

suicide by ingesting between 60-90 sleeping pills. He was independently evaluated on July 5, 2006, by Psychiatrist Roger Cadieux, M.D. (Dr. Cadieux), who concluded that he suffered from a major depressive disorder that was in remission when he saw him. He also diagnosed Trooper Keyes with obsessive compulsive disorder and trichotillomania (a strong compulsion to pull out hair).

On August 23, 2006, Trooper Keyes was involuntarily admitted to Holy Spirit Hospital for depression following his third suicide attempt. There, he was evaluated by Pamela Rollings-Mazza, M.D. (Dr. Rollings-Mazza), a psychiatrist at Holy Spirit Hospital. She noted that this was his third admission to the hospital for suicide attempts and he previously had six shock therapy treatments for depression. She stated that some of the depression was related to issues surrounding his divorce from his first wife, not being able to see his children, and having problems with his current wife. She diagnosed Trooper Keyes with major depressive episode recurrence, severe, without psychosis. She discharged him after three days to Hershey Medical Center for further shock therapy treatment.

Dr. Cadieux re-evaluated Trooper Keyes on November 16, 2006, opining that he could not recommend Trooper Keyes for a limited-duty job because he could not ascertain duties that Trooper Keyes could perform that would be non-stressful and would not allow him to have a further relapse of his major depressive order. He noted that Trooper Keyes had had at least four suicide attempts by overdosing on prescription drugs from June 2006 to the date of his evaluation, and concluded that his prognosis for Trooper Keyes to return to full

duty was fair to poor. He did not believe that he could perform full duty because of the severe and repetitive nature of his problem. As a result of Dr. Cadieux's reports, Trooper Keyes was removed from duty by Employer and remained in that status pending arbitration. Trooper Keyes made another suicide attempt in January 2007 and was admitted to Harrisburg Hospital.

On April 27, 2007, Trooper Keyes' treating psychologist, Richard Williams, Ph.D (Dr. Williams) recommended that he be reinstated as a state trooper. Dr. Williams stated that Trooper Keyes had been treating with him since February 22, 2007, and had initially presented as anxious and depressed due to his second wife divorcing him after only seven months of marriage. He stated that they dealt with his life history of depression, but were focusing on him resuming his work and rebuilding his life. Because Dr. Williams found that he was no longer suicidal and should be allowed to return to work, Trooper Keyes filed a grievance so that he could return to duty either in a limited or full-duty capacity. Both parties of the CBA agreed that an arbitrator could hear the dispute to determine if Trooper Keyes could return to work.

Before the arbitrator, psychiatric medical testimony, both pro and con, was presented as to why Trooper Keyes should or should not return to work. Dr. Williams testified in favor of returning Trooper Keyes to work as did Trooper Keyes himself. Dr. Cadieux, however, testified that while Trooper Keyes could return to work if his depression was under control, he could never return to duty due to his diagnosis of obsessive compulsive disorder. Michael Asken, M.D., Employer's psychologist, testified that he corresponded with Dr. Cadieux

regarding Trooper Keyes' psychiatric status and relied on his opinion to find that he was incapable of returning to any type of work. Dr. Rollings-Mazza testified that she had evaluated Trooper Keyes only one time while he was at Holy Spirit Hospital and did not know his current status. A friend of Trooper Keyes, state trooper Hammar, also testified that he had been called on numerous occasions by Trooper Keyes when he intended to end his life; however, if he was assigned to be his backup in the midnight shift, he would have no problem with that.

The arbitrator relied on the testimony of Dr. Williams, who last saw Trooper Keyes in October 2007 and found his depressive disorder in remission. The arbitrator noted that there were positions available with Employer that would "afford the grievant the opportunity to perform clerical work and one where he would not have access to a firearm and would also not be on the road. These are the kinds of positions that the arbitrator believes that Trooper Keyes would be able to perform. It is therefore so awarded that he be given such a limited duty position, consistent with his skills and abilities and consistent with the terms of the Collective Bargaining Agreement. Further, he shall be monitored on a regular basis by competent medical professionals respecting his psychiatric condition." (Arbitrator's October 20, 2008 award at 10.) The arbitrator then issued the following award:

The Commonwealth does not have reasonable cause to continue to hold Trooper Keyes out of duty rather than put him on medically limited duty. He shall be returned to employment in a limited duty position, consistent with the comments made in the within Award. No back pay shall be awarded but the grievant's seniority shall be restored i.e. he shall be deemed to have been continuously employed since the date of his removal

from duty subject, of course, to any restrictions in the collective bargaining agreement.

Employer filed this appeal contending that the arbitrator's award was in excess of his powers because the clerical work that the arbitrator determined Trooper Keyes could perform was the type of work performed by employees of another union – the American Federation of State, County and Municipal Employees (AFSCME). Such work could not be assigned to persons outside that bargaining unit. If Employer were to assign clerical work to Trooper Keyes, AFSCME could file a complaint under Section 1201 of the Public Employees Relations Act¹ and cite an unfair labor practice.

“Our scope of review of an arbitration award from an Act 111 grievance arbitration is under the narrow certiorari standard which limits courts to reviewing questions regarding 1) the jurisdiction of the arbitrators; 2) the regularity of the proceedings; 3) an excess of the arbitrator's powers; and 4) deprivation of constitutional rights.” *Pennsylvania State Police v. Pennsylvania State Troopers Association (Betancourt)*, 540 Pa. 66, 79, 656 A.2d 83, 89-90 (1995). In this case, the parties defined the issue that the arbitrator was charged with resolving:

Does the Commonwealth have reasonable cause to continue to hold Trooper Keyes out of duty rather than put him on medically limited duty or full duty? If not, what shall be the remedy?

¹ Act of July 23, 1970, P.L. 563, *as amended*, 43 P.S. §1101.1201.

Under the question presented to the arbitrator, the parties gave the arbitrator three choices: he could either put Trooper Keyes back to work full-time, not at all or put him back on medically-limited duty. Because the issue of whether Trooper Keyes could return to work on limited duty was squarely presented to the arbitrator, he did not exceed his jurisdiction by doing so.

Employer contends that the arbitrator exceeded his powers by ordering Trooper Keyes back to work in a “clerical position” because it requires Employer to place him in a position in an AFSCME certified bargaining unit.² Under AFSCME’s CBA with the Commonwealth, there is a section entitled “Classification Titles by Bargaining Unit.” Sub-section “E” is entitled “Clerical, Administrative and Fiscal Unit, Non-Professional, Non-Supervisory.” The jobs described under this subsection include, *inter alia*, messenger, clerk, clerk typist, stenographer, switchboard operator, fiscal technical, data analyst, computer programmer, stock clerk, tax examiner and legal assistant, and are not the type of job that the arbitrator envisioned Trooper Keyes performing. Employer contends that because those positions are part of the AFSCME bargaining unit, the arbitrator exceeded his powers by ordering an impermissible remedy.

² “[O]ur definition of what constitutes ‘an excess of an arbitrator’s powers’ [is] far from expansive. *Pennsylvania State Police v. Pennsylvania State Troopers Association*, 559 Pa. 586, 741 A.2d 1248, 1251 (1999). Essentially, if the acts the arbitrator mandates the employer to perform are legal and relate to the terms and conditions of employment, then the arbitrator did not exceed her authority. *Id.* Act 111 has defined ‘terms and conditions of employment’ as ‘including compensation, hours, working conditions, retirement, pensions and other benefits...’ 43 P.S. §217.1. Finally, we have stressed that a mere error of law will not support a finding that the arbitrator exceeded her powers. *Pennsylvania State Police*, 741 A.2d at 1251.” *City of Philadelphia v. Fraternal Order of Police, Lodge No. 5*, 564 Pa. 290, 298, 768 A.2d 291, 297 (2001).

Assuming that we can even reach that issue under our narrow scope of review, the arbitrator relied upon Employer's Field Regulation Section 4.11 which addresses medical "Limited Duty" stating that it may be granted following duty or non-duty illness or injury. It further provides that "Limited duty may be in the form of modified duties and/or an altered work shift." (Section D 1, Reproduced Record at 537a.)³ Under this section, the arbitrator had the authority to return Trooper Keyes back to work in the form of "Limited Duty" and did not exceed his power in doing so.

As to whether returning Trooper Keyes to "clerical work" was permissibly limited duty, the "clerical" type of job would be whatever Employer would have Trooper Keyes perform in the course of his job as a state trooper while injured such as finishing case reports, a job that Trooper Keyes was performing prior to being removed from duty, the subject of the arbitration. Major Steven McDaniel (Major McDaniel), 19 years employed with Employer and Commander of Area I of the Pennsylvania State Police, testified that if Trooper Keyes was brought back in a limited-duty position, he would still hold the rank of trooper and still have the responsibilities and expectations associated with that position:

Regardless of the fact if a member is engaged in limited-duty activity, i.e., they're not actively engaging in criminal enforcement or traffic enforcement or getting themselves in precarious situations, they still carry the title of trooper and with that the responsibilities. For example, one responsibility which may not seem

³ Additionally, Employer's Field Regulation requires that limited duty "Employees are expected to resume all the duties of their classification within a reasonable period of time." (Reproduced Record, Section 6 at 538a.)

significant would be reports. A person on limited duty may be assigned to supplemental reports. They may be assigned to clean up reports of transferred and retired members. They may be assigned to do close-outs which would be, you know, cases that are pending disposition.

(September 6, 2007 Hearing at 99.) Therefore, Employer knows how to accommodate troopers in “clerical” limited-duty positions.

Employer also argues that the arbitrator’s award cannot be carried out because it would be problematic for Trooper Keyes to be in the vicinity of guns while on limited duty. Not only did the arbitrator determine that Trooper Keyes was sufficiently recovered to return to medical-limited duty based on the medical testimony presented, but, more importantly, Employer’s own Department Directive – Special Order 2009-13 (Exhibit A) gave the arbitrator guidelines to follow. Paragraph 3 of that Department Directive provides the following:

Members assigned to limited duty (temporary or permanent) due to *psychological/psychiatric conditions shall immediately surrender their Department-issued weapons (lethal and less lethal), badge and uniforms to their Commander/Director.* (Emphasis added.)

By acknowledging that a state trooper can be assigned to limited duty with a psychiatric condition but must surrender his weapon, Employer has no basis for arguing that the arbitrator is awarding an impossible order. The arbitrator’s award in this case was merely following Employer’s Department Directive.

Accordingly, while we may well have decided the arbitration differently, because the arbitrator did not exceed his powers, the award is affirmed.

DAN PELLEGRINI, JUDGE

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Pennsylvania State Police,	:
Petitioner	:
	:
v.	: No. 2206 C.D. 2008
	:
Pennsylvania State Troopers	:
Association,	:
Respondent	:

ORDER

AND NOW, this 13th day of October, 2009, the arbitration award entered on October 20, 2008, is affirmed.

DAN PELLEGRINI, JUDGE

exceeds his or her powers by mandating that the employer commit an illegal act or an act which the employer cannot do voluntarily. Id.

It is undisputed that Trooper Keyes was involuntarily committed to Holy Spirit Hospital for psychiatric evaluation and inpatient emergency care and treatment pursuant to Sections 302 and 303 of the Mental Health Procedures Act², and that an examining physician issued a certification that extended inpatient care was necessary and that Trooper Keyes was committable. See Reproduced Record (RR) at 268a-283a. In addition, Section 6105 of the Pennsylvania Uniform Firearms Act³ provides, in pertinent part:

(a) Offense defined.—

(1) A person, ... whose conduct meets the criteria in subsection (c) shall not possess, use, control, sell, transfer or manufacture ... a firearm in this Commonwealth.

* * *

(c) Other persons.—

* * *

(4) A person ... who has been involuntarily committed to a mental institution for inpatient care and treatment under section 302, 303 or 304 of the provisions of ... the Mental Health Procedures Act. This paragraph shall not apply to any proceeding under section 302 of the Mental Health Procedures Act unless the examining physician has issued a certification that inpatient care was necessary or that the person was committable.

² Act of July 9, 1976, P.L. 817, as amended, 50 P.S. § 7302, 7303.

³ 18 Pa.C.S. § 6105(a)(1), (c)(4).

Thus, under the explicit provisions of Section 6105(c)(4) of the Uniform Firearms Act, Trooper Keyes is prohibited from possessing, using or controlling a “firearm” in this Commonwealth.^{4,5}

In spite of the foregoing, the Majority contends that the arbitrator had the authority to reinstate Trooper Keyes to his trooper position because Department Directive – Special Order 2009-13 dictates that limited duty status required the surrender of his weapon. See Majority Opinion at 8. However, one of the essential job functions of the trooper position with the Pennsylvania State Police is the ability to “[l]oad, unload, aim and fire using each hand from a variety of body positions handguns, shotguns and other agency firearms under conditions of stress that justify the [use] of deadly force and at levels of proficiency prescribed in certification standards.” RR at 500a.

⁴ Section 6102 of the Uniform Firearms Act defines “firearm” as “[a]ny pistol or revolver with a barrel length less than 15 inches, any shotgun with a barrel length less than 18 inches or any rifle with a barrel length less than 16 inches, or any pistol, revolver, rifle or shotgun with an overall length of less than 26 inches. The barrel length of a firearm shall be determined by measuring from the muzzle of the barrel to the face of the closed action, bolt or cylinder, whichever is applicable.”

⁵ Moreover, it has been recognized that the General Assembly has vested the Pennsylvania State Police with broad authority and responsibility regarding the administration of the Uniform Firearms Act in general, and with respect to the disability imposed pursuant to Section 6105(c)(4) in particular. See In re Expungements, 938 A.2d 1075, 1081 (Pa. Super. 2007), petition for allowance of appeal denied, 597 Pa. 717, 951 A.2d 1164 (2008) (“While the Pennsylvania State Police is not explicitly granted standing in a proceeding pursuant to Section 6105(f)(1) to remove a disability imposed under Section 6105(c)(4), it has an implicit power to be a litigant in this type of proceeding. As discussed above, the legislature has statutorily conferred the State Police with responsibilities and duties under several provisions of the Uniform Firearms Act. The State Police’s interest in these proceedings is linked to its ability to perform its administrative responsibilities under the Firearms Act and, more importantly, to ensure public safety and welfare by keeping firearms out of the hands of dangerous individuals.”).

In addition, in order to perform these essential job functions, Trooper Keyes' Troop Commander testified that every enlisted trooper must have access to firearms, and that access includes troopers on limited duty status. More specifically, Major McDaniel testified, in pertinent part:

Q. As far as any limited-duty position that you could find for Tpr. Keyes, how could you describe the safety of such a position, given his psychiatric condition and history?

A. Based on my personal experience and based on the experience that we have now with Tpr. Keyes' documented [suicide] attempts, there is no position in the State Police that could ensure that safety, and I say that because as we often say in the Pennsylvania State Police and probably in police work everywhere, every incident is a gun incident because every incident, a police officer brings a gun to the incident, and therefore it is a gun incident.... The weapons locker key is readily accessible to every enlisted member of every station and it won't become any less accessible. In this particular case if he's working in headquarters, every enlisted member has access to firearms in headquarters because there's a firearm somewhere in the proximity of every enlisted member. Go ahead. I'm sorry.

* * *

ARBITRATOR:

Just help me understand, Major, if in fact he's brought back on limited duty, he would in fact have access to such a key? Is that your testimony?

MAJ. MCDANIEL:

Yes.

ARBITRATOR:

Just because it's around?

MAJ. MCDANIEL:

Because it's around, and it must – it has to be accessible. It's not accessible to the general public but it has to be accessible to all members for obvious reasons, and we can't make it not accessible to everyone else....

RR at 433a-434a.

Thus, the award in this case directs the Pennsylvania State Police to reinstate Trooper Keyes to trooper status, which includes access to firearms, even though he is prohibited from possessing, using or controlling a firearm under Section 6105 of the Uniform Firearms Act. It is certainly ironic that the arbitration award in this case directs the Pennsylvania State Police to violate the explicit provisions of the Uniform Firearms Act, an act which confers upon the Pennsylvania State Police the duty to enforce its provisions. See, e.g., In re Expungements, 938 A.2d at 1081 (“[T]he State Police’s interest in these proceedings is linked to its ability to perform its administrative responsibilities under the Firearms Act and, more importantly, to ensure public safety and welfare by keeping firearms out of the hands of dangerous individuals.”).

Accordingly, unlike the Majority, I would reverse the Act 111 arbitration award in this case.

JAMES R. KELLEY, Senior Judge