ARBITRATION BY AGREEMENT OF THE PARTIES
Before
Arbitrator Timothy J Brown, Esquire

Upper Darby Education Support Professional Association, PSEA/NEA	:	
And	:	**(Termination of Nicole Baroni)**
Upper Darby School District	:	

Decision

Appearances:

On behalf of Upper Darby Education Support Professional Association, PSEA/NEA:
Annemarie Dwyer, Esquire
PSEA Legal Division
1512 McDaniel Drive
West Chester, PA 19380-6670

On behalf of Upper Darby School District:
Kelly A. Sullivan, Esquire
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I. Introduction

This arbitration arises as a result of a grievance filed by **Upper Darby Education Support Professional Association, PSEA/NEA** (the Union or the Association) pursuant to a July 1, 2015 through June 30, 2018 collective bargaining agreement (the Agreement or the CBA) between the Association and **Upper Darby School District** (the District or the Employer). In its underlying grievance, the Union contends that the District violated the Agreement by terminating

employee **Nicole Baroni** (Grievant) without just cause. The parties were not successful in their efforts to resolve the matter through the formal steps of the Grievance Procedure contained in the Agreement and selected the undersigned to conduct a hearing on the grievance and render a final and binding arbitration award. The matter was heard on June 29, 2016 in Upper Darby, Pennsylvania. All parties were afforded the opportunity for presentation of opening statements, examination and cross-examination of witnesses and the introduction of relevant exhibits. Grievant was present for the entire arbitration hearing and testified on her own behalf. Upon the close of the hearing on June 29, the parties requested the opportunity to submit written post-hearing briefs on the issues presented, upon receipt of which by the undersigned, the record was closed September 12, 2016.

This Decision and Award is made based upon careful consideration of the entire arbitration record in the matter, including the undersigned's observations of the demeanor of all witnesses.

II. Issues Presented

The parties stipulated that: (1) there are no procedural bars to the presentation of the matter, (2) the matter is appropriately before the arbitrator, (3) the arbitrator has the authority to render a final and binding decision and award in the matter and (4) that the issue or issues to be decided in this arbitration may accurately be stated as follows:

> Did the School District have just cause to dismiss Nicole Baroni, and if not, what shall be the remedy?

Facts

Grievant is Initially Hired in 2009

Grievant is a high school graduate. In 2009 Grievant applied to the District for a position as a noontime assistant and on her employment application answered "yes" to the question: "Have you ever been convicted of a felony?" Grievant then wrote in the space to provide "details;" "My husband use (sic) my name to make his own prescriptions." Following her interview and further inquiring by the District as to the circumstances of her prior arrest, Grievant was hired for the noontime assistant position. Grievant worked the position for approximately one year.

Grievant is Hired for a New Position Beginning in the 2010-2011 School Year and is Arrested for Conduct in September 2010

In the summer of 2010 Grievant applied for a position with the District as a "Building Assistant" at Bywood Elementary School" and was hired for the position; a position that began in October 2010. In September 2010, after Grievant was hired for the Building Assistant position but before she actually began working in the position, Grievant was again arrested. As she explained at the arbitration, while she and other neighbors were participating in a neighborhood Labor Day cookout/picnic, she walked into the house of one of the participating neighbor's, stole a credit card and charged approximately $65 on the card at a local drug store. She testified that some of the money charged was to purchase a prepaid VISA card which she thereafter gave to her "dealer" to pay for drugs she had used. When her neighbor discovered that his credit card was missing and confronted Grievant about the card, Grievant denied any connection with the theft. Her neighbor then investigated the charges on the card made at a local drug store and

received a description of the individual who made the charges (based upon surveillance video) that matched Grievant. The neighbor then reported the matter to the police and when Grievant was confronted by the police, she admitted to the conduct. Grievant's related criminal complaint of September 2010 cited offenses of Burglary (a felony 1 offense), Criminal Trespass (a misdemeanor 3 offense), Theft by Unlawful Taking (a misdemeanor 1 offense), Receiving Stolen Property (a misdemeanor 1 offense), Forgery (a misdemeanor 1 offense) and Access Devise Fraud (a misdemeanor 1 offense).

Grievant Sought Help with her Addiction and Entered a Plea relating to her 2010 Arrest

Grievant testified at the arbitration that at the time she was arrested in 2010, she immediately sought help for her addiction, began seeing an addiction specialist doctor and has been clean and sober since. She testified that she has continued to attend regular meetings with her counselor/doctor and is drug tested monthly. She has been "clean" for seven years.

Grievant testified that following her 2010 arrest, and following discussions with her legal counsel, she plead guilty to one Felony 3 and one Misdemeanor 1, performed the community service required by her plea and completed probation. She further testified that although she now knows she plead guilty to a felony of the 3rd degree for Criminal Trespass as well as a misdemeanor of the first degree for Access Device Fraud, at the time of her plea she thought she was pleading guilty to two misdemeanor charges. She also testified that when she was arrested in 2010 she believed her arrest would be automatically reported to the District.

Grievant Completed a PDE Form 6004 in December 2011.

In December 2011, in compliance with 24 P.S. s1-111(e) and Pennsylvania Department of Education requirements, the District had all of its employees complete a Pennsylvania Department of Education Form 6004; a form used for employees to disclose "Arrests or Convictions" relating to "Reportable Offences" enumerated in 24 P.S. s1-111(e) and described on page 2 of the form. At that time Grievant completed the form she checked the box stating: "no reportable offenses."

The 2011 Form 6004 provided a list of "Reportable Offenses" that included offenses under certain identified provisions of Title 18 of the Pennsylvania Consolidated Statutes including such provisions relating to criminal homicide, aggravated assault, kidnapping, rape, statutory sexual assault, luring a child into a motor vehicle, incest, endangering the welfare of a child, corruption of minors, sexual abuse and exploitation of children, solicitation of minors to traffic drugs, and other specific Sections of the Chapter 25. Form 6004 also identified offenses designated a felony under the "Controlled Substance, Drug, Device and Cosmetic Act" and any law of a similar nature to those identified on the Form under the laws of the United States and other states and jurisdictions. None of the crimes for which Grievant was accused relating to her September 2010 arrest nor her two criminal convictions were identified as a "reportable Offense" on the Form 6004 completed by Grievant in December 2011.

Changes to the Law and PDE Form 6004

Act 82 of 2012 amended the list of "Reportable Offences" in 24 P.S. s1-111(e) and thereafter the Department of Education amended Form 6004. At the arbitration the District offered a copy of the new Form 6004 updated to reflect changes in the controlling statute, changes that took place after Grievant completed her 2011 form. The new Form 6004 provided

an expanded list of offenses that were considered "reportable," a list that now included; (A) conviction for any felony offence of the first, second or third degree if less that ten years have elapsed from the date of the expiration of the sentence for the offense and (B) conviction for any misdemeanor offense of the first degree if less that five years have elapsed from the date of the expiration of the sentence for the offense.

At the arbitration, the District did not offer a copy of any post 2012 PDE Form 6004 completed by Grievant and Grievant testified without contradiction that she had never seen the new Form 6004 and that she was never trained on any change in the law. District Assistant Superintendent Nerelli testified that he believes the new forms were distributed District wide and that employees were informed of the changes in the law.

Grievant's 2015 Criminal Background Report

The law was also amended in 2015 requiring school district employees to submit updated background checks on a more frequent basis and in 2015 the District required all employees to update their criminal background check/clearance. Grievant did so and her background check revealed the Felony 3 conviction and Misdemeanor 1 conviction resulting from her 2010 plea.

The District Terminates Grievant

Having learned of Grievant's criminal convictions, Assistant Superintendent Nerelli met with Grievant and the Union's president, Debbie Beck on December 18, 2015 and informed Greivant of the criminal report and the language of the statute. Grievant initially responded that she believed the report was incorrect and that her 2010 conviction was only for misdemeanors.

The District gave Grievant time to investigate the report and have her record corrected. After pursuing the matter, Grievant then learned that she had plead to a felony 3 and misdemeanor 1. Thereafter, Assistant Superintendent Nerelli, Grievant and president Beck met on December 22, 2015 at which time the Assistant Superintendent notified Grievant that he would be recommending that the School Board terminate her pursuant to the language of the statute.

By letter dated January 6, 2016 the District informed Grievant that it would be recommending that the school board of directors terminate her employment with the District. As for the reasons for the recommendation, the letter provides:

> You are being charged by the school district administration with the failure to report two reportable offenses (an F3 and M1 arrest and conviction) as required by Act 24.[1]

The District's school board thereafter terminated Grievant.

At the arbitration, Assistant Superintendent Nerelli testified that nothing other than Grievant's two convictions caused her to be terminated and that she was not otherwise unsuitable for employment by the District; that she was a satisfactory employee. He confirmed that Grievant did not use her position as a District employee to perpetrate the crimes, the crimes were not committed on school property or on school time, and that the crimes did not involve school students or school property. Nerelli testified that the statute prohibits Grievant's employ by the District because of her convictions and further provides that responsible school district

[1] 24 P.S. section 1-111(j)(6) provides:

> A current or prospective employee who willfully fails to disclose a conviction or an arrest for an offense enumerated under the section shall be subject to discipline up to and including termination or denial of employment and may be subject to criminal prosecution under 18 Pa.C.S. Section 4904 (relating to unsworn falsification to authorities).

administrators such as himself could be fined for permitting an employee to work in the District contrary to the requirements of the statute.[2]

Positions of the Parties

The District

The District argued that at all times relevant Grievant's employment by the District was governed by the Pennsylvania School Code. In accordance with Section 1-111 of the Code, in 2015 all District employees were required to update their criminal history background checks and to complete PDE Form 6004. Grievant completed a 2011 PDE Form 6004 and although she did not know what offenses were covered by the form, she indicated on the form that she had never been arrested or convicted of a "Reportable Offense" – testifying she completed the form in the manner she did because; "I try to be like everyone else in being normal and go down the list and just put 'no' and I did not think I had to." Yet, the District asserted, when the District received an updated criminal background report on Grievant it learned that she had been convicted of a Felony of the Third Degree and a Misdemeanor of the First Degree in December 2010; prior to her completing her Form 6004.

The fact is, the District argued, the District was required to terminate Grievant pursuant to the controlling language of 24 P.S. Section 1-111(f.1) as Grievant is eligible to work for the District only after "a period of ten years has elapsed from the date of expiration of the sentence

[2] 24 P.S. section 1-111(g) provides:

> An administrator or other person responsible for employment decisions in a school or other institution under this section who willfully fails to comply with the provisions of this section commits a violation of this act and shall be subject to civil penalty as provided in this section.
>
> (1) The department shall have jurisdiction to determine violators of this section and may, following a hearing, assess a civil penalty not to exceed two thousand five hundred dollars ($2,500).

for the offense" relating to her 2010 felony conviction and "a period of five years has elapsed from the date of expiration of the sentence for the offense" relating to her 2010 misdemeanor conviction. Additionally, 24 P.S. Section 1-111(g) goes on to provide that any person responsible for employment decisions in a school who willfully fails to comply with the Section commits a violation of the act and is subject to civil penalties.

Article XXXIII of the Bargaining Agreement provides that the Arbitrator is without jurisdiction to render an award contrary to law and the School Code unequivocally prohibits the District from employing Grievant, and here the District argued, the arbitrator is without jurisdiction to enter an award that would require the District to violate Section 1-111(f.1) of the Code.

The Union's argument that the District should exercise discretion in considering Grievant's employment should not prevail, the District asserted. The Department of Education's advice offered into the record by the Association, recognizes the District's unassailable right to terminate any employee who willfully fails to properly report to a District an arrest or conviction that is required to be reported pursuant to Section 1-111. Thus, even if Grievant had a mistaken belief that she was convicted only for misdemeanors, she would nevertheless have been required to report the conviction to the District and the record is clear that she did not, the District maintained. Moreover, the underlying purpose of Section 111 is not to punish the employees convicted of reportable offenses, but rather to protect students. Here, Grievant engaged in a crime of dishonesty and the District accordingly weighed the circumstances of Grievant's arrest and conviction against the interest of the District in protecting school children.

The grievance should be dismissed, the District concluded.

The Association

The District's dismissal of Grievant is subject to the just cause standard and here the District has not shown just cause for the termination of Grievant, the Association argued. Here, Grievant was terminated for "failing to report two reportable offenses (an F3 and an M1 arrest and conviction) as required by Act 24." The District failed to meet its burden of showing just cause for Grievant's termination. The District, the Association asserted, did not show that Grievant failed to report; the District did not show that its decision to terminate Grievant is supported by the School Code; the District did not show that Grievant had notice that her conduct could result in discharge and the District did not show that the discipline of discharge was proportionate to any conduct of Grievant established by the evidence.

The District also did not show that Grievant failed to report two reportable offenses as required by Act 24 of 2011, the Association maintained. As established by the evidence, at the time Grievant completed her PDE 6004 form in 2011, the crimes for which she was convicted in 2010 were not "reportable" under the Act. She did not fail to report any reportable crime and her completion of the form was correct and complete according to the instructions she received and the law at the time, the Union argued.

As for any reporting requirement after the law was changed by Act 82 of 2012, Grievant did not willfully fail to comply with any such requirements, the Association argued. Although the law was amended to include the felony 3 and misdemeanor 1 of which she was convicted in December 2010 and the Department of Education eventually revised its Form 6004 to reflect the amendments to the Act, including the requirements to report such convictions as F3 and M1, the evidence establishes that Grievant was never provided the revised Form 6004, was never required to complete the form, and was never trained by the District on changes in reporting

requirements. The evidence establishes that Grievant was completely unaware of the new reporting requirements and that she did not intentionally hide her situation from the District. To the contrary, the Association asserted, Grievant was always forthcoming with the District; she notified the District of her criminal record when she was first hired in 2008, honestly and accurately completed the Form 6004 in 2011 and cooperated with the District in securing her criminal record in 2015. Grievant did not willfully fail to report any arrest or conviction as required by Act 24.

Additionally, the Union argued, Grievant's termination amounts to an unconstitutional application of 24 P.S. Section 1-111. In this regard, the Association maintained, consistent with decisions of the Commonwealth Court[3], the PDE has provided advice on the "continuing obligation" of school districts pertaining to employment restrictions contained in Section 1-111 of the Code. Pursuant to such advice, and consistent with controlling case law, the Association asserts, the District's application of the statute as applied to Grievant was unconstitutional. Although Grievant is not subject to a life-time ban on employment like the employees in the Commonwealth Court cases, she is subject to a significant ban and like the employees involved in the cited cases she did not attempt to hide her convictions. Grievant disclosed information on her application and credibly testified that she believed her 2010 convictions would be automatically reported to the District. Consistent with the PDE advice and case law, the District should have – but did not – consider the nature of Grievant's crimes and whether her conduct poses a danger to school students or makes her otherwise unsuitable for school employment, particularly whether her conduct involved a sexual offense, especially an offense involving

[3] Johnson v. Allegheny Intermediate unit, 59 A.3d 10 (Pa. Commw. Ct. 2012), Jones v. Penn Delco Sch. Dist., 2012 WL 8668277 (Pa. Commw. Ct. 2012) (unreported) and Croll v. Harrisburg Sch. Dist., 2012 WL 8668130 (Pa. Commw. Ct. 2012) (unreported).

sexual, physical or verbal abuse against a child. Nor did the District consider the time that elapsed since the offenses; the isolated nature of the offenses; Grievant's lack of subsequent criminal history; whether the offenses bear a relationship with Grievant's position; the fact that the offenses did not occur on District property or while Grievant was working; Grievant's employment record with the District or the successful effort Grievant has made toward rehabilitation. The District's failure to make such considerations requires a conclusion that her termination was without just cause, the Association argued.

Finally, the Association asserted, there is no dispute that the District's actions were based solely upon its interpretation of Section 1-111. It offered no other evidence to support it decision to terminated Grievant. In applying the discipline of termination, the District failed to apply progressive discipline and rendered a punishment against Grievant, the "capital punishment " of termination, that was far too severe for the conduct involved. The grievance should be sustained and Grievant should be reinstated with back pay, the Association concluded.

VI Discussion

Introduction

An analysis of whether or not Grievant's discharge was for just cause under generally recognized standards in labor arbitration requires consideration of all of the circumstances in determining whether the issuance of discipline was "fair." Some of the several factors often considered by arbitrators when applying the just cause standard include whether or not: (1) the rule or policy being enforced is reasonable; (2) there was prior notice to the employee of the rule and the consequences for its violation; (3) the disciplinary investigation was adequately and fairly conducted and the employee was afforded an appropriate level of due process under the circumstances; (4) the employer was justified in concluding that the employee engaged in the

conduct as charged; (5) the rule has been consistently and fairly enforced and (6) whether or not the discipline issued was appropriate given the relative gravity of the offense, the employee's disciplinary record and considerations of progressive discipline.

It is well recognized that in arbitrations of cases presenting questions of discipline or discharge for cause, it is the employer's burden to show that its discipline satisfies all of the requirements of just cause. In the instant matter, I find that the Employer has failed to meet its burden of showing just cause for the termination of Grievant.

A Traditional Analysis of Just Cause

I find that in reaching its decision to terminate Grievant the District did not apply just cause but instead merely relied upon a mechanical application of the words of 24 P.S. Section 1-111 without giving consideration to the principals of fairness underlying the just cause standard – principals that are not inconsistent with substantive due process protections of Article 1, Section 1 of the Pennsylvania Constitution.

The reasons communicated by the District to the Grievant for its decision to terminated Grievant were narrow:

> "failure to report two reportable offenses (an F3 and M1 arrest and conviction) as required by Act 24."

The evidence fails to establish that Grievant engaged in such conduct. Instead, the evidence establishes that Grievant completed her 2011 form 6004 accurately and that the f 3 and m1 crimes for which Grievant was convicted in 2010 were not "Reportable Offenses" either identified at the time on the form 6004 or by the controlling statute. As for subsequent changes in the law under Act 82 and any obligation that may have arguably arisen on Grievant's part to

report her 2010 convictions, I find the evidence is insufficient to establish that the District ever provided Grievant an updated form 6004 or otherwise informed or trained Grievant on the changes in the law. Nor do I find sufficient evidence in the record to establish that Grievant – a high school educated support employee – otherwise would have or should have known of the changes in the law. Even assuming for purposes of analysis that after the 2012 changes in the statue Grievant was subject to a requirement that she notify the District of her 2010 convictions, I find that, contrary to the argument or the District, any failure by Grievant to make such reports was not willful. The District has failed to meet its burden of establishing that Grievant engaged in the conduct described in its notice to Grievant of the reasons for her termination.

Just cause requires advance notice to the employee of the rule involved. Just cause requires a showing that the employee engaged in the misconduct alleged. Just cause requires that the employer consider the employee's disciplinary record and the severity of the offense found and apply progressive discipline where warranted. Just cause requires that the employer shows that the level of discipline issued is proportional to the violation found. Here, the District failed to show these elements of just cause.

Just Cause Within the Context of P.S. 24 Section 1-111

Having found a lack of just cause within the classic sense of the standard, I recognize that special attention should be given to the District's argument that notwithstanding other considerations of just cause, the District's decision to terminate Grievant was nevertheless permissible because the District was complying with requirements mandated by Act 24; particularly the language of section 1-111(e) of the statute providing: "No person…shall be employed or remain employed…where a report of criminal history…indicate the person has been

convicted…" of F-3 and M-1offenses if periods of ten years and five years respectively have not elapsed.

Considering the evidence and arguments of the parties within the narrow context of this record, I am not persuaded by the argument that regardless of other considerations normally applying to just cause, the District's decision to terminate Grievant satisfied just cause as a matter of law because such is mandated by Act 24.

There is no dispute that the District is required to comply with Act 24, or that the District and Association are parties to a lawful collective bargaining agreement; a contract that establishes certain duties and obligations on both parties. It is axiomatic that the parties to a bargaining agreement may not agree to violate statutory law. However, as a consequence of its dual legal obligations – the CBA and the mandates of statutory law - the District is required whenever possible to meet both obligations to the extent that meeting the obligations of the CBA does not cause the District to violate the mandates of Act 24.

The District is obligated to apply the just cause standard to the greatest extent permitted within the law. Because Grievant was protected by the just cause standard, the District was obligated by the CBA to provide Grievant an appropriate amount of due process under the circumstance. Considering that *an unconstitutional application of a statute* resulting in the termination of an employee would be contrary to the principals of fairness embodied by the just cause standard, I find that the District was, at the very least, required by the demands of just cause to give fair consideration to whether or not its termination of Grievant was constitutional. The District did not satisfy this requirement. Rather, in deciding to terminate Grievant the District plainly did not undertake a process of considering the substantive due process constitutional rights of Grievant or the other important public interests implicated. Instead, the

District simply and mechanically applied the employment bar of P.S. 24 section 1-111, ignored any consideration of Grievant's constitutional protections and wholly discounted the important public interests involved, such as the public interest in the rehabilitation of individuals, the pubic interest in the viability of contract and, of particular import to the issue presented in this arbitration, the public interests protected by the Commonwealth's labor laws.

In the circumstances of this case, I find that the District may not solely rely upon the words of Act 24 to meet its burden of establishing just cause for the termination of Grievant. Instead, I find that the considerations of fairness that underlay the just cause standard required the District to consider whether its decision to terminate Grievant was consistent with the protections affording Grievant by the Pennsylvania Constitution. The District failed to do so and as a consequence, failed to provide Grievant the just cause required by the CBA.

The Undersigned has the Authority to Order an Appropriate Remedy of Reinstatement

Contrary to the argument of the District, where, as here, Grievant's termination deprives the employee of her constitutionally protected right to engage in her occupation, the undersigned has authority to order the reinstatement of Grievant as such does not amount to an order that the District violate the law.

In Johnson v. Allegheny Intermediate Unit, 59 A.3d 10 (Pa. Commw. Ct. 2012), the Court recognized that although P.S. 24, section 1-111 may be constitutional as written, the application of such statute to an individual in a particular set of circumstances may be found to deprive that individual of a constitutional right. In Johnson, the involved employee had been convicted of voluntary manslaughter and was nevertheless hired by the Intermediate Unit (IU) as a van driver after disclosing his conviction (then over 20 years earlier) and was later trained and

placed as a "Fatherhood Facilitator" in the IU. At the time of his hire the law provided a five-year employment ban for such a felony homicide conviction. When Act 82 amended the statute in 2012 the law was changed to provide for a "lifetime ban" for those convicted of felony homicide and Johnson was thereafter discharged by the IU solely because of that ban. In Johnson the Court found that the restrictions on employment established by P.S. 24 Section 1-111 *as applied* to Johnson by the IU were not rationally related to the valid state objective of the statute and deprived the employee of his constitutionally protected right to engage in any occupation of life.

To determine whether a statute as applied is unconstitutional under Article 1, Section 1, the Court wrote, the Court must take into consideration the rights of the parties involved subject to the public interest sought to be protected by the statute so as to protect citizens from arbitrary and irrational action of government. There, the Court held that both the interest of Act 24 in protecting school children as well as the "deeply ingrained policy" of the Commonwealth "to avoid unwarranted stigmatization and unreasonable restriction upon former offenders" warranted consideration. After considering the interests presented, the purpose of the statute and the relationship between the statutory ban and the goals of the statute, the court held that the IU failed to present any rational reason as to how applying the employment ban established by the statute to Johnson served a legitimate government purpose. Of particular note in this regard, the Johnson Court found that to the contrary of any rational basis for the promotion of any legitimate government function encompassed by the statute, the IU admitted that but for 24 P.S. Section 1-111(e)(1) the employee would not have been removed from his position. The Court also noted that the IU failed to proffer sufficient reasons for why Johnson's conviction of approximately 30 years prior for manslaughter was predictive of future behavior such as to continue the ban on his

employment. Because 24 P.S. Section 1-111(e)(1) creates a lifetime ban for a homicide offense that "has no temporal proximity to Johnson's present ability to perform the duties of his Position," the Court wrote, "and it does not bear a real and substantial relationship to the Commonwealth's interest in protecting children, it is unreasonable, unduly oppressive and patently beyond the necessities of the offense." As a result, the Court held; the statute "imposes unusual and unnecessary restrictions upon Johnson's employment…and it is unconstitutional as violative of his substantive due process rights…"

Following Johnson, the Pennsylvania Department of Education issued "Guidance" to school administrators within the Commonwealth as to their continuing obligations under Section 1-111(e) and expressed the view that the Court's ruling in Johnson applies to all of the employment bans contained in Section 1-111(e), including the 10-year and 5-year bans involved with Grievant herein.

In contemplating the appropriate remedy in this matter, I have concluded that an order reinstating Grievant would not run afoul of P.S. 24 section 1-111 as I have found the District's termination of Grievant was without just cause, and further find that the termination of Grievant violated Grievant's substantive due process rights under the Pennsylvania Constitution as the District's application of the employment ban in Grievant's case bears no real and substantive relationship to the Commonwealth's interests in protecting children. In reaching this latter conclusion, consistent with the holding of the Court in Johnson and Pennsylvania Department of Education guidance, I have relied upon the following findings:

(1) Grievant's convictions were approximately five years old;

(2) The offenses for which Grievant was convicted did not involve children in any manner, were not sexual in nature and did not involve abuse,

(3) Grievant's convictions related to a single course of isolated conduct;

(4) the conduct for which Grievant was convicted is unrelated to Grievant's employment with the District;

(5) There is no evidence in the record that Grievant has engaged in criminal conduct since her convictions;

(6) Grievant has successfully performed the requirements of her position with the District throughout the approximately five years since her convictions and the District has been satisfied with Grievant's work;

(7) Grievant did not lie or otherwise misrepresented her criminal record to the District;

(8) Grievant has been successful in her rehabilitation and continues to exercise the vigilance needed for success in the future;

(9) The record is devoid of evidence that in her position Grievant could endanger the health and safety of school children; [4] and

(10) The record establishes that the District relied solely upon the ban on employment for individuals with felony and misdemeanor 1 convictions contained in 24 P.S. Section 1-111(e)(1) for its decision to terminate Grievant for failing to report her 2010 convictions and that "but for" the ban contained in the statute the District would have continued to employ Grievant.

Consequently, as with the holding of the Court in Johnson, I find that the District's reason for its termination of Grievant has no rational basis in the promotion of any legitimate

[4] Although the District argued in its post-hearing brief that Grievant's conviction of a misdemeanor for "access devise fraud" established that Grievant committed "a crime of dishonesty" and that such represents a danger to the safety of school students, no evidence of such reasoning by the District was offered during the arbitration and I find that the District did not make such a determination prior to its decision to terminate Grievant. Instead, consistent with the testimony of the District's Assistant Superintendent, I find that the District was solely motivated by its belief that because Grievant was convicted of a felony 3 and misdemeanor 1 (of any type) the statute required Grievant's dismissal.

government function encompassed by the Act 24. As a result, I find that I have authority to order the reinstatement of Grievant as my ordering such is consistent with Article I Section 1 of the Pennsylvania constitution, consistent with just cause, consistent with the authority granted the arbitrator by the parties, and is contrary to neither P.S. 24 or the guidance of the Pennsylvania Department of Education.

VI Conclusion

Considering the record as a whole, I find that the District has failed to meet it burden of showing that it had just cause to terminate Grievant. As remedy I shall order the District to reinstate Grievant and make her whole.

Dated: September 26, 2016

Timothy J Brown, Esquire
Arbitrator

ARBITRATION BY AGREEMENT OF THE PARTIES
Before
Arbitrator Timothy J Brown, Esquire

Upper Darby Education Support Professional Association, PSEA/NEA	:	
And	:	**(Termination of Nicole Baroni)**
Upper Darby School District	:	

AWARD

The District has failed to meet it burden of showing that it had just cause to terminate Grievant Nicole Baroni. As remedy, the District is ORDERED to:

1. Revoke its termination of Grievant.
2. Expunge all reference to the termination of Grievant from its employment records.
3. Promptly reinstate Grievant to her former position.
4. Make Grievant whole for any and all lost wages and benefits caused by her termination, including but not limited to, any vacation leave, sick leave, pension and seniority benefits to which she may have been entitled under the terms of the bargaining agreement from the effective date of her discharge to either her reinstatement, her waiver of reinstatement or her failure to respond to a bona fide offer of reemployment with the District within ten work days of delivery of such offer to Grievant, whichever occurs first.

   The undersigned shall retain jurisdiction over this matter for purposes of remedy only.

Dated: September 26, 2016

Timothy J Brown, Esquire
Arbitrator