04-1040-CD
DUBOIS AREA SCHOOL DISTRICT VS DUBOIS AREA EDUCATION ASSN.

DuBois Area SD vs DuBois Area EA
2004-1040-CD

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT,	:
	:
VS.	:CIVIL ACTION
	:
DUBOIS AREA EDUCATION ASSN.	:NO._____ OF 2004 - 1040-CD

FILED ON BEHALF OF: DUBOIS AREA SCHOOL DISTRICT

TYPE OF DOCUMENT: PETITION TO VACATE ARBITRATION AWARD

FILED: WILLIAM R. STRONG, ESQUIRE
PO BOX 7, 616 MAIN STREET
CLARION, PA 16214
814-226-4171
PA ID NO. 19980

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT,	:
	:
VS.	:CIVIL ACTION
	:
DUBOIS AREA EDUCATION ASSN.	:NO._____ OF 2004

PETITION TO VACATE ARBITRATION AWARD

Petitioner, DuBois Area School District (District) pursuant to 42 Pa. C.S.A. 7314 hereby requests the Court vacate the Arbitration Award of Edward J. O'Connell dated June 23, 2004 and alleges the following:

1. Petitioner is the DuBois Area School District which is a political sub-division engaged in providing K through 12 educational services to residents in Clearfield and Jefferson Counties
2. The Respondent, DuBois Area Education Association, is the certified collective bargaining agent representing the Professional Employees of the DuBois Area School District.
3. The Association and District are parties to a Collective Bargaining Agreement which provides for the arbitration of grievances.

4. On February 24, 2004, Arbitrator O'Connell conducted a hearing on a grievance filed by the Association on behalf of the retiring teachers alleging a violation of a provision of the Collective Bargaining Agreement. The grievance protested the District's denial of a request for continued coverage of prescription and dental benefits paid through the end of August after retirement.

5. The District raised two defenses. First, long standing past practice of terminating dental and prescription insurance at the time of retirement prevails under existing case law authority: See County of Allegheny vs. Allegheny County Prison Employees Independent Union 381 A2d 849, 852 (Pa. 1978); Greater Johnstown Area Vocational-Technical School vs. Greater Johnstown Vocational-Technical Education Association, 489 A2d 945, 948 N.3 (Pa. Commw. 1985); Appeal of Chester Upland School District, 423 A2d 437, 551 N. 4 (Pa. Commw. 1980). Second, the general phrase under Article XVIII did not apply to dental and prescription insurance upon retirement.

6. Arbitrator O'Connell issued an Opinion and Award on June 23, 2004 sustaining the Grievance.

7. The Opinion and Award of Arbitrator O'Connell fails to draw its essence from the Collective Bargaining Agreement.

8. The Opinion and Award of Arbitrator O'Connell cannot be sustained on the basis of any rational interpretation of the Collective Bargaining Agreement because the ruling by Arbitrator O'Connell that a past practice cannot give meaning to a contractual provision that is clear and explicit is contrary to law. Case law allows a past practice to modify or amend unambiguous language, create or provide a separate and enforceable condition of employment which cannot be derived from the expressed language of the contract, or implement unambiguous contract language which sets forth only a general rule. The County of Allegheny vs. Allegheny Prison Employees Independent Union, 381 A2d 849, 852 Pa. 1978; Greater Johnstown Area Vocational-Technical School vs. Greater Johnstown Vocational-Technical Education Association, 489 A2d 945, (Pa. Cmwlth 1985); Appeal of Chester of Upland School District, 423 A2d 437, (Pa. Cmwlth. 1980).

9. The Opinion and Award of Arbitrator O'Connell is contrary to established case law which permits a past practice to change unambiguous contract language as set forth above.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT,	:
	:
VS.	:CIVIL ACTION
	:
DUBOIS AREA EDUCATION ASSN.	:NO._____ OF 2004

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petition to Vacate Arbitration Award in this matter has been served on Randall C. Rodkey, Esquire by mailing a copy to him by first class mail, prepaid, to his address of Richland Square II, Suite 202, 1397 Eisenhower Blvd. Johnstown, Pennsylvania 15904 on July 7th, 2004.

William R. Strong, Esquire

IN THE MATTER OF ARBITRATION

BETWEEN

DUBOIS AREA SCHOOL DISTRICT

AND

DUBOIS AREA EDUCATION ASSOCIATION

DECISION IN

RETIREMENT BENEFITS CASE

GRIEVANCES: The grievances protest the District's discontinuance of the Grievants' dental and prescription insurance coverage for the months of July and August following their respective retirements in June of 2002 and June of 2003.

AWARD: The grievances are sustained. The Grievants are to be reimbursed for monthly premiums paid for the months of July and August following their retirements in June of 2002 and June of 2003.

HEARING: February 24, 2004; DuBois, Pennsylvania

ARBITRATOR: Edward J. O'Connell

APPEARANCES

For the District
William R. Strong, Attorney
Sharon L. Kirk, Superintendent
Gary L. Sayers, Business Manager

For the Association
Randall C. Rodkey, Attorney
Terra Begolly, PSEA Uniserv Representative
Lou Russell, Witness/Grievance Chair
Denise Thunberg, Association President
Janice Russell, Witness
David Schwab, Grievant

ADMINISTRATION

By letter dated July 16, 2003, from the Pennsylvania Bureau of Mediation the undersigned was notified of his selection by the Parties to hear and decide a matter then in dispute between them. A hearing went forward on February 24, 2004, where the Parties presented evidence and testimony in support of the positions adopted. The record was closed upon receipt of Post-Hearing Briefs and the matter is now ready for final determination.

GRIEVANCE AND QUESTION TO BE RESOLVED

On June 12, 2002, a Grievance Form (Joint Exhibit 2A) was filed with the District on behalf of all affected members, alleging as follows:

> The Dubois Area School District retiring teachers have been informed by the District that the District intends to pay some but not all medical and dental benefits through the month of August.

The following relief was sought:

> That all retired teachers have all their medical, prescription, and dental benefits paid through the end of August.

Due to a delay in the selection of an arbitrator in this matter a second grievance concerning the identical issue was filed on June 12, 2003, for those teachers retiring in June of 2003 (Joint Exhibit 2B). The Parties agreed to consolidate the two grievances, inasmuch as they involve the same facts and contractual language.

The question to be resolved is whether the District violated the Agreement when it refused to continue the Grievants' dental and prescription insurance coverage for the months of July and August following their retirement in June of 2002 and June of 2003.

CITED PORTIONS OF THE AGREEMENT

The following portions of the Agreement (Joint Exhibit 1) were cited by the Parties:

ARTICLE XVIII
FRINGE BENEFITS

> Effective dates and expiration dates concerning fringe benefits shall be September 1 and August 31 respectively, unless otherwise specified.

D. IF ANY EMPLOYEE OFFICIALLY RETIRES prior to age 65, he/she shall be eligible to continue in the bargaining unit's hospitalization, medical-surgical, and major medical group at his/her expense until the month prior to his/her eligibility for Medicare.

1. Employees who retire effective on or before June 30, of any given school year, and are eligible by virtue of age to remain as a member of the bargaining unit's hospitalization medical-surgical and major medical group will be covered by the District through August of that year.

I. DENTAL

For the 1998-99, 1999-2000, 2000-2001, and 2001-2002 contract years, the Employers will pay the full cost required to provide a basic Dental Insurance Plan (comparable to Delta Dental Basic Plan II) for each employee and pay the full cost required to provide dependent unit coverage for the dependents of each employee according to the following schedule of benefits and restrictions:...

J. PRESCRIPTION

The Board will provide full family prescription coverage. Deductible amounts will be $12.00 for brand name drugs and $6.00 for generic drugs. A Flex-RX program will be in effect as well. Total prescription program will be for the length of the contract.

FACTUAL BACKGROUND

By and large, the facts giving rise to these grievances are not in dispute. By letter dated April 28, 2002, teacher and Association Representative David Schwab informed the District of his intent to retire effective June 30, 2002. Included in this letter was a request for information concerning the continuation of his insurance plans. Mr. Schwab requested the same information in a letter dated May 10, 2002 to Mr. Roy Clark in the District's Personnel Records and Benefits Department. By letter dated June 3, 2002, Mr. Schwab was informed that his hospitalization insurance coverage would continue until August 31, 2002, but that his insurance coverage from other group plans would be terminated effective June 30, 2002. Such other group plans included his dental plan and prescription plan. The June 3, 2002 letter sent to Mr. Schwab was similar to that sent to other teachers retiring from the District in 2002 and 2003. Similar letters dating back to March of 1997 were submitted for four other teachers. According to the District's Business Manager, the practice of terminating dental and prescription plans in June of the year of retirement has been in existence since at least 1988.

As a result of the District's representations, Mr. Schwab paid for his dental and prescription insurance coverage for the months of July and August of 2002. Such premiums

were in the amount of $36.62 per month for dental coverage and $215.69 per month for prescription coverage. The same premiums were paid by other teachers who were retiring at the same time, as well as those teachers retiring in June of 2003.

These grievances were filed in protest of the District's termination of the Grievants' dental and prescription insurance plans on the June 30th following their retirement instead of maintaining coverage through August 31st of the same year. Following unsuccessful efforts by the Parties to resolve their differences, the matter was referred to arbitration hereunder.

CONTENTIONS OF THE PARTIES

Association Contentions

The Association contends that the District violated the Agreement by terminating the Grievants' dental and prescription insurance plans as of June 30th following their retirement. It maintains that the clear and unambiguous language of Article XVIII of the Agreement, which addresses fringe benefits, provides that the insurance plans should have been extended to August 31st. In support of this position, the Association emphasizes that the introductory sentence of Article XVIII reads, "Effective dates and expiration dates concerning fringe benefits shall be September 1 and August 31 respectively, unless otherwise specified." It is argued that since the Agreement does not specify alternative expiration dates for either dental or prescription plans, the plans were contractually required to be continued until August 31st for the retiring teachers.

The Association disputes the District's contention that the Parties have an enforceable past practice of terminating fringe benefits as of June 30th of the teacher's retiring year. It asserts that the District failed to prove the existence of such a practice, as it only introduced letters sent to four individuals since 1997. Furthermore, even if a past practice existed, the Association argues that it cannot alter the clear language of Article XVIII of the Agreement. It also points out that the Agreement provides for a full year of benefits even though teachers only work nine months of the year. The Association asserts that to give effect to the District's interpretation would be tantamount to an unacceptable forfeiture of the earned fringe benefits.

Because Article XVIII of the Agreement states that fringe benefits terminate as of August 31st unless otherwise specified, and no such specification was made for dental or prescription plans, the Association maintains that the grievances should be sustained. As a remedy, it asks that all retirees covered by the two grievances be reimbursed for premiums paid for dental and prescription plans for the months of July and August in the respective years of 2002 and 2003.

District Contentions

The District contends that its actions were in accordance with the Agreement, as well as consistent with the Parties' established past practice. In defending its actions, it disputes the Association's contention that the introductory sentence of Article XVIII of the Agreement requires continued fringe benefit coverage through August 31st of the year that an employee retires. According to the District, the language requiring continued coverage only applies to those employees who remain in the District's employment, and does not apply to those who retire, quit or are terminated. It points out that the Parties have negotiated an extension for hospitalization coverage through the express language of Article XVIII, Section D.1 of the Agreement. Since a similar extension was not included for dental and prescription coverage, the District maintains that these insurance plans were properly terminated upon the Grievants' retirement.

The District also argues that the Parties have an established past practice of terminating dental and prescription coverage at the end of the month following retirement. It alleges that this practice has continued unchallenged since 1988. As a result, the District asserts that the language of the introductory sentence of Article XVIII of the Agreement has been waived by the Parties. In light of this established past practice as well as the contractual language, the District contends that it did not violate the Agreement by terminating the Grievants' dental and prescription coverage in June rather than August following their retirements. It therefore asks that the grievances be denied.

DISCUSSION AND FINDINGS

At issue in this matter is whether the District was contractually required to continue the Grievants' dental and prescription insurance plans until the August 31st following their retirements. At stake is the amount in premiums paid by the Grievants during the two-month period from their retirement in June of either 2002 or 2003 until August of the same year. The District justifies its actions based upon its interpretation of the contractual provision addressing fringe benefits, i.e., Article XVIII of the Agreement. It also asserts that the discontinuation of the coverage was consistent with the Parties' past practice and therefore appropriate.

Before analyzing the contractual language, the District's allegation of an established past practice must be given consideration. In this regard, the District maintains that for many years teachers have been informed that their dental and prescription insurance plans would be terminated at the end of the month in which their retirement was to take place. Indeed, the letters informing the Grievants of the termination in coverage are similar to those issued to

retiring employees in the past. The District submitted four of such letters, dating back to March of 1997. Furthermore, the District's Business Manager testified credibly that the termination of fringe benefits in the month of retirement has been the Parties' past practice since at least 1988. Prior to these grievances, this practice has never been challenged. All of this evidence convincingly establishes the existence of a past practice by which fringe benefits, including dental and prescription insurance plans, have been terminated at the end of the month of the employee's retirement.

Without question, custom and past practice are useful tools in interpreting ambiguous contract language. Clear and longstanding customs and past practices can establish conditions of employment that are as binding as if they were written agreements. However, this tool has certain limitations. A past practice cannot give meaning to a contractual provision that is clear and explicit. In such situations, the negotiated contractual language cannot be modified by the past practice and must be followed.

In this matter, the relevant contractual language is found in Article XVIII of the Agreement, addressing fringe benefits. The introductory sentence of that provision states as follows:

> Effective dates and expiration dates concerning fringe benefits shall be September 1 and August 31 respectively, unless otherwise specified.

Article XVIII then proceeds to set forth the Parties' contractual obligations concerning the various types of fringe benefits, including a dental plan in Article XVIII, Section H and a prescription plan in Article XVIII, Section J. While both of these provisions outline the coverage to be provided, neither includes any mention of an expiration date.

The District points out that in Article XVIII, Section D.1 of the Agreement, the Parties have specifically negotiated an extension of coverage for hospitalization for those employees retiring on or before June 30th. According to the District, the Parties would have included a similar provision for dental insurance and prescription insurance if they intended for the coverage to be likewise extended. This argument must be rejected since it is contrary to the explicit language of the introductory sentence, which clearly states that August 31st is the expiration date for fringe benefits, "unless otherwise specified." Article XVIII, Section D.1 of the Agreement deals only with employees retiring prior to age 65 and hospitalization, medical-surgical and major medical group plans. Since this provision does not address dental or prescription insurance plans and no other expiration date was negotiated for those plans, the introductory sentence can only be deemed to designate August 31st as the contractually agreed upon expiration date.

When the negotiated language is as clear and explicit as it is in Article XVIII of the Agreement, it must be given effect. As a result, even though the Parties have a past practice of terminating dental and prescription coverage at the end of the month of retirement, the District is contractually obligated to continue the coverage until August 31st of the retirement year. The Grievants in this matter were denied this insurance coverage. As a result, they incurred out-of-pocket expenses for monthly insurance premiums for the months of July and August following their retirement in either June of 2002 or June of 2003. The monthly premiums were in the amount of $215.69 for prescription coverage and $36.62 for dental coverage. Since the District was contractually responsible for continuing the insurance coverage until August 31st of the respective year, it is determined that the Grievants are entitled to reimbursement for these expenses.

AWARD

The grievances are sustained. The Grievants shall be reimbursed for out-of-pocket dental and prescription premiums paid for the months of July and August following their retirements in either June of 2002 or June of 2003.

June 23, 2004
Lititz, Pennsylvania

FILED

JUL 09 2004

m 11:30 bm

William A. Shaw

Prothonotary/Clerk of Courts

NO CERT.

CA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,
PENNSYLVANIA
CIVIL DIVISION

DUBOIS AREA SCHOOL DISTRICT :
:
vs. : No. 04-1040-CD
:
DUBOIS AREA EDUCATION ASSN. :

ORDER

AND NOW, this 30th day of July, 2004, upon consideration of Plaintiff's Petition to Vacate Arbitration Award in the above matter, it is the ORDER of the Court that argument on said Petition has been scheduled for the 30 day of August, 2004, at 10:00 A.M, in Courtroom No. 1, Clearfield County Courthouse, Clearfield, PA.

BY THE COURT:

Judge J. Ammerman

FREDRIC J. AMMERMAN
President Judge

FILED

JUL 20 2004

William A. Shaw
Prothonotary/Clerk of Courts

FILED
03:28
JUL 20 2004

William A. Shaw
Prothonotary/Clerk of Courts

2cc to Atty Strong
w/ memo Re: Rules &
Service of Scheduling orders

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT **Petitioner**	)	**CIVIL ACTION - LAW**
	)	**NO. 04-1040-CD**
VS.	)	
DUBOIS AREA EDUCATION ASSOCIATION **Respondent**	)	

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TYPE OF DOCUMENT: ANSWER AND NEW MATTER TO PETITION TO VACATE ARBITRATION AWARD

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Randall C. Rodkey, Esq.
Dubois Area Education Association
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PA ID No. 05952

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT **Petitioner**	)	**CIVIL ACTION - LAW**
	)	**NO. 04-1040-CD**
VS.	)	
DUBOIS AREA EDUCATION ASSOCIATION **Respondent**	)	

NOTICE

You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint is served, by entering a written appearance personally or by attorney, and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the Court without further notice for any money claimed in the Complaint or for any other claims or relief requested by the plaintiffs. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Randall C. Rodkey, Esq.
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Johnstown, PA 15904
(814) 266-2244
PA ID No. 05952

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT **Petitioner**	)	**CIVIL ACTION - LAW**
	)	**NO. 04-1040-CD**
VS.	)	
DUBOIS AREA EDUCATION ASSOCIATION **Respondent**	)	

ANSWER AND NEW MATTER TO PETITION TO VACATE ARBITRATION AWARD

AND NOW COMES, the Respondent, **DUBOIS AREA EDUCATION ASSOCIATION,** (hereinafter referred to as "Association") by and through its Attorney Randall C. Rodkey, Esq. and files a within Answer to the Petition to Vacate Arbitration Award and in support thereof alleges as follows:

1) Admitted.

2) Admitted.

3) Admitted.

4) Admitted, with the qualification that the Hearing held on February 24, 2004 involved two (2) identical Grievances, one involving the 2002-2003 school year and the other involving 2003-2004 school year. It was agreed by the parties that these Grievances would be consolidated into one Hearing.

5. Admitted, that the District raised the two (2) defenses set forth in its Petition. However, it is specifically denied that either of the two (2) matters raised by the District are legal defenses to the Grievance filed by the Association.

6. Admitted.

7. The averments of paragraph 7 of the Petition are statements of legal conclusions to which no response is required. To the extent that said allegations are deemed to be factual, they are denied, because the Award is a rational interpretation of the Collective Bargaining Agreement and is founded within its terms.

8. The averments of paragraph 7 of the Petition are statements of legal conclusions to which no response is required. To the extent that said allegations are deemed to be factual, they are denied, because the Award is a rational interpretation of the Collective Bargaining Agreement and is founded within its terms.

9. The averments of paragraph 7 of the Petition are statements of legal conclusions to which no response is required. To the extent that said allegations are deemed to be factual, they are denied, because the Award is a rational interpretation of the Collective Bargaining Agreement and is founded within its terms.

10. The averments of paragraph 7 of the Petition are Statements of Legal Conclusions to which no response is required. To the extent that said allegations are deemed to be factual, they are denied, because the Award is a rational interpretation of the Collective Bargaining Agreement and is founded within its terms.

WHEREFORE, Respondent prays this Honorable Court to dismiss the Petition to Vacate and to affirm the Arbitration Award.

NEW MATTER

By way of a further and more complete Response to the Petition to Vacate, the Respondent alleges the within New Matter and in support thereof alleged avers as follows:

11. Paragraphs 1 through 10, above, are incorporated by reference as thought they were set forth herein at length.

12. In the Collective Bargaining Agreement, Article XVIII-Fringe Benefits, provides in the first sentence thereof as follows:

"Effective dates and expiration dates concerning fringe benefits shall be September 1st and August 31st respectively, unless otherwise specified". The fringe benefits in question in the Grievance are dental insurance and prescription insurance. The Arbitrator's ruling, in essence, was that he found no other "unless specified otherwise" provision in the Collective Bargaining Agreement and, therefore, awarded that the District must provide dental and prescription insurance coverages for persons who retired June 30th of a given contract year to and including August 31st of that contract year. This holding is entirely consistent with the above referenced provision of the Collective Bargaining Agreement.

13. The Arbitrator held that the aforesaid provision of the Collective Bargaining Agreement is clear and explicit and must be given effect. The Arbitrator ruled that since the contractual provision was clear and explicit, he would not to give weight to the District's argument that it had been modified or waived by past practice.

14. The Pennsylvania Supreme court has articulated a two-prong test for lower courts who are called upon to overturn an arbitrator's award:

> "First the court shall determine if the issue as properly defined is within the terms of the collective bargaining agreement. Second, if the issue is embraced by the agreement, and thus, appropriately before the arbitrator, the arbitrator's award will be upheld if the arbitrator's interpretation can rationally be derived from the collective bargaining agreement. That is to say, a court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement. Id. At 412, (Emphasis supplied)."

State System of Higher Education (Chaney University) v. State College University Professional Association, 743 A.2d 405 (Pa.1999).

15. The issue in this case is clearly within the terms of the Collective Bargaining Agreement

16. The Award of Arbitrator O'Connell is clearly derived from the Collective Bargaining Agreement inasmuch as he found that the contractual language in question was clear and unambiguous and that the ending date for the fringe benefits of dental insurance and prescription insurance was August 31st. Arbitrator O'Connell discussed and dismissed the District's defense of past practice as he was clearly entitled to do on the facts of this case. He found that the alleged past practice of the District did not modify the Collective Bargaining Agreement and did not work a waiver of the provision in question.

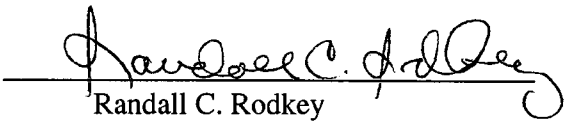
17. The Award of Arbitrator O'Connell in the instant case indisputably and genuinely has its foundation in and logically flows from the Collective Bargaining Agreement.

18. Based on the clear pronouncement of the Pennsylvania Supreme Court as to the review of public arbitration awards by the lower courts, the Petition to Vacate the Labor Arbitration Award should be dismissed.

19. The Petition to Vacate fails to state grounds upon which an arbitration award may be vacated.

20. Pursuant to the provisions of 42 Pa. C.S.A. Sec. 7314(d), the Court has the power to and is hereby requested to confirm the Award of Arbitrator O'Connell dated June 23, 2004.

WHEREFORE, Respondent Dubois Area Education Association prays that the Arbitration Award between it and the Petitioner, Dubois Area School District, dated June 23, 2004 be confirmed.



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IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT **Petitioner**	)	**CIVIL ACTION - LAW**
	)	**NO. 04-1040-CD**
VS.	)	
DUBOIS AREA EDUCATION ASSOCIATION **Respondent**	)	

VERIFICATION

I, Randall C. Rodkey, Esquire, verify the he is attorney for the DuBois Education Association and that as such he authorized to execute this Verification on its behalf and that the statements made in the foregoing Answer and New Matter to Petition to Vacate Labor Arbitration Award and New Matter are true and correct to the best of his knowledge, information and belief. He understands that false statements herein are made subject to penalties of 18 Pa. C.S. Sec. 4904, relating to unsworn falsification to authorities.

Date: July 30, 2004

Randall C. Rodkey, Esquire

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT **Petitioner**	)	**CIVIL ACTION - LAW**
	)	**NO. 04-1040-CD**
VS.	)	
DUBOIS AREA EDUCATION ASSOCIATION **Respondent**	)	

CERTIFICATE OF SERVICE

I hereby certify that on I am this 30th day of July, 2004, serving a copy of the foregoing Answer and New Matter to Petition to Vacate Arbitration Award on the following person by U.S. First Class Mail, postage pre-paid:

William A. Strong, Esq.
PO Box 7
616 Main Street
Clarion, PA 16214

Randall C. Rodkey
Attorney for Respondents

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT, PETITIONER	:
VS.	:CIVIL ACTION – LAW
DUBOIS AREA EDUCATION ASSN. RESPONDENT	:NO. 04-1040-CD

REPLY TO NEW MATTER

WILLIAM R. STRONG, ESQUIRE
PO BOX 7, 616 MAIN STREET
CLARION, PA 16214
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PA ID NO 19980

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT, PETITIONER	:
VS.	:CIVIL ACTION – LAW
DUBOIS AREA EDUCATION ASSN. RESPONDENT	:NO. 04-1040-CD

REPLY TO NEW MATTER

The Petitioner, DuBois Area School District, by and through their Attorney, William R. Strong, files this Reply to New Matter and alleges the following:

11. Paragraphs 1 through 10 of the Petition are incorporated by reference.

12. Admitted in part and denied in part. It is admitted that the introductory paragraph of Article XVIII states the general rule of the Collective Bargaining that the effective and expiration dates of fringe benefits shall be September 1 and August 31 respectively unless otherwise provided. It is specifically denied that the Arbitrator's Decision was consistent with this phrase. On the contrary, this general rule was for the current employees who continued their employment for each year of the Collective Bargaining Agreement. It could not rationally apply to former employees who lose their

employment by death, resignation, firing, or retirement. Common practice and common sense dictate that employees who are no longer employed lose their fringe benefits unless there is a particular provision continuing the coverage after death, firing, resignation or retirement. By the same token, Article I, Section XVIII (d) expressly extends insurance coverage for hospitalization only through August of the year of retirement. There are no similar provisions extending coverage for former employees who die, resign, get fired or retire for prescription, dental and life insurance.

13. Denied. On the contrary, the Arbitrator made an error of law by stating that a past practice cannot give meaning to a contractual provision that is clear and explicit. Errors of law are not rationally derived from the Collective Bargaining Agreement.
14. Admitted.
15. Denied. On the contrary, the decision cannot be rationally derived from the Collective Bargaining Agreement.
16. Denied. On the contrary, Arbitrator O'Connell's decision is not rationally derived from the Collective Bargaining Agreement. Arbitrator O'Connell's ruling is contrary to law which permits past practices to give meaning to clear

(unambiguous) contract language. County of Allegheny vs. Allegheny County Prison Employees Independent Union, 381 A2d 849, (Pa. 1978); Greater Johnstown Area Vocational-Technical School vs. Greater Johnstown Vocational-Technical Education Association, 489 A2d 945 (Pa. Cmwlth. 1985); Appeal of Chester Upland School District, 423 A2d 437 (Pa. Cmwlth. 1980).

17. Denied. Arbitrator O'Connell's decision is irrational, lacks logic, and does not derive its essence from the Collective Bargaining.
18. Denied. On the contrary, the award must be set aside because it is irrational, contrary to law, and contrary to Section 7302 (d) (2) of the Uniform Arbitration Act.
19. Denied. The Petition sets forth valid grounds to vacate the Arbitration Award.
20. Admitted.

WHEREFORE, the Petitioner requests your Honorable Court to vacate the award for the reasons given.

Respectfully submitted,

William R. Strong, Esquire

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT, PETITIONER	:
VS.	:CIVIL ACTION – LAW
DUBOIS AREA EDUCATION ASSN. RESPONDENT	:NO. 04-1040-CD

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Reply to New Matter in this matter has been served on Randall C. Rodkey, Esquire by mailing a copy to him by first class mail, prepaid, to his address of Suite 202, Richland Square III, 1397 Eisenhower Boulevard, Johnstown, Pennsylvania 15904 on July 26th 2004.

William R. Strong, Esquire

FILED NO CC
m/10:36 BL
JUL 28 2004
William A. Shaw
Prothonotary Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT, PETITIONER	:
VS.	:CIVIL ACTION – LAW
DUBOIS AREA EDUCATION ASSN. RESPONDENT	:NO. 04-1040-CD

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Order in this matter has been served on Randall C. Rodkey, Esquire by mailing a copy to him by first class mail, prepaid, to his address of Suite 202, Richland Square III, 1397 Eisenhower Boulevard, Johnstown, Pennsylvania 15904 on July 26th 2004.

William R. Strong, Esquire

FILED NO CC
m/9:12BV
AUG 02 2004
E/AB
William A. Shaw
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,
PENNSYLVANIA
CIVIL DIVISION

DUBOIS AREA SCHOOL DISTRICT :
:
vs. : No. 04-1040-CD
:
DUBOIS AREA EDUCATION ASSN. :

ORDER

AND NOW, this 20th day of July, 2004, upon consideration of Plaintiff's Petition to Vacate Arbitration Award in the above matter, it is the ORDER of the Court that argument on said Petition has been scheduled for the 30 day of August, 2004, at 10:00 A.M, in Courtroom No. 1, Clearfield County Courthouse, Clearfield, PA.

BY THE COURT:

/s/ Fredric J. Ammerman

FREDRIC J. AMMERMAN
President Judge

I hereby certify this to be a true and attested copy of the original statement filed in this case.

JUL 20 2004

Attest.

Prothonotary/
Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL DIVISION

DUBOIS AREA SCHOOL DISTRICT, Plaintiff	*	
vs.	*	NO. 2004-1040-C.D.
DUBOIS AREA EDUCATION ASSOCIATION, Defendant	*	

FILED

AUG 30 2004

William A. Shaw
Prothonotary/Clerk of Courts

O R D E R

NOW, this 27th day of August, 2004, counsel for the Plaintiff having requested a continuance of hearing on Plaintiff's Petition to Vacate Arbitration Award scheduled for Monday, August 30, 2004; counsel for the Defendant having no objection to same, it is the ORDER of this Court that said request be and is hereby GRANTED. The Court Administrator is hereby directed to reschedule said hearing.

It is the further Order of this Court that counsel for the Plaintiff shall file the necessary document to withdraw and have new counsel enter his appearance. Said document shall be filed with the Prothonotary in no more than ten (10) days from the date of this Order.

By the Court,

Fredric J. Ammerman

FREDRIC J. AMMERMAN
PRESIDENT JUDGE

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT PETITIONER	:	
vs.	:	CIVIL ACTION - LAW
DUBOIS AREA EDUCATION ASSN. RESPONDENT	:	NO. 04-1040-CD

MOTION FOR CONTINUANCE

AND NOW, comes the Petitioner, **DUBOIS AREA SCHOOL DISTRICT**, by its newly appointed Solicitor, **R. EDWARD FERRARO, ESQ.**, and requests your Honorable Court to continue the Argument scheduled for Monday, August 30, 2004 as we just received notice yesterday of appointment as Solicitor, and received the papers regarding the case today, and no opportunity has been provided to prepare for said Argument. The prior Solicitor declined to argue the case, and **RANDALL C. RODKEY**, Attorney for Respondent, has consented to the within request and will be sending confirmation to the Court on the same.

Entry of Appearance will be made within the next ten (10) days on the Court records.

Respectfully submitted,

R. Edward Ferraro, Esq.
Ferraro & Young
Solicitor for Petitioner

cc: Randall C. Rodkey, Esq.

RANDALL C. RODKEY
ATTORNEY AT LAW
SUITE 202, RICHLAND SQUARE III
1397 EISENHOWER BOULEVARD
JOHNSTOWN, PENNSYLVANIA 15904
TELEPHONE (814) 266-2244
FAX (814) 266-0435

August 27, 2004

VIA FACSIMILE (Only)
(814) 765-7649

The Honorable Fredric J. Ammerman, President Judge
Court House
230 Market Street
Clearfield, PA 16830

Att: Judy

Re: DuBois Area School District
Vs.
DuBois Area Education Assn. ***No: 04-1040-CD***

Dear Judy:

This will confirm that in response to Mr. Ferraro's request, I have no objection to a Continuance or postponement of the Argument in the above captioned matter which has been scheduled for August 30, 2004.

Thank you very much for your attention to this matter.

Very truly yours,

Randall C. Rodkey
Attorney at Law

RCR/klr

cc: R. Edward Ferraro, Esq.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY,
PENNSYLVANIA
CIVIL DIVISION

DUBOIS AREA SCHOOL DISTRICT	:	
	:	
vs.	:	No. 04-1040-CD
	:	
DUBOIS AREA EDUCATION ASSN.	:	

ORDER

AND NOW, this 31 day of August, 2004, it is the ORDER of the Court that hearing on Plaintiff's Petition to Vacate Arbitration Award in the above matter has been rescheduled from August 30, 2004 to Friday, September 24, 2004 at 10:00 A.M. in Courtroom No. 1, Clearfield County Courthouse, Clearfield, PA.

BY THE COURT:

FREDRIC J. AMMERMAN
President Judge

FILED
01 12:50 BL
AUG 31 2004
William A. Shaw
Prothonotary/Clerk of Courts
1 CC Attys: Strong, Rodkey, Ferraro

IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT PETITIONER	:	
vs.	:	CIVIL ACTION - LAW
DUBOIS AREA EDUCATION ASSN. RESPONDENT	:	NO. 04-1040-CD

ENTRY OF APPEARANCE

AND NOW, September 31, 2004, the undersigned having been appointed as the new Solicitor for the **DUBOIS AREA SCHOOL DISTRICT** on August 25, 2004, and having requested a continuance which was granted by Court Order of August 27, 2004, the undersigned hereby makes the following Entry of Appearance on behalf of the Plaintiff, **DUBOIS AREA SCHOOL DISTRICT**:

R. EDWARD FERRARO, ESQ.
FERRARO & YOUNG
690 Main Street
Brockway, PA 15824
814/268-2202

FILED
SEP 07 2004
William A. Shaw
Prothonotary

FERRARO & YOUNG

BY: _____
R. Edward Ferraro, Esq.
Ferraro & Young

entry of appearance – dasd
cgm

1 cert to Atty

FILED

SEP 07 2004

William A. Shaw
Prothonotary

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT, PLAINTIFF	:
VS.	:CIVIL ACTION
DUBOIS AREA EDUCATION ASSOCIATION DEFENDANT	:NO. 2004-1040-CD

PRAECIPE FOR WITHDRAWAL AND ENTRY OF APPEARANCE

TO THE Prothonotary:

Please withdraw my appearance on behalf of the DuBois Area School District, the Plaintiff in the above caption matter.

William R. Strong, Esquire

Please enter my appearance on behalf of the DuBois Area School District, the Plaintiff in the above caption matter.

Edward R. Ferraro, Esquire

FILED EGK
SEP 24 2004 1cc
01/10:46BN Atty Ferraro
William A. Shaw Copy to CIA
Prothonotary/Clerk of Courts

CA

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

DUBOIS AREA SCHOOL DISTRICT, Plaintiff	*	
vs.	*	No. 2004-1040-C.D.
DUBOIS AREA EDUCATION ASSOCIATION Defendant	*	

O R D E R

NOW, this 4th day of October, 2004, the Court being satisfied of the propriety of the arbitrators award dated June 23, 2004, it is the ORDER of this Court that the said arbitration award be and is hereby affirmed. The Petition to Vacate Arbitration Award filed on behalf of the Plaintiff is hereby dismissed.

Opinion to be filed in the event of an appeal.

By the Court,

Honorable Fredric J. Ammerman
President Judge

FILED
0 2:54 2cc atty Ferraro
1cc atty Rodkey
OCT 05 2004

William A. Shaw
Prothonotary

DuBois Area School District vs. DuBois Area Education Assn.

Civil Other

Date		Judge
07/09/2004	Filing: Petition to Vacate Arbitration Award. Paid by: Strong, William Receipt number: 1882497 Dated: 07/09/2004 Amount: $85.00 (Check) no cert. copies copy to C/A	No Judge
07/20/2004	ORDER, filed. Cert. to Atty Strong w/memo. NOW, this 20th day of July, 2004, ORDER of court that a argument on Petition has been scheduled for Aug. 30, 2004	Fredric Joseph Ammerman
07/21/2004	Answer and New Matter to Petition to Vacate Arbitration Award, filed by s/Randall C. Rodkey No CC	Fredric Joseph Ammerman
07/28/2004	Reply to New Matter, Filed by s/William R. Strong. No cc	Fredric Joseph Ammerman
	Certificate of Service, Reply to New Matter, on Randall C Rodkey, Esq., via firstclass mail, postage pre-paid. Filed by s/William R. Strong. No cc.	Fredric Joseph Ammerman
08/02/2004	Certificate of Service, Order, served on Randall C. Rodkey, Esquire. via first class mail, prepaid. Filed by s/William R. Strong, Esquire. No cc.	Fredric Joseph Ammerman
08/30/2004	Order, NOW, this 27th day of August, 2004, counsel for the Plaintiff having requested a continuance of hearing on Plaintiff's Petition to Vacate Arbitration Award scheduled for Monday, August 30, 2004; counsel for the Defendant having no objection to same, it is the ORDER of this Court that said request be and is hereby GRANTED. Court Administrator is to reschedule said hearing. It is the further Order of this Court that counsel for the Plaintiff shall file the necessary document to withdraw and have new counsel enter his appearance within 10 days of this Order. BY THE COURT, /s/Fredric J. Ammerman, President Judge. 1CC Attys. Strong, Ferraro, Rodkey.	Fredric Joseph Ammerman
08/31/2004	Order, AND NOW, this 31 day of August, 2004, Order that hearing on Plaintiff's Petition to Vacate Arbitration Award in the above matter has been rescheduled from August 30, 2004, to September 24, 2004, at 10:00 a.m. in Courtroom No. 1. BY THE COURT: /s/Fredric J. Ammerman, P.J. One CC Attys: Strong, Rodkey, Ferraro	Fredric Joseph Ammerman
09/07/2004	Praecipe For Entry of Appearance, filed Filed by Atty. Ferraro. 1 Cert. to Atty. Enter Appearance on behalf of Plaintiff, being apponited as new Solicitor for Plaintiff.	Fredric Joseph Ammerman

5.02 Approval by Shareholder of CMC.

Before the Effective Time of the Merger, RICP, as the sole shareholder of CMC, shall approve of this Plan in accordance with Title 15, Section 1924(a) of the BCL.

ARTICLE VI

Termination and Abandonment

6.01. Right to Terminate and Abandon.

The Board of Directors of any party to this Plan may terminate this Plan and abandon the proposed Merger at any time prior to the Effective Date, whether before or after the approval of this Plan by the shareholder(s) or the Board of Directors of CMC or C&M.

6.02. Procedure for Termination and Abandonment.

In the event of the termination of this Plan and abandonment of the proposed Merger by the Board of Directors of any party to this Plan of and Agreement of Merger in accordance with Section [6.01] above, written notice of such action shall forthwith be given by the terminating party to all other Parties to this Plan.

6.03. Effect of Termination.

Upon the termination of this Plan and abandonment of the proposed Merger in accordance with this [Article VI] :

a. No party, nor any director, officer or shareholder of any party to this Plan shall incur liability to any other party, or a director, officer, or shareholder thereof, in connection with this Plan; and

b. This Plan and Agreement shall immediately become wholly void and of no effect, except for the provisions of *[Article VII]* (Expenses) which shall survive termination and abandonment pursuant to this *[Article VI]*.

ARTICLE VII

Expenses

Each party to this Plan shall bear all of its own expenses incurred in connection with Merger.

RANDALL C. RODKEY
ATTORNEY AT LAW
SUITE 202, RICHLAND SQUARE III
1397 EISENHOWER BOULEVARD
JOHNSTOWN, PENNSYLVANIA 15904
TELEPHONE (814) 266-2244
FAX (814) 266-0435

August 10, 2004

Honorable Fredric J. Ammerman
Clearfield county Court House
230 East Market Street
Clearfield, PA 16830

RE: DuBois Area School District v. DuBois Area Education Association
No. 04-1040-CD

Dear Judge Ammerman:

I am enclosing the Brief on behalf of the DuBois Area Education Association in the above captioned matter.

By a copy of this letter I am forwarding a copy of our Brief to William R. Strong, Attorney for the DuBois Area School District.

Thank you for your kind attention in this matter.

Very truly yours,

Randall C. Rodkey

RCR/mp
Enclosure
cc: Terra Begolly (w/encl)
William R. Strong, Esq. (w.encl)

R:\PSEA\PSEA letters\Dubois Brief ltr-Ammerman.wpd

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT **Petitioner**	)	**CIVIL ACTION - LAW**
	)	**NO. 04-1040-CD**
VS.	)	
DUBOIS AREA EDUCATION ASSOCIATION **Respondent**	)	

****

TYPE OF DOCUMENT: RESPONDENT'S BRIEF IN SUPPORT OF ARBITRATION AWARD

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****

Randall C. Rodkey, Esq.,
Attorney for:
Dubois Area Education Association
1397 Eisenhower Boulevard
Richland Square III, Suite 202
Johnstown, PA 15904
Telephone: (814) 266-2244
PA ID No. 05952

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT **Petitioner**	)	**CIVIL ACTION - LAW**
	)	**NO. 04-1040-CD**
VS.	)	
DUBOIS AREA EDUCATION ASSOCIATION **Respondent**	)	

RESPONDENTS' BRIEF IN SUPPORT OF ARBITRATION AWARD

I. STATEMENT OF THE FACTS.

The Dubois Area Education Association, hereinafter referred to as "Respondent" filed two (2) Grievances with the DuBois Area School District, hereinafter referred to as "District", one in June of 2002 and the second one in June of 2003 seeking reimbursement for dental and prescription insurance premiums paid for the months of July and August following the June 30th retirement of several members of the Association.

The Grievances were processed through the various steps of the Grievance Procedure in the Collective Bargaining Agreement without resolution and were referred to binding arbitration.

Due to delays not the fault of either party, the Arbitration Hearing was not held until February 24, 2004. The Arbitrator, Edward O'Connell entered his Award dated June 23, 2004 sustaining both Grievances. The District filed a timely Petition to Vacate the Arbitration Award and this Brief is filed by the Association in support of said Award.

II. STATEMENT OF QUESTION INVOLVED.

Should this public employee Arbitration Award be affirmed by the Court, taking into account the very limited scope of review of public employee arbitration awards?

Answered in the affirmative by the Association.

III. RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS.

RELEVANT CONTRACT PROVISIONS

ARTICLE XVIII.
Fringe Benefits

Effective dates and expiration dates concerning fringe benefits shall be September 1 and August 31 respectively, unless otherwise specified.

Subparagraph D.

IF ANY EMPLOYEE OFFICIALLY RETIRES prior to the age 65, he/she shall be eligible to continue in the bargaining unit's hospitalization, medical-surgical, and major medical group at his/her expense until the month prior to his/her eligibility for Medicare.

Subparagraph D. 1.

1. Employees who retire effective on or before June 30, of any given school year, and are eligible by virtue of age to remain as a member of the bargaining unit's hospitalization medical-surgical and major medical group will be covered by the District through August of that year.

Subparagraph I- DENTAL

For the 1998-99, 1999-2000, 2000-2001, and 2001-2002 contract years, the Employer will pay the full cost required to provide a basic Dental Insurance Plan (comparable to Delta Dental Basic Plan II) for each employee and pay the full cost required to provide dependent unit coverage for the dependents of each employee according to the following schedule of benefits and restrictions.

Subparagraph J - PRESCRIPTION:

The Board will provide full family prescription coverage. Deductible amounts will be $12.00 for brand names drugs and $6.00 for generic drugs. A Flex-RX program will be in effect as well. Total prescription program will be for the length of the contract.

IV. ARGUMENT.

It is the position of the Association in this case that the only issue for consideration by the Court should be the scope of review. At this point, whether or not the Court would agree with the Arbitrator's conclusion in this case or would come to a different conclusion is not legally relevant. This case is, purely and simply, a scope of review case.

In reviewing a public employee arbitration award, the parties are bound by the record consisting of the collective bargaining agreement, the grievance and the arbitration award and the trial court does not take testimony and does not hold a de novo hearing. Borough of Dormont v. Dormont Borough Police Department, 654 A.2d 69, 72 (Pa. Cmwlth., 1995), allocator denied 661 A.2d 875.

The Public Employee Relations Act provides for mandatory binding arbitration in disputes arising out of the provisions of a collective bargaining agreement between a public employer and a bargaining representative of public employees such as teachers – 43 P.S. Section 1101.903.

The Association and the District are parties to the Collective Bargaining Agreement (CBA) which provides in Article II. 8., that Grievances may be submitted to Arbitration and that the decision of the Arbitrator shall be final and binding.

The Pennsylvania Supreme Court has recently examined the limited scope of review of public employee arbitration awards in State System of Higher Education (Cheyney University) v.State College University Professional Association (PSEA/NEA), 743 A.2d 405 (Pa.1999). The court first noted the legislature recognized the value of informal dispute resolution because arbitration of grievances is mandated under Act 195 – 43 P.S. Section 1101.903 and the legislature provided for a binding arbitration decision – 743 A.2d at 410. The court noted that the philosophy of judicial

restraint was made clear in the Supreme Court's initial expression of the essence test – 743 A.2d at 411. The court rejected a standard of review looking to the reasonableness of the arbitration award – 743 A.2d at 413. The court states:

> ". . . we believe that the role for a court reviewing a challenge to the labor arbitration award under Act 195 is one of deference. We hold that in light of the many benefits of arbitration, there is a strong presumption of the Legislature and the parties intended for an arbitrator to be the judge of disputes under a collective bargaining agreement. That being the case, courts must accord great deference to the award of the arbitrator chosen by the parties. A fortiori, in the vast majority of cases, the decision of the arbitrator shall be final and binding upon the parties. However, there exists an exception to this finality doctrine. The arbitrator's award must draw its essence from the collective bargaining agreement. Pursuant to the essence test as stated today, a reviewing court will conduct a two-prong analysis. First, the court shall determine if the issue as properly defined is within the terms of the collective bargaining agreement. Secondly, if the issue is embraced by the agreement, and thus, appropriately before the arbitrator, the arbitrator's award will be upheld if the arbitrator's interpretation can rationally be derived from the collective bargaining agreement. That is to say, a court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement." 743 A.2d at 413.

Deference is the "touchstone of the appropriate standard of review". Cheyney, 743 A.2d, at 416.

The Supreme Court made it clear that:

> " a court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement." Cheyney, 743 A.2d at 413.

The Supreme Court also noted that overturning an arbitrator's award is the rare exception to the general rule that arbitrator's awards must be upheld. Cheyney, 743 A.2d at 416.

The Supreme Court again noted the limited scope of review in the case of Danville School District v. Danville Education Association, 754 A.2d 1255 (Pa. 2000). The Supreme Court held:

> "The proper role of an appellate court in reviewing an arbitrator's interpretation of the terms of a collective bargaining agreement is one of deference . . .
> The rationale behind this limited review is that final and binding arbitration is a highly favored form of dispute resolution and extremely important in the context of labor relations. Unlike more traditional judicial resolution of disputes, arbitration

> offers speed, low expense and informality. Moreover, it has been pointed to as a prime factor in assuaging industrial strife. *Id.* These benefits would be eroded if courts were to assume a greater role in reviewing labor arbitration awards. Thus, it is through this circumscribed standard that we must view the Commonwealth Court's opinion and the arbitrator's award." Danville School District, 754 A.2d 1258, 1259.

The increased deference to be given to a public employee arbitration award was again emphasized by a unanimous Supreme Court after Cheyney. In Pa. Game Commission v. State Civil Service Commission (Toth), 747 A.2d 887 (Pa. 2000), hereinafter referred to as "Toth". In Toth, the Supreme Court emphasized that it had explicitly rejected a standard of review based on reasonableness. See Id. 747 A.2d at 891.

> "We reiterate that the essence test does not permit an appellate court to intrude into the domain of an arbitrator and determine whether an award is 'manifestly unreasonable'." In fact, it rejected the reasonableness standard specifically because it was *insufficiently deferential.* Therefore, to overturn the arbitrator's award, the District had the extremely heavy burden of demonstrating that the award is irrational."

As recently as March of this year, the Supreme Court has had occasion to affirm the extremely limited role that a Court plays in resolving labor arbitration disputes. Office of Attorney General the Counsel 13 American Federation of State, County and Municipal Employees, 844 A.2d 1217 (Pa. 2004).

> The Court said " Thus, by statute and by case law, arbitration is the favored means of resolution of labor disputes, *a fortiori,* a Court should play an extremely limited role in resolving such disputes. Indeed, frequent judicial disapproval of the awards of labor arbitrators would tend to undermine a system of private ordering that is of the highest importance to the well-being of employer and worker alike".

The Supreme Court has clearly pronounced a two prong test in reviewing Arbitration Awards. The first test, is that the Court shall determine if the issue is within the terms of the collective bargaining agreement. Clearly, such is the case here. Article XVIII of the contract deals with the fringe benefits in question in subparagraph I and subparagraph J thereof.

Actually, Article XVIII is dispositive of the Grievance in this case, in that it plainly says that effective dates and expiration dates concerning fringe benefits shall be September 1 and August 31, respectively, unless otherwise specified. There is no "otherwise specified" provision in the contract and Arbitrator O'Connell so determined. The District tried to convince the Arbitrator that subparagraph D.1 which stated that employees who retire on or before June 30th will have their hospitalization covered by the District through August 31st of that year is an "otherwise specified" provision as to the dental and prescription coverage. The Arbitrator quite simply did not accept the District's argument and ruled against it.

The second prong of the test as enunciated by the Supreme Court is whether the arbitrator's award can rationally be derived from the Contract. The Court in Chenyey, supra, further defines the second prong saying, "that is to say, a Court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in/or fails to logically flow from, the collective bargaining agreement." A quick review of the Collective Bargaining Agreement provisions cited in this Brief show that the award is founded in and flows logically from the Collective Bargaining Agreement.

Before the Arbitrator and again before this Court, the District asserts a past practice whereby, prior to these Grievances, the dental and prescription coverage terminated in the month of retirement. The Arbitrator found such a practice to exist. However, the Arbitrator quoted horn book law and

held that while past practices are useful tools in interpreting ambiguous contract language, a past practice cannot give meaning to contractual provisions that are clear and explicit. He further held that in such situations, the negotiated contractual language cannot be modified by the past practice and must be followed. (Arbitration Award, page 5). The Arbitrator then went on to conclude that the District's argument that the contract provision that hospitalization coverages should end August 31 means that dental and prescription coverage ends some other time must be rejected. Again, based on the explicit language of the introductory sentence to Article XVIII, which states that August 31st is the expiration date for fringe benefits, unless otherwise specified, the Arbitrator rejected the District's position.

As the Arbitrator found on page 6 of the Award: "when the negotiated language is as clear and explicit as it is in Article XVIII, it must be given effect". The Arbitrator went on to again dismiss the District's argument of past practice, finding that the contract obligated the District to provide coverage to August 31.

After reading the award, the Association believes the Court will find that it cannot hold that the Award indisputably and genuinely is without foundation in this Collective Bargaining Agreement.

The District has asserted that the Arbitrator committed an error of law in his decision to disregard the District's past practice. Actually, the finding of Arbitrator O'Connell is consistent with one of the more respected treatises on arbitration, Elkouri & Elkouri, How Arbitration Works, 6th Edition, which states at page 627 as follows:

"While custom and past practice are used very frequently to establish the intent of contract provisions that are susceptible to differing interpretations, arbitrators who follow the "plain

meaning" principle of contract interpretation will refuse to consider evidence of a past practice that is inconsistent with a provision that is "clear and unambiguous" on its face.

> "Plain and unambiguous words are undisputed facts, The conduct of Parties may be used to fix a meaning to words and phrases of uncertain meaning. Prior acts cannot be used to change the explicit terms of a contract. An arbitrator's function is not to rewrite the Parties contract. His function is limited to finding out what the Parties intended under a particular clause. The intent of the Parties is to be found in the words which they, themselves, employed to express their intent. When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used."

In its Brief, the District cites several cases, which according to the District, stand for the proposition that past practice can modify or amend apparently unambiguous contract language which has arguably been waived by the Parties. While such is cited as dicta in one or more of the cases cited by the District, none of those cases actually hold that an unambiguous contract provision has been waived or modified.

For example, the case of Greater Johnstown Area Vocational-Technical School v. Greater Johnstown Area Vocational-Technical Education Association, 489 A.2d, 945 (Pa. Cmwlth.1985) did not involve an express contract provision. Again, County of Allegheny v. Allegheny Prison Employees Independent Union, 381 A.2d., 849 (Pa. Supreme, 1978) the subject matter of the grievance was not referred to in the collective bargaining agreement, therefore no express provision of the contract was involved.

Finally in Appeal of Chester Upland School District, 423 A 2d, 437 (Pa. Cmwlth.1980), the Court specifically stated that the case presented the situation where the past practice was used to prove an employment condition, which cannot be derived from any express language of the Agreement.

While the District has cited dicta that past practice may modify or amend apparently unambiguous language, which has arguably been waived by the Parties, clearly the Arbitrator in this case did not find a waiver or modification of the contract language. The Arbitrator in this case did not violate law, but simply disagreed with the manner in which the District wanted him to apply its past practice argument. Again, the Arbitrator's decision is clearly founded in the Collective Bargaining Agreement and logically flows from it.

Finally, the District argues (assuming) that the Arbitrator made an error of law, therefore, it cannot be rationally derived from the Collective Bargaining Agreement. Again, cases cited by the District do not support that proposition in this case. For example, the case of Pennsylvania Labor Relations Board v. Bald Eagle Area School District, 451 A 2d. 671(Pa.1982) stated only that: "Courts have no reason to assume an arbitrator will ignore the law and award a payment based on contractual interpretation which conflicts with fundamental policy of this Commonwealth as expressed in statutory law. If so, judicial relief is available." (Emphasis added). Clearly, the issue in the instant case as to when the payment for fringe benefits ended is not a fundamental policy of the Commonwealth nor is it expressed in statutory law.

In Upper Marion School District v. Upper Marion Education Association, 482 A.2d 274 (Pa. Cmwlth.1984), the Court did find that an arbitrator's award which clearly was contrary to a recent decision of the Commonwealth Court on the same subject matter, was reversible. That case involved an arbitrator's ruling on the length of a school day, which is a statutory embodiment of the School Code. Again, the instant case involves the ending date of certain contractually provided fringe benefits and does not deal with a statutory pronouncement such as in the Upper Marion. Additionally, it should be noted that these cases predate the standard of review as announced by the Supreme Court in the Cheyney, supra, and the cases following it.

In its final argument, the District attempts to argue that the award is not rational by ascribing to it a holding that is not embodied in the Award. The District argues that an irrational result would apply to employees who die, who quit, who are fired or who retire after September 1st, say, on September 2nd of any given year if their benefits were extended to August 31.

It is quite clear that the Grievance involves teachers who submitted their intent to retire effective June 30th. (Arbitration Award, p.2.) At page 6 of the Arbitration Award, the Arbitrator speaks of Grievants who were denied this coverage and incurred out of pocket expenses for monthly insurance premiums for the months of July and August following their retirement in either June of 2002 or June of 2003. While the District seeks to apply the Arbitration Award beyond its holding, it is clear what the Arbitrator intended and his Award is only applicable to those Grievants who submitted their intent to retire at the end of June, 2002 and June, 2003. These Grievants constituted a class of teachers who worked for the District for the entire school year and therefore earned the right to be paid the full contractual benefits based on the full contractual year that they worked. The Award says nothing more or nothing less.

V. CONCLUSION.

In view of the foregoing argument, and based on the very deferential nature of arbitration awards and the extremely limited role of a reviewing court, the public employee arbitration Award of Arbitrator O'Connell should be affirmed. This Award is clearly founded in the Collective Bargaining Agreement between the Parties and logically flows from it. It is certainly a rational interpretation of the express language of the Collective Bargaining Agreement between the Parties in this case.

Respectfully submitted:

Randall C. Rodkey,
Attorney for Respondent,
Dubois Area Education Association

--- A.2d ----, 2004 WL 1404030 (Pa.Cmwlth.), 175 L.R.R.M. (BNA) 2243

Commonwealth Court of Pennsylvania.

UNITED MINE WORKERS OF AMERICA, DISTRICT 2 and United Mine Workers of America, Local 2002

v.

COUNTY OF BLAIR.

Appeal of County of Blair.

Argued Feb. 2, 2004.

Decided June 24, 2004.

Reargument En Banc Denied Aug. 16, 2004.

Background: Union representing county employees sought judicial review of arbitrator's decision interpreting collective bargaining agreement to mean that part-time employees' accrual of time toward vacation began with signing of agreement, not with first day of service. The Court of Common Pleas, Blair County, No. 2002-4192, Reilly, Jr., J., vacated arbitrator's award. County appealed.

Holding: The Commonwealth Court, No. 1372 C.D. 2003, Leavitt, J., held that, under collective bargaining agreement, part-time employees' accrual of vacation time began when agreement was signed.

Reversed.

[1]

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)3 Arbitration Agreements
231Hk1543 Construction and Operation
231Hk1549 Matters Subject to Arbitration Under Agreement
231Hk1549(2) k. Arbitration Favored; Presumption of Arbitrability. Most Cited Cases

There is a strong presumption that the legislature and the parties to a collective bargaining agreement intend for an arbitrator to judge disputes arising from their agreement.

[2]

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)5 Judicial Review and Enforcement
231Hk1618 Scope of Inquiry
231Hk1620 k. Deference in General. Most Cited Cases

Courts must give great deference to the arbitrator's decision unless it can be shown that the award does not draw its essence from the collective bargaining agreement.

[3]

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)4 Proceedings

231Hk1590 Award
231Hk1592 k. Conformity to Collective Bargaining Agreement. Most Cited Cases

The essence test of whether an arbitrator made a decision based on collective bargaining agreement requires a two-pronged analysis: (1) the reviewing court must determine whether the issue falls within the terms of the collective bargaining agreement and, if so, (2) the reviewing court must determine whether the arbitrator's interpretation can rationally be derived from the collective bargaining agreement.

[4]

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)5 Judicial Review and Enforcement
231Hk1618 Scope of Inquiry
231Hk1623 Interpretation of Collective Bargaining Agreement
231Hk1623(1) k. In General. Most Cited Cases

A court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement.

[5]

231H Labor and Employment
231HXII Labor Relations
231HXII(E) Labor Contracts
231Hk1268 Construction
231Hk1280 k. Benefits. Most Cited Cases

Under collective bargaining agreement for union representing some county employees, vacation time for part-time employees was to be calculated on the basis of hours for the first year, and years of service thereafter, not according to total years of service.

[6]

231H Labor and Employment
231HXII Labor Relations
231HXII(H) Alternative Dispute Resolution
231HXII(H)5 Judicial Review and Enforcement
231Hk1618 Scope of Inquiry
231Hk1623 Interpretation of Collective Bargaining Agreement
231Hk1623(1) k. In General. Most Cited Cases

The standard in an appeal of an arbitration award is not whether the arbitrator correctly applied contract law principles, but whether the arbitrator's interpretation can be related to the language of the collective bargaining agreement.
Aimee L. Willett, Altoona, for appellant.
Claudia Davidson, Pittsburgh, for appellee.

BEFORE: PELLEGRINI, Judge, and LEAVITT, Judge, and JIULIANTE, Senior Judge.

OPINION BY Judge LEAVITT.
***1** The County of Blair (County) appeals from an order of the Blair County Court of Common Pleas (trial court) granting summary judgment to the United Mine Workers of America, Local 2002 (Union)

in its challenge to an arbitrator's award. The trial court vacated the arbitrator's award, finding that the award could not be rationally derived from the provisions of the collective bargaining agreement (Agreement) relating to the calculation of vacation benefits for part-time employees. We reverse.
The Union and County entered into an Agreement effective from January 1, 2001 through December 31, 2003. As part of the negotiations, the County agreed, for the first time, to extend vacation benefits to part-time employees. Accordingly, Article 11, Section 7 of the Agreement states that: [p]art time employees [[FN1]] will earn vacation based on the full time employees['] accrual rates on a Pro Rata basis for all hours worked in the previous year.
Early in 2002, the Union became aware that the County was calculating the part-time employees' vacation benefits by using years of service from the commencement of the Agreement, January 1, 2001. On the other hand, full-time employees had their vacation time calculated on the basis of total years of service with the County. The Union filed a grievance arguing that the Agreement required the County to calculate part-time employees' vacation time in the same manner as the full-time employees, *i.e.,* by using total years of service with the County.
After a hearing on the matter, [FN2] the arbitrator denied the Union's grievance, reasoning that [v]acation for part-time employees is covered in Article 11, [S]ection 7, which makes no mention of years of service, but determines vacation by hours worked in the previous year.
Arbitrator Order, 1. Thus, the arbitrator concluded that the calculation of vacation time for part-time employees is to be based on hours worked in the first year of the new Agreement. [FN3] In each successive year, years of service since January 1, 2001, would be used to calculate vacation time. Service before that date was irrelevant.
On October 8, 2002, the Union filed a complaint with the trial court alleging that the arbitrator's award was not rationally related to the Agreement. The County opposed the Union's complaint. Thereafter, the Union filed a motion for summary judgment, which the County opposed.
On June 2, 2003, the trial court granted the Union's motion for summary judgment and vacated the arbitrator's award. The trial court concluded that vacation time for part-time employees must be calculated based on their total years of service with the County, both before and after January 1, 2001. In so holding, the trial court relied upon Article 11, Sections 1 and 4, which provide that:
Section 1. Employees covered in this agreement [[FN4]] shall be entitled each calendar year to annual vacations with pay according to the following schedule:

Years of Service	Entitlement Per Year
1 year inclusive	5 days
2 to 5 years inclusive	10 days
6 to 11 years inclusive	15 days
12 to 22 years inclusive	20 days
Over 22 years	25 days

***2** Employees may carry up to twice their annual accrual of vacation days into the next year.

* * *

Section 4. All employees shall be granted on January 1, of each year of employment, their annual vacation based on their years of continuous service. Such employees may schedule their vacation throughout the calendar year; however, in the event that any such employee terminates, resigns, or retires prior to December 31 of any year, their vacation entitlement shall be paid to the employee at his current hourly rate.
Trial Court Opinion, 2. Based on these provisions, the trial court reasoned that the arbitrator completely ignored the clear and unambiguous requirements of the Agreement ... the Agreement clearly requires that both part-time and full-time employees accrue their vacation benefits based on their years of service. Nowhere does the Agreement require that part-time employees' years of service commence as of the effective date of the Agreement. Indeed the pertinent language in the Agreement set forth above makes no distinction between full or part-time employees with regards to the accrual of vacation days.
Trial Court Opinion, 2-3. The County then brought this appeal.
On appeal, the County raises one issue for our consideration. It asserts that the trial court erred by substituting its interpretation of the Agreement for that of the arbitrator. Stated otherwise, the trial court failed to apply the proper test in an appeal of an arbitration award, *i.e.,* whether the award draws its essence from the collective bargaining agreement.

[1][2][3][4] There is a strong presumption that the Legislature and the parties to a collective bargaining agreement intend for an arbitrator to judge disputes arising from their agreement. *State System of Higher Education (Cheyney University) v. State College University Professional Association (PSEA-NEA)*, 560 Pa. 135, 149, 743 A.2d 405, 413 (1999). Accordingly, courts must give great deference to the arbitrator's decision unless it can be shown that the award does not draw its essence from the collective bargaining agreement. *Id.* at 149-150, 743 A.2d at 413. The essence test requires a two-pronged analysis: (1) the reviewing court must determine whether the issue falls within the terms of the collective bargaining agreement and, if so, (2) the reviewing court must determine whether the arbitrator's interpretation can rationally [FN5] be derived from the collective bargaining agreement. *Id.* at 150, 743 A.2d at 413. "A court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement." *Id.; see also Greene County v. District 2, United Mine Workers of America*, 778 A.2d 1259, 1262 (Pa.Cmwlth.2001).

The parties agree that the calculation of part-time employees' vacation time is covered by the Agreement. Thus, we must determine whether the arbitrator's award requiring the County to calculate part-time employees' vacation time from the commencement of the Agreement and forward was rationally derived from the Agreement.

***3** The County argues that the arbitrator's award meets the essence test because Article 11, Section 7 of the Agreement does not state that past years of service are to be considered when calculating part-time employees' vacation time. The Union counters that the arbitrator's award fails the essence test because the arbitrator overlooked several provisions in Article 11 of the Agreement that direct using past years of service to calculate vacation days.

Article 11, Section 7 of the Agreement (emphasis added) provides that part-time employees' will earn vacation time based on the "full time employees ['] accrual rates on a Pro Rata basis *for all hours worked in the previous year.*" The parties agree that part-time employees did not receive vacation benefits prior to the commencement of the Agreement. [FN6] Accordingly, the arbitrator found that during the first year of service under the Agreement, January 1, 2001 through January 1, 2002, part-time employees accrue vacation time based on the *hours worked.* Once the part-time employees have worked for over a year under the Agreement, then the calculation of their vacation time will be based on *years of service,* as stated in Article 11, Sections 1 and 4 of the Agreement. The arbitrator's interpretation of the Agreement can be rationally derived from the terms of that document, and it was error for the trial court to set this interpretation aside.

The trial court concluded that the arbitrator "completely ignored the clear and unambiguous terms of the agreement," because Article 11 Sections 1, 4 and 7 requires "that both part-time and full-time employees accrue their vacation benefits based on their years of service." Trial Court Opinion, 2. The trial court is correct in that the Agreement requires the calculation of vacation for part-time employees to be based on years of service, but only after those employees have completed at least one year under the Agreement. [FN7]

There are other flaws to the trial court's interpretation of the Agreement. It reduces the language contained in Article 11, Section 7 that provides "for all hours worked in the previous year" to meaningless surplusage. *See Rochester Area School District v. Rochester Education Association, PSEA/NEA*, 747 A.2d 971 (Pa.Cmwlth.2000) (holding that arbitrator's award was not rationally related to the collective bargaining agreement where arbitrator ignored several terms of the agreement and provisions of the School Code and Act 195). [FN8] In addition, the trial court's interpretation adds a retroactivity provision, which was not expressly set forth in the Agreement. [FN9] *See Greater Nanticoke Area School District v. Greater Nanticoke Area Education Association*, 760 A.2d 1214, 1219 (Pa.Cmwlth.2000) (noting that when the words of a collective bargaining agreement are clear and unambiguous the intent is to be gleaned exclusively from the express language of the agreement).

[5][6] However, the standard in an appeal of an arbitration award is not whether the arbitrator correctly applied contract law principles. The issue is whether the arbitrator's interpretation can be related to the language of the collective bargaining agreement. The arbitrator's conclusion that vacation time for part-time employees was to be calculated on the basis of *hours* for the first year and *years* of service thereafter finds support in the language of the Agreement. The trial court erred in substituting his judgment for that of the arbitrator. *Greene County*, 778 A.2d at 1264 (holding that arbitrator's award was rationally related to the agreement terms and the trial court erred by substituting its judgment for that of the arbitrator although the Court believed arbitrator's award to

be incorrect).
*4 For these reasons, we reverse the trial court.

ORDER

AND NOW, this 24th day of June, 2004, the order of the Blair County Court of Common Pleas dated May 29, 2003, in the above-captioned matter, is hereby reversed.

FN1. Article I Section 5 of the Agreement defines part-time employees, in relevant part, as "employees who are regularly scheduled less than thirty five (35) hours per week." Article 1 Section 4 of the Agreement defines full-time employees, in relevant part, as "employees who are

regularly scheduled thirty five (35) hours per week or more."

FN2. No transcript was taken at the arbitration hearing. County's Brief at 15, n. 1.

FN3. The Union's Complaint to Vacate Arbitration Award provides that it learned in early 2002 that the County was incorrectly calculating benefits for part-time employees and filed its grievance in March 2002. Complaint to Vacate Arbitration Award ¶ 7-8, Reproduced Record, 7a-8a (R.R. ____). Thus, the Union was challenging the calculation of benefits for the first year of the Agreement, *i.e.*, from January 1, 2001, through January 1, 2002, and forward. The arbitrator's award addressed how to calculate benefits for the first year of the Agreement by concluding that benefits should be calculated based on hours of service.

FN4. The trial court noted that the Agreement "defines 'employees covered in this agreement' as 'all full-time and regular part-time professional and non-professional employees.' " Trial Court Opinion at 2.

FN5. The Court in *Cheyney University* cautioned against using the term reasonable and rational interchangeably. The Court stated,

We acknowledge that the terms "rational" and "reasonable" have often been used interchangeably as part of the standard of review. Indeed, in common parlance, the two words have similar meanings. However, we find that in the context of review of an Act 195 labor arbitration award, determining an award to rationally be derived from a collective bargaining agreement connotes a more deferential view of the award than the inquiry into whether the award is reasonable. An analysis of the "reasonableness" of an award too easily invites a reviewing court to ignore its deferential standard of review and substitute its own interpretation of the contract language for that of the arbitrator. Thus, we find that in this very limited context, a review of the "reasonableness" of an award is not the proper focus.

Cheyney University, 560 Pa. at 150, 743 A.2d at 413, n. 8.

FN6. The Union in Paragraph 5 of its Complaint to Vacate Arbitration Award provides, "[p]rior to the time that the Union represented theses [sic] employees, part time employees for the County did not enjoy vacation benefits. The Union successfully negotiated benefits for the part time employees in the agreement with the County." R.R. 6a.

FN7. The Union contends the arbitrator's interpretation of the Agreement does not make sense. Specifically it argues that:

If a part-time employee earns vacation only on the basis of hours worked in the previous year, then a part-time employee with ten years' seniority (working twenty hours per week) earns the same number of vacation days as a part-time employee with one year of seniority (working twenty hours per week). There is no rational way to conclude that Section 7's reference to hours worked in the previous year permits the County to ignore part-time employees' years of continuous employment when determining their vacation benefits.

Union Brief at 10-11.

In addition, the Union argues that the Agreement distinguishes between full-time and part-time employees when necessary. For example, Article 10 provides for paid holidays only to full-time employees, suggesting that part-time employees are not entitled to this benefit and similarly, Article 14 provides that full-time employees are entitled to more bereavement leave than part-time employees. The arbitrator's failure to draw such distinctions with respect to the accrual of vacation benefits is significant.

Finally, the Union contends that the bargaining history supports its interpretation. Keith Barnhart, the Union's Chief Negotiator, testified that the parties intended for vacation benefits for both full-time and part-time employees to be calculated on the same basis--the employees'

years of service with the County.

However, all of these arguments address *how* the County is to calculate benefits not *when* the calculation of the new vacation benefits is to commence. Further, the Union overlooks the fact that the Agreement is intended to apply from January 1, 2001 forward. These provisions become important after part-time employees put in a year of service under the new Agreement.

FN8. In *Rochester Area School District,* the Court held that the arbitrator's award was not rationally related to the collective bargaining agreement where the arbitrator required a school district to consult with the Rochester Education Association PSEA/NEA (Association) to develop a new honor roll policy. In doing so, the arbitrator ignored and rendered meaningless several sections of the agreement and ignored relevant provisions of School Code and Act 195 that expressly preserved the school district's rights to adopt management policies without the Association's consent.

FN9. In addition, this interpretation is supported by the County's understanding of the Agreement as indicated by its refusal to credit part-time employees with vacation time in the same manner as full-time employees

since the commencement of the Agreement.

Pa.Cmwlth.,2004.
United Mine Workers of America, Dist. 2 v. County of Blair
--- A.2d ----, 2004 WL 1404030 (Pa.Cmwlth.), 175 L.R.R.M. (BNA) 2243
END OF DOCUMENT

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July 27, 2004

Honorable Fredric J. Ammerman
Clearfield County Court House
230 East Market Street
Clearfield, PA 16830

RE: DuBois Area School District

Dear Judge Ammerman:

Enclosed is the District's Brief if the above caption matter. By copy of this letter, I am forwarding a copy of the brief to opposing counsel, Randall Rodkey.

Sincerely,

WRS

William R. Strong, Esquire
WRS/pah
Enclosure
C: Randall Rodkey, Esquire (w/encl)
Sharon Kirk, Superintendent (w/encl)
Darrell E. Clark (w/encl)
Paul Orcutt (w/encl)
Dr. John A. Fabre (w/encl)
Thomas E. Vizza (w/encl)
John M. Yount (w/encl)
E. Lloyd McCreight (w/encl)
Kenneth J. Mitchell (w/encl)
Dennis V. Raybuck (w/encl)
Mary Ruth Wilson (w/encl)

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT, PETITIONER	:
VS.	:CIVIL ACTION – LAW
DUBOIS AREA EDUCATION ASSN. RESPONDENT	:NO. 04-1040-CD

DISTRICT'S BRIEF

WILLIAM R. STRONG, ESQUIRE
PO BOX 7, 616 MAIN STREET
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PA ID NO 19980

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DUBOIS AREA SCHOOL DISTRICT, PETITIONER	:
VS.	:CIVIL ACTION – LAW
DUBOIS AREA EDUCATION ASSN. RESPONDENT	:NO. 04-1040-CD

DISTRICT'S BRIEF

I. HISTORY OF THE CASE

This matter is now before the Court on a Petition to Vacate Arbitration Award filed by the DuBois Area School District (District) against the Arbitration Award of Edward J. O'Connell, dated June 23, 2004 sustaining the Grievance by the DuBois Area Education Association (Association) on behalf of several members seeking reimbursement for dental and prescription premiums for the months of July and August following their June retirements.

Several Association members, upon retiring in June of 2002, filed a Grievance on June 12, 2002 on behalf of all effected members after receiving a letter from the District which indicated that dental and prescription premiums coverage would cease for the months of July and August, but that hospitalization would continue through the end of

August. This had been a long-standing practice of the District since 1988 (14 years). The Grievance was processed through the various steps and Arbitrator Steven Schmerin was selected on October 7, 2002. An Arbitration Hearing was scheduled for February 7, 2003. Arbitrator Schmerin was appointed Secretary of Labor and Industry by Governor Rendell. A new Arbitrator, Edward J. O'Connell, was selected in June of 2003.

In the interim, the Association had filed a second Grievance raising the same issue for the retirees in June of 2003. Both Grievances were consolidated by stipulation of the parties into one arbitration proceeding. An Arbitration Hearing was held on February 24, 2004. Arbitrator O'Connell, by award dated June 23, 2004 sustained both Grievances. The District filed the current Petition to Vacate Arbitration Award.

II. STATEMENT OF JURISDICTION

Pursuant to 42 Pa. C.S.A. Section 933 (b), the Court of Common Pleas of Clearfield County has both jurisdiction and venue to hear the Petition to Vacate Arbitrator's Award.

III. STATEMENT OF QUESTIONS INVOLVED

1. WHETHER ARBITRATOR O'CONNELL'S AWARD IS RATIONALLY DERIVED FROM THE COLLECTIVE BARGAINING AGREEMENT SATISFYING THE ESSENCE TEST WHERE ARBITRATOR O'CONNELL CONCLUDED, CONTRARY TO BINDING CASE LAW, THAT THE DISTRICT'S LONG-ESTABLISHED PAST PRACTICE CANNOT GIVE

MEANING TO A CONTRACT PROVISION THAT IS CLEAR (UNAMBIGUOUS)?

2. WHETHER ARBITRATOR O'CONNELL'S AWARD WHICH CONCLUDES, CONTRARY TO BINDING CASE LAW, THAT THE DISTRICT'S LONG-ESTABLISHED PAST PRACTICE CANNOT GIVE MEANING TO A CONTRACTUAL PROVISION THAT IS CLEAR (UNAMBIGUOUS) VIOLATES SECTION 7302 (D) (2) OF THE UNIFORM ARBITRATION ACT?

3. WHETHER ARBITRATOR O'CONNELL'S AWARD IS RATIONALLY DERIVED FROM ARTICLE XVIII WHERE THIS GENERAL RULE OF STARTING AND ENDING DATES IS CLEARLY APPLICABLE TO EXISTING EMPLOYEES AND THERE IS NO LOGICAL REASONS TO EXTEND IT TO FORMER EMPLOYEES WHO HAVE DIED, RESIGNED, WERE FIRED OR RETIRED?

IV. SCOPE OF JUDICIAL REVIEW

Judicial review of arbitrator's decisions can be found in Section 7302 (d) (2) of the Uniform Arbitration Act and the case of State System of Higher Education vs. State College University Professional Association, 56 Pa. 135, 743 A2d 403 (1999).

Under Section 7302 (d) (2) of the Uniform Arbitration Act, 42 Pa. C.S.A. 7302 (d) (2), it provides as follows:

> "Where this paragraph is applicable, a court in reviewing an arbitration award pursuant to this subchapter shall, notwithstanding any other provision of this subchapter, modify or correct the award where the award is contrary to law and is such that had it been a verdict of a jury the court would have entered a different judgment or a judgment

> not withstanding the verdict. (Emphasis Added)."

Although the presentation of a legal issue in arbitration decision does not render arbitration improper because an arbitrator might find an award contrary to law, courts have the expressed statutory authority under Section 7302 (d) (2) to review and correct legal errors on appeal. Pennsylvania Labor Relations Board vs. Bald Eagle Area School District, 499 Pa. 62, 451 A2d 671 (1982); Greater Johnstown School District vs. Greater Johnstown Education Association, 647 A2d 611 (Pa. Cmwlth. 1994); Upper Marion School District vs. Upper Marion Education Association, 482 A2d 274 (Pa. Cmwlth. 1984).

In State System of Higher Education, supra, the Supreme Court reaffirmed the essence test. It is stated as follows:

> "The arbitrator's award must draw its essence from the Collective Bargaining Agreement. Pursuant to the essence test as stated today, a reviewing court will conduct a two-prong analysis. First, the court shall determine if the issue as properly defined is within the terms of the Collective Bargaining Agreement. Second, if the issue is embraced by the agreement and thus appropriately before arbitrator, the arbitrator's award will be upheld if the arbitrator's interpretation can rationally be derived from the Collective Bargaining

Agreement. That is to say, a Court will only vacate an arbitration award where the award indisputably and genuinely is without foundation in, or fails to logically flow from the Collective Bargaining Agreement."

V. PERTINENT CONTRACT PROVISIONS

ARTICLE XVIII - FRINGE BENEFITS

Effective dates and expiration dates concerning fringe benefits shall be September 1, and August 31 respectively, unless otherwise specified.

D. If any employee officially retires prior to age 65, he/she shall be eligible to continue in the bargaining unit's hospitalization, medical-surgical and major medical group at his/her expense until the month prior to his/her eligibility for Medicare.

1. Employees who retire effective on or before June 30, of any given school year, and are eligible, by virtue of age, to remain as a member of the bargaining unit's hospitalization medical-surgical and major medical group, will be covered by the District through August of that year.

I. DENTAL

For the 1998-1999, 1999-2000, 2000-2001 and 2001-2002 contract years, the Employers will pay the full cost required to provide a basic Dental Insurance Plan (comparable to Delta Dental Basic Plan II) for each employee, and pay the full cost required to provide dependent unit coverage for the dependents of each employee according to the following schedule of befits and restrictions...

J. PRESCRIPTION

The Board will provide full family prescription coverage. Deductible amounts will be $12.00 for brand name drugs and $6.00 for generic drugs. A Flex-RS program will be in effect as well. Total prescription program will be for the length of the contract.

VI. ARGUMENT

1. ARBITRATOR O'CONNELL'S RULING THAT THE DISTRICT'S LONG ESTABLISHED PAST PRACTICE CANNOT GIVE MEANING TO A CONTRACT PROVISION THAT IS CLEAR (UNAMBIGUOUS) IS AN ERROR OF LAW.

Arbitrator O'Connell found a long established past practice of the District since 1988. Arbitrator O'Connell finds on page 4 and 5 as follows:

> "Indeed, the letters informing the Grievants of the termination in coverage are similar to those issued to retiring employees as in the past. The District submitted four of such letters, dating back to March of 1997. Furthermore, the District's Business Manager testified credibly that the termination of fringe benefits in the month of retirement has been the Parties' past practice since at least 1988."

Arbitrator O'Connell then, on page 5 of his Opinion and Award, states the following ruling:

> Without question, custom and past practice are useful tools in interpreting ambiguous contact language. Clear and long-standing customs and past practices can establish conditions of employment that are as

> binding as if they were written agreements. However, this tool has certain limitations. A past practice cannot give meaning to a contractual provision that is clear and explicit. In such situations, the negotiated contractual language cannot be modified by the past practice and must be followed."

Binding legal authority in Pennsylvania establishes that a past practice can give meaning to clear contract language in two distinct areas. They are as follows:

1. To implement contract language which sets forth only a general rule.
2. To modify or amend apparently **unambiguous** language which has arguably been waived by the parties.

County of Allegheny vs. Allegheny County Prison Employees Independent Union, 381 A2d 849 (Pa. 1978); Greater Johnstown Area Vocational-Technical School vs. Greater Johnstown Vocational-Technical Association, 489 A2d 945, 948 N.3 (Pa. Cmwlth. 1985); Appeal of Chester Upland School District, 423 A2d 437, 441 N.4 (Pa. Cmwlth. 1980).

Arbitrator O'Connell's Decision that the past-practice of the District since 1988 cannot give meaning to clear contract language, is directly contrary to the above cited case authority. Therefore, this Honorable Court has the statutory authority under Section 7302 (d) (2) of the Uniform Arbitration Act to vacate this award as an error of law.

2. ARBITRATOR O'CONNELL'S DECISION DOES NOT DRAW ITS ESSENCE FROM THE COLLECTIVE BARGAINING AGREEMENT BECAUSE IT IS A DECISION BASED UPON AN ERROR OF LAW WHICH CANNOT BE RATIONALLY DERIVED FROM THE COLLECTIVE BARGAINING AGREEMENT.

The cases of Pennsylvania Labor Relations Board vs. Bald Eagle Area School District, 499 Pa. 62, 451 A2d 671 (1982); Greater Johnstown School District vs. Greater Johnstown Education Association, 647 A2d 611 (Pa. Cmwlth. 1994); Upper Marion School District vs. Upper Marion Education Association, 482 A2d 274 (Pa. Cmwlth. 1984) are a long line of authority wherein an arbitration award does not draw its essence from the Collective Bargaining Agreement that is based upon an error of law.

In the present case, Arbitrator O'Connell's decision that the long established past practice of the District for 14 years cannot give meaning to clear contract language is contrary to law and does not draw its essence from the Collective Bargaining Agreement according to this long line of cases.

Under the standard of review as announced in the case of State System of Higher Education, supra, Arbitrator O'Connell's decision violates the second prong of the essence test because it is contrary to law. A decision contrary to law cannot be considered rationally derived from the Collective Bargaining Agreement.

3. ARBITRATOR O'CONNELL'S AWARD THAT ARTICLE XVIII IS APPLICABLE TO FORMER EMPLOYEES IS NOT RATIONALLY DERIVED FROM THE COLLECTIVE BARGAINING AGREEMENT.

The Collective Bargaining Agreement for the DuBois Area School District covers the school years from July of 2002 until June 30, 2008, a period of 6 years. Article XVIII provides as follows:

> "Effective dates and expiration dates concerning fringe benefits shall be September 1, and August 31 respectively, unless otherwise specified."

Clearly, this general statement merely sets the beginning and ending dates of fringe benefits for existing employees who work each year for the six years of the Collective Bargaining Agreement. A Collective Bargaining Agreement governs the terms and conditions of current employees. It does not cover persons before they are employees and it doesn't cover people after they cease employment (former employees). It only covers former employees when such coverage is clearly set forth. The only provision covering former employees in Article XVIII (d) giving retirees hospitalization only until August 31 following retirement.

Arbitrator O'Connell reasoned in the award that the general phrase requires all fringe benefits be paid from September 1 until August 31 of the following year for people who retire after September 1 because there is no other provision in the contract to exclude

it. The real trouble with this twisted logic is that it likewise would apply to the other categories of former employees. These categories are employees who die, quit, or are fired. If any of these individuals die, quit or get fired after September 1, they would receive all benefits under Arbitrator O'Connell's irrational logic because there is no other provision to exclude the coverage in the contract.

These former employees could not rationally argue that they are entitled to all fringe benefits for this extended period after they are gone, especially where the employee gets fired. Extending coverage for all fringe benefits to all categories of former employees is very costly to the District and must be bargained for and clearly set forth in the agreement. Article XVIII (d) does provide this for retired employees only and for hospitalization only. There is no similar provision extending other coverage for dental and prescription for retired employees.

If Arbitrator O'Connell's decision was rationally derived from the Collective Bargaining Agreement, it would not apply to former employees. Employees who die, quit are fired or retire after September of any year would not be automatically entitled to fringe benefits coverage until August of the following year simply because there is no provision providing such.

The question becomes whether it is rational to conclude under the general introductory phrase of Article XVIII [effective date and expiration dates concerning fringe benefits shall be September 1 and August 31 respectively, unless otherwise provide] that former employees who die, quit, are fired or retire after September of any year are automatically entitled to fringe benefits through August even through they are no longer employed, are no longer contributing to the District, and do not warrant coverage especially in the case of employee's who are fired. Arbitrator O'Connell's decision interpreting Article XVIII as extending coverage not only to existing employees but also to former employees leads to an absurd result. The absurd result is that former employees get extended coverage without having bargained collectively with the District for such costly rights. The absurdity of Arbitrator O'Connell's logic is shown as follows:

1. If an employee quits on September 2 of any year, he/she would get coverage for all fringe benefits including very costly hospitalization until August 31 of the following year. This is an absurd result.
2. If an employee is fired on September 2 of any year, he/she would get coverage of all fringe benefits including very costly hospitalization until August 31 of the following year. Once again, this is the ultimate of absurdity.

3. If an employee dies on September 2 of any year, he/she would get coverage of all fringe benefits until August 31 of the following year. Once again, this is an absurd result.
4. If any employee retires on September 2 of any year, he/she would get fringe benefits (dental, life, and prescription) until August 31 of the following year. Once again, this is absurd because the District did not bargain for this.

The District did agree under Article XVIII (d) (1) to pay only retirees and only for hospitalization until August of the following year. Arbitrator O'Connell's irrational logic would now extend all fringe benefits for all four categories of former employees even though the District has not bargained for this.

The District submits that a rational interpretation of the introductory general rule of Article XVIII merely defines the beginning and ending dates for existing employees who continue under the Collective Bargaining Agreement for each year of the six years of the Agreement. This construction would then mean that former employees who die, get fired, quit or retire after September of any year do not receive a windfall of fringe benefits until August of the next year.

In summary the District submits that Arbitrator O'Connell's interpretation of Article XVIII as being applicable to former employees is irrational and leads to the

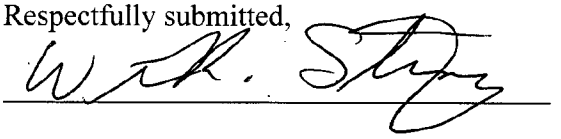
absurd result that these employees would receive fringe coverage after they are no longer an employee of the District and no longer contributing.

VII. CONCLUSION

Arbitrator O'Connell's award is contrary to law because past practices are legally permitted to give meaning to clear contract language in two situations. Therefore, the award violates Section 7302 (d) (2) of the Uniform Arbitration Act and the essence test of State System of Higher Education vs. State College University Professional Association.

Arbitrator O'Connell's award is not rationally derived from the Collective Bargaining Agreement because it extends coverage for fringe benefits to the four categories of former employees. This leads to absurd results for former employees who quit, get fired, die or retire. This absurdity is extremely costly to the District and was not properly bargained for across the table as was done for hospitalization only for retirees only as shown in Article XVIII (d).

Respectfully submitted,



William R. Strong, Esquire

GREATER JOHNSTOWN AREA VOCATIONAL-TECHNICAL SCHOOL, Appellant,

v.

GREATER JOHNSTOWN AREA VOCATIONAL-TECHNICAL EDUCATION ASSOCIATION, Appellee.

In re Robert (Bud) WARD.

Commonwealth Court of Pennsylvania.
Argued Nov. 14, 1984.
Decided March 8, 1985.

Technical school sought court review of arbitrator's award in favor of teachers' union. The Court of Common Pleas, Cambria County, Joseph F. O'Kicki, J., affirmed arbitrator's award, and school appealed. The Commonwealth Court, No. 819 C.D. 1983, Palladino, J., held that: (1) dispute as to whether union field representatives could meet with members on school property during school hours involved an "employment condition" and was therefore a "grievance" which was arbitrable; (2) arbitrator's decision that union was entitled to continuation of the past practice was drawn from the "essence" of the collective bargaining agreement; and (3) because no provision of the school code prohibited such practice, Commonwealth Court would not set it aside.

Affirmed.

Colins, J., dissented.

1. Labor Relations ⇐434.6

Dispute concerning whether state teachers' union field representatives could meet with members during their preparation and lunch periods at school involved an "employment condition" benefitting union members, and therefore arose out of interpretation or application of provisions of collective bargaining agreement, such that the dispute was a "grievance" and was arbitrable, even though the representatives were not covered by the agreement.

See publication Words and Phrases for other judicial constructions and definitions.

2. Labor Relations ⇐457

Evidence of past practice may be used in labor arbitration as indicia of parties' intentions in four situations: to clarify ambiguous language, to implement contract language which sets forth only a general rule, to modify or amend apparently unambiguous language which has arguably been waived by parties, and to create or prove a separate, enforceable condition of employment which cannot be derived from expressed language of agreement.

3. Labor Relations ⇐465

Questions which go to the merits of a labor grievance submitted to arbitration are reserved to the arbitrator and may not be ruled upon further by reviewing courts.

4. Labor Relations ⇐462

Arbitrator's decision that teachers' union was entitled to continue past practice of union field representatives meeting at school with union president or other teachers during their preparation or lunch periods, which had evolved into an employment condition incorporated into collective bargaining agreement, was "drawn from the essence" of the agreement, particularly where agreement did not contain an integration clause, and decision did not conflict with express language of the agreement.

5. Labor Relations ⇐248

Commonwealth Court will not supercede provision of collective bargaining agreement, or past practice which has been implicitly incorporated therein, because of a statutory conflict, except where conflict is explicit and definitive.

6. Labor Relations ⇐249

Vocational school's past practice of allowing union representatives to meet with teachers on school premises during school hours, which had been implicitly incorporated into collective bargaining agreement,

would not be set aside by the Commonwealth Court where that practice was not explicitly prohibited by the school code. 24 P.S. §§ 1–101 to 26–2606.

Marlin B. Stephens, Gary L. Costlow, Johnstown, for appellant.

William K. Eckel, Johnstown, for appellee.

Before CRUMLISH, Jr., President Judge, and WILLIAMS, CRAIG, MacPHAIL, BARRY, COLINS and PALLADINO, JJ.

PALLADINO, Judge.

Before us is the appeal of the Greater Johnstown Area Vocational-Technical School (Vo-Tech) from a decision of the Court of Common Pleas of Cambria County which affirmed an arbitrator's award in favor of the Greater Johnstown Area Vocational-Technical Education Association (Association).

The Vo-Tech and the Association were parties to a collective bargaining agreement (agreement) which was in effect July 1, 1981 through June 30, 1984. On October 27, 1981, the Vo-Tech sent a letter to the president of the Association informing her (1) that Association members are prohibited from conducting Association business during normal school hours and (2) that Pennsylvania State Education Association (PSEA) field representatives are prohibited from entering the school building during the normal work day to engage in Association activities. The Association thereafter filed a grievance pursuant to the agreement. The arbitrator granted the Association's grievance and found that because a "past practice" of permitting PSEA field representatives to appear at the Vo-Tech to meet with the Association president and/or other teacher's during their preparation or lunch periods existed and had evolved into an employment condition incorporated into the parties' agreement, the Vo-Tech had violated the agreement.

Before this Court the Vo-Tech contends: (1) that because the dispute involved PSEA field representatives who are not covered by the agreement, the dispute is not arbitrable; (2) that the award does not draw its essence from the agreement; and (3) that pursuant to the Public School Code of 1949 (School Code) [1] it had the right to prevent the interruption of its educational program.

With respect to the threshold issue of arbitrability, our Supreme Court stated in *County of Allegheny v. Allegheny County Prison Employees Independent Union*, 476 Pa. 27, 381 A.2d 849 (1977):

> As this Court noted in *Board of Education of Philadelphia v. Federation of Teachers Local No. 3*, 464 Pa. 92, 99, 346 A.2d 35, 39 (1975), Pennsylvania labor policy not only favors but requires the submission to arbitration of public employee grievances 'arising out of the interpretation of the provisions of a collective bargaining agreement'. [Citation omitted.] From this policy is derived the corollary principle that where, as here, an arbitrator has interpreted a collective bargaining agreement in favor of the arbitrability of the grievance before him, a reviewing court should be slow indeed to disagree. As the Supreme Court of the United States observed in *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 584–85, 80 S.Ct. 1347, 1354, 4 L.Ed.2d 1409 (1960):
>
> > 'In the absence of any *express* provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.' (Emphasis added).

County of Allegheny, 476 Pa. at 31–32, 381 A.2d at 851 (footnotes omitted).

1. Act of March 10, 1949, P.L. 30, *as amended*, 24 P.S. §§ 1–101–26–2606.

[1] After reviewing the applicable clauses of the agreement,[2] we find no error in the arbitrator's conclusion that the dispute concerning whether PSEA field representatives could meet with Association members during their preparation and lunch periods involved an employment condition benefitting Association members and therefore arose out of the interpretation or application of the provisions of the agreement. Moreover, the definition of grievance as "any alleged violation" of the agreement or "any dispute" involving "its meaning interpretation or application" is quite broad. The arbitration provision, by its language, extends to grievances not resolved to the satisfaction of the parties in the final step of the grievance procedure. And there is no express provision excluding this particular dispute from either the grievance procedure or arbitration. Accordingly, we will not disturb the arbitrator's decision on the arbitrability of the dispute.

We must next determine whether the arbitrator's award was drawn from the essence of the agreement. *Northwest Tri-County Intermediate Unit No. 5 Education Association v. Northwest Tri-County Intermediate Unit No. 5*, 61 Pa.Commonwealth Ct. 191, 432 A.2d 1152 (1981). The "essence" test, which defines our scope of review of an arbitrator's award, has been articulated by our Supreme Court:

> To state the matter more precisely, where a task of an arbitrator, ... has been to determine the intention of the contracting parties as evidenced by their collective bargaining agreement and the circumstances surrounding its execution, then the arbitrator's award is based on a resolution of a question of fact and is to 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....'

Leechburg Area School District v. Dale, 492 Pa. 515, 520, 424 A.2d 1309, 1312 (1981) (quoting *Community College of Beaver County v. Community College of Beaver County, Society of the Faculty (PSEA/NEA)*. 473 Pa. 576, 593–94, 375 A.2d 1267, 1275 (1977) (quoting *Ludwig Honold Manufacturing Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir.1969))).

[2, 3] Four situations have been articulated where evidence of past practice is used in arbitration as indicia of the parties' intention.[3] Here, we are confronted with a situation within the fourth category, where evidence of past practice may prove an employment condition which cannot be derived from any express language of the agreement. After reviewing evidence of the parties' conduct during prior collective bargaining agreements, the arbitrator found that for the past six years the Vo-Tech had permitted PSEA field representatives to meet with the Association president and/or other teachers during their preparation or lunch periods. Upon entering the school, the field representatives would report to the main office to inform the Vo-Tech of their presence, with whom

2. The pertinent clauses are as follows:

ARTICLE IV—GRIEVANCE PROCEDURE

A. *Definitions*

1. A "Grievance" is any alleged violation of this Agreement or any dispute with respect to its meaning, interpretation, or application.

. . . . .

ARTICLE V—RIGHTS OF PROFESSIONAL EMPLOYES

. . . . .

H. *Just Cause*

No Professional Employe shall be discharged, disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause.

3. The four situations are:

(1) to clarify ambiguous language; (2) to implement contract language which sets forth only a general rule; (3) to modify or amend apparently unambiguous language which has arguably been waived by the parties; and (4) to create or prove a separate, enforceable condition of employment which cannot be derived from the express language of the agreement

County of Allegheny, 476 Pa. at 34, 381 A.2d at 852.

they would be meeting and where the meeting would take place.[4] Based on these findings, the arbitrator concluded that this practice had evolved into an employment condition incorporated into the parties' agreement.

[4] The arbitrator's decision that the Association is entitled to the continuation of this "past practice" does not conflict with any language of the agreement. Moreover, the agreement does not contain an integration clause[5] which might serve to negate the notion that the parties intended to include any employment condition which cannot be derived from the express language of the agreement. *See County of Allegheny.*[6] Thus, we hold that the arbitrator's decision was drawn from the essence of the parties' agreement.

[5, 6] Finally, the Vo-Tech asserts that it acted within its rights under the School Code in deciding to prohibit PSEA field representatives from entering its building during normal school hours. While this may be true, the arbitrator found that it had been the Vo-Tech's practice to permit the field representatives' entrance during school hours. Moreover, this Court will not supersede a provision in a collective bargaining agreement, or in this case a past practice which has been implicitly incorporated therein, because of a statutory conflict except where the conflict is explicit and definitive. *County of Erie Appeal,* 72 Pa.Commonwealth Ct. 24, 455 A.2d 779 (1983). We have examined the School Code and find no provision which would explicitly prohibit the Vo-Tech from permitting Association members to meet with PSEA field representatives during preparation and lunch periods.

We will, therefore, affirm the order of the court of common pleas which upheld the award of the arbitrator.

ORDER

AND NOW, this March 8, 1985 the order of the Court of Common Pleas of Cambria County in the above-captioned matter is hereby affirmed.

COLINS, J., dissents.

WILLIAMS, J., did not participate in the decision in this case.

4. We will not address the Vo-Tech's contention that it was unaware of this practice inasmuch as the arbitrator is the sole judge of factual questions in an arbitration proceeding. *Northwest Tri-County.* Questions which go to the merits of a grievance are reserved to the arbitrator and may not be ruled upon further by the courts. *West Shore Education Association v. West Shore School District,* 72 Pa.Commonwealth Ct. 374, 456 A.2d 715 (1983).

5. A typical integration clause states that the written provisions constitute the entire agreement of the parties.

6. In *County of Allegheny,* the parties' agreement not only made no mention of past practices but contained a broad integration clause. Our Supreme Court held that an arbitration award incorporating into such an agreement a past practice antedating the effective date of the agreement cannot be said to "draw its essence" from the agreement.

Rosemarie CUNDIFF, Petitioner,

v.

COMMONWEALTH of Pennsylvania, UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, Respondent.

Commonwealth Court of Pennsylvania.
Submitted on Briefs Feb. 1, 1985.
Decided March 19, 1985.

Employee was denied unemployment compensation benefits on the ground of willful misconduct. The Unemployment Compensation Board of Review affirmed the referee's decision, and employee peti-

any other Pennsylvania law governing the enforcement of money judgments.

Accordingly, the petition for allowance of appeal is granted, the order of the Commonwealth Court is vacated, the order of the court of common pleas which stayed execution sale of Loden's personal property on Culp's writ of execution is vacated, and the case remanded to the court of common pleas for further proceedings consistent with this opinion.

476 Pa. 27

COUNTY OF ALLEGHENY, Appellee,

v.

ALLEGHENY COUNTY PRISON EMPLOYEES INDEPENDENT UNION, Appellant.

Supreme Court of Pennsylvania.

Argued Sept. 20, 1976.

Decided Dec. 1, 1977.

Rehearing Denied Feb. 3, 1978.

County appealed from arbitrator's award sustaining union's grievance relating to county jail guards' demands that lounge, in which they took their meals, be supervised at meal time by guard and that guards be able to select for their meals any food available from the jail kitchen and not be limited to menus offered to prisoners. The Commonwealth Court, at No. 86 Misc. Docket, James S. Bowman, President Judge, set aside arbitrator's award, and union appealed. The Supreme Court, No. 52 March Term, 1976, Pomeroy, J., held that: (1) the dispute arose out of an interpretation or application of provisions of collective bargaining agreement, and, thus, such dispute was arbitrable, and (2) practices, which related to security for guards at lunch time and permitting them to select any food available and which had prevailed for a time in the past, were not implicitly incorporated into collective bargaining agreement as separately enforceable conditions of guards' employment relationship.

Order affirmed.

Roberts, J., dissented and filed opinion.

Manderino, J., dissented and filed opinion.

1. Labor Relations ⇐483

Where arbitrator has interpreted a collective bargaining agreement in favor of arbitrability of grievance before him, a reviewing court should be slow to disagree.

2. Labor Relations ⇐434.5

Dispute involving county jail guards' demands that lounge, in which they took their meals, be supervised at meal time by guard and that guards be able to select for their meals any food available from the jail kitchen and not be limited to menus offered to prisoners arose out of interpretation or application of provisions of collective bargaining agreement, and thus, the dispute was arbitrable. 43 P.S. § 1101.903.

3. Labor Relations ⇐257

Practices, which related to security for county jail guards at lunch times and permitting guards to select for their meals any food available from jail kitchen and which had prevailed for a time in the past, were not implicitly incorporated into collective bargaining agreement as separately enforceable conditions of guards' employment relationship where, though such practices were neither repudiated in agreement nor inconsistent with its terms, the agreement made no mention of past practices and included a broad clause to effect that the agreement as written was the complete agreement between parties.

4. Labor Relations ⇐465

Labor relations courts are not to become super-arbitrators and are bound to defer to arbitrators findings relative to intent of parties as arbitrators perform their task of interpreting labor contracts negotiated under Public Employee Relations Act. 43 P.S. § 1101.101 et seq.

Frank P. G. Intrieri, Jubelirer, McKay, Pass & Intrieri, Ernest B. Orsatti, Pittsburgh, for appellant.

Stephen A. Zappala, County Sol., Henry W. Ewalt, Sp. Labor Counsel, Pittsburgh, for appellee.

Before JONES, C. J., and EAGEN, O'BRIEN, ROBERTS, POMEROY and MANDERINO, JJ.

OPINION OF THE COURT

POMEROY, Justice.

The question presented by this appeal is whether, in an arbitration of a grievance by public employees under a collective bargaining agreement, an award sustaining the grievance may properly be based on a practice of the parties which had obtained during a period prior to the agreement. Under the facts of this case and in light of the terms of the agreement, which contains no past practice clause nor any mention of the practice in question, but does contain an integration clause, we answer the question in the negative.

This case was initiated by the appellant, Allegheny County Prison Employees Independent Union (hereinafter "Union") when on May 10, 1972, it filed a grievance against the County of Allegheny (hereinafter "County") under the provisions of a collective bargaining agreement between the parties.[1] The grievance concerned two aspects of mealtime conditions for guards working at the Allegheny County jail: The Union demanded that the officers' lounge where the guards took their meals be supervised at mealtime by a guard and that the guards be able to select for their meals any food available from the jail kitchen rather than being limited to the menus offered to the prisoners. The matter proceeded to arbitration and, following a hearing in which the County entered only a "special" appearance, the arbitrator issued an award which agreed with appellant's position and sustained the grievance. On appeal, the Commonwealth Court, in a unanimous opinion, set aside the arbitrator's award. *County of Allegheny v. Allegheny Cty. Pris. Emp. I. U.*, 20 Pa.Cmwlth. 173, 341 A.2d 578 (1975).[2] This Court then granted the Union's petition for allowance of appeal.

The ultimate question before us is whether the arbitrator's interpretation of the collective bargaining agreement[3] " 'can in any rational way be derived from the agreement, viewed in the light of its language, context, and any other indicia of the parties' intention . . . .' "[4] Because we

1. Appellant Union was first certified as the exclusive bargaining representative of a unit comprised of all the prison guards at the Allegheny County jail on May 29, 1971. The first collective bargaining agreement, under which the grievance was presented, was effective from May 1, 1972 to April 30, 1973. A successor agreement was in force from August 1, 1973 to April 30, 1976, and in all relevant respects its provisions were the same as those in the earlier agreement.

2. The County petitioned for an appeal both to the Court of Common Pleas of Allegheny County and to the Commonwealth Court. The Commonwealth Court accepted the appeal to it and vacated the appeal before the court of common pleas.

In *Community College of Beaver v. Community College of Beaver County, Society of the Faculty*, 473 Pa. 576, 375 A.2d 1267 (1977), this Court held that under Pa.R.J.A. 2101 an appeal from an arbitrator's award under a labor agreement negotiated under the Public Employee Relations Act of 1970 (PERA), Act of July 23, 1970, P.L. 563, No. 195, 43 P.S. § 1101.101 *et seq.* (Supp. 1977–78) was properly taken to the Commonwealth Court. Therefore, the Commonwealth Court's assertion of its exclusive jurisdiction in this case was correct. Pa.R.J.A. 2101 has been superseded by Pa.R.A.P. 703 and Pa.R.C.P. 247.

3. As in *Community College of Beaver, supra*, the relationship of the parties in this case is governed by the Public Employee Relations Act of 1970, Act of July 23, 1970, P.L. 563, No. 195, Art. I, § 101 *et seq.*, 43 P.S. § 1101.101 *et seq.* (Supp. 1977–78).

4. *Community College of Beaver, supra* n.2, 473 Pa. at 593, 375 A.2d at 1275, quoting *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969). The paragraph in our *Community College* opinion in which the *Ludwig Honold* quotation appears is as follows:

"To state the matter more precisely, where a task of an arbitrator, PERA or otherwise, has been to determine the intention of the contracting parties as evidenced by their col-

conclude that the negative answer which the Commonwealth Court gave to this question was correct, we affirm its order setting aside the award.

I.

[1, 2] The threshold question in this case is whether the subject matter of the asserted grievance was arbitrable. As this Court noted in *Board of Education of Philadelphia v. Federation of Teachers Local No. 3*, 464 Pa. 92, 99, 346 A.2d 35, 39 (1975),[5] Pennsylvania labor policy not only favors but requires the submission to arbitration of public employee grievances "arising out of the interpretation of the provisions of a collective bargaining agreement".[6] See also *Lincoln System of Education v. Lincoln Association of University Professors*, 467 Pa. 112, 354 A.2d 576 (1976). From this policy is derived the corollary principle that where, as here, an arbitrator has interpreted a collective bargaining agreement in favor of the arbitrability of the grievance before him, a reviewing court should be slow indeed to disagree.[7] As the Supreme Court of the United States observed in *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 584–85, 80 S.Ct. 1347, 1354, 4 L.Ed.2d 1409 (1960):

> "In the absence of any *express* provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." (Emphasis added).

After reviewing the applicable clauses of the collective bargaining agreement in question[8] we cannot say that the arbitrator was in error when he concluded that the dispute concerning the mealtime conditions of the employee guards arose out of the interpretation or application of the provisions of the agreement. We must, therefore, disagree with the Commonwealth Court insofar as it held that the grievance filed by the Union was not arbitrable.

II.

[3] Turning to the substantive question of whether the arbitrator's award had a rational basis in the collective bargaining agreement, we must conclude that it did not. The agreement contains no provision whatever which deals either with the question of security arrangements for the em-

> lective bargaining agreement and the circumstances surrounding its execution, then the arbitrator's award is based on a resolution of a question of fact and is to 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 . . . .'"

5. The present writer dissented in *Board of Education of Philadelphia, supra*, but on grounds not related to the proposition here referred to. 464 Pa. at 108, 346 A.2d 35.

6. Act of July 23, 1970, P.L. 563, No. 195, art. IX, § 903, 43 P.S. § 1101.903 (Supp. 1977–78) provides in part that

> "Arbitration of disputes or grievances arising out of the interpretation of the provisions of a collective bargaining agreement is mandatory."

7. The interpretation of clauses of a collective bargaining agreement which delineate those matters to be submitted to arbitration involves, of course, a factual determination of the parties' intentions. See, *Community College of Beaver, supra*, 473 Pa. at 593, 375 A.2d at 1275.

8. The pertinent clauses are as follows:

> "Article III—Grievance Procedure
>
> 1. Grievance Procedure Definitions:
>
> A. Grievance—An alleged breach or violation of this Agreement or a dispute arising out of the interpretation or application of the provisions of this Agreement . . . .
>
> 2. Scope of Grievance Procedure:
>
> A. Any matter not specifically defined as a grievance in Section 1 above, as well as any matter reserved to the discretion of the County by the statutes, legal precedents and regulations of the Commonwealth of Pennsylvania, and/or by the terms of this Agreement is not a grievance and will not be construed as a grievance . . . .
>
> * * * * * *
>
> "Article XII—Management Rights
>
> The County retains and reserves unto itself all powers, rights, authority, duties and responsibilities including but not limited to the security of the prison conferred upon and vested in it by the Commonwealth of Pennsylvania and all matters not covered by this Agreement . . . ."

ployees' mealtimes or with what food should be available to the employees from the prison kitchen.[9]

The arbitrator's decision that the union members were entitled to choose for their luncheons any food available in the prison kitchen and were not limited to the items available on the daily prison menu was based on what he found to have been the past practice of the parties over a period of time, a practice which, so the arbitrator held, had been implicitly incorporated in the collective bargaining agreement which became effective in 1972.[10]

A recognized commentator[11] in the field of labor law identifies four situations in which evidence of past practice[12] is used in arbitrations: (1) to clarify ambiguous language; (2) to implement contract language which sets forth only a general rule; (3) to modify or amend apparently unambiguous language which has arguably been waived by the parties; and (4) to create or prove a separate, enforceable condition of employment which cannot be derived from the express language of the agreement. In the case at bar, the arbitrator concluded that the implementation by the County of the advisory recommendation of a panel of ar-

9. The only clause of the agreement which refers to meals is found in Article VII, Section 4:

"A lunch period of 30 minutes shall be made available to all employees before their sixth hour of work. . . ."

The Union argued to the arbitrator that implicit in this clause are both a choice of foods to be served to the guards and a requirement that security be provided during mealtimes. The arbitrator did not address himself to this contention in his opinion and award, nor did he in his award purport to interpret either the 30 minute lunch clause or the integration clause, (Article XXIV, Sec. 1), discussed *infra*. The dissenting opinion of Mr. Justice ROBERTS, *post*, has ascribed to the arbitrator interpretations that simply are not to be found in his decision.

10. The facts shown by the record are as follows:

Before 1967, prison guards at the Allegheny County jail ate their meals in the prison kitchen, either bringing their lunches from outside or choosing from any of the food available within the prison. In May of 1967, the warden directed employees to cease bringing their own lunches. The Union protested this directive and submitted a grievance to a three member panel authorized by the predecessor statute to PERA, the Act of June 30, 1947, P.L. 1183, § 1 *et seq.*, 43 P.S. § 215.1 et seq. *as amended* (1964). This panel recommended that the prohibition against lunches brought from outside be continued, but that the guards be given a choice of any food available in the prison kitchen. For some time this recommendation, although not legally binding, was followed. When later an officer's lounge was established the guards were permitted to take their luncheons from the kitchen to the lounge to be eaten. In December, 1970, the warden issued an order, which although objected to was apparently complied with, restricting the prison guard personnel to a choice of food from the daily prison menu. After the collective bargaining agreement became effective in May of 1972, the Union filed the present grievance challenging the 1970 directive of management. When, apparently in response to the filing of this grievance, the prison authorities issued further orders restricting the guards' privileges, the Union filed an unfair labor practice charge with the Pennsylvania Labor Relations Board. This charge was settled by the County's agreement to rescind the later restrictions, with the understanding that the processing of the grievance would continue. After this settlement, the old practice of allowing each employee to select any food available was, according to the arbitrator, gradually reinstated.

11. R. Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators 30 (1961).

12. In a frequently cited passage in an arbitration award, the meaning of "past practice" has been stated as follows:

"A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the men involved as the *normal* and *proper* response to the underlying circumstances presented." Sylvester Garrett, Chairman, Board of Arbitration, U. S. Steel—Steelworkers, Grievance No. NL–453, Docket No. N–146, January 31, 1953. Reported at 2 *Steelworkers Arbitration Bulletin* 1187. (Emphasis in original.)

bitrators in 1967 [13] created a binding past practice, a clear example of the fourth use of past practices in the above formulation. With this implementation, the arbitrator held,

> ". . . the Guards acquired a working condition which constituted a recognizable benefit. Its constant, continual use caused the benefit to ripen into a binding practice. . . . The privilege given to each Guard to choose his meal from the available kitchen foods became one of the many day-to-day facets of the working relationship between the Prison administration and its Guards. . . ." Record at 13a.[14]

As for the Union demand for protection of its members by a guard posted in the officers' lounge at mealtimes, the arbitrator concluded that a "slightly different" problem was involved but that the contractual reservation to the County in Article XII of all responsibility relating to security, see n.8, *supra*,

> "must be interpreted in a reasonable fashion. The Union is not seeking to interfere with the security of the Prison. On the contrary, it is trying to insure the physical safety of its member Guards. . . . The Prison was sufficiently concerned about the problem to provide a Guard over the residents when employees ate in the Prison kitchen. There is no reason why the same protection ought not to be afforded to employees while they are eating in the Officers' Lounge." Record at 15a.

The question for decision is whether the arbitrator was correct in concluding that the parties to the contract here involved implicitly incorporated into it, as separately enforceable conditions of their employment relationship, practices relative to food and security at lunch times which had prevailed for a time in the past, when those practices are neither repudiated in the agreement nor inconsistent with its terms, but when the contract includes a broad clause to the effect that the agreement as written is the

13. See n.10, *supra*.

14. The arbitrator gave the following rationale in support of his conclusion that the past practice was implicitly included in the bargaining agreement:

> "The Warden was, or should have been, aware that a contractual grievance procedure provided the only practicable way by which the Union could attack his December 1970 edict [restricting the employes to food on the daily menu]. . . . During the negotiations leading up to the 1972 collective bargaining agreement, which first provided that type of grievance procedure, this awareness must be imputed to the County. It would obviously be impossible, in such an agreement, to incorporate all of the work practices and customs previously accepted by the mutual consent of the parties. If the County wished to bar this particular matter from the grievance procedure, the County had the duty to seek specific contract language on the subject. In this particular instance, the absence of a past practice clause does not eliminate the eating customs in effect as of December 1970 nor prevent the Union from setting aside the Warden's directive by filing a grievance. It is fair to conclude that the working condition at issue was one of the many implicitly incorporated into the collective bargaining agreement." Record at 13–14a.

In contrast, the Commonwealth Court, in an alternative ground for its decision, concluded as follows from its review of the record:

> "If there did, in fact, exist a past policy regarding luncheon procedure, it was a policy of constant change. Being aware of the ever-varying nature of appellant's practice towards guards' luncheons, to escape the application of . . . [those provisions of the agreement dealing with management's discretion over all matters not covered by the agreement], it was incumbent upon . . . [the Union] to have negotiated and explicitly reached an agreement upon this particular condition of employment." 20 Pa.Cmwlth. at 178, 341 A.2d at 580.

In light of our disposition of this case there is no need for us to resolve the question of which, if either, party had the responsibility to take the initiative in making past practices a subject of negotiation. Similarly, we are not called upon to decide whether a practice which was legally but unilaterally terminated by employer direction a year and a half before the collective bargaining agreement was entered into, but which termination has been a subject of continuing controversy between the parties, is properly to be considered a "past practice" as a matter of law. *See* Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Mich.L.Rev. 1017, 1033–34 (1961).

complete agreement between the parties.[15] Although the non-inclusion of the practices in the bargaining agreement does not necessarily compel the conclusion that past practices are not impliedly so incorporated,[16] the existence in a contract of a broad integration clause, if it means anything, does clearly negate the notion that the parties meant to include any terms or conditions, including those based *only* on past practices, not specifically incorporated in the written contract or reasonably inferable from its provisions. We think that this provision is dispositive of this case.[17] At least one arbitrator has expressly so held, *Lone Star Brewing Co.*, 53 LA 1317 (1969) (LeRoy Autrey), and we know of no decision to the contrary. See also Cox & Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 Harv.L.Rev. 1097, 1116–1117 (1950).

[4] In deciding as we do, we hold only that where a collective bargaining agreement not only makes no mention whatever of past practices but does include a broad integration clause, an award which incorporates into the agreement, as separately enforceable conditions of the employment relationship, past practices which antedate the effective date of that agreement cannot be said to "draw its essence from the collective bargaining" agreement.[18] *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). We hasten to add that courts are not to become super-arbitrators and are bound to defer to the arbitrators'

15. The clause is contained in Article XXIV of the agreement and is as follows:

Article XXIV

"1. The parties mutually agree that the terms and conditions expressly set forth in this Agreement represent the full and complete agreement and commitment between the parties thereto."

Paragraph 2 of Article XXIV provides as follows:

"2. All items proposed by the Union, whether agreed to or rejected, will not be subject to renegotiation until negotiations for a new contract commence . . . and items included within the scope of the bargaining which were or are not proposed by the Union shall likewise not be subject to negotiation until the period specified above . . . ."

16. Wallen, *The Silent Contract v. Express Provisions: The Arbitration of Local Working Conditions*, Proceedings of the Fifth Annual Meeting of the National Academy of Arbitrators 117 (1962).

As Mittenthal pointed out in his authoritative paper, *supra* n.11, at 47

"Most agreements . . . say nothing about management having to maintain existing conditions. They ordinarily do not even mention the subject of past practice. The question then is whether, apart from any basis in the agreement, an established practice can nevertheless be considered a binding condition of employment. The answer, I think, depends upon one's conception of the collective bargaining agreement. . . . '[I]s the agreement an exclusive statement of rights and privileges or does it subsume continuation of existing conditions.'" (Footnote omitted.)

See also, Gilman, *Past Practice in the Administration of Collective Bargaining Agreements in Arbitration*, 4 Suffolk U.L.Rev. 689 (1970). *Note* "Labor Law—Arbitration and Award—Judicial Review of Labor Arbitration Awards which rely on the Practices of the Parties," 65 Mich.L.Rev. 1647 (1967). See in general Griffin, *Judicial Review of Labor Arbitration Awards*, 4 Suffolk U.L.Rev. 39 (1969); Markham, *Judicial Review of an Arbitrator's Award under Section 301(a) of the Labor Management Relations Act*, 39 Tenn.L.Rev. 613 (1972).

17. The arbitrator made note of the existence of Article XXIV, only to conclude, without explanation, that its "zipper provisions" were inapplicable. Record at 13a. It does not advance a reasoned solution of the problem presented by this case to dismiss this provision as "boilerplate," the characterization used in both dissenting opinions, *infra*. We are obliged to take the agreement as the parties wrote it. The significance of the integration clause is given emphasis by the broad language of the management rights clause (Article XII) quoted at n.8, *supra*.

18. Mittenthal, *supra* note 11, at 48–49, articulates the theory on which many arbitrators rely in concluding that a past practice not specifically repudiated during negotiations for a contract are impliedly incorporated in the agreement which is finally reached. He then observes (p. 49, n.39):

"This implication, of course, would not be possible if it conflicted with the express language of the contract. For example, if a contract said the written provisions constitute the entire agreement of the parties, it would be difficult to imply that the parties meant to make practices a part of their contract."

findings relative to the intent of the parties as the arbitrators perform their task of interpreting labor contracts negotiated under PERA. See *Community College of Beaver County v. Community College of Beaver County, Society of the Faculty*, 473 Pa. 576, 375 A.2d 1267 (1977). The able arbitrator in this case, however, was not so much interpreting the contract before him as he was declaring, no doubt out of his conviction of what was fair and reasonable, that the employer should be bound by a non-existent provision which the arbitrator then incorporates into the contract by implication. But there is here nothing to support the implication. Conceding that the past attitude of the management of the County's prison may have been petty, it is nevertheless a function of future bargaining to remedy the situation. For the arbitrator to seek to supply the remedy is on these facts not in accord with the approach of *Enterprise, supra*, which we have adopted as the proper one for applying the Arbitration Act in public employment contracts. The award must, therefore, be set aside. *See* Sec. 11(d) of the Act of April 25, 1927, P.L. 381, No. 248, 5 P.S. § 171(d); *Community College of Beaver County, supra.*

What we have said, of course, is not to suggest that in another case the evidence may not justify a contrary conclusion. Nor do we intend to say that an arbitrator's reliance on past practices to clarify ambiguous language in the collective bargaining agreement, to implement general contract language or to show that a specific provision in the contract has been waived by the parties, would be improper although the agreement in question included an integration clause.[19]

The order of the Commonwealth Court is affirmed.

NIX, J., did not participate in the consideration or decision of this case.

JONES, Former C. J., did not participate in the decision of this case.

ROBERTS, J., filed a dissenting opinion.

MANDERINO, J., filed a dissenting opinion.

ROBERTS, Justice, dissenting.

Appellant, Allegheny County Prison Employees Independent Union, negotiated a collective bargaining agreement with appellee, Allegheny County, covering the salaries and working conditions of guards at the Allegheny County Jail. In 1972, appellant filed a grievance against appellee concerning the food available to guards at mealtimes and security provisions in the dining hall during guards' meals. The arbitrator sustained the grievance and granted the award requested by the Union. On appeal, the Commonwealth Court held that the grievance was not arbitrable because it does not "arise out of" the collective bargaining agreement. The Union petitioned for allocatur, which we granted. The majority now affirms the judgment of the Commonwealth Court, holding that although the grievance was arbitrable, the arbitrator's award did not have a "rational basis in the collective bargaining agreement."

I agree with the majority's conclusion that the grievance is arbitrable. I disagree, however, with the majority's conclusion that the arbitrator's award exceeded the bounds of the collective bargaining agreement.

The majority reaches its result because it asserts that the arbitrator drew upon "past practices" in making his award, and that consideration of such practices is barred by an integration clause in the collective bargaining agreement. In so holding, however, the majority substitutes its interpretation of the integration clause for that of the arbitrator, in contravention of the contractual arbitration clause which gives the arbitrator power to interpret all parts of the collective bargaining agreement including the integration clause itself. The majority

19. Gilman makes the point that much of the confusion related to prior courses of conduct in the context of collective bargaining agreements could be eliminated by carefully drafted provisions and by an increased awareness on the part of negotiators of the possible implications of such past practices. *See* Gilman, *supra*, 4 Suffolk U.L.Rev. at 704.

also contravenes the decisions which make the arbitrator the final interpreter of the contract both as to law and to fact. See *Community College of Beaver v. Community College of Beaver County, Society of the Faculty*, 473 Pa. 576, 375 A.2d 1267 (1977); *Sudders v. United National Insurance Co.*, 217 Pa.Super. 196, 269 A.2d 370 (1970), aff'd 445 Pa. 599, 284 A.2d 500 (1971), following *Ludwig-Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960).

The majority's holding deprives the arbitrator of two of his most valuable tools in settling labor disputes whenever the collective bargaining agreement contains a boilerplate integration clause. These tools are the arbitrator's knowledge of the particular conditions in which labor and management operate and his knowledge of the rules—the "law of the shop"—which labor and management have developed to respond to these conditions. I cannot agree that the presence of an integration clause so completely alters the basic rules of the arbitration process. I therefore dissent.

The majority holds that the arbitrator failed to give proper weight to the "integration clause" in the collective bargaining agreement. In so doing, however, the majority misapplies the "essence test," the standard by which courts of this Commonwealth are to review arbitration awards. See *Community College of Beaver v. Community College of Beaver County, Society of the Faculty*, 473 Pa. 576, 375 A.2d 1267 (1977). The essence test adopted in *Community College of Beaver County*, supra, was first set forth by the Supreme Court of the United States in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596–97, 80 S.Ct. 1358, 1360–61 (1960):

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The . . . policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. . . . [T]he arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices of a particular factory or of a particular industry as reflected in particular agreements.
> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate *only so long as it draws its essence from the collective bargaining agreement.* When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."

This "essence test" reflects a judgment that arbitrators, and not courts, are best equipped to deal with the multitude of potential disputes which the parties agree to submit to them. This deferential standard also serves to solidify the integrity of the arbitration process by giving the parties the assurance that the decision of the arbitrator will, in the vast majority of cases, be final.

The majority's decision is contrary to these policies. The majority, by requiring the arbitrator to conform to the strict rules of contract law applied by the courts in non-labor contract cases deprives him of the opportunity to employ his knowledge of the customs and practices of the industry and the shop involved. As the Supreme Court of the United States stated in *United Steelworkers v. Warrior & Gulf Navigation*

Co., 363 U.S. 574, 579–80, 582–83, 80 S.Ct. 1347, 1351, 1352 (1960):

> " 'the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words.'
>
> . . . . .
>
> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law,—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment."

In view of the fact that the guards are required to eat their meals on the premises, the award here which covers the meals for guards and the security available to the guards while eating involves important working conditions. By allowing a boiler-plate integration clause to divest the arbitrator of the ability to make an award concerning these important conditions, the majority defeats the policy which encourages arbitrators to draw upon their knowledge of the particular job setting so that a "fair solution of the problem" can be reached. The majority forces the arbitrator to treat the integration clause with more deference than the parties to the collective bargaining agreement may have intended, given their particular work situation. In so holding, the majority discourages the arbitrator from performing fully the services expected from him.

Moreover today's decision destroys the stability of the arbitration process. "[T]he arbitrators are the final judges of both law and fact and their award will not be disturbed for a mistake of either." *Ludwig-Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3d Cir. 1969). Accord, *Sudders v. United National Insurance Co.*, 217 Pa.Super. 196, 269 A.2d 370 (1970), aff'd, 445 Pa. 599, 284 A.2d 500 (1971). If an award of an arbitrator is upheld by the courts so long as it is rationally based, then parties can respect the decision of the arbitrator as a final resolution of the dispute between them. If, instead, the award of the arbitrator is open to unnecessary judicial modification, the arbitrator becomes only a small step in the process of resolving labor disputes; the judgment of the arbitrator which the parties bargained for is thereby replaced with the judgment of the courts.[1]

It is part of the arbitrator's function, not part of a court's, to determine the import of an integration clause in a collective bargaining agreement, at least where the contract contains a clause submitting to arbitration any "dispute arising out of the interpretation or application of the provisions of this Agreement." We must realize that an arbitrator may draw his understanding of any clause in the contract, including an integration clause, from the particular labor setting in which the contract was signed. See, e.g., *Warrior v. Gulf Navigation Co.*, supra; *Enterprise Wheel & Car Corp.*, supra; *Ludwig-Honold Mfg. Co.*, supra. Here, the arbitrator specifically found that the parties could not have reduced to writing all aspects of the ongoing labor-management relationship. In fact, the "lunch period" clause does not specifically mention all the conditions under which employees are to take their meal breaks. The arbitrator concluded that the contract should be interpreted so that the conditions under which the lunch break is taken are appropriate to the workplace in which these employees find themselves. These employees

1. The majority decision today, injecting the courts into an area properly reserved for the arbitrator, is bound to produce unnecessary additional burdens upon the judicial system. If courts will be required to assume the function of the arbitrator, the advantages of arbitration as a speedy, fair, inexpensive substitute for court litigation will be largely dissipated.

are prison guards. They are prohibited from leaving prison grounds during lunch. It was wholly rational for the arbitrator to use his knowledge of what work in a prison is like to conclude that when the contract specified a "30-minute lunch period" it must have meant a lunch period during which there is adequate protection for those guards who are eating. Similarly, it is not so irrational as to go beyond the essence of the agreement for the arbitrator to conclude that a "30-minute lunch period" was intended to be a period at which the guards, like most American workers, have a reasonable choice of foods. The arbitrator was aware of the impracticality of allowing the guards to enter and leave the prison grounds during lunch in order to find a choice of foods. He also considered the prison rule prohibiting guards from bringing their own lunches. He devised means of implementing the collective bargaining agreement based on the peculiar circumstances of these particular workers in this particular prison. This is the arbitrator's job.

The arbitrator reached these conclusions in light of the arbitration and integration clauses in the contract. It was his duty under the arbitration clause to interpret the "lunch" clause. He interpreted it in light of management rules and working conditions which require prison employees to remain on the premises and to eat food from the prison kitchen. In the course of interpreting the "lunch" provision of the contract, he found the integration clause did not preclude his award.[2]

We see from these circumstances that the arbitrator drew his conclusions from, and based his award upon, the essence of the contract. We are not free to say that whenever the arbitrator interprets a contract differently from the manner in which a court might have interpreted it, the arbitrator has stepped outside the essence of the contract. *Ludwig-Honold Mfg. Co. v. Fletcher*, supra; *Sudders v. United National Insurance Corp.*, supra; see *United Steelworkers v. Enterprise Wheel & Car Corp.*, supra. Here the Commonwealth Court disagreed with the interpretation the arbitrator placed upon the collective bargaining agreement between the parties. The parties did not bargain for the judgment of the court, however. They expressed a preference for the judgment of an arbitrator. This is why the award of an arbitrator will be sustained if there is "any rational way" it can be "derived from the [collective bargaining] agreement, viewed in the light of its language, context, and any other indicia of the parties' intention . . . ." *Community College of Beaver v. Community College of Beaver County, Society of the Faculty*, 473 Pa. 576, 375 A.2d 1267 (1977), quoting *Ludwig-Honold Mfg. Co. v. Fletcher*, supra.

I would reverse the order of the Commonwealth Court and enforce the award of the arbitrator.

MANDERINO, Justice, dissenting.

I agree with the majority that we should uphold the arbitrator's decision that this grievance filed by the Union was arbitrable. I cannot agree, however, that because this particular collective bargaining agreement contains an integration clause, the arbitrator was in error in determining that a past practice, though not specifically mentioned in the collective bargaining agreement, was implicitly incorporated in that agreement.

A collective bargaining agreement cannot possibly cover every single term and condi-

2. In footnote 17, the majority opinion states that the arbitrator here did not give a "reasoned" explanation for his interpretation of the integration clause. I find that the opinion of the arbitrator does disclose the train of thought by which he reached his conclusion. But even if the opinion is unclear or ambiguous, we should remember that

> "A mere ambiguity in the opinion accompanying an [arbitral] award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions."

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. at 598, 80 S.Ct. at 1361.

tion of employment. The existence of an integration clause does not alter this fact. Integration clauses such as the one which existed here are boilerplate, and parties to a collective bargaining agreement do not, because an integration clause is present, go to any greater lengths to insure that every term or condition of employment, form the choice of meals to the furnishing of restroom necessities, is contained within the agreement. Under the majority's reasoning, if the employer has been furnishing toilets and toilet paper but the agreement is silent about such matters, the employer can ignore the past practice and cease furnishing the restroom necessities.

Here, the arbitrator concluded that the parties *agreed* on certain conditions concerning guards' lunches, conditions which were present prior to the effective date of the agreement and which the parties felt no need to spell out in the collective bargaining agreement. That conclusion should be upheld in spite of the existence of a "broad" integration clause, otherwise, collective bargaining agreements will have to be written on rolls of paper stretching endlessly. The parties bargained for an arbitrator to interpret their contract and they are bound by his award. As the United States Supreme Court observed:

> "[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599, 80 S.Ct. 1358, 1362, 4 L.Ed.2d 1424, 1429 (1960).

When parties to a collective bargaining agreement agree to have an arbitrator interpret their contract, we should keep in mind that the "arbitrator's source of law is not confined to the express provisions of the contract," rather, "the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581–82, 80 S.Ct. 1347, 1352, 4 L.Ed.2d 1409, 1417 (1960).

I respectfully dissent.

476 Pa. 47

The BOROUGH OF SCOTTDALE, a Municipal Corporation

v.

NATIONAL CABLE TELEVISION CORPORATION and Jay L. Sedwick, Appellants.

Supreme Court of Pennsylvania.

Argued Sept. 26, 1977.

Decided Dec. 23, 1977.

Rehearing Denied Feb. 8, 1978.

Borough brought action to enjoin cable television company from increasing its rates for cable service without prior approval of the borough. The Court of Common Pleas, Westmoreland County, No. 3071 of 1975, Gilfert M. Mihalich, J., granted an injunction and the company appealed. The Commonwealth Court, No. 997 C.D.1976, 368 A.2d 1323, affirmed, and appeal was taken. The Supreme Court, No. 194 March Term, 1977, Packel, J., held that: (1) the borough ordinance regulating the charges for cable television services was not unconstitutional, and (2) unless and until there was a valid preemptive control over such charges by the federal government or by the Commonwealth, Pennsylvania municipalities had authority to control charges made by cable television companies.

Order of the Commonwealth Court affirmed.

Roberts, J., dissented and filed opinion.

peal under R.A.P.No.301(a) when it was entered in the first appropriate, the appearance, docket. Since there was no direction by the court that the order be entered in any docket, R.A.P.No.301(a) requiring entry as specified in the court's order, is of no application. We will therefore dismiss the condemnees' motion to quash.

[5, 6] On the merits we are required to reverse and remand the record for an evidentiary hearing and new disposition of the matter submitted. We have carefully reviewed the record including the only evidentiary record, that of the jury of view hearing, and find no evidence supporting the date November 23, 1971, or any other date including December 24, 1974, the date advanced by PennDOT, as the date when the Commonwealth obtained or the condemnees relinquished possession. In this connection we point out that delay compensation is not payable during the period condemnees remain in possession after condemnation and that the mere filing of a declaration does not effect a condemnation for Section 611 purposes. *Govatos v. Redevelopment Authority of Montgomery County*, 11 Pa.Cmwlth. 529, 314 A.2d 536 (1974); and that the exception provided with respect to condemnations "such that possession is not required to effectuate [them]" refers only to out–of–ordinary or exceptional situations in which the condemnation is not initiated by a Declaration of Taking. *Commonwealth v. Upholzer*, 18 Pa.Cmwlth. 102, 334 A.2d 812 (1975).

Motion to quash dismissed; order reversed; and record remanded for further proceedings.

ORDER

AND NOW, this 25th day of November, 1980, the respondents' motion to quash is dismissed; order appealed from is reversed; and the record is remanded for further proceedings consistent with this opinion.

In re Appeal of CHESTER UPLAND SCHOOL DISTRICT from Award of Arbitrator.

Appeal of CHESTER UPLAND SCHOOL DISTRICT, Delaware County, Pennsylvania.

Commonwealth Court of Pennsylvania.

Argued Oct. 8, 1980.

Decided Dec. 4, 1980.

School district appealed from order of the Court of Common Pleas, Delaware County, Howard F. Reed, Jr., J., affirming arbitrator's decision in favor of certain professional employees under collective bargaining agreement with respect to entitlement to vacation time. The Commonwealth Court, No. 550 C. D. 1980, Craig, J., held that: (1) determination that issue of entitlement to six weeks rather than four weeks vacation per work year was arbitrable was not error; (2) past practice with respect to vacations was needed to evidence essence of the agreement and was thus admissible; (3) determination that professional employees were entitled to six weeks vacation did not conflict with or disregard any language of agreement; and (4) involvement of former president by informal action allowing extension of vacation time, acquiescence of district's superintendent and administration for seven years in former president's action, and memorialization of practice in district's records, made imputation of knowledge of practice against district appropriate.

Affirmed.

1. Labor Relations ⇐434.5

Determination that issue of professional employee bargaining unit members' entitlement to 30 rather than 20 days vacation per work year, informally negotiated as alternative to wage increase without any formal school district board action, was arbi-

trable was not error where definition of grievance in collective bargaining agreement as "complaint" was broad and expressed in language which was procedural rather than substantive, neither procedures nor forms contained any subject matter limitation, grievance procedure purpose was expressed in broad language as being to secure equitable solutions to "problems which may from time to time arise," arbitration provisions of agreement extended to any dispute subject to grievance procedures in first instance, and there was no express exclusion of controversy from grievance and arbitration channels.

2. Labor Relations ⇐483

"Essence" test, i. e., whether arbitrator's decision can be said to have been drawn from essence of collective bargaining agreement, defines Commonwealth Court's scope of review of arbitrator's award.

3. Labor Relations ⇐483

Where a task of an arbitrator, Public Employee Relations Act or otherwise, has been to determine intention of contracting parties as evidenced by their collective bargaining agreement and the circumstances surrounding its execution and where the arbitrator's award is based on a resolution of such question of fact it is to 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.

4. Labor Relations ⇐257

Evidence of past practice may prove employment condition which cannot be derived from any express language of collective bargaining agreement so long as agreement contains no integration clause.

5. Labor Relations ⇐457

Where question of how many weeks professional employees had to work to fulfill their obligation under collective bargaining agreement with school district was central element of terms and conditions of employment and thus had to be resolved if agreement was to have any meaning, and agreement contained no integration clause, past practice was needed to evidence "essence of the agreement" and was thus admissible in arbitration proceeding.

See publication Words and Phrases for other judicial constructions and definitions.

6. Labor Relations ⇐462

Determination on basis of past practice that professional employees of school district were entitled to six weeks vacation did not conflict with or disregard any language of collective bargaining agreement.

7. Labor Relations ⇐457

Involvement of former president of school district board in informal action allowing professional school district employees additional two weeks vacation per work year, acquiescence of district's superintendent and administration for seven years in former president's action, and memorialization of practice in district's records, made imputation of knowledge of past practice appropriate for purposes of arbitration against district when attempt was made to reduce vacation time for professional employees. 24 P.S. § 5-508.

Leo A. Hackett, Fronefield & deFuria, Media, for appellant.

Alexander A. DiSanti, Richard, Brian, DiSanti & Hamilton, Media, for appellee.

Before CRAIG, MacPHAIL and WILLIAMS, JJ.

CRAIG, Judge.

The Chester Upland School District (district) appeals from the order of the Court of Common Pleas of Delaware County which affirmed an arbitrator's decision in favor of certain professional employees within the bargaining unit represented by the Chester Upland Education Association (association).

The unit represented by the association includes, in addition to classroom teachers, other professional employees such as deans, guidance counsellors, health services employees and the like, all of whom are compensated by 26 biweekly salary payments.

The relevant collective bargaining agreement (agreement) treats teaching employees as "Ten (10)–month personnel," and specifies their work year as being 184 days. The agreement is silent with respect to the required work year of non–teaching employees within the unit such as those enumerated above; these latter employees, generally denominated 12–month employees, have an admittedly longer work year than teaching employees.

From 1963 until 1969, all year–round employees (professional and non–professional) of the district were required to work the equivalent of 24 pay periods (48 weeks), pursuant to a district board resolution allowing such employees four weeks of vacation.

In 1969, however, by informal action of the then President of the district board, in negotiations with certain 12–month professional employees, the latter's work year was in fact reduced to 23 biweekly periods (46 weeks) by way of allowing those employees an additional 2 weeks vacation, to make a total of 6 weeks. The record indicates that the work year reduction was negotiated as an alternative to a wage increase.

From 1969 until the action precipitating this litigation, 12–month professional employees were in fact required to work only 23 biweekly periods; they were permitted, with the approval of the district superintendent, to take up to 30 days (6 weeks) vacation upon request, as is evidenced by notations within the employees' personnel records kept by the director of personnel and curriculum.

During the 1976–77 school year, the district board reviewed past board minutes and failed to discover any formal board action comporting with the existing practice of 46 weeks work/6 weeks vacation.

In September 1977, at the direction of the board president, the superintendent issued a memorandum advising 12–month professional employees that the "official" policy of only 20 days (4 weeks) vacation would be followed, effective with the 1977–78 school year. That memorandum, however, expressly recognized that the existing practice was to allow 30 days vacation and therefore to require only 46 weeks of work, in that it recited, in part:

CURRENT VACATION STATUS

Vacation time earned during *1976–1977 (30 Days)* will be taken between July 1, 1977 and June 30, 1978.

Vacation time earned for *1977–78 (20 Days)* will be taken during the period July 1, 1978 to June 30, 1979.

In October 1977, the association filed a grievance against the district, alleging that the district was improperly depriving the 12–month professional employees of their rightful 6–week vacations; confronted with the district's response that the matter was not grievable, the association presented it to arbitration.

In arbitration, the district contended, first, that because the issue of vacation for 12–month professional employees was nowhere addressed in the agreement, the matter was not arbitrable; second, assuming the arbitrability of the issue, the district argued that the principle of past practices was not applicable.

The arbitrator decided against the district in both respects, concluding that the district had violated the agreement by reducing the allowed vacation period. The common pleas court affirmed the arbitrator, and this appeal followed.

Here, the district raises the same issues as it did before the arbitrator and the trial court; we address them in the order above stated.

With respect to the threshold question of arbitrability, we are guided by *County of Allegheny v. Allegheny County Prison Employees Independent Union*, 476 Pa. 27, 381 A.2d 849 (1977):

> As this Court noted in *Board of Education of Philadelphia v. Federation of Teachers Local No. 3*, 464 Pa. 92, 99, 346 A.2d 35, 39 (1975), Pennsylvania labor policy not only favors but requires the submission to arbitration of public employee grievances 'arising out of the interpretation of the provisions of a collective bargaining agreement'. [Citation

omitted.] From this policy is derived the corollary principle that where, as here, an arbitrator has interpreted a collective bargaining agreement in favor of the arbitrability of the grievance before him, a reviewing court should be slow indeed to disagree. As the Supreme Court of the United States observed in *United Steelworkers of America v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 584–85, 80 S.Ct. 1347, 1354, 4 L.Ed.2d 1409 (1960):

> 'In the absence of any *express* provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.' (Emphasis added).

supra at 31–2, 381 A.2d at 851 (footnotes omitted.)

[1] We find no error in the decision here that the issue was arbitrable. The definition of grievance in the agreement,[1] as a "complaint" in accordance with procedures and forms, is broad and is expressed in language which is procedural rather than substantive; neither the procedures nor the forms contain any subject matter limitation. The grievance procedure purpose is stated as being to secure equitable solutions to "the problems which may from time to time arise"–broad language indeed. The arbitration provisions of the agreement, by their language, extend to any dispute subject to grievance procedures in the first instance. Further, there is no express exclusion of this controversy from grievance and arbitration channels, although the parties did, in Article X, expressly exclude some topics, unrelated to this litigation, from those channels.

The district's argument based on the absence of express reference in the agreement to the issue of vacation for 12–month employees is offset by the association's dependence upon the inclusiveness of clauses IV–C and IV–D in the agreement.[2] Although the second sentence of clause IV–C might reasonably be interpreted to refer only to rights granted by statute, such an interpretation would make the sentence mere surplusage; in any event, that interpretation is certainly no more reasonable than that advanced by the association, and adopted by the arbitrator, that such language was intended to preserve other existing rights not enumerated in the agreement.

Accordingly, we will not disturb the arbitrator's threshold decision. *Community College of Beaver County v. Community College of Beaver County, Society of the Faculty (PSEA/NEA)*, 473 Pa. 576, 597–8, 375 A.2d 1267, 1277 (1977). We note that few matters could be more centrally related to the interpretation of a collective bargaining agreement than the length of the required work year as an obligation of the employees and the length of their vacations as a benefit complementary thereto.

[2, 3] The final question is thus whether the arbitrator's decision, that the 12–month employees were entitled to 6 weeks of vacation, i. e., were obligated to work only 46

1. III–A(1) Grievance

   A 'grievance' is a complaint between a teacher and/or the Association and the School District in accordance with the procedures and Grievance Report forms incorporated herein as within this Article.

2. IV–C Statutory Savings Clause

   Nothing contained herein shall be construed to deny or restrict to any teacher such rights as he may have under Pennsylvania School laws or other applicable laws and regulations. The rights granted to teachers hereunder shall be deemed to be in addition to those provided elsewhere.

   IV–D Discipline–Grievance Procedure

   No teacher shall be disciplined, formally reprimanded, reduced in rank or compensation or deprived of any benefits secured herein without justifiable reason. Any such action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure herein set forth. This provision shall not apply to circumstances where the teacher would otherwise have a remedy under the provisions of the Public School Code of 1949, as amended.

weeks of the year, can be said to have been drawn from the essence of the agreement.[3] In view of "other indicia of the parties' intention," *Ludwig Honold, Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 (3rd Cir. 1969) we hold that the arbitrator's decision was so drawn.

[4, 5] Four situations have been articulated where evidence of past practices can be legitimate indicia of the parties' intention.[4] This case presents a situation within the fourth category, where evidence of past practice may prove an employment condition which cannot be derived from any express language of the agreement. However, this fundamental question–how many weeks must the employees work to fulfill their obligation–*must* be resolved if the agreement, admittedly applicable to 12–month professional employees, is to have any meaning. Hence, past practice is needed to evidence the essence of the agreement, because without it, a central element of the terms and conditions of employment cannot be ascertained.

[6] The decision that the employees in question are entitled to 6 weeks vacation does not conflict with or disregard any language of the agreement. Further, the agreement here contains no integration clause, so that the fourth category of past practice situations is not foreclosed as in *County of Allegheny, supra*, 476 Pa. at 37, 381 A.2d at 854.

[7] The district also asserts that the arbitrator's decision binds the district by the unauthorized action of the former board president, in violation of Section 508 of the Public School Code of 1949, Act of March 10, 1949, P. L. 30, *as amended*, 24 P. S. § 5–508 which requires formal board action on specified matters. We find no merit in this contention for several reasons: (1) the record reveals that the matter at hand involves no additional expenditures of money or hiring of personnel, because no substitutes have been hired to replace 12–month employees when on the longer vacation basis; (2) Section 508 has been held to be directory only, *Mullen v. DuBois Area School District*, 436 Pa. 211, 259 A.2d 877 (1969); and (3) the involvement of the former president, the acquiescence of the district's superintendent and administration for seven years, and the memorialization of the practice in the district's records, makes imputation of knowledge of the practice appropriate.

Accordingly, we affirm the decision appealed.

ORDER

AND NOW, this 4th day of December, 1980, the January 30, 1980 order of the

3. The "essence" test, which defines our scope of review of an arbitrator's award, has been reiterated by our Supreme Court:

> We said in *Community College of Beaver County v. Community College of Beaver County, Society of the Faculty (PSEA/NEA)*, 473 Pa. 576, 375 A.2d 1267 (1977), the test is to be as follows:
>
> 'To state the matter more precisely, where a task of an arbitrator, PERA or otherwise, has been to determine the intention of the contracting parties as evidenced by their collective bargaining agreement and the circumstances surrounding its execution, then the arbitrator's award is based on a resolution of a question of fact and is to 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 ..." *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, [at] 1128 (3d Cir. 1969). It was this approach which was meant to be suggested by the brief statement in *International Brotherhood of Firemen and Oilers*, [*v. School Dist. of Philadelphia*, 465 Pa. 356, 350 A.2d 804] quoted supra, that "the arbitrator's interpretation of the contract must be upheld if it is a reasonable one." 465 Pa. at 366, 350 A.2d at 809.'
>
> *Ringgold Area School District v. Ringgold Education Association, PSEA/NEA*, 489 Pa. 380, —, 414 A.2d 118, 120 (1980).

4. (1) to clarify ambiguous language;
(2) to implement contract language which sets forth only a general rule;
(3) to modify or amend apparently unambiguous language which has arguably been waived by the parties; and
(4) to create or prove a separate, enforceable condition of employment which cannot be derived from the express language of the agreement.
See: County of Allegheny, supra, 476 Pa. at 34, 381 A.2d at 852.