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DIRECT COMMUNICATION TO EMPLOYEES OF STATUS OF NEGOTIATIONS IS NOT AN UNFAIR LABOR PRACTICE

Erie County Technical School v. Pennsylvania Labor Relations Board, 1818 C.D. 2016 (2017) (Commonwealth Court concluded that an employer's direct communication with its employees concerning the status of ongoing negotiations was not an improper coercive tactic or bad faith bargaining).

BACKGROUND

In January 2014, Erie County Technical School (School) and the union representative of its teachers, the Erie County Technical School Federation of Teachers (Union), began negotiations for a successor collective bargaining agreement. The negotiations extended months beyond the expiration of the collective bargaining agreement in June 2014. In December 2015, the parties had an unsuccessful negotiation session in which a mediator was present. Several days later, the School sent a letter to the Union's members, which stated:

> On September 21st, after nearly two years of negotiations, the [School's] Negotiating Committee presented a Final and Best Offer to the Negotiating Committee of the [Union]. We again met with the [Union's] team on December 2nd.
>
> We have enclosed for your review the [School's] Final and Best Offer. If you should have any questions about this offer, you should direct them to the [Union's] Negotiating Committee as they are your exclusive bargaining representatives. At the December 2nd meeting, the Committee advised the [Union's representatives] that if an agreement was not ratified by December 14th, there was no guarantee the wage increases proposed would be retroactive.

As stated in the letter, the School attached a copy of its Final and Best Offer. Further, the memorandum contained the statement: "At the December 2nd meeting, the [School's] Committee advised the [Union's representatives] that if an agreement was not ratified by December 14th, there was no guarantee the wage increases proposed would be retroactive."

In response, the Union filed a complaint with the Pennsylvania Labor Relations Board (PLRB) charging that the School's direct communication to the teachers via the memorandum violated the Public Employee Relations Act (PERA)

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by engaging in a coercive tactic and not bargaining in good faith. The School contended that the communication was protected by the First Amendment and that the memorandum was an accurate depiction of what occurred at the bargaining table. The PLRB disagreed, concluding that the memorandum "was a direct communication to the bargaining unit members in an attempt to coerce employees, and contained a veiled threat of reprisals through the loss of retroactive pay increases."

On appeal, the Commonwealth Court reversed the PLRB's order, concluding that the School's informational communication to its teachers was not an unfair labor practice.

DISCUSSION

The Commonwealth Court noted that both Pennsylvania courts and the PLRB have recognized that an employer has a First Amendment right under the Constitution of the United States to communicate its general views to his employees and that such right remains operational during periods of labor negotiation. Further, the Court observed that it is well established that an employer is not precluded from communicating, in non-coercive terms, with employees during negotiations, so long as those communications are not an attempt to negotiate directly with bargaining unit members.

In this context, the Court first reviewed whether the School's memorandum to staff was threatening in nature. Although the memorandum stated that the retroactivity of proposed wage increases could be withdrawn by the School in further negotiations, the Court opined that, because employees did not have a vested right to retroactive wage increases, it was not coercive for the School to state that it could retract proposed retroactivity absent a prompt contract settlement.

Next, the Court considered whether the memorandum was direct dealing in derogation of the Union's status as the exclusive bargaining representatives. Relevant to this inquiry is whether a bargainable matter is not first presented to the union representative in a bargaining atmosphere where the union negotiator has a meaningful opportunity to consider the proposed matter in the context of bargaining without external influences or reactions from employees, who may not be privy to the full panoply of issues relevant to the proposal or the negotiations in general. Here, the School's memorandum recounted the terms of the actual proposal presented to the Union bargaining team days before. Thus, the Court concluded this factual recitation of what was presented at the bargaining table did not undermine the authority of the Union.

Consequently, the Court determined that the School's memorandum to staff was not coercive and did constitute improper direct negotiations with staff members. Accordingly, the Court reversed the PLRB's decision.

PRACTICAL ADVICE

This decision exemplifies the right of a school district to communicate directly with its employees regarding ongoing contract negotiations. A school district may speak freely to its staff about a wide range of issues including the status of negotiations, outstanding offers, its position, the reasons for its position, and objectively supportable, reasonable beliefs concerning future events. The school district cannot act in a coercive manner by making separate promises of benefits or threatening employees. As long as the school district communicates with employees in non-coercive and informational terms and those communications do not contain some sort of express or implied quid pro quo offer that is not before the union, an unfair labor practice is not committed.

COURT AFFIRMS REINSTATEMENT OF A SCHOOL BUS DRIVER WHO TESTED POSITIVE FOR DRUG USE

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 who 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.

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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.

THE AUTHORITY TO PUNISH LEWD SPEECH DISAPPEARS ONCE A STUDENT EXITS SCHOOL GROUNDS

B.L. by Levy v. Mahanoy Area School District ("Levy"), Case No. 3:17-CV-1734, 2017 WL 4418290 (M.D. Pa. Oct. 5, 2017). District Court for the Middle District of Pennsylvania grants cheerleader's Motion for Preliminary Injunction and enjoins school district from dismissing her from the high school cheerleading squad for posting a profane "Snap" on Snapchat outside of school.

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BACKGROUND

Plaintiff, a high school cheerleader, posted a "Snap" featuring a photo of her and a friend holding up their middle fingers with the text, "f[***] school f[***] softball f[***] cheer f[***] everything" superimposed on the image. Plaintiff took the Snap at a local convenience store on the weekend when she was not participating in any school activity. The Snap did not specifically mention the high school or picture the high school. Further, the Snap was only shared with Plaintiff's friends on SnapChat (a social media platform), and thus was not available to the general public.

Shortly after Plaintiff sent the Snap, one of the cheerleading squad's coaches informed Plaintiff that she was being dismissed from the cheerleading squad. The coach produced a printout of Plaintiff's Snap and told Plaintiff that the Snap was "disrespectful" to the coaches, the school and the other cheerleaders.

At the preliminary injunction hearing, the coach testified that she suspended Plaintiff from the cheerleading squad because of Plaintiff's use of profanity. The school district ("District") acknowledged that the Snap was produced off school property during the weekend when no school event was in progress.

DISCUSSION

The U.S. Supreme Court in the seminal case of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) held that "to justify prohibition of a particular expression of opinion," school officials must demonstrate that "the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker* sets the general rule for regulating school speech, and that rule is subject to several narrow exceptions. One exception is set out in *Bethel School District v. Fraser*, 478 U.S. 675 (1986), which permits school officials to regulate "'lewd,' 'vulgar,' 'indecent,' and 'plainly offensive' speech in school."

The District did not allege that it had punished the Plaintiff because Plaintiff's Snap *materially and substantially interfered* with the operation of the school. Instead, Plaintiff was punished solely for her use of profanity. As noted above, the exception set forth in *Fraser* is limited to profane on-campus speech and does not apply to off-campus speech. Therefore, in *Levy*, the court confirmed that schools cannot punish students for private, out-of-school speech that does not cause substantial, material disruption to school activities.

The court held that this case was controlled by *J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915, 932 (3d Cir. 2011)*, where a student created a fake online profile of her principal that accused the principal of having sex in his office, hitting on students and being a "sex addict." Additionally, the student in *Blue Mountain* specifically named and personally attacked members of the school's staff and their families. The Third Circuit held that the speech was protected because it originated outside of the control of the school district.

Like the plaintiff in *Blue Mountain*, the Plaintiff in *Levy* created content that was distributed through use of the internet during the weekend on a device that was not owned or controlled by the District. Additionally, the Plaintiff was not on school property when the speech was generated. Therefore, the court held that if the explicit speech in *Blue Mountain* was protected, the generic statement in this case was protected as well.

The court rejected the District's argument that a student may be punished for out-of-school speech so long as the punishment does not encroach on what the District referred to as a "protected property interest." In other words, the District argued that Plaintiff did not have a protected interest in participating in extracurricular activities and that it could levy any punishment it chose so long as it did not suspend or expel the Plaintiff. The court found this argument to be "unseemly and dangerous" and noted that when presented with cases where students were removed from an extracurricular activity due to their speech, the Third Circuit has not distinguished such punishment from a student's suspension or expulsion.

The court also rejected the District's argument that Plaintiff's Snap should be construed as on-campus speech. The court noted that the Third Circuit has plainly stated that profane speech created off-campus cannot be "imported" on-campus to invoke *Fraser*. Instead, off-campus speech must meet the *Tinker* standard by materially interfering with and disrupting the school in order to justify punishment.

PRACTICAL ADVICE

The *Levy* case serves as an important reminder that the First Amendment limits the ability of school districts to punish students for protected speech. With respect to student speech, courts have established the following general principles:

- Student speech that materially and substantially interferes with the educational process, or reasonably may cause such interference, may be prohibited and/or subjected to disciplinary response. However, student speech that expresses an unpopular viewpoint or merely causes discomfort and unpleasantness for others is not subject to regulation by school officials.

- On-campus student speech that is vulgar or plainly offensive may be prohibited and/or subjected to disciplinary response regardless of whether such speech has disrupted or substantially interfered with school operations. However, off-campus student speech that is potentially lewd or vulgar cannot be regulated or punished unless it materially and substantially interferes with the educational process.

- School-sponsored student speech may be regulated and restricted to the extent reasonably related to educational concerns.

- Student speech at school events and field trips off school grounds is subject to the school's rules for student conduct.

While these principles appear to be straightforward, they are often difficult to apply in practice because the question of whether a school district can punish student speech is often fact-sensitive. For example, the result in *Levy* could have been different if the Plaintiff's Snap featured her in her cheerleader's uniform at a school event. Similarly, the punishment may have been upheld if the Snap caused a substantial disruption in the school. School districts should work closely with their solicitors when determining when speech can be punished and when it is protected by the First Amendment.

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