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Commonwealth Court Upholds Reinstatement of Pennsylvania Professor with Sexual Abuse Conviction

SUMMARY

Following sweeping background check legislation passed in 2013 and 2014, background checks of faculty and staff have become the norm for Pennsylvania institutions of higher education. The commonwealth's Child Protective Services Law (CPSL) now requires colleges and universities to conduct checks of employees with direct contact with children, and many choose to conduct checks of all faculty and staff. But what happens when these background checks reveal troubling information from an employee's past?

Lock Haven University, a public Pennsylvania institution, recently faced this issue upon learning that a tenured professor had been convicted of felony sexual offenses against children. As a result, the University dismissed the professor. Its decision, however, was overturned in arbitration, and the arbitrator's decision was subsequently [affirmed on appeal by the Pennsylvania Commonwealth Court](#).

The Commonwealth Court had previously addressed the background check requirements for faculty of state colleges and universities in the Pennsylvania State System of Higher Education ("PASSHE"). In 2015, the court granted an injunction limiting the background checks to faculty (a) who have direct contact with children through university programs, (b) who teach introductory-level classes (which may enroll minor freshman), or (c) who teach any course which includes a dual-enrolled high schooler.

Against this backdrop, PASSHE member university Lock Haven performed required background checks for a tenured professor of mathematics. As a result of these checks, the University learned for the first time that, at age 19, the professor had performed oral sex on an 8-year-old boy and engaged in another unspecified sexual act with another minor. The then 19-year-old professor was convicted of sodomy and sexual abuse, for which he served time in prison and successfully completed a voluntary sex offender therapy program.

When the professor was initially hired at Lock Haven in 2004, the employment application that he completed asked only whether he had been convicted of a crime within the previous decade or whether there were any criminal charges currently pending against him – to which he truthfully answered no. There was no allegation that he engaged in any other instance of sexual abuse or any other impropriety while employed at Lock Haven or at any point after his initial offenses.

After learning of the offense, Lock Haven placed the professor on paid administrative leave. Although the professor pointed to his record of good behavior since his release, the University determined that he had a "regular and recurring teaching assignment" of 100-level courses in which non-matriculated minors could enroll. He also participated in running an annual math competition for high school students hosted by Lock Haven. The University's president ultimately found that the severity and relevancy of the criminal offenses outweighed any possible mitigation due to the passage of time, and dismissed the professor.

Arbitrator Orders Reinstatement of Professor

The professor's dismissal was overturned in binding arbitration. The arbitrator found that the University lacked just cause for the termination (a requirement under the governing collective bargaining agreement), noting that the preponderance of evidence showed that the professor's "youthful criminal acts had not followed him into middle age." The arbitrator further concluded that "being in direct contact with dual enrollees was not an essential aspect of his role as a professor" and he could perform his job duties with minimal accommodation to ensure he does not teach dual enrollees. The arbitrator accordingly concluded that terminating the professor violated the faculty collective bargaining agreement, and ordered reinstatement. The University appealed.

The Commonwealth Court's Opinion

The Commonwealth Court noted that the law requires "great deference" to an arbitration award, and found that the arbitrator's reinstatement of the professor comported with the "essence" of the faculty collective bargaining agreement. But under the applicable law, the court could nevertheless have put aside the award if it violated "a well-defined and dominant public policy of the Commonwealth."

While declining to reverse the reinstatement of the professor, the Commonwealth Court agreed that there exists a public policy in favor of protecting minors from abuse (citing the state's CPSL, Public School Code, and the Sexual Offender Registration and Notification Act). The court further agreed that the professor's past conduct squarely implicated this important public policy.

However, the court disagreed that the particularized facts of the professor's past crime against children warranted a finding that his reinstatement violated public policy. The mitigating factors (the 25-year passage of

time, the professor's relatively young age at the time of his crime, voluntary rehabilitative therapy and interim work as a teacher) demonstrated that public policy would not preclude the enforcement of the arbitrator's award of reinstatement. In addition, the arbitrator and court both looked to the professor's substantive due process right to pursuit of his profession under the Pennsylvania constitution, and noted several instances when "blanket bans" preventing future employment for past crimes were deemed unconstitutional by Pennsylvania courts.

Takeaways for Administrators:

- The CPSL does not mandate that current employees be automatically terminated if their criminal history reports uncover convictions that would disqualify an applicant from being initially hired. In other words (and paradoxically), despite the fact that if the Lock Haven professor applied for another teaching job in Pennsylvania it is almost certain that his criminal background would render him ineligible for hiring, the same disqualifying background does not necessarily justify termination.
- When considering a termination of an existing employee, colleges and universities must engage in a particularized assessment of both the employee's offense and their actual and potential interactions with children.

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