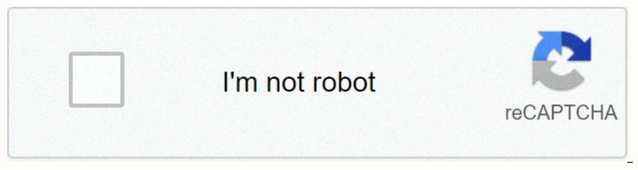

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Springfield township education association

Before SMITH and FLAHERTY, JJ., and MIRARCHI, Jr., Senior Judge. A. Martin Herring, Philadelphia. Kenneth A. Roos, Blue Bell. The Springfield Township Educational Support Personnel Association (Association) is appealing from an order from the Court of Common Pleas of Montgomery County (trial court) that reversed the award of an arbitrator. For the reasons that follow, we reverse the order of the trial court and reinstate the arbitrator's award.Mr. Randolph Mack was a custodian at a school in the School District of Springfield Township (District). On June 7, 1995, The District terminated Mr. Mack's tenure as custodian. The dismissal led to this case. In September 1994, Mack met with Principal Landis and maintenance manager Johnson to discuss Mr. Mack's lacklustre custodian performance and his frequent tendency to get to work thirty to forty minutes early. At that meeting, Principal Landis and Supervisor Johnson explicitly asked Mr. Mack not to come to work more than fifteen minutes before his scheduled start time. Principal Landis and Supervisor Johnson testified before the arbitrator that their concern about Mr. Mack's early arrival was prompted by insurance concerns. They testified that the insurance company required employees not to arrive early for work due to safety reasons and coverage concerns. At that meeting, they warned Mr. Mack that continuing to come to work more than fifteen minutes early and failing to improve his cleaning would constitute a basis for disciplinary action, including, but not limited to, dismissal. Sometime in January 1995, the district learned that Mr. Mack could not read, and that this could have contributed to him being unable to clean as he was instructed because the instructions were written. Then the district provided a tape recorder for Mr. Mack, leaving verbal work instructions for him. But sometimes this tape recorder was locked up, thus preventing Mr. Mack from receiving his specific instructions. On January 6, 1995, the district suspended Mr. Mack for five days as a result of him continuing to come to work more than fifteen minutes early. From January 1995 to April 1995, Mr. Mack arrived at least thirty minutes early to work on eleven different occasions. On May 5, 1995, the district terminated him. The association and the district are parties to a collective agreement (CBA). The association mourned Mr. Mack's resignation. The parties went to arbitration. The arbitrator found that in the resignation letter that the district sent to Mr. Mack, of the twenty dates that list the events that led to his resignation, fourteen of them processed early arrivals. (The arbitrator's opinion on p. 12.) The arbitrator ordered Mr. Mack to return to his job. that coming to work early did not constitute an acceptable reason for only cause as a reason for termination. (The arbitrator's opinion on 14.) The arbitrator found that Mr. Mack had provided sufficient explanation for his inability to fully clean his areas. The arbitrator stated that Mr. Mack did not perform [his cleaning duties] as well as possible, but with some reasons for this and ... the arrival time seems to be the relevant reason for the termination. After concluding that the main reason for the dismissal was Mr. Mack's early arrival at work, and because the arbitrator concluded that such a thing could not constitute only cause under CBA, the arbitrator ordered the reinstatement. The district asked the court for a review of the arbitrator's award. The lawsuit concluded that when the arbitrator found out that Mr. Mack had actually engaged in the conduct that the district accused him of, the arbitrator was without the power to change the discipline imposed by the district. The trial also concluded that the arbitrator failed to determine that Mr. Macks show up early at work after being instructed not to do so, not just reasons for dismissal. The lawsuit also found that the arbitrator's award was contrary to CBA because CBA gave the district exclusive right to establish rules of conduct and to schedule work. Thus, the trial reversed the arbitrator's price. This appeal from the trial court's order followed. The limit of an appeals court's review of an arbitrator's award in the context of an appeals court as this is the essence test and the inquiry in question is whether the award may in any way be rationally derived from the collective agreement in light of the agreement, its language, context and any other accusations of the parties' intent. Leechburg-area school district v. Dale, 492 Pa. 515, 424 A.2d 1309 (1981). The first question that the Association presents for our review is whether the trial court failed by exceeding its narrow scope of review according to the essence test. The lawsuit found that the arbitrator's award did not draw its essence from CBA because when the arbitrator determined that Mr. Mack had actually engaged in the conduct for which the district disciplined him, the arbitrator was without the authority to change the discipline imposed, citing, The Riverview School District v. Riverview Education Association, PSEA-NEA, 162 Pa.Cmth. 644, 639 A.2d 974, 977 (1994), appeal refused, 540 Pa. 588, 655 A.2d 518 (1995). The association argues that the award in this case actually drew its essence from CBA and therefore the trial court had to confirm because the only inquiry the court is allowed to embark on is to inquire whether the price drew its essence from CBA. It notes that CBA allows discipline for a fair cause, but that CBA is silent about what constitutes a fair cause; Ly, the arbitrator here in here was free to determine whether the conduct of Mr. Mack constituted a fair cause in the meaning of CBA. When the arbitrator determined that the principal's directive not to appear early was not reasonable, and therefore a violation of this could not constitute a fair cause, the arbitrator performed only his function of interpreting CBA. The association therefore argues that the trial was without the authority to review the arbitrator's interpretation of CBA given the rewritten scope of the review mandate of the essence test. The district argues that Article IV of the CBA specifically gives the district the power and responsibility to plan work and to adopt and enforce code of conduct. The district notes that the arbitrator concluded that the principal's directive to Mr. Mack not to show up for work earlier than fifteen minutes before the scheduled start time was unreasonable. The district argues that the arbitrator's conclusion in this regard exceeded his authority and impermissibly interfered with the district's exclusive right to plan work and to establish rules of conduct what rights were granted to the District by the CBA. However, we note that the exact language of CBA stipulates that the district's responsibilities shall include . the right to establish and enforce reasonable code of conduct. (Reproduced record (R.R.) on p. 27. (highlight added)). See County Council v. Musser, 519, Pa. 380, 393, 548 A.2d 1194, 1200 (1988) ([g] iven species and scope of judicial review under the essence test, we must begin our resolution of this appeal by focusing on the collective bargaining agreement itself.) CBA defines or devalues the term reasonably just as CBA does not define fair cause. In the absence of clear guidance from CBA, the arbitrator has the power to define reasonable and just cause. See, eg, Upper St. Clair School District v. Upper St. Clair Educational Support Personnel Association, 168 Pa.Cmwlth. 1, 649 A.2d 470, 472 n. 4 (1994); McKeesport Area School District vs. McKeesport School Service Personnel Association, 137 Pa.Cmwlth. 28, 585 A.2d 544 (1991); American Federation of State County and Municipal Employees v. City of Reading, 130 Pa.Cmwlth. 575, 568 A.2d 1352 (1990) (AFSCME). For example, in the McKeesport Area School District, the district terminated a ground ranger for three separate incidents to neglect its duties. The union representing the founding guardian mourned the resignation. The arbitrator found that only one of the three incidents amounted to only reason to discipline the landowner. after determining that the termination was disproportionate to the breach, the arbitrator changed the termination to a 14-day suspension. The district appealed to the Court of Appeal, which upheld the award. The district then appealed to this court. By confirming the award, this court stated that:Because the [collective bargaining] agreement itself does not define a fair cause, it is within the province of the arbitrator to interpret the only causal provision. The arbitrator found that only the incident on June 8, 2015, was the first time that the incident had been reported. However, the arbitrator did not find Grievant's [base guardian's] conduct on that occasion to be serious enough to justify dismissal. Moreover, because the district discharged Grievant on the basis of three violations and the arbitrator determined that only one of those violations gave only reason for discipline, the arbitrator changed the discharge to a suspension. McKeesport Area School District, 585 A.2d at 546. As the agreement in the McKeesport Area School District, CBA here fails to define the fair cause; Thus, it was within the arbitrator's province to give meaning to that expression, which is precisely what the arbitrator herei did. Moreover, because CBA here did not define reasonably in the context of the Rules of Conduct, the arbitrator was also free to give meaning to that term as well. In AFSCME, a city employee was discharged for being intoxicated and sleeping while on duty, disobedience and failing to perform his assigned work. The union representing the employee mourned the spill. The arbitrator ordered the employee reinstated and made the whole thing for all lost wages and benefits. The city appealed and the Court of Common Pleas left the arbitrator's award. The union appealed to this court that reversed the court order and reinstated the arbitrator's award. This court stated the question to the arbitrator as if the city employee was discharged for no reason. This court noted that [t]he [collective bargaining] agreement itself, as in other collective bargaining agreements, does not provide a definition of 'fair case'. AFSCME, 568 A.2d at 1355. This court then went on to conclude that it was obviously unreasonable for the arbitrator here to conclude that there was no fair case, especially since the parties did not outline a definition of fair cause in the agreement. AFSCME, 568 A.2d at 1356. Likewise here, the parties do not define the fair cause in CBA; Therefore, the arbitrator was free to find that the conduct of Mr. Mack, even if it was as the district alleged, did not constitute a fair cause for dismissal. In the Upper St. Clair School District, while transporting a load of students, a school bus driver left bus and engaged in a physical confrontation with an angry motorist. The school district dismissed the driver, claiming that he intentionally left students to engage in the physical confrontation. The driver's union mourned the dismissal. The arbitrator found that the driver's conduct at most constituted negligent conduct contrary to intentional conduct and changed the termination to a 90-day suspension. The school district appealed the arbitrator's decision to the Court of Common Prayers that upheld the arbitrator's decision. The school district appealed to this court, essentially arguing that the arbitrator exceeded its powers in changing the termination to a 90-day suspension. Rejecting this argument, and concluding that the arbitrator did not exceed his scope of authority, this court stated that [w] hen an arbitrator finds that only cause of termination does not exist, and the collective agreement does not prohibit the arbitrator's change of a district's punishment, then the arbitrator may change the discipline accordingly. Upper St. Clair School District, 649 A.2d at 472-73. Just as in the Upper St. Clair School District, so too here, the arbitrator found that only the cause did not exist to terminate Mr. Mack and as the CBA did not prohibit an arbitrator from changing the punishment, the arbitrator was free to do as he did. The arbitrator's determination that Mr. Mack's actions did not constitute a fair cause and the arbitrator's change of the penalty was not incompatible with CBA, and therefore the arbitrator's award could be said to be rationally derived from CBA. Because the arbitrator was free to find that rule of conduct established for Mr. Mack that prohibited him from showing up at work more than 15 minutes before his scheduled time was unreasonable, according to CBA, and because the arbitrator was free to find that a violation of such a rule did not constitute a fair cause in the meaning of CBA , we must conclude that the price drew its essence from CBA. This is so because the essence test requires that an arbitration award must be maintained if it can in any rational way be derived from the collective bargaining agreement in light of the language, context and other indices of the parties' intent. Pennsylvania State Education Association v. Appalachia Intermediate Unit 08, 505 Pa. 1, 5, 476 A.2d 360, 362 (1984). Given the silence of the CBA on the issue of what constitutes reasonable rules of conduct and fair cause, we must conclude that the arbitrator's provision of reasonableness and fair cause and his subsequent award based on it in this case may rationally be derived from CBA. Therefore, we agree with the Association that the trial court failed to find that price did not derived its essence from CBA. In the second case that the Association raises for this court's review, the association essentially argues that the trial court failed as a matter of law in determining that the arbitrator exceeded his authority when the arbitrator changed the punishment that the district imposed on Mr. Mack. The trial court ruled that when the arbitrator concluded that Mr. Mack actually engaged in the actions that the district alleged he did, namely failing to satisfactorily clean his areas and appearing more than fifteen minutes early for work, the arbitrator was without the power to change the discipline imposed by the district. The trial court cited the Riverview School District v. Riverview Education Association, PSEA-NEA, in support of its disposition of this case. In Riverview, two teachers spent sick time taking a ski ing holiday. Their employer fired them. The arbitrator found that in fact the two teachers did as their employer claimed, but still reinstated the teachers, finding that despite their improper use of sick time, so did not constitute a fair reason for dismissal. The employer appealed and the trial upheld the arbitrator. The employer appealed to this court that left the arbitrator's award. This court stated that when the arbitrator found out that the teachers committed the accused conduct, the issue of appropriate discipline was reserved by the CBA and applicable law to the employer. The association is trying to separate Riverview by adding that Riverview treated professional employees. The association notes that although CBA in Riverview did not define the fair cause as CBA here, the Pennsylvania School Code was incorporated into Riverview CBA and the school code specifically defined reasons that justified termination. The association encourages that Riverview is inapplicable here because Mr. Mack is a non-professional employee while Riverview involved professional employees who should be held to a higher standard. Furthermore, only cause was given specific content in Riverview via the incorporation of the school code into Riverview CBA as opposed to here where only the cause is not defined. The district responds that the definition of what constitutes only reason for the termination of professional employees, contained in the School Act, actually provides greater protection for professional employees, essentially limiting the basis for the discharge of professional employees, while there are no such restrictions on what constitutes only reason for the termination of non-professional employees. According to the District, because this case deals with a non-professional employee who is not protected by the statutory restrictions on only cause of discharge, Riverview stands, if anything, for the suggestion that the employee involved here had less protection from discharge for their conduct than a professional employee would have. We agree that the distinction between this case and Riverview based on the difference between professional and non-professional employment status is not a legally significant distinction for the purpose of settling this case. Rather, the legally significant distinction between this case and Riverview is

that in Riverview there was language in CBA that committed the issue of appropriate discipline to the employer. See Riverview 639 A.2d at 979, (the question of whether appropriate discipline was a matter reserved by the agreement and applicable law to the employer.) (highlighting added). However, the parties herein have not pointed to any language in the governing CBA which also commits the question of what discipline should be administered exclusively to the district. For example, McKeesport School District v. Personal Association, 585 A.2d at 546 n. 4 (this court separated the case for it from County of Centre v. Musser, supra, on the basis that there was specific language in CBA in Musser that limited the arbitrator's authority to determine whether there was only reason for discharge as opposed to in the case before there was no such language as the ruled out the arbitrator from changing the penalty imposed). From there we agree with the Association that the trial court failed as a matter of law in concluding that simply because the arbitrator did not dismiss the facts as alleged by the district, the arbitrator was thus barred from changing the penalty imposed. Such a rule of law would ignore the arbitrator's traditional role that not only makes findings of fact, but must determine the legal significance of these facts in light of CBA. See AFSCME, 130 pa.cmwlth. 575, 568 A.2d 1352, 1356 (Pa.Cmwlth.1990) (Part of what the arbitrator denotes is the arbitrator's view of the facts and the importance of the contract that the parties have agreed to accept.) (highlighting added). In other words, the arbitrator was certainly free to do as he did here, namely to determine that the essential facts alleged by the district were true, that is, Mr. Mack's cleaning was below expectations and that he appeared to work earlier than he was asked to do, but then continue to establish that such conduct did not constitute a fair cause in the meaning of the CBA. For example, the McKeesport Area School District (arbitrator does not dispute the facts as alleged by the District in two of three incidents that form the basis of the district's discipline, but nonetheless concluded that these facts did not constitute a fair cause.) To summarise then, we are therefore limited by previous case law to keep the parties agreeing with CBA that an arbitrator should decide what is the fair cause discipline by not further limiting the fair cause in CBA. Although the employer retained the right of CBA to establish and enforce reasonable code of conduct, by accepting the use of the word reasonably and by omitting language that circumcises the term reasonably, for example, using the term all instead of reasonable, the employer of the arbitrator decisized the decision-making power to define what is meant by the term reasonable. Furthermore, even if the arbitrator, in the interpretation of CBA, agreed that the work rule was reasonable (which he did not) he would still be within the essence of the contract to determine that a violation of such a reasonable labor rule did not constitute a fair cause for the discipline imposed, because only the cause is also not defined or limited by the CBA. Because the essence test narrowly rewrites a court's review of an arbitration award and the trial court in this case exceeded its proper limited review, and because the trial court failed to conclude that the arbitrator was without the authority to change the discipline imposed by the district, the order of the trial court is hereby reversed and the arbitrator's award has been reinstated. On April 2, 1998, the order from the Court of Common Pleas of Montgomery County, dated April 2, 1997, and docked at 96-13607, is hereby reversed. The award of the arbitrator has hereby been reinstated. Flaherty, Judge. Judge.

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