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Limiting Public Policy in Reviews of Arbitration

On Nov. 28, 2000, the U.S. Supreme Court upheld an arbitrator's reinstatement of an employee who tested positive for marijuana on two separate occasions. The Court unanimously rejected the employer's argument that reinstating the employee violated public policy. *Eastern Associated Coal Corp. v. United Mine Workers of America District 17*, __ U.S. __, 121 S. Ct. 462 (2000).

On Aug. 3, 2000, the Appellate Division, Third Department, upheld the reinstatement of a nurse who administered morphine to a patient without a doctor's authorization. This court also unanimously rejected the employer's argument that reinstating the employee violated public policy. *Nurses Ass'n v. Mount Sinai Hosp.*, 275 A.D. 2d 538, 712 N.Y.S.2d 200 (3rd Dept. 2000).

This article will examine these and other cases that demonstrate the limited role public policy plays in judicial review of arbitration awards.[1]

James Smith drove heavy construction equipment on public highways, so he was subject to U.S. Department of Transportation (DOT) drug and alcohol testing regulations. In 1996, he tested positive for marijuana. Eastern Associated Coal Corp. fired him, but an arbitrator reinstated him subject to: 1) a 30-day suspension; 2) participation in a rehabilitation program; and, 3) follow-up testing for five years.

In July 1997, on his fifth follow-up test, he again tested positive for marijuana. Once again, the employer sought to discharge him, but the arbitrator again ordered reinstatement. This time he conditioned it upon: 1) a suspension of more than three months; 2) payment of the employer's and union's costs for both arbitrations; 3) continued rehabilitation and follow-up testing; and, 4) that he give the employer a signed, undated letter of resignation to take effect if he tested positive during the next five years.

The employer petitioned the district court to vacate the award, arguing that the award violated public policy. Rejecting the argument, the court enforced the award. The court of appeals affirmed, and the employer appealed to the Supreme Court.

The Court began by stating that "the question to be answered is not whether Smith's drug use itself violates public policy, but whether ... [reinstatement] does so."121 S. Ct. at 467.[2] The Court then looked to the DOT regulations to determine the public policy embodied therein.

The regulations do not prohibit reinstatement, nor do they require it. Rather, they permit it conditioned upon: 1) evaluation by a substance abuse provider; 2) completion of any prescribed rehabilitation program; 3) passing a return to duty test; and, 4) follow-up testing. See 49 C.F.R. §382.605. Additionally, "the [Omnibus Transportation Employee Testing Act of 1991] says that 'rehabilitation is a critical component of any testing program' and that rehabilitation 'should be made available to individuals, as appropriate'...." 121 S. Ct. at 467. Like reinstatement, however, rehabilitation is an option, not a requirement.

In light of the foregoing, the Court held:

> The award before us is not contrary to these several policies, taken together. The award does not condone Smith's conduct or ignore the risk to public safety that drug use by truck drivers may pose. Rather, the award punishes Smith by suspending him for three months, thereby depriving him of nearly $9,000 in lost wages; it requires him to pay the arbitration cost of both sides; it insists upon further substance-abuse treatment and testing; and it makes clear (by requiring Smith to provide a signed letter of resignation) that one more failed test means discharge....
>
> The award is also consistent with the Act's rehabilitative concerns, for it requires substance-abuse treatment and testing before Smith can return to work.
>
> The fact that Smith is recidivist — that he has failed a drug test twice — is not sufficient to tip the balance in Eastern's favor. The award punishes Smith more severely for his second lapse.

Id. at 468-69.

The Court followed the rule set forth seventeen years earlier, that for an arbitration award to violate public policy, "such public policy must be explicit, well defined, and dominant. It must be ascertained by reference to the law and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183 (1983) (upholding arbitrator's finding that an E.E.O.C. consent decree did not insulate the employer from liability for violating its collective bargaining agreement).

Four years later, the Court expanded upon its holding in *W.R. Grace*:

> Two points follow from our decision in *W.R. Grace*. First, a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy. Second, it is apparent that our decision in that case does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy. Although we discussed the effect of that award on two broad areas of public policy, our decision turned on our examination of whether the award created any explicit conflict with other "laws and legal precedents" rather than an assessment of "general considerations of supposed public interests." 461 U.S., at 766. At the very least, an alleged public policy must

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be properly framed under the approach set out in *W. R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced.

Paperworkers v. Misco, Inc., 484 U.S. 29, 43-44, 108 S. Ct. 364, 367 (1987) (upholding reinstatement of an employee found in a car on company property where marijuana was also found).

Relying on *Misco*, the Second Circuit has upheld reinstatement of employees guilty of seemingly egregious acts. See, e.g., *Local 97, I.B.E.W. v. Niagara Mohawk Power Corp.*, 196 F.3d 117 (2d Cir. 1999), cert. dismissed, __ U.S. __, 121 S. Ct. (2000) (*Mohawk II*) (upholding reinstatement of nuclear power plant employee who failed to respond to alarm and lied about it); *Local 97, I.B.E.W. v. Niagara Mohawk Power Corp.*, 143 F.3d 704 (2d Cir. 1998) (*Mohawk I*) (upholding reinstatement of nuclear power plant employee who adulterated urine sample and then tested positive on drug test).[3]

Nevertheless, under appropriate circumstances, the Second Circuit will invalidate an arbitration award that violates public policy. For example, in *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990), cert. denied, 499 U.S. 922, 111 S. Ct. 1314 (1991), the court held that an award reinstating an employee who engaged in sexual harassment violated the public policy against sexual harassment. Notwithstanding the arbitrator's finding that the employee inappropriately touched female coworkers on at least three occasions and that four years earlier a different arbitrator upheld a suspension for a previous incident of sexual harassment, the arbitrator reinstated him.

Newsday moved to vacate the award, which the district court did. Citing Title VII, along with *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986), the court found that "there is an explicit, well-defined and dominant public policy against sexual harassment in the workplace" and the "award of reinstatement completely disregarded" that policy. Id. at 845.[4]

New York Decisions

New York courts also require a strong showing of violation of a specific public policy. The Third Department's recent decision in *Nurses Ass'n v. Mount Sinai Hospital*, 275 A.D.2d 538, 712 N.Y.S.2d 200, illustrates this approach. The chief resident instructed a nurse to give a patient Demerol, but while she attempted to locate the drug the patient's pain continued. Another nurse, the petitioner, administered morphine without authorization from a doctor (and then failed to secure the morphine tubex). The hospital terminated her.

The arbitrator concluded that petitioner had indeed administered morphine without authorization and failed to secure the tubex.[5] He also found, however, that morphine was an appropriate medication and the patient was not harmed by it. Treating the 2 1/2 years between the termination and his award as an unpaid suspension, the arbitrator reinstated her.

The hospital sought to overturn the award on public policy grounds, but the trial court enforced it. The Third Department affirmed:

> [T]he arbitrator's imposition of a 2 1/2-year suspension was not in contravention of public policy since respondent has not identified any statute or regulation which requires termination of employment rather than a lengthy suspension in connection with such conduct.

712 N.Y.S.2d at 202. The court cited its recent decision in *Cohoes Police Officers Union, Local 756 v. City of Cohoes*, 263 A.D.2d 652, 692 N.Y.S.2d 796 (3rd Dept. 1999) (upholding award denying benefits under General Municipal Law section 207), which in turn relied upon *Sprizen v. Nomberg*, 46 N.Y.2d 623, 415 N.Y.S.2d 974 (1979).

Sprizen involved an award enforcing a five-year non-competition agreement. The former employee claimed the arbitrator was partial, and refused to participate in the arbitration hearing. Ruling only upon the evidence presented by the employer, the arbitrator enforced the agreement.

Nomberg moved to vacate on the grounds that the arbitrator was biased and the "award itself was unjust." The trial court enforced the award, but the First Department reversed on the ground that the award violated public policy. The Court of Appeals reversed:

> The courts, however, must exercise due restraint in this regard, for the preservation of the arbitration process and the policy of allowing parties to choose a nonjudicial forum, embedded in freedom to contract principles, must not be disturbed by courts, acting under the guise of public policy, wishing to decide the dispute on its merits, for arguably every controversy has at its core some issue requiring the application, or weighing, of policy considerations.

46 N.Y.2d at 630.

Courts will get involved only in:

> cases in which public policy considerations, embodied in statute or decisional law, prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator. Stated another way, the courts must be able to examine an arbitration agreement or an award on its face, without engaging in extended fact-finding or legal analysis, and conclude that public policy precludes its enforcement.

Id. at 631.[6]

A year prior, the Court of Appeals decided *Port Jefferson Station Teachers Ass'n, Inc. v. Brookhaven-Comeswogue Union Free School District*, 45 N.Y.2d 898, 411 N.Y.S.2d 1 (1978). The arbitrator prohibited the school district from assigning teachers outside of their specialty, which the school district argued restricted its control over education. Supreme Court denied enforcement, but the Appellate Division reversed.

The Court of Appeals also rejected the argument:

> Incantations of public policy may not be advanced to overturn every arbitration award that impairs the flexibility of a school district.... Only when the award contravenes a strong public policy, almost invariably involving an important constitutional or statutory duty or responsibility, may it be set aside.

45 N.Y.2d at 899.

The Court of Appeals continues to follow this approach. See, e.g., *New York State Correctional Officers and Police Benevolent Ass'n, Inc. v. State of New York*, 94 N.Y.2d 321, 704 N.Y.S.2d 910 (1999) (upholding award reinstating correctional officer who flew Nazi flag from the porch of his house); *Professional, Clerical, Technical Employees Ass'n v. Buffalo Board of Education*, 90 N.Y.2d 364, 660 N.Y.S.2d 827 (1997) (upholding award requiring board of education to promote individual who scored highest on test); *Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146, 630 N.Y.S.2d 274 (1995) (upholding award enforcing provision in partnership agreement that reduced withdrawing partner's payments according to his earnings at new law firm).

Under appropriate circumstances, however, New York courts will vacate an award on public policy grounds. In *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354, 386 N.Y.S.2d 831 (1976), an author claimed royalties for two books. After the publisher refused to participate in the hearing, the arbitrators awarded both compensatory and punitive damages.

When the author moved to confirm the award, the publisher argued that arbitrators were prohibited from awarding punitive damages, so the award violated public policy. Supreme Court affirmed the award as did the Appellate Division, but the Court of Appeals reversed:

> The prohibition against an arbitrator awarding punitive damages is based on strong public policy indeed. At law, on the civil side, in the absence of statute, punitive damages are available only in a limited number of circumstances...

> Punitive sanctions are reserved to the State, surely a public policy of such magnitude as to call for judicial intrusion.

40 N.Y.2d at 358 (citations and quotations omitted). See also *Onteora Central School Dist. v. Onteora Non-Teaching Employees Ass'n*, 56 N.Y.2d 769, 452 N.Y.S.2d 22 (1982) (award requiring school district to pay custodians for work performed by student-volunteers violated policy of placing sole authority for determining contingent expenses with Commissioner of Education); *Matter of Aimcee Wholesale Corp.*, 21 N.Y.2d 621, 289 N.Y.S.2d 968 (1968) (arbitrator's attempt to decide matters "involving enforcement of our state's antitrust laws" violates public policy).

Conclusion

Courts are generally reluctant to review arbitration awards, and simply alleging a public policy violation will not suffice. When and if you ask a court to vacate an award on public policy grounds, you must articulate a well-defined public policy, based on explicit statutory or judicial authority.

(1) Separate and apart from public policy arguments are the grounds enumerated in the respective federal and state provisions for vacating arbitration awards. See 9 U.S.C. §10; C.P.L.R. §7511(b).

(2) The Court treated the award like an agreement between the parties to reinstate Smith, so the Court had to determine "whether a contractual reinstatement requirement would fall within the legal exception that makes unenforceable a collective bargaining agreement that is contrary to public policy." 121 S. Ct. at 467. See *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 42, 108 S. Ct. 364, 377 (1987) ("[a] court's refusal to enforce an arbitrator's award ... because it is contrary to public policy is a specific application of the more general doctrine ... that a court may refuse to enforce contracts that violate law or public policy.").

(3) The district court in *Mohawk II* remarked that the employee engaged in such conduct "to mask this Homer Simpson-like conduct." See 196 F.3d at 124 n.4.

(4) Cf. *Brookdale Hosp. Med. Ctr. v. Local 1199*, 107 F. Supp.2d 283 (S.D.N.Y. 2000) (remanding case to arbitrator for a finding of, inter alia, whether any of the employees discharged for sexual harassment had a history of such conduct).

(5) He rejected the employer's contention that she also falsified records.

(6) The court reiterated the almost unfettered authority arbitrators enjoy.

> Quite simply, it can be said that the arbitrator is not bound to abide by, absent a contrary provision in the arbitration agreement, those principles of substantive law or rules of procedure which govern the traditional litigation process....
>
> Thus, an arbitrator's award will not be vacated for errors of law and fact committed by the arbitrator. Even where the arbitrator states an intention to apply a law, and then misapplies it, the award will not be set aside.

46 N.Y.2d at 629 (citations and quotations omitted). See also *Mohawk I*, 143 F.3d at 716 ("a court's task in reviewing an arbitral award for possible violations of public policy is limited to [reviewing] the award itself, as contrasted with the reasoning that underlies the award....").