

PUBLIC POLICY AGAINST ILLEGAL DRUGS SUPPORTS FIRING OF PUBLIC SCHOOL AIDE DESPITE ARBITRATOR'S REINSTATEMENT

By Roger S. Kaplan on July 2, 2013

An elementary public school classroom assistant was properly terminated for workplace drug abuse despite her 23 years of unblemished service and an arbitrator's award reinstating her subject to various conditions because, a Pennsylvania appellate court has held, the award ran afoul of a "well-defined documented public policy of protecting children in school from the damages of illicit drugs and drug use." Westmoreland Intermediate Unit #7 v. Westmoreland Int. Unit #7 Classroom Assist. Ed. Support Pers. Ass'n, PSEA-NEA, Comm. Ct. of Pa., No. 1746 CD 2008, filed June 20, 2013. The court vacated the award.

The Grievant was responsible for working on a one-to-one or small group basis with emotionally disturbed children. She also assisted in administrative duties, such as escorting children to restrooms, lunch recess and to and from buses. Her lengthy employment history was without disciplinary incident.

In March 2001 the Grievant was found unconscious in the school's restroom as a result of a drug overdose. She was wearing a 100 mcg Fenotyl patch on her back while performing her duties. Fenotyl is a Schedule II narcotic opioid analgesic under the state's controlled substances law, which makes its possession a misdemeanor, absent a valid prescription. It is approximately 50 times more potent than heroin and 50-100 times more potent than morphine, the court noted. The patch was not prescribed to the Grievant; she had gotten it from a friend. Emergency room records show the Grievant had worn it because it was "a temptation." The school fired the employee as a result of the incident.

The Grievant's union took her case to arbitration. It claimed the employer lacked "just cause" for the firing because her conduct did not amount to "immorality" under the Commonwealth's Public School Code (describing valid causes for termination).

The arbitrator sustained the grievance with conditions. He relied heavily on the Grievant's lengthy, unblemished service. Her single error of judgment did not amount to such a grievous offense that it would offend community morals, he concluded. Recognizing the gravity of her conduct, however, the arbitrator required that the Grievant participate in a drug and alcohol treatment program, abstain from mood altering drugs or chemical substances while on duty, submit to drug and alcohol screenings and participate in counseling and a treatment program. He also denied back pay.

The employer sought judicial relief from the award. Years of litigation ensued, including in the State Supreme Court. Meanwhile, the Supreme Court in an unrelated case crafted a new "public policy" exception to the familiar rule that arbitration awards must be upheld if they draw their essence from the parties' collective bargaining agreement. Philadelphia Housing Authority v. AFSCME, ___ Pa. ___, 52 A.2d 1117 (2012) (involving sexual

harassment). It substituted the new exception for a “core functions” exception which the High Court found “insufficiently precise.”

Applying Philadelphia Housing Authority, the Commonwealth Court concluded that “the Arbitrator’s award of reinstatement, even with the conditions imposed, would violate the public policy of this Commonwealth.” The majority explained, “the public policy of educating our children about the dangers of illicit drugs and drug abuse and protecting children from exposure to drugs and drug abuse is compelling.” Agreeing with the employer, the court said:

to reinstate an employee who attended work while under the influence, while charged with the duty of overseeing young children, with the hope that she will overcome her addiction, defies logic and violates public policy. The award essentially would allow Grievant to be placed back in the classroom pending her attempts at recovery. Simply put, an elementary classroom is no place for a recovering addict. The Arbitrator’s award demonstrates a tolerance, rather than intolerance for illicit drug use, and is in direct contravention of public policy. Grievant’s immediate reinstatement to the classroom while she attempted rehabilitation “eviscerated” Employer’s ability to enforce the dominant public policy.

The Court vacated the arbitrator’s award.

The dissenting judge reasoned much as did the arbitrator. She would have sustained his award. She also took issue with the majority’s characterization of the Grievant as an “addict,” finding no support in the record for that description.

Given the lengthy history of litigation in this case, a request for State Supreme Court review is not out of the question. In the meantime, however, the Commonwealth Court has invoked “zero tolerance” as a cornerstone of public policy.

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