

NEUTRAL NOTES

THE JACOBS CENTER FOR
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THIS ISSUE is devoted to arbitration and court decisions vacating or affirming arbitral awards. There are some central themes. Courts routinely recite the four bases to set aside an arbitrator's award:

1. where the award was procured by corruption, fraud, or undue means;
2. where there was evident partiality or corruption in the arbitrators, or either of them;
3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
4. where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Additionally, one of the cases deals with public policy which can be interpreted

to mean that the arbitrator had not understood the law correctly and not applied the law appropriately.

Arbitration requires an agreement to arbitrate, usually in writing. Without such an agreement courts are reluctant to affirm awards. The cases discussed involve employment disputes, sexual harassment, and commercial matters. Every decision repeats the mantra regarding the preference for arbitration. However, several of the cases vacated arbitral awards for the reasons listed above.

I am happy to help with private arbitration and am now listed on the following panels as an arbitrator: FINRA, FMCS, NY PERB, AAA, NJ State Board of Mediation, and the United States District Court. I also conduct mediations and fact-finding as other forms of assisting parties' attempts to resolve disputes.

INSIDE THIS ISSUE:

Courts Set Aside Arbitration Awards Sometimes	1
Arbitration Award Overturned On Public Policy Grounds	3
NJ Education Issue Over "School Days"	4
Commercial Arbitration	4
Contact Information	5

COURTS SET ASIDE ARBITRATION AWARDS SOMETIMES

In New Jersey Regional Council of Carpenters, et al. v. Jayeff Construction Corporation, the Third Circuit Court of Appeals affirmed the decision of District Court Judge Joel A. Pisano setting aside an arbitration award.

The facts are quite interesting, particularly since a close examination demonstrates why the award was defective.

FACTS:

Jayeff Construction Corporation is a commercial construction contracting company that hires subcontractors to work on its projects. Jayeff utilizes an open shop workforce meaning

it does not require employees to join or financially support a union as a condition of employment. Significantly, Jayeff had not entered into a Statewide contract with the New Jersey Carpenters Funds. The action had been brought by the Funds and the New Jersey Regional Council of Carpenters. The Funds had brought an action to confirm an arbitration award regarding contributions.

Jayeff had employed members of the Carpenters Union and, at the individual employees'

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Cont'd on pg. 2, column 1

Courts Set Aside Arbitration Awards Sometimes

(Cont'd from pg. 2)

requests, submitted payment of their benefits to the Funds so the employees could maintain their union benefits. Between 2003 and 2009, Jayeff voluntarily submitted fringe benefit payments for five employees who were members of the Carpenters Union. None of these individuals performed carpentry work for Jayeff but were, instead, employed in managerial positions.

Jayeff used the forms required by the Funds which were standard fill-in-the-blank forms listing the name of the employee and the amount being remitted. The form also contained the following language in fine print:

The Employer hereby acknowledges his or its agreement to the Collective Bargaining Agreement which requires the payment of the fringe benefits forwarded herewith. The Employer further agrees to the Agreements and Declarations of Trust governing the New Jersey Carpenters' Fringe Benefits Funds. Both Collective Bargaining Agreement and the Agreements and Declarations of Trust are hereby incorporated by reference and the Employer agrees to abide by said agreements.

The forms were signed and submitted by Jayeff's personnel manager, not its President.

After a payroll audit for the period January 1, 2009 through March 31, 2010, the Funds' auditor issued a report stating Jayeff should have remitted payments for additional non-union employees and issued a delinquency for \$246,181.67. Jayeff took the position that since it was not a signatory to the CBA with the Funds, no additional payment was due. When the Funds communicated an intent to arbitrate, Jayeff informed the Funds it would not participate and could not be compelled to participate since it had never signed any CBA or any arbitration agreement.

ARBITRATION AWARD:

The arbitrator conducted the proceedings without Jayeff on December 30, 2010. He determined that Jayeff was bound to the CBA with the Council of

Carpenters despite Jayeff not being a signatory. He issued an order on January 3, 2011 directing Jayeff to pay \$392,178.71 to the Funds. After Jayeff failed to make payment the Funds filed a motion to compel in U.S. District Court. Jayeff cross-moved to vacate the award. On October 11, 2011, the District Court issued an Order denying the Funds' motion to confirm the award and granted Jayeff's motion to vacate. The Funds timely appealed.

THE DISTRICT COURT:

The District Court took jurisdiction under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185(a) and §520 of ERISA.

The Court found, contrary to the Funds' contention, that the District Court impermissibly usurped the role of the arbitrator by interpreting the contract.

The Court said Jayeff was not challenging the validity of the CBA nor any of its provisions. Rather, "the issue is whether a contract to arbitrate was ever entered into by the parties." In that case, the Court, and not the arbitrator, has the power to adjudicate that issue.

The Court made reference to the Federal Arbitration Act and noted a strong presumption in favor of enforcing arbitration awards. Under the Act there are a limited number of circumstances in which an award can be set aside including:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

The Court noted that even going as far back as the Steelworkers Trilogy by the U.S. Supreme Court, arbitration is a matter of contract and a party cannot be

asked to submit a dispute to arbitration which it has not agreed to submit.

The District Court said there were two main issues to determine arbitrability: (1) whether the parties formed an agreement to arbitrate; and (2) whether the dispute in question falls within the scope of that agreement.

THIRD CIRCUIT RULING:

At the outset, the Court of Appeals stated that "[i]t is undisputed that Jayeff was not a signatory to the CBA." That fact alone, however, does not end the inquiry since a writing is not necessarily needed.

The Funds argued that the parties formed an agreement to be bound by the CBA when Jayeff executed the remittance forms mentioned above. The Court of Appeals echoed the lower court's finding that Jayeff's conduct did not indicate an intent to be bound by the CBA. Rather, the remittance forms were expressly limited to payment of fringe benefits forwarded for the five designated employees who were not even employees of Jayeff and requested the contributions. The form was drafted by the Funds to permit non-signatory parties, like Jayeff, who were only contributing for certain employees, to make contributions. Significantly, the Court of Appeals stated that "[t]here is no precedent to support the Funds' position that an employer that has not signed a CBA can nevertheless be bound by all of the provisions of the CBA solely from signing remittance forms."

The Third Circuit noted that all other individuals employed by Jayeff were non-union employees and Jayeff acted only at the request of its employees to make contributions on their behalf. The Court ruled that "there is no evidence that Funds believed Jayeff was bound by the CBA: for seven years, until the accounting in 2010, the Funds never attempted to enforce any of the numerous provisions of the CBA against Jayeff."

The Court concluded that since Jayeff was not a signatory and there was no intent to be bound by the CBA and that any enforcement action only resulted after the fact (after an audit in

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ARBITRATION AWARD OVERTURNED ON PUBLIC POLICY GROUNDS

The Supreme Court of Pennsylvania (Eastern District) affirmed an order vacating an arbitration award as contrary to public policy in The Philadelphia Housing Authority v. American Federation of State, County and Municipal Employees, District Council 33, Local 934.

The Philadelphia Housing Authority (PHA) has a contract with Local 934 which includes a termination provision requiring “just cause.” The arbitration had to do with sexual harassment allegations against Thomas Mitchell.

After an internal investigation, Mitchell was terminated based upon a complaint by co-employee Stephanie Broadnax. The Court examined the record before the arbitrator regarding sexual harassment. The record showed physical conduct and comments that were highly inappropriate including touching as well as Mitchell touching himself. Broadnax also testified she saw Mitchell pinch the breasts of another female warehouse employee Linda Bradford. Broadnax testified that Mitchell made her nervous and was a bully. Her testimony was contrasted to a warehouse supervisor, Jonas Shour, who stated that the PHA had a “locker room” like style and Mitchell’s action were joking, inoffensive, and “normal” but not crossing the boundaries of impropriety.

There was testimony substantiating Broadnax’s claims despite Mitchell’s denial. The arbitrator concluded Mitchell was not credible and that Broadnax’s testimony was credible. He found that Mitchell had been adequately informed about the PHA policy against sexual harassment and his behavior was “lewd, lascivious and extraordinarily perverse.” However, the arbitrator concluded the PHA did not have just cause for termination. The arbitrator ruled that Mitchell stopped after he received a verbal warning by Joseph Brunetti, a supervisor. The PHA was ordered to reinstate Mitchell with back pay. The PHA filed a petition to vacate the arbitrator’s award which was denied in the trial court.

The Supreme Court opined that it would follow its newly-adopted public policy exception to the prior “essence test.” The Court found that a “core function” of the PHA was to protect its employees. Since the arbitrator’s award required Mitchell’s reinstatement, the Court concluded it was not rationally derived from the CBA and could not be enforced. The Court found reinstating Mitchell violated two related public policies arising from Title VII of the 1964 Civil Rights Act as well as the policy embodied in the Pennsylvania Human Relations Act.

The arguments of the parties are interesting in light of the national condemnation of sexual harassment on campus and at work. The appellants argued that the arbitrator’s award did not violate any well-defined dominant public policy because counseling and a stern warning had already been given. They argued that the employer must only take steps reasonably necessary to stop the harassment.

The Court stated that the PHA had a formal policy regarding sexual harassment; the policy was posted at the workplace; and the arbitrator expressly found that this policy bulletin provided adequate notice to Mitchell regarding the potential penalties up to and including termination. The court declared that “[a]lthough we do not hold that termination was required under the circumstances here, we likewise reject the arbitrator’s and appellant’s counter-assertion that a public employer can be precluded from taking such decisive action against an employee following its investigation.”

The Court ruled that the arbitration award was contrary to the policy and “affirmatively encourages – indeed it rewards – sexual harassment in the public workplace.”

The PHA argued that the conversation by supervisor Brunetti and Mitchell could not have replaced the role of discipline because it took place prior to the completion of the investigation and before the extent of his sexual harassment

had been discovered. The Court disagreed with the arbitrator’s finding as follows: “The absurd award here makes a mockery of the dominant public policy against sexual harassment in the workplace, by rendering public employers powerless to take appropriate actions to vindicate a strong public policy. Such an irrational award undermines clear and dominant public policy.”

The Court stated that this was not “a difficult case.”

The Pennsylvania Supreme Court acknowledged that a labor arbitrator’s decision “is entitled to deference by a reviewing court.” However, it is not “entitled to a level of devotion that makes a mockery of the public policy against sexual harassment.”

Obviously, the arbitrator “got it” because he concluded that Mitchell’s behavior was unacceptable. He ultimately divorced Mitchell’s conduct and failure to accept responsibility from any consequence and did not find just cause.

The Court, on the other hand, concluded that “a public employer must be permitted to do more than engage in adjectival condemnation when faced with this sort of employee misconduct.” It held the arbitrator’s award of reinstatement with back pay violated the public policy of the Commonwealth of Pennsylvania and affirmed the decision to vacate the award.

TIP: Public policy is an exception that can be used to overturn an award where the arbitrator’s award ignored the law. Sexual harassment is an important subject in the workplace. Its avoidance must be ensured when credible facts are presented.



NJ EDUCATION ISSUE OVER “SCHOOL DAYS”

Another motion to vacate an arbitration award was denied in Education Association of Mt. Olive v. Mt. Olive Board of Education. The collective bargaining agreement was in place from July 1, 2008 through June 30, 2011. The CBA provided that the work year for teachers included 1 opening day, 180 student days, and 2 full-length in-service days. It also included, in salient part, that the last two scheduled student days of school “will be shortened days.” The language has been present for an indeterminate number of years in the contract. Teachers consistently work full days on the last two scheduled student days; students had shortened days on the last two days; and the Association had not challenged this requirement until now.

After the 2010-2011 school year calendar was issued, the Association filed a grievance challenging it because it showed that the last two student days would be shortened for students only. At arbitration, the arbitrator determined that the relevant section of the CBA was ambiguous and, therefore, considered the parties’ past practice supporting a conclusion that the last two student days had always been half days for students only. Since the paragraph of the CBA was ambiguous, the arbitrator found the parties’ long-standing past practice controlling and denied the grievance.

The Association filed an order to show cause in the Chancery Division seeking reversal, particularly suggesting the past practice should not have been considered.

The Appellate Division repeated the general principles guiding review of arbitration decisions:

Arbitration is a favored means of resolving labor disputes. State v. Int’l Fed’n of Prof’l & Technical Eng’rs, Local 195, 169 N.J. 505, 513 (2001) (citing County Coll. of Morris Staff Ass’n v. County Coll. of Morris, 100 N.J. 383, 390 (1985)); Scotch Plains-Fanwood Bd. of Educ. v. Scotch Plains-Fanwood Educ.

Ass’n, 139 N.J. 141, 149 (1995). The aim of arbitration is to provide the final disposition of a dispute in a speedy and inexpensive manner. Barcon Assocs., Inc. v. Tri-County Asphalt Corp., 86 N.J. 179, 187 (1981). Accordingly, judicial review of an arbitrator’s decision is very limited, and the arbitrator’s decision is not to be cast aside lightly. Ibid. “In the public sector, the scope of review in matters of interpretation is confined to determining whether the interpretation of the contractual language is reasonably debatable.” County Coll. of Morris Staff Ass’n, supra, 100 N.J. at 390-91.

Citing Board of Education of Borough of Alpha, Warren County v. Alpha Education Association, 190 N.J. 34, 41-42 (2006).

The appellate court found that the record was “ambiguous” consistent with the arbitrator’s determination. The CBA did not state that the shortened days were for students only. Thus, it was appropriate for the arbitrator to consider parties’ past practice. The past practice demonstrated that the teachers had worked full days on those last two days of the school year even though students had shortened days. Based on this history, the arbitrator reached a “reasonably debatable interpretation” of the CBA.

The Court concluded, based upon the record evidence, that the arbitrator did not exceed his powers. Since his interpretation of the CBA was “reasonably debatable” it was entitled to “deference.”

Practice Tip: Past practice can be considered but in limited circumstances where there is contractual ambiguity.

COMMERCIAL ARBITRATION

Some arbitration awards get confirmed. In CD&L Realty LLC v. Owens-Illinois, Inc., et al., U.S. District Court Judge Renee Bumb confirmed an arbitration award regarding the sale of Owens, a former glass manufacturing property in Bridgeton, New Jersey. The purchase and sale agreement (PSA) contained an arbitration agreement. The arbitration provision is as follows:

20.15 Arbitration of Disputes. Except as otherwise provided in this Agreement, any controversy or dispute arising out of this Agreement or the interpretation of any of the provisions hereof shall be submitted to arbitration in Bridgetown, New Jersey, under the commercial arbitration rules then obtaining of the American Arbitration Association. Any award or decision obtained from any such arbitration proceeding shall be final and binding on the parties, and judgment upon any award thus obtained may be entered in any court having jurisdiction thereof. No action at law or in equity based upon any claim arising out of or related to this Agreement shall be instituted in any court by any party hereto except an action to compel arbitration proceeding in accordance with this Section. All notices relating to any arbitration shall be given as provided in this Agreement.

Purchaser defendant Owens-Brockway had closed the manufacturing operation in 2000 and began remediation of various areas of environmental contamination on the property which were not completed before closing of the deal on August 30, 2000.

On August 6, 2010, CD&L Realty filed a demand for arbitration against Owens-Brockway alleging a commercial dispute.

CD&L amended the demand for arbitration a few times, first alleging that defendant Owens-Brockway concealed certain facts about the condition of the

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Commercial Arbitration

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property before the PSA was executed and that defendant had not fulfilled its obligations for remediation under the agreement. A subsequent amendment alleged common law fraud, violation of the Consumer Fraud Act, breach of covenant, and other claims based upon violation of New Jersey environmental law. At the arbitration itself plaintiff raised a jurisdictional challenge arguing that the plaintiff's Industrial Site Recovery Act (ISRA) claim and claims under the Consumer Fraud Act and the Environmental Rights Act (ERA) were not appropriately addressed in arbitration.

The arbitrator concluded to the contrary - that the PSA was enforceable and included all of plaintiff's claims. The matter appears to have been litigated extensively including a site visit, pre- and post-hearing briefs, and oral argument. Shortly after the arbitrator issued a final award dismissing all claims and counterclaims, plaintiff filed a verified complaint and proposed order to show cause in Superior Court. This claim was then removed to Federal Court.

In addition to the four statutory bases for vacating an arbitration award discussed in New Jersey Regional Council of Carpenters, there are three common law grounds for vacatur: (1) an arbitrator's manifest disregard for the law as opposed to legal error; (2) if the award is completely irrational; and (3) if the award is contrary to public policy.

The Court also commented on the standard to be used in the case stating that plaintiff argued the New Jersey Arbitration Act should apply. The Court rejected that assertion stating that parties to an arbitration "must express a clear intent to have a law other than the FAA applied to the resolution of their dispute." In this case while New Jersey is mentioned as

the location of any arbitration in the arbitration provision, there was no language suggesting the parties intended to apply the New Jersey Arbitration Act standard in lieu of the FAA.

Judge Bumb essentially rejected all of plaintiff's arguments stating that the Court did not review arbitrator awards for claims of factual or legal error. For example, claim 7 was that the arbitrator exceeded his authority by finding that legal violations by Owens-Brockway did not constitute breaches of the PSA. The Court characterized this argument as a challenge to the arbitrator's factual findings and legal interpretation which the Court does not review. The same may be said for the argument rejecting claims under the New Jersey Consumer Fraud Act. Plaintiff first argued that the arbitrator exceeded his powers because the validity of the PSA was a matter for the Court and not arbitration. The Court found that "all of Plaintiff's arguments as to the validity of the PSA go to the agreement's validity as a whole, and not specifically to the agreement's arbitration provision." Thus, the Court concluded there was no basis to challenge

the arbitrator's jurisdiction to hear the dispute.

Plaintiff had also argued that the PSA was voidable because Owens-Brockway failed to get consent from NJDEP and failed to properly conduct an investigation and remediation. Based upon these assertions plaintiff argued that the PSA was void as a matter of contract law and the PSA would be void by statute. The Court found that plaintiff was not entitled to a right of rescission. Significantly, the Court stated that plaintiff knew of these issues at time of closing but failed to raise them until the arbitration proceeding. Thus, they were time-barred.

Practice Tip: Claims by parties should be brought early and preserved so they are not lost forever.



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Courts Set Aside Arbitration Awards Sometimes

(Cont'd from pg. 2)

2010), it affirmed the order vacating the arbitration award.

Practice Tip: Arbitration is a creature of contract. There must be a contract and agreement to arbitrate, preferably signed by the parties, in order to proceed to arbitration. Absent a writing and evidence of intent to be bound, an arbitration award is not likely to have a basis in contract.