

**Courts May Vacate Grievance Arbitration Awards When
Contrary to Public Policy: *Westmoreland Intermediate Unit
No. 7 v. Westmoreland Intermediate Unit No. 7 Classroom
Assistants Educational Support Personnel Ass'n.***

LABOR AND EMPLOYMENT – ALTERNATIVE DISPUTE RESOLUTION – JUDICIAL REVIEW AND ENFORCEMENT – The Pennsylvania Supreme Court held that under the Public Employe Relations Act (PERA), the essence test is applicable to judicial review of grievance arbitration awards and is no longer subject to the core functions exception, but is now subject to a new public policy exception.

Westmoreland Intermediate Unit No. 7 v. Westmoreland Intermediate Unit No. 7 Classroom Assistants Educational Support Personnel Association, 939 A.2d 855 (Pa. 2007).

Sherie Vrable (“Ms. Vrable”) was terminated from her position as a classroom assistant in the Westmoreland Intermediate Unit No. 7 (“Intermediate Unit”) after wearing an illicit drug patch to work that caused her to suffer a serious adverse medical reaction.¹ Prior to her termination, she had twenty-three years of experience as a classroom assistant with no prior disciplinary record.² The events leading up to Ms. Vrable’s termination took place on March 18, 2002, while she was responsible for assisting Cynthia Pierce (“Ms. Pierce”) with eleven children in a special education classroom.³ After arriving to work that day, Ms. Vrable complained of feeling too ill to work and told Ms. Pierce that she intended to call in a substitute assistant.⁴ Ms.

1. *Westmoreland Int. Unit No. 7 v. Westmoreland Int. Unit No. 7 Classroom Ass'ts Educ. Support Pers. Ass'n*, 939 A.2d 855, 855 (Pa. 2007). The patch was a DURAGESIC® Fentanyl Transdermal System manufactured by Janssen, division of Ortho-McNeil-Janssen Pharmaceuticals, Inc., which states on their prescribing pamphlet that:

DURAGESIC® contains a high concentration of a potent Schedule II opioid agonist, fentanyl. Schedule II opioid substances which include fentanyl . . . have the highest potential for abuse and associated risk of fatal overdose due to respiratory depression. DURAGESIC® is indicated for management of persistent, moderate to severe chronic pain that: requires continuous, around-the-clock opioid administration for an extended period of time, and cannot be managed by other means such as non-steroidal analgesics, opioid combination products, or immediate-release opioids.

DURAGESIC® Prescribing Pamphlet (2008), available at <http://www.duragesic.com/duragesic/shared/-pi/duragesic.pdf>.

2. *Westmoreland Int. Unit No. 7*, 939 A.2d at 857.

3. *Id.* Cynthia Peirce is the Intermediate Unit’s special education teacher in the West Newton Elementary School of the Yough School District in Westmoreland County, Pennsylvania. *Id.* The children were in grade levels three through five. *Id.*

4. *Id.*

Pierce became concerned when Ms. Vrable left the classroom to make the phone call but never returned.⁵ The ailing assistant was later found locked inside the women's restroom and unresponsive.⁶ Principal Joyce Speck initiated a "Code Blue" lockdown before calling the police and EMS to the scene.⁷

The officers unlocked the restroom door with a screwdriver and found Ms. Vrable unconscious.⁸ A police investigation revealed that an unprescribed Fentanyl patch on her back had caused a severe overdose.⁹ Criminal charges were filed for possession of a controlled substance¹⁰ and disorderly conduct.¹¹ Further investigation conducted by the Intermediate Unit determined that, although Ms. Vrable had been under the care of a physician for back pain, she had obtained the patch from a friend.¹² On March 27, 2002, the Intermediate Unit's Executive Director, Bruce Paul, suspended Ms. Vrable without pay.¹³ The Board of Directors ultimately terminated her employment on September 24, 2002.¹⁴

Following the termination, Westmoreland Intermediate Unit No. 7 Classroom Assistants Educational Support Personnel Association, PSEA-NEA¹⁵ ("Association") filed a grievance on Ms. Vrable's behalf, which claimed that under her Collective Bargaining Agreement ("Agreement") with the Intermediate Unit, there was not just cause for her dismissal.¹⁶ On March 19,

5. *Id.*

6. *Id.*

7. *Westmoreland Int. Unit No. 7*, 939 A.2d at 857. Code Blue is a security code that instructs teachers to keep students in the classroom and not permit them to be dismissed for any purpose. *Id.*

8. *Id.* Ms. Vrable was found slumped over on the toilet, partially nude, and having difficulty breathing. *Id.* at 858. She was immediately transported by the EMS to a local hospital and spent one day in a mental health unit. *Id.*

9. *Id.*; Brief for Appellant at 7, *Westmoreland Int. Unit No. 7 v. Westmoreland Int. Unit No. 7 Classroom Ass'ts Educ. Support Pers. Ass'n*, 939 A.2d 855 (Pa. 2007) (No. 51) 2005 WL 5268965. See *supra* text accompanying note 1 (explaining the patch worn by Ms. Vrable).

10. See 35 PA. CONS. STAT. § 780-113(a)(16) (2006); Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act, 35 PA. CONS. STAT. § 780-104(2)(ii) (2006). Fentanyl is specifically identified as a Schedule II controlled substance. *Id.*

11. *Westmoreland Int. Unit No. 7*, 939 A.2d at 858. Ms. Vrable pled guilty to the charge of misdemeanor possession subject to a plea agreement in which she agreed to Probation Without Verdict. *Id.* Probation Without Verdict is a program for first time offenders accused of non-violent possessory offenses. See 35 PA. CONS. STAT. § 780-117 (2006). Additionally, the disorderly conduct charge was dismissed. *Westmoreland Int. Unit No. 7*, 939 A.2d at 858.

12. *Westmoreland Int. Unit No. 7*, 939 A.2d at 858.

13. *Id.*

14. *Id.*

15. The Pennsylvania State Education Association (PSEA) is an affiliate of the National Education Association (NEA) and "represents the labor, policy, and professional interests of more than 186,000 public school teachers . . ." <http://www.psea.org/general.aspx> (follow "About PSEA" hyperlink). It is a "member-driven organization, headed by elected officers, an executive director and a board of directors," with a mission to "advocate for quality public education and [] members through collective action." *Id.*

16. *Westmoreland Int. Unit No. 7*, 939 A.2d at 858. The pertinent language of the Agreement reads, "The employer shall not discharge employee without just cause For purposes of this section, just cause shall mean . . . any causes not herein enumerated, but included for professional employees in Section 1122 of the Public School Code of 1949 . . ." *Id.* at 859 (quoting Collective Bargaining Agreement, App. C, § 9). See Public School Code of 1949, 24 PA. CONS. STAT. § 11-1122 (2006) ("The only valid

2003, the grievance was arbitrated before Elliot Newman.¹⁷ The issue presented was whether the Intermediate Unit had just cause for the termination, and if such cause was absent, what remedy should be afforded.¹⁸ Arbitrator Newman reasoned that, according to the terms of the Agreement, an employee of the Intermediate Unit could only be terminated for “immorality.”¹⁹ Arbitrator Newman held that Ms. Vrable’s behavior was merely “foolish and irresponsible,” and thus, did not rise to the specified level needed to justify a dismissal.²⁰ Upon this finding, Arbitrator Newman reinstated Ms. Vrable without back pay and required that she complete one year of probation, participate in drug and alcohol treatment and counseling programs, abstain from using drugs while on-duty, participate in unannounced drug and alcohol screening, and agree to allow the Intermediate Unit to monitor her progress.²¹

The Intermediate Unit appealed the arbitrator’s decision to the Pennsylvania Court of Common Pleas of Westmoreland County.²² First, the court followed mandatory precedent for reviewing an arbitrator’s award.²³ It determined that this standard was prescribed by the “essence test,” which holds that courts are not to be concerned with the merits of a case, but rather, should determine if an award logically flows from the underlying collective bargaining agreement.²⁴ After determining this standard of review, the court addressed whether the “core functions exception” to the essence test was applicable, and whether this exception allowed it to vacate the arbitrator’s award.²⁵ This exception enables courts to overturn awards that burden an employer’s core public functions.²⁶ Judge Gary Caruso held that the exception was appropriate in this case and reasoned that, since Ms. Vrable’s behavior prohibited the Intermediate Unit from discharging its core functions, the arbitrator’s award should be vacated.²⁷ The Association appealed this decision to the Commonwealth Court of Pennsylvania.²⁸

In an opinion authored by Judge Bernard McGinley, the Commonwealth Court affirmed the lower court’s decision and added that, according to the

causes for termination of a contract heretofore or hereafter entered into with a professional employe shall be immorality . . .”).

17. *Westmoreland Int. Unit No. 7*, 939 A.2d at 859.

18. *Id.*

19. *Id.*

20. *Id.* at 859.

21. *Id.* Any breach of these conditions would result in immediate termination. *Id.*

22. *Westmoreland Int. Unit No. 7*, 939 A.2d at 860.

23. *Id.*

24. *Id.* See *City of Easton v. AFSCME, Local 447*, 756 A.2d 1107, 1109-10 (Pa. 2000), *abrogated by Westmoreland Int. Unit No. 7*, 939 A.2d at 855; *State Sys. of Higher Edu. (Cheyney University) v. State College; Univ. Prof’l Ass’n*, 743 A.2d 405, 409-10 (Pa. 1999) [hereinafter *Cheyney University*] (explaining the essence test). See also complete discussion of the essence test *infra*.

25. *Id.*

26. *Id.* See *City of Easton*, 939 A.2d at 1111-12 (explaining the core functions exception). See also complete discussion of the “core functions” exception *infra*.

27. *Westmoreland Int. Unit No. 7*, 939 A.2d at 859. (citing *City of Easton*, 756 A.2d at 1111-12)

28. *Id.*

standard of review prescribed by the essence test, the arbitrator's decision was not rationally derived from the collective bargaining agreement.²⁹ The majority found that Ms. Vrable's actions on March 18, 2002 were, in fact, "immoral" when considering the definition of that word in *Kinniry v. Abington School District*.³⁰

Judge Dante Pellegrini dissented and noted that under the deferential essence test, the arbitrator's decision *was* rationally derived from the collective bargaining agreement.³¹ Judge Pellegrini further disagreed with the majority and found that the core functions exception would not be applicable here, because the responsibilities of the Intermediate Unit could not have been compromised by Ms. Vrable's single imprudent action.³²

The Association appealed and the Pennsylvania Supreme Court granted allocatur.³³ Chief Justice Cappy delivered the opinion of the court.³⁴ The majority addressed three interrelated issues: (1) whether a deferential application essence test should dictate the standard of review in this case, (2) whether the core functions exception to this standard of review could be used to vacate the arbitrator's award, and (3) whether the Intermediate Unit's failure to raise the issue of the grievance's arbitrability before the arbitrator constituted a waiver of the core functions exception.³⁵

First, Chief Justice Cappy analyzed the role of arbitration under the Public Employe Relations Act ("PERA")³⁶ in conjunction with current policies regarding judicial review of arbitration awards.³⁷ The court aligned with the views of the General Assembly, which have respected collective bargaining agreements that eschew disputes to final and binding arbitration.³⁸ Adhering to its recent opinion in *Office of the Attorney General v. Council 13, American Federation of State, County & Municipal Employees*,³⁹ the majority upheld the narrow perspective of reviewing arbitration awards under the

29. *Id.* See *Westmoreland Int. Unit No. 7 v. Westmoreland Int. Unit No. 7 Classroom Ass'ts Educ. Support Pers. Ass'n*, No. 1782 CD 04 (Pa. Cmmw. Ct. 2005) (2-1 decision), *rev'd*, *Westmoreland Int. Unit No. 7*, 939 A.2d at 855.

30. *Id.* (citing *Kinniry v. Abington Sch. Dist.*, 673 A.2d 429, 432 (Pa. Cmmw. Ct. 1996) (Defining "immorality" as, "a course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and elevate . . ."). *Id.*

31. *Id.*

32. *Westmoreland Int. Unit No. 7*, 939 A.2d at 860.

33. *Id.* at 861.

34. *Id.* at 857.

35. *Id.*

36. 43 PA. CONS. STAT. § 1101.903 (2006). The pertinent language of the Act is as follows: *Arbitration of disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory. The procedure to be adopted is a proper subject of bargaining with the proviso that the final step shall provide for a binding decision by an arbitrator or a tri-partite board of arbitrators as the parties may agree.*

Id. (emphasis added).

37. *Westmoreland Int. Unit No. 7*, 939 A.2d at 862. See statutory language *supra* note 36.

38. *Id.*

39. 844 A.2d 1217, 1223 (Pa. 2004) (citing *Newark Morning Ledger Co. v. Newark Typographical Union*, 797 F.2d 162, 165 (3d. Cir. 1986) (judicial censure of arbitration awards would contravene reliance upon a system that is important to both employers and employees))).

essence test.⁴⁰ The court offered that this perspective was specifically enumerated by the deferential standard of review discussed in *Community College of Beaver County v. Community College of Beaver County, Society of Faculty* (“*Community College*”).⁴¹ The majority also asserted that this standard of review was consistent with federal case law, which holds that the language of the collective bargaining agreement is controlling upon the arbitrator.⁴² Thus, a legitimate award is one that draws its essence from that agreement.⁴³

The court then discussed Pennsylvania’s reaffirmation of what was eventually termed the “essence test”⁴⁴ in the case of *State System of Higher Education (Cheyney University) v. State College; University Professional Association* (“*Cheyney University*”).⁴⁵ Chief Justice Cappy explained that *Cheyney University* set forth a two-prong approach to the essence test: (1) a court must initially determine whether the issue is within the collective bargaining agreement, and (2) then decide if the arbitrator’s decision can be rationally derived from that agreement.⁴⁶ The court explained that the scope of this test does not permit courts to determine the reasonableness of the arbitrator’s decision given the facts of the case.⁴⁷ Instead, courts should only determine if the arbitrator’s decision could be rationally derived from the collective bargaining agreement.⁴⁸

The majority acknowledged that Pennsylvania affords some exceptions to this deferential standard of review.⁴⁹ The court recently applied one of these exceptions in *City of Easton v. AFSCME, Local 447* (“*City of Easton*”),⁵⁰ when it determined that a city employee’s conduct was so egregious that his reinstatement by the arbitrator would have deprived the city of utilizing a core public function: the power to terminate employees who steal from the city.⁵¹ This ruling was later characterized as the “core functions” exception.⁵² Chief Justice Cappy also introduced cases that lent support to another

40. *Westmoreland Int. Unit No. 7*, 939 A.2d at 865.

41. *Id.* at 862 (citing *Comty. Coll. of Beaver County v. Comty. Coll. of Beaver County, Soc’y of Faculty*, 375 A.2d 1267 (Pa. 1977) [hereinafter *Community College*] (the award must be “respected by the judiciary if ‘the interpretation can in any rational way be derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties’ intention’” (quoting *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969))).

42. *Westmoreland Int. Unit No. 7*, 939 A.2d at 862. (citing *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960)).

43. *Id.*

44. *See Id.* at 863 (discussing the essence test).

45. *Id.* *See Cheyney University*, 743 A.2d at 409-10.

46. *Westmoreland Int. Unit No. 7*, 939 A.2d at 863 (citing *Cheyney University.*, 743 A.2d at 413).

47. *Id.*

48. *Id.*

49. *Id.*

50. 756 A.2d at 1107.

51. *Westmoreland Int. Unit No. 7*, 939 A.2d at 864 (citing *City of Easton*, 756 A.2d at 1107).

52. *Id.*

exception that is more in line with federal law,⁵³ identified as the “public policy” exception.⁵⁴ The court admitted that it never set out a general statement regarding this second exception.⁵⁵ Given the facts of the case at hand, however, it took the opportunity to address the creation of a public policy exception to the essence test once again.⁵⁶

In furtherance of the court’s judgment, the majority addressed the downfalls of the current core functions exception and simultaneously answered the petitioners’ third argument.⁵⁷ The weight of this argument led the court to consider that the current exception could be contrary to the essence test itself.⁵⁸ The Association successfully argued that under this exception a collective bargaining agreement could *never* address an employer’s right to terminate an employee for egregious behavior that burdened the execution of its core functions.⁵⁹ Consequently, they asserted that no arbitrator would have jurisdiction over such cases if the core functions exception were to remain in effect.⁶⁰ The court agreed and determined that, due to the trust afforded public entities to ensure the health, safety, and welfare of the community, the essence test should remain the proper standard of review.⁶¹ Additionally, the court abrogated the core functions exception set forth in *City of Easton*⁶² and replaced it with a new public policy exception.⁶³ Upon this ruling, the issue of arbitrability under the core functions exception was dismissed for mootness.⁶⁴

Chief Justice Cappy explained the operation of the public policy exception by deferring to precedent of the United States Supreme Court, which held that public policy must be “well defined and legally ascertainable.”⁶⁵ The court reasoned that the mere violation of public interest would not contravene public policy.⁶⁶ Finally, the court relinquished jurisdiction to the

53. *Id.* (citing *Cheyney University*, 743 A.2d at 416 n.14; *City of Phila. Office of Hous. and Cmty. Dev. v. Am. Fed’n of State County and Mun. Employees, Local Union No.1971*, 876 A.2d 375 (Pa. 2005)). Compare federal cases listed *infra* note 49.

54. *Id.*

55. *Id.*

56. *Westmoreland Int. Unit No. 7*, 939 A.2d at 864.

57. *Id.*

58. *Id.*

59. *Id.* at 865.

60. *Id.* (“[A]ny unexcused absence would give an employer ‘unfettered ability’ to discharge an employee because when an employee is not at work, such as when a teacher is absent, it impacts the employer’s ability to carry out its core functions.” (quoting *Westmoreland Int. Unit No. 7*, 1782 CD at 22 (Pellegrini, J., dissenting))).

61. *Westmoreland Int. Unit No. 7*, 939 A.2d at 865-66.

62. *City of Easton*, 756 A.2d at 1107.

63. *Westmoreland Int. Unit No. 7*, 939 A.2d at 866.

64. *Id.* “Mootness” is a doctrine that stands for the principle that, “American courts will not decide moot cases -- that is, cases in which there is no longer any actual controversy.” BLACK’S LAW DICTIONARY 1030 (8th ed. 2004).

65. *Id.*

66. *Id.*

court of common pleas to apply the newly adopted public policy exception to the case at hand.⁶⁷

Justice Thomas Saylor concurred with the majority opinion, but expressed concern over the court's failure to adhere to the doctrine of stare decisis.⁶⁸ Genuinely supporting the court's decision to settle on a logical exception to the essence test, Justice Saylor agreed with the majority's adoption of the public policy exception.⁶⁹

Justice Ronald Castille wrote a dissenting opinion criticizing the majority for failing to allow the legislature to consider the creation of a public policy exception.⁷⁰ The dissent also expressed hesitation over the court's vague explanation of the new public policy exception.⁷¹ Justice Castille stated that he was concerned about the possibility of creating confusion and excess litigation in an area of law where certainty is paramount.⁷² Finally, he advocated that the second prong of the two-prong essence test should encompass a "manifestly unreasonable" standard of review.⁷³ Justice J. Michael Eakin joined Justice Castille's dissent and added that he disapproved of the majority's sua sponte⁷⁴ introduction of the public policy exception.⁷⁵ Both Justices

67. *Id.* at 867.

68. *Westmoreland Int. Unit No. 7*, 939 A.2d at 867 (Saylor, J., concurring) ("legislative bodies are in the best position to address judicial holdings with which they disagree."). "Stare decisis" is "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY 1443 (8th ed. 2004).

69. *Westmoreland Int. Unit No. 7*, 939 A.2d at 868 (Saylor, J., concurring)

70. *Id.* (Castille, J., dissenting). Justice Castille stated,

There has been no intervening legislation since this Court's last examination of the essence test . . . [s]tepping into the void, the plurality issues a judicially-created public policy exception. The plurality's new standard not only creates an unnecessary delay in the resolution of the present matter, but does so via adopting a public policy exception in a vacuum-as the Legislature might do.

Id. at 868.

71. *Id.* at 868-69 n.1 (Castille, J., dissenting) (The new exception "does not offer the lower courts sufficient guidance . . . [And] if application of [the court's] public policy exception is so clear and certain as the plurality asserts . . . it should identify the dominant policy that could remotely serve as a basis to overturn the decision here.").

72. *Id.* (Castille, J., dissenting).

73. *Id.* (Castille, J., dissenting). Justice Castille offered that,

Initially, [he] approve[d] of the majority's two-pronged approach and agree[d] with the notion that the first prong should encompass the essence test. However, once a reviewing court has found, as required by the majority, that the issue before it falls within the terms of the collective bargaining agreement, then the second prong should, in [his] view, include further review to determine if the decision of the arbitrator is manifestly unreasonable.

Id. at 869-70. After stating that the essence test incorporated a reasonableness standard, Justice Castille provided case law to support his opinion. *Id.* (citing *Cheyney University*, 743 A.2d at 412-13; *Pa. Liquor Control Bd. v. Indep. State Stores Union*, 553 A.2d 948, 953-54 (Pa. 1989) (applying a "manifestly unreasonable" standard); *County of Centre v. Musser*, 548 A.2d 1194 (Pa. 1988) (applying a reasonableness review standard as part of the essence test); *Phila. Hous. Auth. v. Union of Sec. Officers No. 1*, 455 A.2d 625 (Pa. 1983) (applying a "manifestly unreasonable" standard)).

74. *Westmoreland Int. Unit No. 7*, 939 A.2d at 868-69 (Eakin, J., dissenting). "Sua sponte" means "[w]ithout prompting or suggestion; on its own motion." BLACK'S LAW DICTIONARY 1464 (8th ed. 2004).

75. *Id.*

agreed, however, that they would have reversed the commonwealth court's decision and reinstated the arbitrator's ruling.⁷⁶

Historically, Pennsylvania has preferred prompt and proficient resolution of disputes between employers and employees in the public sector.⁷⁷ This is evidenced by the legislature's enactment of PERA, and furthered by the judiciary's adoption of the deferential standard of review for arbitration award disputes under the essence test.⁷⁸ In 1964, Pennsylvania courts began to develop the underpinnings of what would become the essence test.⁷⁹ However, the formal birth of this test is often attributed to Justice Thomas W. Pomeroy's opinion in *Community College*, in which he explicitly adopted the United States Supreme Court's essence test as the appropriate standard of review for arbitration award disputes.⁸⁰ Despite this long settled history, Pennsylvania courts have engaged in manipulations and modifications of this test, which has led to controversy, confusion, and frequent litigation.⁸¹

The Pennsylvania Supreme Court has addressed this judicial anomaly several times in an attempt to explain the correct application of the essence test.⁸² Its most noted attempt is found in *Cheyney University*.⁸³ Specifically, the case involved a probationary employee of Cheyney University who was terminated after he was arrested for speeding and driving without a valid driver's license in a state-owned vehicle.⁸⁴ The termination was immediate and occurred within twenty-four hours of the University's discovery of the events.⁸⁵ The union challenged the dismissal and argued that the collective

76. *Id.*

77. *See* discussion *infra*.

78. *Id.* *See* 43 PA. CONST. STAT. § 1101.903; *Community College*, 375 A.2d at 1267 (adopting the essence test).

79. *See* H.K. Porter Co. v. United Saw, File & Steel Prods. Workers of Am., 333 F.2d 596 (3d Cir. 1964); *Ludwig Honold*, 405 F.2d at 1123; *Teamsters Local Union No. 77 v. Pa. Tpk. Comm'n*, 331 A.2d 588 (Pa. Commw. Ct. 1975).

80. *Community College*, 375 A.2d at 1274. The United States Supreme Court established the essence test in a line of cases now referred to as the "Steelworkers Trilogy." *See Enterprise Wheel*, 363 U.S. at 593; *United Steelworkers of Am. v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960). The use of arbitration was formally developed by the United States Supreme Court in these cases as a means of settling labor disputes. *Id.*

81. *Cheyney University*, 743 A.2d at 409 ("[T]he court has stated different variations of the applicable standard which has led to a less than uniform proclamation of the appropriate degree of deference that a reviewing court should accord to a labor arbitrator's decision."). *See also* Michael D. Matter, *Manifestly Unreasonable: Misapplying the Essence Test Standard of Review of Arbitration Awards in Pennsylvania's Public Sector—Are the Courts Abusing Their Discretion?*, 103 DICK. L. REV. 667, 673-691 (1999); Nicholas J. Zidik, *Sitting as "Superarbitrators" or According "Great Deference?"*, 41 DUQ. L. REV. 579, 587-617 (2003) (discussing the courts' varied applications of the essence test since *Cheyenne University*).

82. *Cheyney University*, 743 A.2d at 409 (stating that "[o]ur court has spoken to this issue on numerous occasions," while impliedly referring to seminal Pennsylvania essence test cases such as *Community College*).

83. *Id.*

84. *Id.* at 407. The employee was hired as a counselor/recruiter and was in route from a business related trip in Washington D.C. when he was arrested. *Id.* Police impounded the vehicle when Mr. Mitchell was unable to produce a valid driver's license. *Id.*

85. *Id.* The university neither verified the allegations nor confirmed the events in any way prior to terminating the employee. *Id.*

bargaining agreement provided for progressive disciplinary measures.⁸⁶ The case proceeded to arbitration.⁸⁷

The arbitrator weighed the evidence and determined that the employee was not entitled to “just cause” protection, but was entitled to progressive discipline.⁸⁸ Following a reversal by the Pennsylvania Commonwealth Court, the Pennsylvania Supreme Court granted the union’s petition for allocatur.⁸⁹

In *Cheyney University*, Chief Justice Cappy began the majority opinion by stating that the essence test standard of review had become inconsequential and fraught with impracticality.⁹⁰ He explained that after the court created the essence test, it failed to define the test consistently, which complicated the matter for subsequent courts.⁹¹ The majority found that, although it did not necessarily agree with the arbitrator’s decision in the case at hand, it was bound by that decision under a proper application of the essence test.⁹² In an effort to support this judgment and clarify the standard of review, Justice Cappy undertook an extensive discussion of case history⁹³ and set forth a comprehensive two-prong approach.⁹⁴ Despite the court’s effort to promote a complete and accurate application of the essence test, it left open the notion that a possible exception to this deferential standard of review might subsist.⁹⁵

86. *Id.* The pertinent language of the agreement is as follows:

Discharge, Demotion, Suspension and Discipline:

During a professional employees [sic] initial twelve (12) months of employment, the provisions of this Article shall not apply. If at any point during a professional employee's initial probationary period, the President or their [sic] designee(s) determine that the professional employee will not be retained, the professional employee will be given 90 days notice prior to termination, which may include paid or unpaid periods of time. The parties hereto recognize that for some serious offenses, progressive discipline is inappropriate and immediate removal may be warranted and such 90 days [sic] notice period referred to in this section shall not be applicable.

Id. at 408 (quoting Collective Bargaining Agreement Article 14, Section 3, p. 7).

87. *Cheyney University*, 743 A.2d at 407.

88. *Id.* (citing Interim Arbitration Award, June 26, 1996 at 10-11).

89. *Id.* at 409.

90. *Id.* at 409 (“based upon the number of challenges to arbitration awards, [the] court's standard of review has seemingly become a boilerplate standard lacking in real meaning or practical application”).

91. *Id.* at 411.

92. *Cheyney University*, 743 A.2d at 416.

93. *Id.* (citing, *inter alia*, *Community College*, 375 A.2d at 1275 (setting forth the essence test); *Leechburg Area Sch. Dist. v. Dale*, 424 A.2d 1309 (Pa. 1981) (suggesting a deferential approach to the essence test by holding that as long as the agreement addresses the issue, the award should be upheld); *Pa. Liquor Control*, 553 A.2d at 948 (addressing a manifestly unreasonable standard under the essence test); *Scranton Fed'n of Teachers v. Scranton Sch. Dist.*, 444 A.2d 114 (Pa. 1982) (discussing a mere reasonableness standard under the essence test)).

94. *Id.* at 413. Once a court determines the case is arbitrable, it should only vacate the arbitrator's award “where [it] indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement.” *Id.* See also brief discussion of the two-prong approach *infra*.

95. *Id.* at 417, n. 14 (“it is not for our court to address . . . a separate public policy basis on which a court may vacate an arbitrator’s award or whether such an analysis is subsumed within the essence test as stated today.”).

With few exceptions, commonwealth court opinions after *Cheyney University* staunchly followed the succinct two-prong approach to the essence test.⁹⁶ Yet, less than one year after this seminal decision, the Pennsylvania Supreme Court revisited the notion of a strict deferential standard of review in *City of Easton*.⁹⁷

In this opinion, authored by Justice Russell M. Nigro, the majority carved out an exception to Chief Justice Cappy's narrow two-prong approach that allowed the court to overturn an arbitrator's decision.⁹⁸ This exception became known as the "core functions" exception.⁹⁹ Chief Justice Cappy, in a vehement dissent, stated that the court should have adhered to its previous decision requiring a deferential standard of review, which would have sustained the arbitrator's findings, even though the majority disagreed with those findings.¹⁰⁰ The dissent scorned the majority for relying on cases that were precedently questionable given the court's recent decisions.¹⁰¹ Most importantly, Chief Justice Cappy noted that PERA did not specifically prohibit collective bargaining agreements from addressing the subject of discipline or discharge.¹⁰²

In 2005, the Pennsylvania Supreme Court revisited the idea of a public policy exception to the essence test in *City of Philadelphia Office of Housing*

96. See Zidik, *supra* note 81, at 587-617 (discussing those opinions following *Cheyney University*).

97. *City of Easton*, 756 A.2d at 1107.

98. *Id.* The majority relied upon *Pa. Liquor Control*, 553 A.2d at 948; *County of Cent. v. Musser*, 548 A.2d 1194 (Pa. 1988); and *Phila. Hous. Auth. v. Union of Sec. Officers No. 1*, 455 A.2d 625 (Pa. 1983) for the proposition that governmental entities/agencies do not have the freedom to bargain away essential powers required to properly discharge their core public functions. *Id.* at 1107.

99. *Id.*

100. *Id.* (Cappy, J., dissenting).

101. *Id.* (Cappy, J., dissenting) (citing *Cheyney University*, 743 A.2d 405, 412-13; *Danville Area Sch. Dist. v. Danville Area Edu. Ass'n*, 562 Pa. 238 (Pa. 2000); *Pennsylvania Game Comm'n v. Civil Serv. Comm'n (Toth)*, 747 A.2d 887, 891 n.7 (Pa. 2000)). These decisions rejected the "manifestly unreasonable" standard that the majority seemed to rely upon, reasoning that this standard was inconsistent with the essence test. *Id.*

102. *City of Easton*, 756 A.2d at 1107 (Cappy, J., dissenting); 43 Pa. Cons. Stat. § 1101.701 (2006); 43 Pa. Cons. Stat. § 1101.702 (2006). The pertinent language of the statutes are as follows:

Matters Subject to Bargaining:

Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employes to meet at reasonable times and confer in good faith with respect to *wages, hours and other terms and conditions of employment*, or the negotiation of an agreement or any question arising thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree to a proposal or require the making of a concession.

43 PA. CONS. STAT. § 1101.701 (1970) (emphasis added).

Matters Not Subject to Bargaining:

Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the *functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel*. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employe representatives.

43 PA. CONS. STAT. § 1101.702 (emphasis added).

*and Community Development v. American Federation of State County and Municipal Employees, Local Union No.1971.*¹⁰³ The case concerned the City of Philadelphia Office of Housing and Community Development (“OHCD”) which was charged with controlling and allocating funds from state and federal sources.¹⁰⁴ In 1997, OHCD attempted to qualify for home assistance grants under the Settlement Grant Program.¹⁰⁵ In furtherance of this effort, employees belonging to the American Federation of State, Local, and Municipal Employees, Local Union No. 1971 (“Union”) were required to perform the requisite home inspections under an existing collective bargaining agreement.¹⁰⁶ However, OHCD entered into non-union bid contracts with other firms for this service.¹⁰⁷

Following this alleged violation of the collective bargaining agreement, the Union requested arbitration.¹⁰⁸ On October 17, 2001, the arbitrator found in favor of the Union and awarded punitive damages.¹⁰⁹ OHCD then filed a petition to vacate this award in the Pennsylvania Court of Common Pleas of Philadelphia County.¹¹⁰ The judge relied upon *City of Philadelphia Office of Housing & Community Development v. AFSCME, Local Union No.171*,¹¹¹ and determined that the arbitrator’s remedy of punitive damages was not of the essence of the collective bargaining agreement.¹¹²

The Pennsylvania Supreme Court reviewed this decision, with Justice Eakin authoring the majority opinion.¹¹³ The court determined that although that some sister jurisdictions have found it proper to award punitive damages against an agency,¹¹⁴ Pennsylvania views such awards as against public poli-

103. 876 A.2d 375 (Pa. 2005).

104. *City of Phila.*, 876 A.2d at 375.

105. *Id.*

106. *Id.* at 376. The relevant language of the collective bargaining agreement was as follows:

1. The employer may contract out OHCD functions, services, locations, or sites at or in which work is presently performed by Employees in the Bargaining Unit represented by the Union only if:
 - a. the work can be performed more economically by a Union contractor (or other contractor in the event no Union contractor is available) as opposed to Employees represented by the Union; and
 - b. the Employer shall give the Union no less than 30 days written notice before issuing a formal request for proposal or a formal bid solicitation package in order to offer the Union an opportunity to meet and discuss whether the work can be performed more economically by a Union contractor (or other contractor in the event no Union contractor is available) as opposed to Employees represented by the Union.

Id. (quoting Collective Bargaining Agreement, Article XXIX, at 39).

107. *Id.*

108. *Id.*

109. *City of Phila.*, 876 A.2d at 376.

110. *Id.*

111. No. 308 CD 2002, unpublished memorandum at 10 (Pa. Commw. filed January 15, 2003).

112. *City of Phila.*, 876 A.2d at 377.

113. *Id.*

114. See *Local 416, Sheetmetal Workers Int'l. Ass'n (AFL-CIO) v. Helgesteel Corp.*, 335 F.Supp. 812 (W.D. Wis. 1971), *rev'd on other grounds*, 507 F.2d 1053 (7th Cir.1974). See also *Bacardi Corp. v. Congreso de Uniones Industriales de Puerto Rico*, 692 F.2d 210 (1st Cir. 1982); *Howard P. Foley Co. v. Int'l Bhd. of Elec. Workers, Local 639*, 789 F.2d 1421 (9th Cir. 1986) (holding that punitive damages are

cy.¹¹⁵ The court ultimately vacated the arbitrator's decision based upon, *inter alia*, this public policy argument.¹¹⁶

In a brief concurring opinion, Justice Saylor asserted that, when reviewing public-sector labor cases, the court had superseded the essence test with a "manifestly unreasonable standard."¹¹⁷ Justice Saylor supported his belief by stating that, while the court has attempted to exclude this standard in previous opinions,¹¹⁸ recent decisions have relatively eluded to its application.¹¹⁹

Notwithstanding Justice Saylor's suggestions, it is important to recognize that Pennsylvania courts had successfully employed the majority's alternative public policy considerations to other areas of the law.¹²⁰ However, when it came to labor and employment arbitration disputes, such a public policy doctrine had only been applied by the United States Supreme Court.¹²¹ Since the Pennsylvania Supreme Court has now deferred to this Court's standard,¹²² a review of federal jurisprudence pertaining to the public policy doctrine is imperative. Furthermore, given the facts presented in *Westmoreland Int. Unit No. 7*, it is equally important to review the public policy doctrine with respect to cases involving the discharge of an employee based upon claims of substance abuse.

Foremost, the United States Supreme Court has held that an arbitrator's interpretation of a collective bargaining agreement may be unenforceable where the interpretation would violate public policy that is "well defined, dominant and ascertainable by reference to laws and legal precedent."¹²³ The Court has stated that the public policy exception applies when the arbitrator's award violates this standard, or when the public policy is narrow and must satisfy the principles of precedent.¹²⁴ In *United Paperworkers Interna-*

only permissible where the agreement permits those damages or where there is evidence of willful and wanton misconduct))).

115. *City of Phila.*, 876 A.2d at 377.

116. *Id.*

117. *City of Phila.*, 876 A.2d at 379 (Saylor, J., concurring) ("the [c]ourt has effectively supplanted the essence test with a manifest unreasonable standard.").

118. *See Pa. Game Comm'n v. State Civil Serv. Comm'n (Toth)*, 747 A.2d 887, 891 n.7 (Pa. 2000) (stating that "the essence test does not permit an appellate court to intrude into the domain of the arbitrator and determine whether an award is 'manifestly unreasonable.'").

119. *City of Phila.*, 876 A.2d at 379 (Saylor, J., concurring) (citing *Greene County v. Dist. 2 United Mine Workers of Am.*, 852 A.2d 299, 310 (Pa. 2004) (Saylor, J., concurring). *See also Matter, supra* note 81, at 673-691.

120. *See Eichelman v. Nationwide Ins. Co.*, 711 A.2d 1006, 1008 (Pa. 1998) ("As the term 'public policy' is vague, there must be found definite indications in the law of the sovereignty to justify the invalidation of [an award] as contrary to that policy . . . [o]nly dominant public policy would justify such action. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, the [c]ourt should not assume to declare [an award] . . . contrary to public policy." (quoting *Hall v. Amica Mut. Ins. Co.*, 648 A.2d 755, 760 (Pa. 1994))); *Burstein v. Prudential Prop. & Cas. Ins. Co.*, 809 A.2d 204 (Pa. 2002).

121. *See Westmoreland Int. Unit No. 7*, 939 A.2d at 857.

122. *Id.*

123. *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29 (1987).

124. *E. Assoc. Coal Corp. v. United Mine Workers of Am.*, Dist. 17, 531 U.S. 57 (2000).

tional Union v. Misco, Inc. (“*Misco*”), the United States Supreme Court scorned the appellate court in that case for conducting “fact finding” and forming the conclusion that an employee had been, and would continue to be, under the influence of marijuana while operating dangerous machinery, simply because marijuana was found in the employee’s vehicle.¹²⁵ Some courts interpreted the *Misco* decision by reviewing drug related public policy arguments in consideration of whether the employee failed a work related drug test or was discovered with drugs on the job.¹²⁶ However, a recent United States Supreme Court decision has clarified that, what must be considered violative of public policy is not the act of drug use itself, but the arbitrator’s decision to reinstate the employee.¹²⁷ This important facet of the public policy exception remains to be developed by Pennsylvania courts.

In an attempt to reincarnate the strict judicial review standards once held by the Commonwealth, the Pennsylvania Supreme Court strictly interpreted “public policy” in *Westmoreland Int. Unit No. 7*.¹²⁸ However, this strict interpretation did not offer a clear illustration of the types of arbitration decisions that the court could vacate on the grounds of public policy.¹²⁹ It provided only that the public policy must be “well-defined, dominant and ascertainable by reference to laws and legal precedent.”¹³⁰ The majority also vaguely expressed that this, “narrower, more well defined” exception is rooted in the law of the Commonwealth.¹³¹ Yet Justice Castille’s dissent challenged the majority’s assertion that this exception was better defined, by stating that the majority opinion failed to suggest any public policy that might be used to overturn the arbitrator’s award in this case.¹³²

It is foreseeable that this new exception could strengthen the barrier between an arbitrator and the judiciary, because now a grievant may have difficulty enumerating specific Pennsylvania law to support a proper public policy argument. Furthermore, without a clear illustration by the majority opinion of what public policy can be provided to overturn an arbitrator’s award, it is predictable that this exception may foster uncertainty and confusion, which the court had previously attempted to eradicate in this area of

125. *United Paperworkers Int. Union*, 484 U.S. at 43 (stating that the arbitrator’s decision must create an, “explicit conflict with other ‘laws and legal precedents’ to violate public policy”) (quoting *W.R. Grace & Co. v. Local Union 759, Int’l Union of United Rubber Workers*, 461 U.S. 757 (1983)).

126. *See Exxon Shipping Co. v. Exxon Seamen’s Union*, 993 F.2d 357 (3rd. Cir. 1993) (Arbitrator’s decision to relieve employee of his position was found inappropriate in light of the fact that the employer was unable to show that the employee used drugs while on the job)).

127. *E. Assoc. Coal Corp.*, 531 U.S. at 57. *See generally* Camille Herbert, *Challenges to Enforcement of Arbitration Awards Dealing with Drug Testing or Drug Use*, 1 EMP. PRIVACY LAW § 5:23 (2008); Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. ON DISP. RESOL. 91 (2000) (analyzing review of arbitrator’s awards dealing with employee discharge for use or possession of drugs and failed or refused drug tests)).

128. *See Westmoreland Int. Unit No. 7*, 939 A.2d at 866.

129. *Id.*

130. *Westmoreland Int. Unit No. 7*, 939 A.2d at 866.

131. *Id.*

132. *Id.* at 869, n.2 (Castille, J., dissenting).

law.¹³³ This prediction is substantiated by the few courts that have already begun to interpret the exception.

In *Board of School Directors of Phoenixville Area School District v. Phoenixville Area Education Association*, for example, the Pennsylvania Court of Common Pleas of Chester County relied on the public policy exception to overturn an arbitrator's award that reinstated a teacher who had helped students cheat on a standardized test.¹³⁴ The court based its opinion on the Pennsylvania School Code and the federal No Child Left Behind Act, which it believed provided a public policy against cheating that was substantial enough to overturn the arbitrator's award under the new public policy exception.¹³⁵

However, compare that case to *Pennsylvania Turnpike Commission v. Teamsters Local Union No. 250*, where the Pennsylvania Commonwealth Court held that "[t]here is no public policy that mandates the discharge of all employees who are alleged to have committed acts of misconduct."¹³⁶ In addition, the Commonwealth Court of Pennsylvania evaluated the public policy exception in *Philadelphia Housing Authority v. American Federation of State, County & Municipal Employees, District Council 47, Local 2187*, and stated, "if the award simply does not punish an illegal act, it does not fall within the exception, and a federal court would enforce the award."¹³⁷

The interpretations of the public policy exception provided in these cases exemplify the conundrum Pennsylvania courts have begun to face. However, it is logical to conclude that when the dust settles, Pennsylvania courts will eventually follow the understanding of public policy provided by United States Supreme Court.¹³⁸ Thus, in considering whether an arbitration award is violative of public policy, the issue will not be whether an employee's wrongdoing is a violation of public policy, but rather, the issue will be whether reinstatement of the employee is a violation of dominant public policy.¹³⁹

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133. See sources cited *supra* note 81.

134. No. 07-05847, slip op. at 5 (Pa. Comm. Pl. Ct. 2008).

135. *Id.* at 3-4.

136. 948 A.2d 196, 207 (Pa. Cmmw. Ct. 2008). Here, the majority affirmed an award by an arbitrator which reinstated a toll collector who was terminated for intentionally falsifying records. *Id.* The court found that the work rules of the Collective Bargaining Agreement were not "dominant public policy, ascertainable by law and legal precedent." *Id.* at 206.

137. 945 A.2d 796, 800 (Pa. Cmmw. Ct. 2008).

138. This is logical based on the fact that the Pennsylvania Supreme Court adopted a rule that was first promulgated by the United States Supreme Court. See *Westmoreland Int. Unit No. 7*, 939 A.2d at 857.

139. See *E. Assoc. Coal Corp.*, 531 U.S. at 57.