

# **BETANCOURT AND THE NARROW CERTIORARI SCOPE OF REVIEW OF APPEALS FROM ACT 111 GRIEVANCE ARBITRATION AWARDS: ITS TIME HAS ALREADY COME AND GONE**

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It has long been established that arbitration is the “highly valued and greatly favored” means of resolving labor disputes—in both the public and private sector—in the Commonwealth of Pennsylvania.<sup>1</sup> As with federal labor policy, the basis for Pennsylvania’s strong policy in favor of arbitration is the belief that arbitration is both less formal and less expensive than litigation. Many courts also characterize arbitration as a faster means of dispute resolution, although that is not always an accurate characterization.

Perhaps more importantly, arbitration is seen as “a prime force in the policy of reducing industrial strife” because it is “more responsive to individual needs and preferential in light of the ongoing relationship between employer and union.”<sup>2</sup> As the *Cheney University* court noted, the importance of arbitration under Pennsylvania labor policy is perhaps best highlighted by § 903 of the Pennsylvania Employee Relations Act which mandates “final and binding” arbitration of disputes between employees and employers governed by the Act.<sup>3</sup>

The strong labor policy in favor of arbitration notwithstanding, courts have not completely relegated to arbitrators the task of resolving labor disputes. Although arbitration awards are generally “final and binding,” they are not absolute, and in rare cases court review is available. The challenge involved in allowing such review is balancing the interests and policies involved in collective bargaining while exercising the proper

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1. See *State Sys. of Higher Educ. (Cheney Univ.) v. State Coll. Univ. Prof’l Ass’n*, 743 A.2d 405, 409 (Pa. 1999).

2. *Id.*

3. See *Cheney Univ.*, 743 A.2d at 410.

degree of review of grievance arbitration awards.

In Pennsylvania, courts reviewing arbitration awards apply the "essence test" adopted from federal labor policy and the Uniform Arbitration Act and the "narrow certiorari" scope of review.<sup>4</sup> This article will discuss the development and policies supporting both standards. Although both standards have their advantages and disadvantages, the narrow certiorari scope of review simply does not accommodate all of the concerns and interests involved in grievance arbitration or collective bargaining. The standard does not further the goals of Pennsylvania labor policy as applied to collective bargaining and grievance arbitration. Its application to certain grievance awards in Pennsylvania should be changed by legislative action.

#### I. THE ESSENCE TEST AND THE PENNSYLVANIA EMPLOYEE RELATIONS ACT

For years Pennsylvania courts, like their federal counterparts, have applied the essence test when reviewing a grievance arbitration award.<sup>5</sup> In *Community College of Beaver County*, the Pennsylvania Commonwealth Court relied on the reasoning established by the United States Supreme Court in the well-known *Steelworkers Trilogy* and confirmed that the essence test was appropriate under Act 195.<sup>6</sup>

Unlike the federal courts, however, the Pennsylvania courts have struggled over defining the essence test consistently.<sup>7</sup> Although it should perhaps be relabeled the "Pennsylvania essence test," it appears that the current essence test under Pennsylvania law can be best stated as a two-part analysis:

First, the court shall determine if the issue as properly defined is within the terms of the collective bargaining agreement. Second, if the issue is embraced by the agreement, and thus, appropriately before the arbitrator, the arbitrator's award will be upheld if the arbitrator's interpretation can rationally be derived from the

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4. See *infra*, Part I, for a discussion of the essence test, and see also *infra*, Part II, for a description of the narrow certiorari scope of review.

5. See *Cnty. Coll. of Beaver County v. Cmty. Coll. of Beaver County, Soc'y of Faculty (PSEA/NEA)*, 375 A.2d 1267 (Pa. 1977). Grievance arbitration involves a dispute over the interpretation of a term or provision of a collective bargaining agreement. See *Upper Makefield Township v. Pa. Labor Relations Bd.*, 753 A.2d 803, 805 n.2 (Pa. 2000).

6. *Id.* at 1272 (citing *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enter. Wheel and Car Corp.*, 363 U.S. 593 (1960)).

7. Compare *Dauphin County Technical Sch. Educ. Ass'n v. Dauphin County Area Vocational-Technical Sch. Bd.*, 398 A.2d 168 (Pa. 1978) with *Del. County v. Del. County Prison Employees Indep. Union*, 713 A.2d 1135 (Pa. 1998).

collective bargaining agreement. That is to say, a court will only vacate an arbitrator's award where the award indisputably and genuinely is without foundation in, or fails to logically flow from, the collective bargaining agreement.<sup>8</sup>

The inconsistency of the Pennsylvania courts in defining the limits of the essence test appears to be the result of an attempt to balance the significant competing interests that are in play when reviewing grievance arbitration awards. On one hand, the courts in the Commonwealth have recognized the need for a reviewing court to exercise deference to an arbitrator's award. The parties bargained for an arbitrator to resolve a dispute and, generally, a court has no business interfering with that agreement.

On the other hand, Pennsylvania courts have long recognized that arbitrators are far from infallible. Pennsylvania courts have thus ensured that a reviewing court has the authority to vacate an arbitrator's award when the arbitrator has rewritten the agreement between the parties to impose an award that "is so illogical" that the parties could not have possibly intended the result, or where the arbitrator has simply imposed his or her "own brand of industrial justice."<sup>9</sup> In striking that balance, the Pennsylvania courts have allowed the review of grievance arbitration awards under the essence test, but have mandated that such review be ever so slight and deferential. A court cannot overturn a grievance arbitration award merely because it determines the result is factually or legally incorrect.

## II. ACT 111 AND GRIEVANCE ARBITRATION

The essence test is designed to promote and protect the Commonwealth's labor policy favoring arbitration and the interests that both employers and employees have in making sure that an arbitrator's award is based on the contract they bargained and is not the product of an illogical analysis or "insanity."<sup>10</sup> Unfortunately, it is not the only standard utilized by Pennsylvania courts to review grievance arbitration awards.

In Pennsylvania, Act 195 governs the labor relations and collective bargaining of most non-uniformed public employees. Another statute, commonly referred to as Act 111,<sup>11</sup> governs the collective bargaining rights

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8. *Cheney Univ.*, 743 A.2d at 413.

9. *Cheney Univ.*, 743 A.2d at 410, 413. *See also* *Enter. Wheel and Car Corp.*, 363 U.S. at 597 (noting that "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.").

10. *Cheney Univ.*, 743 A.2d at 413.

11. *See* 43 P.S. §§ 217.1-217.10.

and obligations of police and fire personnel and their employers. Act 111 outlines a procedure for uniformed personnel to engage in such purported bargaining culminating in binding interest arbitration pursuant to specified procedures.<sup>12</sup> In exchange for binding interest arbitration, the legislature withheld the right of police and fire personnel to strike because their services were deemed to be critical to the public safety and welfare.<sup>13</sup>

The provisions of Act 111 deal mainly with interest arbitration.<sup>14</sup> Shortly after Act 111 was enacted, the Pennsylvania Supreme Court decided that the narrow certiorari scope of review applied to an appeal of an Act 111 interest arbitration award.<sup>15</sup> Under that scope of review, a reviewing court is limited to reviewing questions concerning: 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.<sup>16</sup> The question that resulted was whether the same standard applied to the review of Act 111 grievance arbitration awards.

Grievance arbitration is barely mentioned in Act 111, except for one brief reference in § 1.<sup>17</sup> Due in part to Act 111's lack of specificity regarding grievance arbitration, a debate arose, prior to 1995, regarding whether the essence test applied to an appeal of a grievance arbitration award under Act 111.

### III. *BENTANCOURT* AND THE APPLICATION OF THE NARROW CERTIORARI SCOPE OF REVIEW TO ACT 111 GRIEVANCE ARBITRATION AWARDS

In 1995, the Pennsylvania Supreme Court confronted head-on the question of whether the essence test or the narrow certiorari scope of

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12. See *Township of Moon v. Police Officers of the Township of Moon*, 498 A.2d 1305 (Pa. 1985).

13. *Upper Makefield Township v. Pa. Labor Relations Bd.*, 717 A.2d 598, 600 (Pa. Commw. Ct. 1998), *aff'd on other grounds*, 753 A.2d 803 (Pa. 2000) (citing *Township of Moon*, 498 A.2d 1305 (Pa. 1985)).

14. See 43 P.S. 217.1-217.10; *Pa. State Police v. Pa. State Troopers' Ass'n* (*Bentancourt*), 656 A.2d 83 (Pa. 1995). Interest arbitration is an arbitration hearing and procedure that results under Act 111 after the parties are unable to agree on the terms of a new collective bargaining agreement. *Upper Makefield Township*, 753 A.2d at 805 n.2.

15. *City of Washington, Pa. v. Police Dep't of Washington* (*Washington Arbitration*), 259 A.2d 437, 441 (Pa. 1969).

16. *Id.* The Pennsylvania Supreme Court's decision to apply the narrow certiorari scope of review in *Washington Arbitration* was based on the fact that Act 111 specifically prohibited appeals from an arbitration award. That prohibition, the Court ruled, had to be viewed in light of what was then Supreme Court Rule 68 1/2 which stated that "if an appeal is prohibited by an Act . . . the law is well settled that an appeal will lie to the Courts in the nature of a narrow certiorari . . ." *Id.* Although Rule 68 1/2 was later rescinded, the Pennsylvania courts still applied the narrow certiorari scope of review to the appeals interest arbitration awards under Act 111. *Township of Moon*, 498 A.2d at 1305.

17. 43 P.S. § 217.1.

review applied to the review of Act 111 grievance arbitration awards. The Court decided on the latter and its decision, although not unexpected, has been plaguing public employers and their uniformed employees ever since. Shortly after the Court decided *Bentancourt*, the legacy of that decision was compounded by the Court's rejection of a public policy overlay on its *Bentancourt* holding.<sup>18</sup>

In *Bentancourt*, a Pennsylvania state trooper was suspended for 30 days without pay for conduct unbecoming based on allegations that he exposed his penis while on duty at police headquarters during a conversation with other officers. After the incident the officer was placed on restricted duty performing janitorial work awaiting his court martial hearing.<sup>19</sup>

After his court martial hearing, the officer appealed the discipline through the grievance and arbitration procedure. The arbitrator determined that the officer's conduct did not fit precisely within the definition of conduct unbecoming and that the officer was adequately punished when he was placed on restricted duty and required to perform janitorial work for a two-month period between the date of the incident and his court martial hearing.<sup>20</sup>

In deciding whether the narrow certiorari scope of review, and not the essence test, applied to an appeal of a grievance arbitration award under Act 111, the Pennsylvania Supreme Court relied, to a large extent, on the fact that it was Act 111 and not the Uniform Arbitration Act that authorized grievance arbitration for police and fire personnel.<sup>21</sup> The Court then reviewed the history of Act 111 and determined that since uniformed personnel in Pennsylvania did not have the right to strike, the legislature did not intend for labor disputes involving such personnel to be bogged down in "protracted litigation."<sup>22</sup> The legislature, the Court reasoned, intended a swift resolution to any labor dispute under Act 111 and safeguarded that intent by expressly prohibiting appeals from an arbitration award.<sup>23</sup>

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18. See *Pa. State Police v. Pa. State Troopers Ass'n (Smith)*, 741 A.2d 1248 (Pa. 1999).

19. *Pa. State Police v. Pa. State Troopers' Ass'n (Bentancourt)*, 656 A.2d 83, 85 (Pa. 1995).

20. *Id.*

21. *Id.* at 88. The Uniform Arbitration Act applies only to a "collective bargaining agreement to arbitrate controversies between employers and employees or their respective representatives only where the arbitration pursuant to this subchapter is consistent with any statute regulating labor and management relations." 42 PA. CONS. STAT. ANN. § 7302(b) (West 1998).

22. *Bentancourt*, 656 A.2d at 89.

23. *Id.* See 43 P.S. § 217.7(a) ("[n]o appeal [from an arbitration award] shall be allowed to any court."). The Pennsylvania Supreme Court explained that in *Washington Arbitration* it authorized a "limited right of review" of interest arbitration awards under the narrow certiorari scope of review. The Court noted that the Pennsylvania legislature was

The *Bentancourt* court concluded that allowing greater review of an Act 111 grievance arbitration award through the essence test would be contrary to the legislative intent behind Act 111. The Court found that the legislature intended Act 111 grievance arbitration awards to be subject to no greater judicial review than interest arbitration awards. Characterizing the essence test as “markedly broader” than the narrow certiorari scope of review, the Court ruled that applying the essence test would “interfere impermissibly with the legislative scheme as the courts would be able to alter Act 111 arbitration awards by means of an unauthorized expansion of the proper scope of review.”<sup>24</sup>

#### IV. THE ABSENCE OF PUBLIC POLICY GROUNDS FOR APPEAL UNDER THE NARROW CERTIORARI STANDARD OF REVIEW

Several years later, in 1998, the Pennsylvania Supreme Court narrowed the potential scope of review of Act 111 grievance arbitration awards even further by holding that public policy prohibits Pennsylvania courts from disturbing arbitration awards as well.<sup>25</sup> In *Smith II*, a state trooper, while off duty, became intoxicated and got into an argument with an ex-girlfriend. The argument was highlighted by the state trooper jamming his loaded, police-issued weapon into his ex-girlfriend’s mouth and threatening to kill her. The state trooper was arrested later that day for driving under the influence, simple assault, and making terroristic threats, charges to which he subsequently plead guilty. The Pennsylvania State Police then terminated the officer’s employment.<sup>26</sup>

The arbitrator determined that the officer had committed the acts in question. Nevertheless, he determined that the penalty of discharge was too excessive. The arbitrator based his decision primarily on the fact that the conduct in question was less egregious than actions of other troopers who received less discipline. He also relied on the fact that the officer purportedly had an exemplary record over a thirteen-year career and had been under stress as a result of working at the crash site of a USAir jet in the fall of 1994.<sup>27</sup>

The State Police attempted to vacate the arbitrator’s award, arguing that the decision was contrary to public policy and thus the arbitrator exceeded his powers under the narrow certiorari scope of review. The

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well aware of the *Washington Arbitration* decision in 1974 when it repealed portions of Act 111 without modifying the scope of review. *Bentancourt*, 656 A.2d at 89 n.15. (citing *Washington Arbitration*, 259 A.2d at 440).

24. *Bentancourt*, 656 A.2d at 89.

25. See *Pa. State Police v. Pa. State Troopers Ass’n (Smith II)*, 741 A.2d 1248, 1252-53 (Pa. 1999).

26. *Id.* at 1250.

27. *Id.*

Supreme Court rejected that argument. The Court found that adopting the argument proffered by the State Police would impermissibly broaden the narrow certiorari scope of review. The Court concluded that “public policy” was a “nebulous concept” and ruled that broadening the narrow certiorari scope of review to include such a basis for review would “greatly expand the scope of review in these matters” and “markedly increase the judiciary’s role in Act 111 arbitration awards.”<sup>28</sup>

#### V. IT IS TIME TO REEXAMINE THE *BETANCOURT*/NARROW CERTIORARI SCOPE OF REVIEW.

The *Betancourt* decision and the application of the narrow certiorari scope of review have been in place for almost eight years. Public employers, labor unions and attorneys have learned to live with it, but they certainly do not like it. Although there have been repeated comments from the courts, particularly the Commonwealth Court, regarding the inappropriate nature of that standard as applied to the review of Act 111 grievance arbitration decisions, the law has not changed and is not likely to change in the near future.

The legislature has taken no action to modify the “*Betancourt* standard” even though Act 111 has been amended since 1995.<sup>29</sup> Likewise, the Pennsylvania Supreme Court has not even attempted to revisit its decision. In fact, the Supreme Court decided against broadening the scope of review in its *Smith* decision in 1999. Thus, it appears that the “*Betancourt* standard” is here to stay. Such a prospect, however, appears to be counterproductive to Pennsylvania labor policy, collective bargaining, and grievance arbitration.

If the purpose of the narrow certiorari scope of review is solely to reduce the degree of judicial scrutiny of Act 111 grievance arbitration awards, and perhaps provide a disincentive for parties to appeal such awards, the *Betancourt* decision has been successful. That purpose, however, is not entirely consistent with Pennsylvania labor policy and is problematic in several significant ways.

Regardless of whether a grievance arbitration<sup>30</sup> arises under Act 195 or Act 111, the purpose of grievance arbitration is the same. Through

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28. *Id.* at 1252-53.

29. *See, e.g.,* Pa. State Police v. Pa. State Troopers Ass’n, 698 A.2d 688, 694 (Pa. Commw. Ct. 1997) (citing *Commw. v. Willson Products, Inc.*, 412 Pa. 78, 87, 88, 194 A.2d 162 (Pa. 1963); *Loeb Estate*, 400 Pa. 368, 162 A.2d 207, 212 (Pa. 1960)), *aff’d*, 741 A.2d 1248 (Pa. 1999).

30. 43 PA. CONS. STAT. ANN. § 1101.101 (West 1991). Act 195 withheld the right to strike and mandates binding interest arbitration, substantially similar to Act 111, only with respect to court employees and guards at prisons and mental hospitals. Thus, it is possible for a grievance arbitration to arise under Act 195 as well.

grievance arbitration, the parties have bargained for a neutral third party to resolve disputes involving the interpretation of their agreement.<sup>31</sup> It is that expectation and intent that supports the general view that a court has “no business” overruling an arbitrator simply because it disagrees with the arbitrator’s interpretation of the bargaining agreement.<sup>32</sup>

At the same time, federal and state courts have recognized that the deferential approach to reviewing arbitration awards must assure that an arbitrator “cannot sit as King.”<sup>33</sup> Such deference has limitations and, as a result, since the arbitrator is only empowered to interpret a collective bargaining agreement and not rewrite it or dispense his or her “own brand of industrial justice,” an arbitrator’s award is only “legitimate” if it draws its essence from the collective bargaining agreement.<sup>34</sup> “When the arbitrator’s words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.”<sup>35</sup>

The fact that one of the parties in the grievance arbitration is a police officer or fireman or that the employee’s right to engage in collective bargaining arises under Act 111 or Act 195 does not change the purpose of grievance arbitration, the role it has in the collective bargaining relationship between the parties, or the role of the arbitrator, particularly in the public sector.<sup>36</sup> It also should not change the role of a court reviewing a grievance arbitration award. Under the narrow certiorari scope of review, however, an arbitrator can completely ignore the bargaining agreement and courts are helpless to correct the arbitrator’s “infidelity to this obligation”<sup>37</sup> to interpret the collective bargaining agreement.

The Commonwealth Court’s decision in *Bensalem Township v. Bensalem Township Police Benevolent Ass’n*<sup>38</sup> is a classic example of how a court is powerless under the *Betancourt* standard to correct an arbitration award in which an arbitrator has essentially rewritten the parties’ agreement or issued an award that is so illogical that the parties never

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31. See, e.g., *State Sys. of Higher Educ. (Cheyney Univ.) v. State Coll. Univ. Prof’l Ass’n*, 743 A.2d 405, 413 (Pa. 1999).

32. See *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

33. *Cheyney Univ.*, 743 A.2d at 411.

34. *Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

35. *Id.*

36. As noted by Commonwealth Court Judge Pellegrini in *Smith*, arbitrators involved in disputes between public sector employees should generally consider other concerns and considerations relating to the public trust and whether public employees, particularly uniformed employees, properly serve the community in which they are employed. *Pa. State Police v. Pa. State Troopers Ass’n (Smith)*, 698 A.2d 688, 694 (Pa. Commw. Ct. 1997). Such considerations, however, are not part of the *Betancourt* scope of review.

37. *Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

38. 803 A.2d 239 (Pa. Commw. Ct. 2002).



intended or expected to be so bound.<sup>39</sup> In *Bensalem Township*, the township discharged a police officer who was subsequently reinstated by an arbitrator. The collective bargaining agreement prohibited an arbitrator from awarding monetary relief in excess of one year. The arbitrator, however, not only reinstated the officer, but awarded him twenty-one months of back pay and benefits—nine months more than the parties authorized him to award under the collective bargaining agreement.<sup>40</sup>

As the court recognized, the arbitrator issued an award that was expressly prohibited by the collective bargaining agreement. Nevertheless, under the narrow certiorari scope of review, the court was powerless to vacate or even adjust the award. Although the township argued that the arbitrator had acted outside his jurisdiction by issuing a remedy that was expressly prohibited by the collective bargaining agreement, the Commonwealth Court rejected that argument.<sup>41</sup> The court reasoned that the township was basically asking it to apply the essence test.<sup>42</sup> The Commonwealth Court thus affirmed an award that did not draw its essence from the agreement or uphold the bargain between the parties and was not within the intent of the parties. Such a result was clearly not the purpose of Pennsylvania's labor policy or the court; nevertheless, the court upheld the award "only because [it was] compelled to do so" under the narrow certiorari scope of review.<sup>43</sup>

Likewise, in *City of Philadelphia v. Fraternal Order of Police, Lodge No. 5*,<sup>44</sup> an arbitrator reinstated a Philadelphia police officer who had crashed her police cruiser into parked cars while under the influence of alcohol and cocaine. The city appealed, but the court was once again forced to enforce the award.<sup>45</sup> Even though the court agreed that the police officer's conduct was "certainly appalling," it found itself handcuffed by the narrow certiorari scope of review and could not consider public policy arguments to overturn the award.<sup>46</sup>

Under the essence test, *Smith, City of Philadelphia, Bensalem Township*, and several other cases probably would have been decided differently. The important point, however, is not whether those and other grievance arbitration awards would have been affirmed or vacated. Rather,

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39. *Id.* at 242-43.

40. *Id.* at 242.

41. *Id.* at 242-43.

42. *Id.*

43. *Id.* at 243.

44. 711 A.2d 1060 (Pa. Commw. Ct. 1998).

45. *Id.* at 1061.

46. *Id.* at 1062. See also *Pa. State Police v. Pa. State Troopers Ass'n (Smith)*, 698 A.2d 688 (Pa. Commw. Ct. 1997) (affirming the reinstatement of a police officer who drove while intoxicated, jammed his service weapon in his former girlfriend's mouth and threatened to kill her, and then pleaded guilty to the resulting criminal charges).

the focus of the court's review in those cases would and should have been on the collectively bargained agreement and enforcing the intent of the parties. That is the purpose of resolving disputes through grievance arbitration, and it should be the purpose of judicial review of arbitration awards.

That purpose applies with respect to employees under Act 195 and Act 111 alike. The intent and contractual provisions of public employers, police, and fire personnel whose relationship is governed by Act 111 is no less important than that of public employers and public employees whose relationship is governed by Act 195. The narrow certiorari scope of review, as applied to grievance arbitration appeals, does not protect these significant interests.

Results such as those in *Bensalem Township* and *Smith* erode confidence in the arbitration process and, over time, will weaken the confidence the parties have in collective bargaining. Indeed, if a contractual provision or the intent of the parties to a collective bargaining agreement is going to be ignored or rendered meaningless by arbitral fiat and approved by the judiciary, what is the purpose of collective bargaining under Act 111? Such erosion in the confidence employers and employees have in collective bargaining and the grievance arbitration process is a serious matter since both principals form one of the cornerstones of labor policy in Pennsylvania.

The application of the narrow certiorari scope of review to Act 111 grievance arbitration awards is based on the history and purpose of Act 111 as detailed in the Pennsylvania Supreme Court's *Betancourt* decision. The linchpin of the Court's reasoning was that since grievance arbitration under Act 111 is authorized by Act 111, the same scope of review applicable to interest arbitration awards under Act 111 should apply.<sup>47</sup> As the *Betancourt* Court acknowledges, however, Act 111 provides detailed procedures for interest arbitration, but no such direction for grievance arbitration.<sup>48</sup> In fact, a review of Act 111 reveals that except for a brief statement in § 1 of Act 111 that provides "the right to an adjustment or settlement of grievances and disputes in accordance with the terms of [Act 111],"<sup>49</sup> there is no mention of grievance arbitration in the statute.<sup>50</sup> In

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47. *Pa. State Police v. Pa. State Troopers' Ass'n* (Trooper James Betancourt), 656 A.2d 83 (Pa. 1995).

48. *Id.* at 87. Unlike Act 195, Act 111 does not expressly mandate grievance arbitration. See also *Upper Makefield Township v. Pa. Labor Relations Bd.*, 717 A.2d 598, 601-03 (Pa. Commw. Ct. 1998), *aff'd on other grounds*, 753 A.2d 803 (Pa. 2000). Until the Pennsylvania Supreme Court's decision in *Betancourt*, there was a dispute over whether Act 111 even provided for grievance arbitration. See *Betancourt*, 656 A.2d at 87 (Pa. 1995). Several courts, including the Pennsylvania Supreme Court in *Betancourt*, had determined that Act 111 did not provide for grievance arbitration. See *id.*

49. *Upper Makefield Township*, 717 A.2d at 601. As noted above, since the *Betancourt*

view of the legislature's virtual oversight of grievance arbitration under Act 111, it is very debatable that the same standard of review should be applied to both grievance and interest arbitration awards under Act 111. This is particularly true in light of the different purposes of interest and grievance arbitration.

Although the Pennsylvania Supreme Court found the essence test to be inconsistent with Act 111, the analysis in support of the application of the narrow certiorari scope of review does not adequately balance the perceived purpose of Act 111 with the purpose of grievance arbitration and the role it plays in collective bargaining. Section 1 of Act 111 clearly states that one of its purposes was to allow police to collectively bargain and to enter into contractual agreement with public employers.<sup>51</sup> Arbitration under Act 111 has been determined to be an extension of collective bargaining.<sup>52</sup>

Yet, as highlighted by *Bensalem Township* and *Smith*, the narrow certiorari scope of review does not focus on the agreement or the parties' intent during collective bargaining. In fact, the narrow certiorari scope of review does not even consider the terms of the collective bargaining agreement. As a result, there is a significant risk that the agreement the parties collectively bargained will not be enforced as intended. This potentially cheapens the value of collective bargaining under Act 111, and threatens to deteriorate the process to an empty formality. Such a result is contrary to and defeats the clearly-stated purpose of Act 111. The *Betancourt* decision did not balance this concern but focused almost entirely on the legislature's apparent desire for swift resolutions of labor disputes under Act 111.<sup>53</sup>

The need for a swift resolution of labor disputes, however, is nothing new in labor policy on the federal level or in the Commonwealth, and does not support or require the application of the narrow certiorari scope of review. The swift resolution of labor disputes has been recognized as one of the main reasons for grievance arbitration under both federal and Pennsylvania labor policy. Even so, federal and Pennsylvania courts apply the essence test when reviewing grievance arbitration awards.

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Court determined that the essence test was inconsistent with Act 111, the proper scope of review was the narrow certiorari scope of review that had been applied to the judicial review of interest arbitration awards.

50. 43 PA. CONS. STAT. ANN. § 217.1 (West 1992).

51. *Id.*

52. See, e.g., *Dunmore Police Ass'n v. Borough of Dunmore*, 528 A.2d 299 (Pa. 1987); *Pottstown Police Officers' Ass'n v. Pa. Labor Relations Bd.*, 634 A.2d 711 (Pa. Commw. Ct. 1993).

53. *Betancourt*, 656 A.2d at 83. The Court also noted that police and fire personnel do not have a right to strike under Act 111 or Pennsylvania law. That fact alone, however, does not require or justify the *Betancourt* standard.

Furthermore, even though the essence test will allow slightly more judicial oversight, it is not by any means a strict or even high standard of scrutiny. The essence test, as noted above, was formulated so courts would be deferential to arbitration awards and intervene only where an arbitrator clearly did not satisfy his obligation to interpret the collective bargaining agreement.<sup>54</sup> Likewise, the same judicial procedures essentially are followed regardless of whether the arbitration award being challenged is reviewed under the narrow certiorari scope of review or the essence test. Thus, it can hardly be said that the application of the essence test will result in arbitration awards and employment disputes being “mired in protracted litigation”<sup>55</sup> any more than the application of the narrow certiorari scope of review.<sup>56</sup>

A narrow certiorari scope of review is unnecessary under Act 111 despite the concern that the statute specifically states that there shall be no appeal from an arbitration award. This argument is unpersuasive if one compares Act 111 to Act 195. Act 195, it should be noted, states that arbitration decisions shall be “final and binding.”<sup>57</sup> It appears that both statutes anticipated arbitration decisions being final. Thus, the slight difference in wording provides little justification for applying the different scopes of review.<sup>58</sup>

Although one can quibble with analysis of the *Betancourt* decision, the Court’s reasoning was certainly not without merit or foundation. Indeed, the legislature has not taken any action to supercede the *Betancourt* decision. The only way to correct this problematic scope of review is for legislative action to clarify that the essence test, as articulated by the Pennsylvania courts under the UAA, applies to grievance arbitration awards under Act 111. The goal of interest arbitration is to formulate the terms of a new collective bargaining agreement because the parties were

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54. *Cheyney*, 743 A.2d at 413.

55. *Betancourt*, 656 A.2d at 89.

56. The lack of any meaningful review of an arbitration award under the *Betancourt* standard will provide a disincentive to appeal arbitration awards, but as noted above, that concern should apply equally to arbitration awards under Act 195 as well.

57. 43 PA. CONS. STAT. ANN. § 1101.903 (West 1991).

58. Similar reasoning applies to the fact that Act 111 prohibits police and fire personnel from striking. 43 PA. CONS. STAT. ANN. § 217.1 (West 1992). Act 195, although not prohibiting strikes, limits the rights of non-uniformed public employees to strike. From a practical perspective, the limitations placed on the right to strike under Act 195 make it very difficult for a non-uniformed employee to engage in a lawful strike based on an event that gives rise to a grievance. Further, guards at prisons and mental institutions and certain court personnel do not have the right to strike and are subject to binding interest arbitration procedures under Act 195. 43 P.S. §1101.805. Nevertheless, the Pennsylvania Supreme Court has held that grievance arbitration awards involving such employees under Act 195 are reviewed under the “essence test.” See *County of Centre v. Musser*, 519 Pa. 380, 548 A.2d 1194 (1984).

unable to do so. In such a situation, “review of whether an interest award draws its essence from a nonexistent agreement would be oxymoronic.”<sup>59</sup>

The narrow certiorari scope of review is appropriate for interest arbitration awards in which the arbitration panel is essentially creating or amending the collective bargaining agreement. As highlighted above, however, that standard has no place in the review of a grievance arbitration award. Action by the legislature to clarify that the essence test, as formulated under the UAA, applies to the review of grievance arbitration awards would provide for the swift resolution of labor disputes as well as protect the sanctity of the collective bargaining relationship.

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59. Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 725 A.2d 206, 209 (Pa. Commw. Ct. 1999).