transit operator who was discharged for inappropriately touching a female passenger. The Court held that under City of Easton, *supra*, the Port Authority lacked capacity to contract away the unfettered right to discharge an employee whose on-the-job misconduct impaired Port Authority's ability to provide safe public transportation. As it did in City of Pittsburgh, *supra*, the Court characterized OAG as confirming the continued vitality of the principle that a government employer cannot bargain away its power to fire for misconduct bearing directly upon the performance of its public function. The Pennsylvania Supreme Court then refused to hear the union's appeal from this decision.

Shortly after the Commonwealth Court's decisions were filed in Port Authority and City of Pittsburgh, the Pennsylvania Supreme Court decided Greene County v. District 2, United Mine Workers of America, 852 A.2d 299 (Pa. Commw. 2004). It was in this case that the Court first articulated that the essential holdings of the cases discussed above comprise the "core functions" doctrine. In Greene County, an arbitrator had reinstated a Children and Youth Services caseworker whose file mismanagement placed in immediate danger the very children that CYS had a legislative duty to protect.

Perhaps the best statement of the core functions doctrine, as stated by the Supreme Court in Greene County, is as follows:

Unlike private sector employers, public employers are ultimately responsible for the health, safety, and welfare of our communities. Due to their unique nature and role, public employers must be able to perform the functions they are charged to carry out by their citizenry. Consistent with this status . . . public employers cannot be compelled in arbitration to relinquish powers that are essential to the proper discharge of their functions. Thus, while as a general proposition, an arbitrator has broad authority to interpret an undefined provision regarding termination for just cause in a collective bargaining agreement, to permit an arbitrator to interpret the agreement as to require reinstatement of an employee who was determined to have engaged in egregious misconduct that strikes at the very core function of the public enterprise would be to deprive the employer of its ability to discharge that essential function.

Greene County, 852 A.2d 299, 308 (Pa. 2004). (Citations omitted). Although these cases often turn on subtle distinctions, the Court's of this Commonwealth have consistently ruled that arbitrators are prohibited from interpreting collective bargaining agreements in such a way that would mandate the employer to relinquish powers that are inherent and essential to government, including the power to discharge employees for certain acts of misconduct. Based on the development of case law in this area, it is clear that arbitrators are not provided with free reign to overturn disciplinary penalties including discharge. If you believe that an employee has engaged in conduct which strikes at the core function of your community's statutory mission, you should consult with qualified labor counsel, aggressively pursue discharge and educate the arbitrator concerning his or her inability, under applicable law, to alter the penalty imposed. The appellate courts of this Commonwealth, while reluctant to overturn the decisions of arbitrators generally,

have shown a willingness to review those decisions that public employers find uniquely offensive.

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This article was first published by the Borough News Magazine in April 2006 (Volume 6 & Issue 4) and is reproduced with the publisher's permission. Borough News is published by the Pennsylvania State Association of Boroughs (PSAB) - 2941 N. Front Street, Harrisburg, PA 17110. PSAB has represented the interests of boroughs and has helped to shape the laws that have laid the foundation for boroughs and other municipal governments. For more information, visit www.boroughs.org.