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**School Committee of Marshfield vs. Marshfield Education Association
84 Mass. App. Ct. 743 (2014)**

I. INTRODUCTION

In this case the Appeals Court determined that a PTS teacher retains employee rights under the collective bargaining agreement even though his certification for a teaching position had lapsed.

The teacher had been employed in Marshfield for approximately 8 years and, according to the school committee, was terminated by operation of law when his certification expired. The committee did not extend to the teacher an opportunity for a Section 42 hearing and thus the matter proceeded to arbitration under the collective bargaining agreement rather than the statutory procedures contained in M.G.L. c. 71, §42. The committee's view was that, having ceased to be a "teacher" given the absence of certification, the individual was not entitled to any rights under Section 42, which establishes a process for termination of teachers with professional status.

The committee relied on the teacher certification statute which states: "no person shall be eligible for employment as a teacher... unless he has been granted by the Commissioner a provisional or standard certificate with respect to the type of position for which he seeks employment." See M.G.L., c. 71, §38G. As many of you know, there is an exception to this requirement based upon the issuance of a waiver from the Commission of Education.

II. FACTS

The teacher was assigned to students with disabilities in the alternative high school. The position required a moderate special needs certificate. The teacher's preliminary license was in English and was to expire in March of 2006. He had acquired professional teacher status.

Over a period of approximately 18 months the teacher sporadically communicated with DESE and the Central Office, requesting the superintendent's assistance in the re-certification process. In May of 2007, the superintendent advised that a waiver had been obtained for the 2006-2007 school year but that the teacher's status remained open for 2007-2008. Although he did not obtain a re-certification for 2007-2008, the teacher returned to employment in the Marshfield schools in September of 2007. Marshfield applied for a second waiver for that year, but it was denied by DESE. Many months later, in April of 2008, the teacher lobbied the district for additional correspondence to DESE supporting his re-certification and experience based competencies. The superintendent discussed the matter with DESE and wrote to the teacher in May of 2008 rejecting the teacher's proposal to count field experience as the basis for demonstrated competencies for re-certification. On June 30th, 2008 DESE approved retroactively the second request for a waiver in the 2007-2008 school year.

A third waiver was promptly requested for the 2008-2009 school year. The request was denied on July 29, 2008 and the superintendent subsequently wrote to the teacher stating that because he did not have a license, and the waiver for the 2008-2009 school year had been denied, the teacher was no longer eligible for employment. The teacher requested a personal, unpaid leave of absence for 2008-2009 to finish his certification requirements. The leave provisions were non-discretionary under the Collective Bargaining Agreement. The superintendent restated his position that, given the lack of certification, the teacher was not eligible for employment and denied the request for a leave of absence.

III. ARBITRATION AWARD

The case proceeded to arbitration under the collective bargaining agreement. Arbitrator Mary Ellen Shea ultimately determined that the superintendent wrongfully rejected the teacher's request for a personal, unpaid leave of absence. The arbitrator ruled that the contract mandated the grant of personal, unpaid leave. By denying the leave the superintendent effectively terminated the teacher's employment in Marshfield and violated the contract.

The arbitrator observed that the committee could have proceeded to termination under Section 42 of Chapter 71. The arbitrator explained her rationale by distinguishing between unlicensed educators who are on unpaid leaves of absence, and therefore not "employed" as a teacher, with individuals engaged in actual teaching duties. As part of the remedy, she ordered that the teacher be given an unpaid leave of absence for the 2008-2009 school year and that he be made whole for any financial loss and seniority which he would have received but for the decision to end the employment relationship.

IV. COURT PROCEEDINGS

The School Committee unsuccessfully sought to vacate the award in the Superior Court. It then filed an appeal.

The Appeals Court first reviewed the standards of review applicable to arbitration awards. Most readers are familiar with the rules which permit only the narrowest grounds for judicial review of arbitration awards adjudicating contract claims. Generally speaking, arbitrators' awards can be reviewed by courts only to determine whether arbitrators exceeded their powers or rendered an award requiring a person to commit a fraudulent act or engage in conduct prohibited by state or federal law. See M.G.L. c. 150C, §11(a)(3). While judicial review is independent, a reviewing court is "strictly bound by the arbitrator's factual findings and conclusion of law, even if they are in error." Marshfield Slip Opinion, Page 5, citing School Committee of Lowell v. Robishaw 456 Mass 653, 660 (2010).

The Committee argued to the Appeals Court that the lack of a certificate and/or DESE waiver extinguished any statutory or collective bargaining rights as a matter of law, relying on M.G.L. c. 71, §38G, quoted above. The case presented the court with an opportunity to review the interplay of Section 38G and the dismissal statute codified in Section 42 of Chapter 71. The Appeals Court noted that Section 38G limns baseline eligibility criteria for employment but "does not in any way define the requirements for termination of employment and the associated rights of employment for those who have been previously licensed and achieved professional status" as had the teacher in this case. The court observed that even the arbitrator had found the absence of a license to be a substantive basis for termination under Section 42. Additionally, the court commented that the absence of a license could provide substantive grounds to terminate an employee under the relevant just cause provisions of a collective bargaining agreement, but these two rules do "not automatically extinguish all of the employee's rights."

Getting closer to the nub, the court concluded the arbitrator did not exceed her authority when she concluded that, as a result of the absence of Section 42 dismissal procedures, the employment relationship between the teacher and the district continued even though the teacher was no longer certified. Because the employment relationship continued, even in the absence of a certification, the arbitrator had the authority to conclude that the superintendent wrongly denied the teacher's request for a personal leave of absence under the collective bargaining agreement. In effect, according to the court, the arbitrator ruled that the superintendent had incorrectly determined the teacher's legal status. As a result the teacher retained the contractual right to a non-discretionary personal leave.

The court dispatched arguments made by M.A.S.S. in an amicus brief, and by the Marshfield Committee, to the effect that the arbitrator's ruling violated public policy requiring individuals to be certified as teachers in order to retain their employment status. The court reiterated that there was nothing in Section 38 detailing the termination rights of teachers, and the grant of a one year leave of absence did not violate Section 38G.

Arbitration awards can be overturned on public policy grounds if the employer establishes three elements. First, the employee's conduct leading to the discipline and discharge must implicate "a well-defined, dominant, public policy ascertained by

reference to a specific law or legal precedent.” One might have thought that the certification rules constituted a well-defined, dominant public policy. Second, the conduct in question must be integral to the employee’s duties. Similarly, one might have thought a professional license was a prerequisite, even integral, to employment for teachers. Third, the employee’s conduct would “require an employee’s dismissal.” Marshfield; Slip Opinion, Page 7, citing School Committee of Lowell v. Robishaw, 456 Mass. at 664. The Appeals Court observed that even if the first two requirements were satisfied, Marshfield did not establish the third element, i.e. that reinstatement would frustrate public policy, as it did not require the employee’s reinstatement to active teaching duties without a License. Apparently, being rendered ineligible for employment as a teacher by absence of a certificate is only a threshold matter. Once licensed, those who subsequently become unlicensed may be dismissed only through the cumbersome discharge process, not simply by operation of law.

V. DISCUSSION

The decision does reaffirm that licensure is a matter between the employee and the Commonwealth. The case and the decision, however, should be filed under the general heading of “No good deed goes unpunished.”

It appears that, after several years of central office assistance and the teacher’s lackadaisical efforts to become re-certified, one cannot “teach,” but still can be “employed” under the collective bargaining agreement. This, of course, begs the questions: employed to do what and eligible for which contractual benefits? So, be clear about teachers’ responsibilities to become and remain licensed. Be clear about the amount of assistance you may choose to provide to educators whose license has lapsed. You are under no obligation to initiate assistance. Survey staff at least annually to confirm records of licensure and current areas of license. Ask staff for certification updates. Follow up in writing on your requests for certification information. Do not rely on the absence of a license as a disqualifying event, per se. If you wish to terminate unlicensed employees, do so in accordance with M.G.L. c. 71, §42 or your collective bargaining agreement. Consult local counsel before taking action in these cases.

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