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PENNSYLVANIA SUPREME COURT NARROWS STANDARD OF REVIEW FOR ARBITRATION AWARDS

In a recent decision, *Westmoreland Intermediate Unit No. 7 v. Westmoreland Intermediate Unit No. 7 Classroom Assistants Education Support Personnel Association, PSEA/NEA*, the Pennsylvania Supreme Court has altered the applicable standard of review for arbitration awards in collective bargaining settings. This case may impact the decision-making process of public employers both in pursuing discharge proceedings and deciding whether to take appeals from unfavorable awards.

The facts of the case involve an aide employed by an Intermediate Unit to assist an emotional support classroom. She had been employed for 23 years and had no prior discipline before the incident giving rise to her termination. The aide reported to school one day, complained of feeling sick and informed the classroom teacher that she was going to call a substitute to finish the workday for her after she retrieved some materials from another classroom. The aide left her classroom and did not return. After some period of time, the aide was found in a locked restroom and responded to her name being called by moaning. The school's principal was unable to open the door, so she declared a state of emergency for the school, causing classroom doors to remain closed and student movement, including lunch and bathroom breaks, to be curtailed. A 911 call was placed and the responding officers obtained entrance to the bathroom, where they found the aide unconscious before transporting her to a hospital. The police discovered that she had a Fentanyl patch on her back which belonged to a friend and which caused an overdose leading to her condition. The aide received probation without verdict, a type of suspended sentence for first-time offenders.

> *The Pennsylvania Supreme Court… replaced the core functions test with a different exception, by which an arbitractor's award is subject to being vacated if it violates public policy.*

The IU suspended the aide without pay and issued charges for her termination for reasons of immorality. The union filed a grievance on her behalf, arguing there was no just cause for her termination. Arbitration proceeded before Elliot Newman, who found that the aide's behavior, while "foolish" and "irresponsible," did not grossly offend community morals or rise to the level of "immorality." He concluded there was no just cause for dismissal and reinstated the aide, without back pay and conditioned upon a one-year probationary period and the aide's participation in drug and alcohol treatment programs.

The IU appealed the award to the Court of Common Pleas. Typically, courts review arbitration awards under the "essence test," which holds that if an arbitrator's interpretation of the collective bargaining agreement can rationally be derived from the essence of the agreement, it should be affirmed. One exception is the "core functions" test, which inquires into the core functions of a public entity and asks whether an arbitrator's award deprives the employer of its ability to discharge one or more of those core functions.

The Court of Common Pleas found that the aide's conduct was of a kind which related to the IU's discharge of its public function to provide education, and thus the arbitrator's award impacting that core function was vacated. The union appealed that decision to the Commonwealth Court, which affirmed the lower Court in a 2-1 decision. The Commonwealth Court agreed that the aide's conduct fell within a core function of the IU in educating children, and also found that Arbitrator Newman's award did not satisfy the essence test because the aide's conduct constituted immoral-

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ity as defined under Section 1122 of the School Code.

The union appealed to the Pennsylvania Supreme Court, which agreed to review the case. The union argued the essence test should have been the sole standard in reviewing the arbitration award, and that the core functions exception had been improperly applied.

In deciding the case, the Pennsylvania Supreme Court noted the role of arbitration in the Public Employee Relations Act is to ensure that labor disputes arising under a Collective Bargaining Agreement (CBA) are resolved by final binding arbitration. As a result, judicial review of arbitration awards is very narrow to preserve the role of arbitration in resolving disagreements under CBAs. However, the Court also noted the core function exception and the rationale for the exception. The union asked the Court to discontinue applying the core functions test on the basis that it is inconsistent with the essence test and inapplicable in the public school context. The IU contended that the core functions test was a necessary exception to ensure that CBAs could not be interpreted to violate public policy.

The Pennsylvania Supreme Court carved out a middle ground between the parties' positions and replaced the core functions test with a different exception, by which an arbitrator's award is subject to being vacated if it violates public policy:

> [T]oday we reaffirm the two-prong essence test . . . . We conclude, however, that the essence test should be subject to a narrow exception by which an arbitrator's award will be vacated if it is violative of the public policy of the Commonwealth. While the core functions exception . . . attempted to set forth such a standard, we find . . .[it] is insufficiently precise, and raises serious questions regarding the jurisdiction to utilize arbitration as well as concerns regarding the potentially limitless reach of the exception as stated. Rather, . . . we conclude that the federal public policy exception is appropriately applied to arbitrator's awards arising under PERA as well. We believe that such a public policy exception constitutes a reasonable accommodation of the sometimes competing goals of dispute resolution by final and binding arbitration and protection of the public health and is more consistent with our recent case law in this area.

The reason for the exception is that courts must not enforce contracts which are unlawful or in violation of public policy, which includes giving deference to an award which interprets a CBA involving a public entity in a manner which violates public policy. In applying the public policy exception to the facts of the case at bar, the Supreme Court found that the arbitrator's award satisfied the "essence test," and that the aide's unlawful use of the Fentanyl patch did not rise to the level of immorality. However, the Court did not answer the question of whether the arbitrator's award violated public policy, and for that purpose it remanded the case to the Court of Common Pleas to make a determination. The Supreme Court offered some guidance that in making that decision, the Common Pleas Court should look at whether the award "contravenes a well-defined, dominant public policy that is ascertained by reference to the laws and legal precedents and not from mere general considerations of supposed public interests." As of the printing of this newsletter, there has been no reported decision regarding subsequent proceedings.

The Supreme Court's decision will impact how public employers decide whether to take an appeal from an unfavorable arbitration award in personnel matters, as the Court has reaffirmed that the deferential "essence test" will apply in most circumstances, and the exception to when it applies is narrowed to only those arbitration awards which violate public policy as opposed to whether or not the award deprives the employer of its ability to discharge one of its core functions.

SCHOOL CLOSINGS – THE LAST RESORT IN THE BUDGETARY PROCESS

More and more Districts are wrestling with difficult, and at times, emotionally sensitive, issues of school consolidation. When budgetary constraints are coupled with declining enrollment due to increasing Charter and Cyber-Charter School enrollments, one of the most difficult and painful options to consider in efficiently providing for the educational needs of the students is school closings, usually elementary schools in community settings. Although the budgetary savings from the consolidation of services and school closings can be significant, the emotional and sensitive nature of the decision sparks controversy and can be divisive. The following legal standards and practical step-by-step process may assist you if you are facing these difficult choices.

Section 1311(a) of the School Code vests broad discretionary power in school boards with regard to school closings. Courts will not interfere with a Board's exercise of its discretionary power unless the action was based on a "misconception of law, ignorance through lack of inquiry into the facts necessary for an intelligent judgment, or if the action is the result of arbitrary will or caprice." Mere differences of opinion as to the desirability of closing a school is an insufficient basis for the court to interfere with the Board's discretion.

While a School Board is required to "investigate, inquire, study, ponder and finally decide the question before them in order to exercise its lawfully mandated discretion," the process leading up to the decision cannot be unending. Pennsylvania courts have held that eventually a School Board is entitled to act without being stopped at every turn by the difference of opinions of others. As long as the facts are sufficient to support a School Board's decision, that is all that is necessary for a Court to find that the Board did not abuse its discretion.

When considering a school closing, the overlapping statutory requirements contained in Sections 524, 780 and 1124 of the School Code must be followed to protect the rights of the general public and the School District's professional employees. Section 780 of the School Code requires the School Board to hold a public hearing on the issue of whether to permanently close a school building. The public hearing must be held three months (not 90 days) prior to the decision on whether or not to close a school with public notice at least 15 days prior to the hearing. Therefore, a minimum three and one half month time period must elapse before the Board can take action.

It is also mandatory that appropriate notice procedures be provided to the School District's professional employees. Section 524 of the School Code contains the written notice that must be given to all temporary-professional and professional employees and requires that "in the event a School Board shall determine prior to the beginning of the next school term to close any school or department, sixty (60)

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days notice, in writing, prior to the closing of any school or department, shall be given to all temporary professional and professional employees affected thereby . . . Upon failure to give written notice of intention to close any school or department, the School District shall pay such employees their salaries until the end of the school year during which said schools or departments were closed." This provision uses two different phrases, "school term" and "school year". A school term commences on the opening of school in the Fall of one year and terminates on the closing of school in the Spring of the following year. 24 P.S. §1-102. A school year commences on July 1st and terminates on June 30th of the following year. 24 P.S. §102. In a typical situation, the teachers' 60 day notice is given immediately after a School Board's formal decision to close the school. The District should also review its Collective Bargaining Agreement for any additional furlough notice requirements.

> ***If you are considering the difficult decision to close a school, the public hearing must be held in March.***

In regard to suspensions (furloughs) that may arise as a result of a school closing, Section 524 is not, in and of itself, a basis for suspending a professional employee. Courts have held that Section 524 is merely a procedural statute while Section 1124 specifies the sole grounds to base a professional employee's suspension. Accordingly, resolutions and notices regarding the school closing must also be keyed to one of the suspension reasons contained in Section 1124. In addition to the usual suspension reason of substantial decrease in pupil enrollment, an additional Section 1124 cause for suspension is the consolidation of schools within a single District. Even if the closing may not result in the suspension of any professional or temporary employees, but merely a reassignment, the sixty (60) day notice required by Section 524 should still be given to those employees currently assigned to the school to be closed. This would be the most prudent course since Section 524 requires the sixty (60) day notice to be given to professional employees "affected" by the closing.

Finally, the Department of Education also specifically requires that when a School District closes a school building for educational use, it must notify the Department prior to the closing. The notification must include the reason or reasons for the closing and describe how the closing contributes to the orderly development of attendance areas. 22 Pa. Code §349.28(a). The Department may require that the approval be based upon conformance with a long-range attendance area plan. 22 Pa. Code §349.28(b).

If your District is considering the difficult decision whether to close a school at the beginning of the 2008-2009 school term, the public hearing must be scheduled as soon as possible. The mere holding of the public hearing does not obligate the School Board to actually close a school building. However, the public hearing must be held in sufficient time to give the appropriate Section 524 notices to any professional employees in the event the school is closed. A recommended timetable is available on our website at www.mbm-law.net. Our school law attorneys are well versed in issues regarding school closings and are available to answer any questions which you may have.

COURT FINDS THAT DISTRICT ABRIDGED STUDENT FREE SPEECH RIGHTS

Recent editions of the Maiello, Brungo & Maiello, LLP Education News have highlighted recent court decisions involving student free speech rights and how a school district's ability to enforce a code of student conduct is impacted. Our Fall, 2006 issue discussed the initial court proceedings in the case of Layshock v. Hermitage School District. That case has now been decided with finality, and we are providing an update. In Layshock, a high school student used his grandmother's computer to create an insulting profile of his principal on the popular website MySpace.com. While the profile was created during off-school hours on private property, it incorporated the principal's photograph from the District's website. It was accessed by several students on school computers during school hours, and after it was confirmed that Layshock created the profile, he was suspended and assigned to an alternative education program. Initially, the Court denied the student's request for a preliminary injunction and found that the District might successfully prove that the speech materially and substantially disrupted the school's educational environment.

The case proceeded to the discovery stage. The parties held depositions and exchanged documents concerning the issue of disruption to the school. Following the completion of discovery, the student and his family moved for summary judgment, claiming that on the record established, there were no facts in dispute and the District had violated the student's first amendment rights as a matter of law. In an opinion issued by Judge Terrence McVerry, the court agreed and found in favor of the student and against the District.

Judge McVerry stated that although the fake MySpace.com profile created by Layshock was lewd and profane, it was not "spoken" or "made" on school grounds or during school time. Further, and more importantly, Judge McVerry found that the District could not establish a sufficient causal nexus between Layshock's profile and any substantial disruption of the school environment. Students other than Layshock were also creating fake profiles of the school principal, and there was no evidence they were created as a result of Layshock's creation. Additionally, there was no way to tell how much of the supposed "buzz" among students was caused by Layshock's profile or those created by others. Further, while administrators spent time investigating the fake profiles, there was no need to cancel classes and no widespread disorder requiring a significant disciplinary response. The Court found that the temporary disruption to the school's computer system necessitated to block access to MySpace.com did not constitute substantial disruption under the Tinker test. In short, the Court concluded that the School District's right to maintain order and enforce its code of conduct did not justify curtailing the student's first amendment freedom of speech.

Except for speech that advocates illegal behavior or is lewd or profane, the Layshock decision illustrates that Courts will continue to look first at whether student speech materially and substantially disrupts the educational environment. As such, a school district should be prepared to demonstrate ways in which substantial and material disruption of the educational environment occurred as a result of the student's speech if it chooses to take significant disciplinary action.

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SIXTH CIRCUIT ALLOWS SUIT CHALLENGING NO CHILD LEFT BEHIND ACT TO PROCEED

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Presently, the No Child Left Behind Act is due for reauthorization by Congress. As of this newsletter going to print, Congress has not yet reauthorized it, and many observers have speculated that no action will be taken one way or the other until after the November election. Nevertheless, a recent federal court decision ensures that the Act will remain in the headlines for the near future.

On January 7, 2008, a three-judge panel of the Sixth Circuit Court of Appeals reversed a district court's dismissal of a Complaint brought against the Department of Education arising out of the No Child Left Behind Act. The case, captioned as *School District of the City of Pontiac v. Secretary of the U.S. Department of Education*, was brought by several large school districts in three states and the teachers' unions from nine states and alleges that the NCLB Act constitutes an unlawful unfunded mandate. The plaintiffs clamed that they should not be obligated to pay for any additional costs required to satisfy the requirements of NCLB. By a 2-1 vote, the Sixth Circuit panel reversed the lower court and will allow the suit to proceed on the grounds that NCLB may not provide clear notice to states who accepted the federal funds and liabilities provided by NCLB that they would bear additional costs to comply with the statute. The Department of Education has indicated it will seek rehearing by the full Sixth Circuit. We will update the progress of this suit in future editions of Education News.

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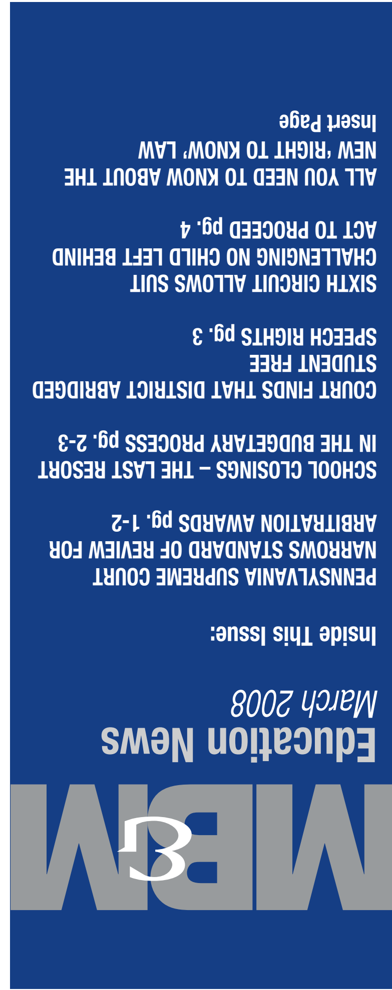

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