

Pennsylvania Supreme Court to Consider Modification of Narrow Certiorari Scope of Review in Act 111 Grievance Arbitration Cases

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The Pennsylvania Supreme Court has agreed to review the Act 111 narrow appeal standard in a case where a police officer was returned to work by an arbitrator despite egregious misconduct. On September 6, 2024, the Pennsylvania Supreme Court granted a petition for allowance of appeal in *City of Philadelphia v. Fraternal Order of Police Lodge No. 5*. The case began as an appeal from an arbitration award related to the discharge of a police lieutenant for sending a series of sexually suggestive texts and a bestiality video to two female officers and then instructing one of the officers to lie during the resulting internal affairs investigation. The City discharged the officer due to violation of numerous department policies including the City's sexual harassment policy. Despite the horrendous misconduct committed by this police command officer an arbitrator overturned the discharge by incredibly ruling that the City's sexual harassment policy was not violated.

The City filed a petition to vacate the arbitration award with the Philadelphia Court of Common Pleas. The Common Pleas Court denied that Petition and the City appealed to the Pennsylvania Commonwealth Court. The Commonwealth Court concluded that its scope of review in Act 111 cases was limited to narrow certiorari pursuant to the Pennsylvania Supreme Court decision in *Pennsylvania State Police v. Pennsylvania State Troopers Association (Betancourt)*, 656 A.2d 83 (Pa. 1995). Under the narrow certiorari test, the Court may only vacate an Act 111 arbitration award on one of four grounds: 1) jurisdiction of the arbitrator, 2) the regularity of the proceedings, 3) whether the arbitrator exceeded his powers, or 4) the deprivation of constitutional rights. In practical terms, the narrow certiorari standard severely restricts the grounds for an appeal from an Act 111 arbitration decision. The practical effect of this is that in all but the rarest of circumstances an arbitrator's award in a grievance arbitration matter is final.

The City filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, which granted that Petition. The Pennsylvania Supreme Court defined the appeal issue as follows:

Where a police officer sends a series of sexualized texts to two subordinate officers and then encouraged one of the officers to cover it up, but where the grievance arbitrator reinstated the employee, should this Court modify the narrow certiorari scope of review set forth in *Pa. State Police v. Pa. State Troopers Association (Betancourt)*, and instead apply the essence test or judgment N.O.V. test or at least incorporate a limited public policy section into the narrow certiorari test?

The essence test is generally used as a standard of review for grievance arbitration awards under the Public Employee Relations Act (Act 195). When reviewing an arbitrator's award under the essence test, a Court conducts a two-prong analysis. First, the Court determines if the issue was properly defined as within the terms of the collective bargaining agreement. Second, if the issue is embraced by the agreement, the arbitrator's award will be upheld if the arbitrator's

interpretation can rationally be derived from the CBA. Generally, while still a deferential standard, the essence test is a more relaxed standard of review than the narrow certiorari test.

The Supreme Court will also consider in this appeal whether to incorporate a public policy exception to the narrow certiorari test. Generally, a public policy exception to the essence test under Act 195 requires the application of a three-prong test. First, the Court must identify precisely what remedy the arbitrator imposed. Next, the Court must inquire into whether that remedy implicates a public policy that is well-defined, dominant, and ascertained by reference to the laws in legal precedent and not from general considerations of supposed public interest. Finally, the reviewing Court must determine whether the arbitrator's award compels the employer to violate the implicated policy given the particular circumstances in the factual findings of the arbitrator.

The narrow certiorari Act 111 appeal standard has severely limited municipal employers' ability to appeal bad decisions by arbitrators even when arbitrators are wrong regarding the law and the arbitrator's decision violates public policy. Hopefully, the Supreme Court in this case will restore municipal employers' ability to effectively appeal bad arbitration decisions, especially those that violate public policy. Campbell Durrant, along with the Pennsylvania Municipal League, will be filing an amicus brief supporting the City's request to overturn this overly restrictive appeal standard. Our brief will list egregious arbitration decisions that could not be appealed due to the narrow certiorari standard. Please contact us if your municipality received a bad arbitration decision where an appeal was denied due to this overly restrictive standard. We would like to include a list of the most egregious cases when we file our amicus brief on November 15th. Hopefully, the Supreme Court will soon restore public employers' right to appeal bad arbitration decisions under Act 111.