

Court Affirms Reinstatement of A School Bus Driver Who Tested Positive For Drug Use

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Upper Merion Area School District v. Teamsters Local #384, 165 A.3d 56 (Pa. Cmwlth. 2017). The Commonwealth Court holds that an arbitrator's decision to reinstate a school bus driver to her position with back pay when the bus driver tested positive for drug use during a random drug test was not against public policy or contrary to the school bus drivers union's collective bargaining agreement with the school district.

BACKGROUND

Sheena Boone–East ("Employee") worked at the Upper Merion Area School District ("District") as a school bus driver for close to two and a half years before she was terminated for violating the District's Alcohol and Drug Policy. The Employee was randomly drug tested at work and her test results showed traces of amphetamines in the Employee's system. Random drug tests were permitted by the District's Alcohol and Drug Policy, which was enacted according to federal law and regulations. The Employee was a member of the Teamsters Local # 384 ("Union")-the exclusive bargaining agent for all school bus drivers in the District. The Union's Collective Bargaining Agreement ("CBA") with the District, then in effect, allowed the District to suspend or discharge any employee for "[d]rinking or consuming illegal drugs during working hours, including lunchtime, or being under the influence of liquor or drugs during work time, including lunch time." *Id.* at 58. Further, the District's Alcohol and Drug Policy prohibited school bus drivers from "reporting or remaining on duty while using any drugs or testing positive for drugs." *Id.*

After the Employee was suspended from her job without pay, she advised the District that she was opting to proceed under the CBA's grievance procedure rather than section 514 of the Public School Code of 1949 ("School Code"). The Union filed a grievance on the Employee's behalf requesting that she be reinstated to her position as a bus driver and that she be made whole with respect to any lost wages and benefits. The Employee's grievance proceeded through various steps and reached arbitration.

The selected arbitrator for the case ("Arbitrator") held a hearing at which the District presented the testimony of the director and custodian of records ("Drug Tester") of the third-party agency that administered the District's random drug testing. The Drug Tester confirmed that the Employee tested positive for amphetamines and that when she was informed of this result, the Employee advised a physician that worked at Drug Tester's office that she had taken one of her son's Adderall pills. The Drug Tester testified that federal regulations do not require the District to terminate an employee for a positive drug test. However, the Drug Tester noted that federal regulations require that a person who tests positive for drug use must be immediately removed from his or her position and examined by a certified substance abuse professional, who determines if there is a need for counseling and treatment.

The Employee testified that she tested positive for amphetamines because she had taken one of her son's Adderall pills three days before the random drug test but never felt any effects of the medication. The Employee explained that her son suffers from attention deficit hyperactivity disorder and was initially prescribed a low dosage of Adderall that was gradually increased from five milligrams to thirty milligrams. The Employee stated that when her son began losing his appetite, she became concerned with the effects of the medication, and ultimately decided to try it herself. The Employee asked her son's psychiatrist if Adderall was a narcotic and was advised it was not, so she thought that it was safe to take.

The Arbitrator issued an award directing that the Employee return to her position as a school bus driver with back pay from the time of her dismissal and submit to evaluations to determine if she needed counseling or treatment, in

accordance with federal laws and regulations.

The Arbitrator noted in his award that there was no dispute concerning the Employee's violation of the District's Alcohol and Drug Policy or the District's authority to terminate employees who violate that policy. Nonetheless, the Arbitrator held that the Employee's case was unique because the Employee was not a recreational drug user; it was unlikely that her "misadventure" would be repeated; the Employee's son's doctor told her that Adderall was not a narcotic, and there was no evidence that the Employee was at all impaired or that her acuity to drive the school bus was at all diminished as a result of ingesting the Adderall pill.

Notably, the Arbitrator stated that under the District's Alcohol and Drug Policy, the District was not required to terminate the Employee. The Arbitrator observed that the District's reservation of discretion to impose a lesser penalty reflected the District's understanding that, on occasion, unique circumstances might call for a lesser penalty. The Arbitrator concluded the Employee's case merited a lesser penalty. Also, federal regulations for safety sensitive positions, such as a bus driver, did not require the District to terminate an employee who tests positive for drug use.

The District filed a petition for review with the Common Pleas Court of Montgomery County, but the trial court upheld the Arbitrator's award, and the District appealed to the Commonwealth Court.

DISCUSSION

A Court must uphold an employment arbitrator's award if: (1) the issue as properly defined is within the terms of the collective bargaining agreement; and (2) the award can be rationally derived from the agreement. This two-prong test is known as the "essence test." An exception to the "essence test" is when the arbitrator's award is contrary to public policy.

First, the District argued that the Arbitrator's award violated a well-defined, dominant public policy of protecting children from dangers related to illegal drug use. Because the Employee tested positive for drug use and admitted to ingesting one of her son's Adderall pills, the District maintained that the public policy exception to the "essence test" applied in the case.

The Court noted that the issue was not whether the Employee's actions or conduct violate a public policy, but whether the Arbitrator's award violated public policy. The Court concluded the arbitrator's award did not violate public policy. Specifically, the Court held that the Arbitrator's award did not "pose an unacceptable risk" that will undermine the public policy of protecting children from dangers related to illegal drug use or cause the District to breach its lawful obligations or public duties because the Arbitrator determined that the Employee's ingestion of her son's medication was a single "misadventure" not likely to be repeated and had imposed conditions upon the Employee to return to her position.

Second, the District also argued that the Arbitrator's award violated the second prong of the "essence test," listed above. The District claimed the Arbitrator's award ignored a part of the CBA that gives the District's Board the right to discharge any "employee for just cause or for violation of the [CBA]." *Id.* at 66.

The Court held that when a collective bargaining agreement does not specifically define or designate the discipline to be imposed, and does not specifically state that the employer is the one with *sole discretion* to determine discipline, the arbitrator is within his or her authority to modify the discipline imposed. The Court explained that for the discipline imposed not to be subject to arbitration, the language in the agreement must specifically reserve to the school district disciplinary matters provided for under the Pennsylvania School Code. Because the CBA did not limit the Arbitrator's power to modify discipline, the Court held that the Arbitrator's award was rationally derived from the CBA.

Third, the District contended it could terminate the Employee under Section 514 of the School Code. That section gives the board of school directors authority "to remove any of its . . . [employees] . . . for incompetency, intemperance, neglect of duty, violation of any of the school laws of this Commonwealth, or other improper conduct." (24 P.S. § 5-514). The

District argued this section of the School Code applied despite the parties stipulating that the Employee would proceed through the CBA's grievance procedure rather than the provisions of Section 514 of the School Code. Thus, the District maintained it could terminate the Employee for "improper conduct" under Section 514 of the School Code.

However, the Court noted that the District was ignoring the Arbitrator's findings. The Arbitrator expressly found that "there is simply no evidence that [Employee] was at all impaired or that her acuity to drive the school bus was at all diminished." *Id.* at 66. Accordingly, the Court held that according to the record in the case, the Employee's actions were not "improper conduct" under Section 514 of the School Code.

PRACTICAL ADVICE

While the Court struggled with reinstating a school bus driver who had tested positive for drug use on the job, it seemed constrained to uphold the Arbitrator's award under the unique facts of the case. Judge McCullough wrote a dissenting opinion in which he wrote that the Arbitrator's award "violates a well-defined, dominant public policy of protecting school children from illegal drugs/drug use and ensuring their safety." *Id.* at 67. However, the Court's majority opinion noted that "for the discipline imposed not to be subject to arbitration, the language must be similar to that in *Board of Education of the School District of Philadelphia v. Philadelphia Federation of Teachers, AFL-CIO*, 147 15, 610 A.2d 506 (Pa. Cmwlth. 1992), which specifically reserved to the district disciplinary matters provided for under the Pennsylvania School Code." *Id.* at 66.

School districts can preempt an arbitrator from deciding what discipline is appropriate for an employee's violation of the school district's policies. To do so, a school district should include language in its collective bargaining agreements with employee unions that specifically reserves to the school district disciplinary matters provided for under the Pennsylvania School Code.

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